Rethinking the (Limited) Responsibility of Multinational Enterprises

Régis Bismuth[*]

The widespread use of limited liability entities in corporate groups as well as the strict standards applied by courts for piercing the corporate veil have been two major obstacles to the emergence of a liability regime for multinational enterprises. In light of these difficulties, a "corporate social responsibility" (CSR) discipline of "responsibilisation" of parent companies has emerged through the recognition of a duty of care in relation to the activities of their subsidiaries. However, this discipline presents significant shortcomings which should lead us to critically question the regime of limited liability by highlighting that it was an accident of history that has led to an asymmetry between the circulation of rights and the fragmentation of liabilities throughout the corporate group. It is against this background that we propose a new way of solving the issue of corporate group responsibility.

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Juxtaposing the words "enterprises" and "responsibility" might cause some awkwardness. Legal responsibility requires the existence of a legal subject to which a wrongful act can be attributed. Multinational enterprises are not

[*] Professor of Law at Sciences Po Law School (Paris).

de plano legal subjects. It is indeed necessary to draw a distinction between, on one hand, an enterprise which actually takes decisions as an economic structure and, on the other hand, corporations into which the enterprise has been fragmented, which, formally take decisions as distinct legal entities. As underlined by Jean-Philippe Robé, an *enterprise*, as "a unique organization coordinated by a single management team exists in reality, although it does not exist as such in the legal system".[1] Without going as far as considering that the "responsibility of enterprises" is an oxymoron, it is possible to identify a kind of hiatus or discontinuity between these two notions through which a form of legal irresponsibility can take root.[2] It is indeed within this gap between form and substance that legal engineering to optimize the circulation of assets throughout the enterprise – generally composed of limited liability companies – while allowing for compartmentalization of liabilities has taken place. This potential for legal engineering is amplified in the case of multinational enterprises (MNEs) since the characteristics of different legal orders can be more easily exploited to optimize the circulation of rights and the segmentation of obligations.[3]

It is therefore necessary to comprehend lucidly the ways through which the legal organization of enterprises (mostly through parent companies and subsidiaries) constitutes an obstacle to imputing responsibility on multinationals. This paper studies situations where the liability for tortuous acts of the parent is sought for acts attributable to the subsidiaries located abroad. Imputing responsibility on the parent company may be sought for different motives: legal (greater confidence in the legal system of the State where the parent is located), financial (if the subsidiary is not solvent) or strategic (a claim lodged against the parent company could affect its reputation and facilitate an off-court settlement).

Disputes of this nature generally raise two key difficulties. The first, that will be at the centre of analysis, is related to the link between the parent and the behaviour of the subsidiary. The liability of the former can be incurred

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1 Jean-Philippe Robé, *Globalization and Constitutionalization of the World Power System*, *in* Multinationals and the Constitutionalization of the World Power System 14, (Jean-Philippe Robé, Antoine Lyon-Caen & Stéphane Vernac (eds.), Routledge, 2016); *see also*, Jean-Philippe Robé, Le temps du monde de l'entreprise – Globalisation et mutation du système juridique 90 (Dalloz, 2015).

2 Juliette Tricot, *Personne(s) morale(s) et personne(s) physique(s) : Comment renouveler l'approche personnaliste ? Réflexions à partir du droit pénal*, *in* La RSE Saisie Par le Droit – Perspectives Interne et Internationale 173, (Kathia Martin-Chenut & René de Quenaudon (eds.), Pedone, 2016).

3 Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 72 Washington and Lee Law Review 1769 (2015).

either by way of attribution of the contentious conduct (by lifting the corporate veil) or due to a failure to fulfil a duty of care concerning the activities of the subsidiary. The second arises from the obstacles to the jurisdiction of domestic courts of the host State of the parent company. Indeed, the claim usually concerns facts occurring abroad and involving a legal entity not having string ties with the forum. From an international law perspective, States enjoy a great flexibility since they neither oblige nor preclude them from exercising their jurisdiction in such situations. Besides, the Ruggie's "Guiding Principles on Business and Human Rights" adopted by the Human Rights Council simply indicate that "as part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy".[4] There is no such thing as an obligation for States to exercise extraterritorial jurisdiction for human rights abuses perpetrated abroad. The issue of jurisdiction has already been dealt with in many studies[5] and does not require to be further explored within the framework of this article. The root of the problem lies more in the characterization and conceptualization of the link between the parent company and its subsidiary. Our proposal is to develop a framework that would eventually solve all issues concerning the jurisdiction of domestic courts.

Limited liability and the problem associated with lifting the corporate veil constitute two major obstacles to affixing responsibility on multinational enterprises. A study of the litigation through which the (*ex post*) liability of the parent is sought for acts committed by the subsidiary shows that the criteria implemented for lifting the corporate veil are particularly restrictive (A). Given these difficulties, a new form of (*ex ante*) "responsabilisation" of parent companies has emerged and intends to promote corporate social responsibility (CSR). The emerging duty of care of parent companies concerning the activities of their subsidiaries also has some significant shortcomings (B). These obstacles and shortcomings should lead us to critically rethink the legal regime of limited liability. A short historical analysis shows that the emergence of limited liability is more an accident of history and has eventually generated imprudent and risky behaviour from corporations[6] as

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4 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Principle 25, A/HRC/17/31 (21 March, 2011).

