

SOCIAL RESPONSIBILITY AND ACCOUNTABILITY: THE CASE OF MULTINATIONAL ENTERPRISES OPERATING IN SOUTH AFRICA

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ABSTRACT

This article examines corporate social responsibility from the perspective of documented cases of governmental institutional failures in holding foreign multinational enterprises (MNEs) accountable in the host states in which they operate. Such institutional failures are evident in a number of cases involving multinational enterprises operating in South Africa and other developing host countries. These cases demonstrate that with weak regulation, the foreign direct investment (FDI) of MNEs can in some cases do more harm than good, resulting in lapses in accountability; harming the environment and human health. Accordingly, it is argued that special attention should be given to MNEs as a result of their unique nature and characteristics, as well as for the dynamic global context within which they operate. The focal area of the paper is concentrated on examining some of the legal aspects and complications associated with the FDI of MNEs with the expectation of exploring the prospects for regulatory reform in South Africa.

INTRODUCTION

Corporate social responsibility is a relatively modern concept that refers to taking account of societal (as contrasted to internal organizational) costs and benefits that result from an organization's activities (Brockington 1993:207). Organizations take cognizance of corporate social responsibility not necessarily out of a need to act benevolently, but more so for survival in a globally competitive and legally complex modern environment (Moeti 2000). It is also intuitively justified to argue that governments must be involved in ensuring that organizations are held accountable for their actions.

However, the attainment of this objective of government has proven to be elusive for many nations, especially when dealing with foreign multinational enterprises (MNEs).

This article begins with a brief discussion of MNEs and the challenges they pose for autonomous governance. Thereafter, the case study approach is applied in five cases that serve to demonstrate the exact nature of these challenges in order to identify specific problem areas and possible solutions thereof.

MULTINATIONAL ENTERPRISES

Academic interest and inquiry into multinational enterprises (MNEs) is a relatively recent phenomenon, as the first serious attempts to understand this type of business enterprise were undertaken in the late 1950s and early 1960s. The comprehensive works of Coase (1973, 1960), Hymer (1960, 1968) and Knickerbocker (1973), among others, greatly influenced regulatory frameworks (from liberal/non-interventionist to conservative/insular) applicable to MNEs (Dunning 1993:554-560; Muchlinski 1995:172-3). Despite the focus of the literature being projected at developing and third world countries, even some of the advanced industrialized countries of the world felt the need to regulate this type of investment at one time or another through such government agencies as the Foreign Investment Review Agency (FIRA) in Canada and the Committee on Foreign Investment in the United States (CFIUS).

In the Republic of South Africa (RSA), however, there is no governmental body on any sphere of government that is charged with complete and centralized responsibility for policy-making and regulation of foreign direct investments (FDI) in the form of multinational enterprises (MNEs). Furthermore, within the protocols and regulatory frameworks of both Southern African Development Cooperation (SADC) and Common Market for Eastern and Southern Africa (COMESA) (of which the RSA holds membership), little consideration is given to the inherent perplexities of the FDI of MNEs.

The unique characteristic of MNEs is the fact that they are formed and incorporated under the laws of one country whilst having the flexibility to establish subsidiary or branch operations in other countries. As such, it will not always be possible to regulate, to the full extent of the law, those multinational foreign businesses that choose to leave the jurisdictional boundaries of the host country. In such cases, and barring increased regulation, more creative and feasible alternative interventions are required of government(s). The *cooperative* model used in the EU under the ambit of the *Brussels Regulation* (In 2000 the EU adopted the *Brussels Regulation* to modify and replace the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters) offers just such an alternative that can easily be adapted elsewhere.

The discussion of this article begins with a review of three international legal cases that demonstrate the need for host government (and/or regional) reforms in regulating multinational enterprises. The article then briefly reviews a fourth legal case, *Lubbe vs. Cape Plc.*, which is a case study that may prove to be pivotal in defining the direction in which foreign direct investment policy may have to evolve in the South African context. Finally, the facts and outcome of *Lubbe v. Cape Plc* are contrasted against those of the

fifth and final case, *Gisondo v. Cape Plc.* *Gisondo v. Cape Plc.* emanated from Italy with Italian claimants who sued Cape Plc. in the U.K. The *Gisondo* case brings to the fore the stark contrasts in the way litigation brought by EU and Non-EU residents are handled in European courts. The common threads running through all of the cases dealt with in this article are the legal principles of class-action litigation, extraterritorial jurisdiction and *forum non-conveniens*. In the final analysis, this article is concerned with exploring perceived shortcomings in current South African government regulation and policy with respect to the FDI of MNEs in order to generate possible solutions thereof.

