VIOLATION OF HUMAN RIGHTS BY MULTINATIONAL CORPORATIONS: AN INTEGRATED THEORY OF REGULATION

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ABSTRACT

This study examines critically the (in)adequacy of existing regulatory responses to human rights violations by multinational corporations (MNCs). This examination is done against the backdrop of the ever-growing influence of MNCs and the consequent changing social expectations about their place and role in society generally. The research takes the gas leakage at Union Carbide's chemical plant at Bhopal (Bhopal) as a case study to explore various challenges that corporate human rights abuses pose.

MNCs like Union Carbide are considered difficult regulatory targets for several reasons. This difficulty is reflected in the inadequacy of the existing regulatory framework to make MNCs accountable for human rights violations. Based on a critical evaluation of six 'representative' regulatory initiatives, it is contended that this inadequacy is the result of a three-fold deficiency. The existing framework does not prescribe clear human rights standards, offers weak rationales for compliance, and is supported by a deficient or underdeveloped implementation-cum-enforcement mechanism.

In order to remedy the inadequacy of the existing regulatory framework, an 'integrated theory' of regulation is proposed and defended. The theory seeks to achieve integration between business issues and human rights issues, between the 'why', 'what' and 'how' of corporate human rights responsibility discourse; and between different available modes of implementation, levels of operation and types of sanctions. To begin with why, this thesis challenges the view that the only responsibility of corporations is to maximise shareholders' profit subject to some narrowly defined rules. As it is also problematic to rely too much on the 'business case' for human rights, a stronger theoretical premise is canvassed to support the thesis that corporations must be subject to human rights norms. Moving on to what, the study explores the human rights standards that MNCs should follow while operating in countries which differ drastically from each other in terms of regulatory, social, economic, political and cultural factors.

The thesis finally deals with the question of how to ensure that MNCs comply with their human rights obligations. The efficacy of the 'responsive regulation' model proposed by Ian Ayres and John Braithwaite in controlling and redressing corporate human rights abuses is tested. It is argued that although a synergy between persuasion and punishment is desirable for successful regulation, an approach which moves progressively towards more punitive regulatory techniques upon the failure of softer techniques adopted earlier may prove inadequate in making MNCs accountable for human rights violations. As an alternative, it is suggested that multiple regulatory techniques should be employed in tandem to complement one another. The rationale for integration applies equally to the levels at which regulatory initiatives should be put in place and the types of sanctions to be invoked in cases of non-compliance. Finally, the potential efficacy of the proposed model of integrated regulation is assessed with reference to Bhopal.
DECLARATION OF ORIGINALITY

This thesis contains my original work, minor parts of which have been published in various journals that I have acknowledged at relevant places. To the best of my knowledge, the thesis contains no copy, paraphrase or summation of the published or unpublished work of any other person, except where duly acknowledged in the text and/or footnotes.

I also declare that no part of this thesis has been previously presented for a degree at the University of Sydney or at any other university.

.................................
Surya Deva
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<td>F Supp</td>
<td>Federal Supplement</td>
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<tr>
<td>HL</td>
<td>House of Lords</td>
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<tr>
<td>HRSP</td>
<td>Human Right-Social Policy</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Convention on Civil and Political Rights</td>
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<td>Id</td>
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<td>IELRC</td>
<td>International Environmental Law Research Centre</td>
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<td>IIED</td>
<td>International Institute for Environment and Development</td>
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<td>International Legal Materials</td>
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<td>MIC</td>
<td>Methyl Isocyanate</td>
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MIT Massachusetts Institute of Technology
MNCs Multinational Corporations
MNEs Multinational Enterprises
MPLJ Madhya Pradesh Law Journal
NCPs National Contact Points
NLSIU National Law School of India University
NSW New South Wales
OECD Organisation for Economic Cooperation and Development
NGOs Non-Governmental Organisations
PDE Principle of Double Effect
PIG Public Interest Groups
PRI Principles for Responsible Investment
QB Queen's Bench
SC Supreme Court
SCC Supreme Court Cases
SMEs Small and Medium Enterprises
s(s) Section(s)
TFT Tit-for-Tat
TNCs Transnational Corporations
TVPA Torture Victim Protection Act
UCC Union Carbide Corporation
UCIL Union Carbide India Ltd.
UDHR Universal Declaration of Human Rights
UK United Kingdom
UN United Nations
UN ESCOR United Nations Economic and Social Council Official Records
UNCTAD United Nations Conference on Trade and Development
UNDP United Nations Development Programme
UNEP United Nations Environment Programme
UNEP FI United Nations Environment Programme Financial Initiative
US Unites States of America
USC United States Code
WTO World Trade Organisation
HRW Human Rights Watch
# List of Tables and Figures

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CHAPTER 1: INTRODUCTION

1.1 BACKGROUND – THE CHANGING DYNAMICS OF HUMAN RIGHTS

The discourse of human rights has moved a long way since the French Declaration and the American Bill of Rights, and especially since its formal institutionalisation under the rubric of the United Nations (UN) and the Universal Declaration of Human Rights (UDHR). In contemporary times, the debate on and about human rights is no longer confined to the matrix of individuals and states. Individuals are not the sole beneficiaries of human rights, as it was thought once, and states are not the only

5 'If human rights are the rights that one has simply as a human being, then only human beings have human rights; if one is not a human being, then by definition one cannot have a human right.' Jack


7 The term 'globalisation' means different things to different people. In the present context it is used to indicate the phenomena of liberalisation of economies through liberalisation and privatisation, shift in power from states to private actors and the removal of national barriers with reference to market, capital, services, governance, etc. The above is achieved through the '4 Ds': deregulation, disinvestment, denationalisation, and digitalisation. However, this is not to suggest that 'we are moving inexorably towards a single world government nor does it mean the end of nation-states.' William Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000), 5. See also Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996).

8 It is felt that liberalisation of international trade under the WTO has also resulted in liberalising the constraints on corporations regarding their human rights obligations. See International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (Versoix: ICHRIP, 2002), 113 (hereinafter ICHRIP, *Beyond Voluntarism*).


11 Reinisch examines how 'a radical conceptual change in the way we use and think about human rights' has taken place. August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Alston (ed.), *Non-state Actors*, above n 6, 37, 38, and generally 37-89. Clapham also notes: 'The paradigm shift is coming as businesses are treated, not only as partners, but
however, limited to the changing relationship of 'right-duty bearers': there is a change not only in the content, prioritisation, and enforcement of human rights but also in the nature of actual or potential violators of human rights. The growing role, power and influence of multinational corporations (MNCs) in public spheres, including in the formulation of law and policies on key public issues, has afforded them an opportunity to violate human rights, thus breaking the dominance of states as

as having responsibilities under the international law of human rights.' Clapham, Non-State Actors, above n 6, 270.


13 Some rights are becoming more important than others in the free market economy. Baxi argues that the UDHR is 'supplanted by [a paradigm] of trade-related, market-friendly human rights.' Baxi, above n 1, 132, and generally 144-46, 149-52 (emphasis in original).

14 Civil society organs such as media and non-government organisations (NGOs) are gaining importance as non-formal human rights enforcement mechanisms. The initiatives on their part either supplement or (sometimes) even force legislature, executive or judiciary to act.


16 A working definition of 'MNCs' is offered in part 1.4.3 of this chapter. Despite differences between MNCs and transnational corporations (TNCs), I have used MNCs to indicate both. See generally David C Korten, When Corporations Rule the World (West Hartford, Conn.: Kumarian Press, 1995), 125; Peter T Muchlinski, Multinational Enterprises and the Law, updated edn. (Oxford: Blackwell Publishers, 1999), 12-15 (hereinafter Muchlinski, MNEs and the Law); Cynthia D Wallace, Legal Control of the Multinational Enterprise (The Hague: Martinus Nijhoff, 1982), 10-12. The preference for using MNCs over TNCs, which is the term used by the UN, is influenced, as explained in part 1.4.3 below, by an inclination to adopt the more widely used term.


18 MNCs influence law making and policy formulation in areas such as public health, child labour, workers' rights, consumer protection, foreign investment, environment protection, women's rights at workplace, and indigenous peoples' rights. See, for example, how Ok Tedi and BHP influenced the government of Papua New Guinea to enact laws to avert their liability for environmental pollution. Bob Burton, 'The Big Ugly at Ok Tedi', 23 Multinational Monitor (Jan/Feb 2002), <http://multinationalmonitor.org/mn2002/02jan-feb/jan-feb02front.htm> (last visited 18 September 2006). See also Sharon Beder, Suiting Themselves: How Corporations Drive the Global Agenda (London: Earthscan, 2006).
violators of human rights. MNCs, acting alone or in connivance with states, pose a real threat of violating a wide range of — civil, political, social, economic and cultural — human rights in diverse ways. In sum, the impact of day-to-day (and apparently business) decisions taken by MNCs is not limited to shareholders alone; it rather affects a larger group of stakeholders.

19 Woodroffe though observes that the ‘abuse of human rights has never been the sole preserve of governments, although attention has only recently focused on private actors such as transnational corporations.’ Jessica Woodroffe, ‘Regulating Multinational Corporations in a World of Nation States’ in Addo (ed.), above n 4, 131.


23 For example, the decisions, policies and activities of MNCs could violate basic human rights such as the right to food. Smita Narula, ‘The Right to Food: Holding Global Actors Accountable under International Law’ (2006) 44 Columbia Journal of Transnational Law 691, 719-23.

24 An oft-quoted definition of a ‘stakeholder’ is provided by Freeman: ‘A stakeholder in an organisation is (by definition) any group or individual who can affect or is affected by the achievement of the organisation’s objectives.’ R Edward Freeman, Strategic Management: A Stakeholder Approach (Boston: Pitman, 1984), 46.
Although the involvement of corporations in human rights abuses can be traced as early as to the activities of the British East India Company, a time when even the notion of human rights in its present form was unknown, both modern corporations and their role in human rights violations differ significantly from their ancestors.

Today's corporations operate at a transnational level within a complex web of parent, subsidiary and affiliate sister concerns, and are considered indispensable to the development process of nation states. More importantly, in the era of neo-colonisation, corporations, ergo MNCs, act more as independent entities or in partnership with states rather than as the agents of colonial powers. There is a qualitative difference even in terms of the nature of human rights violated, the modus operandi of such violations and the places where such violations are occurring: a wide range of human rights are violated; the violations are occurring not only by actions

25 Wood and Scharffs though suggest that ‘human rights and private corporations, traditionally, have not been linked terms.’ Stephen G Wood & Brett G Scharffs, ‘Applicability of Human Rights Standards to Private Corporations: An American Perspective’ (2002) 50 American Journal of Comparative Law 531, 538. But mere absence of academic discussion on linkage of corporations and human rights should not be treated as an evidence of corporations’ neutrality or non-involvement in human rights violations. It would be more appropriate to agree with Ratner who rightly points out: ‘Claims that various kinds of corporate activity have a detrimental impact on human welfare are at least as old as Marxism, .... But today’s assertions are different both in their origin and in their content.’ Steven R Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 Yale Law Journal 443, 446.


29 In fact, it is arguable that now ‘many states are more than willing to act as agents of MNCs’, e.g., when states enact laws to suits corporate interests, or when states file complaints before the WTO’s dispute settlement body. Surya Deva, ‘From 3/12 to 9/11: Future of Human Rights?’ (2004) 39 Economic & Political Weekly 5198, 5200. ‘3/12’ here refers to the date (the night of 2nd and 3rd December 1984) on which the gas leaked from the Bhopal plant in India. See Chapter 2.3.2.

30 Paust notes: Human rights that multinational corporations have been accused of violating include human rights to life, including the right to enjoy life; freedom from torture and cruel, inhuman, or
but also by inactions, including by remaining silent or benefiting from violations; and the violations are taking place most of the time in developing or undeveloped countries.

How did law and regulatory regimes react to the growing instances of human rights violations by MNCs, acting alone or in complicity with states? Over a period of time, a plethora of regulatory responses incrementally came onto the scene so much so that it is not possible even to mention all of them here. Apart from voluntary initiatives launched by public figures, business leaders, corporations, manufacturers, industry associations, and NGOs, governments at the national level also had general laws that have human rights implications for local corporations. However, there was hardly any law at the municipal level that ‘specifically’ elaborated the human rights responsibilities of MNCs. States not only doubted their capacity to regulate effectively the activities of MNCs but also showed a degree of unwillingness to act

degrading treatment; freedom from forced or slave labor; freedom from arbitrary detention or deprivation of security of person; freedom to enjoy property; freedom from deprivation of or injury to health; enjoyment of a clean and healthy environment — the latter also implicating interrelated international law recognizing private responsibility for pollution; — and freedom from discrimination. One should also consider private corporate deprivations of rights such as free choice in work; fair wages, a "decent living," and equal remuneration for work of equal value; safe and healthy working conditions; protection of children from economic exploitation; and protection of mothers.

Paust, above n 21, 817-19.


32 "There is clearly a negative symbiosis between the worst corporate-related human rights abuses and host countries that are characterised by a combination of relatively low national income, current or recent conflict exposure, and weak or corrupt governance." Commission on Human Rights, Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, E/CN.4/2006/97 (22 February 2006), para 30 (hereinafter Interim Report). See also Chapter 2.2.1.


34 See Reinisch, above n 11, 43-49.

tough even against local subsidiaries of MNCs, primarily because of the fear that this might impair their competitiveness to attract foreign investment much needed for development. The extraterritorial legislative measures taken by some developed countries to counter human rights violations by MNCs had limited success. The innovative use of the Alien Tort Claims Act (ATCA) also provided an avenue in the US courts to make MNCs accountable for human rights abuses committed abroad. But litigation under both the ATCA and other national laws has faced serious hurdles, almost to the extent of making these initiatives symbolic. For example, of the thirty-six cases filed so far under the ATCA, no single case has been decided against an MNC on the merits.

At the international level, on the other hand, there was no real push for regulating MNCs' activities until the mid-1970s, despite the involvement of MNCs in

36 Clapham observes that local authorities 'are unable or unwilling to penalise foreign investors for fear of losing them to less demanding sites for investment.' Clapham, Non-State Actors, above n 6, 238. See also Deva, The Sangam', above n 28, 320-22.


38 28 USC § 1350 (2003). See Joseph, Transnational Litigation, above n 21, 21-54; Sacharoff, above n 21, 958-64.


40 Bill Baue, ‘Win or Lose in Court: Alien Tort Claims Act Pushes Corporate Respect for Human Rights’, Business Ethics (Summer 2006), 12. It is a separate issue that litigation under the ATCA may have had indirect benefits in making MNCs take their human rights responsibilities more seriously.
perpetuating human rights abuses during the Second World War and other concerns generated by their activities since the 1960s. Of course during that period international human rights law was evolving, but its primary, if not sole, concern was securing human rights against state action. Apart from a limited number of jus cogens or customary human rights, the predominantly state-centric international human rights did not, at least in the beginning, envisage imposing specific human rights obligations on corporations. Nor is reliance on a reference to the responsibilities of 'every individual and every organ of society' in the UDHR and other international instruments sufficient to make explicit the human rights responsibilities of corporations. Rather than generating confusion between what corporate responsibilities international human rights law actually envisaged and ought to have envisaged, it is more appropriate to concede that during its early years international human rights law, at best, adopted an 'indirect' approach in imposing

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42 Muchlinski, MNEs and the Law, above n 16, 3-7; Zerk, above n 37, 8-10; Jügers, In Search of Accountability, above n 41, 100-01.

43 'International law – and human rights law in particular – has traditionally concerned itself with state responsibility, rather than the responsibility of non-states actors such as companies.' Fitzgerald, above n 35, 33. ‘International law and human rights law have principally focused on protecting individuals from violations by governments.’ Weissbrodt, above n 41, 59.

44 Clapham, Non-State Actors, above n 6, 86-91; ICHR, Beyond Voluntarism, above n 8, 62-64.


46 Commenting on the scope of the Preamble to the UDHR, Henkin famously argued: ‘Every individual include juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.’ Henkin, ‘Universal Declaration at 50’, above n 45, 25 (emphasis in original). A reference could also be made to similar provisions in the Preamble to the International Convention on Civil and Political Rights and Articles 27-29 of the African Charter on Human and People Rights.

and enforcing human rights obligations against MNCs.48 The rationale was that if states were placed under a legal obligation to respect and promote human rights, it also implied a derivative obligation, i.e., that states had also to ensure that other natural or legal actors, including corporations, operating within their respective territories respected human rights.49 This early 'blankness' or 'indirect approach' of international human rights law regarding MNCs' human rights obligations – though remarkable50 – was consistent with how human rights historically evolved in the context of individuals versus states.51

However, both the blankness and indirect approach of international human rights law qua MNCs' human rights responsibilities began to change slowly from the early 1970s. The first sign of this change came when the UN decided to research the impact of MNCs' activities on development, and then the UN Commission on Transnational Corporations proceeded to draft a code of conduct specifying the responsibilities of MNCs.52 Although this attempt to draft a code at international level failed to materialise,53 it at least emphasised the need of international regulation of MNCs' activities. The OECD Guidelines of 1976 and the ILO Tripartite Declaration of

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49 See ICHRIP, Beyond Voluntarism, above n 8, 46-52; Reinisch, above n 11, 79-82; Zerk, above n 37, 83-91.

50 Professor Weissbrodt notes that 'it is really remarkable that corporations have not received more attention in the evolution of international law, particularly international human rights law.' Weissbrodt, above n 41, 59. He also observes that it is regrettable that the international community has frequently ignored instances of corporate human rights abuses. Id., 55.

51 'International human rights law aims primarily to protect individuals ... from abusive action by states and state agents.' Shelton, Above n 10, 333. Higgins notes: 'A human rights is a right held vis-à-vis the state, by virtue of being a human being.' Higgins, above n 117, 98. Professor Henkin also wrote: 'Human rights, I stress, are rights against society as represented by government and its officials.' Henkin, above n 1, 2. Henkin though liberalised his stand later on. Henkin, 'Universal Declaration at 50', above n 45. It should also be noted that the Indian Constitution of 1950 remarkably provided for certain fundamental human rights which were 'designed to protect the individual against the action of other private citizens,' e.g., articles 15(2), 17 and 23. Granville Austin, The Indian Constitution: Cornerstone of a Nation (Oxford: Clarendon Press, 1966), 51.

52 Muchinski, MNEs and the Law, above n 16, 5-6, 592-94; Jägers, In Search of Accountability, above n 41, 119-24.

53 Muchinski, MNEs and the Law, above n 16, 594-97.
1977 – both of which were revised in 2000\(^ {54} \) – for the first time sought to prescribe directly and specifically the human rights responsibilities of MNCs in limited areas.\(^ {55} \) Arguably, these initiatives were evidence of the fact that in order to achieve fuller and wider realisation of human rights, the spectrum of human rights obligations should directly cover even MNCs. However, as far as the compliance with human rights responsibilities was concerned, both these regulatory initiatives, though admittedly voluntary in nature, continued to rely primarily, though not exclusively, on the ‘indirect’ approach, i.e., the task of whether MNCs follow up or implement these responsibilities rests principally with states with a minor role for other stakeholders.\(^ {56} \)

Although the inherent limitations of the OECD Guidelines and the ILO Declaration are highlighted in more detail in Chapter 4,\(^ {57} \) one point may be noted here. The reliance of both these regulatory initiatives on states for enforcement is problematic, for states sometimes may be unable\(^ {58} \) and/or unwilling\(^ {59} \) to enforce vigorously human


\(^{56}\) Jägers, In Search of Accountability, above n 41, 106-09, 112-14; Clapham, Non-State Actors, above n 6, 207-11, 216-18.

\(^{57}\) Chapter 4.2.3 and 4.2.4.

\(^{58}\) Such ‘inability’ could arise because of a weak regulatory system, or due to limitations inherent in controlling an entity that operates at the transnational level and could hide behind a corporate veil. ‘State regulation is often difficult or impossible, not for lack of will, but for lack of capacity.’ Dinah Shelton, ‘Challenges to the Future of Civil and Political Rights’ (1998) 55 Washington & Lee Law Review 669, 684. Ratner also points out to this incapacity when he says that MNCs ‘have headquarters in one state, shareholders in others, and operations worldwide... [They] can also shift activities to states with fewer regulatory burdens, including human rights regulations.’ Ratner, above n 25, 463. See also Susan Strange, The Retreat of State: The Diffusion of Power in World Economy (New York: Cambridge University Press, 1996), 49-50. It should further be noted that such inability is not limited to developing countries. See Jonathan I Charney, ‘Transnational Corporations and Developing Public International Law’ (1983) Duke Law Journal 748, 749

\(^{59}\) ‘Unwillingness’ could result due to a state’s complicity with the involved MNCs, or its desire to get foreign investment, or in view of the economic power of MNCs. See generally M E Porter, ‘Year for Competition in Global Industries: A Conceptual Framework’ in M E Porter (ed.), Competition in Global Industries 15 (arguing that a developing nation must show itself to be an advantageous location for business in order to attract direct investment by MNCs). This is truer in the case of developing countries. Acquaah observes: ‘The dilemma thus posed for the host [Third World] governments is a choice between foreign investment and the health and safety of its citizenry.’ Kwame Acquaah,
rights responsibilities against MNCs. It is, therefore, critical that any international regulatory initiative also invokes non-state mechanisms to make MNCs accountable for breaches of human rights obligations. Two relatively recent international regulatory initiatives – the UN Global Compact, and the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (UN Norms) – seem to move in this direction in distinct ways. The Global Compact, though still a totally voluntary initiative, conceives a role for multiple stakeholders to promote responsible corporate citizenship. The UN Norms, on the other hand, are not only ‘non-voluntary’ but also propose to implement corporate human rights responsibilities through a range of measures and institutions instead of relying solely on states. The UN Norms, thus, mark a clear departure from the erstwhile indirect approach of international law in specifying and enforcing corporate human rights responsibilities.

This brief mapping of existing regulatory initiatives that seek to impose and enforce human rights obligations upon MNCs was intended to indicate that there has not been any dearth of regulatory initiatives. Regulatory mechanisms have flowed, and more could flow in future, from an internal or an external source, or in some cases from a

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60 Joseph, *Transnational Litigation*, above n 21, 4-5.

61 See Chapter 8.2.3.3.

62 The UN Secretary General Kofi Annan on 31 January 1999 at the World Economic Forum in Davos proposed the Global Compact consisting of nine principles in the areas of human rights, labour, and the environment. Later on, the tenth principle related to anti-corruption was added. See <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited 10 January 2006). See, for the evolution and a critique, Surya Deva, ‘The UN Global Compact for Responsible Corporate Citizenship: Is it Still too Compact to be Global?’ (2006) 2 *Corporate Governance Law Review* 145.

63 UN Norms, above n 6.

64 See Chapter 4.2.5.

65 UN Norms, above n 6, paras 15-19.


67 By an ‘internal’ regulatory mechanism I mean an initiative that is introduced by possible violators themselves, individually or collectively. An ‘external’ regulatory regime, on the other hand, is developed and implemented by those organs of society which aim to protect human rights. See Chapter 3.3.2.1.
partnership between internal and external sources. These regulatory regimes operate at various levels – from (corporate) institutional to national, regional and international levels. But despite the plethora of regulatory regimes directed towards fixing responsibility on MNCs for human rights violations, what we witness more often than not is a situation of impunity – from Union Carbide Corporation (UCC) and Enron Corporation in India to Unocal Corporation in Myanmar, from Nike and Reebok in Asia to Shell Oil Company in Nigeria, from Texaco in Ecuador to Freeport-McMaran in Indonesia, from Yahoo!, Microsoft and Google in China to BHP in Papua New Guinea. MNCs continue to remain unaccountable for human rights violations by exploiting the gaps or loopholes in the existing regulatory mechanisms. They are also able to employ various legal tools to their advantage to resist, delay or escape liability for human rights abuses.

The situation of impunity described above arises, in my view, not because of any perceived vacuum of regulatory responses but due to the inadequacy of existing regulatory regimes. The current regulatory regimes have proved, and are proving, inadequate to provide justice to the victims of human rights violations. As far as


69 The term ‘institutional’ is here defined expansively so as to include one uni-national corporation to any given business sector or industry. See Chapter 8.2.1. The majority of the image-conscious big corporations have adopted internal codes of conduct: ‘One would be hard-pressed to find any major corporation today that did not make some claim to abiding by a code of conduct that comprised, at least in part, adherence to human rights standards. Indeed, more often than not, such adherence to codes is trumpeted by major corporations.’ Kinley & Tadaki, above n 47, 953. There are some codes which are issue or industry specific rather than being limited to a single corporation. See, for example, Clean Clothes Campaign Code of Labour Practices for the Apparel Industry, <http://www.cleanclothes.org/codes/ccccode.htm> (last visited 12 November 2006).

70 Above notes 35, 37, and 38.


72 ILO Declaration, above n 54; OECD Declaration, above n 54; Global Compact, above n 62; UN Norms, above n 6.

73 Above n 21.

74 Two such tools deserve special mention. First, the reliance on the principles of separate personality and limited liability to avoid liability for human rights violations by subsidiaries. Second, a resort to the plea of forum non conveniens to delay the trial or frustrate the victims. See above n 39; Chapter 8.2.2.2, 8.2.3.2.
internal (or self) regulatory initiatives are concerned, the basic infirmity lies in their voluntary character because compliance or non-compliance is largely dependent on the wish of possible violators. This is over and above the fact that ‘what’ is to be complied with is also not clear, especially in the context of MNCs operating in different countries. External regulatory regimes similarly suffer from several lacunae which seriously hamper any prospect of effective regulation. Briefly put, the municipal regimes are either under-developed or states are ‘unable’ and/or ‘unwilling’ to make MNCs accountable. The infirmities of international initiatives, which are arguably more suited to deal with actors operating at the transnational level, on the other hand, are multi-fold: they neither prescribe clear human rights standards nor resolve the dilemma of operating at ‘home’ and in ‘Rome,’ are based upon flawed premises, rely excessively on states to enforce obligations, offer no sanctions in case of non-compliance, and do not address the critical procedural issues. With the possible exception of the UN Norms, which have an uncertain future despite their approval by the UN Sub-Commission on the Promotion and Protection of Human Rights, all of these initiatives impose moral or ethical responsibility and are voluntary in terms of compliance. Moreover, these admittedly voluntary mechanisms have not made adequate and sincere efforts to utilise even alternative non-

75 A regulatory regime is considered 'adequate' if it can prevent or preempt human rights violations by MNCs – at least in some cases – and could also offer adequate relief to victims in cases of violations. See Chapter 3.2.
76 Deva, 'Where from Here?', above n 22, 17-21. See also Chapter 4.3.3.4.
77 UN Norms not only construe the obligations in terms of 'shall', but also make special provisions for implementation and sanctions. Above n 6, paras 15-19. Though it can be argued that the ATCA also imposes legal obligations, it should be noted that it was not enacted to impose/enforce obligations on MNCs. Moreover, its scope is limited in many respects as illustrated by many cases litigated under it. See David I Becker, 'A Call for the Codification of the Unocal Doctrine' (1998) 32 Cornell International Law Journal 183; Lisa Lambert, 'At the Crossroads of Environmental and Human Rights Standards: Aguinda v. Texaco, Inc., Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in US Courts' (2000) 10 Journal of Transnational Law & Policy 109; 'Developments in the Law - International Criminal Law: Corporate Liability for Violations of International Human Rights Law' (2001) 114 Harvard Law Review 2025, 2027-29 (hereinafter 'Developments in the Law').
78 Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2003/16 (13 August 2003), E/CN.4/Sub.2/2003/L.11, 52-55. Perhaps the most damaging critique of the UN Norms came from Professor John Ruggie. Interim Report of the Special Representative of the Secretary General, above n 32, paras 56-69. For more discussion about the contribution and future of the UN Norms, see Chapter 4.2.6; Weissbrodt, above n 41; David Kinley & Rachel Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 6 Human Rights Law Review 447.
conventional sanctions such as naming and shaming, independent monitoring, and consumer boycotts.

The above background, in short, provides the starting point for the present research. This thesis revolves around the current state of MNCs' impunity for human rights violations and an inadequate regulatory response to such conduct. Although prima facie the situation of impunity is the effect of inadequate regulation, one can also see impunity as the cause of regulation. The relation between these two variables is arguably circular: whether corporate impunity for human rights violations is the cause of regulation or whether it is the effect of (inadequate) regulation, or vice versa, could be a moot point. In the next section, I outline the issues connected with the above circular cause-effect relation, which I intend to explore in the present work.

1.2 OBJECTIVE: ISSUES TO BE EXPLORED

This thesis aims to examine the (in)adequacy of existing regulatory initiatives – which differ significantly from each other in terms of their nature, content, form, scope, source, and level of operation – related to human rights violations by MNCs. Although the present research focuses primarily on MNCs, it needs to be clarified at the outset, to avoid any confusion,79 that one should not infer from this limited focus that only MNCs violate human rights, or that existing regulatory initiatives are adequate to regulate the activities of non-MNCs. I argue, in Chapter 5, that all corporations, and not merely MNCs, should have human rights responsibilities.

MNCs are chosen primarily because, in view of their power and influence,80 they are more prone not only to violate a wider range of human rights in diverse settings but

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79 Professor Clapham, for example, writes: 'Much of the commentary on the topic of corporations and human rights confusingly concentrates on the concept of the transnational corporation.' Clapham, Non-State Actors, above n 6, 199 (emphasis in original).

80 'General Motors Corporation's sales in a single year are greater than the gross national product of 179 countries .... TNCs hold 90% of all technology and product patents worldwide, and are involved in 70% of world trade. TNCs directly employ ninety million people (some twenty million of whom live in developing countries) and produce 25% of the world's gross product. The top thousand of these TNCs account for 80% of the world's industrial output.' Weissbrod, above n 41, 58-59 (footnotes omitted).
also to resist, delay or evade accountability for such violations. ‘Bhopal’ – an Indian city where thousands of people died because of a gas leak from a chemical plant owned by UCC is invoked as a case study to investigate how MNCs are able to violate human rights and then evade accountability by exploiting the loopholes present in existing regulatory initiatives. Since MNCs like UCC are more difficult regulatory targets, it is sensible to explore the issue of the inadequacy of existing regulatory regimes with reference to MNCs and not just uni-national corporations. For the same reason, it will be pertinent to assess the strengths of the regulatory framework proposed here with reference to MNCs.

The inadequacy of current regulatory responses to corporate human rights abuses is examined in furtherance of the central objective of the thesis, that is, to canvass an ‘integrated theory of regulation’ which could be used to anchor an effective regulatory framework dealing with human rights responsibilities of MNCs. The integrated theory, like a tripod, has three independent but interconnected legs:

- **why** should corporations have human rights responsibilities;
- **what** are these responsibilities for MNCs operating in different countries; and
- **how** could such human rights responsibilities be enforced in an effective manner?

Any theory of corporate human rights responsibility faces, in my view, these three distinct but interrelated challenges, which I will label throughout the thesis as the **why**, **what** and **how** of corporate human rights responsibility discourse. The three challenges identified here are substantive, structural and/or procedural in nature. The discussion below should make it clear what these three-fold challenges are and how they differ in terms of their nature.

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81 The fact that they have multiple production facilities means that TNCs can evade state power and the constraints of national regulatory schemes by moving their operations between their different facilities around the world.’ Claudio Grossman & Daniel Bradlow, ‘Are We Being Propelled towards a People-Centered Transnational Legal Order?’ (1994) 9 American University Journal of International Law & Policy 1, 8.
82 See, for details, Chapter 1.4.4 and Chapter 2.
84 Chapters 7 and 8 outline in detail the integrated theory as well as the vision of a regulatory framework based on it. For a brief description of the integrated theory, see Chapter 1.4.5.
The first and foremost challenge pertaining to why questions the very basis of, and need for, any relation between business and human rights that results in business actors attracting human rights obligations. In view of business and human rights being perceived as different pursuits having conflicting interests as well as theoretical underpinnings, why should it be the business of business to respect and promote human rights? Why should corporations, ergo MNCs, which are economic entities established for profit maximisation and wealth generation, respect and promote human rights, especially when compliance with human rights obligations might impede their primary objective? Though the vigour of this challenge has diminished in recent years in view of scholars making a strong case for corporate human rights responsibility, and many corporations accepting that they have some responsibilities, a few dissenting voices can still be heard. In view of this, I critique the thesis of two prominent scholars - Milton Friedman and Elaine Sternberg - who argued that the only responsibility of business is to maximise shareholders' profit or value. It is contended that such a view is narrow, unsound, and outdated in the current economic climate. In addition, I also advance positive justifications to demonstrate why corporations should have human rights.

85 Friedman famously argued that in a free market economy 'there is one and only one social responsibility of business - to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game.' Milton Friedman, Capitalism and Freedom, 40th anniversary edition (Chicago: University of Chicago Press, 2002), 133.
87 The 'business case' for human rights though posits that corporations could earn more profit by complying with human rights norms. Below n 184. For a critique of this rationale, see Chapter 5.3.
88 'The Nature of CSR debate has now moved on - from "why" be socially responsible, to "how"?' Zerk, above n 37, 25.
90 'By now companies seem to have accepted that compliance with human rights obligations is an important part of being "socially responsible". Most leading multinationals now have a "human rights policy" displayed somewhere on their web-sites.' Zerk, above n 37, 42. Corporations, however, treat human rights responsibilities not as legally binding but only voluntary. Id., 43.
92 Chapter 5.2.
responsibilities.\textsuperscript{93} Doing so is essential, in my view, also to provide an overall sound base to the integrated theory of regulation proposed in this thesis, for the requisite 'what' and 'how' could hardly be rooted on a fragile response to 'why.'\textsuperscript{94}

Second, assuming that MNCs are bound by human rights norms, what human rights standards should guide their conduct? Although the difficulty of agreeing on the ascertainable content of human rights is a problem associated with human rights law generally,\textsuperscript{95} the problem acquires an additional dimension when it comes to MNCs. MNCs, unlike states,\textsuperscript{96} operate in many states that differ drastically from each other in material particulars, e.g., in their respective legal systems, socio-economic conditions, political environments, religions, and cultures. Because of these differences, MNCs often face a business dilemma: should they apply the standards of the host country, the standards of the home country, or adopt international standards irrespective of where they operate? The determination of precise human rights standards for MNCs should be a priori to their accountability for human rights violations.\textsuperscript{97} However, the existing regulatory initiatives, howsoever paradoxical it may look, do not resolve this dilemma of varying standards. I intend to fill this gap by exploring both the approach that does generally guide (the business approach) and the approach that should guide (the human approach) MNCs in resolving the dilemma concerning varying standards of human rights.\textsuperscript{98} As the business approach is unlikely to protect the human rights of people in developing countries, it is contended that MNCs' decisions should be guided by the human approach.

\textsuperscript{93} Chapter 5.4.
\textsuperscript{94} 'If MNEs are to be subjected to direct and legally enforceable obligations to observe fundamental human rights, the grounds for doing so must be strong and conceptually unassailable.' Muchlinski, 'Is There a Problem?', above n 27, 32.
\textsuperscript{95} Marceau argues that 'a particular difficulty in dealing with human rights treaties is the fact that they are often drafted in rather general terms, and frequently there is no consensus on their interpretation.' Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 European Journal of International Law 753, 786.
\textsuperscript{96} Unless a particular state is acting through its corporate hands. To illustrate, China Petrochemical Corporation, which is 100 per cent owned by the Chinese government, does business in several countries.
\textsuperscript{97} Deva, 'Where from Here?', above n 22, 39.
\textsuperscript{98} Chapter 6.
The third challenge that the theory of corporate human rights responsibility faces is how to implement and enforce MNCs' human rights obligations effectively. The regulatory framework should not only be able to encourage MNCs to take on board their human rights responsibilities but also be capable of dealing robustly with those MNCs which are not so encouraged. Issues related to this challenge are many and quite diverse. For example, what should be the nature and form of such an enforcement mechanism? Should it be voluntary, mandatory, or a combination of both? At which level, or levels, should regulatory initiatives be put in place to ensure an effective enforcement framework? Should (and could) international law impose and enforce human rights obligations upon MNCs directly? What types of implementation strategies and sanctions could prove effective against MNCs? What is the extent, if any, to which markets and civil society organisations could be used to make MNCs accountable for human rights abuses? The regulatory framework, based on the integrated theory of regulation, outlined in this thesis deals with all such issues.

Besides the above-mentioned enforcement issues, some questions related to 'how' arise primarily due to the nature of the actors to be regulated. The task of regulation becomes tougher when one has to regulate the behaviour of a legal person, especially one operating at the transnational level through a web of subsidiaries. At least three issues require serious consideration. First, what should be the liability, if any, of a parent MNC for human rights violations by its subsidiaries? Second, other than the problem of attribution faced while dealing with a legal person, what level of participation (act or omission) and state of mind (intention, knowledge, or reason to believe) should be sufficient to impose liability for human rights violations? Third,

99 Wright observes: 'Our systems of international implementation and enforcement of human rights must eventually come to include all effective players, not just the state and the individuals.' Wright, above n 3, 217.
100 See Chapters 7 and 8.
102 Joseph, Transnational Litigation, above n 21, 129-43.
103 See Wright, above n 3, 211.
how should one deal with the plea of *forum non conveniens*\(^{104}\) which is often raised by MNCs to scuttle legal actions for human rights violations?\(^{105}\) Each of these important issues is a potential subject of a separate thesis, and I do not intend to deal with them in the present thesis in detail. However, a passing reference to them is made at appropriate places.

In short, the objective of this thesis is to confront the three-fold challenges – why, what and how – that any theory of corporate human rights responsibility faces. I intend to take up all three challenges outlined above at some stage of my thesis, for failure to tackle effectively any one of these challenges will leave gaps in a quest to establish an effective enforcement mechanism for corporate human rights accountability. The treatment of the issues in terms of exhaustiveness will, however, vary; the more fundamental or pressing issues will be explored more extensively.

### 1.3 The Structure of Argument and Chapter Scheme

This thesis makes two claims, one ‘prerequisite’ and the other ‘central.’ The prerequisite claim is that existing regulatory initiatives that seek to make MNCs accountable for human rights abuses are seriously inadequate. Since it is not feasible to evaluate all, or even a majority of, current regulatory initiatives here, six representative regimes are chosen for a critical assessment.\(^{106}\) On the basis of the

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\(^{104}\) *Forum non conveniens* ‘is a common law doctrine which permits ... courts to dismiss cases on the basis that the balance of relevant interests weighs in favour of trial in a foreign forum.’ Joseph, *Transnational Litigation*, above n 21, 87, and generally 87-99. The test that courts apply to dismiss a case on the ground of *forum non conveniens* varies in different countries. See Peter Prince, ‘Bhopal, Bougainville and Ok Tedi: Why Australian *Forum non Conveniens* Approach is Better’ (1998) 47 *International & Comparatively Law Quarterly* 573; Zerk, above n 37, 120-27.

\(^{105}\) In some cases the courts have though reacted more positively. See, for example, *Connelly v RTZ Corp plc* [1997] 4 All ER 335 (HL); *Lubbe v. Cape plc* [2000] 1 WLR 1545 (HL); Peter Muchinski, ‘Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases’ (2001) 50 *International & Comparative Law Quarterly* 1. The decision of the European Court of Justice in *Owusu v Jackson* [2005] 2 WLR 942 is also significant in that the Court held that the dismissal of a suit on the ground of *forum non conveniens* will be incompatible with the European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 (Brussels Convention), reprinted in 8 *ILM* 229 (1969). Joseph, *Transnational Litigation*, above n 21, 88-99 (illustrating that the US courts seem to be becoming more sympathetic to accept jurisdiction in recent years). However, generally the doctrine still presents formidable challenge in making MNCs accountable for human rights abuses. Deva, ‘Overcoming Hurdles’, above n 39, 91-96.

\(^{106}\) The six representative regulatory regimes are: ATCA, corporate codes of conduct, OECD Guidelines, ILO Declaration, Global Compact, and UN Norms. See Chapter 4. In order to ensure that
evaluation of these specific regulatory initiatives, a general claim about the inadequacy of existing regulatory initiatives relating to MNCs is supported. I argue that the existing regulatory framework suffers from three deficiencies: it does not prescribe sufficiently clear human rights standards, offers insufficient or contestable rationales for compliance, and is supported by deficient or undeveloped implementation and enforcement mechanisms.

The central claim that this thesis advances is that the 'integrated theory of regulation' could anchor a regulatory framework that could overcome to a great extent the inadequacies of existing regulatory regimes and in turn, redress the current state of MNCs' impunity for human rights violations. In addition to tackling the triple challenges signified by 'why,' 'what' and 'how', the integrated theory proposes integration on two more counts: (i) between human rights and business; and (ii) between different available levels of regulation, strategies of implementation, and types of sanctions. These aspects of the integrated theory are described in part 1.4.5 below.

The arguments related to these two claims - prerequisite and central - are presented in a logical order. After demonstrating the limitations of existing regulatory initiatives on the basis of a review of six representative regimes, the three legs of the integrated theory are dealt with one by one: why, what and how. The thesis is divided into nine chapters, including this introductory chapter. A brief overview of the chapters that will follow the present introductory chapter is given below.

Since Bhopal is a common thread that runs through the whole thesis, the next Chapter aims to give readers an understanding not only of the background and circumstances under which UCC established its chemical plant at Bhopal but also of the litigation that unfolded after the gas leakage. Bhopal, a symbol of corporate impunity for human rights violations, is used to show how pre-entry negotiations between MNCs these regimes are truly 'representative,' their selection is based on taking into account several variables relevant to the taxonomy of existing regulatory regimes. See Chapter 3.
and host states could prepare the groundwork for MNCs to violate human rights in developing countries by adopting inferior human standards or otherwise.

Chapter 3 conceptualises what ‘adequacy’ entails for a regulatory framework, and develops an analytical framework for the critical evaluation of regulatory initiatives related to MNCs’ human rights responsibilities. The chapter suggests five factors that could be used to understand the taxonomy of existing regulatory regimes: the source from which they flow; the content of obligations; the strategy that they adopt to reach MNCs; their level of operation; and their nature in terms of compliance strategy. These factors are then used to select a representative sample of six regulatory initiatives to be evaluated critically to ascertain their adequacy in controlling human rights abuses by MNCs.

Chapter 4, based on the analytical framework developed in Chapter 3, reviews six representative (as well as prominent) regulatory initiatives that seek to render corporations accountable for human rights violations. A review of these initiatives – which include both internal and external mechanisms operating at institutional, national, regional and international levels – reveals a three-fold inadequacy. On this basis, it is contended that the existing regulatory framework that seeks to make MNCs accountable for human rights violations (i) does not prescribe clear human rights standards, (ii) offers insufficient or contestable rationales for complying with human rights norms, and (iii) is supported by a deficient or undeveloped enforcement mechanism. These inadequacies should be taken into account when reforming existing regulatory initiatives or introducing new initiatives.

Chapter 5 is aimed at overcoming the first challenge faced by a theory of corporate responsibility for human rights violations, i.e., ‘why’ should corporations be subject to human rights obligations? It challenges the thesis of both Friedman and Sternberg, who argued that the only social responsibility of business is to maximise shareholders’ profit. This chapter also highlights why it is problematic to rely too much on the ‘business case’ for human rights as a compliance rationale. As an alternative justification for corporate human rights responsibilities, it is argued that all corporations (not merely MNCs) should have human rights responsibilities because of their relation with and position in society.
Chapter 6 deals with the question of ‘what,’ that is, in case more than one set of standards regarding a given human right obligation exists, which standards – out of the home, host and international standards – should an MNC adopt while operating in different countries? In other words, how should corporations behave in Rome, or when operating outside their home jurisdiction? Two approaches, which represent contrasting visions of the role and place of corporations in society, that do or should guide MNCs in overcoming this complex dilemma are discussed: the business approach and the human approach. With the help of the Bhopal case, I illustrate that the business approach will often fail to protect human rights of people in developing countries, for this approach encourages MNCs to always adopt host standards which most of the time are inadequate. MNCs’ decisions should, therefore, be guided by the human approach: requiring them to apply in host countries the home or international standards modified in view of morally relevant local differences. Local differences are morally relevant only if they facilitate a better realisation of human rights.

Chapters 7 and 8 together relate to the final leg of the integrated theory of regulation: ‘how’ to make MNCs accountable for human rights violations in an effective manner? Whereas Chapter 7 elaborates the integrated theory, Chapter 8 outlines how a regulatory framework based on this theory could be put in place. Chapter 7 begins with a critique of the model of responsive regulation proposed by Ayres and Braithwaite,107 with a view to ascertaining if this model could support a framework for MNCs’ accountability for human rights abuses. In particular, I highlight the limitations of the enforcement pyramid and the model of enforced self-regulation in controlling and redressing corporate human rights violations. It is contended that regulatory techniques should be employed simultaneously rather than being invoked only when the techniques situated lower on the regulatory pyramid fail to deliver.

Chapter 8 maps how the conduct of MNCs should be regulated, in an integrated manner, at an institutional level through voluntary codes, at a national level by the

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laws enacted by governments of home and host countries of MNCs, and at the international level by an international treaty delineating corporate human rights responsibilities. Regulatory initiatives at all three levels should invoke, as far as possible, twin implementation strategies (incentives and coercion) and triple sanctions (civil, criminal and social) simultaneously so as to result in a robust enforcement of corporate human rights responsibilities. One aspect stressed under the proposed framework is that in view of inherent limitations of law and states in regulating MNCs, it is imperative for regulatory initiatives to employ non-legal regulatory initiatives, techniques and sanctions that do not primarily rely on government agencies, processes, or mechanisms.

Chapter 9 presents an overview of the thesis and summarises the conclusions of the study. In particular, it highlights how and why current regulatory initiatives that aim to promote corporate human rights responsibilities should be informed by the integrated theory of regulation. This concluding chapter also outlines the issues arising from this thesis that require further research and exploration.

1.4 KEY TERMS AND CONCEPTS

One of the critical issues in the debate on human rights has been the amorphous nature of the concepts and terms used in the debate. In fact, the use of uncertain, vague or general terminology has often proved a shield for taking human rights obligations less seriously. It is, therefore, imperative to overcome this definitional challenge. Though I do not intend or pretend to offer universally accepted definitions of the terms invoked in the debate, workable definitions for the present study are presented in order to maintain clarity. The terms defined are configured in relation to an 'identified problem' and a 'suggested response.' The identified problem is 'human rights violations by MNCs' and the suggested response is an 'integrated theory of legal responsibility.' As the present research uses Bhopal to illustrate both the

\[\text{\textsuperscript{108}}\text{Marceau, above n 95.}\]

\[\text{\textsuperscript{109}}\text{It is also possible to explain the sequence of defined terms in a series of connected questions. For example, what happened and is happening; how were the rights violated; who was responsible for the violation; where did the violation occur; what was/is the response to such a scenario?}\]
problem and the response, what is meant by ‘Bhopal’ is also described in part 1.4.4 below.

1.4.1 Human Rights

A definition of ‘human rights’ is vital because the obligations/duties/responsibilities—the words used interchangeably here—of MNCs will be framed with reference to what these rights are. The term ‘human rights’ in this thesis is taken to include all internationally recognised civil, political, social, economic, environmental, and cultural rights which MNCs could possibly violate. Critics could suggest that this is a circular response that brings us back to square one: what are those rights? On closer scrutiny, however, this is not the case. The above definition of human rights signifies two things. First, at the international level, there is a general consensus on what these human rights are. I take the International Bill of Rights (Bill of Rights) and other international instruments as an example of this consensus despite some states not ratifying all the conventions forming part of the Bill of Rights, or not implementing the obligations undertaken. Second, I think that there is no need to reformulate human rights that could be claimed exclusively against corporations. Rights do change and new rights may be created, but no new list of rights needs to be drawn afresh for regulating MNCs’ activities. Rather what needs to be done is to formulate duties specific to MNCs with reference to the rights enumerated in the Bill of Rights and other instruments. Subject to those human rights which MNCs could not possibly

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110 Corporations have been sued for violating extensive categories of human rights: from economic, social and cultural to civil and political rights. See ‘Developments in the Law’, above n 77, 2027-30; and the material cited in above n 21.


112 The Preamble to the UN Norms makes a reference to the majority of these instruments. UN Norms, above n 6.


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violate, the Bill of Rights should, and could, shed light on the human rights obligations of MNCs as well. I treat the OECD Guidelines, the ILO Declaration, the Global Compact and the UN Norms as an attempt, though far from perfect, to elaborate such duties.

Critics could also ask how could the human rights obligations of MNCs (or corporations generally) be formulated with reference to a Bill of Rights which was framed with primarily states in mind? This is a valid question but could be answered by two alternative responses. The Bill of Rights seemingly imposed obligations primarily on states but this was for the apparent reason that at that point of time only states were regarded as subjects of international law. However, over a period of time many non-states actors have been accepted as subjects of international law. It is also forcefully contended that the classification between subjects and objects of international law does not serve any useful purpose, and that even MNCs should be accepted as (at least limited) subjects of international law, so as to keep

115 'It is difficult to imagine a corporation having a great deal of influence on the right to seek and enjoy asylum or the right to a nationality.' Jägers, In Search of Accountability, above n 41, 59. Consider also, for example, Article 11 of the UDHR and Article 14(2) of the ICCPR (right to be presumed innocent when charged for a penal offence) and Article 12 of the ICCPR (liberty to leave and enter his own country). Ratner, however, contemplates the situations in which corporations could be involved in violation of even such rights. Ratner, above n 25, 493.

116 See Chapter 4.

117 Friedman wrote long ago: 'Although states remain by far the most important – and the only full – subjects of international law, ... they are no longer the only subjects of international law.' Wolfgang Friedman, Law in a Changing Society, 2nd edn. (New York: Columbia University Press, 1972), 469 (emphasis in original). See also Reparation of Injuries Suffered in the Services of the UN (1949) ICJ Rep 174, 179-80, 185; Malcolm N Shaw, International Law, 3rd edn. (Cambridge: Grotius Publications, 1991), 183; Skogly, above n 6, 63-71 (for the status of the World Bank and the IMF under international law); Ian Brownlie, Principles of Public International Law, 6th edn. (Oxford: Oxford University Press, 2003), 57-66, 648-50; Rosalyn Higgins, Problems and Process: International Law and How We Use It (Oxford: Clarendon Press, 1994), 12-13, 46-55. Regarding the status of the WTO, a reference could be made to Article VIII:1 of the WTO Agreement, which states: 'The WTO shall have legal personality, and shall be accorded by each of its members such legal capacity as may be necessary for the exercise of its functions.'

118 Higgins, above n 117, 49-50. Zerk argues that 'a more useful approach would be to consider the degree to which international law recognises the existence of different kinds of participants in the international legal system.' Zerk, above n 37, 74 (emphasis in original).

119 Jägers, In Search of Accountability, above n 41, 19-23; Clapham, Non-State Actors, above n 6, 76-82; Kinley & Tadaki, above n 47, 944-47; Zerk, above n 37, 73-76; Deva, 'Where from Here?', above n 22, 48-56. See also David A Ijaiya, The Extension of Corporate Personality in International Law (New York: Oceana Publications, 1978).
international law alive to changed circumstances. Conversely, one may take a path taken by Jägers and argue that 'the doctrine of legal personality does not constitute a conceptual obstacle to recognising human rights obligations for corporations.'

The proposition that no theoretical barrier exists in deducing the human rights obligations of MNCs with reference to the Bill of Rights could be supported from another angle as well. An agreement on human rights in the form of a Bill of Rights necessarily contemplates the presence of duty-holder(s). States were treated as, and undoubtedly are, primary duty-holders. But this does not mean that other duty-holders did not or could not co-exist with states. In fact, as Joseph Raz argues, this 'ability' to impose new duties is a special feature of rights:

"There is no closed list of duties which correspond to the right ... A change of circumstances may lead to the creation of new duties based on the old right. ... This dynamic aspect of rights, their ability to create new duties, is fundamental to any understanding of their nature and function in practical thought." 124

Against this background, it is contended that the shift of powers and functions from states to MNCs signifies a sufficient change in circumstances to justify the creation of new duties for MNCs. Thus, for developing a theory of corporate human rights responsibility, the need is not to redefine human rights but to reconceptualise and

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120 Professor Charney observed: 'If, however, international power has shifted from nation-states toward TNCs, then a legal system that focuses only on the former would be unrealistic and ineffective.' Charney, above n 58, 770.

121 Jägers, In Search of Accountability, above n 41, 35, and generally 19-35. Professor Clapham suggests that 'we concentrate on the rights and obligations of entities rather than their personality.' Clapham, Non-State Actors, above n 6, 83.

122 Even the UN Norms, which laid down responsibilities of corporations, acknowledge this: 'States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights.' UN Norms, above n 6, para 1 (emphasis added).

123 Jochnick argues that 'human rights obligations linked to human dignity may be violated by a host of actors including non-parties to the treaties; the exclusive focus on the state must be viewed as pragmatic and contingent, rather than necessary.' Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21 Human Rights Quarterly 56, 61.

extend the existing obligations in order to include MNCs (and such other entities) as new duty-holders together with states.  

1.4.2 Violation

Since the question of ‘violation’ necessarily arises in the context of *breaching an obligation*, the meaning of violation could properly be understood with reference to the nature and scope of human rights obligations of MNCs. Should the nature and scope of MNCs’ obligations be similar to those of states, that is, to respect, fulfil, and protect human rights? Although these obligations of states have been framed in different typologies, one may note that the obligations encompass both negative and positive elements. The distinction between positive and negative *rights* may be illusory and misguided, but, as Shue points out, a ‘useful distinction’ among *duties* correlative to rights does exist. Should MNCs then have an obligation to take positive steps to protect and promote human rights? Some scholars are likely to reply in negative. For example, Professor Thomas Donaldson, who concurs with Shue that three correlative duties are possible for any basic right, contends that the duties of corporations do not extend to protecting from deprivation or aiding the deprived. Such duties, Donaldson feels, are within the province of governments.

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125 Ratner argues that ‘other entities [non-state actors] may also pose a threat to human dignity – either acting with the state or alone – so that any contemporary notion of human rights must contemplate duties on those entities as well.’ Ratner, above n 25, 469.

126 ICHR, *Beyond Voluntarism*, above n 8, 46.

127 Kinley and Tadaki, for example, frame these obligations as ‘to prevent human rights abuses; to provide means and mechanisms of human rights compliance; and to promote the understanding, appreciation and application of human rights standards.’ Kinley & Tadaki, above n 47, 963.

128 It is now well established that states would be liable for violation when they fail to respect, fulfil or promote human rights; violation will occur both by states acting in derogation of obligations as well as failing to act. See David Kinley, ‘Human Rights as Legally Binding or Merely Relevant?’ in Stephen Bottomley & David Kinley (eds.), *Commercial Law and Human Rights* (Aldershot: Ashgate/Dartmouth, 2002), 38-42; ICHR, *Beyond Voluntarism*, above n 8, 45-54.


130 As early as in 1932, Dodd wrote: ‘There is a widespread and growing feeling that industry owes to its employees not merely the negative duties of refraining from overworking or injuring them, but affirmative duty of providing them so far as possible with economic security.’ E Merrick Dodd, Jr, ‘For Whom Are Corporate Managers Trustees?’ (1932) 45 Harvard Law Review 1145, 1151 (emphasis added).

131 Three duties are: (1) duties to avoid depriving, (2) duties to protect from deprivation, and (3) duties to aid the deprived. Shue, above n 129, 52.

132 Thomas Donaldson, *The Ethics of International Business* (New York: Oxford University Press, 1989), 83-84. He argues that the ‘corporation is an economic animal’ and therefore, ‘it would be unfair, not to mention unreasonable, to hold corporations to the same standards of charity and love as human
It seems, however, that such a restrictive interpretation of MNCs' human rights obligations is untenable for at least four reasons. First of all, human rights cannot be fully realised unless 'multiple kinds of duties' are imposed on all those actors which could abridge rights.\(^{133}\) In a situation where states are no longer the sole duty bearers, it is desirable that even non-state actors such as MNCs are subjected to positive obligations.\(^{134}\) Second, the scope of these duties should be coterminous with possible ways in which rights could be breached, that is, both by diverse actions as well as omissions.\(^{135}\) MNCs could violate human rights in a wide range of scenarios. Apart from directly violating human rights, in some cases MNCs could also contribute to violation indirectly, that is, when they assist in violation, fail to prevent violation, remain silent to violation, or benefit from operating in a state that violates human rights.\(^{136}\) Unless MNCs are subjected to positive obligations, all these kinds of abuses cannot be addressed. Third, in view of how MNCs do their business, it will not be sufficient if MNCs (their subsidiaries included) alone are within the loop of human rights obligations. Because MNCs should not be allowed to contract out human rights abuses, they should be responsible to ensure that their business partners and supply chain participants – over which they often exercise effective control – also do not

\(^{133}\) The complete fulfillment of each kind of rights involves the performance of multiple kinds of duties.' Shue, above n 129, 52. Even regarding those rights which are labeled as 'negative', positive duties must be fulfilled: 'It is impossible for any basic right – however "negative" it has come to seem – to be fully guaranteed unless all three types of duties are fulfilled.' Id., 53.

\(^{134}\) 'The international human rights obligations of TNCs ... are not to be minimal, or non-existent. ... TNCs must also be required, to some extent, to positively provide means for human rights attainment and to promote third-party compliance with, and provision for, human rights guarantees.' Kinley & Tadaki, above n 47, 966.

\(^{135}\) Mill argued that a person may cause evil to others not only by his actions but also by his inactions, and in either case he is justly accountable to them for the injury. J S Mill, ‘On Liberty’ in M Warnock (ed.), Utilitarianism (London: Fontana, 1960), 74.

\(^{136}\) The level of MNCs' responsibility in these varying situations is contentious. What is indisputable, however, is that their responsibility would differ, as Frey rightly points out:

At the primary level of responsibility, the TNC has the greatest duty to act when a company itself is compelled to participate in human rights abuse. On the other end of the continuum are situations imposing the least responsibility for action by the company. Such situations include scenarios in which the company lacks involvement in the human rights violations as well as influence over the perpetrator of the violations.

Frey, above n 89, 181 and also generally 181-7.
indulge in human rights violations on their behalf. 137 This will necessarily require taking positive measures on the part of MNCs. 138 Fourth, the fact of states being under positive human rights obligations does not forestall the imposition of similar duties on other non-state actors such as MNCs which are now performing some of the functions that were performed earlier by states. 139 Both states and MNCs can have, though to a varying degree as explained below, concurrent positive obligations.

In view of the above brief analysis, ‘violation’ in the present study is construed broadly, for the simple reason that doing so is necessary to ensure the effective protection of human rights. MNCs will violate human rights if they breach their dual obligation: the duty to respect human rights and the duty to promote as well as fulfil human rights. 140 The violation is taken to mean breach of an obligation to respect, protect, or fulfil human rights, including failure of the concerned MNC to ensure that its subsidiaries, contractors and suppliers respect human rights. 141

The positive obligations of MNCs are, however, subject to two riders, because their obligations need not, and should not, be identical or as extensive as those of states. 142 First, the positive obligations of MNCs should be limited, at least to begin with, to the core/basic human rights, 143 or to those human rights which are relevant to their

137 See Zerk, above n 37, 265-67.
138 Joseph describes several steps that MNCs could take to enforce human rights within their supply chains. Sarah Joseph, ‘The Appropriate Role of Corporations in Fostering Development and Combating Poverty’ in Kumar & Srivastava (eds.), above n 6, 189, 199.
139 If MNCs start performing those public services that were once performed by states, there is no good reason why the state’s human rights obligations should also not be transplanted to MNCs, as holding otherwise will mean that states can do indirectly what they cannot do directly. The transfer of power should also accompany the transfer of responsibilities. See Chapter 5.4.
141 Clapham explores what the typology of duties developed with reference to states – the duty to respect, protect, secure fulfilment, and promote human rights – entails for corporations. Clapham, Non-State Actors, above n 6, 230-33. Jagers also develops the duty ‘not to co-operate’ in the context of those corporations that operate in states that are engaged in egregious human rights abuses. Jagers, In Search of Accountability, above n 41, 92-95, and generally 79-95.
142 Shue writes: ‘... for every basic right – and many more other rights as well – there are three types of duties, all of which must be performed if the basic right is to be fully honoured but not all of which must necessarily be performed by the same individuals or institutions.’ Shue, above n 129, 52 (emphasis added). Zerk also notes that ‘if human rights law obligations are extended to corporate actors they will need to reflect the different roles and capacities of companies vis-à-vis states.’ Zerk, above n 37, 79. See also Kinley & Tadaki, above n 47, 961-66.
143 The question of defining ‘core’ or ‘basic’ is a contested one. Donaldson draws a list of ten fundamental international rights; Donaldson, The Ethics of International Business, above n 132, 81.
business operations. For example, an MNC manufacturing life-saving medicines should be under a positive obligation to make available such medicines at a reasonably affordable price (not free or at a nominal price as the obligation on the government might be), for failure to do so would violate the right to life and health. Such MNC should not though be expected to help small shop owners whose business is threatened by the opening of Wal-Mart-style shopping malls. Second, MNCs should be expected to take positive measures only within their respective spheres of operations, influence and within their economic resources. It is plausible to argue that the concept of ‘spheres of influence,’ introduced by the Global Compact, is analogous to the principal obligation of states to respect and promote human rights within their respective territorial jurisdictions. As the UN Norms also make clear,

Shue, on the other hand, argues that ‘rights are basic ... only if enjoyment of them is essential to the enjoyment of all other rights. This is what is distinctive about a basic right.’ Shue, above n 129, 19, and generally 20-30. See also Patricia Stirling, ‘The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organisation’ (1996) 11 American University Journal of International & Policy 1, 39-40; Theodor Meron, ‘On a Hierarchy of International Human Rights’ in Philips Aiston (ed.), Human Rights Law (Aldershot: Dartmouth, 1996), 77-99. Donnelly, however, argues: ‘All human rights are “basic rights” in the fundamental sense that systematic violations of any human rights preclude realising a life of dull human dignity .... ’ Donnelly, Universal Human Rights, above n 5, 41 (emphasis in original).

144 ‘Businesses are not responsible for solving all social problems. They are, however, responsible for solving problems that they have caused, and they are responsible for helping to solve problems and social issues related to their business operations and interests.’ Donna J Wood, ‘Corporate Social Performance Revisited’ (1991) 16 Academy of Management Review 691, 697. See also Michael E Porter & Mark R Kramer, ‘The Link Between Competitive Advantage and Corporate Social Responsibility’ (December 2006) Harvard Business Review 1, 8-12. Neville Isdell, chairman and chief executive of Coca-Cola recently observed that companies ‘cannot be involved in every single issue that needs resolving at the moment .... In China and India [Coke’s investment in anti-retroviral programmes, condom distribution and education] is relevant but we’re not involved in a major way in the US because there is no need for us to be involved.’ Andrew Edgecliffe-Johnson, ‘Business Leaders “Babbling” on Aids Fight, Financial Times (26 January 2007), <http://www.ft.com/cms/s/has/da17a-4d1f-11db-8709-0000779e2340.dwp_uuid=7f2c1e2a-91c0-11db-a945-0000779e2340.html> (last visited 29 January 2007). See also Michael E Porter & Mark R Kramer, ‘The Link Between Competitive Advantage and Corporate Social Responsibility’ (December 2006) Harvard Business Review 1, 8-12.


148 International law though permits universal jurisdiction in those areas where states owe obligations to the whole international community. See Higgins, above n 117, 56-65.
MNCs have human rights obligations only within ‘their respective spheres of activity and influence.’ For this reason, every MNC should be obligated to ensure that its own subsidiaries, suppliers and contractors respect human rights, to the extent that it is capable of doing so. Similarly, only the concerned MNC should have a positive obligation towards people who are displaced and/or lose their means of livelihood because of the construction of a gas pipeline, or a huge dam.

It may be noted that this liberal conception of MNCs’ human rights obligations is also consistent with the direction taken by recent regulatory initiatives. Besides the revised OECD Declaration and ILO Guidelines, the UN Norms clearly impose affirmative or positive obligations on MNCs. The UN Norms provide that MNCs shall not only refrain from directly or indirectly contributing to, and benefiting from, human rights violations but also ‘use their influence in order to promote and ensure respect for human rights.’ Similarly, the Global Compact principles, though very short and imprecise in content, stipulate that corporations should ‘support and respect the

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149 'Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights.' UN Norms, above n 6, para I (emphasis added).

150 See, for example, the Unocal case. John Cheverie, 'United States Court Finds Unocal may be Liable for Aiding and Abetting Human Rights Abuses in Burma' (2002) 10:1 Human Rights Brief.6.

151 The displacement of people because of the Sardar Sarovar project in India, or the construction of China’s Three Gorges dam provides good example of this. See Ranjit Dwivedi, Conflict and Collective Action: The Sardar Sarovar Project in India (New Delhi: Routledge, 2006); Sarah C Aird, ‘China’s Three Gorges: The Impact of Dam Construction on Emerging Human Rights’ (2001) 8 Human Rights Brief 24.

152 Para II.1 of the revised OECD Guidelines lays down: ‘Enterprises should ... contribute to economic, social and environmental progress with a view to achieving sustainable development.’ OECD Guidelines, above n 54 (emphasis added). The revised ILO Declaration again reaffirms positive obligation of private actors in para 2 in the following words: ‘The aim of this Tripartite Declaration of Principles is to encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimise and resolve the difficulties to which their various operations may give rise.’ ILO Declaration, above n 54, 188.

153 MNCs have the ‘obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights.’ UN Norms, above n 6, para 1. See also para 12 where an obligation is constructed in terms of not only respecting but also contributing to the ‘realisation of human rights.’ See also Stephen Kabel, ‘Our Business is People (Even if It Kills Them): The Contribution of Multinational Enterprises to the Conflict in the Democratic Republic of Congo’ (2004) 12 Tulane Journal of International & Comparative Law 461, 472-73.

protection' of human rights as well as 'make sure that they are not complicit in human rights abuses.'

1.4.3 MNC

The use of the term 'MNC', to denote an economic entity that operates at a transnational level, in the present thesis requires a response to two definitional questions. First, in view of the many terms being used by different writers and institutions, why is ‘MNC’ preferred over others? Second, irrespective of the preference for a particular term, how should the entity covered by the term be defined? Let me tackle the first issue first. Despite a difference in the usage of terms, by and large there is a consensus on what these terms refer to: a corporation (whether so called, or referred to as an entity or enterprise) that operates, owns or controls operations (whether production, export-import or services operations) in more than one country. In my view, differentiating one label from another, or making a claim that one label is better indicative of its contents hardly serves any useful purpose because whatever term is adopted, it has to be defined. I have, therefore, given more importance to the definition than to the label. The label of ‘MNC’ – which is considered a ‘misnomer’ by some scholars – is preferred only because out of the

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155 Global Compact, above n 62, Principles 1 and 2.
156 Different writers have used different terms such as transnational corporations (TNCs), MNCs, multinational enterprises (MNEs), transnational enterprises (TNEs), supranational entities, etc. Similarly, there is no consensus in usage even among the international institutions. The UN has used TNCs whereas the OECD and the ILO have preferred MNEs. Practitioners and researchers often use the terms “international”, “supranational”, “global”, “transnational”, and “multinational” interchangeably. David A Heenan & Howard V Perlmutter, Multinational Organisation Development (Reading, Massachusetts: Addison-Wesley, 1979), 15.
157 Wallace though points out the divergence in the use of terms ‘multinational’ and ‘transnational’ in general usage and in the UN parlance: ‘Thus, whereas in general usage ‘transnational’ is a term descriptive of ownership and/or control, in United Nations parlance it describes the extent of operations or activities. Conversely, in general usage “multinational” describes ownership and/or control distribution.’ Wallace, above n 16, 12. Professor Clapham notes that ‘the corporation may be both operating transnationally and the bearer of multinationality.’ Clapham, Non-State Actors, above n 6, 200.
158 Donaldson argues that the term ‘multinational’ is a ‘misnomer’: ‘[A]lthough global companies are multinational in doing business in more than one country, they are uninnational in composition and character. They are chartered in single country, typically have over ninety-five percent of their stock owned by citizens of their home country, and have managements dominated by citizens of their home country.’ Thomas Donaldson, ‘Multinational Decision-Making: Reconciling International Norms’ (1985) 4 Journal of Business Ethics 357, 358. Robe writes that ‘the greatest challenge to state sovereignty comes from organisations which have no existence in law!’ Jean-Philippe Robe, ‘Multinational Enterprises: The Constitution of a Pluralistic Legal Order’ in Gunther Teubner (ed.), Global Law Without a State (Aldershot: Dartmouth, 1997), 45, 52. Professor Vagts also notes that
many phrases in use, it commands more universal acceptance in terms of usage. I believe that the readers will be able to identify the label (MNC) with its contents more easily and clearly than any other label.

Now I address the task of defining an MNC, which is a more difficult task than the exercise of labelling. Professor Muchlinski highlights the difficulty involved in construing a definition of the term MNC. This difficulty is further evident from the fact that two international regulatory regimes especially designed to regulate the activities of MNCs do not consider it necessary to have a 'precise' definition of the term. There is, however, a deviation from this approach in the recent UN Norms which offer quite a wide definition of the term. But contestable issues still exist. For example, what - ownership or operations or both - should determine whether a corporation is multinational or not? Should there be any threshold limit, for

MNCs are a creature of national private corporate law and not of international law. Vagts, above n 17, 113.

159 For example, a comparative search of the terms 'MNCs' and 'TNCs' in combined world law reviews and journals on Westlaw on 10 January 2007 came up with 487 and 288, documents, respectively.

160 See generally Christine Baez et al, Multinational Enterprises and Human Rights (1999-2000) 8 University of Miami International & Comparative Law Review 183, 187-89 (analysing the definition of MNC from various perspectives, e.g., ownership, location of production or operation, location of headquarter, size, and percentage of sales made in foreign countries); Phatak, above n 27, 1-3.

161 Muchlinski, MNEs and the Law, above n 16. Heenan and Perlmutter argue that one of the difficulties is caused by the fact that there is a considerable disagreement over the meaning of 'multinationalism.' Heenan & Perlmutter, above n 156, 15, and generally 15-21. See also Thomas N Gladwin & Ingo Walter, Multinationals under Fire: Lessons in the Management of Conflict (New York: John Wiley & Sons, 1980), 2; Zerk, above n 37, 49-54.

162 ILO Declaration, above n 54, para 6; OECD Guidelines, above n 54, para 1.3. The ILO Declaration though offers a tentative inclusive definition of multinational enterprises in para 6: 'Multinational enterprises include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based.' Para 1.3 of the OECD Guidelines throws some light on the meaning of multinational enterprises: 'These [MNEs] usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another.' Vagts, however, writes that a definition was not considered necessary because until now 'there is no set of rules applicable to, and only to, such concerns.' Vagts, above n 17, 114.

163 Para 20 gives the following definition: 'The term "transnational corporation" refers to an economic entity operating in more than one country or a cluster of economic entities in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.' UN Norms, above n 6.

164 Wallace, for example, argues: 'Clearly, for purposes of regulation ... it matters little whether the ownership is uninational or plurinational ...; what matters is the activities to be regulated.' Wallace, above n 16, 12. But it can be argued that even ownership is a relevant factor in regulation because operations are controlled, in effect, by owners.
example, in terms of the annual turnover, or the number of employees or subsidiaries, to gain the status of an MNC? How should corporations engaged solely in export be treated?

Some of the definitional difficulties could, however, be overcome, to a great extent, if we were to identify two considerations: the type of corporations needed to be covered, and the policy objective sought to be achieved by including them in the definition. Regarding the first consideration, it could be said that the need is to target those corporations which operate in more than one country, including by owning, managing or controlling other corporations as well as acting, in part, through suppliers and contractors. The objective, on the other hand, is to subject such corporate actors to an international regulatory mechanism so that they could not exploit the weaknesses of municipal regimes.

In view of the above parameters, an MNC, for the purpose of this thesis, is an economic entity, in whatever legal form, that owns, controls, or manages operations, either alone or in conjunction with other entities, in two or more countries. The central element of this definition is the control exercised by a corporation over operations outside the country in which it is established. Such control could be exercised in various ways, including by ownership of shares, control over the Board of Directors, or through management of operations and affairs. The term 'manages operations' in this definition is wide enough to cover even the suppliers and contractors of an MNC. Therefore, an MNC would potentially be responsible for human rights violations by these persons as well as its own.

Critics may, however, assert that the proposed definition is too wide to be viable. Some may suggest introducing one or more limiting factors in the definition: that only an MNC which employs a particular number of employees, or has a definite annual

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165 These are generally accepted corporate tools employed by a corporation to exercise control over other corporations. See 18 Am. Jur. 2d Corporations 35 (1985); Zerk, above n 37, 52-53.
166 It must be noted that although the term 'manage' implies some sort of control, it is wider in scope than the term 'control'. The control test might prove inadequate while dealing with a series of contractors/suppliers of an MNC. See Ratner, above n 25, 519-22.
turnover, or controls a particular number of subsidiaries, or performs a public function should be included in the definition. I, however, think that the introduction of any one or more of these variables would allow MNCs to bypass the ambit of the definition, which in turn would frustrate the regulatory proposal advanced in this thesis. For example, if the number of employees is introduced as a limiting factor, agreement on such a number would be difficult. Should it be twenty, fifty, one hundred, or even more? More importantly, another hurdle would be construing the term 'employment'. As employment demands the presence of a master-servant relationship, MNCs could circumscribe the cut-off figure by simply hiring independent contractors or by creating new subsidiaries. Since there are similar operational difficulties associated with other limiting factors, I am not inclined to adopt any of them within the given definition.

1.4.4 Bhopal

Bhopal is a capital city of the state of Madhya Pradesh in central India, where thousands of people died on the night of 2-3 December 1984 due to the leakage of Methyl Isocyanate (MIC) and other toxic gases from a chemical plant run by Union Carbide India Ltd. (UCIL), a subsidiary of UCC. But in the present study the term 'Bhopal' has been used in a different and somewhat wider sense because I am of the view that now Bhopal has acquired a secondary meaning: it represents and symbolises the impunity of MNCs for human rights violations worldwide. Therefore, unless indicated otherwise, Bhopal signifies not only what happened in Bhopal on the night of 2-3 December 1984 but also the factual-legal matrix that preceded and followed it. In particular, Bhopal refers firstly to the decisions and/or steps taken (or not taken) by UCC and the Indian government that led to the gas leak. Secondly, it includes the

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167 See Frey, above n 89, 177-78 (Frey makes reference to vendor standards incorporated by various MNCs in their codes of conduct).
169 Weissbrodt argues that 'it is not easy to define a transnational corporation and there is a risk that sophisticated corporate lawyers will be able to structure any business so as to avoid the application of international standards.’ Weissbrodt, above n 41, 65.
legal battle for liability (or for the evasion of liability) spreading over two decades both in the US and Indian courts. Thirdly, Bhopal refers to the continuing miseries of the victims of the gas leakage. The next chapter describes these Bhopal-related attributes in some detail.

Either actual Bhopal (what actually happened way back in 1984) or hypothetical Bhopal (what would transpire if it were to happen again today) is invoked to explore, test, support, or illustrate various arguments advanced herein. In different chapters Bhopal is relied on to investigate issues such as: Why, and in what respects, the existing regulatory regimes dealing with corporate human rights abuses are inadequate? Why do corporations tend to ignore their human rights obligations? Why should corporations have human rights responsibilities? What should be the nature of such responsibilities? How could MNCs resolve the dilemma related to varying human rights standards? What limitations does the model of responsive regulation face in responding to scenarios such as Bhopal? Finally, Bhopal is also used to test the prescriptive regulatory solutions offered in this thesis.

1.4.5 Integrated Theory of Regulation

The integrated theory of regulation mooted in this thesis is a response to the inadequacy of prevailing regulatory strategies and theories that underpin existing regulatory initiatives related to corporate human rights responsibilities. In particular, the theory is a critical response to the model of responsive regulation put forth by Ayres and Braithwaite in that it seeks not only to plug the gaps in responsive regulation but also extends the scope of integration. I argue that attempts should be made to achieve a three-fold integration. 171

First of all, the integrated theory emphasises the necessity of establishing a balance between often-conflicting human rights issues and business issues, 172 for both human

170 Compare the US Code of Conduct Bill, above n 37, § 3 (proposed 20 employees as the cut-off limit), with the Australian Code of Conduct Bill, above n 37, § 4 (proposing 100 employees as the cut-off limit).
171 See, for details, Chapter 7.3.
172 ‘To advance CSR, we must root it in a broad understanding of the interrelationship between a corporation and society while at the same time anchoring it in the strategies and activities of specific
rights and business are important for the development of individuals as well as society as a whole. Such balance could be stated in terms of human rights (for business). In many cases it should be possible to arrive at such a balance, satisfactory for both human rights and business constituencies. However, if the conflict between human rights and business interests persists at an irreconcilable level, the former should prevail over the latter. Recognition of such a hierarchy in the case of unavoidable conflict is essential because business could still survive if subordinated to human rights, though the reverse may not be true.

Second, any theory of corporate human rights responsibility in order to be viable should overcome three challenges: why should corporations have human rights obligations; what standards of human rights should they follow; and how to enforce human rights obligations effectively. The integrated theory seeks to confront all three challenges together rather than focusing only on one or two of these.

companies.’ Porter & Kramer, above n 144, 7. They also argue that there is no ‘tension between business and society’ as they are interdependent. Id., 4. Such a claim is, however, unsustainable on the face of lack of consensus and contradictory positions taken by different parties to the debate. Moreover, tensions and conflicts do not disappear merely because certain variables are interdependent. Professor Redmond, for example, argues: ‘There is an endemic conflict between the goals of corporate profit maximization and those of human rights protection and social development.’ Redmond, above n 10, 94. Human rights and business are seen, taken more as foes than friends. This remains the case despite recent promotion of the idea that a dialogue between human rights and business could be established and that it is beneficial even for business to observe human rights. Stuart Rees & Shelley Wright, ‘Human Rights and Business Controversies’ in Stuart Rees & Shelley Wright (eds.), Human Rights and Corporate Responsibility – A Dialogue (Sydney: Pluto Press, 2000), 3, 5-8, 19-21 (hereinafter Rees & Wright (eds.), A Dialogue). See also generally Ernst-Ulrich Petersmann, “Time for a United Nations “Global Compact” for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration” (2002) 13 European Journal of International Law 621; Robert Wai, ‘Countering, Branding, Dealing: Using Economic and Social Rights in and Around the International Trade Regime’ (2003) 14 European Journal of International Law 35.

174 See, for example, the land use agreement reached between Hammersley Iron Pty Ltd. and the Gumala Aboriginal Corporation. Chris Burnup, ‘Sharing the Benefits: Lessons in regard to Mining and Native Title’ in Rees & Wright (eds.), A Dialogue, above n 173, 89-101. RugMark – a child-labour-free certification granted by an NGO to those companies which agree to employ adults only – provides another example. In the US, only licensed RugMark importers are legally permitted to sell carpets carrying the RugMark label. See <http://www.rugmark.org/index.php?cid=13> (last visited 12 January 2007).

175 The idea of human rights as ‘trumps’ could provide support to this hierarchy. Dworkin argues: ‘Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do ... ’ Ronald Dworkin, Taking Rights Seriously (London: Duckworth, 1977), xi. Garcia also observes that ‘the concept of a right functions to privilege certain claims against other competing claims, claims which in other contexts might overcome rights claims. It is in fact a distinctive feature of a right that it can be pressed this way. Human rights by their very nature and justification are not
rights and business are important for the development of individuals as well as society as a whole.\textsuperscript{173} Such balance could be stated in terms of human rights \textit{or} business. In many cases it should be possible to arrive at such a balance, satisfactory for both human rights and business constituencies.\textsuperscript{174} However, if the conflict between human rights and business interests persists at an irreconcilable level, the former should prevail over the latter. Recognition of such a hierarchy in the case of unavoidable conflict is essential because business could still survive if subordinated to human rights, though the reverse may not be true.\textsuperscript{175}

Second, any theory of corporate human rights responsibility in order to be viable should overcome three challenges: \textit{why} should corporations have human rights obligations; \textit{what} standards of human rights should they follow; and \textit{how} to enforce human rights obligations effectively. The integrated theory seeks to confront all three challenges together rather than focusing only on one or two of these.


\textsuperscript{174} See, for example, the land use agreement reached between Hammersley Iron Pty Ltd. and the Gumala Aboriginal Corporation. Chris Bumup, 'Sharing the Benefits: Lessons in regard to Mining and Native Title' in Rees & Wright (eds.), \textit{A Dialogue}, above n 173, 89-101. RugMark – a child-labour-free certification granted by an NGO to those companies which agree to employ adults only – provides another example. In the US, only licensed RugMark importers are legally permitted to sell carpets carrying the RugMark label. See <http://www.rugmark.org/index.php?cid=13> (last visited 12 January 2007).

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Third, the theory posits that as no single regulatory strategy, implementation technique, or sanction is adequate to deal with difficult regulatory targets such as MNCs, we need to invoke more than one strategy and sanction in an integrated fashion to remove the gaps in regulatory framework. Therefore, regulatory initiatives at institutional, national and international levels should employ, in an integrated fashion rather than progressively, two implementation strategies (incentives and sanctions) and three types of sanctions (civil, criminal, and social). It is contended that an approach which moves progressively towards more punitive regulatory techniques upon the failure of softer techniques adopted earlier may prove inadequate in making MNCs accountable for human rights violations. This integration rationale applies equally to the levels at which regulatory initiatives should be put in place and the types of sanctions to be invoked in case of non-compliance.

1.4.6 Responsibility and/or Accountability

Various terms such as corporate responsibility, corporate citizenship and corporate accountability have been used to denote that corporations do, or should, have social (including human rights) responsibilities. It is possible to draw a distinction between corporate responsibility and corporate accountability. Generally speaking, ‘responsibility’ implies duties – which are by and large voluntary in nature – rooted in morality and ethics, rather than in law. ‘Accountability’, on the other hand, tends to suggest mandatory obligations, flowing mostly from law, which are enforced by sanctions. One could also contrast the notions of corporate responsibility as well as

subject to compromise in the pursuit of good consequences ...’ Garcia, above n 86, 75 (emphasis added). See also Donnelly, Universal Human Rights, above n 5, 9-10.

Nolan writes:

Corporate accountability implies commitment, legal responsibility and mechanisms that allow for enforcement of human rights. It assumes reference to a process whereby a company considers, manages and can be held accountable for the long-term human rights impact of its decisions on its stakeholders. Corporate accountability contrasts with the softer terms more commonly associated with the corporate responsibility/citizenship movement, the latter signifying a voluntary uptake of ethical conduct by corporations that is not necessarily legally enforceable.

accountability with corporate 'citizenship' in that the latter may also imply rights and privileges of corporations.\textsuperscript{177}

Despite such differences between these terms, corporate responsibility and corporate accountability are used in this thesis interchangeably for two reasons. First, the distinction between the two is not as clear as it is canvassed. The responsibility and accountability approaches are not mutually exclusive because a given corporate human rights obligation could be underpinned by both morality and law. It is also possible that doing what is merely a moral duty today may take the character of a legal obligation in future. Second, neither of these two approaches are self-sufficient, and it is suggested that the voluntary approach of responsibility and the mandatory approach of accountability could complement each other.\textsuperscript{178} Since what is required is a combination of both, the distinction between responsibility and accountability is not consciously adhered to.

\section*{1.5 Methodology}

The present research examines two variables – the state of MNCs' impunity for human rights violations and an inadequate legal response to such impunity – which may arguably have a \textit{circular cause-effect} relation. The two variables are further dissected into the issues underlying them, in order to explore an effective legal response. For example, why do MNCs not respect, and why should they respect, human rights; which standards of human rights should they adopt; in what respects are the prevailing regulatory regimes deficient; and how could the deficiency or inadequacy of existing regulatory regimes be rectified. All these issues are analysed with the objective of developing an appropriate regulatory theory and framework that could make MNCs accountable for human rights abuses in a robust manner. During

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\textsuperscript{177} 'Citizenship' is defined as: 'The legal link between an individual and a particular state ... under which the individual receives certain rights, privileges, and protections in return for allegiance and duties.' David M Walker, \textit{The Oxford Companion to Law} (Oxford: Clarendon Press, 1980), 220. See Deva, 'Global Compact', above n 68, 112-13.
\textsuperscript{178} 'We believe that mandatory and voluntary approaches to this issue are not mutually exclusive since there is a need in society for both. Indeed, they may be seen as complementary since voluntary approaches are designed to raise the bar whereas the starting position for mandatory approaches is the legally enforceable minimum.' Business Leaders Initiative on Human Rights, Report 3: Towards a
the course of this thesis, I develop different components of the integrated theory of regulation which, I argue, could redress the current unsatisfactory situation.

This thesis employs several theories at different stages to underpin the integrated theory of regulation, or to support other arguments. The stakeholder theory – which basically challenges Milton Friedman's vision of one-dimensional corporations by asserting 'that corporate responsibility cannot be reduced to the interests of a single group of stakeholders' 179 – provides primary support to the integrated theory. 180 'The central claim of the stakeholder approach is that corporations are operated or ought to be operated for the benefit of all those who have a stake in the enterprise, including employees, customers, suppliers, and the local community.' 181 The stakeholder theory has received compelling criticisms from various corners. 182 One of the main charges that has been levelled against this theory is that it does not provide corporations with any yardstick or test to balance the interests of different stakeholders. In order to counter this line of criticism, I have modified the stakeholder theory by introducing a human rights element into it. 183 It is contended that human rights could provide a framework for achieving this balance, for stockholders and stakeholders might disagree but they do not dismiss the human rights discourse altogether.

179 Donaldson, The Ethics of International Business, above n 132, 45 (emphasis in original).
182 Friedman asks: 'If businessmen do have a social responsibility other than making maximum profit for stockholders, how are they to know what it is? Can self-selected private individuals decide what the social interests is? Can they decide how great a burden they are justified in placing on themselves or their stockholders to serve that social interest?' Friedman, Capitalism and Freedom, above n 85, 133-34. See also Janet Dine, Companies, International Trade and Human Rights (Cambridge: Cambridge University Press, 2005), 223-25; Donaldson, The Ethics of International Business, above n 132, 45-47; Boarright, 5th edn., 387-88; Sternberg, above n 91, 49-52.
In order to challenge the current trend of over-reliance on the ‘business case for human rights,’ I invoke the prisoner’s dilemma, which is a game theory construct. It is contended that the prisoner’s dilemma, among others, may discourage corporations to take on board human rights obligations. Unless corporations see ascertainable (rather than speculative) benefits in adopting pro-human rights policies, they are likely to face a business dilemma because costs are generally more certain and easily identifiable than the ‘potential’ and perhaps ‘long-term’ benefits.

This thesis also explores the possibility and usefulness of applying the theory of responsive regulation to develop an effective regulatory framework of corporate accountability for human rights abuses. ‘The basic idea of responsive regulation is that governments should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is needed.’ Ayres and Braithwaite develop an enforcement pyramid that allows regulators to employ a hierarchy of sanctions and regulatory strategies. I argue that an approach which moves progressively towards more punitive sanctions or regulatory techniques upon the failure of softer techniques adopted earlier may prove inadequate in making MNCs accountable for human rights violations. As an alternative, the integrated theory proposes that regulatory techniques should be integrated, that is, employed in

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183 Chapter 6.2.2.2.
185 The prisoner’s dilemma is a situation in which two (or more) persons have to take decision on a given issue. Each person has an option to ‘cooperate’ or ‘defect’, but each of them may decide to defect in order to maximise their own advantage, even if that harms the other party. For discussion of the original concept of the prisoner’s dilemma, see John Perry & Michael Bratman (eds.), Introduction to Philosophy: Classical and Contemporary Readings, 3rd edn. (New York: Oxford University Press, 1993), 792; Shaun P Hargreaves Heap & Yanis Varoufakis, Game Theory: A Critical Text, 2nd edn. (London: Routledge, 2004), 172-74.
186 See Chapter 5.3.
187 Ayres & Braithwaite, above n 107.
‘tandem, to complement one another’ rather than being invoked only when the techniques situated lower on the regulatory pyramid fail to deliver.

In order to enforce corporate human rights responsibilities, the integrated regulatory framework relies on informal, non-legal tools and non-state institutions, because regulatory objectives could be achieved and are often achieved even outside formal legal processes. This is in consonance with contemporary regulatory ideas that do not see and/or link ‘regulation’ exclusively to formal law, state and legal institutions. Since both the state and law suffer from inherent limitations in regulating the conduct of corporations and it is doubted if law alone could bring about the required change in the behaviour of corporations, informality is a key methodical aspect of the integrated theory of regulation canvassed here.

As noted before, Bhopal is the principal case study – though other case studies are referred to wherever considered necessary or feasible – employed not only to expose the inadequacy of existing regulatory initiatives but also to test the regulatory framework proposed here. Of many possible case studies, why is Bhopal chosen as a representative example? The justification for this is provided in the next chapter, but the main reasons may be summed up here. First, Bhopal is a good example of the typical problem analysed in the thesis: human rights violations experienced by poor, illiterate people of a developing country at the hands of an MNC (or its subsidiary). Second, in making UCC account for Bhopal, the victims encountered almost all major legal challenges that over the years have been noticed as impeding attempts to bring MNCs to justice for abridging human rights. Third, though Bhopal is now more than

189 Fiona Haines, Corporate Regulation: Beyond ‘Punish’ or ‘Persuade’ (Oxford: Clarendon Press, 1997), 221.
191 ‘The capacity of law to regulate corporations is limited by the opacity and complexity of corporate structures, the desire to avoid over-regulation, and the fact that corporate management has such a great capacity to control employee workplace behaviour.’ Parker, above n 101, viii. See also Peter Cleary Yeager, The Limits of Law: The Public Regulation of Private Pollution (Cambridge: Cambridge University Press, 1991), 29-47.
twenty-two years old, by and large the regulatory challenges posed by it have still not been overcome.

At this stage it may also be worthwhile to justify the value of invoking case studies as such in this kind of research. First, the use of case studies/histories for developing and evaluating arguments not only enables higher level of conceptual validity but also brings academic discussion closer to business reality. One could learn from case studies, for example, the dynamics of corporate decision-making that leads to human rights violations. Second, the case study method enables researchers to analyse ‘complex causal relationships.’ This is an important variable for the present purpose as we can learn how different stakeholders (from governments to MNCs, NGOs, victims, media, consumers, investors, and courts) interact and/or react before and after corporate human rights abuses take place. Third, case studies are also useful in assessing an ethical theory as well as criticism mounted against it. For example, Bhopal tells us why the thesis of Friedman and Sternberg that corporations should solely seek to maximise shareholders’ profit is unsound, or why it is important for MNCs not to apply inferior safety standards in developing countries simply because of lax legal standards.

There are well-known costs and potential pitfalls in using the case study methodology. For example, the researcher may have a selection bias in order to achieve a particular result. It may also be hazardous to draw strong general conclusions, or the chosen case(s) may be indicative of an exception rather than a

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197 Chapter 2.2.
201 Chris Megone, ‘The Use of Case Histories in Business Ethics’ in Megone & Robinson (eds.), above n 195, 161, 162-64.
202 Terry Hutchinson, *Researching and Writing in Law*, 1st edn. (Pyrmont, NSW: Lawbook Co., 2002), 100; George & Bennett, above n 194, 22-34.
203 George & Bennett, above n 194, 22-25.
rule.200 Bhopal, one may suggest, is unique— in that it has not been replicated since and even the chances of future repetitions are thin— and that for this reason, it is not an appropriate case study to analyse current state of human rights violations by MNCs. My response to such apprehensions is two-fold. First, in this thesis I have not limited myself to the case study method alone; rather a wide range of tools such as judicial decisions, academic writings, statutes, international instruments, and media accounts of social developments have been used to support the analysis. Second, although Bhopal is the principal case study invoked in this thesis, a reference has been made to other cases or case studies wherever considered necessary or appropriate to support general conclusions. Supplementing Bhopal with other case studies should also, indirectly, counter any suggestion of bias, for this implies that the arguments made with reference to Bhopal could be made vis-à-vis other case studies too.

Beyond the theoretical dimensions of this thesis outlined above, the present research is multi-disciplinary in nature. It relies on a wide range of literature from several disciplines such as international law, human rights law, constitutional law, environmental law, corporate law, criminal law, tort law, corporate citizenship, (business) ethics, philosophy, law and regulation, economics, and business management. The thesis likewise draws upon multiple sources such as international and regional human rights instruments, reports, books, articles in journals as well in newspapers and magazines, case studies, judicial decisions, commentaries, blogs, and media reports. It is not possible to deal with the plethora of existing regulatory initiatives— either at national or international level, from voluntary to non-voluntary and mandatory— dealing with corporate human rights responsibilities. Therefore, an analytical framework is developed in Chapter 3 to choose and assess the inadequacy of the following six representative (as well as prominent) regulatory initiatives: ATCA, corporate codes of conduct, OECD Guidelines, ILO Declaration, Global Compact, and UN Norms. In addition, wherever considered necessary a reference is made to other regulatory initiatives already in place, evolving, or even failed attempts, e.g., attempts made in the US, Australia and the UK to regulate the conduct of MNCs

200 Bennett & Ellman, above n 196, 260.
by enacting a law having extraterritorial operation. The thesis also takes cognizance of amendments introduced in the corporate law of some jurisdictions to impose specific corporate social responsibilities on directors (e.g., the UK), or to provide for making product disclosure statements (e.g., Australia).

1.6 SCOPE AND LIMITATION

The interaction of human rights and business, even if limited to business of and by MNCs, is manifold, and there are many questions that might be broached under this rubric. In fact, the issues arising out of corporate human rights abuses are too diverse and complex to be effectively treated in one thesis. This thesis does not pretend or claim to do the seemingly impossible task of dealing exhaustively with all issues relevant to this much-debated topic. Against the backdrop of changing dynamics of human rights and the continued impunity of MNCs for human rights violations, the present study sets out to make and defend two limited claims. First, that because of a three-fold deficit, existing regulatory initiatives are inadequate to make MNCs accountable for human rights abuses. Second, that an integrated theory of regulation can redress the many loopholes present in existing regulatory regimes that seek to ensure that MNCs respect and promote human rights. Of various well-documented case studies of MNCs indulging in human rights violations, the present research relies on Bhopal, for the reasons stated above, to illustrate, explain and test the arguments made herein. Other case studies are, however, used wherever considered necessary to support the findings.

I have consciously limited my analysis to, what could be regarded, three foremost challenges to any theory of corporate human rights responsibilities: ‘why,’ ‘what,’ and ‘how’. Nevertheless, I have not dealt with every single important aspect related to these three types of challenges. For example, I could focus only on one of many justifications that could be advanced to support the imposition of human rights obligations on corporations. Similarly, instead of ascertaining the precise obligations of MNCs with reference to the International Bill of Rights, I attended to another

201 Above n 37.
related challenge, that is, what standards of human rights MNCs should apply while operating in countries that differ from each other drastically. In terms of how to make MNCs accountable for human rights abuses also, it was not feasible to examine all the avenues. For example, the extent to which the doctrine of state responsibility, or international trade regulatory institutions such as the WTO could be utilised was not discussed. Nor could I consider in detail the legal principles appropriate to attribute criminal liability to MNCs, or why it is necessary to treat MNCs as limited subjects of international law so as to impose as well as enforce human rights obligations directly.

There are two other important issues that are critical to the efficacy of any regulatory framework, but have not been dealt with in detail. First, should a parent MNC be liable, if at all, for human rights violations by its subsidiaries? Second, how could MNCs be restrained from invoking forum non conveniens as a shield to avoid or delay liability for human rights violations? This thesis highlights the current unsatisfactory legal position regarding these issues, emphasises the need for breaking ground on these issues, and briefly mentions the direction that future reform proposals may take. These two issues, however, require far more rigorous analysis and detailed exploration, which was not possible within the boundaries of the present research.

Before I move on to Chapter two, one more point by way of caveat. Any proposal for a theory of corporate human rights responsibilities should not be taken as diminishing or derogating the human rights obligations of states. Corporate responsibilities only

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supplement, and do not supplant, states’ responsibility to respect, protect, fulfil and promote human rights. 206

CHAPTER 2: UNDERSTANDING ‘BHOPAL’ AFRESH

2.1 INTRODUCTION

Since Bhopal is a common thread that runs through the whole thesis, it is vital to give readers an understanding not only of the background and circumstances under which UCC established its chemical plant at Bhopal but also of the litigation that unfolded after the gas leakage. Furthermore, as no consensual or uniform narrative of Bhopal is readily available or even possible, it is desirable to outline at the outset how I prefer to read Bhopal. This chapter tries to achieve these objectives. The chapter begins with advancing justifications for choosing Bhopal as a case study. It is argued that although twenty-two years have passed since the gas leakage, the relevance of Bhopal in illustrating corporate impunity for human rights violations has not diminished. The chapter then moves on to capture central features of the Bhopal story, from UCC’s entry into India to the five phases of litigation directed at securing justice for the victims.

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2 ‘Justice’ for the Bhopal victims is interpreted broadly so as to include not only adequate compensation but also rehabilitation assistance, medical care, employment, clean up of the plant site and criminal liability of UCC-UCIL and their officials. See Ward Morehouse & M Arun Subramaniam, The
The freshness to this narrative is provided by its focus on the human rights implications of Bhopal. Moving from specificity to generality, one could see from this analysis how the entry and operations of MNCs could adversely affect the realisation of human rights, especially in developing countries.

2.2 Why ‘BHOPAL’?

The use of case studies (or histories) to teach business ethics or to explore complex issues related to corporate human rights responsibilities is a well-established tool. Case studies such as of Nestlé, Nike, Unocal, Shell, Texaco, Dow Corning, Tobacco litigation, Yahoo!, Enron, Chevron, Holocaust companies, Thor Chemicals, Exxon Mobil, BHP and James Hardie are potential candidates to narrate the story of corporate impunity for human rights violations. It is, therefore, natural to ask whether the choice of Bhopal as a case study is an appropriate one. Is Bhopal a representative case study to understand the dynamics of modern corporate human rights abuses?


Megone and Robinson draw a distinction between case studies ‘which may be wholly or partly imaginary stories’ and case histories which are ‘accounts of real cases.’ Chris Megone & Simon J Robinson, ‘Introduction’ in Chris Megone & Simon J Robinson (eds.), Case Histories in Business Ethics (London: Routledge, 2002), 1.


It is crucial that the case studies chosen for attention are representative.’ Terry Hutchinson, Researching and Writing in Law, 1st edn. (Pyrmont, NSW: Lawbook Co., 2002), 99.
my view, Bhopal is an ideal sample case study because of at least three reasons elaborated below.

2.2.1 Example of a Typical Scenario

Although no country is completely immune from instances of corporate human rights abuses, there is a noticeable bias: a great majority of human rights violations by MNCs take place in developing or under-developed countries.\(^7\) A survey of 65 instances of corporate human rights abuses in 27 countries by Professor John Ruggie, UN Secretary General's Special Representative on Human Rights and Transnational Corporations,\(^8\) confirms this pattern.\(^9\) Similarly, it is not surprising to know that a great majority of MNCs involved in such violations are from developed countries,\(^10\) probably because most of the MNCs are based there.\(^11\) There are two more components of this typical scenario: the reluctance of host states to actively pursue MNCs involved in human rights abuses,\(^12\) and a large pool of generally poor and/or illiterate victims.\(^13\)

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\(^8\) The Commission on Human Rights had requested the UN Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises. E/CN.4/2005/69 (20 April 2005). In pursuance of this resolution, in July 2005 Kofi Annan appointed Professor John Ruggie as the Special Representative for two years. Press Release, 'Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises', UN Doc. SG/A/934 (29 July 2005).

\(^9\) The instances occurred in 'mainly low-income countries' or in countries 'on the low side of the middle-income category.' Interim Report, above n 7, para 27.

\(^10\) Professor Weissbrodt, for example, notes: 'The UN Panel of Experts on the Illegal exploitation of National Resources and Other Forms of Wealth of the Democratic republic of Congo identified more than eighty companies from [thirty] developed nations that exploited Congolese natural resources during the war.' David Weissbrodt, ‘Business and Human Rights’ (2005) 74 University of Cincinnati Law Review 55, 57 (emphasis added). Although this scenario is likely to change as MNCs from China and India are starting to appear on the world stage, it is still less likely that MNCs from developing countries will violate human rights while operating in developed countries.

\(^11\) For example, about 90 per cent of the top 100 MNCs, which are prime source of foreign investment, are from the European Union, Japan and the US. UNCTAD, World Investment Report 1999: Foreign Direct Investment and the Challenge of Development (New York: UN, 1999) Overview, 2.

\(^12\) This reluctance is attributable primarily to two reasons: the incapacity (e.g., weak legal system, corruption) or unwillingness (e.g., dependence on foreign investment flowing from MNCs) of states. Woodroffe points out that 'some governments will fail to enforce basic standards on foreign investors —
As explained in the next section, Bhopal exemplifies this typical scenario well. The gas leak from the Bhopal chemical plant affected the enjoyment of a range of human rights such as the right to life, the right to health, the right to information, and the right to a clean environment.

2.2.2 Encounter with Major Legal Challenges

In making UCC account for Bhopal, the victims encountered almost all the major legal challenges that over the years have impeded bringing MNCs to justice for infringing human rights. Consider, in particular, the following:

- lack of specific human rights obligations for corporations;
- inadequate or fragile regulatory frameworks;
- unwillingness or incapacity of states to vigorously pursue MNCs;
- economic leverage that MNCs enjoy to influence regulatory initiatives;
- (non)liability of a parent corporation for human rights abuses by its subsidiaries;
- corporate misuse of the doctrine of forum non conveniens;
- use of litigation delay as a defence by MNCs;
- large number of victims, many of whom could be poor and/or illiterate;
- absence of, or difficulties in imposing, effective sanctions against MNCs; and
- inherent hurdles in criminal prosecution of MNCs and/or their executives.

Arguably, any research in the area of human rights violations by MNCs should be able to respond to these legal challenges. Bhopal, as shown in the next section, is a

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either because they are unwilling to deter investors, or because they are unable to stand up to the legal might of corporations; or because governments just don't want to.' Woodroffe, above n 7, 132-33.

13 'The most affected colonies are among the poorest in Bhopal.' Fortun, above n 1, 161. She also notes that most victims could not read the papers that they carry to claim courts, and hospitals. Id., 167.

14 This could be one of the reasons why MNCs are considered difficult regulatory targets. For details, see discussion under Chapter 3.3.

long, sad and unfinished epic that epitomises almost all of these challenges. Therefore, on this count too, Bhopal proves to be an ideal ‘one-stop’ case study to investigate how MNCs could be made to respect, protect and promote human rights.\(^{16}\)

### 2.2.3 Major Hurdles Remain Unresolved

Finally, even after twenty-two years since the gas leak in December 1984, the major hurdles that victims faced then in making an MNC accountable for ignoring its human rights obligations have still not been overcome. Therefore, it is necessary that ‘further examination of the issues related to this accident be carried on, at least until the ways and means of thinking through the Bhopal quandary have been exhausted.’\(^{17}\) Over the years although some progress has been made, no effective legal regulatory framework has yet been put in place.\(^{18}\) It is difficult to conceive how the legal process would be able to respond more effectively and swiftly if Bhopal was to occur today. For example, even after almost one decade of litigation pursued in a developed legal system (the US), no legal liability could be imposed on anyone for grave human rights violations in a more recent case concerning Unocal’s operations in Myanmar. The victims had to merely feel contented with an ‘opaque’ settlement.\(^{19}\)

In summary, selection of Bhopal as a case study is intended to serve two purposes: it is employed not only to understand the dynamics of how MNCs violate human rights in developing countries, but also to demonstrate the inadequacy of current regulatory responses and in that process get useful insights for future regulatory reforms.

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\(^{16}\) George and Bennett point out that ‘the investigator should clearly identify the universe – that is, the “class” or “subclass” of events – of which a single case or a group of cases to be studied are instances.’ Alexander L. George & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, Massachusetts: MIT Press, 2005), 69.


\(^{19}\) See Rachel Chambers, 'The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses' (2005) 13:1 *Human Rights Brief* 14; Benjamin C Fishman,
2.3 UNDERSTANDING ‘BHOPAL’ AFRESH

In this section an attempt will be made to capture the central features of the Bhopal gas leakage in the following four stages: 

- the context of UCC’s entry and operations in India;
- the factual matrix surrounding the gas leakage;
- the human rights implications of Bhopal; and
- the victims’ quest for justice and the five phases of litigation.