5 For instance, see, Claire Bright, L'accès à la justice civile en cas de violations des droits de l'homme par des entreprises multinationals (2013) (Unpublished Ph.D. thesis, European University Institute) (on file with the author).

6 Paddy Ireland, *Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility*, 34 Cambridge Journal of Economics 837, 845 (2010) (noting that

well as an opportunity for them to better protect their rights and fragment their liabilities (C). Drawing on this, we propose a new way of conceiving enterprise responsibility (D).

I. The Fortress of Corporate Veil (Ex Post Responsibility)

Holding parent companies liable for acts committed by their subsidiaries can be envisaged first, through an approach where the acts of the subsidiaries are directly attributed to the parent. This possibility has been recognized only following very strict standards of attribution to the extent that it calls into question the principle of separate legal personality and *per extensionem* the rule of limited liability (when the liabilities of the subsidiary exceeds the amount of the original investment of the parent company). Two fundamental institutions of corporate law are thus at stake when the responsibility of the parent is envisaged, which explains the strict standards of attribution that have been implemented. We will limit ourselves to some general remarks, notwithstanding the fact that they do not reflect all the nuances and subtleties of the issue[7].

Different regimes of corporate veil piercing (or any other doctrine leading to an equivalent result in substance) are applicable depending on the domestic legal systems in place.[8] In France, we usually refer to the notions of "*abus de la personnalité morale*" ("abuse of legal personality") or of "*transparence de la personnalité morale*" ("transparency of legal personality"). In common law systems, notions of "instrumentality", "alter-ego", "agent", "dummy" or "cover" are used. One of the most emblematic cases of corporate veil piercing, where the acts of a subsidiary were attributed to the parent company is perhaps the *Amoco Cadiz* case in which a US federal court observed that the parent "exercised such control over its subsidiaries

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the no-obligation, no-responsibility, no-liability nature of corporate shares permits their owners or their institutional representatives to enjoy income rights without needing to worry about how the dividends are generated. They are not legally responsible for corporate malfeasance, and in the event of failure only their initial investments are at risk).

7 Jennifer A. Zerk, Multinationals and Corporate Social Responsibility – Limitations and Opportunities in International Law 215 (Cambridge University Press, 2006); Marguerite Kocher, Emmanuel Leroux & Pedro Nicoli, *Groupe d'entreprises* , *in* La RSE Saisie Par le Droit – Perspectives Interne et Internationale 151 (Kathia Martin-Chenut & René de Quenaudon (eds.), Pedone, 2016).

8 For a cross-cutting study, see Karen Vandekerckhove, Piercing the Corporate Veil 86 (Kluwer, 2007); Stephen M. Bainbridge & M. Todd Henderson, Limited Liability – A Legal and Economic Analysis 86 (Edward Elgar, 2016).

AIOC and Transport that those entities would be considered to be mere instrumentalities".[9]

Without having the intention to list exhaustively the criteria applied by domestic courts, it is important to note that the sole existence of constant intra-group relations is not sufficient to lift the corporate veil. It is necessary to gather evidence showing the absence of separation of business activities, continuous interferences in the business of the subsidiary, the existence of common executives and directors in the two entities, a chronic undercapitalization of the subsidiary due to a siphoning off of the profits of the subsidiary, etc. Legislative authorities have already adopted some special rules of attribution in order to facilitate corporate veil piercing in certain cases. For instance, Article L512-17 of the French environmental Code imposes on the parent, the duty to compensate environmental damages that cannot be covered by the subsidiary whenever it is established that a misconduct from the parent lead to the subsidiary's lack of assets.

In the field of European Union (EU) competition law, standards of attribution are less stringent and consecrate a genuine responsibility of corporate groups. Besides, it is important to note that EU disciplines regarding anti-competitive practices (Treaty on the Functioning of the EU, articles 101 and 102) apply to "undertakings" and it was thus, necessary for the Court of Justice of the EU to define this notion.[10] Such standards facilitate the work of the EU Commission when it comes to collecting fines from insolvent subsidiaries or imposing larger fines since they are based on the turnover of the whole corporate group.[11] Attributing the liability to the parent company neither requires to be proved that it played any role, active or passive, in the infringement nor that it had been made with its knowledge. It suffices to attest that the parent can exert decisive influence on the conduct of its subsidiary. Besides, the Court of Justice of the EU (CJEU) considers the fact that when 100% of the shares in a subsidiary are held by its parent, it generates a rebuttable presumption (but irrebuttable in practice) that the latter exerts decisive influence over the former.[12] It is also noteworthy to mention some arguments that have been raised by parent companies to attest the autonomous conduct of their subsidiaries. Some of them are indeed similar to those raised in transnational litigation targeting multinational corporations of human rights or environmental abuses. When the parent alleges

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[9] Oil Spill by the "Amoco Cadiz" off the Coast of France on March 10, 1978, In re, MDL docket no. 3, 76 ND III. 1984, American Maritime Cases, 2123-2199. See also, Vandekerckhove, *supra* note 8, at 85.

