Multinational Enterprises and Environmental Degradation-- What Makes Multinational Enterprises Hard to be Held Accountable and Solutions

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Abstract. How to pursue legal accountability of multinational enterprises damaging the environment outside their home countries is an urgent problem pending to be solved, especially when environmental issues caused by them are becoming the primary driver of global environmental degradation. To circumvent their accountability to pay for what they have done to the environment and people living there, parent companies usually justify their innocence through the idea of independent accountability their subsidiaries legally have. This article will focus on reasons and difficulties in making parent companies directly responsible for environmental degradation caused by their subsidiaries and finally put forward theoretical and practical solutions that can be taken by home countries and internationally to regulate MNEs so as to surmount the problem. Through these efforts, not only will it be easier for environmental victims to seek justice in the foreseeable future, but the global environmental degradation caused by MNEs will be substantially prevented.

Keywords: Environmental Issues, Multinational Enterprises, Limited Liability.

1. Introduction

In December 1984, the world's worst chemical spill accident occurred. The city of Bhopal, located in the central region of India, saw an Indian subsidiary leak some thirty-two tons of methyl isocyanate gasses that were supposed to be used for the production of insecticides. The gasses proceeded to spread steadily across the city [1]. That caused severe personnel casualties in India; over 5200 people were known to be killed in this incident. Furthermore, the number of those survivors who went on being exposed to toxic gases would be more than 500000. Owned by the American parent company, Union Carbide, the Indian subsidiary was established in 1934 under Indian law. The Union Carbide holds 50.9 percent of the shares, while the Government of India holds about 22 percent of the shares, and the remaining shares belong to about 20,000 Indians [2]. It has made India and the whole international community take the environmental responsibility of multinational companies into consideration. It has also shed light on the enormous environmental risks that industrial pollution by multinational companies may bring to host countries. However, the Bhopal case is not an isolated incident. Thousands of other similar MNEs' environmental cases are happening all around the world, which do damage not only to those victims themselves but also to the entire human living environment. Moreover, such issues are predicted to become more prevalent in the future. Tons of other similar incidents would happen in the future killing thousands of other innocent people. Therefore, international law needs to be strengthened in order to regulate such behaviors.

Nevertheless, according to separate legal personality—the cornerstone of corporate law, the parent company and subsidiary are two separate legal persons. This default principle of corporate separateness makes holding the parent company liable considerably difficult. However, there still are ways to help the court to hold parent companies liable, among which the most widely applied one is veil piercing. Unfortunately, veil piercing has fallen out of favor with many courts and commentators, and the legal requirements for doing so have become increasingly strict [3]. Apart from that, many

obstacles remain in the way of victims seeking justice. Therefore, new approaches need to be adopted in order to achieve justice and hold the parent company liable despite all those difficulties.

In view of the current situation, this article examines theories and policy considerations governing the parent company. The article begins with a general introduction of the theories of the parent company's environmental responsibility for its subsidiaries, which illustrates the reasonableness of holding the parent company liable, and next introduces the legal practice of the parent company's environmental responsibility to its subsidiaries. Within this section, the article examines the currently existing legal approaches and their drawbacks. The third section is about the reasons for the present difficulties victims have when asking for compensation. The fourth section presents the feasible solutions to such problems, including the practice of theories making parent companies responsible for their subsidiaries' behaviors, home countries' responsibility and the solutions from an international perspective.

2. Reasons why MNEs should be responsible for environmental issues

Enterprises are reluctant to operate in an environmentally friendly manner consciously since most of them treat the cost of doing so, for example, introducing monitoring equipment and upgrading production technology, as a waste of money rather than a way to improve the efficiency of resources usage and the input-output ratio [4]. However, parent companies' ignorance of pollution made by their subsidiaries will bring external costs to local society [5]. If they do not take responsibility, the environment and people their subsidiaries have hurt cannot be restored and compensated. Besides, by regulating MNEs' excessive use of natural resources in pursuit of profits, the whole of humanity can be driven to deal jointly with global environmental problems such as climate warming through MNEs' influence in markets and supply chains.