What value will this analysis add to the existing rich literature on Bhopal? Whereas the existing literature has treated Bhopal typically as an example of mass tort or an environmental tragedy and not as a human rights issue, the present analysis is refreshing in that it focuses on the human rights implications of Bhopal – from UCC’s entry into India to the long litigation that unfolded after the gas leak. Additional originality is provided by my claim that the roots of corporate human rights abuses could be traced to the circumstances and conditions under which MNCs enter and continue to operate in emerging markets. This claim is elaborated with the help of Bhopal.

However, before we proceed further, a brief note on the terminology used is offered. There is no consensus on how to label the Bhopal gas leakage. ‘Many different words have been used to describe what happened in Bhopal on the night of December 2, 1984: accident, disaster, catastrophe, crisis; but also sabotage, conspiracy, massacre, even experiment.’ Shrivastava also highlights this difficulty in portraying what

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20 Baxi divides Bhopal in three periods: ‘the pre-catastrophe period; the catastrophe period (the minor 1982 gas leak and its managerial aftermath; the “management” of the immediate events on 2/3 December 1984); and the period of juridicalization of the catastrophe (from 1985 to the 1998 “settlement” and its aftermath).’ Baxi, ‘The Just War’, above n 1, 184.
21 See below n 127.
22 ‘[T]he Bhopal gas tragedy in 1984 in India was never treated as a human-rights issue by the UN or the human-rights NGOs though thousands of innocent civilians lost their lives and thousands more were affected by the gas leak from the Union Carbide plant. Indeed, even now, as the case winds its way through American courts again, the human-rights community is hardly engaged on ensuring delivery of justice to victims.’ Balakrishnan Rajagopal, International Law from Below: Development, Social Movements and Third World Resistance (Cambridge: Cambridge University Press, 2003), 196.
occurred in Bhopal on that fateful night. He writes: 'In its technical reports, Union Carbide referred to what happened as an “incident”. The government of India, in its reports, called it an “accident”. The injured victims called it a “disaster”. And the social activists called it a “tragedy”, a “massacre”, and even “industrial genocide”.' The website of the organisation Students for Bhopal considers it as the ‘worst crime against humanity’.

It is thus clear that labels of Bhopal are loaded with what a particular stakeholder would like that label to convey. In order to avoid any such bias, I prefer to simply refer it as Bhopal. Arguably, ‘Bhopal’ has acquired a secondary meaning and therefore, it no longer requires any other adjective to describe what it symbolises, that is, ‘the corporate irresponsibility of MNCs for their violations of human rights and the timid response of a government to such irresponsibility.’

2.3.1 Context of UCC’s Entry and Operations in India

Understanding the circumstances and conditions under which MNCs enter and operate in the markets of developing countries is as important as an investigation of their actual conduct or operations. In fact, negotiations between MNCs and host developing countries, especially before entry, are fundamental to whether MNCs operate as responsible good corporate citizens or not. At a superficial level, negotiations determine the conditions under which foreign investment and/or transfer
of technology will take place. But at a deeper level, such negotiations could also prepare the groundwork for MNCs to violate human rights in developing countries by adopting inferior human standards or otherwise. In other words, the roots of corporate human rights abuses could be traced to the circumstances and conditions under which MNCs enter and continue to operate in markets, because human rights promotion is rarely the main driving force behind their entry or activities.

During negotiations, the relative bargaining position of negotiating parties is a key variable. The core issues related to foreign investment – which country gets how much foreign investment from where and on what terms – are the subject matter of bargaining and negotiations between potential investors and countries seeking foreign investment. At the pre-entry stage, rules of operation regarding several aspects such as technology transfer, tax treatment/concessions, competition policy, property expropriation, employment of foreign personnel, and compliance with national safety, labour and environmental laws are negotiated, often in the context of a foreign investment agreement. MNCs, because of their stronger bargaining position vis-à-vis developing countries, are often able to set favourable terms for their post-entry operations. This hypothesis is also affirmed by the circumstances and conditions

27 In the context of negotiations between UCC and the Indian government, Cassels argues that 'the different needs and interests of the two major parties to the negotiations were to create a dynamic within which considerations of health and safety were all but excluded.' Cassels, The Uncertain Promise, above n 23, 35. See also Jamie Cassels, 'Outlaws: Multinational Corporations and Catastrophic Law' (2000-2001) 31 Cumberland Law Review 311, 319 (hereinafter Cassels, 'Outlaws').

28 'The relationship between the host state and a [multinational enterprise] will be the outcome of a bargaining process between them.' Peter T Muchlinski, Multinational Enterprises and the Law, revised edn. (Oxford: Blackwell Publishers, 1999), 104.

29 Deva, 'The Sangam', above n 4, 320.


31 See Paul Redmond, 'Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance' (2003) 37 International Lawyer 69, 72-73. The views taken by the proponents of bargaining theory that developing countries could, in fact, have stronger position, or that the bargaining power of host states have increased on account of the emergence of many MNCs operating within the same industry, are not very sound. Deva, 'The Sangam', above n 4, 321-22. Muchlinski cautions that in view of several theories it may be difficult to generalise. Muchlinski, above n 28, 104-07.

under which UCC entered, and expanded into, the Indian market. UCC - 'with one hundred and thirty subsidiaries in some forty countries, approximately five hundred production sites, and one hundred and twenty thousand employees' - was clearly the more influential party in its negotiations with the Indian government. It will be clear from the analysis below that apart from gaining access to the huge Indian market for pesticides, UCC basically got what an MNC could ask for in a developing country during that period.

There were a number of ways in which UCC exerted influence in its negotiations with the Indian Government. The first example of UCC's influence relates to the very circumstances in which it came to establish the chemical plant at Bhopal. Since foreign investment and modern technology are vital tools for economic development, developing countries compete with each other to create the most attractive environment for the entry of MNCs - which are the prime sources of investment and technology. This often results in a 'race to the bottom' regarding human rights as well as environmental and labour standards. In such a scenario, developing countries

33 The relationship between Union Carbide and the Government of India is a textbook-perfect illustration of the evolving nature of the relationship between [MNCs] and their host countries in the developing world. The terms and conditions of this relationship are fundamentally determined by the interests and abilities of the parties, which include the relative poverty and development needs of the host state, balanced against the power and economic imperatives of multinational business organisations. Cassels, The Uncertain Promise, above n 23, 33 (emphasis added).
36 Barnet and Muller observe that 'the three essential structures of power in underdeveloped societies are typically in the hands of global corporations: the control of technology, the control of finance capital, and the control of marketing and dissemination of ideas.' Richard J Barnet & Ronald E Muller, Global Reach: The Power of the Multinational Corporations (New York: Simon & Schuster, 1974), 146. An advertisement given by UCC in National Geographic Magazine in April 1962, inter alia, mentioned: 'But India needs the technological knowledge of the Western world. That is why Union Carbide, working with Indian engineers and technicians, has made its scientific resources available to help construct a large plant to produce chemical products and plastic goods near Bombay.' Lapierre & Moro, above n 34, 61.
are often left with no choice but to either lower their human rights standards or not enforce them. As a ‘race to the bottom’ is in the interest of MNCs, it will not be unreasonable to assume that MNCs might play this card during negotiations for investment deals: emphasising the range of investment options open to them and the readiness of other governments to lower regulatory standards. But even when there is no such ‘race to the bottom,’ MNCs such as UCC are able to exert a lot of influence on the decision-making process including because of their economic power.

Although UCC through its subsidiary (UCIL) – which could trace its roots to at least 1934 – had been operating in India since 1920s, it was in the early 1960s that the company expanded its business in the real sense. This was the time when India was fighting hard to overcome a food shortage, including by relying on high-yielding


40 There is no direct evidence to suggest if a ‘race to the bottom’ played out during UCC’s entry to the Indian market, for it is not known whether other developing countries were also eyeing for UCC’s technology and investment.


42 The corporate ancestor of UCIL, Eveready Company, was incorporated in 1934. Since 1934, the name did change in view of mergers, acquisitions or consolidations. After the sale of UCC’s shares in UCIL in 1994, the new company is known as Eveready Industries India Ltd. See Fortun, above n 1, 87-91; Commerce Research Bureau, ‘Union Carbide – A Profile’ as reproduced in Surendra (ed.), above n 35, 77.


44 UCC, for example, gave its famous ‘Science helps build a new India’ advertisements in the National Geographic Magazine in April 1962. See Lapierre & Moro, above n 34, 61; Fortun, above n 1, 97.
seeds under the ‘green revolution.’ But these high-yielding varieties of food grains were also highly ‘vulnerable to disease and insects’ – something which the locally manufactured pesticides could not adequately handle. This forced Indian leaders, in 1966, to turn to one of the ‘foreign manufacturers’ of effective pesticides, which resulted in UCC agreeing initially to supply and later on to manufacture locally the Sevin pesticide. By exploiting the development needs of India, UCC influenced several decisions related to the establishment of its chemical plant in Bhopal. For example, although the Industrial Development and Regulation Act 1951 had reserved the pesticide formulation activity (i.e., the process of mixing concentrate with sand) for small firms of Indian nationality, UCC was able to convince the Indian government to waive this requirement. The government arguably sanctioned the project under pressure to industrialise, even though the appropriate industrial infrastructure and support systems were missing. In sum, as William argues, the genesis of the Bhopal gas leakage lies in the ‘political economy of development in the Third World.’

The second instance of UCC’s influence in decision making is evident in how it overcame the limitation on foreign investment imposed by Indian law at that time to

45 Lapierre & Moro, above n 34, 62; Kurzman, above n 34, 21. Apart from using the high-yielding seeds, the ‘green revolution’ entailed the expansion of farming areas, double-cropping and the use of fertilizers and pesticides.

46 Lapierre & Moro, above n 34, 62. ‘As part of the “green revolution”, hybrid seeds were developed which produce higher yields ... but the hybrids are much more susceptible to pests. ... these “miracle seeds” do not have the pest resistance characteristic of traditional seeds ....’ David Weir & Mark Schapiro, Circle of Poison: Pesticides and People in a Hungry World, (Oakland: Institute for Food and Development Policy, 1981), 36.

47 Corporate executives reasoned out the export of pesticides, some of which were banned in developed countries, to developing countries by saying that ‘the hungry world needs our pesticides in its fight against famine.’ Weir & Schapiro, above n 46, 6. An executive of Velsicol Chemical Co. justified the sale of Phosvel, a banned substance in the US, in other countries because he saw ‘nothing wrong with helping the hungry world eat’. Id., 32.

48 Lapierre & Moro, above n 34, 63-64. Cassels argues that ‘the Bhopal facility was part of India’s “green revolution.”’ Cassels, The Uncertain Promise, above n 23, 39. Sheoin concurs: ‘The factory in Bhopal was a direct result of the implementation in India of the Green Revolution ....’ Tomas Mac Sheoin, Report on the Union Carbide Corporation (A Report for the Fact Finding Mission on Bhopal), 4, <http://www.bhopalffm.org/pdf%20files/BHOPAL%20FFM%20R1%20UNION%20CARBIDE%20.pdf>. See also Sneeyenbos et al, above n 43, 509-10.

49 ‘The company hoped to cash in on India’s drive to modernise and become self-sufficient in food production.’ Cassels, ‘Outlaws’, above n 27, 316.

50 Lapierre & Moro, above n 34, 54-65, 72, 77; Fortun, above n 1, 115.

51 Bogard, above n 23, xi. ‘The blind belief in technology and the unholy haste on the part of decision makers in developing countries to “modernise” their countries leads to the importation of quite often useless and obsolete technology.’ Surendra (ed.), above n 35, 12.
maintain control over UCIL. Apart from the general policy of the Indian government to push for indigenous ownership, the Foreign Exchange Regulation Act of 1973 specifically limited foreign investment in Indian companies to 40 per cent. To comply with this new restriction, UCC reduced its holding in UCIL from 60 per cent to 50.90 per cent, but no further. It rather successfully persuaded the Indian government to grant an exemption from the 40 per cent rule in view of 'significant export volume and the technological sophistication of its operations.' This exception from foreign control again 'attests to the power' of UCC vis-à-vis the Indian government. UCC was holding 50.90 per cent shares of UCIL and, as Jones tells us, 'UCIL was one of the few firms in India in which the parent company was allowed to maintain a majority interest.' It is apparent that for UCC, control over UCIL was critical. This control enabled UCC to take all critical decisions for UCIL, including those which led to the gas leakage. But at the same time it maintained a safe 'distance by design' from UCIL as part of its 'arms length'
corporate policy 64 and relied on the separate entity status of UCIL when it came to the question of legal liability for Bhopal. 65

Third, closely related with the control exercised by parent MNCs like UCC over their subsidiaries are three other factors: centralised policy making and its effect on communications within the group, the role as well as the relative importance of different corporations within a corporate group, 66 and a conflict of interest between the parent MNC and the host government. These interrelated factors played out and in some way contributed to Bhopal. Consistent with how many MNCs are organised and structured, 67 UCC practised centralised policy making and controlled the functioning of its subsidiary UCIL. 68 The control that UCC exercised over the UCIL-run Bhopal plant was not limited to share ownership or representation on the Board of directors, 69 but extended to the taking of key decisions regarding issues such as technology, plant design, safety, storage and handling of MIC, training of employees, and the financial viability of the plant. 70 This excessive centralisation not only resulted in a rift between

64 Judge Keenan in his judgment noted that the design Transfer Agreement and the Technical Service Agreement between UCC and UCIL 'were negotiated at "arms-length" pursuant to Union Carbide corporate policy.' In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984, 634 F. Supp. 842, 856 (1986).

65 See Jones, above n 57, 33-37. Warren Anderson was categorical in explaining this distance: 'Non-compliance with safety procedures is a local issue ... It's their company, their plant, their people ... Safety is the responsibility of the people who operate our plants. You cannot run a $10 billion corporation all out of Danbury.' Id., 36-37. See also Kurzman, above n 34, 181-85.


67 UCC's Corporate Policy Manual, for example, clearly provided that '[e]xcept for certain special situations, it is the general policy of the Corporation to secure and maintain effective management control of an affiliate.' As quoted in Amnesty International, Clouds of Injustice: Bhopal Disaster 20 Years On (2004), 46 (hereinafter Amnesty, Clouds of Injustice). The control exercised by UCC over UCIL was also consistent with the observation of Professor Muchlinski that 'there is some evidence to suggest that US firms tend to be more centralised than non-US firms.' Muchlinski, above n 28, 60-61.

68 UCC held 50.90 per cent shares of UCIL and controlled the appointment of five out of eleven directors. Kurzman, above n 34, 182. In view of UCIL's Articles of Incorporation, 'no business could be conducted by UCIL without Union Carbide's 50.9% ownership interest.' 'Reply of Union of India' in Baxi & Dhanda (eds.), Valiant Victims, above n 55, 109, 131.

69 in fact, in the complaint filed in the New York District Court, the Indian government specifically alleged that MNCs 'by virtue of their global purpose, structure, organisation, technology, finance and resources have it within their power to make decisions and take actions that can result in industrial disasters of catastrophic proportion and magnitude.' 'Complaint filed by the Union of India in the US
the formulation of global policies and their local implementation, but also contributed to a communication and management gap between UCC and UCIL. Cassels gives a concrete example of how this rift played its part in the occurrence of Bhopal: ‘Safety information was not properly communicated from the head office, and what information was communicated was ignored.’

There was also a mismatch between what the parent corporation (UCC) would have liked its subsidiary (UCIL) to achieve and the expectations of the host state (India) from that particular subsidiary. Given that the ‘Bhopal plant was an unprofitable unit in an unimportant division of the corporation,’ UCC was no longer interested in the proper management or successful running of the plant. In fact, at the time of gas leakage, UCC was rather keen to dismantle and sell the plant. The Indian government, on the other hand, would have preferred the Bhopal plant to continue operating safely, including because it manufactured pesticides locally and provided much needed jobs. In this disjunction of priorities of UCC and the Indian government regarding the Bhopal plant, the issue of safety took a back seat and thus contributed to Bhopal: at the critical point of time, safety was not the priority of UCC, whereas the Indian government was seemingly not serious about safety, or considered safety the sole business of UCC.
Fourth, it is important to consider why UCC chose Bhopal as the site for its chemical plant. Bhopal was perhaps chosen because of its central location, having enough electricity and water supply, having excellent rail connections to all parts of India and the availability of cheap labour (workers having migrated from rural parts of India). On top of these factors, the state government was encouraging companies to set up new industries in the state. Although all these factors were positive points for establishing the plant in Bhopal, the physical-cum-regulatory infrastructure in Bhopal was neither suitable to handle such a sophisticated technology, nor adequately prepared to cope with any major accident. So, Bhopal perfectly affirms the thesis of Shrivastava that ‘industrial crises are most likely to occur in areas that are industrialising rapidly, but lack strong supporting infrastructure.’

Fifth, even within Bhopal, the location of the chemical plant was inappropriate and somewhat suspicious. UCC was permitted ‘to establish a potentially hazardous pesticide plant at [a site]… barely eight hundred yards … from the railway station.’ While allotting the land, the state government did not adequately consider ‘the population pressure and the growing needs of the town,’ or the human rights operating partner has the knowledge, skill, commitment and resources necessary for safe operation. If not, it should not go ahead with the venture. It cannot shrug off responsibility by saying that it is no longer in full control.’ Trevor Kletz, Learning from Accidents, 2nd edn. (Oxford: Butterworth-Heinemann. 1994), 101

Fortun, above n 1, 159.

The rail connectivity was critical to transport pesticides and chemicals across all parts of India with ease.

Lapierre & Moro, above n 34, 65; Cassels, The Uncertain Promise, above n 23, 15.

The absorption of technology is generally regarded ‘problematic’ in (least) developing countries. Muchlinski, above n 28, 429.

Shrivastava, above n 24, 4, 57-61. Cassels also concludes that ‘the local infrastructure in Bhopal was simply unsuitable for such a hazardous operation.’ Cassels, The Uncertain Promise, above n 23, 14. In an article written in 1989, Trotter et al reach a similar conclusion: ‘In essence, the operating environment in India, for various reasons, was woefully inadequate in terms of safety, land use, and environmental controls to prevent the disaster four years ago.’ Trotter et al, above n 57, 443.

Shrivastava, above n 24, 20.

Shastri, above n 41, 12.

Id. Lack of proper town planning regulations also played their part. Kletz observes: ‘If materials which are not there cannot leak, people who are not there cannot be killed. The death toll at Bhopal
implications of the project. Nor did it consider the consequences of an escape of harmful gases to people living in adjoining places or who might be using the Bhopal railway station especially when it was a busy station. Moreover, the objection of the Bhopal municipal authorities to the site of the plant — in that it was meant only for commercial or light industrial use — was overruled by the central and state governments. The state government also quelled any attempts to relocate the plant. It is, therefore, logical to conclude that the central and state governments — in permitting UCC-UCIL to operate in violation of relevant rules and regulations — were either swayed by the development rhetoric or must have acted for reasons other than merit and objectivity. In either case, this again verifies that MNCs like UCC can exert so much influence on the governments of developing countries that they may not be able to decide and act for the benefit of their own people.

In view of the above analysis, Bhopal was predictable, and to some extent this predictability was rooted in the context in which UCC-UCIL was allowed to enter and continue to do business in India. Bhopal only surfaced in the year 1984 — a year in which Freeman presented his stakeholder model — but its roots go back to at least 1960s.

would have been much smaller if a shanty town had not been allowed to grow up near the plant. Kletz, above n 78, 97. See also Trotter et al, above n 57, 443.

89 ‘Human rights considerations scarcely impinge on location decisions; “safety” considerations so matter but not decisively, at least when a multinational corporation operates in a populous developing country setting.’ Baxi, ‘Just War’, above n 1, 186.

90 More than 2/3 of the victims were least prepared — because of their socio-economic condition — to handle the after effects of gas leakage: ‘Because of the location of the plant and the direction of the wind on the night of 2/3 December 1984, the gas leakage disproportionately affected the poorest in the city.’ Amnesty, Clouds of Injustice, above n 68, 19.

91 Shrivastava, above n 24, 41-42. See also Kurzman, above n 34, 22-23.

92 Cassels, The Uncertain Promise, above n 23, 15-16. While responding to the demands for relocation, the state labour minister reportedly said: ‘There has been an investment of rupees 25 crores [about $15.5 million (US)]. It is not a small stone that can be removed just like that.’ Id., 16; Kurzman, above n 34, 35.

93 Shastri, above n 41, 77-78.

94 Fortun presents a useful prologue of what happened in 1984. Fortun, above n 1, xiii-xxi.


96 Fortun takes the ‘other possible origins of the disaster’ to as early as to 1600 when East India Company was chartered in London. See Fortun, above n 1, 353.
2.3.2 Factual Matrix Surrounding the Gas Leakage

On the night of 2 and 3 December 1984, there was a massive leakage of toxic gases\(^{97}\) from Methyl Isocyanate (MIC)\(^{98}\) storage tank number 610 of the Bhopal chemical plant.\(^9\) According to UCC 'approximately 54,000 pounds (24,500kg) of unreacted MIC left Tank 610 together with approximately 26,000 pounds (11,800kg) of reaction product.'\(^{100}\) This 1985 report carefully chooses the terms 'unreacted' and 'reaction product.' Whereas the term 'unreacted' gives the impression of leaked MIC being an innocuous gas, the term 'reaction product' suggests that UCC was unable or incapable to determine the exact contents and composition of leaked substances. Undoubtedly, UCC was in the best position to find out and release this information (so as to facilitate, among others, the treatment of victims),\(^{101}\) but to date it has failed to do so reflecting the extent to which UCC has 'always maintained a high amount of secrecy about its manufacturing process.'\(^{102}\) The intellectual property regime under which MNCs operate also makes it extremely difficult for the home government or third parties to assess the risks involved in a given potentially hazardous activity.\(^{103}\)

The immediate cause\(^{104}\) for reaction and consequent leakage of gases was the introduction of water into the MIC storage tank.\(^{105}\) However, there is no consensus on

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\(^{97}\) On the basis of his scientific research, Sriramachari argues that 'the Bhopal disaster cannot be attributed to exposure to a single chemical like MIC.' S Sriramachari, 'The Bhopal Gas Tragedy: An Environmental Disaster' (2004) 86:7 Current Science 905, 918.

\(^{98}\) MIC has an interesting, contradictory character. Whereas in a closed environment a few drops of water could react violently with MIC, in open environment water provides the best anti-dote, for MIC is completely soluble in water. Lapierre & Moro, above n 34, 279.

\(^{99}\) Cassels, The Uncertain Promise, above n 23, 3.

\(^{100}\) UCC, Bhopal Methyl Isocyanate Incident Investigation Team Report (Danbury, March 1985) (hereinafter UCC, MIC Report), 24, as quoted in Amnesty, Clouds of Injustice, above n 68, 10 (emphasis added).

\(^{101}\) Shastri, above n 41, 26. Kurzman asks: 'What was the poison that killed them? If that were known, an antidote might still save the thousands who were barely hanging to the life.' Kurzman, above n 34, 99, and 99-102 generally (emphasis in original). Baxi agrees: 'Given the UCC's global monopoly of technoscientific information concerning the toxicity of MIC, these evasive moves successfully impeded appropriate therapeutic regimes that could have minimised the overall harm and mayhem.' Baxi, 'Just War', above n 1, 180.

\(^{102}\) Shastri, above n 41, 61.

\(^{103}\) This was true of the Bhopal case as well. The Indian government as well as its regulatory agencies relied primarily on information supplied by UCC-UCIL. 'Reply of Union of India' in Baxi & Dhand (eds.), Valiant Victims, above n 55, 132-33.

\(^{104}\) Cassels argues that the 'introduction of water into tank number 610 ... may have triggered the event, but it did not cause the disaster that ultimately took place in Bhopal.' Cassels, The Uncertain Promise, above n 23, 11 (emphasis in original). See also Kletz who points out hazards of invoking a causative model for analysing accidents. Kletz, above n 78, xv-xvii
how water entered the tank.\textsuperscript{106} Whereas UCC tried to explain this through a sabotage theory,\textsuperscript{107} the Indian government suggested that water might have entered the tank during routine washing of pipes on that night.\textsuperscript{108} Although there are ‘gaps and anomalies’ in the two conflicting explanations of how water might have entered tank number 610,\textsuperscript{109} it seems more plausible that UCC invoked the sabotage theory as a line of defence, or at best as a ‘convenient conclusion.’\textsuperscript{110}

A number of factors jointly contributed to the gas leakage. Shrivastava argues that ‘[h]uman, organisational, and technological failures in the plant paved the way for the crisis that ensued.’\textsuperscript{111} Similarly, Cassels highlights multiple ‘systemic’ failures in terms of information and planning, technology, management and operation, and regulation that led to the Bhopal.\textsuperscript{112} This issue is dealt with in more detail in Chapter 6 with special reference to those causal factors that establish how the application of inferior standards by MNCs such as UCC could infringe the human rights of many people. Here it will suffice to note that Bhopal was inevitable\textsuperscript{113} in view of several decisions taken (or not taken) by UCC-UCIL over a period of time. After the gas leak, in a plant that was presented as a symbol of ‘state of the art technology’\textsuperscript{114} and as safe

\textsuperscript{105} Cassels, The Uncertain Promise, above n 23, 4. See also Praful Bidwai, ‘What Caused the Pressure Build-Up?’, The Times of India (26 December 1984), as reproduced in Surendra (ed.), above n 35, 57-62.

\textsuperscript{106} ‘[T]here has been more than one explanation of how the water and other impurities entered the MIC storage tank.’ Amnesty, Clouds of Injustice, above n 68, 40. See also Kletz, above n 78, 98-99; Kurzman, above n 34, 185-89; Sneoyenbos et al, above n 43, 511.

\textsuperscript{107} UCC’s versions of the sabotage theory varied from the accident being triggered by a terrorist organisation to the work of a disgruntled employee. ‘Union Carbide’s Motion for Dismissal of Complaint on the Grounds of Forum Non Conveniens’ in Menon, Documents and Court Opinions, above n 70, 33 (hereinafter ‘UCC’s Motion for Dismissal’). See also Kurzman, above n 34, 185-86; Morehouse & Subramaniam, above n 2, 10-12; Fortun, above n 1, 101-03.

\textsuperscript{108} Cassels, The Uncertain Promise, above n 23, 8-11.

\textsuperscript{109} Id., 11.

\textsuperscript{110} Shrivastava, above n 25, 315. See also Shrivastava, above n 24, 50-51.


\textsuperscript{112} A local journalist, for example, wrote about this inevitability in October 1982. Rajkumar Keswani, ‘Bhopal Sitting at the Edge of a Volcano’, Rapat Weekly (1 October 1982), <http://www.studentsforbhopal.org/BhopalStories.htm#Keswani> (last visited 17 August 2006).

\textsuperscript{113} Bogard argues: ‘The relentless promotion by Carbide, UCIL, and the Indian government of the Bhopal facility as a symbol of state-of-the-art technology in the service of progress undoubtedly led to a false association in some peoples minds of the level of technical sophistication at the plant with the actual safety of the product.’ Bogard, above n 23, 21.
as a chocolate factory, UCC started shifting all the blame for Bhopal on its subsidiary UCIL.

In this blame game, some blame was rightly attributed to the central and state governments in India which at their levels facilitated the occurrence of Bhopal, e.g., by improper planning permission, not fully appreciating the hazardous nature of the process in the chemical plant, lax enforcement of (albeit underdeveloped) safety laws, and allowing slums to develop in the immediate vicinity of the plant. We have already seen how the regulatory exemptions granted by the central government to UCC-UCIL — apparently to ensure availability of locally manufactured pesticides — backfired in that they divested the government of the capacity to have any effective say in policy or decision-making. Furthermore, the state government granted UCIL the license to establish a potentially hazardous plant in close proximity to the inhabited areas of the city, apparently to grab this deal at any cost. I will also show in part 2.3.4 of this chapter how the Indian government allowed UCC to escape easily and lightly from its legal liability for Bhopal. All this, in a way, shows how even a democratic state eager to appease, or acting in concert with, MNCs could actually harm the interests of its poor populace while purportedly seeking to do the opposite.

In terms of the consequences of the gas leakage, for several reasons no one knows with certainty the precise number of dead and injured. As per the official

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115 The project leader of the Bhopal plant assured that it ‘will be as inoffensive as a chocolate factory.’ Lapierre & Moro, above n 34, 88.
116 ‘Warren Anderson had his company’s best interests at heart, and so he would pile all the blame for the accident on Union Carbide India, whose assets amounted to only about $175 million compared with $10 billion ($7 billion by 1987) for the parent firm.’ Kurzman, above n 34, 181. Fortun also notes that UCC ‘began distancing itself from the operations of its Bhopal plant immediately following the 1984 gas leak.’ Fortun, above n 1, 115.
119 Cassels, The Uncertain Promise, above n 23, 5; Lapierre & Moro, above n 34, 350; Amnesty, Clouds of Injustice, above n 68, 10-12; Fortun, above n 1, 15; Marc Galanter, ‘Legal Torpor: Why so
government figure, about 3,000 people died immediately after the tragedy. This figure was revised to 15,248 in the 2003 report of the Bhopal Gas Tragedy Relief and Rehabilitation Department, State of Madhya Pradesh. However, according to Amnesty International’s estimate ‘between 7,000 and 10,000 people died within three days of the gas leak’ and over 20,000 to date. In total, 22,149 death claims were filed for compensation. Perhaps more tragic is the plight of survivors of Bhopal and their post-Bhopal children. Out of the then estimated total population of Bhopal (894,539), more than 62 per cent (559,835) were affected by the gas leakage. Many survivors still suffer from a range of (and in some cases multiple) medical conditions — from respiratory illness to eye disease, immunity impairment, neurological damage, neuromuscular damage, cancers, gynaecological disorders, miscarriages and compromised mental health. Last but not least, Bhopal also led to environmental pollution in the vicinity of the plant, including contamination of the ground water.

2.3.3 Human Rights Implications of Bhopal

How does this loss of life, continued misery of survivors, and environmental contamination in Bhopal translate in terms of the human rights discourse? Bhopal has been analysed and explored by writers within a diverse range of frameworks — from tort law to environmental law, international law, business ethics, risk management, principles of cost-benefit and double effect, sociology, advocacy, historical narrative, 

Little has Happened in India After the Bhopal Tragedy?" (1985) 20 Texas International Law Journal 273, 282-83 (hereinafter Galanter, 'Legal Torpor').


121Amnesty, Clouds of Injustice, above n 68, 12.

122 Id., 10, 12.


and biography. Despite such an extensive scholarly treatment of Bhopal, it has been generally seen as a mass (toxic) tort or an environmental disaster, and not as a human rights tragedy. Amnesty International’s Clouds of Injustice: Bhopal Disaster 20 Years On is perhaps the first major work that tried to analyse Bhopal ‘through a human rights lens.’

The reason why the existing literature on Bhopal did not invoke the analytical framework of human rights is not too difficult to find. At the time of Bhopal in December 1984, the entity that arguably violated human rights (UCC-UCIL) was under no clear human rights obligations under international or Indian law. As far as international law is concerned, it is argued by scholars that some of the provisions of the International Bill of Rights do extend, or could be extended, to MNCs, and that the Preamble to the UDHR requires ‘every individual and every organ of the


128 Rajagopal, above n 22.

129 Amnesty, Clouds of Injustice, above n 68, 2. Violation of international human rights law was though pleaded in cases filed under the ATCA. See below n 289. In an article published in 2005, Weissbrodt also notes: ‘One of the most visible examples of corporate human rights abuses occurred in Bhopal, India, in 1984, when fifty-one tons of methyl isocyanate were released from a plant owned by Union Carbide Corporation.’ Weissbrodt, above n 10, 58. See also International Council on Human Rights Policy, Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies (Versoix: ICHRP, 2002), 17-18; Zerk, above n 32, 305.

130 Although the UN in 1974 had constituted a Commission on Transnational Corporations to draft an agreeable code of conduct for transnational corporations (TNCs), the attempt failed to materialise due to various reasons and the Commission was dismantled in 1993. See Muchlinski, above n 28, 593-96; Sean D Murphy, ‘Taking Multinational Corporate Codes of Conduct to the Next Level’ (2005) 43 Columbia Journal of Transnational Law 389, 403-05; Justine Nolan, ‘The United Nations’ Compact With Business: Hindering or Helping the Protection of Human Rights?’ (2005) 24 University of Queensland Law Journal 445, 454-55.

131 Paust, above n 5, 810-17.

society' to promote respect for human rights. Nevertheless, it can hardly be denied that the regulatory framework of international law was, and continues to remain, primarily state-centred. As examined in more detail in Chapter 4, with the exception of the ILO Declaration, international law in the early 1980s hardly imposed direct human rights duties on MNCs, at least in areas that could have been relevant to the case of Bhopal. Even the OECD Guidelines were not applicable to UCC's operations in India and the use of the ATCA to remedy corporate human rights abuses was only in its infancy, after the decision in *Filartiga*.

Possible arguments based on the evolving jurisprudence of horizontal effect, or the state responsibility for human rights abuses by private actors such as corporations also do not offer much help as these are essentially post-Bhopal developments. In sum, at the time of Bhopal, although the Indian government, having ratified the International Bill of Rights, was under a duty to respect, protect and fulfil human rights, UCC and UCIL were under no similar obligation. Bhopal thus exposed a dichotomy in the international human rights framework in that it imposed human rights obligations on perceived violators (states) but not on other potential violators (MNCs).

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133 Commenting on the scope of this provision, Henkin emphatically argued: 'Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.' Louis Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets' (1999) 25 *Brooklyn Journal of International Law* 17, 25 (emphasis in original). A reference can also be made to similar provisions in other international instruments, e.g., Preamble to the ICCPR, GA Res. 2200A (XXI), UN Doc. A/6316 (1966); and Articles 27-29 of the African Charter on Human and Peoples' Rights, reprinted in 21 *ILM* 58 (1982).

134 The first salient feature of international law is that most of its rule aim at regulating the behaviour of States, not that of individuals.' Antonio Cassese, *International Law*, 2nd edn. (Oxford: Oxford University Press, 2005), 3. 'But on one thing everyone can agree. International law is, for the time being, still *primarily* of application to states. States are, at this moment of history, still at the heart of the international legal system.' Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), 39 (emphasis in original).


137 *Filartiga v Pena-Irala* 630 F. 2d 876 (2nd Cir., 1980).

138 The European Court of Human Rights, for instance, has held that the failure of a state to prevent human rights violations by private persons, including corporations, within its territory amounts to a violation of a state's mandate under international conventions. See, e.g., *Lopez Ostra v Spain* (1994) 20 EHR 277; *Guerra v Italy* (1998) 26 EHR 357. See also David Kinley, "Human Rights as Legally Binding or Merely Relevant?" in Stephen Bottomley & David Kinley (eds.), *Commercial Law and Human Rights* (Aldershot: Ashgate/Dartmouth, 2002), 25, 40-41; Ramer, above n 5, 470.
The possibility of UCC-UCIL being subject to human rights responsibilities flowing from municipal Indian law was not encouraging either. It was not surprising that at the time of Bhopal, India did not have any 'specific' law that imposed human rights obligations on corporations. In fact, Bhopal triggered the enactment or amendment of laws in several areas, e.g., the enactment of the Environment (Protection) Act 1986 and the Public Liability Insurance Act 1991, and the amendment of the Factories Act in 1987 to insert special provisions dealing with 'hazardous processes.' Thus, with the possible exception of the Air (Prevention and Control of Pollution) Act 1981, there was hardly any positive legal human rights obligation that UCC-UCIL could have breached by doing what it did in Bhopal. Similarly, though the protection of certain fundamental rights under the Indian Constitution extends beyond state action, most of the developments vis-à-vis the human rights obligations of non-state actors such as corporations have taken place after Bhopal and are still far from satisfactory.


There were scattered provisions in some laws such as the Trade Unions Act (No. 16 of 1926), the Minimum Wages Act (No. 11 of 1948), the Factories Act (No. 63 of 1948), the Maternity Benefit Act (No. 53 of 1961), and the Air (Prevention and Control of Pollution) Act (No. 14 of 1981). Except the Air Pollution Act, these and other similar statutes were not very relevant in the context of Bhopal.

Act No. 29 of 1986.

Act No. 6 of 1991.


Even the Air (Prevention and Control of Pollution) Act (No. 14 of 1981) was amended in 1987.

Section 20 reads: 'No person ... operating any industrial plant, in any pollution control area shall discharge or cause or permit to be discharged the emission of any air pollutant in excess of the standards laid down by the State Board under clause (g) of sub-section (1) of section 17.' Air (Prevention and Control of Pollution) Act (No. 14 of 1981). See Ramaseshan, above n 76, 35.

It is arguable that discharging emissions in air beyond the permissible limits will violate, at least, the right to life and the right to health.

Constitution of India, arts. 15(2), 17, 23(1), and 24. The concept of 'state action' has also been interpreted by the Indian Supreme Court expansively. See Mahendra P Singh, Shukla’s Constitution of India, 10th edn. (Lucknow: Eastern Book Co., 2001), 21-26.

The Supreme Court, for example, developed the absolute liability principle in M C Mehta v Union of India (1987) 1 SCC 393 and the 'polluter pays' principle in Indian Council for Enviro-Legal Action v Union of India (1996) 3 SCC 212. See Shubhankar Dam & Vivek Tewary, 'Polluting Environment: Is a “Polluted” Constitution Worse than a Polluted Environment?' (2005) 17 Journal of Environmental Law 383, 386-87. The Court has also read several rights into Article 21, which provides for the right to life. See Singh, above n 146, 164-81.

2.3.3.1 Amnesty International's human rights lens for Bhopal: A critique

In view of the above, it is not straightforward to see or analyse Bhopal as a site for human rights violations. However, Amnesty’s *Clouds of Injustice* fails to acknowledge, confront and overcome these challenges. It seeks to use a ‘human rights framework to examine ... what obligations under international law have been breached and what protective standards failed.’

*Clouds of Injustice* refers to various regional or international treaties, conventions, declarations, standards, case laws and General Comments to make a case for Bhopal resulting in the violation of several human rights such as the right to life, right to the highest attainable standard of health, right to remedy, and the right to a safe environment.

Amnesty International’s human rights analysis of Bhopal, however, has one major limitation and two serious flaws. The limitation stems from the general dichotomy of international human rights law pointed out above. For obvious reasons, Amnesty’s report investigates Bhopal as a human rights tragedy primarily from the perspective of states: it was the governments of India and/or the state of Madhya Pradesh that violated human rights by allowing UCC-UCIL to indulge in hazardous activities. Although the report admits that ‘human rights responsibilities extend beyond states,’ how the conduct of UCC-UCIL itself could have violated human rights is given a superficial and vague treatment. For example, nowhere does the report mention how and which specific human rights responsibilities UCC-UCIL breached in relation to their Bhopal plant.

Even if one overlooks this limitation, at least two analytical flaws are too obvious to be ignored. First, instead of grounding its case in legal provisions as they stood in December 1984, Amnesty’s *Clouds of Injustice* on many occasions refers to post-1984 legal developments to support its position. How could one reasonably expect the Indian government or UCC to follow legal standards that were non-existent prior

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149 Amnesty, *Clouds of Injustice*, above n 68, 27.
150 *Id.*, 28-38. Arguably, a glaring omission from this list is the right to information.
151 *Id.*, 28.
152 *Id.*, 35-38.
to December 1984? Therefore, unless one assumes that human rights were violated not merely by the gas leakage but also continuously since then, such a position is plainly untenable.

Second, even where the report makes a reference to pre-1984 legal provisions, the reasoning is unsound or full of gaps. For example, the report ‘selectively’ quotes paragraph 5 of the Human Rights Committee’s General Comment to contend that states shall regulate corporate activities so as to ensure that the right to life is not threatened. However, if one reads the Comment in its context, it does not seem to support this argument. This General Comment requires states to take ‘positive measures’ in a specific context, that is, ‘to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.’ Furthermore, the reliance on EHP v Canada is misleading because the UN Human Rights Committee did not rule on merit, as it found the communication inadmissible for failure to exhaust local remedies.

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154 One can draw an analogy with the maxim nullum crimen sine lege, nulla poena sine lege, on which Article 15 of the ICCPR is based: ‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.’ ICCPR, above n 133. Interestingly, the report itself acknowledges this with reference to the UN Norms: ‘The UN Norms did not exist at the time of the Bhopal disaster, and one cannot expect the UCC, UCL, the government of India or the state government of Madhya Pradesh to have been guided by them.’ Amnesty, Clouds of Injustice, above n 68, 36.

155 UN Human Rights Committee, ‘General Comments No. 6: The Right to Life (Article 6)’, 30/04/82, <http://www.unhchr.ch/tbs/doc.nsf/(SymbolY84ab9690cc811f7c12563ed0046f2e3?OpenDocument> (last visited 7 July 2006). Para 5 reads as follows: ‘Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.’

156 Amnesty, Clouds of Injustice, above n 68, 29.

157 Id.
Although I have tried to demonstrate loopholes in the analysis of Amnesty’s *Clouds of Injustice*, I have not rejected the use of ‘human rights lens’ or its usefulness in analysing Bhopal. The human rights approach, in fact, offers several advantages which are lost when we see Bhopal merely as a mass toxic tort or an environmental disaster. Framing responsibilities of UCC-UCIL with reference to human rights law allows one to benefit from the general consensus that has been reached at the international level regarding the content and scope of responsibilities aimed at protecting human rights. In addition, the power that the language of human rights has acquired in recent times could also be utilised: human rights as ‘trumps’ may be invoked against corporate pursuit of profit maximisation. Moreover, by adopting the human rights approach, one could contend that MNCs like UCC should not apply inferior safety standards in developing countries when this is likely to result in human rights violations. Last but not least, as human rights realisation is no longer simply a national, but also a shared global objective, the international community and international institutions could be urged to step in if a given state seemingly fails to secure justice for the victims of corporate human rights abuses. Arguably, the US courts should have taken this factor into account before dismissing the Bhopal case on the ground of *forum non conveniens*.160

### 2.3.3.2 An alternative human rights analysis of Bhopal

How could then one pursue a human rights analysis of Bhopal? Were UCC and UCIL subject to some human rights responsibilities at the time of gas leakage? Without being exhaustive, I offer here two possible, and perhaps more convincing, lines of argument to posit that UCC and UCIL breached certain human rights with reference to their Bhopal plant operations. First of all, the ILO Declaration of 1977 was applicable to the operation of the chemical plant run by a subsidiary of UCC, for UCC as an MNC was expected to observe the principles contained therein.161 Some of the provisions of the ILO Declaration had direct relevance to the factual matrix of Bhopal. UCC, for example, was ‘commended’ to observe the UDHR,162 to ‘ensure that relevant training is provided for all levels of their employees in the host country, as

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160 See discussion under Chapter 2.3.4.2.
161 ILO Declaration of 1977, above n 135, 423 (Preamble), 424 (para 4).
162 *Id.*, 424 (para 8).
appropriate, to meet the needs of the enterprise,"\(^{163}\) and to 'maintain the highest standards of safety and health ... bearing in mind their relevant experience within the enterprise as a whole, including any knowledge of special hazards.'\(^{164}\) It should also have made available, inter alia, to workers' representatives the 'information on the safety and health standards relevant to their local operations, which they observe in other countries.'\(^{165}\) As we have seen briefly above and will see in more detail in Chapter 6, UCC was clearly in breach of these (and several other) principles. Breach of these labour standards directly resulted in violation, for example, of the right to life, right to health, right to information, and the right to a clean environment.

The second, and an indirect, way to deduce the human rights obligations of UCC-UCIL is through the law of tort. Human rights, or at least the underlying interests, could be and have been protected in the past through non-human rights laws too, namely, constitutional law, criminal law, equity, and tort law.\(^{166}\) Out of these legal fields, the suitability of tort law in protecting and promoting human rights is widely acknowledged.\(^{167}\) The law of torts is apt to assume this role because it protects a range of private and public interests,\(^{168}\) has the required 'fertility and flexibility to protect' almost all basic human rights,\(^{169}\) could be invoked to sue even non-state actors, and in

\(^{163}\) Id., 426 (para 30).
\(^{164}\) Id., 427 (para 37) (emphasis added).
\(^{165}\) Id. (emphasis added).
\(^{169}\) Lord Bingham in Cane & Stapleton (eds.), above n 166, 12. Sir Mason concurs that 'the law of torts may be capable of being moulded in such a way as to provide remedies for human rights violations.' Sir Mason in Cane & Stapleton (eds.), above n 166, 14.
the past victims have used it to 'secure accountability' of decision makers. This is not to suggest that the resort to tort law to protect human rights does not have its limitations, or that there are no conceptual differences between tort law and human rights law. Rather the objective is to highlight the fact that the agenda of human rights protection could be realised additionally by recourse to tort law.

I contend that it is possible to invoke Indian tort law to deduce human rights duties applicable to UCC-UCIL at the time of Bhopal. In other words, one could explore how the tortious principles, for example, relating to negligence, nuisance, strict (or absolute) liability, and product liability might be used to enforce obligations to protect the human rights of life, health and environment. Although India is not a litigious society and its tort law is neither codified nor as developed as that of the US, the courts have been innovative in adopting and applying common law principles albeit in the face of limited opportunities. Let us consider and test the conduct of

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171 See, for difference between the foundations of the two branches of law, Sir Mason in Cane & Stapleton (eds.), above n 166, 16-18.

172 In fact, it is argued that ‘one of the functions of the law of torts is the protection of what are popularly known as human rights.’ John Murphy, *Street on Torts*, 1st Indian reprint (New Delhi: Oxford University Press, 2006), 4, and generally 4-12.


174 Pollock, on the instruction of the government of British India, had completed the draft of a Bill to codify the law of civil wrongs as early in 1886, but the law of torts in India to date remains largely uncodified. Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law*, 13th edn., (London: Stevens & Sons Ltd., 1929), 618. See, for the text of the Indian Civil Wrongs Bill, id., 620-86.


176 The evolution of constitutional torts and the absolute liability principle are two examples of this innovation. The courts have also read into Indian law the provisions of international human rights conventions ratified but not legislated upon by India, provided they were not in conflict with fundamental rights under the Constitution. *Sunil Bara v Delhi Administration AIR 1980 SC 1579*, *Prem Shankar Shukla v Delhi Administration AIR 1980 SC 1535*, *Sheela Barve v Secretary, Children’s Aid Society AIR 1987 SC 656*, *Nilabati Behera v State of Orissa AIR 1993 SC 1960*, *PUCL v Union of India (1997) 3 SCC 433*, *D K Basu v State of West Bengal (1997) 1 SCC 416*. The readiness to incorporate international convention provisions into municipal law overcomes a big hurdle in promoting human rights through common law. See Sir Mason in Cane & Stapleton (eds.), above n 166, 20.
UCC-UCIL on the touchstone of the tort of negligence and the strict liability principle for a moment.

The tort of negligence requires a duty of care, breach of that duty, and such breach causing harm to the plaintiff(s). UCC-UCIL undoubtedly owed a duty, under the neighbour principle, not only to its workers but also to those who lived in the vicinity of the plant. UCC-UCIL breached this duty because it did not exercise a reasonable standard of care in its maintenance and operation of the plant and consequently the MIC gas leaked out of the chemical plant. A person breaches the duty of care by 'behaviour that creates unreasonable foreseeable risk of injury.' The risk was unreasonable because even known safety precautions were not complied with; it was unreasonable even by Judge Learned Hand's famous 'B < PL' test based on a cost-benefit analysis that corporations often do. The risk of injury as well as the magnitude of injury should have been foreseeable given that MIC was an in-house invention of UCC, and the company was very much aware of its chemical composition, reactive nature and health risks associated with its contact. UCC-UCIL also failed in their duty to caution adequately the public about the dangers of MIC before, during and after the gas leakage. As we have seen before, the breach of duty on the part of UCC-UCIL caused serious harm to thousands of victims.

177 Street on Torts, above n 172, 177-78; Ratanlal & Dhirajlal's The Law of Torts, above n 175, 412; Zerk, above n 32, 216-23.
178 Even the parent MNC (UCC) could be under a duty of care if it could foresee the possibility of harm to victims and there was a proximity (which need not be physical) between the MNC and the victims. Zerk, above n 32, 216-20. She also explores other alternatives such as vicarious liability, secondary liability and the enterprise principle to base a parent MNC's duty of care towards those affected by the operations of its subsidiaries. Id., 223-34. See also Ratanlal & Dhirajlal's The Law of Torts, above n 175, 37.
179 Donoghue v Stevenson [1932] AC 562. The Indian courts have recognised and applied the neighbour principle. Ratanlal & Dhirajlal's The Law of Torts, above n 175, 419.
180 The likelihood of harm and the magnitude of harm are two important factors that influence the expected standard of care in a given case. Street on Torts, above n 172, 248-49.
182 United States v Carroll Towing Co. 159 F.2d 169 (2d Cir., 1947). In the B < PL formula, B is the burden (cost) of taking precautions, P is the probability of loss, and L is the gravity of loss. The product of P x L must be a greater amount than B to create a duty of due care for the defendant.
183 Lapierre & Moro, above n 34, 32-33, 43.
184 UCC's Reactive and Hazardous Chemicals Manual stated clearly that MIC is 'a hazardous material by all means of contact' and 'a recognised poison by inhalation.' UCC, MIC Report, above n 100, 11.
In order to make a successful case under the tort of negligence, the plaintiff must prove fault (carelessness) on the part of the defendant. In some cases, however, tort law may impose liability without any fault. The principle of strict liability laid down in *Rylands v Fletcher* provides one such example, under which the person who undertakes a dangerous activity is liable to pay compensation for the damage caused irrespective of any carelessness. Strict liability does not require fault, but still demands 'foreseeability' of harm arising from the activity undertaken. Given that the Indian courts have applied the strict liability principle (or as explained below the absolute liability principle), one could have invoked this principle against UCC-UCIL because a dangerous substance did escape out of the Bhopal plant and caused harm. There was arguably a 'non-natural use' of land by UCC-UCIL if we apply the test laid down by *Rickards v Lothian* that it must be some special use bringing with it increased dangers to others. Even the pre-condition of foreseeability should stand satisfied in the Bhopal case - both as to the escape of MIC and the significant harm that it might cause on escape. Finally, none of the exceptions to the *Rylands v Fletcher* principle seem to have been attracted in the case of Bhopal.

During the same time when the Bhopal case was fiercely litigated before the Indian courts, the Indian Supreme Court, in December 1986, delivered a far-reaching judgment in *M C Mehta v Union of India*, a case dealing with leakage of Oleum gas. The manual also enumerated in detail 'the horrible effects of accidentally inhaling MIC' and also the measures that should be taken to counter the effects of MIC. Lapierre & Moro, above n 34, 51.

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185 *Rylands v Fletcher* (1866) LR 1 Exch 265; (1868) 3 HL 330. See also *Street on Torts*, above n 172, 431-443.
186 *Ratanlal & Dhirajlal's The Law of Torts*, above n 175, 434.
189 Muchlinski, 'The Bhopal Case', above n 188, 566.
190 [1913] AC 263, 280. But see Muchlinski, 'The Bhopal Case', above n 188, 566.
191 The two-fold foreseeability could be imputed to UCC-UCIL because of several reasons, e.g., awareness about the hazardous nature of MIC gas, past gas leak incidents, internal safety audit reports, location of the plant, etc. Muchlinski argues that 'it is likely that Union Carbide has superior knowledge of the risk involved in production process used at Bhopal, as compared to the victims, or the regulatory authorities.' Muchlinski, 'The Bhopal Case', above n 188, 581.
192 Exceptions such as statutory authority, Act of God, consent of the plaintiff, and contributory negligence. *Street on Torts*, above n 172, 443-48. Murphy argues that 'the defence of the unforeseeable act of a stranger' should not be available to the strict liability principle. *Id.*, 447. Muchlinski, however,
from one of the plants of an Indian company. In this case, the Indian Supreme Court propounded the principle of 'absolute' liability, because it thought that the 19th century Rylands v Fletcher principle was not suitable to meet the needs of a modern industrial society. The Court observed:

[An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone ... the enterprise must be absolutely liable to compensate for such harm and it should be no answer for the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.

Looking at the language and timing of the judgment, it is apparent that the 'judgment was clearly written with Bhopal in mind. The absolute liability principle neither required proving a 'non-natural' use of land nor was it open to any of defences accepted to Rylands v Fletcher. Justice Seth of the Madhya Pradesh High Court applied the absolute liability principle to the Bhopal case, something that UCC fiercely contested before the Supreme Court. Although no opportunity arose for the Indian Supreme Court to consider this issue on merit (as a settlement was reached), the principle of absolute liability has been applied in other cases since then. Baxi

indicates the possibility of some of defences being available to UCC, e.g., common benefit and statutory authority, Muchlinski, 'The Bhopal Case', above n 188, 566.

193 AIR 1987 SC 1086.
194 See Dam & Tewary, above n 147, 386-87.
195 AIR 1987 SC 1086, 1099 (emphasis added).
196 Cassels, The Uncertain Promise, above n 23, 186.
197 The main distinction between absolute liability and strict liability is that no defences are available in case of former. Englard explains: [S]trict liability is by no means a monolithic concept; it starts from what might be called absolute liability, a form of liability which excludes any defences, be they of causal nature or of other nature. In its most extreme form, it does not require any causal connection between the person held liable and the damaging event. Other kinds of strict liability progress, on a gradually attenuating scale, until the transition to liability based on fault.' Izhak Englard, The Philosophy of Tort Law (Aldershot: Dartmouth, 1993), 21.
199 'Special Leave Petition of UCC on Interim Relief in Baxi & Dhanda, Valiant Victims, above n 55, 413-15, 434-36.
200 See, for example, Indian Council for Enviro Legal Action v Union of India (1996) 3 SCC 212. It should be noted though that the Supreme Court in Charan Lal Shau v Union of India AIR 1990 SC 1480 did express doubts if the absolute liability principle as laid down in Mehta case was part of the ratio.
also argues that the Indian Supreme Court could have, if necessary, overcome easily
the challenges mounted against the Mehta principle. 201

In view of the above analysis, it is logical to contend that in addition to negligence,
UCC-UCIL could have been held liable for Bhopal under the strict or absolute
liability principle as well. The failure of UCC-UCIL to comply with their duties –
whether under tort of negligence or the principle of strict/absolute liability – resulted
in loss of lives, infliction of injuries, and environmental pollution. Conversely, the
right to life, right to health, and the right to a clean environment could have been
protected had UCC-UCIL complied with these tortious obligations. Thus, a plausible
case could be made to deduce from tort law certain human rights obligations of UCC-
UCIL, an indirect means of protecting human rights.

It should, however, be admitted that the arguments in an Indian court on this line
would not have been as simple or non-controversial as presented above. 202 The basic
objective of the thought experiment undertaken above was to illustrate that even if
national and international human rights laws do not impose any specific obligation on
MNCs, one could still find comparable corporate human rights responsibilities under
tort law or some other law. 203 This conclusion, however, should not be interpreted to
mean that there is no need for a legally binding international regulatory framework
dealing with corporate human rights abuses. 204


202 See, for example, the analysis of Professor Muchlinski. Muchlinski, ‘The Bhopal Case’, above n 188, 566-73. In addition to evidentiary challenges, the principles of separate personality and limited liability, and the enforcement of award against UCC in the US courts would have created major hurdles.


204 See, e.g., Greenpeace, Corporate Crimes, above n 26; Surya Deva, ‘Human Rights Violations by Multinational Corporations and International Law: Where from Here?’ (2003) 19 Connecticut Journal of International Law 1. Howland suggests a principle of international law which ensures forced internalisation of costs so that ‘no individual can operate a production process unless all costs of that production process are internalised.’ Howland, above n 118, 310.
2.3.4 Victims’ Quest for Justice and the Five Phases of Litigation

For several reasons, the victims’ quest for seeking justice against UCC/UCIL, Dow Chemical205 and the Indian government has turned out to be another catastrophe for the Bhopal victims.206 The report of Amnesty International, Clouds of Injustice, aptly points out that what happened in Bhopal ‘was not just a tragedy of the past; it has continued to be a tragedy ever since.’207 Attempts to seek justice for the victims of Bhopal through judicial as well as non-judicial means (such as students’ protests or boycotts, public campaigns, marches, or shareholders’ resolutions) have continued unabated in both the US and India.208 This section will focus primarily on the struggle inside the courts which, as the Table 2.1 below shows, could broadly be divided into five phases of litigation.209 Whereas the place of struggle in each of these five phases has been the Indian and/or the US courts, the time span and the objective of struggle have been different.

205 Since 2001, UCC has been a wholly owned subsidiary of Dow Chemical.
206 Cassels notes that the Bhopal ‘lawsuit turned out to be a second catastrophe for the victims.’ Cassels, ‘Outlaws’, above n 27, 311. Baxi notes that the ‘legal labyrinth created by thus far may appear to the victims of Bhopal another incarnation of the December 1984 catastrophe.’ Baxi, Inconvenient Forum, above n 127, 33. See also Trotter et al, above n 57, 447-49.
207 Amnesty, Clouds of Injustice, above n 68, 10. The report sums up: ‘Yet 20 years on, the survivors still await just compensation, adequate medical assistance and treatment, and comprehensive economic and social rehabilitation. The plant site has still not been cleaned up so toxic wastes continue to pollute the environment and contaminate water that surrounding communities rely on. And, astonishingly, no one has been held to account for the leak and its appalling consequences.’ Id, at 1. Harlow also notes that ‘[t]wenty years after the Bhopal disaster, there has been no real redress.’ Harlow, above n 170, 50.
209 Cassels divides the ‘long and sad story of litigation’ in the following stages: Legalization and globalisation; Consolidation: the Bhopal Act; Framing the issues: articulating a globalised tort law; The US litigation: choice of forum; Indianisation and the development of law as a bargaining endowment; Interim compensation and the corporate veil: water down the Ganges; Settlement: corruption or compromise. Cassels, ‘Outlaws’, above n 27, 320-32.
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Table 2.1: Victims' Quest for Justice and Five Phases of Litigation

2.3.4.1 Phase I: How and where to litigate?

In terms of the administration of justice, Bhopal presented multiple challenges as to compensating victims and fixing liability for the massive gas leakage. Some of the challenges arose because of the large number of victims (a majority of whom were poor and/or illiterate), evidentiary problems (including those related to causation and attribution), undeveloped Indian law dealing with such disasters, the economic incapacity of the Indian subsidiary (UCIL) to fully compensate victims, corporate law principles of limited liability and separate personality, and other difficulties inherent in any transnational litigation (e.g., choice of law). Various judicial as well as non-judicial alternatives were mooted and debated to overcome these challenges. However, as the parties assumed an 'adversarial posture' and resorted to defensive

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210 See Englard, above n 197, 219. Englard concludes that 'mass tort cases exemplify the inherent limits of tort law'. *Id.*, 222.
211 For these and other reasons, Bhopal litigation was considered 'the most complex litigation in the late twentieth century world.' Baxi, 'An Introduction' in Baxi & Dhanda, *Valiant Victims*, above n 55, iv.
'positioning,' legal redress became the only available response to Bhopal. But even a legal mechanism for redress was not free from difficulties. At least the following four issues were contentious:

- who should file the case (individuals, government, or a consolidated class action);
- against whom (out of UCC, UCIL and the Indian government);
- where (in the US or Indian courts); and
- under what law (e.g., product liability, tort law, breach of contract, and/or criminal law)?

These issues attained an element of urgency because just a couple of days after Bhopal, American lawyers—described by some as 'ambulance chasers'—started descending upon the city of Bhopal with a promise of getting millions of dollars in compensation. To counter the possible exploitation of mostly poor-illiterate victims by such US lawyers and in conformity with its eagerness to file the case in the US courts, the Indian government as parens patriae acted swiftly and enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act (Act/Bhopal Act) in March 1985. The Act, which replaced an earlier Ordinance promulgated in February 1985, vested in the central government of India an 'exclusive right to represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim' arising out of the Bhopal disaster. This extraordinary

213 Id., 112-15.
214 Fortun, above n 1, 12.
216 Baxi notes: 'The immediate trigger was provided by the swarm of contingency fee American lawyers that descended upon the Bhopal victims in the wake of the catastrophe.' Baxi, 'Just War', above n 1, 192. See also Cassels, The Uncertain Promise, above n 23, 115; Cassels, 'Outlaws', above n 27, 320; Kurzman, above n 34, 111, 127-30, 133-35; Snoeyenbos et al, above n 43, 513; Dhavan, above n 173, 295; Muchlinski, 'The Bhopal Case', above n 188, 546-47.
217 Judge Keenan in one of his orders footnoted: 'The behaviour of many American lawyers who went to Bhopal, India during December 1984 and January 1985 is not before this Court on this motion. Suffice it to say that those members of the American bar who travelled the 8,200 miles to Bhopal in those months did little to better the American image in the Third World—or anywhere else.' In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984, 634 F. Supp. 842, 844 (1986). See also Cassels, The Uncertain Promise, above n 23, 115-17.
218 See Galanter, 'Legal Torpor', above n 119, 284-85.
219 Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 (No. 21 of 1985). For this innovative formulation and application of parens patriae doctrine, see Baxi, 'An Introduction' in Baxi & Dhanda, Valiant Victims, above n 55, v-vi.
220 Bhopal Gas Leak Disaster (Processing of Claims) Ordinance 1985 (Ord. 1 of 1985).
221 Bhopal Act, above n 219, Sec. 3. Section 2(a) provides the following definition of 'disaster': "'Bhopal gas leak disaster' or "disaster" means the occurrence on the 2nd and 3rd days of December,
power was conferred on the central government to deal with Bhopal claims ‘speedily, effectively, equitably and to the best advantage of the claimants.’\(^{222}\) In order to balance this exceptional provision, the Act preserved the victims’ limited right to have their views taken into account by the Indian government and be represented by a lawyer of their choice in the suits or proceedings initiated by the government.\(^{223}\)

The Bhopal Act, though an innovative piece of legislation,\(^{224}\) received a great deal of criticism\(^{225}\) and also faced a constitutional challenge to its validity.\(^{226}\) The Act, however, settled the first two issues (who will file a case and against whom); the vesting of exclusive standing to deal with all claims arising out of Bhopal in the central government virtually meant that the government could not be sued for its contribution in the occurrence of Bhopal.\(^{227}\) The Bhopal Act also indicated where such cases could be filed in that it expressly contemplated the possibility of the Indian government representing victims’ claims abroad.\(^{228}\) The principles of liability (i.e., under what law) were to be made explicit soon by the complaint filed by the government before the US District Court.

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1984, which involved the release of highly noxious and abnormally dangerous gas from a plant in Bhopal (being a plant of the Union Carbide India Limited, a subsidiary of the Union Carbide Corporation, USA) and which resulted in loss of life and damage to property on an extensive scale.’ \(^{222}\) Id., Preamble.

\(^{223}\) ‘Notwithstanding anything contained in section 3, in representing, and acting in place of, any person in relation to any claim, the Central Government shall have due regard to any matters which such person may require to be urged with respect to his claim and shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim.’ \(^{224}\) Id., Sec. 4.

\(^{224}\) Muchlinski conclude that ‘the Bhopal Act may be seen as a necessary legal response to the accident.’ Muchlinski, ‘The Bhopal Case’, above n 188, 552.

\(^{225}\) Cassels, The Uncertain Promise, above n 23, 119-20. Hawkes argues that India was not entitled to invoke the doctrine of parens patriae and therefore, the US courts should have denied parens patriae standing to the Indian government. Lisa M Hawkes, ‘Parens Patriae and the Union Carbide Case: The Disaster at Bhopal Continues’ (1988) 21 Cornell International Law Journal 181, 186-96.

\(^{226}\) The Indian Supreme Court upheld the constitutional validity of the Bhopal Act in Charan Lal Sahu v Union of India AIR 1990 SC 1480, also reproduced in Menon, Documents and Court Opinions, above n 70, 338. See, for a critique, Baxi, ‘An Introduction’ in Baxi & Dhanda, Valiant Victims, above n 55, lvii-lxii.

\(^{227}\) In fact, this conflict of interest position of the Indian government was one of the grounds on which the validity of the Bhopal Act was assailed before the Supreme Court.

\(^{228}\) Bhopal Act, above n 219, Sec. 3. The Act was not only extraterritorial but also retrospective. Therefore, even if suits/proceedings have been launched abroad before this law came into force, the
2.3.4.2 Phase II: Going after the 'parent' in the US

For several reasons, the Indian government considered it a better strategy to sue the parent corporation UCC\(^{229}\) and to do so in the US courts.\(^{230}\) On the other hand, UCC’s legal strategy\(^{231}\) was to project and push for an early settlement as being in the interest of victims,\(^{232}\) while maintaining that if a trial had to take place, it should happen in India.\(^{233}\) These strategies underpinned the respective positions of UCC and the Indian government in the years to come.\(^{234}\)

Exercising its power under the Bhopal Act, the Indian government on 8 April 1985 filed a complaint in the Southern District Court presided over by Judge John Keenan. In order to overcome the key legal challenges pointed out before, the complaint was grounded in two notable principles: absolute and/or strict liability for ultrahazardous and inherently dangerous activity, and enterprise liability for MNCs.\(^{235}\) Both of these principles as well as their application to Bhopal were strongly rebutted by UCC both

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\(^{229}\) In cases of corporate human rights abuses, suing parent corporations for the acts/omissions of their subsidiaries becomes necessary in view of several peculiar circumstances. Deva, 'Overcoming Hurdles', above n 15, 97-99. Cassels observes: 'To hold the parent liable is often the only way to ensure full compensation for these victims and to encourage the parent companies to exercise greater responsibility in controlling its foreign operations.' Cassels, 'Outlaws', above n 27, 323. See also Jay Lawrence Westbrook, 'Theories of Parent Company Liability and the Prospects for an International Settlement' (1985) 20 Texas International Law Journal, 321, 327-29.

\(^{230}\) See Kurzman, above n 34, 195-96; Chopra, above n 17, 247-48; Galanter, 'Legal Torpor', above n 119, 286; Muchlinski, 'The Bhopal Case', above n 188, 248.

\(^{231}\) See, for UCC’s public relations strategy, Morehouse & Subramaniam, above n 2, 40-44. In its submission before the Bhopal District Judge, UCC mentioned: ‘... it is submitted that there is a more effective and complete means of avoiding “the jungle of laws and legal battles”, referred to in the Court’s proposal – by an overall settlement of all claims as already proposed by the Union Carbide Corporations without admitting liability.’ 'Submission on Behalf of the Defendant Pursuant to the Proposal of the Court Dated April 2, 1987', as reproduced in Baxi & Dhanda, Valiant Victims, above n 55, 243, 245 (emphasis added).

\(^{232}\) An early settlement was in the economic interest of UCC too, because intricate questions of legal liability could exhaust years and millions of dollars. UCC in its 1984 annual report admitted that a 'quick and fair settlement of the legal claims of the victims would serve the company's needs far better than prolonged and expensive litigation.' Union Carbide Corporation, 'Annual Report 1984: After Bhopal', p. 4, as quoted by Trotter et al, above n 57, 445. However, in order to gain an upper hand during negotiations it was necessary not to highlight this fact. See also Westbrook, above n 229, 329-30; Morehouse & Subramaniam, above n 2, 84.

\(^{233}\) Trotter et al note that that 'Union Carbide could benefit greatly from legal proceedings held by a court in India, rather than a court in the United States.' Trotter et al, above n 57, 443. See also Kurzman, above n 34, 196-204, 229.

\(^{234}\) Regarding the strategy, for example, of UCC, Baxi argues that the 'settlement on its own terms was the controlling purpose of all UCC legal initiatives and responses.' Baxi, 'An Introduction' in Baxi & Dhanda, Valiant Victims, above n 55, xxxv.
inside and outside the courts. Whereas the Indian government tried to impress upon Judge Keenan the general incompetence of Indian courts and legal system to handle effectively a case of this magnitude, UCC defended the soundness of the Indian legal system and made a robust plea for dismissing the suit on the ground of *forum non conveniens.*

Judge Keenan encouraged, and provided enough opportunity to, UCC and the Indian government to reach a settlement. But when such efforts did not prove fruitful, on 12 May 1986 he dismissed the suit on the ground of *forum non conveniens.* As all private and public interest factors favoured the dismissal of the suit, Keenan was ‘firmly convinced that the Indian legal system is in a far better position than the American courts to determine the cause of the tragic event and thereby fix liability.’

The judge was also of the view that this will afford the Indian judiciary an opportunity to...

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235 Cassels, ‘Outlaws’, above n 27, 322. See also ‘Complaint Filed by the Union of India in the US District Court, New York’, as reproduced in Menon, *Documents and Court Opinions,* above n 70, 1, 3-4.

236 This self-disparagement of its legal system by the Indian government attracted serious criticism. Justice Seth, for example, observed: ‘This Court cannot restrain itself from expressing its shock over the manner in which ... the plaintiff-Union of India under-rated its own judiciary and made it a subject matter of ridicule so publicly before a foreign Court.’ *Union Carbide Corporation v Union of India,* Civil Revision No. 26 of 88, as reproduced in Baxi & Dhanda, *Valiant Victims,* above n 55, 338, 341. Baxi also echoes this feeling: ‘India auto-criticizes her own legal system in a misguided exuberance of a litigative strategy; an American multinational is thus accorded the historic privilege to celebrate the Indian legal system. India biopsies her own legal system with the help of an American law professor; ...’ Baxi, *Inconvenient Forum,* above n 127, 1.


239 Judge Keenan noted: ‘This Court has laboured hard and long to promote settlement between the parties for over a year, to no avail. It would appear that settlement, although desirable for many reasons, including conservation of attorneys’ fees and costs of litigation, preservation of judicial resources, and speed of resolution, is unlikely regardless of the level of activism of the presiding judge.’ In *Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984,* 634 F. Supp. 842, 851 (1986). See also Baxi, *Inconvenient Forum,* above n 127, 3.


241 Whereas ‘private interest’ factors concern the interests of the specific litigants to an action, ‘public interest’ factors affect not merely given litigants but the society generally. On this issue, the US Supreme Court decisions in *Gulf Oil Corp. v Gilbert* 330 US 501 (1947) and *Piper Aircraft Co. v Reyno* 454 US 235 (1981) are considered authoritative and were relied on by Judge Keenan to reason out why India was a more convenient forum to adjudicate the Bhopal case.
‘opportunity to stand tall before the world’ and dispel any signs of judicial imperialism. The dismissal was nevertheless subject to the following three conditions:

- UCC shall consent to submit to the jurisdiction of the courts of India;
- UCC shall agree to satisfy any judgment rendered by an Indian court provided that it conforms with the minimal requirements of due process; and
- UCC shall be subject to discovery under the model of the US Federal Rules of Civil Procedure.

The US Court of Appeals affirmed the order of dismissal on the ground of forum non conveniens, but it removed the last two conditions on appeal. In sum, the dismissal of the suit from the US courts was seen as a victory for UCC, which did prefer to litigate, if at all, in India. The Indian government and victims could, on the other hand, seek consolation in the fact that UCC – the parent corporation with deep pockets – agreed to submit to the jurisdiction of the Indian courts.

2.3.4.3 Phase III: Struggle to fix responsibility in India

In its struggle to fix responsibility for Bhopal, the Indian government had its own ‘settlement versus litigation’ dilemma, each strategic option having certain pros and cons. A settlement is likely to result in swift compensation for victims, but the compensation awarded might not be just, adequate or maximum. Any resultant settlement also had a risk of lacking legitimacy and public support if the government

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243 ‘To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947.’ Id., 867.
244 Id.
245 In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984, 809 F. 2d 195 (1987); Muchlinski, ‘The Bhopal Case’, above n 188, 560-63. It is ironical that although UCC did concede before Judge Keenan that the Indian courts provide an adequate forum, in appeal it contended for the removal of second condition on the ground that the Indian courts ‘do not observe due process standards that would be required as a matter of course in this country.’ Id., 204. Baxi argues that three ‘conditions themselves demonstrate that Judge Keenan is not altogether confident that Indian courts provide an alternative forum.’ Baxi, Inconvenient Forum, above n 127, 7, and generally 7-8.
246 Trotter et al, above n 57, 447. Fortun notes that the ‘news of the settlement caused UCC stock to rise $2 a share, or 7 per cent.’ Fortun, above n 1, 26.
247 ‘The very fact that Judge Keenan helped the government and victims secure jurisdiction over the parent company was a victory.’ Chopra, above n 17, 250. See also Baxi, ‘An Introduction’ in Baxi & Dhanda, Valiant Victims, above n 55, viii.

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was seen as negotiating with the culprit, an American MNC. On the other hand, though litigation offered the possibility of getting adequate compensation for the victims, the government neither wanted its role exposed and subjected to international scrutiny in a lengthy litigation, nor did it want the Bhopal litigation to discourage other MNCs from investing in India.

Amidst these dilemmas, on dismissal of the complaint by Judge Keenan, the Indian government on 5 September 1986 filed a suit against UCC in the Bhopal district court. The Indian government by and large persisted with the principles of liability invoked originally before Judge Keenan: it maintained that UCC exercised effective control over UCIL and was, therefore, strictly and/or absolutely liable for indulging in an ultrahazardous and inherently dangerous activity. UCC resolutely refuted all the contentions based on what Baxi terms a recourse to ‘massive negation’ – denying everything from the very existence of the concept of ‘multinational corporation’ to the fact that it controlled UCIL, that MIC was an ultrahazardous and dangerous substance, and that it was liable for Bhopal in any way. UCC also challenged, on various occasions, the power of Indian courts to award interim compensation in tort cases, assailed the principle of absolute liability as well as its application to Bhopal case, and opposed any attempt to pierce the corporate veil to reach UCC.
The litigation before the Bhopal district court (or even before the High Court\textsuperscript{258} and the Supreme Court) never proceeded to an assessment of the merits of the case.\textsuperscript{259} Throughout the time during which the Indian courts were adjudicating on the matter, UCC played its cards skilfully—e.g., delaying proceedings,\textsuperscript{260} increasing the complexity of the case, asserting separate existence of its subsidiary UCIL,\textsuperscript{261} filing cross appeals, challenging the powers and jurisdiction of the Indian courts,\textsuperscript{262} and even conveying a veiled threat about the non-enforceability of an Indian judgment against UCC in the US—to coerce the government to enter into a settlement.\textsuperscript{263} Even the sabotage theory,\textsuperscript{264} used to explain how water might have entered the MIC tank, was part of this comprehensive defence strategy: even if the courts pierce the corporate veil, UCC should not be liable for those acts of its employees which were committed outside the course of employment.\textsuperscript{265} The sabotage theory could have perhaps survived India’s reliance on strict liability,\textsuperscript{266} but of course not absolute


\textsuperscript{258}The judgment of Justice Seth of the MP High Court is perhaps the only exception to this in that he held that the order of interim compensation ‘is not a payment of interim relief without reference to the merits of the case as held by the trial court but is a payment as damages under the substantive law of torts on the basis of more than prima facie case having been made out in favour of the plaintiff-Union of India to receive such payment from the defendant-UCC.’ \textit{Union Carbide Corporation v Union of India}, Civil revision No. 26 of 88 (1988 MPLJ 540), as reproduced in Baxi & Dhanda, \textit{Valiant Victims}, above n 55, 338, 383. See also Cassels, ‘Outlaws’, above n 29, 329.

\textsuperscript{259}The proceedings before the District Court, Bhopal, never fully reached the core of the strategic contentions raised by India and UCC. Instead, the District Court’s entire time was blocked by a whole variety of other issues.’ Baxi, ‘An Introduction’ in Baxi & Dhanda, \textit{Valiant Victims}, above n 55, xix.

\textsuperscript{260}The UCC corporate governance and culture are favourably disposed to delaying consideration of the real issues because delays favour relatively low settlements that fall within the range of insured amounts.’ Baxi, ‘Just War’, above n 1, 193.

\textsuperscript{261}The oft-quoted sentence sums up this assertion in a plain language thus: ‘The Bhopal plant was managed, operated and maintained entirely by Indians in India’. ‘UCC’s Motion for Dismissal’ in Menon, \textit{Documents and Court Opinions}, above n 70, 32. See also Morehouse & Subramaniam, above n 2, 79.

\textsuperscript{262}For a record of the Bhopal litigation as it unfolded before several Indian courts, see Baxi & Dhanda, \textit{Valiant Victims}, above n 55, 3-524.

\textsuperscript{263}Id., xix-xxi, xxxv-xxxvi; Amnesty, \textit{Clouds of Injustice}, above n 68, 52-54; Dembo, above n 15.

\textsuperscript{264}Above n 107.


\textsuperscript{266}The principle of strict liability admits of several defences, e.g., consent, common benefit, act of God, act of stranger and statutory authority. W V H Rogers, \textit{Winfield & Jolowicz on Tort}, 16th edn. (London: Sweet & Maxwell, 2002), 561-64; \textit{Clark & Lindsell on Torts}, above n 168, 1246-51; \textit{Salmond & Heuston on the Law of Torts}, above n 265, 315-18. Trotter et al, however, point out that the doctrine of strict liability, which the Indian government sought to invoke, ‘would probably permit recovery even in the event that there was a “disgruntled” employee that committed “sabotage.”’ Trotter et al, above n 57, 448 (emphasis added).
After years of futile litigation, the Indian Supreme Court, in a ‘dramatic and terminal turn,’ approved a settlement between UCC and the central government by its two orders dated 14 and 15 February 1989. The settlement order, inter alia, read: ‘The aforesaid payments [US$470 million] shall be made to the Union of India as claimant and for the benefit of all victims of the Bhopal gas disaster ... and not as fines, penalties, or punitive damage.’ So, UCC agreed to award compensation not in pursuance of any legal liability but as a token of mercy shown to the Bhopal victims. Moreover, as the settlement settled all civil proceedings, quashed pending criminal proceedings, and directed the central and state governments to take necessary steps to defend UCC-UCIL and their personnel against future proceedings, it also, in effect, conferred immunity on UCC-UCIL and their personnel against any future civil or criminal liability.

It is notable that the two settlement orders were as brief as a few paragraphs. Beyond putting on record that such a settlement was considered ‘just, equitable and reasonable’ in view of ‘the enormity of human suffering occasioned by the Bhopal gas disaster and the pressing urgency to provide immediate and substantial relief to victims of the disaster,’ the orders, for example, gave no reasons for how a magical figure of US$470 million was reached. The settlement orders evoked public outrage.

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267 See Baxi, ‘The Just War’, above n 1, 182.
270 Union Carbide Corporation v Union of India AIR 1990 SC 273, 275 (emphasis added). Bhopal is not an isolated instance of how MNCs deal with their liability. More recently, Unocal paid an undisclosed amount to settle cases filed against it before the US courts. See above note 19. It may be worthwhile to note that James Hardie Industries – which unlike UCC and Unocal did not face any legal proceedings – also made a similar offer to the Special Commission of Inquiry instituted by the NSW government to investigate the liability of the company for pending and future asbestos claims. Elisabeth Sexton, ‘Cracks in the Board’, Sydney Morning Herald, 17-18 July 2004, 37.
271 Baxi, ‘An Introduction’ in Baxi & Dhanda, Valiant Victims, above n 55, xlii-xlili. UCC consistently took the stand that its responsibility for Bhopal is only ‘moral.’ Fortun, above n 1, 98-101.
274 Id.
275 Fortun, above n 1, 38.
and fierce criticism, which forced both the Indian government and the Supreme Court to come out with reasons later on.

Arguably in view of the government’s ‘settlement versus litigation’ dilemma and the clever strategy adopted by UCC, a court-approved settlement was the best result that the Indian government (or even the victims) could have asked for. In the end, the government got what it wanted. This settlement did not do much harm to UCC either: it indeed ‘escaped a corporate catastrophe.’ As far as the victims were concerned, they were never a party, or even privy, to intricate details of the litigation-settlement. Although both UCC and the Indian government supposedly acted for the benefit and in the best interest of victims, the victims were totally at the mercy of their twin custodians.

276 Baxi notes that ‘the Indian Supreme Court, despite a long and proud history of judicial activism, did not cover itself with glory in ordering an excessive and premature settlement.’ Baxi, ‘Just War’, above n 1, 194. There were even allegations of corruption, or a deal within the deal. Cassels comments: ‘The victims, observers, and the general public were astounded. ... The settlement would provide only a pittance in compensation to the victims. It let the company off cheap, threw out the criminal charges, and abandoned any effort to improve safety in the third world.’ Cassels, ‘Outlaws’, above n 27, 330. For a detailed critique, see Baxi, ‘An Introduction’ in Baxi & Dhandha, Valiant Victims, above n 55, xxxv-1. See also Rajeev Dhavan, ‘Bhopal: Requiem without Respite’ in Menon, Documents and Court Opinions, above n 70, 391-92; Fortun, above n 1, 7-8, 38-39.

277 The government released a brochure entitled Bhopal Gas Tragedy: Basis of the Supreme Court’s Award. See Baxi, ‘An Introduction’ in Baxi & Dhandha, Valiant Victims, above n 55, 1-li.

278 Union Carbide Corporation v Union of India (1989) 3 SCC 38. Also reproduced in Baxi & Dhandha, Valiant Victims, above n 55, 539-49. The Court opined: ‘It appeared to us that the reasons that persuaded the Court to make the order for settlement should be set-out, so that those who have sought a review might be able effectively to assist the Court in satisfactorily dealing with the prayer for a review.’ Id., 540. Regarding reasons for the settlement, the Court summed up that it ‘directed the settlement with the earnest hope that it would do them good and bring them immediate relief, for, tomorrow might be too late for many of them.’ Id., 548.

279 After analysing the complexity of Bhopal litigation, Schwadron in 1987 suggested that ‘settlement is the only rational course of action’ and therefore, ‘the principal actors in the Bhopal dispute should continue to strive toward that goal.’ Schwadron, above n 240, 481, 445, respectively. Hawkes also observes: ‘The disaster continues as long as the Bhopal victims, or victims of any industrial accident, go without compensation, Settlement, which compensates victims quickly, offers the best means to alleviate this suffering.’ Hawkes, above n 225, 199, and generally 196-99. Morehouse & Subramaniam, however, cautioned against a ‘premature and inadequate’ settlement. Morehouse & Subramaniam, above n 2, 85.

280 ‘Union Carbide has indeed escaped a corporate catastrophe that might have forced it into bankruptcy. As the corporation announced to its shareholders in its 1988 annual report, Carbide’s total accrued liability was $237 million, after accounting for insurance recoveries. Last year’s profits were an estimated $720 million, by comparison.’ Cameron Carr, ‘Carbide Escape: Why India’s Awkward Strategy Forced the Settlement?’ (1989) 11:4 The American Lawyer 99, 105 (emphasis in original). Cassels also writes: ‘The settlement seemed clearly to be a victory for Union Carbide. On the day it was announced, the price of its shares on the New York stock market rose by $2.’ Cassels, The Uncertain Promise, above n 23, 223.

281 ‘The victims, to whom law gives its guarantees, are virtually excluded from legal view, and in the end are advised by the Supreme Court of India not to further pursue the uncertain promises of law.’ Cassels, ‘Outlaws’, above n 27, 331.
2.3.4.4 Phase IV: Trying to overturn the settlement, and seeking compensation and medical care

Dismayed at what the victims considered an inadequate and non-transparent settlement, victims groups sought to overturn the settlement order by challenging its constitutional and legal validity before the US and Indian courts. The Indian Supreme Court, rejecting multiple arguments advanced by victims’ lawyers, upheld the settlement award, but agreed to reinstate criminal charges against UCC-UCIL and their personnel.282 Parallel to the challenge mounted before the Indian Supreme Court, some victims also knocked at the doors of US courts to assail the validity of the settlement contending that the Indian Government had a conflict of interest position, that most of the victims opposed the settlement as grossly inadequate, and that their due process rights were violated.283 As expected, the US courts dismissed these suits on procedural grounds.284

When it became apparent that the efforts to set aside the settlement might not bring the desired result, the victims groups focused their attention on the disbursement of compensation and access to medical care. Time and again victims groups or socially active lawyers have had to approach the Supreme Court to ensure that interim relief is provided, compensation reaches rightful victims swiftly and efficiently, and that the settlement money lying with the government is distributed to all victims on a pro rata basis.285 This recourse to the judiciary was necessitated because the government’s efforts to provide compensation, medical care and rehabilitation to victims were hampered by the sheer number of victims, bad planning, corruption, a cumbersome

284 Judge Keenan went on to observe that some of the arguments advanced by the plaintiffs ‘would be labelled imaginative by a kind or charitable observer.’ Bano Bi v Union Carbide Corporation 1992 US Dist. LEXIS 1909, 7.
claims process, difficulty in medical categorisation, inefficient administration, and an opportunistic cartel of doctors, lawyers and aid disbursement agencies.\textsuperscript{286}

\textbf{2.3.4.5 Phase V: Resort to the ATCA and the continuing quest for criminal liability}

As pointed out previously, Bhopal also led to the environmental pollution in the vicinity of the plant, including contamination of the ground water.\textsuperscript{287} Greenpeace reports of 1999 and 2002 amply document the level of contamination of soil and water on and around the plant site.\textsuperscript{288} To date, the plant site has not been cleaned, and toxins continue to seep through and contaminate the community water sources.

Being disappointed by the lack of will shown by the Indian government to respond effectively to the miseries of the Bhopal victims generally and to the contamination of the plant site specifically, victims' groups once again approached the US courts in November 1999 under the ATCA. This time, specific claims were also made for environmental contamination including of land and water wells, before as well as after the gas leak. While at this stage this litigation is far from over,\textsuperscript{289} a close perusal of a series of decisions indicates that the litigation does not offer much hope for the victims.\textsuperscript{290} No doubt, a 17 March 2004 decision of the US Court of Appeals did open a window of opportunity for making UCC clean up the plant site if the central and/or state governments intervene or agree to cooperate.\textsuperscript{291} The Indian government submitted a ‘no objection certificate’ for UCC cleaning up the plant site, but did not


\textsuperscript{287} Amnesty, \textit{Clouds of Injustice}, above n 68, 22-26.


\textsuperscript{290} The failure of the Indian government, which has exclusive standing to initiate proceedings related to Bhopal disaster, to support victims’ petitions, and also the defective pleading as well as erroneous arguments on the part of lawyers representing the victims helped the US courts in dismissing these petitions, primarily on procedural grounds. Deva, ‘From 3/12 to 9/11’ , above n 26, 5199-5200.
intervene or subject itself to the jurisdiction of the US courts. But even this small window was not properly utilised by victims’ lawyers. Recently, Bhopal survivors and activist undertook an 800 kilometres padyatra (a march on foot) from Bhopal to Delhi and staged an indefinite hunger strike in Delhi to press for their demands. The hunger strike was called off when the Indian Prime Minister accepted some of their demands.

The outcome of efforts to fix criminal liability on UCC-UCIL has not been much different from what we have seen regarding the struggle for civil responsibility. Although the Indian Central Bureau of Investigation (CBI) did file a charge sheet against UCC-UCIL and their personnel in December 1987, nothing much happened and then the Supreme Court’s settlement order quashed all pending criminal proceedings in February 1989. The quest for criminal liability got some momentum again after the Court reinstated the criminal proceedings in October 1991. Even after this, the criminal proceedings moved at a snail’s pace and had many curves and turns. For example, Warren Anderson, CEO of UCC – who was arrested soon after landing in India and then released on bail on the same day – did not appear before the court and was declared a proclaimed offender. Later on, the Indian Attorney General advised the government that the proceedings in the US for extradition of Anderson are not likely to succeed and, therefore, the same may not be pursued.

291 Sajida Bano v UCC 361 F. 3d 696, 716-17.
293 The District Court observed: ‘To date, plaintiffs have not sought reconsideration of Your Honor’s dismissal of plaintiffs’ claim for injunctive relief to remediate the UCIL site and the aquifer. Thus, these claims remain dismissed.’ Sajida Bano v UCC 2005 US Dist. LEXIS 32595, 8.
299 Lapierre & Moro, above n 34, 335-39; Murlidhar, above n 208, 4; Muchlinski, ‘The Bhopal Case’, above n 188, 550-51.
300 Murlidhar, above n 208, 36-39. The courts can declare a person who faces criminal charges but neither appears before it nor responds to its summons a ‘proclaimed offender.’
against. 301 Then the Indian Supreme Court, by reversing the judgment of the High Court, diluted the charges leveled at the Indian accused (but not against Anderson) from Section 304 Part II to Section 304A of the Indian Penal Code (IPC). 302

The criminal cases are still pending and a final conviction could still be far away. 303 Arguably the Indian government failed to live up to the expectations of victims on this front too. It could neither secure conviction of the Indian accused nor did it pursue vigorously the extradition of Anderson. It also supported the dilution of the charge against the Bhopal defendants from Section 304 Part II to Section 304A of the IPC. This overall inability or unwillingness of the Indian government to bring UCC and others to justice, it is suggested, is inconsistent with its obligations under international law to ensure the availability of an effective legal remedy for a violation of human rights, 304 assuming that the violations in question may be regarded as ongoing violations of norms binding upon the Indian state. This also leaves no doubt that, in the Indian context, at least the executive wing of the principal legal guardian of human rights (i.e., the state) has considered the creation of an MNC-friendly environment to be more important than safeguarding the rights of its own populace.

2.4 CONCLUSION

This chapter has tried to offer a basic understanding of Bhopal to the readers—Bhopal as a city, Bhopal as a site of victims' struggle for justice against UCC-UCIL, and at a general level Bhopal as a symbol of corporate impunity for human rights violations. 305


302 Keshub Mahindra v State of Madhya Pradesh (1996) 6 SCC 129; Murlidhar, above n 208, 34-35. Whereas Section 304 Part II of the IPC provides for an offence for 'culpable homicide not amounting to murder,' Section 304A creates an offence for causing death by 'rash or negligent act.'


305 A Greenpeace report notes that the Bhopal 'disaster, more than any other, highlights the current failure of governments to protect public welfare and the failure of corporations to observe basic standards e.g. the avoidance of liability by parent corporations, and the avoidance of responsibility for compensation and environmental cleanup.' Greenpeace, above n 26, 4.
An understanding of Bhopal was essential because throughout the thesis Bhopal will be invoked to investigate various issues related to corporate human rights abuses and in turn test, support, illustrate, or demonstrate various arguments advanced herein. Understanding Bhopal at the outset was critical for another reason too. Because ‘the Bhopal story is replete with ironies and contradictions’ and no one consensual narrative is readily available or even possible, the readers should know how I prefer to read Bhopal and why.

Although it was a Herculean task to elucidate fully the multiple dimensions of Bhopal in a short chapter like this, an attempt was made to capture the central features of Bhopal. I have explained, in the beginning, why Bhopal could be considered a representative case study to understand the dynamics of modern corporate human rights abuses – from the background of UCC’s entry and operations in India to the factual matrix surrounding the gas leakage, human rights implications of Bhopal and the victims’ quest for justice through five phases of litigation. This analysis was arguably refreshing for two reasons. First, I have tried to see Bhopal through the prism of human rights, a prism that has the potential to promote good corporate citizenship because of the power that the language of human rights carries with it. Second, it is suggested that pre-entry negotiations between MNCs and host states often prepare the groundwork for MNCs to violate human rights in developing countries by adopting inferior human rights standards or otherwise.

A brief examination of the five phases of Bhopal litigation, inter alia, highlights the absence and/or inadequacy of legal mechanisms – not only as they existed in 1984 but also the current ones – to effectively deal with instances of human rights abuses by MNCs. The next two chapters highlight this inadequacy in some more detail. Chapter 3 will develop an analytical framework for the evaluation of existing regulatory regimes that seek to impose and enforce human rights obligations against MNCs. Chapter 4 will then apply this analytical framework to test the adequacy of select regulatory initiatives. The hypothetical Bhopal – what would happen if Bhopal

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307 ‘Bhopal is clearly an example of twentieth century legal system running up against a twenty-first century problem.’ Cassels, ‘Outlaws’, above n 27, 332.
were repeated – is used to find out whether the legal response to Bhopal would be significantly different from what we have seen, if it occurred today.
CHAPTER 3: EVALUATION OF EXISTING REGULATORY INITIATIVES RELATED TO MNCs – AN ANALYTICAL FRAMEWORK

3.1 INTRODUCTION

It was pointed out in the previous two chapters that existing regulatory initiatives have proved inadequate to make MNCs accountable for human rights abuses. I intend to elaborate upon that claim further in this, and the following chapter. Both Chapters 3 and 4 should, therefore, be read in conjunction with each other. Whereas this chapter develops an analytical framework for the evaluation of existing regulatory initiatives that seek to make MNCs accountable for human rights violations, Chapter 4 evaluates selective representative regulatory initiatives as per the framework developed herein.

In my view, it is important for a number of reasons to develop an analytical framework for evaluating regulatory initiatives before venturing into the actual evaluation. First, how is the adequacy of existing regulatory initiatives to be judged? Moreover, what will make the regulatory framework mooted in this thesis a viable alternative? I propose that the adequacy of regulatory initiatives should be judged with reference to the objective of regulation, that is, the expected effect on the conduct of regulatees.¹ A regulatory initiative that aims to ensure that MNCs respect their human rights obligations should be labelled as adequate if it is effective on two levels: both preventing and redressing corporate human rights abuses. This twin

¹ Regulation implies 'the act of controlling, directing, or governing according to a rule, principle, or system.' Tony Prosser, Law and the Regulators (Oxford: Clarendon Press, 1997), 4.
efficacy should be the minimum prerequisite for justifying the existence as well as continuance of any regulatory initiative operating in this area.

Second, scholars concede that MNCs are difficult regulatory targets. But how could one explain this, given that this difficulty has not stifled the mushrooming of new regulatory initiatives? I argue that MNCs are difficult regulatory targets because of at least five regulatory dilemmas that their regulation poses: who should regulate what activities of which corporation, where, and how.

Third, as the existing regulatory initiatives dealing with corporate human rights responsibilities are too numerous and diverse to be examined in detail, how can one choose a representative sample out of a wide spectrum for the purpose of evaluating and making a claim about their (in)adequacy? I argue that the five regulatory dilemmas identified above could be used not only to differentiate one regulatory initiative from another but also to understand their taxonomy. The five differentiating variables, which correspond to five regulatory dilemmas mentioned above, are: the source from which regulatory initiatives flow; the content of obligations; the targeting approach; the level of operation; and the nature in terms of compliance strategy. These differentiating variables can help us in classifying existing regulatory initiatives into different heads. One can then pick up, as I do in the next chapter, certain representative initiatives from these heads, and could reasonably make a general claim about the inadequacy of the existing regulatory framework by evaluating the working of chosen specific initiatives.

This chapter begins with a brief explanation of the two levels of efficacy and their interrelation. It then explores the five ‘regulatory dilemmas’ that make MNCs ‘difficult regulatory targets.’ Finally, an attempt is made to understand the taxonomy of existing regulatory initiatives with the help of five differentiating variables, which are based on the identified regulatory dilemmas.

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3.2 THE TEST OF ‘TWIN EFFICACY’ AND EXISTING REGULATORY INITIATIVES

It is suggested that the inadequacy of existing regulatory initiatives that seek to impose and enforce human rights obligations on MNCs should be judged with reference to their efficacy. The efficacy of a norm can be tested by inquiring about the extent to which it has achieved its objectives, that is, by comparing the ‘actual’ effect of a given norm with its ‘intended’ effect. I argue that regulatory initiatives, for our purpose, can secure their intended effects if they are able to (a) encourage MNCs to comply with their human rights responsibilities, and (b) bring to justice those MNCs which are not so encouraged. Therefore, the efficacy of existing regulatory initiatives should be judged with reference to their efficacy in achieving these two objectives, which I call ‘preventive’ and ‘redressive’ levels of efficacy, respectively. A regulatory initiative should be considered adequate if it satisfies, to a varying degree, this test of twin efficacy elaborated below. The interrelation of these two levels of efficacy is also explained below.

3.2.1 Two Levels of Efficacy

A regulatory initiative related to corporate human rights responsibilities should be considered ‘effective’ if it can prevent or preempt human rights violations by MNCs – at least in some cases – and could offer adequate relief to victims in cases of violations. In other words, the efficacy of a regulatory initiative ought to be judged at two levels: the ability to prevent MNCs from indulging in violation of human rights obligations in the first instance (the preventive level) and to redress such violations adequately if they do occur (the redressive level). The efficacy, which has different implications for regulatory initiatives at the two levels, expected is not of an absolute but a reasonable standard.

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3 It is though possible to contend that regulatory dilemmas arise because MNCs are difficult regulatory targets. This argument is dealt with in part 3.3.1.

4 Tulkens writes that ‘when the effect of a norm is compared with the intended effect, it is the norm’s effectiveness that is measured; i.e. whether it has succeeded in putting the new rule into everyday practice.’ Françoise Tulkens, ‘Human Rights, Rhetoric or Reality?’ (2001) 9 European Review 125, 129.

5 Professor Stone labels these as ‘reductive’ goal (a primary goal) and ‘distributive’ goal (a secondary goal) of the law, respectively. Christopher D Stone, Where the Law Ends: The Social Control of
At the preventive level, a regulatory regime will be effective if it is able to encourage, persuade or convince not all but a sizable number of MNCs to take on board human rights responsibilities and take steps to avoid, as far as possible, contributing to human rights violations. By doing so, a regulatory initiative might achieve a degree of preventive efficacy by pre-empting human rights abuses. How could this be done? Each regulatory initiative could make a case, in its own way, that condoning or participating in human rights violations is not a viable business option, e.g., that there is a business case for human rights, or that human rights have to be observed as a precondition of doing business. Assuming that a majority of MNCs (or at least the people who run them) behave rationally most of the time, a regulatory regime may also enhance the potential cost of violating human rights in comparison to the cost of complying with them and convey this message to potential violators. It is important, however, that a given regulatory regime — in order to achieve this preventive efficacy — is able to convey such a message before MNCs take decisions that result in human rights violations.

Another reason why a serious effort should be made to encourage MNCs to respect their human rights responsibilities is because corporations are also regarded, by scholars like Thomas Donaldson and Peter French, as moral agents that could bear responsibility for their conduct. Although this position is not without its critics, it is...
arguable that corporations like individuals 'exhibit enough independence, decision-making capacity, self-control, and moral awareness to be considered moral agents.'

Ozar contends that 'the corporation is to be thought of as a single moral agent because ... a system of social rules exists which constitutes certain actions, performed by individual human persons, to be actions of the corporation as a single entity.'

Moreover, as corporations – which consist of individuals who bear individual moral responsibility while acting alone – make concerted efforts to achieve a certain mission, do make choices, can adjust their behaviour on account of criticism, and help people in emergencies, they may be attributed with a conscience. In view of the structure and the environment within which people take decisions within corporations, it should be no argument that the corporate moral agency is reducible to that of individuals who work for corporations. Regulatory initiatives should, therefore, utilise, to whatever extent possible, the corporate capability or propensity to behave as moral agents rather than suffocating moral initiatives on their part.

However, as it is likely that some MNCs will not be persuaded to respect human rights norms, or may defy the assumption of being rational economic actors or moral agents, a regulatory initiative should also have a redressive element. What should be the essential dimensions of this redressive element? I suggest that to achieve efficacy at the redressive level, a regulatory regime should exhibit at least four aspects. First, a regime should be able to respond with a range of sanctions or adverse consequences in a high percentage of cases involving corporate human rights violations. A reasonable certainty about an adverse penalty is *sine qua non* for efficacy, for too

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9 See, for example, Michael J Kerlin, 'Peter French, Corporate Ethics and the Wizard of Oz' (1997) 16 *Journal of Business Ethics* 1431.
13 Haines, for example, highlights the difficulties in promoting corporate virtue through law and legal institutions. Fiona Haines, *Corporate Regulation: Beyond 'Punish' or 'Persuade'* (Oxford: Clarendon Press, 1997).
14 Goodpaster argues that governments 'must permit enough corporate freedom for the exercise of moral responsibility' because a 'regulatory environment that would seek to replace corporate decision-making responsibility is also an environment that would suffocate corporal moral initiative.' Kenneth Goodpaster, 'The Concept of Corporate Responsibility' (1983) 2 *Journal of Business Ethics* 1, 20-21 (emphasis in original).
much uncertainty or unpredictability might induce potential violators (MNCs in this case) to take chances with regulation. Sanctions or adverse consequences need not always come from formal judicial institutions, but may also flow from market forces and stakeholders.\textsuperscript{16}

Second, a regulatory regime should be able to deal with the cases of alleged human rights violations by MNCs in a swift manner. Given that MNCs have been able to use litigation ‘delay as a defence’\textsuperscript{17} in the past,\textsuperscript{18} it seems essential for the efficacy of a regime that it is able to remove this extra-legal defence by cutting the time span taken in adjudication of disputes. For those regulatory initiatives which rely on formal judicial mechanisms to make MNCs accountable for human rights abuses, achieving this objective will necessarily involve overcoming delays caused by the corporate misuse of the doctrine of \textit{forum non conveniens}\textsuperscript{19} and the principles of separate personality and limited liability.\textsuperscript{20}

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\bibitem{note15} Shue observes that there should be some ‘reasonable level of guarantee,’ rather than an absolute guarantee, that rights are fulfilled. Henry Shue, \textit{Basic Rights: Subsistence, Affluence, and US Foreign Policy}, 2\textsuperscript{nd} edn. (Princeton, NJ: Princeton University Press, 1996), 17.
\bibitem{note16} I label adverse consequences such as naming and shaming, consumer boycott and public protest as ‘social sanctions.’ See Chapter 8.3.2.3.
\bibitem{note17} MNCs employ judicial delay in the adjudication of disputes, among others, to put pressure on victims to settle the pending legal dispute out of court in an unjust and unfair manner.
\bibitem{note18} Out of many instances, some are noted here. First, in Bhopal case it took more than four years to get the compensation from the UCC, though several related proceedings are still pending in the Indian and the US courts. Second, the pre-trial litigation against Texaco for environmental harm in Ecuador and Peru spanned for over seven years. Third, the proceedings against Unocal for human rights abuses in Myanmar continued in both state and federal courts of the US for more than seven years.
}
Third, another indicator of a regime's efficacy is the cost of enforcement it places on the victims of human rights violations. In a majority of the cases of large-scale human rights abuses involving MNCs, the victims are from a poor or disadvantaged section of the society. It will be unreasonable for regulators to expect that such victims will be able to fight for justice at any cost against an opponent possessing far greater economic and legal power. An effective regulatory regime, therefore, should have provisions for legal aid and a liberal *locus standi* requirement so as to balance the position of litigating parties.

Lastly, a regulatory initiative can claim to have redressive efficacy if it can deliver adequate relief to the victims of human rights violations. Relief in one sense could never be adequate in many cases, e.g., when there is irreversible environmental pollution, or there is a loss of human lives as well as injury to several future generations. Nevertheless, the concerned MNC should not be able to claim immunity from liability by paying a pittance. Settlements under which the compensation to the victims is paid as a matter of charity or mercy rather than in pursuance of the legal liability for a wrong should hardly be regarded as a sign of an effective regulatory framework. The settlement reached between UCC and the Indian government in the...
Bhopal case illustrates this. The settlement order, which was approved by the Indian Supreme Court, read: ‘The aforesaid payments [US$470 million] shall be made to the Union of India as claimant and for the benefit of all victims of the Bhopal gas disaster ... and not as fines, penalties, or punitive damage.’ Any regulatory regime which grants such a ‘release letter’ to an MNC is anything but effective, for the wrongdoer accepts no responsibility for the wrong committed. Such settlements also preempt the possibility of resultant litigation setting legal precedents for future cases.

Bhopal should not, however, be considered as an exception to this trend. In September 2003, Nike did not admit any liability but agreed to pay US$1.5 million to Fair Labour Association to settle a case which alleged it of making false and misleading statements about its labour practices. Similarly, in the Unocal case, the opaque nature of the settlement suggests that Unocal may not have admitted any liability for human rights abuses in Myanmar. More recently, James Hardie agreed to fund a compensation scheme for asbestos victims but again without admitting its legal liability for violating the right to life and the right to health of thousands of people.

