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An Overview of the Position Outside the United
States**

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Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States

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Over the past 17 years, conventional tort litigation has been increasingly successful in holding multinational corporations (MNCs) accountable for human rights violations in developing countries. Further utilisation and development of this approach is all the more imperative in light of uncertainty over the future of such claims in the United States under the Alien Tort Statute 1789.

The notion of MNC parent company 'duty of care' has gained increasing recognition, notwithstanding the 'corporate veil' obstacle. There is no reason in principle why, like any other legal entity or person, a parent company which is responsible for, or in control of, specific functions at overseas subsidiary operations should not be liable for damage arising from those functions or deficiencies in them.

The scale, complexity and media attention arising from these cases constitutes a potentially powerful deterrent against bad practices by MNCs. However, awards of compensation based on those of MNC host states may diminish this deterrent effect.

Various factors are critical to victims' access to a legal remedy against a parent MNC. Forum non conveniens is a key barrier in most common law states, but not in the European Union. Of fundamental importance is the availability of funding and lawyers willing and able to represent victims in this complex, hugely expensive and risky type of litigation. This is dependent on assessment of the financial viability of cases by victims' lawyers, which is in turn influenced, among others, by the existence of legal procedural mechanisms such as class actions, financial costs incentives for victims' lawyers, damages levels and global collaboration between victims' representatives.

If cases survive inevitable legal procedural challenges, MNC cases to-date have been settled before trial due to the high stakes, especially for the MNC, of a trial. Binding legal precedents in this area are generally limited to procedural issues which, albeit of tangential relevance to the substance of a case, are frequently decisive. Drawing on insights gained from tort litigation over the years, this article provides a reflection on these issues.

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I. CONTEXT

Over the past decade, the Alien Tort Statute 1789 (ATS)¹ — domestic legislation which gives the United States (US) courts jurisdiction in cases alleging international human rights violations — has generally been viewed as the mechanism with the most promising potential for holding multinational corporations (MNCs) to account for human rights violations in developing countries. In recent years, US public interest lawyers² have been at the forefront of developing ATS cases where MNCs are alleged to have been complicit with states in such violations. Perhaps the most notable successes were in two settlements. The first settlement was in *Doe v Unocal*,³ a case in which Burmese villagers sued the California-based energy giant for its alleged direct complicity in abuses committed by the Burmese military, being Unocal's partner in a natural gas pipeline joint venture. In 2005, Unocal agreed, in a confidential settlement, to compensate the plaintiffs and provide funds for programmes in Burma to improve living conditions and protect the rights of people from the pipeline region (the exact terms of the settlement are confidential).⁴ The second settlement was in *Wiwa v Royal Dutch Shell*,⁵ a case in which it was alleged that Shell was complicit in supporting military operations against the Ogoni and that Shell actively pursued the convictions and execution of the Ogoni Nine, including by bribing witnesses against them. In June 2009, Shell agreed to settle for US\$15.5 million, including US\$5 million which the plaintiffs donated to a trust to benefit the Ogoni people.⁶

However, a majority decision of the US Second Circuit Courts of Appeals in September 2010 may have put a 'spanner in the works'. The Court in *Kiobel v Royal Dutch Petroleum Co* held that customary international human rights law does not recognise the liability of corporations and consequently MNCs cannot be held liable under the ATS.⁷ On 4 February 2011, the Second Circuit of the same court denied reconsideration of this September ruling in *Kiobel*, holding that the jurisdiction granted by the ATS does not extend to civil actions brought against corporations.⁸ The court voted not to rehear the case. This issue is now

¹ 28 USC 1350.

² These lawyers have represented organisations such as the US Center for Constitutional Rights and EarthRights International.

³ 248 F 3d 915 (9th Cir 2001).

⁴ EarthRights International, 'Final Settlement Reached in Doe v. Unocal', *The Guardian* (21 March 2005) <<http://www.earthrights.org/legal/final-settlement-reached-doe-v-unocal>> (accessed 13 December 2011).

⁵ 2009 WL 498088.

⁶ EarthRights International, 'Wiwa v Royal Dutch/Shell' (Press Release of EarthRights International) <<http://www.earthrights.org/legal/wiwa-v-royal-dutchshell>> accessed 13 June 2011.

⁷ *Kiobel v Royal Dutch Petroleum Co* 621 F 3d 111 (2d Cir 2010).

⁸ *Kiobel v Royal Dutch Petroleum Co* 642 F 3d 379 (2d Cir 2011).

being finally resolved by the Supreme Court,⁹ since the Eleventh Circuit had reached a contrary result in two different cases, deciding that corporations may be held liable under the ATS.¹⁰

Consequently, at this point in time it would seem timely to consider the state of play with regard to the continued development of more conventional tort law remedies. These too have yielded considerable success over the past decade or so. After briefly highlighting some major MNC tort cases litigated since the mid-1990s in Part II (see the Appendix for details), I examine in Part III the principle of MNC parent company liability. Whereas Part IV reviews key substantive, procedural and practical factors affecting access to justice in MNC home courts, Part V shows how procedural or commercial matters often take precedence over merits in MNC tort litigation cases.

II. USE OF CONVENTIONAL TORT LITIGATION

In general, apart from using the ATS, it is not possible to obtain civil legal redress for human rights violations *per se* directly against corporations (whether as direct perpetrators or on the grounds of complicity with state perpetrators). Cases against MNCs have been pursued on the basis of tort, specifically the law of ‘negligence’ or ‘delict’, the fundamental objectives of which are to (i) provide a level of compensation to a victim which as much as possible reinstates the victim in the position that he or she would have been in if the negligence had not occurred and (ii) act as a deterrent against future wrongdoing by the perpetrator and others generally.¹¹

Tort cases against corporations allege harm caused by ‘negligence’ arising from a breach of a ‘duty of care’ (rather than, for example, torture or violation of the right to life etc.). Since they involve claims for compensation and are invariably costly, these cases may serve to achieve critical elements of MNCs’ accountability, namely, monetary redress for victims and deterrence against future human rights violations. An approach entailing allegations of negligence has been criticised for diminishing the significance of the alleged misconduct and harm (whereas the converse criticism has been levelled in some quarters at the use of allegations of fundamental international human rights violations in ATS claims against MNCs). Nevertheless, this approach has the advantage of relatively less complexity and more favourable law on jurisdiction, at least in the European Union (EU).

⁹ In October 2011, the US Supreme Court admitted a petition to consider whether corporations can be sued under the ATS.

¹⁰ *Sinaltrainal v Coca-Cola* 578 F 3d 1252, 1263 (11th Cir 2009); *Romero v Drummond Co, Inc* 552 F 3d 1303 (11th Cir 2008).

¹¹ Prior to the use of ATS, US MNC cases had also been pursued on this basis. See, e.g., *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984* 634 F Supp 842 (1986).

This area has developed over the past 17 years and has included the following cases:¹²

- **1995 – 1998:** *Connelly v RTZ Corporation Plc*¹³ (Namibian uranium mine and throat cancer)
- **1995 – 1997:** *Ngcobo v Thor Chemicals Holdings Ltd & Desmond Cowley*¹⁴ (mercury poisoning of South African workers)
- **1997:** *OK Tedi litigation against BHP*¹⁵ (claim by 30,000 Papua New Guineans for damages to land in the Supreme Court of Victoria, Australia)
- **1997 – 2000:** *Sithole v Thor Chemicals Holdings & Desmond Cowley*¹⁶ (mercury poisoning of South African workers)
- **1997 – 2003:** *Lubbe v Cape Plc*¹⁷ (7,500 South African asbestos miners)
- **2004 – present:** *Hempe & Ors v Anglo American South Africa Ltd*¹⁸ (South African gold miners' silicosis cases)
- **2008–present:** Litigation for alleged oil pollution damage against Shell commenced in The Hague by Nigerian claimants and Dutch NGO, Milieudefensie¹⁹
- **2009 – July 2011:** *Guerrero v Monterrico Metals Plc*²⁰ (torture/mistreatment of 33 Peruvian environmental protesters)
- **2011 – present:** *Bodo Community v Royal Dutch Shell Plc (RDS) & Shell Petroleum Development Company (Nigeria) Ltd (SPDC)*²¹ (claim by a Nigerian fishing community in Ogoniland for environmental damage caused by oil leaks)²²
- **2011 – present:** *Vava & Ors v Anglo American South Africa Ltd*²³ (South African gold miners' silicosis mass tort claim in England)

¹² The author of this article has conducted most of these cases.

¹³ [1998] AC 854.

¹⁴ Times L Rep 10 November 1995.

¹⁵ *Dagi v BHP* [1997] 1 VR 428.

¹⁶ 2000 WL 1421183.

¹⁷ [1998] CLC 1559 (CA); [2000] 1 WLR 1545 (HL).

¹⁸ South Gauteng High Court, Johannesburg Case No 18273/04.

¹⁹ *Oguru, Efanga & Milieudefensie v Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd* No. 330891/ HA ZA 09-579 2009. The claimants are represented by Professor L Zegveld and M Uiterwaal.

²⁰ [2009] EWHC 2475; [2010] EWHC 3228.

²¹ *Bodo Community v Shell Petroleum Development Company of Nigeria* Case No HQ11X01280.

²² J Vidal, 'Shell Accepts Liability for Two Oil Spills in Nigeria' *The Guardian* (London 3 August 2011) <<http://www.guardian.co.uk/environment/2011/aug/03/shell-liability-oil-spills-nigeria>> accessed 13 December 2011.

²³ Claim No HQ11X03245.

It can be noted that most of these cases relate primarily to violations of socio-economic rather than civil and political rights. Details of the above cases, over which the author has had care and conduct, are contained in the Appendix.

III. PARENT COMPANY LIABILITY

Victims' difficulties in obtaining access to justice locally have led to a search for remedies in the home courts of MNCs. This depends on securing jurisdiction in the home courts by pursuing the head office parent company, rather than the local operating subsidiary.²⁴ It also gives rise to the 'the corporate veil' legal complications: under the principle of separate corporate personality, a parent company is not liable, simply by virtue of being a shareholder, for the conduct of its subsidiaries in which it invests.²⁵ Were it otherwise, the effect would be to undermine the distinct legal personality which separates a company from its shareholder and to treat 'the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders'.²⁶

The corporate veil can be 'pierced', for instance on the ground of fraud. In such a case, the subsidiary is treated as the creature of the parent acting on its behalf and the parent company becomes liable on the basis that the subsidiary's conduct should be treated as its conduct.

In an attempt to circumvent the corporate veil, allegations in MNC cases in the United Kingdom (UK) have centred on the 'direct negligence' of the parent company for harm caused by its own wrongdoing (in relation to the functions for which it was responsible or over which it had control) instead of or in addition to its responsibility for the negligence of its subsidiaries. The principal allegation is that the parent company breached a 'duty of care' (itself and/or through the conduct of individuals for whom it is vicariously liable) which it owed to individuals affected by its overseas operations (e.g., workers employed by subsidiaries and local communities) and that this breach resulted in harm.

Under English law, whether or not a duty arises is dependent on a three-stage test: (a) was the harm foreseeable; (b) was there sufficient proximity between the parties; and (c) is it fair, just and reasonable to impose a duty of care?²⁷ The issue of the duty of care of an MNC parent company was formulated by the English Court of Appeal in *Lubbe* as follows:

Whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through

²⁴ Note that the *Trafigura* case for victims of toxic waste dumping in Côte d'Ivoire was atypical in this respect as it involved the UK head office company itself and no subsidiary. *Yao Essaie Motto & Ors v Trafigura Ltd & Trafigura Beheer BV* HQ06X03370.

²⁵ See *Salomon v Salomon and Co Ltd* [1897] AC 22; *Adams v Cape Industries Plc* [1991] 1 All ER 929.

²⁶ *Atlas Maritime Co SA v Avalon Maritime Ltd (No. 1)* [1991] 4 All ER 769.

