Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill

Robin F. Hansen

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38RH24

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill

By Robin F. Hansen, LL.B., M.A.*

Abstract: This Article examines the activities of various multinational enterprises (MNEs) involved in the Prestige oil spill of 2002. The liability exposure of such enterprises is found to have been minimized by three legal phenomena which result from the current treatment of MNEs under national and international law. Review of the Prestige spill suggests that MNE liability exposure may be minimized by: (1) outsourcing, (2) reliance on renegade regime regulation, and (3) operation of the corporate veil. The reason for this observed minimized MNE liability is twofold. First, the current legal landscape which frames MNE activities is deficient to the extent that it facilitates this minimization. Second, MNEs adopt available minimization strategies to reduce liability exposure because this is consistent with their broader operational tendencies, as is explained in international business and international political economy scholarship. For instance, MNEs seek reduced liability exposure because this is consistent with their drive to reduce transaction costs.

* BA (Hons.) (Calgary), MA (Carleton), LL.B. (Ottawa), LL.M (McGill, in progress), of the Bar of Ontario. The author would like to thank Craig Forcese, Donald M. McRae and Maureen A. Molot for their valuable comments on an earlier draft. All errors remain the author's own.
I. INTRODUCTION ................................................................. 412
   A. MNE Liability Minimization, Public Policy, and the Rule of Law ........................................ 413
   B. What is a Multinational Enterprise? ........................................... 414
   C. The Prestige Spill .......................................................... 415
II. MULTINATIONAL ENTERPRISE LIABILITY MINIMIZATION .......... 418
   A. Outsourcing ..................................................................... 420
   B. Renegade Regime Regulation ............................................... 424
      1. Secrecy Havens ................................................................ 425
      2. Flags of Convenience .................................................... 427
   C. Reliance on the Corporate Veil .............................................. 431
      1. The Scope of the Corporate Veil ....................................... 432
      2. Legal Instances Where the Veil Unravels ......................... 434
         i. Statutory Intervention .................................................. 434
         ii. Agency Law .............................................................. 434
         iii. Veil-Piercing Doctrine .............................................. 435
         iv. Direct Claims Against the Parent Company ............... 436
      3. States’ Non-Assumption of Jurisdiction over Foreign Nationals ........................................ 437
      4. The Many Veils of the Alfa Group ................................... 438
         i. Crown Resources Inc.’s Legal Ownership Chain ............ 439
         ii. Crown Resources Inc.’s Role in the Alfa Group ............ 440
         iii. The Alfa Group’s Liability Minimization in Action ....... 441
III. EXPLANATIONS FOR MNE LIABILITY MINIMIZATION ............. 442
   A. The Eclectic Paradigm ...................................................... 443
      1. Internalization Advantage .............................................. 443
      2. Ownership Advantage .................................................. 445
   B. The International Value Chain .......................................... 445
   C. The Obsolescing Bargain ............................................... 447
   D. The Law of Uneven Development ..................................... 447
IV. CONCLUSION ...................................................................... 449

https://scholarship.law.berkeley.edu/bjil/vol26/iss2/4
DOI: https://doi.org/10.15779/Z38RH24
Multinational enterprises (MNEs), also called multinational or transnational corporations, play a leading role in the world economy. These business organizations generate an increasing proportion of global GDP and account for one third of world trade.¹ Moreover, various MNEs now command resources greater than the individual GDPs of many countries.² Such economic power and international reach pose new regulatory challenges to the nation state, particularly as national jurisdiction is often confined to territory while MNEs’ agency is not.

While international law and its regulatory effects have developed in recent years,³ domestic law and domestic legal institutions remain the most significant sources of oversight and regulation of MNEs.⁴ In this Article, I examine MNE liability within national jurisdictions, noting that such liability is central to the rule of law and to states’ pursuit of policy objectives. This Article reviews the events surrounding the 2002 Prestige oil spill, and examines three legal mechanisms that affected the liability exposure of the MNEs involved in the spill: (1) outsourcing; (2) use of renegade regime regulation; and (3) the corporate veil distinction between parent and subsidiary companies. I contend that these mechanisms operate to insulate MNEs from liability around the world. This Article offers several explanations, gleaned from international business and international political economy literature, for why MNEs seek minimized liability exposure and make use of the mechanisms currently available.


² UNCTAD’s 2002 World Investment Report ranked the world’s countries and MNEs alongside each other comparing their value-added annually. Of the 100 largest value-added entities ranked, twenty-nine were MNEs rather than states. The first MNE on the list at number 45 was ExxonMobil, which produced approximately 63 billion USD in value-added for 2000, and exceeded the GDP of countries such as Pakistan and the Czech Republic, along with most other countries. UNCTAD, WORLD INVESTMENT REPORT 2002: TRANSNATIONAL CORPORATIONS AND EXPORT COMPETITIVENESS, at 90, U.N. Doc. UNCTAD/WIR/2002, Sales No. E.03.II.D.8, (2002), available at http://www.unctad.org/en/docs/wir2002_en.pdf.

³ The near-universal membership of the World Trade Organization (151 as of February 2008), along with the obligations concerning domestic regulation that such membership entails, is one indication of the growing scope of international law rules and institutions. World Trade Organization, Members and Observers, http://www.wto.org/English/thewto_e/whatis_e/tif_e/orig6_e.htm (last visited March 18, 2008).

⁴ See, e.g., PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 107 (Blackwell Publishing 1995).
MNE liability minimization must be addressed by policy-makers who wish to effectively safeguard both universal human rights and our global environmental future. A grave ecological event such as the Prestige spill reveals significant weaknesses in the way in which national and international law currently treats MNE liability. The strain of human consumption on the earth's natural resources, along with the compounding problems of air and water contamination, make the regulation of environment-related interests increasingly important. Billions of citizens who depend on the integrity of the shared environment are profoundly affected by MNE activities.

A. MNE Liability Minimization, Public Policy, and the Rule of Law

Liability in this Article refers to an obligation that is court-ordered and state-enforceable, determined in either a criminal or civil law context. A state may enforce a judgment finding liability by exercising its enforcement jurisdiction, such as through asset seizure or incarceration.

Courts give effect to law, and thus strengthen the rule of law, through findings of liability or, in other words, through their determination of state-enforceable obligations. If a person avoids liability for breach of a law, even when the person has indeed broken that law, then the law is ineffectual, and the rule of law in that instance is weak.

Insofar as public policy is conducted through the court system, it is largely done so through findings of liability. Such judgments alter citizen behavior by encouraging adherence to the law. Furthermore, since liability findings are inherently enforceable, specific judicial rulings implement public policy by affecting certain results. For example, states may pursue the public policy goal of deterring anti-competitive firm behavior. Courts enforce competition laws by making findings of liability in instances in which anti-competitive behavior is established.

Public policy motivations direct the creation of many laws as is suggested by the policy language found in the "Purpose" or "Preamble" sections of many laws.


6. The importance of indiscriminate application of the law or the rule of law generally is reflected in a key Canadian case, Roncarelli v. Duplessis, in which Quebec's Premier was held liable for arbitrarily, and thus illegally, revoking the liquor license of a restaurant owner who was a Jehovah's Witness. The court found the Premier liable for this and in doing so ignored the fact that he was an official with public stature and power. The courts thus used a finding of liability to ensure that no one was above the law and that private interests could not trump public norms. Roncarelli v. Duplessis, [1959] S.C.R 121; 16 DLR (2d) 689.

7. In their implementation of public policy through findings of liability, courts are clearly bound by the rules of fairness which ensure due process.

8. In Canada, liability for an anti-competitive act would be established first by the Competition Tribunal and then by a court in case of appeal.

9. Policy objectives are evident in the "Purpose" section of Canada's Competition Act: "The
Since liability relates closely to both public policy and the rule of law, the strategic avoidance of liability can have repercussions for the rule of law within a state and on a state’s ability to pursue public policy goals. If a person is able to evade a liability finding without ceasing the prohibited behavior, then the person will continue this behavior undeterred, and neither the rule of law nor public policy will be served.

Demonstrating actual liability avoidance requires extensive factual and legal reasoning, an exercise which is beyond the scope of this Article. Instead, this Article explores what I term “liability minimization.” Liability minimization occurs when parties take steps to reduce the likelihood of a liability finding, without changing the behavior that ought to lead to a liability finding. Some element of speculation is inevitable in identifying liability minimization, while liability avoidance must be demonstrable in order to exist. However, since it is only one step removed from liability avoidance, liability minimization also represents a potential risk to the rule of law and effective public policy implementation.

B. What is a Multinational Enterprise?

A clear definition of a MNE is a prerequisite for a discussion of how MNE liability minimization operates. From a business perspective a MNE is, as John Dunning wrote, a business organization which “owns and controls income-generating assets in more than one country”. In other words, a MNE is a multinational actor which coordinates its activities in order to generate profits on an aggregate level. In economic terms, MNEs are the global economy’s main agents of foreign direct investment (FDI). MNEs typically invest in a foreign country by establishing a directly controlled subsidiary endowed with some of its resources. Thus, from a legal perspective, a MNE may be understood as a series of related corporations. As there is no process of international incorporation, the subsidiaries are incorporated under various countries’ national laws. Thus, a parent corporation incorporated in one country will own the equity of a purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets . . . .” Competition Act, R.S., 1985, c. C-34, s. 1, available at http://laws.justice.gc.ca/en>ShowFullDoc/cs/C-34///en.


13. MNEs often assume much more complicated legal forms than a parent corporation’s ownership of subsidiary corporations. For instance, trusts or partnerships can be included within a MNE’s network of operations.
subsidiary corporation incorporated in another country (the "host country"). Incorporation results in legal personhood, and shields shareholders from full liability for a corporation's actions.

Corporations are business organizations which have undergone the legal process of incorporation. A MNE's corporate components are often connected by equity capital: one corporation will be the shareholder of another corporation.

There is a striking difference between the way that business and economics view MNEs and the way the law does. Business and economics definitions of a MNE regard it more or less as a unified actor, while the legal definition of a MNE does not. Rather, national laws view each corporation within the MNE's ownership chain as a distinct entity, and liability does not automatically transfer between these individual corporate components. For instance, United States (U.S.) law recognizes British Petroleum as "more than one thousand separate interrelated corporations acting under a common control." With these observations in mind, this Article will now address the facts surrounding the Prestige spill.