3.2.2 Dynamics and Interrelation of Two Levels of Efficacy

The two levels of efficacy are interrelated and complementary to each other in the sense that the efficacy of a regulatory regime at one level will enhance the efficacy at the other level. In other words, the efficacy of a regulatory initiative at the redressive level will contribute to the efficacy of the initiative at the preventive level and vice versa. MNCs, on a balance of probabilities, might decide not to violate human rights

24 Union Carbide Corporation v Union of India AIR 1990 SC 273, 275 (emphasis added).
28 Braithwaite and Drahos tell us, on the basis of their experiences with the Australian Trade Practices Commission from 1985-1995, how taking to the court of selected cases that could send widest possible ripples gives the regulator a ‘clout’ to settle thousands of cases on the strength of a single phone call. John Braithwaite & Peter Drahos, ‘Zero Tolerance, Naming and Shaming: Is there a Case for it with
if they are convinced that violation will result in a penalty or adverse consequences which are significant and are certain to follow in a swift manner. On the other hand, if a regulatory initiative is effective in preventing or pre-empting human rights abuses, this should significantly reduce the enforcement costs or burden and in turn increase the redressive efficacy of the given regulatory initiative.

Two other aspects of the twin efficacy require clarification. First, not all regulatory initiatives will focus on, or aim to achieve, both levels of efficacy equally. For example, the ATCA – or any similar legislation at the municipal level – is directed more towards the redressive rather than the preventive level of efficacy. Conversely, an initiative like the Global Compact pays attention to the preventive level by encouraging corporations to respect and promote human rights. It is a different matter though that in view of an interrelation between the two levels of efficacy, the regulatory initiatives in both these examples are likely to contribute to the other level of efficacy as well. So, the requirement of twin efficacy is satisfied as long as a regulatory initiative incorporates components of both preventive and redressive levels of efficacy.

Second, regulatory initiatives are likely to employ different strategies to achieve these two levels of efficacy. Just to illustrate, whereas regulatory initiatives flowing from states could offer tax incentives to encourage corporations to respect human rights, corporate codes of conduct could put in place an internal mechanism by which human rights issues are integrated into day-to-day business decisions. Conversely, whereas state initiatives could redress corporate human rights abuses by introducing a range of coercive measures, codes of conduct could contribute to redressing grievances by laying down a complaint procedure and prescribing the range of compensation to be provided to those affected by corporate activities.

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3.3 Regulation of MNCs: Difficult Regulatory Targets, Regulatory Dilemmas, and the Taxonomy of Existing Regulatory Initiatives

Although MNCs are generally considered difficult regulatory targets, there is no dearth of regulatory initiatives that seek to ensure that MNCs respect their human rights obligations.\(^{30}\) One possible explanation for this paradoxical position could be that the regulation of those activities of MNCs which might impinge upon human rights is considered essential despite the challenges and hurdles inherent in this exercise.\(^{31}\) Such a perception of regulatory necessity (coupled with lack of any effective overall regulatory framework) probably contributes to the evolution of multiple regulatory initiatives.

This part, however, does not seek to solve the above paradox. Rather it tries to provide answers to two questions. First, why are MNCs considered difficult regulatory targets? Second, how could one select a representative sample out of the existing regulatory initiatives? It is submitted that MNCs are difficult regulatory targets because of several regulatory dilemmas that their regulation poses. Five such dilemmas have been explored below. I propose that these five regulatory dilemmas could also help in answering the second question. The five regulatory dilemmas could be translated into five differentiating variables, which can help us in understanding the taxonomy of existing regulatory initiatives and also choosing a representative sample for the purpose of analysis. The regulatory dilemmas related to MNCs, thus, serve two purposes: they explain why MNCs are difficult regulatory targets and provide a basis for classifying existing regulatory initiatives in different categories.

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\(^{31}\) Rubin, in a revised version of an article originally published as (1981) 30 American University Law Review 903, argued: 'Almost all nations agree on the desirability, if not the necessity, of some form of international regulation of TNC's.' Seymour J Rubin, 'Transnational Corporations and International Codes of Conduct: A Study of the Relationship between International Legal Cooperation and Economic Development' (1995) 10 American University Journal of International Law & Policy 1275, 1282. It can be argued that in recent years, in view of growing instances of corporate impunity for human rights abuses, regulation of MNCs has become more of a 'necessity.'
3.3.1 MNCs as ‘Difficult Regulatory Targets’ and ‘Regulatory Dilemmas’: A (Circular) Relation?

MNCs are considered difficult regulatory targets generally by scholars and regulators alike. This squarely applies to those regulatory initiatives that seek to impose and enforce human rights obligations on MNCs. But why are they considered difficult regulatees? Is it because of the regulatory dilemmas that their regulation poses or for some other reasons? Some of the common reasons that make MNCs difficult regulatory targets can be summed up here. First, regulation of conduct itself is a difficult task, more so when one has to regulate a fictitious legal person. For example, not only do individuals tend to lose ‘some of the ordinary internalised restraints’ when placed in an organisational structure, but also some major sanctions that can be invoked to control human beings are unavailable against corporations. Furthermore, as we are dealing with the regulation of not mere corporations but MNCs, such a fiction becomes multi-layered and could be called ‘fiction infinite’ as there is no limit on how an MNC could structure its operations through a web of

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33 I consider the corporation a legal fiction created by the state. See George W Paton, A Textbook of Jurisprudence, 4th edn. (Oxford: Clarendon Press, 1972), 410-11. Salmond considered extension of personality beyond human beings as ‘one of the most noteworthy feats of the legal imagination.’ P J Fitzgerald (ed.), Salmond on Jurisprudence, 12th edn. (London: Sweet & Maxwell, 1966), 66. Stone argues that one of the reasons for ineffective regulation of corporations is ‘the law’s failure to search out and take into account special features of business corporations as actors that make the problem of controlling them a problem distinct from that of controlling human beings.’ Stone, above n 5, 1, and also 7, 26-28 (emphasis added).

34 Stone, above n 5, 35-36.
parent, subsidiary and affiliate sister concerns. This legal leeway ipso facto makes MNCs difficult regulatory targets.

Second, another related reason is provided by the twin vintage principles of corporate law: the principles of separate personality and limited liability. Although these principles evolved at a time when the notion of an MNC was unknown and arguably had not been originally intended to apply to corporate groups, the modern MNCs take full advantage of them to escape the clutches of regulatory initiatives. Of course, in principle it is permissible to pierce the corporate veil in certain given situations, but the associated evidentiary burden has not proved to be easy to discharge – considering that parent corporations keep ‘distance by design’ from their subsidiaries.

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37 See Joseph, Transnational Litigation, above n 20, 129-43.

38 ‘In fact, historically corporations even lacked the power to acquire and hold shares of other corporations unless expressly granted by special statute or charter provisions. Philip I Blumberg, The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality (Oxford: Oxford University Press, 1993), 52 (hereinafter Blumberg, The Multinational Challenge to Corporation Law).


40 Above n 20.

41 Courts can lift the veil and disrobe the separate personality of a corporation when it is a sham, or used as a ‘cloak’ for fraud or illegality, or when corporation is a ‘puppet’ of the owner. See, for example, Walkovsky v Carlton 276 NYS 2d 585, 223 NE 2d 6 (1966); Wallersteiner v Moir [1974] 3 All ER 217; Tata Engineering & Locomotive Co. Ltd. v State of Bihar AIR 1965 SC 40; LIC v Escorts Ltd. AIR 1986 SC 1370. See also Paul Davies, Gover and Davies’s Principles of Modern Company Law, 7th edn. (London: Sweet & Maxwell, 2003), 176-90; Roman Tomasic, Stephen Bottomley & Rob Mcqueen, Corporations Law in Australia, 2nd edn. (Annandale: Federation Press, 2002), 42-50.

Third, MNCs become difficult regulatory targets because they not only operate at a transnational level, but also move their operations from one jurisdiction to another, especially if they apprehend that legal proceedings against them could be instituted in a particular jurisdiction.\textsuperscript{43} In fact, in the course of moving their operations, MNCs may \textit{legally} become invisible, disappear totally, or take a new form and name.\textsuperscript{44} If the victims try to sue the parent MNC, it is most likely to frustrate victims' strategy by invoking the doctrine of \textit{forum non conveniens}.\textsuperscript{45} All this makes the regulation of MNCs' human rights violative activities almost impossible: municipal law mechanisms find themselves wanting, extraterritorial measures are fraught with difficulties of their own, and the international regulatory framework is still undeveloped.\textsuperscript{46}

Fourth, regulatory initiatives that seek to impose and enforce human rights obligations against MNCs challenge several traditional legal concepts. Apart from privatising human rights radically, the extraterritorial or international regulation of MNCs' activities also creates problems for state sovereignty in that such measures would entail states other than where MNCs are operating or international bodies exercising universal regulatory jurisdiction over MNCs' activities.\textsuperscript{47} The notion of corporate human rights responsibilities also demands a reorientation in the place and role of MNCs in society in that they are not to be seen as merely profit maximising entities.

Fifth, the primary objective and ideology that guides the establishment as well as running of corporations provides another reason for MNCs being considered difficult

\textsuperscript{43} The recent investigation into the shifting of location from Australia to Netherlands by James Hardie Industries provides a good example of this. The Special Commission of Inquiry into Medical Research and Compensation Foundation, <http://www.lawlink.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/pages/MRCF_index> (last visited 30 July 2006).

\textsuperscript{44} From the perspective of establishing liability, the rebirth of corporations becomes more problematic if the laws of a given place do not recognise the doctrine of 'successor liability'. For example, the UK law does not recognise this doctrine. Dan D Prentice, 'Veil Piercing and Successor Liability in the United Kingdom' (1996) 10 Florida Journal of International Law 469, 480-81.

\textsuperscript{45} Above n 19.


regulatory targets. One of the reasons why MNCs are seemingly difficult regulatory targets is the lack of a strong political will to regulate effectively their human rights violative activities. This is not to suggest that MNCs operate in a regulatory vacuum or that states and international bodies are taking no measures to promote corporate human rights responsibilities. I have already highlighted that there is perhaps an oversupply of regulatory initiatives in this area. Rather the point is that in an environment of free markets and globalised economies, states – both developed and developing – face different pressures and dilemmas when it comes to regulating the activities of MNCs, which possess unparalleled power and influence. Out of numerous, some examples may be given to support this contention. The US government has not only opposed the use of the ATCA to make MNCs accountable for human rights abuses abroad, it also voted in the UN Commission on Human Rights against a resolution on human rights and MNCs. Attempts to enact an extraterritorial law to regulate the overseas activities of corporations registered in their respective jurisdictions have failed in the US, Australia, and the UK. Despite tremendous pressure from asbestos victims, the Australian government did not proceed to make James Hardie legally accountable for its past deeds; it also rejected the proposed amendment of the corporate law that would have imposed specific duties on directors to take into account the interests of the wider community. On the other hand, the government of a developing state like Papua New Guinea went out of its way to legislate to limit the

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48 'It also is clear that English law considers risk shifting by use of the corporate form as perfectly legitimate.' Prentice, above n 44, 484. Dine also argues that the "moral" philosophy of market liberalism effectively releases those who have property from an obligation to those who do not." Janet Dine, 'Multinational Enterprises: International Codes and the Challenge for "Sustainable Development"' (2001) 1 Non-State Actors & International Law 81, 97, and generally (hereinafter Dine, 'Multinational Enterprises').


50 Joseph, Transnational Litigation, above n 20, 55-60.


liability of an MNC for causing environmental degradation and violating human rights.\textsuperscript{54} We have also seen in Chapter 2 how the Indian government has handled the issue of Warren Anderson’s extradition to face criminal charges for Bhopal.

Apart from these specific illustrations, two general aspects also deserve a mention. First, under the existing regulatory framework, the cost for MNCs to observe human rights is greater than the benefits that might accrue for doing so.\textsuperscript{55} Given that situation, it is not surprising if some MNCs consciously violate human rights because of a fear of losing competitive advantage.\textsuperscript{56} Second, with few exceptions, neither municipal corporate law nor international economic law requires MNCs to take human rights norms into account while making business decisions.\textsuperscript{57} In short, when MNCs are regarded as key economic entities for wealth generation and are expected to generate maximum profit for their shareholders, it is natural that their focus will be on earning just profit and not just profit\textsuperscript{58} – notably, promotion of human rights is still not considered as part of business ‘profit’.\textsuperscript{59}

The above summary account may give the impression that dilemmas in the regulation of MNCs’ activities arise because MNCs are difficult regulatory targets. In other words, it might suggest that regulatory dilemmas are the effect of MNCs being


\textsuperscript{55} ‘Socially irresponsible behaviour of a corporation should not be condoned, but in the current global climate there is no long-term incentive for a corporation to adopt a code of conduct.’ Erin Elizabeth Macek, ‘Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights’ (2002) 11 Minnesota Journal of Global Trade 101, 115. This remains so despite the business case for human rights. See Chapter 5.3.1.

\textsuperscript{56} As far as the international economic law is concerned, one may refer to Article XX of the General Agreement on Tariffs and Trade (GATT) 1994. On the other hand, municipal corporate laws of some countries ‘now’ require corporations to take into account the interest of their stakeholders, e.g., Companies Act 2006 (UK), ss 172(1) and 417(5)/(6). See also Corporations Act 2001 (Aus), ss 299(1)(f) and 1013D(l).

\textsuperscript{57} Nobel Laureate Professor Muhammad Yunus, in a path-breaking proposal, ‘called for a social stock market to list a new variety of business – social business – to do good to people on a no loss, no dividend basis.’ ‘Let There be a Stock Market for Social Business: Yunus’, \textit{The Hindu} (4 February
considered difficult regulatory targets. I will, however, prefer to take a different position. It is not denied that the relationship between MNCs as ‘difficult regulatory targets’ and ‘regulatory dilemmas’ concerning the regulation of their activities could be a circular one: whether regulatory dilemmas are the ‘cause’ or the ‘effect’ of MNCs being considered difficult regulatory targets could be a moot point. Nevertheless, I am of the view that various regulatory dilemmas are the cause of MNCs being considered difficult regulatory targets.

The reasons – that make MNCs difficult regulatory targets – identified above relate to the five regulatory dilemmas discussed in the next section. For example, the first two reasons have a nexus with the third regulatory dilemma: which corporation, out of a corporate group, should be targeted by regulatory initiatives? Similarly, the third reason – which embodies the problem posed by transnational operations and their movement from one jurisdiction to another – is directly connected to the fourth dilemma: where should regulation take place in order to be effective? On the other hand, the fourth reason that points out a ‘deficit of political will’ raises questions which are relevant to the second dilemma: what should be regulated? It is also conceivable that if other possible reasons that make MNCs difficult regulatory targets do exist, they could be related to these five or other similar regulatory dilemmas.

3.3.2 Understanding the Taxonomy of Existing Regulatory Initiatives:
‘Regulatory Dilemmas’ as ‘Differentiating Variables’

As pointed out in the beginning of this chapter, there exist at least five dilemmas concerning the regulation of MNCs or their operations: who should regulate what activities of which corporation, where, and how? I demonstrate how these five regulatory dilemmas have made MNCs difficult regulatory targets, and consequently

60 These five dilemmas are a further extension of my argument that the regulation of MNCs poses at least ‘four’ dilemmas. Surya Deva, ‘Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should “Bell the Cat”?’ (2004) 5 Melbourne Journal of International Law 37, 41, and 41-46 for elaboration of the argument (hereinafter Deva, ‘Who Should “Bell the Cat”?’). 61 It should be noted that these five dilemmas do not include another dilemma related to ‘why’: why the regulation of MNCs is necessary. Although it is now widely accepted that MNCs should have human rights obligations, I formulate positive justifications for this in Chapter 5.

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regulatory initiatives have still not been able to match the power, multi/transnational structure, operations and modus operandi of MNCs.

The five regulatory dilemmas are, however, employed here to achieve another objective too. The regulatory dilemmas are used in understanding the taxonomy of current regulatory initiatives concerning human rights obligations of MNCs and classifying them into different categories. Such classification will enable me to choose a representative sample of the existing initiatives, which are then evaluated to draw general conclusions about the (in)adequacy of the existing regulatory framework. I propose that existing regulatory initiatives could be classified into different groups on the basis of five differentiating variables: the source from which regulatory initiative flow; the content of obligations; the targeting approach; the level of operation; and the nature in terms of compliance strategy.62

These five differentiating variables correspond to the five regulatory dilemmas that confront the regulation of MNCs' activities, and the relationship between the two is illustrated in Table 3.1 below. As one can see, the first variable source is a response to the first regulatory dilemma of 'who' should regulate MNCs' activities. The second dilemma – 'what' should be regulated – translates into the content of human rights obligations. 'Which' corporation of a corporate group should be regulated, the third regulatory dilemma, corresponds to the third variable, namely, the targeting approach adopted by different regulatory initiatives. Similarly, the fourth differentiating variable (the level of operation) is a direct response to 'where' should regulation occur. Lastly, the fifth variable (nature) is a reflection of the fifth regulatory dilemma, i.e., 'how' should regulation be supported?

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62 The five factors listed above are not, however, exhaustive in any way, and more similar differentiating variables could be thought of.
Table 3.1: Basis, and the Objective, for Classifying Existing Regulatory Regimes

Table 3.1 also throws some light on the analytical objective served by differentiating one regulatory regime from another on the basis of five variables chosen here. Although it is outside the scope of this thesis to demonstrate in detail how these objectives could be served, a brief explanation and direction for such future inquiry is provided under the respective sub-headings.

3.3.2.1 ‘Who’ should regulate? – The ‘source’ of regulatory initiatives

The first dilemma concerns who should regulate the activities of MNCs, in order to ensure that they respect their human rights obligations? Should the regulation be carried out by internal or external sources, or a combination of the two? In order to

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63 Macek refers both to consumer pressure which provides ‘an incentive for a corporation to voluntarily adopt a code of conduct,’ and to examples of various external institutions which may be positioned to
achieve an effective regulatory framework, should regulatory initiatives flow from MNCs, states, international organisations, civil society organs, or all of the above? This kind of regulatory dilemma points towards the ‘source’ of regulatory initiatives: *internal* and *external*.64 Whereas a regulatory initiative is internal when it owes its origin to the potential violators of human rights (MNCs in the present case), it is external when it flows from those organs of society that aim to protect and promote human rights (such as states, international institutions, and NGOs). Voluntary codes of conduct or principles formulated and adopted by MNCs are an example of internal regulatory initiatives.65 Such codes could also be area, issue or industry specific.66

Although internal regulatory initiatives would seem to be the most efficient way of ensuring that MNCs respect human rights,67 they have proved to be an inadequate mechanism of regulation. Internal regulatory initiatives generally have imprecise or limited content, lack mechanisms for independent assessment, and are short on enforcement procedures.68 Therefore, the search for, and evolution of, more effective

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64 Deva, ‘Where from Here?’, above n 46, 4.
66 For example, the Equator Principles – which were first adopted by 10 banks on 4 June 2003 – relate to financial institutions. They now extend to 25 financial institutions located in 14 countries.
67 Slaughter notes that ‘states can allow private actors to develop their own codes of conduct and then incorporate those codes into official regulation, thereby purportedly ensuring the efficiency of the rules that are adopted.’ Anne-Marie Slaughter, ‘A Liberal Theory of International Law’ (2000) 94 American Society of International Law Proceedings 240, 244. Picciotto also highlights the advantages of corporate codes and argues that ‘the sharp distinction between voluntary codes and binding law is inaccurate, undesirable, and unnecessary’. Sol Picciotto, ‘Rights, Responsibilities and Regulation of International Business’ (2003) 42 Columbia Journal of Transnational Law 131, 144-50. See also Ayres & Braithwaite, above n 32, 113.
methods of external regulation continues. Regulatory initiatives at municipal as well as at international levels are initiatives that fall in this category. The Sullivan Principles, the Clean Clothes Campaign, the Sustainability Guidelines of the Global Reporting Initiative, and the codes of conduct or labelling techniques framed by NGOs like Amnesty International and Social Accountability International are also examples of the external regulatory initiatives.

However, external regulatory initiatives too have limitations. States may be unwilling to regulate MNCs, or even if willing, may find themselves incapable to regulate effectively the activities of MNCs. On the other hand, the regulatory initiatives at the international level, though desirable, lay down vague guidelines and also lack effective implementation tools at this stage. In sum, regulatory initiatives flowing from both internal and external sources have their own limitations, and the debate about a judicious mix of internal and external regulatory initiatives has so far not provided concrete answers. For this reason, MNCs continue to be difficult regulatory targets.

Despite the distinction that I have drawn above between internal and external regulatory initiatives, one should not lose sight of the fact that the distinction may not always be very clear, especially when more and more emphasis is put on developing regulatory partnerships and cooperative regulation, and on the participation of affected groups in the decision-making process. For example, an MNC may formulate

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69 Below n 136 to n 140.
70 For example, OECD Guidelines; ILO Declaration; Global Compact; UN Norms. Above n 30.
76 See Chapter 4 for discussion.
77 See, e.g., Global Compact, above n 30. Similarly, the United Nations Environment Programme Finance Initiative (UNEP FI) is a global partnership between the UNEP and the private financial sector. See <http://www.unepfi.org/about/index.html> (last visited 16 January 2006).
a code of conduct after extensive consultations with consumers, human rights activists, NGOs and labour unions. Similarly, external agencies such as the OECD, ILO and the UN often consult with MNCs (or at least their representative bodies) before finalising what I designate as an external code. A similar overlap also exists in relation to the implementation and enforcement mechanism under internal and external regulatory initiatives. Whereas an internally formulated regulatory code could be enforced both internally as well as externally, an external regulatory initiative also involves a process of internalisation.

Nevertheless, it is critical to make the distinction between the internal and external sources of regulatory regimes for a number of reasons. First, one can measure the gap between MNCs' acceptance of their human rights responsibilities through internal codes and the expectations of their stakeholders reflected in external regulatory initiatives. Second, it is particularly useful to contrast and impeach the actual conduct of MNCs with reference to the codes of conduct drawn and adopted by them rather than vis-à-vis external regulatory initiatives. Third, one can judge, by reference to the distinction between internal and external initiatives, the level of commitment, integrity and seriousness of the regulatory actors behind a given initiative in ensuring that MNCs respect their human rights obligations. For example, drawing on the research on the pitfalls involved in private rule writing, one may investigate if the vagueness in specifying human rights responsibilities and the lack of enforcement provisions in a given internal code of conduct is evidence of window dressing.

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78 Murphy notes that ‘relevant stakeholders are typically a part of the drafting process.’ Murphy, above n 65, 401.

79 See, for example, the multi-stakeholder consultation conducted during the drafting of the UN Norms. Weissbrodt, above n 51, 67-68.

80 The model of ‘enforced self-regulation’ proposed by Ayres and Braithwaite encompass, for example, the involvement of corporations, public interest groups and regulatory agencies in enforcing rules. Ayres & Braithwaite, above n 32, 106-07. See also Orts’s model of reflexive environmental law. Orts, ‘A Reflexive Model’, above n 32, 785-87.


82 Simons, for example, writes: A comparison of the voluntary codes and/or policies of BP, Shell, Talisman and Premier Oil is illustrative of the lack of consistency between, and the insufficient definition of, human rights commitments set out in corporate policy documents. Each corporate policy displays a slightly different level of commitment to respect human rights and none of the codes or policies makes a clear statement of obligation on the part of the company to be bound by international human rights standards. Simons, above n 68, 107, and generally 106-08. See also Redmond, above n 42, 89-90.
Similar factors in an external regulatory initiative, on the other hand, may point towards lack of political will and/or an attempt for public appeasement.

3.3.2.2 'What' should be regulated? – The 'content' of regulatory initiatives

The next regulatory dilemma could be framed in terms of what: what are the exact areas or activities of MNCs that need to be regulated? Should labour rights or environmental rights be dealt with separately (and by separate institutions) from human rights? Further, should tax avoidance or the problem of bribery be part of regulatory efforts that deal with human rights? There are also disagreements about the scope and extent of obligations regarding given human rights. For example, will an MNC that manufactures life saving drugs violate human rights merely by selling drugs at a premium price? Moreover, should the nature of human rights obligations of MNCs doing business in information technology be similar to that of those which operate in the mining sector? The crux of the dilemma is: what is the extent to which MNCs should go in promoting human rights?

All these unresolved and contested issues again make MNCs difficult regulatory targets. In view of a significant divergence between the regulatory expectations of MNCs and their representative bodies on the one hand and human rights activists on the other, states – either acting individually or collectively – struggle to balance these contradictions. MNCs expect all-pervasive deregulation, except in those areas where deregulation hampers their capacity to maximise profit, e.g., intellectual property rights or law and order. Human rights activists, on the other hand, demand extensive regulation in matters affecting the public interest, including human rights. They expect states to provide a level playing field to the otherwise unequal bargaining positions of MNCs and the general public, whether as employees, consumers or

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83 Historically, developed countries – the places where most of MNCs are based – have placed greatest emphasis on putting in place international standards dealing with combating corruption, transparency, competition, and taxation.

84 Dobbin writes: 'Corporations want more – more cuts to their taxes, more cuts to UI [unemployment insurance] and pension premiums, ever greater cuts to social programs, more repeals of environmental laws and protections for workers' health and safety, and more and better ways to squeeze more from their employees.' Dobbin, above n 49, 2.

85 'A strong and vigorous state is not only seen as a prerequisite to the protection of civil and political rights ... it is also seen as essential to protect economic and social rights.' Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003), 191.
otherwise. 86 This divergence concerning the desirable content of regulation acquires new relevance amidst the perception that the sovereignty and power of states to regulate MNCs are withering in an era of globalisation. 87 Of course states need to reorient their regulatory role in view of globalisation. 88 But serious concerns are expressed if this reorientation results in states ignoring or tolerating human rights abuses by MNCs. 89

One can note from the above that a lack of consensus about the content of MNCs’ human rights obligations makes it very difficult to put in place a regulatory framework that comprehensively deals with all the human rights obligations. Therefore, what we have generally witnessed is an incremental and piecemeal approach to the formulation of MNCs’ human rights obligations. A comparison of current regulatory initiatives reveals that the content of human rights obligations of MNCs differs primarily in two respects: the ‘width’ of obligations (i.e., the subject

86 Slaughter observes that ‘state law is likely to be needed to regulate conflicts between different private actors in transnational society. When one side or the other – corporations or NGOs – perceives a major power imbalance, it is likely to appeal for state intervention ... many corporations on the receiving end of NGO-organized consumer boycotts are likely to seek some kind of government redress.’ Slaughter, above n 67, 244-45(emphasis added).

87 ‘[S]tate sovereignty has been parcelled out up (to international institutions such as the World Trade Organisation – WTO – and Bretton Woods Institutions) and down (to market actors and NGOs). Rajagopal, above n 85, 12, and also 14 (emphasis added). See also Claudio Grossman & Daniel D Bradlow, ‘Are We Being Propelled Towards a People-Centered Transnational Legal Order?’ (1993) 9 American University Journal of International Law & Policy 1; Sherif H Seid, Global Regulation of Foreign Direct Investment (Aldershot: Ashgate, 2002), 102-4; Dobbins, above n 84, 107-11; and generally David C Korten, When Corporations Rule the World (West Hartford, Connecticut: Kumarian Press, 1995); Noreena Hertz, The Silent Takeover: Global Capitalism and the Death of Democracy (London: William Heinemann, 2001). Sassen argues that a loss of sovereignty is not occurring, but merely a reconstitution of it: ‘it seems to me that rather than sovereignty eroding as a consequence of globalization and supranational organizations, it is being transformed.’ Saskia Sassen, Losing Control? Sovereignty in an Age of Globalization (New York: Columbia University Press, 1996) 30, and generally 1-30.


89 Baxi questions: For whom, and when the ‘nation-state’ has ‘ended’ ... [t]he so-called borderless world remains cruelly re-bordered for the violated victims ... Myanmar is thus borderless for Unocal, though not for Aung San Su Kyi and the thousands of Burmese people she symbolizes. India is borderless for Union Carbide and Monsanto but not for the mass disaster violated Indian humanity. Ogoniland is borderless for Shell but becomes the graveyard of human rights and justice for a Ken Saro Wiwa, and the people’s movement martyred alongside him. Upendra Baxi, The Future of Human Rights (2002) 136-7 (emphasis in original).
areas covered) and the 'depth' of obligations (i.e., whether obligations of MNCs are merely negative in nature or also extend to the taking of positive steps). 90

In terms of the width of human rights obligations, the recent UN Norms, coupled with Commentary appended to them, 91 provide the most comprehensive and detailed statement of MNCs' human rights (including labour and environmental rights) obligations. 92 The ATCA, on the other hand, is probably an example of the other extreme in that it provides a cause of action only for torts committed against non-US nationals in violation of the law of nations or a treaty of the US. 93 In between these two extremes, one could place (and probably grade as shown in Figure 3.1) various other regulatory regimes such as the OECD Guidelines, the ILO Declaration, the Global Compact, and various types of codes of conduct. 94 Whereas the ILO Declaration by and large focuses on areas such as employment, training, conditions of work and life, and industrial relations including collective bargaining, 95 the OECD Guidelines deal with a range of human rights and arguably non-human rights issues (e.g., employment and industrial relations, environment, consumer interests, science

90 The distinction between positive and negative rights may be illusory and misguided, but, as Shue points out, a 'useful distinction' among duties correlative to rights does exist. Shue, above n 15, 35-46, 52. This distinction is more useful in the context of MNCs, whose human rights obligations are not similar to that of states. See Chapter 1.4.2.
93 Although the phrase 'law of nations' seemingly looks quite wide in its ambit, it has received restrictive judicial interpretation; even violation of a treaty of the US has been interpreted to refer to only self-executing treaties. The majority judgment of the US Supreme Court in Sosa seems to limit the scope of ATCA further by holding that it provides a 'limited, implicit sanction to entertain the handful of international law cum common law claims understood in 1789.' Jose Francisco Sosa v Humberto Alvarez-Machain 124 S. Ct. 2739, 2754 (2004). The Court further observed that the 'federal courts should not recognise private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilised nations than the historical paradigms familiar when' the statute was enacted. Id., 2765 (emphasis added). See, for discussion, Chapter 4.2.1; Joseph, Transnational Litigation, above n 20, 22-33, 53-54; and generally James Boeving, 'Half Full ... or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain' (2005) 18 Georgetown International Environmental Law Review 109.
94 See Table 4.1.
95 ILO Declaration, above n 30, 187, 190-95 (Introduction; paras 13-59).
and technology, disclosure, bribery, competition, and taxation). The Global Compact, on the other hand, consists of ten ‘one-liner’ principles in four areas: human rights, labour, environment, and anti-corruption.

As far as the depth of MNCs’ human rights obligations is concerned, the UN Norms are again at the forefront of canvassing positive human rights obligations. The

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96 OECD Guidelines, above n 30, 240-46.
97 Professor Weissbrodt notes that the Global Compact ‘contains ten short sentences.’ Weissbrodt, above n 51, 66.
99 UN Norms, above n 30, para 1 and 12. See also the Commentary on the Norms, above n 91, Commentary (b) to para 1.
positive content of corporate obligations is less clear under the Global Compact,\textsuperscript{100} the ILO Declaration,\textsuperscript{101} and the OECD Guidelines.\textsuperscript{102} This position is hardly surprising given that until recently scholars had argued that it would be unreasonable to put MNCs under positive human rights obligations.\textsuperscript{103}

Now let us turn to the question of the analytical objective served by classifying existing regulatory initiatives into different categories on the basis of their ‘content.’ In my view, by comparing the content of a regulatory initiative vis-à-vis other initiatives one can judge the relative amplitude and strength of the protection afforded by that particular initiative. As indicated above, the level of human rights protection available under a given regulatory initiative will depend, among others, on both the \textit{width} and \textit{depth} of human rights obligations,\textsuperscript{104} for in the absence of one the other loses its effect. To illustrate, MNCs should not only be obligated to recognise collective bargaining but also facilitate such bargaining by its policies, say, by not insisting on individual employees’ contracts. Conversely, extensive obligations but only in few areas will also be not adequate.

\textbf{3.3.2.3 ‘Which’ corporation of a corporate group should be regulated? – The ‘targeting approach’ of regulatory initiatives}

As MNCs, by definition, consist of several integrated corporations – structured in pyramidal order or otherwise\textsuperscript{105} – their structure per se poses another regulatory dilemma. \textit{Which} corporation of a given corporate group should be targeted by a regulatory initiative? Should the ultimate parent of a group be held accountable for

\textsuperscript{100} Principle 2, for examples provides that businesses should ‘make sure that they are not complicit in human rights abuses.’ Similarly, under Principle 8 businesses agree to ‘undertake initiatives to promote greater environmental responsibility.’ Global Compact, above n 30.

\textsuperscript{101} ILO Declaration, above n 30, 188-91 (e.g., paras 2, 5, 8, 16, and 22).

\textsuperscript{102} One can infer this from the use of the terms ‘contribute,’ ‘provide’ and ‘promote’ in the OECD Guidelines at several places. OECD Guidelines, above n 30, 240-44 (paras II.1, II.8, IV.1/2/3, and V.7/8).

\textsuperscript{103} See, for example, Thomas Donaldson, \textit{The Ethics of International Business} (New York: Oxford University Press, 1989), 83-84.

\textsuperscript{104} ‘The extent to which human rights are recognised, protected and enforced depends largely on the nature and scope of the rights protected in the first instance, the constitutional position of the legislation enacted to secure these rights in the second, and the manner in which rights are upheld and enforced in the third.’ Jonathan L Black-Branch, ‘Parliamentary Supremacy or Political Expediency?: The Constitutional Position of the Human Rights Act under British Law’ (2002) 23 \textit{Statute Law Review} 59 (emphasis added).
the conduct of all corporations so as to treat the whole group as one ‘enterprise,’ or each and every corporation of a group be treated as a separate ‘entity?’ This dilemma, which has its roots in the twin principles of separate personality and limited liability, reaches its zenith when the ultimate or immediate parent of an apparent corporate violator is located outside the territorial boundaries of the state in which the impact of human rights violations is felt.

Questions arise as to how states should and could overcome this regulatory dilemma. States have responded in diverse ways such as supporting the evolution of an international regulatory regime, attempting to reach overseas subsidiaries through extraterritorial laws, or approaching the courts of the country where the parent MNC is based to pierce the corporate veil or recognise the enterprise principle. The existing regulatory initiatives have also adopted different approaches to overcome this dilemma, and on the basis of a difference in their approaches, they could be classified into different heads. One could examine whether regulatory initiatives have adopted the entity principle (i.e., treated every corporation of a corporate group as a separate entity), or the enterprise principle (i.e., treated all the corporations of a group as a single enterprise) for the purpose of imposing and enforcing human rights obligations against MNCs. Another issue relevant only in the context of international regulatory

105 Professor Muchlinski describes several types of structures in which MNCs could be organised. Peter T Muchlinski, Multinational Enterprises and the Law, revised edn. (Oxford: Blackwell Publishers, 1999), 65-70.

106 The ‘enterprise principle’ and ‘entity principle’ provide opposing justifications for the appropriate reach of a regulatory regime. Whereas the traditional ‘entity principle’ treats each corporation as a separate person, the ‘enterprise principle’ treats all the constituent corporations of a group as one legal person, for a particular purpose, provided they are part of an integral business group. Blumberg, The Multinational Challenge to Corporation Law, above n 38, viii-ix; Blumberg, ‘Conceptual and Procedural Problems’, above n 19, 494-95. See generally Phillip Blumberg, ‘The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities’ (1996) 28 Connecticut Law Review 295; David Aronofsky, ‘Piercing the Transnational Corporate Veil: Trends, Developments, and the Need for Widespread Adoption of Enterprise Analysis’ (1985) 10 North Carolina Journal of International Law & Commercial Regulation 31;

107 Dine contends:

There are significant difficulties in enforcing corporate obligations in poor host states and a more profitable route may be to explore the possibility of compelling rich host (sic) nations to improve their record on “lifting the veil” so that parent companies would become liable for the way in which they exercise control over their foreign subsidiaries.

Dine, ‘Multinational Enterprises’, above n 48, 84.

108 See Joseph, Transnational Litigation, above n 20, 129-43; above n 30; above n 52.
initiatives is if they impose and implement obligations against MNCs through states—an indirect approach\textsuperscript{109}—or try to reach them directly.\textsuperscript{110}

One could notice a divergence in the approach adopted by different regimes vis-à-vis the entity versus enterprise principle. The Global Compact,\textsuperscript{111} and the internal corporate codes of conduct are seemingly wedded to the principles of separate personality and limited liability and therefore, treat every corporation of a corporate group as a separate entity for the purpose of imposing obligations. The OECD Guidelines,\textsuperscript{112} and the ILO Declaration\textsuperscript{113}—though do not embrace the enterprise principle—expect various entities of a corporate group to cooperate and provide assistance to each other to facilitate the observance of enumerated responsibilities.

The UN Norms, on the other hand, try to overcome this entity versus enterprise dilemma by extending responsibilities not only to MNCs but also to other business enterprises.\textsuperscript{114} In addition, the UN Norms also provide that MNCs and other business enterprises ‘shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, [and] distributors’—implying thereby that MNCs exercise a degree of influence and control


\textsuperscript{110}See Jennifer A Zerk, Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law (Cambridge: Cambridge University Press, 2006), 76-93.

\textsuperscript{111}It is, however, possible to contend, for two reasons, that the Global Compact treats MNCs as one enterprise. First, it asks ‘companies to embrace, support and enact, within their sphere of influence.’ The sphere of influence should arguably include all subsidiaries of an MNC. Global Compact, above n 30. Second, the Global Compact applies the leadership principle, that is, if the Chief Executive Officer of a parent MNC embraces the Compact principles, it is assumed that all subsidiaries participate too. Surya Deva, ‘The UN Global Compact for Responsible Corporate Citizenship: Is it Still too Compact to be Global?’ (2006) 2 Corporate Governance Law Review 145, 174-75.

\textsuperscript{112}The Guidelines are addressed to all the entities within the multinational enterprise (parent companies, and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and assist one another to facilitate observance of the Guidelines. OECD Guidelines, above n 30, 239 (para I.3). The Guidelines also lay down that the ‘information should be disclosed for the enterprise as a whole and, where appropriate, along business lines or geographic areas.’ Id., 240 (para III.1) (emphasis added).

\textsuperscript{113}It is expected that various entities of a multinational enterprise ‘will cooperate and provide assistance to one another as necessary to facilitate observance of the principles laid down in the Declaration.’ ILO Declaration, above n 30, 189 (para 6).

\textsuperscript{114}UN Norms, above n 30, paras 20 and 21 define ‘transnational corporations’ and ‘other business enterprises’, respectively.
over the latter. The commentary to the relevant paragraph, in fact, goes further and imposes a specific obligation on MNCs and other business enterprises to do business *only* with those contractors and suppliers which comply with the UN Norms. This being the case, it would be anomalous if an MNC was held responsible for the breach of human rights obligations by its suppliers and contractors, on which it could exercise lesser control, but not for breaches by its subsidiaries.

The clearest adoption of the enterprise principle to impose human rights obligations on MNCs was, however, seen in the unsuccessful legislative initiatives in the US, Australia and the UK. Of these three Bills, the UK Bill was by far the most radical: the Bill, probably for the first time, invoked the enterprise principle to enforce human rights obligations in that it clearly proposed the liability of a parent corporation for wrongs committed by its subsidiaries.

Let me turn now to the issue of direct versus indirect approaches that may be adopted by international regulatory initiatives to impose and enforce human rights obligations against MNCs. All major international regulatory initiatives—such as the UN Norms, ILO Declaration, OECD Guidelines and the Global Compact—address human rights responsibilities directly to MNCs. Differences exist, though, regarding the enforcement of obligations. Whereas the UN Norms envisage invoking both state-based (direct) and non-state (indirect) implementation techniques, the Global Compact relies on a wide variety of formal or informal dialogues, partnerships and networking amongst all relevant actors including MNCs to ensure observance of its principles. Both these initiatives thus show a departure from exclusively state-

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115 UN Norms, above n 30, para 15.
116 "Transnational corporations and other business enterprises *shall ensure that they only do business* with (including purchasing from and selling to) contractors, subcontractors, suppliers, licensees, distributors, and natural or other legal persons that follow these or substantially similar Norms." Commentary on the Norms, above n 91, Commentary (c) to para 15 (emphasis added).
117 Whereas in case of the US and Australian Bills this could be inferred from their provisions which provide for the inclusion of the people employed by the subsidiaries of a corporation to reach the threshold limit, the UK Bill laid down a clear rule in section 6. Above n 52.
118 UK Bill, above n 52, s 6(1)(3).
119 Above n 30.
120 UN Norms, above n 30, para 15-17. See Deva, ‘UN’s Human Rights Norms’, above n 92, 514-17.
centered enforcement. On the other hand, under the ILO Declaration and the OECD Guidelines — though there are not many provisions or emphasis on the implementation of obligations — principal reliance on states for the purpose of ensuring compliance with human rights obligations is manifest.

Classifying existing regulatory initiatives related to MNCs' human rights responsibilities on the basis of the targeting approach that they adopt to reach MNCs again serves an analytical purpose. One could, for example, investigate whether the regulatory initiatives that rely on the traditional entity principle, as compared to the enterprise principle, offer lesser chances to make MNCs accountable for human rights abuses or not. Similarly, one can compare the efficacy as well as the limitations of the international regulatory initiatives that solely rely on states to enforce human rights obligations against MNCs with those regimes which do not exclusively rely on states.

3.3.2.4 ‘Where’ should regulation occur? – The ‘level’ of regulation

There is another dilemma which confronts the architects of regulatory regimes: where should the regulation take place in order to be effective? In other words, should the activities of MNCs be regulated at an institutional, municipal, regional or international level, or at all of the above levels?

In the absence of any consensus as to the most appropriate or practical level of regulation, regulatory initiatives, flowing both from internal and external sources,

Sebastian van der Vegt (eds.), *Raising the Bar: Creating Value with the UN Global Compact* (Sheffield: Greenleaf Publishing Ltd., 2004), 73-157.

122 Though the Declaration is intended to guide all three parties involved — governments, multinational enterprises and employers' and workers' organisations — it repeatedly urges states to take measures or adopt policies to implement the labour obligations. ILO Declaration, above n 30, 190-93 (paras 9, 12-14, 21, 29, 39).

123 OECD Guidelines rely on National Contact Points to ensure implementation of its provisions. OECD Guidelines, above n 30, 239 (para 1.10).

124 See, for the inadequacy of an indirect approach, Deva, ‘Where from here?’, above n 46, 20-21, 43, 48-49.

125 The term 'institutional' is taken to mean regulation here defined expansively so as to include one uni-national corporation to an MNC to any given business sector or industry.

126 ‘The international scope of MNEs operations offers, in theory, a choice between three major levels of regulation" the national level, ... the regional level, ... and the international level.' Muchlinski, above n 105, 107, and generally 107-14.
have mushroomed at all the four levels\textsuperscript{127} – from institutional\textsuperscript{128} to municipal,\textsuperscript{129} regional,\textsuperscript{130} and international levels.\textsuperscript{131} The ‘level of operation’ can thus provide another criterion to classify different regulatory initiatives that impose and enforce human rights obligations on MNCs. Whereas at the institutional level there are varied kinds of codes of conduct, labelling schemes, and principles formulated and adopted by MNCs or industry associations,\textsuperscript{132} one can see the evolution of regional initiatives in terms of European Commission’s Green Paper.\textsuperscript{133} Some may probably argue that the OECD Guidelines – on account of the organisation consisting of only thirty countries – are also regional in character. I, however, prefer to treat them as international in operation for two reasons. First, the Guidelines encourage the enterprises operating on their territories to observe the guidelines \textit{wherever they operate}.\textsuperscript{134} Second, the OECD member states, which are the home of the majority of MNCs, produce two-thirds of the world’s goods and services.\textsuperscript{135}

At the municipal level, several regulatory experiments are underway which seek either to reinvent an existing mechanism, or establish a fresh extraterritorial regulatory regime. Some of these experiments may be noted here. First, in many states there are general legislative instruments which deal with different aspects of human

\textsuperscript{127} If one focuses solely on regulation involving states, the categorisation could be recast as consisting of unilateral, bilateral, multilateral and international regulation. Deva, ‘Who Should “Bell the Cat”’, above n 60, 44-45.

\textsuperscript{128} Zerk notes: ‘Most leading multinationals now have a “human rights policy” displayed somewhere on their website.’ Zerk, above n 110, 42. See also David Kinley & Junko Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44 \textit{Virginia Journal of International Law} 931, 953. There are some codes which are issue or industry specific rather than being limited to a single corporation. Above n 66; Murphy, above n 65, 413-20; Barbara A Frey, ‘The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights’ (1997) 6 \textit{Minnesota Journal of Global Trade} 153, 177-80.

\textsuperscript{129} The most notable is the innovative use of the ATCA and the Torture Victim Protection Act 1991 to make MNCs accountable for a range of human rights abuses. See Joseph, \textit{Transnational Litigation}, above 20; Jordan Paust, ‘Human Rights Responsibilities of Private Corporations’ (2002) 35 \textit{Vanderbilt Journal of Transnational Law} 801. Besides, liability is also located under tortious principles in some jurisdictions. Below n 137.


\textsuperscript{131} Above n 30.

\textsuperscript{132} Above n 128.

\textsuperscript{133} Above n 130.

\textsuperscript{134} ‘Governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines wherever they operate.’ OECD Guidelines, above n 30, 239 (para i.2).

\textsuperscript{135} ICHRFP, \textit{Beyond Voluntarism}, above n 68, 66.
rights norms and could be utilised against MNCs. Second, in some jurisdictions the victims have tried to make MNCs accountable under law of tort principles. Third, the ATCA (and to some extent the Torture Victim Protection Act 1991) have proved to be a fertile mine for instituting legal actions against MNCs for human rights violations. Fourth, an attempt was also made to impeach the conduct of an MNC under false advertising and unfair competition laws with reference to its codes of conduct. Fifth, legislative initiatives were taken in at least three states – the US, Australia and the UK – to enact an extraterritorial law to regulate overseas activities of corporations registered within respective jurisdictions.

For several reasons, these experiments at the municipal level have not proved very successful. MNCs are able to move from one place to another quite easily. To evade national regulation, they could also disappear from one jurisdiction, or become invisible by taking new forms. In view of this general dichotomy between

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138 See Paust, above n 129.


140 One common possibility is that an MNC may be taken over by another MNC, e.g., UCC was taken over by Dow Chemical Company in 2001. Invisibility may also arise because of a merger between two MNCs, e.g., after the merger of Unocal with Chevron, one cannot even find the website of Unocal.
the *modus operandi-cum-structure* of MNCs and the *regulatory structure* of national initiatives regulating their activities, \(^{145}\) increasingly people are looking towards international law for solution. However, international law, as Zerk shows, is no panacea, \(^{146}\) and several conceptual, theoretical and political hurdles would have to be overcome before it is able to deal with MNCs effectively. For example, the invisibility of MNCs under international law has to be addressed; \(^{147}\) MNCs should be treated as (limited) subjects of international law. \(^{148}\) Despite such inherent hurdles, several regulatory initiatives have been put in place at the international level. In addition to several international regulatory codes and principles initiated by NGOs or other non-state organisations, \(^{149}\) most of the international regulatory regimes have flowed from three states-based international organisations, namely, the OECD, the ILO and the UN. \(^{150}\)

Differentiating existing regulatory initiatives on the basis of their level of operation serves an important analytical purpose. The initiatives at each level face different types of problems while regulating the activities of MNCs and consequently, have different types of limitations. For example, while the municipal regimes find it difficult to reach parent MNCs based in some other jurisdiction, the international regimes are either toothless or depend heavily on states to enforce sanctions against MNCs. A comparison and classification of regulatory initiatives on the basis of their level of operation also reveals the advantages of regulation at a certain level. Being informed by the limitations and advantages of respective initiatives, one could develop a regulatory mix suitable to regulate effectively MNCs' activities.

\(^{145}\) The legal structures governing this modern entity [i.e., MNC], however, still reflect, to a large degree, the outmoded single-nation structure of the nineteenth century corporation. Corporations are multinational while legal systems are still largely national, creating a disconnect between international corporate structures and the law.' Stephens, 'The Amorality of Profit', above n 68, 54.

\(^{146}\) International law does not provide easy solutions to the social and environmental issues posed by MNCs. A comparison and classification of regulatory initiatives on the basis of their level of operation also reveals the advantages of regulation at a certain level. Being informed by the limitations and advantages of respective initiatives, one could develop a regulatory mix suitable to regulate effectively MNCs' activities.

\(^{147}\) Johns highlights the ‘absence’ of MNCs from international law sphere and also investigates the theoretical reasons for this position. Fleur Johns, ‘The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory’ (1994) 19 Melbourne University Law Review 893.


\(^{149}\) Above n 71-74.
The fifth and final regulatory dilemma concerning the regulation of MNCs is: how should regulatory initiatives against MNCs be enforced? Between voluntary and mandatory approaches, which is the more efficacious and efficient way of bringing about compliance with human rights responsibilities? Furthermore, assuming that resort to a mandatory approach will be essential – either to complement voluntary initiatives or otherwise – which type of compliance strategies and sanctions could be invoked against MNCs that fail to respect their human rights responsibilities? Resolving this regulatory dilemma is critical because the issues of implementation and enforcement of human rights obligations remain the common weakest links of all the existing regulatory initiatives that aim to ensure that MNCs respect and promote human rights.\textsuperscript{151}

Traditionally, the debate about the appropriate compliance strategy used to be cast in terms of ‘voluntary versus mandatory’\textsuperscript{152} – in which corporations preferred the former whereas stakeholders emphasised the need for the latter. Now this ‘either or’ approach is, however, considered misguided,\textsuperscript{153} or inappropriate as it is considered desirable to develop a synergy between the two approaches.\textsuperscript{154} It is also contended, I think correctly, that even the voluntary initiatives are not totally voluntary in that stakeholders can use them to move shareholders’ resolutions, impeach the conduct of MNCs before the courts, or to run a naming and shaming campaign.\textsuperscript{155} The UN

\textsuperscript{150} UN Norms, Global Compact, ILO Declaration, and OECD Guidelines, above n 30.
\textsuperscript{151} ‘Lack of practical and effective implementation and enforcement techniques is the most problematic aspect of the global search for corporate accountability for human rights violations.’ Deva, ‘Who Should “Bell the Cat”?’?, above n 60, 55.
\textsuperscript{152} See ICHR, above n 68, 7-11. The title of the report ‘Beyond Voluntarism’ is also instructive in this regard. See also Zerk, above n 110, 32-34.
\textsuperscript{153} Zerk, above n 110, 34-36.
\textsuperscript{154} ‘We believe that mandatory and voluntary approaches to this issue are not mutually exclusive since there is a need in society for both. Indeed, they may be seen as complementary since voluntary approaches are designed to raise the bar whereas the starting position for mandatory approaches is the legally enforceable minimum.’ Business Leaders Initiative on Human Rights, Report 3: Towards a ‘Common Framework’ on Business and Human Rights: Identifying Components (London: BLIHR, 2006), 4.
Norms have muddied the water further in that the Norms are considered only non-voluntary and not mandatory, despite framing the human rights obligations in terms of ‘shall’ and also providing – for the first time – the implementation provisions.

As far as the compliance strategies and sanctions are concerned, many measures such as government incentives, civil liability, pressure flowing from consumers and investors, naming and shaming, and criminal sanctions are being employed, or could be employed, to make MNCs respect their human rights responsibilities. It is still a moot point which one of these (or a combination of these) measures are most suitable to bring about corporate compliance with human rights obligations.

In view of the above diversity in enforcement strategies and sanctions, the ‘nature’ of regulatory initiatives in terms of the implementation and enforcement strategies that they adopt becomes a natural choice for investigation and a basis for classification of such initiatives. Such classification could arguably be done at two levels: primary and secondary. At the primary level, one could ask whether an initiative is voluntary or mandatory. If a regime is found to be mandatory in nature, a secondary query could

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156 David Weissbrodt & Muria Kruger, ‘Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) 97 American Journal of International Law 901, 913. This opinion assumes more weight because Professor Weissbrodt was one of the key authors behind the drafting of the UN Norms.


159 See, for example, cases filed under ATCA or the law of torts. Joseph, Transnational Litigation, above n 20.


161 See Braithwaite & Drahos, above n 29.


163 See Deva, ‘Where from Here?’, above n 46, 43-46.
also be raised, namely, which coercive techniques are employed to ensure compliance with the mandate.

At the primary level, until recently the current regulatory initiatives related to MNCs could have been safely placed either in the voluntary or mandatory category. With the exception of general national laws (including the tortious principle of duty of care) and the ATCA, all other regulatory initiatives are by and large voluntary in that non-compliance with human rights obligations is not met with any formal sanction or penalty. The position has, however, changed slightly since the coming into existence of the UN Norms, which are neither voluntary nor mandatory but 'non-voluntary.' The evolution of this middle 'non-voluntary' category can be seen as an evidence of a slow progression from voluntary to mandatory standards, for the business community still resists calls for any mandatory regulatory initiative at the international level.

The regulatory initiatives that are, or could (have) become, mandatory in nature can be classified further on the basis of the type of techniques and sanctions they employ to bring about compliance with human rights obligations. It seems that the US courts hearing cases under the ATCA will have the power to use all the civil remedies that are generally available in tort cases such as awarding damages and issuing injunctions. On the other hand, the three lapsed extraterritorial Bills differed from each other in terms of the compliance and enforcement strategy that they adopted: the US Bill relied on incentives, investigations and civil damages; the Australian Bill on annual reporting, civil penalties and civil action; and the UK Bill on reporting, consultation, disclosure, auditing, civil actions as well as criminal

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164 One could also place some obligations flowing from the International Bill of Rights in obligatory category. But there is no consensus on whether the Bill of Rights binds MNCs directly or through an indirect horizontal application of its obligations, which is further dependant on the discretion of courts in different jurisdictions.


166 See John Murphy, Street on Torts, 1 Indian reprint (New Delhi: Oxford University Press, 2006), 577-89.

167 See, for a comparison of the implementation/enforcement provisions in the US and Australian Bills, Deva, 'Who Should "Bell the Cat"?', above n 60, 54-55.

168 US Bill, above n 52, ss 4-8.

169 Australian Bill, above n 52, ss 14, 16 and 17.
penalties. The UN Norms, though not mandatory, provide for several techniques—such as internalisation, self-evaluation, monitoring and verification by national and international mechanisms, and regulation by states— to ensure that MNCs comply with their human rights obligations. The UN Norms also make provision for prompt, effective and adequate reparation to those who are adversely affected by failure to comply with the human rights responsibilities.

What is the analytical objective served by classifying existing regulatory initiatives related to MNCs on the basis of their nature? I pointed out above that the usefulness of the inquiry in terms of 'voluntary versus mandatory' is increasingly questioned. Despite this new focus on the complementariness, two types of regulatory initiatives should still be compared and contrasted, not to reject one altogether, but to become more informed about their relative viability and efficacy in moulding the behaviour of MNCs. In fact, such an analysis is critical even to achieve the goal of complementary invocation of both voluntary and mandatory initiatives, for a judicious mix of the two can be reached only if we know the limitations and advantages of pursuing each of them. A similar analytical objective could be achieved by comparing the efficacy of various coercive techniques employed by different regulatory initiatives to ensure compliance, e.g., one may ascertain which two or more types of sanctions could be used together so as to fill in the gaps that exist in each other’s operation. Undoubtedly, more in depth research is required to achieve these analytical objectives, but as indicated in the beginning of this part, that is something outside the scope of this thesis.

3.4 CONCLUSION

This chapter has tried to develop an analytical framework that will be used in the next chapter to evaluate the adequacy of existing regulatory initiatives that aim to impose and enforce human rights obligations on MNCs. Developing such a framework was considered essential for a number of reasons, including to ascertain the meaning of 'adequacy' and to understand the taxonomy of current regulatory regimes. A

170 UK Bill, above n 52, ss 3-11.  
171 UN Norms, above n 30, paras 15-17. See Deva, 'UN's Human Rights Norms', above n 92, 513-17.  
172 UN Norms, above n 30, para 18.  
173 Above n 154 to n 156.
regulatory initiative, it is proposed, is adequate if it is effective at two levels: the preventive level and the redressive level. In other words, the efficacy of a regulatory initiative ought to be judged with reference to its ability to prevent/preempt, at least in some cases, human rights violations by MNCs and to redress such violations adequately if they do occur.

I also tried to explain why MNCs are considered difficult regulatory targets. It was contended that MNCs are difficult regulatory targets because of five regulatory dilemmas — who should regulate what activities of which corporation, where, and how — that their regulation poses. But these regulatory dilemmas have not, surprisingly, stilled the growth of regulatory initiatives related to MNCs. Such multiplicity per se is not problematic in the context of regulation of MNCs; in fact, multiple regulatory initiatives may be essential to regulate the activities of MNCs in an effective manner. However, an un-coordinated mushrooming of regulatory initiatives might have had a negative impact on the efficacy and efficiency of the overall regulatory framework. Multiple regulatory initiatives, for example, might be making the task of ensuring that MNCs ascertain and implement their human rights obligations quite challenging. This scenario also leaves MNCs prone to multiple (and sometimes also vexatious) legal proceedings.

Finally, this chapter suggested five differentiating variables, which correspond to the five regulatory dilemmas, to understand the taxonomy of existing regulatory initiatives related to MNCs. I argued that one could classify current regulatory initiatives into different categories on the basis of the following five variables: the source from which they flow; the content of obligations; the targeting approach; the

\[174\] For example, it is suggested that the ‘proliferation [of voluntary codes] is leading to contradictory or incoherent efforts.’ ICHR, above n 68, 4.

\[175\] For example, in a given case the executives of an MNC might not be able to ascertain the precise human rights obligations of their company even after going through, say, the ILO Declaration, the OECD Guidelines, the Global Compact and the UN Norms, as these instruments in turn make a reference to several international conventions and treaties. Orts highlights this difficulty with reference to the proliferation of environmental statutes in the US: ‘At some point in the escalating process of governments churning out statutes, ... and courts deciding cases, nobody will be able to say anymore what the applicable legal rules really are or what they are accomplishing. When a body of law becomes so complex ... that it cannot even be known, let alone fully complied with or enforced, one cannot hope that its objectives will be realised.’ Orts, ‘A Reflexive Model’, above n 32, 782.

\[176\] The litigation in the Bhopal case, to be fair to UCC and Dow Chemical Co., illustrates this point well. See Chapter 2.3.4.
level of operation; and the nature in terms of compliance strategy. Such classification not only serves important analytical objectives but can also help in selecting a representative sample of the multiple, diverse regulatory initiatives for the purpose of evaluating their (in)adequacy.

In the light of the analytical framework developed in this chapter, the next Chapter 4 will evaluate the adequacy of six selected regulatory initiatives that seek to ensure that MNCs respect their human rights obligations.
CHAPTER 4: MNCs AND EXISTING REGULATORY INITIATIVES – AN EVALUATION OF (IN)ADEQUACY

4.1 INTRODUCTION

The previous chapter developed an analytical framework to evaluate the (in)adequacy of existing regulatory regimes that seek to ensure that MNCs respect and promote human rights. Developing such a framework was considered desirable for a number of reasons, including to identify certain representative initiatives that could be surveyed to demonstrate why the existing regulatory framework is inadequate. It was suggested that the existing regulatory initiatives could be differentiated from one another, and also classified into different heads, on the basis of five criteria: the source from which they flow; the content of human rights obligations; the targeting approach adopted by initiatives; the level of operation; and the nature in terms of the compliance strategy.

This taxonomy of existing regulatory regimes related to MNCs, which I analysed in Chapter 3, could be depicted in a tabular form too (see Table 4.1). In this table the qualitative values assigned to each regulatory initiative qua five differentiating variables signify the response of that particular initiative to the corresponding regulatory dilemma. For example, the corporate codes of conduct flow from an internal source (who), are narrow in content (what), recognise the entity principle (which), operate at the institutional level (where), and are voluntary in nature (how). The UN Norms, on the other hand, owe their origin to an external source (who), are extensive in scope (what), apply to almost all business enterprises and rely on direct-cum-indirect implementation techniques (which), operate at the international level (where), and are non-voluntary in nature (how).
### Table 4.1: Tabular Taxonomy of Existing Regulatory Initiatives

<table>
<thead>
<tr>
<th>Source</th>
<th>Content</th>
<th>Targeting Approach</th>
<th>Level of Operation</th>
<th>Nature</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alien Tort Claims Act</td>
<td>External Narrow</td>
<td>Entity Principle</td>
<td>Municipal, but extraterritorial</td>
<td>Mandatory</td>
</tr>
<tr>
<td>Codes of Conduct, Principles or Labels by Non-State Entities</td>
<td>External Limited</td>
<td>Entity Principle; Direct</td>
<td>International</td>
<td>Voluntary</td>
</tr>
<tr>
<td>Corporate Codes of Conduct</td>
<td>Internal Narrow</td>
<td>Entity Principle</td>
<td>Institutional</td>
<td>Voluntary</td>
</tr>
<tr>
<td>Duty of Care Principle</td>
<td>External Narrow</td>
<td>Entity Principle</td>
<td>Municipal</td>
<td>Mandatory</td>
</tr>
<tr>
<td>EU's Green Paper on CSR</td>
<td>External Limited</td>
<td>Entity Principle; Direct</td>
<td>Regional</td>
<td>Voluntary</td>
</tr>
<tr>
<td>General Municipal Laws</td>
<td>External Narrow</td>
<td>Entity Principle</td>
<td>Municipal</td>
<td>Mandatory</td>
</tr>
<tr>
<td>Global Compact</td>
<td>External Wide</td>
<td>Entity Principle; Direct</td>
<td>International</td>
<td>Voluntary</td>
</tr>
<tr>
<td>ILO Declaration</td>
<td>External Wide</td>
<td>Entity Principle; Direct/indirect</td>
<td>International</td>
<td>Voluntary</td>
</tr>
<tr>
<td>International Bill of Rights</td>
<td>External Limited</td>
<td>Entity Principle</td>
<td>International</td>
<td>Mandatory</td>
</tr>
<tr>
<td>OECD Guidelines</td>
<td>External Wide</td>
<td>Entity Principle; Direct</td>
<td>International</td>
<td>Voluntary</td>
</tr>
<tr>
<td>Specific Municipal Bills (US, UK &amp; Australia)</td>
<td>External Limited</td>
<td>Enterprise Principle</td>
<td>Municipal, but extraterritorial</td>
<td>Mandatory</td>
</tr>
<tr>
<td>UN Human Rights Norms</td>
<td>External Extensive</td>
<td>Entity Principle; Direct/indirect</td>
<td>International</td>
<td>Non-voluntary</td>
</tr>
</tbody>
</table>

* One may at least refer to the following regulatory initiatives: the Global Sullivan Principles of Social Responsibility; the Equator Principles; the UNEP Statement by Financial Institutions on the Environment and Sustainable Development; the Sustainability Reporting Guidelines of the Global Reporting Initiative; Amnesty International's Human Rights Principles for Companies; Clean Clothes Campaign Code of Labour Practices for the Apparel Industry; Social Accountability 8000; ISO 14000.

† Primarily because most of its provisions are not directed to MNCs.

‡ Certainly the provisions of the relevant instruments are binding on state parties to each of those conventions under the principle of [pacta sunt servanda; arguably all human rights are mandatory for all states and other international legal subjects to the extent that they embody customary norms, but at least this is the case for those rights which have acquired the status of [jus cogens or erga omnes] norms.

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This chapter elaborates the argument that the existing regulatory initiatives have proved inadequate to make MNCs accountable for human rights violations. I intend to support this claim by surveying the following six regulatory regimes (which are shown in bold font in Table 4.1): the ATCA, corporate codes of conduct, the OECD Guidelines, the ILO Declaration, the Global Compact, and the UN Norms. These initiatives – which are chosen on the basis of five differentiating variables encapsulated above and elaborated in the previous chapter – are representative of existing mechanisms that seek to regulate human rights violative activities of MNCs. The selection is representative because these regimes represent both types of sources (internal and external); all degrees of content (narrow, limited, wide and extensive); divergent targeting approaches (the entity principle as well as its variation, and both direct as well as indirect implementation techniques); different levels of operation (from institutional to municipal and international); and are different in terms of their nature (voluntary, non-voluntary and mandatory).

On the basis of reviewing the provisions as well as omissions of these selected regulatory initiatives, it is contended that the existing framework that aims to make MNCs accountable for human rights abuses is inadequate in that it fails the twin test of efficacy laid down in Chapter 3.¹ The inadequacy arises, I argue, because of three broad deficiencies: the lack of precise, measurable human rights standards; insufficient or contestable rationales for compliance with human rights obligations; and deficient or undeveloped implementation and enforcement mechanisms. This three-fold inadequacy of existing regulatory regimes is illustrated further with reference to Bhopal. The conclusion sums up the findings of the analysis. It is also pointed out that a regulatory framework based on the ‘integrated theory of regulation’ could rectify the inadequacy of current regulatory framework related to MNCs.

4.2 A SURVEY OF EXISTING REGULATORY INITIATIVES

Before proceeding to examine the adequacy of each of the six regulatory regimes, it may be worthwhile to draw some general conclusions about the taxonomy of existing

¹ To recap, a regulatory initiative is considered ‘effective’ if it can prevent or preempt human rights violations by MNCs – at least in some cases – and could offer adequate relief to victims in cases of violations. See Chapter 3.2.1.
regulatory initiatives, presented in Table 4.1, on the basis of the five differentiating variables.

- With the exception of codes of conduct formulated by corporations, all other regulatory regimes have originated from external sources. From this, one could assume that internal regulation has not gained the confidence of society as an adequate safeguard against corporate human rights abuses. On the other hand, the presence of a large number of external initiatives also indicates that even they have not been effective in achieving the desired result.

- Although it is difficult to generalise, it seems that by and large the content and scope of MNCs' human rights responsibilities under regulatory initiatives revised or formulated in recent times is expanding, e.g., the revision of the OECD Guidelines and the ILO Declaration in 2000, and the UN Norms of 2003.2

- In terms of the approach to target corporations of a corporate group, almost all of the existing regulatory initiatives rely upon the entity principle, though some deviations are noticeable in the case of the OECD Guidelines, ILO Declaration and the UN Norms. Moreover, a majority of international regulatory initiatives still adopts an indirect implementation approach, that is, they exclusively or predominantly rely upon states to ensure that MNCs comply with their human rights obligations.

- There is an increased interest in putting in place an international regulatory framework, primarily because of the apparent inability of municipal initiatives in regulating the activities of trans-border actors.

- Although voluntary initiatives have not lost their relevance, the need for introducing some sort of mandatory regulatory framework is increasingly becoming self-evident. Among others, the pursuit of MNCs under the ATCA and the 'non-voluntary' character of the UN Norms are evidence of this need.

4.2.1 Alien Tort Claims Act

The ATCA provides that 'the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'3 This provision was originally part of the Judiciary Act

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2 See parts 4.2.3, 4.2.4, and 4.2.6 below.
There is an unusual degree of uncertainty about the origin, exact scope, and the legislative intent behind the enactment of the ATCA. Even the constitutionality of this statute has invited an intense academic debate. Yet it is relatively non-contentious that in its current form the jurisdiction of district courts to entertain civil actions is limited by three factors:

- only an alien can invoke this provision;
- there should be an allegation of the commission of a tort; and
- the alleged tort should have been committed either in violation of the law of nations or a treaty of the US.

Despite these limitations (the seriousness of which is examined in some detail below), victims of corporate human rights abuses have pursued several corporations in the US courts under the ATCA. Such cases — a majority of which involved suing US corporations for various human rights abuses and attracted wide media coverage,
Although the recourse to the ATCA for redressing corporate human rights abuses did raise high hopes initially, the final results to date have not been very encouraging. 23

11 ‘[T]he principal benefit of these suits to their plaintiffs is the public attention they generate.’ Anne-Marie Slaughter & David Bosco, ‘Plaintiff’s Diplomacy’ (September/October 2000) 79 Foreign Affairs 102, 106.


16 Flores v Southern Peru Copper 253 F Supp. 2d 510 (SDNY, 2002); Flores v Southern Peru Copper 418 F 3d 140 (9th Cir., 2003).

17 Presbyterian Church of Sudan v Talisman Energy 244 F Supp. 2d 289 (SDNY, 2003).


23 ‘These suits have encountered a variety of doctrinal and procedural barriers.’ Bradley, ‘Customary International Law’, above n 12, 426. Stephens, however, suggests: ‘While few money judgments have
fact, of the thirty-six cases filed against MNCs so far under the ATCA, no single case has been decided against an MNC on merits.\(^2^4\) Whereas most of the cases have been dismissed on procedural or technical grounds,\(^2^5\) an out of court settlement has been reached in a couple of cases, including in the widely acclaimed Unocal case.\(^2^6\) Perhaps this dismal outcome is partly because of the fact that the one-section ATCA hardly offers any guidance on relevant substantive or procedural issues.\(^2^7\) As this leaves almost everything for argumentation, courts as well as academic commentators differ widely about the exact contours of this legislation.\(^2^8\) For example, there is no consensus even on the basic issue whether this legislation is about a right or a remedy or both. Although Casto argues that the ATCA ‘should be construed as liberally as possible,’\(^2^9\) he thinks that it ‘does not create a statutory cause of action’ and that any suggestion to the contrary is ‘simply frivolous.’\(^3^0\) Bradley and Goldsmith also offer several reasons to question whether this statute creates a cause of action.\(^3^1\) However, several other commentators such as D’Amato,\(^3^2\) Paust,\(^3^3\) and Dodge\(^3^4\) disagree that the

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\(^2^4\) Bill Baue, ‘Win or Lose in Court: Alien Tort Claims Act Pushes Corporate Respect for Human Rights’, \textit{Business Ethics} (Summer 2006), 12. It is a separate issue that litigation under the ATCA may have had indirect benefits in making MNCs take their human rights responsibilities more seriously.\(^2^5\) See Borg, above n 19, 609.


\(^2^8\) See the material cited in notes 6-8, 12, 23, 27, 29, 31, and 32.


\(^3^0\) Id., 479-80 (emphasis added).


\(^3^2\) Anthony D’Amato, ‘What does Tel-Oren Tell Lawyers? Judge Bork’s Concept of the Law of Nations is Seriously Mistaken’ (1985) 79 \textit{American Journal of International Law} 92, 100-04 (hereinafter D’Amato, ‘Judge Bork’s Concept’). But see Alfred P Rubin, ‘What does Tel-Oren Tell

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ATCA provides only jurisdiction (remedy) and not a cause of action (right). Recently, the former viewpoint has been endorsed by the US Supreme Court in *Jose Francisco Sosa v Humberto Alvarez-Machain* by holding that ‘the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.’

4.2.1.1 Limitations of ATCA

Despite this academic debate about the ATCA which continues even after the decision in *Sosa*, this statute is undoubtedly the most frequently used initiative to grill MNCs for alleged violations for human rights. However, various recent attempts to invoke the ATCA to make MNCs accountable for human rights violations demonstrate that it suffers from several serious limitations – some of which stem from the fact that the ATCA was never designed to redress today’s human rights violations by MNCs. It may be worthwhile to note some of the factors that restrict the scope of this legislation here. To begin with, only an ‘alien’ can rely upon the ATCA to sue a corporation for human rights violations. So, even if a US corporation abridges the human rights of US citizens in the US or abroad, they are barred at the outset from basing their claim on this statute. This is a serious limitation because it denies US citizens an avenue to seek justice for human rights violations even in a situation where other alternatives such as the Torture Victim Protection Act (TVPA) do not cover their cases. Furthermore,

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33 Paust, above n 9, 822.


36 In my view, the above debate misses one key point. Irrespective of the fact whether the ATCA is taken to provide only jurisdiction or both jurisdiction and a cause of action, the question of what constitutes a tort in ‘violation’ of the ‘law of nations’ survives. Arguably, the debate is more academic than anything else, for in either case one has to look beyond the single-section statute (i.e., ATCA) to find an answer to this question. Under both the circumstances, the interpretation of the phrase ‘law of nations’ would ultimately depend on what that phrase means and with reference to which sources that meaning is to be ascertained.


38 Pub L No 102-256, 106 Stat 73 (1992). The TVPA allows for the filing of cases in the US courts against individuals who ‘under actual or apparent authority, or color of law, of any foreign nation’ committed torture or extrajudicial killing. *Id.*, sec. 2.
even the US government cannot rely on the ATCA to rein in its own corporations from indulging in human rights abuses abroad. \(^{39}\)

Second, despite not being expressly mandated by the language of the ATCA, \(^{40}\) the suits under this statute are subject to the general requirement that the US district courts must have personal jurisdiction over the alleged wrongdoer, i.e., MNC. \(^{41}\) In other words, the ATCA, in effect, enables victims of human rights violations to approach the US courts for relief not against any MNC but only those MNCs which have some jurisdictional connection with the US. \(^{42}\) Professor Redmond rightly points out that this jurisdictional hurdle is quite serious in view of the principles of corporate law which normally ‘restrict legal action against individual members of a corporate group.’ \(^{43}\) Needless to say that in the absence of sufficient jurisdiction over the MNC which is sued, the victims’ suit will be dismissed at the outset. \(^{44}\)

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\(^{39}\) See Borg, above n 19, 622-23.


\(^{44}\) For example, the Court of Appeal for the Ninth Circuit in Unocal case did not admit a suit against Total SA, the French parent of the Total Group, merely because of its interrelation with California based subsidiaries of the Total Group. Doe v Unocal Corporation 248 F 3d 915 (2001). The court held that mere existence of a relationship between the parent and subsidiary is not sufficient to attract jurisdiction. Id., 926. But see Wiwa v Royal Dutch Petroleum Co. 226 F 3d 88 (2000).
Third, given that a tort to be actionable under the ATCA should be committed in violation of the law of nations or a treaty of the US, this brings two additional, related limitations. Should – in order to be successful – the alleged (mis)conduct satisfy the ‘state action’ requirement? In other words, could individuals or corporations which are neither a state’s agent nor act under the colour of law be held liable under the ATCA? Another issue is when should an MNC be taken to ‘violate’ human rights, that is, only when it directly indulges in human rights abuses, or also when it merely assists, encourages, supports, abets, acquiesces, or tolerates human rights violations?  
Regarding the first issue, the courts have insisted on state action as a prerequisite for a successful cause of action, except in those cases which involved violation of jus cogens norms such as torture, genocide, crimes against humanity, war crimes, forced labour, and slavery. On the other hand, as far as the question of construing ‘violation’ is concerned, the US courts have adopted a more liberal approach in some decisions. For example, ‘direct and substantial’ assistance provided by a corporation would entail liability. Similarly, in the Unocal case, the Court of Appeals for the Ninth Circuit ruled that the appropriate standard to determine the liability of Unocal is whether it provided ‘knowingly practical assistance or encouragement that has a substantial effect on the perpetration of the crime’ which requires actual or

45 Joseph observes that ‘it is uncertain how proximate the human rights abuses have to be to the MNE’s activities before the MNE accrues legal responsibility under ATCA for those abuses.’ Joseph, above n 40, 180 and generally 188-91.
46 Joseph, Transnational Litigation, above n 9, 33-39; Redmond, above n 43, 82-83. Borg suggests, I think erroneously, that the state action requirement is implied from the use of terminology ‘law of nations’ in the ATCA ‘as states enter into the treaties and organisations that create and bind them to international law.’ Borg, above n 19, 6615. Sacharoff, however, argues that the ‘state actors requirement inadvertently evolved from the Filartiga decision.’ Ariadne K Sacharoff, ‘Multinationals in Host Countries: Can they be Held Liable under the Alien Tort Claims Act for Human Rights Violations?’ (1998) 23 Brooklyn Journal of International Law 927, 940. See also Lamberti, above n 41, 125-26. In my view, the real question is not – as Borg seems to assume – who creates law of nations but whether non-state actors could violate the law of nations, that is, obligations created by states.
48 Presbyterian Church of Sudan v Talisman Energy 244 F Supp. 2d 289, 323-24 (SDNY, 2003). The International Court of Justice recently held Serbia not to be complicit in genocide because it did not provide aid or assistance with the knowledge that this will used for committing genocide. Bosnia and Herzegovina v Serbia and Montenegro - Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (26 February 2007), paras 419-38, <http://www.icj-cij.org/icjwww/idocket/ibhj/ibhjjudgment/ibhj_judgment_20070226_frame.htm> (last visited 1 March 2007).
constructive knowledge.' Nevertheless, the question of the appropriate test by which to judge MNCs' complicity in human rights violations is far from settled. For example, merely benefiting from human rights may not be sufficient to attract liability.

Therefore, even if courts apply the liberal Unocal test in cases of alleged complicity of MNCs with states, the state action doctrine would still pose serious hardships in making MNCs accountable for the violation of non-jus cogens human rights norms. Consequently, obtaining relief under the ATCA in a number of corporate human rights abuses cases would still remain difficult.

Fourth, the victims' pursuit of justice in cases of corporate human rights violations has to confront often an almost unassailable plea based on the doctrine of forum non conveniens. This common law doctrine allows courts to dismiss cases on the ground that the balance of relevant public and private interest factors favours that the trial takes place in a foreign forum. The actions pursued under the ATCA have been no exception to this legal shield invoked by MNCs. Out of many, two decisions illustrate this point. First is the case of Aguinda v Texaco, Inc., involving environmental pollution caused by Texaco in Ecuador, where the district court

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50 Joseph, Transnational Litigation, above n 9, 50.

51 The discussion related to this limitation of the ATCA borrows from one of my previous articles: Surya Deva, 'Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations against Overseas Corporate Hands of Local Corporations' (2004) 8 Newcastle Law Review 87, especially 93-94 (hereinafter Deva, 'Overcoming Hurdles').

dismissed the plaintiffs' claim by invoking the doctrine of *forum non conveniens.*\(^53\) Similarly, in *Wiwa v Royal Dutch Petroleum Co.*, the US district court dismissed on *forum non conveniens* grounds a case in which the plaintiffs alleged human rights abuses at the hands of Nigerian authorities with direct/indirect participation of the defendant Dutch and British oil companies.\(^54\)

One could, however, point out that the US Court of Appeals has subsequently overruled the district court's decisions in both *Aguinda\(^55\)* and *Wiwa,\(^56\)* and that the position is changing after the Court of Appeals' decision in the *Wiwa* case.\(^57\) But still it is to be remembered that on neither of these occasions has the Court of Appeals ruled that the doctrine of *forum non conveniens* has no role to play in cases filed under the ATCA. In fact, the Court, while overruling the district court's ruling in *Wiwa,* noted that even the TVPA has not 'nullified, or even significantly diminished, the doctrine of *forum non conveniens.*'\(^58\) More importantly, the decision of Court of Appeals for the Second Circuit – affirming the district court's second dismissal in *Aguinda* on the ground of *forum non conveniens* – was delivered after the Court of Appeals' decision in *Wiwa,* a fact which again illustrates that the ghost of *forum non conveniens* will still haunt victims.\(^59\) Thus, it is clear that even 'the ATCA and TVPA laws do not guarantee that US courts will hear a case. *Forum non conveniens* must also be considered.'\(^60\)


\(^{54}\) *Wiwa v Royal Dutch Petroleum Co. and Shell Transport & Trading Co.*, 1998 US Dist. LEXIS 23064.

\(^{55}\) The *Aguinda* decision was reversed (and the case remanded back to the district court for reconsideration) because 'dismissal for *forum non conveniens* is not appropriate, at least absent a commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts for purposes of this action.' *Jota/Ecuador v Texaco, Inc* 157 F 3d 153 (1998), 159. It is, however, interesting to note that on reconsideration the district court again dismissed the suit on *forum non conveniens* ground [Maria *Aguinda v Texaco, Inc; Gabriel Ashanga Jota v Texaco, Inc* 303 F 3d 470 (2001)], and this time the Court of Appeal did affirm that decision. *Aguinda v Texaco, Inc* 303 F 3d 470 (2002).


\(^{59}\) *Aguinda v Texaco, Inc* 303 F 3d 470 (2002).

\(^{60}\) Fellmeth, above n 57, 242. See also Skolnik, above n 57, 219-222.
Fifth, since a court hearing an action under the ATCA could arguably award relief similar to a tort action, the statute provides ‘inadequate remedies,’ especially when we consider the type of cases that have been brought under it. For example, criminal sanctions will be out of question even in those cases where egregious human rights abuses are proved.

Sixth, the US government as well as various other states – in addition to several international law scholars – are not supportive of an expansive application of the ATCA so as to make it umbrella legislation to redress all types of corporate human rights abuses occurring anywhere. Not only the US government, but also the governments of the UK, Australia and Switzerland jointly filed an amici curiae brief before the US Supreme Court in Sosa to oppose the wholesale use of the ATCA for redressing human rights violations by US-based MNCs. In these circumstances, it

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61 In tort cases, two most common remedies are damages (including punitive damages in appropriate cases) and injunctions. See Slawotsky, above n 43, 1099-1101; John Murphy, Street on Torts, 1st Indian reprint (New Delhi: Oxford University Press, 2006), 577-89.

62 Borg, above n 19, 620, 622.

63 See, for example, Bradley, 'The Costs of International Human Rights Litigation', above n 27; Donald J Kochan, 'Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act' (1998) 31 Cornell International Law Journal 153; Ramsey, above n 37; 'Developments in the Law', above n 26, 2042-45. Burley also concludes that the scope of the ATCA is too limited to advance the cause of human rights generally:

Goals of this magnitude are clearly beyond the scope of the Alien Tort Statute. ... Although expanding it to cover cases against official torturers is indeed consistent with its letter and its spirit, such cases provide more symbol than substance in terms of actually advancing the cause of international human rights.

Burley, above n 6, 493.

64 Haberstroh cautions that 'the greatest advocates of ATCA as a vehicle for such human rights claims may actually threaten the statute, when they attempt to use ATCA to attack wrongs, such as the softer shades of third-party complicity, which a world consensus has not decided are in violation of customary international law.' Haberstroh, above n 7, 271.

65 The brief is available at <http://www.ccr-ny.org/v2/legal/docs/sval5.pdf> (last visited 15 October 2004). Earlier also, the US government had filed an Amicus Curae Brief in Doe v Unocal 963 F Supp. 880 (Nos 00-56603, 00-56628), <http://www.hrw.org/press/2003/05/doj050803.pdf> (last visited 1 May 2004). The US Supreme Court has, however, held that such proceedings could be initiated under the ATCA in a limited number of circumstances. Jose Francisco Sosa v Humberto Alvarez-Machain 124 s. Ct. 2739 (2004).


67 See Joseph, Transnational Litigation, above n 9, 55-60.
would be reasonable to assume that the likelihood of similar extraterritorial legislation being enacted by other states is very low.68

4.2.1.2 The meaning of 'law of nations' after Sosa

Last but not least,69 the most serious limitation of the ATCA stems from the (narrow) interpretation to the phrase 'law of nations' given by the courts. The phrase 'law of nations' seemingly looks quite wide in its ambit. Professor Sarah Joseph argues that the phrase 'law of nations' refers to 'customary international law and jus cogens' as two non-treaty sources of binding international norms.70 But the US courts have not consistently applied this broad yardstick to judge the scope of the ATCA.71 It is also clear that even if the US courts consistently apply a broad interpretation of 'law of nations', this can take care of only a limited number of human rights violations.72 The decision of the US Supreme Court in Sosa arguably limits the scope of the ATCA by its narrower interpretation of the term 'law of nations.'73 The majority in Sosa held that the ATCA provides a 'limited, implicit sanction to entertain the handful of

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69 This is not to forget that there are several other impediments such as sovereign immunity, limitation periods and the political question doctrine. See ‘Developments in the Law’, above n 26, 2036; Ramsey, above n 37.

70 Joseph, Transnational Litigation, above n 9, 22-23. ‘While a jus cogens violation is sufficient, it is not a necessary requirement for an ATCA claim, which may also be satisfied by proof of violation of other international law norms.’ Redmond, above n 43, 82.

71 Joseph, Transnational Litigation, above n 9, 23-25. Justice Friendly in IIT v Vencap Ltd. 519 F 2d 1001 (2nd Cir., 1975) quoted with approval the following observation (at 1015): ‘The reference to the law of nations must be narrowly read if the section is to be kept within the confines of Article III.’ Lopes v Reederie Richard Schroder 225 F Supp. 292, 297 (ED Pa., 1963). See also Forti v Suarezmason 672 F Supp. 1531 (ND Cal., 1987); Hilao v Estate of Marcos 25 F. 3d 1467 (9th Cir., 1994); Beena/ v Freeport-McMoRan, Inc. 969 F Supp. 362 (ED La., 1997); Doe v Unocal 110 F Supp. 2d 1294 (CD Cal., 2000). Joseph, however, contends that the ‘universal’ limb of the test laid down in Forti – i.e., breaches of the law of nations to be ‘definable, obligatory, and universally condemned’ – is ‘a misnomer, and should therefore be dropped.’ Id., 23-24.

72 Joseph, Transnational Litigation, above n 9, 25-30. The courts’ restrictive interpretation of the law of nations has significantly limited the human rights claims that plaintiffs may bring against corporations. Although corporations are capable of violating a broad range of human rights, courts have recognised corporate liability only for the most egregious violations of civil and political rights and for violations of international humanitarian law. ‘Developments in the Law’, above n 26, 2037.

73 See Curtis A Bradley, Jack L Goldsmith & David H Moore, ‘Sosa, Customary International Law, and the Continuing Relevance of Erie’ (2007) 120 Harvard Law Review 869, 896-901, 924-29 (hereinafter Bradley et al). Among others, the authors contend: ‘For a variety of reasons, we believe that the best reading of Sosa is that ATS [Alien Tort Statute] liability cannot be extended to corporations based on an aiding and abetting theory absent further action by Congress.’ Id., 924. Some
international law *cum* common law claims understood in 1789. The Court observed that the ‘federal courts should not recognise private claims under federal common law for violations of any international law norm with less *definite content and acceptance* among civilised nations than the historical paradigms familiar when’ the statute was enacted. The requirement that today’s norms should have acquired a comparable degree of acceptance to the small number of international legal causes of action recognised in the 18th century – that is, violations of safe conduct, offences against ambassadors, and piracy – places a heavy burden on the shoulders of victims of corporate human rights abuses.

However, the US Supreme Court in Sosa did not stop there. In addition to satisfying the stringent restrictions in terms of the content and acceptability of a norm by states, the determination of the question whether a norm is sufficiently definite or not 'should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.' This leeway would satisfy those who argue that a wide use of the ATCA for making US corporations accountable for human rights violations abroad might interfere with US foreign policy, adversely affect the economy of US allies, discourage foreign investment in developing countries, and/or hamper the war on terrorism. Furthermore, and quite importantly, the Supreme Court in Sosa left open the question of imposing additional limiting requirements – such as the exhaustion of domestic law remedies in the litigant’s home jurisdiction and 'a policy of case-specific deference to the political branches.'

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US courts have not, however, agreed with this position taken by Bradley et al, e.g., Presbyterian Church of Sudan v Talisman Energy, Inc. 374 F. Supp. 2d 331 (SDNY, 2005).


75 *Id.*, 2765 (emphasis added).

76 "The Sosa Court’s stipulation that an actionable claim must be “defined with a specificity comparable to the features of the 18th-century paradigms” can thus be construed to mean that a claim need not only be based on a customary international norm, but that it must be a narrowly tailored, specific guard against individual actions that bear consequences for international peace and security.’ Virginia Monken Gomez, ‘The Sosa Standard: What Does it Mean for Future ATS Litigation?’ (2006) 33 Pepperdine Law Review 469, 485.


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Thus, in view of a narrower interpretation of the term ‘law of nations’ adopted in *Sosa*,80 the scope of the ATCA to remedy corporate human rights abuses is more restricted now than ever before. 81 Although in principle the court could have interpreted the ‘law of nations’ more liberally, it preferred not to do so. Dodge, for example, canvasses four alternative standards – from most expansive to most restricted – that might be utilised to determine what constitutes a tort in violation of the law of nations. 82 He argues that the ‘law of nations’ should be interpreted in accordance with its plain language, that is, the term should encompass all norms of customary international law determined with reference to state practice followed out of a sense of legal obligation. 83 Similarly, D’Amato, in his critique of Judge Bork’s opinion in *Tel-Oren v Libyan Arab Republic*, 84 explains the wide ambit of the phrase ‘law of nations’ by contrasting it with ‘international law.’ 85 The US Supreme Court, however, considered it a constitutional imperative to perform ‘vigilant door-keeping’ as far as the judicial recognition of new actionable international norms for ATCA purposes is concerned. 86

80 Commenting on the decision in *Sosa*, Joseph notes: ‘The most substantial effect that Sosa may have on ATCA litigation is that it may narrow the test for the “law of nations”.’ Sarah Joseph, ‘Updates: Corporations and Transnational Human Rights Litigation’, 4, <http://www.hartpub.co.uk/updates/pdfs/sj.pdf> (last visited 20 December 2006). She though also expresses the possibility that the litigation under the ATCA may continue as usual, because the majority only endorsed the test laid down in *Forti v Suarez-Mason* 672 F Supp. 1531 (ND Cal., 1987). Id., 3-5.


The most expansive would be to read the Alien Tort Statute as authorising the federal courts not just to apply customary international law established by existing state practice but to create new law. ... A second possibility would be to read the Alien Tort Statute, in accordance with its plain language, to extend to all torts in violation of the law of nations determined in the usual way - by state practice followed out of a sense of legal obligation. ... A third and arguably narrower reading would limit suits under the Alien Tort Statute to those that are “universal, definable, and obligatory,” and a fourth reading would limit actionable torts to a still narrower category of those that violate jus cogens norms.

Id. (footnotes omitted).

83 Id., 353-59.

84 726 F 2d 774 (DC Cir., 1984).

85 D’Amato argues:

The 19th-century emphasis on states as subjects of “international law” ... changed and distorted what the law of nations was at the time of the Judiciary Act of 1789. ... The phrase “law of nations” says a great deal, in contrast to Bentham’s phrase “international law.” The latter suggest a law that regulates the interactions of nations. But the former suggests a law that is “of” the nations, a law that comes from them and exists as a system of rules and norms.

D’Amato, ‘Judge Bork’s Concept’, above n 32, 103.

In sum, the innovative, ambitious experiment of invoking the ATCA to make MNCs accountable for human rights abuses has not proved very successful to date and it offers little hope for a better outcome in future for several reasons pointed out above. Even within its limited scope, it is arguable that the ATCA has failed the twin test of efficacy. Although it is difficult to say with certainty whether the ATCA has encouraged MNCs to respect human rights or not, it is clear that this regulatory initiative has not provided adequate relief to the victims of corporate human rights abuses. As I pointed out earlier, it is problematic to cite the out of court settlements in cases such as *Unocal*, which are regarded as positive by-products of litigation under the ATCA, as clinching evidence of the redressive efficacy of this statute.

4.2.2 Corporate Codes of Conduct

A number of MNCs, especially the bigger or more prominent ones, are increasingly formulating and adopting some kind of voluntary corporate code of conduct. Arguably the practice of at least adopting a code of conduct by corporations is more widespread than are instances of corporate human rights abuses. The adoption of these codes - which can take various forms in terms of their nature, scope, objective, label, applicability, and implementation - is driven by several considerations.

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87 For this reason also, Borg proposes that the US Congress should enact a new law to deal with cases of human rights violations by US MNCs. Borg, above n 19, 610, 639-42.

88 Redmond concludes that 'the ATCA remedy is likely to play only a modest role in relation to TNC accountability.' Redmond, above n 43, 84. Wilson also concurs: 'It is not possible to pretend that ATCA is a perfect, or even a particularly helpful of efficient, means for holding TNCs to account [for human rights abuses].’ Andrew J Wilson, ‘Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable under the Alien Tort Claims Act' in Olivier De Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford: Hart Publishing, 2006), 43, 71.


90 'One would be hard-pressed to find any major corporation today that did not make come claim to abiding by a code of conduct that comprised, at least in part, adherence to human rights standards. Indeed, more often than not, such adherence to codes is trumpeted by major corporations.' David Kinley & Junko Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44 *Virginia Journal of International Law* 931, 953.

91 See, for example, the codes available at <http://www.codesofconduct.org/company.htm> (last visited 5 January 2005).

example, whereas certain MNCs might have adopted codes of conduct because it is a ‘right’ or ‘just’ way of doing business (i.e., by making a public commitment to respecting human rights), many others might have been forced to respond to market pressure, including the behaviour of consumers, investors, the media, NGOs, and unions. Some others might have perceived such codes as a current business fashion statement, or even a means of preempting state regulation, as well as a way of gaining competitive advantage over their business rivals in terms of the solicitation of public support. On the other hand, certain corporations might use them as a smokescreen, or a ‘window dressing’ device – a human face for inhuman business activities. My objective in this section, however, is not to examine these and similar other motivating factors, but first to highlight the advantages that corporate codes of conduct present vis-à-vis other external regulatory initiatives, and then outline their limitations for both preventing and redressing human rights violations by MNCs.

97 ‘Reputational damage could quickly affect bottom-line profits, while investment in social responsibility could reap long-term benefits.’ Picciotto, above n 92, 139-40. Lu also thinks that these codes ‘are an asset in public relations with consumers, employees and investors/shareholders.’ Lu, above n 92, 613. See also Kinley & Tadaki, above n 90, 953-54; OECD, Codes of Corporate Conduct: An Expanded Review of their Content, TD/TC/WP(99)56/FINAL (June 2000), 20-22. <http://app1.oecd.org/refis/1999doc.nsf/0/c15353362e1b372d4d99c125688a0055d899c12568d1005e01b9c42 56870015dd97bFILE/000788855.PDF> (last visited 20 December 2006) (hereinafter OECD, Codes of Corporate Conduct).
4.2.2.1 Advantages of corporate codes of conduct

Voluntary corporate codes undoubtedly have several advantages over other regulatory initiatives. First of all, unlike general regulatory regimes, corporate codes of conduct offer flexibility: each corporation can tailor a code of conduct to its specific business needs, corporate structure and/or local operating circumstances. For example, some (if not all) of the human rights issues that a corporation doing business in the mining industry has to face will be different from a corporation that manufactures medicines or is engaged in investment business.

Second, corporate codes of conduct also seem to be a more efficient way of regulating MNCs' conduct and ensuring that they respect human rights. Apart from the efficiency that results from the specificity and particularity of the content of codes designed for a given MNC or industry, codes contribute to compliance-cum-enforcement efficiency by cutting the cost of employing investigators, regulators, prosecutors and judges.

Third, by creating 'a web of transnational obligation,' codes of conduct can prove immensely useful in guiding the conduct of MNCs and their suppliers and contractors in an environment where state-based regulatory initiatives are non-existent due to weak governance, economic incapacity, conflict or corruption. Codes can also secure MNCs' cooperation in the promotion of human rights when states themselves are indulging in, or tolerating, human rights violations. Consider, for instance, the role played by the Sullivan Principles in fighting apartheid in South Africa.

98 Engle suggests that 'voluntary codes of good conduct can be used as camouflage to delay, confuse and conceal real reform.' Eric Engle, 'Corporate Social Responsibility: Market-Based Remedies for International Human Rights Violations?' (2004) 40 Williamette Law Review 103, 120.
99 This flexibility, however, brings its own problem of 'self-selection' and 'patchy and uneven content.' Picciotto, above n 92, 147.
100 See also the illustration that Picciotto gives with reference to how a general law might deal with the problem of child labour. Picciotto, above n 92, 147.
101 Slaughter notes that 'states can allow private actors to develop their own codes of conduct and then incorporate those codes into official regulation, thereby purportedly ensuring the efficiency of the rules that are adopted.' Anne-Marie Slaughter, 'A Liberal Theory of International Law' (2000) American Society of International Law: Proceedings of the 94th Annual Meeting 240, 244.
102 See OECD, Corporate Responsibility, above n 96, 23.
103 Redmond, above n 43, 90.
105 Lu, above n 92, 612-13; Liubicic, above n 95, 123-24; Westfield, above n 95, 1092-95. The Sullivan Principles, among others, require a participating company (i) to promote equal opportunity for
Fourth, codes provide an opportunity for corporations to work together with their stockholders as well as stakeholders such as workers, consumers, labour unions, NGOs and the media. Such a cooperative enterprise might reduce friction and develop a feeling of trust. Finally, codes could also work as a stepping-stone for the evolution of legally binding human rights obligations flowing from external sources. For example, states – either acting individually at a municipal level or collectively at a regional or international level – might rely on codes formulated and adopted by various MNCs to develop generally agreeable human rights standards.\(^{106}\)

**4.2.2.2 Limitations of corporate codes of conduct**

Despite the above advantages that corporate codes of conduct offer, one should not lose sight of the serious inherent limitations which directly limit their value in promoting corporate human rights responsibilities.\(^{107}\) First, codes usually use general, vague language and are selective in their content – thus hardly providing sufficiently clear human rights standards to guide the conduct of MNCs' employees. Besides, there is a tendency to commit, in a corporate code of conduct, to maintain lower standards rather than agreeing to work towards achieving higher standards, albeit step-by-step. For example, two recent studies by the ILO and the OECD, based on a survey of hundreds of codes, have found that a majority of codes used 'self-defined' standards, often referred to national standards as compared to international standards, and did not give adequate place to important rights such as freedom of expression or collective bargaining.\(^{108}\) Liubicic identifies yet another limitation related to the scope of corporate codes of conduct: the fact that a vast majority of these codes do not apply to overseas workers employed on a contract basis, or to those that work in the informal, unorganised sector.\(^{109}\)

\(^{106}\) See Kinley & Tadaki, above n 90, 957-60; Picciotto, above n 92, 145-46.

\(^{107}\) There is clear evidence that codes have serious weaknesses that undermine their utility as human rights assurance measures. Redmond, above n 43, 91, and generally 91-95.

\(^{108}\) Picciotto, above n 92, 142-43. See also OECD, *Codes of Corporate Conduct*, above n 97, 12-14; Liubicic, above n 95, 142-43.

\(^{109}\) Liubicic, above n 95, 139-40. Professor Murphy highlights similar limitation with reference to the (non)-applicability of codes to the partners of MNCs. Murphy, below n 115, 401-02.
Second, a great majority of codes of conduct do not provide for external independent assessment, verification or monitoring of corporate conduct vis-à-vis the obligations undertaken under such codes. Codes are either silent about the implementation and enforcement aspects of obligations contained therein, or at best provide for internal follow-up action. Even in those select codes that contain a provision for external monitoring and/or verification, scholars and human rights activists often doubt the independence, resourcefulness or competence of the external agencies so appointed. It is also suggested that the whole exercise might be just 'public relations gimmicks.' Although scholars have canvassed some means by which voluntary codes may be 'clothed in legal garb' and thus enforced, these options too are very limited in scope. Voluntary codes, therefore, face a serious legitimacy crisis, and 'have no meaning unless they are translated into action and unless that action is monitored and audited.'

Third, given that most of the codes of conduct do not provide for any external monitoring, the extent of their actual influence on corporate conduct largely depends on the response (often in the form of pressure) of corporate stakeholders such as

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110 Of the 246 codes surveyed by the OECD, only 26 (less than 11 per cent) contained a provision for independent, external monitoring. OECD, Codes of Corporate Conduct, above n 97, 35. 'Provisions for reporting on the organisation's performance to external stakeholders are contained in about 29 per cent of all codes.' Id., 32 (emphasis added). Only about 39 per cent of the codes had a provision for penalty or some adverse consequences for employees or business partners in case of non-observance. Id., 31, 35.

111 Liubicic, for example, points out that internal 'corporate monitoring appears to be the prevalent method of code compliance currently used by US MNCs.' Liubicic, above n 95, 134. There are no reasons to believe that the position is different qua non-US MNCs. See OECD, Codes of Corporate Conduct, above n 97, 35.

112 Anderson, above n 93, 486-88; Liubicic, above n 95, 129.

113 Lu, above n 92, 615; Picciotto, above n 92, 143. At a general level also, Liubicic highlights several limitations of monitoring even under idealised circumstances. Liubicic, above n 95, 144-50.

114 Anderson, above n 93, 489. See also Lu, above n 92, 616.

115 Kinley & Tadaki, above n 90, 956-58, relying on Ward, above n 42. See also Mark D Kielsgard, 'Unocal and the Denial of Corporate Neutrality' (2005) 36 California Western International Law Journal 185; Sean D Murphy, 'Taking Multinational Corporate Codes of Conduct to the Next Level' (2005) 43 Columbia Journal of Transnational Law 389; Lu, above n 92.

116 Kinley & Tadaki note that 'their significance at present lies more in their potential rather than extant power to shape corporate behaviour.' Kinley & Tadaki, above n 90, 960. Cleveland also observes that 'internal monitoring by companies may smell of the fox minding the chicken coop.' Cleveland, above n 92, 1553.


118 A stakeholder in an organisation is (by definition) any group or individual who can affect or is affected by the achievement of the organisation's objectives. R Edward Freeman, Strategic Management: A Stakeholder Approach (Boston: Pitman, 1984), 46.
consumers, investors, the media and NGOs. However, in the face of codes lacking any coherence or credibility, it would be unrealistic to assume that these stakeholders might exert their influence over the involved MNCs adequately and regularly. I develop this argument in detail in Chapter 5.3.1. Here it should suffice to say that consumers and investors, for example, may not have sufficient information about the human rights abuses being committed by an MNC while manufacturing or producing a given product. Alternatively, they may be unwilling to indulge in boycotts on every occasion, or may find themselves unable to purchase products made in a human rights friendly environment in view of the cost inherent in exercising such a choice. Moreover, in a given case the effect of a consumer backlash or a media exposure may be short-lived. Thus, even the informal measures that (could) sustain the enforcement of codes of conduct are rather fragile, or unpredictable at best.

Fourth, a sincere, not token, commitment to the adoption and observance of codes of conduct on the part of MNCs faces several practical challenges. In the absence of a clear, positive relation of codes of conduct to business profits, several corporations

119 Some commentators though have argued that codes could also be enforced through deceptive advertising laws. See, for example, Lu, above n 92. In my view, however, the scope of this remedy is very limited.
120 Liubicic, for example, argues that 'for consumers to make meaningful choices about socially desirable levels of workplace conditions, codes and labelling schemes must be coherent and credible.' Liubicic, above n 95, 119 and generally 131-39.
121 Liubicic argues that 'consumers normally do not have the information necessary to make meaningful distinctions among the different levels of working conditions attached to the competing commodities of different corporations.' Liubicic, above n 95, 118 and generally 118-19. An OECD study also concludes: 'There appear to be wide divergences of commitment even in relatively narrowly defined issue areas (e.g. labour standards in branded apparel, environmental and human rights commitments in extractive industries, fighting bribery).' OECD, Corporate Responsibility, above n 96, 9, and generally 33, 51-58.
122 Consumers will not respond to every NGO call to battle and the particular TNCs that lose the battle will eventually be replaced.' Lu, above n 92, 615.
124 'Should he Shell Out for Petrol, or Let Shell in?', Question to Modern Guru, Sydney Morning Herald (5-6 June 2004), 15. See also Macek, above n 95, 114.
125 OECD, Corporate Responsibility, above n 96, 24. Murphy though notes that 'the codes are crafted to promote conduct that, although it entails some costs to the MNC, brings greater benefits to the MNC.' Murphy, above n 115, 402.
may be hesitant to adopt and/or implement such codes;\textsuperscript{126} corporations will not regulate themselves into competitive disadvantage.\textsuperscript{127} In fact, the 'prisoner's dilemma'\textsuperscript{128} might discourage corporations from observing (if not adopting) these voluntary codes both in their letter and spirit.\textsuperscript{129} Simply put, the prisoner's dilemma scenario suggests that in view of uncertainty about the behaviour of one's competitors towards codes of conduct, it may be safer for an MNC not to adopt or observe such a code rather than risk being disadvantaged by its own implementation of such a code. Moreover, those MNCs which do not have or need an image to protect, or produce 'intermediate-use goods' are also less inclined to adopt and observe such codes.\textsuperscript{130} These factors make corporate codes of conduct a non-starter as a regulatory device, at least in terms of their real impact on moulding corporate conduct.\textsuperscript{131}

Finally, one could make a claim about the inadequacy of corporate codes of conduct on the basis that many of the MNCs that are sued or publicly chastised for violating human rights obligations had some sort of internal code of conduct in force at the time when the alleged violations took place.\textsuperscript{132} Out of several instances, one could helpfully refer to the cases of Unocal,\textsuperscript{133} Nike,\textsuperscript{134} Exxon Mobil,\textsuperscript{135} and BHP.\textsuperscript{136} So,

\textsuperscript{126} Macek argues that 'in the current global climate there is no long-term incentive for a corporation to adopt a code of conduct.' Macek, above n 95, 115 and generally 113-18. See also Liubicic, above n 95, 143-44; Redmond, above n 43, 93-94.