[10] Walter Frenz, Handbook of EU Competition Law 202 (Springer, 2016).

[11] EC Treaty arts. 81-82 (as in effect December, 2002) (now TFEU articles 101 and 102).

[12] Case C-97/08, *Akzo Nobel NV e.a. v. Commission*, 2009 E.C.J.

that it does not play any role in the commercial policy of the subsidiary, the European courts hold that in large corporate groups, "the division of tasks constitutes a common practice".[13] They have also noted that the implementation of a "philosophy of maximal delegation of functions to subsidiaries does not constitute an evidence likely to prove their autonomous conduct".[14]

Therefore, there exists a significant asymmetry between the loose conditions under which the corporate veil can be lifted in competition cases and the more stringent ones for other types of litigation. EU competition law also shows that there is no insurmountable obstacle (stemming for instance from corporate law principles) to implementing a different standard of attribution of the conduct of the subsidiary to the parent when it comes to human rights or environmental litigation – unless we consider that market competition is an overriding objective deserving special protection. Recent evolutions of corporate social responsibility have nonetheless shown that the more radical solutions implemented in EU competition law have not been a source of inspiration. It is within this framework that it is necessary to show that the current promotion of an *ex ante* "responsibilisation" of corporations through a "duty of care" owed by the parent company has important shortcomings.

II. The Mirages of the Emerging Duty of Care (Ex Ante "Responsabilisation")

The difficulties surrounding corporate veil piercing through an attribution of the acts of the subsidiaries to the parent have left gaps in holding multinationals accountable. It is for this reason that emerging disciplines of corporate social responsibility have focused on the obligations of the parent company – among which, its duty of care in relation to the activities of its subsidiaries.[15] This duty is based on the idea that the parent has an obligation to be interested in the activities of its subsidiaries regardless of whether they enjoy wide management autonomy. The rationale for the duty of care of the parent is both to prevent harmful conduct as well as to fix a point (the parent) to which responsibility may be assigned.

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[13] Arkema SA v. Commission, TEU, 30 September, 2009, T-168/05 80.

[14] Legris Industries SA v. Commission, TEU, 24 March 2011, T-376/06 53. (a "*philosophie de délégation maximale aux filiales ne constitue pas un élément de preuve susceptible de démontrer l'autonomie de ces dernières*").

[15] Nicolas Cuzacq, *Le devoir de vigilance des sociétés mères et des donneurs d'ordre*, *in* La RSE Saisie Par le Droit – Perspectives Interne et Internationale 453 (Kathia Martin-Chenut & René de Quenaudon (eds.), Pedone, 2016).

Before being enshrined in domestic legislation, the duty of care of parent companies had already been recognized in some precedents, such as in *Chandler v. Cape*. A claim was brought before British courts against the parent company following the contraction of asbestosis by an employee of a subsidiary. The issue at stake was not about piercing the corporate veil but rather to determine what the obligations of the parent company towards the employees of its subsidiaries was. In 2012, the Court of Appeal held that the parent company had a direct duty of care concerning the health and safety of such employees, but only under strict conditions: the parent company and its subsidiary had similar businesses and the parent company had superior knowledge of the risks involved by such activities (knew, or ought to have known) and it knew or ought to have foreseen that the subsidiary or its employees would eventually rely on using that superior knowledge. It is also noteworthy to mention that at the time of that litigation, the subsidiary entity had been dissolved, thereby implying a risk of denial of justice.[16]

While applied by domestic courts under stringent criteria, this "duty of care" has become, these past years, the new credo of CSR, being sometimes enshrined under a different label such as the "due diligence" obligation.[17] It has progressively – yet timidly – been incorporated in domestic statutes. It is the case of the UK Bribery Act of 2010 which introduced an obligation to develop "adequate procedures" of due diligence to prevent bribery.[18] The obligations of corporations (designated as "commercial organisations") are vaguely worded in this piece of legislation. Besides, the Act indicates that "the Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing".[19] It was eventually done in 2011.[20] A similar due diligence obligation has been incorporated in the recent French anti-bribery statute adopted in 2016 but implementation measures have not yet been adopted.[21]

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[16] Chandler v. Cape Plc., (2012) 1 WLR 3111 : 2012 EWCA Civ 525 at 80.

[17] Guiding Principles on Business and Human Rights (Implementing the United Nations "Protect, Respect and Remedy" Framework), Endorsed by the UN Human Rights Council in its resolution 17/4 of 16 June 2011, Principle No. 17 (noting that "in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence").