C. The Prestige Spill

After serving as a port storage facility in St. Petersburg for several months, the Prestige—a large tanker—left port in Ventspils, Latvia and began its journey to Singapore in November 2003. On November 13, 2003, 28 miles from the Spanish coast, heavy waves cracked the tanker’s starboard stern. Six days


15. PAUL R. KRUGMAN & MAURICE OBSTFELD, INTERNATIONAL ECONOMICS THEORY AND POLICY 171 (6th ed. Addison Wesley 2003); DUKELOW & NUSE, supra note 5, at 260. As will be discussed in section 2.32, this separation of liability is not absolute. As Wallace writes, "[O]f all the essential or possible criteria one might mention, the one that is absolutely crucial and common to every form of multinational enterprise [...] is: central direction." CYNTHIA DAY WALLACE, LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE: NATIONAL REGULATORY TECHNIQUES AND THE PROSPECTS FOR INTERNATIONAL CONTROLS 20 (Brill 1982).


later, the 243.5 meter long tanker lay broken in two at the bottom of the Atlantic Ocean, two hundred kilometers from the Spanish coast. As a result, 64,000 tons of oil were spilled; only 14,000 tons of oil were ever salvaged.\textsuperscript{18} The \textit{Prestige} flew the Bahamian flag at the time of its sinking, and the Bahamas Marine Authority concluded that rough waves caused the wreck.\textsuperscript{19} The seas proved too much for the twenty-six-year-old single-hulled tanker which was reaching the end of its life cycle.\textsuperscript{20}

The \textit{Prestige}'s heavy fuel oil contaminated 3,000 kilometers of European coastline and killed approximately 300,000 sea birds.\textsuperscript{21} Experts predicted that the marine life would suffer for many years, given the presence of carcinogenic polynuclear aromatic hydrocarbons (PAHs).\textsuperscript{22} The spill led to massive economic costs as well. Spain's clean-up costs and initial compensation totaled 3 billion Euros.\textsuperscript{23} The International Oil Pollution Compensation Fund, which compensates only reasonable clean up costs and direct income loss, announced in June 2004 that \textit{Prestige} related claims could total 1.038 billion Euros.\textsuperscript{24}

\textsuperscript{18} Spill amount: RAUL GARCIA, WWF, \textit{THE PRESTIGE: ONE YEAR ON, A CONTINUING DISASTER} 4 (2003), available at \url{http://www.panda.org/downloads/marine/finalprestige.pdf}; Carcinogenic cargo: \textit{ Almighty mess, almighty row}, \textit{THE ECONOMIST} Nov. 20, 2002, available at \url{http://www.economist.com/agenda/displayStory.cfm?id=1453846}; Salvage amount: JACQUELINE MICHEL ET AL., \textit{POTENTIALLY POLLUTING WRECKS IN MARINE WATERS, ISSUE PAPER PREPARED FOR THE 2005 INTERNATIONAL OIL SPILL CONFERENCE IV} (2005), available at \url{http://www.iosc.org/docs/IOSC_Issue_2005.pdf}. A salvage amount of 14,000 tons plus a widely cited spill amount of 64,000 tons gives a total amount of 78,000 tons. This figure exceeds the recorded cargo of the \textit{Prestige} (77,033 tons) by about one thousand tons. This discrepancy may be explained by the fact that the tanker was also carrying non-cargo oil to be used for its own propulsion. Some sources do state a total spill amount of 63,000 tons rather than 64,000; however, the later is more commonly cited.

\textsuperscript{19} Bahamas report into Prestige fails to pin down definite cause, 15:49 TRADEWINDS 46 (Dec. 3, 2004).

\textsuperscript{20} EUR. COMM’N, supra note 17. Various parties have maintained that Spain's decision to have the tanker towed away from shore worsened the spill. See, e.g., NEWS RELEASE, Am. Bureau of Shipping, ABS fires back at Spanish Government over Prestige (June 30, 2003), available at \url{http://www.eagle.org/NEWS/PRESS/june30.html}. Assessment of the precise validity of such claims is beyond the scope of this Article. Several facts do merit mention on this point, however: (1) Spain by no account was the initial cause of the spill; (2) the incident became an emergency quickly, as evidenced by the rapid crew evacuation; and (3) the nearest shore area was a highly sensitive ecological region with a significant fishing industry.


\textsuperscript{22} Gaia Vince, \textit{Prestige Oil Spill Worse than Thought}, \textit{NEW SCIENTIST}, Aug. 27, 2003, available at \url{http://www.newscientist.com/article.ns?id=dn4100}.

\textsuperscript{23} GARCIA, supra note 18, at 19.

amount greatly exceeded the Compensation Fund’s available 171.5 million Euros. 25 Because of this shortfall, Prestige claims are disbursed at a 15 percent pro rata rate. 26

The public in Spain and abroad was outraged at the Prestige. 27 In France, the public was appalled that another major spill could taint French beaches and fisheries so soon after the Erika spill, less than two years before. In December 1999, the twenty-four-year-old Erika broke apart on stormy seas and spilled 31,000 tons of heavy fuel oil, polluting 400 kilometers of French Northwest coastline. 28 The Erika incident was merely one of many serious oil spills in the past decade. 29

The Prestige spill thus led many to believe there were endemic failures in the international regulation of oil transport. 30 It generated calls for improvements that would ensure responsible parties would be brought to justice within the rule of law. Another theme that emerged as part of the public response was the need for effective public policy, with strong pressure on European governments to take steps to stop oil spills from occurring.

In the end, public actors, such as the Spanish government, overwhelmingly paid for the clean-up and compensation to injured parties. The tanker owner’s insurance company, London Steamship Owner’s Mutual Association, was strictly liable for about 25 million USD, 31 under the Protocol of 1992 to Amend The International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC 1992). 32 Apart from this, the private parties involved in the Prestige spill

25. Id.
26. Id.
29. In 1996, the Sea Empress ran aground off the coast of Wales, spilling 72,000 tons of heavy bunker oil; and in January 1993, the Brear spilled 84,700 tons of heavy bunker oil off the Shetland Islands. In 1991, the Haven spilled 144,000 tons of Iranian heavy crude oil off Genoa, Italy. See International Tankers Owner Pollution Federation Limited, Case Histories, http://www.itopf.com/casehistories.html (last visited Feb. 21, 2008). In the region harmed the most by the Prestige, the nineteen-year-old Aegean Sea had run around in 1992, spilling 72,000 tons of crude oil. See European Maritime Safety Agency, Large Tanker Spills since 1984, http://www.emsa.eu.int/end185d014d001d017.html (last visited Feb. 21, 2008).
32. Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollu-
do not appear to have financed any clean-up or compensation. The owner of Prestige's oil cargo, Swiss-incorporated Crown Resources Inc. (Crown), was sold by its parent company, and later liquidated, without having paid any compensation, despite the fact that Crown's corporate ownership chain leads to the Alpha Group, a Russian conglomerate with significant capacity for compensation.

Spain sued the tanker's classification agency, the American Bureau of Shipping, for clean-up costs under U.S. law for its alleged negligence in certifying the tanker as seaworthy. But a New York federal judge dismissed the claim in January 2008, determining that the U.S. Court did not have jurisdiction over the case. This judgment did not address the issue of asset location or nationality of the parties, but rather held that the CLC 1992, a convention to which the United States is not a party, required that damage claims be heard in a state which is a signatory to the convention.

II. MULTINATIONAL ENTERPRISE LIABILITY MINIMIZATION

With the facts of the event outlined above, I now begin my analysis of the three types of MNE liability minimization which come to light in the Prestige incident: first, the outsourcing arrangements, particularly as between charterer and ship owner; second, MNE reliance on secrecy havens and flags of convenience; and third, the legal distinction evident between parent and subsidiary corporations within a MNE.

33. The following notice was published in the LONDON GAZETTE on June 4th, 2004, "A Petition to wind up the above-named Company of ERC Trading AG (formerly Crown Resources AG), presented on Wednesday 19 May 2004 by Kinetic Energy PTE Ltd./Sumitomo Corporation (Singapore) Pte Ltd., claiming to be Creditors of the Company, will be heard at the Royal Courts of Justice, Strand, London WC2A 2LL, on 23 June 2004, at 10.30 am." The notice cited the proceeding as "In the Matter of ERC TRADING AG (formerly Crown Resources AG) and in the Matter of the Insolvency Act 1986." The notice also named the following forum "High Court of Justice (Chancery Division) Companies Court." Corporate Insolvency Notices, 57308 THE LONDON GAZETTE, at 7029 (June 4, 2004), http://www.gazettes-online.co.uk/ViewPDF.aspx?pdf=57308&geotype=London&gpn=7029&type=Issue&all=Kinetic%20Energy%20PTE%20Ltd.

34. Crown's reported 2006 asset value was over 32 billion USD and its declared profit for that year was 1.6 billion USD. The Alfa Group, Financial Highlights and Analysis, http://www.alfagroup.org/258/financial.aspx (last visited March 4, 2008). The site states that "the following financial information is extracted from the IFRS consolidated (or combined) financial statements of Alfa Group Consortium which was audited by PricewaterhouseCoopers."


36. Id.

37. Id. at 17.
These three categories are not intended to be rigid; they relate closely to each other and can occur simultaneously. For instance, a MNE could outsource a high-risk process to a company which was within the jurisdiction of a secrecy haven. Furthermore, it is notable that the latter two methods of liability minimization can be traced to the gap that exists between the way in which international law treats MNEs, as weakly related individuals which are nationals of their state of incorporation, and how they exist in reality, as unified, transnational economic actors.

The following table summarizes the names and roles of actors involved in the \textit{Prestige} spill.

\textbf{Table 1: Principal Corporations Involved in the \textit{Prestige} Spill\textsuperscript{38}}

<table>
<thead>
<tr>
<th>Role in Spill</th>
<th>Name of Corporation</th>
<th>Country of Incorporation</th>
<th>Owners</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tanker Owner</td>
<td>Mare Shipping</td>
<td>Liberia</td>
<td>Couloupolos Family trust</td>
</tr>
<tr>
<td>Tanker Operator</td>
<td>Universe Maritime Ltd.</td>
<td>Greece</td>
<td>Unknown</td>
</tr>
<tr>
<td>Cargo Owner (\textit{Prestige} Charterer)</td>
<td>Crown Resources Inc.</td>
<td>Switzerland</td>
<td>Crown Luxembourg, A.G.</td>
</tr>
<tr>
<td></td>
<td>Crown Luxembourg A.G.</td>
<td>Luxembourg</td>
<td>CTF Holdings Ltd.</td>
</tr>
<tr>
<td></td>
<td>CTF Holdings Ltd.</td>
<td>Gibraltar</td>
<td>Crown Finance Foundation</td>
</tr>
</tbody>
</table>

A. Outsourcing

Outsourcing commonly refers to how a firm contracts out operational elements to unaffiliated arm’s length entities.\(^\text{39}\) Whether or not to outsource a particular element is a question of business strategy, and such decisions necessarily shape the boundaries of the firm.\(^\text{40}\) Outsourced operations lie “outside” the MNE in the sense that the performing companies are not connected to the MNE by equity ownership, but rather by contractual relationships. Section 3, infra, examines the international business and international political economy explanations for outsourcing, notably those related to Ronald Coase’s 1937 theory of the firm, which holds that firms internalize production within the firm only when it is economical to do so.\(^\text{41}\) For the purposes of this section, however, I will focus on outlining the legal effects of outsourcing on MNE liability exposure.