\textsuperscript{127} Engle, above n 98, 113. He continues further that 'expecting corporations to self-regulate is realistic only when ethical conduct and profitability are linked.' \textit{id.}, 120. Scalet writes: 'Asking businesses to conform to voluntary codes of ethics in a competitive environment creates a prisoner's dilemma.' Steven Scalet, 'Prisoner's Dilemma, Cooperative Norms, and Codes of Business Ethics' (2006) 65 \textit{Journal of Business Ethics} 309, 316.

\textsuperscript{128} See Chapter 1, note 185.

\textsuperscript{129} For discussion, see Chapter 5.3.2. See also Macek, above n 95, 115; Surya Deva, 'Human Rights Standards and Multinational Corporations: Dilemma Between "Home" and "Rome"' (2003) 7 \textit{Mediterranean Journal of Human Rights} 69, 87-89 (hereinafter Deva, "Dilemma Between "Home" and "Rome"").

\textsuperscript{130} Liubicic, above n 95, 116, 141-42.

\textsuperscript{131} They are expansive to implement, incentives from consumers pressure wane over time, competitive advantages decreases, and individual employee concerns can result at a competitive disadvantage.' Macek, above n 95, 118.

\textsuperscript{132} Steinhardt notes that 'the companies alleged to be complicit in abuses are frequently the very companies that adopt human rights principles with the greatest public fanfare.' Ralph G Steinhardt, 'Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria' in Philip Alston (ed.), \textit{Non-State Actors and Human Rights} (New York: Oxford University Press, 2005), 177, 186.

\textsuperscript{133} Anderson, above n 93, 496-99.

\textsuperscript{134} Jeff Ballinger, 'Just Do It – Or Else' (June 1995) 17:6 \textit{Multinational Monitor}, <http://multinationalmonitor.org/htpp/mm0695.html#nike> (last visited 31 January 2005).

\textsuperscript{135} Kielsgard, above n 115, 208-09. A recent newspaper report exposes how Exxon Mobii – picking up from the strategy adopted by tobacco corporations – has been quietly funding several organisations that sow suspicion as to the need for addressing global warming, while at the same time openly admitting
even the empirical evidence suggests that codes are not always able to change the conduct of those MNCs that adopt them.

In short, 'while corporate codes are not without value'\textsuperscript{137} because they have contributed to human rights' realisation historically\textsuperscript{138} and may have 'indirect positive effects' on several important actors\textsuperscript{139} - they suffer from serious limitations which undermine their viability as a robust mechanism for making MNCs accountable for human rights violations.\textsuperscript{140} The most pressing problems, as Picciotto argues, relate to the 'self-selected nature of the content and the lack of independent external implementation or monitoring mechanisms.'\textsuperscript{141} Unless these limitations are addressed and codes of conduct are taken to 'the next level' by an ambitious course chartered for governments by Professor Murphy,\textsuperscript{142} they will continue to offer limited or little regulatory benefit. To be more specific, the twin efficacy of corporate codes of conduct is suspect: at best they may have encouraged a small number of MNCs to internalise human rights norms in their business operations, but most of the codes perform miserably at the redressive level by not even providing for any remedy or relief to the victims of human rights abuses. However, at this stage it remains an open question, as Liubicic puts it, 'whether today's private initiatives will gradually evolve

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\textsuperscript{136} See discussion below under part 4.2.5.

\textsuperscript{137} Anderson, above n 93, 490. Engle also argues:

'[E]ven where not obeyed and existing only on paper, codes can be used to embarrass and shame the corporation, or even as evidence of action ultra vires if the corporation violates its own code or bylaws. Further, such violations may be presented as evidence against the corporation in the event of lawsuits against the company. Engle, above n 98, 112.

\textsuperscript{138} Above n 105. Cassel, however, writes that 'the Sullivan Principles failed both in their ostensible goal, to bring down apartheid, and in their tactical goal, to offer a publicly palatable alternative to divestment from South Africa.' Cassel, above n 94, 1971.

\textsuperscript{139} Liubicic outlines how corporate codes and labelling schemes may indirectly promote international labour rights by influencing the conduct not only of MNCs, workers, consumers and investors but also of governments. Liubicic, above n 95, 150-57.

\textsuperscript{140} Lu though contends that 'encouraging the voluntary adoption of human rights codes of conduct by TNCs has become increasingly important to the advancement of human rights.' Lu, above n 92, 611.

\textsuperscript{141} Picciotto, above n 92, 143.

\textsuperscript{142} Professor Murphy proposes several initiatives in the form of carrots and sticks that governments can take to ensure that codes are taken seriously by MNCs. Murphy, above n 115, 396, 423-32.
into this complete and effective system of self-regulation, or whether they will remain public relations tools that fail to achieve meaningful results.\(^{143}\)

### 4.2.3 OECD Guidelines

The OECD Guidelines,\(^{144}\) which are part of the Declaration on International Investment and Multinational Enterprises,\(^{145}\) came into effect on 21 June 1976 and were revised most recently in June 2000.\(^{146}\) The Guidelines are the result of the OECD engaging in a ‘constructive dialogue with the business community, labour representatives, and non-government organisations’ (NGOs).\(^{147}\) They are recommendations jointly addressed by governments to MNCs,\(^{148}\) and encourage MNCs to observe the principles and standards laid down in the Guidelines in areas such as human rights, disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition, and taxation.\(^{149}\)

#### 4.2.3.1 Positives out of the 2000 review of the Guidelines

The 2000 review of the Guidelines was important as it resulted in a significant improvement over the original Guidelines of 1976 in terms of widening their scope, improving the process of implementation, and including a specific recommendation on human rights.\(^{150}\) Some of these improvements deserve special mention. First, as compared to the 1976 Guidelines – which were limited to MNCs ‘operating in’ the

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\(^{143}\) Liubicic, above n 95, 158. Murphy observes: ‘Over time, if the codes remain in nature as they presently are, while demands for social and environmental justice increase, the codes may lose much of their legitimacy.’ Murphy, above n 115, 422.

\(^{144}\) The Guidelines have preferred the term ‘MNEs’ to ‘MNCs’ or ‘TNCs.’ However, to maintain consistency, I have used the term MNCs except where it is not possible.


\(^{148}\) OECD Guidelines, above n 146, 237 (Preface, para 1), 239 (para I.1).

\(^{149}\) Id., 240-46 (para II-X). See, for discussion, Muchlinski, MNEs and the Law, above n 43, 588-91.

\(^{150}\) Decisions of the OECD Council, above n 147, 2-3. See also Murphy, above n 115, 409-10; Nicola Jägers, Corporate Human Rights Obligations: In Search of Accountability (Antwerpen: Intersentia, 2002), 102-06.

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territories of member states— the revised Guidelines are addressed to MNCs ‘operating in or from’ the territories of member states. In fact, now the Guidelines not only ask MNCs to observe the provisions ‘wherever they operate,’ but also, and more importantly, expect them to encourage their ‘business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.’ This is a significant improvement in the scope of the OECD Guidelines.

Second, the post-2000 review Guidelines specifically lay down that MNCs should ‘respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.’ On the face of it, the term ‘affected by their activities’ is wide enough to include stakeholders of MNCs, meaning thereby that MNCs ought not to violate the human rights of their stakeholders. A reference to international obligations of the host country could make these Guidelines a potential tool when read with another provision which provides that the enterprises should ‘contribute to economic, social, and environmental progress with a view to achieving sustainable development.’

Third, the Guidelines now encourage MNCs to disclose publicly ‘information on the social, ethical and environmental policies of the enterprise and other codes of conduct to which the company subscribes.’ Since the flow of information is critical for stakeholders acting as informal checks on the conduct of corporations, this provision is important, especially because the ‘information should be disclosed for the

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151 OECD Guidelines of 1976, above n 145, 968 (para 1), 970 (para 6). The 1976 Guidelines though expected member states to support and cooperate with non-members states so as to ensure that MNCs could make a positive contribution in the society. Muchlinski, MNEs and the Law, above n 43, 579.
152 Decisions of the OECD Council, above n 147, 5 (para I).
153 OECD Guidelines, above n 146, 239 (para 1.2).
154 Id., 240 (para II.10).
156 Id., 240 (para II.2). MNEs should also ‘take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders.’ Id., 240 (para II).
157 Id., 240 (para II) (emphasis added). The term ‘contribute’ would definitely include an assumption of positive obligations.
158 Id., 241 (para III.5.a).
enterprise as a whole and, where appropriate, along business lines or geographic areas.’

Fourth, the revised Guidelines formulate special obligations of MNCs regarding environmental protection, combating bribery, and protecting consumers’ interests – something that was totally missing in the Guidelines of 1976. In addition, as compared to the original Guidelines of 1976, the provisions related to employment and industrial relations under the Guidelines of 2000 are much stronger and wider. For example, MNCs now should not only contribute to ‘the effective abolition of child labour’ as well as ‘the elimination of all forms of forced or compulsory labour,’ but should also ‘take adequate steps to ensure occupational health and safety in their operations.’ On the other hand, a provision that MNCs should observe ‘standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country’ may not go far enough because in many cases the standards applied in host states may not be adequate.

Fifth, the 2000 Guidelines also provide that MNCs should ‘refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environment, health, safety, taxation, financial incentives or other issues.’ This provision should discourage MNCs from seeking special exemptions – which in some cases may directly or indirectly contribute to human rights violations, as in the Bhopal case – from the regulatory framework in force in host states. It is, however, doubtful if this could counter the problem of a ‘race to the bottom’ which forces host countries to lower their human rights standards in order to attract investment by MNCs.

Sixth, the 2000 review of the Guidelines improved the compliance process too, as compared to the 1976 Guidelines. The revised Guidelines stipulate that the

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159 Id., 240 (para II.1) (emphasis added). The disclosures policies of MNEs though could be ‘tailored ... with due regard taken of costs, business confidentiality and other competitive concerns.’ Id.
160 Id., 241-42 (para IV.1.b/c).
161 Id., 242 (para IV.4.b).
162 Id., 242 (para IV.4.a) (emphasis added).
163 Id., 240 (para II.5).
164 Chapter 2.3.1.
165 See Clapham, Non-State Actors, above n 49, 205-06.
governments adhering to them ‘will’ promote and encourage their use, including by establishing National Contact Points (NCPs) and participating in ‘review and consultation procedures to address issues concerning interpretation of the Guidelines.’ One aspect that deserves special mention is the institution of a ‘special instances’ procedure, by which the NCPs can entertain complaints relating to alleged violations of the OECD Guidelines by MNCs. Should a complaint merit an examination, the concerned NCP offers its good offices to help the parties resolve the dispute. If the parties do not reach an agreement on the issue raised, the relevant NCP issues a statement and may also make appropriate recommendations on the implementation of the Guidelines.

4.2.3.2 Drawbacks of the OECD Guidelines

However, despite the improvements brought about by the 2000 review, the real impact of these Guidelines in terms of making MNCs accountable for human rights violations is doubtful. One could conclude so by looking at the provisions of the Guidelines that deal with both the formulation and implementation of human rights standards as well as their operation. At the outset, it is surprising that the Guidelines do not consider it necessary to offer ‘a precise definition’ of MNEs, something that is fundamental to their scope. Besides, the Guidelines are very general and vague in formulating human rights standards. In fact, the recommendation on human rights finds its place only in a section on General Policies and, unlike with other matters, the Guidelines contain no specific section on human rights. Even where a specific human

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166 OECD Guidelines, above n 146, 239 (para 1.5/10).
169 Decisions of the OECD Council, above n 147, 28.
170 See, for example, Christian Aid et al, Flagship or Failure?, above n 168, 13-20.
171 OECD Guidelines, above n 146, 239 (para 1.3). However, to be fair to the 2000 Guidelines, it must be admitted that they acknowledge that MNEs might be ‘so linked that they may co-ordinate their operations in various ways.’ Id.
173 Joseph, above n 40, 182.
rights obligation is construed, the language is very weak. For example, instead of the Guidelines totally prohibiting MNCs from practising child labour or forced or compulsory labour, they lay down that MNCs ‘should contribute’ towards the said goals, and that too ‘within the framework of applicable law, regulations and prevailing labour relations and employment practices.’

There is also a problem in the Guidelines’ inclination to rely too much on the policies, practices, regulations, obligations or standards of the ‘host’ countries of MNCs on any given issue. As many such enterprises operate in developing countries – where the above guidance variables are less stringent and also suffer from lax enforcement – compliance with merely the standards of host countries might not prove to be sufficient. One wonders whether the Guidelines should not have provided that MNCs should apply the higher of the standards emanating from their ‘home’ and ‘host’ countries; arguably instead of MNCs practising ‘when in Rome, do as Romans do,’ they should ‘do in Rome or anywhere else as they do at home.’

Another fundamental lacuna of the Guidelines lies in the lack of a strong enforcement system if MNCs do not follow these principles. The Guidelines clearly state that ‘observance of the Guidelines by enterprises is voluntary and not legally enforceable.’ The efficacy of their implementation depends upon the mandate and working of NCPs and the Committee on International Investment and Multinational Enterprises (Investment Committee). All member countries are expected to set up NCPs so that they can promote the OECD Guidelines, hold discussions with relevant parties, handle enquiries, and deal with ‘specific instances’ related to the

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174 OECD Guidelines, above n 146, 241-42 (para IV.1.b/c) (emphasis added).
175 Id., 240 (para II.2), 242 (para IV.4.a), and 243 (para V).
176 Deva, ‘Dilemma between “Home” and “Rome”’, above n 129.
177 OECD Guidelines, above n 146, 239 (para 1.1). The position was the same under the original Guidelines of 1976. Robinson suggests, with reference to the 1976 Guidelines, that the guidelines are an example of ‘soft law,’ that is, politically agreed upon guidelines for behaviour that cannot be directly legally enforced or legitimately infringed. John Robinson, Multinationals and Political Control (New York: St Martin’s Press, 1983), 111.
179 See, for various promotional activities undertaken, OECD, Report by the Chair, above n 167, 5-13.
implementation of the Guidelines.\textsuperscript{180} On the other hand, the Investment Committee — which is ‘comprised of representatives from all OECD member countries and observers’\textsuperscript{181} — is responsible for ‘clarification’ of the Guidelines but cannot ‘reach conclusions on the conduct of individual enterprises.’\textsuperscript{182}

It is thus clear that these two-tier institutions in principle have some potential, albeit limited, to promote the observance of the Guidelines by MNCs, for they provide a forum for exchange of views and perform advisory, consultative, recommendatory and clarificatory functions.\textsuperscript{183} In particular, the mandate of NCPs to resolve issues arising out of the (lack of) implementation of the OECD Guidelines by MNCs in specific instances is crucial. Since the special instances procedure was put in place in June 2000, the NCPs have received 106 requests for special instances.\textsuperscript{184} The NCPs have taken up and pursued further 72 instances, out of which 44 have been ‘concluded’ and the rest are ‘ongoing.’\textsuperscript{185} Although in some cases the NCPs could resolve the matter to the satisfaction of the concerned parties,\textsuperscript{186} in many instances the mediation process did not work because, for example, the activities did not have the necessary investment character, or the particular enterprise was not truly multinational.\textsuperscript{187}

On the face of it, the ‘special instances’ complaint procedure should have ensured that MNCs operating in and from the OECD member states comply with the Guidelines. This has not happened, however, for a number of reasons.\textsuperscript{188} Although the NCPs try to resolve issues arising out of the Guidelines through consensual and non-adversarial means, they have no power to enforce their recommendations.\textsuperscript{189} The OECD’s

\textsuperscript{180} Decisions of the OECD Council, above n 147, 25, 27-28.
\textsuperscript{181} Christian Aid et al, Flagship or Failure?, above n 168, 12.
\textsuperscript{182} Decisions of the OECD Council, above n 147, 26.
\textsuperscript{183} Id., 25-29; Joseph, above n 40, 182.
\textsuperscript{184} OECD, Report by the Chair, above n 167, 14.
\textsuperscript{185} Id. It is notable that out of 72 instances that were further investigated by NCPs, 44 concerned activities in non-OECD member states. Id.
\textsuperscript{186} For example, a complaint relating to labour management practices against a Mexican subsidiary of a German tyre manufacturer was settled amicably. Id., 16. See also ‘Detention Centres Meet NGO Demands’, <http://www.bsl.org.au/main.asp?PageId=3857> (last visited 10 January 2007).
\textsuperscript{187} OECD, Report by the Chair, above n 167, 14-16, 44-56.
\textsuperscript{188} Christian Aid et al, Flagship or Failure?, above n 168. See also Clapham, Non-State Actors, above n 49, 208-210.
\textsuperscript{189} Decisions of the OECD Council, above n 147, 28.
procedure and usual practice of maintaining confidentiality of proceedings, and the resulting reluctance to reveal the identity of an enterprise involved in a dispute, make the matter worse; there is thus no scope for ‘naming and shaming’ an MNC that infringes the Guidelines. In addition, the follow-up process is taken up only in thirty member countries, and not throughout the world. Even in countries where follow up has taken place, NGOs have sometimes assailed the working of NCPs.

In short, the OECD Guidelines, despite possible arguments that they have some force, are really only moral requests and are not much better than the codes of conduct adopted by many MNCs. This is demonstrated once again by a case study

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190 id.
193 Kinley & Tadaki, above n 90, 950; Anne-Christine Habbard, General Secretary, International Federation for Human Rights, <http://www.oecd.org/dataoecd/37/10/2348834.pdt> (last visited 19 October 2003). In some recent cases, however, complaints to NCPs have come out in the public domain, primarily because of the increasing scrutiny of corporate conduct by civil society organisations and/or sensitivity of the issue involved. The recent complaint against Global Solutions Limited (Australia) Pty Ltd. (GSL Australia), which alleged that GSL Australia breached human rights provisions contained in the OECD Guidelines while operating immigration detention centres, provides a good example of this. The fact that this issue did not remain confidential might have also contributed in GSL Australia agreeing to take remedial steps. See ‘Statement by the Australian National Contact Point’, <http://www.ausncp.gov.au/content/docs/298_343_final20statement.pdf> (last visited 2 August 2007).
194 In addition to thirty OECD member states, some non-members countries have also ‘chosen to adhere’ to the Guidelines. Olivier De Schutter, ‘The Challenge of Imposing Human Rights Norms on Corporate Actors’ in Schutter (ed.), above n 88, 1, 4 (hereinafter Schutter in Schutter (ed.)).
195 The follow-up procedure is in force only in 30 OECD member countries. See Karl in Addo (ed.), above n 178, 89.
196 For example, a recent report challenges on several counts the integrity and commitment shown by the UK government in implementing the OECD Guidelines. Christian Aid et al, Flagship or Failure?, above n 170, 13-20.
198 ‘Neither the Contact Points nor the CIME [Committee on International Investment and Multinational Enterprises] can judge the behaviour of individual companies; this amounts to saying that there is no enforcement.’ Habbard, above n 193.
of Ecuador’s banana plantation industry conducted by Human Rights Watch. The report discloses a corporate failure – especially on the part of Dole, a US-based MNC, which is not only a ‘signatory member’ of Social Accountability 8000 but also supposed to comply with the OECD Guidelines – to contribute to the effective abolition of child labour and to respect workers’ right to unionise. On the basis of the preceding analysis and case studies such as conducted by Human Rights Watch, it is reasonable to conclude that the OECD Guidelines are inadequate – on account of offering, at best, very limited preventive and redressive efficacy – to ensure that MNCs respect their human rights responsibilities wherever they operate.

4.2.4 ILO Declaration

Soon after the OECD issued its Guidelines in 1976, the ILO released the ILO Declaration in 1977. The ILO Declaration too was revised in 2000. The Declaration, the result of extensive research and consultation with all interested parties, was an attempt to reach an ‘agreed solution in a highly complex and controversial area of social policy through dialogue and negotiations between governments, employers and workers.’ Keeping in mind its ‘tripartite’ character, the ILO Declaration invited ‘governments of state members of the ILO, the employers’ and workers’ organisations concerned and the multinational enterprises operating in their territories to observe the principles embodied therein.’ It was

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200 Id.
201 Though the ILO had initiated the process of formulation of a code of conduct for MNCs before the OECD, it seems that the OECD has influenced the initiatives of the ILO. In fact, the ILO Declaration itself mentions that the ILO has been informed by the activities of other international bodies including the OECD. ILO Declaration, below n 203, 188. It is, however, difficult to say whether it is merely a coincidence (or something more) that the ILO Declaration of 1977 followed the OECD Guidelines of 1976. Similarly, the ILO’s revision in November 2000 followed the OECD’s revision in June 2000.
203 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 2000, reprinted in 41 ILM 186 (2002) (hereinafter the ILO Declaration). In March 2006, the ILO Declaration was revised again “to include references to relevant ILO instruments that have been adopted” since the 2000 revision. See <http://www.ilo.org/public/english/employment/multi/multinews.htm> (last visited 2 August 2007).
204 ILO Declaration of 1977, above n 202, 422 (emphasis added).
205 Id., 423.
hoped that the Declaration would facilitate the positive contribution that MNCs can make to economic and social progress.  

4.2.4.1 Scope of the ILO Declaration

The ILO Declaration lays down principles for employers' and workers' organisations, governments and MNCs which they are 'recommended to observe on a voluntary basis.' Most of the guidelines in the Declaration deal with labour rights in four areas: employment (promotion, equality of opportunity and treatment, and security of employment); training; conditions of work and life (wages, benefits and conditions of work, minimum age, and safety and health); and industrial relations (freedom of association and the right to organise, collective bargaining, consultation, examination of grievances, and the settlement of industrial disputes). However, paragraph 8—which is part of General Policies—has a specific human rights mandate. It provides that all the concerned parties 'should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly.' The ILO envisages that 'adherence to the Declaration by all concerned would contribute to a climate more conducive to economic growth and social development.'

The ILO Declaration also contains rhetorical statements, which still enshrine important principles. Paragraph 10, for example, reads:

Multinational enterprises should take fully into account established general policy objectives of the countries in which they operate. Their activities should be in harmony with the development priorities and social aims and structure of the country in which they operate. To this effect, consultations should be held between multinational enterprises, the government and, wherever appropriate, the national employers' and workers' organizations concerned.

206 Id., 422.
207 ILO Declaration, above n 203, 189 (para 7).
208 See, for discussion, Muchlinski, MNEs and the Law, above n 43, 461-80.
210 ILO Declaration, above n 203, 187 (Introduction).
211 Id., 190 (para 10) (emphasis added).
It is really doubtful if MNCs can, or should, fully appreciate and take into account the 'policy' objectives of countries in which they seek to operate. The same could be said about MNCs conducting their activities in harmony with the development priorities and social aims of concerned states. The issue of 'consultation' with stakeholders is, however, an important one and should go a long way towards ensuring that the activities and policies of MNCs do not abridge the provisions of the ILO Declaration. However, in order to be effective, such consultation should be held before the proposed activities.

The 2000 revision of the ILO Declaration made two important positive changes. First, a newly inserted paragraph provides that MNCs as well as national enterprises 'should respect the minimum age for admission to employment or work in order to secure the effective abolition of child labour.' Second, the Declaration lays down that MNCs 'should contribute to the realisation of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted in 1998.' The addition and application of this new principle to MNCs is significant because the 1998 ILO Declaration commits member states to respect, promote and realise – irrespective of whether they ratified the relevant Conventions or not – the following four rights: freedom of association and the effective recognition of the right to collective bargaining; the elimination of forced or compulsory labour; the abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

4.2.4.2 Limitations of the ILO Declaration

The limitations of the ILO Declaration again lie in its limited scope, directory nature, the absence of any monitoring process, and the lack of any implementation mechanism. To be specific, although the ILO Declaration – like the OECD Guidelines – declares that '[t]o serve its purpose this Declaration does not require a

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212 Id., 193 (para 36).
213 Id., 189 (para 8).
215 See Muchlinski, MNEs and the Law, above n 43, 480.
precise definition of multinational enterprises,\textsuperscript{216} it goes on to detail certain indicia of MNEs.\textsuperscript{217} This approach only creates avoidable doubts concerning to which enterprises this Declaration does \textit{not} apply.

Second, despite the fact that the Declaration makes a reference to the UDHR and the relevant international covenants adopted by the General Assembly, apparently its scope is limited to labour rights. It does not, therefore, deal with several other important facets of human rights such as the right to life and security of person, cultural rights, or the right to a clean environment.\textsuperscript{218}

Third, all the principles of the ILO Declaration, without any exception, are drafted in terms of `should,'\textsuperscript{219} and are `recommendatory' except for convention provisions that are binding on the member states.\textsuperscript{220} For this reason, the Declaration neither provides for a robust implementation mechanism nor makes any effort whatsoever to institutionalise external monitoring of the conduct of MNCs vis-à-vis the principles laid down therein. Undoubtedly, a Committee on Multinational Enterprises has been constituted, but its role is limited to interpreting the provisions of the Declaration when disagreement arises over their meaning.\textsuperscript{221} Furthermore, even the right to approach the Committee to interpret a provision in case of disagreement over its meaning is severely restricted. As \textit{a rule} only the government of member states – and not even organisations of employers or workers – are allowed to approach the Committee on Multinational Enterprises with such a request.\textsuperscript{222}

\textsuperscript{216}ILO Declaration, above n 203, 189 (para 6).
\textsuperscript{217}Notably, these indicia bear a striking resemblance to the factors mentioned in the OECD Guidelines.
\textsuperscript{218}Although the right to a clean environment is not explicitly recognised in the International Bill of Rights, it could be deduced from certain rights mentioned therein, e.g., Article 12 the ICESCR (the right to health) and Article 6 of the ICCPR (the right to life). One might also refer to Article 24 of the African Charter on Human and Peoples' Rights 1981, reprinted in 21 \textit{ILM} 58 (1982).
\textsuperscript{219}For example, `Multinational enterprises should observe standards of industrial relations not less favourable than those observed by comparable employers in the country concerned.' ILO Declaration, above n 203, 193 (para 41).
\textsuperscript{220}\textit{Id.}, 198. Professor Clapham notes: `The fact that the Declaration is stated to be voluntary can not detract from the normative value of those parts of it that reflect binding obligations; where companies are already bound to respect certain legal obligations, their inclusion is declaratory and a reminder of those existing obligations.' Clapham, \textit{Non-State Actors}, above n 49, 213.
\textsuperscript{221}ILO Declaration, above n 203, 200-01.
\textsuperscript{222}\textit{Id.}, 201. See also Compa, above n 191, 706-07.
Fourth, similar to the OECD Guidelines, the ILO Declaration also undermines its provisions' value by asking MNCs to follow labour standards prevalent in host countries. To illustrate, paragraph 33 provides that 'Wages, benefits and conditions of work offered by multinational enterprises should be not less favourable to the workers than those offered by comparable employers in the country concerned.'

Such a yardstick, even if complied with, can hardly ensure that the workers in developing countries are treated humanely and paid decent wages, for the problem in such countries relates to the lack of adequate labour standards and/or their lax enforcement.

To conclude, barring some core labour rights, the ILO Declaration ends up being a merely aspirational declaration without any legal enforceability, or even the possibility of market coercion in the absence of any process for publicly 'naming and shaming' the delinquent MNCs. Apart from lacking any teeth to implement the provisions of the Declaration, it also fails to offer a sound basis, rationale or strategy to encourage MNCs to observe best labour practices wherever they operate. The ILO Declaration arguably fails the twin test of efficacy, and could not be relied on too much for promoting labour rights against MNCs' continued drive for access to cheap labour in developing countries.

4.2.5 Global Compact

The UN Secretary General Kofi Annan tried to revive the role and relevance of the UN in regulating corporate human rights abuses when on 31 January 1999 at the

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223 With reference the OECD Guidelines on Employment and Industrial Relations and the ILO Declaration, Professor Muchlinski notes: 'The reference to the primacy of national law severely weakness the effectiveness of both codes.' Muchlinski, MNEs and the Law, above n 43, 460.

224 ILO Declaration, above n 203, 192 (emphasis added).

225 The way US MNCs (and their representative bodies) operating in China are opposing an attempt by the Chinese government to make its labour laws more stringent provides a good example. Tim Costello, Brenda Smith & Jeremy Brecher, 'Labour Rights in China', Foreign Policy in Focus (FPIF) Commentary, <http://www.fpif.org/fpifhtml/3824> (last visited 29 December 2006).


227 Shifts in power from states to non-state actors pose challenges to the role of the UN as protector of human rights. Secretary General Kofi Annan said: 'I see the Compact as a chance for the UN to renew itself from within, and to gain greater relevance in the twenty-first century by showing that it can work with non-state actors, as well as states, to achieve the broad goals on which its members have agreed.'
World Economic Forum in Davos, he proposed the Global Compact consisting of nine principles in the areas of human rights, labour, and the environment. On 24 June 2004, during the Global Compact Leaders Summit, a tenth principle related to ‘anti-corruption’ was added after extensive consultation with all the participants. It is claimed that the ten principles enjoy ‘universal consensus’ and ‘are derived from’ the UDHR, the ILO Declaration of Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN’s Convention against Corruption.

The Global Compact is a multi-stakeholder initiative involving diverse actors such as governments, corporations, labour and civil society organisations, and the UN. It calls upon business enterprises to ‘embrace, support and enact, within their sphere of influence, a set of core values’ in the four covered areas: human rights, labour, environment and anti-corruption. The ten principles of the Global Compact are very short but quite ambitious in their scope and try to ‘fill a void between regulatory regimes, at one end of the spectrum, and voluntary codes of industry conduct, at the other.’ To participate in the Compact, the Chief Executive Officer of the organisation must send a letter ‘to the UN Secretary General expressing support for the Global Compact and its principles.’ The participant is also expected to set in


229 It reads: ‘Businesses should work against all forms of corruption, including extortion and bribery.’ ‘The Ten Principles’, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited 29 December 2006).


233 Compact Progress Report, above n 227, 4.

234 Ministry of Foreign Affairs of Denmark & UNDP, Implementing the UN Global Compact: A
motion changes to its business operations, publicly advocate the Compact and its principles, and publish an annual sustainability report regarding the steps taken to implement the principles.  

The Global Compact ‘in its simple form is the dissemination of and adherence to good business practices.' At a wider level, the vision of the Global Compact is ‘to promote responsible corporate citizenship so that business can be part of the solution to the challenges of globalisation,’ that is, good corporate citizenship could contribute to establishing a ‘more sustainable and inclusive global economy.’ It pursues two ‘complementary goals’: first, making efforts to internalise the Compact principles as part of business strategy and operations and second, facilitating ‘co-operation and collective problem-solving between different stakeholders.’ The Compact seeks to achieve these goals through the following four engagement mechanisms: leadership (promoting initiatives supporting the Global Compact at all levels); dialogues (engaging in policy dialogues with all concerned stakeholders); learning (enabling dissemination of best business practices through sharing of ‘examples’ and ‘case studies’); and outreach or networking (providing action platforms, including promotion of public-private partnership projects).

It should be noted at the outset that the ‘Global Compact is not a regulatory instrument – it does not “police,” enforce or measure the behavior or actions of companies.’ It is not even a ‘benchmarking system that measures good and bad.’ Since the Compact is a ‘learning dialogue and a platform of action,’ it relies on a
range of unconventional means and strategies to promote respect for its principles. These include principle-based change, risk management, public accountability, the enlightened self-interest of companies, sharing good practices, and partnerships.244

4.2.5.1 A quick tour of the Global Compact’s evolution

The Compact Progress Report, 245 various case studies 246 or examples by companies,247 and a report on impact assessment prepared by McKinsey & Co.248 document the progress as well as the outreach that the Compact has achieved since its inception. The Global Compact has constantly evolved and grown, so much so that today it is acclaimed as ‘the world’s largest and most widely embraced corporate citizenship initiative’ 249 and is hailed as ‘one of the Secretary General’s most significant achievements.’ 250 Though it is not possible to describe all the milestones in the evolutionary journey of the Compact,251 some important ones may be noted here briefly. Quite notably, this ‘public-private’ partnership between the UN and business as well as other non-state stakeholders has been given legitimacy by being invoked in several General Assembly resolutions.252

244 Id.
245 Compact Progress Report, above n 227, 10-30. See also Kell, above n 232, 41-45.
248 The report concludes that ‘the Global Compact has had noticeable, incremental impact on companies, the UN, governments and other civil society actors’ and that it has ‘built up a solid participating case and string local network structure.’ McKinsey & Co., Assessing the Global Compact’s Impact (May 2004), 2, 9, <http://www.unglobalcompact.org/content/NewsDocs/Summit/imp_ass.pdf> (last visited 3 September 2004). The report, however, also acknowledges that the Compact has acted ‘primarily as an accelerator and facilitator of action, rather than the dominant force for change’ in companies’ actions, behaviour or action. Id., 3-5.
Since the Global Compact Office is concerned about the 'brand management' of its initiative, in recent times it has taken several integrity measures to ensure that participants do not misuse the name or goodwill of the Compact. First, the Compact participants are expected 'to communicate annually to all stakeholders their progress in implementing the [Global Compact] principles.' Should a participant fail to do so for two years in a row, that participant would be labeled “inactive” on the Global Compact website. In pursuance of this policy, the Global Compact Office has now started listing participants as ‘inactive.’ Second, the Compact Office has formulated and released a Logo Policy that specifies permissible and non-permissible uses of the logo.

In March 2006, the Compact Office sent a letter to open a consultation with its academic partners. The consultation was aimed at exploring how academic institutions could help in furthering the goal of corporate citizenship by providing responsible business education or otherwise. This initiative of the Compact Office to engage with educational institutions is laudable, for the academic community could play a vital role in spreading a critical understanding of the corporate citizenship initiative through education, research, and writing. Moreover, if the curricula in business, management, and law schools are aligned with the agenda of corporate...
citizenship, they could provide useful training to current and future corporate executives.\textsuperscript{261}

Secretary General Kofi Annan, on 27 April 2006, launched the Principles for Responsible Investment (PRI), which have been signed by the heads of leading institutional investors from sixteen countries, representing more than $2 trillion in US assets.\textsuperscript{262} The Global Compact along with the UN Environment Program Finance Initiative coordinated the process of drafting the PRI. There are in total six principles, which specify multiple actions regarding each of the principles.\textsuperscript{263} In summary, participating investors are expected to incorporate ‘environmental, social, and corporate governance (ESG) issues’ into their investment analysis, decision-making, and policies.\textsuperscript{264}

In order to strengthen the quality, integrity and governance components of the Global Compact, a new governance framework has been introduced.\textsuperscript{265} There will, however, be no change in the Global Compact’s founding principles, mission, objectives, the open-voluntary nature of the initiative, or the leadership model.\textsuperscript{266} The Global Compact Board will consist of twenty members from four constituency groups: business, civil society, labour, and the UN.\textsuperscript{267} Apart from three ex-officio members coming from the UN (the Secretary General, the Head of the Compact Office, and the Chair of the Global Compact Foundation), eleven will come from business, four from civil society, and two from labour.\textsuperscript{268} Thus, the dominance of corporations on the

\textsuperscript{261} Notably, the academic institutions have agreed to develop Principle for Responsible Business Education. ‘Academic Institutions Agree to Develop Principles for Responsible Business Education’, <http://www.unglobalcompact.org/NewsAndEvents/news_archives/2006_10_26.html> (last visited 4 December 2006).


\textsuperscript{264} Id.

\textsuperscript{265} Global Compact Office, ‘The Global Compact’s Next Phase’, <http://www.unglobalcompact.org/docs/about_the_gc/2.3 gc gov_frame.pdf> (last visited 1 November 2006). It is proposed that the governance functions will be shared by (i) Triennial Global Compact Leaders Summit, (ii) Global Compact Board, (iii) Local Networks, (iv) Annual Local Networks Forum, (v) Global Compact Office, and (vi) Inter-Agency Team. Id., 6.

\textsuperscript{266} Id., 2.

\textsuperscript{267} Id., 6.

\textsuperscript{268} Id., 7.
Board—which will provide 'ongoing strategic and policy advice' to the corporate citizenship initiative—is apparent.269

4.2.5.2 Deficiencies in the Global Compact

From the above brief tour, it is clear that the Compact has undergone 'intense experimentation': 270 not only are its key concepts and the modalities for its implementation still being finalised, but even the original language of its principles has been changed271 and a new principle has been added. The Global Compact has received (and continues to receive) mixed reactions from corporations, labour organisations, NGOs and member countries,272 and its credibility as well as its success are uncertain at this stage.273 Nonetheless, the Compact is continuously attracting new participants—on 11 February 2007, it had 3,944 participants (excluding 494 corporations which have been listed as ‘inactive’).274

I will, however, show that the Global Compact suffers from several deficiencies that seriously limit its efficacy in terms of both preventing and redressing corporate human rights abuses. First, it seems that the Compact still faces a directional crisis. It is not clear what it wants to achieve itself and what it leaves to be achieved by other regulatory initiatives. Despite the express assertions that the Compact is neither a

270 Kell, above n 232, 36.
271 For example, Principle I initially provided that the world business should 'support and respect the protection of international human rights within their sphere of influence.' It now reads: 'Businesses should support and respect the protection of internationally proclaimed human rights.' Two differences are noteworthy. First, the phrase 'within their sphere of influence' is removed from principle I and added as a qualifier to all ten principles. Second, 'international human rights' is qualified by 'proclaimed,' implying thereby that some international human rights are not official, or publicly declared to be so.
regulatory framework (as a substitute for government regulation or otherwise) nor ‘positioned to compete with other voluntary initiatives,’\textsuperscript{275} it in effect does both: the Compact not only tries to regulate (though in the disguise of voluntary self-regulation) but also seems to ‘dwarf’ other similar voluntary initiatives.\textsuperscript{276}

Second, the language of the Global Compact principles is so general and vague\textsuperscript{277} that MNCs can easily circumvent or comply with them without doing anything to promote human rights.\textsuperscript{278} The ten principles of the Compact are basically ‘one-liners,’\textsuperscript{279} at best an example of a ‘minimalist code’ of corporate conduct.\textsuperscript{280} They hardly provide adequate and concrete guidance to corporations about the conduct expected from them.\textsuperscript{281} Ruggie notes that many of the Compact’s ‘principles cannot be defined at this time with the precision required for a viable code of conduct.’\textsuperscript{282} The generality-cum-vagueness of the Compact principles is counterproductive from the perspective of both sincere and insincere corporate citizens.\textsuperscript{283} A certain level of generality or flexibility in guiding principles of any international initiative is a desirable virtue,\textsuperscript{284}

\textsuperscript{275} Kell, above n 232, 41. Blckett also argues: ‘[T]he Global Compact wisely does not try to create an all-encompassing “code,”’ rather, it seeks only to coexist with existing and future initiatives.’ Blckett, above n 227, 444 (emphasis added).

\textsuperscript{276} ‘With more than 1,100 companies formally committed to the Global Compact, the Global Compact is by far the world’s largest voluntary corporate citizenship networks, dwarfing other similar, voluntary initiatives, such as the Global reporting initiative (387 participants) and SA8000 (353 participants).’ Above n 273, 10. See Deva, ‘A Critique of UN’s “Public-Private” Partnership’, above n 226, 144-45.


\textsuperscript{278} Deva, ‘A Critique of UN’s “Public-Private” Partnership’, above n 226, 129-33.

\textsuperscript{279} David Weissbrodt, ‘Business and Human Rights’ (2005) 74 University of Cincinnati Law Review 55, 66 (indicating that the Global Compact ‘contains ten short sentences.’).

\textsuperscript{280} Professor Murphy concedes that ‘[a] minimalist code for codes might look something like the UN Global Compact, simply calling for MNCs to adhere to codes that address certain core issues, such as labor, human rights, environmental harm, and corruption.’ Murphy, above n 115, 425.

\textsuperscript{281} Nolan writes that ‘the Compact does little to advance the debate toward clarifying what the key human rights issues are for business.’ Nolan, above n 269, 460. See also Klaus M Leisinger, ‘On corporate Responsibility for Human Rights’, <http://www.novartisfoundation.com/pdf/leisinger_contribution_hr_business.pdf> (last visited 30 October 2006).

\textsuperscript{282} Ruggie, above n 237, 304. For example, ‘no consensus exists on what “the precautionary principle” is.’ Id.

\textsuperscript{283} Deva, ‘A Critique of UN’s “Public-Private” Partnership’, above n 226, 129.

\textsuperscript{284} The Global Compact is very flexible in practice and can be adapted to the situation and reality of the individual company. The company decides for itself in which way and how fast it will implement the Global Compact. It means that the company decides for itself what to prioritise, where to concentrate its efforts and which methods to employ.’ Implementing the UN Global Compact, above n 235, cover page.
but not if it could be taken to include or exclude anything according to individual corporate convenience.

Let us consider the language of a few principles.\textsuperscript{285} Principle 1, for example, provides that ‘businesses should support and respect the protection of internationally proclaimed human rights.’\textsuperscript{286} This principle does not elaborate on what such ‘internationally proclaimed human rights’ are and what actions ‘supporting’ and ‘respecting’ such rights would entail. Also, it should not be forgotten that this principle, like other principles, is subject to the general rider that corporations need to take measures, if at all, only within their sphere of influence. Arguably, in those cases where human rights abuses occur within the supply chain of an MNC, the MNC can easily take the stand that it would wish to support and respect human rights, but a particular independent contractor manufacturing goods for it (or a particular subsidiary) is not within its ‘sphere of influence.’\textsuperscript{287}

The stand taken by BHP regarding the obligation flowing from Principle 3 of the Compact – which lays down that ‘businesses should uphold … the effective recognition of the right to collective bargaining’ – further illustrates how fragile the Compact principles are. Even though the plain text of this provision should prima facie require BHP (or any participating corporation, for that matter, which has committed to support and advance the Compact principles) to institutionalise ‘collective bargaining,’ it continues to require its new employees to sign individual contracts.\textsuperscript{288} In fact, BHP disputes that Principle 3 directs ‘that employment be based on collective bargaining.’\textsuperscript{289} What makes the matter worse is that even the Global

\begin{itemize}
\item \textsuperscript{285} Professor Clapham examines how the concept of ‘complicity’ under Principle 2 is not free from operational difficulties. Clapham, \textit{Non-State Actors}, above n 49, 220-24.
\item \textsuperscript{286} ‘The Ten Principles’, above n 229.
\item \textsuperscript{287} The Global Compact Office though seems to be aware of this limitation. In June 2003, it held a dialogue on how to translate the then nine principles throughout the supply chain. Keil, above n 232, 41.
\item \textsuperscript{288} See a series of correspondences between the Australian Council of Trade Unions (ACTU), BHP and the Global Compact Office: <http://www.cfname.au/mining-energy/policy/GC071I03.pdf>; <http://www.cfname.au/mining-energy/policy/GC110803.pdf> (last visited 1 September 2004). The BHP, in fact, claims that it offers a ‘choice’ even to its new employees: ‘But new employees have a choice. If they want to join BHP Billiton, they can apply to join but we do require them to sign the individual contract.’ \textit{id}.
\item \textsuperscript{289} BHP’s letter dated 16 June 2003 to the ACTU. \textit{id}. See also the BHP’s letter dated 17 June 2003, to Mr Kofi Annan, <http://www.bhpwillton.com/bbContentRepository/Policies/LettertoKofiAnnanUnitedNations170603.pdf> (last visited 14 September 2004). Notably, BHP relies
\end{itemize}
Compact Office seemingly agreed with this (mis)interpretation of Principle 3 by BHP. As a result, one could reasonably conclude that the Compact principles are too general and vague to be of any real value in terms of formulating the human rights obligations of MNCs.

Third, it is also clear that the Global Compact does not provide for any recourse in case the participating MNCs ignore this 'moral compass,' that is, if they fail to embrace its principles. It is openly admitted that 'the Global Compact is not a code of conduct; monitoring and verification of corporate practices do not fall within the mandate or the institutional capability of the United Nations.' Dialogue with business is a central tool of the Global Compact in ensuring respect for human rights, but it is doubtful to what extent the means employed could achieve the end of responsible corporate citizenship. Professor Alston argues:

> It must suffice to say that the UN and the various specialised agencies already have endless dialogue designed to promote policy coordination and it is difficult to see how the addition of one new one, albeit termed a Global Compact, would be more successful in relation to human rights when other dialogues have yet to be especially productive.

It is also likely that corporate executives will continue to resist any attempts directed at external monitoring or mandatory enforcement of the Compact principles, despite the growing demands by NGOs that external independent monitoring as well as a robust and transparent system for evaluating corporations' conduct are a sine qua non for the success and credibility of the Compact.


290 The Compact Office in its letter dated 1 December 2003 to BHP 'clarifies': 'The Global Compact does not prescribe any particular form of workplace arrangements. Hence, we do not expect participants to change their industrial relations framework as a result of signing on to the Global Compact.' <http://www.bhpbilliton.com/bbContentRepository/Policies/UNLetter.PDF> (last visited 14 September 2004).

291 'At its core, the Compact is nothing more than a moral compass.' Kell, above n 232, 47.


The fourth deficiency of the Global Compact lies in its progress reporting mechanism. The Compact participants are required, to show their commitment to the Global Compact principles, to submit an annual ‘communication on progress’ (COP), which ‘is an annual description of actions taken in support of the Global Compact, made available to stakeholders.’ A failure to provide the COP may result, under different conditions, in that corporation being listed on the Compact’s website as a ‘non-communicating’ or an ‘inactive’ participant. Although it is hazardous to generalise, it seems that this exercise may have proved to be a mere ritual or a public relations exercise in the absence of any proper and independent monitoring of the conduct of corporations. Though the requirement of submitting the annual COP is not very onerous, about 25 percent of the total participants (mostly corporations) have defaulted on this requirement in the short life span of the Compact. A comparison of total participants and ‘non-communicating’ participants in fourteen countries, conducted in March 2006 and repeated again after four months in July 2006, reveals

Figure 4.1: Comparing the Percentage of ‘Non-Communicating’ Participants in Fourteen Countries with the Corresponding Global Average

* Hong Kong is taken here as a country merely to keep conformity with the data available at the Global Compact website

295 ‘Guidance Package on Communication on Progress’, <http://www.unglobalcompact.org/CommunicatingProgress/COP_Guidance.html> (last visited 29 January 2007). Earlier, the Compact required a participant to submit an annual 'net report' showing concrete examples of how it has internalised one or more Compact principles. Compact Progress Report, above n 227, 6, 9, 19.


297 Deva, 'A Critique of UN’s “Public-Private” Partnership’, above n 226, 137-41.

298 On 18 March 2006, the number of total participants and non-communicating participants (given in bracket) in the surveyed fourteen countries was as follows: Argentina 203 (0); Australia 20 (5); Brazil 151 (44); China 62 (14); France 403 (109); Germany 65 (7); Hong Kong 0 (0); India 116 (53); Japan 44 (4); Mexico 102 (2); Philippines 139 (97); Singapore 4 (0); South Africa 16 (4); and the USA 124 (26).
that the percentage of non-communicating participants is much higher than the global average in some countries (see Figure 4.1). 299

Fifth, although the Compact is not a state-focal corporate citizenship initiative, states are still one of the key stakeholders from which it requires multi-faceted support. 300 Blackett suggests that it may be necessary to bring to the ‘fore’ the role of government in implementing the Compact principles. 301 However, to date the Compact has failed to map the proper role of states by indicating what sort of legislative or administrative measures are expected of them to support the implementation of the Global Compact principles.

Finally, as the Global Compact Office ‘neither regulates nor monitors company’s submissions and initiatives,’ 302 apprehensions have also been expressed that MNCs might use the Global Compact as a ‘marketing tool,’ 303 or to ‘bluewash’ their reputation/image, 304 or to gain undue sympathy of consumers and prospective shareholders/employees. 305 For example, BHP – despite blatantly ignoring the mandate of ‘collective bargaining’ – continues to represent on its website as well as in its various reports that BHP is committed to the Global Compact principles.

301 Blackett, above n 227, 444.
302 Kell, above n 232, 38.
303 Human Rights First, Letter to the UN, above n 294.
304 Taylor, above n 227, 980; Rule, below n 316, 328; Blackett, above n 227, 442. He argues: ‘Despite terms in the guidelines that suggest that corporations that are complicit in human rights abuses will not be eligible for partnership, it is not apparent that any triage has been undertaken.’ Id., 445.
305 This concern is raised very eloquently in a recent letter written by Human Rights First to the UN Secretary General:

If the Global Compact is intended simply as an open forum that includes all companies, regardless of their record, then you should make this clear. This would then limit the opportunity for companies to use their participation in global Compact meetings for public relations purposes. ... Companies that are not taking their commitments seriously should not continue to benefit from their formal association with the Global Compact.

Human Rights First, Letter to the UN, above n 294, 1-2. In fact, the Global Compact Office also, in its letter dated 22 June 2004 to the Human Rights First, has acknowledged this ‘concern about the need to protect the integrity of the Global Compact.’ This letter is available at <http://www.humanrightsfirst.org/workers_rights/pdf/un_response_ruggie_kell_062204.pdf> (last visited 2 February 2005).
4.2.6 UN Norms

The UN Norms, which were drafted by the five-member UN Working Group on the Working Methods and Activities of TNCs over a period of four years, are the most recent addition to the existing regulatory initiatives that seek to formulate human rights responsibilities of corporations. The UN Norms, coupled with the Commentary appended to them, not only provide the most comprehensive and detailed statement of MNCs' human rights (including labour and environmental rights) obligations, but also outline the procedure for their implementation. Although the Sub-Commission on the Promotion and Protection of Human Rights approved the Norms, they lack any 'legal standing' at this stage and their future is uncertain, especially in the light of an antagonistic position adopted by Professor John Ruggie, the UN Secretary General's Special Representative on Human Rights and Transnational Corporations.

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4.2.6.1 Why are the UN Norms a step in the right direction?

Nevertheless, as I argued elsewhere, the UN Norms present to date the most promising framework for establishing MNCs' accountability for human rights violations because of at least six factors. First, instead of being limited to labour and/or environmental rights, the UN Norms present a comprehensive list of human rights obligations. Besides a general obligation 'to respect, ensure respect for, prevent abuse of, and promote human rights recognised in international as well as national law,' specific obligations relate to: the right to equal opportunity and non-discriminatory treatment; the right to security of person; the rights of workers; respect for national sovereignty and human rights; and consumer and environmental protection. The general obligation to respect 'international human rights' becomes a potent provision in view of paragraph 23, which provides that a reference to 'international human rights' in the UN Norms includes all civil, cultural, economic, political and social rights. Paragraph 12 provides further specificity to these obligations.

Second, the Preamble to the Norms makes a clear, specific and unequivocal reference to the UN Charter, the UDHR and other international treaties as the bases to deduce obligations for MNCs. This provides a stronger and more widely accepted basis for corporate human rights responsibilities generally, and a jus cogens basis regarding

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316 Rule suggests that 'they may be the first major stepping stone towards the adoption of an international, enforceable set of legal obligations binding' on MNCs. Troy Rule, 'Using “Norms” to Change International Law: UN Human Rights Laws Sneaking in through the Back Door?' (2004) 5 Chicago Journal of International Law 326, 326. Kinley and Chambers also conclude: 'Despite their imperfections, it cannot be overlooked that the Norms already represent a big leap forward in the setting of human rights standards for TNCs at the levels of both international and domestic law.' Kinley & Chambers, above n 310, 493. See also Weissbrodt, above n 279, 64-67.
317 Although the ILO Declaration makes a reference that the multinational enterprises 'should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly' (above n 203, para 8), the thrust of its provisions is undoubtedly on labour and employment rights. Same could be said about the OECD Guidelines, despite the fact that after the 2000 review a recommendation on human rights finds a place in para II.2. The OECD Guidelines, above n 146.
318 UN Norms, above n 308, para 1.
319 Id., para 12.
320 The reference to various international conventions, for the purpose of reliance, is quite elaborate and covers a wide range of civil, political, social, economic and cultural rights. Id., the Preamble. The UN Norms though refer to other sources as well. See Peter T Muchlinski, 'Human Rights, Social Responsibility, and the Regulation of International Business: The Development of International Standards by Intergovernmental Organisations' (2003) 3 Non-State Actors & International Law 123, 139.
some human rights.\textsuperscript{321} In view of the UN Norms' reliance on the said international covenants, one commentator has concluded that the Norms 'thus represent a restatement of existing international human rights law' which 'already does or should apply to companies' conduct.'\textsuperscript{322} Although an argument could be made that the UDHR or other international covenants apply to non-state actors including MNCs,\textsuperscript{323} one should not, however, lose sight of the fact that those international covenants were never drafted to apply directly to MNCs\textsuperscript{324} and did not provide for any enforcement mechanism in case MNCs fail to observe the obligations set forth in those covenants.\textsuperscript{325} It was already explained in Chapter 1 why it is important to formulate duties specific to MNCs with reference to the rights enumerated in the International Bill of Rights.\textsuperscript{326} In short, the UN Norms do more than merely restate the existing obligations; they not only formulate obligations directed clearly and directly to MNCs,\textsuperscript{327} but also lay down provisions for their implementation. They represent not only the changing character of international law but are also evidence of the inadequacy of the prevailing state-centered international human rights regime to provide fully for human rights' realisation.\textsuperscript{328}


\textsuperscript{322} Hilleman, above n 296, 1070 (emphasis added). Nolan also observes: 'Accusations that the Norms are, in part, duplicative and merely restate ... obligations ... are accurate.' Nolan, 'With Power Comes Responsibility', above n 310, 586.


\textsuperscript{324} It can be argued that the courts have 'indirectly' tried to make private actors accountable, i.e., failure of state to prevent human rights violations by private persons, including corporations, within its territory amounts to violation of a state's mandate under the international conventions. See, e.g., \textit{Guerra v Italy} 26 EHRR 357 (1998). See also David Kinley, 'Human Rights as Legally Binding or Merely Relevant?' in Stephen Bottomley & David Kinley (eds.), \textit{Commercial Law and Human Rights} (Aldershot: Ashgate Dartmouth, 2002), 25, 40-41; Steven R Ratner, 'Corporation and Human Rights: A Theory of Legal Responsibility' (2001) \textit{111 Yale Law Journal} 443, 470.

\textsuperscript{325} An ICHRP report concludes that only the ILO and OECD enforcement mechanism were designed with companies in mind. ICHRP, \textit{Beyond Voluntarism}, above n 178, 117.

\textsuperscript{326} Chapter 1.4.1.

\textsuperscript{327} 'Their value comes from their comprehensive nature because in a single document they pull together the principal rights relevant to business ... and translate these statements, primarily addressed to states, to corporations.' Nolan, 'With Power Comes Responsibility', above n 310, 586.

\textsuperscript{328} Ratner argues that 'a system in which the state is the sole target of international legal obligations may not be sufficient to protect human rights.' Ratner, above n 324, 461.
Third, in terms of the nature of obligations also, the Norms clearly make an encouraging advancement vis-à-vis prior or existing corresponding regulatory initiatives. As MNCs could violate human rights in several ways (including by failing to act), it is insufficient to draft obligations in conventional ‘negative’ terms, i.e., that MNCs should or shall not violate human rights. The UN Norms try to overcome this problem by imposing ‘positive’ obligations on MNCs. MNCs shall not only refrain from directly or indirectly contributing to, and benefiting from, human rights violations, but also ‘use their influence in order to promote and ensure respect for human rights.’

Fourth, the UN Norms substitute the conventional approach of ‘should’ with ‘shall’ in terms of the standard for compliance with the obligations. Although it may be suggested that the change of terminology may not make much difference in terms of the end result and that as a matter of fact the Norms are not binding, it is still a positive and definite shift in approach, and should make a difference when coupled with provisions for implementation of the norms. This shift also embodies tacit

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330 This is clear from the use of terms obligation to 'promote' and 'protect' human rights in para I. See also para 12 where an obligation is constructed in terms of not only respecting but also contributing to the realization of human rights. UN Norms, above n 308. See, for an argument why TNCs should be under positive obligations, Deva, 'Dilemma between "Home" and "Rome"', above n 129, 87-89.

331 Commentary on the Norms, above n 309, Commentary (b) to para 1. See also Hillelmanns, above n 296, 1073.

332 A shift in approach is visible from the use of the term ‘shall’ in paras 2-16, 17 and 19 as well as by the fact that the provisions for implementation are given due importance and place in the UN Norms. UN Norms, above n 308. See also Hillelmanns, above n 296, 1068. Notably, international business organisations are sceptical of this shift in approach as they ‘view them as the beginning of the end for the incumbent system of voluntarism and self regulation.’ Rule, above n 316, 328.

333 The Norms are presented as being neither voluntary nor obligatory but 'non-voluntary.' Weissbrodt & Kruger, above n 307, 913.

334 The ‘UN practice suggests that the use of shall in a treaty creates a “harder” sense of obligation than the use of should, which arguably belongs to the category of “soft law.”’ Clapham, Non-State Actors, above n 49, 75 (emphasis in original).

335 The many implementation provisions show that they amount to more than aspirational statement of desired conduct. ‘Id. It is important to note that para 14 of the final draft of the UN Code of Conduct on Transnational Corporations has chosen ‘shall’ in place of ‘should’. It read: ‘Transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate.’ (emphasis added) Draft of the UN Code of Conduct on Transnational Corporations, UN ESCOR, Doc. E/1990/94 (1990).
acceptance of the fact that the prevailing ‘dialogue-cooperation’ based approach of voluntary compliance\textsuperscript{336} with human rights norms is not proving to be adequate.\textsuperscript{337}

Fifth, the UN Norms propose specific provisions for implementation of human rights norms.\textsuperscript{338} In fact, this is a corollary to the Norms opting for a non-voluntary approach to compliance. Besides asking corporations to adopt, disseminate and internally implement the obligations laid down therein,\textsuperscript{339} the UN Norms urge states to ‘establish and reinforce the necessary legal and administrative framework for ensuring that the Norms’ are implemented by MNCs.\textsuperscript{340} The Norms also propose independent and transparent periodic monitoring as well as verification by national and international (including the UN) mechanisms.\textsuperscript{341} This again is a departure from the existing indirect mode of implementation in which the responsibility of enforcing corporate human rights responsibilities lies solely and exclusively with states. Note must be taken of another significant provision of the UN Norms which provides for prompt, adequate and effective reparation to persons and communities adversely affected by the failure of MNCs (or other business enterprises) to comply with their responsibilities thereunder.\textsuperscript{342}

Sixth, the scope of the Norms is not limited just to MNCs, but also covers ‘other business enterprises,’\textsuperscript{343} that is, any business entity, regardless of its legal form and/or area of operation, including a partnership, contractor, subcontractor, supplier, licensee or distributor (hereinafter contractors and suppliers etc.).\textsuperscript{344} The Norms shall apply to such ‘other business enterprises’ if they have any relation with an MNC, the impact of
its activities is not entirely local, or the activities involve violations of the right to security outlined in paragraphs 3 and 4. Such wide amplitude of the UN Norms should be seen as a response to the problem associated with pinning precise responsibility on an MNC. As in many situations the apparent violator is not an MNC but its subsidiary, contractor or supplier, should the concerned MNC be allowed to bypass its human rights liability on technical grounds, for example, by invoking separation of corporate personality or lack of management control? The Norms try to overcome this problem by placing a direct obligation on MNCs that their concerned contractors and suppliers etc. respect human rights. Not only this, the obligation of MNCs also extends to ensuring that their contractors and suppliers etc. actually implement the Norms in their respective operations. The Norms, therefore, send a clear message to MNCs: either ensure that the entities with which you do business respect human rights or do not deal with them, for failure to act may attract liability.

4.2.6.2 Shortcomings of the UN Norms

The above analysis makes it manifest that the UN Norms undoubtedly represent an improvement in terms of both the formulation and implementation of human rights standards over earlier such attempts at the international level. Nevertheless 'they still fall short of what is required for evolving an effective international regulatory regime

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345 Id. See, on how the scope of the application of the UN Norms changed during the drafting stage, Muchlisnki, above n 320, 136-38.
346 Although the definition of TNC in para 20 is wide enough to cover even the subsidiaries of a TNC, 'subsidiaries' as such are not specifically mentioned along with suppliers-contractors et al in para 21. It seems, however, that the subsidiaries of a TNC could still be covered, being a ‘business enterprise’ having a ‘relation with a transnational corporation.’ This interpretation could also be supported from the language used in para 15. UN Norms, above n 308.
347 Para 1 provides: ‘... Within their respective spheres of activity and influence, transnational corporations and other business enterprises shall have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, ...’ UN Norms, above n 308 (emphasis added). See also Hillemanns, above n 296, 1072-73.
348 This is clear from a provision regarding implementation found in para 15, which lays down:

... Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

UN Norms, above n 308 (emphasis added).
349 See Commentary on UN Norms, above n 331, commentary (c) to para 15.
of corporate human rights responsibility. The Norms still suffer from serious operational shortcomings – both in terms of the formulation and implementation of human rights obligations. Some of these shortcomings are noted here briefly. First, the Norms’ frequent reference to numerous international treaties, which are negotiated as well as signed by states and are directed primarily towards states, to deduce human rights of MNCs is problematic due to several reasons. Besides this approach being circular, it will present difficulty in ascertaining the human rights obligations of MNCs with reference to state-focal international instruments and will ultimately lead to inefficient regulation. It is also unreasonable to expect MNCs to go through all the enlisted human rights instruments before being sure what their precise human rights responsibilities are.

Second, the UN Norms provide an ‘overly inclusive’ list of human rights for corporations, probably driven by a desire to ‘maximise’ the scope of corporate human rights responsibilities. A reference to the language of paragraph 12 of the Norms will make this point clear:

Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realisation, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realisation of those rights.

This formulation of corporate human rights responsibilities not only covers a wide range of rights (some of which are controversial or lesser established) but also...
envisages extensive duties regarding those obligations, that is, the duty to respect, the
duty to contribute to, and the duty to refrain from impeding those human rights.
Without discounting that all the human rights mentioned in paragraph 12 have some
relevance to business operations, it may have been more appropriate for the UN
Norms to begin with a less ambitious and more pragmatic approach.

Third, a related issue is that the Norms do not adequately address the issue of
translating the universality of human rights into precise standards for an MNC
operating in different countries. The issue of localisation of universality — or the
question of which local differences MNCs should take into account or disregard while
operating in countries that differ from each other in material particulars — is an
important one, but the UN Norms apparently fail to address this aspect even
tentatively.358 Of course the UN Norms were not expected to detail industry-wise or
state-wise human rights obligations,359 but they should have at least provided
guidelines with reference to which obligations at the municipal level could be
formulated. In other words, the question how MNCs should behave at ‘home’ and in
‘Rome’ remains unresolved.360 I discuss this aspect in detail with reference to Bhopal
in Chapter 6.

Fourth, there is uncertainty about the precise nature of the Norms, which are neither
voluntary nor mandatory, but ‘non-voluntary.’ Though the addition of this new
category might be explained as a logical progressive step from ‘soft’ to ‘hard’
obligations,361 this complicates the whole issue of compliance strategy. Not only is
the distinction between ‘mandatory’ and ‘non-voluntary’ nonsensical, it also
undermines the usefulness of the implementation provisions contained in the UN
Norms. In summary, it is not clear what the Norms — which construct human rights
obligations in terms of ‘shall’ and also make special provisions for implementation —

358 The precise content, say of the right to safe and healthy working environment, adequate
remuneration, the right to health or the freedom of speech and expression will vary from one place to
another.
359 Kinley and Chambers note: ‘The fact that they are open-ended is not only unexceptional, it is also
necessary to achieve international consensus on the subject and to enable all parties to relate to the
initiative.’ Kinley & Chambers, above n 310, 466.
want to achieve and how. Barring a provision dealing with reparation, the Norms fail to canvass other possible sanctions that might be resorted to against delinquent MNCs in case they fail to observe the obligations laid down therein. For example, there is no provision for criminal – except those that states may institute under paragraph 17 – or social sanctions. In addition, the idea of establishing an enforcement mechanism, especially at the international level, is very unclear and undeveloped at this stage. These factors will undermine the viability and efficacy of the Norms.

Fifth, despite the fact that in the past MNCs have successfully employed the doctrine of *forum non conveniens* and the principle of separate personality to delay or avoid their liability for human rights abuses, the Norms do not even acknowledge the relevance of these important issues to fix accountability on MNCs. This lacuna will again negatively impair the efficacy of the Norms. Whereas the suitability of a litigation forum will remain a critical issue unless an international judicial body hears disputes arising under the Norms, the argument based on separation of legal personality will be invoked whichever court adjudicates cases of human rights abuses against MNCs.

Sixth, the Norms might prove a non-starter in view of the vocal opposition they have faced from leading MNCs, business organisations, states and even the UN.
Secretary General's Special Representative on Human Rights and Transnational Corporations. Consequently, on the one hand, the Norms in their current form face a legitimacy crisis; on the other, they might prove useless if they try to address and accommodate the concerns of MNCs and business organisations.

The above critical analysis of the UN Norms is not to suggest, however, that they are without any value. The Norms have not only taken the agenda of clarifying and elaborating corporate human rights responsibilities further, but have also provided ‘the basis for corporate action’ even though they are not legally binding or adopted by the UN. My objective was only to demonstrate that even if the Norms were to be adopted by the UN in their current form, which is very unlikely, they fall short of what is required for establishing a robust international regulatory regime of corporate human rights responsibilities. In view of the drawbacks explained above, the Norms are also unlikely to satisfy the twin test of efficacy, though they come closest to doing so as compared to other five regulatory initiatives examined in this chapter.

4.3 THE THREE-FOLD INADEQUACY OF THE EXISTING REGULATORY INITIATIVES

By presenting an analysis of six representative regulatory initiatives related to MNCs, the previous part highlighted the specific limitations of those regimes in making MNCs accountable for human rights violations. Based upon that analysis, in this part I intend to draw some general conclusions about the inadequacy of the existing regulatory framework. I argue that the general deficiencies of the current regulatory framework relate to, and could be classified under, three broad categories:

- lack of precise, measurable human rights standards;
- insufficient or contestable rationales for compliance; and

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374 Above n 314.

375 Kinley and Chambers critically examine in detail the arguments for and against the UN Norms. Kinley & Chambers, above n 310.

376 Weissbrodt, above n 279, 72-73; Kinley & Chambers, above n 310, 461-62.
deficient or undeveloped implementation and enforcement mechanisms.

4.3.1 Lack of Precise, Measurable Human Rights Standards

Although the presence of precise and measurable (as far as possible) human rights standards should be a precondition to any regulatory regime related to MNCs, it is doubtful if the existing regulatory initiatives satisfy this basic precondition. Whereas some of the existing mechanisms are very limited in scope, almost all of them prescribe vague and general human rights standards, do not resolve MNCs' dilemma of applying different standards at 'home' and in 'Rome,' adopt an indirect approach in deducing the obligations of MNCs under international human rights law, and suffer from the problem of over-referencing to state-centric human rights treaties. The Norms without doubt make an attempt to resolve some of these issues, but, as I highlighted, still fall short of a desirable level of specificity. In the absence of precise, measurable human rights standards that could be applied by and enforced against MNCs, the existing regulatory framework essentially becomes unworkable. Even if an MNC is keen to respect and follow human rights, no concrete generally agreeable standards that it can ascertain easily are available.

One might contend that generality is a problem associated with all human rights treaties and not something peculiar to instruments specifically directed towards

377 For example, the ATCA, corporate codes of conduct and the Global Compact.
378 See, e.g., para II.1 of the OECD Guidelines, which provides that enterprises should 'contribute to economic, social and environmental progress with a view to achieving sustainable development.' OECD Guidelines, above n 146, 240. Principle 8 of the Compact invites world business to 'undertake initiatives to promote greater environmental responsibility.' Global Compact, above n 229.
379 See, e.g., para 33 of the ILO Declaration provides: 'Wages, benefits and conditions of work offered by multinational enterprises should be not less favourable to the workers than those offered by comparable employers in the country concerned.' ILO Declaration, above n 203, 192 (emphasis added). Paragraph 34 further reads: 'When multinational enterprises operate in developing countries, where comparable employers may not exist, they should provide the best possible wages, benefits and conditions of work, within the framework of government policies.' Id. (emphasis added). Finally, paragraph 38 provides: 'Multinational enterprises should maintain the highest standards of safety and health, in conformity with national requirements ...' Id., 193 (emphasis added).
380 See, e.g., para II.2 of the OECD Guidelines lays down that MNCs should respect human rights in a manner 'consistent with the host government's international obligations and commitments.' OECD Guidelines, above n 146, 240 (emphasis added). The UN Norms though make a departure from this approach by imposing human rights obligations on MNCs directly flowing from international human rights law rather than through the host or home country's obligations. See generally UN Norms, above n 308.
381 The ILO Declaration and the UN Norms are very good example of this. Arguably, instead of making a reference to the state-focal international human rights treaties, the human rights obligations of MNCs should be deduced from such treaties.
MNCs. Moreover, it might be argued that general comments by the committees established under the UN human rights treaties — which ‘form a reasonably comprehensive and detailed interpretation of provisions of human rights law by treaty bodies’ — may be invoked to provide specificity to the content of MNCs’ human rights obligations. But again these general comments are made neither with reference to instruments specifically directed towards MNCs nor keeping in mind the nature, purpose, structure and modus operandi of MNCs. Just to illustrate, General Comment 20 of the Human Rights Committee provides, among others, that ‘states parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.’ In view of the increasing involvement of MNCs in the ‘war against terror,’ this Comment does not offer much help in ascertaining the human rights obligations, if any, of MNCs.

4.3.2 Missing, Vague or Erroneous Rationales for Complying with Human Rights Obligations

Given that corporations are meant to generate wealth and earn maximum profit for their shareholders and that they supposedly conduct their business in a rational manner, it is very important that concrete (perhaps also empirically verifiable) rationales are advanced to back the imposition of legally binding human rights obligations on MNCs. Arguably, such rationales, in order to be logically sustainable, should also take a position vis-à-vis the profit maximisation motive of corporations.

382 See Sacharoff, above n 46, 931-32.  
383 Marceau, for example, points out that ‘a particular difficulty in dealing with human rights treaties is the fact that they are often drafted in rather general terms, and frequently there is no consensus on their interpretation.’ Gabrielle Marceau, WTO Dispute Settlement and Human Rights’ (2002) 13 European Journal of International Law 753, 786.  
The existing regulatory regimes, however, do not address this important aspect at all, offer general and vague reasons, or worse provide highly contestable and unsound rationales. A brief review of the six regulatory initiatives discussed above in this chapter will make this clear.

To begin with, the ATCA is silent on why corporations should be bound by human rights norms. Even the cases decided under the ATCA hardly offer any guidance on this matter. The closest courts have come to this issue is when they have observed that there is no bar against suing corporations under the ATCA. However, this is different from saying that corporations should be bound by the mandate of international human rights law due to reason ‘X’.

Corporate codes of conduct, on the other hand, provide diverse justifications for corporations taking into account human rights issues while doing business — from this being ‘a right thing to do’ to behaving like ‘a good/responsible corporate citizen,’ preserving ‘reputation,’ doing ‘ethical business,’ or founding it just on a ‘handshake.’ These pious statements directly or indirectly link compliance with human rights to business profit, a rationale that should be avoided for the reasons outlined below.

Both the ILO Declaration and the OECD Guidelines offer, in almost identical terms, aspirational rationales for complying with human rights or other obligations: it is urged that by observing these standards corporations can make a positive contribution to economic, social and environmental progress and also resolve the difficulties to which their various operations may give rise. The OECD Guidelines, in addition, also offer a glimpse of invoking the business case for human rights, which is more clearly formulated in the EU’s Green Paper and in the writings of several

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388 See, for example, Presbyterian Church of Sudan v Talisman Energy 244 F Supp. 2d 289 (SDNY, 2003); Doe v Unocal 2002 US App. LEXIS 19263 (9th Cir., 2002).
389 Above n 93 to n 97.
390 ILO Declaration, above n 203, 188 (para 2); OECD Guidelines, above n 146, 238 (para 10).
391 OECD Guidelines, above n 146, 238 (para 6).
This compliance rationale - that MNCs should comply with human rights norms to earn greater profits and enjoy a competitive advantage over their competitors - may be attractive for corporations, but is flawed as I demonstrate in Chapter 5.3. In short, the business case rationale for compliance is not only based on too many unpredictable and contestable market assumptions, but also compromises the peremptory nature of human rights. It is contended that a theory of corporate responsibility for human rights violations should be based upon a more concrete foundation rather than relying on indeterminate and fragile assumptions.

Finally, whereas the Global Compact principles do not throw any light on compliance rationales, one could gather some insight on this issue from the Preamble to the Norms which 'recalls' that the UDHR proclaims a common standard of achievement for all peoples/individuals of society and 'recognises' that MNCs, 'as organs of society, are also responsible for promoting and securing the human rights.' As compared to other regulatory initiatives, this compliance rationale offered by the UN Norms is most convincing. I endorse and elaborate upon this approach in Chapter 5.4, by arguing that corporations ought to respect human rights because of their relation with and position in society.

4.3.3 Deficient or Undeveloped Implementation/Enforcement Mechanisms

If human rights 'are to have any meaningful bearing on the life of individuals and communities, they must be translated into action.' Various mechanisms to implement and enforce human rights norms help foster their translation into action. However, the existing regulatory initiatives provide deficient or undeveloped implementation and enforcement mechanisms in view of at least three reasons.

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394 The other documents and materials relating to the Global Compact, however, make a business case for human rights. See Claude Fussler, Aron Cramer & Sebastian van der Vegt (eds), Raising the Bar: Creating Value with the UN Global Compact (Sheffield: Greenleaf Publishing L.t.d., 2004), 23, 218-26.
395 UN Norms, above n 308, Preamble.
4.3.3.1 Overdose of dialogue and cooperation

With the possible exception of the ATCA and the UN Norms, the existing initiatives rely excessively on the strategies of 'dialogue' with, and 'cooperation' of, MNCs to make the realisation of human rights an integral part of their business. Although this approach is not harmful per se and in fact is ideal if the dialogue results in MNCs internalising human rights norms in their operations, the excessive reliance of these initiatives on this strategy creates the impression that human rights are not rights any longer, for their realisation seems dependent upon the cooperation (or lack of it) of MNCs. The language used in several regulatory instruments supports this impression. For example, the Global Compact 'asks' companies to 'embrace, support and enact ... a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption.' Similarly, paragraph 1.2 of the OECD Guidelines, inter alia, provides that the 'governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines.' But, if the past and present serve as guides, the fact remains that with some possible exceptions, many MNCs have not often been 'encouraged' to respect human rights beyond expressing that encouragement in words.

With reference to the Global Compact, Professor Alston makes an apt remark, which holds true regarding other regulatory initiatives as well: '[T]he more puzzling nature of the proposal [i.e., the Global Compact] is that it reduces the focus to a very soft and dialogue-based effort to promote human rights.' The 'dialogue-cooperation strategy' arguably commits a fatal mistake by ignoring the limitations of such efforts and by surrendering human rights to the power of global business. This also implicitly sends the signal that human rights are still the subject matter of negotiation and bargaining when it comes to their applicability to corporations.

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397 The norms make separate provisions for implementation. UN Norms, above n 308, paras 15-19.
398 Above n 336.
399 Donnelly, for example, argues: 'A rights claim (I have a right to that) is more than a reminder or an appeal, it also involves a powerful demand for action .... Claiming a right makes things happen.' Jack Donnelly, Universal Human Rights: In Theory and Practice (Ithaca: Cornell University Press, 1977) 10.
400 Global Compact, above n 231, opening para (emphasis added).
401 See OECD Guidelines, above n 146 (emphasis added).
402 Alston, above n 293, 837 (emphasis added).
4.3.3.2 Lack of sanctions

Assuming that the strategies of dialogue and cooperation are not sufficient to ensure that MNCs comply with their human rights responsibilities, it seems logical that avenues for imposing sanctions should exist. However, the existing mechanisms for ensuring corporate human rights accountability are primarily voluntary; non-compliance with human rights obligations is not followed by any civil, criminal, or social sanctions. With the possible exception of the UN Norms, there is not even a provision regarding sanctions in these regulatory schemes: the OECD Guidelines, the ILO Declaration and the Global Compact are admittedly voluntary initiatives.

To make the situation worse, the existing regulatory initiatives – even if voluntary – have not made full use of unconventional non-state based enforcement techniques such as independent monitoring, consumer boycotts, and naming and shaming. For example, the OECD usually maintains confidentiality of its proceedings and does not reveal the identity of an enterprise involved in the dispute. The Global Compact does not require MNCs embracing its principles to disclose publicly to their stakeholders if any of their activities do, or did, infringe the Compact principles. In short, in the absence of provisions for any type of sanctions, the existing regulatory initiatives are spineless when it comes to the implementation of their mandate.

4.3.3.3 Over-reliance on states for implementation and enforcement

The current regulatory initiatives that seek to make MNCs accountable for human rights abuses are manifestly state-focal when it comes to the implementation and the enforcement of obligations. Almost all the existing international regulatory initiatives adopt an indirect approach in that they expect states to enforce human rights obligations against MNCs, presumably because MNCs are still treated as objects and not subjects of international law. Apart from the Global Compact (which does not rely on states, but it is also not concerned much about enforcing the implementation of its principles), the UN Norms seem to take care of this anomaly by providing that

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403 Civil and criminal consequences are self-explanatory. I label adverse consequences such as naming and shaming, consumer boycott and public protest as ‘social sanctions.’ See, for details, Chapter 8.3.2.3.

404 UN Norms, above n 308, paras 15-19.

405 See Deva, ‘Where from Here?’, above n 329, 48-56.
MNCs 'shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms.' However, if such monitoring and verification by the UN and other existing (or yet to be created) international institutions still heavily relies upon states or state reporting, it would hardly be an improvement. Rather, this is likely to burden further the existing treaty monitoring bodies.

Thus, in terms of implementing and enforcing human rights obligations against MNCs, the dominant character of existing regulatory initiatives still remains state-centric. This is problematic because any approach which excessively or exclusively relies upon states to enforce human rights obligations against MNCs is bound to offer limited value for a number of reasons. At best, states could only be one of the (perhaps, primary) bearers of this enforcement responsibility and not the sole bearer. It may be imminent that new institutions are created or the existing institutions are modified to enable direct implementation or enforcement control over the activities of MNCs. However, this would require, among other changes, a re-examination of the status of MNCs under international law.

4.3.3.4 Failure to respond to key conceptual and procedural hurdles

Past litigation experiences inform us that in order to set up an effective regulatory framework for MNCs' accountability for human rights abuses, at least two hurdles must be overcome: the principle of separate personality (conceptual hurdle) and the doctrine of *forum non conveniens* (procedural hurdle). But none of the existing regulatory initiatives adequately deal with these two challenges. As far as the first issue is concerned, it is critical that parent MNCs are held liable for human rights violations committed by their subsidiaries as a matter of principle, unless they show circumstances absolving them from such liability (for example, by showing that the violations took place despite due diligence exercised by the parent MNC). I have already explained in Chapter 3 that the six surveyed regulatory initiatives by and large

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406 UN Norms, above n 308, para 16.
407 The UN Norms propose that states are subjected to additional reporting requirements. Commentary on UN Norms, above n 331, Commentary (b) to para 16. See Weissbrodt & Kruger, above n 307, 917-18.
408 Nolan, 'With Power Comes Responsibility', above n 310, 607; Kinley & Tadaki, above n 90, 997-98.
do not try to tackle this issue. The position is not much different regarding the other hurdle, as even the ATCA and the UN Norms, under which judicial proceedings against MNCs are possible, do not take cognizance of the difficulty posed by the doctrine of forum non conveniens.

I have tried to demonstrate above that the specific deficiencies of the six representative regulatory regimes could be classified under three broad categories: lack of precise, measurable human rights standards; insufficient or contestable rationales for compliance; and deficient or undeveloped implementation-cum-enforcement mechanisms. In view of these deficiencies, the existing regulatory framework dealing with human rights violations by MNCs is inadequate—a fact which is further buttressed below with the help of Bhopal.

4.4 Bhopal: A Live Example of Inadequacy?

The claim that the existing regulatory regimes have been inadequate to ensure that MNCs respect human rights could also be supported with the help of Bhopal, which arguably is a live example of this inadequacy. I consider it a ‘live’ example because even after more than twenty-two years of the gas leakage and inhumane legal proceedings, victims are still fighting for justice not only against the corporate wrongdoer (UCC/UCIL), but also against their own government. Out of the six representative regulatory regimes surveyed above, the first four—the ATCA, corporate codes of conduct, the OECD Guidelines and the ILO Declaration—existed at the time of Bhopal, albeit in slightly different forms. Whereas around 1984 the use of the ATCA to remedy corporate human rights abuses was only in the inception stage after the decision in Filartiga, the safety guidelines that UCC had adopted were

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409 Ratner, above n 324, 461-63; Deva, ‘Where from Here?’, above n 329, 48-49.  
410 Chapter 3.3.1 and 3.3.2.3.  
413 Filartiga v Pena-Irala 630 F 2d 876 (2nd Cir., 1980).
also different from, though comparable to, today’s corporate codes of conduct. Similarly, both the OECD Guidelines and the ILO Declaration have been revised in the year 2000.\textsuperscript{14} Let us consider briefly how these six regimes fared vis-à-vis Bhopal.

Apart from the fact that the ATCA apparently had no prescriptive influence on UCC’s conduct – for example, its jurisprudence did not indicate to UCC that violation of certain human rights might constitute a breach of the law of nations, for which it could be sued in the US courts – the statute hardly performed better in making UCC accountable after the gas leak. In recent years, several suits against UCC have been filed in the US courts, but without any significant success.\textsuperscript{415} One may contend that these suits were dismissed on technical grounds such as being barred by the limitation period, lack of standing on account of non-joinder by the government of India,\textsuperscript{416} and in view of the final settlement being in force. Arguably, however, even if these procedural limitations had not frustrated victims’ quest for justice, the result might not have been any different in view of the narrow interpretation of the breach of the law of nations adopted by the US courts.

It is not surprising that by 1984 neither UCC nor UCIL had adopted any corporate code of conduct in the sense in which we understand them today, for it was not a part of general business strategy at that point of time. UCC, however, had a corporate safety policy and did take lot of pride in pioneering state of art, safe technologies. The Preamble to this policy proclaimed that ‘human beings are our most precious asset, and their health and safety are therefore our number one priority.’\textsuperscript{417} The rationale behind this commitment might put to shame even today’s MNCs: ‘Good safety and good accident prevention practices are good business.’\textsuperscript{418} This safety policy was further echoed by notices such as ‘Safety is everybody’s business’ being put up on the walls of the Bhopal plant.\textsuperscript{419} On the basis of these safety policies/measures it was

\textsuperscript{414} See discussion under parts 4.2.3 and 4.2.4.
\textsuperscript{415} Above n 20.
\textsuperscript{416} Under section 3 of the Bhopal Gad Leak Disaster (Processing of Claims) Act 1985, the Government of India has the ‘exclusive right’ to represent victims of the disaster.
\textsuperscript{417} Dominique Lapierre & Javier Moro, \textit{It Was Five Past Midnight in Bhopal} (Delhi: Full Circle Publishing, 2001), 126. Kamal Pareek, the future assistant manager for safety at the Bhopal plant, during his training in the US also got the impression that UCC’s ‘real emblem was not the logo but a green triangle inscribed with the words “SAFETY FIRST”.’ \textit{Id.}, 127.
\textsuperscript{418} \textit{Id.}
\textsuperscript{419} \textit{Id.}, 262.
suggested that the Bhopal plant would be 'as inoffensive as a chocolate factory.'

There was, however, a great divergence between theory and practice as the company's own safety polices were thrown to wind under pressure to improve the 'bottom line,' or reduce corporate losses.

As far as the application of the OECD Guidelines of 1976 to the Bhopal gas disaster is concerned, it is reasonable to argue that UCC was not in breach of them because the Guidelines itself were not applicable to the case. The Guidelines of 1976 acknowledged that 'the operations of multinational enterprises extend throughout the world,' but they were 'recommendations addressed by Member countries to multinational enterprises operating in their territories.' This 'non-application' of the Guidelines to scenarios such as Bhopal – that is, not being applicable to a great majority of human rights abuses being committed in non-OECD developing countries – again highlights a serious inadequacy in terms of the scope of the OECD Guidelines of 1976. However, as I have already pointed out earlier, the 2000 review of the OECD Guidelines has remedied, among others, this inadequacy of the original 1976 Guidelines. Does this mean then that the Guidelines of 2000 would have dealt with Bhopal more effectively? It seems that in view of the drawbacks of the 2000 Guidelines highlighted above, the result might not have been much different. For instance, these Guidelines would not have helped the Bhopal victims in getting compensation from UCC.

Finally, the ILO Declaration of 1977 was applicable to the operation of chemical plant run by a subsidiary of UCC, for UCC as an MNC was expected to observe the principles contained therein. Some of the provisions that had a direct relevance to the factual matrix deserve a brief mention. UCC, for example, was 'commended' to

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420 Id., 88.
423 Id., 970 (para 6) (emphasis added).
424 Because whereas UCC's operations were being conducted outside the US, UCIL was neither an MNC nor was it operating in an OECD country, i.e., India.
425 See part 4.2.3.1 above.
426 See part 4.2.3.2 above.
427 ILO Declaration of 1977, above n 202, 423 (Preamble), 424 (para 4).

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observe the UDHR, \textsuperscript{428} 'ensure that relevant training is provided for all levels of their employees in the host country, as appropriate, to meet the needs of the enterprise,' \textsuperscript{429} and 'maintain the highest standards of safety and health ... bearing in mind their relevant experience within the enterprise as a whole, including any knowledge of special hazards.' \textsuperscript{430} It should also have made available, inter alia, to workers' representatives 'information on the safety and health standards relevant to their local operations, which they observe in other countries.' \textsuperscript{431} As I will demonstrate in Chapter 6.3.1, UCC was clearly in breach of these obligations. However, as far as the ILO Declaration was concerned, such gross breaches of its principles did not entail any adverse consequences either for UCC or the Indian government.

On the other hand, an inquiry into the possible effect of the Global Compact and the UN Norms on Bhopal is bound to be speculative. One has to ask the following hypothetical question: would these two regimes in the pre-Bhopal period have prevented the occurrence of the gas leakage, or in the alternative, how would have they helped in making UCC accountable for Bhopal? Undoubtedly, the Compact principles related to the protection of 'internationally proclaimed human rights' or dealing with environmental preservation would have been directly applicable to the operations of UCC/UCIL in Bhopal. \textsuperscript{432} However, given that the Global Compact has not put in place any more definite measurable human rights standards for corporations\textsuperscript{433} and in the absence of any legal force, it is plausible to conclude that the Compact would have added little strength to the then prevailing regulatory framework. It is equally doubtful how the Compact would have helped in making UCC accountable for human rights abuses at Bhopal in a more efficient and adequate way.

Similarly, UCC would have been subject to several provisions of the UN Norms (if they were in force at the relevant time) such as providing a safe and healthy working

\textsuperscript{428} Id., 424 (para 8).
\textsuperscript{429} Id., 426 (para 30).
\textsuperscript{430} Id., 427 (para 37) (emphasis added).
\textsuperscript{431} Id. (emphasis added).
\textsuperscript{432} Global Compact, above n 231, Principles 1, 7, 8 and 9.
\textsuperscript{433} The 'precautionary approach' as contained in Principle 7 is arguably an exception to this as it raises the bar in terms of the applicable standards.
environment including as per the relevant international instruments, contributing to the realisation of highest attainable standard of physical and mental health, ensuring the safety and quality of goods and services, and complying with the applicable national as well as international environmental standards. In view of the fact that these obligations are framed in terms of ‘shall’ and are also backed by implementation measures, they might have had some positive impact on how seriously UCC would have taken its human rights obligations. It is, nevertheless, possible that the end result might not have been much different, for the Norms too are not legally binding and suffer from several lacunae, as discussed above.

Therefore, the hypothetical application of six representative initiatives to the factual matrix of Bhopal gas leakage also confirms that the existing regulatory framework related to MNCs’ accountability for human rights abuses is inadequate.

4.5 CONCLUSION

The objective of this chapter was to demonstrate that the existing regulatory initiatives dealing with human rights violations by MNCs are inadequate. I intended to achieve this objective by surveying the following six representative regulatory initiatives in voyage: the ATCA, corporate codes of conduct, the OECD Guidelines, the ILO Declaration, the Global Compact, and the UN Norms. In order to ensure that these regimes are representative of existing mechanisms that seek to regulate human rights violative activities of MNCs, I used five differentiating variables, that is, the source from which regimes flow, the content of obligations, the targeting approach that they adopt, the level of operation, and the nature in terms of compliance strategy.

On the basis of a critical evaluation of above six initiatives, I argued that the existing regulatory framework is inadequate to make MNCs accountable for human rights violations. This inadequacy of the regulatory framework, which is judged in terms of two levels of efficacy, is the result of a three-fold deficiency. The existing framework does not prescribe precise human rights standards, offers insufficient or contestable

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434 UN Norms, above n 308, para 7.
435 Id., para 12.
436 Id., para 13.
437 Id., para 14.
rationales for compliance, and is supported by a deficient or undeveloped implementation-cum-enforcement mechanism. This three-fold inadequacy also stands verified by the hypothetical retrospective application of these six regulatory initiatives to Bhopal.

As the prevailing regulatory framework is inadequate and has been unable to ensure effective accountability of MNCs for human rights violations, a search for an alternative model that does not suffer from these infirmities is natural as well as necessary. I argue that the integrated theory of regulation, which I advance and defend as an alternative in the following chapters of this thesis, could rectify the deficits that engulf the existing regulatory initiatives. As mentioned in Chapter 1, the tripod of this theory consists of the following three legs: *why*, *what* and *how*. An alternative regulatory framework (i.e., how) – based on the integrated theory – will be proposed in Chapters 7 and 8 of this thesis. But before that, I will deal with first two legs of this tripod: *why* should corporations observe human rights standards, and *what* standards should they follow? I begin in the next chapter by first critiquing theories which posit that the only social responsibility of corporations is to maximise shareholders’ profit, and then advancing a positive justification for why corporations should be subjected to human rights obligations.
CHAPTER 5: JUST PROFIT OR ‘JUST’ PROFIT: WHY SHOULD CORPORATIONS HAVE HUMAN RIGHTS OBLIGATIONS?

5.1 INTRODUCTION

This chapter deals with the first, and perhaps also the natural, challenge that any theory of corporate human rights responsibility faces, that is, why should corporations have human rights obligations? I begin with an evaluation of why corporations should have no human rights responsibilities. Milton Friedman was\(^1\) perhaps the best known scholar who articulated and defended the position that a corporation is ‘an instrument of the stockholders who own it’ and that in a free market economy ‘there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game.’\(^2\) Recent and influential support for Friedman’s thesis came from Elaine Sternberg who, in *Just Business: Business Ethics in Action*, argued that ‘[u]sing business resources for non-business purposes [social responsibility] is tantamount to theft.'\(^3\) The ‘purpose of business,’ for Sternberg, ‘is maximising owner value over the long term by selling goods or services.'\(^4\)

\(^1\) While I was writing this chapter, Professor Milton Friedman passed away in San Francisco on 16 November 2006.


\(^4\) Id., 32.
In this chapter I critique this position taken by both Friedman and Sternberg. An attempt is made to show why their stand vis-à-vis corporate social responsibilities (CSR) is unsound and should be rejected, in part because many corporations themselves are refusing to follow the course suggested by Friedman and Sternberg.

The chapter then examines a popular economic rationale behind why corporations should respect human rights obligations. This rationale is generally known as the ‘business case’ for human rights, that is, corporations could not only earn more profits but also gain an economic advantage over their competitors by fulfilling their human rights responsibilities. As the business case is rooted in the economics of goodwill, I label it ‘goodwill-nomics’ and challenge, in part three of this chapter, the usefulness of relying too much on this rationale for promoting corporate human rights responsibilities. Not only is the goodwill-nomics hypothesis based on a series of fragile and unpredictable market assumptions, it tries to resolve a central problem by bypassing it. The key issue is: should corporations comply with human rights obligations even if doing so reduces their profits and/or competitive advantage, and if yes, then why? Instead of taking a stand on this critical issue, goodwill-nomics begs


6 'For example, corporate philanthropy that makes the community in which a company is located a better place to live and work results in direct benefits. The “goodwill” that socially responsible activities create makes it easier for corporations to conduct their business.' John R Boatright, Ethics and the Conduct of Business, 5th edn., (Upper Saddle River, New Jersey: Pearson Prentice Hall, 2007), 370.

7 'I take real issue with the critics when they propose that corporations must put their other citizenship responsibilities ahead of their responsibility to earn a fair return for the owners.' Procter & Gamble
the question by trying to suggest a positive link between corporate compliance with human rights and corporate profits.

The business case for human rights is further undermined by the ‘prisoner’s dilemma,’ which might discourage some corporations from taking on board human rights obligations. It is contended that some corporations may hesitate to adopt and implement human rights policies in view of an uncertainty about the stand of their competitors and consequent fear of losing competitive advantage.

Finally, this chapter, in part four, canvasses an alternative justification for ‘why’ corporations should observe human rights norms while doing business. It is argued that all corporations, not merely those which are multinational or transnational, should be subjected to human rights obligations – appropriate to their activities and operations – because of their relation with and position in society.

5.2 JUST BUSINESS OR ‘JUST’ BUSINESS?: A CRITIQUE OF THE THESIS OF FRIEDMAN AND STERNBERG

There has been a long and inconclusive debate about what is or ought to be the role and place of corporations within society. Broadly speaking, the debate has unfolded

8 The prisoner’s dilemma, which is a game theory construct, is a situation in which two (or more) persons have to take decision on a given issue. Each person has an option to ‘cooperate’ or ‘defect’, but each of them may decide to defect in order to maximise their own advantage, even if that harms the other party. For discussion of the original concept of the prisoner’s dilemma, see John Perry & Michael Bratman (eds.), Introduction to Philosophy: Classical and Contemporary Readings, 3rd edn. (New York: Oxford University Press, 1993), 792; Shaun P Hargreaves Heap & Yanis Varoufakis, Game Theory: A Critical Text, 2nd edn. (London: Routledge, 2004), 172-74.
within the stockholder versus stakeholder framework. As early as the 1930s, the Berle-Dodd debate revolved around this question. Berle argued that the powers granted to a corporation or its management ‘are necessarily and at all times exercisable only for the rateable benefit of all the shareholders as their interest appears.’ Dodd countered this position by contending that shareholders ‘are not strictly cestuis que trust,’ and that by virtue of both law and public opinion directors should serve the interests of non-shareholders as well. Berle replied by asserting that Dodd’s argument reflected only ‘theory, not practice.’ Among others, Berle’s position was informed by the fear that extending responsibilities beyond shareholders might result in conferring an unguided, uncontrolled discretion on the directors of a corporation: ‘When the fiduciary obligation of the corporate management and “control” to stockholders is weakened or eliminated, the management and “control” become for all purposes absolute.’

10 Shareholder and stakeholder value have for a long time been the rival objectives of the firm. Shareholder value views shareholders as the owners of the firm, and thus focuses on profit maximisation as the objective of the firm. Stakeholder value, on the other hand, sees the firm as encompassing all those affected by its activities and emphasises sustainability and inclusion. Sarah Kiarie, ‘At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road should the United Kingdom Take’ (2006) 17 International Company & Commercial Law Review 329. See also Benedict Sheehy, ‘Scrooge--The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate’ (2005) 14 University of Miami Business Law Review 193, 196-200. Dhir observes: ‘Any attempt to address the intersection of corporations and HRSP [human rights-social policy] accountability must be informed by two supposedly inconsistent theoretical models [i.e., stockholder model v. stakeholder model] which have dominated the debate over proper corporate purposes.’ Aaron A Dhir, ‘Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability’ (2006) 43 American Business Law Journal 365, 369, and generally 369-71 (footnote omitted). But Dhir thinks that ‘this divide is fallacious and that pursuing social welfare, in fact, best serves shareholder interests.’ Id., 371. However, to me rather than the divide, the suggested harmony between two models looks fallacious, also because the relationship between CSR policies and financial performance is still both inconclusive and uncertain.

11 Dodd, above n 9; Berle, above n 9. Werner, however, suggests that the differences between the positions taken by Berle and Dodd were not many. Walter Werner, ‘Corporation Law in Search of its Future’ (1981) 81 Columbia Law Review 1611, 1644.

12 Berle, above n 9, 1049 (emphasis added). Drawing an analogy with the law of trusts, he further contended that in addition to satisfying the technical rules of corporate law, the ‘use’ of corporate powers must also be justified whether ‘the result fairly protects the interests of the shareholders’. Id. 1074.

13 Dodd, above n 9, 1146.

14 Dodd challenges both the assumptions, i.e., that business is private property and that the directors of a corporation are fiduciaries for the stockholders-owners. Dodd, above n 9, 1162.

15 ‘The industrial “control” does not now think of himself as a prince; he does not now assume responsibilities to the community; his bankers do not now undertake to recognise social claims; his lawyers do not now advise him in terms of social responsibility.’ Berle, ‘A Note’, above n 9, 1367 (emphasis in original).

16 Berle, ‘A Note’, above n 9, 1367.
The most visible and influential spokesperson for the stockholder theory was, however, Milton Friedman,\(^{17}\) who consistently maintained and expressed his opinions on this issue for over half a century.\(^{18}\) Although Friedman’s views did not receive support from all corners, he has continued to inspire a new breed of scholars who debunk any notion of corporations having social or human rights responsibilities. Elaine Sternberg is one of these well-respected scholars,\(^{19}\) who admittedly defends and extends Friedman’s thesis.\(^{20}\) In this chapter, I critique the thesis of both Friedman and Sternberg to contend that corporations should have human rights responsibilities.

However, before moving further, let me provide a signpost here. There is no single stockholder theory: a caveat that equally applies to stakeholder theory,\(^{21}\) which basically challenges Milton Friedman’s vision of one-dimensional corporations by asserting ‘that corporate responsibility cannot be reduced to the interests of a single group of stakeholders.’\(^{22}\) The justifications for why corporations and their directors owe sole or primary responsibility to their shareholders vary largely. The justifications range from the claim that shareholders are owners of corporations and

\(^{17}\) It will not be incorrect to say that the relation of Friedman to CSR debate is similar to as of Rawls to justice, Dicey to rule of law, Dworkin to rights, Marbury v Madison to judicial review, Montesquieu to separation of powers, and Mahatma Gandhi to non-violence.

\(^{18}\) Friedman, above n 2; Milton Friedman, ‘The Social Responsibility of Business Is to Increase Its Profits’, The New York Times Magazine (13 September 1970), 33, as reproduced in Milton Snoeyenbos, Robert Almeder & James Humber (eds.), Business Ethics, revised edn. (Buffalo: Prometheus Books, 1992), 73 (hereinafter Friedman, ‘The Social Responsibility of Business’). Friedman, however, was by no means alone in taking such a stand. For example, Hansmann & Kranz recently concluded: ‘The triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured, even if it was problematic as recently as twenty-five years ago.’ Henry Hansmann & Reinier Kranz, ‘The End of History for Corporate Law’ (2001) 89 Georgetown Law Journal, 439, 468. They note that ‘there is today a broad normative consensus that shareholders alone are the parties to whom corporate managers should be accountable’. Id., 441.

\(^{19}\) Megone writes: ‘Sternberg’s approach to business ethics, one of the most prominent and theoretically rich in the field, provides a clear and carefully defended decision procedure for reaching ethical judgements in business practice.’ Chris Megone, ‘Two Aristotelian Approaches to Business Ethics’ in Chris Megone & Simon J Robinson (eds.), Case Histories in Business Ethics (London: Routledge, 2002), 23, 24 (emphasis added).

\(^{20}\) Sternberg, above n 3, 41-42.

\(^{21}\) Radin suggests that there are several ‘types of stakeholder “theories” within the general stakeholder theory “genre”’. Tara J Radin, Stakeholder Theory and the Law (PhD Dissertation, The Colgate Darden Graduate School of Business Administration, University of Virginia, August 1999), 2-3. See also Andrew L Friedman & Samantha Miles, Stakeholders: Theory and Practice (Oxford: Oxford University Press, 2006), 38, and generally 36-82.

thus entitled to priority, to the fear of directors having unguided and uncontrolled
discretion otherwise, and to the suggestion that shareholders' primacy is a
precondition for the free market. However, the central plank of the stockholder theory
has been its insistence on corporations being profit maximising economic entities.

5.2.1 Friedman’s Rebuke for Corporations having Social Responsibilities

In his celebrated book *Capitalism and Freedom*, Friedman briefly and probably
incidentally dealt with the question of CSR in a chapter on ‘Monopoly and the
Social Responsibility of Business and Labour.’ Friedman, however, specifically
elaborated on his views on this matter in 1970 in an essay published in *The New York
Times Magazine.* It is necessary to quote Friedman at length:

The view has been gaining widespread acceptance that corporate officials and
labour leaders have a “social responsibility” that goes beyond serving the
interests of their stockholders or their members. This view shows a
fundamental misconception of the character and nature of a free market
economy. In such an economy, there is one and only one social responsibility
of business — to use its resources and engage in activities designed to increase
its profits so long as it stays within the rules of the game, which is to say,
engage in open and free competition, without deception or fraud.

Few trends could so thoroughly undermine the very foundations of our free
society as the acceptance by corporate officials of a social responsibility other
than making as much money for their stockholders as possible. This is a
fundamentally subversive doctrine. If businessmen do have a social
responsibility, how are they to know what it is? Can self-selected private
individuals decide what the social interest is? Can they decide how great a
burden they are justified in placing on themselves or their stockholders to
serve that social interest?

Responding to the specific instance of corporate donations to support charitable
activities, Friedman further noted that “[s]uch giving by corporations is an

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23 The book was originally published in 1962, and over half a million copies have been sold since then.
Friedman, above n 2.
24 About three pages are devoted to this discussion in a book of over two hundred pages. Id., 133-36.
Also, corporate social responsibility was not even worthy of a mention in the concluding chapter. Id.,
196-202.
25 The connection between monopoly and social responsibility of business is best understood in the
words of Friedman: “the existence of monopoly raises the issue of the “social responsibility” ... of the
monopolist. ... The monopolist is visible and has power. It is easy to argue that he should discharge his
power not solely to further his own interests but to further socially desirable ends. Yet the widespread
application of such a doctrine would destroy a free society.” Friedman, above n 2, 120.
27 Friedman, above n 2, 133-34 (emphasis added).
inappropriate use of corporate funds in a free-enterprise society' because the 'corporation is an instrument of the stockholders who own it.' In short, the whole notion of CSR, for Freidman, was 'a step away from an individualistic society and toward the corporate state.' Corporations should also shun any talk of social responsibility, Friedman argued, because not doing so 'helps to strengthen the already too prevalent view that the pursuit of profits is wicked and immoral and must be curbed and controlled by external forces.' The context and the time (the Cold War era) in which Friedman was writing suggest that his views on CSR were probably informed by how he understood this concept, that is, CSR as a Marxist or socialist tool to attack capitalism and the free market economy. It then became natural for Friedman to point his gun at the notion of business having any social responsibilities.

Friedman conceded, nevertheless, that the 'doctrine of social responsibility is frequently a cloak for actions that are justified on other grounds rather than a real reason for those actions.' For example, corporations may be tempted to rationalise charitable donations or their support for community projects on the ground of social responsibility, rather than as means to 'generate good will' - a means 'entirely justified in its own self-interest.' In this reasoning, one discerns the roots of the current 'business case' for human rights (that is, the claim that corporations could earn more profits and gain an economic advantage over their competitors by observing human rights norms). Friedman did not like 'corporate executives to refrain from this hypocritical window-dressing,' also because if 'the attitudes of the public' promoted such a cloaking, then let it be. Although Friedman was not very comfortable with such 'use of the cloak of social responsibility,' seemingly he did not mind corporations taking those socially responsible measures which are also

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28 Id., 125.
29 Id., 136.
30 Friedman, "The Social Responsibility of Business", above n 18, 77.
31 Friedman wrote that businessmen who talk about corporations having social responsibilities 'are unwitting puppets of the intellectual forces that have been undermining the basis of a free society these past decades.' Id., 72.
32 Id., 76, and generally 76-77.
33 Id., 76.
34 Id., 76.
35 "Whether blameworthy or not, the use of the cloak of social responsibility, and the nonsense spoken in its name by influential and prestigious businessmen, does clearly harm the foundations of a free society." Id., 77.
likely to increase corporate goodwill and in the process contribute to shareholders’ profit.