²⁷ *Caparo Industries Plc v Dickman* [1990] 1 All ER 568 (HL).

its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company?²⁸

The concept of ‘product liability’ reflects a universal recognition of sufficient ‘proximity’ between a manufacturer and a consumer so as to impose a legal ‘duty of care’ notwithstanding the absence of a contractual relationship. Similarly, there should be no principled objection to the imposition of a duty of care on an MNC parent that has an integral involvement in controlling, managing or designing operations and processes which it is foreseeable may adversely affect workers, communities or the environment at or in the vicinity of its overseas operations.²⁹

Moreover, the imposition of a duty of care is consistent with the moral obligation that many MNCs themselves seem to have acknowledged for decades: ‘The aim of the group is, and will remain, to make profits for our shareholders, but to do it in such a way as to make a lasting contribution to the communities in which we operate.’³⁰

Key negligence allegations against the parent MNC in the some of the above and other cases were as follows:

- ***Thor Chemicals Holdings Ltd:*** Negligent design and transfer of hazardous chemical technology to South Africa and negligent monitoring and supervision of the health of South African workers by the parent company as well as by directors and employees for whose conduct it was vicariously liable (see the Appendix).
- ***Connelly:*** ‘It was alleged that RTZ had devised RUL’s [the Namibian subsidiary] policy on health, safety and the environment, or alternatively had advised RUL as to the contents of the policy. It was further alleged that an employee or employees of RTZ, referred to as RTZ supervisors, implemented the policy and supervised health, safety and/or environmental protection at the mine.’³¹ (See the Appendix.)
- ***Lubbe:*** Negligent exercise of its ‘effective control’ of health and safety at its South African subsidiaries’ asbestos mining operations (see the Appendix).
- ***Gold Miners’ Silicosis Litigation against Anglo American:*** Negligent control over mining operations and/or negligent advice given to mining subsidiaries pursuant to technical service contracts between the parent and the mining subsidiaries, in particular relating to medical and dust prevention systems (see the Appendix).

²⁸ *Lubbe* (CA) (n 17) 1568.

²⁹ R Meeran, ‘Process Liability of Multinationals: Overcoming the Forum Hurdle’ (November 1995) *Journal of Personal Injury Litigation* 170.

³⁰ *Anglo American, 1954 Annual Report* (London 1954) (per E Oppenheimer).

³¹ *Connelly* (n 13) 864.

- ***OK Tedi Litigation:*** Negligent management of subsidiary operations resulting in damage to the land by tailings from a gold/copper mine.³²
- ***Shell-Nigeria Litigation in the Netherlands:*** Negligence in relation to the control of the Nigerian operations, maintenance of pipelines and supervision of clean-up of oil spills. The May 2008 subpoena against Shell alleges that the parent MNC is liable essentially because (i) it owed a duty of care to the Nigerian farmers (the potential harm was foreseeable), and (ii) it had the power to ensure that adequate steps were taken to avoid the harm, but it breached that duty by failing to ensure that the appropriate safeguards were taken. The subpoena specifically cites *Lubbe* and *Connelly* as legal authorities supporting the existence of a duty of care.
- ***Peruvian torture victims' litigation against Monterrico Metals:*** Negligent management and control of the response to an environmental protest and the treatment of detained protesters (based primarily on alleged violations of the Peruvian Civil Code 1984; see the Appendix).

The issue of parent company liability has not, however, been subject to a final determination in any of the above MNC cases, which were either settled before trial (e.g., *Thor Chemicals*) or struck out for other reasons (e.g., *Connelly*). A positive decision (though not a determination) in respect of parent company liability was the dismissal of an attempted strike out application by Thor Chemicals in 1996, where the Court held that it was 'clear on the face of it that the statement of claim without consideration of evidence discloses a reasonable cause or causes of action' against the parent company and that the evidence went 'well beyond establishing a clear evidential basis' for liability against the parent company.³³

Although the *Connelly* action was ultimately struck out on the grounds of limitation, the Rio Tinto failed in its attempt to strike the case out for lack of a cause of action, as Justice Wright ruled that:

On a fair reading of this pleading, it seems to me that ... [RTZ] had taken into its own hands the responsibility for devising an appropriate policy for health and safety to be operated at the Rossing mine, and that either ... [RTZ] or one or other of its English subsidiaries implemented that policy and supervised the precautions necessary to ensure so far as was reasonably possible, the health and safety of the Rossing employees through the RTZ supervisors. Such an allegation, if true, seems to me to impose a duty of care upon those defendants who undertook those responsibilities, whatever contribution Rossing itself may have made towards the safety procedures in the mine. The situation would be an unusual one; but if the pleading represents the actuality then, as it seems to me, the situation is likely to ... give rise to a duty of care.³⁴

³² *Dagi* (n15).

³³ *Ngcobo v Thor Chemicals Holdings Ltd* (unreported 1996) (Maurice Kay J).

³⁴ *Connelly v RTZ Corporation Plc* (unreported December 1998).

Consistent with the notion that parent company liability may stem from the functions over which it has assumed responsibility, the judgment contained the following analysis:

Mr Spencer asserts that no other person other than the plaintiff's actual employer can owe the duty owed by a master to his servant to the plaintiff. As a matter of strict language this may well be true; but that is not to say that in appropriate circumstances there may not be some other person or persons who owe a duty of care to an individual plaintiff which may be very close to the duty owed by a master to his servant. For example, the consultant who advises the employer upon the safety of his work processes may owe a duty to the individual employee who he can foresee may be affected by the contents of that advice — see, for example, *Clay v Crumb and Sons Limited* [1964] 1 QB 533. Even more clearly, if the situation is that an employer has entirely handed over responsibility for devising, installing and operating the various safety precautions required of an employer to an independent contractor, then that contractor may owe a duty to the individual employee which is virtually coterminous with that of the employer himself. That is not to say that the employer, by so handing over such responsibility, will necessarily escape his own liability to his employee.³⁵

The Australian case of *CSR Ltd v Wren*,³⁶ though not an MNC case, was a claim by a mesothelioma victim employed by Asbestos Products Pty Ltd, a wholly owned subsidiary of CSR Ltd. The New South Wales Court of Appeal held that the essential question in the case was 'whether the relationship between CSR and Mr Wren were such as to give rise to a duty of care in CSR to protect Mr Wren from the risk of foreseeable injury'.³⁷ The majority in *Wren* made it clear that the decision was clearly based within the law of tort, and did not do 'violence' to the 'corporate veil' principle. The Court held that 'the reason CSR was liable in the circumstances here is because it brought itself into a relationship with the employees of Asbestos Products Pty Ltd by placing its staff in the role of management at Asbestos Products Pty Ltd'.³⁸ In other words, CSR's liability was based on its negligent control of the operations of the employer.

A landmark decision of the UK Court of Appeal in *Chandler v Cape Plc* [2012] EWCA Civ 525 significantly clarified and advanced UK law on parent company liability.

The claimant sued for asbestosis contracted as a result of exposure to dust during his employment by Cape Products, a subsidiary of Cape Plc. He alleged that Cape Plc owed him a duty of care, inter alia, because it employed a medical and a scientific officer responsible for overseeing health and safety across the group including at Cape Products. An essential issue at trial was '[w]hether Cape was proved to have assumed responsibility

³⁵ Ibid.

³⁶ (1998) 44 NSWLR 463.

³⁷ Ibid.

³⁸ Ibid.

for the safety of the employees of its subsidiary, Cape Products, so as to give rise to a relevant duty of care owed by Cape to Mr Chandler to prevent the exposure of which he complained' [para 33].

The Court held that the conventional three-part *Caparo* [*Caparo Industries v Dickman* [1990] 2 AC 605] test of foreseeability of harm, proximity and reasonableness applied to a parent company just as it did to an individual. The Court specifically noted that it had been held in *Connelly* and *Ngcobo* that it was arguable that a parent company may owe a duty of care to employees. The Court in *Chandler* held [para 66] that '... if a parent company has responsibility towards the employees of a subsidiary there may not be an exact correlation between the responsibilities of the two companies. The parent company is not likely to accept responsibility towards its subsidiary's employees in all respects but only for example in relation to what might be called high level advice or strategy.'

Regarding the defendant's contention that imposing liability would require a lifting of the corporate veil, the Court emphatically rejected any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. It observed [paras 69-70]: 'A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company. The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees.'

The Court in *Chandler* held [para 78] that in view of Cape's 'superior knowledge about the nature and management of asbestos risks', it was 'appropriate to find that Cape assumed a duty of care either to advise Cape Products on what steps it had to take in the light of knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken.' In paragraph 80, the Court of Appeal concluded that:

... in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.

It is worth noting that the Court of Appeal in *Chandler* acknowledged [para 2] that 'this is one of the first cases in which an employee has established at trial liability to him on the

part of his employer's parent company, and thus this appeal is of some importance not only to the parties but to other cases.' As a result of this ruling, there can be no principled legal objection, under UK law, to the imposition of a legal duty of care on a parent company. But whether or not such a duty should be imposed will depend on the facts of each case and consequently there will be instances where the degree of involvement and control by the parent company warrant the imposition of such a duty and other instances where it does not. Of course, in an MNC context — where a claim is likely to be governed by local law — the *Chandler* decision will have its greatest influence on MNC operations in states with English-law based tort systems.

The invariable settlement (or termination) of cases that might result in a positive finding of parent company liability and judgement against an MNC is undoubtedly frustrating for academic lawyers and campaigners. But it reflects the financial realities and risks to MNCs, the claimants and the claimants' lawyers of not settling. Unless an MNC is confident of a resounding victory and that no significant evidence damaging to its reputation will emerge at trial, the risk of going to trial usually makes little commercial sense. The primary objective of claimants is usually to obtain the maximum amount of compensation as speedily as possible.³⁹ Claimants' lawyers, whose resources and cash flow can be stretched to the limit by such cases, may also feel under pressure to settle. In the claim against Shell by the Ogoniland Bodo Community, liability has been admitted by Shell's Nigerian subsidiary but not by Royal Dutch Shell.⁴⁰ In July 2011, the case against Monterrico Metals, which had been scheduled for a ten week trial in the English High Court in October 2011, was also settled without admission of liability (see the Appendix).

IV. FACTORS AFFECTING ACCESS TO JUSTICE MNC HOME COURTS

Due to the inability to fund lawyers and experts to represent them in their local courts, often the only prospect of obtaining justice in claims against MNCs is to pursue claims in their home courts, where victims may obtain the services of lawyers in a position to represent them on a contingency fee or *pro bono* basis.⁴¹

MNC home courts will have jurisdiction over a claim against a parent company domiciled in their jurisdiction, but victims' access to such a remedy will depend on a combination of substantive, procedural and practical factors, in particular: (a) the extent to which the MNC home courts are able to decline to exercise jurisdiction; (b) the law by reference to which the liability of the parent company is to be determined; and (c) other

³⁹ During the course of the seven years of litigation, approximately 1,000 of the 7,500 claimants died before receiving any compensation.

⁴⁰ See Vidal (n 22).

⁴¹ In many instances, there are of course other reasons why justice may be inaccessible locally, for example, persecution of claimants and corruption.

procedural and practical factors affecting the financial viability of litigation and victims' lawyers' ability and willingness to act.

A. *Forum Non Conveniens* and Jurisdiction

The *forum non conveniens* principle serves as a procedural means of restricting the exercise of extra-territorial jurisdiction to cases that have their closest connection with the country in which the proceedings have been instituted. The question is essentially whether there is a 'more appropriate forum' for the trial than the MNC home court in which the ends of justice can be served. Under English law, answering this question involves the application of a two-stage test: is there a 'clearly and distinctly more appropriate' forum; if yes, are there nevertheless reasons why justice requires that the MNC home court should retain jurisdiction?

The *Connelly*, *Lubbe* and *Thor Chemicals* litigation in the UK became bogged down for years with *forum non conveniens*. In *Connelly*, the House of Lords laid down the principle that a claimant who would be denied substantial justice in her local courts, due to the inability to pay for lawyers and experts to pursue a case, but who was able to obtain such representation in the courts where she had instigated her claim, would be allowed to proceed with her claim, even though the local courts were otherwise the more appropriate venue:

[T]he availability of financial assistance in this country coupled with its non-availability in the appropriate forum, may exceptionally be a relevant factor in this context. The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available ...⁴²

Application of the *Connelly* principle (after three years of hearings up and down the court system) enabled the *Lubbe* claimants to finally overcome *forum non conveniens* and continue with their claim in England three years later⁴³ (see the Appendix).

The test applied by the UK and Canadian courts appears to be the same.⁴⁴ In the case of *Recherches Internationales Quebec v Cambior Inc*,⁴⁵ the court dismissed proceedings, on the grounds of *forum non conveniens*, brought by a public interest group against a Canadian mining company following the spill of cyanide-contaminated tailings at a site occupied by its subsidiary in Guyana. On the other hand, the decision in *Somji v Somji* (a

⁴² *Connelly* (n 13) 873.

⁴³ *Lubbe* (HL) (n 17).

⁴⁴ *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460; *Amchem Products Inc v British Columbia (Workers Compensation Board)* (1993) 1 SCR 897.