On one level, outsourcing affects liability exposure because it represents contractual risk-sharing between parties. Allocation of risks, including liability risk as against third parties and public authorities, can be a major stumbling block in the negotiation and conclusion of an outsourcing agreement.\(^\text{42}\) An outsourcing contract cannot shield a hiring corporation from all liability risk, however, as applicable law (such as non-derogable statutory obligations\(^\text{43}\)) can create residual liability exposure despite the precise contractual terms. This statutory influence aside, the particular terms of an agreed contract affect (and can reduce) the liability exposure of an outsourcing MNE.\(^\text{44}\)

In addition to contractual risk-sharing, outsourcing affects liability exposure on a more fundamental level: by shifting firm operations to an arm’s length...
party, an outsourcing company reduces its vicarious liability exposure for employee performance in such operations. Vicarious liability refers to legal responsibility for the misconduct of another person, and such liability commonly arises in the course of employment.\footnote{See DUKELow & NUSE, supra note 5, at 260; ROBERT M. SOLOMON, R.M. KOSTAL & MITCHELL MCIINNES, CASES & MATERIALS ON THE LAW OF TORTS 636-45 (5th ed., Carswell 2000).} Outsourcing decisions therefore can strongly affect liability exposure because the contracted arm’s length party largely carries the risk of vicarious responsibility, not the hiring party.\footnote{See Eric W. Orts, Shirking and Sharking: A Legal Theory of the Firm, 16 YALE L. & POL’Y REV. 265, 306 (1998).}

Contrasting examples, particularly in the context of oil transport outsourcing, show how arm’s length contracting affects vicarious liability. First, when the \textit{Erika} spill occurred in 1999, the owner of the oil, TotalFina, disavowed any responsibility for the spill on the grounds that it did not own or operate the tanker but had only contracted with an arm’s length service provider.\footnote{Peter Gumbel, \textit{Total Clean Up}, TIME, Jan. 26, 2004, at A10, available at http://www.time.com/time/magazine/article/0,9171,993213-2,00.html. Gumbel writes: “Total even prevented its employees from volunteering for the cleanup.” It is worth noting that an outsourcing contract does not necessarily protect a charterer from being found guilty in the court of public opinion. The French public did not accept TotalFina’s claim that it lacked responsibility for the spill, and Total was forced to make “voluntary” contributions towards the clean-up.} Conversely, in the 1989 case of the \textit{Exxon Valdez} spill, Exxon actually owned and operated the tanker, making it impossible for the oil company to claim that it was a mere contractor protected from vicarious liability for the spill.\footnote{See, e.g., Marcia Coyle, \textit{Exxon Valdez Case Brings $2.5B Damages Fight to Supreme Court}, THE NAT’L L.J., Sept. 12, 2007, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1189501364988.}

Intuitively, it seems logical that when an arm’s length party is hired for a task a MNE should not bear liability arising out of that party’s action. However, the factual circumstances of outsourcing relationships require close scrutiny in order to address the scope of such relationships for liability minimization. Legislative redress is likely required in some instances in order to ensure that outsourcing is not a mechanism by which a MNE may reduce the likelihood of liability, without altering its behavior.

Specifically, leaders aiming to safeguard the rule of law and effective public policy should examine outsourcing as a potential means of liability minimization in light of three often interrelated factors: (1) the terms of outsourcing contracts; (2) the applicable legal regimes governing party responsibilities; and (3) the comparative significance of vicarious liability within overall liability risks.

With regard to the first factor, legal processes should be in place to compare the appropriateness of party behavior with the liability-sharing terms found in the outsourcing contract. For instance, outsourcing contracts may unduly bur-
den one party with liability exposure as a result of power imbalance in the bargaining process. In such instances, factual determination regarding control and agency should prevail over the terms of the contract. For example, Canadian labour laws permit factual assessment of outsourcing agreements by providing that a purportedly independent contractor may be deemed an employee when the contractor is found to be "in a position of economic dependence on, and under an obligation to perform duties for" the hiring party. Similar legislation permitting the determination of constructive relationships, or otherwise setting a standard of minimum liability for all parties, may be needed to address instances in which an outsourcing contract permits liability minimization by creating relationships with unbalanced liability exposure.

The second factor, that of the statutory context governing outsourcing relationships, can also result in liability minimization; this is true in cases where the law places a rigid and potentially undue burden on one type of party to an outsourcing contract. The relationship can become fixed by applicable law without permitting an appreciation of actual party conduct. Lawmakers should be cognizant of areas of the law which create unequal liability exposure, and of the policy ramifications of such exposure inequities as well as their potential for liability minimization.

Thirdly, policymakers should acknowledge that outsourcing provides a level of protection from vicarious liability. As with the first two factors, this legal status should not operate without regard to the actual conduct of outsourcing parties, particularly concerning the effective control of employees. If clear direction and control over workers is evident, vicarious liability should arguably follow.

With the foregoing discussion in mind, it is notable that according to industry reports, oil companies, deterred by liability risk, are outsourcing oil transport more than ever. Review of the Prestige facts suggests that this may be due in part to the operation of the aforementioned factors. In particular, it may be due


51. For example, under the CLC 1992 the tanker owner is held strictly liable for oil pollution (according to tanker tonnage) while the tanker charterer in contrast is directly excluded from all liability, unless the ship-owner sues it directly or unless it is proved that "the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result." CLC 1992, supra note 32, at Art. 6. See also Article 3, ¶ 5 of the 1969 Civil Liability Convention, which holds: "Nothing in this Convention shall prejudice any right of recourse of the owner against third parties." CLC 1969, infra note 57.


53. It is beyond the scope of this Article to explore in a meaningful fashion the bargaining relationship and potential for inequitable liability risk sharing, which exists between tanker owners and
to an aversion to vicarious liability, as well as a response to the liability exposure placed on tanker owners under applicable law, namely the International Maritime Organisation’s CLC 1992 which governs most of the world’s shipping. This protocol imposes strict liability, to a limit determined by tanker tonnage, on the tanker owner. In contrast to the tanker owner, however, the tanker charterer is directly excluded from all liability under the CLC 1992, unless the ship owner sues it directly or “unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.”

The reasons for the CLC 1992’s treatment of charterers as compared with its treatment of ship owners are complex and relate to the historic balancing of interests seen in the creation of these international norms. A primary goal of the CLC regime is the payment of compensation to injured third parties at a strict liability standard.

Crown, the owner of the Prestige’s fuel oil, chartered the tanker from Liberia-based Mare Shipping. Crown’s liability as charterer was limited by the chartering contract and by the CLC 1992. Knowledge of this limited liability exposure was apparent in Crown’s conduct, as evidenced by the company’s response to the spill. Andrey Varganov, Vice President of Crown stated:

We are very sorry for the Spaniards, but this is not our fault: we have chartered a tanker which was available on the market and was up to the standards of an international maritime register. As cargo owners we are entitled to compensation of our losses [the cargo was insured for $8 million]. However, the responsibility for the vessel is on the ship owner when the vessel is sailing.

Oil cargo owners. It is worth noting, however, that the tanker ownership industry appears to be less concentrated (with a greater number of small players) than the oil production industry. For example, INTERTANKO maintains that independent owners (non-state and non-oil company) operate eighty percent of the world’s tankers and that its 250 members comprise seventy percent of the world’s independent tanker fleet. In contrast, sixty-eight percent of proven global oil reserves are said to be held and controlled by just ten oil companies. See INTERTANKO, About Us, http://www.intertanko.com/templates/Page.aspx?id=1086 (last visited Mar. 21, 2008); Natural Res. Canada, How World Oil Markets Work, http://www.fuelfocus.nrcan.gc.ca/fact_sheets/oilmarket_e.cfm (last visited Feb. 21, 2008).

54. CLC 1992, supra note 32.
55. CLC 1992, supra note 32 at Art. 6.
58. See e.g., Michael Mason, Civil Liability for Oil Pollution Damage: Examining the Evolving Scope for Environmental Compensation in the International Regime, 27 MARINE POL’Y 1, 2-3 (2003).
59. Id. at 10.
Crown’s protection, as a charterer, from a liability finding occurred even though the company appeared to directly control the Prestige’s movements. According to a U.S. court judgment, Crown directly ordered the Prestige to travel to Gibraltar for further instructions.\textsuperscript{61} Unless sued directly by the ship owners or proved to be a willful polluter, Crown was likely protected from liability arising from the matter. To the best of this author’s knowledge, neither of these two scenarios came to pass before the company’s eventual sale and dissolution.

In sum, outsourcing can reduce the likelihood of a liability finding, without necessarily discouraging activity that would reasonably lead to a liability finding. This can result from at least three factors: (1) an outsourcing contract’s terms may unduly allocate liability exposure to one party over another; (2) law applicable to the outsourcing agreement may shelter one class of party from liability; and (3) the reduction of vicarious liability exposure inherent in outsourcing may be unwarranted given actual party conduct. These factors are apparent in the example of the Prestige spill. Not only did Crown’s choice to outsource oil transport create a buffer against vicarious liability for tanker employee conduct, but it also placed Crown as a charterer within the favorable liability protections offered under the CLC 1992.\textsuperscript{62} These protections operated despite the fact that Crown exhibited some level of direct control over the tanker.

B. Renegade Regime Regulation

States’ deference to each others’ discrete spheres of domestic jurisdiction enables a second type of MNE liability minimization. I refer to this second form of liability minimization as “renegade regime regulation.”\textsuperscript{63} Simply put, renegade regime regulation occurs when a MNE avoids liability in State A by claiming that it is regulated by State B. Problems arise when State B’s jurisdiction over the MNE impairs the ability of State A to effectively regulate MNE activities (\textit{that is}, permits MNEs to avoid liability). Due to a lack of enforcement capacity, State B may fail to honor its international commitments to regulate appropriately. Another possibility is that there may not be relevant international commitments in the area, and State B acts purely in its best interests, without regard for how its failure to regulate affects other states. Finally, it is possible that a state is acting in knowing violation of applicable international norms.

The Prestige example offers two illustrations of renegade regime regulation. First, it illustrates the function of some states as secrecy havens. This is

\footnotesize{\textsuperscript{61} In early November, Crown directed the Prestige to proceed to Gibraltar for further orders.” Reino de Espana v. Am. Bureau of Shipping, Inc., 328 F. Supp. 2d 489, 491 (2d Cir. 2004).

\textsuperscript{62} CLC 1992, supra note 32.