Friedman gave more (and closer) attention to the issue of CSR in his essay first published in *The New York Times Magazine*. In this essay he advanced a robust defence of why the ‘only’ social responsibility of business is to increase shareholders’ profit and also laid the ground of what is today known as the ‘business case’ for human rights. Friedman began by challenging the very concept of CSR, and lamenting the ‘analytical looseness and lack of vigor’ seen in discussions on this topic.36 He opened his case by asking ‘what it [CSR] implies for whom’37 and then moved on to launch what I consider to be a three-pronged attack on the idea of corporations having any responsibility other than earning profits for their shareholders.38 The merit of Friedman’s three objections is assessed below.

5.2.1.1 CSR undermines free markets and capitalism

Friedman saw CSR as undermining both free markets and capitalism, because those who argued for corporations having social responsibilities were ‘preaching pure and unadulterated socialism.’39 CSR, for Friedman, smacked of socialism40 — whatever he meant by it41 — and was, therefore, incompatible with a free market economy and capitalism. Several objections could be made to this argument which is both theoretically and factually untenable at this point of time.42

36 Id., 72.
37 Id. Wood also notes this difficulty: “Throughout the 1960s and 1970s, scholars searched to define what a corporation’s social responsibilities were and were not.” Donna J Wood, ‘Corporate Social Performance Revisited’ (1991) 16 *Academy of Management Review* 691, 694.
38 Commentators have canvassed grounds on which Friedman attacks the notion of corporate social responsibility differently. Mulligan, for example, writes: ‘Friedman argues that the exercise of social responsibility by a corporate executive is: (a) unfair, …; (b) undemocratic, …; (c) unwise, …; (d) a violation of trust, …; (e) futile, ….’ Thomas Mulligan, ‘A Critique of Milton Friedman’s Essay “The Social Responsibility of Business Is to Increase Its Profits” ’ (1986) 5 *Journal of Business Ethics* 265.
40 ‘[T]he doctrine of “social responsibility” involves the acceptance of the socialist view that political mechanisms, not market mechanisms, are the appropriate way to determine the allocation of scarce resources to alternative uses.’ Id., 74 (emphasis added). The CSR doctrine ‘does not differ in philosophy from the most explicitly collective doctrine.’ Id., 77.
41 Mulligan argues that ‘Friedman has not provided a necessary element for his argument — a definite criterion for what constitutes socialism.’ Mulligan, above n 38, 269, and generally 268-69.
42 See, for example, Mulligan, above n 38, 268-69.
First, CSR does not seek to substitute, as Friedman supposed, political mechanisms with market mechanisms as a means 'to determine the allocation of scarce resources to alternative uses.' Friedman gave example of three social objectives – preventing inflation, improving the environment, and reducing poverty – the pursuit of which by corporations under the label of CSR would result in such substitution of mechanisms. Apart from the fact that doubts could be raised about the appropriateness of these examples, it is no one's case that under the CSR discourse the whole responsibility of accomplishing social objectives is transferred from governments to corporations. Corporations, as members of society, are only expected to play their part by taking appropriate measures within their respective areas of operation (or 'sphere of influence' as the Global Compact and the UN Norms term it); for example, ensuring that effluents from their respective factories are not discharged into rivers so as to preserve the environment, or paying reasonable wages to workers resulting in the reduction of poverty of some people. In short, Friedman wrongly asserted that 'the doctrine of ‘social responsibility' taken seriously would extend the scope of political mechanisms to every human activity,' for CSR is, in fact, seen as a tool to preempt government regulation. Should market actors

43 Friedman, 'The Social Responsibility of Business', above n 18, 73.
45 Parkinson writes that CSR aims to ‘constrain’ profit making, rather than ‘to replace profit seeking with an open-ended goal of maximising the welfare of affected groups’. John Parkinson, ‘The Socially Responsible Company’ in Addo (ed.), above n 5, 49, 58.
47 The Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption. ‘The Ten Principles’, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited 20 January 2007) (emphasis added).
48 'Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law'. UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/ CN.4/Sub.2/2003/12/Rev.2 (13 August 2003), para 1 (emphasis added).
49 Friedman, 'The Social Responsibility of Business', above n 18, 77.
(corporations) want non-interference by political mechanisms, they merely need to
fulfil their legitimate responsibilities.51

Second, Friedman’s thesis seems to propose an inverse linkage between CSR and
capitalism-cum-free markets: because CSR undermines capitalism and free market
ideology, the more emphasis is placed on CSR, the less free would be markets. But
this proposition has proved untrue as a fact; the evidence rather suggests a positive
relation between corporations taking on board social or human rights responsibilities
and the sustainability of capitalism and free markets.52 Among other usages,
corporations are using CSR to counter the legitimacy crisis53 that they are facing.54
Conversely, Friedman’s thesis tends to posit compatibility between CSR and
socialism, which is again based on an inaccurate assumption. As (private)
corporations do not have a prominent role to play under socialism, the relevance of
CSR in such a system is quite limited. CSR has a legitimate place not so much in
socialism as in a capitalist economy based on free market principles, because public
expectations grow in proportion to the role played by corporations only under the
latter.55 Orlando also counters Friedman’s argument – that the free market system is
harmed if corporations are asked to take on social obligations – by contending that
corporations ‘are best thought of as entities permitted to exist by the state because
they serve the public good, not because individuals have a right to enrich themselves
through them.’56

51 See Chapter 5.4 below why protection and promotion of human rights should be part of legitimate
responsibilities of corporations.
52 'A company pursuing a goal of long-term profit maximisation will want to establish a positive
reputation with actual and potential customers, employers, and suppliers of finance. It is likely to take
considerable precautions, for example, to avoid the kind of public relations disaster that might result
from a major environmental incident.' Parkinson, above n 45, 50 (emphasis in original).
53 Bhagwati argues that people believed MNCs as 'the principal beneficiaries, and the main agents ... of
this socially destructive globalisation.' Jagdish Bhagwati, In Defense of Globalisation (New York:
Oxford University Press, 2004), ix. Much earlier, Vernon wrote that '[t]he multinational enterprise has
come to be seen as the embodiment of almost anything disconcerting about modern industrial society.'
Raymond Vernon, Storm Over the Multinationals: The Real Issues (Cambridge, Mass.: Harvard
of Miami Law Review 811.
54 See, for example, George Lodge & Craig Wilson, A Corporate Solution to Global Poverty: How
Multinationals can Help the Poor and Invigorate their Own Legitimacy (Princeton: Princeton
University Press, 2006).
55 Parkinson observes: ‘As the reach and pervasiveness of corporate enterprise has grown, the public’s
expectations about the conduct of large companies have become more demanding.’ Parkinson, above n
45, 49.
56 John Orlando, ‘The Ethics of Corporate Downsizing’ in William Shaw (ed.), Ethics at Work: Basic
Finally, the argument that CSR policies will undermine capitalism and free markets indirectly suggests that these are sacred frameworks which must be preserved at all costs. But capitalism or free markets are not unqualified virtues.\textsuperscript{57} Though Friedman himself admitted the limitations of the free market and conceived a role for government,\textsuperscript{58} he still neglected to acknowledge other infirmities in the working of markets.\textsuperscript{59} Markets often fail to provide basic essential services such as access to water, education, health facilities, or transport facilities to \textit{all},\textsuperscript{60} and there is nothing wrong with the government offering such services alone or in conjunction with corporations. Professor Amartya Sen highlights other pitfalls of the market, observing that market 'efficiency results do not say anything about the equity of outcomes, or about the equity in the distribution of freedoms,'\textsuperscript{61} and that markets may not be effective in fostering 'public goods' such as environmental preservation, public health care and a malaria-free environment.\textsuperscript{62}

The context in which Friedman was writing perhaps provides a justification for why he took such an unbalanced, extreme position. Friedman was not directly interested or perplexed by the question of CSR. Rather, his main concern, as observed above, was

\textsuperscript{57} See generally Amartya Sen, 'The Moral Standing of the Market' (1985) 2 \textit{Social Philosophy \& Policy} I (hereinafter Sen, 'Moral Standing').

\textsuperscript{58} See Friedman, above n 2, 25-32.

\textsuperscript{59} Such neglects contribute to the evolution of positive 'prejudices (in favour of pure market mechanism'). Amartya Sen, \textit{Development as Freedom}, 1st paperback edn. (Oxford: Oxford University Press, 2001), 112 (hereinafter Sen, \textit{Development as Freedom}). Professor Sen writes: 'The virtues of the market mechanism are now standardly assumed to be so pervasive that qualifications seem unimportant. Any pointer to the defects of the market mechanism appears to be, in the present mood, strangely old-fashioned and contrary to contemporary culture (like playing an old 78 rpm record with music from the 1920s).'

\textsuperscript{60} Stiglitz points out one of the failures of the markets with reference to the International Monetary Fund (IMF): 'IMF simply assumed that markets arise quickly to meet every need, when in fact, many government activities arise because markets have failed to provide essential services.' Joseph E Stiglitz, \textit{Globalisation and Its Discontents} (London: Allen Lane, 2002), 55 (emphasis in original). See also UNDP, \textit{Privatising Basic Utilities in Sub-Saharan Africa: The MDG Impact} (January 2007), <http://www.undp-povertycentre.org/pub/IPCPolicyResearchBrief003.pdf> (last visited 20 February 2007).

\textsuperscript{61} Id., 127-29. Stone also notes that the market itself cannot 'allocate resources adequately to fill social needs.' Christopher D Stone, \textit{Where the Law Ends: The Social Control of Corporate Behavior} (New York: Harper \& Row, 1975), 88.
to defend capitalism and the free market economy 'which he perceived to be under fire in the late sixties and early seventies.'

5.2.1.2 Stockholders own the corporation

The idea of CSR runs counter to how Friedman perceived the relation between a corporation, its shareholders and corporate executives. Milton Friedman argued that corporate executives as employees or agents of their shareholders have primary responsibility to their employers, that is, to make as much money as possible. Ireland rightly points out that 'a natural corollary' of the assumption that stockholders own the corporation is 'that the interests of shareholders should take priority, if not complete precedence, over all others.' In other words, corporate executives, Friedman thought, could act in a socially responsible manner only by acting against the interest of shareholders. I contest this position on three grounds: first, the assertion that stockholders own corporations is a myth; second, that even if stockholders, arguendo, own corporations, they could still be under certain social responsibilities; and third, that corporate executives could earn profits for stockholders even while observing their social responsibilities.

First, although the notion that shareholders own corporations has long, pervasive and influential roots, it has gradually decayed to the extent of being labelled as a

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64 Friedman, 'The Social Responsibility of Business', above n 18, 73. Dine also explains: 'In this case the “ownership” of the company leads to the understanding that the company must be run primarily in the interest of its “owners” and that their interest in that company is in extracting maximum profit from “their” capital.' Janet Dine, Companies, International Trade and Human Rights (Cambridge: Cambridge University Press, 2005), 263.
66 'What does it mean to say that the corporate executive has a “social responsibility” in his capacity as businessman.' If this statement is not pure rhetoric, it must mean that he is to act in some way that is not in the interest of his employers.' Friedman, 'The Social Responsibility of Business', above n 18, 73. Friedman was by no means alone to take this position. Werner, for example, writes: 'The shareholder’s position is further threatened by the new version of the old corporate social responsibility doctrine. The doctrine ... relates to corporate action that requires financial sacrifice by shareholders in order to effect some socially worthwhile goal.' Werner, above n 11, 1664 (emphasis added).
"myth," 68 a 'serious misconception,' 69 or something that bears 'an ever-decreasing resemblance to reality.' 70 Had shareholders owned the corporation, they would not have been standing 'last in line to receive the economic benefits of the company's activities.' 71 The conception of 'shareholders as owners' also runs counter to the corporation being regarded as a separate legal person. 72 For these and other reasons, Professor Jennifer Hill, after analysing several changing visions of shareholders vis-a-vis corporations, 73 concludes that 'a one-dimensional model of the past, such as the "shareholder as owner," is inadequate today and can result in a disjunction between law and reality.' 74

Second, even if it is accepted that shareholders are owners of the corporation, this does not negate the responsibilities of owners (shareholders) or their agents (corporate managers and directors) towards other members of the society. 'Ownership rights are not absolute' 75 and for this reason ownership of property does not come without

68 Dine, above n 64, 263.
69 Parkinson, above n 45, 52.
70 'If shareholder assertion of ownership rights were the ideal, it was an ideal which bore an ever-decreasing resemblance to reality, with the growth of large public corporations at the turn of the 20th century.' Hill, above n 67, 43. See also James E Post, Lee E Preston, & Sybilie Sachs, Redefining the Corporation: Stakeholders Management and Organisational Wealth (Stanford: Stanford University Press, 2002), 12-16 (hereinafter Post et al, Redefining the Corporation).
71 Paul Davies, Gower and Davies's Principles of Modern Company Law, 7th edn. (London: Sweet & Maxwell, 2003), 372. Davies further notes that 'the profits of the company (some part of which are likely to be distributed to the shareholders) are struck only after the claims of creditors on the company have been allowed for and that, on a winding up, the shareholders are the last to receive a distribution from the company.' Id.
72 Ireland writes that 'through the doctrine of separate corporate personality in its modern form, company law expresses and reinforces not only the separate existence of "the company" but the erosion, de jure and de facto, of shareholder's ownership rights.' Ireland, above n 65, 48, and generally. Dine also dismisses this 'exaggerated property rhetoric' and argues that we 'should understand the company as truly owner of its assets with the managers exercising its ownership rights.' Dine, above n 64, 263.
73 How shareholders are perceived with corporations has a direct bearing on the question if they are to be regarded as owners or not. Hill notes: 'The various ways in which shareholders can be characterised within the corporate structure have important implications for two major issues concerning the role of shareholders in corporations — first, the appropriate level of shareholder participation in corporate governance, and secondly, the status of shareholder interests, specifically whether they should be treated as paramount within the corporate structure.' Hill, above n 67, 42 (emphasis added).
74 Id., 78.
75 'Ownership rights are not absolute (ownership of a knife does not entitle the owner to stab people with it). That shareholders might own companies does not mean that they may insist that directors attempt to maximise profits in any way at all.' Parkinson, above n 45, 51 (emphasis added). Boatright also suggests that means are important: 'managers of a corporation do not have an obligation to earn the greatest amount of profit for shareholders without regard for the means used.' Boatright, above n 6, 375 (emphasis added).
responsibilities. Dine rightly asserts that the ‘focus on property rights tends to divert attention away from the duties and responsibilities that are associated with them.’ Despite such attempts of diverting the attention from responsibilities of property owners, scholars have advanced a very strong case that ownership rights ought to be exercised subject not only to legal but also moral and ethical responsibilities. Orlando, for example, forcefully contends that ‘it must be understood that one cannot justify the position that shareholder concerns takes precedence over all other groups simply by appeal to the fact that the shareholders are the legal owners of the corporation.’ Shareholders definitely enjoy ‘certain rights, but as their liabilities are limited, so their rights are limited too.’ According to this view, while exercising their rights, shareholders are not entitled to violate the rights of others.

In fact, even Friedman conceded the existence of some responsibilities when he said that business should be conducted subject to ‘rules of the game,’ by which he meant that the business ‘engages in open and free competition, without deception or fraud.’ The real disagreement concerns, therefore, not whether shareholders and corporations should have responsibilities but the extent of such responsibilities. The views of those – such as Friedman and Sternberg – who construe corporate responsibilities and limitations on profit maximisation narrowly are contested by other scholars. For example, Parkinson argues that Friedman’s notion of ‘rules of the game’ encompasses ‘some ill-defined but narrow ethical principles’ and ‘rests on a very impoverished understanding of what morality entails.’

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76 ‘The “property concept” tells us nothing about the limitations to be imposed.’ Dine, above n 64, 257. Sen also notes: ‘It is not easy to understand why rules of ownership, transfer, etc., should have such absolute priority over the life and death of millions of people.’ Sen, ‘The Moral Standing’, above n 57, 6.
77 Dine, above n 64, 257.
78 For example, Parkinson writes: ‘To demand respect for ownership rights is to make a moral claim. Shareholders could not consistently invoke a moral right to profits, in circumstances in which those profits were made by immoral means.’ Parkinson, above n 45, 51. Dine also argues: ‘The exercise of ownership over any thing brings with it both moral and legal responsibilities.’ Dine, above n 64, 257.
79 Orlando, above n 56, 33.
81 Friedman, above n 2, 133.
82 Parkinson, above n 45, 49, 51.
The argument that shareholders’ ownership rights over corporations do not \textit{ipso facto} divest them of their social responsibilities could be supported from another angle as well. Friedman himself admitted that freedom ‘is a rare and delicate plant’ and that ‘the great threat to freedom is the concentration of power.’\textsuperscript{83} Therefore, Friedman reasoned, though the government is necessary to preserve freedom, ‘the scope of government must be limited’ and the ‘government power must be dispersed.’\textsuperscript{84} There is no reason why this logic should be limited to governments; rather it should also apply to corporations too, some of which now possess more power than states, which creates danger for this ‘delicate plant’ of freedom. Human rights embody a normative commitment to freedom (including the freedom to develop).\textsuperscript{85} The wide scope as well as the concentrated nature of corporate power poses a clear threat to this freedom embodied in human rights. Furthermore, the harmful potential of the concentration of corporate power is not remedied even if one assumes \textit{bona fides} of corporate executives, for ‘[c]oncentrated power is not rendered harmless by the good intentions of those who create it.’\textsuperscript{86}

The ‘shareholders as owners’ premise, at best, is useful to suggest that shareholders have a legitimate expectation to protect their investment and also benefit from it. However, this premise is inadequate to assert that profit has to be maximised at all costs,\textsuperscript{87} or to suggest that corporations could not have social responsibilities, or to contend that shareholders’ interests have an absolute primacy over the interests of other stakeholders.\textsuperscript{88} Of course shareholders’ investment is often crucial to maintain

\textsuperscript{83} Friedman, above n 2, 2.
\textsuperscript{84} Id., 2-3.
\textsuperscript{86} Friedman, above n 2, 201.
\textsuperscript{87} ‘[E]ven if management had made an express promise to its shareholders to “maximise your profits” ... I am not persuaded that the ordinary person would interpret it to mean “maximise in every way you can possibly get away with, even if that means polluting the environment, ignoring or breaking the law.”’ Stone, above n 62, 82 (emphasis in original).
\textsuperscript{88} Parkinson argues that other than shareholders being owners of corporations, ‘some further argument is needed in order to demonstrate that shareholder interests should automatically prevail over those of the other participants, or indeed of third parties or society in general.’ Parkinson, above n 45, 52. Freeman also writes that ‘if business organisations are to be successful in the current and future environment then executives must take multiple stakeholder groups into account.’ Freeman, above n 9, 52 (emphasis added).
the economic viability and profitability of corporations. However, shareholders are not the sole contributors or risk takers behind the success of corporations. For example, workers contribute by putting in labour, supply chain participants contribute by making available necessary materials and other inputs, consumers contribute by buying goods or services, and governments contribute by maintaining law and order and by creating a business-favourable regulatory environment. All these stakeholders contribute to the working and success of corporations, and take different kinds of risks while making their respective contributions. One should not over-play the risk taken by shareholders as that risk-assumption is not unique by any means. In fact, Ireland goes to the extent of arguing that the claim ‘that shareholders are “risk-takers” deserving of rewards as “providers” of capital … misunderstands both the risks associated with and the nature of corporate shareholding.

Finally, Friedman assumed an inherent, permanent and irreconcilable divergence between the interests of shareholders and those of other stakeholders. However, there might not always be a conflict between the interests of stockholders and other stakeholders, at least in the longer run. Friedman himself gave an illustration: a situation, which could be justified in terms of corporate ‘self-interest,’ may be cloaked

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89 Shareholders of large, publicly held corporations had ceased to be owners in the full sense and had become merely one kind of provider of the resources needed by a corporation. Boatright, above n 6, 378 (emphasis added).
90 Sheehy challenges the argument based on risk. Sheehy, above n 10, 216-17. See also Kiarie, above n 10, 332-33.
92 Ireland argues that ‘not only are corporate assets no longer private property, but that, as the product of collective labour of many generations upon which we all depend, there are compelling grounds for designating them common property.’ Ireland, above n 65, 56.
93 Kiarie argues:
It is inaccurate to regard shareholders as the sole residual risk owners. The company seriously impacts on other constituencies and stakeholders like employees, creditors and suppliers may also bear a significant risk. Shareholders may lose their investment but employees may lose their life line and, possibly, their future where the failure of the company affects their pensions. Kiarie, above n 10, 332. The contractual theory of the corporation tries to justify why shareholders – who agree to absorb unknown risks for indefinite returns – could push for maximisation of profit. But even this theory has certain gaps. See Parkinson, above n 45, 52-54; Boatright, above n 6, 383-85.
94 A degree of risk is practically associated with every conceivable human activity. But in all those situations, there is no necessary expectation of a certain amount of profit. More specifically, Atiyah notes that risk is inherent in the very idea of landed the money. P S Atiyah, The Rise and Fall of Freedom of Contract (Oxford: Clarendon Press, 1979), 130.
95 Ireland, above n 65, 54.
as an ‘exercise of “social responsibility”.’\textsuperscript{97} It is not too difficult to conceive of other situations where generally conflicting interests might converge,\textsuperscript{98} especially in view of the growing numbers of ethical investors who do not insist merely on maximisation of profit.\textsuperscript{99} For example, an overlap between the interests of shareholders and other stakeholders is bound to occur because shareholders also act in other capacities such as consumers and/or employees.\textsuperscript{100} Similarly, though a corporate decision to adopt an environment-friendly technology may demand more expenditure, this may also reduce operating costs. Therefore, in situations in which there is a convergence in the interests of shareholders and stakeholders, corporate executives could perform their social responsibilities without violating their responsibility to maximise shareholders’ profit.

5.2.1.3 Corporations are not meant, or suitable, to assume social responsibilities
Friedman also thought that the assumption of CSR by corporations would result in corporations doing what states or civil servants should be doing, such as ‘imposing taxes’ and ‘deciding how the tax proceeds shall be spent.’\textsuperscript{101} If corporations were to assume social responsibilities, corporate executives would be behaving more like unaccountable, unguided civil servants.\textsuperscript{102} This line of argument against CSR also invokes the public-private division of functions,\textsuperscript{103} incapacity of corporate executives

\textsuperscript{96} Werner though suggests that ‘pressures to produce instant profits curtail the manager’s discretionary power to seek long-range goals likely to benefit both shareholders and society.’ Werner, above n 11, 1665.

\textsuperscript{97} Friedman, ‘The Social Responsibility of Business’, above n 18, 76.

\textsuperscript{98} The ‘business case’ for human rights is entirely founded on this assumption. See Chapter 5.3.1 below.

\textsuperscript{99} ‘Today’s shareholder is likely to be an institution with wider community interests than just profit maximisation. ... This is especially true among the growing numbers of ethical investors.’ Addo, ‘An Introduction’, above n 67, 15. Orlando also suggests that ‘most shareholders expect managers to take into account considerations beyond maximising profit.’ Orlando, above n 56, 38.

\textsuperscript{100} Boatright writes that ‘the interests of shareholders are not narrowly economic; corporations are generally expected by their owners to pursue some socially desirable ends. Shareholders are also consumers, environmentalists, and citizens in communities.’ Boatright, above n 6, 376 (emphasis added). Kiarie also argues: ‘Shareholders are also not a distinctly different group of people. They are simultaneously consumers or employees and thus expect the company to perform beyond the realms of short-term profit delivery.’ Kiarie, above n 10, 333-34.

\textsuperscript{101} Friedman, ‘The Social Responsibility of Business’, above n 18, 74.

\textsuperscript{102} Id., 74-75.

\textsuperscript{103} Friedman writes:

The whole justification for permitting the corporate executive to be selected by the stockholders is that the executive is an agent serving the interests of his principal. This justification disappears when the corporate executive imposes taxes and spends the proceeds for “social” purposes. He becomes in effect a public employee, a civil servant ... If they are to be civil servants, then they must be selected through a political process.

\textit{Id.}, 74.
to take and implement appropriate decisions,$^{104}$ and the prisoner’s dilemma.$^{105}$ Again, it is possible to rebut these objections.

First of all, it is difficult to understand, as Mulligan demonstrates, how corporations would in effect be imposing a ‘tax’ on stockholders while pursuing CSR policies.$^{106}$ Friedman was right in asserting that corporations lack any authority whatsoever to impose a tax on shareholders, but he somehow believed that corporations will impose tax if they assume social responsibilities.$^{107}$ There are both conceptual and substantive fallacies in this argument. At the conceptual level, if corporations lack the authority to do ‘X’, they cannot legally do ‘X’; they can only do something other than ‘X’, or risk acting ultra vires and thereby losing the benefit of the corporate veil. Tax is a compulsory, coercive exaction of money by a state (or other authority that possesses political power) for common benefit.$^{108}$ Corporations cannot impose tax in this sense because they lack the required authority and political legitimacy. So even if the assumption of social responsibilities by corporations reduces the profit of shareholders, this could not be because of the imposition of tax. This would amount to a tax only if states decide to levy tax on corporations (and not on shareholders as such) and then spend the collected money to fulfil social responsibilities of corporations. I doubt if Friedman would have preferred that course.

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$^{104}$ Friedman illustrates this incapability of corporate executives thus:

He [i.e., corporate executive] is told he must contribute to fighting inflation. *How is he to know what action of his will contribute to that end? He is presumably an expert in running his company – in producing a product or selling it or financing it. But nothing about his selection makes him an expert on inflation.*

*Id.,* 75 (emphasis added).

$^{105}$ Referring to the fate of the corporate executive who decides to discharge his/her social responsibilities, Friedman asks: ‘Will not the stockholders fire him? ... His customers and his employees can desert him for other producers and employers less scrupulous in exercising their social responsibilities.’ *Id.,* 75. Shaw also observes: ‘About the most certain outcome would be that “free riders,” i.e., non-conforming firms in the industry, would cut into “responsible” firm’s profits.’ Bill Shaw, above n 63, 541.

$^{106}$ Mulligan, above n 38, 266-67. See also Boatright, above n 6, 375-76.

$^{107}$ See Friedman, ‘The Social Responsibility of Business’, above n 18, 74-75. Shaw, who defended Friedman’s thesis, also argued: ‘A corporation simply cannot, by majority vote or otherwise, bestow upon itself political power and authority [to impose tax].’ Bill Shaw, above n 63, 542.

The substantive fallacy in the argument of Friedman lies in ignoring that shareholders only have an expectation of some profit from their investment, but not a right to earn a certain amount of profit. Shareholders' profit can fall below the expected level not merely because of taxation, but also for several other reasons such as bad investment decision-making on the part of management. 109 Does this amount to corporations taxing shareholders? If not, why should one regard as a tax any diminishment in shareholder profit that results from corporations spending their resources to fulfill their legitimate social responsibilities by, for example, paying adequate salaries to employees? As contended in part four of this chapter, corporations ought to observe human rights obligations because of their relation with and position in society.

Second, Friedman argued that corporate executives are not experts in handling CSR issues and that they cannot judge the future impacts of their actions with a view to achieving given social objectives. 110 The first limb of the argument has some merit, 111 but corporations could overcome this capacity limitation by simply hiring experts. 112 Corporations have the resources to do so and there are no reasons why they should not do so in the area of social responsibility, especially when they follow this practice in other areas of operation. Regarding the second limb of the argument, it could be said that there is always an element of uncertainty, calculated risk and speculation in almost all business decisions and this is not unique to CSR-related decisions. 113 Therefore, decisions "about socially responsible actions, no less than decisions about new products or marketing campaigns, can be made using this "business-like" approach." 114 Besides, Friedman's fear that corporate executives in the course of acting in a socially responsible manner would behave like unaccountable or unguided

109 'Markets are so complex and unpredictable that even genuine experts can misjudge them on occasion ... but no one will have acted unethically.' Sternberg, above n 3, 98.
110 Above n 104. Shaw agrees with Friedman: 'It puts corporate managers in an untenable position of taking responsibility in areas in which they have no training, experience, or authority.' Shaw, above n 63, 539.
112 There are now many organisations and corporations doing CSR consultancy.
113 Mulligan succinctly argues: 'Human life, however, requires action in the absence of certainty, and business people in particular have a bias toward action. They do not wait for perfect foreknowledge of consequences, but instead set a decision date, gather the best information available, contemplate alternatives, assess risks, and then decide what to do.' Mulligan, above n 38, 268.
civil servants disappears to a great extent if the company incorporates CSR into its charter.\textsuperscript{115} Parker convincingly contends that by opening up corporations so as to enable stakeholders to participate in corporate deliberations, we can bring more accountability and transparency to corporate functioning.\textsuperscript{116}

Third, any suggestion (based on a private versus public division of functions) that corporations should focus only on efficient wealth creation and that states alone should bear the responsibility of human rights' realisation\textsuperscript{117} is both obsolete and unsound. Such a position could have been tenable at a time when the welfare state used to play a dominant and pervasive role, including that of protecting and promoting human rights. But it is not tenable any more when corporations are performing many public functions and/or providing public services under a free market economy – providing health services and access to water, managing prisons and detention centers, ferrying suspected terrorists to outsource torture, and more.\textsuperscript{118} It is logical that corporate assumption of public functions and powers ought to be accompanied by corporate acceptance of appropriate social responsibilities. As feminist scholars have shown, this distinction between ‘public’ and ‘private’ is also unsound;\textsuperscript{119} the distinction is not only difficult to make and maintain but also problematic for several reasons. For example, if we maintain this distinction, then

\textsuperscript{114}Id.
\textsuperscript{115}See id., 267.
\textsuperscript{116}Christine Parker, \textit{The Open Corporation: Effective Self-regulation and Democracy} (Cambridge: Cambridge University Press, 2002).
\textsuperscript{117}Werner, for example, argues that ‘society is best served by corporations on the efficiency goal, leaving other socially desirable goals for specialised agencies more competent to undertake such activities.’ Werner, above n 11, 1665.
corporations operating in free markets could hardly be subject to human rights norms, nor could the question of state responsibility for actions or omissions by corporate agents generally arise.\textsuperscript{120}

Such a watertight division of functions also ignores the value of cooperation and the limitations of a ‘doing it alone’ approach. Cooperation between governments and the private sector is increasingly emphasised in order to meet contemporary challenges – whether of sustainable development, global warming, or the Millennium Development Goals.\textsuperscript{121} The current trend, therefore, is towards establishing ‘public-private’ partnerships in governance, service delivery and regulation. I have explained in the last chapter how the Global Compact envisages such partnership between governments, international institutions, MNCs and NGOs to achieve a more inclusive and sustainable global economy.\textsuperscript{122}

Fourth, the fear of Friedman that CSR would result in corporate executives abusing the trust of shareholders is unfounded too. Friedman was not the first one to express such fear; Berle also cautioned that CSR might make corporate management ‘absolute,’\textsuperscript{123} for no precise yardsticks would be available to test their conduct. However, we know as a matter of fact how baseless the fear proved. Werner rightly points out: ‘Berle’s 1932 forecast – that managers would use the opening created by Dodd’s thesis to abuse shareholder rights – did not materialise. Shareholders complained for various reasons, but not because managers were sacrificing shareholders for the community’s welfare.’\textsuperscript{124} One major explanation for why such a fear is unwarranted is because ‘directors do consider the interest of stakeholders, \ldots


\textsuperscript{123} Berle, ‘A Note’, above n 9, 1367-68.

\textsuperscript{124} Werner, above n 11, 1645.
[and] they do not do so for the ulterior motive or purpose of trying to subvert business accountability.\textsuperscript{125} The fear is less likely to materialise in future: first, because now many shareholders insist on corporations behaving as good corporate citizens, and second, because the nature and extent of social responsibilities of corporations – though far from absolutely clear – is getting more and more concrete.

Fifth, one could notice another paradox in the thesis of Friedman. According to Friedman, only ‘responsible individuals’ could be the bearers of freedom,\textsuperscript{126} while corporations, as bearers of freedom to do business and maximise profit, need not be responsible entities so as to have certain social responsibilities. He seems to dispel this contradiction by arguing that corporations are artificial entities unlike individuals and so they could not have responsibilities.\textsuperscript{127} But if this is so, how could non-individuals like corporations have and exercise freedoms too? Conversely, if freedoms could be bestowed on corporations, so could responsibilities.\textsuperscript{128} Although the idea is not free from difficulties,\textsuperscript{129} scholars like Goodpaster and Wells have made a strong case that corporations in their individual capacities could be made accountable for breach of their responsibilities.\textsuperscript{130}

In short, Friedman’s views on CSR, though highly influential, are unsound, especially in the current economic climate.\textsuperscript{131} More than anything else, his views have been

\textsuperscript{125} Mohammed B Hemraj, ‘Corporate Governance: Rationalising Stakeholder Doctrine in Corporate Accountability’ (2005) 26:7 Company Lawyer 211.
\textsuperscript{126} ‘Freedom is a tenable objective only for responsible individuals. We do not believe in freedom for madmen or children.’ Friedman, above n 2, 33 (emphasis added).
\textsuperscript{127} ‘What does it mean to say that “business” has responsibilities? Only people can have responsibilities. A corporation is an artificial person and in this sense may have artificial responsibilities, but “business” as a whole cannot be said to have responsibilities, even in this vague sense.’ Friedman, ‘The Social Responsibility of Business’, above n 18, 72 (emphasis added). Another variation of this argument is advanced by the proponents of the contractual theory of the company who argue that corporations are not much different from markets and therefore, cannot have responsibilities. See Parkinson, above n 45, 53.
\textsuperscript{128} ‘Again, it is important to bear in mind that that the responsibilities are to other persons, just as the rights are rights against other persons.’ Dine, above n 64, 257.
\textsuperscript{129} Addo, ‘An Introduction’, above n 67, 17.
\textsuperscript{131} Parkinson considers Friedman’s position to be ‘out of step with many of the attitudes that currently surround business.’ Parkinson, above n 45, 49. See also Stefano Zamagni, ‘Keynote Address – Religious Values and Corporate Decision Making: An Economist’s Perspective’ (2006) 11 Fordham Journal of Corporate & Financial Law 573, 578.
undermined by the conduct of a great number of corporations,132 which preach and/or practice the CSR mantra, operating in a free market economy.133 The thesis of Friedman could be discredited even by applying the yardstick suggested by Professor Shaw: 'Friedman will not be dislodged until it can be shown that the social and political institutions of this nation, that is, the mechanism for determining how power and control over economic resources are distributed, are inadequate to promote the common good and social justice.'134 There is a growing body of literature which shows that states or state-based organisations alone cannot ensure promotion of the common good and social justice (like the realisation of human rights) simply because corporations control activities across a wide sphere of human life.135 For this reason, increasingly an emphasis is placed on developing partnerships, both at the national and international levels, between government institutions, the private sector and other civil society organisations.

5.2.2 What is Sternberg's *Just Business*?

Despite receiving scathing criticism and perhaps being outdated, the legacy of Friedman's views on the social responsibilities of corporations is very much alive even today. One telling example of this is provided by Elaine Sternberg who, in her book *Just Business*, not only defends and extends Friedman's thesis but also seeks to 'provide solid arguments for rebutting trendy, but unethical, demands for "social responsibility" in business.'136 The arguments made in *Just Business* have been

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132 'Few companies these days explicitly adhere to the Friedman's mantra that the business of business is purely business.' Sarah Joseph, 'The Appropriate Role of Corporations in Fostering Development and Combating Poverty' in C Raj Kumar & D K Srivastava (eds.), *Human Rights and Development: Law, Policy and Governance* (Hong Kong: LexisNexis-Butterworths, 2006), 189, 194, footnote 43.

133 'Almost universally, large companies are keen to display their credentials as "corporate citizens", claiming not only to conduct their business in accordance with high ethical standards, but also to be participating positively in addressing society's problems.' Parkinson, above n 45, 49. Writing almost at the same time as Friedman, Fogarty observed: 'If British directors are challenged about their aims in industry, they can give a reasonably clear and convincing answer. They serve ... not only shareholders but customers, employees, and the local and national community. They ought not to neglect any of these interests, nor can they afford to.' Michael Fogarty, *Company and Corporation – One Law?* (London: Geoffrey Chapman, 1965), 2.

134 Shaw, above n 63, 538 (emphasis in original).

135 Sheehy observes: 'The shareholder-stakeholder debate in corporate governance has been going on for decades, but the intensity of the debate increases as globalization increases. As corporations come to dominate more of the planet and its resources, other voices demand to be heard, including those of indigenous people, women, and even governments, who are concerned about their role in the global economy and sovereignty itself.' Sheehy, above n 10, 195. See also the materials cited in above n 121.

136 Sternberg, above n 3, 1 (emphasis added). The introductory chapter of the book is full of self-praises, as I show in the main text.
informed, among others,\textsuperscript{137} by Sternberg's experience as an 'investment banker' and by the experience of 'founding and running profitable businesses.'\textsuperscript{138} She claims that the Ethical Decision Model\textsuperscript{139} presented in the book could be invoked for 'resolving business ethics questions whenever and wherever they arise'\textsuperscript{140} and that the model 'has been successfully tested on the problems of both large and small businesses.'\textsuperscript{141} 

*Just Business* adopts a teleological approach because '[p]urposes are essential for evaluating goodness' of human conduct.\textsuperscript{142} Logically therefore, for Sternberg, 'what constitutes ethical conduct in business depends critically on business's definite purpose.'\textsuperscript{143}

How, then, does Sternberg define 'business' and its definite purpose? In a definition carefully worded and meticulously elaborated, she defines 'business' — which is 'something very specific and limited'\textsuperscript{144} — with reference to its purpose: 'The defining purpose of business is maximising owner value over the long term by selling goods or services.'\textsuperscript{145} It is this distinctive purpose that separates, in her view, business from other aggregations like family, club, church, game, and government.\textsuperscript{146} Everything that business does should be tested against the criterion of maximising long-term owner value, something that business should try to achieve only by selling goods or services.\textsuperscript{147} But what is this 'value?' What is meant by 'long-term?' Who are the 'owners' of business? What does 'maximisation' mean and entail? Sternberg painstakingly tries to explain the meaning of all these phrases.\textsuperscript{148}

\textsuperscript{137} Her thesis, for example, is heavily based on the work of Aristotle. Megone, above n 19, 25-26.
\textsuperscript{138} Sternberg, above n 3, 3.
\textsuperscript{139} Sternberg, above n 3, 110-23. The Model involves four steps by business: clarifying the question; determining the relevance of the question for this business; identifying the circumstantial constraints; and assessing the available options. After this exercise, the right course of action should be chosen that is likely to maximise long-term owner value. *Id.*, 113-20. See also Megone, above n 19, 34-38.
\textsuperscript{140} This is also because the book 'deals with fundamental truths' and the resultant analysis could be applied universally. Sternberg, above n 3, 5.
\textsuperscript{141} Sternberg, above n 3, 1 and 3.
\textsuperscript{142} *Id.*, 4. She explains: 'One of the most distinctive features of this approach is that it identifies and explains human activities by reference to their ends/aims/goals/objectives/purposes.' *Id.*
\textsuperscript{143} *Id.*, 4.
\textsuperscript{144} *Id.*, 31.
\textsuperscript{145} *Id.*, 32 (emphasis in original).
\textsuperscript{146} 'What differentiates business from everything else is its purpose: maximising long-term owner value by selling goods and services.' *Id.*, 35, and generally 35-40.
\textsuperscript{147} *Id.*, 42-43.
\textsuperscript{148} *Id.*, 42-57.
In her definition of the purpose of business, 'value' — a term that she prefers to use over wealth, asset, revenue, or share price\textsuperscript{149} — is nothing but 'financial value.'\textsuperscript{150} The owners of businesses are those who own it, that is, shareholders of a corporation or partners of a partnership firm.\textsuperscript{151} Rather than serving the interests of consumers and employees or stakeholders as such,\textsuperscript{152} 'business is automatically accountable ... [to] its owners ... simply because it belongs to them: it is their property.'\textsuperscript{153} Although Sternberg considers the use of words 'long-term' strictly speaking 'superfluous,' she includes them to highlight two aspects: first, that businesses should 'take into account the future effects of their current actions' because actions generally have 'long-term consequences,' and second, that business by nature is not a temporary but a 'sustained activity.'\textsuperscript{154} Finally, the object of business, Sternberg explains, has to be maximising owner value and 'not just to increase or promote, secure or sustain it' because any '[I]less stringent objectives than maximising fail to differentiate business from other activities.'\textsuperscript{155}

Sternberg concedes that the definition of business that she proposes and defends is narrow, but considers this narrowness 'not an ideological requirement, but a logical one.'\textsuperscript{156} If business is asked to perform social responsibilities and take on board the interests of all stakeholders, it may fail to serve anyone. She emphatically writes: 'By substituting a comprehensive, pretentious notion of business for the narrow, prosaic one, they sharply reduce their chances of achieving either objective. The broad objectives they are seeking are beyond the range of business, while the goal that should be their focus is ignored.'\textsuperscript{157}

\textsuperscript{149} Id., 45-48.
\textsuperscript{150} Id., 44.
\textsuperscript{151} She consciously prefers to choose the term 'owner' over 'shareholder' because the latter will only cover business by corporations: 'Maximising shareholder value is the purpose of corporate business, not of business as such.' Id., 49.
\textsuperscript{152} Id., 49-53. She nevertheless concedes a limited but important role for the notion of 'stakeholder' because it 'is a convenient shorthand way of designating those groups whose support is essential for the business's continued existence.' Id., 52. She is more candid later on: 'Although its responsibilities to stakeholders are limited, the business cannot afford to ignore any stakeholder concern that might affect long-term owner value.' Id., 56-57
\textsuperscript{153} Id., 51 (emphasis added).
\textsuperscript{154} Id., 53-54. She, however, dismisses any suggestion of business being a perpetual activity: 'the object of business is not survival at any cost.' Id., 54.
\textsuperscript{155} Id., 54. She further writes: 'Only maximising provides a sufficiently clear-cut, hard-edged criterion of business action.' Id., 55.
\textsuperscript{156} Id., 33, and generally 32-35.
\textsuperscript{157} Id., 33 (emphasis added).
Elaine Sternberg’s conception of business as outlined above might create the impression that business could pursue the objective of maximising long-term owner value without any moral, ethical or legal limits. However, this is not the case. Similar to Friedman’s ‘rules of the game,’ she considers that ethics is ‘essential for business;’ ethics is an ‘inescapable fact of business life’ because ‘ethical concerns permeate all human activity’ including business.  

Sternberg offers another business reason for why business should take ethics into account: ‘A business that ignores the demand of business ethics, or gets them wrong, is unlikely to maximise long-term owner value.’ She, in fact, thinks that ‘being unethical can cost a business its very life.’

Of course Sternberg does not stop at providing the business case for business ethics: that business should consider observing ethical principles in order to achieve the purpose of maximising owner value over the long-term. She also outlines the contours of such ethical principles. A ‘business will be ethical if it seeks maximum long-term owner value in ethical ways.’ What are these ethical ways? Sternberg argues that there are two fundamental principles of business ethics – ‘distributive justice’ and ‘ordinary decency’ – ‘without which business as an activity would be impossible’ to conduct. Taken together these two principles should ordinarily enhance long-term owner value because ‘being ethical is good for business.’

The principle of distributive justice mandates that ‘organisational rewards should be proportional to contributions made to organisational ends.’ The principle, which explains both why and how benefits should be allocated, is considered essential for business because it ‘encourages contribution’ to the defined business purpose, i.e., maximising long-term owner value by selling goods or services. On the other hand,
the principle of ordinary decency 'consists of fairness and honesty and refraining from coercion and physical violence, typically within the confines of the law.' Although ordinary decency will imply other values like courage, responsibility and integrity, Sternberg maintains that there is no need to extend the list beyond the four components (i.e., honesty, fairness, refraining from coercion and violence, and respecting the law) which will act as constraints on business's legitimate activities. Sternberg reasons that these components are part of ordinary decency because maximising long-term owner value would require values such as confidence, trust and respect for property rights. Her flow chart reads like this: 'maximising long-term owner value views require considering the long term. But long-term views require confidence, which in turn requires trust. Moreover, owner value necessarily presupposes ownership, and so requires respect for property rights.'

Although the narrowness of Sternberg's twin fundamental ethical principles is critiqued in more detail below, it may be noted at this stage that she does not directly or specifically consider whether these principles will include adherence to human rights. Prima facie it looks difficult to imagine how her conception of business ethics could encompass issues concerning human rights, beyond perhaps those concerns that could be encompassed by fairness and refraining from coercion and physical violence as part of ordinary decency. Similarly, the performance of social responsibilities by business is also generally foreign, probably contrary, to how Sternberg visualises business ethics.

To sum up, in order to be ethical as per Sternberg's yardstick, a business action must aim at 'maximising long-term owner value while respecting distributive justice and ordinary decency.' Sternberg not only defends but also extends the thesis of Friedman in that she finds Friedman's terminology (for example, corporate social

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166 Id., 82, and generally 82-87.
167 Id., 82-83.
168 Id., 79 (emphasis added).
169 Id., 79, 82, 84.
170 "Business ethics can therefore save the business from wasting its resources on objectives, notably those called "social responsibilities", that are by their very nature wrong for business." Id., 18-19 (emphasis in original). She further writes that "much of what masquerades as business ethics is nothing of the sort, having little to do with either business or with ethics. Most demands that business promote "social responsibility" fall squarely into this category." Id., 21. See also id., 115-16.
171 Id., 120 (emphasis in original).
responsibility as ‘socialism’ and unauthorised ‘taxation’) ‘too polite.’ 172 She strongly believes that ‘[u]sing business resources for non-business purposes [i.e., social responsibility] is tantamount to theft: an unjustified appropriation of the owners’ property.’ 173 ‘Managers who employ business funds for anything other than the legitimate business objective are simply embezzling.’ 174 Such corporate managers are also guilty of the offence of, what Sternberg calls, ‘logical offence of teleopathy:’ ‘Just as prostitution occurs when sex is proffered for money rather than love, so it exists when business pursues love – or “social responsibility” – rather than money.’ 175 Therefore, corporations must refrain from performing their social responsibilities unless doing so helps in maximising owner value. 176 If shareholders as corporate owners decide to ‘pursue something other than maximum long-term owner value, ... they are simply not engaging in business.’ 177

5.2.3 How Just is Sternberg’s Thesis of ‘Just Business’?

In this section I try to show why Sternberg’s thesis of doing just business – maximising long-term owner value by selling goods or services – subject only to her notions of distributive justice and ordinary decency could not be regarded as just. Some of the arguments advanced by Sternberg are similar to those raised by Friedman and have already been rebutted before. For example, we have seen earlier why her assertion that ‘shareholders of a corporation are, collectively, its owners,’ 178 is unsound. 179 In addition, the position taken by Sternberg could be assailed on several other grounds, elaborated below.

First, although Sternberg devotes several pages of her book to carefully defining and distinguishing the key terms used in her thesis, she does not bother to explain what she means by the ‘social responsibility’ of business. It is nonsensical to ask businesses

172 Id., 41.
173 Id.
174 Id.
175 Id., 42.
176 ‘Business is ethical, not hypocritical, if it only pursues “social responsibilities” when they maximise long-term owner value. ... If, however, a “socially responsible” act does not contribute to the business objective, then it is wrong – ethically as well as financially – for a business to perform it.’ Elaine Sternberg, ‘Leeds Lecture Series’, as quoted by Megone, above n 19, 29. See also generally Sternberg, above n 3, 56-57, 113-22.
177 Sternberg, above n 3, 45. See also Megone, above n 19, 31.
178 Sternberg, above n 3, 200.
not to ‘waste’ its resources on social responsibilities without telling them what these responsibilities are. Not only does Sternberg fail to offer a definition of social responsibility, her analysis, in fact, demonstrates a poor understanding of this term. Let us consider one example. Castigating the ‘oxymoronic approach’ to business ethics (expressed by terms such as social responsibility and stakeholding), she writes: ‘that being ethical in business means replacing the pursuit of owner value with the pursuit of some other end – social welfare, environmental protection or stakeholder interests, for example.’ Hardly anyone – even a stakeholder theorist – expects corporations to substitute their primary goal of wealth maximisation with a concern for social services. The CSR discourse makes only a limited claim: that corporations should not maximise shareholder’s wealth at the cost of, say, the interests of labour and human rights or preserving the environment.

Sternberg’s lack of clarity surrounding the concept of CSR or stakeholder theory is further demonstrated by the fact that she critiques something that the stakeholder theory does not posit. While pointing out one of the ‘four fundamental errors’ of stakeholder theory, Sternberg writes: ‘in maintaining that all stakeholders are of equal importance to a business, and that the business ought to be answerable equally to them all, stakeholder theory confounds business with government.’ But as Hemraj...
and others\(^{185}\) point out, stakeholder theory does not make a claim of equality amongst stakeholders: ‘The responsibility of balancing the interests of various stakeholder groups rests with company directors. The directors’ prerogative is to decide which criteria, objectives or measures they would wish to pursue in order to bring optimum benefit to the company.’\(^{186}\) In other words, it is the responsibility of directors to balance the interests — none of which are ‘primary or over-riding’ — of a range of stakeholders.\(^{187}\)

Second, as pointed out before, the *Just Business* thesis of Sternberg is ‘Aristotelian in specifying the definition of business in terms of its purpose, and in then determining the proper conduct of business by reference to that definitive purpose.’\(^{188}\) Megone tries to show that an alternative approach derived from Aristotle (virtue theory) ‘challenge[s] Sternberg’s view that the proper purpose of business is to maximise long-term owner value by selling goods and services.’\(^{189}\) In view of varied motivations, Aristotle draws a distinction between two types of commercial activities: ‘There are two sorts of wealth getting, as I have said; one is a part of household management, the other is retail trade: the former is necessary and honourable, while that which consists in exchange is justly censured: for it is unnatural.’\(^{190}\) The pursuit of limitless wealth maximisation by business becomes unnatural for Aristotle because ‘it is contrary to what is needed for the proper development of human nature.’\(^{191}\) Wealth is only a means and not an end itself, and in fact, the objective of maximisation might result in the means overtaking or overshadowing ends. In other words, the very purpose of business proposed by Sternberg — maximisation of long-

\(^{185}\) For example, Sheehy writes: ‘Stakeholder theory, to the extent that one can speak of unanimity of views, does not advocate equality of all interests or ... the rejection of the profit motive.’ Sheehy, above n 10, 207.

\(^{186}\) Hemraj, above n 125, 214. He further explains: ‘The stakeholder theory advocates that organisations should consider the legitimate interests of stakeholders in proportion to which the organisation is expected to benefit.’ *Id.*

\(^{187}\) A director or manager ... stands at the point of convergence of interest involved in the operation of his firm; shareholders, employees, customers, dealers, suppliers of materials and equipment, the community at large. *None of these interests is primary or over-riding. The director’s business is to satisfy them all ....*’ Fogarty, above n 133, 8-9 (emphasis added).

\(^{188}\) Megone, above n 19, 39.

\(^{189}\) *Id.*, 50 (emphasis in original).

\(^{190}\) Aristotle, *Politics I*, 10 1258 a39-b3, as quoted by Megone, *id.*, 50. By drawing a distinction between ‘property for private use and property for profit’, Orlando also highlights the limited nature of shareholders’ right. Orlando, above n 56, 33.

\(^{191}\) Megone, above n 19, 50.
term owner value – is contestable.¹⁹² Any doubt about the appropriateness of the purpose of business is fatal for her approach; Sternberg knows how important it is to get the ends right.¹⁹³ Leaving aside this doubt, the ends do not always justify the means.¹⁹⁴

Third, the narrowness with which Sternberg defines two fundamental principles of her business ethics presents another serious difficulty. 'Distributive justice,' or merely justice, is a powerful construct¹⁹⁵ with wide-ranging application. But she primarily confines the application of this principle to the allocation of rewards and achievements within business,¹⁹⁶ because this will encourage contribution to the success of business.¹⁹⁷ There is no sound reason, however, why the principle of distributive justice should not be applied to the allocation of, say, business responsibilities. If applied to the identification and allocation of responsibilities, the principle would place responsibility on businesses for those consequences which their activities cause, or to which they contribute. One could see the evolution of the 'polluter pays' principle in environmental law in this light.¹⁹⁸ By Sternberg's own logic, the application of the distributive justice principle to the allocation of

¹⁹² Geoffrey Chandler argues:

Present company law is an ass in practical terms in recognising shareholders as the only stakeholder for which companies have a legal obligation. This enables the unthinking to sustain the vitiating fallacy that the purpose of a company is to maximise value to shareholders in the long term. This is a condition of survival, but not a purpose.

Sir Geoffrey Chandler, 'Keynote Address: Crafting a Human Rights agenda for Business' in Addo (ed.), above n 5, 39, 44 (emphasis added). See also Megone, above n 19, 49-52.

¹⁹³ 'Given the significance of ends in defining and judging, it is important to get the ends right.' Sternberg, above n 3, 4.

¹⁹⁴ Mahatma Gandhi, for example, firmly believed that ends could not justify means: 'I have never believed and I do not now believe that the end justifies the means. On the contrary it is my firm conviction that there is an intimate connection between the end and the means so much so that you cannot achieve a good end by bad means.' Publications Division, Ministry of Information and Broadcasting, Government of India, The Collected Works Of Mahatma Gandhi, Vol. 24 (22 July 1921 - 25 October 1921), 74 (emphasis added). He considered that that 'there is an indissoluble bond between the means and the end' and therefore both should be pure. Id., Vol. 65 (16 September 1934 - 15 December 1934), 268, 9, <http://www.gandhiserve.org/cwmg/cwmg.html> (last visited 18 November 2006).

¹⁹⁵ Even Sternberg admits this: 'Distributive justice is an extremely powerful concept.' Sternberg, above n 3, 80.

¹⁹⁶ 'Distributive justice is concerned essentially with achievements.' Id., 81. She again explains that 'not all aspects of business life involve considerations of distributive justice. Many explicitly environmental questions – how much packaging to use, for example – do not.' Id., 119.

¹⁹⁷ Id., 80.

responsibilities should necessarily encourage responsible behaviour on the part of business.

Her construction of ‘ordinary decency’ is similarly problematic. Sternberg deduces four values, outlined above, that are part of ordinary decency because maximising long-term owner value requires confidence, trust and respect for property rights: ‘Business therefore presupposes conduct that excludes lying, cheating, stealing, killing, coercion, physical violence, and most illegality, and instead exhibits honesty and fairness. Taken collectively, these constraints embody the values of what may be called “ordinary decency”’. It is not, however, clear why ordinary decency could, or should, exclude respect for human rights which are based upon respect for individual worth and dignity. If the test for including values within the bracket of ordinary decency is that they help in maximising long-term owner value, then either human rights also satisfy this test, or none of the included values could. If ‘business would be impossible’ without what she considers ordinary decency, it would be very difficult, if not impossible, without human rights too. For example, consider whether businesses would like to do business without the protection of human rights such as the right to equality, protection of property (including intellectual property) rights, freedom of trade and commerce, freedom of commercial speech, and the right to movement.

Four, since the business ethics model proposed by Sternberg is universal, it applies equally to international or transnational business. She rightly recognises the problem posed by ‘cross-border, cross-cultural business’ and asks the relevant question: ‘is it, for example, ethical to sell elsewhere, products that fail to meet the standards of the sophisticated home markets?’ To overcome this ethical dilemma, Sternberg offers the following test for the business:

If the danger [in selling abroad the products that are regarded unsafe at home] is small, then it is a matter of trade offs. ... And the lives of starving people can still be saved by food that is wholesome past its “sell by” date. If the products are seriously unsafe, however, then it would be wrong, and counterproductive, to sell them in any market. Selling a kettle that is prone to

199 Sternberg, above n 3, 79 (emphasis in original).
200 ibid., 80.
201 ibid., 89.
The suggested distinction between small and serious dangers could be contested on ethical grounds itself. Subjecting people to known risks — especially against the background of unequal bargaining positions and a lack of informed consent — might be legal but not morally correct, including because this will in effect result in assigning different value to the life and worth of human beings. It may also be difficult for business people to make and sustain such a distinction during actual decisions taken under the duress of profit maximisation. What is the guarantee that the sale of food in developing countries after the ‘best before’ date is likely to save lives rather than cause food poisoning? Moreover, how is the seriousness of the danger to be judged — by the probability or magnitude of harm, or both? Sternberg explicitly offers no concrete guidance in this regard. If her advice to business is to weigh short-term profits that may be gained by selling dangerous products against both the present and future consequences, then this is not an ethical but an economic yardstick, as elaborated further below.

Fifth, one might also ask if there is much ‘ethics’ in those decisions of business which are driven solely by the purpose of maximising long-term owner value. It is no secret that Sternberg wants business to follow ethical principles not because it is the right thing to do (irrespective of the impact on owner value), but because ‘business ethics actually provides essential support for maximising long-term owner value.’

202 Id., 89 (emphasis in original), and generally 89-90. Boatright also makes similar arguments, which are dealt with in detail in Chapter 6. Boatright, above n 6, 406-08.


204 Sternberg, above n 3, 90.

205 This is so though she points out that ‘[f]or an act or activity to be deemed ethical, all that is required is that it be the right thing to do.’ Id., 95.

206 Id., 15, and generally 15-20, 79-90. Critiquing the theory of Sternberg, Zamagni notes: ‘The fact is that the various theories of business ethics are unable to provide a reason for being ethical.’ Zamagni, above n 131, 585.
ethical. She reasons that ‘the act that is actually achieved or accomplished, can usually be abstracted away from the doer’s motive and evaluated separately.’

To illustrate her argument, she gives the example of a *man* saving a drowning child for varied motivations. Let me consider the same example with a little variation in the scenario. Can the act of a person who saves a drowning child be considered ethical in the proper sense if it is motivated *only* by a prize? Sternberg is likely to reply in the affirmative: ‘Whatever the motive, however, a good act – that of saving a child’s life – has been performed.’ Sternberg is right when she says that a good motive does not convert a bad or unethical act into a good or ethical act. Nevertheless, motive should be relevant in determining the moral quality of the act – the act of a person who saves the child without any motive of prize-getting is much more ethical than that of a person who does the same act for money, or to hold the child for ransom, for that matter. Sternberg tries to overcome this difficulty by making a distinction between ‘ethical acts’ and ‘acting ethically’. Motive, she explains, should be relevant to judge not the nature of the act but the character of the actor. However, the nature of act and the motive of actor are often interlinked. For example, in criminal law motive is invoked to judge the true colour of a given act. The distinction between the ‘act’ and ‘actor’ seems fallacious and indefensible in the context of business by corporations. If a corporation agrees to an out of court...

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207 Sternberg, above n 3, 94.
208 *Id.*, 94-95.
209 *Id.*, 94, and generally 94-95.
210 ‘Wrongdoing is not annulled by worthy motives.’ *Id.*, 41. She writes again that ‘the act of selling dangerously defective products is wrong, even if the motive is helping employees by saving their jobs.’ *Id.*, 75.
211 *Id.*, 95.
212 ‘A person who performs an ethical act only out of self-interest, or just because it is required by law, will not deserve the same moral credit as the one who does the right thing because it is right.’ *Id.*, 95 (emphasis in original).
213 As evidence, motive is always important. ... if the prosecution can prove that D had motive for committing the crime, they may do so since the existence of a motive makes it more likely that D in fact did commit it. People do not usually act without motive.’ David Ormerod, Smith & Hogan Criminal Law, 11th edn. (Oxford: Oxford University Press, 2005), 119 (emphasis in original).
214 Zamagni argues that ‘while the logic of a philanthropic enterprise is one of concession or compassion, corporate social responsibility rests on the principle of equal dignity of all subjects involved in a business activity.’ Zamagni, above n 131, 575. He writes further: [The] nature of that which induces the actor to behave in a virtuous way is relevant: *it makes quite a difference whether it is because of fear of legal or social sanction or because it arises from intrinsic motivations*. ... For example, the observation of honest behavior does not mean we can infer a person’s preference for honesty – the honest behavior may arise from fear of social disapproval or of being caught.

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settlement due to the fear of a heavy penalty that may result from legal proceedings, it is unlikely that stakeholders will treat the act (of giving compensation) as ethical while at the same time consider the actor (the corporation) to have acted unethically, or vice versa.

Sixth, Sternberg consciously gives a small, selective dose of ethics to business decision-making, and hopes that this will allow business to reap the benefits of both the shareholder model and the stakeholder model. But this brings incoherence to her thesis as she constantly struggles, rather unsuccessfully, to maintain a harmony between the two ideas. Sternberg’s thesis of maximising long-term owner value is not easily reconcilable with stakeholder theory: unlike stakeholder theory, under her thesis the interests of stakeholders should be taken into consideration only as far as and so long as they help in maximising long-term owner value. But at the same time, she does not want to take the extreme position, adopted by Friedman, that business could afford to totally ignore the views and interest of its stakeholders. Out of several examples of this uneasiness that one could find (sometimes within a single paragraph) in *Just Business*, one should suffice here: ‘Stakeholders ... have no right to expect the business to be seeking anything but long-term owner value. ... Nevertheless, given the importance of well-disposed stakeholders to maximising long-term owner value, only a seriously short-sighted business will ignore stakeholder interests.’ Even if one ignores this constant contradictory posture, one more critical problem remains. Like many others, Sternberg argues that one fundamental gap in stakeholder theory is its failure to provide a criterion with which business could balance the competing interests of its stakeholders. But she fails to satisfy her own standard by omitting to provide any criterion which business people could apply to determine if a given social responsibility is likely to maximise long-term owner value or not.

Finally, a common point about the position taken by both Friedman and Sternberg vis-à-vis CSR may be made. It seems that over the years some scholars, in order to

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*Id.*, 583 (emphasis added).

215 Sternberg, above n 3, 121. At another places she observes: ‘Even when the purpose of business is conceived narrowly, as nothing but the maximisation of long-term owner value, *business must still take into account everything that affects achievement of that limited goal.*’ *Id.*, 25 (emphasis added), and also 6, 52, 56-57.

216 *Id.*, 51.
pre-empt any other legitimate claims that could be made against corporations, may have consistently (over)emphasised that the only responsibility that corporations have is to maximise shareholders' profit. For example, way back in 1932, Berle expressed the fear that corporations might be asked to serve the interests of, and share the wealth with, non-shareholders. Such a fear probably explains the extreme stand adopted by certain theorists who wish to accord complete primacy to the interests of stockholders.

5.3 EXAMINING THE ‘BUSINESS CASE’ FOR HUMAN RIGHTS

If Sternberg considers that it is fashionable to talk about the social responsibilities of business, equally fashionable is the use of the ‘business case’ for anything related to business — from CSR to human rights, sustainable development, and the ‘triple bottom line.’ We have seen already how Sternberg articulates a business case for business ethics, though without acknowledging it. Friedman, on the other hand, did not explicitly embrace the business case. Against this background, the current interest in the business case for human rights should be seen more as a response to the thesis of Friedman than to that of Sternberg.

In this part I critically examine the business case for human rights, which posits that corporations could gain and maintain a competitive advantage over their competitors by taking on board their human rights responsibilities. Compliance with human rights, it is argued, is necessary for none other than ‘bottom line’ reasons. Steiner argues:

217 'One reason why thinkers recently have been anxious to emphasise the duty of managers to maximise the shareholders’ profit is that other competing claims have been advanced, and they fear that companies were coming to be regarded as milch cows to be run for the benefit of other parties'. Lucas, above n 80, 22-23.

218 Berle wrote: 'It is likely that claims upon corporate wealth and corporate income will be asserted from many directions. The shareholders who now has a primary property right over residual income after expenses are met, may ultimately be conceived of as having an equal participation with a number of other claimants.' Berle, 'A Note', above n 9, 1371.

219 Long back, Dodd wrote: 'If the social responsibility of business means merely a more enlightened view as to the ultimate advantage of the stockholders-owners, then obviously corporate managers may accept such social responsibility without any departure from the traditional view that their function is to seek to obtain the maximum amount of profits for their stockholders.' Dodd, above n 9, 1156.

220 Professor Sarah Joseph illustrates how MNCs could benefit by contributing to the development agenda. Joseph, above n 132, 194-96.

221 'Triple bottom line' implies that the success of corporations is measured on three counts: economic, environmental and social. See above n 5.

222 Jungk makes a similar argument based on the 'expediency principle.' She argues:
'Business that ignores and violates core rights or standards could suffer through public disgrace, loss of market share or perhaps governmental intervention.' The argument works in both positive and negative ways. Adherence to human rights norms increases profit, goodwill and competitive advantage; failure to comply with human rights norms results in loss of profit, goodwill, and competitive disadvantage.

The purpose of the inquiry undertaken here is to find out if the current over-reliance on the business case for human rights in scholarly as well as corporate literature is useful and/or theoretically sound. As the business case for human rights is grounded in the economics of goodwill, I label it ‘goodwill-nomics.’ In particular, the business case hypothesis is juxtaposed with analysis in terms of the ‘prisoner’s dilemma.’ The ‘prisoner’s dilemma’ is a game theory construct which suggests that some corporations might be discouraged from assuming human rights responsibilities because of the fear of losing competitive advantage in actual market situations.

5.3.1 ‘Goodwill-nomics’: How Sound is the Business Case for Human Rights?

Several theoretical and empirical studies have tried to investigate the relationship – positive or negative – between CSR (which essentially includes human rights issues) and the financial performance of corporations. Although the results coming from

Action undertaken or refrained from in order to avoid negative publicity associated with human rights violations clearly makes good business sense. Negative publicity not only results in the loss of revenue from the “ethical consumers”, but is also likely to alienate employees who will be embarrassed to work for a company with a bad human rights record.

Margaret Jungk, ‘A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad’ in Addo (ed.), above n 5, 171, 178-79. She also identifies a second ‘expedient’ factor, that is, ‘a stable, conflict-free political environment’ which might be disrupted by flagrant human rights abuses. Id., 179.


this research so far have not been conclusive or one-sided,\textsuperscript{227} it is increasingly suggested that there is a measurable, positive relation between CSR and the ensuing economic benefits.\textsuperscript{228} In other words, a corporation could gain and maintain an edge over its competitors if it acts, and more importantly presents itself, as a good, responsible corporate citizen.

The central economic rationale of this hypothesis revolves around the goodwill, or ill-will, that a corporation might generate because of taking a given stand towards human rights issues. In my view, the business case for human rights is based on the following four interconnected assumptions:\textsuperscript{229}

1) that corporation X adopts policies and takes actions consistent with human rights norms whereas its competing corporation Y does not;\textsuperscript{220}

2) that stakeholders such as consumers, investors, employees, media and NGOs are aware of the fact that X is contributing to human rights realisation but not Y;

3) that stakeholders value human rights and therefore would be willing, as well as able, to punish Y and/or reward X for their respective stands vis-à-vis human rights issues; and

4) that the reward and punishment meted out by stakeholders would result in a positive or adverse effect on market share for and goodwill towards X and Y, respectively, thus giving a competitive advantage to the former.\textsuperscript{231}

\textsuperscript{227} ‘Studies of the effect of a company’s social reputation on consumer purchasing preferences or on stock market performance have been inconclusive at best.’ Porter & Kramer, above n 5, 4.


\textsuperscript{229} See Surya Deva, ‘Human Rights Violations by Multinational Corporations and International Law: Where from Here?’ (2003) 19 Connecticut Journal of International Law 1, 19-20. In a slightly different context, Stone formulates these assumptions a bit differently. He argues that those who rely on the market as capable of regulating corporate conduct are assuming that (1) people knew of the fact that they are being injured, (2) they know where to apply pressure, (3) they are in a position to apply pressure, and (4) that pressure will translate into warranted changes. Stone, above n 62, 89.

\textsuperscript{231} It is really doubtful whether a corporation could still have an economic advantage over its competitors if all of its ‘competitors’ in the market comply with human rights norms.

There is nothing fundamentally wrong with the above series of assumptions because several past instances indicate the possibility of this trend materialising. The very first assumption implicitly permits some corporations to ignore their responsibility for human rights' promotion, for where is the competitive advantage if all corporations comply with human rights norms? Rather than attempting to reduce the effect of the prisoner's dilemma — which, as I will show in the next section, might discourage corporations like X from taking on board human rights responsibilities — goodwill-nomics treats human rights abuses by certain corporations as a fundamental premise or necessary precondition. This is undoubtedly an unsound and unsatisfactory premise for any theory that seeks to promote human rights.

Human rights scholars should find the business case for human rights problematic for another reason. The business case introduces 'cost and benefit' analysis to human rights discourse by connecting corporate compliance with human rights obligations to corporate profits. However, any approach that requires assigning human rights, and life itself, a calculable value and encourages trade off between human rights and other goals is questionable for obvious reasons. Arguably, corporations should be

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232 See, e.g., John Christopher Anderson, 'Respecting Human Rights: Multinational Corporations Strike Out' (2000) 2 University of Pennsylvania Journal of Labour & Employment Law 463, 473-74 (discussing the advantage gained by Coca-Cola due to the boycott of Pepsi products in Burma [now Myanmar]). Parker also discusses how stakeholders' pressure led to a change in policies of Monsanto (regarding genetically modified food) and Shell (regarding the disused oil platform, 'the Brent Spar'). Parker, above n 116, 157-64.


234 It should be conceded, however, that 'all' corporations are unlikely to comply with human rights norms to the same extent. Whether compliance with human rights can give competitive advantage to a given corporation vis-à-vis those corporations which do not comply with human rights norms, is dealt with in the next part of this chapter. See, in particular, Table 5.1 and the related discussion.


subject to human rights obligations, relevant to their operations and activities, irrespective of the impact of doing so on their profits and competitiveness.

Second, the business case hypothesis simply assumes too much; all of these assumptions may not come true in a given case. To start with, as Parkinson argues, information flow among various stakeholders is fundamental to the success of this hypothesis: ‘For market mechanisms to “punish” a company that behaves irresponsibly it is necessary for those with whom it does business to be fully informed about its activities and their impact and to know how its performance compares with that of other companies.’ But the flow of information is not always that smooth or forthcoming in markets or social life, particularly because corporations do not normally release self-disparaging data. Nor is the task of comparing the conduct of different corporations an easy one.

Third, even if we assume that consumers and investors are well-informed of the opposing stands of X and Y vis-à-vis human rights, there is no guarantee that they would always reward X and/or punish Y. Stakeholders may not fully understand the complex ethical dimensions involved in a given product or service. For example, even pro-environment consumers may find it difficult to compare and then choose the product which is most environment-friendly. Moreover, one does not usually boycott each and every product or service. In addition, stakeholders may think that


237 ‘In many cases these conditions will not be fulfilled, or fulfilled only to a limited extent.’ Parkinson, above n 45, 50.

238 Id., 50 (emphasis added).

239 Stone, however, argues that on many occasions consumers might not exactly know that they are getting injured by a particular corporate policy. Stone, above n 62, 89.

240 In view of the internet revolution, stakeholders could know the policies and actions of different corporations in a short span of time.


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their conduct will not change the behaviour of targeted corporation, 243 may not know 'where to apply pressure,' 244 or worse may be bewildered by corporate acquisitions (such as of Body Shop by L'Oreal) 245 whereby the distinction between ethical and unethical conduct is lost. Thus a boycott, bad public exposure, or 'naming and shaming' will not disparage the reputation of concerned corporations in all cases. 246

Fourth, consumers or investors may very much like to support human rights, 247 but may balk at the cost of doing so; the more the variance in price between the products and services of X and Y, the less the chances that rewards and sanctions will flow from consumers and investors. 248 The economic capacity of stakeholders, the amount of value they accord to human rights, and the affordability of products made in a socially-responsible manner will determine to a great extent whether the third assumption turns out to be valid.

Fifth, consumers and investors may be too attracted or hooked to a particular brand name or designer label for the divergence in X’s and Y’s actions to affect their choice. As Stone points out, consumers might not be in a ‘position’ to change their market preferences, including because no viable alternative is available. 249 One could also not ignore how the current culture of shopping restricts consumers’ freedom to practice and in turn promote socially responsible conduct on the part of corporations. 250

Finally, even if the business case for human rights is valid, one should acknowledge its limited scope – the business case is relevant primarily, if not solely, for those big

243 Eric Ng, ‘Berkshire to Keep PetroChina Stake Despite Links to Sudan’, South China Morning Post (24 February 2007), B1.
244 Stone, above n 62, 89-90.
247 See Zamagni, above n 131, 280-81.
249 Stone, above n 62, 90-91.
250 Quoting Michelle Au Wing-tsz, the environment affairs officer for Friends of the Earth, Chan writes: ‘The rise of mega supermarket culture has also made it impossible for consumers to reduce packaging waste, Au says. ‘Think about it; many people don’t buy from wet markets anymore, ... They go to the supermarket where meat and vegetables are packed in polystyrene trays and plastic wrap. It’s quick, convenient – and terribly wasteful.’ Chan, above n 242.
corporations which could afford to suffer short-term economic loss under expectation of long-term profit or value enhancement. Investigating this issue from the perspective of developers and investor of construction industry, Barclay Crawford outlines this limitation of the business case:

But where are the benefits to the speculative developer who needs to maximise short-term profits to cover costs? A big multinational may be prepared to look 10 years in future, but what about the core of the business community - the small-to-medium enterprises that are more concerned with remaining profitable in the next two years than paying extra for planet-friendly office space.251

Therefore, the business case for human rights, which posits that corporations could improve their financial performance and gain or maintain an economic advantage over their competitors by adopting human rights policies, should be treated with caution.252 Although adherence to human rights norms may bring financial benefits to corporations, this assertion is subject to several uncertain, fluctuating, and contestable conditions. There are also several variables linked to the financial performance of a corporation; thus, dissecting one variable and attributing a certain percentage of profits to its influence may not be that convincing. Furthermore, it is not always easy to quantify goodwill (generated through acting responsibly) in dollars.253

5.3.2 The ‘Prisoner’s Dilemma’: Why Some Corporations may Hesitate to Assume Human Rights Responsibilities?

There may be various reasons why some corporations may not adopt policies or take actions to promote human rights. Corporations, for example, might be unsure (or worse, unaware) of their exact place and role in the project of human rights’ realisation, or corporate executives might not be adequately trained to handle complex issues that arise in integrating and implementing the mandate of human rights


252 Although Donaldson appears to buy the argument of the business case for human rights, he still cautions: ‘Hundreds more studies may be necessary before we can claim on the basis of research that corporate responsibility pays.’ Thomas Donaldson, ‘Defining the Value of Doing Good Business’, FT Mastering Corporate Governance 2 (2 June 2005), <http://www.ft.com/cms/s/748f21be-d377-11d9-ad4b-00000e2511c8.html> (last visited 31 December 2006).

253 ‘As for the concept of CSR as insurance, the connection between good deeds and consumer attitudes is so indirect as to be impossible to measure. Having no way to quantify the benefits of these investments puts such CSR programs on shaky grounds, liable to be dislodged by a change of management or a swing in the business cycle.’ Porter & Kramer, above n 5, 4.
policies. In view of the fact that corporations are considered economic animals which act rationally, it should be helpful to evaluate the economic rationale behind several corporations hesitating to take a walk on the road of human rights. With the help of the prisoner’s dilemma, which is a typical game theory construct, it is argued that some corporations may hesitate to embrace human rights policies because of uncertainty about the stand of their competitors. In other words, the prisoner’s dilemma may work against the business case for human rights by dissuading corporations from taking on board human rights responsibilities.

If corporations assume responsibility for the protection and promotion of human rights, they have to act differently from how they would have conducted their business otherwise. This acting differently — formulating policies, taking actions, monitoring conduct, etc. — would necessarily involve some extra expenditure on their part. This brings to the fore the issue of corporations comparing the costs of acting differently with the potential benefits that may ensue. Unless corporations see ascertainable (rather than speculative) benefits in adopting pro-human rights policies, they are likely to face a business dilemma because costs are generally more certain and easily identifiable than the “potential” and perhaps “long-term” benefits. Should corporations then accept human rights responsibilities or not? This corporate quandary could be understood with the help of prisoner’s dilemma.

255 Donaldson, The Ethics of International Business, above n 22, 84.
257 Sethi identifies the economics of ‘free rider’ as one of the rationales. Sethi, above n 233, 27. See also Muchlinki, above n 246, 35-36. Here it may not be out of place to refer to the findings of Frank et al who note that because of their ‘training in economics’, economists ‘are more likely than others to free ride’ instead of cooperating under a prisoner’s dilemma situation. Robert H Frank, Thomas Gilovich & Dennis T Regan, ‘Does Studying Economics Inhibit Cooperation?’ (1993) 7 Journal of Economic Perspectives 159, 170.
258 Corporations, for example, would have to outlay extra resources to pay better wages, not employ child labor, invest in the development of environmentally-friendly technology, or abandon a project altogether if it turns out to be harmful for the local community, etc. See Kristina K Herrmann, ‘Corporate Social Responsibility and Sustainable Development: The European Union Initiative as a Case Study’ (2004) 11 Indiana Journal of Global Legal Studies 205, 219.
259 Bakan notes that ‘cost-benefit analyses are at the heart of corporate decision making.’ Bakan, above n 9, 64.
260 ‘Stakeholder value via ethical, social and environmental responsibility also enhances profits as it reduces costs, e.g. by reducing wastage and maintaining a good reputation.’ Kiarie, above n 10, 334. See also Sternberg, above n 3, 118.
The prisoner's dilemma is a situation in which two (or more) persons have to decide on a given issue. Each person has an option to 'cooperate' or 'defect,' but each of them may decide to defect in order to maximise their own advantage, even if that harms the other party or hinders the production of common good. Let us assume that two corporations, X and Y, have to decide whether to assume human rights responsibilities or not. Both X and Y would have two choices: either to assume responsibilities or not. Table 5.1 below shows what X and Y may decide, and what will be the consequent results of their choices.

<table>
<thead>
<tr>
<th>Y Assesses Responsibilities</th>
<th>X Assumes Responsibilities</th>
<th>X does not Assume Responsibilities</th>
</tr>
</thead>
<tbody>
<tr>
<td>None will have competitive (dis)advantage over the other; both may gain in market settings</td>
<td>Y will have competitive disadvantage vis-à-vis X; but Y may gain in market settings</td>
<td></td>
</tr>
<tr>
<td>Y does not Assume Responsibilities</td>
<td>X will have competitive disadvantage vis-à-vis Y; but X may gain in market settings</td>
<td>None will have competitive (dis)advantage over the other; both may lose in market settings</td>
</tr>
</tbody>
</table>

Table 5.1: Human Rights Responsibilities and the Prisoner's Dilemma

As shown in the table, if both X and Y decide to assume human rights responsibilities, none will have a competitive (dis)advantage over the other. Similarly, if both decide not to assume responsibilities, neither of them will have a competitive (dis)advantage over the other. Whether they have competitive (dis)advantage vis-à-vis other corporations in the market, and how assuming responsibilities translates into

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262 See, for discussion on the original concept of the prisoner's dilemma, Perry & Bratman (eds.), above n 8, 792; Heap & Varoufakis, above n 8, 172-74.

263 Scalet argues that prisoner's dilemmas create 'a divergence between individual and collective rationality.' He notes: 'The best move from an individual's point of view leads to collective results that seem clearly less desirable than another feasible outcome.' Steven Scalet, 'Prisoner's Dilemma, Cooperative Norms, and Codes of Business Ethics' (2006) 65 Journal of Business Ethics 309, 310.


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economic gains under market settings, is an altogether different question. On the other hand, if X decides to assume human rights responsibilities but not Y, X will have a competitive disadvantage vis-à-vis Y in terms of the resultant expenditure. Conversely, if X decides not to assume responsibilities whereas Y decides otherwise (i.e., assumes responsibilities), Y will have a competitive disadvantage vis-à-vis X.

Despite initial competitive disadvantage that X or Y may have due to one of them assuming responsibilities, this might convert into economic gain in a market setting owing to a certain amount of goodwill arising from the assumption of responsibilities. But as we have seen in the previous section, the gain, if any, and the extent of it will depend on several unpredictable assumptions. This uncertainty triggers the prisoner’s dilemma and in turn undercuts the business case for human rights. On the basis of an analysis of the possible consequences of one's conduct, it is likely that rational corporations (like X and Y) would like to play it safe. Given the uncertainty about the behavior of the other party, the safest (not necessarily the best) course will not be to assume human rights responsibilities, for doing so might put a corporation at a competitive disadvantage vis-à-vis other corporations that are not wedded to the agenda of human rights.

These above propositions should be read, however, subject to certain riders. The results are likely to vary if X and Y are allowed to communicate before taking a decision, if they knew beforehand how the other is going to act, or if they play this game not just once but repeatedly. For example, if they are able to communicate beforehand, there is a transparency in their decision taking process, and if the game is played more than once, both X and Y may decide to cooperate, that is, assume responsibility toward human rights and gain optimal economic dividends. There is

265 Scalet observes that 'consumers and investors can reward ethical business practices', thus undercutting the problem of prisoner's dilemma. Scalet, above n 263, 316. He, however, admits: 'But information is fragmented, markets are imperfect, and consumer and investor choices are ambiguous. Thus, in practice, this dilemma is a fundamental challenge for the efficacy of codes of business ethics.' Id.

266 'It is commonplace now that in a Prisoner's Dilemma situation, the most rational strategy for a participant is to choose not to cooperate.' Manuel Velasquez, 'International Business, Morality, and the Common Good, (1992) 2 Business Ethics Quarterly 27, 34, and generally 34-35.

267 See Note, 'A New Game Theoretic View', above n 264, 1964-65; Velasquez, above n 266, 35-36.

268 Axelrod develops a variation of prisoner's dilemma (iterated prisoner's dilemma) in which actors who have frequent encounters may start cooperating with each other rather than defecting. Robert Axelrod, The Evolution of Cooperation (London: Penguin Books, 1990). Scalet, in fact, argues that as
also a possibility, as noted by Professor Zamagni, that the conduct of virtuous corporations, which obtain ‘optimal results,’ might influence the behaviour of not so virtuous and skeptic corporations.\footnote{Zamagni, above n 131, 584. But he himself poses a counter point: ‘One may object – why should self interested agents be influenced by virtuous agents, and not vice versa, as many others submit?’ \textit{Id.}}

One should also not ignore the limitations of using the prisoner’s dilemma model to understand and explain complex corporate behavior. Critics point out that it is too simplistic to predict the behavior of corporations in market settings on the basis of the prisoner’s dilemma game played in a controlled environment;\footnote{Note, ‘A New Game Theoretic View’, above n 264, 1961-62.} in fact, the model has been criticised for this as well as other reasons.\footnote{See Robert C Solomon, ‘Game Theory as a Model for Business and Business Ethics’ (1999) 9 \textit{Business Ethics Quarterly} 11.} Nevertheless, the prisoner’s dilemma framework still serves an important purpose. It demonstrates that at least some corporations may hesitate to embrace human rights responsibilities because they are unsure about the behavior of their competitors. In a situation of uncertainty, the safest position for (at least some) corporations will be not to commit to the project of human rights’ realisation. The weaker the positive link between corporate citizenship and financial performance, the more opportunities there will be for the prisoner’s dilemma to dissuade corporations from the task of promoting human rights.

\section*{5.4 Why Should Corporations Have Human Rights Responsibilities?}

This part seeks to state and augment, what Mulligan will call, ‘positive arguments to demonstrate why business people should pursue’ social responsibilities.\footnote{Mulligan, above n 38, 269 (emphasis in original).} This is important despite the fact that I have tried to show in part two of this chapter why the position taken by Friedman and Sternberg is untenable; after all one ‘does not prove a thesis even by fully disproving an argument against it.’\footnote{Shue, Basic Rights: Subsistence, Affluence, and US Foreign Policy, 2\textsuperscript{nd} edn. (Princeton, NJ: Princeton University Press, 1996), 150.} In past decades the opposition to corporations having certain social responsibilities has diminished significantly, so much so that Shaw went to the extent of declaring that it ‘is past time an ethical market culture benefits from prisoner’s dilemmas, we should not always seek to eliminate them. Scale, above n 263.}
to ask whether corporations should be socially responsible.\textsuperscript{274} Nevertheless, as we have seen before, some scholars like Sternberg are still likely to resist any attempt to impose human rights responsibilities on corporations.

Scholars have advanced several alternative principles to justify the imposition of social (or human rights) responsibilities on corporations.\textsuperscript{275} Jungk, for example, identifies three principles on which basis a human rights policy of MNCs could be justified: the expediency principle, the societal principle, and the ethical principle.\textsuperscript{276} Many scholars regard corporations the result of a concession granted by the state.\textsuperscript{277} Therefore, the state, and in turn society, could have certain legitimate expectations in return for granting this concession.\textsuperscript{278} Human rights law arguably embodies these expectations which corporations should respect.

Alternatively, one could also argue that corporations were neither created solely for wealth maximisation in the past nor are they treated so now.\textsuperscript{279} Corporate bodies used to serve the interests of a wider community rather than merely of their shareholders from the very ancient time.\textsuperscript{280} Law has also always envisaged, to a varying degree, a role for corporations in protecting the interests of a range of societal constituents other

\textsuperscript{274} Shaw, above n 63, 542.
\textsuperscript{276} Jungk, above n 222, 178-83. The 'expediency' principle basically encapsulates the business case for human rights. See the passage quoted in above n 222. Whereas the 'ethical' principle is self-explanatory, the 'societal' principle is based on the concepts of reciprocity and compensation. id., 179-80.
\textsuperscript{278} If, however, one adopts the model of the corporation as a concession from society, then one may rightly claim some corporate obligations back to society.' Sheehy, above n 10, 225. See also Dine, above n 64, 233-34.
\textsuperscript{279} In fact, the institution of corporation in its early stages was designed to attain social objectives. Stone, above n 62, 11; Post et al, Redefining the Corporation, above n 70, 7-8.
\textsuperscript{280} Professor Khanna, for example, describes that in ancient India, sreni (a group of people, guild, who were involved in a trade) used to spend their resources in performing various social responsibilities not very dissimilar to today. He notes:

\begin{quote}
Many sreni would engage in acts to support charity and religious institutions. It was quite common for the sreni to use some of their profits toward building or maintaining a public garden, tank, assembly hall, or religious edifice as well as providing support to people during natural disasters and to those who are ill, destitute or otherwise economically disadvantaged. Vikramaditya S Khanna, 'The Economic History of the Corporate Form in Ancient India' (1 November 2005), 19, <http://ssrn.com/abstract=796464> (last visited 23 January 2007) (footnotes omitted).
\end{quote}
than only shareholders. Professor Dodd argued that ‘business is permitted and encouraged by the law primarily because it is of service to the community rather than because it is a source of profit to its owners.’ For this reason, the running of business – whether individually, under a partnership, or through incorporation – is subject to regulation by various laws such as labour laws, consumer protection laws, competition law, health and safety laws, environmental laws, and social security laws. These laws, which safeguard the interest of various stakeholders, dispel, or at least limit, the notion that corporations are the private property of stockholders, who have an unqualified right to profit from their investment.

Without rejecting these justifications, below I develop an additional rationale to augment the support for the thesis that corporations must have human rights responsibilities. It is argued that all corporations (and not merely those which are multinational or transnational) ought to be subjected to human rights obligations – appropriate to operations and activities – because of their relation with and position in society. I explore three strands of this rationale.

5.4.1 The Duty of Corporations to Abide by Human Rights Norms as Social Organs

Corporations should respect human rights norms simply because they are social organs. Both the limbs of this claim – that corporations are social organs, and that human rights embody such moral-cum-legal norms which every organ of society should follow – can be supported. Despite suggestions that corporations are purely wealth maximising economic animals, it is undeniable at this point of time that

\[\text{[References and notes]}\]

281 'Several hundred years ago, when business enterprises were small affairs involving the activities of men rather than the employment of capital, our law took the position that business is a public profession rather than a purely private matter, and that the business man, far from being free to obtain all the profits which his skill in bargaining might secure for him, owes a legal duty to given adequate service at reasonable rates.' Dodd, above n 9, 1148 (emphasis added).

282 Id., 1149.

283 Professor Dodd rightly points out that ‘these regulations ... involve important limitations on the right of stockholders and managers acting in their interests to treat the enterprise as the private property of the former.' Id., 1150.

284 Zerk writes that that CSR implies that ‘each business enterprise, as a member of society, has a responsibility to operate ethically and in accordance with its legal obligations and to strive to minimise any adverse effects of its operations and activities on the environment, society and human health.’ Jennifer A Zerk, Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law (Cambridge: Cambridge University Press, 2006), 32 (emphasis in original).
If it is accepted that corporations are social organs, then they ought to comply with basic moral and legal norms of society in which they operate, for not doing so will lead to chaos and instability. Corporations, as moral agents, should observe human rights, which reflect such basic rules of the society. The idea that corporations should have human rights responsibilities is grounded not only in national and international laws, but also in rules of ethical custom and social morality. Just to
illustrate, the right against slavery could be deduced from an implied moral rule that certain things are not to be put in the market for sale, even if such rule reduces profits or efficiency. It is this rule which underpins the abolition of slavery in that the sale of human beings in open markets was considered repugnant to the moral minimum. Therefore, human rights – which are based upon the worth and dignity of human beings and are non-negotiable – should bind those actors who do business either individually or collectively.

It is possible to advance two additional justifications for why corporations as organs of society should abide by human rights norms. First, because of the inter-linkage and inter-dependence of corporations and society, both could legitimately have certain reciprocal expectations from each other. Here we are only concerned with society's expectations from corporations. Wood identifies three distinct principles for such societal expectations from corporations: 'expectations placed on business because of their roles as economic institutions, expectations placed on particular firms because of what they are and what they do, and expectations placed on managers (and others) as moral actors within the firm.' The societal principle advanced by Jungk, on the other hand, is based on the concepts of reciprocity and compensation: 'Reciprocity is the idea that the company should give something back to society, generally in proportion to what it gains. The second [component] is “compensation”, which is the idea of recompense to society for the disturbances caused to it by the activities associated with business.'

Human rights, without doubt, embody these societal expectations and corporations as organs of society should try to fulfill those expectations. Bowie argues that if

294 Werhane defines 'moral minimums' as 'those negative standards beyond which ordinarily one would agree no action should be undertaken without very good and justifiable reasons.' Patricia H Werhane, 'Moral Character and Moral Reasoning' in Thomas I Donaldson & R Edward Freeman (eds.), Business as a Humanity (New York: Oxford University Press, 1994), 98, 103, and generally 103-04.
295 Addo forcefully argues: 'It is vain to deny that corporations have no responsibility beyond those imposed by the law. Indeed, the effective workability of the law often depends on unwritten rules of social morality which bind every actor of that society and this is just as applicable to corporations.' Addo, 'An Introduction', above n 67, 22.
296 See Post et al, Business and Society, above n 91, 5-7; Wood, above n 37, 695; Porter & Kramer, above n 5, 5-12.
297 Wood, above n 37, 695.
298 Jungk, above n 222, 179-80.
corporations do not observe certain moral minimum rules (which various human rights are) of society, their conduct would become 'unjust':

... multinational corporations are obligated to follow these [minimum] moral rules. Because the multinational is practicing business in the society and because these moral norms are necessary for the existence of the society, the multinational has an obligation to support those norms. Otherwise, multinationals would be in the position of benefiting from doing business with the society while at the same time engaging in activity that undermines the society. Such conduct would be unjust. 299

It is of fundamental importance to emphasise, as Bowie and others have done, 300 that corporations are under such a duty not merely for their survival (i.e., the business case for human rights), but because they have a moral and/or legal obligation to do so.

Second, one could also apply the neighbour principle developed by Lord Atkin in Donoghue v Stevenson 301 to ground social or human rights responsibilities of corporations. In the instant case, the question before that court was whether the manufacturer of a product was under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect when the product is not sold directly to the consumer. 302 Moving on from 'a general public sentiment of moral wrongdoing' to a rule of law, Lord Atkin formulated the famous neighbour principle as follows: 'The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; ... You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.' 303

Therefore, every corporation (like any other social being) should take reasonable care that its policies and actions do not violate the interests of its neighbours, 304 that is,

299 Bowie, above n 203, 249 (emphasis added).
300 Fogarty, above n 133, 10 (quoting John Seymour, Company Direction (Macdonald & Evans, 1954).
302 Donoghue v Stevenson, above n 301, 578-79.
303 Id., 580 (emphasis added).
304 Without applying the neighbour principle, Lucas identifies three sets of neighbours: 'the local community, the nation state, and - perhaps - the whole mankind. In addition, we can identify a non-personal neighbourhood, the environment, as being also a focus of concern.' Lucas, above n 80, 26.

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those stakeholders which are affected by the conduct of a given corporation. This idea of exercising care so as not to harm the interest of other members of society is arguably based on a mixture of self-interest, cooperation, and reciprocity. I have a duty to drive carefully so as not to injure other motorists and pedestrians because I myself would not like to be injured by others. It is, therefore, in my own interest to care for others. By doing so, I prepare the ground for expecting cooperation from others based on the idea of reciprocity. Obviously, not everyone is going to conduct oneself based on these premises, but still these ideas provide a framework for the smooth working of social relations. It is proposed that human rights could also be seen in this context. Human rights presuppose duties — duties based on dignity, mutual respect and individual worth. Therefore, the duty of care principle could also support the imposition of human rights responsibilities on corporations. Such a duty on corporations is justified, among others, on the ground that they are in a better position to know the consequences of their conduct and also take remedial action.

5.4.2 Corporations Possess the Position to both Violate and Promote Human Rights

Kinley and Tadaki observe that 'there is a single overarching objective of international human rights law — that is, to protect human rights.' How could human rights be protected? Human rights are protected by imposing and enforcing duties. The next question is who should be subject to such duties? In order to fulfil this objective fully, obligations should arguably be imposed on all those entities,

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305 The following test laid down by Wood is useful to ascertain who are the neighbours of a given corporation: 'Businesses are not responsible for solving all social problems. They are, however, responsible for solving problems that they have caused, and they are responsible for helping to solve problems and social issues related to their business operations and interests.' Wood, above n 37, 697 (emphasis added). She further explains that 'every firm is responsible for fixing what it has broken, for avoiding future breakage, and for helping to solve those social problems that affect it.' Id., 699. Wood's test is based on a distinction drawn by Preston and Post between primary and secondary involvement of corporations with society. Lee E Preston & James E Post, Private Management and Public Policy: The Principle of Public Responsibility (Englewood Cliffs, NJ: Prentice-Hall, 1975), 10, 95-97.

306 Donaldson argues: 'The flip side of a right typically is a duty. ... If we cannot say that a multinational cooperation has a duty to keep the levels of arsenic low in the work place, then the worker's right not to be poisoned means little.' Donaldson, 'Moral Minimum', above n 293, 168.

307 See Arrow, above n 46, 307-08.

308 David Kinley & Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 Virginia Journal of International Law 931, 962-63. 'The main purpose of human rights law is to ensure that the minimum rights of every human being are respected.' International Council on Human Rights Policy, Beyond Voluntarism: 257
rather than being limited to state actors, which are in a position to violate human rights.\textsuperscript{309}

Although the idea of rights or human rights may not have been "tied" to states jurisprudentially or historically,\textsuperscript{310} human rights generally came to be regarded as a protective shield against the powers of an all-pervasive state.\textsuperscript{311} Human rights secured a field for individuals in which they could enjoy freedoms and liberties without any unjustified state interference.\textsuperscript{312} The initial conception of (human) rights was primarily negative in nature,\textsuperscript{313} but it broadened over a period of time to include positive duties as well\textsuperscript{314}—states are now under a duty to respect, fulfil and protect human rights by taking positive measures.\textsuperscript{315} It is to be noted that the state had this power because it enjoyed a special position vis-à-vis individuals, by virtue of social contract or otherwise. But power alone was not sufficient to violate or promote human rights; there must also be opportunities to do so. The state had these opportunities because it regulated the lives of people and also provided many services to them.\textsuperscript{316}

These opportunities were again provided by the position that the state had qua its

\begin{flushright}
\textit{Human Rights and the Developing International Legal Obligations of Companies} (Versoix: ICHR, 2002), 46 (hereinafter ICHR, \textit{Beyond Voluntarism}).
\end{flushright}

\textsuperscript{309} "If human rights are aimed at the protection of human dignity, the law needs to respond to abuses that do not implicate the state directly." Ratner, above n 275, 472.

\textsuperscript{310} Ratner, above n 275, 468-69.

\textsuperscript{311} ... international as well as national lawyers have traditionally been trained to conceive of human rights as fundamental guarantees and standards of legal protection for individuals against the power, and particularly, against the abuse of power, of states." August Reinisch, \textit{The Changing International Legal Framework for Dealing with Non-State Actors} in Philip Alston (ed.), \textit{Non-State Actors and Human Rights} (New York: Oxford University Press, 2005), 37, 37-38. He further notes the "basic conceptual premise that human rights are limitations of state power, that they apply in the public sphere, and that they protect the (weak) individual against the (strong) state." \textit{Id.}, 38.

\textsuperscript{312} Ratner observes: "Over time, however, the rhetoric of natural rights came to focus on duties of the state, because of the state's agglomeration of both power and authority over its citizens. And when the idea of natural rights moved into the international arena, this focus continued." Ratner, above n 275, 468-69 (footnotes omitted).

\textsuperscript{313} "The early notion of individual rights was strictly liberal. That is, the state was not required to take affirmative steps to ensure individual rights, but only to refrain from interfering with these rights." Mark Freeman & Gibran Van Ert, \textit{International Human Rights Law} (Toronto: Irwin Law, 2004), 7.

\textsuperscript{314} Tulkens notes that "increasingly, a requirement that states take action is now being added to the requirement that they be passive." Françoise Tulkens, \textit{"Human Rights, Rhetoric or Reality?"} (2001) 9 \textit{European Review} 125, 127.

\textsuperscript{315} ICHR, \textit{Beyond Voluntarism}, above n 308, 46. This typology of duties has been construed variably by different authors. There is, however, a commonality that duties of states are both negative and positive element. Shue, for example, argues that three correlative duties are possible for any basic right: (1) duties to avoid depriving, (2) duties to protect from deprivation, and (3) duties to aid the deprived. Shue, above n 273, 52.

\textsuperscript{316} "The focus at this time [i.e., after the Second World War] was on states because the state was perceived to be the entity that had most effect on people's lives." ICHR, \textit{Beyond Voluntarism}, above n 308, 9.
people. 'Position,' therefore, leads to two things: power as well as opportunity to both violate and promote human rights.

Over the years, this position of the state (the principal status as human rights violator and promoter) loosened as non-state actors such as corporations acquired a similar position — whether because of delegation or out-sourcing of powers and functions by states, or by virtue of a direct social contract with individuals. Among other contributing factors, this development took place because of increasing globalisation and the spread of the free market economy. In such a scenario, if the objective is to realise human rights to the fullest extent, then logically corporations which enjoy a position — both power and opportunity — to violate as well as promote human rights should be subject to a degree of human rights obligations. Danailov argues: '[I]f human rights were historically granted to individuals to shield them against the state's abuse action, and some states' functions are taken over by other entities susceptible to violate those rights, we can then argue that these entities should be called upon to respect human rights obligations towards ... individuals.' If the loop of human rights obligations is not extended to cover corporations, it will mean that states can do indirectly what they cannot do directly.

317 Reinisch, above n 311, 74-77. See also War on Want, Corporate Mercenaries: The Threat of Private Military and Security Companies (October 2006), <http://www.waronwant.org/Corporate+Mercenaries+13275.twl> (last visited 17 November 2006)


319 Professor Clapham highlights four variables that make it relevant to conceive human rights obligations of non-state actors: globalisation, privatisation, fragmentation, and feminisation. Clapham, Non-State Actors, above n 119, 3, and generally 3-19.


321 Just as human rights law was initially developed as a response to the power of states, now there is a need to respond to the growing power of private enterprise, which affects the lives of millions of people around the world. ICHRIP, Beyond Voluntarism, above n 308, 10.


323 'The state cannot absolve itself from the responsibility of not violating ... [human rights] merely by diffusing itself into new bodies or by transferring its powers into limited hands unaccountable to people.' Singh, above n 322, 305. See also Reinisch, above n 311, 81-82.
Scholars have shown that there are no serious theoretical or practical impediments to this expansive understanding of human rights obligations. Professor Joseph Raz, for example, contends that 'there is no closed list of duties which correspond to the right ... A change of circumstances may lead to the creation of new duties based on the old right.' Of course, the obligations of corporations cannot be similar to that of states, because everyone need not be subject to the same or identical duties. But this is different from saying that corporations cannot have human rights obligations at all. In practical terms, various recent developments — for example, the horizontal application of human rights, or the introduction of express constitutional and legislative measures for private application of human rights — also suggest that the extension of human rights obligations to corporations is not only possible and desirable, but also practicable to implement. One may also refer to a relatively old example to buttress this point. As early in 1950, the Indian Constitution consciously made available the protection of certain fundamental rights (such as the prohibition of

324 Professor Ratner, for example, tackles some of the challenges and derives corporate human rights duties on the basis of four factors: 'the corporation's relationship with the government, its nexus to affected populations, the particular human rights at issue, and the place of individuals violating human rights within the corporate structure.' Ratner, above n 275, 496-97, and generally 496-524. Clapham also rebuts five objections that are often raised against the 'privatisation' of human rights. Clapham, Non-State Actors, above n 119, 33-58.


326 Shue writes: '... for every basic right — and many more other rights as well — there are three types of duties, all of which must be performed if the basic right is to be fully honoured but not all of which must necessarily be performed by the same individuals or institutions.' Shue, above n 273, 52 (emphasis added).


328 Article 8(2) of the Constitution of the Republic of South Africa, 1996 reads: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' Similarly, Section 6(3)(b) of the UK Human Rights Act, 1998 defines 'public authority' to include any person certain of whose functions are functions of a public nature.'
untouchability and forced labour) against private individuals, simply because such non-state actors could infringe these human rights.

It is trite that corporations of today, especially MNCs, more than their predecessors, have both power and opportunity to violate as well as to promote human rights. Whereas the enormous economic power and political influence of corporations dwarf those of many states, they are getting extensive opportunities to abuse that power because of their ever-increasing sphere of activities. Because of this combination of power and opportunity, corporations (could) violate a range of human rights in diverse settings. At the same time, corporations also possess the potential to promote human rights due to their economic, operational, technological and human resource capabilities. In short, in view of the above analysis, corporations should be subject to human rights responsibilities because of their current position in society.


330 Professor Singh highlights this remarkable feature of the Indian Constitution as compared to the Western constitutions drafted during that time:

Unlike the West, where constitutional guarantees were entrenched against an overbearing state, the Indian Constitution-makers wrote the fundamental rights and directive principles of state policy against the background of a pre-colonial tradition. Certain sections of the community violated the rights of others either in the absence of a powerful state or because of the lack of State intervention. Therefore, the Constitution makers sought to safeguard the rights of the individual not only against the state but also against non-state actors.

Singh, above n 322, 305 (emphasis added). See also Sudhir Krishnaswamy, 'Horizontal Application of Fundamental Rights and State Action in India' in C Raj Kumar & K Chockalingam (eds.), *Human Rights, Justice, and Constitutional Empowerment* (New Delhi: Oxford University Press, 2007), 47.


333 See the materials cited in above n 118; War on Want, *Corporate Mercenaries*, above n 317.
5.4.3 Power and Responsibility Walk Hand in Hand

Finally, it is possible to contend that corporations should have human rights responsibilities because power and responsibility go hand in hand. Power is, and must be, accompanied by responsibility, for power devoid of responsibility does not survive for long. Davis and Blomstrom described the Iron Law of responsibility as follows: ‘In the long run, those who do not use power in a manner which society considers responsible will tend to lose it.’ This squarely applies in the case of corporations too. Dodd noted that ‘[p]ower over the lives of others tends to create on the part of those most worthy to exercise it a sense of responsibility.’ Even Berle was concerned with bestowing too much power on corporate management as he wrote that ‘through the very nature of corporate entity, responsibility goes with power.’ Of course the concern of Berle was not that absolute powers in the hands of corporations and corporate managers might result in infringement of stakeholders’ interests. Nevertheless, he conceded that absolute power is susceptible to misuse.

