Corporate Regulation, Climate Change and Corporate Law: Challenges and Balance in an International and Global World

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Abstract

The focus of this paper is the impact of corporate governance on the way in which corporations handle their environmental obligations. It is noted that the current relationship between corporations and the environment is unsatisfactory, drawing on levels of climate pollution and disasters such as the Tafigura to demonstrate the fact. Possible methods through which corporate governance can be used to address environmental issues are explored. The neo-liberal bent of current supervisor standards, in particular the World Bank's country assessment and OECD's guidelines emphasis on shareholder interests, is highlighted. It is argued that the current capitalist models fails to take adequate account of environmental concerns. The paper compares of UK and Albanian approaches to the regulations of directors' duties, as a reflection on the corporate governance policy of these jurisdictions. The ability of shareholders to protect and enforce corporate and environmental interests against directors who mismanage the corporation under both systems in considered. The paper concludes that the adoption by Albania of laws allowing for the lifting of corporate veils for companies acting internationally represents a significant advantage for minority stakeholders, including the environmental lobby, to ensure corporate responsibility.

Introduction

'There is "a looming environmental crisis", which poses a threat to the basic of our very existence'.[1] The IPCC believe

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[1] Beate Sjafjell, *Towards a Sustainable European Company Law,* 3 (Wolters Kluwer 2009); Dieter Helm & Cameron Hepburn (eds), *The Economics and Politics of Climate Change* (Oxford University Press 2009).

> change to which effective adaptation is not possible, or will only be available at very high social, environmental and economic costs.[2]

This paper tries to link climate change and corporate governance because corporate governance systems have failed to mitigate dangerous emissions by companies. Partly this is because of the powerful neo-liberal paradigm which does not recognise company externalities and tries to deregulate in a global context. It seems that we cannot continue to prosper on this planet with unlimited deregulated growth. We need a new paradigm for corporate governance. If growth is to be constrained significant redistribution is necessary and this is a huge challenge for corporate governance particularly in the Western world. This chapter posits a stakeholder model for companies which will give national jurisdictions more power to control companies of groups (Multinational Companies) by allowing all of the components of the group to be sued. For some time the imbalance between governments and ordinary people has been growing because of the protective veils mechanisms between companies and their minions and individual responsibility.

To consider 'Corporate Governance' or the regulation of companies[3] is also to consider competing models of capitalism and competing global economic models. There is no doubt that we are living in an age when capitalism is in crisis. Many academic commentators believe that there is 'a rapidly accelerating and potentially fatal human crisis of global proportions?'[4] And if there is, are 'the systemic forces nurturing the growth and dominance of global corporations … at the heart of the current human dilemma?'[5] Escalating recent scandals in the financial sector, press manipulation of communications,[6] the increasing anomie in our societies, the burgeoning inequality between individuals and between states shows that our model of capitalism is in trouble. Rowan Williams argues that 'no-one can any longer regard the free markets as a natural beneficent mechanism.'[7]

If there is a crisis of capitalism today it is important to consider the root causes of the problems, economically, philosophically and legally. It is not good enough to divide specialities into watertight compartments. Many scholars argue that powerful companies are a central part of a system which exacerbates poverty and inequality.[8]

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[2] The Intergovernmental Panel on Climate Change (IPCC) *Climate Change 2007: Synthesis Report*, 65 http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf (accessed on 16 Oct. 2012).

[3] Principally company law but also soft law instruments and pressure from individuals and groups (for example NGOs).

[4] David Korten, *When Corporations Rule the World,* 3 (Kumarian Press 1995).

[5] *Ibid.,* 9.

[6] The National Archive, *Leveson Inquiry: Culture, Practice and Ethics of the Press*, www.leveson inquiry.org.uk/ (accessed 26 Sept. 2012).

[7] David Hare, *Rowan Williams: God's Boxer* (9 July 2011) http://www.theguardian.com/uk/2011/jul/08/rowan-williams-interview-david-hare (accessed 20 June 2014).