\textsuperscript{63} I am building on others’ terminology here. See Lorraine Eden & Robert T. Kudrie, Tax Havens: Renegade States in the International Tax Regime?, 27 LAW & POL’Y 100, 107 (2005) (“Strong international regimes provide rules that define rights and responsibilities, allocate benefits and costs, provide mechanisms that safeguard against opportunism and monitor compliance . . . . A renegade state is an outlier from the specific practices of a regime.”).}
achieved by maintaining strict confidentiality laws and withholding information that other states would find useful in the exercise of their own jurisdiction. Such havens attract investment, and generate applicable fee revenue, by offering confidentiality in business affairs. Second, the Prestige spill provides an illustration of commodified national jurisdiction in the form of unintrusive (and thus potentially low or inadequate) national regulatory oversight granted in exchange for registration fees. At play in the Prestige example were open ship registries, also referred to as flags of convenience.

1. Secrecy Havens

Incorporation in and reliance upon secrecy havens can facilitate liability minimization. A secrecy haven can pose a barrier to holding MNEs liable by cloaking the identity of the shareholders or personnel of a corporation registered in its jurisdiction, or otherwise withholding information relevant to a potential liability finding in another state. 64

Conceptually and practically, secrecy havens are closely tied to tax havens, as tax havens entail a high level of confidentiality, particularly with regard to banking records. Currently, there are about seventy tax haven states globally, a number which has doubled over the past twenty-five years. 65 They may be broadly defined as states that adopt tax legislation designed to attract subsidiaries and branches from heavily taxed countries. 66 They range from states that impose no income tax, but rather collect license fees (for example, the Bahamas and the Cayman Islands) to those which impose minimal taxes (for example, Liechtenstein and Switzerland). 67 Tax havens now play an enormous role in the contemporary world economy. While their very nature makes tax haven activities difficult to quantify, one author estimates that one half of the global money supply either resides in or passes through tax havens. 68

Liberia was a notable secrecy haven involved in the Prestige incident. Despite Liberia's civil unrest in recent decades, the country maintains a strong cor-


67. Id.

68. Id. at 156.
porate registry, as well as the second largest open ship registry in the world. Interestingly, these two functions overlap, as one website manages both types of registration. Like other tax havens, Liberian corporate registration practice affords entities significant privacy and confidentiality. For example, taxes on foreign income are low or non-existent, thus removing the need for stringent tax disclosure.

The culture of secrecy implicit in Liberian corporate registration was evident following the Prestige spill. Once it was publicly known that Mare Shipping, a Liberian-incorporated company, owned the tanker, the question still remained: who actually owned Mare Shipping? Strangely, this mystery remained for a number of days after the spill. Purportedly under Liberian law, the owners of Mare Shipping could remain unrevealed. Whether the delay in identifying the true owners of the sunken tanker was a result of substantive Liberian law, or was rather the result of a culture of secrecy, is unknown to this author. However, it appears possible that if not for the high profile nature of the Prestige spill, the shareholder identity of Mare Shipping might never have been corroborated by the Liberian registry.

Liberia is not the only state that demonstrated curious conduct regarding ownership of the Prestige. Before it was publicly known that a Greek shipping trust (held for the Coulouspolus family dynasty) owned Mare Shipping, Greece’s diplomatic representative in Spain stated on the record that the tanker did not have Greek owners. Liberia and Greece’s involvement in the confusion over the true ownership of the Prestige suggests that reliable information regarding the identity and conduct of MNE corporations registered in secrecy havens can be difficult to secure and validate. Thus, secrecy havens create a lack of transparency in MNE structure and conduct.

Without such information, lawsuits against MNEs are impossible to pursue, thus minimizing potential liability. Such havens impair the initiation of a legal investigation or trial, since plaintiffs may have difficulty knowing whom to sue, and may not ascertain the details of the MNEs’ internal equity connections in time to sue, given statute of limitation requirements. Furthermore, such havens could impair the function of an investigation or trial that is already underway, since their involvement worsens the already daunting logistical task of acquiring information and evidence across jurisdictions. In sum, while the holdings of a MNE are economically connected, determining their precise legal connections

71. Palan, supra note 66.
72. Secretive Greek Dynasty Linked to Sunken Tanker, supra note 38.
73. Specifically, “The ship was earlier described as Greek-owned. But the Greek embassy in Madrid has denied this, saying its owners Mare Shipping Inc were Liberian-based.” Tanker Faces Break Up as Port Refuses Entry, Sydney Morning Herald, Nov. 19, 2002.
can be difficult. This is exacerbated by the involvement of secrecy havens, creating a method of liability minimization.

In addition to temporarily cloaking the tanker owner’s corporate family tree, secrecy havens also protected the owner of *Prestige*’s oil. Crown, a Swiss-based corporation, was the immediate owner of the cargo, and a tracing of its ownership reveals entities that are all incorporated in tax havens, namely Gibraltar, Luxembourg and Lichtenstein. The entity highest in the ownership chain is a trust established under Lichtenstein law, one of the few states currently identified by the OECD as an uncooperative tax haven.

Use of secrecy havens in MNE corporate structuring further complicates lawsuits that already face the difficult challenge of determining an appropriate judicial forum for activities that span multiple jurisdictions. As discussed above, incorporation in countries that do not favor information sharing with other states can facilitate liability minimization in myriad ways (that is, the hindrance of evidence collection). Moreover, one need only recall the central role that secrecy havens played in the structure of the now-infamous Bank of Commerce and Credit International, to see how secrecy havens can obstruct national regulatory scope in addition to judicial process.

2. Flags of Convenience

In addition to secrecy havens, lax regulatory oversight by states with exclusive jurisdiction provides another method of liability minimization. For example, liability exposure associated with shipping may be minimized by using open ship registries (also called flags of convenience). First, selecting a particular ship nationality because that state is unlikely to enforce its laws represents one form of liability minimization. Second, when a MNE registers a ship in Flag State A, which then acquires semi-exclusive jurisdiction over the ship, this can result in State B’s inability to find liability against the MNE under its laws.

Currently, approximately 50 percent of all registered vessels are registered in open registry states. These states allow non-nationals to register their ves-

---

74. Eden & Kudrle, *supra* note 63, at 102 (Switzerland and Luxembourg). See also Palan, *supra* note 66, at 155 (list of offshore havens).

75. Organization for Economic Co-operation and Development [OECD], List of Uncooperative Tax Havens, http://www.oecd.org/document/57/0,2340,en_2649_33745_30578809_1_1_1_1,00.html (last visited Feb. 21, 2008) [hereinafter OECD Tax Haven List].


77. *Panama to let US search its ships*, *supra* note 69.
sels and to fly the country's flag.\textsuperscript{78} Under international law, a ship's flag state assumes exclusive jurisdiction over the ship and crew on the high seas.\textsuperscript{79} Despite their prominence in world shipping, flags of convenience remain controversial, particularly due to inadequate regulatory oversight over labour abuses, illegal fishing, ownership transparency, and safety and pollution standards.\textsuperscript{80} Fundamentally, such controversy relates to the way in which flags of convenience attract paying registrants by offering non-intrusiveness.\textsuperscript{81}

The extent to which flag states hold exclusive jurisdiction over vessels registered in their territory requires further exploration. The balance of jurisdiction held between flag and non-flag states under international law is in fact quite nuanced. The \textit{United Nations Convention on the Law of the Sea} (UNCLOS) encroaches on flag state jurisdiction by giving port and coastal states the authority to charge and apprehend vessels that pollute within their waters.\textsuperscript{82} However, this right is mitigated by UNCLOS article 228 which shifts jurisdiction to flag states by holding that such port or coastal state charges "shall be suspended upon the taking of proceedings to impose penalties in respect of corresponding charges by the flag state within six months of the date on which proceedings were first instituted."\textsuperscript{83} This flag state right of preemptive prosecution can be overcome by port and coastal states in three circumstances: (1) if the violations occurred in the coastal state's territorial sea; (2) if proceeding related to a case of major damage to the coastal state; or (3) if the applicable flag state has a record of continually disregarding its international obligations to enforce relevant rules and standards.\textsuperscript{84}

In addition to UNCLOS, another relevant treaty is the 1973 \textit{International Convention for the Prevention of Pollution by Ships} (MARPOL 1973), combined with its 1978 Protocol (MARPOL), which governs vessel source pollu-

\begin{itemize}
\item \textsuperscript{79} Stephen J. Darmody, \textit{The Oil Pollution Act's Criminal; Penalties: On a Collision Course with the Law of the Sea}, 21 B. C. ENVTL. AFF. L. REV. 89, 103 (1993). \textit{See also Case of the S.S. "Lotus"} (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 10, at 25.
\item \textsuperscript{81} Randon H. Draper, \textit{Resuscitating the Victims of Ship Pollution: the Right of Coastal Inhabitants to a Health Environment}, 15 COLO. J. INT'L ENVTL. L. & POL'Y 190, 190 (2004).
\item \textsuperscript{83} \textit{Id.} at Art. 228.
\item \textsuperscript{84} Dempsey, \textit{supra} note 78, at 548. These exceptions are profiled in UNCLOS Art. 228.
\end{itemize}
MNE LIABILITY MINIMIZATION

tion. 85 MARPOL maintains deference to flag ship enforcement of the ship design and discharge standards contained in the treaty, 86 however, the treaty also protects port and coastal states' right to enforce inspection and other laws within their territorial waters. 87 Notably, MARPOL also requires that ships obtain an "International Oil Pollution Preventions Certificate" through a private classification society. 88

Flag of convenience states may have an economic disincentive to strictly enforce MARPOL and UNCLOS pollution laws, and thus port and coastal states have had to increase their inspection of passing ships. 89 Port state initiatives, including the EU's Erika I and Erika II Directives, aim to reduce the power of open registry states in international shipping. 90 Despite such domestic legislation, flag states still retain a great deal of jurisdiction under international law. Flags of convenience continue to provide a method of liability minimization in those situations where a flag state's loosely enforced, but still exclusive, jurisdiction is an effective shield against a liability finding within another state's jurisdiction.