[18] Obligation stemming from Section 7 of the UK Bribery Act titled "failure of commercial organisations to prevent bribery".

[19] UK Bribery Act, Section 9(1).

[20] The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010), March 2011, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

[21] Loi 2016-1691 of 9 December 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.

On a much larger scale, the French Parliament adopted in March 2017 a new Statute – kept in limbo for a considerable time – implementing a general duty of care (*devoir de vigilance*) of companies with respect to the activities of their subsidiaries and suppliers.[22] This statute imposes on companies of a certain size an obligation to establish, publish and implement a "vigilance plan" which includes reasonable measures aimed at identifying and preventing serious breaches to human rights and adverse impacts on health and on the environment stemming from the activities that a company controls, directly or indirectly, through subsidiaries or suppliers with whom it has an established commercial relationship.[23] If the company fails to meet its obligations of vigilance, the statute provides that it will have to compensate for the harm which the proper fulfilment of its obligations would have avoided.[24] While the claimant would still have to prove a causal link between the fault of the company and the damage they have suffered, the new system aims at circumventing legal obstacles arising out the principle of separate legal personality and the stringent standards applicable to corporate veil piercing.

While some felt that the new statute would eventually affect the competitiveness of French corporations[25], it has some weaknesses that could potentially diminish its effectiveness. Of course, the implementation of the vigilance plan increases the accountability and awareness of corporations but such a plan could be designed so as to optimize the protection of the parent. It is important to note the considerable uncertainty surrounding some notions listed in the statute. It indicates that the "vigilance plan" must incorporate "risk mapping" (*cartographie des risques*), "assessment procedures" (*procedures d'évaluation*) of subsidiaries and suppliers, "risk mitigation" tools, and a "warning mechanism" (*mécanisme d'alerte*").[26] Implementation measures will probably clarify these requirements but this must not overshadow the fact that this new scheme will generate legal-managerial engineering, driven by audit and consulting firms, to conceive vigilance plans that would eventually shield the parent company from liability. The statute indeed specifies that it is a failure to comply with requirements relating to the vigilance plan that could eventually lead to an obligation to compensate the harm suffered. This is particularly blatant if we look at the

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[22] Loi 2017-399 of 27 March 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

[23] Code de commerce [C. com.] [Commercial Code] art. L225-102-4-I.

[24] Code de commerce [C. com.] [Commercial Code] art. L225-102-5-I.

[25] *See* for instance during the travaux préparatoires, Rapport fait au nom de la Commission mixte paritaire chargée de proposer un texte sur les dispositions restant en discussion de la proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, AN n° 4184, Sénat n° 99, 2 November 2016. See also, Nicolas Cuzacq, *supra* note 15, at 453.

[26] Code de commerce [C. com.] [Commercial Code] art. L225-102-4-I.

parliamentary discussion. An MP stressed that the statute has not implemented an "obligation of result" but rather a "best effort obligation". He also pointed out that "if an accident occurs, which could unfortunately happen, the corporation would have to prove that it took precautionary measures, for instance to prevent the cascade of subcontractors from being to opaque, and this will be sufficient to escape liability".[27] The UK Bribery Act includes a provision which perfectly illustrates this philosophy by underlining that "*it is a defence for (a commercial organisation) to prove that (it) had in place adequate procedures designed to prevent persons associated with (it) from undertaking such conduct*".[28] We could also anticipate exculpatory synergies stemming from a loose duty of care coupled with the common law doctrine of the "business judgment rule" which – provocatively put – can be described as the "managerial margin of appreciation" pursuant to which it is not the province of courts to assess the economic or strategic opportunity of executives' decisions taken in good faith.

As a consequence, when it comes to the responsibility of multinational corporations, the fortress of corporate veil (except in competition law matters) is to be superseded by the managerial shield of duty of care. On a side note, one can be surprised that the standard of responsibilisation and of responsibility implemented under such frameworks are similar for the activities of subsidiaries and of suppliers. It is clear that the influence exerted over suppliers can be as significant as that exerted over subsidiaries. To that extent, the obligation to control suppliers is a useful step forward. Would it be necessary, however, to consider that the position of subsidiaries is specific since they belong to the capital structure of the enterprise and that their acts, as a result, should be deemed to be attributable to the parent?

III. Limited Liability as an Accident of History

A historical analysis of the evolution of corporate law shows that the current situation giving full effect to limited liability and limiting the possibility of a genuine enterprise liability eventually constitutes an anomaly. Indeed, History shows that three key ruptures occurred in the nineteenth century: the first concerns the changing nature of joint stock companies (1), the second deals with the incidental emergence of corporate groups (2) and the third

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[27] Declaration of MP Dominique Raimbourg. See, Rapport fait au nom de la Commission mixte paritaire, *supra* note 25 ("si un accident se produit, ce qui peut malheureusement arriver, l'entreprise devra montrer qu'elle avait mis en œuvre des mesures et pris des précautions, par exemple pour éviter que la cascade de sous-traitants ne soit trop opaque, et cela suffira ä dégager sa responsabilitë").