⁴⁵ [1998] QJ No 2554 (Superior Court of Quebec, Canada).

dispute over matrimonial property in Tanzania) gives some cause for optimism.⁴⁶ In that case, a judge in Alberta decided that Alberta was the better forum for a dispute involving Tanzanian law:

I conclude that the United Republic of Tanzania presently faces significant governance issues which include, in the words of the national web site found at www.tanzania.go.tz/governance.html “financial mismanagement; corruption; poor accountability; an overloaded and inefficient legal system; ambivalence in sanctioning the fundamental human rights; erosion of meritocracy in public service; tax evasion and unnecessary bureaucratic procedures”.⁴⁷

More recently, an application by Anvil Mining to stay proceedings on the ground that the courts of Australia or the Democratic Republic of Congo (DRC) were more appropriate *fora* was dismissed by the Superior Court of Quebec on 28 April 2011.⁴⁸ The Court held that ‘everything indicates that if the court were to refuse to accept the application [for a class action] there would be no other possibility for the victims’ claims to be heard.’⁴⁹ The decision was, however, reversed on 24 January 2012 by the Quebec Court of Appeal which held that it had no jurisdiction in a claim against the Canadian parent.⁵⁰ In the present context, it held that jurisdiction should not be exercised on the grounds of *forum necessitatis*⁵¹ because there was no proof that the victims could not pursue their claims in the DRC or Australia.

The Australian approach to the *forum non conveniens* principle is more favourable to claimants in that the burden is on the defendant to show that the Australian court is a ‘clearly inappropriate forum’, rather than to show that the local court is a ‘clearly more appropriate forum’.⁵² Even when the law of a foreign country has to be applied to decide a case, Australia would not be a ‘clearly inappropriate’ forum for hearing the matter.⁵³

⁴⁶ 2001 ABQB.

⁴⁷ *Ibid* [57].

⁴⁸ *Association Canadienne Contre L’impunité v Anvil Mining* [2011] JQ No 4382, 500-06-000530-101. A case in which Congolese villagers allege complicity by the parent company in a massacre and other serious human rights violations committed by the Congolese military in 2004.

⁴⁹ *Ibid*.

⁵⁰ *Anvil Mining v Association Canadienne Contre L’impunité* 2012 QCCA 117. An appeal against this decision has been filed before the Supreme Court of Canada.

⁵¹ A safety-net provision under the Quebec Civil Code which provides that on an exceptional basis the court will have jurisdiction, where this would not otherwise be the case, if no other forum, with which the dispute is closely connected is available. A similar provision has been proposed in the Green Paper of the European Commission on the review of the Brussels I Regulation on jurisdiction and recognition of enforcement of judgments in civil and commercial matters: COM(2009) 175 Final.

⁵² *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

⁵³ *Renault SA v Zhang* (2002) 210 CLR 491.

Neither the Canadian nor the Australian courts appears to have endorsed the *Connelly* principle yet. The upshot is that claimants who are unable, for financial reasons, to secure access to justice in their local courts may still be denied a hearing in Canada and Australia.

MNC claimants suing under the ATS have been somewhat cushioned against the effects of *forum non conveniens*, because significant weight is given to the 'United States' strong public interest in adjudicating international human rights violations'.⁵⁴ *Forum non conveniens* was applied to harsh effect in claims brought in tort law, the dismissal of the Bhopal claims by the New York District Court perhaps providing the most striking example.⁵⁵ Should claims against MNCs under the ATS be barred, MNC claimants in the US courts will again face the same forum hurdle.

With regard to the EU, subject to exceptions that are irrelevant for present purposes, European law stipulates that a defendant shall be sued in its domicile,⁵⁶ and that the domicile of a company is in the location of its corporate headquarters or its registered office.⁵⁷ Apart from the UK, the courts of other EU states have interpreted this rule strictly. Thus, in the *Shell Nigeria* litigation in the Netherlands,⁵⁸ the Dutch court had mandatory jurisdiction over the claim against the Netherlands-based parent company, Royal Dutch Shell Plc. The Nigerian subsidiary, SPDC, was a co-defendant in the proceedings. Shell challenged jurisdiction, among others, on the grounds that the Dutch court only had jurisdiction over SPDC by virtue of the claim against Royal Dutch Shell, and that the claim against the latter was tenuous and had only been pursued to enable the claim against SPDC to proceed. In its judgment on 30 December 2009, the Court of The Hague dismissed Shell's challenge, concluding that the claim against the parent company was not 'unsound or certain to fail', that 'the same complex facts in Nigeria must be assessed in respect of the claims against both defendants', and that accordingly that the court had 'international jurisdiction' over SPDC.⁵⁹

However, until 2005, the English courts had interpreted Article 2 of the Brussels Regulation as allowing dismissal of a case against a UK-domiciled defendant in circumstances where there was a more appropriate forum located in a non-EU state.⁶⁰ It

⁵⁴ *Wiwa v Royal Dutch Petroleum Co* 226 F 3d 88 (2d Cir 2000).

⁵⁵ *In re Union Carbide* (n 11).

⁵⁶ Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation), Council Regulation (EC) No 44/2001 of 22 December 2000, art 2.

⁵⁷ A company is domiciled where it has its 'principal place of business', 'statutory seat' or 'central administration' (art 60). Brussels I Regulation, *ibid*.

⁵⁸ *Oguru, Efang & Milieudefensie v Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd* No. 330891/ HA ZA 09-579 2009.

⁵⁹ *Ibid*. There is a similar procedural principle in the UK which enables the joinder of a foreign subsidiary to a claim against a UK parent if the subsidiary is a 'necessary and proper party'. Civil Procedure Rules 1998 (UK), Practice Direction 6B s 3.1(3)(b).

⁶⁰ *In re Harrods (Buenos Aires) Ltd* [1992] Ch 72.

was on this basis that the English courts entertained *forum non conveniens* applications in the *Connelly*, *Thor Chemicals* and *Lubbe* cases (which involved UK-domiciled defendants).⁶¹

A decision of the European Court of Justice (the highest court across the EU, the decisions of which are binding on the courts of all EU states) in 2005 clarified that the national courts of the EU (including those of the UK) did not have the power to halt proceedings on the grounds of *forum non conveniens* in cases brought against EU domiciled defendants, where the alternative venue was outside the EU.⁶² Consequently, *forum non conveniens* is no longer an issue in the UK in these MNC cases and that is the reason why the litigation in *Trafigura* and *Monterrico* was not plagued by this obstacle.

Litigation commenced by South African silicosis victims against Anglo American South Africa Ltd was commenced in the English High Court in September 2011.⁶³ The defendant is a wholly-owned subsidiary of the London-based mining giant, Anglo American Plc. The claimants contend that the ‘central administration’ or ‘principal place of business’ of the defendant is in London and that accordingly, by virtue of Article 60(1)(b)/(c) of the Brussels I Regulation, Anglo American South Africa Ltd is domiciled in the UK. Anglo is challenging UK jurisdiction.

B. MNC Home or Host State Substantive Law?

Whereas the ATS cases are based on alleged violation international human rights law, conventional tort cases involving a foreign element may be governed by the law of an MNC’s home or host state. Insofar as the latter may be less stringent than the former in terms of human rights protection, application of the latter could be seen as endorsing ‘double standards’. Whether or not this might also be regarded as an obstacle to justice would seem to depend on the law in question. This issue is considered further below by reference to specific examples. But to take an obvious example, a situation in which an MNC operating the same process in two countries where the relevant health and safety at work standards were different would seem to pose an obvious impediment to justice to workers subject to the less stringent standards. The general experience, however, indicates that it is usually the lack of enforcement of local laws and regulations, rather than the content of the local laws *per se*, that is unsatisfactory and encourages double standards.

In tort cases, European jurisdictions have generally required the application of the substantive (not procedural) law of the place where the tort was committed.⁶⁴ The current

⁶¹ It was however contended, on behalf of the claimants in *Cape Plc*, that the UK courts had no power to apply the *forum non conveniens* principle to a case involving a UK defendant. In its ruling, the House of Lords concluded that the position was not ‘*acte clair*’ and that had the Court found in *Cape*’s favour, they would have referred the issue to the European Court of Justice for resolution.

⁶² *Owusu v Jackson* [2005] ECR 1383.

⁶³ *Vava & Others v Anglo American South Africa Ltd* Claim No. HQ11X0324. See also the Appendix.

⁶⁴ L Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws*, (14th edn, Sweet & Maxwell, London 2006) 35-004.

position within the EU is that the applicable law in tort claims will usually be the law of the country where *the damage occurs irrespective of the country in which the event giving rise to the damage occurred unless the tort is manifestly more closely connected with another country*.⁶⁵ In cases concerning MNCs, this means that the law of the host state will usually apply. However in claims for ‘environmental damage’, the claimant may elect to have the claim governed by the law of the country where the ‘event giving rise to the damage’ occurred.⁶⁶ In common law jurisdictions other than the UK, the law of the place of the tort will generally be the governing law.⁶⁷

The choice of law may be largely immaterial where the relevant laws of the MNC home and host states are essentially the same. For example, in the case of South Africa or Namibia, the law of delict utilises concepts of legal duty, negligence and wrongfulness, which although not entirely corresponding to the concepts of duty of care and breach of duty in English law are likely, when applied to specific factual situations, to produce the same result.⁶⁸

Neither may the choice of law be significant where the laws of an MNC’s host and home states, albeit having a different basis, in essence require proof of the same facts. The *Monterrico* case was formulated on the basis of both the English law of negligence and under the Peruvian Civil Code. It is understood that the Code provides for fault-based liability of individuals who cause harm (Article 1969), liability for someone who incites or aids another in causing harm (Article 1978), vicarious liability for someone in control of another who causes harm (Article 1981), and joint liability of individuals whose conduct causes harm in combination (Article 1983). Thus, on the face of it, the Code provides a mechanism (akin to negligence) for liability for harm caused by the conduct of individual MNC employees, their employers and their employers in conjunction with the state perpetrators. The liability of the parent company, *Monterrico*, for any wrongdoing seemed to turn on a factual analysis of whether a relationship of ‘effective control’ over aspects relevant to causation of harm is proved. Consequently, establishing legal responsibility, including overcoming the corporate veil obstacle, would on that basis seem to present essentially the same set of challenges under the Peruvian Civil Code as it does under English law.

⁶⁵ Section 11(2)(a) of the Private International Law (Miscellaneous Provisions) Act 1995 and (from 11 July 2007) Article 4 of the Rome II Regulation on the Law Applicable to Non-contractual Obligations, No 864/2007.

⁶⁶ Rome II Regulation, *ibid* art 7.

⁶⁷ For instance, the Supreme Court of Canada in *Tolofson v Jensen* [1994] 3 SCR 1022 stated that exceptions might be required in international cases in order to avoid injustice. See also the decision of the High Court of Australia in *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491.

⁶⁸ Although note that in the gold miners’ silicosis litigation, which is being litigated under South African law, it is alleged that ‘legal duty’ must be determined in light of provisions of the Constitution of the Republic of South Africa 1996 s 24, which provides: ‘Everyone has the right (a) to an environment that is not harmful to their health and well-being.’

As indicated above, Article 1969 of the Peruvian Civil Code presents the possibility of individual employees, such as directors, being held liable for harm caused by their fault. The principle under English law is that a director who personally directs and procures a company to commit a tort is herself liable to the victim no less than the company.⁶⁹ In the *Thor Chemicals* case, the High Court held (in the context of a strike-out application) that there was ‘ample evidence’ on which the trial judge might find the chairman and co-defendant, Cowley, liable on this basis.⁷⁰ So here too, in the *Monterrico* case, the differences between the laws of the MNC home and host states seemed to be of limited relevance. However, a civil action against individual MNC directors is rarely utilised. This is no doubt partly because the company is more likely to be in a position to afford to pay damages than an employee/director.

The choice of applicable law may, however, be very significant in certain situations. For example, the limitation period in tort claims is three years under the English law, two years under the Peruvian law,⁷¹ thirty years under the law of the DRC,⁷² and ten years under the Colombian law.⁷³

It does not necessarily follow that simply because a foreign limitation period is shorter than that of the MNC home state, this constitutes an obstacle to justice. Limitation is treated as a matter of substantive law in the UK by virtue of the Foreign Limitation Periods Act 1984, and consequently in a foreign tort case, the foreign limitation period will generally apply. The Act does, however, allow the court to disregard a foreign limitation if its application would constitute ‘undue hardship’ or be ‘contrary to public policy’.⁷⁴ A case brought in England against T&N, an MNC, by an asbestos victim who worked at T&N’s subsidiary factory in Quebec was struck out where the Court of Appeal held that the law of Quebec (which had a one year limitation period) was not unduly harsh or contrary to public policy and should apply.⁷⁵

Another situation when the choice of applicable law will become critical is where claims may be barred by the law of the host or home state, for example under workmen’s compensation law barring claims against an employer (defined under South African law to include ‘anyone controlling the business of the employer’⁷⁶). This bar was raised in the *Connelly*, *Thor Chemicals* and *Lubbe* litigation. It also led to the barring of a claim brought in Australia against an Australian parent company by an asbestos victim employed by its

⁶⁹ *Evans v Spritebrand Ltd* [1985] 1 WLR 317.

⁷⁰ *Ngcobo* (n 33).

⁷¹ Peruvian Civil Code 1984 art 2011(4).

⁷² Congolese Civil Code art 647.

⁷³ Colombian Civil Code art 41. Law 153 stipulates 20 years, which was reduced to 10 years under Law 791 in 2002.