The Prestige was registered in the Bahamas, an open registry state and the self-proclaimed third largest ship registry. 91 The Bahamas is also among the flag of convenience states identified by UNCTAD, along with Bermuda, Cyprus, Liberia and Panama. 92 As a flag state, the Bahamas has exclusive jurisdiction over a registered ship, including the determination of its seaworthiness and the enforcement of international standards of pollution prevention and labour conditions. 93


86. MARPOL 1973, supra note 85, at Art. 4.
87. Draper, supra note 81, at 188.
88. Id. See also MARPOL 1978, supra note 85, at Annex I: Regulation for the Prevention of Pollution by Oil, Regs. 5-8.
92. Duruigbo, supra note 89, at 153.
93. UNCLOS supra note 82, at Art. 94; MARPOL 1973, supra note 85, at Art. 4.
Open registry states, such as the Bahamas, are likely to only weakly exercise their exclusive regulatory jurisdiction as a result of at least three factors: (1) lack of connection between national territory and regulatory obligations; (2) lack of capacity; and (3) competing interests. First, the international nature of shipping creates a disassociation between territory and regulation. For instance, because of their possible lack of proximity, flag states may be less motivated to regulate pollution than may be nearby coastal states. Second, several of the largest registries (i.e., Panama and Liberia) are small countries that may lack the finances, human resources or infrastructure to adequately monitor their ships around the world. Third, because open registries compete with one another to attract registrants, strong enforcement initiatives are tempered by a desire to maintain good business relations with registrants. Unlike coastal or port states, whose regulatory activities are executed less in tandem with the business transaction of registration, flag states have competing roles. Consequently, strict regulatory enforcement may suffer at the expense of other objectives.

The pressures on open registries to weakly enforce their regulatory jurisdiction are potentially exacerbated by the central role that private classification agencies play in certifying ships as seaworthy. Flag states often rely on such classification agencies to complete ship inspections. Since ship owners must pay for inspections, and classification agencies also compete with one another, questions as to the predominant character of such inspections arise. The classification agency active in the Prestige's case was American Bureau of Shipping. At international law, Bermuda—as the flag state—was responsible for ensuring that the Prestige complied with international standards; however, Bermuda relied upon the vessel’s classification agency, the American Bureau of Shipping, to actually determine whether the Prestige was, in fact, in compliance with such standards.

To the extent that Mare Shipping's registration of the Prestige in the Bahamas: (1) guaranteed low exposure to Bahamian law due to weak enforcement, and (2) ensured protection from other legal regimes due to the flag state’s exclusive jurisdiction, use of this open registry state constituted a means of liability.
minimization for the company. While a factual determination of whether Bahamian enforcement of international standards was lax in this case is beyond this author's expertise, the theoretical scope for flags of convenience to provide a method of liability minimization is undeniable. Disassociation between territory and regulatory scope, lack of enforcement capacity and conflicting roles, may have undermined the Bahamas' function as an effective regulator in this instance, thus providing a source of liability minimization for the MNE involved.

C. Reliance on the Corporate Veil

A third category of MNE liability minimization is reliance on the corporate veil, which often limits the transfer of liability between the various corporations comprising the MNE. Limited shareholder liability, when applied to MNEs, means that parent companies are not always liable for the actions of their subsidiaries. The specific approaches of the United States, Canada and the United Kingdom will be discussed below.

In some circumstances, the corporate veil may be "pierced," and a parent company may be liable for the actions of a subsidiary. However, these circumstances tend to be the exception, rather than the rule. Moreover, the fragmentation of a MNE's legal identity across many corporations acts to minimize liability, as well as to localize liability exposure to one corporate person at a time. Thus, corporate structure is highly determinative of the potential success of holding one component of the MNE liable for the actions of another component.

While the corporate veil provides a real barrier to legal proceedings against a MNE's multiple components, it must be noted that an even more insurmountable barrier is that posed by the logistical challenges of transnational litigation involving multiple corporate entities (i.e., arranging cooperation among states in enforcement matters, tracking corporate finances and dissolution, witness subpoenas, evidence gathering, etc.). Moreover, civil litigation against MNEs is often financially very difficult, if not impossible, for the majority of the world's citizens. Given the level of global poverty, as well income disparity levels both within and amongst countries, most of the world's population lacks the fi-


100. Id.

101. To use a family analogy, while the veil may be pierced successfully and the parent company may be found liable, a corporate "cousin" of the subsidiary, while still a clear component of the MNE, may likely not be found liable for the actions of a given MNE subsidiary.

nancial means necessary for civil litigation, whether against locally incorporated or foreign incorporated MNE components.

1. The Scope of the Corporate Veil

The corporate veil describes the way in which a corporation is a separate legal being from its shareholders, directors and officers. The separate legal personality of MNE corporate components, along with the doctrine of limited liability for shareholders means that, as a rule, parent companies are not liable for the actions of their subsidiaries. This separation of liability is referred by some as the "entity law approach to MNE liability." As Antunes writes, "[t]he so-called entity law approach is the traditional and still-prevailing regulatory strategy concerning intragroup liability for the great majority of Common or Civil Law countries."

Barcelona Traction, Light and Power Company, Ltd. (Barcelona Traction) is the leading international law case dealing with the corporate veil, and its holding supports the entity law approach. The International Court of Justice (ICJ) held in Barcelona Traction that corporations are nationals of their country of incorporation. Furthermore, the ICJ "refused to lift the corporate veil to determine the real control relationship of the Belgian shareholders." The ICJ based its decision on municipal law principles, since there was no direct guidance from existing international law. The ICJ noted that piercing the veil was an exceptional step, and ultimately determined that it was not willing to take such a step in that case.

MNEs can rely upon the corporate veil to minimize liability in at least two ways. First, the corporate veil discourages courts from assuming jurisdiction over MNE components which are deemed foreign nationals. Without a veil-piercing that would connect the foreign MNE components to the state, therefore providing subject matter or personal jurisdiction, foreign MNE components may

103. DUKELOW & NUSE, supra note 5, at 899.
104. MNEs also operate internationally without controlling host country incorporated subsidiaries. MNEs achieve this by using branches or contractual joint ventures.
108. Id. at ¶ 70.
110. Barcelona Traction, supra note 107, at ¶¶ 56-58.
111. Id. at ¶¶ 56-58 & 101.
be outside a state's jurisdiction. Second, the corporate veil makes it difficult to plead a sufficient cause of action regarding the activities of a MNE component that is not locally incorporated. For instance, a court in the country of a MNE parent company may dismiss a claim against the parent company on the grounds that the actions in question were committed by a subsidiary company. In this instance, the subsidiary company is regarded as a separate legal entity whose acts cannot be imputed to the parent company in the absence of a veil-piercing doctrine or statutory direction. For instance, in Doe v. Unocal, claims that Unocal's French parent Total S.A. knowingly profited from Burmese forced labour were dismissed due to lack of personal jurisdiction; although Total S.A. was an "active parent corporation involved directly in decision-making about its subsidiaries' holdings," this was insufficient to pierce the veil since the two companies had maintained legal corporate separateness.

It should be noted that there is a contrasting approach to the entity law approach: the enterprise or single entity approach. The enterprise approach has seen limited application to date, and has occurred mainly in European Court of Justice decisions, proposals for EU legislative reform, and in some areas of North American law (although it has been limited to competition and anti-trust regulation). However it has not attained acceptance under international law. The enterprise approach recognizes: (1) a presumption that a subsidiary will act in the accordance with the wishes of its parent, and (2) a rebuttable presumption that a parent and subsidiary may be properly treated as a single undertaking.

Interestingly, the enterprise approach may face challenges on international law grounds, since international law currently favors the entity law approach, as interpreted from Barcelona Traction. International law may be nominally supportive, through soft law, of states' use of the enterprise approach in regulat-

112. In Wiwa v. Royal Dutch Shell, the U.S. Court of Appeals for the Second Circuit did not establish personal jurisdiction via Shell USA, but by Royal Dutch Shell's minimal contacts in New York. Originally, a magistrate had held such contacts inadequate, finding that New York did not have jurisdiction over Royal Dutch Shell because "neither the maintenance of the Investor Relations Office nor the defendants' direct actions in New York, were sufficient." Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 94 (2d Cir. 2000), cert. denied, 121 S.Ct. 1402 (2001).

113. Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001).

114. The European Court of Justice has employed this approach in several instances of competition law, leading to extraterritorial application of EU law. WALLACE, supra note 109, at 639.

115. Id.

116. Canada applies a similar approach in the area of tax law, and on certain occasions the United States has exhibited a single entity approach in its application of anti-trust law. Id. at 657.

117. Id. at 657.


119. International Labour Organisation (ILO), Tripartite Declaration of Principles Concerning

https://scholarship.law.berkeley.edu/bjil/vol26/iss2/4
DOI: https://doi.org/10.15779/Z38RH24
ing MNE activities in areas such as tort law. However, international law's general default adoption of the entity law approach can be seen as contrary to states' use of the enterprise approach in these circumstances; the prevailing international law view is that each of the corporations of a MNE is a distinct national of the nation-state in which it is incorporated.\textsuperscript{120} This view is difficult to rectify with an alternative legal conception of MNEs which would recognize their unified elements more overtly and would permit liability findings to apply to MNEs' multiple corporate parts.

2. Legal Instances Where the Veil Unravels

In several jurisdictions the corporate veil's strict separation of liability between parent and subsidiary companies under the entity law approach can be transcended in at least four circumstances: (1) statutory intervention; (2) invocation of an applicable legal doctrine such as agency law; (3) invocation of a veil-piercing doctrine; and (4) a direct cause of action against a parent company itself. Each of these exceptions will be addressed in turn.

\textit{i. Statutory Intervention}

The corporate veil cannot exist or minimize liability where there is directly applicable law to the contrary. Under Canadian Labour Law, for instance, Labour Boards have no trouble piercing the corporate veil in cases where they are required to permit workers' right to a collective bargaining unit.\textsuperscript{121} Several areas of U.S. law are governed by statutes which include the concept of "controlling corporation," "controlled corporation," or "integrated enterprise," including labour, banking, sale of alcoholic beverages and foreign corrupt practices.\textsuperscript{122} Where laws clearly overrule the entity law approach, "[t]raditional concepts of corporation law based on entity law and the severe limitations of 'piercing the veil' remedy are no longer relevant."\textsuperscript{123}

\textit{ii. Agency Law}

In some Common Law jurisdictions, such as the United Kingdom or the


121. Under Canadian Labour Law, the corporate veil is pierced readily in cases where an employer-employee relationship can be factually constructed despite the legal separation caused by the corporate veil. Canada Labour Code, \textit{supra} note 50.


123. \textit{Id.} at 315.}
United States, agency theory can be used to overcome entity law. A subsidiary may operate as the agent of the parent company such that the parent company is liable for the actions of the subsidiary. While the doctrine's factual requirement of "control" of a parent over its subsidiary is readily met, agency theory is inappropriate in most cases because both parties (the parent and subsidiary) must agree that the subsidiary is acting on behalf of the parent. Consequently, the consent element of agency theory often maintains the corporate veil. Subsidiaries are frequently used to "shield the parent corporation from liability" and therefore parent companies are careful not to act as though they have consented to having their subsidiaries act as agents.

iii. Veil-Piercing Doctrine

Many legal systems contain legal tests whereby the corporate veil can be pierced, which restrict the utility of the corporate veil for liability minimization purposes within that jurisdiction. The United States is the source of one fifth of the world's outward FDI. Since MNEs are the principle source of FDI, this fact underscores the importance of U.S. law and veil-piercing in the context of MNEs.