[28] UK Bribery Act, section 7(2).

concerns the extending scope of the limited liability of legal persons (3). On those distinct aspects, the writings of Jean-Philippe Robé[29], Paddy Ireland[30], Phillip Blumberg[31] as well as Stephen Bainbridge and Todd Henderson[32] have been extremely influential.

A. The Changing Nature of Joint Stock Companies

First, it should be recalled that the creation of the first joint stock companies was not originally a right accessible to anyone but rather a privilege granted by the State for the implementation of projects of general interest (building bridges, exploitation of mines, etc.). Robé explains that, in the vision of liberal society that prevailed after the French Revolution, there can be no recognition of any form of authority of intermediate bodies interposing themselves between the State and the individual. Besides, this led to the adoption of the "Loi Le Chapelier" of 1791 which banned all types of guilds and to a rising suspicion *vis-à-vis* corporations.[33] Following the former "companies" which needed to be recognized pursuant to a Royal charter in the seventeenth and eighteenth centuries, the first joint stock companies were only incorporated in France after an authorization granted by the government. The process was particularly long and costly[34] and archives shows that the "public interest" objective of the entity was scrupulously scrutinized.[35] While procedures were different in the US and the UK at that time, the "public interest" criterion remained the same. Some authors also underline that the limited liability granted to those entities fulfilling public objectives derives from the principle of absolute sovereign immunity which was then prevalent.[36] The stringent procedures governing the creation of corporations were aimed at regulating institutions which were regarded as "necessary but dangerous".[37] Limited liability was deemed necessary for economic initiative but was potentially a source of negative externalities and moral hazard.[38]

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[29] Robé, *supra* note 1.
[30] Ireland, *supra* note 6, at 837.
[31] Phillip I. Blumberg, The Multinational Challenge to Corporation Law – The Search for a New Corporate Personality (Oxford University Press, 1993).
[32] Stephen M. Bainbridge & Todd Henderson, *supra* note 8.
[33] Robé, *supra* note 1, at 84.
[34] Anne Lefebvre-Teillard, La Société Anonyme Au Xixe Siècle – Du Code De Commerce À La Loi De 1867 : Histoire D'un Instrument Juridique Du Développement Capitaliste 21 (PUF, 1985).
[35] Robé, *supra* note 1, at 86.
[36] Stephen M. Bainbridge & Todd Henderson, *supra* note 8, at 25.
[37] Anne Lefebvre-Teillard, *supra* note 34, at 22.
[38] Anne Lefebvre-Teillard, *supra* note 34, at 22. See also, Paddy Ireland, *supra* note 6, at 844.

However, by mid-nineteenth century, most of those requirements were progressively dismantled in the US due to regulatory competition between federated states wishing to be more economically attractive. A similar evolution was observable in Europe after the main occidental powers adhered to economic liberalism.[39] This has resulted, for instance in France, in the law of 24 July 1867 which abolished the condition of prior governmental authorization, thereby, shifting corporations into a private law framework.[40] This evolution constituted a historic turning point that has allowed the constitution of private powers and, as a consequence, the coalition of affected stakeholders.[41] It is not a coincidence that at the same time, in 1864, France adopted the "Loi Ollivier" abolishing the criminal offense of coalition and subsequently in 1884, the "Loi Waldeck Rousseau" recognizing trade union freedom.

B. The Incidental Emergence of Corporate Groups

Until the end of the nineteenth century, particularly in the US, only individuals had the possibility of holding corporate shares. It was prohibited for corporations unless a specific authorization was granted by Statute. Those restrictions were progressively dismantled following several reforms adopted by the state of New Jersey in 1888, 1889 and 1893.[42] The states of New York, Delaware and Maine followed this lead as they wished to preserve the fiscal resources resulting from incorporation of businesses. This led to the formation of large corporate groups which "replaced trusts as the preferred technique for achieving corporate concentration".[43]

It is also not a coincidence that at the same time competition law emerged in the US with the adoption of the Sherman Act of 1890 and the creation of the Federal Trade Commission in 1914. Besides, in 1910, US President Taft proposed the Congress adopt a prohibition of intercorporate ownership of stock but the initiative was eventually unsuccessful[44].

C. The Extending Scope of Limited Liability

The possibility of constituting large corporate groups coupled with the device of limited liability increased the opportunities for legal engineering. It is noteworthy to mention that between the end of the nineteenth century and

39 Robé, *supra* note 1, at 88-90.
40 Anne Lefebvre-Teillard, *supra* note 37, at 417.
41 Robé, *supra* note 1, at 101.
42 Blumberg, *supra* note 31, at 56.
43 Blumberg, *supra* note 31, at 56.
44 Blumberg, *supra* note 31, at 58.

the beginning of the twentieth, the legal regime of limited liability evolved in a way that was very favourable to corporations. Initially, a distinction existed between contractual liability and liability for torts.[45] Before discussing this evolution it is necessary to present the underlying issues at stake.