⁷⁴ English Foreign Limitation Periods Act 1984 s 2(2).

⁷⁵ *Durham v T&N Plc* (unreported, 1 May 1996).

⁷⁶ Compensation for Occupational Injuries and Diseases Act 1993 s35.

New Zealand subsidiary.⁷⁷ It was originally raised by Anglo in the gold miners' silicosis litigation.⁷⁸ A decision of the South African Constitutional Court on 3 March 2011, however, held that this bar did not apply to miners whose claims were subject to payment of compensation under different legislation, under which the amounts of payments were significantly less.⁷⁹ Thus, the bar in the South African legislation has been held not to apply, thereby removing what would otherwise constitute an obstacle to justice.

Given that the objectives of MNC human rights litigation are to provide monetary compensation for victims and a financial deterrent against bad practices, the impact of choice of law on the level of damages awards is critical. A recent detrimental development for claimants suing in the EU is the coming into effect of provisions of European law which will require damages to be assessed in accordance with the law and procedure of the country where the harm occurred.⁸⁰ Previously, the position under English law was that damages would be assessed in accordance with the law and procedure of the country in which the case was proceeding, even if the claim was governed by local law.⁸¹ For the reasons indicated in the section below, this provision also has potentially serious implications for access to justice.

As indicated above, allegations of 'negligence' have formed the basis of claims against the parent company. To base a claim on the law of an MNC's home state is consistent with the contention that the alleged harm arose as a result of bad decisions and actions that emanated from the headquarters.⁸² Moreover, in cases brought in the home courts of an MNC, a strategic reason for arguing that the applicable law should be that of the MNC home state, may be to counter the inevitable opposite contention by the MNC that the claim should be governed by the law of the host state, where the claimants reside and the harm was done, and that this is a reason why the MNC's home courts should decline jurisdiction in favour of the local courts.⁸³

From the above analysis, it is clear that differences between home and host state law may be virtually immaterial or highly significant, depending upon the given legal matrix.

C. Costs and Resources

In considering the potential for legal action in the home courts of MNCs, the relevance of financial resources, constraints and incentives for claimants' lawyers cannot be overstated.

⁷⁷ *James Hardie & Coy Pty Limited v Putt Matter* [1998] NSWSC 434.

⁷⁸ See the Appendix.

⁷⁹ *Thembekile Mankayi v AngloGold Ashanti Limited* [2011] ZACC 3.

⁸⁰ Rome II Regulation (n 65) arts 4 and 15.

⁸¹ *Harding v Wealands* [2006] UKHL 32.

⁸² *Ngcobo* (n 14). Deputy High Court Judge James Stewart QC held that, by reason of the connections with Thor's Margate factory, English, rather than South African law was likely to apply.

⁸³ This issue related to the doctrine of *forum non conveniens* remains live in common law countries other than the UK, which is subject to the Brussels Regulation I (n 56).

The fact of the matter is that, barring a few exceptions, claimants' lawyers in MNCs' home states have shown a distinct lack of enthusiasm for undertaking such cases. The reasons are clear: these cases are complex, risky, hard-fought by MNCs and resource-intensive. Therefore, they are expensive to fund, of uncertain duration and outcome and have significant cash flow implications for the claimants' lawyers (the MNC lawyers, by contrast, are funded on an on-going basis, irrespective of the outcome). Furthermore, the magnitude of the financial risk is that only lawyers who are experienced in this field are likely to feel sufficiently confident to take the risk (or put it another way, the perceived risk for lawyers who are new to this field is even greater). That said, if these cases succeed, they may potentially be very profitable, thereby increasing the financial incentive for claimants' lawyers with experience and sufficient resources to take on such cases.⁸⁴

The *Connelly*, *Lubbe* and *Thor Chemicals* cases were publicly funded by the UK Legal Services Commission. This meant that the claimants' lawyers received a regular stream of funding for expenses and legal fees, albeit not at very high rates.⁸⁵ Cases are now run on a no-win-no-fee basis, a system authorised by legislation in the UK,⁸⁶ Australia⁸⁷ and South Africa,⁸⁸ which means that lawyers are paid only if they win, but if they do win they may charge an uplift fee on their costs. The US-style contingency fee agreements, by which lawyers are entitled to a share of a claimant's damages, are expressly prohibited in these countries. However, it is understood that such damages-sharing agreements are permissible in Canada (at least in Ontario).⁸⁹ A further benefit to claimants suing in the UK has been that the costs uplift (or 'success fee') is payable by the unsuccessful defendant, rather than from the claimant's compensation.⁹⁰

However, the UK government is about to implement recommendations for fundamental reform of the civil costs system, including abolishing the right of successful claimants to recover success fees from the defendant.⁹¹ Success fees, if they were to be paid, would then need to be deducted from claimants' damages (as is the case, for example, in Australia and South Africa). This, combined with the introduction of Articles 4 and 15 of the Rome II Regulation — which is likely to produce a significant reduction in damages awards for

⁸⁴ In Europe, Australia and South Africa, claimants' lawyers tend to form the less wealthy end of the legal profession. Commercial law firms, which undertake a variety of impressive pro bono work in the UK, Australia and South Africa, would be ideally placed, in terms of resources and expertise, to undertake these MNC cases but as they represent MNCs, they would invariably be reluctant to act or even conflicted out of acting.

⁸⁵ Obtaining such public funding in the UK is no longer realistic.

⁸⁶ Courts and Legal Services Act 1990 (UK) ss 58 and 58A.

⁸⁷ See, e.g., Legal Profession Act 2004 (Vic) ss 3.4.27 and 3.4.28.

⁸⁸ Contingency Fees Act 1997 (South Africa).

⁸⁹ *McIntyre Estate v Ontario (Attorney General)* [2001] OJ 713 (Superior Court of Justice in Ontario, Canada).

⁹⁰ CPR (n 59), Practice Direction to Part 44 s 9.1.

⁹¹ Legal Aid, Sentencing and Punishment of Offenders Bill, implementing the January 2010 report, 'Review of Civil Litigation Costs', of Lord Justice Jackson.

developing country claimants — would effectively rule out recovery of success fees in MNC litigation and consequently reduce the incentive for UK lawyers to take on such cases.

Equally significant for these MNC cases is the recommended proposed stricter application of the ‘proportionality principle’.⁹² Due to the complex and protracted nature of this litigation, legal costs are often substantially higher than compensation. If a successful claimant’s legal costs can only be recovered from an MNC to the extent that they correspond to the level of compensation and the level of compensation is reduced (by the Rome II Regulation) in line with compensation in the MNC’s host state, then this will serve as a powerful deterrent against claimants’ lawyers undertaking these cases.⁹³

D. Class or Group Actions

For claimants and claimants’ lawyers, the Australian and Canadian legal systems have a potential advantage of providing for class actions, that is, a representative claimant may sue for the benefit of a group of individuals falling within the class definition. Once instituted, a class action suspends the limitation period for all class members. Such a mechanism is potentially speedier and far less costly and thus presents less of a financial disincentive for claimants’ lawyers. In Australia, class action legislation has been passed in Victoria,⁹⁴ though the main *OK Tedi* litigation was not brought as a class action.⁹⁵ The proposal to introduce an amendment to permit class action in the near future in the New South Wales has also been announced.⁹⁶ Australia has class action legislation at a federal level too,⁹⁷ but MNC litigation based primarily on common law negligence is generally unlikely to have a federal element and would therefore need to be brought in state courts. Having said that, the recent Australian class action relating to anti-arthritic drug Vioxx was pursued against US manufacturer Merck & Co Inc in the Federal Court alleging breaches of consumer product safety law under the Trades Practices Act.⁹⁸ In Canada, it is understood that class actions are permissible in nine out of ten provinces. Two class actions against tobacco manufacturers are presently put in train in the Superior Court of Quebec.⁹⁹

⁹² The overriding objective includes ‘dealing with the case in ways which are proportionate (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party’. CPR (n 59) r 1.1.

⁹³ R Meeran, ‘Multinationals will Profit from the Government’s Civil Litigation Shake-up’ *The Guardian* (London 24 May 2011) <<http://www.guardian.co.uk/commentisfree/libertycentral/2011/may/24/civil-litigation-multinationals>> accessed 24 May 2011.

⁹⁴ Supreme Court Act 1986 (Vic) Part 4A.

⁹⁵ *Dagi* (n 15).

⁹⁶ Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010, <<http://www.legislation.nsw.gov.au/exposure/archive/b2010-108-d05.pdf>> accessed 13 December 2011.

⁹⁷ Federal Court of Australia Act 1976 (Cth) Part IVA.

⁹⁸ *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* [2011] FCAFC 128, a case which the author initiated in Victoria, Australia.

⁹⁹ Lauzon Bélanger Lespérance Avocats, ‘Class Action: JTI-MacDonald & al.’ (Subscription to Class Action) <<http://lblavocats.ca/en/class-actions/tobacco-victims/active/jti-macdonald.php>> accessed 4 October 2011.

Both the Australian and Canadian class action systems are of the ‘opt out’ variety, meaning that members of the class are included in (and bound by) the outcome of the action unless they opt out. This also enables key legal issues to be resolved without instructions having to be taken from a large number of individual claimants, thereby reducing the level of legal resources required (and their financial disincentive for claimants’ lawyers).

The UK does not have class actions as such,¹⁰⁰ which may partly explain why the Vioxx litigation and the tobacco litigation, pursued respectively in Australia and Canada, have not got off the ground in the UK. However, the UK procedural rules do provide special procedures for the cost-effective case management of group actions.¹⁰¹ UK group actions are essentially of the ‘opt in’ variety, which means that commencement of legal action on behalf of a small number of individuals does not stop the limitation clock from running for the remainder of the group. This in turn implies that instructions must be taken from all members of the group, thereby increasing the costs and decreasing the financial viability (in comparison with proper class actions).

E. Global Collaboration on Behalf of Victims

A positive development over the past decade has been the increasing global collaboration between public interest lawyers and human rights campaigners in MNC litigation. This has undoubtedly been facilitated by internet communication methods. The litigation in the *Monterrico* case illustrates this. This case was referred to by the US-based Environmental Defender Law Center;¹⁰² it involved Peruvian human rights organisation, Fedepaz,¹⁰³ and its umbrella organisation, Coordinadora Nacional de Derechos Humanos;¹⁰⁴ Hong Kong commercial lawyers¹⁰⁵ acted for the claimants to secure, from the Hong Kong High Court, an ancillary freezing injunction in aid of the English freezing injunction; and Swedish lawyers acted for the claimants in securing the implementation, by the Stockholm’s Tingsratt Court, of a request made by the English High Court for obtaining evidence from the Sweden-based MNC Securitas, the parent company of Forza (Peru), which provided security personnel at the Rio Blanco mine at the time of the alleged human rights violations.¹⁰⁶

¹⁰⁰ CPR 19.6 does, however, provide for ‘representative proceedings’ in which one person may claim on behalf of himself and others ‘with the same interest’. CPR (n 59).

¹⁰¹ Ibid Part 19.

¹⁰² Environmental Defender Law Center, ‘Home Page’ <<http://www.edlc.org>> accessed 8 August 2011.

¹⁰³ Fedepaz, ‘Home Page’ <<http://www.fedepaz.org>> accessed 8 August 2011.

¹⁰⁴ Coordinadora Nacional de Derechos Humanos, ‘Home Page’ <<http://derechoshumanos.pe>> accessed 8 August 2011.

¹⁰⁵ Gall, ‘Home Page’ <<http://gallhk.com>> and barrister, Yang-Wahn Hew <<http://dvc.hk/members/view/34>> accessed 4 October 2011.

¹⁰⁶ The request was made pursuant to the European Regulation on Cooperation between Courts of Member States in the Taking of Evidence in Civil or Commercial Matters, Council Regulation (EC) No 1206/2001 art 4.

Since 2004, in the gold miners' silicosis litigation against Anglo American South Africa Ltd in the South African High Court (see the Appendix), Leigh Day has been working in conjunction with the South African Legal Resources Centre (which represents the claimants) and South African advocates and experts who are receiving funding from Legal Aid South Africa. This collaborative arrangement, which presents significant logistical and resource challenges, may provide a model for similar action, in some instances, in South Africa or the courts of other developing countries.¹⁰⁷

V. PROCEDURAL AND COMMERCIAL FACTORS OVER SUBSTANCE

Experience of MNC litigation indicates that procedural issues and factors, which may only be peripherally related to the merits of the cases, often dominate the litigation. The *Lubbe* case was litigated up and down the UK court system for four years on the procedural issue of *forum non conveniens*, including two rulings from the House of Lords and three in the Court of Appeal. Reasons given by Cape Plc as to why the case should be heard in South Africa rather than England included the need to re-create the environmental conditions of an asbestos mine. Yet within a year of losing the hugely costly jurisdiction battle, Cape Plc announced that it had run out of money and wanted to settle for a paltry sum.¹⁰⁸ The *Lubbe*, *Connelly* and *Thor Chemicals* cases would all have collapsed if the *forum non conveniens* applications had been upheld.