The correlation of corporate power and corporate responsibility can also be established with reference to the status of corporations as aggregations of duty-bearing (and also right-bearing) individuals. If individuals acting alone and in their capacity as natural persons are subject to responsibilities, not all of which arise from law, how could these responsibilities disappear merely because individuals decide to act collectively and in an artificial form? On the contrary, as this acting collectively and in an artificial form increases powers substantially, it is logical that responsibilities should also increase in the same proportion. Showing his scepticism

334 Above n 121.
335 ‘To the extent that businessmen and other groups have social power, the lessons of history suggest that social responsibility should be equated with it. … social responsibilities of businessmen arise from the amount of social power they have.’ Davis & Blomstrom, above n 285, 48 (emphasis in original).
337 Davis & Blomstrom, above n 285, 50, and generally 48-52 (emphasis in original).
338 Dodd, above 9, 1157.
339 ‘[I]t is noteworthy that for years corporate papers and general corporation laws have multiplied powers and have made them increasingly absolute; … It seems not to have occurred to draftsmen that, through the very nature of corporate entity, responsibility goes with power.’ Berle, above n 9, 1050.
340 ‘Not all corporate responsibilities are grounded in law. Some, including many popularly canvassed concerns, are matters of moral rather than legal obligations.’ Addo, ‘An Introduction’, above n 67, 16.
341 Donaldson writes that ‘enhanced power confers enhanced responsibilities.’ Donaldson, The Ethics of International Business, above n 22, 31. Lucas argues: ‘Corporations have no souls: … But it does not follow that the ordinary universal obligations of communal life do not apply to them. These
of the performance of the World Bank, Professor Amartya Sen observes that the ‘power to do good goes almost always with the possibility to do the opposite.’ 342 As corporations have the power and potential to make a positive contribution to the realisation of human rights, it needs to be ensured that they do not retain many opportunities to do the opposite, or that they are dissuaded from taking up those opportunities.

The exercise of power without corresponding responsibilities also raises the question of social legitimacy. ‘According to the principle of legitimacy,’ Wood argues, ‘society has the right to establish and enforce a balance of power among its institutions and to define their legitimate function.’ 343 So, the assumption of human rights responsibilities by corporations will also provide social legitimacy and approval for their activities (something which they need badly), 344 rather than undermining their significant role in society. 345

5.5 Conclusion

This chapter sought to achieve two related objectives. First, it sought to show that the thesis propounded by scholars like Friedman and Sternberg — that the only responsibility of business is to maximise shareholders' profit or value and that CSR should be the concern of corporations only if it helps the pursuit of profit maximisation — is narrow, unsound and outdated in the current economic climate. 346
As part of this inquiry, I also examined whether it is problematic to rely too much on the ‘business case’ for human rights. Although there is some merit in the business case hypothesis, this merit should not be blown out of proportion. In fact, in view of the effect of the prisoner’s dilemma and the unpredictable nature of the business case assumptions, it is essential that corporate human rights responsibilities are based on other stronger theoretical premises.

Second, this chapter has sought to develop a positive argument in support of the thesis that corporations should observe human rights norms while doing business. I argued that all corporations (not merely those which are multinational or transnational) should be subjected to human rights obligations because of their relation with and position in society. It should be clarified that this contention does not seek to reject or undermine the role of corporations in wealth maximisation in society. The only limited claim put forth here is that the right to maximise profit should not be at the cost of the rights of other members of the society, and that corporations should not be left outside the net of human rights law merely because they are predominantly economic entities. The corporations’ Kantian duty is implied in the Kantian right held by all.

Professor Berle was not wrong when he submitted more than seventy years ago that ‘you can not abandon emphasis on “the view that business corporations exist for the sole purpose of making profits for their stockholders” until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.’ Now the time has come when an over-emphasis on the profit maximisation thesis should be abandoned in favour of a more balanced view of the role of corporations in society, a view that is capable of meeting the conditions laid down by Berle. Human rights law provides a framework that could be applied to deduce the social responsibilities that corporations should have towards their

347 Bowie answers in negative the question ‘Can the multinational pursue profits at the expense of the other corporate stakeholders?’ Bowie, above n 203, 242.
348 Arrow examines various scenarios in which profit maximisation should not be allowed. Arrow, above n 46, 303-10.
349 Frederick, above n 292, 171.
350 Berle, ‘A Note’, above n 9, 1367.
stakeholders.\textsuperscript{351} Whereas this chapter developed a justification for why corporations should have such responsibilities, the next chapter examines the principle with reference to which human rights responsibilities of corporations that operate in many countries could be ascertained. Finally, a framework, based on an integrated theory of regulation, for the enforcement of such responsibilities is proposed in Chapters 7 and 8.

\textsuperscript{351} 'The task for the international ethicist is to develop or discover concepts capable of specifying the obligations of multinational corporations in cases such as these. \textit{One such important concept is that of human rights.}' Donaldson, 'Moral Minimum', above n 293, 167 (emphasis added).
CHAPTER 6: HOW TO BEHAVE IN 'ROME'? DETERMINING STANDARDS APPLICABLE TO MNCs

6.1 INTRODUCTION

This chapter confronts the second challenge that a theory of corporate human rights responsibility faces. Even if a theoretically convincing case is made for subjecting corporations to human rights obligations, a major practical difficulty lies in the precise identification of such obligations. It is suggested that this difficulty could be overcome with reference to 'existing human rights standards.' \(^1\) But since existing human rights obligations were drafted while keeping in mind states as the primary, if not the sole, duty bearers and corporations differ from states in several respects, \(^2\) the task of identification is neither easy nor straightforward. \(^3\) Nevertheless, constant

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\(^1\) Addo writes that 'the participants gathered in Exeter [who contributed in an influential book edited by Addo] put forward the proposition that the uncertainties and difficulties in the process of defining corporate (social, political, economic, or other) responsibilities may be remedied through existing human rights standards.' Michael K Addo, 'Human Rights and Transnational Corporations - An Introduction' in Michael K Addo (ed.), Human Rights Standards and the Responsibility of Transnational Corporations (The Hague: Kluwer Law International, 1999), 3, 5, and generally 23-31 (hereinafter Addo in Addo (ed.)).

\(^2\) However, it remains true that corporations are not created or regulated to take on the welfare functions of the state in promoting positive human rights; ultimately corporations are intended to act as private, not public entities.' Glen Kelley, 'Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations' (2001) 39 Columbia Journal of Transnational Law 483, 524. See also David Kinley & Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 Virginia Journal of International Law 931, 961.

\(^3\) Addo, however, seems to take a different position: 'Using the human rights approach, this is no more than a re-labelling of existing corporate responsibilities.' Addo in Addo (ed.), above n 1, 27. But the process may not be as simple as Addo believes it to be. For example, some state-centric human rights will hardly have any relevance for corporations. There is also the question about the extent to which corporations should be subject to 'positive' human rights duties. See Steven R Ratner, 'Corporation and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale Law Journal 443, 492-95; Andrew Clapham, Human Rights Obligations of Non-State Actors (Oxford: Oxford University Press, 2006), 561.
efforts at several levels are underway to draw up a catalogue of human rights obligations specific to corporations with reference to the state-centric International Bill of Rights, or otherwise. The UN Norms and the work done by the UN Secretary General’s Special Representative on Human Rights and Transnational Corporations are also part of this slow and highly contested evolutionary process, which started way back in the 1970s. I already pointed out in Chapter 1 that it is possible to deduce human rights obligations of corporations with reference to the provisions of the International Bill of Rights. Because I agree with this approach taken by scholars (which is also reflected in instruments such as the UN Norms),


this chapter does not attempt to identify 'precise' human rights obligations of corporations. Rather it seeks to elaborate and deal with an additional but related challenge.

The additional challenge lies in the fact that even an enumeration of specific corporate human rights responsibilities does not resolve completely the problem faced by those corporations which operate in more than one country, i.e., MNCs. To be precise, in the event that more than one set of standards regarding a given human rights obligation exists – something that is possible even if we agree on the universality of human rights – which particular standards should MNCs adopt while operating in different countries? Should MNCs apply the standards of the country of operation, the standards of the country where the parent corporation is incorporated, or international standards throughout a corporate group? In other words, when in ‘Rome’ should MNCs do as Romans do and apply local human rights standards, or do as they do at ‘home’, i.e., apply the standards of their home country, assuming that the home standards are higher than the standards in their host country?

MNCs typically have at least three potentially divergent options to choose from: host standards, home standards, and international standards. Making a choice about the applicable human rights standards in a given case will always present a formidable


Kiersky observes: ‘MNCs function in three domains: (A) a home base of operation where the MNC is headquartered and chartered, (B) a foreign base of operation in a host country, and (C) additional foreign markets beyond both (A) and (B) each of these domains has a unique web of ethical beliefs and principles which often conflicts with those of the other domains.’ James Kiersky, ‘Ethical Complexities Involving Multinational Corporations’ in Milton Snoeyenbos, Robert Almeder & James Humber (eds.), Business Ethics, revised edn. (Buffalo: Prometheus Books, 1992), 515. See also John R Boatright, Ethics and the Conduct of Business, 3rd edn. (Upper Saddle River: Prentice Hall, 2000), 378.

For example, ‘[t]here are no absolute standards of what constitutes low wages or, on the other end of the spectrum, good wages.’ Eugene B Mihaly, ‘Multinational Companies and Wages in Low-Income Countries’ (1999) 3 Journal of Small & Emerging Business Law 1, 2. Boatright also argues that ‘the existence of universal standards does not tell us how to apply them in specific instances.’ Boatright, 3rd edn., above n 11, 380. Rodrik goes one step further and observes: ‘But in fact there are few that are truly universal [norms]. Slavery would clearly be one; prison labour or forced labour, perhaps. As for collective bargaining, free association, and similar notions, there are very different practices. In some sense, if they were truly universal, the problems would not exist.’ Dani Rodrick in Human Rights Program Harvard Law School, Business and Human Rights – An Interdisciplinary Discussion held at Harvard Law School in December 1997 (Cambridge, MA: Harvard Law School Human Rights
challenge to MNCs because MNCs, by definition, operate in several countries that differ from one another in terms of their political system, level of development, culture, religion, language, and social norms. MNCs' decisions to choose appropriate standards are further complicated in those cases where host states either boast an oppressive regime or lack commitment to protect and promote human rights. How do, or should, MNCs overcome these challenges and make a right decision? Is it possible to formulate any principled approach or policy to facilitate MNCs' decisions in this regard?

This chapter deals with such questions. It begins with exploring the dilemma that MNCs face with regard to choosing one out of at least three separate standards of human rights applicable in a given case (assuming inconsistency among them). Then it moves on to explain the two approaches — the business approach and the human approach — which, I argue, do or should influence MNCs' choice regarding applicable human rights standards. How these two approaches could and should guide MNCs' decisions is further illustrated with the help of Bhopal. In short, it is contended that MNCs should discard the business approach in favour of the human approach, for reliance on the former will often result in human rights violations.

6.2 Resolving the Dilemma Between Standards at 'Home' and in 'Rome': Three Options and Two Approaches

An agreement among stakeholders on the human rights standards applicable to MNCs operating in different locations should be a precondition to their accountability for human rights violations. One of the reasons why it is difficult to reach such an agreement is because more than one set of standards exist regarding many human rights obligations, for varying standards come into the picture when it comes to giving effect to universal rights in a particular setting, i.e., through the localisation of universality. At the same time, it must be acknowledged that certain human rights

Program, 1999), 16 (emphasis added) (hereinafter Harvard Law School, An Interdisciplinary Discussion).

13 MNCs operating, for example, in conflict zones or in countries such as China, Myanmar, North Korea, and Zimbabwe will face this additional difficulty.


have become part of customary international law\(^{16}\) and regarding these, there will be no or minimal divergence between the standards applicable at home, in the host country or internationally.\(^ {17}\) MNCs across the globe should not generally face any difficulty in implementing the universal mandates prohibiting, for example, slavery, forced labour, torture, or genocide.\(^ {18}\)

How do existing regulatory regimes concerning corporate human rights responsibilities deal with this problem of varying standards? It is reasonable to say that the existing regulatory regimes hardly offer any help to MNCs in resolving this day-to-day dilemma,\(^ {19}\) or that the solution they offer is worse than the problem. For example, the ten principles of the Global Compact do not elaborate on this issue beyond enlightening us that these principles 'enjoy universal consensus and are derived from' the UDHR and other relevant international instruments. On the other hand, although the ILO Declaration provides a yardstick, it paves the way for MNCs, in effect, to comply with the standards of a host country. Paragraph 38 of the ILO Declaration illustrates this. It stipulates that 'multinational enterprises should maintain the highest standards of safety and health, in conformity with national requirements' and the experience of special hazards that an MNC might have.\(^ {20}\) Arguably, qualifying 'highest' standards with 'national requirements' will often result in merely complying with no or minimal safety and health standards when MNCs operate in countries that are developing in terms of their economies and/or legal systems. This is precisely what happened in Bhopal – UCC-UCIL perhaps operated in compliance

\(^{16}\) For example, prohibition of slavery and forced labour; prohibition of genocide; prohibitions of torture and extrajudicial execution. See Kelley, above n 2, 522-23.

\(^{17}\) ‘Not all human rights vary across culture. There are human rights which are so fundamental that they transcend cultural differences. Amongst others, these are the right to life, freedom from torture, inhuman treatment and slavery, and the right to recognition as a person before the law … The violation of such fundamental rights cannot be excused by differing cultural values, and they should be given priority in the considerations of businesses.’ Jungk, in Addo (ed.), above n 1, 171, 176.

\(^{18}\) Arguably, there could still be difficulties, or at least difference of opinion, in concluding if a particular conduct amounts to torture or not. ‘What you and I mean by torture could be different.’ Colonel Peter Brownback, the US Military Officer trying Guantanamo Bay detainees. ‘US Military Court may be Open to Torture Evidence’, South China Morning Post (3 March 2006), A15. When states that are party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (GA Res. 39/46 of 10 December 1984) suggest that the meaning of ‘torture’ is relative, there are more reasons for corporations to adopt this line of argument.

\(^{19}\) See Chapter 4.3.1.

with the non-existent or lax Indian standards, but not in accordance with the ‘highest standards of safety and health,’ say, as then prevailing in the US.

6.2.1 Three Potential Options

MNCs have at least three options as to which standards of human rights they might choose to apply in a given case: they could apply the standards of the host country, the standards of the home country, or could adopt international standards for their activities throughout the world. The ‘host’ country of an MNC is the country where it operates through its subsidiaries or otherwise. On the other hand, the ‘home’ of an MNC, in this thesis, is regarded as the country where the parent corporation is incorporated.21 This interpretation is maintained, for purposes of this thesis, despite the fact that scholars argue for a re-conceptualisation of the concept of ‘home’ of MNCs,22 because MNCs have become ‘stateless’23 or ‘de-nationalised,’24 and that they themselves consider territorial boundaries to be unreal.25

The proposition that MNCs will normally have an opportunity of choosing one out of three options is based on two assumptions. First, it is assumed that there is a disparity between the three sets of standards. For example, what amounts to fair and reasonable wages for a given work will differ from country to country. Similarly, the safety


22 Dine, for example, makes a persuasive argument that for the human rights purposes the place where the actual control over a corporation is exercised should be the locus of control for that corporation. She argues: ‘[I]t would not be extraordinary to accept that the locus of control for the purpose of regulating its impact on human rights is the place where the control was actually exercised.’ Janet Dine, ‘Multinational Enterprises: International Codes and the Challenge for “Sustainable Development”’ (2001) 1 Non-State Actors & International Law 81, 87, and generally 84-89.

23 Zerk, above n 21, 146.

24 ‘TNCs have become “de-nationalised” in the sense that they view the world, rather than their home or host states, as their base of operations.’ Claudio Grossman & Daniel Bradlow, ‘Are We Being Propelled towards a People-Centered Transnational Legal Order?’ (1994) 9 American University Journal of International Law & Policy 1, 8. See also Clapham, above n 3, 200.

25 The president of IBM reportedly observed: ‘For business purposes, the boundaries that separate one nation from another are no more real than the equator.’ Richard J Barnet & Ronald E Muller, Global Reach: The Power of the Multinational Corporations (New York: Simon and Schuster, 1974), 14.
standards, say, in the chemical industry, or in any other hazardous activity for that matter, are bound to differ between two places. Recently, the involvement of Yahoo!, Microsoft, and Google in the internet censorship controversy in China again demonstrates that there are no universal or common standards regarding freedom of speech. 26

The second assumption is that the human rights standards that apply in a host country are lower than the international as well as the home standards. This assumption about the general superiority of home (or even international) standards is valid because the 'home' of a majority of MNCs is in the developed world 27 - developed not only economically but also in terms of their legal system, literacy level and public awareness of rights. Of course, developed countries are also the host states on many occasions. However, when both home and host states are developed, MNCs do not face the kind of business dilemmas explored here. This chapter primarily deals with those situations when MNCs based in developed countries move to operate in developing countries. One of the main reasons why MNCs tend to locate their operations outside their respective home countries is the presence of lower standards in developing countries which contribute to lower operating costs. 28 The following question posed by Duffield also implies this: Whether international standards that are generally applied in the home country of an MNC, by virtue of the domestic laws in operation there, should be applied where the domestic regulations are less thorough? 29

It should be noted that Duffield seems to be assuming that there is 'generally' no difference between the 'home' and 'international' standards. Duffield is, however, not

27 'Almost 90% of the top 100 TNCs are headquartered in the Triad (the EU, Japan, the United States). TAM, World Investment Report 2004: The Shift Towards Services (New York: UN, 2004), 11.
alone in making an assumption that there are merely two sets of standards: home and host. Donaldson assumes this when he asks: "[G]ranted that multinationals must observe minimal standards for safety in foreign manufacturing plants, what counts as "minimal standards" – the multinational’s home country standards, or the standards of the host country?"  

Similarly, Boatright also suggests that there are two extreme options:

In answer to the question "When in Rome, do what?" there are two extremes. The absolutist position is that business ought to be conducted in the same way the world over with no double standards. ... This view might be expressed as "When in Rome or anywhere else, do as you would do at home." The opposite extreme is relativism, which may be expressed in the familiar adage, "When in Rome do as the Romans do."  

In my view it is unwarranted, and to some extent fallacious, to assume that ‘home’ standards match ‘international’ standards, or that ‘home’ standards would always be higher than ‘host’ standards. There could be situations where the standards applicable even in developed countries (the home states of MNCs) may fall short of the ideal, aspirational international standards. For example, since the US and Australia have not ratified the Kyoto Protocol, the home standards related to climate change for MNCs based in these countries will be lower than corresponding legally binding international standards. On the other hand, the advice that ‘when in Rome or anywhere else, do as you would do at home’ will not work when the home standards are lower than the host standards. For instance, a Chinese or an Indian MNC operating in the US or in Europe could not hope to maintain Chinese and Indian labour standards or wage levels with impunity. It is, therefore, more plausible to construct MNCs’ choices as to

30 Donaldson, above n 4, 5.
available standards in terms of three potential options: host standards, home standards and international standards.

Against this background, let me explore more closely the three options regarding human rights standards available to MNCs, and also suggest advantages as well as limitations associated with choosing one option over the other.

6.2.1.1 ‘Host’ standards

Following the standards adopted (or not adopted) by the country of operation is perhaps the easiest option available to MNCs. MNCs that decide to apply host standards will, by implication, bypass – as a matter of policy – international standards and the standards that they might be applying at home or in other operating countries. A standard explanation for such practice is that in order to do business in different countries there is no option but to follow the local applicable laws. For example, Yahoo!, Microsoft, and Google recently used this argument in explaining why they agreed to internet censorship in China.34 Another potential justification for adopting host standards might be that ‘when in Rome, do as Romans do,’ because otherwise MNCs will have a competitive disadvantage vis-à-vis local corporations which are normally bound only by the ‘local’ standards. Examining the issue from the perspective of differences in wages, Mihaly rightly points out that MNCs may ‘set pay significantly over the prevailing level only at their peril’ and that ‘corporate headquarters would demand a rationale for unnecessary payments – and for subverting the rationale for being in a low-wage country in the first place.’35

Some MNCs may, however, adopt a slightly different policy than to apply the host standards in a routine manner. Although such MNCs will generally apply host standards, occasionally they may choose to apply the ‘host-plus’ standards. In other words, instead of adopting a standard formula, some MNCs might adopt a more

34 Yahoo stated: ‘We recognise each country enacts its own laws in accordance with its own local norms and mores, and we must comply with applicable laws.’ ‘Yahoo! Our Beliefs as a Global Internet Company’, <http://yahoo.client.shareholder.com/ReleaseDetail.cfm?&ReleaseID=187401> (last visited 3 March 2006). Similarly, Microsoft’s spokesperson observed that ‘when we operate in markets around the world we have to ensure that our service complies with global laws as well as local laws and norms.’ Joe McDonald, ‘Microsoft Shuts Down Chinese Blog’, <http://www.forbes.com/business/healthcare/feeds/ap/2006/01/06/ap2432425.html> (3 March 2006).
35 Mihaly, above n 12, 11.
flexible 'pick and choose' policy and decide on a case-to-case basis if applying standards higher than the host standards will make business sense. For example, the higher standards in a given scenario may be adopted if doing so has the potential to earn more profit, generate good will, attract and retain better staff, or help in occupying a high moral ground vis-à-vis competitors. These measures in business management literature are often regarded as part of 'strategic' corporate citizenship.  

The flexible 'pick and choose' policy nonetheless remains a variation of the application of host standards, for there is no consistent and principled departure from observing the host standards. The higher standards are essentially applied (if at all and often temporarily) merely as a sheer business tactic.

What are the pros and cons of MNCs applying the human rights standards of their host countries? As pointed out before, it will usually be easier for MNCs to observe host country standards, both in terms of meeting applicable standards and justifying their actions. However, this option may not be the most efficient, or the safest course available. To implement varying standards, MNCs would have to draft separate codes of conduct for each country of operation, and also adopt varied implementation strategies, including training programs for staff. Further, in view of the fact that host standards (i.e., the standards prevailing in many developing countries) may not always offer adequate human rights protection, MNCs may be accused of violating human rights by adopting double standards. In the past MNCs have been sued for adopting double standards even regarding basic human rights.  

36 'For any company, strategy must go beyond best practices. It is about choosing a unique position - doing things differently from competitors in a way that lowers costs or better serves a particular set of customer needs.' Michael E Porter & Mark R Kramer, 'The Link Between Competitive Advantage and Corporate Social Responsibility' (December 2006) Harvard Business Review 1, 10 (emphasis added).

37 Apart from multiple cases against UCC for Bhopal, see, for example, the case against Nike for applying (but not acknowledging) inferior labour standards to its workers in Asian countries. Kasky v Nike, Inc. 45 P. 3d 243, 248 (Cal. 2003), cert. granted, 537 US 1099 (2003), and cert. dismissed, 123 S. Ct. 2554 (2003). See Michele Sutton, 'Between a Rock and a Judicial Hard Place: Corporate Social Responsibility Reporting and Potential Legal Liability Under Kasky v. Nike' (2004) 72 University of Missouri at Kansas City Law Review 1159. See also the cases against Thor chemicals, Rio Tinto, Cape Plc and Ferodo. Meeran in Addo (ed.), above n 1, 161, 164-69.
6.2.1.2 'Home' standards

The second option that an MNC has is to apply in host countries the standards of its home country, obviously assuming that the home standards are higher than the host standards. The adoption of this policy, in effect, means choosing the higher of the home and host standards.

A corporate policy to apply higher home standards even in host countries will face several challenges. First, the implementation of higher standards will undoubtedly demand additional expenditure, resulting in a possible competitive disadvantage to the concerned MNCs vis-à-vis other local corporations operating in the host state. This may raise, in the host country, concerns about the erosion of, or disregard for, national sovereignty, which may in turn embroil the concerned MNC in potentially costly legal and/or political conflicts with (or within) the host state. It could also lead to situations of conflict between the standards applicable at two places. For example, whereas the home country of an MNC may recognise freedom of association and the right to collective bargaining, the host country may prohibit the formation of independent trade unions and/or the right to strike.

Some of these challenges are similar to those that are raised to cast doubt on the desirability and efficacy of home state extraterritorial laws seeking to impose home standards on corporations operating abroad. However, the differences between host and home standards should not necessarily or always result in conflict. There is no real conflict where compliance with both home and host standards is by and large possible. Rather, conflicts ordinarily only arise when the host standards prescribe

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38 McGarity terms this as the 'high road' approach which would require an MNC to apply in all countries the standards that it is subjected to in the home country. Tom McGarity, 'Bhopal and the Export of Hazardous Technologies' (1985) 20 Texas International Law Journal 333, 335.

39 See McGarity, above n 38, 335-36.


what the home standards proscribe, or vice versa. For example, laws of host states
would hardly prescribe employment of child or forced labour, require the manufacture
of potentially harmful substances, or demand the payment of less-than-living wages or
pollution of the environment — something which the laws of the home state may
expressly prohibit.

In terms of advantages, the adoption of home standards above, or in addition to, host
standards should result in better protection of human rights. This might also bring
benefits to the concerned MNCs. Besides attracting and retaining the most talented
personnel, this ‘proactive’ policy may, as some argue, help such MNCs gain a
competitive edge over other MNCs and local corporations that continue to apply
lower standards. It is also likely that MNCs that adopt higher standards will avoid, at
least in some cases, public shaming and/or litigation for indulging in human rights
abuses.

6.2.1.3 ‘International’ standards

I noted before that in some circumstances the home standards — though higher than
the host standards — may not be the highest or most appropriate. In such cases where
the relevant international standards are higher than the home standards, it is possible
for an MNC to adopt the former for the whole corporate group. Complying with
international standards, however, does not mean that an MNC would be following the
‘same’ standards everywhere. I will show below with the help of Bhopal that
international standards (or the home standards for that matter) could be adjusted in
view of those local differences which help in promoting the realisation of human
rights in the country of operation.

But why should an MNC adopt international standards? The following example may
help in understanding one of the rationales. The environmental standards in Europe

at the ISBEE Conference in Melbourne (15-17 July 2004), <http://www.lawhouse.dk/?ID=261#> (last
visited 12 May 2005); Porter & Kramer, above n 36.
46 Noreena Hertz, ‘New Ethics: Just Do it Right – Smart Firms Knows Acting Socially Helps the
INGPOCNKSD1.DTL> (last visited 17 May 2005).
are generally considered more stringent than those that prevail in the US or Japan,\(^47\) the home of several high profile MNCs. Therefore, even the application of Japanese (home) standards in a host country like China may not be the best thing to do when most of the goods manufactured therein are sold in Europe.\(^48\) In view of this, some MNCs may find it desirable to adopt the highest possible international standards as a risk management strategy. Another reason why an MNC might like to adopt international standards is because human rights, at least some if not all, do enjoy a universal acceptance.

The adoption of international standards for human rights is likely to result in the evolution of comparable standards in all countries where a given MNC operates.\(^49\) This should also cut down the business dilemma that MNCs face in terms of applicable standards in different countries, for MNCs adopting international standards would not have to deliberate upon this question afresh every time they start operations in a new place. On the other hand, it will not always be easy to formulate international standards, even regarding those issues which enjoy universal acceptance. Furthermore, as with the application of home standards, the adoption of international standards may also create a problem of conflict with the standards prevailing in a host country. But, as pointed out above, it is conceivable that an MNC may be able to minimise such conflicts.

### 6.2.2 Two Approaches for Resolving the Dilemma of Varying Standards

While doing business in a given country, out of the three available human rights standards, which standards should MNCs choose to apply, and on what basis? In addition, how could corporate decisions to apply a particular set of standards be justified? Several guiding principles have been posited to help corporations in resolving this dilemma. Such principles often try to tackle the business dilemma

\(^{47}\) 'In other instances, US firms may have an obligation to operate at a higher level at home, by observing in their European operations the stricter environmental protection laws that prevail there....' Boatright, 3rd edn., above n 11, 378-79.

\(^{48}\) 'Forward-looking companies, seeing where the regulatory environment is heading, are deciding to run in front of it. So Sony is now insisting that its suppliers in China meet not Chinese environmental standards, but those that are required in Europe, where most of its goods are sold.' Hertz, above n 47.

\(^{49}\) 'Basing transnational corporate responsibilities on international human rights standards is no doubt the most effective way of ensuring comparable standards across national jurisdictions.' Addo in Addo (ed.), above n 1, 31.
within an ethical, moral or human rights framework. For example, Boatright argues that though neither an absolutist nor a relativist position is satisfactory, home standards need not be applied everywhere in view of ‘morally relevant’ or cultural differences.

Donaldson, on the other hand, applies a hypothetical ‘social contract’ between corporations and members of society and deduces ten fundamental international rights that corporations must respect everywhere. The failure of a corporation to observe its ‘minimal’ duties would ‘deprive the corporation of its moral right to exist’. However, as in certain instances even an appeal to such rights may not resolve the corporate dilemmas as to conflicting standards, Donaldson proposes a complex ‘ethical algorithm’ which MNCs could use to find out if the adoption of lower standards in the host country could be justified.

Although ethical, moral or human rights frameworks do provide useful guiding principles to resolve the business dilemma as to varying human rights standards, these principles do not examine the issue from the internal standpoint of corporations. It may be more useful to explore potential guiding principles by placing oneself in the shoes of corporate executives who might be operating with a particular vision of the place and role of corporations in society. Based on this understanding, I suggest two approaches – the ‘business approach’ and the ‘human approach’ – that do or should guide MNCs’ decisions as to the standards that they apply in a given case. As the titles itself indicate, ‘business’ and ‘human’ respectively are central to these two approaches, which represent contrasting positions as to the place and role of

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51 Boatright, 4th edn., above n 31, 439.
52 Id., 414-17.
53 Donaldson, above n 4, 47, 81. These ten rights are: the rights to freedom of physical movement; ownership of property; freedom from torture; a fair trial; non-discriminatory treatment; physical security; freedom of speech and association; minimal education; political participation; and the right to subsistence. Id., 81.
54 Donaldson, above n 4, 62.
55 Donaldson, above n 4, 95-108.
56 Corporate regulatory initiatives also suffer from this ‘external’ account of corporate responsibilities. With reference to the OECD Guidelines, Dine argues: ‘[I]t is also problematic that the Guidelines represent a form of “outside the company exhortation” and it will be unlikely to be effective unless mechanisms to achieve sustainable development can become part of the internal governance systems of
corporation in society. It is contended that one of these two approaches invariably underpins decisions taken by MNCs as to which human rights standards they should apply out of the three options canvassed above.

It should be noted at this stage that as compared to the business approach, the human approach is more prescriptive in nature. The business approach performs a dual purpose: it not only explains why MNCs tend to apply varying standards of human rights (descriptive function) but also rationalises why they should adopt varying standards (prescriptive function). On the other hand, as very few MNCs seemingly adopt the human approach at this stage, it by and large fulfils a prescriptive role by providing a basis for MNCs applying such standards — i.e., home or international standards modified in view of morally relevant local differences — so as not to result in human rights violations.

6.2.2.1 No standard standards: The 'business' approach

The business approach perceives corporations primarily as economic entities, and logically puts profit as reflected in the financial statements first and foremost. This approach is grounded in the well-known assertion that the only social responsibility of business is to increase the profits for its shareholders. As stockholders' profit maximisation guides the business approach, the protection and promotion of stakeholders' human rights is not, in itself, considered a part of 'profits' quantified in dollars. For this reason, the business approach does not take a principled stand vis-à-vis human rights: it is profits that will determine whether human rights are to be respected and if so, then which standards are to be followed. The 'business case' for companies rather than outside encouragement.' Janet Dine, Companies, International Trade and Human Rights (Cambridge: Cambridge University Press, 2005), 237.

57 As early as the early 1930s, the famous Berle-Dodd exchange debated the role of the corporation. Adolph A Berle, Jr, 'Corporate Powers as Powers in Trust' (1931) 44 Harvard Law Review 1049; E Merrick Dodd, Jr, 'For Whom Are Corporate Managers Trustees?' (1932) 45 Harvard Law Review 1145; Adolf A Berle, Jr, 'For Whom Corporate Managers are Trustees: A Note' (1932) 45 Harvard Law Review 1365. The debate has continued unabated since then. See part 5.2 above, especially the materials cited in notes 9 and 10.

58 This is based on what is known as the 'classical view' about the role of corporations in society. John Bostridge, Ethics and the Conduct of Business, 5th edn. (Upper Saddle River, New Jersey: Prentice Hall, 2007), 371.

human rights (discussed in the preceding chapter) is also a variation of this approach in that corporations are counselled to respect human rights in order to gain and maintain an economic advantage, or as a sound risk management exercise.

Since under the business approach, profit considerations determine how issues concerning human rights are settled, MNCs that consciously or otherwise adopt this approach do not have a consistent policy towards the standards that they should apply in a given scenario. Instead, varying standards of human rights may be applied as per infinite local differences. The business dilemma as to the choice of applicable standards, which might give the impression of hard choices to be made, is often resolved by MNCs rather easily. By citing local difficulties – in view of social, cultural or economic differences, level of development, or the political system – in applying the home or uniform standards, the MNCs subscribing to the business approach typically settle for host standards, which may be inferior and inadequate. The common argument in terms of justification for this practice runs like this: the ‘business’ of business is to do business and this is possible only by following host standards and practices, otherwise the main objective of reducing operating costs by moving business to a particular location is frustrated.

MNCs’ choice to adopt the business approach is also influenced, among others, by legal principles that govern liability for human rights abuses within a corporate group. For example, if parent corporations – whether immediate, intermediate or ultimate – could be held liable for human rights violations committed by their subsidiaries, parent corporations might be more willing to adopt international standards for the whole corporate group instead of outsourcing their human rights responsibilities to their offshore subsidiaries. However, as a general rule across civil and common law

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60 Chapter 5.3.1. See also the materials cited in Chapter 5, note 5.


62 See Mihaly, above n 12, 11. It must be admitted though that business decisions relating to foreign investment are not influenced solely by the presence of low operating costs in developing countries.

63 Hansmann & Knaakman write: [S]trong empirical evidence indicates that increasing exposure to tort liability has led to the widespread reorganisation of business firms to exploit limited liability to evade damage claims. The method of evasion differs by industry. For example, placing hazardous activities
jurisdictions, all corporations of a group are treated as separate entities and are protected by a veil that could be pierced or lifted only in limited circumstances, which are not always easy to prove. It is arguable, therefore, that existing legal principles related to the issue of liability within a corporate group indirectly encourage MNCs to adopt varying human rights standards applicable in different host countries.

The adoption of a business approach by MNCs could be criticised on several grounds. To begin with, this approach fails miserably to protect the human rights of people living in developing or under-developed countries where MNCs operate, and should be rejected merely on this ground. This argument is elaborated in more detail in the next part with the help of the Bhopal case. Second, I have tried to show in Chapter 5 why the classical view - which underpins the business approach - about the role of corporations in society is now simply indefensible because of a fundamental

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in separate subsidiaries seems to be the dominant mode of insulating assets in the tobacco and hazardous waste industries. In contrast, disaggregating or downsizing firms seems to be the primary strategy for avoiding liability in the chemical industry and, more recently, in the oil transport industry. Indeed, one study finds that, over the past twenty-five years, a very large proportion of small firms entering all hazardous industries in the United States are motivated primarily by a desire to avoid liability for consumer, employee, and environmental harms.


This is based on the traditional 'entity principle' as distinguished from the 'enterprise principle' which treats all corporations of a group as one enterprise. Blumberg, The Search for a New Corporate Personality, above n 21, viii-ix; Phillip Blumberg, 'Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems' (2002) 50 American Journal of Comparative Law 493, 494-95 (Suppl.).


Meeran also argues that principles of separate personality and forum non conveniens have enabled MNCs 'to apply "double standards" in developing countries.' Richard Meeran, 'The Unveiling of Transnational Corporations: A Direct Approach' in Addo (ed.), above n 1, 161.
shift in the position of both states and corporations, and a visible change in societal expectations from corporations. 69

Third, the underlying assumption that the sole (or even predominant) obligation of corporations is to increase shareholders' profit is arguably shaky. 70 People, of course, invest in corporations in order to maximise their economic gains, and there is perhaps nothing wrong with this activity. 71 But this is different from saying that all shareholders of an MNC might like it to maximise profit at all cost. To recapitulate an argument made in Chapter 5, shareholders are human beings too and as part of society those people have multiple interests acting in different capacities. 72 For example, shareholders as consumers or parents might expect to have access to safe products, or to products that are not manufactured using child labour or in a manner harmful to the environment. The business approach, however, fails to respond to such multiple interests of even its shareholders by simply treating all shareholders as one-dimensional, profit-driven persons or organisations. The adoption of a business approach may also result in MNCs ignoring, as Addo points out, 'the interests of future members of the company' the views of whom are not yet known, but who could be concerned about more than simply profit maximisation. 73

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70 Lucas argues that although profit maximisation may be presented as a 'rational' choice, '[i]t is a mistake to construe rationality in terms of maximising' and that businessmen 'are not being irrational if they take into consideration a wider range of concerns than simply maximising immediate individual profit.' J R Lucas, 'The Responsibilities of a Businessman' in William Shaw (ed.), Ethics at Work: Basic Readings in Business Ethics (Oxford: Oxford University Press, 2003), 15, 16-17. He also contends that corporate obligations towards shareholders are not paramount, as suggested. Id., 21. Orlando argues that corporate managers have no greater duty to shareholders than to workers. John Orlando, 'The Ethics of Corporate Downsizing' in Shaw (ed.), Id., 31, 33-40.

71 One could still argue that such system is discriminatory because it necessarily excludes those who do not earn enough to buy the shares of corporations. Writing in the 19th century, Raymond wrote that corporations are 'artificial engines of power ... calculated to destroy [the] natural equality among men.' Daniel Raymond, The Elements of Political Economy, 2nd edn. (1823), as quoted by Walter Werner, 'Corporation Law in Search of its Future' (1981) 81 Columbia Law Review 1611.

72 'Today's shareholder is likely to be an institution with wider community interests than just profit maximisation.' Addo in Addo (ed.), above n 1, 15. Orlando also suggests that 'most shareholders expect managers to take into account considerations beyond maximising profit.' Orlando in Shaw (ed.), above n 70, 38. There are also evidence of increasing market for green consumption and ethical investing. Dhir, in fact, explores how shareholders could use corporate law to bring human rights issues within corporate operations. Aaron A Dhir, 'Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability' (2006) 43 American Business Law Journal 365.

73 Addo in Addo (ed.), above n 1, 15.
Fourth, Williams and Conley convincingly argue that the ‘current fiduciary duties [of corporate boards] to their shareholders require them to consider the rights and interests of stakeholder groups, including those rights and interests exemplified in the international law of human rights.’ If this position is accepted, the boards of MNCs would have to ensure that the standards that they choose to apply result in the protection of the human rights of their stakeholders, or otherwise risk incurring liability for not taking their fiduciary duties seriously.

Fifth, the business approach is also unsound on ethical and moral grounds. Donaldson makes a strong case for corporations losing their ‘moral right to exist’ if they fail to perform ‘minimal’ duties to protect certain fundamental (human) rights. Similarly, on the adoption of double standards by MNCs, Braithwaite argues that the ‘moral failure of the transnationals lies in their willingness to settle for much lower standards than at home.’ Therefore, it is arguable that ‘any attempt by a multinational to take advantage of discrepancies between the home country and the host country in order to pursue profit ... without considering the interests of all the stakeholders is immoral.’

In short, it is contended here that the business approach, which results in MNCs’ applying varying standards of human rights as per local differences with a view only to economic gain, excessively supports the pursuit of profit maximisation at the cost of undermining the human rights of stakeholders.

### 6.2.2.2 Realisation of stakeholders’ human rights: The ‘human’ approach

In comparison to the business approach, the human approach would require MNCs to resolve their dilemma as to varying standards with reference to the impact of their decisions, actions or omissions on the realisation of human rights of their stakeholders. The human approach takes a more holistic view of the role of...
corporations in society. It considers corporations an integral part of society; the role of corporations, according to this view, is multi-faceted rather than being limited to efficient wealth creation. 79 In other words, the goal of profit maximisation is not to be pursued at the expense of other equally important social objectives. Despite all the controversies and limitations linked to human rights discourse, 80 there is a broad consensus that the realisation of human rights is an important social objective for people and polities all over the world. 81 Therefore, corporations should not undermine the human rights of their stakeholders while pursuing the task of wealth creation. The human approach would require that MNCs do not always stick to host standards as a rule, but explore if the application of home or international standards is likely to promote better protection and realisation of stakeholders’ human rights.

The human approach regards human rights above the profit principle and trade considerations. The humanity of this approach lies in the fact that it treats each ‘human’ as an end in itself. 82 Since the existence of human beings is a prerequisite for anything else (including for the existence of corporations) and human rights embody the core interests of human beings, 83 these interests ought not to be subordinated to any other principle which is inferior in status, such as profit maximisation, or wealth creation. The adoption of a human approach by MNCs would also be consistent with the Bhopal Principles on Corporate Accountability. 84 In particular, it may be pertinent to quote here Principle 6 which provides:

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79 ‘Profit for owners and directors remain one consideration, and a very important one, essential as an index and for survival. But it is one among others, not a unique guiding light.’ Michael Fogarty, Company and Corporation – One Law? (London: Geoffrey Chapman, 1965), 9.
83 Czemy writes: ‘Human rights translates the human condition into those fundamental, essential, non-negotiable and enforceable terms which are necessary in order that life might be life, that is, in order that life must begin, grow, develop and flourish in all its attributes.’ Michael F Czemy, ‘Liberation Theology and Human Rights’ in Kathleen E Mahoney & Paul Mahoney (eds.), Human Rights in the Twenty-first Century (Dordrecht: Martinus Nijhoff Publishers, 1993), 36 (emphasis added).
States shall ensure that corporations adhere to the highest standards for protecting basic human and social rights including health and the environment. Consistent with Rio Declaration Principle 14, states shall not permit multinational corporations to deliberately apply lower standards of operation and safety in places where health and environmental protection regimes, or their implementation, are weaker.\(^85\)

Although this principle is not directed towards corporations, MNCs would complement the initiatives taken by states if they adhere to the human approach.

Although the human approach demands ‘a reinterpretation of the role of corporations, of their purpose and legitimacy beyond the profit margin,’\(^86\) it neither undermines the wealth creation role of corporations, nor demands an application of uniform or universal standards by MNCs regarding all human rights. This approach acknowledges the important role that corporations play in creating wealth efficiently while staying ‘within the rules of the game.’\(^87\) It merely asserts that the protection and promotion of human rights should be an integral part of such rules of the game – not only because human rights are arguably the only universally acceptable aspirational currency,\(^88\) but also because corporations themselves invoke human rights to protect their business interests.\(^89\) In other words, the corporate contribution towards the

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\(^{85}\) Id. (emphasis added).


Dine also notes: ‘There needs to be a complete rethink about corporate structures before social responsibility becomes an embedded reality within companies.’ Dine, above n 56, 222. She Continues: ‘The introduction of ethical and social concerns is therefore hostile to the underlying philosophy and thus the way in which the rules regulating that company are structured.’ Id., 223.

\(^{87}\) For Friedman ‘the rules of the game’ are satisfied if business ‘engages in open, and free competition, without deception or fraud.’ Friedman, *Capitalism and Freedom*, above n 59, 133.

\(^{88}\) ‘Ours is the age of rights. Human rights is the idea of our time, the only political-moral idea that has received universal acceptance.’ Henkin, *The Age of Rights*, above n 81, ix. One may also consider that in recent times even countries like China, which considered human rights a Western concept, has invoked the language of rule of law and human rights to justify their conduct and policies.

realisation of human rights and other developmental goals should be considered as part of the 'profit' or 'wealth' generated by corporations in a wider sense.\textsuperscript{90}

It also needs to be clarified that the human approach does not advocate the application of uniform or universal standards by MNCs. I have already noted that MNCs may adopt uniform universal standards qua a limited number of human rights that have acquired the status of \textit{jus cogens} and/or \textit{erga omnes} norms.\textsuperscript{91} However, such uniformity might not be desirable or even workable regarding several other human rights. Since the stakeholders of a given MNC, as well as all the human rights at stake in a given country are bound to vary, it is logical that the response of MNCs in determining appropriate human rights standards could not be uniform. MNCs are, therefore, required to adopt a 'context-sensitive approach'\textsuperscript{92} by keeping in mind morally relevant local differences.\textsuperscript{93} As explained in the next part, only those local differences which facilitate the realisation of human rights are to be treated as 'morally relevant.'

Critics might pose two valid questions here. If MNCs could adopt different standards even while guided by the human approach, how is it different from the business approach? Further, does the human approach support relativism? It is true that MNCs could apply variable human rights standards under both the business and human approaches, but there is a critical distinction arising from the reason for adopting different standards in each case. Whereas under the business approach \textit{profit} dictates MNCs' choice to adopt variable (often inferior) host standards, the better \textit{protection of human rights} is the driving force behind choosing different (not necessarily lower) standards.

\textsuperscript{90} Post et al, for example, propose a broad concept of 'organisational wealth' which extends beyond 'conventional accounting and financial measures.' James E Post, Lee E Preston, & Sybille Sachs, \textit{Redefining the Corporation: Stakeholders Management and Organisational Wealth} (Stanford: Stanford University Press, 2002), 36, and generally 36-46. By 'organisational wealth' they mean the capacity of an organisation to create both tangible and intangible benefits for its stakeholders over the long term. \textit{Id.}, 45.

\textsuperscript{91} Webley suggests that the majority of MNCs concede that there are 'a few non-negotiable principles which apply world-wide.' Simon Webley, 'The Nature and Value of International Code of Ethics' in Addo (ed.), above n 1, 107, 110.

\textsuperscript{92} Wiggen & Bomann-Larsen terms this context-sensitive approach 'casuistic' in that it allows particularities to determine how moral decisions are made. Wiggen & Bomann-Larsen in Bomann-Larsen & Wiggen (eds.), above n 86, 6-7.

\textsuperscript{93} See Bowie, above n 77, 243. But he cautions that the 'judgment [of adopting different standards] is made because we believe that the divergent practices conform to some general moral principles.' \textit{Id.}
standards under the human approach. Moreover, the human approach does not become relativist merely because human rights standards have to be aligned to local needs. Relativism is harmful or controversial when it undermines universally accepted human rights but not when it helps in their realisation as per local needs. In short, the human approach treats human beings living in different parts of the world with equal respect and dignity, and justifies the adoption of different standards by MNCs only to show equal concern to the rights of all.

Readers may have noticed that the human approach is based on a modified version of the stakeholder theory. Let me first encapsulate the stakeholder theory — which prescribes a ‘normative’ model — before highlighting the modification. As pointed out in Chapter 5, stakeholder theory challenges Friedman’s vision of one-dimensional free corporations (answerable only to the economic interests of their shareholders) by asserting ‘that corporate responsibility cannot be reduced to the interests of a single group of stakeholders.’ The central claim of the stakeholder approach is that corporations are operated or ought to be operated for the benefit of all those who have a stake in the enterprise, including employees, customers, suppliers, and the local community. What is this ‘stake,’ who are the ‘holders’ of this stake, and how could

Bowie draws a prescriptive chart to find out when MNCs should (and should not) do in Rome as Romans do. 

94 Rebutting a similar argument that could be mounted against the ‘context sensitive’ approach, Wiggen & Bomann-Larsen observe: ‘That an approach to ethics is context sensitive does not mean that it relativises the ethical case that lies at the heart of the CSR discourse. Rather, it can be argued that the ethical case demands that particular features of each situation are taken into account when practical responses are being formed.’ Wiggen & Bomann-Larsen in Bomann-Larsen & Wiggen (eds.), above n 86, 6-7.

95 There is so much diversity within the stakeholder theory that it is suggested that there are several ‘types of stakeholder “theories” within the general stakeholder theory “genre”.’ Tara J Radin, Stakeholder Theory and the Law (PhD Dissertation, The Colgate Darden Graduate School of Business Administration, University of Virginia, August 1999), 2-3. ‘One of the central problems in the evolution of stakeholder theory has been confusion about its nature and purpose.’ Thomas Donaldson & Lee E Preston, ‘The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implication’ (1995) 20 Academy of Management Review 65, 69, and generally.

96 ‘The stakeholder model is a genuinely normative, in contrast to empirical, model because it is prescriptive or “action guiding”’. Donaldson, above n 4, 45. There seems to be a change in the position of Donaldson later on as along with Preston he examines four aspects of the stakeholder model: descriptive, instrumental, normative and managerial. See Donaldson & Preston, above n 95, 66-67.

97 Donaldson, above n 4, 45 (emphasis in original). Radin argues that the stakeholder theory attacks the common misunderstanding that stockholders are the only claim holders in the company or that their interests are primary. Radin, above n 95, 5.

the ‘benefit of all’ stakeholders be served? The stake implies some kind of interest – from employees’ expectation of decent wages and working conditions to the community’s desire for a clean environment.99 The holders of this stake are all those which affect or are affected by the actions and performance of corporations.100 This being the case, the stakeholders of various corporations will not be the same. Finally, the theory proposes a balancing exercise in order to ensure that the conflicting interests of different stakeholders are simultaneously served, to the maximum extent possible.

This version of the stakeholder theory has been modified here by introducing a human rights element into it. This is primarily done to redress some of the ‘compelling criticisms’101 that stakeholder theory receives.102 For example, it is argued that the theory prescribes no method to balance stockholders’ interests with stakeholders’ interests.103 One could counter this by pleading that human rights could provide a framework for achieving this balance, for stockholders and stakeholders might disagree, but they are not likely to dismiss human rights discourse altogether. Human rights norms set common standards of behaviour which corporations should adhere to

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99 See Corfield, above n 69, 214.
100 ‘Stakeholders are individuals and groups that benefit from or are harmed by organisational actions.’ John D Daniels et al, Globalization and Business, 1st edn. (Upper Saddle River, NJ: Prentice Hall, 2002), 126. ‘The stakeholders in an organisation are the groups, beings or systems that are affected by the company’s operations and whose support is required to safeguard the company’s future.’ Liz Crosbie & Ken Knight, Strategy for Sustainable Business: Environmental Opportunity and Strategic Choice (London: McGraw-Hill, 1995), 33. See also Freeman, above n 98, 46.
101 ‘These are compelling criticisms and I have seen no theoretical solution which compellingly answers them.’ Dine, above n 56, 224.
102 Friedman asks: ‘If businessmen do have a social responsibility other than making maximum profit for stockholders, how are they to know what it is? Can self-selected private individuals decide what the social interests is? Can they decide how great a burden they are justified in placing on themselves or their stockholders to serve that social interest?’ Friedman, Capitalism and Freedom, above n 59, 133-34. See also Dine, above n 56, 223-25; Donaldson, above n 4, 45-47; Boarright, 5th edn., above n 58, 387-88; Corfield, above n 69, 227-29; Sternberg, above n 59, 49-52.
103 Boarright, for example, argues that ‘the stakeholder model leaves many questions unanswered. Many difficult corporate decisions involve trade-offs in which a benefit to one group must be balanced against a loss to another.’ Boarright, 5th edn., above n 58, 387. Donaldson agrees: ‘No serious attempt has been made by defenders of the model to devise a principle for making trade-offs between the interests of shareholders, suppliers, employers, consumers, members of the general public, or anyone else who might qualify as a stakeholder.’ Donaldson, above n 4, 45. Dine also notes that the ‘difficulty is the weight to be allocated to each interest group’s concerns. … If no mechanism which creates a hierarchy of interests is created, how can we know that proper weight has been given to the interests of creditors, employees or the environment?’ Dine, above n 56, 224.
while doing business. Moreover, merely because it is difficult to negotiate a balance between conflicting interests does not mean that such a balance could not be achieved. Lucas offers some simple advice:

Often there is no clear-cut path of duty, and the businessman has to balance conflicting obligations. But this is nothing new. We are familiar with the dilemmas of private life, and though their resolution is not easy, we are sometimes able to discern what we ought to do. The same is true in business life.\(^\text{104}\)

Just to illustrate, although the exercise is proving difficult,\(^\text{105}\) attempts have been made at national as well as international levels to strike a balance between the intellectual property rights of pharmaceutical corporations and the availability of life-saving drugs (as part of the right to health) to people.\(^\text{106}\)

It is also contended that the stakeholder theory 'lacks any explicit theoretical moral grounding,'\(^\text{107}\) that it 'may result in abuse of ... directors' discretion,'\(^\text{108}\) and that 'no stakeholder theorist has offered a detailed proposal for changes in corporate governance that would result in a stakeholder corporation.'\(^\text{109}\) Bringing human rights within the framework of stakeholder theory should also redress the first two fears: human rights could not only provide a firm grounding for stakeholder theory, but could also afford guidelines for directors' decisions. Regarding the last criticism, it could be said that appropriate structural changes could be made in the corporate

\(^{104}\) Lucas in Shaw (ed.), above n 70, 29.


\(^{107}\) Donaldson, above n 4, 46. For this reason, he invokes the social contract model to 'augment' the stakeholder model and to deduce minimal and maximal duties of corporations. Id., 47-64. See also Donaldson, Corporations and Morality, above n 50, 36-57.

\(^{108}\) Corfield, above n 69, 227.

\(^{109}\) Boartright, 5th edn., above n 58, 388.
governance model so as to give adequate representation to stakeholders. Professor Christopher Stone, for example, has canvassed a wide range of reforms in corporate structure (such as the appointment of general and special public directors) to make corporations more responsive to the interests of their stakeholders.

6.3 ‘Bhopal’ and the Two Dilemma Resolving Approaches

Now let us see how the three potential options and two approaches related to the dilemma of varying human rights standards in the Bhopal case. Bhopal illustrates why MNCs like UCC tend to be guided by the business approach rather than the human approach. UCC, as the discussion below will show, applied home standards of safety in the Bhopal chemical plant primarily to make savings on operational costs. The analysis in this part will also demonstrate why it is important for the realisation of human rights that MNCs reject the business approach in favour of the human approach: Bhopal tells us that the adoption of the business approach will often result in the violation of human rights.

6.3.1 The Business Approach: How did UCC Resolve the Dilemma in Bhopal?

The business approach is clearly manifest in the case of Bhopal. Bhopal signifies how the corporate dilemma of varying standards is resolved rather easily, and how the business approach fails to protect even basic human rights such as rights to life and health. Let me begin this elaboration by posing the following question: which standards of safety and technology should UCC, a company incorporated in the US, have applied in a chemical plant run by its subsidiary at Bhopal, a city in a developing country? As UCC had a similar plant in West Virginia, it could have applied the same (home) standards, lower (host) standards, or even superior standards that might have evolved since its US plant was established several years prior to construction of its

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110 One could learn from the corporate governance models that are operating in countries like Germany and Japan. See Corfield, above n 69, 232-36.
112 Shue argues that ‘rights are basic ... only if enjoyment of them is essential to the enjoyment of all other rights. This is what is distinctive about a basic right.’ Henry Shue, Basic Rights: Subsistence, Affluence, and US Foreign Policy, 2nd edn. (Princeton, NJ: Princeton University Press, 1996), 19. He further concludes that ‘[s]ecurity and subsistence are basic rights, then, because of roles they play in
Bhopal plant. But UCC, in the Bhopal plant, apparently chose to apply different, inferior technology and safety standards as compared to its West Virginia plant. 113 This factor, in conjunction with other variables, contributed to the gas leak.114 Below is a brief account of those causal factors which demonstrate that UCC applied inferior and largely untested115 technology and safety standards in the Bhopal plant.116 Such factors could be divided in three parts: technology, training and maintenance, and the emergency response.

First of all, although UCC consistently maintained that there was no disparity between the technology and safety standards adopted in its two plants (one in West Virginia and the other in Bhopal),117 the available evidence and studies support a contrary conclusion.118 For example, there was no computerised monitoring at the Bhopal plant, nor was the cooling system based on chloroform — a substance non-reactive with the

both enjoyment and the protection of all other rights. Other rights could not be enjoyed in the absence of security or subsistence ....' Id., 30, and generally 20-30.


115 UCC’s internal papers admitted this. ‘Union Carbide Corporation’s Factory in Bhopal: A Brief and Deadly History’, 3 <www.studentsforbhopal.org/Assets/Bhopal-BriefAndDeadlyHistory.pdf> (last visited 28 January 2007).


117 Jones, 17; Cassels, The Uncertain Promise, above n 113, 18. In his testimony before the US Congress after Bhopal, UCC’s Vice president Ronald Wishart observed: ‘With respect to safety standards, we meet the higher of the two, whether it be Union Carbide or the local standards.’ Testimony of Ronald Wishart, Hearing before the Subcommittee on Asian and Pacific Affairs of the Committee on Foreign Affairs, House of Representative, 98th Congress, 2nd session, US Government Printing Press, Washington (12 December 1984), 56, as quoted in Amnesty, Clouds of Injustice, above n 116, 41-42.

MIC gas.\textsuperscript{119} Not only this, there was also a mismatch between the production and storage of MIC on the one hand, and the formulation and processing of Sevin pesticide out of it on the other.\textsuperscript{120} Unlike the West Virginia plant where around the clock manufacturing of Sevin required production and storage of a considerable amount of MIC, the storage of a large quantity of MIC for a long period of time at the Bhopal plant was not justified.\textsuperscript{121} This basically amounted to an invitation to danger, given that UCC-UCIL did know about the highly volatile and hazardous nature of MIC.

Second, in terms of the training of workers and maintenance of the plant, UCC and/or its subsidiary UCIL adopted inferior standards at the Bhopal plant in comparison to the West Virginia plant.\textsuperscript{122} The manpower at the plant Bhopal in each shift was cut by half, skilled and trained workers were replaced with unskilled and inexperienced ones, specialist personnel were pooled together to work as floating generalists, damaged equipment was replaced with sub-standard equipment, and a proper record of the maintenance of the safety valve and other critical parts of the plant was not kept.\textsuperscript{123}

All these factors directly compromised the safe running of the Bhopal plant. But the story of Bhopal goes beyond the application of double standards, for even those

\begin{itemize}
\item \textsuperscript{119} Amnesty, \textit{Clouds of Injustice}, above n 116, 42. Shrivastava is quite categorical when he writes that the ‘technological preconditions for a major accident were embedded in the design of the Bhopal plant...’ Shrivastava, above n 113, 54, and generally 53-57.
\item \textsuperscript{120} For this reason, Cassels argues that ‘the technology chosen was inappropriate to local needs and conditions’ because ‘[e]xpensive pesticides designed for large agribusiness were not on the cards for the millions of small farmers eking out a living in the Indian countryside.’ Cassels, ‘Outlaws’, above n 114, 316. It is also worth noting that the plant never functioned at more than half of its capacity. Id. See also Dan Kurzman, \textit{A Killing Wind: Inside Union Carbide and the Bhopal Catastrophe} (New York: McGraw-Hill, 1987), 24.
\item \textsuperscript{121} Amnesty, \textit{Clouds of Injustice}, above n 116, 41; Dominique Lapierre & Javier Moro, \textit{It Was Five Past Midnight in Bhopal} (New Delhi: Full Circle Publishing, 2001), 86-88; Cassels, \textit{The Uncertain Promise}, above n 113, 14. Kletz writes: ‘There are many lessons to be learnt from Bhopal but the most important is that the material which leaked need not have been there at all. It was an intermediate, not a product or raw material, and while it was convenient to store it, it was not essential to do so.’ Trevor Kletz, \textit{Learning from Accidents}, 2\textsuperscript{nd} edn. (Oxford: Butterworth-Heinemann, 1994), 96.
\item \textsuperscript{122} Amnesty, \textit{Clouds of Injustice}, above n 116, 42-43.
\item \textsuperscript{123} Lapierre & Moro, above n 121, 200-01; Amnesty, \textit{Clouds of Injustice}, above n 116, 45; Cassels, \textit{The Uncertain Promise}, above n 113, 21; Shrivastava, above n 113, 48-51; Kletz, above n 121, 102; Kurzman, above n 120, 40-43, 167; R Clayton Trotter, Susan G Day & Amy E Love, ‘Bhopal, India and Union Carbide: The Second Tragedy’ (1989) \textit{8 Journal of Business Ethics} 439, 442 (hereinafter Trotter et al); Praful Bidwai, ‘Plant Undermanned, Run Down’ in Surendra (ed.), above n 118, 70-74. Kamal Pareek, an experienced engineer who left the plant amidst all this, thought that his ‘beautiful plant was losing its soul.’ Lapierre & Moro, above n 121, 201.
\end{itemize}
double (inferior) standards were not complied with.\textsuperscript{124} Cassels sums up the laxity exercised in the maintenance and operational safety of the Bhopal plant:

\begin{quote}
[T]he MIC tank that ruptured was overfilled with gas and a reserve tank was also full; the refrigeration system designed to stabilise the gas was not functional, the gas scrubbers had been shut off for maintenance and the flare tower was inoperative; the water sprayers were insufficiently pressurised to reach escaping gases, and warning systems were so inaccurate and unreliable that they were routinely ignored.\textsuperscript{125}
\end{quote}

One main reason behind a continuous decline in safety measures as well as the morale and training of employees at the Bhopal plant was cost-cutting measures.\textsuperscript{126} These measures were supervised and implemented by a financial controller whose brief was not safety but improving the ‘bottom line’ of the company.\textsuperscript{127} In view of the ongoing deterioration of safety measures, Bhopal was inevitable\textsuperscript{128} or ‘should have at least been anticipated.’\textsuperscript{129} UCC’s technicians did, in fact, anticipate some of the operational and maintenance hazards in a report produced in May 1982, but whereas the safety lapses pointed out in this report were not rectified in full, a second report prepared in September 1984 was not communicated to the management of the Bhopal plant.\textsuperscript{130}

\begin{footnotes}
\item[124] None of the five major methods of neutralising MIC leak worked on the night. Kurzman, above n 120, 50-54.
\item[125] Cassels, ‘Outlaws’, above n 114, 317; Cassels, \textit{The Uncertain Promise}, above n 113, 19. See also Amnesty, \textit{Clouds of Injustice}, above n 116, 42-43; Lapiere & Moro, above n 121, 255-57; Shrivastava, above n 113, 45-48; Kletz, above n 121, 99-101; Kurzman, above n 120, 46.
\item[126] Cassels, ‘Outlaws’, above n 114, 316. Trotter et al observe: ‘In an effort to decrease expenses, management allowed the plant and equipment to deteriorate, allowing attrition among qualified employees and lowered entrance standards resulting in a lack of qualified applicants, which seems to have led to the greater potential for accidents.’ Trotter et al, above n 123, 442. Some safety lapses arguably were not the direct result of cost saving, e.g., in violation of safety regulations, MIC tank number 610 was almost full, whereas the third tank was not empty as it should have been. See Lapiere & Moro, above n 121, 256.
\item[127] See Lapiere & Moro, above n 121, 195-204.
\item[128] A local journalist, Rajkumar Keswani, had been writing in local newspapers that a disaster at the plant was imminent, but no one took his warnings seriously. Cassels, \textit{The Uncertain Promise}, above n 113, 20; Lapiere & Moro, above n 121, 178-81; Kurzman, above n 120, 32-35.
\item[129] Lapiere & Moro, above n 121, 257. However, Trotter et al write that although ‘an accident of the magnitude of Bhopal was probably totally unforeseeable by the management of Union Carbide, accidents of some degree of magnitude are clearly foreseeable by all chemical manufactures.’ Trotter et al, above n 123, 449 (emphasis in original). These writers nevertheless admit that as UCC ‘has previously experienced minor accidents at its other chemical plants,’ it ‘should have recognised the potential for a greater disaster.’ \textit{Id.}
\item[130] Cassels, \textit{The Uncertain Promise}, above n 113, 20-21; Shrivastava, above n 113, 53; Amnesty \textit{Clouds of Injustice}, above n 116, 44-45; Lapiere & Moro, above n 121, 178-80; Kurzman, above n 120, 90-91; Trotter et al, above n 123, 440; Rajkumar Keswani, ‘Bhopal’s Killer Plant’, <http://www.studentsforbhopal.org/Resources.htm#Articles> (last visited 17 August 2006).
\end{footnotes}
Perhaps, as the Bhopal plant 'had become an orphan operation,' no one cared about safety anymore.  

Third, unlike the West Virginia plant, there was no robust emergency plan at the Bhopal plant to caution the public in case of any accidental escape of toxic gases. Whereas an elaborate public alert system and evacuation procedure were in place at the West Virginia plant, similar measures were almost missing or at least not shared with the public authorities or general public in Bhopal. Except a loud siren, the Bhopal plant was not equipped with any system to warn the public of a gas leakage or advise them what to do in such a situation. However, in order to facilitate the communication of instructions through a loudspeaker and also to prevent any panic in the neighbourhood, even this loud siren was switched off after a while. Therefore, most of the victims were caught totally unaware by the gas leakage; they also had no clue about the wind direction, or the importance of taking simple precautions such as covering one's mouth with a wet towel.

Thus, gross negligence and the application of inferior technology-cum-standards on three counts, among other factors, directly contributed to the gas leakage and
consequent violation of the victims' human rights such as the right to life, right to health, right to information, and the right to a clean environment. It is critical to note that UCC applied inferior technology and implemented cost cutting measures – which directly compromised safety standards – in the Bhopal plant, knowing very well the hazards involved in dealing with or storing MIC. MIC being an in-house invention of UCC, the company was very much aware of its chemical composition, reactive nature and health risks associated with human contact with it. UCC’s Reactive and Hazardous Chemicals Manual stated clearly that MIC is ‘a hazardous material by all means of contact’ and ‘a recognised poison by inhalation.’ The Manual also enumerated in detail ‘the horrible effects of accidentally inhaling MIC’ and also the measures that should be taken to counter the effects of MIC. To keep under control the volatile nature of MIC, several safeguards were required. It has to be ‘kept permanently at a temperature near zero.’ In addition, any plant that was going to store MIC was required to ‘be equipped with decontamination apparatuses and flares to neutralise or burn it in case of accidental leakage.’

Why did UCC apply different, inferior safety standards while operating away from home? One major justification of any MNC like UCC might run like this: it makes business sense to establish and operate plant in a developing country like India only if lower standards are applied, otherwise the MNC loses any possible economic


See Chapter 2.3.3. Critics like Kletz argue that UCC was responsible even ‘for allowing a shanty town to grow alongside the plant.’ Kletz, above n 121, 99.

Bogard makes a ‘cost-benefit analysis’ of the tragedy, that is, how cost reduction measures compromised safety standards. However, UCC/UCIL maintained that the cost cutting measures would have no negative impact on the overall safety. Bogard, above n 138, 10-12.

MIC was ‘one of the most dangerous compounds ever conceived’ by the chemical industry and the test results done by UCC’s toxicologists on rats were ‘so terrifying that the company banned publication of their work.’ Lapierre & Moro, above n 121, 43.

Id., 32-33, 43.

UCC, Bhopal Methyl Isocyanate incident Investigation Team Report (Danbury, March 1985), as quoted in Amnesty, Clouds of Injustice, above n 116, 11.

Lapierre & Moro, above n 121, 51.

Lapierre & Moro, above n 113, 4.

Lapierre & Moro, above n 121, 50; Shastri, above n 118, 24-25.

Lapierre & Moro, above n 121, 50.
advantage to be gained from the developing country location. This inferiority in overall standards was driven by economic considerations not only in the beginning of UCC’s Bhopal operations, but also throughout the life of the plant; there was a direct link between UCIL’s losses and the lowering of, or non-compliance with, safety standards. UCC’s decision to apply inferior standards in the Bhopal plant also highlights a gap between what MNCs project themselves to be doing and what they actually do: UCC had professed itself as an ambassador of ‘environmental excellence’ and a ‘builder of modern India’ in advertisements published in several leading magazines such as *Fortune* and *National Geographic*.

MNCs are not, however, alone in justifying the adoption of different, inferior standards. Scholars too have rationalised the adoption of inferior standards on a range of grounds – from different local conditions to varying stages of development, acceptable level of risk within the cost-benefit analysis, cultural relativism, and voluntary acceptance of different standards by a host country. Boatright, for example, justifies the disparity in standards in the Bhopal plant as compared to the West Virginia plant in the following words:

> If Rome is a significantly different place, then standards that are appropriate at home do not necessarily apply there. *Consumer and worker safety standards in the developed world*, for example, are very stringent, reflecting greater affluence and a greater willingness to pay for more safety. The standards of these countries are not always appropriate in poorer, less developed countries with fewer resources and more pressing needs. It may be rational for a government like that of India to prefer a plant design that increases jobs and reduces the price of goods at the expense of safety. The United States government made different trade-offs between safety and other values at

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148 "Transnational corporations might not find it profitable to invest in less developed countries if they were required to install extensive safety equipment or to employ less hazardous technologies. One reason that companies in developed countries go abroad, in fact, is to take advantage of a looser regulatory environment in order to utilise manufacturing methods that are prohibited at home." Boatright, 3rd edn., above n 11, 386.


150 See, for some of these advertisements, *Fortune*, above n 113, 94-97. UCC continued to give advertisements about its ‘environmental excellence’ even after the Bhopal gas leakage. *Id.*, 345.

151 See, for a critique of treating loss of lives in Bhopal as an acceptable risk for development, Morehouse & Subramaniam, above n 137, 133-34.

152 Donaldson, for example, cites international business textbooks that use ‘cultural relativity’ as a means ‘to justify practices abroad which, although enhancing corporate profits, would be questionable in the multinational’s home country.’ Thomas Donaldson, ‘Multinational Decision-Making: Reconciling International Norms’ (1985) 4 *Journal of Business Ethics* 357, 358.
earlier stages of the country's economic development. On the other hand, the marketing of hazardous consumer products abroad or the exposure of workers to easily prevented workplace hazards may be considered a violation of basic human rights. 153

Boatright also considers several alternative variables — i.e., minimal and maximal duties, fundamental international rights, the negative harm principle, and the rational empathy test — of an ethical framework within which MNCs could determine how to do business in Rome. 154 Although Boatright admits that UCC as a parent company must bear a ‘heavy responsibility’ for Bhopal, 155 upon application of this ethical framework to the Bhopal case he seems to justify the conduct of UCC in applying inferior safety standards. 156 For example, he argues that the level of acceptable risk varies from one setting to another, 157 that risk could be increased ‘by local conditions beyond the control’ of MNCs, 158 that assessing risk in less developed countries is a complicated task, 159 or that ‘[l]ower safety standards in the facility [i.e., the Bhopal plant] were justified to some extent by the desire of the Indian government to boost the industrial output of the country and provide jobs and needed products.’ 160

Broadly speaking, four arguments are central to Boatright’s thesis. UCC, Boatright suggests, was morally justified in adopting inferior standards in the Bhopal plant because:

- morally relevant local differences existed between ‘home’ (the US) and ‘Rome’ (Bhopal);
- it was not easy for UCC to assess risk in a developing country like India;

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153 Boatright, 3rd edn., above n 11, 379 (emphasis added). In subsequent edition of the book, Boatright has substituted the example of Bhopal with another scenario related to double standards practiced by pharmaceutical companies. Boatright, 4th edn., above n 31, 414; Boatright, 5th edn., above n 58, 407.
155 Id., 385. Worth Loomis, the former President of Dexter Corporation, categorically wrote that ‘the responsibility of the parent corporation for the human rights violations of its subsidiaries is very high’ and that ‘a parent corporation should not consciously allow its subsidiaries to have lower moral standards than its own.’ Worth Loomis, ‘The Responsibility of Parent Corporations for the Human Rights Violations of Their Subsidiaries’ in Addo (ed.), above n 1, 145.
156 Boatright, 3rd edn., above n 11, 385-88.
157 ‘Thus, a country with a desperate need to raise food for a growing population might accept a trade-off that creates a greater risk of an industrial accident in return for more fertilizers and pesticides. Similarly, a government might accept lower safety standards as the price for gaining local control and creating jobs for its own citizens.’ Boatright, 3rd edn., above n 11, 386.
158 Id., 386.
159 ‘Assessing risk in less developed countries is greatly complicated by the difficulty of determining the relative weight that other people place on the various benefits and harms.’ Id., 386.
the Indian government accepted a higher level of risk because of its unique local
developmental needs; and

- in comparison to consumers of developed countries, the Bhopal victims did not
  have the capacity and willingness to pay for higher safety standards.

I will try to demonstrate below that none of these justifications holds much water
upon closer scrutiny. Conversely, even if we concede, for the sake of argument, that
the justifications advanced by Boatright have merit, it seems that UCC violated the
human rights of the Bhopal victims even by his yardstick. Boatright admits that 'the
marketing of hazardous consumer products abroad or the exposure of workers to
easily prevented workplace hazards may be considered a violation of basic human
rights.'\(^{161}\) We should not forget that the product which proved hazardous (MIC gas) in
Bhopal was initially exported from the US, and that the hazards created in the Bhopal
chemical plant were easily preventable had there been a willingness on the part of
UCC. Moreover, it defies logic as well as any moral compass that Boatright considers
the marketing of hazardous consumer products abroad a violation of basic human
rights, but finds no such violation if the same products are manufactured locally using
a hazardous technology.

6.3.1.1 Were the differences between Bhopal and West Virginia ‘morally relevant’?
Let us try to find out, first, how Bhopal (Rome) was different from West Virginia
(home) and second, whether those differences were morally relevant so as to justify
the application of inferior safety standards. Bhopal was significantly different from
West Virginia in many ways. It was (and is) a small city in the heart of India, striving
for industrial development. The infrastructure of transport, safety, health, and
communication at Bhopal was not comparable with West Virginia. In terms of
employment opportunities, wages, and working conditions, people of Rome (Bhopal)
stood nowhere near to the populace of home (West Virginia).\(^{162}\) In Bhopal, for
instance, near the plant site there were many slum dwellers, with no bargaining power,
who had migrated from different parts of the country in search of jobs. These people,

\(^{160}\) Id., 387.
\(^{161}\) Id., 379.
\(^{162}\) See generally, for an economic and safety gap between developed and developing countries, Cassels,
The Uncertain Promise, above n 113, 35-45.

299
who constituted much of the work force in the plant, were generally poor and illiterate, and probably unlike the people employed at the West Virginia plant, the ‘training, habits, and attitudes of Indian employees were lax and naïve.’ The Indian regulatory framework relating to the use of hazardous technology, working conditions, health and safety of workers, and the environment was either non-existent or non-workable.

Boatright is, therefore, right when he observes that in terms of local conditions Bhopal was significantly different from West Virginia. But were these differences, even if material, morally relevant to determine which standards should UCC-UCIL apply at the Bhopal plant? What should be the test to judge the ‘moral relevance’ of local differences so as to justify the adoption of different, inferior standards? Boatright does not elaborate what he means by ‘morally relevant differences.’ I suggest that one way to judge whether a local difference is morally relevant or not, could be to determine if the said difference promotes the realisation of human rights or not. Despite accepting the universality of human rights, I do believe that local (including cultural) differences play an important role in contextualising, operationalising and realising human rights. But a distinction needs to be made between two types of local differences. If local differences require adjustment in standards to such an extent that their accommodation is likely to abridge human rights, then such local differences, howsoever material they might be for the place in question, should be treated as irrelevant. On the other hand, if human rights are promoted by the application of different – which need not be inferior – standards in

163 Donaldson, above n 4, 111.
164 India enacted its comprehensive environmental legislation – the Environment Protection Act – only in 1986, i.e., after Bhopal. There were some legislations dealing with industrial safety (the Factories Act 1948), air pollution (the Air (Prevention and Control of Pollution) Act 1981) and insecticides (the Insecticides Act 1968), but there were either outdated or lacked implementation. See C M Abraham & A Rosencranz, ‘An Evaluation of Pollution Control Legislation in India’ (1986) 11 Columbia Journal of Environmental Law 101.
165 Fuller defines ‘morality of duty’ as ‘the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark.’ Lon L Fuller, The Morality of Law, 2nd Indian reprint (New Delhi: Universal Law Publishing Co. Pvt. Ltd, 2000), 5-6. In the current era, human rights, in essence, are such basic moral rules without which it is impossible to build an orderly society.
view of some local differences, then such local differences should be considered as relevant.

Let me take some concrete as well as hypothetical examples to illustrate this distinction further. In order to take care of the religious concerns of Hindus, McDonald's in India stopped using beef flavour and/or beef oil for preparing its French fries. As the application of different (but not inferior) standards in this case did not violate human rights, the religious belief of Hindus, a local difference, could be considered a morally relevant difference. But this could not be said of the situation when MNCs exploit illiteracy and a higher level of unemployment to pay unreasonably low or unjust wages, release toxic effluents in view of the undeveloped environmental regime of a country, or insist on their right to continue advertising and marketing some cigarettes as 'light' or less harmful in those countries where tobacco regulations are not stringent.

The differences between Bhopal and West Virginia highlighted in the beginning should have been irrelevant to the question of applicable safety standards in the Bhopal plant, because any dilution in safety standards in the chemical plant directly risked several important human rights, including the right to life, the right to health, the right to a safe place of work, the right to information, the right to livelihood, the right to a clean environment, and the right to receive just and speedy relief. The risk

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168 See 'No Beef in McDonald's Fries', <http://news.bbc.co.uk/1/hi/world/south_asia/1312774.stm> (last visited 31 August 2006).
169 This is not to suggest that MNCs should pay 'same' wages everywhere. It only requires that the same factors are taken into consideration to fix wages at different places. Even Boatright agrees that 'the disparity is not unjust if the same mechanism for setting wages is employed' at two different places. Boatright, 3rd edn, above n 11, 379 (emphasis in original). Compare Ian Maitland, 'The Great Non-Debate Over International Sweatshop' in Shaw (ed.), above n 70, 49 (a forceful defence of MNCs' payment of market wages as they prevail in host countries) with Arnold Berleant, 'Multinationals, Local Practice, and the problem of Ethical Consistency' (1982) 1 Journal of Business Ethics 185, (who argues for equal reward for equal work principle internationally).
170 'Tobacco Giants in Court Battle to Sell "Light" Cigarettes Overseas', South China Morning Post (2 September 2006), A9.
171 'The accident with the subsidiary of the American MNC Union Carbide in Bhopal, India in 1984 is a sad example of the effect MNCs can have on this right [to life]. Nicola Jägers, 'The Legal Status of Multinational Corporation under International law' in Addo (ed.), above n 1, 259, 261 (emphasis in original). Arguably, the right to life of even unborn future generations was breached.
172 See Amnesty, Clouds of Injustice, above n 116, 28-34.
at the Bhopal plant was generated and imposed not by an ignorant and incapable entity, but by UCC which was both aware of the risks and capable of averting them. Different considerations may arguably apply when one cannot reasonably foresee the risk generated by one's action or one does not have the technical and/or economic resources to avoid it. In the Bhopal case none of these two factors were applicable. UCC was not naïve as to the composition and toxic nature of MIC. It had spent millions of dollars in research on MIC and had described itself as a ‘pioneer’ in technology. In fact, Edward Munoz, the technical representative of UCC, in a letter to convince the Indian government, had claimed that ‘during the last three years, Union Carbide Corporation has made dramatic improvements in the production technology.’ Similarly, the economic and technological capacity of UCC had undoubtedly placed it in a position where it could have adopted the home (US) or superior standards at the Bhopal plant.

To sum up, Boatright is right when he argues that home standards might not be appropriate everywhere, because MNCs might need to adjust standards to local differences. But not all differences are relevant to resolve MNCs’ dilemma as to varying standards. I have tried to show above that although there were significant differences between Bhopal and West Virginia, they were not morally relevant so as to justify UCC’s adoption of inferior safety standards in the Bhopal plant. The differences could hardly be morally relevant, as Boatright seems to suggest, when their accommodation leads to a violation of human rights. Local differences should not be used as a pretext to apply different, inferior standards, but rather should be

173 For example, to attract responsibility under the principle of double (PDE) effect, it is necessary that agents either ‘foresee’ or ‘should have foreseen’ that harmful side effects will occur. Under this principle, actors are blamed ‘only for those things that lie within power to do something about.’ Wiggen & Bomann-Larsen in Bomann-Larsen & Wiggen (eds.), above n 86, 5-6 (emphasis in original).

174 See ‘Complaint Filed by the Union of India in the US District Court, New York’ in Upendra Baxi & Thomas Paul (eds.), Mass Disasters and Multinational Liability: The Bhopal Case (Bombay: N M Tripathi Pvt. Ltd., 1986), 3-4. The complaint mentions that ‘defendant [UCC] represented to plaintiff that it was a pioneer in pesticide research and development with extensive research facilities . . . .’ It should be noted that this assertion was not contested by the UCC in its Motion.

175 Baxi & Paul (eds.), above n 174, 66.

176 UCC was the seventh largest chemical company in the US, with both assets and annual sales approaching $10 billion. It owned and operated business in forty countries. See Shirivastava, above n 113, 35.

177 By applying the PDE, Baxi reaches the same conclusion: ‘[I]n designing and maintaining efficient safety systems, the UCC management was clearly obligated by a PDE regime to maintain the same level of state-of-the-art safety systems across its worldwide MIC-based production.’ Baxi in Bomann-Larsen & Wiggen (eds.), above n 86, 188.
invoked to promote the realisation of human rights.\textsuperscript{178} After all, ‘[p]overty is no excuse for slavery.’\textsuperscript{179}

6.3.1.2 Could UCC really not assess the risks in Bhopal?

Boatright argues that in view of several factors, the task of UCC to assess risks for its Bhopal plant was ‘complicated,’ implying thereby that whatever safety standards it applied should be accepted as appropriate. The risk assessment task was complicated because UCC, for example, could not have known ‘the relative weight that other people [say people of Bhopal] place on the various benefits and harms.’\textsuperscript{180} It is plausible to argue that risk assessment was neither necessary nor morally desirable in view of an obvious value disparity between the potential benefits (e.g., employment or better wages) and harms (e.g., high likelihood of death or permanent disability).\textsuperscript{181} Any suggestion of risk assessment necessarily requires giving a monetary value to human lives\textsuperscript{182} and probably other human rights such as the right to health or the right to a clean environment. Scholars have already made a strong case why such cost-benefit analysis, which would make human rights a subject of trade-offs,\textsuperscript{183} is not suitable for the protection of human rights which (should) enjoy an absolute quality in terms of inviolability.\textsuperscript{184}

\textsuperscript{178} Henkin in a general context argued: ‘Cultural differences and traditions may explain, even justify, different ways of giving expression to the values accepted by all in the international human rights documents; they cannot explain or justify barbarism and repression.’ Louis Henkin, The Rights of Man Today (Boulder, Colorado: Westview Press, 1978), 129.

\textsuperscript{179} Ron Blackwell in Harvard Law School, An Interdisciplinary Discussion, above n 12, 15.

\textsuperscript{180} Boatright, 3rd edn., above n 11, 386.

\textsuperscript{181} The risk assessment is also problematic if it gives too much attention to the overall, cumulative welfare. Donaldson notes:

\begin{quote}
Obviously, pesticide risks to filed workers must be weighed against the crying need of a poor country for greater food production; but when that development is carried entirely on the back of the poor, when the life expectancy of the filed worker is cut by a decade or more while the life expectancy of the urban elite increases by a decade, then distributive moral factors should override consequential cost-benefit offered in the name of overall welfare.
\end{quote}

Donaldson, above n 4, 113-14 (emphasis in original).


\textsuperscript{183} ‘A right is not something that can be assigned on “efficiency” grounds; a right is precisely an individual’s “trump” against the claims of efficiency ....’ Richard N Langlois, ‘Cost-Benefit Analysis, Environmentalism and Rights’ (1982) 2 Cato Journal 279, 283 and also generally. See also the materials cited in Chapter 5, note 235.

Conversely, if it is agreed that risk assessment was necessary as part of the normal business decision-making process, UCC was capable of making an appropriate risk assessment, but failed to do so. Had UCC been serious about assessing the relative weight that Indian people attributed to ‘access to employment’ vis-à-vis ‘life itself,’ it could have gleaned this by making relatively little effort, as UCC employed numerous Indian workers. One should also not forget that UCC was not a new entrant to India or Bhopal and therefore, its management must have gained some insights into the social and cultural norms of the Indian people.

Boatright, however, does not stop at the difficulty in evaluating the potential risks in India. He also points out that risks were increased by local conditions beyond the control of UCC – apparently referring to illegal slums that the state government allowed to develop near the Bhopal chemical plant.\footnote{Boatright, 3rd edn., above n 11, 386.} This reminder, however, fails to note that the gas leakage affected about two thirds of the population of the entire city, not just the people living in the immediate vicinity of the plant.\footnote{The Indian government also pointed out that it was not unusual for UCC to establish its plants in populated areas. For example, the West Virginia plant of UCC was also located near a college campus and a home of handicapped adults. ‘Reply of Union of India’ in Upendra Baxi & Amita Dhanda (eds.), Valiant Victims and Lethal Litigation: The Bhopal Case (Bombay: N M Tripathi Pvt. Ltd, 1990), 109, 126, 133.} Even if one accepts that there was some contributory negligence on the part of the government, this does not exonerate UCC from exercising reasonable care that it should have taken, as a matter of law as well as morality, under the circumstances.

Reliance could also be placed on the fact that laws and policies of the Indian government pertaining to foreign investment, licensing, import of technology and employment of foreign technicians (i.e., local conditions beyond the control of UCC) increased risks of a gas leak from the Bhopal plant.\footnote{UCC, in fact, specifically made this point. Below n 221.} Such local conditions could undoubtedly cause hardship to MNCs in certain situations and in turn provide a justification – though possibly only a limited and suspected one – to the conduct that is impugned for violating human rights.\footnote{Yahoo!, Google, and Microsoft, for example, made an argument that because of local laws they have no option but to indulge in internet censorship and disclose the personal details of cyber-dissidents to the Chinese authorities. I have critiqued this rationale elsewhere. Surya Deva, ‘Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact or the Global Online Freedom Act?’ (2006) 39 George Washington International Law Review (forthcoming).} However, it seems that these ‘beyond...
control' local factors in no way limited UCC's decisions as to the design of the plant or its safety processes. 189

6.3.1.3 So, what if the Indian government agreed to a higher level of risk?

Another argument that is rooted in local conditions is that such conditions reflect different needs of countries and that MNCs should respect the choices made by governments of those countries in which they operate. UCC was justified, Boatright argues, in applying inferior safety standards at the Bhopal plant because India had accepted a higher level of risk in view of her local development needs. 190 The Indian government could have been interested in the production of pesticides at a low cost and in the creation of the maximum possible number of jobs (which country would not wish for that?), but these expectations of a host country do not justify almost total relinquishment of safety standards. As explained in the next section, UCC was under a legal obligation to adopt safety standards commensurate to the nature of activity and this obligation was not negated merely because the government consented to a higher degree of risk.

The argument made by Boatright is based on the 'trade off' hypothesis - that the government of a country could agree to subject its citizens to a higher but avoidable risk in order to meet certain objectives. 191 Bowie, for example, argues that a country could impose lax safety standards regarding drug trials in order to save lives, and that under this scenario it will be 'morally permissible to sell a drug abroad that could not yet be sold' in the home country of an MNC. 192 So, in view of a trade off (say between safety and employment) by the Indian government, the conduct of UCC was justified. But Bowie might not approve the conduct of UCC if India had 'no safety

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189 'Reply of Union of India' in Baxi & Dhanda (eds.), above n 186, 124-27, 137-38.
190 Donaldson makes a similar argument in that his 'ethical algorithm' will permit an MNC to follow inferior standards in the host country if this is due 'to the host country's relative level of economic development.' Donaldson, above n 4, 102. He argues that 'it makes sense to consider ourselves and our own culture at a level of economic development relatively similar that of the other country. And, if, having done this, we find that under such hypothetically altered social circumstances we ourselves would accept the lower risk standards, then it is permissible to adopt the standards that appear inferior.' Id., 124 (emphasis in original).
191 In general non-Bhopal context, Steiner argues that 'certain right may be understood to compete with certain goals. ... Investors or local labour may be willing to accept the "human-rights costs" of some degree of repression as part of an assumed trade-off leading to material gain.' Henry Steiner in Harvard Law School, An Interdisciplinary Discussion, above n 12, 17.
standards at all.\textsuperscript{193} This distinction made by Bowie between lax and no standards is prima facie problematic and in fact, fails to satisfy even his criterion ‘that we cannot impose avoidable harm on an innocent third party.’\textsuperscript{194} Nonetheless, even if we assume the ‘trade off’ hypothesis to be valid, at least two conditions should be met to grant it a moral legitimacy: first, there is a flow of information between the MNC, the government and the people, and second, people have a right to participate in the relevant decision-making processes. None of these two conditions were satisfied in the Bhopal case.

Two additional points could be made here. First, UCC should be liable for Bhopal even under the lower safety standards yardstick it elected to apply, for it failed to ensure that even those standards are complied with in the chemical plant,\textsuperscript{195} and this failure undoubtedly contributed to the gas leak. Second, it is also generally regarded as unethical to violate human rights by exploiting the lack of standards or gaps in the regulatory framework of a host country. Morehouse and Subramaniam ask:

And what if there are no standards? Is liability, or more broadly social responsibility, only limited to relevant regulation? Suppose UCC were to dump nuclear waste upon a community which had no laws governing waste disposal, and the lives of its members were thereby jeopardized? Could Union Carbide disclaim all responsibility?\textsuperscript{196}

There is no legal or moral bar to an MNC filling in the regulatory void in the host state by applying in-house standards based on the home state or international norms.\textsuperscript{197} In fact, not doing so could be unethical in some cases.\textsuperscript{198}

\textsuperscript{192} Bowie, above n 77, 243-44. The reason is that ‘the home and the host country have different moral principles.’ \textit{Id.}, 243.

\textsuperscript{193} See \textit{id.}, 244.

\textsuperscript{194} \textit{Id.}, 243.

\textsuperscript{195} At the time of accident none of the safety devices in the plant were working. See Cassels, \textit{The Uncertain Promise}, above n 113, 19 and Shrivastava, above n 113, 56-57.

\textsuperscript{196} Morehouse & Subramaniam, above n 137, 136.

\textsuperscript{197} Loomis, for example, believes that ‘many global corporations today are adopting environmental standards of their own as a matter of corporation policy and applying them worldwide in the absence of local environmental law’. Loomis in Addo (ed.), above n 155, 149.

\textsuperscript{198} ‘Few would argue that exposing workers to hazardous asbestos is the ethically correct policy. A company must sometimes refuse to adopt host-country standards even when there is no law requiring it.’ Donaldson & Dunfee, above n 61, 46 (emphasis added).
6.3.1.4 Should the protection of human rights depend on 'greater affluence and a greater willingness to pay for more safety'?

Finally, Boatright connects the prevalence of higher safety standards in developed countries to 'greater affluence and a greater willingness' of consumers and workers to pay for better safety. In other words, the poor people of Bhopal — who could not afford or were unwilling to pay a premium for higher safety standards — should not have aspired to a better level of human rights protection. At least two arguments could be advanced to counter a connection between safety standards and economic capability. It is undeniable that there is a positive relation between economic development and an improvement in lifestyle and general standards (not merely safety standards). But there are different levels of safety standards to which one must have regard. Whereas the breach of some safety standards might cause only discomfort, inconvenience or minor injuries, the abridgement of others might directly challenge the very survival of humans. In Bhopal, as the level of safety standards had a direct relation to the enjoyment of the right to life,\textsuperscript{199} the applicability of life-preserving standards should not have been dependent upon the affluence and the paying capacity of stakeholders.\textsuperscript{200} In addition, the above linkage proposed by Boatright is immoral because it, in essence, makes a distinction between the value of life in developed and developing countries.\textsuperscript{201} It is doubtful if the human rights discourse could tolerate such a discriminatory differentiation in the value of human lives.

Second, it could be contended that the greater affluence and/or a greater willingness to pay should not be determinative of those safety standards which have a direct bearing on the realisation of human rights, for the protection of human rights does not, at least in theory, depend upon the financial capacity of right bearers. Of course, the protection and promotion of human rights imposes a financial burden on duty bearers, but this is different from saying that some people should have a better entitlement to human rights merely because of their wealth. It will be unfortunate for the human

\textsuperscript{199} The right to life ... could mean, for corporations, the need to ensure that the working environment is safe and secure. It also tasks corporations to ensure that their products and services do not threaten the lives of consumers or society at large.' Addo in Addo (ed.), above n 1, 28.

\textsuperscript{200} Howland writes that 'a clean environment is a right, and not a “good” which is traded in the marketplace.' Todd Howland, ‘Can International Law Prevent Another Bhopal Tragedy?’ (1987) 15 Denver Journal of International Law & Policy 301, 314.

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rights movement if the applicable standards are subjected to market principles and market fluctuations.

At this stage it may be relevant to deal with another argument that could be made on the basis of the text of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 2(1) of the ICESCR stipulates that each state party undertakes to take steps "to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant." Could this provision be used to contend that UCC was justified in applying inferior safety standards in Bhopal? It is possible to counter any such proposition. As safety standards in the Bhopal chemical plant directly concerned the right to life (a right which can be derogated only in emergencies), the above provision could not lend any support to UCC's case. But even if the above yardstick of the ICESCR was applicable in relation to certain rights (e.g., the right to health), UCC was under an obligation to ensure the satisfaction of "minimum essential levels" of such rights. It is doubtful if UCC — which apparently did not face any resource constraints — fulfilled its "minimum core" obligation to maintain essential safety standards in the Bhopal plant.

Thus, with the help of Bhopal, I have tried to show that both "business" and "academic" justifications of the business approach are unsound since they fail to ensure protection of even bare minimum human rights (such as the right to life and the right to health). When considering applying different standards in different jurisdictions, MNCs should take into account only such local differences which promote the realisation of human rights; those local differences the accommodation of which would undermine human rights could hardly be defended as morally relevant. UCC might have ensured, as outlined below, a better level of protection of human rights by adopting the human approach.

201 "Hazardous production should not be further aggravated by differential management of safety technology that devalues life, livelihoods, and minimal dignity in developing countries." Baxi in Bomann-Larsen & Wigen (eds.), above n 86, 188 (emphasis added).
203 See Committee on Economic, Social and Cultural Rights, 'General Comment No. 3: The Nature of States Parties Obligations (Article 2(1) of the ICESCR), para 10,
6.3.2 The Human Approach: How Could, and Should, UCC have Resolved the Dilemma in Bhopal?

What does the human approach counsel MNCs like UCC to do when they face a business dilemma of varying safety standards regarding their operations in different countries? The approach posits that when there is a high probability that the adoption of lower standards will result in a violation of human rights (especially those which Shue characterises as 'basic' rights),\(^\text{204}\) MNCs must not apply lower standards. It should not be an adequate moral\(^\text{205}\) or legal justification\(^\text{206}\) for the concerned MNC that it complied with lower, non-existent, or unimplemented local standards applicable in the host country.\(^\text{207}\)

On the basis of the analysis in the previous section, it is safe to argue that UCC was aware of the risks associated with MIC gas and had the technical as well as the financial capability to handle these risks. UCC could and should have also foreseen that if proper precautions are not taken, MIC could react violently and leak out of the tanks, and that such leakage would cause serious harm to, inter alia, the life and health of people living in the surrounding areas. Despite this, UCC-UCIL exercised inadequate care to ensure that the hazards associated with the MIC gas were contained if not eliminated altogether. In other words, the causes of the death and

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\(^{204}\) Among others, Shue considers security rights and subsistence rights as basic rights. Shue, above n 112, 20-30. Notably, his definition of subsistence rights is quite broad and relevant in the context of allegations of corporate human rights abuses:

- By minimal economic security, or subsistence, I mean unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter, and minimal preventive public health care.
- Many complications about exactly how to specify the boundaries of what is necessary for subsistence would be interesting to explore. But the basic idea is to have available for consumption what is needed for a decent chance at a reasonably healthy and active life of more or less normal length, barring tragic interventions.

\(^{205}\) The mere fact that a country permits bribery, unsafe working conditions, exploitive wages, and violations of human rights does not mean that these practices are morally acceptable, even in that country. 'Boatright, 3rd edn., above n 11, 379, and generally 380-81.

\(^{206}\) An acknowledgement by a corporation that it conducts its business in accordance with the host country laws might offer 'insufficient guidance.' Webley in Addo (ed.), above n 91, 107.

\(^{207}\) Morehouse & Subramaniam, above n 137, 136. Parkinson also observes: 'Although it may not always be appropriate (because not in the interests of host communities) to insist that companies comply with the same standards throughout the world, the proposition that they need do no more than obey local laws will in many cases be morally unappealing.' John Parkinson, 'The Socially Responsible Company' in Addo (ed.), above n 1, 49, 57.
illness occasioned by Bhopal were not ‘outside the control of the society,’ in this case the corporate actors.

The principle of double effect (PDE) – which could be used to ‘consider in advance what side-effects might result from actions and, if presumed harmful, how these effects ... [could] be prevented or minimised’ – should also have cautioned UCC to abandon the business approach in favour of the human approach. This principle entails that: ‘Actors are responsible for such side-effects when these are foreseeable and they still choose to proceed. Actors are blameworthy for harmful side-effects when they allow them to happen if they could have been prevented, or when they make no, or only insignificant, attempt to minimise them.’ UCC was clearly responsible as well as blameworthy under the PDE too.

In summary, this mixture of risk awareness, capacity to avert risks, and foreseeability of impinging upon human rights should have compelled UCC to decide that the adoption of lax or lower standards was not an appropriate option. In other words, instead of being influenced by the business approach, UCC could and should have been guided by the human approach and applied the highest possible safety standards in the Bhopal plant. It failed to do so, presumably because the Bhopal plant no longer had any financial importance for UCC and therefore, the safety, viability and successful running of the plant were no longer high on the agenda of UCC.

The adoption of a human approach would have required UCC to take at least two measures. First, as an exporter of a potentially hazardous technology, UCC was under

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208 Shue, above n 112, 25.
209 The PDE is an ethical principle which ‘best known from the “just war” tradition,’ Wiggen & Bomann-Larsen in Bomann-Larsen & Wiggen (eds.), above n 86, 4. Baxi examines both the difficulties and relevance of applying the PDE to corporate decisions that might impinge upon human rights. Baxi in Bomann-Larsen & Wiggen (eds.), above n 86, 175.
211 ‘PDE suggests that “legitimate” business operations are those that are consistent with human rights norms, standards, and values; the duty to avoid or minimise “negative” side-effects (i.e., those that violate human rights) ought to inform corporate conduct, governance, and these side-effects may be justified only insofar as they are “proportionate” to the legitimate (business) “objectives”.’ Baxi in Bomann-Larsen & Wiggen (eds.), above n 86, 197, note 8.
213 Chopra proposes that a transnational hazardous business activity ‘must satisfy the highest standards of environmental protection’ and ‘human rights.’ Chopra, above n 138, 280.
a moral duty to caution not only the importing country but also other stakeholders who might be directly affected adversely by the proposed transfer of technology. Applying with a slight modification McGarity’s ‘low road approach,’ UCC should have properly warned the Indian government about the dangers involved in MIC-based production of pesticides so that the government could have made an informed decision whether or on what terms to grant permission to the plant. On the basis of available evidence, it is doubtful if UCC ever specifically communicated adequate warnings about the risks involved in the Bhopal plant to the Indian Government.

214 Under the ‘low road’ approach proposed by McGarity, the exporting country will warn the recipient country about the dangers of a particular technology and then let that country decide for itself. McGarity, above n 38, 334-35.

215 UCC though claimed, on the basis of various correspondences with central and state governments, that information about the nature of MIC as well as potential dangers in its processing were communicated to India. ‘Written Statement of UCC in the Court of the District Judge, Bhopal’, as reproduced in Baxi & Dhanda (eds.), above n 186, 44-48. However, it must be noted that merely stating that MIC is a lethal, toxic or hazardous gas does not fully discharge the burden of giving an adequate warning. Hazardous substances are necessary evil and people consciously deal with them all the time. The real question, therefore, is about the level of risk as well as probability of harm in dealing with a particular potentially hazardous substance, and the capability to minimise such risk/harm.

216 ‘Written Statement of UCC in the Court of the District Judge, Bhopal’, as reproduced in Baxi & Dhanda (eds.), above n 186, 38.

217 ‘Left alone, our government will not always look after the public interest.’ Howland, above n 200, 311.

218 ‘A man is not bound at his peril to fly from a risk from which it is another's duty to protect him, merely because the risk is known.’ Sir Frederick Pollock, The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law, 13th edn., (London: Stevens & Sons Ltd., 1929), 173.

Second, the responsibility of UCC does not end at merely communicating the risks of its operations to the stakeholders; it was still under a legal obligation to exercise ordinary care expected in the given circumstances. Even if the Indian government might have given informed consent to UCC-UCIL to establish and operate a hazardous activity at Bhopal, UCC should have at least applied the home, if not higher, standards related to technology and safety at the Bhopal chemical plant. One
reason is that the consent might have been informed but still not free, given the disparity between the bargaining positions of MNCs and developing countries. Moreover, consent is not a good defence to negligent conduct; consent by ‘neighbours’ to a risky activity is not a license to operate in total disregard for their safety. Rather, the consent given by the Indian government must have been based on the premise that UCC-UCIL would adopt a safe technology and implement reasonable safety measures expected, given the magnitude of risk.

UCC also suggested that variations, if any, in technology or safety standards between its West Virginia plant and the Bhopal plant were attributable to the laws, regulations and policies of the Indian government. I have noted before, this does not seem to be the case. However, even if it is assumed for the sake of argument that it was the rules and policies of the Indian government that compelled UCC to adopt lower standards, UCC could have still insisted that it would not operate unless the said rules or policies which compromise the plant’s safety are modified, or that it would supplement those rules and policies with internal measures to ensure adequate safety. There is no reason to believe that UCC, if it had wished, could not have convinced and prevailed over the Indian government in this respect. It is not to be forgotten that UCC had successfully persuaded the Indian government to grant, for instance, an exemption from a law that did not allow a foreigner to hold more than 40 per cent shares in an Indian company. The difference between the two scenarios is apparent:

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219 See Chapter 2.3.1. This is perhaps one of the reasons why Chopra argues that the ‘dilution of technology to a lesser level while operating in developing countries should be banned, even if the importing nation so desires.’ Chopra, above n 138, 280

220 While ruling on the applicability of the defence of volenti non fit injuria to the tort of negligence, Lord Denning observed:

Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant: or, more accurately, due to the failure of the defendant to measure up to the standard of care that the law requires of him.

Nettleship v Weston [1971] 2 QB 691, 701. Lord Diplock also opined that ‘the maxim in the absence of expressed contract has no application to negligence simpliciter.’ Wooldridge v Sumner [1963] 2 QB 43, 69. See also Dann v Hamilton [1939] 1 KB 509, 516-17. Pollock also writes that ‘the whole law of negligence assumes the principle of volenti non fit iniuria not to be applicable.’ Pollock, above n 218, 172.

221 ‘Written Statement of UCC in the Court of the District Judge, Bhopal’, as reproduced in Baxi & Dhanda (eds.), above n 186, 51-55, 72. ‘A manual system, Tyson [a Danbury safety inspector while appearing before the congressional subcommittee] said, meant more jobs, and this was a particularly vital factor in India.’ Kurzman, above n 120, 25.

222 Above n 189.

223 See Chapter 2.3.1.
UCC accorded more importance to the control that it must have over UCIL than to the safe running of the Bhopal plant. Of course, such control could have also been used to enhance safety of the plant, but apparently this did not happen; the control was rather used to impose cost-cutting measures that directly undermined the safety mechanisms in place.

In short, UCC did not opt for the options canvassed above. It decided, rather, to choose an easier path, that is, to comply with non-existent or lower standards because that made good business sense at the relevant time. UCC’s preference for this easier path, which was arguably based on the business approach, resulted in human rights violations. Had UCC adopted the human approach and behaved like a good corporate citizen, this might have afforded a better level of human rights protection to the people of Bhopal.

6.4 CONCLUSION

This chapter highlighted the dilemma that MNCs face while operating in different countries which differ drastically from each other in terms of social, economic, political and cultural factors. MNCs usually have a choice between at least three sets of standards: the host standards, the home standards, and the international standards. The chapter addressed the question: how should MNCs deal with this dilemma, especially because any decision taken in this regard is likely to have a direct bearing on the protection of human rights? From an ‘internal’ point of view (by placing oneself in the shoes of corporate executives), two approaches were proposed which do or should help MNCs in overcoming this complex dilemma: the business approach and the human approach. These two approaches represent two contrasting visions of the role and place of corporations in society. Whereas the business approach is

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225 Addo argues that ‘a good corporate citizen can be expected to appreciate the value of the application of higher standards of behaviour if the legal requirements lag too far behind acceptable standards in practice.’ Addo in Addo (ed.), 20. Professor Bhagwati also argues that national mandatory codes should extend to MNCs’ operation abroad: ‘In short, the US firms must abide by the basic principles that are expected at home.’ Jagdish Bhagwati, In Defence of Globalisation (New York: Oxford University Press, 2004), 194.
wedded to Friedman's classical view, the human approach is grounded in a modified version of stakeholder theory.