Those contracting with a limited liability entity have the possibility of assessing and eventually accepting the risks stemming from that limitation. However, third persons who suffer on account of the prejudice caused by a limited liability entity have not consented to such limitation. It is therefore possible to question the legitimacy of its effectiveness against third-parties.[46] The question is, whether, it is legitimate that the parent company can benefit from the profits generated by some subsidiaries while circumscribing the losses of others exceeding their contributions. This could induce enterprises to lodge hazardous activities in specific subsidiaries.[47]

The effectiveness of limited liability against third-parties can be regarded as an anomaly. Besides, there had been a debate before US courts as to whether limited liability of shareholders for *debts* should extend to its *liabilities* within the framework of tort claims. The solution depended on how the corporate laws of federated states were drafted. For instance, Californian law made a distinction between responsibility for contractual debts (with limited liability) and torts (no limited liability) until the 1930s.[48] But for the great majority of state legislation, only a reference was made to the limited liability of shareholders for *debts*. The US Supreme Court, following the position of New York courts, considered in *Chase* v. *Curtis* in 1885 that, if no clear distinction existed in state legislation, limited liability shall apply to the responsibility for both debts and torts.[49] Thus, when it concerns tortious liability, corporations have also benefited from the advantages stemming from the corporate veil.

Each of these three evolutions is of a certain importance but they are absolutely fundamental when taken as a whole. They have indeed enabled the development of a legal engineering aimed at the optimization of corporate structures relying greatly on limited liability and the principle of separate legal personality. This historical and critical reinterpretation of corporate

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[45] Gwynne Skinner, *supra* note 3, at 1792.

[46] Pierrick Le Goff, Faut-Il Supprimer Les Sociétés À Risque Limité? Apport Et Critique De L'analyse Économique Américaine Du Droit Des Sociétés, Revue Internationale De Droit Comparé 598-599 (1999).

[47] Henry Hansmann & Reinier Kraakman, *Toward Unlimited Liability for Corporate Torts*, 100 Yale Law Journal 1881 (1991).

[48] Stephen M. Bainbridge & Todd Henderson, *supra* note 8, at 40-42.

[49] Chase v. Curtis, 1885 SCC OnLine US SC 62 : 28 L Ed 1038 : 113 US 452 (1885). Gwynne Skinner, *supra* note 3, at 1793-1794.

law should prompt us to rethink the issue of enterprise responsibility from a different angle.

IV. Rethinking Enterprise Responsibility

Corporations generate wealth but are also externality-producing devices.[50] Wealth can move almost freely throughout the corporate structure for instance, the payment of taxes at the group level or the transfer of dividends. However, when it comes to address the negatives externalities generated by the subsidiaries, the parent company is shielded from liability. It is therefore necessary to redress this asymmetry in order to align the rights and obligations of multinationals.

A. An Analogy with State Responsibility

Given the commonalities with regard to the structures of corporations and of states, one option would be to follow the rules of State responsibility concerning the attribution of an internationally wrongful act to a state. One of the key principles with respect to the attribution of conduct is the irrelevance of the State's internal legal structure: whatever is the horizontal or vertical separation of powers within the State, the conduct of one of its organs is deemed one of its own[51], regardless of its level of independence, even in cases of *ultra vires* acts, "if it exceeds its authority or contravenes instructions".[52] It is also noteworthy to mention the case of persons or entities not within the structure of a State but whose conducts are attributable to the state if they are "in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct" (*de facto organs*).[53]

A parallel can be drawn with corporations: they have the possibility of choosing to carry out their activities in-house or through subsidiaries, subcontractors or suppliers. In that respect, three things ought to be pointed out. First, when a corporation decides to subsidiarise activities, those activities are carried out within the same economic structure. The possible offences or torts committed by the subsidiary should therefore be attributable to the parent, even in case of *ultra vires* acts, namely if the subsidiary does not respect the vigilance plan implemented by the parent. In that sense a subsidiary can

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[50] Robé, *supra* note 1, at 393.

[51] Articles of the International Law Commission (ILC) on the Responsibility of States for Internationally Wrongful Acts, Article 4(1); JAMES CRAWFORD, STATE RESPONSIBILITY – THE GENERAL PART 116 (Cambridge University Press, 2013).

[52] *Ibid.*, Article 7. See also, James Crawford, *supra* note 51, at 136.