The second *Thor Chemicals* case further illustrates this point. This case was settled following an English Court of Appeal ruling relating to the claimants' application for a declaration under Section 423 of the Insolvency Act that a transfer of assets, which had left the *Thor Chemicals* defendant with virtually no money, was unlawful on the grounds that the 'predominant purpose' of the transfer was to defraud the claimants.¹⁰⁹

In 2002, injunction proceedings were brought in the Johannesburg High Court against a mining parent company, Gencor, under legislation that precludes a company from making payments to shareholders when doing so would render the company unable to meet its debts.¹¹⁰ Gencor, whose subsidiaries had operated asbestos mines, had announced an intention to unbundle its assets and distribute the proceeds as dividends to its shareholders without making any provision for compensating the asbestos victims. The *Lubbe* claimants

¹⁰⁷ R Meeran, 'Open Letter to the Special Representative of the UN Secretary-General on Business and Human Rights: The Genesis and Development of MNC litigation in South Africa and a Possible Model for the Future' (16 January 2009) <<http://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Open-Letter-to-SRSG-16-1-09.pdf?ext=.pdf>> accessed 14 December 2011. See also 'SRSG's Statements on Open Letter from Mr Richard Meeran' (19 January 2009) <<http://www.reports-and-materials.org/Ruggie-statement-on-Meeran-letter-19-Jan-2009.pdf>> accessed 8 August 2011.

¹⁰⁸ R Meeran, 'Cape Pays the Price as Justice Prevails', *The Times* (London 15 January 2002) 5.

¹⁰⁹ *Sithole* (n 16).

¹¹⁰ Companies Act 1973 (South Africa) s 90.

– many of whom had also worked at Gencor operations – intervened in the injunction proceedings.¹¹¹ Within a matter of months, Gencor agreed to establish a substantial settlement scheme¹¹² and also to pay a significant sum to the *Lubbe* claimants.

In October 2009, the *Monterrico* claimants succeeded in obtaining from the English High Court a worldwide freezing injunction over £5 million of the company's assets.¹¹³ After *Monterrico* relocated its corporate headquarters to Hong Kong and announced an intention to de-list from the UK AIM Stock Exchange, an ancillary freezing injunction in aid of the UK injunction was also obtained in the High Court of Hong Kong.¹¹⁴ Obtaining the injunction was crucial for the claimants, who might otherwise have later found themselves in a position of winning at trial without any assets over which to enforce the judgment. Obtaining such injunctions has the potential to produce an early settlement (though as it turned out in the *Monterrico* case, the litigation continued for a further eighteen months before settlement).

The key factual issue in determining whether Anvil Mining should bear any liability for the human rights violations perpetrated against Congolese villagers by the military was the circumstances in which the company provided 'logistical support' to the military in its operation. Anvil stated that its trucks and chartered planes were requisitioned under the orders of the Congolese government. In 2008, pre-action proceedings for discovery of documents (meant to provide a speedy and cost-effective method for a prospective claimant to evaluate whether or not she has a claim worth pursuing) that could shed light on this issue were commenced in the Supreme Court of Western Australia by 61 victims.¹¹⁵ The company responded with a subpoena for the production of claimant documents, which Anvil said was required in order to assess whether the claimants' lawyers should provide security for costs. Anvil's contention, with which the court agreed, was that subject to legal privilege the documents needed to be disclosed and the issue of security for costs determined before the merits of the claimants' pre-action discovery application (which Anvil said it would contest) could be considered. These preliminary issues had the potential to develop into major litigation in their own right. As it happened however, the application came to an abrupt end when agents of the claimants' lawyers were prevented by the Congolese authorities from travelling to obtain instructions from the claimants and the Congolese lawyers assisting the claimants received anonymous death threats.

A barrage of procedural hearings in the *OK Tedi* litigation, designed to knock the case out, also illustrates the point. These included unsuccessful applications for security for costs against the plaintiffs, to have the plaintiffs' solicitors punished for contempt of court

¹¹¹ 'UK Law Firm Adds a New Twist in South Africa Asbestos Case' *Financial Times* (London 29 September 2002).

¹¹² The Asbestos Relief Trust, 'Home Page' <<http://www.asbestostrust.co.za>> accessed 8 August 2011.

¹¹³ *Guerrero* (n 20).

¹¹⁴ *Guerrero & Ors v Monterrico Metals Plc* HCMP 1736/2009.

¹¹⁵ Rules of the Supreme Court 1971 (Western Australia) Ordinance r 4. The author acted for the Anvil victims for part of these pre-action proceedings.

after speaking out about the case and to question the validity of the retainer agreement between the plaintiffs and their solicitors. BHP also attempted to halt the case on the basis of the ‘Mozambique rule’¹¹⁶ on the grounds that the Victorian Supreme Court could not determine issues relating to land situated in another jurisdiction.

These examples illustrate how, in practice, legal procedures and strategies impacting on the commercial needs of the MNC are frequently more influential than the strict merits of the case on the outcome of litigation.

VI. CONCLUSION

Tort litigation provides a practically valuable route to achieving the key objectives of MNCs’ accountability for human rights violations in developing countries. The notion of a parent company’s ‘duty of care’ has gained increasing recognition, notwithstanding the ‘corporate veil’ obstacle and the absence of any final legal determination on the point.

There is no reason in principle why, like any other legal entity or person, a parent company which is responsible for, or in control of, specific functions at overseas subsidiary operations should not be liable for damage arising from those functions or deficiencies in them. After all, an outside contractor which was engaged by an MNC’s subsidiary to undertake, or supervise, a hazardous task would be considered to owe a duty of care to those who could foreseeably be damaged by the task. It would seem illogical that an MNC parent company, which undertakes or controls such a task, should be able to avoid liability by virtue of the fact of its shareholding in the subsidiary.

Where, for example as in the *Thor Chemicals* case, a parent company designs a hazardous process, the legal position of the parent, towards workers at the operation, would seem to be analogous to that of manufacturers of products, who are universally regarded as owing a duty of care to consumers, notwithstanding the absence of any contractual relationship.¹¹⁷ The position under English Law has crystallised as a result of the judgement of the Court of Appeal in *Chandler*.

Cases can now proceed against home-domiciled MNC parent companies across the EU, without the obstruction of expensive and protracted *forum non conveniens* disputes. Class and group action procedures assist in enabling claims to be run by victims’ lawyers in a fairly cost-effective manner. Further, increasing global cooperation by victims’ lawyers — facilitated by the internet — gives rise to the possibility, albeit very challenging, of such cases being brought in the victims’ local courts, using the combined resources and skill of local and international lawyers. However, the financial disincentives of these cases to claimants’ lawyers are so great that very few lawyers have shown an inclination to run them. Proposed legal reforms in Europe will, if implemented, intensify this disincentive still further.

¹¹⁶ *British South Africa Co v Companhia de Mocambique* [1893] AC 602.

¹¹⁷ *Meeran* (n 29).

This approach of invoking tort law involves allegations of negligence rather than human rights violations, which could be regarded as diminishing the significance of the harm, but on the other hand has the advantages of simplicity and being potentially applicable to fundamental human rights violations as well as violations of socio-economic rights, whereas the ATS appears to be applicable only to the former.¹¹⁸

Academics and campaigners have expressed concern that the settlement of litigation enables deep-pocketed MNCs to avoid being held to account at trial and deprives the system of binding legal precedents. Negotiation and settlement are, however, integral to civil compensation claims and reflect the interests of both sides, especially when so much is at stake, in striking a balance between achieving their objectives and avoiding the risks of losing at trial. Nevertheless, it is clear that the substantial expense and reputational risks arising from litigation provide a potentially powerful deterrent against MNC wrongdoing. Moreover, despite settlement, the UK MNC claims provide a striking illustration of the progressive development of the law on MNC accountability over a period of last 17 years. The novel approach of basing a claim on alleged parent company (*Thor Chemicals* and *Connelly*) began to gain increasing recognition (*Cape*) culminating in a significant legal precedent (*Chandler*). The pressure to settle is often increased (intentionally) by procedural rulings that are only peripherally related to the merits of the cases.

¹¹⁸ *Sosa v Alvarez-Machain* 542 US 692 (2004).

Appendix: Examples of MNC Tort Cases

The author of this article has had care and conduct of the following cases:

THE THOR CHEMICALS CASE

This was the first recorded success in England in a case of this type. During the 1980s, Thor manufactured mercury-based chemicals in Margate, South East England. Health and safety conditions at the Margate factory came under considerable criticism over a prolonged period from the Health and Safety Executive due to elevated levels of mercury in the blood and urine of the workers. In 1986, the company terminated mercury-based processes in Margate and shifted its Margate mercury operations, ‘lock, stock and barrel’ — including key personnel and plant — to Cato Ridge, Natal, South Africa. Thor also imported to South Africa 3,500 tonnes of mercury-containing waste for ‘recycling’.

Witnesses alleged that in South Africa, rather than taking effective measures to reduce mercury levels in the working environment, Thor recruited individuals who queued at the factory gate for work each day, allowed them to work until their mercury levels reached the limit and then replaced them with new recruits.

In February 1992, mercury poisoning of South African workers came to light. Three workers (one following a three year coma)¹¹⁹ died and many others were poisoned to varying degrees. Thor admitted that the three most seriously affected workers had been poisoned by mercury but contended that this was due to an act of sabotage (a contention that was conclusively rejected by a leading mercury toxicologist).¹²⁰ Thor, however, denied that any other workers had been poisoned.

The following is an extract from the July 1992 Department of Manpower Inquiry (South Africa) into Thor, in which the Production Manager, Bill Smith, who was also in charge of health and safety in the South Africa factory (and who had been a truck driver in England with no health and safety training) explained his understanding of and approach to mercury burns to skin (a recognised route of mercury getting into the body):

Chairman: ‘What advice did you give to Mr Hittler [one of the workers] when he complained about his burn?’

Mr Smith: ‘I tried to say I couldn’t see any burn’

Chairman: ‘No, that’s not the question. The question is, he complained about a burn. He said that he was affected. What advice did you give to him? You may not have seen anything there, but what advice did you give him?’

¹¹⁹ ‘S African Workers Sue British Firm over Poisoning’ *The Guardian* (London 29 September 1994).

¹²⁰ See L Magos, ‘Three Cases of Methylmercury Intoxication which Eluded Correct Diagnosis’ (1998) 72 *Arch Toxicol* 701.

Mr Smith: ‘Possibly, I cannot remember really, but possibly let’s see what it’s like in the morning, because it would have — if he was burned, which he ended up as being burnt, he would have come — it would have come out in the night blistered.’

Chairman: ‘Sorry. Have you ever been burnt with mercury?’

Mr Smith: ‘Yes’

Chairman: ‘And what treatment was given to you when you were burnt?’

Mr Smith: ‘Well, I’ve had quite a bit of experience, and I treat myself.’

Chairman: ‘What treatment, Mr Smith?’

Mr Smith: ‘No treatment’

Chairman: ‘So the treatment you give yourself is basically no treatment at all?’

Mr Smith: ‘No treatment. I just kept it clean.’

Chairman: ‘Wash it, clean it and leave it?’

Mr Smith: ‘Well I don’t particularly wash it. I just keep a loose bandage and lint.’

Chairman: ‘Is that the recognised treatment for a mercury burn?’

Mr Smith: ‘I don’t know. That’s my treatment.’

The inquiry led to a criminal prosecution against Thor in the local (Pietermaritzburg) Magistrates’ Court for manslaughter and breaches of health and safety regulations. The case ended in a plea bargain by which Thor pleaded guilty to breaches of health and safety regulations and was fined the equivalent (at the time) of approximately £3,000.

Compensation claims against the parent company (Thor Chemical Holdings Ltd) and its Chairman (Cowley) were commenced in the English High Court on behalf of 20 workers. The claims alleged that the English parent company was liable because of its negligent design, transfer, set-up, operation, supervision and monitoring of an intrinsically hazardous process. Following a three day hearing in April 2005, Thor unsuccessfully applied to stay the action on the *forum non conveniens* grounds, as the judge concluded (primarily due to the Margate factory connection and evidence) that South Africa was not a ‘clearly more appropriate forum’. In October 2005, Thor’s appeal was struck out by the English Court of Appeal, Thor having been found to have acceded to the jurisdiction by filing a defence.¹²¹ In 1997, following a series of hearings concerning the acceptability of Thor’s disclosure of documents and an unsuccessful strike-out application by Thor, the claim was settled for £1.3 million in April 1997.¹²²

¹²¹ *Ngcobo* (n 14).