[8] Janet Dine, *Companies, International Trade and Human Rights* (Cambridge University Press 2005); A Clapham, *The Question of Jurisdiction under International Criminal Law over Legal Persons* in M Kamminga & S Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law*

> The world has become a dangerous unequal place – even for the rich[9] in the major cities of the West. Debt services alone accounts for $200 billion a year in currency flows from the South to the North…While 1.2 billion people – nearly a fifth of the world's population – have to manage on less than a dollar a day[10]

The first decade of this century has not revealed a better world for the poor; rather research shows that inequality has been rampant,[11] and studies suggesting that powerful companies should have responsibilities to the planet and to stakeholders other than shareholders are now legion.[12] However, there are comparatively few arguments[13] linking these problems to the structure of company law and corporate governance itself. The links between company law and corporate governance, deepening poverty and the structure of company law have not yet been fully drawn. Add the multifaceted environmental[14] crisis, including climate change and pollution means that we need to question all of our institutions, including companies and the related issue of corporate governance. Companies are not a natural phenomenon, they were crafted by societies whether by individuals or together in regional pacts (like the European Union (EU)) and influenced by global players like the International Monetary Fund (IMF), the World Bank (WB), the World Trade Organisation (WTO)[15] or the Organisation for

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(Kluwer 2000); J Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press 2004).

[9] United Nations Development Programme (UNDP), *Beyond Scarcity; Power, Poverty and the Global Water Crisis,* Human Development Report 2006.

[10] Ulrich Beck, *Power in the Global Age,* 24–5 (Polity Press 2005). And see Duncan Green, *From Poverty to Power* (Oxfam 2008–2009); J Stiglitz, *The Price of Inequality,* (Allan Lane Penguin 2012); Richard Wilkinson & Kate Pickett, *The Spirit Level* (Penguin 2009).

[11] Hunger Notes, *2013 World Hunger and Poverty Facts and Statistics,* http://www.worldhunger.org/articles/Learn/world%20hunger%20facts%202002.htm (accessed 28 July 2012).

[12] For a few see: John Ruggie, *Human Rights Council, Seventeenth Session* '*Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Enterprise*s' http://198.170.85.29/Ruggie-report-2010.pdf (updated 9 April 2010); Jennifer Zerk, *Multinational and Corporate Social Responsibilities: Limitations and Opportunities in International Law* (Cambridge University Press 2006); Muzaffer Eroglu, *Multinational Enterprises and Tort Liabilities* (Edward Elgar 2008); Nina Boeger, Rachel Murray & Charlotte Villiers (eds), *Perspectives on Corporate Social Responsibility* (Edward Elgar 2008).

[13] But see Alan Dignam & Michael Galanis, *The Globalization of Corporate Governance* (Ashgate 2009); Zerk *supra* n 12; Eroglu, *supra* n 12.

[14] Mike Hulme, *Why We Disagree about Climate Change* (Cambridge University Press 2009); Edward B Barbier, *A Global Green New Deal: Rethinking the Economic Recovery* (UNEP and Cambridge University Press 2010); Helm & Hepburn, *supra* n 1; Nicholas Stern, *The Economics of Climate Change* (Cambridge University Press 2008); M Chossudovsky, *The Globalisation of Poverty* (Pluto 1998); P Harrison, *Inside the Third World* (3rd ed., Penguin 1993); M Hertsgaard, *Earth Odyssey* (Abacus 1999); J Karliner, *The Corporate Planet* (Sierra Club 1997); Oxfam, *Oxfam Global Finance, Tax Havens: Releasing the Hidden Billions for Poverty Eradication* (1 June 2000) *http://policy-practice.oxfam.org.uk/publications/tax-havens-releasing-the-hidden-billions-for-poverty-eradication-114611* (accessed 25 Oct. 2012); Oxfam, *Oil, Gas and Mining: Poor Communities Pay the Price,* (Oxfam 2001); Michael Redclift & Ted Benton (eds), *Social Theory and the Global Environment* (Routledge 1994).