Under U.S. law, a corporate veil may be pierced if it is found that the parent company has exhibited a surplus of control of its subsidiary. The following factors have contributed to a finding of excessive control: nonobservance of formalities, gross undercapitalization, and commingling of assets. In addition, the veil may be pierced in instances of fraud, or in rare rulings, where veil-piercing is an equitable remedy to plaintiff injury. Despite the presence of statutory veil-piercing in some legal areas, the general U.S. approach to veil-

124. Id. at 307.
125. Id.
126. Id.
128. WIR 2003, supra note 1, at 70.
130. Miller, supra note 127 at 82.
132. Lack of clarity in this area is evidenced by the fact that Cannon Manufacturing Co. v. Cudahy Packing Co. continues to apply, with its holding that "a parent's complete commercial and financial domination of its subsidiary did not bring the parent within the jurisdiction as long as the formal separation was scrupulously maintained." United States v. Watchmakers of Switzerland Information Centre, Inc., 133 F. Supp. 40, 45 (S.D.N.Y. 1955) (cited by WALLACE, supra note 109, at
piercing is imprecise and thus can be conducive to MNE liability minimization.133

Under U.K. law, the 1897 decision of Salomon v. Salomon & Co., which still remains current, established that separately incorporated, parent companies are not liable for wholly-owned subsidiaries’ actions.134 This separation can be overcome by agency law (see above) or if there has been an abuse of the corporate form, namely if the subsidiary is merely “device and sham.”135 U.K. judges have generally shown greater reticence to pierce the corporate veil than have U.S. judges.136

There appears to be some movement towards greater ease in piercing the corporate veil, particularly in the U.S. legal system.137 However, there remains wide discrepancy in judicial rulings on the matter.138

iv. Direct Claims Against the Parent Company

Another way to overcome the corporate veil is to plead a cause of action directly against the parent company. This has been achieved in the U.K., where in at least two decisions, the House of Lords has assumed jurisdiction over claims of parent company negligence in their operation of South African subsidiaries.139 In Connelly v. RTZ Corp. Plc, the House of Lords found that it had jurisdiction over a cause of action brought by Mr. Connelly, who was diagnosed with laryngeal cancer and alleged that a U.K. parent company was responsible for the lack of uranium dust controls at the Namibian mine where he worked.140 The House of Lords also assumed jurisdiction in Lubbe and Others v. Cape Plc, a case involving claims of 3,000 plaintiffs who had developed asbestosis or mesothelioma in connection with mines and manufacturing plants run by the Cape Asbestos Company Ltd.141

---

136. Miller, supra note 127, at 79.
137. Id. at 80.
141. Lubbe and Others v. Cape Plc. 4 All ER 268.
Another alternative method to recovery is to sue the officers or directors of the parent company directly. This avoids the problem of piercing the veil, and if the suit is successful, the parent corporation itself will likely be found vicariously liable. 142

3. States’ Non-Assumption of Jurisdiction over Foreign Nationals

The prevailing view of international law—that corporations, regardless of ownership become nationals of their country of incorporation—has widespread ramifications. 143 If a national court pierces a corporate veil and thus implicates a foreign national in the proceedings (i.e., a parent company incorporated in a foreign state), the national court will assess this finding according to existing principles of jurisdiction under international law. 144 International law permits countries significant leeway in setting their policies regarding extraterritorial legal application. 145 If a country has a policy against extraterritorial legal application, then it may not assume jurisdiction over a foreign national that is an implicated MNE component, even after a successful veil-piercing. 146 For example, the U.S., which has a demonstrated record of extraterritorial legal application, may pierce a corporate veil, implicate a foreign MNE component national, and continue the proceeding despite the existence of a foreign party. A country like Canada, however, which favors a policy against extraterritorial application of its laws, 147 may choose not to use its legal system against foreign nationals.

143. Barcelona Traction included a restatement of this view. See Barcelona Traction, supra note 107, at ¶ 70.
146. Similarly, courts will follow domestic practice in relation to forum non conveniens (FNC), another major barrier to MNE liability findings. FNC occurs when a court refuses to hear a case on the grounds that a better forum exists elsewhere. FNC is highly relevant to MNE liability. On one level, FNC can be characterized as a failing of the international system which permits individual states to forgo adjudication even when this denies access to justice. The EU has moved to address this: article 2 of the Brussels Convention prohibits FNC where a foreign plaintiff brings suit against a corporation in its home state. Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 Sept. 1968, 1972 O.J. (L 299) 32, available at http://www.jus.uio.no/lm/brussels.jurisdiction.and.enforcement.of.judgments.in.civil.and-commercial.matters.convention.1968/doc.html#21. One of the most prominent FNC dismissals was the 1987 dismissal of the case against Union Carbide for the methyl isocyanate spill at its Bhopal subsidiary (resulting in an estimated two to eight thousand mortalities). See In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984, 809 F.2d 195 (2d Cir. 1987). Also beyond the scope of this paper is the U.S. Alien Tort Claims Act, a statute that has in some cases overcome FNC in the U.S. 28 USCS § 1350 (2002).
It appears that the Canadian approach to corporate nationality and extraterritorial jurisdiction makes it difficult for Canadian courts to regulate Canadian-based MNEs’ activities abroad, permitting added liability minimization. This inadequacy points to a need for a changed in the Canadian approach. Aversion to the extraterritorial application of laws, while comprehensible from a diplomatic and comity perspective, can prevent national courts from overseeing those MNEs which originate in their jurisdiction.

While statutory intervention and veil-piercing can overcome the division of parent-subsidiary liability, it is unclear how this innovation should be best transferred onto the international stage inhabited by MNEs, given existing practices with regard to extraterritorial jurisdiction. While the unilateral application of extraterritorial jurisdiction is one option, some commentators maintain that in certain cases it is likely to be self-defeating, pointing again to the need for advances in international law in this area.

4. The Many Veils of the Alfa Group

Having looked at the function of the entity law approach to the corporate veil, veil-piercing techniques and the broader problem of the allocation of national jurisdiction, I now turn to the specific facts of the *Prestige* case. There, the corporate veil successfully insulated the ultimate owners of the oil that was spilled from liability arising from the incident.


148. WALLACE, supra note 109 at 631 (referencing Bowlen v. The Queen, [1978] 1 F.C. 798, 5 C.P.C. 215 (T.D.); CASTEL, EXTRATERRITORIALITY IN INTERNATIONAL TRADE: CANADA AND UNITED STATES OF AMERICA PRACTICES COMPARED 137 (Butterworths, 1988)).

149. For example, Canada’s aversion to extraterritoriality and a lack of Canadian regulation of Canadian mining companies abroad have become contentious public policy issues in recent years. See NATIONAL ROUNDTABLES ON CORPORATE SOCIAL RESPONSIBILITY (CSR) AND THE CANADIAN EXTRACTIVE INDUSTRY IN DEVELOPING COUNTRIES, Advisory Report, (March 2007), http://geo.international.gc.ca/cip-pic/library/Advisory%20Group%20Report%20-%20March%202007.pdf.

150. In Avi-Yonah’s view antitrust and anti-discrimination regulation are two areas where unilateral extraterritoriality is likely to be ineffective. Prof. Avi-Yonah suggests multilateral moves toward harmonization in such areas instead. Reuven S. Avi-Yonah, National Regulation of Multinational Enterprises: an Essay on Comity, Extraterritoriality, and Harmonization, 42 COLUMBIA J. OF TRANSNAT'L L. 5, 26-31 (2002).

151. As discussed in the preceding section, the CLC 1992 currently protects ship charterers (such as Crown) from liability arising from an oil spill. This protection, however, is limited because the ship owner is still entitled to sue the charterers under the Convention. The charterer may also be subject to liability where the damage was caused by the charterer’s “personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.” CLC 1992, supra note 32, at Art. 4, ¶ 4. In an oil spill scenario, therefore, a MNE can still rely on the corporate veil to protect it from liability that would arise from suits launched by the ship owners, as well as from liability in situations where charterer intent is established.
If Crown's veil is not pierced, any liability arising from the spill would be faced only by Crown, regardless of evidence of parent corporation involvement, and regardless of whether Crown is adequately capitalized to pay a judgment against it. As suggested earlier, depending on the domestic jurisdiction involved, Crown's veil might be overcome by statutory intervention, use of a legal doctrine such as agency law, use of a veil-piercing doctrine such as abuse of the corporate form or excessive control, or a direct cause of action against the parent company.

i. Crown Resources Inc.'s Legal Ownership Chain

There are several corporate veils involved in the MNE ownership of the Prestige's oil. The immediate owner of the oil was Crown, which was widely reported to be a Swiss-incorporated subsidiary of a Russian conglomerate called the Alfa Group. Crown's ownership chain was actually much more complex than direct ownership by the Alfa Group, although the ownership chain still ultimately led to Alfa.

Crown's ownership chain involved two corporations, a trust entity and various beneficiaries. Crown Resources Inc. was owned by a Luxembourg corporation called Crown Luxembourg A.G., which was in turn owned by a Gibraltar incorporated company called CTF Holdings Ltd. CTF Holdings was owned by a

152. A direct claim against a parent company would expand the scope of potential liability, despite corporate veil limitations. Blumberg (2001), supra note 99, at 316-17.

153. E.g., Willmore, infra note 171. See also Bhushan Bahree, Carla Vitzthum & Brandon Michener, Oil Strikes Spanish Coast in Tanker Disaster, WALL STREET JOURNAL, 20 NOVEMBER 2003, at A2.
Liechtenstein-created trust entity called the Crown Finance Foundation. This foundation's beneficiaries included three individuals, Mikhail Fridman, Alexey Kuzmichev and German Khan who currently serve on the Alfa Group's supervisory board. In 2002, the Alfa Group itself was allegedly “an unincorporated association of various affiliated companies.” Therefore, at the time of the Prestige spill, the Alfa Group was presumably comprised of a partnership or contractual union involving, among others, the beneficiaries of the Crown Finance Foundation.

Following the Prestige incident, the Alfa Group has continued to prosper, as Board Chairman Mikhail Fridman wrote in his accompanying message to the 2003 Annual Report:

2003 also marked the Group’s fifth consecutive year of strong profitability, with cumulative net profits of US $5.10 billion for the five-year period ended in 2003. At 31 December 2003, Group shareholders’ equity reached US $4.65 billion.

The Alfa Group appears to have sought incorporated status since the Prestige incident. According to its website it is

one of Russia’s largest privately owned financial-industrial conglomerates, with interests in oil and gas, commercial and investment banking, insurance, retail trade, telecommunications, technology, as well as other industrial-trade and special-situation investment.

The Alfa Group is now held by CTF Holdings Ltd., which is still based in Gibraltar.