[53] *Ibid.*, Article 8. See also, James Crawford, *supra* note 51, at 141.

be regarded as an organ of the enterprise just like a political subdivision of a State is one of its organs under international law. Second, when the activities are outsourced or subcontracted to a different entity, a distinction must be drawn between two different situations. If a decisive economic influence is exerted over the supplier or subcontractor, it is a situation of *de facto* control over the external entity and, consequently, its behaviour should be attributed to the client company. This was the approach of the US federal Court in *Doe v. Nestle* in which it was held that the client company exerted "their control over the cocoa market" and that they "continue to supply money, equipment, and training to Ivorian farmers, knowing that these provisions will facilitate the use of forced child labour"[54]. Third, even if the client company does not exert a decisive influence over the supplier or subcontractor, the former owes a duty of care with regard to the activities of the latter and should therefore cut its economic ties with the latter if it "knew, or ought to have known" that the supplier or subcontractor was involved in serious breaches of human rights, environmental regulations or anti-bribery laws. Interestingly, when adopted in domestic legislation, the duty of care (or of vigilance) applies to the corporation in the same way for subsidiaries, suppliers or subcontractors with whom it has an established commercial relationship while our position is that it should apply only with regard to suppliers or subcontractors over which the corporation does not exercise a decisive influence. The applicable standard envisaged in the recent French legislation – which was supposed to be revolutionary – does not jibe with the economic reality of business organizations.

Our historical and critical reinterpretation of the evolution of corporate law shows that limited liability was an accident of history stemming from a regulatory race to the bottom[55] and that it was both legitimate and economically appropriate for the parent to bear the responsibility for the conduct of its subsidiaries. A comparison with the international responsibility of states leads to the same inference. Besides, when a State cannot raise its domestic legal structure as defence (the contentious act was committed by a province enjoying a status of independence in the federal State) for a violation of international law (for instance international human rights), it would be incongruous if a parent company could do so.

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[54] Doe v. Nestle, No. 10-56739, D.C. No. 2:05-CV-05133- SVW-JTL (9th Cir Sep. 4, 2014).

[55] Karen Vandekerckhove, *supra* note 8, at 9 (noting with regard to limited liability "its possibly historically accidental nature and (...) its alleged lack of economic justification").

B. One Conceivable Proposal

The question to be determined is, what would be the optimal strategy to ensure the emergence of a new principle of attribution of the subsidiary's conduct to the parent – taking into account that such a principle may appear as revolutionary and even shocking.[56] A first option could be to abolish limited liability in domestic corporate laws or, on a less radical approach, to limit the responsibility in proportion to equity participation when it comes to tortuous liability.[57] This proposal seems inconceivable since it would require a coordinated and harmonized legislative intervention of several states (and of federated states in a federal context such as in the US) on a matter for which resistance will be encountered.[58] This would also raise several insoluble conflict of laws issues.[59] A second option would be to envisage an international treaty including a list of substantive obligations for multinational corporations (for instance those of the OECD Guidelines for Multinational Enterprises) as well as a regime of strict liability that would be borne by the parent for any violation of the substantive obligations committed by one of the subsidiaries. Claims could be brought before international (for instance the model of the International Criminal Court) or domestic courts. In the latter case, the strict liability imposed on the parent would prevail over domestic rules of limited liability and of distinct legal personality. This second option has the advantage of piercing the corporate veil only for the substantive obligations listed in the treaty. Such a project is, however, not realistic and politically feasible. Keeping in mind the resistance to soft law instruments that deal with corporate social responsibility, there would obviously be no international consensus on such a treaty.

The ultimate option has the merit of being possibly experimented in the long run. It would rest on codes of conduct or other types of unilateral commitments adopted by corporations within the framework of their CSR strategy. While such undertakings are usually exploited as public relations tools[60], the outreach would be different if the parent company accepts to (1) bear the liability stemming from the conduct of any entity included in

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[56] Pierrick Le Goff, *supra* note 46 , at 595.

[57] Henry Hansmann & Reinier Kraakman, *supra* note 47, at 18.

[58] Karen Vandekerckhove, *supra* note 8, at 9 (underlining that "it would seem unthinkable today to deny the benefit of limited liability to multinational groups whose organization is entirely based on this rule. Limited liability has become a fact of international corporate life").

[59] Pierrick Le Goff, *supra* note 46, at 605.

[60] Kathia Martin-Chenut & Juliette Tricot, *La loyauté des engagements : La RSE prise au mot par le droit*, *in* LA RSE SAISIE PAR LE DROIT – PERSPECTIVES INTERNE ET INTERNATIONALE 363 (Kathia Martin-Chenut & René de Quenaudon (eds.), Pedone, 2016).

the group's accounting consolidation scope (thus, including subsidiaries) and (2) consent to the jurisdiction of the domestic courts of states where it is incorporated or where the group conducts business activities. Some general comments can be made regarding those three elements.

First, there is no insurmountable obstacle to impute the responsibility on the parent for the conduct of its subsidiaries. This has already been implemented in the US within the framework of anti-corruption procedures based on the Foreign Corrupt Practices Act (FCPA). For instance, the Alstom case involved several violations committed by different subsidiaries (Alstom Network Schweiz, Alstom Power, Alstom Grid). Eventually, it is the parent company Alstom S.A. which accepted through a guilty plea to pay the financial penalty of $ 772 millions for all infringements.[61] Agreements concluded between US authorities and its subsidiaries specify that they are not liable to fines "because Alstom S.A., the parent company of the Company, pursuant to a separate plea agreement, has agreed to pay a fine of $772,290,000 relating to the same underlying conduct".[62] The agreement concluded between US authorities and Alstom S.A. also indicates that the latter and its subsidiaries shall not accept any reimbursement or compensation, from any source and that the fine shall not be subject to tax deduction.[63] This example clearly shows that the consent of the parent company can constitute the source of attribution of liability.