[15] A Dignam & M Galanis, *Corporate Governance and the Importance of Macroeconomic Context* 28 Oxford Journal of Legal Studies 201 (2008).

Economic Cooperation and Development (OECD). Their behaviour and structures must be examined and scrutinised. This chapter focuses on national law at the same time realising that the global architecture involves multifaceted layers of institutions at global, regional and national implications.

It is clear that the environmental crisis that we are witnessing is partly linked to the proliferation of companies' emissions. The catastrophic rise of temperatures in the world has been due to CO2 and other emissions due to the activities of companies.[16] The structure of companies allowed the managers of companies to 'lose' externalities in their balance sheets including pollution from the air. Recently the Trafigura scandal has shown that pollution is invidious, killing people and degrading the sea and the land.[17] There is also no doubt that there has been a significant export of 'dirty' industries and significant pollution from the activities of mining and manufacturing operations masterminded by TNCs across the world. "One of the keys to understanding the global problem of waste and pollution, is that much of its incidence in the developing world is due to developed nations' illegal shipment of their own waste to these regions… trucks entering Eastern Europe [from Germany] export hundreds of thousands of tons of waste that Westerners find too expensive or too inconvenient to dispose of themselves. The pressure is mostly financial. Under US and European environmental laws today, the cost of disposing of hazardous industrial and mining waste can be as high as several thousand dollars per ton … Shipping such materials abroad is often much cheaper."[18]

The exporting nations can pose as environmentally aware:

> Japan has reduced its aluminium smelting capacity from 1.2 million tons to 149,000 tons and now imports 90% of its aluminium. What this involves in human terms is suggested by a case study of the Philippine Associated Smelting and Refining Corporation (PASAR). PASAR operates a Japanese-financed and constructed copper smelting plant in the Philippine province of Leyte to produce high grade copper cathodes for shipment to Japan. The plant occupies 400 acres of land expropriated by the Philippine Government from local residents at give-away prices. Gas and waste water emissions from the plant contain high concentrations of boron, arsenic, heavy metals, and sulphur compounds that have contaminated local water supplies, reduced fishing and rice yields, damaged the forests, and increased the occurrence of upper respiratory diseases among local residents. Local people whose homes, livelihoods and health have been sacrificed to PASAR are now largely dependent on the occasional part-time or contractual employment they are offered to do the plant's most dangerous and dirtiest jobs.[19]

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[16] N Stern, *The Economics of Climate Change* (Cambridge University Press 2007).

[17] See *infra* n 20.

[18] M Czinkota, I Ronksinen & M Moffett, *International Business* (4th ed., Dryden 1996).

[19] Korten, *supra* n 4, 14.

David Leigh has written on the Trafigura disaster where a ship unloaded cargo in the Ivory Coast killing many and damaging at least 31,000. The ship was loaded with toxic chemicals from Europe:

> The UN human rights special rapporteur, Professor Okechukwu Ibeanu, wrote: 'According to official estimates, there were 15 deaths, 69 persons hospitalised and more than 108,000 medical consultations … there seems to be strong prima facie evidence that the reported deaths and adverse health consequences are related to the dumping.[20]

According to Leigh: 'The documents reveal that the London-based traders hoped to make profits of $7m a time by buying up what they called "bloody cheap" cargoes of sulphur-contaminated Mexican gasoline. They decided to try to process the fuel on board a tanker anchored offshore, creating toxic waste they called "slops".'[21] A number of company internal e-mails were found:

> One trader wrote on 10 March 2006: 'I don't know how we dispose of the slops and I don't imply we would dump them, but for sure, there must be some way to pay someone to take them.' The resulting black, stinking, slurry was eventually dumped around landfills in Abidjan, after Trafigura paid an unqualified local man to take it away in tanker trucks at a cheap rate.[22]

Recently there has been significant disquiet with 'fracking'[23]. There are many reports of environmental violations perpetrated by large companies.[24] Simultaneously the amount of extraction of minerals and other materials from the ground rises exponentially. On the eve of India's independence, Mahatma Gandhi was asked whether he thought the country could follow the British model of industrial development. His response retains a powerful resonance in a world that has to redefine its relation to the earth's ecology: 'It took Britain half the resources of this planet to achieve its prosperity. How many planets will India require for development?' This paper considers this issue in the context of corporate governance.