**ii. Crown Resources Inc.'s Role in the Alfa Group**

There appears to be at least some degree of affiliation between Crown and

---

154. Norex complaint, supra note 38, at ¶ 42.
156. Norex complaint, supra note 38, at ¶ 44.
157. Id. at ¶ 40.

At the time of the \textit{Prestige} spill, the Alfa Group was an owner of TNK oil,\footnote{\textit{Slick business?}, \textit{GUARDIAN OBSERVER}, Nov. 24, 2002, available at http://observer.guardian.co.uk/comment/story/0,6903,846684,00.html.} a major Russian oil company, and some reports have described Crown Resources Inc. as TNK’s “trading arm.”\footnote{\textit{Id.}} While the oil spilled was officially owned by Crown, it is possible that TNK or other Alfa Group entities had some role in the oil’s history, since before its attempted voyage from Ventspils, Latvia to Singapore, the \textit{Prestige} was used as a makeshift port storage facility in St. Petersburg,\footnote{\textit{Eden & Kudrle, supra note 63, at 102.}} perhaps accumulating its cargo through TNK or other Alfa Group entities.

\textit{iii. The Alfa Group's Liability Minimization in Action}

All of the MNE components in Crown’s equity chain are incorporated in different jurisdictions, triggering the logistical problems inherent in transnational litigation. Two of the involved states are known to employ policies of secrecy in financial and corporate matters (Switzerland and Luxembourg)\footnote{\textit{Id.}} and one is listed among only three countries identified by the OECD as “Unco-
operative tax havens" (Liechtenstein).  

The corporate veil is useful to the Alfa Group, not only for how it permits liability to be localized to one corporate component at a time, but also for how it localizes damage to reputation. For instance, the corporate veil permits TNK to publicly claim, uncontested, that it has no relation to Crown. This is exactly what TNK did following the Prestige incident. TNK spokesperson Vladimir Bobylyov is quoted as saying that "TNK has no relation to [Crown] and thus is not the cargo owner of the oil transported by the Prestige." This is despite the fact that as of early 2002, ninety percent of TNK's stock was held by Alfa Petroleum Holding, a subsidiary of the Crown Finance Foundation, mentioned above as Crown's fourth generation parent company (or parent trust entity).  

Interestingly, a month after the Prestige spill, Crown was effectively disowned by its parent company, and was sold by Crown Luxembourg Holdings, A.G., to Crown's management. Six of Crown's managers bought the company for 90.8 million Swiss francs (or 65 million USD), and changed the company name to "ERC Trading." With the sale of its corporate component, directly after the Prestige spill, the Alfa Group reduced the risk that a future piercing of Crown's corporate veil would lead to the parent company's liability exposure.  

III. EXPLANATIONS FOR MNE LIABILITY MINIMIZATION  

Having presented three types of liability minimization evident in the Prestige case — those related to outsourcing, renegade regime regulation and the corporate veil — I will now explain why MNEs might choose to pursue the liability minimization techniques currently available to them. To do so, I examine four theories of MNE operation from international business and international political economy scholarship: (1) the eclectic paradigm; (2) the international value

172. OECD Tax Haven List, supra note 75.
174. Id.
177. Frederik Blassel, The Swiss Crown without «Prestige», CASH (original in German), Jan. 17, 2003. Two years earlier Crown Resources Inc.'s business practice was described as follows: "Crown's trading in commodities totaled about $4.5 billion last year, a figure that Alfa, its parent, said would be more than doubled by [a proposed] merger." Olson & Tavernise, supra note 163.
chain; (3) the obsolescing bargain; and (4) the law of uneven development.

A. The Eclectic Paradigm

One analytical framework offered by international business scholarship is the eclectic or OLI paradigm, which states that MNEs seek to benefit from three types of advantages over local firms: internalization advantage, ownership advantage, and location advantage. Location advantages are the most straightforward of the three types of advantages, and refer to MNE access to country factors of production, such as a country’s natural and human resources, infrastructure, market size, and level of political risk. National standards (both their level and their actual enforcement) can be seen as contributing to the location advantages of a given country. The two other advantages, internalization and ownership, are examined in greater detail below.

1. Internalization Advantage

The theory of internalization advantage within the eclectic paradigm holds that MNEs can gain advantages over one another, and over domestic firms, through market internalization. Market internalization occurs when MNEs expand their operations into related industries and thereby envelope those open market activities which affect their business.

Critical to internalization advantage theory, and to its explanation of liability minimization, is the concept of transaction costs. Internalization theory holds that MNEs internalize markets because they seek decreased transaction costs. Where the transaction costs associated with expanded operations are less than the transaction costs of the open market, MNEs will choose to expand and internalize the market. Transaction costs are the “cost of organizing relationships


180. Eden, supra note 11, at 39.

181. Id.

182. Id.

183. Id.


over and above that which have to be incurred in a perfect market."\(^{186}\) In sum, internalization theory holds that MNEs can minimize their transaction costs through their decisions regarding market internalization.

Transaction costs can be heightened by market imperfection caused by state intervention, and as a result “[s]tate policies in the internalization literature are considered as inefficient policies to be arbitrated by MNEs ... [and] MNEs with global horizons are thus seen as efficient actors, offsetting the inefficient activities of states.”\(^{187}\) Liability, which is a court-ordered and government-enforced obligation, can therefore be viewed under this theory as a source of market imperfection, because it can increase the costs of doing business from those associated with a perfect market. Many instances of corporate behavior suggest that MNEs recognize that liability findings increase transaction costs. For example, pending lawsuits are detailed in notes to corporate financial statements, often along with analysts’ estimates as to the final cost of the lawsuit.\(^{188}\)

In sum, internalization theory argues that MNEs will not expand where transaction costs will be increased as a result of the expansion.\(^{189}\) It follows that MNEs will often not expand into areas with a high risk of liability. Instead, MNEs may choose to outsource activities where the risk of liability findings are high, since outsourcing steps in the production process tends to reduce overall transaction costs. In the *Prestige* context, internalization theory suggests that the transaction costs (likely including those associated with liability) deterred Crown from internalizing the market and owning its own tanker. Instead, an arm’s length arrangement was seen as more advantageous, and a tanker was chartered. MNE liability minimization is consistent with internalization theory,

---


188. In its 2004 Annual Report, Altria (formerly Phillip Morris) describes how liability findings are included in its financial statements: “ALG and its subsidiaries record provisions in the consolidated financial statements for pending litigation when they determine that an unfavorable outcome is probable and the amount of the loss can be reasonably estimated.” ALTRIA GROUP, INC., 2004 ANNUAL REPORT 24, available at http://www.altria.com/download/pdf/investors_2004_AnnRpt_FinancialReview_section5.pdf. It is true that companies are required by law to include such information in their notes to the financials. This legal requirement does not detract from the fact that lawsuits are viewed in financial cost terms by corporations.

The famous Ford Pinto case illustrates how quantification of legal liability can direct business decisions. In this case Ford calculated the costs of the wrongful death lawsuits that would result from a defective car, and weighed this amount with the cost of a recall. *See*, e.g., THE FORD PINTO CASE: A STUDY IN APPLIED ETHICS, BUSINESS AND TECHNOLOGY (Douglas Birsch & John H. Fielder eds., State University of New York Press 1994).

which holds that MNEs will pursue reduced transaction costs where possible and since liability risk represents a type of transaction cost it is minimized according to available mechanisms.

2. Ownership Advantage

A second type of advantage in the eclectic paradigm is ownership advantage. Ownership advantages refer to often intangible MNE assets which permit them to profit in foreign markets and rise above the cost disadvantages of such foreign operation. Ownership advantages have their foundation in either knowledge or oligopoly and can be transferred without cost within the MNE. For example, ownership advantages can include MNEs' global scanning ability, which allows MNEs to exploit differences between countries.

MNE knowledge of how to minimize liability (and thus reduce costs), gained by its global scanning ability, and identification of discrepancies in national regulation, fits within the concept of an ownership advantage. As the specifics of national regulation change, the MNE must constantly update its knowledge in order to reap the cost benefits of liability minimization. In the Prestige context, the Alfa Group had an ownership advantage in knowing which jurisdictions possessed favorable tax and secrecy laws. The Group then used this knowledge and located its subsidiaries in these states.

B. The International Value Chain

Another important theory in international business scholarship is that of the international value chain. This approach understands MNE successes as being based on their selection and enactment of a given strategy. This adopted strategy determines the length and form of the MNE's value chain. A chosen value chain is determined by the type and range of products sold, the geographic locations involved, and the steps in production which are completed within the MNE. Some use the term "direct value chain" to refer to production by MNE

190. Eden, supra note 11, at 36.
191. Id.
193. As mentioned, Crown Resources, Inc., and its parent companies were organized under the laws of Switzerland, Luxembourg, Liechtenstein and Gibraltar, all states favoring policies of secrecy and tax non-evasiveness. See, e.g., Palan, supra note 66, at 155.
194. Eden, supra note 11, at 40
195. Id.
196. Id.
197. Id.
components connected by equity ownership and use "indirect value chain" to refer to MNE production completed by parties not connected by ownership, such as that completed by contracted quasi-affiliates.198

The international value chain approach can explain MNE liability minimization if such behavior is viewed as being within MNE strategy and within a MNE's chosen chain of value creation. Not unlike the concepts of internalization advantage, value chain analysis adds to an understanding of where the boundaries of a MNE may lie, and why a firm may outsource liability-exposed elements of production that add little to their value chain. This perspective also adds to an understanding of how MNEs select the jurisdictions in which they operate. For example, just as taxation rates influence a MNE's location of particular functions,199 so do potential costs associated with liability. MNEs structure their value chain across different countries in ways that allow them to maximize profit by taking discrepancies in national legal regimes into account.200

When a MNE outsources elements of its business, as in the Prestige example, it is hiring an unaffiliated organization to carry out operations which it chooses not to include within its direct ownership value chain—operations which it chooses to keep outside of its boundaries as a firm.201 Such operations may be excluded from the MNE's direct value chain because they pose deterrent costs, which may include liability risk.

International value chain analysis recognizes that MNEs have an advantage over national firms in that they may arrange their operations across different countries.202 For instance, a MNE could achieve net cost savings by structuring its value chain in a way that provides tax savings,203 such as through its location in tax and secrecy havens. This strategic location permits different parts of the MNE value chain to engage in transfer pricing of intra-firm goods and capital flows.204 Value chain analysis thus demonstrate, to some degree, the manner in which many MNEs arrange their corporate components across national jurisdictions in ways that offer cost savings in the form of minimized liability exposure.