¹²² ‘Mercury Poisoning Victims win £1.3 million in Landmark Case’ *The Independent* (London 12 April 1997).

A further 21 claims were commenced by workers from the same factory. In July 1998, Thor's application to stay this second set of proceedings on the *forum non conveniens* grounds was dismissed. In January 1999, the Court of Appeal granted Thor permission to continue with its defence of the proceedings.¹²³

It then emerged from company documents filed in December 1999 that Thor's parent company, Thor Chemicals Holdings Ltd (the defendant), had undertaken a demerger which involved transfer of subsidiaries valued at £19.55 million to a newly formed company, Tato Holdings Limited (Tato). At the same time Thor Chemicals Holdings Ltd had been re-named 'Guernica Holdings Ltd'.¹²⁴ Two weeks before the start of the three-month trial, an application to the court was then made, on behalf of the claimants, for a declaration under Section 423 of the English Companies Act 1986 that the 'dominant purpose' of the demerger was to defraud creditors, such as the claimants, and it was thus void. Thor and its chairman disputed that this was the purpose, but the Court of Appeal held that in the absence of information to the contrary, the inference that the demerger of Thor was connected with the present claims was 'irresistible'.¹²⁵ The Court ordered Thor to pay £400,000 into court within seven days and to disclose documents concerning the demerger. The case was settled on the first day of trial in October 2000.

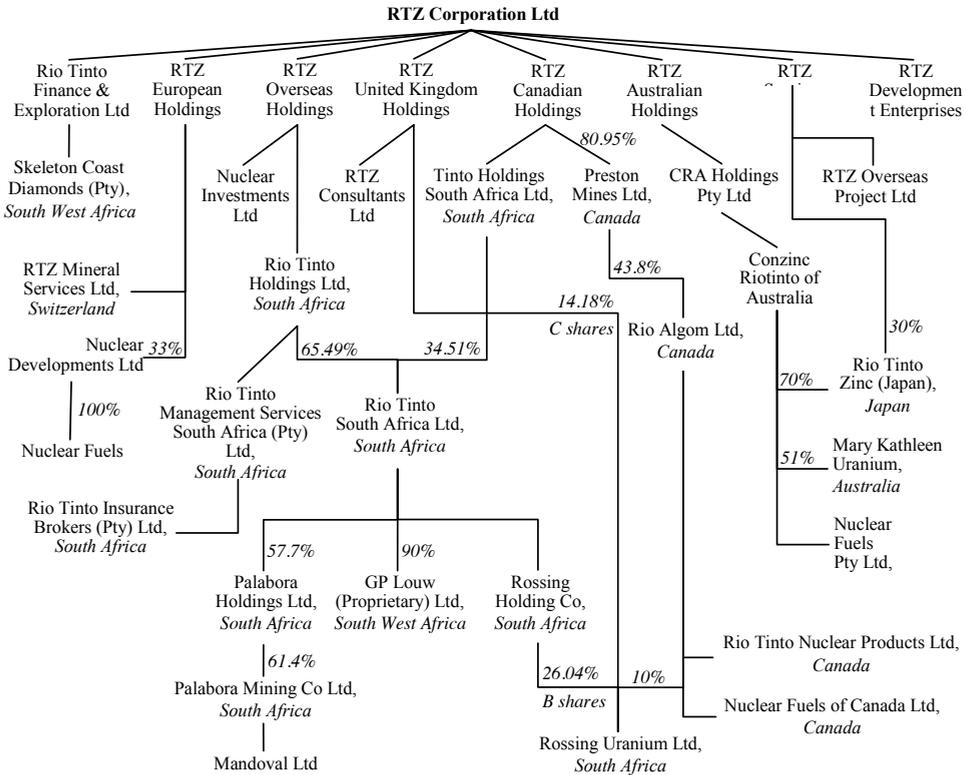
¹²³ *Sithole v Thor Chemicals Holdings Ltd* [1999] All ER (D) 102 (CA).

¹²⁴ According to Cowley, this was to symbolise the 'fascist attacks' made against the company. See Cowley, 'Thor Point' *Private Eye* (London October 2000).

¹²⁵ *Sithole* (n 123).

THE CONNELLY CASE

Figure 1: Partial corporate tree of RTZ Corporation Ltd as at 31 December 1977 (unless indicated otherwise, RTZ's interest is 100%)



In September 1994, a claim for compensation was brought in England by Edward Connelly, a Scottish laryngeal cancer victim who had been employed at Rio Tinto's Rossing uranium mine in Namibia. His case had been referred by the Legal Assistance Centre in Windhoek, Namibia.

Despite the corporate distance (see Figure 1) between the UK head office and the Namibian subsidiary operating the mine, it was alleged that key strategic technical and policy decisions relating to Rossing were taken by the UK-based RTZ companies. It was alleged that Rio Tinto had devised the mine's policy on health, safety and the environment and/or had advised the mine as to the contents of the policy. It was also alleged that an employee or employees of Rio Tinto had implemented the policy and supervised health, safety and/or environmental protection at the mine.

In February 1995, Rio Tinto succeeded, initially, in persuading the English High Court that Namibia was the 'clearly and distinctly more appropriate forum' for the case.

Thereafter, the argument focused on whether Mr Connelly's inability to obtain funding to bring a claim in Namibia, when in the UK such funding was available (in the form of legal aid or lawyers willing to act on a 'no win, no fee' basis) meant that the stay of proceedings should be refused, as otherwise justice would be denied. The case went to the Court of Appeal twice before reaching the House of Lords.

On the first occasion, in August 1995, the Court of Appeal held that, in determining whether Namibia was an 'available forum', Section 31 of the Legal Aid Act 1988 precluded the court from having regard to the fact that the plaintiff was unable to obtain funding to litigate in Namibia but had legal aid to litigate in England. Accordingly, Mr Connelly's appeal was dismissed.

Mr Connelly then applied to lift the stay on the grounds that the funding of his English action had switched to 'no win, no fee' conditional fee agreements — the UK variant of contingency fees — which were made lawful in August 1995. His application was rejected at first instance in October 1995. However, in May 1996 the Court of Appeal, referring specifically to Article 6 of the European Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights, allowed the appeal. Bingham MR (as he then was) stated that:

Faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate, in which there never could, in my judgment, and interests of justice tend to weigh, and weigh strongly in favour of that forum in which the plaintiff could assert his rights.¹²⁶

The House of Lords held, by a 4:1 majority, that Mr Connelly's inability, in practice, to litigate in Namibia meant that the case should be allowed to proceed in England. In the lead judgment, Lord Goff held that: 'The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available.'¹²⁷

The decision was greeted with dismay by the business community.¹²⁸ Subsequently, the Lord Chancellor (UK Minister of Justice) proposed legislation to reverse the effect of the House of Lords' ruling,¹²⁹ but the proposal did not appear to have found favour as it was not implemented.

Unfortunately, in December 1998, the English High Court struck out Mr Connelly's claim on limitation grounds, concluding essentially that the prejudice to Rio Tinto of

¹²⁶ *Connelly v RTZ Corporation Plc* [1996] 2 WLR 251.

¹²⁷ *Connelly* (HL) (n 13).

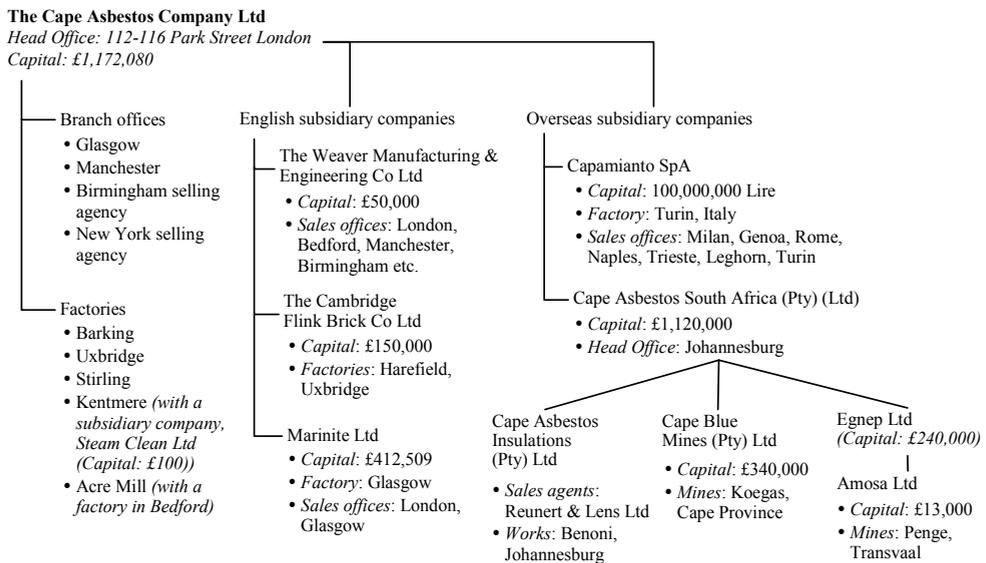
¹²⁸ 'RTZ Ruling Threatens other Multinationals' *Financial Times* (London 25 July 1997).

¹²⁹ 'Mining Firm tries to Change law to Block £100m Claims' *The Guardian* (London 19 March 1999).

allowing the claim to proceed (in terms of tracing witnesses and significant irrecoverable legal costs) outweighed the prejudice to Mr Connelly in being prevented from pursuing a claim that would be extremely difficult to prove (in particular the causative link between laryngeal cancer and uranium dust exposure).¹³⁰

THE CAPE PLC CASE

Figure 2: Corporate structure of The Cape Asbestos Co Ltd



This case was referred by the National Union of Mineworkers (UK & South Africa). Cape Plc (Cape), an English registered company, was formed in 1893 to acquire asbestos deposits in South Africa and a factory in Italy to produce asbestos-related products from the asbestos mine in South Africa. By 1913, Cape was undertaking crocidolite (blue asbestos) mining in the Northern Cape and had a manufacturing plant at Barking in London. The Northern Cape operations were conducted directly by Cape until 1948, and thereafter through Cape's wholly owned subsidiaries until 1979. In 1925, Cape acquired amosite (brown asbestos) mining operations in Limpopo (formerly Transvaal) province, which were operated through wholly-owned subsidiaries until 1979. Cape also operated manufacturing plants in Turin, Italy, from about 1911 to 1968, and in Benoni, Johannesburg, from about 1940 until about 1986.

Associated with the mines were mills involved in the crushing of the asbestos rock to expose and extract the asbestos fibres. A mill was situated in Prieska (Northern Cape), in

¹³⁰ Connelly (n 34).

the middle of the town next to the old Prieska School. The mill ceased operating in about 1964, but the environmental hazard it had created in the form of general contamination and asbestos dumps persisted. Cape sold its South African mining operations in 1979. In 1981, Gefco, a subsidiary of Gencor, a major South African mining company which was also involved in gold mining, purchased these operations. Up to 1979, Cape and Gefco were by far the largest asbestos producers in South Africa.

Asbestos that was mined and milled in South Africa was converted into asbestos products in the factories in South Africa, Italy and England, and then sold globally, particularly in the US. Throughout this chain of production, asbestos-related diseases occurred on a significant scale among numerous groups associated with its miners and millers, namely, workers involved in the transportation of asbestos to ports in South Africa; stevedores loading and unloading ships in South Africa and in the UK; workers utilising the products; and people living near mining, milling and manufacturing operations.

Asbestos production in South Africa was driven by demand generated in Europe and the US. Cape's technical department at the Barking factory designed asbestos products which it marketed worldwide, for example, through Cape's American subsidiary, the North American Asbestos Company. When the demand for asbestos grew, the mining increased. When the demand waned, primarily due to pressure from the US litigation and the US consumers concerned for their own well-being, rather than for the health of South African miners, the South African mining operations ceased. Therefore, far from being a discrete independent business, the Cape South African mining operations were part of an integrated worldwide business.

Asbestos regulations were introduced in the UK in 1931, and the fact that serious lung diseases could be caused by asbestos exposure was well known to the industry before 1930. Despite this, Cape actively and intensively lobbied to conceal the nature and extent of the health risks associated with asbestos exposure, in particular the risks associated with exposure to blue asbestos. This helped ensure the continuation of demand for asbestos from its South African operations. As a direct result, implementation of measures necessary to protect those working with asbestos, including the cessation of the defendant's South African operations, were delayed for many years. Cape closed down its UK factory in Barking in 1968 due to the level of asbestosis in the workforce but continued to operate in South Africa until the 1980s.

Conditions in the South Africa mines were bad and made widespread use of child labour. According to government doctor, Schepers, when he inspected the Penge mine (Limpopo province) in 1949:

Exposures were crude and unchecked. I saw young children completely included within large shipping bags, trampling down fluffy amosite asbestos which all day long came cascading down over their heads. They were kept stepping lively by a burly supervisor with a hefty whip. I believe these

children to have had the ultimate asbestos exposure. X-ray revealed several to have radiologic asbestosis with cor pulmonale before the age of 12.¹³¹

In the litigation that ensued in England in the 1990s, a category of claimants emerged, who had been employed as ‘chissa boys’. These unfortunate workers had the task of lighting the fuses after the engineers had planted the explosives. They had to run as fast as they could in order to avoid being blown apart.