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[20] David Leigh, *How UK Oil Company Trafigura Tried to Cover Up African Pollution Disaster*, The Guardian (16 Sept. 2009) http://www.guardian.co.uk/world/2009/sep/16/trafigura-african-pollution-disaster (accessed 17 Oct. 2012).

[21] *Ibid.*

[22] *Ibid.*

[23] *Quit Coal, Natural Gas & Hydraulic Fracking: What is Greenpeace's position on Natural Gas?*, http://quitcoal.org/natural-gas-hydraulic-fracking (accessed 16 Oct. 2012) "Hydraulic fracture methods ("fracking") are associated with a range of environmental impacts, some of which are not fully understood. It's possible that the carbon footprint of shale gas may be significantly greater than for conventional gas".

[24] See Oxfam, *Global Finance Hurts the Poor,* 46 (Oxfam America 2002); and Oxfam *Oil*, *Gas and Mining, supra* n 14.

I. Climate Change

There is 'a looming environmental crisis, which poses a threat to the basic of our very existence;[25] The IPCC believe

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There has been for some time a pollution epidemic but the climate change crisis has eclipsed this. The corporate governance debate has not included the issues of climate change, rather shied away from internalizing environmental costs including carbon emissions. The sustainability industry is large but is beset by spin doctors.[27] The Stern Review said that the negative effects of externalising greenhouse gasses is 'the greatest and widest-ranging market failing ever seen'[28] Using the **annual ceiling of 14.5 Gt CO_2,** if emissions were frozen at the **current level of 29 Gt CO_2** we would need two planets. However, some countries are running a less sustainable account than others. With 15 percent of the world population, rich countries are using 90 percent of the sustainable budget. How many planets would we need if developing countries were to follow the example of these countries?[29]

At last we believe that anthropogenic is real: 'we have slowly, and at times reluctantly, realised that humanity has become an active agent in the reshaping of physical climates around the world, so our cultural, social, political and ethical practices are reinterpreting what climate change means.'[30] Principle 12 of the Rio Declaration requires states to cooperate to promote a supportive and open international economic system and demanded that 'trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'[31] Agenda 21 of the Rio Declaration also says that international trade has been inequitable and this has been one reason for environmen-

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[25] Sjafjell, *supra* n 1, 3.

[26] IPCC, *supra* n 2.

[27] EIRIS, *On Track for Rio +20?: How are Global Companies Responding to Sustainability?,* http://www.eiris.org/files/research%20publications/EIRISGlobalSustainbailityReport2012.pdf (accessed 9 June 2014); and see T Cave & A Rowell, *A Quiet Word: Lobbying* (Bodley Head 2014).

[28] N Stern, *On the Economics of Climate Change: Executive Summary 2006*, www.sternreview.org.uk (accessed 16 Oct. 2012); see also N Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press 2007).

[29] UNDP, *How Many Planets,* http://hdr.undp.org/en/statistics/data/climatechange/planets/ (accessed 16 Oct. 2012); Helm & Hepburn *supra* n 1.

[30] Hulme, *supra* n 14, xxv.

[31] UNCED, *Report of the UN Conference on Environment and Development Annex 1, Rio Declaration and Development,* A/CONE. 151/26, Vol. 1 (12 Aug. 1992).

tal degradation of the planet. It is a paradox that the Declaration also believed in the logic of trade liberalisation particularly because it would be good for the world. Elliott argues that one reason for the argument is a semantic one; the rhetoric of international trade does not allow 'protection' against nations. She says:

> Can environmental protection issues be accommodated within the logic of trade liberalisation? Can trade liberalisation contribute to overcoming environmental degradation or is it likely to contribute to further environmental degradation? Is it possible in trade liberalisation discourse, to distinguish between environmental protection and environmental protectionism? … These are important because 'trade rules and agreements are a major determinant of how natural resources are used, what pressures are placed on the environment and who benefits from the huge money flows… that cross borders with the exchange of goods … At a normative level, answers to these questions rest in part on different views about 'protection' – a 'pejorative term' for the trade community.[32]

For corporate governance this matters because of the importance of the macroeconomic context where the WTO is crucial and is heavily influenced by neo-liberal economics. Deregulation and free markets policies and environmental protection are usually conflicting aims, although some scholars believe that a market solution can be found. Paterson promotes a privatized market mechanism arguing for a new paradigm known as 'global environmental governance':

> [W]hile such governance is commonly seen in terms of a tragedy of the commons arising out of the anarchy of the interstate system, it is more fruitful to analyse these dynamics in relating to a conception of global capitalism. While efforts to govern global environmental problems started out as attempts to regulate the side-effects of existing form of capitalism development, they have increasing been organised to channel capitalism in novel directions.[33]

Indeed climate change is a new sort of 'pure public commons', since no state or individual can fashion a solution. Although it is clear that inter-state rivals can co-operate in treaties, accords and protocols.[34] The power of 'Capital'[35] is so pervasive that even

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[32] L Elliott, *The Global Politics of the Environment* (2nd ed., Palgrave Macmillan 2004), citing S Postel & C Flavin *Reshaping the Global Economy*" in Lester Brow et al., (eds), *State of the World* (Norton & Co 1991); K Berlin & T Lang, *Trade and the Environment* 16(4) The Washington Quarterly 35 (1993).

[33] Mathew Paterson, *Global Governance for Sustainable Capitalism? The Political Economy of Global Environment Governance*, in W Neil Adger & Andrew Jordan (eds), *Governing Sustainability*, 99 (Cambridge University Press 2009).

[34] Katherina Brown, *Human Development and Environmental Governance: A Reality Check*, in Adger & Jordan, *supra* n 33; Hulme, *supra* n 14.

[35] Beck, *supra* n 10.

international law has been captured.[36] Paterson shows that global governance has been guided by the Washington Consensus and the fetishism of markets today.[37] Now privatisation has gone further, in a 'dynamic change where standards and regulations are obeyed not by governments but in market rules by the market for the market'.[38] Paterson believes that market mechanisms are:

> [S]haping business practice, potentially significantly. Should the variety of schemes to shape investment practice with regard to CO2 emissions – the Carbon Disclosure, Project, the Global Reporting Initiative, UNEP's Financial Industries Initiative, and so on – succeed in generating a norm which treats CO2-intensive firms as financial liabilities, then substantial change in investment in renewable energy can be expected … But, on the other hand, privatisation not only entails firms attempting to self-regulate to organise and legitimate their growth, but environmental NGOs to fill the void left by declining regulation by states, through developing schemes to put pressures on firms to change practices.[39]

We will see whether these market solutions will work and change the complacency around the climate change debate and ameliorate carbon emissions. There is real need to address corporate governance in this context. However, there are already a proliferation of Carbon Trading markets[40] but many commentators believe that financial emission markets are only a way of making money rather than ameliorating the problem of climate change:

> Alongside the development of proposals for emissions trading schemes at global and national level was a positive explosion of activity by financial markets actors … What explains this explosion of activity is that, while emissions trading can be understood in terms of economic efficiency, it very definitely operates through the creation of new markets in which firms can develop economic strategies and secondary markets. In fact, the future markets in this instance existed significantly before the real markets… Emissions trading as a project has been, and continues to be, propelled by realisation by powerful financial actors that here was a new commodity to be sold, new profits to be made.[41]

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[36] *Ibid*; and see Anna Grear, *Redirecting Human Rights* (Palgrave Macmillan 2010).

[37] Paterson, *supra* n 33, 107.

[38] Paterson cites instances like the International Organisation for Standardization's 1400014000, the Forest Stewardship Councils; *Ibid*., 109.