With the help of Bhopal, I have tried to demonstrate that the business approach will often fail to protect the human rights of people in developing countries, for this approach encourages MNCs to always adopt host standards which are inadequate on many occasions. For this reason, MNCs' decisions should instead be guided by the human approach: apply in host countries the home or international standards modified in view of morally relevant local differences. Local differences are, according to this approach, morally relevant only if they facilitate a better realisation of human rights.

In the next chapter, I critique and expose the limitations of the theory of responsive regulation to support a regulatory regime that could effectively make MNCs accountable for human rights abuses. Chapter 8 then outlines, as an alternative, a regulatory framework based on the theory of integrated regulation.
CHAPTER 7: THE INTEGRATED THEORY OF REGULATION: A CRITICAL RESPONSE TO ‘RESPONSIVE REGULATION’

7.1 INTRODUCTION

I have by now dealt with two legs of the tripod of the ‘integrated theory’ of regulation: 1 why and what. In Chapter 5, I advanced a positive rationale for why corporations should have human rights responsibilities. Chapter 6, on the other hand, examined what human rights standards corporations that operate at a transnational level should follow. This chapter, along with the next chapter, examines the third and final leg of the integrated theory, that is, how to make MNCs accountable for human rights violations in an effective manner. 2 I demonstrated in Chapter 4, on the basis of surveying the working of six regulatory initiatives, that the existing regulatory framework dealing with human rights violations by MNCs is inadequate. There is, therefore, an evident need to explore a regulatory framework that could redress the current situation of MNCs’ impunity for human rights violations.

1 ‘Regulation’ generally ‘refers to the means by which any activity, person, organism or institution is guided to behave in a regular fashion, or according to rule.’ Sol Picciotto, ‘Introduction: Reconceptualising Regulation in an Era of Globalisation’ (2002) 29 Journal of Law & Society 1. Clarke writes: ‘While regulation ... implies intervention and has an etymological meaning of subjecting an area of conduct to rules, it is more accurately seen as a process whereby order is achieved in an area which has shown a propensity to disorder to an extent that demands attention.’ Michael Clarke, Regulation: The Social Control of Business between Law and Politics (London: Macmillan Press Ltd., 2000), 2 (emphasis added).

2 Donaldson frames a similar question: ‘But suppose one has determined to his or her own satisfaction what a corporation’s moral obligations are, ... how these obligations can be fulfilled.’ Thomas Donaldson, Corporations and Morality (Englewood Cliffs, New Jersey: Prentice-Hall Inc., 1982), 158 (emphasis in original).
This explorative exercise should ideally address at least two specific issues: identify an appropriate theory for regulating the conduct of MNCs, and apply the identified theory in order to develop a regulatory framework. Whereas this chapter deals with the question of a suitable theory for regulating MNCs' conduct, Chapter 8 will try to outline how a regulatory framework based on such a theory could be developed.

Over the years, various regulatory theories, strategies, and models have been mooted concerning how to mould the behaviour of targeted subjects and achieve optimal results as to the internalisation, implementation and enforcement of given regulations. Scholars have canvassed regulatory tools such as command and control, voluntarism, self-regulation, enforced self-regulation, responsive regulation, reflexive regulation, information-based regulation, economism, and market mechanisms. Regulatory strategies have been mooted at a general level as well as specifically with reference to making corporations accountable for human rights abuses in an effective manner.

In this chapter, I critically examine the theory of 'responsive regulation' put forth by Ian Ayres and John Braithwaite. The theory of responsive regulation, which could be seen as part of a wider critique that the 'command and control' model has attracted in recent times, has proved highly influential both generally and in the specific context of corporate regulation. Dine, for example, writes that as an alternative to the

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5 Fiona Haines, Corporate Regulation: Beyond 'Punish' or 'Persuade' (Oxford: Clarendon Press, 1997), 218. Gunningham also notes that the 'most influential work' within a new regulation paradigm 'is that of Ayres and Braithwaite.' Neil Gunningham, 'Introduction' in Gunningham et al, Smart Regulation, above n 4, 3, 11. Braithwaite explains why responsive regulation has been so influential: 'Responsive regulation has been an influential policy idea because it comes up with a way of
command and control model, there has been a distinct move towards following 'the
innovation in regulatory design suggested by Ayres and Braithwaite of enforced self
regulation. The efficacy of responsive regulation is specifically tested in the context
of the problem investigated in this thesis – how to ensure that MNCs respect their
human rights obligations. It is contended that although a synergy between persuasion
and punishment is desirable for successful regulation, the usefulness of the
progressive ‘enforcement pyramid’ in controlling and redressing human rights
violations by corporations is suspect and limited.

As an alternative, an ‘integrated theory’ of regulation is proposed here. The theory
seeks to achieve integration in the following three respects:

➢ between human rights issues and business issues;
➢ between the ‘why’, ‘what,’ and ‘how’ of corporate human rights responsibility
discourse; and finally
➢ between different available levels of regulation, strategies of implementation,
and types of sanctions.

What this three-fold integration entails and how it could be achieved is explained in
the last part of this chapter.

7.2 Responsive Regulation: A Critical Response

Ayres and Braithwaite elaborated in detail the idea of ‘responsive regulation’ in their
book Responsive Regulation: Transcending the Deregulation Debate, published in
1992. Recently, Professor Braithwaite has argued that the idea of responsive regulation – which requires
regulatory capability at the top of the pyramid – could work, with the inclusion of new strategies, even
'state regulation' of business and 'deregulation.' Writing against the backdrop of how states do and should regulate corporate activities, the two authors challenge, I think rightly, the impression that we are currently living in an era of deregulation. Many versions of enforced self-regulation have evolved since the publication of this book: 'directed self regulation,' for instance.

### 7.2.1 Understanding Responsive Regulation

The essence of responsive regulation is that regulation is 'responsive to industry structure in that different structures will be conducive to different degrees and forms of regulation.' According to this theory, regulatory agencies should keep in mind, among other factors, varying 'motivations' and 'objectives' of targeted firms. Regulators should also be 'responsive to how effectively citizens or corporations are regulating themselves before deciding whether to escalate intervention.' Responsive regulation is not canvassed as the best or universal model of regulation because 'the best strategy is shown to depend on context, regulatory culture, and history.' Flexibility is, thus, implicit in responsive regulation.

In this part, I first explain key ideas of the theory of responsive regulation and then critically assess its suitability to guide a regulatory framework dealing with corporate human rights responsibilities.

#### 7.2.1.1 Progressive enforcement pyramid

The central aspect of responsive regulation, Ayres and Braithwaite point out, is the concept of an 'enforcement pyramid' because 'the achievement of regulatory
objectives is more likely when agencies display both a *hierarchy of sanctions* and a *hierarchy of regulatory strategies* of varying degrees of interventionism. 20 Instead of choosing either persuasion or punishment, 21 the responsive regulatory model invokes a combination of both in a hierarchical order in which one starts with persuasion and then moves on, in an ascending order, from light to severe punishment at the top. 22 Ayres and Braithwaite argue that regulatory sanctions and strategies should be aligned to the mixed motives or objectives 23 of corporate actors in order to ensure an effective and efficient regulatory framework. 24 For example, whereas a ‘strategy based mostly on persuasion and self-regulation will be exploited when actors are motivated by economic rationality,’ a ‘strategy based mostly on punishment will undermine the good will of actors when they are motivated by a sense of responsibility.’ 25 In addition, an all-out punishment strategy tends to prove inefficient because punishment is more expensive to administer than persuasion. 26 In short, regulators will do well if they carry ‘big sticks (and crucially, a hierarchy of lesser sanctions),’ but speak softly, at least in the beginning. 27

As the ‘trick of successful regulation is to establish a synergy between punishment and persuasion,’ 28 responsive regulation is designed to help regulators in deciding ‘[w]hen to punish; when to persuade?’ 29 Ayres and Braithwaite invoke the prisoner’s dilemma 30 and a tit-for-tat (TFT) enforcement strategy to provide an answer to these questions. Ayres and Braithwaite describe the rationale behind the TFT strategy –

20 Id., 5-6 (emphasis added).
21 Clarke compares the advantages as well as disadvantages of invoking persuasive and coercive strategies. Clarke, above n 1, 140-41.
23 In cases where actors have multiple motives, these could be lexically ordered in a different way. For example, first meet with minimum human rights standards and then maximize profits, or vice versa. See Ayres & Braithwaite, above n 5, 27-29.
24 If Smith is more strongly motivated by honesty than by money in a particular context, then in that context appeals to honesty are more likely to move him than opportunities for more money.’ Ayres & Braithwaite, above n 5, 24. They write again that ‘if an actor is motivated by social responsibility goals … then persuasion rather than punishment is the best strategy to further cultivate that motivation.’ Id., 29.
25 Id., 19.
26 Id.
27 Id., 25.
28 Id., 21. In particular, the regulatory pyramid, discussed below, tries ‘to solve the puzzle of when to punish and when to persuade.’ Braithwaite, ‘Responsive Regulation and Developing Economies’, above n 7, 886.
29 As we have seen before in Chapter 5.3.2, the prisoner’s dilemma is a game theory construct.
which they consider to be 'the best strategy' to deal with wide motivational diversity— as follows:

TFT means that the regulator refrains from a deterrent response as long as the firm is cooperating; but when the firm yields to the temptation to exploit the cooperative posture of the regulator and cheats out on compliance, then the regulator shifts from a cooperative to a deterrent posture. Confronted with the matrix of payoffs typical in the enforcement dilemma, the optimal strategy is for both the firm and the regulator to cooperate until the other defects from cooperation. Then the rational player should retaliate (the state to deterrence regulation; the firm to a law evasion strategy).32

This rationale also explains why it is important to start with persuasion rather than punishment — not because 'business people are cooperative in nature,' but because the TFT policy requires regulators to try cooperation first as 'the payoffs in the regulation game make cooperation rational until the other defects from cooperation.'33 This will also 'nurture virtue' in business organisations.34 Another important reason is that 'punishment as a strategy of first choice is counterproductive in a number of ways.'35 Ayres and Braithwaite also remind us that when 'punishment rather than dialogue is in the foreground of regulatory encounters, it is basic to human psychology that people will find this humiliating, will resent and resist in ways that include abandoning self-regulation.'36 They finally caution us, though without alluding to much supporting material, to 'not succumb too readily to an analysis' that suggests that certain actors are bound to be 'recalcitrant' or that certain offenders are 'incorrigible.'37 Therefore, Ayres and Braithwaite sum up, 'we should be cooperative at first to give others a chance to put their cooperative self forward; we should be tough with cheaters to give them reason to favour their cooperative selves; and we

31 Ayres & Braithwaite, above n 5, 29.
32 Id., 21. The two authors conclude: 'So we should be cooperative at first to give others a chance to put their cooperative self forward; we should be tough with cheaters to give them the reason to favour their cooperative values; and we should extend forgiveness to those who show sign of abandoning cheating in favour of cooperation.' Id., 33.
33 Id., 21-22. Clarke also concludes that persuasive strategies are likely to prevail over coercive strategies. Clarke, above n 1, 151.
34 See Haines, above n 7, 2, 9-10.
35 Ayres & Braithwaite, above n 5, 26, and generally 25-27, 47-49. For example, a 'crucial danger of a punitive posture that projects negative expectations of the regulated actor is that it inhibits self-regulation.' Id., 25. See also John Braithwaite, To Punish or Persuade: Enforcement of Coal Mine Safety (Albany: State University of New York Press, 1985).
36 Ayres & Braithwaite, above n 5, 25.
37 Id., 33.
should extend forgiveness to those who show sign of abandoning cheating in favour of cooperation.\textsuperscript{38}

Corporations, Ayres and Braithwaite argue, are not monolithic and like regulatory actors they too have multiple selves.\textsuperscript{39} Since ‘at different moments, in different contexts, the different selves prevail,’ the ‘corporation that the regulator feels should be dealt with as an unscrupulous profit maker this month will be dealt with as a socially responsible corporate citizen the next month.’\textsuperscript{40} Moreover, Ayres and Braithwaite envisage that regulators may ‘need’ to both aggregate and disaggregate corporations: if needed, regulators could deal with a corporate group or an industry association as an aggregation of actors, or disaggregate a corporation into units. Depending upon this aggregation or disaggregation, ‘[c]ooperative, tough, and forgiving regulatory routines might, therefore, be played simultaneously with different audiences in mind as much as sequentially as the TFT account implies.’\textsuperscript{41}

The enforcement pyramid (depicted in Figure 7.1 below) allows Ayres and Braithwaite to combine all these ideas. The pyramid is important because, among other reasons, ‘compliance is most likely when an agency displays an explicit enforcement pyramid.’\textsuperscript{42} The progressive punitiveness of the pyramid ensures that ‘every escalation of noncompliance by the firm can be matched with a corresponding escalation in punitiveness by the state.’\textsuperscript{43} The two authors explain how the pyramid will function as follows:

Most regulatory action occurs at the base of the pyramid where attempts are initially made to coax compliance by persuasion. The next phase of enforcement escalation is a warning letter; if this fails to secure compliance, imposition of civil monetary penalties; if this fails, criminal prosecution; if this fails, plant shutdown or temporary suspension of a license to operate; if this fails, permanent revocation of license.\textsuperscript{44}

\textsuperscript{38} Id., 33.
\textsuperscript{39} Id., 31.
\textsuperscript{40} Id.
\textsuperscript{41} Id., 34 (emphasis in original).
\textsuperscript{42} Id., 34. ‘Defection from cooperation is likely to be a less attractive proposition for business when it faces a regulator with an enforcement pyramid than when confronted with a regulator having only one deterrence option.’ Id., 36.
\textsuperscript{43} Id., 37.
\textsuperscript{44} Id., 35-36.
Although persuasion is the preliminary and a dominant regulatory strategy of the pyramid, it may not deliver expected results in all cases because businesses, as rational actors, might perceive more gains in breaking the law than in complying with it. It is then, Braithwaite reasons, appropriate to move up in the pyramid to make compliance with the law a rational choice: ‘Escalation through progressively more deterrent penalties will often take the rational calculator up to the point where it will become rational to comply.’\textsuperscript{45}

Ayres and Braithwaite admit that the proposed pyramid may not be applicable universally to all areas of regulation – for example, this may be ‘inapplicable to banking or affirmative action regulation.’\textsuperscript{46} Therefore, although the form of the pyramid may not change, the content of the pyramid may require adjustments because

\textsuperscript{45} Braithwaite, ‘Responsive Regulation and Developing Economies’, above n 7, 887.

\textsuperscript{46} Ayres & Braithwaite, above n 5, 36.
"[d]ifferent kinds of sanctioning are appropriate to different regulatory arenas."\cite{47} Furthermore, as this pyramid was designed keeping in mind one firm, they also outline a pyramid of regulatory strategies that could be 'pitched at the entire industry.'\cite{48} This more general pyramid (see Figure 7.2) starts with self-regulation, and then moves on to enforced self-regulation, to command regulation with discretionary punishment and finally to command regulation with non-discretionary punishment.\cite{49}

![Figure 7.2: Example of a Pyramid of Enforcement Strategies](image)

The visible escalation in punitiveness 'gives the state greater capacity to enforce compliance but at the cost of increasingly inflexible and adversarial regulation.'\cite{50} This escalation also ensures that most of the regulatory action takes place at the base of the pyramid, i.e., through persuasion and self-regulation.\cite{51} The pyramid allows the regulators of Ayres and Braithwaite to become benign big guns:\cite{52} 'the greater the

\[47\text{ Id., 36.}\]
\[48\text{ Id., 38.}\]
\[49\text{ Id., 38-39.}\]
\[50\text{ Id., 38.}\]
\[51\text{ Id., 39.}\]
\[52\text{ 'The benign big guns were agencies that spoke softly while carrying very big sticks.' Id., 40. The benign big gun theory of regulation posits that the following three factors determine how effective}\]
heights of punitiveness to which an agency can escalate, the greater its capacity to push regulation down to the cooperative base of the pyramid. 53 Since there will not be many opportunities for regulatory agencies to use punitive sanctions of the highest level, the agencies as well as sanctions will be more or less ‘benign.’

One might ask, however, if the big guns at the apex of this pyramid are admittedly ‘benign’ and are to be used sparingly as a last resort, how effective will they be in regulating the conduct of powerful corporations? Ayres and Braithwaite express confidence in the success of regulators, in part, because regulators could ‘project an image of invincibility to industries that may be more powerful than themselves.’ 54

7.2.1.2 Tripartism

Ayres and Braithwaite acknowledge that cooperation – which ‘should occur only when regulator and firm are in a multiperiod prisoner’s dilemma game’ 55 – between regulators and firms also encourages the evolution of capture 56 and corruption of regulators. 57 In order to counter such capture and corruption of regulatory agencies, they introduce the idea of ‘tripartism’ into their theory of responsive regulation. 58 Tripartism basically involves introducing a third player – a public interest group (PIG) – in the game, along with the regulatory agency and the firm. 59 A PIG is the group ‘best able to contest (rather than “represent”) the public interest embodied in a particular regulatory statute.’ 60 PIGs are not envisaged to become ‘equal partners with compliance with the law is: (i) use of a tit-for-tat strategy; (ii) access to a hierarchical range of sanctions and a hierarchy of interventionism in regulatory style; (iii) how extreme in punitiveness is the upper limit of the range of sanctions. Braithwaite, ‘Convergence in Models’, above n 22, 65.

53 Ayres & Braithwaite, above n 5, 40.
54 Id., 44-45 (emphasis added).
55 Id., 55 (emphasis added).
56 ‘In a capture model, through lobbying the regulated firm is able to win the hearts and minds of the regulators.’ Id., 63.
57 Id., 54-55. They note: ‘The very conditions that foster the evolution of cooperation are also the conditions that promote the evolution of capture and corruption.’ Id., 55.
59 This is in line with the current thinking about the regulatory process where it is regarded as a game involving various types of ‘third party actors.’ See Peter Grabosky, Neil Gunningham & Darren Sinclair, ‘Parties, Roles, and Interactions’ in Gunningham et al, Smart Regulation, above n 4, 93.
60 Ayres & Braithwaite, above n 5, 58. ‘An assumption implicit in our analysis is that for most business regulatory statutes in a democracy, there will be an appropriate PIG. We assume this because we think it unlikely that statutes that threaten the interests of business would ever have been enacted in the absence of an interested group pushing for them.’ Id., 59.

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industry and government’ but only ‘credible watchdogs.’ Ayres and Braithwaite contend that the policy of tripartism fosters the participation of PIGs in the regulatory process in the following three ways:

- granting the PIG ‘access to all the information that is available to the regulator;’
- giving the PIG ‘a seat at the negotiating table with the firm and agency when deals are done;’ and
- granting the PIG ‘the same standing to sue or prosecute under the regulatory statute as the regulator.’

Such participation will empower PIGs, and their presence in the game will serve as a powerful deterrent to the capture of regulators. For example, ‘in the presence of empowered PIGs the firm must capture PIGs as well as the agency to be effective.’ But what if PIGs, the guardians, are also captured and corrupted? Ayres and Braithwaite rely on the notion of ‘contestable guardianship’ to limit this possibility. In the context of PIGs, the notion of contestable guardianship implies, in summary, that different PIGs will compete for ‘the privilege of acting as the third player in the regulatory negotiation.’ Ayres and Braithwaite conclude that the idea of tripartism – which could be applied to any level of the enforcement pyramid – ‘might foster the evolution of cooperation while preventing the evolution of inefficient capture and corruption.’

In addition to anticipating this positive outcome, Ayres and Braithwaite also defend tripartism as a process, because through PIGs it provides an ‘opportunity for participation by stakeholders in decisions over matters that affect their lives.’ The idea of tripartism put forward by them is, therefore, republican in nature. Nevertheless, one may notice that this vision of tripartism also resembles, at least in

61 Id., 100.
62 Id., 57-58.
63 Id., 71. Another reason is that tripartism will ‘dramatically’ increase the cost of capture, e.g., payment of bribes. Id., 70, 73.
64 Id., 57.
65 Id., 58.
66 Id., 97.
67 Id., 82.
68 Id., 54, 81. They further write: ‘Tripartism may be a route to a more participatory democracy, a more genuine democracy, but a practical democracy that does not make unrealistic demands of mass participation in all institutional arenas.’ Id., 83.
its outcome, the public law doctrine of 'checks and balances' as both seek to ensure that no one player could exercise unchecked power.

7.2.1.3 Enforced self-regulation

Finally, Ayres and Braithwaite in their book *Responsive Regulation* elaborate and defend the model of enforced self-regulation,\(^69\) which was an intermediate level in the pyramid of enforcement strategies (Figure 7.2 above). Enforced self-regulation is a response not only to the delay, red tape, and costs that can result from imposing detailed government regulations on business,\(^70\) but also 'to the naiveté of trusting companies to regulate themselves.'\(^71\) This model envisages regulation as the result of negotiations between the state and individual firms.\(^72\) The *selfness* of regulation lies in the fact that '[e]ach firm in an industry is required to propose its own regulatory standards if it is to avoid harsher (and less tailored) standards imposed by the state.'\(^73\) The self-regulation is *enforced* because it is mandated by the state and because 'the privately written rules can be publicly enforced.'\(^74\)

Enforced self-regulation is perceived by Ayres and Braithwaite 'as a form of subcontracting regulatory functions to private actors.'\(^75\) Under this model, the regulated firms will perform some or all of the legislative, executive and judicial regulatory functions that were traditionally assigned to the government: 'As self-regulating legislators, firms would devise their own regulatory rules; as self-

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\(^{70}\) Such limitations of legal regulation are well-known. For example, it is suggested that law is slow to react, does not provide enough flexibility, and that the process of adjudication is time consuming. There is also a problem of the capture of regulators. See Kenneth J Arrow, 'Social Responsibility and Economic Efficiency' (1973) 21 *Public Policy* 303, 310-11; Donaldson, above n 2, 163-66; Clarke, above n 1, 111-16.

\(^{71}\) Ayres & Braithwaite, above n 5, 106. 'Enforced self-regulation thus combines versatility and flexibility of voluntary self-regulation, but avoids many of the inherent weaknesses of voluntarism.' Braithwaite, 'Enforced Self-Regulation', above n 69, 1470.

\(^{72}\) Ayres & Braithwaite, above n 5, 101-02.

\(^{73}\) *Id.*, 101. The regulatory agencies could allow individual firms to promulgate self-regulating standards 'as an alternative to ... "default" regulations', which would be 'most appropriate for the majority of firms.' *Id.*, 108.

\(^{74}\) *Id.*, 101.

\(^{75}\) *Id.*, 103.
regulating executives, firms would monitor themselves for noncompliance; and as self-regulating judges, firms would punish and correct episodes of noncompliance.\footnote{Id.}

Ayres and Braithwaite explain the essential components of the model of enforced self-regulation as follows:

Under enforced self-regulation, the government would compel each company to write a set of rules tailored to the unique set of contingencies facing that firm. A regulatory agency would either approve these rules or send them back for revision if they were insufficiently stringent. At this stage in the process, PIGs would be encouraged to comment on the proposed rule. Rather than having governmental inspectors enforce the rules, most enforcement duties and costs would be internalised by the company, which would be required to establish its own independent inspectorial group. Where feasible, PIGs would be represented on this inspection group ... The primary function of governmental inspectors would be to ensure the independence of this internal compliance group and to audit its efficiency and toughness. ...

State involvement would not stop at monitoring. Violations of the privately written and publicly ratified rules would be punishable by law. ... Regulatory agencies would not ratify private rules unless the regulations were consonant with legislatively enacted minimum standards.\footnote{Id., 106-07 (emphasis added).}

From the above passage, one could see that the model of enforced self-regulation appears more like a shuttling exercise,\footnote{Black perceives this activity as ‘a continual communication, a conversation, between regulator and regulated as to the application of the rule or rules.’ Julia Black, Rules and Regulators (Oxford: Clarendon Press, 1997), 40.} rather than a partnership, between the government agency (state) and the firm (private body) with stopovers via PIGs (public interest representatives). Such shuttling takes place at all stages – from the formulation of rules to their implementation and enforcement. For example, the government would first compel each corporation to write rules for its operations and then approve such rules once they have been written, including by taking into account the comments of PIGs. Similarly, although corporations will supervise the implementation of rules, this would be monitored by the state and, if feasible, also by PIGs. In this shuttling exercise also, one could notice the doctrine of ‘checks and balances’ at work in that all three regulatory players provide inputs and exercise a degree of leverage on the working of each other.

\footnote{Id.}
Dispelling any fears that the presence of individualised standards might arouse, Ayres and Braithwaite argue that enforced self-regulation 'makes possible nonuniform optimal standards that would give greater protection than any (stricter or more lenient) uniform standard.' 79 The two authors give numerous reasons for the superior protective strengths of the enforced self-regulation model. 80 For instance, tailored rules could be simpler and more specific as well as being more comprehensive; particularistic rules could also be adjusted quickly to changing business environments. It is also suggested that corporations would be more committed to the rules that they wrote, and that this would reduce the confusion and costs associated with corporations being subjected to two sets of rules, i.e., applicable government rules and internal corporate rules. Moreover, enforced self-regulation - 'public enforcement of privately written rules, and publicly mandated and publicly monitored private enforcement of those rules' 81 - would bring both efficiency and efficacy in the enforcement mechanism.

This is not to say, however, that the model of enforced self-regulation is free from difficulties. Ayres and Braithwaite themselves considered (and by and large dismissed) some of the major weaknesses of this model. 82 The potential weaknesses range from the costs of a government's ratification of private rules to fears of 'industrial absolutism' and moral relativism, and the public skepticism about the independence of corporate inspection groups. An apprehension is also expressed that corporations might end up writing rules in ways that would assist them in evading the spirit of the law. I take up some of these drawbacks of enforced self-regulation in more detail in the next section.

7.2.2 Responsive Regulation and Corporate Human Rights Abuses: A Critique

The theory of responsive regulation, including its constituent ideas of the TFT strategy, the progressive enforcement pyramid, tripartism and enforced self-regulation, is too sound and influential to warrant an outright rejection. Nevertheless, in this

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79 Ayres & Braithwaite, above n 5, 107.
80 Id., 110-16. See also Braithwaite, 'Enforced Self-Regulation', above n 69, 1474-83.
81 Ayres & Braithwaite, above n 5, 116.
82 Id., 120-28. See also Braithwaite, 'Enforced Self-Regulation', above n 69, 1490-1500.
section I not only raise some general objections to this theory but also assess its possible suitability in supporting a regulatory mechanism which could effectively redress human rights violations by MNCs. It is contended that any regulatory framework that is solely informed by the theory of responsive regulation will prove ineffective in making MNCs accountable for human right abuses. One should then look beyond responsive regulation to explore other regulatory options. The integrated theory of regulation, I suggest, could be one such option.

7.2.2.1 TFT strategy's over-reliance on the motive of regulatees

Under the model proposed by Ayres and Braithwaite, more or less punitive strategies and sanctions will be adopted in accordance with the motive and previous response of individual actors. But motives of actors are not fixed and this may change their 'lexical ordering of concern about money and responsibility,' which in turn could produce, Ayres and Braithwaite admit, 'a great deal of disorder.' From the perspective of regulators, the main difficulty will be to identify the real motive of each of the corporations. Regulators, being outsiders to corporate decision-making, are not placed in an ideal situation to ascertain the motive of corporations. Not to be underestimated is the fact that the task of determining the motive of corporations will be time consuming. In addition, corporations may also bluff the regulators – the public projection of a given motive may differ from the real motive. For example, an MNC running mining operations in tribal areas is likely to express its motive in the language of bringing employment and development to the region rather than profit-making even at the risk of displacing tribal people or disrupting their traditional social and cultural life.

While ascertaining the motive of MNCs – a group of interrelated artificial entities – regulators are likely to face additional challenges. Whose motive will count in the case of MNCs? Will it be the motive of the whole corporate group, a particular subsidiary or its sub-unit, or the motive of management-cum-shareholders? Further, Ayres and Braithwaite contemplate the possibility of both disaggregating an organisation and aggregating organisations. Id., 34.
which view should prevail if there is a divergence among the respective motives of a corporation and its managers as well as shareholders?

Second, it is clear that TFT is essentially a 'reactive,' rather than an active or proactive, strategy and for this reason has some inherent limitations. Ayres and Braithwaite concede that the 'persuasion first' dimension of TFT strategy has two limitations. The strategy will fail, firstly, when faced with regulating the behaviour of a 'pathologically irrational organisation' and, secondly, when faced with a 'determinedly profit-maximising actor' where the actor and the regulator have a one-off encounter. 86 Both these limitations expose the hardship that the TFT strategy would face in dealing with cases of human rights abuses by MNCs. Joel Bakan in The Corporation shows us how corporations have a pathological tendency to pursue power and profit. 87 It is also arguable that (at least some) corporations may acquire this pathological character because they operate rationally, rather than irrationally as Ayres and Braithwaite suggest. If some corporations decide to maximise profits by flouting human rights and environmental laws, it is likely that they are acting rationally because the gains from violating these laws might be more than complying with them. 88

Similarly, the possibility of MNCs and regulators having 'one-off encounters' cannot be ruled out in view of how MNCs operate and move their operations. For instance, an MNC selling Christmas or New Year products could each year award the contract to a new manufacturer in different developing countries. There is also the possibility of a corporation abusing labour rights (such as compulsory overtime with no or minimal payment) not regularly but occasionally as and when needed to meet the supply deadlines.

86 Id., 29-30 (emphasis added).
87 'The corporation's legally defined mandate is to pursue, relentlessly and without exception, its own self-interest, regardless of the often harmful consequences it might cause to others.' Joel Bakan, The Corporation: The Pathological Pursuit of Profit and Power (New York: Free Press, 2004), 1-2. He argues that despite business leaders taking on board the new CSR mantra, 'the corporation itself has not changed.' Id., 28.
88 Professor Braithwaite himself acknowledges this: 'When persuasion does fail, the most common reason is that a business actor is being a rational calculator about the likely costs of law enforcement compared with the gains from breaking the law.' Braithwaite, 'Responsive Regulation and Developing Economies', above n 7, 887.
Third, Ayres and Braithwaite contend that if a corporation 'is motivated by social responsibility goals ... then persuasion rather than punishment is the best strategy to further cultivate that motivation.'\textsuperscript{89} They further suggest that this 'will be true irrespective of whether the caring motivation is itself motivated by profit seeking' or for other benevolent reasons.\textsuperscript{90} Apparently, here Ayres and Braithwaite are referring to two types or levels of motivations – the motive to behave in a socially responsible manner and various underlying motives behind this motive – but without acknowledging the fundamental distinction that exists between the two. While critiquing the thesis of Elaine Sternberg in Chapter 5, I have argued that the difference between these two levels of motives is critical and should not be ignored.\textsuperscript{91} If a corporation behaves as a good corporate citizen \textit{merely} because this will enhance its profits (i.e., the business case), such a corporation could hardly be trusted to have a consistent policy towards human rights. Human rights norms are likely to be shown the door when they start affecting the bottom line adversely. In my view, the persuasion first TFT strategy is a good option, but only for those corporations which generally accept and show a commitment to human rights though occasionally deviate from this path.\textsuperscript{92}

\textit{7.2.2.2 Flaws lurking in the progressively punitive enforcement pyramid}

Several flaws in the enforcement pyramid proposed by Ayres and Braithwaite are worth noting. First, flexibility in regulation is a central tenet of responsive regulation and the progressively punitive pyramid is designed to accommodate such flexibility in ensuring the deployment of appropriate regulatory techniques and sanctions. However, the pyramid that is meant to offer flexibility also constrains this flexibility. For example, regulators have to begin with persuasion always even if they are convinced of its futility. Conversely, in view of the reasons outlined before,\textsuperscript{93} punishment has to be kept always at the background even if bringing it to the foreground might permit regulators to handle certain deviant MNCs better. Furthermore, as the empirical

\textsuperscript{89} Id., 29 (emphasis added).
\textsuperscript{90} Id. (emphasis added).
\textsuperscript{91} Chapter 5.2.3.
\textsuperscript{92} Black argues that enforced self-regulation will only be effective 'where the regulated are not only well-intentioned and well-informed but also well resourced.' Black, above n 78, 40 (emphasis added).
\textsuperscript{93} Chapter 7.2.1.1.
research of Haines shows, even escalation and de-escalation of sanctions may not be as easy as the pyramid ‘deceptively’ suggests.94

Second, an almost irrevocable presumption that regulators have to always start with persuasion, another facet of the lack of flexibility in the enforcement pyramid, is problematic and also illogical. Braithwaite explains: ‘Even with the most serious matters – flouting legal obligations to operate a nuclear power plant safely that risks thousands of lives – we stick with the presumption that it is better to start with dialogue at the base of the pyramid.’95 The presumption could be overridden if there are ‘compelling reasons for doing so.’96 But if the breach of safety regulations that endangers the lives of thousands of people does not provide a ‘compelling’ case for overturning the persuasion presumption, it is difficult to conceive what else could.

It is logical for regulators to invoke multiple strategies and sanctions – from various levels of persuasion to punishment – in tune with varying motives of regulated subjects. However, insistence on persuasion first in almost all cases defies logic in some situations. For example, why should regulators waste effort, time and resources in persuading irrational actors,97 or those actors which are known defaulters?98 Let us consider an example. In 2005, the Hong Kong General Chamber of Commerce and the Business Coalition on the Environment launched the ‘Clean Air Charter,’ an initiative to engage the business sector in improving the air quality in Hong Kong and in the Pearl River Delta.99 After one year, it is reported that ‘only about 100 of the

94 Haines, above n 7, 219-221.
95 Braithwaite, 'Responsive Regulation and Developing Economies', above n 7, 886.
96 ‘A presumption means that however serious the lawbreaking, our normal response is to try to have a dialogue first for dealing with it, to only override this presumption if there are compelling reasons for doing so.’ Id., 887.
97 ‘But companies are not always economically rational.’ John Braithwaite, 'The Limits of Economism in Controlling Harmful Corporate Conduct' (1981) 16 Law & Society Review 481, 493. As Braithwaite concedes that some actors could be irrational, he proposes that incapacitation should be one of the available sanctions at the top of the pyramid. Braithwaite, 'Responsive Regulation and Developing Economies', above n 7, 887.
98 Ayres and Braithwaite anticipate but reject this criticism:
   Therefore, we should not succumb too readily to an analysis that says that we can identify certain actors as bound to be recalcitrant, and for whom it would be a waste of time to use persuasion as a strategy of first choice. Furthermore, we should avoid a premature assumption that certain offenders are incorrigible, an assumption that a strategy that is forgiving will only be exploited.
Ayres & Braithwaite, above n 5, 33.
tens of thousands of Hong Kong-owned factories' have signed on to the Charter.100
The question is should the regulating agency still persuade such corporations which
did not 'even bother to sign a piece of paper' to show their commitment to this project?
The enforcement pyramid of Ayres and Braithwaite is likely to counsel this, but to me
this will amount to wasting the carrot.

Here it may not be out of place to mention that Professor Braithwaite does not seem to
be a consistent advocate of the persuasion first presumption. For example, in an
article published in the Law and Society Review in 1981, which critiqued the model of
economism, he wrote: 'In domains where the interests threatened are great, we must
seize every opportunity to foster deterrence by punishing evil deeds, even when such
deeds do not produce harmful consequences.'101 Thus, Braithwaite at one time was
ready to inflict punishment on corporate officials even in those cases where serious
harm was a possibility that did not actually materialise.102 Although what led to this
complete turnaround is outside the scope of this thesis, it suffices to say that
Braithwaite himself has recognised in the past that it will not be prudent to invoke
persuasion against everyone and in all situations as a first regulatory strategy.103

Third, the progression to more punitive sanctions under the regulatory pyramid is
based on an assumption which is not very sound. Ayres and Braithwaite seem to
assume that firms or their units either cooperate or defect and based on the TFT policy,
their conduct should be met with a range of persuasive and coercive strategies
arranged in a pyramidal order. But corporations do not always function within this
‘either C or D’ typology – rather they often wear many hats at the same time. In other

100 Quinton Chan & Donald Asprey, ‘Firms Slow to Back Air Quality Campaign’, South China
Morning Post (26 November 2006), I.
101 Braithwaite, ‘The Limits of Economism’, above n 97, 489. Picciotto also highlights another
‘surprising’ shift in the work of Professor Braithwaite. Picciotto, above n 1, 4.
102 ‘Just as we wish to punish attempted murders in which no one is hurt, it is important to punish drug
company scientists who cover up the fact that rats die from exposure to a drug when it luckily turns out
that humans do not react to the product in the same adverse fashion as rats.’ Braithwaite, ‘The Limits
of Economism’, above n 97, 489.
103 Gunningham and Sinclair, for example, identify two circumstances ‘where it is inappropriate to
adopt an escalating response up the instrument or enforcement pyramid.’ They argue that the
progressive pyramid will be inappropriate, firstly, ‘in situations which involve a serious risk of
irreversible loss or catastrophic damage’ and secondly, in situations ‘where there is only one chance to
influence the behaviour in question.’ Gunningham & Sinclair, ‘Instruments for Environmental
Protection’ in Gunningham et al, Smart Regulation, above n 4, 404.
words, contrary to what these two respected scholars suggest, a corporate actor can have multiple selves not at different points in time, but at any one given point in time. Just to illustrate, an MNC that is accused of violating certain human rights may, at any one time, be refuting such allegations, negotiating an out of court settlement with victims’ groups, fighting hard cases in courts, projecting a good image through the media, and influencing government policy on the given issue. All these business strategies are usually resorted to simultaneously and not sequentially. As the way corporations do business in actual market settings is much more complex than may be expressed in simple ‘either C or D’ terms, the progressively punitive nature of the pyramid is grounded on a shaky premise.

Fourth, though the progressively punitive regulatory pyramid looks impressive on paper, putting this into practice will not be that easy, especially when dealing with instances of human rights violations by MNCs. Let us consider how the pyramid proposed by Ayres and Braithwaite (Figure 7.1) – which they think might be suitable for ‘occupational health and safety, environment ... regulation’ would work in controlling the conduct of MNCs in these areas. Initial attempts are to be made ‘to coax compliance by persuasion.’ Persuasion (speaking softly) will be effective only when regulators possess the capacity to inflict a series of escalating punishments (i.e., when they carry a carry big stick). But big sticks that could be invoked against MNCs hardly exist in the areas of health, safety and the environment. So even by the yardstick of Ayres and Braithwaite, it will be difficult to persuade MNCs to comply with their human rights responsibilities in this limited area.

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104 'Business executives have profit-maximising selves and law-abiding selves; at different moments, in different contexts, the different selves prevail.' Ayres & Braithwaite, above n 5, 31 (emphasis added).
105 Out of many cases that could be cited, Unocal case provides a good illustration of this.
106 Ayres & Braithwaite, above n 5, 36.
107 Id., 35.
108 Id., 19, 40. Gunningham and Sinclair write that central to Braithwaite's model is 'the existence of a credible peak or tip which, if activated, will be sufficiently powerful to deter even the most egregious offender.' Gunningham & Sinclair, 'Instruments for Environmental Protection' in Gunningham et al, Smart Regulation, above n 4, 396.
109 Picciotto writes that 'the encouragement of voluntary compliance is too often used as an excuse to temper sanctions to the point of ineffectiveness (there is little sign of a big stick in, for example, workplace health and safety regulation). Picciotto, above n 1, 4. This is also self-evident in view of the continuing efforts to formulate legally binding regulations for MNCs in these areas.
There is yet another related difficulty. The critical question is: who is to be persuaded to comply with health and safety standards or environmental regulations? The regulators and the government of a developing country, for instance, could conceivably persuade only a subsidiary located within their territorial jurisdiction, but not the immediate or ultimate parent corporations of such subsidiary that are typically located abroad. Even if regulatory agencies have a big stick, they could hardly use it against parent corporations registered in foreign jurisdictions and consequently, their ability to ‘persuade’ such corporations will be seriously limited. The end result would be that parent corporations, which control key safety and environmental policy decisions of their subsidiaries, will remain outside the persuasion loop of the pyramid in all but the jurisdiction of their incorporation. However, countries where parent corporations are incorporated or headquarter are usually unwilling to exercise the power of persuasion extraterritorially – that is, requiring parent corporations to ensure that even their overseas subsidiaries abide by health and safety standards or the environmental regulations.

This limitation will extend equally to other stages of the regulatory pyramid. For example, if a warning letter has to be written, to whom should such a letter be addressed – to a given subsidiary, its parent corporation and/or both? Similarly, even if a civil or criminal penalty is imposed only on the subsidiary, this may not adequately redress the situation of human rights violations in a given case. It is precisely for this reason that the liability of a parent corporation for human rights abuses by its subsidiaries is considered vital. The persuasion logic of Ayres and Braithwaite, therefore, might not work in the case of MNCs because of one of the two reasons. Regulators will either have no effective leverage for persuasion (due to their lacking a big stick) or their persuasive efforts will not be able to reach those who need to be persuaded (a parent corporation situated abroad) in order to make any real difference in corporate conduct.

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110 For example, in recent years, attempts to enact extraterritorial laws did not materialise in the US, the UK and Australia. See Chapter 3.3.1.
111 Bhopal again is a very good example of this. See Chapter 2.3.4.2.
Finally, the work of Gunningham, Grabsky and Sinclair highlights another important lacuna in the enforcement pyramid designed by Ayres and Braithwaite. Gunningham et al point out that the 'pyramid is concerned with the behaviour of, and interaction between, only two parties: state and business, with only the former acting as regulator and enforcer, and the latter solely in the role of regulatee.' They show how 'there is also very considerable scope for third parties, both commercial and non-commercial, to act as quasi regulators.' No doubt, Ayres and Braithwaite introduce the concept of 'tripartism' into their regulatory model, but, as I highlighted previously, the role of PIGs under their framework is quite limited and one-dimensional, that is, to counter possibilities of corruption and capture of regulators.

Ayres and Braithwaite might reply that these criticisms could be taken care of by appropriately adjusting the 'content' of the pyramid to the particular needs of a given regulatory arena, but even then several aspects of the regulatory pyramid remain problematic. The 'ranking' of strategies/sanctions, for example, offers little guidance to regulators in market settings as to when and where to enter the enforcement pyramid. Even if they enter the pyramid at the right time and level, the responsive regulation model does not tell regulators for how long they should try one regulatory technique before moving up or down to the next level. In short, the enforcement pyramid leaves many questions about its workability unresolved. These questions and concerns are not satisfactorily addressed by saying that the theory of responsive regulation is merely about the form of the pyramid, because the claims made by Ayres and Braithwaite about the utility of their model are not limited to its formal appeal.

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113 Gunningham & Sinclair, ‘Instruments for Environmental Protection’ in Gunningham et al, Smart Regulation, above n 4, 397 (emphasis added).
114 Id., 397, and generally 397-400.
115 See, for discussion, Chapter 7.2.1.2.
116 Ayres & Braithwaite, above n 5, 36. ‘The form of enforcement pyramid is the subject of the theory, not the content of this particular pyramid.’ Braithwaite, ‘Convergence in Models’, above n 22, 63.
117 ‘[W]hile the pyramid may be a useful metaphor to assist a single agency to understand its enforcement policy, it has limited use in understanding the nature of regulation in the market-place,'
7.2.2.3 Reviewing the limitations of the model of enforced self-regulation

The sheer number of MNCs and their subsidiaries is going to present the first challenge to the model of enforced self-regulation. Black notes that for such 'a system of individualised application of general rules' to work, it may be necessary that regulatees are 'relatively few in number.' One could easily imagine the chaos and disorder that is likely to be created if all corporations working in the same sector and in the same country are allowed to have their individual rules concerning human rights responsibilities. Individual rule-writing will not only be unnecessary regarding certain fundamental human rights, but will also open the door for corporations to adopt an avoidable business approach to define their human rights standards in a given jurisdiction (see the discussion in Chapter 6). In addition, this scenario will also seriously limit the extent to which stakeholders such as green consumers and ethical investors could encourage corporations to behave as responsible corporate citizens, for stakeholders would find it difficult to compare and contrast the conduct of different corporations. In short, infinite versions of individual rules regarding any given human rights norm is bound to undermine the protection of human rights as well as the efficacy of regulation.

Second, since under the enforced self-regulation model, privately written rules are to be ratified by the regulatory agency, this naturally raises the issue of costs involved in the whole process. While defending their model against this criticism, Ayres and Braithwaite suggest that the ratification process might in fact prove cost effective. One of the reasons that they advance in support of cost effectiveness is that much of the ratification would be 'routine' because corporations are likely to 'adopt large blocks of rules from other companies' or from the model rules proposed by the regulatory agency. However, this explanation goes against their central thesis that where multiple legal constraints and opportunities shape organisational behaviour. Haines, above n 7, 221.

121 Ayres & Braithwaite, above n 5, 120-21.
122 Id., 121.
individually tailored rules are desirable for several reasons. If individual corporations, even if they have an opportunity to write their own rules, are likely to copy rules written by other corporations or the model rules drafted by regulators, then this suggests that there is no strong need for having individually tailored rules.

Perhaps it is this anticipation of mass borrowing or copying of rules by corporations that allows Ayres and Braithwaite to suggest that the requirement of writing private rules 'should not impose new costs' on corporations beyond delay and paperwork. Otherwise it is hard to believe how the process of writing private rules should not entail significant extra costs for regulators as well as corporations. Ayres and Braithwaite also point out that corporations must already be writing and enforcing their own rules. But this assumption, even if true, misses an important point. Enforced self-regulation requires self-compliance not with any kind of private rules, but rather with 'publicly approved' private rules. Therefore, if the existing private rules in a given area are not in conformity with broad parameters laid down by the regulatory agency or government, which is quite likely, then rules would have to be written afresh. This should in tum result in corporations incurring extra costs which not many corporations would like to bear. Basically, the proposal of private rule-writing and rule-monitoring merely transfers the costs from government to corporations. But this in itself may not be an improvement on the prevailing situations in terms of cost-savings for end-users, because in either case costs are likely to be passed on to taxpayers and consumers, respectively.

Third, it should not be overlooked that the two key attributes of the model of enforced self-regulation — private rule-writing and private monitoring of such rules — do not admittedly apply to small business enterprises. Furthermore, even if we keep aside,

123 *Id.*, 110-16.
124 *Id.*, 122.
125 'If companies are not presently writing and enforcing their own rules on safety, environment, accounting, and other regulatory areas, then there is something very wrong.' *Id.*, 122.
126 'Naturally, old-style direct government monitoring would still be necessary for firms too small to afford their own compliance group.' *Id.*, 106. See also *Id.*, 121, 128-29. Fairman and Yapp conclude: 'Enforced self-regulation has all the features of a regulatory approach that SMEs [small and medium enterprises] will find difficult to comply with. It is complex, systems-based, not linked to harm, process-orientated, difficult to judge compliance, and difficult to implement.' Robyn Fairman & Charlotte Yapp, 'Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement' (2005) 27 *Law & Policy* 491, 512. They further note:
for the sake of argument, this limitation of the model proposed by Ayres and Braithwaite, private writing-cum-monitoring of rules will create challenges when applied to MNCs. Who shall be writing rules for an MNC regarding human rights standards? Will it be the ultimate parent corporation, the immediate parent corporation, or individual subsidiaries of a corporate group? Ayres and Braithwaite do not squarely deal with this issue, but their analysis indicates that rule writing-cum-monitoring is likely to be done by each of the subsidiaries of an MNC. This conclusion, however, is impractical because given the way corporations are structured in a group, the parent corporations are bound to exercise some degree of control over how subsidiaries frame rules for themselves.

Fourth, another criticism levied against private rule-writing by corporations is that this will allow them to evade the spirit of the law more easily. Ayres and Braithwaite respond to this criticism by saying that this problem is not uniquely faced, or aggravated, by the model of enforced self-regulation: 'the business community's resourcefulness at law evasion will be cause for weakness in any system of control.' In my view it is important to understand fully the validity and implications of this criticism, as well as the assumption on which it is based, considering the ever growing power and influence of MNCs. More than ever, now MNCs (as well

127 'Enforced self-regulation therefore fails to live up to two of its objectives—reducing the burden on enforcement agencies, and placing responsibility on businesses.' Id., 516.

128 'Under enforced self-regulation, the government would compel each company to write a set of rules tailored to the unique set of contingencies facing that firm.' Ayres & Braithwaite, above n 5, 106 (emphasis added).

129 Just to illustrate, the policy manuals of UCC provided that the United States divisions of UCC have: 'The duty and authority to issue technical ... policies, procedures, and objectives for corresponding product line operations in ... international affiliates.' Reply of Union of India in Upendra Baxi & Amrita Dhanda (eds.), Valiant Victims and Lethal Litigation: The Bhopal Case (Bombay: N M Tripathi Pvt. Ltd, 1990), 109, 111, and generally 110-12.


131 One could draw on Waldron's partisan model of law and views taken by Marxist legal scholars to contend that rules/laws may reflect the interests of rule makers. See Jeremy Waldron, The Law (London: Routledge, 1990), 12-13, 19-21.

as their organisations) influence law making and policy formulation in unprecedented ways in developing and developed states alike. If MNCs are inclined to go an extra mile to ensure that rules made by governments do not inhibit achievement of their business objectives, one could imagine how easy it will be for them to do so when the task of rule making – even if subject to approval by the regulatory agency – is assigned to them.

Fifth, doubts could be raised about the independence of internal compliance groups that corporations are expected to establish to monitor the implementation of rules. Ayres and Braithwaite try to dispel such fears, because the independence of compliance groups is ‘essential to the success of an enforced self-regulation scheme.’ Apart from pointing out the possibility of invoking tripartism (as


Two recent illustrations, one each from developed and developing countries, should suffice. The US government filed amicus curie briefs before the US courts to oppose the use of Alien Tort Claims Act to make US parent corporations accountable for human rights abuses by their subsidiaries abroad. Similarly, Ok Tedi and BHP influenced the government of Papua New Guinea to enact laws to avert their liability for environmental pollution. Bob Burton, ‘The Big Ugly at Ok Tedi’, 23 Multinational Monitor (Jan/Feb 2002), <http://multinationalmonitor.org/mm2002/02jan-feb/jan-feb02/front.html> (last visited 18 September 2006). Braithwaite and Drahos also acknowledge this shift from states as ‘rule makers’ to ‘rule takers.’ Braithwaite & Drahos, above n 13, 3-4. See also Peter Muchlinski, ‘“Global Bukowina” Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community’ in Gunther Teubner (ed.), Global Law Without a State (Aldershot: Dartmouth, 1997), 79, 83-101; and generally Sharon Beder, Global Spin: The Corporate Assault on Environmentalism, revised edn. (Foxhole, Darlington, Devon: Green Books Ltd., 2002).

For example, corporations used the Shanghai Declaration – which was a declaration about responsible corporate citizenship – to dictate states to bring ‘the Doha round of trade negotiations to a successful conclusion.’ Surya Deva, ‘The UN Global Compact for Responsible Corporate Citizenship: Is it Still too Compact to be Global?’ (2006) 2 Corporate Governance Law Review 145, 166-68.


Ayres & Braithwaite, above n 5, 125.
discussed above), they suggest changes in the organisational structure of corporations
to encourage the independence of compliance groups. However, some of these changes are ambitious, unrealistic, or even futile. Consider, for example, the following proposal: 'In multiple-division corporations, compliance heads within each division or subsidiary, in turn, should have only a dotted-line reporting relationship with the chief executive officer of their subsidiary and a firm line to their immediate supervisor within the compliance group.' It is not clear how this organisational change would ensure independence because the supervisor of the compliance group would in any case be answerable to the chief executive officer. Moreover, the tug of the 'dotted line' between division or subsidiary staff and a subsidiary's chief executive officer is invariably made stronger by the fact that the chief executive officer will ultimately be responsible for compensating the compliance supervisor in question.

Such a proposal also wrongly conceives units within a corporation as watertight compartments which could be insulated from the influence of, or interference by, other units. For example, cost-cutting measures proposed by the finance and accounting department might seriously undermine the extent to which a safety unit in a plant dealing with hazardous substances implements the applicable safety regulations. Furthermore, if there is empirical evidence supporting the capacity of compliance groups to prevail over the corporate executives who would otherwise insist on profit maximisation, there is also evidence to the contrary, i.e., situations where internal compliance groups lost that battle.

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138 Id., 126-27.
139 Id., 126.
140 Vagts argues that 'all the units [of an MNC] do tend to respond to a common maximising strategy directed from a single "nerve centre".' Detlev F Vagts, Transnational Business Problems, 2nd edn. (New York: Foundation Press, 1998), 114. "[T]he global corporation is an organic structure in which each part is expected to serve the whole." Barnet & Muller, above n 132, 14.
141 Regarding the situation in Bhopal plant, Trotter et al observe: 'In an effort to decrease expenses, management allowed the plant and equipment to deteriorate, allowing attrition among qualified employees and lowered entrance standards resulting in a lack of qualified applicants, which seems to have led to the greater potential for accidents.' R Clayton Trotter, Susan G Day & Amy E Love, 'Bhopal, India and Union Carbide: The Second Tragedy' (1989) 8 Journal of Business Ethics 439, 442. See also Dominique Lapierre & Javier Moro, It Was Five Past Midnight in Bhopal (New Delhi: Full Circle Publishing, 2001), 195-204.
142 Ayres & Braithwaite, above n 5, 127.
143 For example, in Bhopal the reports of safety teams were not taken seriously. See Chapter 6.3.1. Firing of whistle-blowers by MNCs provides another example where profit dictates compliance with safety, or environmental regulations.
Another external coercive measure that Ayres and Braithwaite propose to secure the independence of internal compliance groups deserves critical attention. They write: 'The best guarantee of compliance group independence is external: making the failure to report unrectified violations a crime. Regulatory agencies would continuously audit to determine whether the group was discovering and reporting violations as it should.' 144 One might wonder: if continuous auditing and coercive force of the government is necessary for ensuring the independence of internal compliance groups, in the absence of which they will be redundant, then not much is gained by insisting on private monitoring of the enforcement of rules. Perhaps the better alternative could have been to rely on an extended version of tripartism under which NGOs, trade unions, media, social activists and independent auditors ensure that corporations implement the rules that they have written. Among others, such third parties might also be empowered to approach the courts if they find that a given corporation is acting in breach of its adopted rules or code of conduct. 145

In view of the above drawbacks in the theory of responsive regulation generally and in the model of enforced self-regulation in particular, 146 their usefulness in underpinning a regulatory framework dealing with human rights abuses by MNCs is suspect. This conclusion also stands affirmed by the analysis below, in which it is shown that responsive regulation would have failed to respond effectively to Bhopal.

7.2.3 Responsive Regulation and Bhopal

Whether responsive regulation (including its constituent ideas of the enforcement pyramid, tripartism and enforced self-regulation) offers a viable option to ground a regulatory framework relating to MNCs’ accountability for human rights violations could also be tested with specific reference to Bhopal. Although enforced self-

144 Ayres & Braithwaite, above n 5, 127.
146 Incidentally, while advocating this model in an article published in 1982, Braithwaite himself labelled it 'impractical.' Braithwaite, 'Enforced Self-Regulation', above n 69, 1467.
regulation is apparently a pre-Bhopal thesis, to my knowledge the model has not been specifically tested with reference to the Bhopal matrix of events. In this section an attempt is made to find out, by a hypothetical application, what promises responsive regulation holds in making an MNC like UCC accountable for human rights abuses.

Let me begin with a hypothetical application of the model of enforced self-regulation along with the enforcement pyramid to Bhopal. The model of enforced self-regulation would have required UCIL to formulate rules regarding the handling of hazardous substances, the health and safety of workers and perhaps about the possible environmental consequences arising out of the plant operation, and then submit these rules to the Indian government for approval. On their approval by the Indian government, UCIL would have been required to monitor the implementation of these rules through internal inspection-compliance groups. The government authorities would have been responsible for ensuring the independence of inspection-compliance groups and in case of violation of privately written and publicly ratified rules, would have been called upon to invoke progressively punitive sanctions. Of course, any kind of punitive sanctions, in accordance with the enforcement pyramid of Ayres and Braithwaite, would have followed only on the failure of a series of persuasive measures to bring about UCIL's compliance with those rules.

7.2.3.1 Assessing the efficacy of responsive regulation in preventing and redressing Bhopal

Could the model of enforced self-regulation coupled with the enforcement pyramid have responded better to Bhopal – in the sense of both averting it and providing justice to victims after it occurred – than the regulatory framework that was in force at the relevant time? It is doubtful if these regulatory tools would have fared any better on both fronts due to the reasons elaborated below.

I assess first the possibility of the model of enforced self-regulation averting Bhopal. At the time of Bhopal, UCC-UCIL had in place extensive safety policies and rules. Braithwaite outlined the model of enforced self-regulation in an article published in 1982. Braithwaite, 'Enforced Self-Regulation', above n 69. See Chapter 4.4.
These were akin to privately written rules under the model of enforced self-regulation, except in one material respect, i.e., they were not ratified by the government. However, arguably the ratification process would hardly have made any difference because the Indian government at that time did not have a developed regulatory regime related to health, safety and the environment. UCC-UCIL also had designated staff as well as internal reporting procedures to ensure the safe running of its business, and UCIL averred that its Bhopal plant was subject to pervasive regulation and frequent inspections from several governmental agencies. Therefore, the Bhopal plant also by and large satisfied two other requirements of the enforced self-regulation model: the presence of an internal compliance unit and public monitoring of private rule implementation.

Despite all these measures in place, I have already noted in Chapter 2 what happened in the Bhopal plant on the night of 2/3 December 1984. It should be noted, however, that the gas leakage on that fateful night - though massive, unprecedented and probably also unanticipated - was not the first one. Apart from an instance of water contamination that killed cows, minor gas leaks in the plant took place previously on at least three occasions. Among other contributing factors, the breach of internal safety policies of UCC-UCIL may have contributed to these incidents. How might regulators, working under the model of enforced regulation and the enforcement pyramid proposed by Ayres and Braithwaite, have reacted to these relatively minor incidents of gas leak or pollution? It is likely that they might have sought reports from UCIL’s compliance group and written warning letters, etc. However, this is more or less what the Indian government authorities did - they investigated these incidents.

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149 The government of India, for example, admitted that the Factories Act 'was drafted to regulate labour in factories and was never intended to provide for inspection of technical design procedures such as the MIC plant.' 'Reply of Union of India' in Baxi & Dhanda (eds.), above n 128, 109, 126. Similarly, commenting on the Indian Water and Air Acts, Abraham and Rosencranz noted: 'But the Acts are neither readily enforceable nor effective, and the elaborate administrative machinery they set up are poorly staffed and do little more than routine paper work.' C M Abraham & A Rosencranz, 'An Evaluation of Pollution Control Legislation in India' (1986) 11 Columbia Journal of Environmental Law 101, 106-07. See also Chapter 6.3.1.1.

150 'Written Statement of Union Carbide in the Court of the District Judge, Bhopal' in Baxi & Dhanda (eds.), above n 128, 33, 47-51.

151 Lapierre & Moro, above n 141, 121-22, 167-71.
and also made some recommendations. Of course the government did not suspend or cancel UCIL’s license, nor did it impose a hefty fine upon UCIL or launch criminal prosecution against UCIL staff. But given the emphasis placed by Ayres and Braithwaite upon working methodically through the lower stages of the enforcement pyramid, it is unlikely that responsive regulators ‘bound’ by the flexibility of the pyramid would have taken such steps either. It is, therefore, possible to contend that the model of enforced self-regulation might have failed in preventing Bhopal.

It is equally doubtful if Ayres and Braithwaite’s model would have fared better in delivering justice to the victims of Bhopal. I have already noted that responsive regulation is primarily a reactive model, in view of its reliance on the motive and conduct of concerned regulatees. Accordingly, post-Bhopal, UCIL could have been subjected to harsh punitive measures such as a fine, the suspension or revocation of its license, and possible criminal prosecution. But these measures would have proved insufficient to deliver complete justice; victims also needed to be compensated, for example. It is uncertain if the enforcement pyramid could encompass compensation at the peak, at which point maximum punitiveness is the primary regulatory focus. Also unknown is how the punitive measures contemplated in the work of Ayres and Braithwaite would have reached the deep pockets of UCC, which was outside the Indian regulators’ enforcement loop of both persuasion and punishment.

7.2.3.2 The reason for deterrence’s failure in Bhopal

Why do corporations not comply with business regulations even if they are supported by deterrence introduced under the enforcement pyramid? Professor Braithwaite recently offered the ‘most common’ explanation:

Perhaps the most common reason in business regulation for successive failure of restorative justice and deterrence is that non-compliance is neither about a lack of goodwill to comply nor about rational calculation to cheat. It is about management not having the competence to comply. The manager of the nuclear power plant simply does not have the engineering knowhow to take on a level of responsibility this demanding. He must be moved from the job.

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\[152\] ‘Written Statement of Union Carbide’ in Baxi & Dhanda (eds.), above n 128, 49-50. Compare Lapierre & Moro, above n 141, 174 (suggesting that the government did not take very seriously the request for intervention made by trade union leaders).
However, Bhopal seems to refute this (overstated) thesis of Braithwaite. The capability and training of corporate managers to comply with their social responsibilities undoubtedly has a bearing on the question of compliance with regulations dealing with such responsibilities, and in some cases, this *managerial capacity deficit* can explain successive non-compliance with regulations. But it is suspect if this is ‘the most common reason’ why corporations tend to ignore or fail to comply fully with deterrent regulatory measures. For example, in Bhopal (where at least some regulatory deterrence was present), UCC-UCIL did not comply with safety regulations primarily for reasons other than the competence of management. In fact, the UCC-UCIL personnel had more than enough technical know-how to handle the risks associated with a hazardous substance such as MIC.

Braithwaite’s solution to the problem of management’s incompetence – ‘incapacitation’ or removal of the concerned management – is too simplistic and naïve. He seems to assume that the problem of corporate irresponsibility can be fixed by simply putting in more competent or technically qualified personnel in management roles. This assumption clearly underestimates that the management of any given corporation functions collectively as per a given corporate structure and objective, and that corporate scandals are rarely attributable solely to the conduct of merely certain incompetent individuals. 156

### 7.2.3.3 Ayres and Braithwaite’s tripartism and Bhopal

The most promising feature of responsive regulation, in the context of Bhopal, is the concept of tripartism. The tripartism of Ayres and Braithwaite would have required information sharing with a selected PIG and allowing such PIG to participate not only in the Indian government negotiations with UCC-UCIL but also in post-Bhopal litigation. Such participation of a PIG would have arguably made a positive contribution in preventing or redressing Bhopal. However, the original ‘simplest’

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153 Braithwaite, ‘Responsive Regulation and Developing Economies’, above n 7, 887 (emphasis added).
155 See Chapter 6.3.1.

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conception of tripartism advanced by Ayres and Braithwaite is quite narrow; it does not allow various civil society organisations to participate fully in ensuring that corporations respect their human rights responsibilities. At least two limitations inherent in their version of tripartism may be noted. First, under the simplest model of tripartism, 'a single PIG is selected by the state' to perform the three roles summed up above. This restriction may be practical, but unreasonably inhibits the engagement of a wider range of societal organs. Second, Ayres and Braithwaite do not explore PIGs' role outside the formal regulatory framework, for instance, how PIGs could exert social pressure or sanctions on concerned corporations to change their behaviour.

In the Bhopal case, the PIGs did not get a chance to participate in a formal capacity, as envisaged by Ayres and Braithwaite. In fact, as discussed in Chapter 2 and as I will explain further in Chapter 8, the Indian government seriously limited (though for a legitimate reason) the right of civil society organisations to participate in the Bhopal litigation and the out of court settlement negotiations. Nevertheless, outside the formal regulatory process, NGOs, journalists, and social activists played a key role before, during and after the gas leakage. Their contributions ranged from giving warnings about the looming disaster to facilitating relief and the rehabilitation of victims to fighting continuously for justice (including for adequate medical facilities and compensation). The involvement of civil society organisations played a critical role in whatever justice the victims of Bhopal have received to date. In particular, the participation of women in the struggle for justice against UCC-UCIL as well as the government was phenomenal, especially considering that many of these were Muslim women, who are sometimes perceived to be timid and voiceless due to their wearing of a veil. In short, Bhopal indicates that a liberal conception of tripartism does have some potential, albeit limited, to make MNCs accountable for human rights abuses.

157 Ayres & Braithwaite, above n 5, 58. In a recent article, Professor Braithwaite seems to have liberalised this original version. He has proposed a 'regulatory society' model for developing economies in which they could network with civil society organs, even from abroad, to fill in gaps in their regulatory capabilities. Braithwaite, 'Responsive Regulation and Developing Economies', above n 7.
158 Ayres & Braithwaite, above n 5, 58.
7.3 INTEGRATED THEORY OF REGULATION

The integrated theory of regulation mooted here is a response to the inadequacy of prevailing strategies that underpin existing regulatory initiatives relating to corporate human rights responsibilities. In particular, the theory is a critical response to the model of responsive regulation put forth by Ayres and Braithwaite, for the model is found wanting as an option to support a framework which could make MNCs accountable for human rights abuses. The integrated theory of regulation, therefore, attempts to not only fill the gaps in responsive regulation but also extends the scope of integration. The integrated theory accepts the initial premises of responsive regulation that regulation should be responsive to the conduct of regulatees and that a synergy between persuasion and punishment is desirable for successful regulation. However, it questions the usefulness of the enforcement pyramid in which the progressive ranking of various regulatory strategies totally excludes the possibility of using sanctions in the first place. An approach which moves progressively towards more punitive sanctions or regulatory techniques, upon the failure of softer techniques adopted earlier, may prove inadequate in making MNCs accountable for human rights violations. It will be argued, instead, that regulatory techniques should be integrated, that is, employed in ‘tandem, to complement one another’ ¹⁶⁰ rather than being invoked only when the techniques situated lower on the regulatory pyramid fail to deliver. This integration rationale applies equally to the levels at which regulatory initiatives should be put in place and the types of sanctions to be invoked in case of non-compliance.

I already offered in Chapter 1 a brief definition of the integrated theory of regulation put forward in this thesis.¹⁶¹ A more detailed explanation of the theory is offered here, first, by contrasting it with the theory of responsive regulation and second, by elaborating the three-fold integration central to this theory. It is important to contrast, at the outset, integrated regulation with responsive regulation, because in a way the enforcement pyramid of responsive regulation also integrates multiple regulatory techniques and sanctions. While noting the limited and flawed theories concerning

¹⁶⁰ Haines, above n 7, 221. See also Bhagwati who proposes that ‘we need three complementary approaches’: social norming like the Global Compact, voluntary codes, and national mandatory codes to promote corporate social responsibility. Jagdish Bhagwati, In Defence of Globalisation (New York: Oxford University Press, 2004), 191, and generally 191-95 (emphasis added).
rationales for compliance (such as restorative justice, deterrence, and incapacitation), Braithwaite observes that '[w]hat the pyramid does is cover the weaknesses of one theory with the strengths of another.' 162 What then is the distinction between responsive regulation and integrated regulation? I argue that the basic distinction between two theories lies in the way that this regulatory integration is achieved. Whereas responsive regulation encompasses progressive integration, the theory of integrated regulation seeks to achieve cumulative and coordinated integration. In the former, the integration is vertically ordered in that strategies or sanctions lower in the pyramid must fail first before one may move up to more punitive options. On the other hand, the integration is horizontal and simultaneous in the latter – depending upon the need and nature as well as the conduct of a regulated actor, all or some of the available strategies and sanctions may be invoked at the same time, if needed.

The benefit of cumulative integration over progressive integration arises from the fact that the simultaneous availability of strategies and sanctions will enable them to complement each other better. Instead of entering the scene of regulation at a given stage at the demise of strategies and sanctions lower in the pyramid, various strategies and sanctions may offer a helping hand to each other to remedy their respective limitations. Gunningham who, along with Grabosky and Sinclair, seeks to develop an optimal mix of regulatory instruments and parties in the book Smart Regulation, sums up – though without using the term ‘integrated’ – what the integrated theory of regulation aspires to achieve:

We will argue that such “single instrument” or “single strategy” approaches are misguided, because all instruments have strengths and weaknesses; and because none are sufficiently flexible and resilient to be able to successfully address all environmental problems in all contexts. Accordingly, we maintain that a better strategy will seek to harness the strengths of individual mechanisms while compensating for their weakness by the use of additional and complementary instruments.163

There is another important difference between responsive regulation and integrated regulation. Whereas in the former theory integration, albeit progressive, is limited to

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161 Chapter 1.4.5.
162 Braithwaite, ‘Responsive Regulation and Developing Economies’, above n 7, 887.
regulatory strategies and sanctions, in the latter integration is envisaged in other areas as well. The integrated theory of regulation is, thus, wider in that it also seeks to achieve integration, firstly, between human rights and business and secondly, between the ‘why,’ ‘what,’ and ‘how’ of corporate human rights responsibility discourse, as discussed further below. In short, it is the nature and scope of integration that differentiates the integrated theory of regulation from the theory of responsive regulation.

As indicated in the beginning of this chapter, integration under the proposed regulatory theory could be achieved in several arenas. In the following sections, however, I canvass what I consider to be the three most important spheres in which integration rather than progression is necessary if the current situation of corporate impunity for human rights abuses is to be redressed effectively.

7.3.1 Integrating Human Rights and Business

The integrated theory of regulation, first of all, asserts that it is fundamental that balance and integration are established at a deeper level between human rights issues and business issues. The interface between business and human rights involves different stakeholders which often have competing and/or conflicting interests. It should, therefore, come as no surprise that human rights advocates and business representatives have been seen (to some extent even today) more as foes than friends, despite recent attempts to foster a dialogue between human rights and business.

Among other manifestations, this presumed antagonism has been reflected in the

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165 Customers, suppliers, and retailers have different interests. Owners are most interested in realising a return on their investment, whereas customers and suppliers are most interested in gaining fair value in the exchange of goods and money. Neither has a great interest in the other's stake.' James E Post, Anne T Lawrence, James & Weber, Business and Society: Corporate Strategy, Public Policy, Ethics, 9th edn. (Boston: Irwin/Mcgraw-Hill, 1999), 11 (emphasis added) (hereinafter Post et al, Business and Society).

evolving structure and content of human rights law and its institutions on the one hand and business-corporate-trade law and its institutions on the other.\textsuperscript{167}

However, the disposition of compartmentalised aloofness by which these bodies of law have been inflected is changing now. Scholars have made arguments (not always free from difficulties)\textsuperscript{168} for pursuing such integration between human rights and business concerns as well as institutions at several levels.\textsuperscript{169} In concrete terms, company laws are being amended to impose specific duties on corporations and/or their directors that they should take care of the interests of their stakeholders.\textsuperscript{170} One possible reason for this shift in approach could be the realisation that unless a balance is established between the interests of human rights groups and the business community, regulatory initiatives that seek to promote corporate human rights responsibilities will continue to administer a superficial treatment of the problem of endemic human rights abuse.\textsuperscript{171}

As both the effective realisation of human rights and the presence of a healthy business environment are important for the development of individuals as well as society as a whole, the integrated theory seeks to substitute approaches such as


'human rights or business,' 'business and human rights,' and 'business for human rights' with human rights for business. Today, 'the question is not, Should business be ethical? Nor is it, Should business be economically efficient? Society wants business to be both at the same time.' Rather than substituting the wealth creation and profit maximisation goals of corporations, we could bring in other equally important goals such as the realisation of human rights, because 'corporations in unprincipled pursuit of profits can do great social harm.' Initiatives to achieve such integration between human rights issues and business issues have to be taken at various levels. Although I will explore some of these possibilities in the next chapter, let me highlight here how wide the canvas is for achieving this integration. Educational institutions, for example, could play a key role in this process. Donaldson observed: 'If the subject matter of business education is limited to functional questions - How can market share be enhanced? How can efficacy be maximised? How can accounting be simplified? - human issues are intentionally excluded.' It is, therefore, important that other types of questions are also asked: for example, who is likely to be affected by the decision to be taken in a given instance, or does the decision satisfy a moral minimum? No doubt such questions should be raised at business management and/or law schools during the

171 Hinkley, for example, locates the problem of corporate human rights irresponsibility in corporate law. Robert C Hinkley, 'Developing Corporate Conscience' in Rees & Wright (eds.), A Dialogue, above n 166, 287, 288-90.
172 Post et al, Business and Society, above n 165, 17.
173 Rather than eliminate the goal of profits, a more reasonable approach seems to be to introduce other goals, i.e., moral goals, into the corporate decision-making structure. The consequence would be to balance the motive of profit against other motives in order to improve a corporation's behaviour.' Donaldson, above n 2, 168 (emphasis in original).
174 Braithwaite, 'The Limits of Economism', above n 97, 481.
175 See, for example, the recent initiative of the UN Global Compact to forge a partnership with academic institutions to promote responsible corporate citizenship. Letter from Georg Kell, Executive Head, UN Global Compact Office, Office of the Secretary-General to the Academic Community (29 March 2006), <http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/lll/ac_netw_032006.pdf> (last visited 30 October 2006). See also Surya Deva, 'Global Compact: A Critique of UN's "Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34 Syracuse Journal of International Law & Commerce 107, 126-27; and generally Richard Levin, 'Global Climate Change: Taking the Battle to the Campus', Yale Global Online (26 February 2007), <http://yaleglobal.yale.edu/display.article?id=8822> (last visited 28 February 2007).
177 Patricia H Werhane, 'Moral Character and Moral Reasoning' in Donaldson & Freeman (eds.), Business as a Humanity, id., 98, 105.
education and training of future business managers, to the extent that they are not raised in those settings already. A beginning has already been made in this direction, but more needs to be done and in the correct way. For example, instead of merely offering one course on corporate social responsibility or business ethics, these issues should be integrated into other courses as well, that is, in courses on corporate law, industrial law, intellectual property law, and the like. The reverse should also happen: human rights courses should also include issues related to business and corporations. This integration may not ipso facto make future business managers virtuous, but it would at least train them in how to take business decisions consistent with human rights law and policy.

7.3.2 Integrating ‘Why,’ ‘What,’ and ‘How’

The theory proposed here is integrated because it encompasses, in my view, all three essential components required for constructing a viable theory of corporate human rights responsibility. These three components are: why should corporations, ergo MNCs, respect human rights; what standards of human rights should they uphold; and how should corporate human rights obligations be enforced in an effective and efficient manner?

I consider this integration necessary for at least two reasons. First, the ‘why,’ ‘what,’ and ‘how’ embody three legitimate challenges that those engaged in the quest to impose human rights obligations on MNCs face. An adequate and sound reply to why is needed because until recently corporations were not seen as bearers of human rights responsibilities; traditionally, human rights discourse evolved to mediate relations between states and individuals. What, on the other hand, becomes a pressing issue because MNCs by definition do business in countries which differ significantly from

178 De George writes that business school can and should take the lead in the project of humanising business. Richard T De George, ‘Business as a Humanity: A Contradiction in Terms?’ in Donaldson & Freeman (eds.), Business as a Humanity, id., 11, 17. He again notes that the ‘purpose of a business school that is consonant with that of a university is to humanise business.’ Id., 21.
179 A growing number of MBA programmes incorporate social and environmental issues. The most recent ranking in 2005, in the biennial Beyond Grey Pinstripes report, found that 54 per cent of participating schools required students to take at least one course in ethics, corporate social responsibility, sustainability or business and society, up from 45 per cent in 2003 and 34 per cent in 2001.’ Sarah Murray, ‘A Degree of Ethical Leadership’, Financial Times (15 January 2007), <http://www.ft.com/cms/s/782779a6-e43c-11db-bec4-0000779e2340.html> (last visited 16 January 2007).
each other in several material particulars. Finally, how perhaps signifies the most formidable challenge in that we are talking about regulating the conduct of extremely powerful artificial entities that operate at a transnational level and enjoy the protection of several legal principles. As not responding adequately to any of these challenges will undermine any proposed regulatory framework, they should be dealt with together.

A second, and more fundamental, reason for the integration proposed here is that a dynamic relationship exists between the ‘why,’ ‘what,’ and ‘how’ of corporate human rights responsibility discourse. Let me explain how the characteristic and nature of these components is, or ought to be, influenced and informed by each other. An investigation into ‘why’ tells us, among other things, about the role and place of corporations in society. Their given role and place in society has a direct bearing on the question of ‘what,’ that is, the extent of human rights responsibilities of corporations, for their responsibilities could hardly be identical to those of states. ‘Why’ also informs us why corporations hesitate to take on board human rights responsibilities, for instance, by reason of the effect of the prisoner’s dilemma, or because of lack of precision in relevant standards. If we know that the prisoner’s dilemma discourages corporations from assuming their human rights responsibilities, it is rational to think that something should be done, prompting the question ‘how?’ Similarly, if imprecise standards discourage compliance, then attempts should also be made to rectify such imprecision and vagueness in responding to the ‘what’ question.

An inquiry into ‘why’ may also indicate why corporations tend to comply with their human rights responsibilities: for economic reasons, because of the effect of naming and shaming, through the exertion of market pressure, or for other reasons. This being the case, the efficacy of compliance strategies and sanctions under ‘how’ might be judged with the help of one’s response to the question ‘why.’ Finally, if we know that corporate actors are deterred not only by economic losses but also by reputational losses, then consideration can be given to adverse publicity sanctions for regulatory

180 De George, above n 178, 18.
offenders' 181 – demonstrating a further relationship between ‘why’ and ‘how’ inquiries.

7.3.3 Integrating Available Levels of Regulation, Strategies of Implementation, and Types of Sanctions

The integrated theory, finally, emphasises the need for integrating different available levels of regulation, strategies of implementation, and types of sanctions. Regulatory initiatives aimed at MNCs' conduct could be introduced at several levels – from the local corporate level to the international level. It is proposed that such initiatives should be put in place at the institutional, national and international levels in a coordinated manner. Again, several strategies – from persuasion to punishment – are deployed to ensure that corporations respect their human rights responsibilities. The integrated theory suggests that two strategies should be invoked in an integrated way: (dis)incentives and sanctions. Finally, the theory posits that civil, criminal and social sanctions should be invoked, not in ascending progression but in tandem, against those MNCs which do not comply with their human rights responsibilities.

This three-fold integration is essential for removing the gaps and shortcomings of individual regulatory strategies and sanctions and in turn establishing a regulatory mechanism that could effectively deal with instances of human rights abuse by MNCs. The establishment of such a mechanism should protect the interests of MNCs too, by reducing the fears of unpredictable outcomes and multiple proceedings manifest under the existing regimes of accountability.

At the risk of repetition, the common justification for introducing integration between different available levels of regulation, strategies of implementation, and types of sanctions merits reiteration. The central assumption of the integrated theory of regulation is that all regulatory tools have certain inherent limitations. As no one single level of regulation, strategy or sanction is adequate to deal effectively with human rights violations by MNCs, an attempt should be made to combine their potential through integration. The integrated theory of regulation is directed towards achieving this result.

181 Ayres & Braithwaite, above n 5, 22. See also Brent Fisse & John Braithwaite, The Impact of
7.4 Conclusion

Scholars generally agree that there is a need both to encourage corporations to respect their human rights responsibilities and robustly deal with those corporations not so encouraged. However, there is still no consensus as to how this could be achieved, and the jury is still out on the question of finding optimal regulatory strategies and sanctions to promote responsible corporate citizenship. Out of many theories, one theory that stands out and has proved highly influential is the theory of responsive regulation put forward by Ayres and Braithwaite. This chapter critically assessed the suitability of this theory as prospective underpinning for a regulatory regime that could effectively make MNCs accountable for human rights violations. It is concluded that although this theory provides a useful starting point, the usefulness of the progressive enforcement pyramid as well as enforced self-regulation in controlling and redressing human rights violations by corporations is both suspect and limited.

As an alternative, the integrated theory of regulation is proposed, which builds upon and extends responsive regulation. The point of departure for integrated theory is that integration between different available strategies of implementation and types of sanctions should be cumulative and coordinated rather than being progressive and hierarchically ordered. In order to maximise efficacy, I argue that regulatory techniques and sanctions should be employed simultaneously to complement one another rather than being invoked only when the techniques situated lower on the regulatory pyramid fail to deliver. In addition, the integrated theory also emphasises the need for integration between the ‘why,’ ‘what,’ and ‘how’ of corporate human rights responsibility discourse, and between human rights and business concerns more generally.

Different regulatory initiatives try to attain certain pre-determined objectives. The integrated theory of regulation is also driven by an objective: it seeks to provide a foundation for a regulatory regime that could effectively deal with instances of human rights violations by MNCs. Keeping this objective in mind, the theory proposes to

Publicity on Corporate Offenders (Albany: State University of New York Press, 1983).

See Clarke, above n 1, 7-8.
maximise the chances of effective regulation by introducing regulatory regimes which utilise integrated strategies of implementation and types of sanctions at institutional, national and international levels. Whereas this chapter outlined the basic components of the integrated theory of regulation in contrast to responsive regulation, the next chapter will explain how this integration could be achieved in different areas.
CHAPTER 8: VISION OF AN INTEGRATED FRAMEWORK OF CORPORATE REGULATION

8.1 INTRODUCTION

I argued in the previous chapter that the integrated theory of regulation could anchor an effective regulatory regime dealing with human rights violations by MNCs. But why is it important to develop and sustain a robust regulatory framework that could ensure that MNCs are brought to account for human rights violations? Shue provides an explanation: ‘That a right involves a rationally justified demand for social guarantees against standard threats means, in effect, that the relevant other people have a duty to create, if they do not exist, or, if they do, to preserve effective institutions for the enjoyment of what people have rights to enjoy.’1 As I have shown in Chapters 3 and 4 that existing regulatory initiatives are inadequate to offer justice to victims of corporate human rights abuses, ‘relevant people’ – legal scholars included – have a ‘duty’ to strive for the creation and preservation of effective institutions which could safeguard human rights in the face of contemporary challenges and structural transformations.2

This chapter seeks to outline how such an effective regulatory framework grounded in the integrated theory could be developed. To recapitulate, the integrated theory proposes a three-fold integration: (i) between human rights and business; (ii) between the ‘why,’ ‘what,’ and ‘how’ of corporate human rights responsibility discourse; and (iii) between different available levels of regulation, strategies of implementation, and types of sanctions. Since the process of integrating the ‘why,’ ‘what,’ and ‘how’ is already underway in the earlier discussion dealing with the two legs of this tripod (‘why’ in Chapter 5 and ‘what’ in Chapter 6), this chapter primarily deals with integration on the first and third counts. As elaborated in different parts of this chapter, the integration between human rights issues and business issues has to be achieved at all three levels of regulation: institutional, national, and international. Such integration also needs to be embedded in strategies of implementation and types of sanctions. For example, balancing between human rights and business considerations is likely to yield a conclusion that states should offer incentives to those corporations which choose to respect their human rights responsibilities even at the cost of possible economic losses, or alternatively punish irresponsible corporate citizens. For the same reason, consumers and investors should share the burden of subjecting corporations to human rights responsibilities by, for instance, being willing to pay more for the products or services offered by corporations that comply with human rights norms.

This chapter also outlines how integration between different available levels of regulation, strategies of implementation, and types of sanctions could be achieved. To begin with, the conduct of MNCs should be regulated at three levels: at the institutional level through voluntary codes; at the national level by the laws enacted by governments of both the home and the host countries of MNCs; and at the international level by an international treaty stipulating corporate human rights responsibilities. Regulatory initiatives at all three levels should invoke, as far as possible, two types of implementation strategies – (dis)incentives and sanctions – and three kinds of sanctions – civil, criminal and social – in an integrated manner. A glimpse of how this complex task could be undertaken is provided in the parts that follow.
8.1.1 Two Themes that Underpin the Proposed Regulatory Framework

Readers are going to notice two themes underpinning the regulatory framework drawn here: *coordinated multiplicity* and *informality*. The first of these themes has already been noted in the previous chapter: since no single regulatory theory, strategy, or sanction is flawless, more so when dealing with difficult regulatory targets such as MNCs, we need to invoke more than one strategy or sanction in an integrated fashion. The enforcement pyramid proposed by Ayres and Braithwaite provides one way of doing so. It was, however, contended that this progressive integration would have limited success in relation to MNCs. As an alternative, I proposed a simultaneous and coordinated integration.

The second common theme that underpins the vision of an integrated regulatory framework outlined in this chapter is the reliance on informal, non-legal tools and non-state institutions to ensure that MNCs respect and promote human rights. The integrated theory thus underscores the point that 'regulation' should not be seen and linked exclusively to formal law, state and legal institutions, because regulatory objectives could be achieved and are often achieved even outside formal legal processes. Law suffers from inherent limitations in regulating the conduct of corporations, and it is doubted if law alone could bring about the required change in

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3 In my view, the purpose of comparing and contrasting different models or theories of corporate regulations should be to appreciate better the relative advantages and limitations of each model, which in turn should open avenues for making necessary refinement or adjustments in regulatory models. However, when this inquiry is used to disparage and reject one model altogether, or to suggest the best model, the whole exercise becomes problematic. Parkinson, for example, notes that the 'dispute is ... about the best means of securing socially desired behaviour' from corporations. John Parkinson, 'The Socially Responsible Company' in Michael K Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International, 1999), 49, 56 (emphasis added). Parkinson though admits that exposing the limitations of a model is not 'to deny the importance' of the given model. *Id.*, 57.


5 The capacity of law to regulate corporations is limited by the opacity and complexity of corporate structures, the desire to avoid over-regulation, and the fact that corporate management has such a great capacity to control employee workplace behaviour. Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge: Cambridge University Press, 2002), viii. Donaldson observes that though various laws have made a difference, ‘a gap exists between the expectations for

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the behaviour of corporations. Law is slow to react to changing corporate structures and behaviours, does not provide enough flexibility to respond effectively to those changes, and the process of adjudication is time consuming and expensive. Professor Christopher Stone, in his influential book Where the Law Ends, highlights the point that ‘even if the corporation followed the law anyway, it would not be enough’ to promote responsible corporate citizenship because of a three-fold limitations of the law.

Similarly, the limitations of the state as a force for regulating the conduct of MNCs are well-known. Some of these limitations arise directly from the nature, power, structure and modus operandi of MNCs. Furthermore, in some instances states
might be unwilling to regulate (due to a lack of political will, a desire for investment-driven development, or complicity with MNCs) or incapable of regulating (by reason of the transnational operations of MNCs, or the economic-legal incapacity of concerned states) MNCs effectively. In an era of globalisation, privatisation, and liberalisation of trade, there has also been a significant change in the position and role of states vis-à-vis law making, governance and regulation. Increasingly, more and more issues are being regulated and governed by regional and international treaties, agreements or conventions. States are also under constant pressure from MNCs and international organisations such as the International Monetary Fund (IMF), World Bank and the WTO to either deregulate as far as possible or entrust the task of regulation to private actors. Finally, as Gunther Teubner argues, 'globalisation of law creates a multitude of decentred law-making processes in various sectors of civil society, independently of nation states.' The effect of all these developments is that the capacity of states to regulate the activities of MNCs has been further weakened.

11 For example, the Australian Government decided against enacting an extraterritorial law to regulate the overseas activities of Australian corporations. See Australian Parliamentary Joint Statutory Committee on Corporations and Securities, Report on the Corporate Code of Conduct Bill 2000, <http://www.aph.gov.au/senate/committee/corporations_ctte/corp_code/report/report.pdf> (last visited 6 October 2003). Similarly, the US Government is not very supportive of the ATCA being used to make the US corporations liable for human rights violations abroad. See, for example, Brief for the United States of America as Amicus Curiae in Doe v Unocal 963 F Supp 880 (Nos 00-56603, 00-56628), <http://www.hrw.org/press/2003/05/doj050803.pdf> (last visited 1 May 2004). The US Supreme Court has, however, held that such proceedings could be initiated under the ATCA. Jose Francisco Sosa v Humberto Alvarez-Machain 124 S. Ct. 2739 (2004).


16 Robe, for example, contends that 'the monopoly of state law creation is being challenged' by extraterritorial laws and 'the self-regulation of transnational civil society.' Jean-Philippe Robe, 'Multinational Enterprises: The Constitution of a Pluralistic Legal Order' in Teubner (ed.), above n 15, 45, 49.
Therefore, alongside the institutions of statehood, the integrated theory relies on informal and non-state institutions (e.g., educational institutions, and families), forums (from public parks to markets, universities, websites, and board meetings), actors (e.g., employees, consumers, investors, NGOs, trade unions, the media, and other social activists), and means (e.g., protests, naming and shaming, and boycotts) to enforce human rights responsibilities against MNCs.

8.1.2 Making Clear a Few Caveats and Assumptions

Before proceeding further, it is also desirable to announce a few caveats about the scope of this endeavour and the underlying assumptions. First, in this chapter I do not intend to debate in detail the relative merit of introducing regulatory initiatives at different levels. Nor do I intend to evaluate with reference to MNCs the merit of invoking any one strategy or sanction as compared to another. A huge amount of literature already exists on this issue, and here it is assumed that all regulatory tools have some advantages as well as disadvantages. The focus of this chapter is, rather, how the integrated theory of regulation could assemble various regulatory tools to develop an effective regulatory framework dealing with human rights abuses by MNCs.

Second, as the vision of an integrated regulatory framework is quite ambitious, it will not be feasible here to elaborate in detail all aspects of the proposal. In this chapter, I intend only to canvass key ideas that may be adopted, outline the direction that might be taken, and flag areas in which reforms are needed to accomplish the regulatory goals mooted here. An attempt with reference to Bhopal will be made, however, to provide a more concrete illustration of how the framework might respond to human rights violations by MNCs.

Third, the regulatory model proposed in this chapter is founded on various assumptions. In order to accept and recognise the strengths of the model outlined in this chapter, readers would have to have bought in to the arguments advanced in

17 See, for discussion, Chapter 4 where the merits of six representative regulatory regimes have been assessed.
Chapters 5 and 6. To recapitulate, it was contended that corporations have a responsibility to respect human rights, and that MNCs should follow the human approach to overcome a business dilemma of varying human rights standards that they face while operating in different countries. It is also assumed that various potential regulatory actors (such as states, international institutions, corporate stakeholders, civil society organs and MNCs) are committed to promoting corporate human rights responsibilities and are willing to take appropriate measures to achieve that end. In particular, it is hoped that (at least some) states will be eager to strengthen the information flow – which is vital for the working of several ideas outlined here – between MNCs and their stakeholders.

8.2 LEVELS OF REGULATION

As discussed, it is essential that regulatory measures are put in place, in an integrated manner, at the institutional, national and international levels to ensure that MNCs respect their human rights responsibilities. Critics may query what improvement this proposal offers, given that regulatory initiatives already exist at these three (in fact, more) levels. The difference, it is hoped, will be made by the adoption of an integrated approach in both the formulation and the implementation of corporate human rights responsibilities. Let me explain at the outset how this integration is achievable.

There is a broad consensus among scholars that it is important to agree on the human rights responsibilities of MNCs at an international level. At the same time, one size cannot fit all MNCs doing business across the globe. It is invariably necessary for MNCs to make necessary adaptations in view of local differences, which exercise has its hazards, as highlighted in Chapter 6. To overcome this dilemma, it is suggested that regulatory initiatives at both institutional and national levels should permit necessary modifications in human rights standards by following the 'human approach' elaborated in Chapter 6 with reference to the Bhopal case. MNCs would then be applying in host countries the home or international human rights standards modified in view of morally relevant local differences. In this process of integration, a 'top

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18 One could, for example, find regulatory initiatives at regional levels or even industry or sector wise. See Table 4.1.
down' approach is visible in that international human rights standards will influence the content of standards at national and institutional levels. However, a 'bottom up' approach will also be at work simultaneously: that is, the standards adopted by MNCs at an institutional level and the standards formulated by governments at a national level will form the basis for an agreement on standards at the international level.\(^{20}\)

The crucial aspect of this integration process is a *continuous upward-downward cycle of dialogue and evolution* between regulatory initiatives at three levels in that they will be informed by the experiences and outcomes of each other. Just to illustrate, if the government of a state is contemplating enacting a law to impose human rights responsibilities on MNCs, an integrated regulatory framework would require that government to look at, and learn lessons from, regulatory initiatives in place at both institutional and international levels in developing its own national standards.\(^{21}\)

The main benefit of the evolution of corporate human rights responsibilities through this integrated process is that the process could continue even if one of the links in this chain is missing. For example, if we have international human rights norms for corporations, then MNCs could straightaway adopt appropriate business practices based on these standards, irrespective of whether or not these international norms have been transplanted to the national level. A combined reading of my arguments in Chapter 5 and 6 provides a normative grounding for this view: firstly, that corporations, as social organs, are duty bound to respect and promote human rights relevant to their business activities and within their sphere of influence or operations;\(^{22}\) and secondly, that in order to discharge that duty, MNCs should adopt the human approach and look beyond standards applicable in their host countries.\(^{22}\) In

\(^{19}\)See Chapter 8.2.3, and Chapters 4 and 6 generally.


\(^{21}\)Governments may, for example, 'accept standards developed in the private sector and give them official status.' Grabosky et al, 'Parties, Roles, and Interactions' in Gunningham et al, *Smart Regulation*, above n 4, 125.

\(^{22}\)Chapter 5.4.

\(^{23}\)Chapter 6.2.2.2 and 6.3.
summary, the presence of weak human rights standards (or the total lack of any such standards) in states facing conflict, corruption, or weak governance structures should be no justification for MNCs operating in such states to violate human rights. Conversely, if no human rights standards are agreed yet at the international level, MNCs should look for standards applied at a national level – not merely in the country of operation but also in other countries, including their home countries.24

In order for the system sketched here to remain effective, there has to be integration between regulatory regimes at three levels in that each should complement the other in enforcing human rights responsibilities against MNCs. So, if an MNC does not implement its adopted code of conduct and the enforcement mechanism at the national level is weak or non-existent, then the international regime should step in to avoid any situation of corporate impunity for human rights violations. On the other hand, if there is a situation in which neither the relevant international regime nor the national regime in the host country offer any hope for justice, then extraterritorial law enacted by the home country of a given MNC could provide an avenue. Finally, if no state-based institutions at the national and/or international levels are in a position to enforce human rights norms against MNCs, then civil society organisations should exert pressure on MNCs in market contexts by relying on social sanctions. The central idea of integrated implementation, thus, is that corporate human rights responsibilities should be enforceable by multiple actors in multiple venues by invoking multiple compliance strategies and sanctions. Gunningham makes this point well:

[A] mix of [regulatory] instruments will work more effectively if a broader range of participants are capable of implementing them. This means the direct involvement not only of governments (first parties) but also of business and other “targets” of regulation (second parties) and a range of other interested actors (third parties), both commercial and non-commercial.25

The above vision of integration does not imply over-regulation of MNCs’ activities or suggest that more regulations will ipso facto result in more effective compliance. Rather the idea is to streamline existing multifarious regulatory initiatives by developing coordination amongst them. It is critical to have the option of introducing

24 Spar and Yoffie suggest certain steps that states can take to prod MNCs into a 'race to the top' rather than to the bottom. Deborah Spar & David Yoffie, 'Multinational Enterprises and the Prospects for Justice' (1999) 52 Journal of International Affairs 557, 579-80.
regulatory initiatives at more than one level because it is highly unlikely that expected initiatives will be put in place or enforced at all levels, or that all regulatory actors will behave in an expected manner. This coordinated multiplicity, it is hoped, will offer, in most instances, at least one avenue for justice to victims of human rights abuses by MNCs.

In order to ensure that corporations uphold their human rights responsibilities, regulatory regimes at all three levels should employ two strategies (incentives and sanctions) and three types of sanctions (civil, criminal, and social). These strategies and sanctions need to be utilised not one after another but simultaneously so as to cover effectively the limitations of each other. I elaborate on this aspect later in this chapter.

8.2.1 Regulation at an Institutional Level

The corporation is an important institution of society and any attempt to regulate its activities effectively should ideally involve putting in place some regulatory initiatives at the institutional level. The term ‘institutional level’ is given a wide and varied meaning here in that one single-state-based corporation, an MNC, and all businesses of any given industry are treated as an institution for the purposes of this discussion. The regulatory initiatives at the institutional level may take the shape of codes of conduct, guidelines, principles, charters, declarations, citizenship commitments, and/or policy statements.26 A significant push for putting in place such initiatives will come from external regulatory initiatives in force at national, regional and international levels as well as from corporate stakeholders’ expectations, demands or pressures. Who are these stakeholders of MNCs? An oft-quoted definition of a ‘stakeholder’ is provided by Freeman: ‘A stakeholder in an organisation is (by definition) any group or individual who can affect or is affected by the achievement of the organisation’s objectives.’27 Heenan and Perlmutter also provide several criteria

26 Murphy outlines varied nature of existing codes of conduct adopted by corporations. Sean D Murphy, ‘Taking Multinational Corporate Codes of Conduct to the Next Level’ (2005) 43 Columbia Journal of Transnational Law 389, 400-01. See also Chapter 4.2.2.
27 R Edward Freeman, Strategic Management: A Stakeholder Approach (Boston: Pitman, 1984), 46. At places, he has used the word ‘purpose’ or ‘mission’ in place of ‘objective.’ Id., vi, 25, 52, 53. See also John D Daniels et al, Globalization and Business, 1st edn. (Upper Saddle River, NJ: Prentice Hall,
for stakeholding on similar lines. In view of these indicia, the stakeholders of MNCs will be their employees, consumers, investors, suppliers, NGOs, and the media.

The regulatory design proposed here at the institutional level is based on a modified version of 'self-regulation,' which is considered an integral component of any successful regulatory regime. Two key aspects embody this modification. First, although individual institutions (MNCs or industry associations) will design regulatory initiatives themselves, they would be guided by the content of regulatory initiatives at the national and international levels as well as by inputs from their stakeholders. Second, stakeholders of these institutions will try to ensure, through a range of strategies and sanctions, that initiatives adopted are implemented in their letter and spirit by the concerned MNC. This would be in addition to any internal enforcement and compliance mechanism that MNCs in question might set up. In short, the autonomy — the selfness — that MNCs enjoy in both the formulation and implementation of human rights obligations at an institutional level would not be absolute.

It should be noted that the version of self-regulation put forth here as part of the integrated theory of regulation is different from the model of enforced self-regulation propounded by Ayres and Braithwaite. The basic difference lies in the fact that unlike

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28 The argument that a corporate stakeholder should have 'one or more' of the following features: (i) its contributions are vital to the MNC; (ii) it has considerable influence over important corporate decisions; (iii) it has the ability to inflict significant damage on the MNC if its expectations are not met; and (iv) its withdrawal of support will endanger the performance and survival of the MNC. See Andrew L Friedman & Samantha Miles, Stakeholders: Theory and Practice (Oxford: Oxford University Press, 2006), 4-10.

29 See Andrew L Friedman & Samantha Miles, Stakeholders: Theory and Practice (Oxford: Oxford University Press, 2006), 4-10.

30 'Self-regulation is not a precise concept but ... may be defined as a process whereby an organised group regulates the behaviour of its members.' Neil Gunningham & Darren Sinclair, 'Instruments for Environmental Protection' in Gunningham et al, Smart Regulation, above n 4, 37, 50. One possible reason why it is difficult to define self-regulation precisely is because there are several categories of self-regulation. See id., 51.

31 Clarke notes that there 'is an element of self-regulation in all regulation, therefore, and more particularly in successful regulation.' Michael Clarke, Regulation: The Social Control of Business between Law and Politics (London: Macmillan Press Ltd., 2000), 3. Self-regulation through voluntary codes is also more popular amongst MNCs for obvious reasons: 'MNCs are far more attracted to codes that are self-applied, that are tailored to the MNC's unique situation, and that are not dictated by government regulation.' Murphy, above n 26, 395.
enforced self-regulation, the model mooted here does not entail a formal involvement of government agencies in the writing of rules by corporations or their enforcement. It relies on stakeholders to ensure, first, that MNCs adopt appropriate human rights responsibilities, and second, that they adhere to such responsibilities. Stakeholders could, nevertheless, rely on government machinery (including the judicial system and/or parliamentary committee processes) to compel corporations to respect their human rights responsibilities. However, this indirect or background reliance on government institutions is entirely different from the role of government agencies that Ayres and Braithwaite envisage in enforced self-regulation.

8.2.1.1 Designing the regulatory initiative at institutional level

How, according to this scheme, should an MNC go about designing self-regulatory initiatives at the institutional level? I propose that the ultimate parent corporation should draft a code that elaborates broad human rights policies and responsibilities for the whole corporate group. In order to accord with the integrated framework outlined in this thesis, it would be essential that the draft is informed by existing regulatory initiatives of corporate human rights responsibilities at the national and international levels. Furthermore, the draft should be widely publicised so that relevant stakeholders have an opportunity to provide inputs on the content of the proposed regulatory initiative to be introduced at the institutional level. The code should be adopted only after considering, and incorporating wherever necessary or possible, the suggestions made by stakeholders.

It is anticipated that MNCs and their stakeholders (or even various stakeholders) might have divergent views about the content of such codes. If no consensus on human rights responsibilities is reached after this deliberative exercise, an MNC should still adopt a code reflective of its position. However, in order to explain

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33 This will require relaxing the locus standi requirements as elaborated in Chapter 8.3.1.1.
34 Such an exercise will also reduce what Murphy terms 'the likelihood of sham MNC codes.' Murphy, above n 26, 426.
35 These are not radical proposals as some of the existing codes of conduct may have undergone this process. Murphy, for example, notes: 'The codes may draw on or refer to international law norms (particularly in the filed of international labour, environmental, or human rights law), [and/or] may focus on MNC adherence to local laws.' Murphy, above n 26, 400. He further notes that 'relevant stakeholders are typically a part of the drafting process.' Id., 401. See also Zerk, above n 4, 42-43.
reasons behind the contested inclusions and exclusions in a human rights code, I propose that each MNC should issue an *explanatory note* along with its adopted code. Such a note – the production of which is a standard practice followed by legislative bodies in several countries when enacting new legislation – could be used, inter alia, to explain any special circumstances that required some deviations or reservations vis-à-vis existing national or international regulatory initiatives, or why certain suggestions of stakeholders were not included in the code. The requirement of an explanatory note should not only bring fairness, openness and transparency to the decision making process, but would also bring the norm-setting exercise into the public domain permitting dialogue among stakeholders. Other MNCs as well as regulators at national and international levels could learn lessons from the resultant discussion on the contents of the code and the note.

Since the code and the note contemplated above would not be country-specific, but rather would apply across the whole corporate group, the subsidiaries of any one group could potentially need to make some adjustments in the parent code. This adaptation may also be desirable because the subsidiaries of a given MNC might be doing business in diverse sectors and therefore, they may feel the need to align their human rights responsibilities with specific needs of a particular sector. As long as subsidiaries of an MNC follow the *human approach* (developed in Chapter 6) in making such adjustments, this process should present no threat to the realisation of human rights. It is, however, critical that all the steps that I have outlined above with reference to the parent code are followed again in relation to any subsidiary code.

Apart from detailing human rights responsibilities for the whole corporate group or a given subsidiary, as the case may be, the regulatory initiative in the form of a code should also elaborate how the corporation(s) in question plan(s) to implement and integrate their human rights responsibilities into their day-to-day business decisions. The Business Leaders Initiative on Human Rights (BLIHR), an initiative of ten MNCs

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36 At least *some* of the human rights issues or challenges faced by corporations operating, for example, in mining, pharmaceutical, and information technology sectors are bound to be different. 37 For example, Gladwin and Walter explore how MNCs could handle human rights issues as a 'conflict management' exercise. Thomas N Gladwin & Ingo Walter, *Multinationals under Fire: Lessons in the Management of Conflict* (New York: John Wiley & Sons, 1980), 130-220. Similarly, Freeman explores the framework of 'stakeholder management.' Freeman, above n 27.
comprising a group headed by Mary Robinson, highlights the need for designing the means to integrate human rights issues into 'risk assessment procedures.' If the assumption of human rights responsibilities would require any changes in the corporate structure or organisation, or the creation of new units or departments, that should also be specified in the code. Jungk, for example, proposes the establishment of a 'human right policy-unit' in corporations so that 'the humanitarian considerations ... are interjected into the decision-making process' with consistency. In short, the regulatory initiatives at an institutional level should do everything necessary to 'institutionalise responsibility' despite inherent challenges in doing so.