A wealth of documentary evidence from government departments revealed high dust levels in the working and surrounding environments, with poor methods of exhaust ventilation and filtration systems in the absence of respiratory equipment. For instance, in Prieska, with the encouragement of Cape, asbestos tailings were used to gravel roads, to construct golf greens and sport fields, and to make bricks and roofing materials used to build houses. Cape’s Chief Medical Officer, Dr WJ Smither, in his 1962 report (obtained from a public source by the claimants’ lawyers) noted:

At Prieska, the conditions around and about the mill are not good. The crusher is out of doors. Fibre comes in on the windward side of the mill and is crushed in the open. We saw this opening on several occasions and it was obvious that quite a cloud of dust was being produced and being blown away by a fairly strong wind towards the town ... the mixer was raised from the floor of the general warehouse area and had a very dusty platform. Men were working below in a rain of dust.

Given the circumstances of Cape’s South African operations, any attempt to contest an allegation of negligence is likely to have been untenable. Due to the insolvency of Cape’s South African subsidiaries, the only realistic target for legal action was the parent company, Cape. In February 1997, compensation claims were commenced in the English High Court on behalf of three workers at the Penge mine and two Prieska claimants who had lived in the vicinity of Cape’s mill in that town. One of the claimants was the widow of a Prieska resident who had lived near the mill. The resident, his mother and brother had all died of mesothelioma. None of them had ever worked with asbestos. Multiple family deaths from mesothelioma were not uncommon in Prieska.

Claims were also lodged on behalf of four Italian workers employed at Cape’s Turin manufacturing operation. Like the South African operations, the Turin factory was operated by a wholly owned subsidiary of Cape, Capamianto. It too shared directors in common with the UK company. Predictably also, a number of the Italian workers had developed asbestos-related diseases, including mesothelioma. A criminal prosecution for manslaughter was initiated by the Turin State Prosecutor in 1993 against Capamianto and its managing director. The prosecution was, however, suspended when he was diagnosed with Alzheimer’s disease.

¹³¹ M Felix et al, ‘Three Minerals, Three Epidemics: Asbestos Mining and Disease in South Africa’ in MA Mehlman and A Upton (eds), *Advances in Modern Environmental Toxicology: The Identification and Control of Environmental and Occupational Diseases*, Vol 22, Part 1 (Princeton Scientific Publishing Co, Princeton 1994) 265.

Cape applied to stay the South African claims on the *forum non conveniens* grounds, contending that the cases ought to be tried in South Africa. In January 1998, following an eight-day hearing spread over six months, Cape's application was granted. However, on appeal in July 1998, the Court of Appeal reversed this decision.¹³²

In January 1999, two further actions comprising almost 2,000 claims were commenced in England against Cape by South African claimants exposed to asbestos in the same geographic regions of South Africa. Cape re-applied to stay the 2,000 claims on the *forum non conveniens* grounds, contending that the emergence of the group was a sufficiently material change to warrant a different conclusion from that of the Court of Appeal in the first five cases. Cape also sought a stay of the first five cases on the grounds that the Court of Appeal had been misled as to the true nature of the case. The Court granted a stay of all the actions, including the initial five claims, as it concluded that South African legal aid was likely to be available to the claimants to litigate in South Africa.

Subsequently, legal aid was withdrawn in South Africa for all damages claims. Nevertheless, in November 1999, the Court of Appeal dismissed the claimants' appeal, deciding that South African lawyers would undertake the case on a 'no win, no fee' basis. It also decided — on the basis of principles developed in US cases, in particular the *Bhopal* case¹³³ — that the 'public interest' of South Africans in hearing the case was greater than that of England. Although the vast majority of the claimants did not speak English and many could not read or write, the Court found that they would be able to gain access to the scientific, technical, and medical evidence necessary to pursue their case in South Africa.

The claimants appealed to the House of Lords, and the South African government was given permission to intervene on their behalf in relation to the issue of public interest. Among other things, its written representations to the Court stated:

The South African legal system, as with all South African public services, is under very great financial and administrative pressure, in seeking to right the wrongs of the apartheid regime, to pay its debts, to build the new South Africa. Under the old regime, the majority of South African people did not (in financial or geographical terms) have access to law or lawyers. The new South African Government has embarked on a proactive programme to establish courts in the countryside, particularly in the former black homelands where justice has been seriously neglected, and where people may have to travel over 1,000km to the nearest High Court. These services are regarded as high priority, but many have had to be on hold for lack of funds. The current budget of R2,117 billion (£202 million) which is allocated to the Department of Justice is not sufficient to meet the Republic's goals and programs for access to justice. The South African legal aid scheme for claims sounding in damages was abolished in 1999.

¹³² *Lubbe* (CA) (n 17).

¹³³ *In re Union Carbide* (n 11).

The allegations against Cape did not take place in a legitimate legal system, and the new South African government cannot afford to determine every wrong of the old regime through its judicial system. The discriminatory health and safety laws, which left South African workers unprotected, or significantly underrepresented against known risks as a matter of South African law, were against the common law of humanity. They should have no part to play in determining the scope of the negligence liability of a foreign multinational which operated under those laws.

In July 2000, in a landmark decision in favour of the claimants, all five Law Lords held that the case should be allowed to continue in the English High Court.¹³⁴ Applying the principle it had developed exactly three years earlier in *Connelly*,¹³⁵ the House of Lords held that a case of such magnitude required expert legal representation and experts on technical and medical issues, none of which could be funded in South Africa.

Further claimants joined the case, so that by August 2001, about 7,500 were registered in the group. Notably, 6 per cent of this group had worked on the asbestos mines when they were under the age of seven years.

It had been anticipated that Cape, having failed in its bid to halt the claims in the English courts, would wish to negotiate a settlement. However, the litigation continued with a series of hearings in which the argument revolved not around where the case should be heard, but how and in what form it should be heard. From the claimants' side, it was contended that the only real issue to be resolved was the question of the legal liability of Cape as the parent company. Cape, however, claimed that it wished to contest all issues, including negligence and the medical condition of the claimants. The subsequent developments in the case were largely unconnected with the merits.

In March 1999, it emerged that Cape had instructed political lobbyists on the case and that these lobbyists had advised on a media campaign to discredit the UK Lord Chancellor over the granting of UK legal aid to black South African workers and to label the claimants' lawyers, Leigh Day & Co, as 'ambulance chasers'.¹³⁶

¹³⁴ *Lubbe* (HL) (n 17)

¹³⁵ *Connelly* (n 13).

¹³⁶ A motion tabled in the House of Commons read:

That this House condemns the activities of Cape plc, a UK-based multinational company which engaged lobbyists, GJW Government Relations Ltd and Media Strategy Ltd, to derail claims brought against Cape plc in England on behalf of hundreds of fatally and seriously injured South African asbestos miners; notes that the lobbyists' written media political and communication audit reports for Cape plc in January 1999 recommended action on behalf of Cape plc, to launch a campaign targeted at the ambulance chasing activities of Leigh Day, the claimants' lawyers, and to encourage the Daily Mail to embarrass the Lord Chancellor by making him have to 'choose between black workers and multinationals (such that) the detail of the claims are likely to be of secondary interest'; and further notes that to achieve these objectives the lobbyists communicated with a variety of senior government sources including the Lord Chancellor's advisers, Gary Hart and Victor Benjamin, advisers to the Minister of State, officials at the Foreign and Commonwealth Office, Department of Trade and Industry, HM Treasury and Lord Falconer of the Cabinet Office on the grounds that he has a very close relationship with both the Prime Minister and the Lord Chancellor.

K Livingstone, 'Early Day Motion 449: Cape Plc' (House of Commons, 18 March 1999) <<http://www.parliament.uk/edm/1998-99/449>> accessed 14 December 2011.

However Cape announced in October 2001 that it was in financial difficulty and that the claimants were in a 'lose-lose' situation. If they continued with the case to trial and lost, Cape would be 'in the clear', but if they fought the case to trial, Cape would exhaust its remaining assets on defending the case to trial.

Negotiations occurred between the claimants and one of Cape's shareholders, Montpellier Limited. In December 2001, terms of settlement were reached which provided for payment of a total of £21 million through a trust to be established in South Africa. The settlement terms represented a pragmatic solution to the financial reality of Cape's position, rather than reflecting any relation to the true value of the case. The tariffs were to vary for different categories of disease, with mesothelioma/asbestos-related lung attracting the highest awards of £5,250.

Although the evidence justified the claimants' confidence of winning the trial that had been set for April 2001, Cape's financial position was such that it would probably have gone into liquidation if it lost. During the litigation, its share value plummeted from £1.50 to £0.11. Had Cape suffered this fate, the only achievement of a court victory might have been to set a precedent for claims against MNCs. Victims would receive only what was available on break-up of the company. Hundreds of claimants had also died during the litigation.

So there was a serious risk that a court judgment would not have translated into real money. The challenge was thus to negotiate the best possible settlement based on what Cape could afford. The claimants' position was that they would rather have taken the case to trial and run the risk of recovering nothing, than accept a derisory amount and see Cape carrying on in business. There was to be no repetition of the Union Carbide debacle, which left thousands of Indian victims of the Bhopal chemical explosion uncompensated while the American multinational continued to flourish.

How much Cape could afford (or rather was prepared to borrow) was a nebulous concept, being a function of the company's contrasting perspective: a successful defence was the ideal outcome, whereas defeat would mean the end of business. Commercially, settlement was the sensible course, provided that it reflected Cape's assessment of the merits of its defence and enabled it to continue to do business and recover its value. The latter depended on whether finality could be achieved, otherwise the settlement would simply be followed by waves of further claims, which would force Cape out of business. This was why Cape stipulated that the settlement encompassed all potential claimants in the form of a settlement trust. However, a balance had to be struck: by applying to the trust for compensation, a sufferer would forfeit the right to take court action. If sufferers were to be encouraged to use the trust rather than to litigate, payments would need to be sufficiently high.

The December 2001 settlement was generally hailed as a victory,¹³⁷ but certain of its terms were unpalatable, for example, the condition that the South African government should waive any future claims against Cape in respect of environmental liabilities¹³⁸ (although ultimately, since this settlement collapsed, the waiver was ineffective).

Substantial work was done (on a *pro bono* basis) to establish the trust machinery and to process the claims of the 7,500 victims in accordance with the settlement. An eminent group of trustees was appointed. Until August 2002, all the indications from Cape were that it fully expected to honour the settlement. It emerged in August, however, that Cape had encountered financial problems and that their bankers were not agreeable to the release of the set amount of money.

Consequently, in September 2002 the litigation recommenced — a blow to the claimants who at that point had expected to begin recovering their compensation payments. Due to Cape's precarious financial position, permission was also sought and obtained to join Gencor as a co-defendant to the English proceedings. Gencor's subsidiary, Gefco, had been a major asbestos producer in South Africa from about the same time as Cape and had bought the Cape subsidiaries in 1981. Many of the Cape claimants had also worked at Gencor-owned operations. However, the action against Gencor was struck out due to the absence of any connection with England.

In 2002, injunction proceedings were brought in the Johannesburg High Court against Gencor by another group of asbestos victims under legislation that precludes a company from making payments to shareholders when doing so would render the company unable to meet its debts.¹³⁹ Gencor, whose subsidiaries had operated asbestos mines, had announced an intention to unbundle its assets and distribute the proceeds as dividends to its shareholders without making any provision for compensating the asbestos victims. The *Lubbe* claimants — many of whom had also worked at Gencor operations — intervened in the injunction proceedings.

¹³⁷ See, for instance, the following motion tabled in the House of Commons:

That this House welcomes the agreement, by Cape plc, a British company who mined asbestos in South Africa for several decades, to pay £21 million in compensation to South African asbestos victims; congratulates the 7,500 claimants, the communities of Northern Cape and Northern Province and the National Union of Mineworkers in South Africa, as well as national and regional political leaders in South Africa for the perseverance and dignity of their long struggle for justice; commends the actions of those in the United Kingdom who have worked tirelessly to support the claimants, including the lawyers of Leigh, Day and Co and John Pickering and Partners, and the staff and activists of pressure group Action for Southern Africa, as well as many trade union members in the United Kingdom; believes that this settlement represents a contribution to the ongoing process of truth and reconciliation in South Africa, particularly through the recognition of the role of United Kingdom based businesses in the injustices of the past; notes with concern that many multinational companies continue to neglect the health and safety of their workers; and welcomes the signals given by this case that the British public now demands concrete action to back up the warm words of corporate social responsibility.