198. Id.
201. See, e.g., Jones, supra note 40.
203. See, e.g., Eunni & Post, supra note 199.
204. Eden, supra note 11, at 41.
C. The Obsolescing Bargain

One international political economy approach to MNEs, developed by Raymond Vernon, focuses upon the bargaining relationship between MNEs and host states. According to the obsolescing bargain approach, the host state is initially in a weaker position than the MNE in the bargaining relationship, because the state must offer concessions to attract the foreign direct investment. As the relationship between a MNE and a host state matures, however, the MNE commits immobile assets to its investment. This weakens its bargaining power, since it then has more assets at stake than it did initially. Therefore, the MNE's bargaining position vis-à-vis the host state weakens with the passing of time.

The obsolescing bargain approach offers significant insight into MNEs' pursuit of liability minimization. One way to interpret this theory is to recognize that MNEs lose bargaining power when their assets are placed at risk. Liability exposure itself represents a risk to MNE assets, because a finding of liability could compromise assets through a fine or asset seizure. Since MNEs wish to maintain a strong bargaining position in their relations with states, they will try to keep their assets out of reach of the host state's enforcement jurisdiction, i.e., through liability minimization. Therefore, MNE liability minimization is tantamount to avoiding risk to its assets.

In the Prestige example, use of potentially non-cooperative secrecy havens by the Alfa Group was a method of safeguarding assets which acted to strengthen the bargaining position of this MNE. Furthermore, it is notable that the relationship between ship registries (i.e., flag states) and shipping companies does not represent a usual MNE-host state investment relationship as the MNE does not submit immovable assets to the flag state when it chooses to register its ship with this authority. Since the obsolescing bargain is not triggered, it appears that the state does not garner a stronger bargaining position with time, potentially contributing to pressure on flag states to exercise weak regulatory oversight in order to encourage ships' continued registration.

D. The Law of Uneven Development

The law of uneven development is an analytic framework developed by Stephen Hymer that holds that MNEs operate as hierarchical structures which,

206. Eden, supra note 11, at 31.
207. Id.
208. Id.
209. While the registrant must pay the vessel registration fee, the registrant stays in possession and control of the vessel registered.
as they increase in size, "create a spatial division of labour across the globe that corresponds to the vertical division of labour within the MNE." According to the framework, the MNE's corporate hierarchy is "divided geographically into three divisions: top management in the largest core cities, white-collar coordination in smaller core cities, and blue-collar production distributed globally." The core, which contains the top management, grows continually wealthier than the periphery. This uneven development is facilitated through corporate tax avoidance, mobility of production facilities and loss of state power.

From this theoretical perspective, liability minimization can be viewed as a method by which a MNE constrains state power in its pursuit of uneven development. This constraint of state power allows the MNE to pursue its economic endeavors unfettered, with inequitable results. Successful liability minimization represents a weakening of state power and a strengthening of MNE power, permitting the periphery to be marginalized and the core to be favored. Corporate laws favoring MNEs avoidance of liability serve to weaken state power in that they lessen a state's ability to control the MNE.

Interestingly, liability minimization can be regarded not only as part of how MNEs act to constrain state power, but it is also a characteristic of the inequitable structure of the MNE itself. This can be seen in the way in which the peripheral parts of the MNE can be forced to assume more liability exposure than does the core; for example, entities at the MNE's periphery, such as quasi-affiliates, may face more exploitative terms of engagement (i.e., higher liability exposure) than do entities at the core of the MNE. For example, tanker owners face a greater liability risk than do the oil companies which charter them.

211. Id.
212. Id.
213. Id.
214. Liability minimization can happen at the core and at the periphery. The point is that with weakened state power, MNEs have the power to organise themselves in a value pyramid in disregard for other, non-MNE interests.
216. For instance, a contracted company at the MNE's periphery might have to assume all liability arising out of its operations, even in cases where the MNE itself bears some responsibility. As previously discussed, shifting firm operations to an arm's length quasi-affiliate permits an outsourcing company to reduce its vicarious liability exposure for employee performance. See Orts, supra note 46.
217. First, tanker owners (if they are also the tanker operators) are exposed to vicarious liability with regard to vessel operation, unlike the tanker charterers. Second, as discussed previously, under the CLC 1992 the tanker owner is held strictly liable for oil pollution (according to tanker tonnage) while the tanker charterer in contrast is directly excluded from all liability, unless the shipowner sues it directly or unless it is proved that "the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result." CLC 1992, supra note 33, at Art. 6. See also Article 3, ¶ 5 of the 1969 Civil
Hierarchy and wealth concentration appear clearly in the organization of the MNE which owned the *Prestige*’s oil. The company at the bottom of the ownership chain, Crown, was sold by its parent company to its managers, and then eventually went into liquidation.\textsuperscript{218} Crown was marginalized and then rejected from the core of the MNE, the Alfa Group. This MNE core continues to thrive, and judging by its financial statements is becoming continually wealthier, particularly as compared with its liquidated periphery, Crown.\textsuperscript{219}

\section*{IV. CONCLUSION}

MNEs play too critical a role in the global economy to unduly minimize their liability exposure by outsourcing, renegade regime regulation, and the corporate veil. National legislators and treaty negotiators must acknowledge MNEs’ liability minimization through the use of the three methods identifiable in the *Prestige* spill. Otherwise, liability minimization will ultimately become liability avoidance, and will undermine both the rule of law and states’ ability to implement public policy through their court systems.

The *Prestige* example demonstrates several ways in which MNE liability minimization occurs. First, the existence of the outsourcing contract buffered the cargo owners from liability and thus served to minimize Crown’s liability. Second, liability minimization also occurred when the Coulouspolus family trust, the owners of the Liberian company which owned the *Prestige*, remained insulated from liability since Liberian law purportedly forbid their identification as corporate shareholders.\textsuperscript{220} Third, the tanker owners minimized their liability by registering the *Prestige* in an open ship registry, a jurisdiction which may have had less onerous regulatory requirements than those exercised by closed registry.\textsuperscript{221} Finally, the corporate veil provided further liability minimization; while Crown owned the *Prestige*’s oil on paper, it is but one of a network of corporations controlled by Russia’s Alfa Group, an entity with the resources to contribute significantly to the clean-up and compensation necessitated by the spill, but also an entity that is well protected from liability by the legal fiction of the corporate veil.\textsuperscript{222}

There are various explanations for why MNEs seek liability minimization.

\footnotesize{\textsuperscript{218} See Managers buy metals trader from Alfa Group - Crown Resources, supra note 165; Corporate Insolvency Notices, supra note 33.  
\textsuperscript{219} The ALFA GROUP, 2003 ANNUAL REPORT, supra note 158.  
\textsuperscript{220} Secretive Greek Dynasty Linked to Sunken Tanker, supra note 38.  
\textsuperscript{221} The Bahamas is a flag of convenience states identified by UNCTAD. Duruigbo, supra note 89, at 153.  
\textsuperscript{222} Three corporate veils and one trust instrument separated Crown Resources Inc. from the Alfa Group. Norex complaint, supra note 38, at ¶42.}
Under the international business theory of the eclectic paradigm, liability can be regarded as a source of increased MNE transaction costs. MNEs thus seek to reduce liability exposure in the same fashion that they seek to reduce other sources of transaction costs. MNEs furthermore view liability exposure in relation to their internalization, location and ownership advantages. Directed by this type of analysis, MNEs may choose to expand into low liability industries, locate in areas with a low risk of a liability finding or safeguard sensitive information related to liability exposure. Under the international value chain theory of the MNE, liability minimization can be understood as the result of a selected MNE strategy that leads to the structuring of an international value chain such that liability-related costs are minimized.

In international political economy literature, the obsolescing bargain explains liability minimization as a result of a MNE's wish to retain a strong bargaining position vis-à-vis its host state. Avoiding the risk of liability relates closely to MNEs' desire not to expose assets to state action, and to maintain bargaining power. Under the law of uneven development, MNE liability minimization can be understood as a method by which MNEs weaken state power, to ensure their ability to organize in an unequal hierarchy.

There are several policy and legislative options available to address liability minimization. These include continued national and multilateral initiatives aimed at influencing secrecy regimes and flags of convenience. Outsourcing as a way of reducing liability exposure may also merit legislative attention. Furthermore, lawmakers could favor the enterprise rather than the entity law approach to the corporate veil in circumstances where to do otherwise would shield MNE components from liability. State coordination with regard to appropriate extraterritorial regulatory and adjudicatory jurisdiction is another avenue meriting development.

Addressing the liability minimization permitted by the corporate veil poses unique challenges. While states have moved towards international cooperation and comprehensive multilateral regimes that address this problem in areas such as bankruptcy and taxation, other areas such as MNE tort liability remain largely unregulated.


224. Eden, supra note 11 at 31.

225. Id.

226. As Avi-Yonah writes in the context of international bankruptcies, “there has been a long-standing consensus that the correct policy outcome only can be achieved under ‘universalism,’ i.e., an enterprise approach.” Avi-Yonah, supra note 150, at 20. With regard to taxation, he notes that “Decades of experience have shown that the entity approach to taxing MNEs—i.e. separate accounting—is not feasible and that the only viable alternative is an enterprise approach.” Id. at 23.

undefined in the international realm.\textsuperscript{228} With such areas largely undefined, states are free to use their own policies, such as aversion to extraterritoriality, in addressing MNE tort claims.\textsuperscript{229} Deference to individual state policies in this area is not conducive to the creation of a comprehensive regime which would match MNE scope with appropriate regulatory scope. Furthermore, unless supported by developments in international law, states attempting to regulate MNEs using the enterprise approach may find it difficult to secure support from other states, resulting in challenges such as lack of access to information.\textsuperscript{230}

This Article has stressed the importance of exposing MNE parent companies to liability for subsidiary actions because such a move would better reflect the economic reality of MNEs, entities which often act according to global strategies. It is notable that public policy objectives, such as deterrence of risky and polluting behavior, may also be better served when more than one corporate component is exposed to the legal ramifications of an event such as the Prestige. For instance, if Crown’s veil were pierced, the wider MNE of which it is a part, including oil giant TNK, may be influenced. The whole MNE may recognize that its interests are served by acting to avoid oil spills in the future.

On a final note, it must be recognized that in affecting both the rule of law and effective public policy, liability minimization also has ramifications for democracy. A government’s ability to effectively implement public policy goals is vital to the function of democracy. If a government is unable to act according to the will of the people, then there is little point to people voicing their will. In other words, democratic representation is useless if it is not tied to the possibility of effective state action. The rule of law is also critical to democracy because without common adherence to public laws, private power will dominate society and render obsolete the idea of democratic representation. The Prestige incident illustrates the challenges that MNE liability minimization mechanisms pose to states seeking to enable both effective public policy and the rule of law within their borders.

\textsuperscript{228} Avi-Yonah argues for a comity-driven, case-by-case application of the Enterprise approach in cases of tort liability. Avi-Yonah, supra note 150, at 15.

\textsuperscript{229} Canada, for example, tends not to apply extraterritorial jurisdiction. See, e.g., OECD, supra note 147.