3. Significance of the Parent Company's Responsibility for the Subsidiary Company of Multinational Enterprises

A subsidiary of a multinational corporation has its own name, by laws, and legal personality. However, due to the control of the parent company, it is difficult for subsidiary to obtain legal personality. Despite the fact that subsidiaries should operate independently, they are frequently controlled by the parent company for the benefit of the multinational. When competing and trading, subsidiaries should maximize their own interests, but sometimes they must accept bad conditions or prices. This demonstrates that many subsidiaries of multinational corporations no longer have their own economic position and interests, like traditional corporations, and hence cannot behave in accordance with their own needs and desires. This suggests that sometimes subsidiaries lack legal distinctiveness. However, when a subsidiary follows the parent company's directives and harms the environment, the subsidiary is typically held accountable while the parent company escapes punishment. People have considered this problem in light of well-known situations. Due to their distinctive perspective and profound relevance, these occurrences continue to be frequently studied today.

4. Present Dilemma

4.1. Circumventing accountability by subsidiaries' independent character

The opinion of separate legal personalities can usually be found linked with the idea of limited liability between parent companies and subsidiaries. Since most subsidiaries are set abroad under outside law, with the opinion of a separate legal personality, MNEs often asseverate their innocence once their subsidiaries damage the local environment by claiming that subsidiaries, as a foreign entity [6], own an independent personality and corresponding ability to self-responsibility [7]. In this way, even though subsidiaries do transfer their profits to their parent companies year by year, MNEs could

still avoid paying for environmental restoration cost and compensation to affected people through the reason that subsidiaries run and decide themselves. It would possibly lead to an end that only the subsidiaries assume the liability that their comparably few assets cannot afford.

4.2. Difficulty of the jurisdiction

4.2.1 The importance of jurisdiction in the environmental degradation of MNEs

The determination of jurisdiction is the premise of the choice of the application of law. Only when the application of law is selected can it be finally determined to identify the legal liabilities of the subjects. Therefore, the substantive purpose of ascertaining the jurisdiction is to determine the environmental responsibility [8].

4.2.2 Jurisdiction in environmental tort of multinational enterprises

From the perspective of jurisdiction over the parent company, if the victim goes to the place where the parent company is located to sue the parent company of the multinational enterprises, the home country has extremely strict requirements or whether to exercise jurisdiction. Generally, the home country will refuse to exercise jurisdiction over such environmental degradation cases for the benefit of its parent company. In many cases of environmental degradation by multinational enterprises, victims have tried to sue in the home country of multinational enterprises. The parent company hopes that the home country can exercise jurisdiction over the parent company. If it does not go to the home country to sue, it will only be in the host country. The probability that the host court can exercise jurisdiction over the parent company is almost zero. Although the victims have traveled thousands of miles to our home country to sue the parent company, in practice, they have almost all failed because of the parent company of a multinational enterprise. The position of the company in the home country is very important. For its own interests, the home country is generally unwilling to exercise jurisdiction over the parent company, but refuses to exercise jurisdiction on the principle of forum non conveniens [8]. Therefore, the establishment of jurisdiction in the environmental tort of multinational enterprises is extremely important, which is related to the interests of the victims. Only after the establishment of the jurisdiction can the application of the law be realized, and the final responsibility can be implemented.

By contrast, if the victim sues the multinational enterprises in the host country, the court of the host country will have jurisdiction over it according to the relevant jurisdiction principles. The jurisdiction is determined one day, which directly affects the following. In terms of the application of law, the court will generally apply the laws of the host country according to the place where the environmental degradation case occurred and the notified subsidiary, and finally, the victim can only accept the result that the compensation is disproportionate to the damage.

For the jurisdiction over subsidies, in the case of environmental tort by multinational enterprises, the victim and the place where the infringement takes place are usually in host countries. As subsidiaries are subjects with independent legal personalities, they have the capabilities to undertake legal liabilities alone. Therefore, there is no doubt that the jurisdiction of subsidiaries can be held by host countries. Nevertheless, most of the victims with the limited capacity of subsidiaries failed to get reasonable compensation in the litigation. In fact, the subsidiaries were not completely separated from the parent company and multitudinous subsidiaries were controlled by the parent company. Their operation modes and production behaviors are all subject to the command of the parent company. In this case, if the subsidiary follows the parent company's business strategy and conducts production and operation activities for the benefit of the parent company, when environmental tort occurs, only the subsidiary undertakes the liability for the tort. In order to protect the interests of the weak and achieve justice, there has been a breakthrough in the practice of "independent responsibility", such as "piercing the corporate veil" and kinds of relevant theories, such as "strict liability" and "overall liability of multinational enterprises" support that the parent company should be responsible for the debts of its subsidiaries under certain conditions [9].