K McNamara, 'Early Day Motion 661: Victory for South African Asbestos Claimants' (House of Commons, 15 January 2002) <<http://www.parliament.uk/edm/2001-02/661>> accessed 14 December 2011.

¹³⁸ M Lekorotsoana, 'Government Should Not Accept the Cape Plc Settlement Deal' (National Union of Mine Workers Press Statement issued in Johannesburg, South Africa, 13 February 2002).

¹³⁹ Companies Act 1973 (South Africa) s 90.

On March 2003, two settlement agreements were signed on behalf of the *Cape* claimants:

- a new settlement with Cape for the 7,500 claimants with a one-off payment of £7.5 million by Cape; and
- a settlement between the 7,500 claimants and Gencor for approximately £3 million. All settlements were contingent on Gencor's completing its unbundling, the deadline for which was set at 30 June 2003. In fact, Gencor did unbundle on 18 June 2003.

Whilst the *Cape* settlement undoubtedly constituted a powerful deterrent against human rights violations by MNCs, subsequent research indicated that the litigation experience, at least for one of the more isolated communities involved in the case, had not been empowering.¹⁴⁰ No doubt this sentiment was partly due to the amounts of money paid to each claimant, which reflected the overall value of the settlement and Cape's parlous financial position.

¹⁴⁰ L Waldman, 'When Social Movements Bypass the Poor: Asbestos Pollution, International Litigation and Griqua Cultural Identity' (2007) 33 *Journal of Southern African Studies* 577.

SILICOSIS CLAIMS OF SOUTH AFRICAN GOLD MINERS AGAINST ANGLO AMERICAN

Background

A series of published scientific studies over the past decade have shown black South African former gold miners to be suffering from consistently high rates of silicosis and tuberculosis (TB).¹⁴¹ In an industry which employs hundreds of thousands of miners, experts estimate that there are tens of thousands of victims of these diseases. Those worst affected are miners in the former 'bantustans' and neighbouring states from where migrant labour for the mines was drawn during apartheid. The cause of this epidemic is unprotected exposure of miners to excessive dust. Black miners undertook the dustiest jobs and were at greatest risk.

That excessive dust exposure in gold mines had caused silicosis and TB in gold miners was well understood by the mining industry for well over a century, as were the methods required to protect miners from dust. It would appear (at least during the apartheid era) that the industry's hunger for profit combined with totally incompetent oversight of dust control by the South Africa's Department of Minerals and Energy meant that miners' health was sacrificed. Also important here was the absence of any realistic mechanism by which impoverished miners could obtain legal redress and hold the industry to account legally.

Miners' risk of contracting silicosis and TB as a result of their dust inhalation does not end when they leave employment on the mines, but continues for the remainder of their lives. For those living in rural areas where TB is endemic and where medical facilities have been rudimentary or non-existent, TB has frequently not been diagnosed or treated until serious permanent lung damage has occurred (or worse). Miners returning from the mines with TB, and susceptible miners who contract TB, may then infect members of their families and communities. One eminent occupational South African medical specialist has publicly described the situation as a 'river of disease flowing out of South African mines'.¹⁴²

The extent of the disregard for miners' health was graphically illuminated in the evidence given to, and in the report of, the Leon Commission in 1994. This led to more stringent health and safety legislation. In 2002, the South African government and the mining industry signed a Silicosis Elimination Program, the goal of which is said to be the elimination of further cases of silicosis by 2013.

¹⁴¹ BV Girdler-Brown et al, 'The Burden of Silicosis, Pulmonary Tuberculosis and COPD among Former Basotho Goldminers' (2008) 51 *American Journal of Industrial Medicine* 640; TW Steen et al, 'Prevalence of Occupational Lung Disease among Botswana Men Formerly Employed in the South African Mining Industry' (1997) 54 *Occupational and Environmental Medicine* 19; AS Trapido et al, 'Prevalence of Occupational Lung Disease in a Random Sample of Former Mineworkers, Libode District, Eastern Cape Province, South Africa' (1998) 34 *American Journal of Industrial Medicine* 305.

¹⁴² 'Dust in Goldmines Gave Thousands Lung Disease, Says Lawyer' *The Guardian* (London 18 November 2009) 17.

Regarding the former miners' on-going risk of silicosis and TB, the mining industry has been well aware of the problem for decades but still appears to be taking the view that they are no longer responsible once the miners have left employment (even though these on-going health risks are directly attributable to the excessive dust exposure on the mines). The statutory compensation system (administered by the Compensation Commissioner), on which sick miners who are unable to work rely, is seriously flawed. It does not compensate for pain and suffering. It is also inaccessible to many miners, for example, those in the Eastern Cape, and totally inaccessible to miners living in Lesotho. The result is that a substantial proportion of the victims are left uncompensated.

*Litigation in South Africa*¹⁴³

This case was referred by a South African victims' support group following the *Cape* settlement. A series of individual cases against Anglo American South Africa Ltd (AASA) for former Free State gold miners and their families, who contracted silicosis and silico-tuberculosis, have been on-going in the Johannesburg High Court since August 2004. Fifteen of these cases have been set down for trial. All the plaintiffs were employed at AASA's President Steyn mine in the Free State prior to 1998 when AASA's role ended.

Although Anglo American is now headquartered in London, the defendant is AASA, the former parent company of the Anglo group.¹⁴⁴ This parent company was the technical adviser and consulting engineer to the whole group. It is alleged that it negligently (a) controlled and (b) advised its operating mining companies, in particular on matters concerning the nature and role of silicosis, dust exposure and medical surveillance of underground miners.

*UK litigation*¹⁴⁵

The litigation by South African silicosis victims against AASA¹⁴⁶ was commenced in the English High Court in September 2011 and covers eleven mines that were within the AASA group prior to 1998. The claimants contend that the 'central administration' and/or 'principal place of business' of the defendant is in London (where AASA's parent company, Anglo American Plc is based) and accordingly, by virtue of Article 60 of the Brussels I Regulation, that AASA is domiciled in the UK. AASA has indicated that it intends to challenge the UK jurisdiction.¹⁴⁷

¹⁴³ *Hempe & Ors v AASA* South Gauteng High Court, Johannesburg Case No 18273/04. The author (on behalf of Leigh Day & Co) is a consultant to the South African Legal Resources Centre which represents the plaintiffs. AASA is represented by Webber Wentzel.

¹⁴⁴ More specifically, AASA is a South African-registered company which is now a wholly-owned subsidiary of Anglo American PLC, a London based company that was established in 1999.

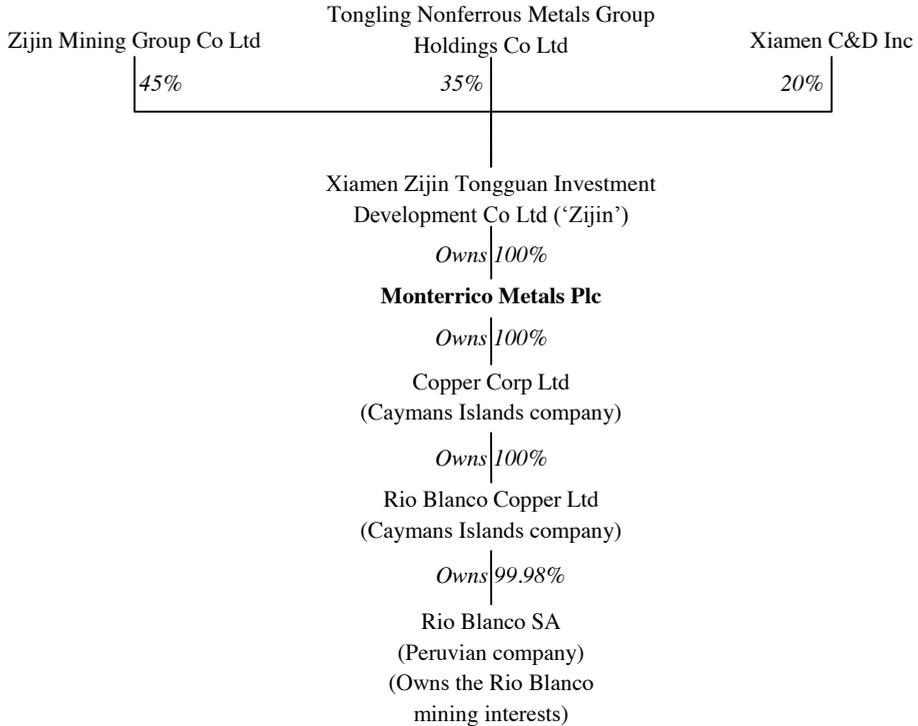
¹⁴⁵ *Vava & Ors v Anglo American South Africa Ltd* Claim No. HQ11X03245.

¹⁴⁶ *Vava & Ors v Anglo American South Africa Ltd* Claim No. HQ11X0324.

¹⁴⁷ It is not contended that Anglo American Plc (which only became the parent company in 1999) has any liability for these silicosis claims.

THE *MONTEERRICO* CASE

Figure 3: Ownership of *Monterrico Metals Plc*



In June 2009, proceedings were commenced against *Monterrico Metals Plc* in the English High Court on behalf of 33 indigenous Peruvians who have allegedly been tortured and mistreated at *Monterrico’s* Rio Blanco mine in August 2005 following an environmental protest. The claimants alleged, in essence, that *Monterrico* was complicit in the torture and mistreatment in the following ways: (i) the mine camp manager, calling the protesters terrorist members of ‘Shining Path’, incited the police to attack and mistreat them; (ii) some employees and the mine security contractor, *Forza* (now owned by *Securitas* (Sweden), participated in the mistreatment (including capturing, beating and taunting protesters, carrying police munitions, providing sacks and ropes to detain protesters); and (iii) the company failed to prevent the mistreatment that occurred over two to three days on the mine premises. *Monterrico* denied all these allegations.

Monterrico was incorporated in England and the Rio Blanco mine was its principal asset. Its founding director and chief operating officer (CEO) was also the general manager of *Rio Blanco Copper Ltd* (RBC) based in Peru. Witnesses claimed that the CEO regularly contacted the mine camp manager during the incident. The claimants alleged that *Monterrico* controlled the Peruvian operation and that RBC was, in effect, the same legal entity as *Monterrico*.

Contemporaneous photographs show protesters hooded, handcuffed and injured. The claimants alleged (and Monterrico denied) that they were beaten, abused, threatened (including with rape and death), two women were sexually abused, they were forced to eat rotten food and were detained on a wet platform for slaughtering animals. Five claimants were shot; one lost an eye. Medical experts confirmed that most of the claimants suffered from post-traumatic stress disorder, some very severely. The claimants were further criminally charged over the protest (and other unrelated matters) allegedly supported by the company.

The claimants alleged that the incident formed part of the company's strategy designed to suppress opposition including attacks organised by RBC on the peasant community and various other provocative and violent incidents organised by the company between January and April 2006 to intimidate opponents of the mine and justify establishing a police presence locally. Monterrico, however, denied all of these allegations.

Monterrico was subsequently purchased by the Xiamen Zijin Tongguan Investment Co Ltd (a Chinese consortium) in 2007, when it shifted its corporate headquarters from London to Hong Kong. Monterrico owns all the shares in Copper Corp Limited (Cayman Islands); Copper Corp Limited owns all the shares in RBC (Cayman Islands); RBC owns 99.98 per cent shares in Rio Blanco Copper SA (Peru), which owns the Rio Blanco mine (see Figure 3).

In May 2009, Monterrico announced its intention to de-list from the AIM UK stock exchange with effect from 3 June 2009. It is accepted that this was for genuine commercial reasons and that there was no intention to dispose of assets in relation to these claims, but there were concerns that the transfer of assets out of the UK might make the claimants' legal action here futile.

On 2 June 2009, an interim worldwide freezing injunction was granted to the claimants by the English High Court. This prohibited Monterrico from disposing of assets to an extent that would leave Monterrico with less than £7.2 million. The injunction application was made in the absence of Monterrico. A further hearing occurred on 8 or 9 July, with both parties present where Monterrico argued that there was no justification for freezing its assets as the claimants did not have an arguable case against Monterrico. Monterrico said it could not be held responsible for the conduct of the police and vigorously denied that its officers or employees had any involvement with the alleged abuses.

Hong Kong solicitors, Gall, were then instructed on behalf of the claimants. On 5 September, a freezing injunction was granted by the Hong Kong High Court over Monterrico's assets in Hong Kong. On 16 October 2009, Mrs Justice Gloster confirmed that the claimants had a 'good arguable case' against Monterrico and that company assets of £5 million should remain frozen.¹⁴⁸

The proceedings continued at quite a pace and the case was scheduled for a ten week trial commencing in October 2011. However, in July 2011 the proceedings were settled, on confidential terms, by a payment of compensation and legal costs, without admission of liability.

¹⁴⁸ *Guerrero* [2009] (n 22).