Public Administration is most commonly defined in terms of the provision, by government, of practical procedures and methodologies to ensure an operating framework for government institutions that is characterized by efficiency and effectiveness on the one hand, and democratic responsibility and accountability on the other (Chandler and Plano 1982:1-2). The current article constructs such a framework along the public policy branch of the Public Administration discipline. More specifically, a particularly critical imperative of public policy is explored, which is the acknowledgment of governments' regulatory responsibilities in respect of protecting the health and safety of individual citizens (Chandler and Plano 1982:96-8).

These regulatory objectives of government extend very broadly to all parties, foreign or domestic, engaged in business activities in the Republic of South Africa. Although MNEs are an integral part of the analytical construct, the unit of analysis is actually the institution of government. Thus the focus of analysis is on gauging the effectiveness with which the South African government can deliver on its regulatory responsibilities with respect to holding MNEs responsible and accountable in cases where the environment and citizens' health and safety are endangered. It is within these broadly defined parameters of Public Administration, in the public policy domain, that the regulation of MNEs is explored in the passages that follow. A case study approach is followed as empirical evidence can, *inter alia*, illuminate regulatory shortcomings and suggest practical solutions thereof.

Case 1: Government of India vs. Union Carbide Corporation

Union Carbide Corporation (Union Carbide), incorporated in New York, owns fifty-one percent of the stock of Union Carbide India Limited (UCIL). On the 3rd and 4th of December 1984, what is generally believed to have been a technical malfunction, caused substantial amounts of toxic methyl isocyanate gas (a pesticide) to be leaked from a chemical plant owned and operated by UCIL in the city of Bhopal India. Some legal pundits allege that Union Carbide, the parent company of UCIL, was negligent in allowing its subsidiary to store large quantities of a deadly poisonous substance in a substandard facility located in close proximity to densely populated areas. The Bhopal disaster left approximately 2 100 people dead and over 200 000 injured (Chinen 1987:202-9; Hawkes 1988:181-200; Rogge 2001:299-314).

Several class action lawsuits against Union Carbide were consolidated into one and filed in a state district court of New York, the state in which the parent company was incorporated. In March of 1985, the Indian Parliament passed the Bhopal Gas Leak

Disaster Act (Bhopal Act), which granted the Indian government exclusive rights to represent all plaintiffs in the suit. Union Carbide's defense strategy was to file a motion to dismiss the case on grounds of *forum non-conveniens* (inconvenient/inappropriate forum). On 12 May 1986, the New York district court ruled in favour of Union Carbide's motion and dismissed the case on *forum non-conveniens* grounds (Rogge 2001:303).

Despite arguments from the defendants that the Indian legal system was inadequate to handle a case of this magnitude, the New York district court made the determination that since Union Carbide acknowledged and agreed to submit to Indian jurisdiction, the appropriate forum for this case was in India (Chinen 1987:204). The defendants' petition to the Appellate Court was unsuccessful and the case was eventually settled out of court for a fraction of what the company was being sued for (Rogge 2001:302).

Case 2: Alfaro vs. Dow Chemical Company

In Alfaro vs. Dow Chemical, eighty-one Costa Rican plaintiffs sued Standard Fruit and Dow Chemical for alleged damages suffered as a result of the negligent use of 1,2 dibromochloropropane (DBPC). DBPC is a chemical used in Nemagon and Fumazone pesticides that had been shown to cause cancer and male sterility. Based on the track record of male sterility cases associated with DBPC use in the United States, in September 1977 the U.S. Environmental Protection Agency banned the use of DBCP in the United States. At the same time, there was no legislation preventing the manufacture and export of DBCP. Dow Chemical and other manufacturers of DBCP thus continued to produce and distribute DBPC for export, mostly to countries where environmental and safety standards were either below those of the United States or in some cases just less rigidly enforced (Rogge 2001:302-6).

The plaintiffs' claim of negligence was based on the argument that Dow Chemical was fully aware of the dangers of DBCP, but failed to seize its production, distribution and use of the chemical. The plaintiffs further argued that where use of the chemical was continued, Dow Chemical failed to exercise due diligence by not providing occupational safety training for workers who handled the chemical (Rogge 2001:302-6).