[39] Paterson, *supra* n 33, 109–10.

[40] Including the European Trading Market, Australian, BP, etc. see S Pulver, *Making Sense of Corporate Environmentalism: An Environmental Contestation Approach to Analyzing the Causes and Consequences of the Climate Change Policy in the Oil Industry* 20 Organisation and Environment 1 (2007).

[41] Paterson, *supra* n 33, 111–2.

Similar projects are criticised in the some way, including the Joint Implementation and the Clean Development Mechanism.[42] Corporate governance mechanisms could affect the implementation of sustainable business; so far there are lamentably few effective strategies.[43] One of the problems is that the economists and the environmental lobby think very differently, certainly the macroeconomists believe that growth is crucial for material gains pushed by their neo-liberal ideology. On the other hand environmentalists believe that the sustainability of the planet needs less growth and instead redistribution.[44] Legislators and lawyers are locked into a power struggle between powerful interests, specifically the Multinational Companies and the environment. This is an unbalanced struggle because in corporate governance terms defining the 'environment' is a very complex problem. Even if we could define the 'environment' as a stakeholder (which is a complex argument itself)[45] the paramount model in the western world discounts stakeholder models of companies preferring shareholder primacy. It seems that this model with the other relevant trailing neo-liberal connotations will inevitably leave us trashing the planet and eventually make human life extinct.[46] This article therefore focuses on a number of stakeholder models to see whether the environment concerns are embedded in legislation or soft law. First, at the international level the prestigious World Bank/OECD Codes have some relevance. Although these Codes are neo-liberal based the environment are mentioned (sparingly). The World Bank and The Organisation for Economic Co-operation and Development (OECD):

> As part of the Reports on the Observance of Standards and Codes (ROSC) initiative, the World Bank has established a program to assist its member countries in strengthening their corporate governance frameworks. The objectives of this program are to
>
> - Benchmark the country's corporate governance framework and company practices against the OECD Principles for Corporate Governance.
> - Assist the country in developing and implementing a country action plan for improving institutional capacity with a view to strengthening the country's corporate governance framework.

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[42] *Ibid.*

[43] P Sands, *Principles of International Environmental Law* (Cambridge University Press 2009); for a European perspective see Sjafell, *supra* n 1, 227–8.

[44] M Sandel, *What Money Can't Buy* (Allan Lane 2012); R Skideksky & E Skidelsky, *How Much is Enough* (Allan Lane 2012); and see J Dine & M Koutias, *The Nature of Corporate Governance: The Significance of National Cultural Identity* (Edward Elgar 2013).

[45] Andrew Keay, *The Corporate Objective,* Ch. 3 (Edward Elgar 2011).

[46] Dine & Koutias, *supra* n 44, 4 et seq; L Talbot*, Progressive Corporate Governance for the 21st Century* (Routledge 2013); A Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave 2010).

- Raise awareness of good corporate governance practices among the country's public and private sector stakeholders.[47]

II. Promoting the Neo-Liberal Agenda in Corporate Governance: Standards, Codes and Templates

'The World Bank conducts corporate governance country assessments under the Reports on the Observance of Standards and Codes (ROSC) initiative at the invitation of country authorities. The World Bank uses a diagnostic tool – a Template – that it has developed to gather pertinent information for preparing the Corporate Governance ROSC.'[48] It is very clear that the World Bank Template of Corporate governance is significantly tilted against stakeholders other than shareholders; the Template propagates the canard[49] that the shareholders are the owners of the company.[50] The Template considers the most important issues of corporate governance to be the rules about shareholders' rights and particularly their property rights. The Template is in a form of a questionnaire and the first section is entitled 'Ownership and Control' question 1 is about the 'ownership and its concentration'.[51] Later in this template a key concept of neo-liberal axioms appears, that is the message that markets should be 'efficient' without properly defining efficiency: it is certain that the template prefers a shareholder primacy. On these terms many externalities are not included in the definition of 'efficiency', especially a fair wage for employees and the costs for the environment. 'A Corporate governance framework should be developed with a view to its impact on overall economic performance, market integrity and the incentives it creates for the market participants and the promotion of transparent efficient markets.'[52] Chapter II details the importance of shareholders' rights. 'The title is "The rights of shareholders and key ownership functions": The corporate governance framework should protect and facilitate the exercise of shareholders' rights.'[53] The questions in this section are extensive, involving questions 141–201. After this there is a wide-ranging set of questions about the market for corporate controls which is neo-liberal speak for takeovers which allows the powerful companies to dominate the international agenda and often dominate states: 'Markets for corporate control should be allowed to function