5. Solutions

5.1. Corporate Veil Piercing Doctrine

The parent company may be held liable for the torts or responsibilities of its subsidiary if the subsidiary has become a "scapegoat" of the parent firm [10]. This is the narrowest standard, as the prior to the two entities being recognized as one for legal purposes [11], the plaintiff must often satisfy some criteria:

i. Control - not just stock ownership, but complete authority over the subsidiary's rules, operations, and goals.
ii. The control was abused by the parent through the subsidiary to commit fraud or wrongdoing, such as to dodge legal responsibilities or statutory requirements or to unjustly restrict the plaintiff's rights.
iii. The plaintiff suffered harm as a result of the fraud or wrongdoing [10].

Control is the key criterion in evaluating whether a parent business should take responsibility for its subsidiary because, in the absence of control, the parent corporation will be awarded limited liability protection. Courts analyze a number of factors when determining whether the parent corporation has exerted sufficient control, including:

i. The parent company owns all or the majority of the subsidiary's capital stock.
ii. Both the parent company and subsidiary company share directors and officers.
iii. The parent organization finances the subsidiary.
iv. The parent firm subscribes to all of the subsidiary's capital stock or establishes the subsidiary in some other way.
v. The capital of the subsidiary is grossly insufficient.
vi. The parent business covers the subsidiary's salaries and any additional expenses or losses.
vii. The subsidiary engages primarily in business with the parent company and has no assets other than those transferred by the parent company.
viii. In the documents of the parent company or in the declarations of its executives, the subsidiary is referred to as a department or division of the parent company, or its business or financial obligations are referred to as the parent company's.
ix. The parent business uses the subsidiary's assets as if they were its own.
x. The directors or executives of the subsidiary do not act independently in the subsidiary's best interest; rather, they adhere to the orders of the parent firm in its best interest and the formal legal obligations of the subsidiary are disregarded [10].

5.2. Group Liability

The theory of group liability means that the parent company of a multinational company should be responsible for all the debts of its subsidiaries owned or controlled by it, and that the parent company and subsidiaries should be held accountable as one enterprise entity. It regards the enterprises in different countries as a single entity, and believes that the close combination of multinational enterprises is enough to make the parent company of the multinational enterprises liable for the debts of its subsidiaries, and the damage caused by any part of the entity can be attributed to the entity as a whole. In fact, this theory replaces the concept of the corporate subject and advocates that if there is consistency in business operation, interests and ownership among multinational companies, these companies are essentially different departments of the same enterprise. They also believe that these companies exist in their own independent forms only to enable the enterprise as a whole to escape the possible debt liability, thus damaging the abuse of creditors and jeopardizing the realization of justice and fairness. Therefore, the court can ignore the independence of the legal subjects of each company and regard them as an enterprise entity or an economic unity to investigate the responsibility of the enterprise as a whole.

5.3. Corporate Veil Piercing Doctrine

Currently, in several areas where the idea of fairness is the key consideration (such as bankruptcy law), the Company Law perspective is also defined by its directness and thoroughness, and there is a trend to supplant the substantive law perspective. The so-called company law view states that organizations that are autonomous in the legal form are considered a single enterprise if they are economically interdependent. The viewpoint of substantive law refers to the notion that economically associated businesses are viewed as legally separate entities. The insolvency of multinational corporations does not consider the intimate economic relationships between each company but rather simply the legal idea. So long as the corporation is legally autonomous, it will be regarded in accordance with the general relationship between autonomous entities. The concept of substantive law emphasizes the presence of a company's form rather than its substance. It was observed that the subsidiary is legally distinct from the parent business, but the tight economic relationships between the entire firm group were not considered. It focuses on whether the subsidiary has a minimum capital, an independent bank account, and works through its own board of directors and shareholders' meeting, etc. According to the concept of substantive law, as long as the corporation maintains a semblance of independence, other issues, such as whether the parent company has subsidiaries, are irrelevant. Even telephone numbers and trademarks are meaningless, as are the number or all of the shares, whether the directors or managers of the subsidiary are identified, and whether the parent-subsidiary has a common director or manager. Under the supervision of the notion of substantive law, the reality of business operation has been overlooked, particularly the important variables that subsidiaries maximize the group's interests in accordance with the instructions of the parent firm.