The *forum non-conveniens* argument had consistently protected defendant multinational corporations from tort liability in the home country, and resulted in much smaller settlements for plaintiffs either out of court, or in the host country's legal system. However, Dow Chemical's petition to have the suit against them dropped on the basis of *forum non-conveniens*, was initially rejected in 1990 at the level of the Texas Supreme Court. The Texas Supreme Court's ruling was based on the wrongful death and personal injury statutes (the Alien Tort Statutes) of the Texas Civil Practice & Remedies Codes. The Alien Tort Statutes were determined to be inconsistent with the *forum non-conveniens* argument as the Alien Tort statutes did not discriminate on the basis of the jurisdiction in which an alleged infraction occurred. The Alfaro case was allowed to continue in the Texas district court system and a settlement in favour of the plaintiffs was eventually made. Consequently however, with the passage of time and pressure from the Texas business community, the Texas legislature repealed the Alien Tort Statutes. This decision by the Texas legislature effectively re-instated, in the state of Texas, the principle of *forum*

non-conveniens as a legitimate defense for multinational enterprises to use to shield themselves from claims by host country plaintiffs (Rogge 2001:302-6).

Case 3: Sequihua vs. Texaco Incorporated

Sequihua vs. Texaco involves a legal suit by Ecuadorian plaintiffs against U.S.-based Texaco for damages resulting from the negligent disposal of oil waste products. It was alleged that substantial contamination of the Amazon region's rivers, lakes, groundwater, soil and air was caused by more than twenty years of substandard and ultra-hazardous waste-disposal technology and methods practiced by Texaco. The plaintiffs brought suit in a district court of Texas seeking a court injunction requiring the defendants to rehabilitate the land to its former condition. This court injunction was to be administered by the court through a trust fund (Rogge 2001:306-7).

In this particular case, Texaco's (first and only) line of defense was to invoke the *forum non-conveniens* argument. The Court ruled in favour of Texaco and summarily dismissed the case. The presiding Judge, Judge Black, expressed the opinion that "...Ecuador is an adequate and available forum even though it may not provide the same benefits as the American system." Judge Black rather controversially added "...this district [Texas] does not have any direct interest in this case, and its citizens should not bear the burden of jury service in litigation which has no relation to their community". These statements differ markedly from the opinions expressed in *Alfaro vs. Dow Chemical* by Texas Supreme Court judge, Justice Doggett who vehemently opposed the view that Texas citizens have no interest in the alleged misconduct of Texas based and incorporated companies operating in foreign countries (Rogge 2001:306-7).

Case 4: Lubbe vs. Cape Plc.

A highly instructive, and perhaps deterministic, case for the South African legal and regulatory framework on inward foreign direct investment, is the case of *Lubbe vs. Cape Plc.* Cape Plc is an asbestos mining, processing and distributing company whose articles of incorporation are founded in England in 1893 under the name – Cape Asbestos Company Limited (Van Niekerk 2001:134-5; Coombs 2002:26-8). Cape Plc, had been engaged in asbestos mining in South Africa from 1893 to 1979, mainly in what is now the Northern Cape Province and Limpopo Province. It also began operating an asbestos processing factory in Benoni near Johannesburg in 1940. From 1948 its South African business activities were conducted through wholly owned subsidiaries with head offices in Johannesburg. In 1979 the Company sold all its mining and mining related interests in South Africa, with the exception of its Benoni factory, to a local company. In 1989 it sold the Benoni factory and has since then ceased to have a physical presence or assets in South Africa, thus effectively putting itself out of the jurisdictional reach of the South African legal system.

Since the principals/representatives of Cape Plc were no longer present in South Africa after 1989, it was impossible for the plaintiffs to initiate legal proceedings for damages against Cape Plc. After almost a decade, during 1997, a summons in the form

of a class action suit, was served on Cape Plc (the defendant) in England by the South African plaintiffs. The basis of this lawsuit can be summarized as follows:

- 7500 South African plaintiffs, resident in South Africa, claimed for personal injuries (and in some cases death) allegedly suffered as the result of exposure to asbestos and its related products that were mined, processed and distributed in South Africa by Cape Plc during its tenure in the country.
- The claim is made against the defendant as a parent company which, allegedly knowing that exposure to asbestos was gravely injurious to health, failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed. In this way, it is contended that, the defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations, with the result that the plaintiffs thereby suffered personal injury and loss.
- The major stumbling block to resolving this case was the issue of whether the proceedings brought by the plaintiffs against the defendant should be tried in England or in South Africa – i.e. the issue of the appropriate forum (referred to in legal circles as *forum non-conveniens*). In this regard, it took several Superior Court and two Appellate Court hearings in England before the case could finally be heard in the House of Lords of the English court system.