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[47] The World Bank Group, *Reports on the Observance of Standards and Codes,* http://www.worldbank.org/ifa/rosc_cg.html (accessed 17 Aug. 2012).

[48] *Ibid.*

[49] P Ireland, *Company Law and the Myth of Shareholder Ownership* 62(1) MLR 32 (1999); see also Jennifer G Hill, *Visions and Revisions of the Shareholder* 48 American Journal of Comparative Law 39 (2000).

[50] Keay, *supra* n 45 considering this issue several times including when he cites the UK's Cadbury committee in its *Report on the Financial Aspect of Corporate Governance* (1992).

[51] The World Bank Group, Corporate Governance Assessment Template, http://www.worldbank.org/ifa/CG_template.pdf (accessed 20 Aug. 2012).

[52] *Ibid.*

[53] *Ibid.*

in an efficient and transparent manner'[54] (nineteen questions). Chapter III returns to the equitable treatment of shareholders' rights with (another thirty-one questions). The template only mentions stakeholders at question 277 where Chapter V deals with stakeholders: 'Do any laws provide rights to stakeholders (employees, trade unions, creditors, customers, suppliers, consumers, and the community) to participate or have input in the corporate governance of the company?' Although the section is headed 'Stakeholders' it is telling in its definition; it 'includes constituencies *other than shareholders*[55], such as employees, trade unions, creditors, customers, suppliers, consumers, and the community.'[56] It is possible that the definition of 'communities' could extend to the environment but it seems unlikely that the emissions from the companies will be counted unless there are a particular pollution issue in the locality. The divisions between 'stakeholders and shareholders are very glaring. Shareholders are a privileged class, not part of the company's' community, the template clearly classify the lambs and the goats, and as well as this evidently the shareholders are 'owners' and the rest of the stakeholders of the enterprise are not part of the polity. It is interesting that the term 'corporate social responsibility' is not included although many scholars believe that the convergence of corporate social responsibility and corporate governance is one of the ways that accountability and responsibility in companies could be fostered. Responsible capitalism and neo-liberal capitalism are at odds. Corporate Governance and Corporate Social Responsibility (CSR) is where competing philosophies divide. To illustrate this divide is to look at the OECD's Corporate Governance Code (2004) and the OECD Guidelines for Multinational Enterprises (2011) which are significantly different and, some would say, contradict themselves[57]. The OECD's Corporate Governance Code is about regulating the internal management of companies; the Guidelines are concerned about external pressures on companies including ethical, social and environmental issues. In *Companies, International Trade and Human Rights*[58] Dine attempted to show that Corporate Governance, CSR, property rights and risks are symbiotic terms, all of these terms are bound in with the way that society orders its economic and its justice. It is very distressing that the discipline of corporate governance is often considered as a separate speciality from CSR. If the two concepts are to be merged much research is necessary to implement concrete proposals,[59] turning it into a solid foundation from which legislators can draft company laws rather than vague statements like those appearing in the Code. Further, having identified society's concessional boundaries these need to be fed into the deci-

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[54] *Ibid.*

[55] My italics.

[56] The World Bank Group, *Template, supra* n.51.

[57] The sources rely on the earlier version of the Guidelines: C Chatterjee, *The OECD Guidelines for Multinational Enterprises: An Analysis* 43 *Amicus Curiae* 18 (2002); J Karl, *The OECD Guidelines for Multinational Enterprises* in M Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer 1999).