Second, the group's accounting consolidation scope seems to be the more relevant criterion in order to determine the scope of application *ratione personae* and identify entities whose contentious conduct is eventually attributable to the parent. Three arguments can be raised. In the first place, there are international standards on that matter adopted by the International Accounting Standard Board (IASB) specifying different forms of corporate control in order to determine what constitutes a "single economic entity".[64] Additionally, when corporations advocate for a recognition of the "group interest"[65] in order to justify the legality of intra-group transactions that are detrimental to the subsidiaries but beneficial from a group perspective, they

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[61] United States of America v. Alstom SA, Plea Agreement, US District Court of Connecticut, 22 December 2014, https://www.justice.gov/file/189331/download.

[62] United States of America v. Alstom Grid, Inc., Deferred Prosecution Agreement, US District Court of Connecticut, 22 December 2014, https://www.justice.gov/file/189296/download.

[63] United States of America v. Alstom SA, *supra* note 61, at 18.

[64] The standard IFRS 10 titled "Consolidated Financial Statements" has been incorporated in EU law through regulation 1254/2012 adopting certain international accounting standard (Official Journal of the EEU, 29 December 2012, L360/1).

[65] On this notion, see, Charley Hannoun, Le Droit Et Les Groupes De Sociétés 83 (LGDJ, 1991).

also rely on the criterion of accounting consolidation scope.[66] Finally, it is through the accounting consolidation scope that corporate groups present themselves to a large categories of actors (shareholders, financial institutions, financial regulatory authorities, etc.). This criterion has therefore the advantage of being both objective and consistent with how the group perceives itself as an economic entity.

Third, the parent's consent to the jurisdiction of domestic courts of states where it is incorporated and where the group conducts business activities can solve all private international difficulties related to the issue of jurisdiction. It is particularly the case when the contentious behaviour occurs in a country different from the place of incorporation of the parent. Moreover, by recognizing the jurisdiction of the domestic courts where the group conducts business activities (a criterion existing in the French new anti-bribery statute)[67], the risks of regulatory arbitrage concerning the localization of the parent company are offset.

In a more prospective sense, it is also possible to envisage the framework under which such a commitment could be undertaken. The corporation's unilateral consent has the advantage of necessitating neither a modification of domestic corporate laws nor for states to accept an international binding instrument. It can be built onto one or several existing CSR international instruments, like the OECD Guidelines for Multinational Enterprises or the UN Human Rights Council Guiding Principles on Business and Human Rights. A possible strategy rests on the idea that a corporate group cannot claim compliance with the said instrument without unilaterally consenting, first, to bear the liability stemming from the conduct of any entity included in the group's accounting consolidation scope and, second, to the jurisdiction of domestic courts in the aforementioned way. In this regard, the reputational dimension of CSR could constitute a useful leverage to ensure the widest possible dissemination of this discipline initially, with the more virtuous multinationals or at least those those wishing to appear as such.

[66] As pointed out by a recent report on that matter, "out of simplicity and uniformity among the Member States, the definition of the group should be based on the accounting consolidation exercise, which is a concept that is already harmonised at the EU level through European directives. Thus, a company is included within the consolidation scope if an exclusive control, a joint control or a notable influence is exercised by the parent company" (Anne Outin-Adam & Didier Martin, *Towards Recognition of the Group Interest in the European Union*, Report from the "Club des Juristes" 22, June 2015, http://www.leclubdesjuristes.com/wp-content/uploads/2015/06/CDJ_Rapports_Group-interest_UK_June-2015_web.pdf). See also, YANN QUEINNEC & WILLIAM BOURDON, RÉGULER LES ENTREPRISES TRANSNATIONALES – 46 PROPOSITIONS, FORUM POUR UNE NOUVELLE GOUVERNANCE MONDIALE 20 (2010,).

[67] Article 21 of Loi 2016-1691 of 9 December 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.

This new mechanism would rely exclusively on the unilateral consent of corporations and therefore can be gradually implemented. It has the advantage of simplicity and would be an effective alternative to the emerging duty of care for which one may dread that it is just a new occasion to make a new form of legal engineering prevail – similar to the one that has been deployed to take advantage of limited liability. Paved with good intentions, this duty of care has probably improved corporate groups practices. However, it overshadows the need for a radical upheaval of the historical accident of limited liability in order to better address contemporary challenges implied by the activities of multinationals. Such a (r)evolution is in line with the natural course of history. The history we are going through as well as the one we have inherited.