In the House of Lords, arguments concerning the appropriate forum in which to hear the case centered around common law principles set in a similar case, *Spiliada Maritime Corporation v. Cansulex Ltd.*, heard before the House of Lords of the English legal system. On the basis of the precedence set in *Spiliada*, if it can be successfully argued that a foreign plaintiff will not obtain justice against an English defendant in the plaintiff's home country, the English court may not grant a stay (a refusal) to have the case heard in England. By the conclusion of the hearings in the second Court of Appeals, *Lubbe v. Cape Plc* passed the *Spiliada* test, thus favouring having the case heard in England (Van Niekerk 2001: 137).

One of the principal arguments made by the plaintiffs in the lower courts, was that in addition to the *Spiliada* test, a second test for assigning the case to the British courts is that of Article 6 of the European Convention on Human Rights. As Article 6 is consistent with the *Spiliada* test in principle, it was successfully argued that granting a stay of the proceedings in favour of South Africa as the legal forum would amount to a violation of Article 6 since the lack of funding and legal representation that the plaintiffs encountered in South Africa would have denied them a fair trial in terms of litigious equality with the defendant (Westlaw 2003). Despite the strength of the plaintiffs' arguments (Article 6 of the European Convention and the *Spiliada* test), the English judiciary did not initially see fit to grant a hearing in England on the basis of these arguments alone and instead favoured the defendant's claim of *forum non-conveniens*.

Case 5: *Gisondo v. Cape Plc*

Comparing *Lubbe v. Cape Plc* with an earlier case against Cape Plc, i.e. *Gisondo v. Cape Plc*, demonstrates the lack of adequate protection for South African complainants

in certain cases of extraterritorial jurisdiction. Vincenzina Gisoni and three other Italian plaintiffs successfully sued Cape Plc for damages in England. There are numerous similarities, with the Lubbe case, in terms of both the nature of the writs and arguments presented with one critical exception – i.e. attorneys for Gisoni successfully argued for consideration under Article 2 of the Brussels Convention to which both England and Italy are signatory states. Under Article 2 of the Brussels Convention the English courts were compelled to not decline jurisdiction in favour of the Italian legal system and accordingly the defendant had no opportunity to apply for a stay on the grounds of *forum non-conveniens* (inappropriate forum) (Morse 2002:556). Unfortunately for South African claimants, international agreements that make up the Brussels Convention only apply to states that are party to the Convention (i.e. E.U. states), thus South African claimants bear a greater burden than their European counterparts in pursuing legal remedy in European and other foreign courts.

Consequences

Anomalies arose in *Lubbe vs. Cape Plc.* from the fact that from 1989 onwards the company no longer had a physical presence in the country and was therefore beyond the reach of South African law and South African claimants who sought to pursue compensation for alleged asbestos poisoning. Although the case was eventually settled in 2001 in England, the difficulties experienced in getting to that stage provide valuable lessons for a renewed assessment of South African, SADC, COMESA and perhaps even the New Partnership for African Development (NEPAD) policy with respect to the FDI of MNEs.

Additionally, a number of well documented cases – for example, Union Carbide in Bhopal India, Standard Fruit and Dow Chemical in Costa Rica, Texaco in Ecuador, and Cape Plc in South Africa – reveal that domestic as well as international law has, to date, not offered adequate and/or timely solutions to problems arising in cases dealing with extraterritorial jurisdiction. This is evidenced by the fact that the fundamental principle of international law is to confer upon each state, exclusive sovereignty over the territory it controls (Muchlinski 1995:124). Strict adherence to this principle carries with it the corollary duty of non-intervention on the part of other states. Thus, this requirement of non-intervention essentially negates the ability of states to pursue legal claims against firms located in foreign jurisdictions. In fact, as Muchlinski (1995) states “...any assertion of extraterritorial jurisdiction by a state would amount to a violation of international law. Such a view might be unduly restrictive of a state’s legitimate interest in the effective enforcement of its laws against [multinational enterprises] ...”. An especially useful model to adapt for addressing this type of jurisdictional complexity is that of the *Brussels Convention* and the *Brussels Regulation*. For example, Article 2 of the *Brussels Convention* explicitly makes provision for persons domiciled in a given EU member country, whatever their nationality, to sue or be sued in the courts of that country. This provision, read together with related provisions of the Convention, has the effect of allowing complainants to sue defendants in either the complainants’ or the defendants’ home country provided that both parties are EU nationals. The advantages of the *Brussels*

Convention and the *Brussels Regulation* lie in the fact that these are instruments of policy that have been negotiated and ratified by the signatories thereby serving as a formal legal structure for effective dispute resolution in the regional context. Accordingly, the stated aims/objectives in the preamble of the *Convention* are to (EC: undated):

- simplify formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals;
- strengthen in the EU the legal protection of persons therein established;
- determine the international jurisdiction of EU member country courts; and
- introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements.