The appearance of regulatory codes at the institutional level may give an impression of being completely voluntary, but this would not be true in reality. Of course the regulatory initiatives adopted at the institutional level would be voluntary in the sense that governments itself would not enforce them. Nevertheless, these initiatives would not be without teeth altogether. Apart from the institutional compliance mechanism that an MNC or a business sector may put in place, stakeholders could use them in a variety of ways to impugn the conduct of a given MNC in the event of deviation from its declared human rights commitments. Civil society organisations could use regulatory codes at the institutional level, for example, to impeach the conduct of corporations inside the courts (assuming that they have the required standing), to run

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40 Dine, for example, argues that '[t]here needs to be a complete rethink about corporate structures before social responsibility becomes an embedded reality within companies.' Janet Dine, Companies, International Trade and Human Rights (Cambridge: Cambridge University Press, 2005), 222.
41 Margaret Jungk, 'A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad' in Addo (ed.), above n 3, 171, 183, and generally 183-85. Parker also argues: 'One of the main objectives of a self-regulation system is to incorporate compliance issues into internal decision-making agendas.' Parker, above n 5, 125.
42 Parker, above n 5, 61. She argues that corporate management must move through the following three stages to institutionalise moral/legal responsibility: (i) the commitment to respond; (ii) the acquisition of specialised skills and knowledge; and (iii) the institutionalisation of purpose. Id., 31, and generally 50-61. Parker also acknowledges the challenges in institutionalising responsibility. Id., 32-37.
a naming and shaming campaign, or to mobilise support for a boycott of corporate
products and services because a particular MNC has not lived up to its commitments.
Shareholders could also use the same codes to introduce resolutions and demand
explanations from management.44

8.2.1.3 Overcoming limitations of institutional codes
Voluntary self-regulation by MNCs at the institutional level has several inherent
weaknesses, some of which I have already discussed in Chapter 4.45 Muchlinski
reiterates one of the most serious weaknesses: 'Internal codes of conduct can be
dismissed as little more than public relations exercises lacking any opinio juris from
among the community of managers that they seek to regulate. This view may be
reinforced by reference to the issue of enforceability...46 Although it is not possible to
completely overcome the limitations of self-regulation, a response is offered at two
levels. First, it is hoped that the involvement of stakeholders in the formulation and
implementation of corporate human rights responsibilities will counter some of the
weaknesses. Second, external regulatory measures at the national and international
levels should ameliorate few shortcomings of corporate self-regulation.

Regulation at the institutional level is premised on the belief that regulators have to
bestow a degree of trust on corporations, which are not only rationally thinking
economic animals but are also moral agents that could bear responsibility for their
conduct.47 A regulatory environment which is based on complete distrust and lack of

Kielsgard, 'Unocal and the Demise of Corporate Neutrality' (2005) 36 California Western
International Law Journal 185.
44 See Abdallah Simaika, 'The Value of Information: Alternatives to Liability in Influencing Corporate
also draw an analogy to the proposal advanced by Dhir. Aaron A Dhir, 'Realigning the Corporate
Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human
45 See Chapter 4.2.2. See also Gunningham & Sinclair, 'Instruments for Environmental Protection' in
Gunningham et al, Smart Regulation, above n 4, 52-53; and generally Penelope Simons, 'Corporate
Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary Self-Regulation
Regimes' (2004) 59 Relations Industrielles 101; Thomas F Mcinerney, 'Putting Regulation Before
Responsibility: The Limits of Voluntary Corporate Social Responsibility' (2005) 2:3 Voices of
46 Muchlinski, 'Global Bukowina', above n 15, 84. Parker examines the three criticisms that self-
regulatory initiatives of the new regulatory state face: over-reliance on corporate management, putting
an intolerable burden on self-regulation staff, and excessive reliance on third party civil institutions to
regulate corporate activities. Parker, above n 5, 136-44.
47 Donaldson, Corporations and Morality, above n 5, 18-32; Peter A French, Corporate Ethics (Fort
372
cooperation is not conducive to effective regulation. For this reason, Goodpaster argues that governments ‘must permit enough corporate freedom for the exercise of moral responsibility’ because a ‘regulatory environment that would seek to replace corporate decision-making responsibility is also an environment that would suffocate corporate moral initiative.’ However, as we cannot rely too much on the promise of corporations behaving as moral agents and institutionalising responsibility, regulatory initiatives at the national and international levels are imperative.

**8.2.2 Regulation at National Level**

Despite all the limitations of law and states in regulating the activities of MNCs, laws enacted by states at the national level are still an indispensable medium to control human rights abuses by MNCs. Hence, state regulation is an integral part of the integrated theory of regulation too, subject to the innovation that regulatory initiatives at the institutional and international levels are also utilised to counter the limitations of municipal regulation.

Regulatory regimes at the national level should aim to influence the conduct of MNCs both from outside and inside. Whereas the former focuses on the ‘outcomes’ of corporate decision-making, the latter looks to the ‘processes’ of decision: the difference lies in whether the concern of the law is ‘what was the decision,’ or also ‘who took the decision and how.’ Under the external influence model, law either specifies an outcome to be achieved (e.g., employ no child labour), or waits for the outcome (i.e., positive or negative impact of a corporate decision on the realisation of human rights) on a given issue and then responds accordingly with incentives or sanctions, as the case may be. Most laws that try to regulate corporate conduct in the area of human rights fall into this category. This approach, though necessary, is not

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49 Id., 21 (emphasis in original).
50 In addition to several well-known limitations of municipal law in regulating MNCs’ activities, Donaldson points out that one important failure of municipal law is ‘to consider the morality of actions affecting the citizens of other nations.’ Donaldson, *Corporations and Morality*, above n 5, 164.
51 Donaldson argues that as moulding ‘corporate moral behaviour will require more than external threats of the law,’ one could try to change corporate behaviour from inside by introducing reforms in how corporations are governed and for what objectives. Donaldson, *Corporations and Morality*, above n 5, 166-67, and generally 179-209. Stone also asserts that ‘the law must be capable of bringing about certain systematic changes within the organisation.’ Stone, above n 8, 32.
sufficient. It could not, for example, change an MNC’s corporate culture or institutional conscience towards human rights. Law should, then, also try to influence not merely corporate decisions but also decision-making processes by changing the internal structure of corporations. Stone captures this role of law when he writes: ‘[W]hat I have in mind is a legal system that, in dealing with corporations, moves toward an increasingly direct focus on the processes of corporate decision-making, at least as supplement to the traditional strategies that largely await upon the corporate acts.’ For this reason, he outlines wide-ranging reforms that should be directed at the board of directors, corporate management, and in the process in which information flows to, from and inside corporations.

8.2.2 Influencing corporate conduct from ‘outside’

Before I turn to how regulatory initiatives at the national level should seek to influence the conduct of MNCs from inside, let me state the obvious first. Robust regulatory measures must be put in place at the national level to ensure that MNCs respect their human rights responsibilities. National regulatory regimes should specify the human rights obligations of corporate actors and also provide for their implementation through multiple enforcement strategies, backed up by a range of sanctions. Despite attempts having been made in several jurisdictions, currently no

52 'To the extent that external regulation is deficient as a control technique, however, it may be desirable to stimulate processes of self-control as well.' John E Parkinson, ‘The Contractual theory of the Company and the Protection of Non-Shareholder Interests’ in David Feldman & Frank Meisel, Corporate and Commercial Law: Modern Developments (London: Lloyd’s of London Press Ltd., 1996), 121, 143.
53 'To promote virtue in the long term then, a regulatory framework needs to be able to influence and direct organisational culture, or at least alter the premises which lie behind the decision making.' Haines, above n 4, 191.
54 Stone, above n 8, 121 (emphasis in original). Stone, in fact, argues that ‘the proponents of corporate responsibility do wrong to put so much emphasis on what corporations are deciding rather than on how they are deciding – the corporate decision process itself.’ Id., 217 (emphasis in original).
55 Stone thinks that merely inducting one or more new members in the Board will not be sufficient. Id., 122-33.
56 Id., 134-216. He also proposes that ‘decision of large social concerns’ should be taken by people of higher ranking in the organisation, that stakeholders should be involved in the decision taking process, and that before taking decisions corporations should make ‘findings’ about certain necessary matters. Id., 217-23.
law exists at a national level that deals specifically and comprehensively with instances of human rights violations by MNCs. This is not to discount the fact that corporate human rights responsibilities arise across several areas of law such as labour relations, industrial planning, consumer protection, investment, or the environment. In order for an integrated theory of regulation to be realised, it would be more appropriate for each state to consolidate, as far as possible, the human rights responsibilities of MNCs in one place. Such consolidation should again be done with reference to corporate human rights responsibilities imposed in other states, the standards developed at the international level and regulatory codes adopted by MNCs at the institutional level.

To ensure the enforcement of corporate human rights responsibilities, states should rely not only on traditional 'command and control' mechanisms and formal judicial systems but also on other innovative strategies and sanctions, including market forces and other types of social sanctions. Rather than relying exclusively on government agencies to enforce corporate human rights responsibilities, efforts should be made to involve both MNCs and their stakeholders in the enforcement process. Governments could, for example, 'make adoption of a code more attractive to MNCs' (including by limiting the effect of the prisoner's dilemma) and promote 'social reporting' of corporations, thus utilising the involvement of stakeholders. Regulatory initiatives at the national level could also incorporate a principle of administrative law evolving in many jurisdictions by imposing a requirement that corporations give and disclose reasons when taking decisions that affect corporate stakeholders. For example, an MNC should explain publicly why it does not allow collective bargaining, or why it...

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58 Murphy, above n 26, 424. Murphy suggests several legislative and administrative measures that governments could pursue to increase the value of voluntary codes of conduct for MNCs. Id., 424-32.
59 Arrow, above n 7, 310. It is arguable that law should disallow, through the use of both incentives and sanctions, any competitive advantage gained on account of not following human rights standards (or applying inferior standards) during business operations.
decided to provide funding to a pipeline that displaces indigenous people from their ancestral land.

Another regulatory measure that could be utilised at the national level is to enact extraterritorial law that imposes and enforces human rights obligations in relation to the overseas activities or subsidiaries of corporations incorporated within the territory of a state. Such initiatives are considered controversial, have their own limitations as well as problems, and are not an ideal choice. For instance, extraterritorial laws ‘can be seen as an attempt by the regulating state to impose its policies upon others, disregarding the interests of the target state.’ Human rights treaties do not require states to enact extraterritorial laws, but they also do not prohibit states from taking such regulatory measures. Arguably, extraterritorial measures – especially in relation to *jus cogens* or *erga omnes* human rights norms – are defensible in that they seek to promote not only national objectives but also internationally recognised human rights. Taking the right to food as an example, Narula asserts that home states should also act extraterritorially to regulate the conduct of MNCs so that their activities do not undermine this important right. At a more general level Professor Redmond notes that the promotion of human rights is ‘a matter of joint, global

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responsibility. For this reason, scholars like Reinisch view such extraterritorial laws 'as a form of decentralised enforcement of international law.' Alternatively, one can endorse the argument made by Dine that no extraterritoriality may be involved when what the home state is doing is merely regulating the parent MNC, which in turn controls its overseas subsidiaries, to ensure that it respects human rights.

In view of past state practices, it is of course likely that only developed and powerful states would venture to enact such an extraterritorial law. But this could be a blessing in disguise because it is this home state extraterritoriality – utilised in jurisdictions where a majority of MNCs are registered – that offers more hope for success than host state extraterritoriality. Even if only a few states home to MNC headquarters introduce extraterritorial laws, that should have a ripple effect on the current state of corporate impunity from human rights abuses.

8.2.2.2 Influencing corporate conduct from 'inside'

Regarding bringing about changes from the inside (i.e., in the process of corporate decision making), one type of recourse that regulatory initiatives at the national level have to take is to amend corporate law. Changes in the area of corporate law are required because the premises on which fundamental principles of the corporate law 'of all economically advanced countries' were based have changed drastically.

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70 ‘If the central management and control of a foreign subsidiary is found to be in the home state then it is over this control that the home state has taken regulatory power. No extraterritoriality is involved.’ Janet Dine, ‘Multinational Enterprises: International Codes and the Challenge for “Sustainable Development”’ (2001) 1 Non-State Actors & International Law 81, 88-89 (hereinafter Dine, ‘Multinational Enterprises’). See also Zerk, above n 4, 140-41.
71 Above n 57.
72 ‘Generally weak states do not attempt such an exercise.’ Muchlinksi, MNEs and the Law, above n 63, 109.
73 Deva, ‘‘Who Should “Bell the Cat”’’, above n 10, 50-51.
74 One could draw an analogy from the cases filed under the ATCA. Although no single case has yet been decided against MNCs on merits, the litigation should have at least cautioned many MNCs against indulging in human rights abroad. Bill Baue, ‘Win or Lose in Court: Alien Tort Claims Act Pushes Corporate Respect for Human Rights’, Business Ethics (Summer 2006), 12.
75 Paul Davies, Gower and Davies’s Principles of Modern Company Law, 7th edn. (London: Sweet & Maxwell, 2003), 176.
76 For example, the twin principles of separate personality and limited liability were extended to govern the relation of parent and subsidiary corporations of a corporate group on the assumption that since
Noting the influence of corporations on the social, economic and political lives of people generally and their role as public service providers, Dine argues that ‘the structure of company law and corporate governance are not only anachronistic but in fact wholly inaccurate in their representation of the character of companies today.’ She further notes that the ‘introduction of ethical and social concerns is therefore hostile to the underlying philosophy and thus the way in which the rules regulating that company are structured.’

It is, therefore, of fundamental significance that those aspects of existing corporate law which hinder the imposition of human rights responsibilities on corporations are rectified. First, the uni-focal nature of the present corporate law conceiving corporations solely or primarily as profit maximising entities is problematic and should be altered. Werner has argued that law should remove the ‘pressures’ that corporate law creates on corporate managers to pursue the goal of profit maximisation with total disregard for the interests of stakeholders other than shareholders. This they are applicable to ordinary shareholders, they should also apply on same parity to situations when the shareholder is a corporation. This extension presents an anomalous situation because, as Blumberg argues, it makes no distinction between corporations as investors and investors simpliciter. Phillip Blumberg, ‘Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems’ (2002) 50 American Journal of Comparative Law 493, 494-95 (Suppl.) (hereinafter Blumberg, ‘Conceptual and Procedural Problems’). See also Peter T Muchlinski, ‘Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review’ (2002) 23:6 Company Lawyer 168, 177; Robert B Thompson, ‘Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise’ (1994) 47 Vanderbilt Law Review 1, 35-9; Deva, ‘Overcoming Hurdles’, above n 57, 99-101.

Dine, above n 40, 265. Sealy also observes:

[At] present out company law lacks the conceptual and remedial tools ... to reflect our new perception of the company as no longer a shareholders' collective, but an enterprise in which the interests of many stakeholders have to be balanced. It has not so far found a way to give these interests a voice – not even the machinery to voice a veto, or even access to the courts to have their say.


Dine, above n 40, 223. Redmond also writes: ‘Corporate law does not explicitly address the problem of corporate compliance with human rights standards; indeed, its systemic orientation aggravates the problem of standard setting and compliance ... Human rights concerns are, for the most part, extraneous to corporate regulation, culture, and doctrines.’ Redmond, above n 68, 73, and generally 73-75.


Donaldson, Corporations and Morality, above n 5, 163-64.

Werner writes that ‘pressures have pushed managers to make more profits for shareholders and to minimise diversion from those profits to serve the public welfare.’ Werner, 1645. Fogarty, however, observed that even if the British company law formally required directors to act in the interests of
would also nullify any attempt made by corporate executives to justify irresponsible conduct on the ground that it is mandated by corporate law. 

Initiatives have already been taken in some countries to change this uni-focal nature of corporate law. The Companies Act 2006 of UK, for example, now imposes a specific duty on company directors to consider 'the impact of the company’s operations on the community and the environment' while promoting the success of the company. It is, however, interesting to note that a Joint Committee of the Australian Parliament rejected the need for introducing a similar amendment to Australian corporate law, because in its view the existing law did not constrain directors from taking into account the stakeholders' interests.

A second important area that requires attention is the way in which MNCs misuse the principles of separate personality and limited liability to evade their liability for human rights violations. Although these principles serve important purposes, they

shareholders alone', in 'practice this is usually only a formal limitation'. Michael Fogarty, Company and Corporation – One Law? (London: Geoffrey Chapman, 1965), 7.

For example, during the time when James Hardie was castigated for showing apathy towards asbestos victims, Meredith Hellicar, the chairwoman of James Hardie Industries, observed: 'The fact of the matter is we cannot wish away our legal and fiduciary duties as much as we would like to in many respects. At the end of the day we are custodians on behalf of the shareholders. We have obligations to our shareholders. I think that perhaps that has been forgotten in all of this. 'Don’t Forget Our Shareholders: James Hardie Chair', Sydney Morning Herald (17 August 2004), <http://www.smh.com.au/articles/2004/08/17/1092508432452.html?from=storyrhs> (last visited 1 January 2007) (emphasis added).


The committee considers that an interpretation of the current legislation based on enlightened self-interest is the best way forward for Australian corporations. There is nothing in the current legislation which genuinely constrains directors who wish to contribute to the long term development of their corporations by taking account of the interests of stakeholders other than shareholders.' Parliament of Australia Joint Committee on Corporations and Financial Services, Corporate Responsibility: Managing Risk and Creating Value (Canberra: Australian Parliament, 2006), 63, and generally 43-63.


'Limited liability for equity investors has long been explained as a benefit bestowed on investors by the state.' Frank H Easterbrook & Daniel R Fischel, 'Limited Liability and Corporation' (1985) 52 University of Chicago Law Review 89, 93, and generally 93-7. See, for the reasons or benefits of the
should not be allowed to become a standard refuge for corporate irresponsibility. 87
Mitchell has described how the principle of limited liability encourages corporations to
behave in an irresponsible manner:

[Limited liability] means that no matter how much environmental damage a
corporation causes, no matter how much debt it defaults on, no matter how
many Malibus explode or tires burst or workers and consumers die of
asbestosis, no matter how many people it puts out of work without their
pension benefits or other protections; in short, no matter how much pain it
causes, the corporation is responsible for paying damages (if at all) only in the
amount of assets it has. 88

Several responses have been canvassed as to how to prevent the misuse of the
principles of separate personality and limited liability by MNCs. 89 Muchlinski
explains that at least three distinct approaches are possible: allowing case-by-case ad
hoc exceptions to the twin principles; the enterprise principle; and the network
liability approach. 90 Whereas under the enterprise principle the whole group is treated
as one enterprise, the network liability approach seeks to allocate liability within the
group to corporations actually connected with alleged harms. 91 Of these three options,
Blumberg, in particular, has made a forceful plea for recognising the enterprise
principle in situations involving human rights violations by subsidiaries. 92 The theory
of ‘limited eclipsed personality’ could provide another alternative solution. 93

principles of limited liability and/or separate personality. Phillip Blumberg, The Multinational
Challenge to Corporation Law: The Search for a New Corporate Personality (New York: Oxford
University Press, 1993), 125–33 (hereinafter Blumberg, The Search for a New Corporate Personality);
Thompson, above n 6, 1039–41; Ian Ramsay, ‘Allocating Liability in Corporate Groups: An Australian
81 Kaye argues that separate corporate personality ‘was devised originally only because it was
considered a useful tool for achieving what were thought to be socially desirable results.’ Tim Kaye,
‘Corporate Manslaughter: Who Pays? The Ferryman?’ in David Feldman & Frank Meisel, Corporate
82 Lawrence E Mitchell, Corporate Irresponsibility: America’s Newest Export (New Haven: Yale
University Press, 2001), 53.
83 Zerk discusses several alternative theories under which a parent corporation could be made liable.
Zerk, above n 4, 215–34.
84 Muchlinski, MNEs and the Law, above n 62, 330–33.
85 Id.
86 Blumberg, ‘Conceptual and Procedural Problems’, above n 76; Philip I Blumberg, ‘The Increasing
Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities’
(1996) 28 Connecticut Law Review 295; Blumberg, The Search for a New Corporate Personality,
above n 86. See also D Aronofsky, ‘Piercing the Transnational Corporate Veil: Trends, Developments
and the Need for Widespread Adoption of Enterprise Analysis’ (1985) 10 North Carolina Journal of
International Law & Commercial Regulation 31; Cindy A Schipani, ‘Infiltration of Enterprise Theory
87 Deva, ‘Overcoming Hurdles’, above n 57, 104–09. Any attempt to limit the principle of limited
liability is bound to attract academic (in addition to corporate) resistance. See, for example, Stephen B
concept of *eclipsed personality* implies 'that in cases of alleged human rights violations, the separate personality of the subsidiaries of a corporate group should be eclipsed in that victims should be free to sue the immediate or ultimate parent corporation of that group as a matter of principle.' The theory is 'limited' in its scope because, firstly, it is applied to determine the question of liability only within a corporate group, and secondly, the separate personality of the subsidiary of a corporate group is eclipsed only in those cases that involve the violation of human rights.

Third, reforms in corporate law should also be directed at making the structure and governance of MNCs more democratic than what it is now. Weir and Oakland argue that '[w]here a few executives from a handful of multinational corporations and their government allies are allowed to make decisions affecting entire peoples, "business as usual" will not serve the majority.' Therefore, attempts should be made, in particular, to increase the participation of stakeholders in corporate decision making bodies and to secure the flow of information between corporations and their stakeholders. Fourth, appropriate reforms should be made in law and legal principles so that corporate executives who take actual decisions, and not merely their corporate aggregates, are held accountable for human rights violations.


Devai, 'Overcoming Hurdles', above n 57, 106.

See Stone, above n 8; Parker, above n 5. Freeman, however, points out that the term 'corporate democracy' has at least four meanings. Freeman, above n 27, 196. Out of these four meanings, it is the second one that is most relevant for the present purpose, that is, increasing/ensuring 'citizen' or 'public interest' participation in corporate management. Id.

Because the global corporation derives its great economic advantage through centralisation, information control, and hierarchical organisation, it is inherently antidemocratic. Richard J Barnet & Ronald E Muller, *Global Reach: The Power of the Multinational Corporations* (New York: Simon and Schuster, 1974), 361.


Parker outlines three steps to achieve corporate "permeability" to the engagement of stakeholders: disclosure of information, consultation with stakeholders regarding decision making as well as self-implementation processes, and systematic procedures to allow stakeholders to contest corporate decisions. Parker, above n 5, 215, and generally 216-33.

Donaldson identifies this defect in the law as follows: 'The legal machinery is often designed to punish the agent who performs the illegal act, which in this case means the corporation. It is the corporation which is fined, not the corporate executives who make the decisions.' Donaldson, *Corporations and Morality*, above n 5, 163 (emphasis in original). See also Brent Fisse & John
8.2.3 Regulation at International Level

Writing in late 1970s, Heenan and Perlmutter expected that 'the era of unilateral regulation will give way to an *era of multilateral regulation* of MNCs.'\(^{101}\) Regulation of MNC at the international, or even at the regional, level reflects this multilateral approach in that more than one state or organisation needs to work together to specify and uphold the human rights responsibilities of MNCs. For several reasons, it is considered essential to have both international standards of human rights responsibility and an international regulatory regime that could enforce such responsibilities against MNCs. Addo, for example, writes: 'It would be totally pointless to define responsibility in terms of national jurisdictions only, while the transnational corporations continue to have ease of movement between countries. Any new standards will therefore need to be globally acceptable ....'\(^{102}\) Donaldson highlights another reason for having an international regulatory framework when he notes: 'Domestic law is usually less effective in regulating the activities of home-chartered corporations abroad than at home, and often also is less effective – especially when it is the law of a small, developing country – at regulating the activities of large, foreign multinationals.'\(^{103}\)

Although by and large there is a consensus among human rights scholars and activists on the desirability of an international regulatory regime of corporate human rights responsibilities,\(^{104}\) an agreement on international standards and international

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101 J. Heenan & P. Perlmutter, above n 28, 7 (emphasis in original).
regulatory framework will not be easy to develop, as there are several challenges. For one, this would require ‘adaptations of the traditional formats of both international instruments and institutions.’ Clarke also highlights the ‘tension’ that exists between the need for international regulation in an increasing number of areas and the divergent interests of nation states which are not open to a dilution of their sovereignty. In my view there are three major challenges. First, it is unclear to what extent states and state-focal human rights frameworks are relevant or conducive to this process. Second, it remains to be determined which institution or body at the international level is appropriate and/or has legitimacy to draft human rights responsibilities for MNCs. Third, it must be decided how and through which institution(s) the human rights responsibilities of MNCs could be enforced at the international level. I think it is possible to overcome these hurdles, though the journey is going to be long and difficult.

8.2.3.1 Role of states and state-focal human rights framework

Although persuasive arguments have been made, MNCs are still not regarded as subjects of international law. This scenario contributes to a belief that any

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"This is a tall but not impossible order." Addo in Addo (ed.), above n 3, 23. Professor Bhagwati also notes: 'The reverse model of starting, rather than ending, with uniform and universalist mandatory codes seems to be unrealistic except for practices that all agree are morally reprehensible, such as slavery and forced labour.' Jagdish Bhagwati, In Defence of Globalisation (New York: Oxford University Press, 2004), 194. See also Zerk, above n 4, 297-98.

Kinley & Tadaki, above n 20, 994.

Clarke, above n 31, 193, and generally 192-224. Redmond notes that it is improbable that the evolution of international binding norms for MNCs will get significant support of developed states. Redmond, above n 68, 99.

This question becomes relevant because international law could regulate, at least in principle, the activities of MNCs in both direct and indirect ways. Zerk, above n 4, 76, and generally 96-91. See also ICHR, Beyond Voluntarism, above n 104.

Kinley and Tadaki note that 'whether and how it is possible to establish the means by which such rights (whatever they are) can be enforced against corporations at the level of international law and practice' is a critical aspect. Kinley & Tadaki, above n 20, 993.


'In principle, corporations of municipal law do not have international legal personality.' Ian Brownlie, Principles of Public International Law, 6th edn. (Oxford: Oxford University Press, 2003), 65.
international regulatory framework has to approach the issue of MNCs’ accountability for human rights abuses through states. This conviction is also attributable to the fact that MNCs’ operations and assets are often physically located within the jurisdiction of particular nation states, which have a primary responsibility for human rights’ realisation therein.\(^\text{112}\) However, if this *indirect approach* of international law to deal with MNCs relies exclusively or even predominantly on states, its success will remain dubious.\(^\text{113}\) Is it, then, possible to bypass states altogether? Since it is currently ‘improbable’ to envisage that international instruments could ‘bind corporations directly,’ Kinley and Tadaki propose ‘a hybrid instrument that is clearly directed towards corporate behaviour ... while maintaining the primary executive duties of states.’\(^\text{114}\) These two scholars see the UN Norms as a reflection of this hybrid approach.\(^\text{115}\)

Undoubtedly, states should remain an integral part of the process of negotiating and implementing human rights responsibilities. However, it is critical that such responsibilities of MNCs at an international level are not only directed directly at MNCs, but can also be enforced, if needed, without the support of states. I have noted previously that the existing state-focal human rights framework, with some appropriate modifications,\(^\text{116}\) provides a good starting point to ascertain the human rights responsibilities of MNCs at the international level.\(^\text{117}\) Most of the existing international regulatory initiatives follow this approach, and no strong reason exists why this approach should be abandoned. Once the human rights norms for MNCs are agreed upon at the international level, they would have to be given a more precise meaning at the national level and in some cases also sector-wise within a country.\(^\text{118}\) An agreement on corporate human rights responsibilities at the international level will also work as, what Professor Murphy labels, a ‘code for codes’ that are adopted by MNCs at the institutional level.\(^\text{119}\) This again emphasises the necessity for adopting an


\(^{113}\) Deva, ‘Where from Here?’, above n 10, 48-49.

\(^{114}\) Kinley & Tadaki, above n 20, 994.

\(^{115}\) *Id.*

\(^{116}\) For example, neither all state-specific human rights are relevant for all MNCs nor the extent of MNCs’ human rights obligations could be similar to those of states.

\(^{117}\) See Chapter 1.4.1 and Chapter 6.1.

\(^{118}\) See BLIHR, *Identifying Components*, above n 38, 6.

\(^{119}\) Murphy, above n 26, 423, and generally 425-26.
integrated approach – between regulatory initiatives at the institutional, national and international levels – to ascertain and entrench the human rights responsibilities of MNCs.

On the other hand, regarding the implementation of human rights responsibilities, an international regulatory initiative should not rely on states exclusively, but only as one of the available enforcement avenues. The international regime would, in fact, hardly serve any purpose if states were entrusted with the sole or even predominant responsibility for enforcing human rights responsibilities against MNCs. The necessity for having an international regulatory regime is precisely felt because of states’ inability or unwillingness to enforce these obligations against MNCs. The UN Norms, in my opinion, adopt an innovative and laudable implementation approach in that they propose to invoke a range of implementation strategies – from internal evaluation to international monitoring and stakeholders’ pressure. I take up the issue of implementation again below.

8.2.3.2 Which international body should hold the reins of the drafting process?

If it is accepted that the existing state-focal human rights framework could be used to ascertain the human rights responsibilities of MNCs, the next question is which international institution possesses the mandate and/or legitimacy to do so? The answer to this is simple – no single international institution or body can claim the mandate and legitimacy to draft human rights norms for MNCs, especially if responsibilities have to be attributed directly to MNCs and not via states. There are then two possible alternatives: either to create a new institution specifically to deal with MNCs and human rights, or to utilise existing institutions.

I prefer the second option because the first one looks like a more remote possibility in view of past experiences. Given that the UN, the ILO and the OECD have had a

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121 From mid-1970s to early 1990s, the UN Center on Transnational Corporations and the UN Commission on Transnational Corporations did try to formulate a code of conduct for MNCs, but the attempt failed to materialise. See Muchlinski, *MNEs and the Law*, above n 62, 592-97; Peter T Muchlinski, ‘Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD’ Kamminga & Zia-Zarifi (eds.), above n 110, 97-117; Jägers, above n 110, 119-24; Murphy, 385
long experience of promoting human rights generally or with special reference to MNCs, they should naturally have a role in drafting corporate human rights responsibilities at the international level. However, in view of how the issue of corporate human rights responsibilities is intertwined with trade, commerce, economic aid, and development, it is desirable that institutions dealing with these aspects at the international level (such as the WTO, the World Bank and the IMF) should also be involved in the drafting process. This would ensure that such international institutions—which have no specific human rights mandate—take cognizance of the human rights responsibilities of corporations and make appropriate adjustments in their policies as well as their working practices.

In addition, various non-states organs or institutions, which have a stake in the evolution of an effective regulatory regime related to MNCs at the international level, should also be consulted. Since these various bodies are likely to have divergent (or even conflicting) positions regarding the content of MNCs’ human rights obligations, it is proposed that the UN should work as a nodal agency to form a core group that could provide a forum to debate the differences and come up with some sort of common ground. Despite all the controversies and debates about its relevance, usefulness or legitimacy, the UN is involved in the drafting process of international laws.

above n 26, 403-04. Nevertheless, proposals to establish new institutions related to MNCs keep on coming. Lodge and Wilson, for example, recently proposed for the establishment of a World Development Corporation which could harness the capabilities of MNCs to confront global poverty and at the same time provide the much needed legitimacy to them. George Lodge & Craig Wilson, A Corporate Solution to Global Poverty: How Multinationals can Help the Poor and Invigorate their Own Legitimacy (Princeton: Princeton University Press, 2006). See also Zerk, above n 4, 282-83. 122 See Ralph G Steinhard, ‘Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria’ in Alston (ed.), above n 69, 177, 202-12.


124 Grossman and Bradlow argue:

States, international organisations, and private actors such as transnational corporations; trade unions; consumer, environmental, development and human rights NGOs; and private individuals, are now all engaged in the ongoing process of formulating and implementing international legal standards. An international legal process that fails to allow non-state actors to participate fully in the process cannot develop legal norms that are fully responsive to the needs of the international community.

best placed to take a lead in this matter. It is, in fact, bound by its Charter 'to employ international machinery for the promotion of the economic and social advancement of all peoples.'

The ultimate aim of such participatory deliberations should be to draw an international treaty (along the lines of the UN Norms) that catalogues human rights responsibilities of MNCs. Such a treaty – which should be grounded in the International Bill of Rights as well as regulatory initiatives at national and institutional levels – could be signed by states and representative organisations of MNCs. Assuming that states show the requisite political will, international law itself does not present any theoretical barrier in imposing human rights responsibilities on MNCs directly.

8.2.3.3 How to enforce human rights responsibilities internationally?

The weakness of enforcement mechanisms is often identified as a general lacuna of international law, and the enforcement of human rights standards against MNCs cannot be totally immune from this weakness. One major reason for an enforcement deficit in international law is that the existing enforcement mechanisms are made impotent by lack of cooperation from states. To overcome this limitation with reference to the enforcement of human rights responsibilities against MNCs, two measures could be introduced. First, it is advisable to invoke a ‘plurality of enforcement mechanisms’ at the international level because ‘no single body can provide a comprehensive enforcement mechanism.’ Second, there is a need to rely on non-state based enforcement of corporate human rights responsibilities, that is, through social sanctions mobilised by stakeholders of MNCs.


128 ‘At present there are only very limited means at international level whereby the human rights performance of companies (or states in relation to the activities of companies) can formally be challenged, let alone enforced.’ Zerk, above n 4, 91. See also Simaika, above n 44, 331-33.
Several scholars have explored the possibility of invoking various international institutions – from the UN human rights bodies to the ILO, the WTO, the World Bank, the OECD, and the International Criminal Court (ICC) – to enforce corporate human rights responsibilities. At the risk of over-generalisation, a common conclusion of such exploratory exercises has been that these institutions do not offer much scope for robust enforcement of corporate human rights responsibilities. This conclusion is hardly surprising because these bodies were not created to deliver what is expected from them now. Although options do exist to harness institutions such as the WTO and the ICC to enforce human rights responsibilities against MNCs, it would be too much to expect that these institutions could be harnessed to the extent of being able to redress the situation of MNCs' impunity for human rights violations.

In my view, existing (primarily) state-focal international institutions should be utilised for what they could possibly deliver. First, they could be mobilised to put pressure on states to regulate the conduct of MNCs more vigorously through municipal measures, as well as by forging regulatory partnerships at regional and international levels. Second, they could work to influence the human rights policies, rather than specific conduct, of MNCs as far as possible. In order to achieve these twin objectives more effectively, it may be appropriate for these institutions to increase the participation of civil society organisations in their deliberations and decision making processes.

In addition, and more importantly, international institutions may facilitate the creation of an international monitoring body, with branches in each state, consisting only of

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129 Kinley & Tadaki, above n 20, 1019-20.
130 Jägers, above n 110, 217-42; Kinely & Tadaki, above n 20, 997-1019; ICHRIP, Beyond Voluntarism, above n 104, 83-120. See also Clapham, 'The Question of Jurisdiction' in Kamming & Zia-Zarifi (eds.), above n 110.
131 Deva, 'Where from Here?', above n 10.
133 Kinley and Tadaki, for example, indicate how the International Finance Corporation, the World Bank's private sector arm, could integrate human right policies into its loaning programs. Kinley & Tadaki, above n 20, 1002-03. Similarly, the dispute settlement mechanism of the WTO may be more sympathetic to the relevance of human rights norms to trade and trade disputes. See Deva, 'Where from Here?', above n 10, 22-35.
civil society organisations. Such a body could verify and investigate, both at local and global levels, the human rights practices adopted by MNCs *suo motu* as well as in response to complaints received from victims of corporate human rights abuses. If on investigation it finds that a given MNC is disregarding its human rights responsibilities — whether arising out of its own code of conduct or national and international instruments — it should seek an explanation from the MNC, and then put the matter in the public domain so that it could provide a basis for the imposition of social sanctions by stakeholders. In specific cases, such a ‘non-state, non-corporate’ body could also issue recommendations to states, MNCs and stakeholders regarding measures that they could take at their respective levels to promote human rights’ realisation.

The establishment of such a body at the international level should also result in better coordination and information-sharing among NGOs working in the field of promoting corporate human rights responsibilities, which would likely enhance their capability to bring pressure to bear against global operations of MNCs. It is also likely to avoid wastage of resources by cutting down a duplication of efforts in monitoring and verification.

Critics have pointed out several hazards in relying on civil society organisations to enforce corporate human rights responsibilities. For instance, NGOs’ dependence on donations and a lack of transparency as well as accountability of their functioning is a matter of concern. In addition, the possibility of one MNC using certain civil society organisations to settle scores against its competitors cannot be ruled out completely. These are legitimate apprehensions, but may be addressed, to some degree, by the fact those civil society organs which indulge in such practices would lose the confidence of their stakeholders and are likely to fade away or would not be taken seriously by public in their future campaigns. Another in-built safeguard would be provided by the presence of multiple civil society organisations; so the capture or corruption of one or few organisations should not undermine the whole process.

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134 It is worth noting that UN Norms do envisage taking ‘into account input from stakeholders (including non governmental organizations)’ in the monitoring and verification of the Norms. UN Norms, above n 120, para 16.
Finally, one should bear in mind that the integrated theory mooted in this thesis would also help in keeping a check on the functioning of NGOs in that the theory does not solely rely on civil society organisations to regulate the activities of MNCs. Rather, it envisages, as outlined earlier, that states and international institutions would also play their part in making MNCs accountable for human rights abuses.

8.3 INTEGRATING IMPLEMENTATION STRATEGIES AND SANCTIONS

The realisation of human rights will invariably require MNCs to perform certain duties. However, as it is likely that not all duty bearing MNCs will perform these duties, we need a mechanism that could ensure that duties are performed most, if not all, of the time. For this reason, the regulatory initiatives that are put in place at all three levels discussed above have to employ suitable implementation strategies and sanctions so as to ensure that MNCs which fail to respect their human rights responsibilities are made accountable in an effective manner. I propose that regulatory initiatives invoke two implementation strategies and three types of sanctions in tandem and not one after another as envisaged under the enforcement pyramid of Ayres and Braithwaite. The 'in tandem' application of multiple strategies and sanctions does not mean, for example, that an MNC which is prosecuted for committing serious human rights abuses also gets incentives (say, tax rebates) at the same time. Rather it implies two things. First, incentives need not be offered to 'all' MNCs but only to those which deserve them, in the opinion of regulatory agencies or other stakeholders, because of their pro-human rights conduct and commitment. Second, there would be no need to exhaust any single strategy or sanction first before moving to more punitive measures.

It should also be noted that the nature of various strategies and sanctions as well as the modus operandi of their administration will vary from one level of regulation to another because regulatory initiatives at each of the three levels differ from each other in several aspects (see Table 8.1). The table is only illustrative and it leaves scope for

136 Shue writes that the 'fulfilment of a basic right ... requires, then, performance by some individuals or institutions of each of these three general kinds of correlative duties.' Shue, above n 1, 60. Shue's 'tripartite typology of duties' implies duties to avoid depriving, to protect from deprivation, and to aid deprived. Id., 52.
flexibility in the evolution and incorporation of innovative enforcement strategies or sanctions.

<table>
<thead>
<tr>
<th>Strategies of Implementation</th>
<th>Types of Sanctions</th>
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<tbody>
<tr>
<td>(Dis)incentives</td>
<td>Sanctions</td>
</tr>
<tr>
<td><strong>Institutional Level</strong></td>
<td>Pay rise; promotion for relevant corporate employees</td>
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<tr>
<td><strong>National Level</strong></td>
<td>Tax rebates; citizenship awards; preferential purchasing or contracting</td>
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<tr>
<td><strong>International Level</strong></td>
<td>Citizenship awards; preferential purchasing or contracting</td>
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Table 8.1: Integrated Employment of Implementation Strategies and Sanctions at Three Regulatory Levels

8.3.1 Twin Implementation Strategies

Regulatory initiatives at the institutional, national and international levels should employ, in an integrated fashion, twin implementation strategies to ensure that MNCs respect and promote human rights: (dis)incentives and sanctions. As the discussion below will indicate more clearly, the content of these strategies will vary according to the level of their implementation, e.g., ‘(dis)incentives’ and ‘sanctions’ will have different connotations at the institutional, national and international levels. The two strategies seek to combine voluntary and mandatory approaches to fostering human rights compliance because both the approaches need to be employed in a

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137 Zerk notes that ‘government are increasingly resorting to other regulatory such as incentives or rewards to encourage good behaviour, or transparency initiatives ... to harness investor and consumer power.’ Zerk, above n 4, 36.
complementary way. Arguably, it is more appropriate to frame the inquiry not in terms of 'beyond voluntarism,' but *besides* voluntarism.

Under the integrated theory of regulation, the two implementation strategies encompass a mixture of both 'carrots' and 'sticks' not only within state-based mechanisms, but also outside formal state institutions under market settings. For a number of reasons it is critical to involve markets and market forces in implementing corporate human rights responsibilities. Markets, that enable and sometimes encourage MNCs to indulge in human rights abuses, could also be used as a strategy to counter such abuses. Corporations respond to markets all the time and therefore, if markets could be harnessed to accommodate the human rights agenda (that is, if corporate stakeholders could align their market choices and behaviour in accordance with human rights norms), this could prove an effective strategy to encourage MNCs to respect their human rights responsibilities. Conversely, unless a market for corporate social responsibility is created, it will not be easy to sustain corporate interest in and engagement with human rights' realisation. Furthermore, markets also present an important advantage over conventional methods of administering incentives or sanctions: in offering incentives and disincentives market

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138 'We believe that mandatory and voluntary approaches to this issue are not mutually exclusive since there is a need in society for both. Indeed, they may be seen as complementary since voluntary approaches are designed to raise the bar whereas the starting position for mandatory approaches is the legally enforceable minimum.' BLJR, *Identifying Components*, above n 38, 4.


140 Zerk argues that voluntary versus mandatory debate about CSR is 'misguided' for several reasons. Zerk, above n 4, 33-36.

141 The main distinction is that in market settings, it is stakeholders who by their choices and conduct offer both carrots and sticks.

142 Murphy writes that 'MNCs operating in developing countries have *done what one would expect them to do in a free market:* seek out the least expensive means for conducting operations so as to maximise profits.' Murphy, above n 26, 400, and generally 398-99 (emphasis added).


144 Commenting on the influence that green consumers could have on corporations, Grabosky et al note: 'Consumers who are environmentally aware are inclined to purchase products which they perceive to be environmentally appropriate, and to favour products of manufactures who have otherwise demonstrated concern for the environment. Collectively, such consumers have the economic muscle to demand that environmentally unsound products are either improved or replaced.' Grabosky et al, 'Parties, Roles, and Interactions' in Cunningham et al, *Smart Regulation*, above n 4, 107 (emphasis added).

145 'Since it is clear that companies reflect the moral basis of society and its dominant philosophy, any calls on them to adopt a morality at odds with that system are doomed to failure.' Dine, *Multinational Enterprises*, above n 70, 106.
forces do not rely on formal state mechanisms as much as regulators do in imposing civil and criminal sanctions.

Regulatory initiatives at all three levels should, therefore, exploit the potential of markets as vehicles to implement corporate human rights responsibilities. In order for markets to work as effective incentive providers, it is, however, vital that stakeholders have a global, rather than local, human rights conscience. Because of the way MNCs do business, it is not sufficient if MNCs' stakeholders merely take into account the well-being (including the human rights realisation) of people closest to them. For example, footballs sold and purchased in France may be manufactured using child labour in Pakistan. Similarly, the diamonds that people buy in New York may be coming from places like Sierra Leone. Such examples could be multiplied, but the point remains the same: that unless MNCs' stakeholders do share a concern for human rights' realisation globally, the role contemplated for market forces in this chapter will be limited. 146

Before I proceed further, a clarification may be appropriate here. Readers may recall that in Chapter 5, I argued that the business case for human rights—which essentially relies on market forces for its success—provides a weak and avoidable rationale for asking corporations to respect human rights norms. 147 If that is the case, then readers may ask why I am now advocating bringing in market forces. The reason why market mechanisms could still be used, without bringing any contradiction into my thesis, as one of the strategies to implement and enforce corporate human rights responsibilities is simple. The unpredictable and fluctuating assumptions on which the business case is based do not allow markets to provide a sound rationale for corporate human rights obligations. Corporations, I argued, must abide by their human rights responsibilities not because it will increase their profits, goodwill, or competitive advantage, but because of their relation with and position in society. 148 Despite this limitation of market forces in supporting adequately the 'why' limb of the integrated theory of regulation, their potential in strengthening the 'how' limb of the theory should not be

146 DiCaprio observed that 'who we are and what we do as consumers in more fortunate countries affects people in places like Sierra Leone and other countries halfway across the world.' Kavita Daswani, 'Hard Act to Follow', South China Morning Post (7 January 2007), The Review, 1.
147 Chapter 5.3.1.
ignored. In short, unlike the business case for human rights, reliance on market forces only as one of the compliance strategies does not compromise the integrity of the integrated theory.

8.3.1.1 (Dis)incentives

‘At present, just about the only positive reward corporations achieve is in the form of profits.\textsuperscript{149} This statement was perhaps more accurate at the time when Stone wrote about three decades ago, but still incentives and/or disincentives do not constitute a major strategy for promoting responsible corporate behaviour. In view of the importance of (dis)incentives, these features of ‘economism’ – a model in which economic incentives and/or disincentives are offered to encourage a particular type of conduct\textsuperscript{150} – should be incorporated into the regulatory framework dealing with corporate human rights responsibilities. Corporations often find a model of incentives, which is concerned only with ‘ultimate results,’ more attractive than an intrusive regulatory design.\textsuperscript{151}

The regulatory initiatives at all three levels should, in their own way, offer incentives to MNCs to encourage them to respect and promote human rights norms. For example, at the institutional level an MNC could link pay rise, promotion and other benefits of executives – who are assigned the responsibility of implementing and integrating human rights norms into business – to how well the company performs socially (i.e., on human rights front) and not merely financially. On the other hand, regulatory initiatives at the national and international levels could employ a range of incentives such as providing tax rebates, designing preferential purchasing or contracting policies, and offering responsible citizenship awards.\textsuperscript{152} These incentives will also work indirectly as disincentives: for instance, the exclusion of firms accused of

\textsuperscript{148} Chapter 5.4.

\textsuperscript{149} Stone, above n 8, 243. He argued that rewards to corporations for excellent behaviour will promote a socially responsible corporate culture. \textit{Id}.

\textsuperscript{150} Under the model of economism ‘responsible conduct is to be encouraged with economic incentives and disincentives.’ John Braithwaite, ‘The Limits of Economism in Controlling Harmful Corporate Conduct’ (1981) 16 \textit{Law & Society Review} 481, 482.

\textsuperscript{151} \textit{Id.}, 482-83. Braithwaite highlights many advantages that economism has over legalism. \textit{Id.}, 483-88. For example, he points out that the ‘fundamental advantage of economism is that it encourages the minimising of social harm.’ \textit{Id.}, 487.

\textsuperscript{152} Zerk, above n 4, 38-40, 188-94. See also Christopher McCrudden, ‘Corporate Social Responsibility and Public Procurement’, <http://papers.ssm.com/sol3/papers.cfm?abstract_id=899686> (last visited
perpetuating human rights violations from public procurement. It is also possible to envisage regulatory agencies formulating specific rules to offer disincentives to corporations from indulging in human rights abuses. For example, the China Banking Regulatory Commission has recently proposed new regulations to prohibit banks from lending money to any industry that ‘pollutes or degrades the environment.’

In addition to offering (dis)incentives to MNCs with reference to how their activities affect human rights, governments at the national level should also consider taking a few other steps that would indirectly ensure that corporations respect their human rights responsibilities. First, states should offer incentives to ‘facilitate the engagement’ of socially active groups in enforcing corporate human rights responsibilities. Of several measures proposed by Grabosky et al, one deserves particular mention: that governments ‘may improve legal standing – the right to bring an action before a court – of public interest groups.’ The question of who represents the victims of human rights abuses by MNCs often becomes critical because in a majority of cases victims (usually many in number) come from relatively disadvantaged sections of society and they are pitted in legal proceedings against very well-resourced MNCs. If *locus standi* was conferred on social action groups to pursue cases in national and/or international judicial bodies, this may help to counter this imbalance, at least partially. The success of public interest litigation in India in providing justice to destitute and disempowered sections of society against powerful actors provides a case in point. It is, therefore, arguable that governments should allow such groups to sue MNCs in appropriate cases, or at least should not exclude their right to represent victims who consent to such representation. As we will see later on in this chapter, it was the decision of the Indian government to assume,

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28 February 2007).


155 *Id.*, 103. They further note that ‘the government may empower third parties to undertake enforcement actions on the part of the state.’ *Id.*, 125.

without consent, the exclusive right to represent victims and thereby almost extinguish the right of social actions groups to represent victims that backfired for victims in the Bhopal case.\footnote{Bhopal Gas Leak Disaster (Processing of Claims) Act 1985, ss 3 and 4.}

Second, a smooth and transparent flow of information between corporations and its stakeholders is \textit{sine qua non} for market forces to offer (dis)incentives\footnote{Gunningham and Sinclair note: ‘Market mechanisms, including economic incentives, also depend heavily for their success upon the availability of sufficient information to enable economic actors to make rational decisions in their self-interest.’ Neil Gunningham & Darren Sinclair, ‘Designing Environmental Policy’ in Gunningham et al, \textit{Smart Regulation}, above n 4, 375, 431. The information flow is essential even for stakeholders punishing corporations for human rights abuses. Parkinson, above n 3, 59-60.} as well as to strengthen the existing market, albeit limited, for ethical corporate conduct.\footnote{See Grabosky et al, ‘Parties, Roles, and Interactions’ in Gunningham et al, \textit{Smart Regulation}, above n 4, 108, 114-15. ‘Law and regulation can strengthen various stakeholders’ positions through mandatory disclosure, facilitating suits, and markets for control.’ Parker, above n 5, 5.} But as markets themselves might not ensure such a flow of information, law has to step in.\footnote{Parker argues that ‘there needs to be an expansion in the areas of performance about which companies are required to disclose information, for example, in relation to the environmental impact of their activities or their health and safety record.’ Parkinson, above n 3, 59. See also UN Human Rights Council, \textit{Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations: Human Rights Impact Assessments – Resolving Key Methodological Questions}, A/HRC/4/74 (5 February 2007), <http://www.business-humanrights.org/Documents/RuggieHRC2007> (last visited 6 March 2007); and generally Todd Landman, ‘Measuring Human Rights: Principle, Practice, and Policy’ (2004) 26 \textit{Human Rights Quarterly} 906.} To illustrate, governments could enact or strengthen the freedom of information laws and compel corporations to share information, say, about the human rights impact assessment of a given project with relevant stakeholders.\footnote{Simaika, above n 44, 348, and generally 347-60.} Simaika goes one step further and moots the idea of a national legislation based on an ‘international right to know’ which would also demand disclosure of information about the overseas activities of an MNC.\footnote{Simaika, above n 44, 348, and generally 347-60.} Of course corporations could disclose information about their affairs even without a legal requirement, or in some cases might go beyond what law requires. There are, however, apprehensions that such voluntary disclosure could be selective and part of a larger window dressing exercise.\footnote{Simaika, above n 44, 348, and generally 347-60.}

Third, it would also be helpful if governments expanded market indicator(s) of corporate performance. This would enable stakeholders to judge the performance of

\footnote{\begin{itemize}
\item Bhopal Gas Leak Disaster (Processing of Claims) Act 1985, ss 3 and 4.
\item Gunningham and Sinclair note: ‘Market mechanisms, including economic incentives, also depend heavily for their success upon the availability of sufficient information to enable economic actors to make rational decisions in their self-interest.’ Neil Gunningham & Darren Sinclair, ‘Designing Environmental Policy’ in Gunningham et al, \textit{Smart Regulation}, above n 4, 375, 431. The information flow is essential even for stakeholders punishing corporations for human rights abuses. Parkinson, above n 3, 59-60.
\item Simaika, above n 44, 348, and generally 347-60.
\end{itemize}}
corporations not merely against financial indicators (profits) but also against social indicators, e.g., how an MNC contributed to the fulfilment of the right to life and health by making available drugs to HIV patients, or how it funded primary education for poor children.\textsuperscript{164} Again law should take the lead in creating such an environment in which corporate performance is assessed and reported publicly according to multiple variables. The resolution of the European Parliament adopted on 13 March 2007 – which calls for integrating financial reporting with social and environmental reporting by companies – is a step in the right direction.\textsuperscript{165}

8.3.1.2 Sanctions

One cannot, however, ignore the limitations of (dis)incentives.\textsuperscript{166} Not all MNCs may respond positively to incentives or disincentives. Moreover, a system of incentives and disincentives might not be desirable, for example, in areas which involve highly hazardous activities.\textsuperscript{167} It is precisely because of this reason that a range of sanctions in the armoury of regulators are necessary. This logic applies squarely to regulatory regimes that seek to make MNCs accountable for human rights abuses.

It is proposed that regulatory initiatives at the institutional, national and international levels should rely on three types of sanctions: civil, criminal, and social. Whereas civil and criminal sanctions are self-explanatory, by ‘social’ sanctions I mean pressure and coercion – such as naming and shaming, public protest, awareness campaigns, media exposure, and consumer boycotts – exerted by stakeholders against MNCs.\textsuperscript{168} The main advantage of employing social sanctions is that as they are operationalised outside the corridors of the judicial system and without direct support of governments, they do not suffer from the same limitations that states and litigants seeking to impose

\textsuperscript{163} Parkinson, above n 3, 60.
\textsuperscript{165} European Parliament, ‘CSR Resolution’, above n 83, para 27.
\textsuperscript{166} See Braithwaite, ‘The Limits of Economism’, above n 150, 488-99.
\textsuperscript{167} Braithwaite writes that ‘in areas involving great hazards, it is important to punish risky behaviour which fortuitously does not result in any harm.’ \textit{id.}, 489.
civil or criminal sanctions against MNCs face. The exact nature of these triple sanctions will again vary from the institutional to national and international levels. In order to avoid duplication, I explain this aspect in the part below.

8.3.2 Triple Sanctions

Regulatory initiatives at the institutional, national and international levels should be capable of invoking, if needed, a range of sanctions. The availability of a range of sanctions – where ‘range’ refers not only to severity but also to types of sanctions – offers at least two advantages. First, sanctions of different severity and type may be suitable for different types of deviant corporations which cannot be encouraged or persuaded to respect human rights norms through incentives. Second, if more than one kind of sanctions is available, then regulatory initiatives could invoke multiple sanctions simultaneously so as to exert more pressure on non-compliant corporate actors. Again one may see a contrast between how sanctions are to be used under the model of responsive regulation (i.e., a progressively punitive pyramid of sanctions) and how sanctions are to be employed under the integrated theory (i.e., invoking civil, criminal, and social sanctions simultaneously) to make MNCs accountable for human rights abuses.

I suggest that three types of sanctions (civil, criminal, and social), each of which can have different levels of severity, should be utilised to make MNCs accountable for human rights abuses. As Table 8.1 already illustrated, the type and severity of sanctions will vary among regulatory initiatives at the institutional, national and international levels.

8.3.2.1 Civil sanctions

An order to make reparation is considered the most common civil sanction asserted against those corporations which violate human rights. At present legal proceedings for reparation are filed ordinarily before national courts for a breach of national or

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169 Ayres and Braithwaite argue that sanctions should be not only be ‘deterrent’ but also ‘in capacitive’ because the “law must have sanctions designed to cope with irrational actors as well as rational actors”. Ayres & Braithwaite, above n 32, 30.

170 Fisse & Braithwaite, Corporations, Crime and Accountability, above 100, 141-45. See also Chapter 7.2.1.
international laws. It is, however, possible to conceive other types of civil sanctions at all three levels. At an institutional level, for example, MNCs could institute internal disciplinary proceedings and/or resort to demotion of those corporate executives and officials which contribute to human rights violations in a given case. It is similarly possible that a corporate representative body like the International Chamber of Commerce could put in place a process to disqualify corporate executives found responsible for human rights abuses from being appointed directors of a corporation in future — more so when it has a Commission on Business in Society which formulates policies regarding the role of business in the context of globalisation and changing societal expectations.\textsuperscript{171}

In addition to reparation, civil sanctions at national and international levels may include formal black-listing of MNCs or their subsidiaries (for the purpose of, say, award of contracts, aid or other government benefits) if they are found to be involved in human rights abuses. There is also a possibility of imposing trade sanctions, within the WTO fold or otherwise, against MNCs that do not respect human rights while doing trade and business.\textsuperscript{172} One other option that could be explored at both these levels is the model of apology and reconciliation, learning from the success of this model elsewhere.\textsuperscript{173}

Coming back to the issue of reparation, three additional points are worth a mention. First, to claim compensation from MNCs for human rights wrongs, victims need not

always rely on formal judicial mechanisms established by national or international regulatory regimes. Rather, direct settlements, which in some cases might be fallouts of litigation in the first instance, could be reached between the concerned MNC and victims' groups. The role of governments in encouraging disputants to arrive at such settlements is at best limited to facilitating or approving the deal to ensure fairness and legitimacy. Reparation deals reached in two cases—Unocal\(^{174}\) and James Hardie\(^{175}\)—are illustrative of this possibility whereby compensation could reach victims without an order from a judicial body. Though such an approach raises questions about the suitability of private settlement for redressing public wrongs, the possibility of MNCs dictating the settlement order, or the opaque nature of the process,\(^{176}\) it has its advantages too. For example, this approach delivers compensation to victims directly without the intervention of state agencies which, as Bhopal shows, are more prone to corruption and inefficiency than victims’ groups.

Second, the labelling and the language of reparation deals are critical if reparation has to really serve as a sanction. MNCs should be compensating victims to remedy a wrong and not as a sign of mercy or compassion without acknowledging responsibility (at least moral if not legal).\(^{177}\) Third, reparation could not only serve a remedial or restitutionary purpose, but also work as a deterrent if the paying capacity of the MNC concerned is also taken into consideration while fixing the amount of compensation.\(^{178}\)

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\(^{177}\) For discussion with reference to settlements in the cases of Bhopal, Unocal and James Hardie, see Chapter 3.2.1.

\(^{178}\) The Indian Supreme Court in *M C Mehta v Union of India* AIR 1987 SC 1086 observed:

> We would also like to point out that the measure of compensation in [cases in which an enterprise was carrying on hazardous activity] must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying of the hazardous or inherently dangerous activity by the enterprise.

*Id.*, para 32 (emphasis added).
8.3.2.2 Criminal sanctions

Although the imposition of criminal sanctions has to be a matter for regulatory initiatives at national and international levels, it is possible to imagine some role for MNCs themselves in enforcing criminal law, if not imposing criminal sanctions (see Table 8.1). Jennifer Arlen, for example, argues that corporate managers can take several measures to deter corporate employees from committing crimes.\textsuperscript{179} Besides, once a fine is imposed on an MNC, the corporation may wish to allocate this liability and recover this fine from the executives or employees concerned who acted with criminal intent.\textsuperscript{180} If regulatory initiatives at the institutional level could ensure that the imposition of criminal liability on corporations would 'result in due allocation of responsibility as a matter of internal disciplinary control'\textsuperscript{181} and did not allow the corporate form to shield individuals who commit actual crimes,\textsuperscript{182} the efficacy of criminal sanctions could increase immensely.\textsuperscript{183}

At present, regulatory initiatives at the national level are the most potent source for imposing various types of criminal sanctions on MNCs which indulge in egregious human rights abuses. The sanctions might include, for example, the imposition of fine, imprisonment, license cancellation, an adverse publicity order, or an order for


\textsuperscript{180} There is a risk of corporate management scapegoating its executives or employees, but this is worth taking given that individuals, as moral agents, should not be allowed to behave irresponsibly and then always seek refuge in corporate form and collective decision making. See Douglas Litowitz, 'Are Corporations Evil?' (2004) 58 University of Miami Law Review 811, 832-41. The risk can also be minimised by putting in place a process that will not allow unreasonable allocation of liability to executives or employees.

\textsuperscript{181} Fisse & Braithwaite, Corporations, Crime and Accountability, above n 100, 8, and generally 8-14. Another problem that Fisse and Braithwaite highlight is the 'non-prosecution of individual representatives of companies for offences committed on their behalf.' Id., 2, and generally 2-8. To overcome these difficulties, they propose the 'accountability model' of corporate criminal justice. Id., 15-16, 133-217.

\textsuperscript{182} The way in which legal liability is structured today often confers a de facto immunity on corporate managers, who are typically shielded by a corporate entity which takes the rap.' Id., 14.

\textsuperscript{183} Wells highlights one of the paradoxes of current corporate criminal liability regimes: 'On the one hand, the courts have been reluctant to make a company liable for the activities of many of its employees. On the other hand, individual managers have been able to hide behind the corporation.' Celia Wells, Corporations and Criminal Responsibility, 2nd edn. (Oxford: Oxford University Press, 2001), 161.
forfeiture of property or community service. After surveying the legal position in sixteen countries, Ramasastry and Thompson conclude that most countries permit prosecution of legal persons for criminal offences and that it is possible to hold MNCs liable under national laws for international crimes. Clough also contends that it is desirable and legally possible to impose criminal liability, including through extraterritorial law, upon MNCs for their involvement in human rights violations.

Of course it is not always easy to inflict criminal sanctions. Questions arise about the (un)desirability of imposing criminal liability upon MNCs, the lack of political will for doing so, or the paucity of ‘prosecutorial resources’ potentially inhibiting successful prosecution of MNCs and/or their executives. There are also other technical hurdles like the difficulty in establishing a legal basis for corporate liability and the challenge of attributing wrong within a corporate structure and of finding appropriate standards of mens rea. Even if criminal sanctions are imposed on corporate wrongdoers guilty of human rights violations, they might not prove an effective deterrent. Coffee highlights the problem of a ‘deterrence trap’ that arises in relation to corporate crimes – it is ‘difficult to set a sanction high enough to be both

184 It is possible to award damages to victims for certain serious crimes, for instance, under the ATCA and the TVPA. National laws in some countries also empower the courts to award compensation to victims for all types of crimes, e.g., Code of Criminal Procedure 1973 (India), s 357. However, as awarding damages cannot be considered a criminal sanction, this aspect is not dealt with in this section.


188 For example, in the case of Bhopal, the Indian government did not show a strong political will to extradite and prosecute in India, Warren Anderson, the former Chairman of UCC. See Chapter 2.3.4.5.

189 Braithwaite, ‘The Limits ofEconomism’, above n 150, 482.

190 Essentially, the problem is that the law is simply unable to conceive of a position where a company can have a state of mind independent of, rather than identical to, that of one of its senior executives... What this means is that true legal personality is being denied to companies on the grounds that they cannot have an independent state of mind.’ Kaye, above n 87, 354. Kaye moots for reintroducing the primary, and not vicarious, liability of corporations for criminal offences. Id., 358-60. See generally Wells, above n 183; Jennifer A Quaid, ‘The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis’ (1998) 43 McGill Law Journal 67; Celia Wells & Juanita Elias, ‘Catching the Conscience of the King’: Corporate Players on the International Stage’ in Alston (ed.), above n 69, 141.

collectable and sufficient for deterrence.\textsuperscript{192} However, as far as legal or technical hurdles are concerned, there is no theoretical reason why these could not be overcome. Kaye aptly argues: 'If making a company potentially liable for serious criminal offences is also socially desirable, there would seem to be little wrong in developing existing doctrine in accordance with established legal principles in order to do just that.'\textsuperscript{193}

On the other hand, at the international level, although it is desirable to have a judicial body which could administer criminal sanctions against MNCs, the establishment of such a body is unlikely to happen primarily for political reasons and because of the powerful corporate lobbying likely to confront any such initiative. The ICC is perhaps the only recourse available at this moment. However, here also the scope of imposing criminal sanctions against MNCs is seriously limited. The Rome Statute does not, in its current form, allow for the prosecution of MNCs, though there was a provision for prosecuting legal persons in the initial draft.\textsuperscript{194} Moreover, the liability is limited, at this stage, to the three most serious crimes: genocide, crimes against humanity, and war crimes.\textsuperscript{195} Thus, though the existing position is far from satisfactory, the limited window of opportunity offered by the Rome Statute to prosecute corporate executives should be invoked in appropriate cases. For example, prospects for prosecution should be explored in relation to corporate executives' role in funding the conflict in Congo,\textsuperscript{196} or those involved in the administration of torture and inhumane treatment of prisoners of war as part of the 'war on terror',\textsuperscript{197} or in forcible transfers of population for development projects in contravention of the existing guidelines.\textsuperscript{198}

\textsuperscript{192} Braithwaite, 'The Limits of Economism', above n 150, 491.
\textsuperscript{193} Kaye, above n 87, 349.
\textsuperscript{194} Clapham, 'The Question of Jurisdiction' in Kamminga & Zia-Zarifi (eds.), above n 110, 143-59.
\textsuperscript{197} See Rosemann, above n 2.
8.3.2.3 Social sanctions

The integrated theory of regulation conforms to the prevailing regulatory paradigm, which does not see states alone as ‘central to regulation’. Rather, contemporary regulatory practice tends to rely also on non-state actors to enforce norms through a range of informal means. The integrated theory of regulation likewise contemplates enforcing corporate human rights responsibilities through the imposition of social sanctions, which operate primarily outside the boundaries of the judicial system and without much government help. Instead of states and their various regulatory agencies imposing sanctions, various constituents of society (that is, ‘social actors’) perform the role of regulators in employing social sanctions against corporations in coercing them to comply with human rights norms.

Various social actors – which act individually as well as collectively and which operate from the local to national, regional and international levels – such as employees, consumers, investors, the media, NGOs, social activists, environmentalists, trade unions, and students will play an important role in exerting social sanctions against those MNCs which violate human rights. Grabosky et al highlight the important contributions that social actors could make in the regulatory process. These include educating the community, providing information to regulators and regulatees, acting as private enforcers, and initiating litigation to seek compensation or preventing an impending harm. In addition to these measures (which are likely to influence the conduct of corporations indirectly), social actors ‘may also bring pressure to bear directly on companies and industries.’
There are several instances when these social actors have forced MNCs operating in market settings to change their business practices inconsistent with human rights norms.\textsuperscript{204} I cite here two quite recent examples which illustrate how social pressures or sanctions, without the intervention of states or international institutions, could encourage MNCs to contribute to the realisation of human rights while doing business.\textsuperscript{205} First, in response to a shareholder proposal, The Hershey Company, the largest North American chocolate and snack food company, has agreed to create a broad supplier code of conduct that will not only cover the entire supply chain of the company but will also have provisions for implementation and monitoring.\textsuperscript{206} Second, in November 2006, Nike announced that the company is ceasing orders with its hand-stitched soccer ball supplier, Saga Sports, based in Sialkot, Pakistan, due to the contract factory's failure to correct significant labour compliance violations.\textsuperscript{207} It is clear from these examples—in which the two MNCs responded to concerns raised by their stakeholders about their business practices—that social actors (could) affect in many ways how corporations operate, or should operate, in market settings.\textsuperscript{208}

It should be made clear that the idea of social sanctions tries to exploit the corporate preoccupation with the maintenance of reputation and market goodwill,\textsuperscript{209} which they

\textsuperscript{204} Parker, for example, shows how stakeholders led to a change in policies of Monsanto (regarding genetically modified food) and Shell (regarding the disused oil platform, "the Brent Spar"). Parker, above n 5, 157-64. Zerk also observes: "Companies have had no choice but to respond. For some, this has meant a re-evaluation of long-held positions and principles." Zerk, above n 4, 23, and generally 23-24. See also Joseph, above n 43, 6.

\textsuperscript{205} Such pro-human rights policy decisions by MNCs may sometimes have double effects. For example, it is suggested that Nike's decision to cancel soccer ball deal with Saga Sports, Pakistan, will affect the right to livelihood of several thousands families. See David Montero, 'Workers Cry Foul as Nike Ends Pakistan Soccer Ball Deal', \textit{South China Morning Post} (25 December 2006), A12.

\textsuperscript{206} Anne Moore Odell, 'Chocolate Giant Commits to Responsible Supplier Code', \textltt{http://www.socialfunds.com/news/article.cgi/2245.html} (last visited 9 March 2007). McDonald's UK also announced that from 10 January 2007, all its restaurants in the UK and Ireland will sell exclusively Kenco coffee containing 10 per cent Rainforest Alliance Certified beans, thus not only protecting the environment but also making a positive contribution to the human rights of coffee growers. Rainforest Alliance, 'Reflecting Trend Toward Global Companies Embracing Sustainability, McDonald's UK Puts Rainforest Alliance Certified Coffee on the Menu', \textltt{http://www.rainforest-alliance.org/news.cfm?id=mcDonalds} (last visited 8 January 2007).


\textsuperscript{209} Company 'can have a reputation, for the disparagement of which it can sue in an action for defamation of character.' Sealy, above n 77, 17.
often try to protect vigorously. Corporations as well as corporate executives care about their reputation, as the research of Fisse and Braithwaite shows, because they think that adverse publicity might have a negative impact on the profitability of corporations. Nothing works better as a sanction against corporate wrongdoing than something which has the potential to reduce their profits. Although the risk of negative publicity might not affect the behaviour of all types of corporations equally, this type of sanction is still worth a try, because a majority of MNCs that have been castigated for egregious human rights violations are well-known and have had high public profiles. Moreover, even if the actual target of social sanctions is a high profile MNC, the imposition of social sanctions should have some deterrent effect on the conduct of other bystander MNCs (or smaller corporations) which are beyond the radar of the public gaze.

'As public sensitivity to human rights violations has grown, the involvement of multinationals has come under increasing scrutiny and challenge.' Various kinds of social actors or groups scrutinise of MNCs' conduct. With a likelihood of increasing public participation in regulation in future, the usefulness and significance of social sanctions is also bound to increase. The regulatory value of social sanctions will be highest in those situations in which governments prove to be incapable of imposing, or unwilling to impose, civil and/or criminal sanctions against MNCs for human rights abuses. All in all, the employment of social sanctions may ameliorate the limitations that regulators face in imposing civil and criminal sanctions against MNCs.

210 Zadek and Forstater label this 'civil regulation' in that 'the reputation of companies can be damaged by civil actions to a degree that will affect their business performance.' Simon Zadek & Maya Forstater, 'Making Civil Regulation Work' in Addo (ed.), above n 3, 69.
212 Haines points out, on the basis of her empirical research, that 'publicity as a sanction may ... only be successful against large organisations with a high public profile.' Haines, above n 4, 222.
213 Gladwin & Walter, above n 37, 130.
214 Id., 31-32.
215 'Public involvement in regulation is a route that we are only beginning to go down.' Clarke, above n 31, 234.
8.4 INTEGRATED REGULATORY FRAMEWORK AND BHOPAL

A natural question arising from the foregoing discussion will be whether the regulatory framework canvassed in this chapter offers the prospect of any improvement over the existing regulatory framework dealing with human rights abuses by MNCs? I propose to answer this question with reference to Bhopal because throughout the thesis I have invoked the Bhopal matrix to demonstrate the inadequacy of prevailing regulatory mechanisms.

Readers may recall that I demonstrated in Chapter 4 that the existing regulatory framework is inadequate in view of a three-fold deficiency: the framework does not prescribe precise human rights standards, offers insufficient or contestable rationales for compliance, and is supported by a deficient or undeveloped implementation-cum-enforcement mechanism. I show, with reference to Bhopal, how the regulatory framework based on the integrated theory of regulation could have cured these three deficiencies. Although the inquiry is hypothetical and speculative in nature, it seems that such a regulatory framework might have either preempted Bhopal, or responded to it more effectively than the then prevailing regulatory regimes.

8.4.1 Could the Proposed Regulatory Framework have Preempted Bhopal?

Let me start with the preemption analysis first. In order to illustrate how UCC-UCIL might have deduced their human rights obligations according to the integrated theory of regulation, I focus only on one human right – the right of health – that was unquestionably abridged in the Bhopal case. The integrated theory would have required formulation of MNCs' obligations relating to the right to health at the institutional, national and international levels with reference to the international human rights framework applicable to states. In other words, Article 25(1) of the UDHR and Article 12 of the ICESCR would have formed the bedrock for UCC-UCIL's responsibilities in protecting the right to health at the institutional, national

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216 'The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.' ICESCR, GA Res. 2200A (XXI), UN Doc. A/6316 (1966), art. 12(1). Since the General Comment No. 14 was issued in 2000, it could not have been used to interpret human rights obligations of the Indian government or UCC-UCIL. Committee on Economic, Social and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the ICESCR)',
and international levels. However, as we have seen previously in Chapter 4, adequate norms directed at protecting the right to health did not exist at any of these three levels during the time UCC-UCIL operated the Bhopal plant, and this perhaps proved fatal. The safety policy of UCC at the institutional level was rhetorical and without any external monitoring, the Indian government (though a party to the ICESCR) did not enact appropriate legislation to protect the right to health, and with the exception of the ILO Declaration, at the international level not even ‘soft’ norms existed.

Second, since the integrated theory does not demand that MNCs follow uniform or identical human rights standards everywhere, they may make necessary adjustments in standards so long as such adjustments are in conformity with the human approach. The human approach postulates that MNCs apply in host countries the home or international standards modified in view of morally relevant local differences. Local differences are morally relevant only if they facilitate a better protection of human rights. I demonstrated in Chapter 6 that no morally relevant differences existed in Bhopal that would have allowed UCC to apply inferior technology and safety standards in its Bhopal plant as compared to the West Virginia plant. Yet, as we have seen before in Chapter 6, UCC applied and justified the application of inferior standards in the Bhopal plant. In other words, had UCC adopted the human approach rather than the business approach to ascertain applicable standards of safety and human rights in India, Bhopal might not have occurred in the first place.

Third, the enactment of freedom of information legislation by the Indian and/or the US governments could have required UCC-UCIL to disclose to their stakeholders (not merely to the Indian government) the information about the chemicals used in the Bhopal plant as well as the hazards involved in dealing with them. It is likely that

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217 The UN Norms now try to fill this gap at the international level. UN Norms, above n 120, paras 7, 12 and 14.
218 Chapter 4.4.
219 The US government, in fact, enacted the Emergency Planning and Community Right to Know Act (EPCRA) in 1986 as a direct response to Bhopal. 42 USC § 11001 (1986). These required companies to disclose information about the chemicals they use, store, and release in their facilities. Commenting on this law, Simaika observes: ‘Ironically, even though the EPCRA was inspired by an accident at a US-owned facility overseas, it does not apply outside US territory.’ Simaika, above n 44, 348.
such disclosure would have attracted and engaged the attention of stakeholders capable of exerting pressure on UCC-UCIL to change their safety policies or cease operation. Here it may be worthwhile to refer to the European Union Directive on Major Accident Hazards – the original version of which Directive was issued before the gas leakage in Bhopal[220] – which ‘is aimed at the prevention of major accidents which involve dangerous substances, and the limitation of their consequences for man and the environment.’[221] The Directive stipulates that member states shall require operators of installations to provide, among others, sufficient information about the dangerous substance, the quantity of such substance, and the elements that are likely to cause a major accident.222 Ideally, such information ought to be shared not only with the concerned government agencies, as the European Union Directive mandates, but also with other civil society organs under the integrated theory. But on this count also, UCC-UCIL did not adequately inform about the risks either to the relevant government agencies or its stakeholders whose human rights were at stake.223

Fourth, the integrated theory would have triggered the employment of various types of sanctions against UCC-UCIL at various regulatory levels and in diverse settings immediately after the minor gas leaks were reported in 1981 and 1982. In addition, the theory would have required resort to all coercive strategies in tandem so as to maximise the efficacy of regulatory initiatives. However, no civil, criminal or social sanctions were imposed on UCC-UCIL subsequent to these minor gas leaks. Had this been done, the fatal 1984 gas leakage might have possibly been averted.

Finally, the integrated theory of regulation provides a sound theoretical rationale for corporate human rights responsibilities in that the duty to observe human rights norms is put before profit considerations. In order to do business in consonance with this theory, UCC-UCIL would have been bound to fulfil their responsibilities regarding the right to health simply because of their relation with and position in society. Of

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[222] Id., art. 6.
[223] See Chapter 6.3.1, and 6.3.2.

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course, they were not bound to operate the Bhopal chemical plant and manufacture fertilizers, especially if doing so was not proving financially viable. However, as long as the plant was running, UCC-UCIL ought to have respected its human rights responsibilities. Corporations should not be allowed, according to the integrated theory, to save on operational costs by ignoring their legitimate human rights obligations.

8.4.2 How would have the Proposed Regulatory Framework Responded to Bhopal?

Even if it is assumed that Bhopal would have happened any way, then also the proposed framework based on the integrated theory might have proved more effective in delivering justice to thousands of victims of several generations. First, the question of UCC’s liability for the conduct of UCIL might not have been litigated for years without any result. Assuming that regulatory initiatives at the national and international levels were put in place in conformity with the integrated theory of regulation, they would have dented UCC’s defence based on the principles of separate personality and limited liability. Relying on the theory of eclipsed personality outlined above, the Bhopal victims could have sued UCC in the US courts as a matter of principle. Moreover, if a parent company is held liable for human rights abuses committed by its subsidiary as a matter of law and principle, this would also have strengthened the victims’ case against dismissal of suits from the US courts on the ground of forum non conveniens.

Second, the proposed regulatory framework would have secured a place for civil society organs (including victims’ groups) not only in litigation and during settlement negotiations, but also outside the judicial system. In the actual events of Bhopal, on the other hand, the assumption of a parens patrie role by the Indian government – though desirable in some respects – had a negative impact on the capacity of civil society organisations to fight the battle against UCC. Not only did the Bhopal Act limit the rights of victims or their representatives inside the courts, it also indirectly dis-empowered victims and their groups even outside the judicial system. For example, UCC-UCIL (and now Dow Chemical) did not take victims’ groups
seriously – the two MNCs neither felt threatened nor compelled to negotiate with them with respect to the payment of compensation. This aspect differentiates the settlement in Bhopal from the settlements reached in Unocal and James Hardie cases. Whereas in the case of Unocal and James Hardie, victims’ groups could put pressure on concerned MNCs and directly negotiate the terms and amount of compensation, in the case of Bhopal they were left to suffer at the mercy of the Indian government.

Third, the integrated theory would have required invoking simultaneous sanctions against UCC-UCIL after the December 1984 gas leakage. But again, this did not happen in the actual scenario; thus sufficient pressure could not be exerted on UCC-UCIL to compensate the victims adequately and swiftly. In reality, social sanctions against UCC could not be applied concurrently with the coercive legal proceedings initiated by the Indian government. As the government was acting as the representative of victims, victims and their organisations trusted and waited for the Indian government to secure justice for them in the first instance instead of putting pressure on UCC together with the government’s efforts. Similarly, upon UCC’s promise to provide the agreed amount of compensation, the Indian Supreme Court was tempted to quash criminal proceedings against UCC-UCIL and their officials, thus not allowing the possibility of criminal sanctions to be inflicted with civil sanctions. It is true that criminal cases were revived later, but the resultant delay has effectively prevented criminal sanctions from having any deterrent effect on UCC-UCIL, or other MNCs.

Fourth, under the regulatory model suggested here, MNCs responsible for Bhopal would have been blacklisted from public procurements at both the national and international levels and threatened with license cancellation by relevant government agencies unless they agreed to compensate victims adequately and also clean up the plant site in Bhopal. However, as we know, nothing of that sort happened. UCC, as well as Dow Chemical which took over UCC in 2001, continued to do business as usual both in the US and India.

\[224\] Suits by the Bhopal victims under the ATCA were dismissed, among others, on the ground of lack of standing. See Chapter 2.
8.5 CONCLUSION

'Producing socially responsible corporations is an extremely arduous task for the law.' Nevertheless, regulatory efforts – both within the fold of formal law and through informal means of regulation – could be made to remedy the current situation of corporate impunity for human rights violations. In this chapter I have tried to show how a regulatory framework based on the integrated theory of regulation could be put in place. Such a framework should not only be able to encourage MNCs to respect their human rights responsibilities but also make them accountable for human rights violations affecting usually disadvantaged sections of society.

The integrated theory of regulation is based on two well-founded assumptions. First, as no single regulatory theory, strategy, or sanction is adequate to deal with difficult regulatory targets such as MNCs, we need to invoke more than one strategy or sanction in an integrated fashion. Second, in view of the inherent limitations of law and states in regulating MNCs, it is imperative to employ non-legal regulatory initiatives, techniques and sanctions that do not primarily rely on government agencies, processes, or mechanisms. However, this is not to discount the important role that states and national as well as international law have to play in regulating the activities of MNCs. In view of these assumptions, the integrated theory mooted that regulatory initiatives at the institutional, national and international levels should be put in place. Initiatives at all three levels should invoke, not in a progressive but an integrated manner, two implementation strategies (incentives/disincentives, and sanctions) and three types of sanctions (civil, criminal, and social) in order to achieve a robust enforcement mechanism.

Integration is also to be achieved between human rights concerns and business concerns, and between the ‘why’, ‘what’ and ‘how’ of corporate human rights responsibility discourse. This cumulative integration should result in the evolution of a regulatory framework that is able, as I demonstrated in the previous part, to avoid and/or handle future Bhopals more effectively.

225 Hess, above n 60, 84.
CHAPTER 9: CONCLUSION

9.1 INTRODUCTION: BACKDROP OF CHANGING PARADIGMS

Human rights discourse has proved to be very dynamic and ever-evolving one. At different points of time, different issues have dominated the debate — from war and peace to the appropriate theory of human rights, the relative importance of different generations of rights, the human right to development, universalism versus cultural relativism, Asian values, national sovereignty, enforcement mechanisms, trade-related and market-friendly rights, and the current project of freedom and democracy. One of the dominant themes of current human rights discourse relates to the nature, extent and enforcement of human rights responsibilities of non-state actors such as corporations. This theme is often explored, as in this thesis, with a focus on MNCs.


2 Regarding the practice to describe from MNCs to NGOs and terrorist groups as 'non-state actors,' Professor Alston argues: '[T]his insistence upon defining all actors in terms of what they are not ... reinforce[s] the assumption that the state is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve.' Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed.), Non-State Actors and Human Rights (Oxford: Oxford University Press, 2005), 3.


4 This should not, however, be taken to mean that uni-national or small business enterprises have no human rights responsibilities. The UN Human Norms, for example, applies to enterprises other than MNCs. This point was again highlighted in a recent report: 'It is important, however that such an
because they are considered more difficult regulatory targets in view of their unique structure, modes operandi, power, and trans-border operations. Globalisation, increasing liberalisation of trade (including under the WTO), the changing role of states, technological developments, and the evolution and expanding influence of civil society organisations have provided further impetus and added newer dimensions to the issue of corporate human rights responsibility.

MNCs are uniquely powerful institutions. States, international institutions, civil society organisations, researchers and the general public all are acknowledging the constant rise in the influence and stature of MNCs on the national as well as international stage. Day-to-day decisions made by MNCs affect, directly or indirectly, the lives of a wide range of stakeholders (including the fulfilment of their human rights). MNCs do not always adversely affect the realisation of human rights; in fact, their potential to make a positive contribution in the promotion of human rights is recognised in scholarly literature. However, as a gap between the potential of MNCs in promoting human rights and their actual performance on this front has
remained, more often than not, MNCs and their activities have been the target of (some scholars feel excessive) criticism from several corners.

Instances of MNCs' involvement in human rights abuses, acting alone or in complicity with states and their private agents, are too well documented in books, reports, articles, judicial decisions, and other (electronic) resources to be dismissed as an academic fantasy. There are also many case studies – from the involvement of IBM in the Holocaust to more recent examples involving Nike, Unocal, Shell, Texaco, Dow Chemical, Yahoo!, Enron, Chevron, Thor Chemicals, Exxon Mobil, BHP, and James Hardie – that illustrate how MNCs have indulged in human rights abuses in the communities in which they operate. One glaring omission from this list that I noticed was UCC's role in Bhopal, where a massive leakage of toxic gases on the night of 2/3 December 1984 killed thousands of people, injured several hundred thousands, and also caused environmental pollution. With few exceptions, the existing academic literature has primarily analysed Bhopal as a mass toxic tort or an environmental disaster. However, Bhopal, as I have tried to demonstrate in Chapters 2 and 6, could also be seen as a site where an MNC violated several human rights (e.g., the right to life, the right to health, the right to information, and the right to a clean environment) of the people of a developing country. By analysing Bhopal from a human rights perspective, this thesis aimed to fill a significant gap in the existing scholarship.

The choice of Bhopal as a case study was justified (in Chapter 2) because it symbolises a typical scenario of MNCs' involvement in human rights violations – that is, an MNC from a developed country undermined the human rights of mostly poor and illiterate populace of a developing country by exploiting the loopholes in the

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11 The chairman of the UCC observed: 'Despite – or perhaps as a result of – their economic success, they have become a focal point of criticism that is based on misconceptions, myths, and misinformation.' Wilson, 'Multinationals' Value', New York Times (11 March 1975), 35, as quoted by Vagts, above n 8, 117. 'The majority of those who agitate [against globalisation] seem to agree on one thing: the rapaciousness of multinational corporations, which they believe are the principal beneficiaries, and the main agents – the B-52s, as I call them in this book – of this socially destructive globalisation.' Jagdish Bhagwati, In Defence of Globalisation (New York: Oxford University Press, 2004), ix, and generally 22-24, 162-90.

12 Professor Vagts offers an explanation for this: 'MNEs are more specific and vulnerable targets for criticism than abstracts of economics, or more remote theories about capitalism.' Vagts, above n 8, 116.

13 See Chapter 2.2.
regulatory framework. Despite the fact that the gas leak took place in Bhopal more than twenty-two years ago, as a case study it is relevant even today because the Bhopal victims faced almost all the major legal and practical challenges that are commonly faced by victims of corporate human rights abuses and those challenges by and large remain unanswered to date. In this thesis, I employed Bhopal not only to show how the roots of corporate human rights abuses could be traced to the circumstances and conditions under which MNCs enter and continue to operate in emerging markets of developing countries, but also to demonstrate how MNCs are often able to enjoy impunity for human rights violations by exploiting the inadequacies of current regulatory initiatives.

The instances of corporate human rights abuse have been met with diverse regulatory responses at various levels – from institutional to national, regional and international levels – flowing from both internal and external sources. There is, therefore, no situation of a regulatory vacuum as some commentators have noted. What we are witnessing, rather, is a situation where the existing regulatory initiatives are proving inadequate to make MNCs accountable for human rights abuses. This inadequacy also arises partly because MNCs are difficult regulatory targets because of five regulatory dilemmas that their regulation poses: who should regulate what activities of which corporation, where, and how? Furthermore, law has reacted slowly to developments in the institution of the corporation generally (something that squarely applies to how it has responded to corporate human rights violations). Law also suffers from several


15 Siegle, for example, notes that MNCs 'exist in a vacuum of environmental liability.' Jennifer M Siegle, 'Suing US Corporations in Domestic Courts for Environmental Wrongs Committed Abroad through the Extraterritorial Application of Federal Statutes' (2002) 10 University of Miami Business Law Review 393. See also Maria Ellinikos, 'American MNCs Continue to Profi5 from the Use of Forced and Slave Labour Begging the Question: Should America Take a Cue from Germany?' (2001) 35 Columbia Journal of Law & Social Problems 1, 32.

16 'So, ... we have seen the company travel from society to association, flirt with partnership, and move on via institution to enterprise. The law, in its separate world, has had some trouble in keeping up....' Len Sealy, 'Perception and Policy in Company Law Reform' in David Feldman & Frank Meisel, Corporate and Commercial Law: Modern Developments (London: Lloyd's of London Press Ltd., 1996), 11, 28 (emphasis added).
serious limitations that hamper its ability to tame the activities of powerful artificial entities which operate at a transnational level.17

9.2 An Integrated Theory of Regulation: A Response to the Inadequacy of Existing Regulatory Initiatives

Against this background, this thesis advanced two claims: one prerequisite and the other central. The prerequisite claim was that existing regulatory initiatives concerning MNCs' accountability for human rights abuses are inadequate. The inadequacy was judged with reference to their efficacy at two levels: at the preventive level and at the redressive level. I argued, in Chapter 3, that a regulatory initiative related to corporate human rights responsibilities should be considered 'effective' if it can prevent or preempt, at least in some cases, human rights violations by MNCs (the preventive level) and could offer adequate relief to victims in cases of violations (the redressive level). Since the existing regulatory initiatives were too numerous to be assessed on the touchstone of this test, it was considered necessary to understand their taxonomy and classify them into different categories so as to choose a representative sample. I contended that the existing regulatory initiatives could be differentiated from one another, and also classified into different heads, on the basis of five criteria: the source from which they flow; the content of human rights obligations; the targeting approach adopted by initiatives; their level of operation; and their nature in terms of compliance strategy.

Applying these five criteria, the provisions, scope, and working of the following six representative regulatory initiatives were examined critically in Chapter 4: the ATCA, corporate codes of conduct, the OECD Guidelines, the ILO Declaration, the Global Compact, and the UN Norms. On the basis of this specific analysis, I made a general claim about the inadequacy of the existing regulatory framework, the efficacy of which was judged in relation to the twin test of efficacy described above. Broadly speaking, the inadequacy of the current regulatory framework relating to corporate human rights responsibilities is, I argued, the result of a three-fold deficiency. The existing framework does not prescribe precise human rights standards, offers insufficient or contestable rationales for compliance, and is supported by a deficient

17 Chapter 8.1.
or undeveloped implementation-cum-enforcement mechanism. This three-fold inadequacy also stands verified by the hypothetical, retrospective application of these six regulatory initiatives to the Bhopal case.

The central claim that I have made is that the integrated theory of regulation proposed in this thesis can redress, to a large extent, the three-fold inadequacy of the existing regulatory framework. The theory seeks to achieve ‘integration’ in the following three respects:

- between human rights issues and business issues;
- between the ‘why,’ ‘what,’ and ‘how’ of corporate human rights responsibility discourse; and finally
- between different available levels of regulation, strategies of implementation, and types of sanctions.

How such integration could be achieved in relation to the last two aspects is summarised below in the next part. Here I recapitulate why integration in the sense of balancing between human rights issues and business issues is essential and how this could be accomplished. The interface between business and human rights involves different stakeholders that often have competing and/or conflicting interests, which is also reflected in the isolated evolution of human rights law and its institutions on the one hand and business-corporate-trade law and its institutions on the other. It was contended that as both the effective realisation of human rights and the presence of a healthy business environment are important for the development of individuals as well as society as a whole, it is imperative that a balance is established between the interests of human rights groups and the business community. Unless this is done, regulatory initiatives that seek to promote responsible corporate citizenship will continue to treat the problem of corporate human rights abuses superficially.

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19 Porter and Kramer, for example, stress the need for integrating ‘business and society’ and also outline how this could be done.’ Michael E Porter & Mark R Kramer, ‘The Link Between Competitive Advantage and Corporate Social Responsibility’ (December 2006) Harvard Business Review 1, 5-14.
There are already signs that efforts are being made to establish such balance. One may, for instance, refer to the moves to amend company laws to impose specific duties on corporations and/or their directors that they should also take into account the interests of their stakeholders while taking business decisions. Even the business case for human rights could be seen as part of this wider project of integration between business and human rights. However, more such measures, at various levels and in various forums, are necessary. I indicated how business management and law schools, for example, could contribute to achieving this integration.

9.3 THE ‘WHY,’ ‘WHAT,’ AND ‘HOW’ OF CORPORATE HUMAN RIGHTS RESPONSIBILITY DISCOURSE

The integrated theory of regulation seeks to overcome the three major challenges that, in my view, any theory of corporate human rights responsibility faces. These challenges were labelled as why, what, and how: why should corporations have human rights responsibilities; what are these responsibilities for MNCs operating in different countries; and how could such human rights responsibilities be enforced in an effective manner?

9.3.1 Why? – The Relation of Corporations, and Position in, with Society

The integrated theory of regulation at the outset rebutted the thesis of scholars such as Milton Friedman and Elaine Sternberg who argued that, subject to certain ill-defined and narrow rules of the game, the only social responsibility or purpose of business is to maximise shareholders' profit. I tried to demonstrate in Chapter 5 why such a view is unsound and simply untenable in the current economic climate. In particular, the views of Friedman that CSR will undermine the free market economy, that stockholders own the corporation, and that corporations are unsuitable to assume social responsibilities were refuted. Similarly, I showed why Sternberg’s thesis of just business is not just: she not only fails to appreciate the true meaning of the concept of CSR, but also misconstrues two key concepts of her theory, that is,


21 Chapter 5.2.1.
'ordinary decency' and 'distributive justice.' One should also not ignore that many corporations have already eschewed the model of shareholders' absolute primacy to which Friedman and Sternberg subscribe. Corporations have started responding to the societal expectation of contributing to human rights' realisation by adopting positive measures in that regard.

I also argued that it is problematic to rely too much on the 'business case' for human rights. Although there is some merit in the business case hypothesis, this merit should not be overstated in view of the unpredictable nature of the assumptions that underpin the business case. I showed, for example, that the prisoner's dilemma might discourage corporations from taking on board their human rights responsibilities. The business case for human rights, by implication, also tends to indicate that corporations need not observe human rights obligations if doing so interferes with their goal of profit maximisation.

It was, therefore, considered essential to ground corporate human rights responsibilities on some other, stronger theoretical premises. I contended that all corporations - not merely those which are multinational or transnational - should be subject to human rights obligations because of their relation with and position in society. Three interrelated strands of this rationale were elaborated. It was suggested that corporations should be bound by human rights norms because, first, they are social organs; second, they possess the position to both violate and promote human rights; and third, because corporate power should be accompanied by an appropriate level of responsibility.

It was also clarified that any assertion that corporations should have human rights responsibilities does not seek to reject or undermine the role of corporations in wealth maximisation in society. The more limited claim being made here is that the right to

22 Chapter 5.2.3.
24 It is arguable that the responsibilities of corporations are not confined to only shareholders but extend to 'all stakeholders.' James E Post, Lee E Preston & Sybille Sachs, Redefining the Corporation: Stakeholder Management and Organisational Wealth (Stanford: Stanford Business Books, 2002), 33 (emphasis in original) (hereinafter Post et al, Redefining the Corporation).
maximise profits should not be enjoyed at the cost of the rights of other members of society, and that corporations should not be left outside the net of human rights law merely because they are predominantly economic entities. In other words, the plea is only for reconceptualising the place and role of corporations in society in view of the changing interface of corporations and states.\textsuperscript{26}

No doubt, making available the protection of human rights law against the conduct of private actors such as corporations will also demand a paradigmatic shift in traditional human rights law and practice. Such a shift is, however, needed if human rights discourse is to remain alive to the changing needs of society,\textsuperscript{27} otherwise its efficacy and usefulness will be undermined.\textsuperscript{28}

9.3.2 What? – Human Approach to Overcome MNCs’ Dilemma of Varying Standards

Since MNCs operate in several countries that differ from one another in terms of their political system, level of development, culture, religion, language, and social norms, making a choice about the applicable human rights standards in a given case always presents them with a formidable challenge. MNCs usually have a choice between at least three sets of standards: host standards, home standards, and international standards. This thesis grappled with the question: how should MNCs deal with this business dilemma, especially because any decision taken in this regard is likely to have a direct bearing on the protection of human rights?

\textsuperscript{26} Chapter 5.4.
\textsuperscript{28} Professor Alston argues that ‘the international human rights regime’s aspiration to ensure the accountability of all major actors will be severely compromised in the years ahead if it does not succeed in devising a considerably more effective framework than currently exists in order to take adequate account of the roles played by some non-state actors.’ Alston, above n 2, 6.
From an ‘internal’ point of view (placing oneself in the shoes of corporate executives), the following two approaches, which do or could help MNCs in overcoming this complex dilemma, were canvassed in Chapter 6: the business approach and the human approach. These two approaches represent two contrasting visions of the role and place of corporations in society. The business approach, which is wedded to Friedman’s classical view about corporations, does not take a principled stand vis-à-vis human rights: it is profit that will determine whether human rights are to be respected and if so, then which standards are to be followed. On the other hand, the human approach, which is grounded in a modified version of stakeholder theory, takes a more holistic view of the role of corporations in society. Under the human approach, MNCs would resolve their dilemma as to varying standards with reference to the impact of their decisions, actions or omissions on the realisation of the human rights of their stakeholders.

By reference to Bhopal, I tried to demonstrate that the business approach will often fail to protect the human rights of people in developing countries, for this approach encourages MNCs to always adopt host standards which are inadequate most of the time. For this reason, MNCs’ decisions should instead be guided by the human approach: that is, they should apply in host countries the relevant home or international standards, modified in view of morally relevant local differences. Local differences, according to this approach, are morally relevant only if their recognition facilitates better realisation of human rights. The human approach is also consistent with the policy of ‘universalism’ that MNCs employ in relation to promoting free trade.29

9.3.3 How? – Integrating Available Levels of Regulation, Strategies of Implementation, and Types of Sanctions

It is encouraging to note that more and more MNCs are adopting human rights codes or policies and have started taking seriously the concerns raised by various stakeholders about their activities.30 Nevertheless, the overall picture is still far from

30 For example, over 80 per cent of corporations, against which human rights concerns were raised by civil society organisations, have responded to such allegations to the Business and Human Rights
perfect and victims of corporate human rights abuses still face an uphill task in bringing to justice MNCs and their executives. Various existing regulatory initiatives that seek to make MNCs accountable for the violations of human rights suffer from serious deficiencies. To remedy this situation, I argued in Chapter 7 that the integrated theory of regulation could provide support to an effective regulatory framework.

The integrated theory – which was developed as a critical response to the responsive regulation model proposed by Ayres and Braithwaite – posits that since no single regulatory theory, strategy, or sanction is fool-proof, more so when dealing with difficult regulatory targets such as MNCs, we need to invoke more than one strategy or sanction in an integrated fashion. I contended that the integration between different available strategies of implementation and types of sanctions should be **cumulative** and **coordinated** rather than being progressive and hierarchically ordered, as the enforcement pyramid proposed by Ayres and Braithwaite suggests. In order to maximise efficacy, regulatory techniques and sanctions should be employed simultaneously to complement one another rather than being invoked only when the techniques situated lower on the regulatory pyramid fail to deliver.

In addition, the integrated theory also emphasised the need for integration between the ‘why,’ ‘what,’ and ‘how’ of corporate human rights responsibility discourse. Such integration is necessary not only to counter jointly the three challenges that any theory of corporate human rights responsibility faces, but also to understand and benefit from the dynamic relationship that exists between the ‘why,’ ‘what,’ and ‘how.’

Based on the integrated theory, a regulatory framework for MNCs’ accountability for human rights violations was outlined in Chapter 8. In short, it was proposed that regulatory initiatives introduced at institutional, national and international levels should try to define human rights responsibilities and enforce them against MNCs by employing various types of (dis)incentives and sanctions. Out of various ideas that were canvassed as part of the integrated regulatory framework, a few merit reiteration here. First, in the formulation of corporate human rights responsibilities, there should

be a *continuous cycle of dialogue* between regulatory initiatives at three levels in that they will be informed by the experiences and outcomes of each other.

Second, I pointed out that regulatory initiatives at all levels should also rely on informal, non-legal tools and non-state institutions to ensure that MNCs respect and promote human rights. In particular, the need for harnessing and fully utilising the potential of market participants in administering social incentives and social sanctions was stressed. A proposal was mooted, for instance, to establish an international monitoring body, with branches in each state, consisting only of civil society organisations. Such a 'non-state, non-corporate' body should verify and investigate, both at local and global levels, human rights practices adopted by MNCs *suo motu* as well in response to complaints received from victims of corporate human rights abuses. If, upon investigation, this body finds that a given MNC is disregarding human rights responsibilities, it should seek an explanation from the MNC, and then put the matter in the public domain so that this could provide a basis for the imposition of social sanctions by stakeholders.

Third, I contended that regulatory initiatives at the national level should try to influence corporate conduct 'from inside' by amending corporate laws appropriately. In particular, if the notion of corporate human rights responsibilities is to succeed in any real sense, it is of fundamental importance to make inroads into the corporate principles of limited liability and separate personality. States should try to rectify an imbalance that corporate law creates between 'risks and rewards ... allocated to shareholders' through the institution of the corporation.31

9.4 APPLICATION OF RESEARCH, LIMITATIONS, AND FURTHER RESEARCH

It is hoped that the research findings and suggestions arising out of this thesis will be useful for a range of stakeholders – corporations, business consultants, scholars, states, international regulatory agencies, NGOs, universities, consumers, and investors – that

31 Davies argues that 'there is an apparent disparity in the risks and rewards which are allocated to shareholders: they benefit, through limited liability, from a cap of their down-side risk, whereas the chance of up-side gain is unlimited.' Paul Davies, *Gower and Davies's Principles of Modern Company Law*, 7th edn. (London: Sweet & Maxwell, 2003), 176.
have an interest in ensuring that corporations respect their human rights responsibilities. Let me offer a few illustrations of the potential usefulness of this study. Being informed by the arguments advanced in this thesis, corporations can not only invoke the human approach to resolve the business dilemma that they face in ascertaining human rights standards applicable in a given country, but can also rationalise the allocation of resources in fulfilling their human rights responsibilities on sound theoretical grounds. On the other hand, states could make suggested reforms in corporate law and at the same time act collectively to put in place new mechanisms, or harness existing ones, at the international level to enforce human rights responsibilities against MNCs. In particular, regulators at various levels might consider integrating social sanctions with existing coercive tools that are used to ensure that MNCs comply with human rights norms.32

The issue of corporate human rights responsibility, which represents only one dimension of the intersections between business concerns and human rights principles, is very complex. For this reason, the debate on this issue has unfolded among various stakeholders from several disciplines, across several forums and institutions.33 This thesis has not remained immune to the fact that MNCs "cross the frontiers of academic disciplines as easily as they cross national frontiers."34 As readers may have noted, I have engaged with literature from diverse fields such as international law, human rights law, constitutional law, environmental law, corporate law, criminal law, tort law, corporate citizenship, (business) ethics, philosophy, regulation, law and economics, and business management. Among other reasons for this eclecticism, this was considered necessary to emphasise that the issue of corporate human rights responsibility cannot be dealt with adequately by reference to human rights law and literature alone.

Nevertheless, it was not possible over the course of this thesis to explore all dimensions of the issue investigated herein. For example, the extent to which the doctrine of state responsibility, or international trade regulatory institutions such as the WTO could be utilised was not discussed. Nor could I consider in detail the legal principles appropriate to attribute criminal liability to MNCs, or why it is necessary to treat MNCs as limited subjects of international law so as to impose as well as enforce human rights obligations directly. Similarly, this thesis could not address in detail how corporate misuse of the principles of separate personality and limited liability as well as the doctrine of forum non conveniens could be addressed. It was, nonetheless, emphasised that these two issues are critical to the success of any regulatory framework. Further in-depth research is required on all these issues, something that could not have been managed in the present study. It would be worthwhile exploring, for example, if the conclusions that I did draw in the context of the Bhopal case could be replicated with reference to other case studies.

To conclude, if the goal of realising human rights is to be achieved fully, then we should not be asking only if this or that state has violated human rights in a given case. Rather than focusing principally on ‘who’ violated human rights norms, inquiry should be directed more to the human ‘whose’ rights are violated, for human rights are premised on protecting human dignity from whatever source the threat originates. For those people whose human rights are violated, it makes little or no difference if the violator is a state or a non-state actor. Of course the obligations of non-states actors should not, and need not, be similar to those of states. But this is different from saying that non-state actors such as MNCs cannot have human rights responsibilities. Human rights law, both at national and international levels, is incrementally moving in the direction of imposing human rights obligations on a range of (public, semi-public and private) actors. There is a need to overcome any remaining hesitation, and move decisively to formulate as well as enforce human rights obligations against MNCs. I am under no illusion that the project of extending

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35 Clapham argued that ‘there should be protection from all violations of human rights, and not only when the violator can be directly identified as an agent of the state.’ Andrew Clapham, *Human Rights in the Private Sphere* (New York: Oxford University Press, 1993), 134.
and enforcing human rights obligations against MNCs will be easy\textsuperscript{36} or that it will have a short gestation period;\textsuperscript{37} the history of human rights law and practice suggests otherwise. However, this project's goals are achievable, and this thesis has suggested some steps that may be taken towards accomplishing these goals.

\textsuperscript{36} As Clarke notes, it is necessary to manage public and academic expectations of what regulation could achieve in controlling and redressing human rights violations by MNCs: 'One of the greatest difficulties that states have with regulation ... is achieving a balanced public understanding of what regulation can offer.' Michael Clarke, \textit{Regulation: The Social Control of Business between Law and Politics} (London: Macmillan Press Ltd., 2000), 231 and generally 231-32.

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