With the fast growth of international corporations, the application of substantive law is becoming restricted, which is increasingly contradictory to economic reality. The close economic connection of multinational enterprises considered in the concept of enterprise law is not the fundamental basis for the application of enterprise law but rather a background element for the court to evaluate whether the internal transactions of multinational enterprises are detrimental to external creditors. When resolving legal obligations between the parent and subsidiary businesses of multinational enterprises, the notion of enterprise law does not inevitably and utterly undermine the independence of corporate identity. When an enterprise inside the group has just an investment link with the group, its economic relationship with the group is minimal, or the enterprise is not viewed as part of the enterprise group in the public's opinion, etc. Under these conditions, the necessity of applying business law is not very pressing. Simultaneously, the resolution of many bankruptcy cases has yielded results that differ from the substantive law, which is not directly the result of adopting the enterprise legislation but is based on the notion of lifting the corporate veil. Therefore, the principle of uncovering the corporate veil is, to some extent, a tool for applying enterprise law.

5.4. Direct Liability

The theory of direct liability is founded on the basic principle of shareholders' restricted liability. Due to the fact that the theory of total liability is excessively burdensome for the parent business and is prone to cause disadvantages, only emphasizes that the parent company is directly liable for the debts of its subsidiaries in exceptional circumstances. The idea of direct responsibility focuses on a complete consideration of issues such as the degree of control, means of control, and intent to control the subsidiaries by the parent business.

From current practice, there are two ways to make the parent company directly liable for the debts of its subsidiaries. The first is to use exceptions to the general principle of limited liability to uncover the company's veil and investigate the parent company's responsibility. And the second is to make direct provisions in the Company Law. In some instances, carelessness or negligence and strict liability may serve as the legal basis for determining the parent company's obligation.

When a parent firm must take direct responsibility for its subsidiary, it also has to exhibits certain behaviors.

5.5. Home Countries' Responsibility

5.5.1 Obligation on parent companies

To cope with the current absence of emergency response exposed when MNEs directly or indirectly caused environmental issues, legislation should require both MNEs' parent companies and subsidiaries to conduct compulsory due diligence, not just when they want to attract investment or check how their business runs. Reports obtained after due diligence can generally directly show parent companies the risks and adverse factors existing in the current operation of their subsidiaries, which makes them bear the responsibility of urging their subsidiaries to make corrections or prepare for an emergency. On this basis, if subsidiaries still cause environmental pollution because of acting wrongfully, victims can use the duty of care to ask parent companies for compensation. More importantly, MNEs actively monitor pollution risks and take measures to solve them through due diligence, which will help reduce the external costs taken by society.

5.5.2 Design a complete mechanism

First of all, claim centers should be built for victims to provide them with contact with relevant public welfare organizations, and guidance on how to use applications for legal aid to improve the convenience for them to seek legal remedies in their home countries [12]. In this regard, the Internet should be made good use of since it can largely reduce the cost of communication.

Secondly, before the trial, the scope of selecting the applicable law should be reduced, and the priority of domestic laws or laws that are better for victims' interest should be emphasized because most international treaties or host country laws provide MNEs with exceptions and exemptions, which will result in the destroyed environment and victims being unable to get remedies [13].

Besides, as victims are usually plaintiffs and in a weaker position than the defendants, namely MNEs, their burden of proof should be reduced to show their appeal is "no demonstratively untrue and unsupportable" at the beginning [13]. At the same time, the reverse onus should be added in the formal trial process so that MNEs bear the main responsibility of proving innocence to balance the substantive gap between plaintiffs and defendants in the burden of proof.