The *Convention* and the *Regulation* can be taken as effective benchmarks that should be considered within the South African context, and more so at the levels of SADC, COMESA and NEPAD. Also, as MNEs come from and operate in different regions of the world, the development of such instruments and agreements should aim to extend, over time, to become inter-regional in scope.

FUTURE OF MNES

Although supra-national treaties in the regional context (e.g. the *Brussels Regulation*) may serve as relatively effective umbrellas for the prevention or remediation of disastrous consequences associated with the negative externalities of the FDI of MNEs, such treaties are far from being a panacea. The simple fact is that as regional agreements, these treaties only cater for the needs of a limited number of countries that are party to the agreement. A more enduring solution to these types of anomalies, therefore, requires the broadening of scope of developing and developed countries beyond regional dimensions of concurrence and congruence, and instead calls for international inclusivity and co-operation which is far more suited to our highly globalized world.

In this regard, it would be short sighted of South Africa to aim for a regional agreement amongst Southern African or African neighbors that is modeled quite closely with the EU agreements found in the *Brussels Regulation*. Such an arrangement would overlook the availability of remedies in cases involving defendant firms from countries that are party to regional agreements other than the one(s) of complainants. A more effective approach would be to consider forming a truly international body or agreement similar in nature to the General Agreement on Tariffs and Trade (GATT) or its successor the World Trade Organization (WTO), through which agreement would be sought at the supra-national level as opposed to the regional or continental levels.

Furthermore, the supra-national approach can serve to support and strengthen domestic policy in individual countries. In the case of South Africa, for example, despite the fact that foreign and domestic investors are held to account for environmental damage and harm to human health through government policy (e.g. Section 28 of the *National Environmental Management Act, 1998* (Act No. 107 of 1998)), it can also be noted that the Department of Minerals and Energy was burdened to spend R20 million during the 2002-

2003 fiscal year on the rehabilitation of abandoned mines. Of this amount, R17 million was spent on rehabilitating asbestos mines alone (Mineral and Petroleum Resources Development Bill 2002, section 42; Department of Minerals and Energy – Annual Report 2002/2003: 14). Such outcomes may be partially ascribed to the fact that by the time government is in a position to take action, some foreign investors may have already left the jurisdictional boundaries of the affected country. The lessons learned from the cases dealt with, expose these types of limitations in domestic policy that relate to the ease of mobility (between countries) enjoyed by MNEs and the protection that they have been able to garner through the legal defense of *forum non-conveniens*.

CONCLUSION

Since the 1970s there has been a gradual shift towards openness globally. There has also been an increase in the number of countries that have introduced laws that aim to attract inward foreign direct investment. The trend seems to be moving towards moderating tax and other incentives to multinational enterprises with provisional requirements regarding improved technology transfer, job creation and industrial development. On the whole, the same is also true of South Africa.

Empirical evidence through case studies provides a valuable tool for gauging the effectiveness of government policy in just about any area or field of public activity. The experiences of plaintiffs in the *Lubbe v. Cape Plc* case demonstrate that it is extremely difficult for complainants to attain due process when harmed by large foreign businesses. The lesson to be learned from this case, in combination with several similar cases, is that the thread of commonality that runs through these types of cases is the fact that multinational enterprises will normally invoke the common law doctrine of the inconvenient forum (*forum non-conveniens*) as a first line of defense to escape liability in cases of transgression against host country citizens. The doctrine has proven time and again to be a significant obstacle for plaintiffs in developing countries who seek to sue foreign based multinational enterprises in their home country for abuses exacted in the host country. Little, if any, support for plaintiffs is provided by home country governments and their representative judiciaries. Thus it leaves plaintiffs with little or no legal recourse in either the home or host country.

In light of the above, it then becomes evidently clear that an approach to foreign direct investment policy that aggressively seeks new investment without considering and planning for the possible negative externalities, will most likely prove detrimental to the long-term livelihood of host country citizens and governments. Although the principles and provisions of the *Brussels Convention* (especially Article 2) and the *Brussels Regulation* may provide feasible solutions to this dichotomous situation, further preventative as well as curative institutional measures need to be investigated.

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