Lastly, appropriate expansion of courts' power to carry out their own investigation is necessary. The courts should be given the power to require the defendant and the third party relative to this case to disclose information compulsorily, such as the due diligence report made by the companies, the information obtained by the third-party investment institutions from their own investigations of the companies' business, and the content of email exchanged between the board of directors and the shareholders of parent companies and subsidiaries. This facilitates the judge to obtain more information to form a discretional evaluation of evidence, make an independent judgment, and avoid MNEs from using the burden of proof to provide biased evidence to avoid liability.

5.5.3 Enhance the information disclosure

As the most efficient tool in distributing resources, the market can only operate well when the information between market subjects is exchanged timely. Home countries can use perfect legal and litigation systems to help the destroyed environment and suffering people get remedies, but the most fundamental way to solve environmental problems is to promote MNEs' transformation.

The scope of MNEs' mandatory disclosure of information can certainly be expended by modifying the Company Law and other regulations, directly requiring MNEs to undertake the obligation of information disclosure. However, these methods often provide an exception clause for the company's confidential information, which may be used as an excuse by MNEs to escape the responsibility of disclosure. To handle the problem, governments can encourage relevant environmental protection and propaganda organizations to establish a mechanism to evaluate MNEs' pollution index. For example, the Corporate Information Transparency Index (CITI) model can be used to provide information about MNEs for consumers and investors [14], and thus force MNEs to automatically adopt a more environmentally friendly production mode through its impact on investors and the consumers' attitudes towards brands and companies.

5.6. International Responsibility

From an international law perspective, regulating MNEs' behaviors needs to be done through joint efforts made by international society, which is determined by the characteristic of MNEs. When it comes to the damage caused by subsidiaries in the host country, the home country mostly will not interfere with such a dispute because of their respect for the host country's sovereign rights and the principle of territorial jurisdiction, which means that the subsidiary's behaviors are mostly regulated by host country's law. However, in most cases, considering some practical factors, many host countries fail to regulate the subsidiaries either because of the subsidiaries' massive power or because their law is not complete enough to regulate such complex cases. Besides, sometimes it is home countries' tightening environmental protection regulations that make parent companies transfer highly polluting production by setting subsidiaries abroad, which makes it necessary for home countries to take responsibility for working together with host countries [15]. As a result, it is important to strengthen cooperation between countries in terms of the environment. More specifically, expanding the scope of trade and investment agreements with home countries of multinational corporations, developing provisions on environmental issues, and performing a stricter environmental regulatory system are all practical ways to minimize the potential adverse consequences of the doctrine of forum non conveniens.

6. Conclusion

At a time when global environmental problems are getting increasingly serious, MNEs can no longer be allowed to take advantage of loopholes in existing laws to make society cover the cost of removing pollution they have emitted. To substantially solve this problem, it is wise to make good use of the four major theories mentioned above to hold parent companies responsible for the pollution of their subsidiaries. Nonetheless, home countries should leverage their influence over the MNE parent company to compel compliance and also make judicial reforms that result in greater access by victims to pursue claims against MNEs, and multinational corporation in setting more strict trade and investment agreements is also necessary.

Compulsory compliance review can effectively urge MNEs to take the initiative to bear the costs of their own investigation and response to pollution incidents and thus prevent the costs from being externalized and taken by society. Otherwise, parent companies will be supposed that deliberately ignore the adverse factors and risks in the operation of their subsidiaries, which is very easy for the victims to use the duty of care theory to ask for compensation. Since most international treaties and host country laws cannot directly and effectively investigate the pollution liability of MNEs, their application in the trial of cases should be limited before a multinational trade and investment agreement more effective in preventing and handling environmental issues is launched, and instead, laws that can effectively investigate the pollution liability of MNEs should be applied. In addition, to facilitate and encourage victims to seek remedies and claim their rights, institutional help should also be provided to them before and during litigation and thus can fill the gap between their burden of proof and that of MNEs to pursue substantive justice. Finally, to solve the problem of MNEs transferring highly polluting production links abroad due to the tightening of domestic regulations and also to motivate the whole society to pay attention to the environmental problems in the production of MNEs, it is necessary for the government to cooperate with non-governmental public organizations to improve the publicity of the production information of MNEs. Although these measures cannot solve environmental problems immediately, it will be a meaningful step for all humanity to jointly solve global environmental problems by cultivating MNEs' enthusiasm for environmental protection.

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