[58] Dine, *supra* n 8.

[59] The Ruggie report is trying to 'operationalizing' principles which are central to company governance and human rights; Ruggie, *supra* n 12.

sion making machinery of a company and extracted from the public relations[60] departments of companies. In this chapter I will consider a number of initiatives which could ameliorate the company emissions. We have seen that companies have exported pollution to developing countries where frequently they will incorporate a subsidiary. If this protection could be either stopped or limited the imbalance between the powerful countries and society could be rebalanced. Before considering these questions the next section contemplates two detailed comparisons showing the different culture in a shareholder primacy model (although theoretically the UK has an enlightened shareholder value model) as against a stakeholder model.

III. Corporate Governance in the UK and Albania Three Case Studies; Directors Duties, the Complaints Mechanisms and Groups of Companies

Although there are significant differences in all jurisdictions, especially in the details, often the essence of the nature of the corporate governance philosophy in any state can been viewed in the way that the duties of directors can be regulated. For this reason this paper considers the directors' duties in Albania and the UK and directors' liabilities trying to show the in a small way a stakeholder model could be better for communities and the environment. It is clear this is a very small contribution to mitigate the catastrophe; however it is clear that the global politicians cannot agree binding regulations for all sorts of reasons.[61] Maybe national law can contribute by changing the stakeholder model allowing directors to internalizing emissions and simultaneously allowing a thriving society rather than a state riven with dissent, inequality and poverty like the UK.[62] For this reason this section will consider directors' duties and the fallback if the company is badly managed, the complaints process. The last case study in this article will consider the law on company groups because of the importance of the economic, political and societal risks involved. Albanian company law is chosen because I was privileged to draft the 2008 Albanian law 'On Entrepreneurs and Company, No. 9901, 14.04.2008 with a friend and colleague.[63]

1. The UK Law on Directors' Duties

Although in 2006 the law on directors' duties were changed, many argue that the shareholder primacy is still the paramount driver of corporate governance in the UK. Despite the new section 172 which includes a list of actors whose interests have to be taken into account when the directors are exercising their duty to promote the *suc-*

[60] Ralph Tench & Liz Yeoman, *Exploring Public Relations* (Pearson 2012).

[61] Brown, *supra* n 34; Hulme, *supra* n 14.

[62] Social Mobility and Child Poverty Commission, *Business and Social Mobility: A Manifesto for Change* (7 Oct. 2013) https://www.gov.uk/government/publications/business-and-social-mobility-a-manifesto-for-change; Niall Cooper & Sarah Dumpleton, *Walking the Breadline* (Oxfam 2013).

[63] Dr Michael Blecher, from *GIZ* (*Deutsche Gesellschaft für Internationale Zusammenarbeit*).

cess[64] of the company, the reality is that little if any has changed in relation to the composition of the corporation in the UK context. Governments of whatever colour have refused to change the structure of companies to combat dangerous environmental threats. The then Government in 2006 opined that although issues such as environmental protection and health and safety was enormously important, '[w]e do not think, however, that they should be addressed through company law reform'.[65] There are some promising initiatives for the environment but the shareholder primacy model is still solid.[66] One initiative which impacts on corporate governance is the Climate Change Act 2008. Although it does not contain specific reporting requirements, instead, section 85 ('Regulations about reporting by companies') provides that the Secretary of State should make regulations under section 416(4) of the Company Act 2006 requiring the directors' report (for Public Companies) of a company to contain such information as may be specified in the regulations about emissions of greenhouse gases from activities for which the company is responsible. However as Havercroft and Reisberg note in researching the Company Bill 2006:

> In many, if not most, cases, the success of the company is dependent on its ability to continue damaging the environment, and within a fairly distant time horizon, making large parts of the globe uninhabitable. The airlines, for example, are spewing enormous amounts of CO2 and low molecular weight hydrocarbons into the upper atmosphere, contributing to a rise in temperature which is likely to result in the melting of the polar icecaps and the raising of sea levels by 18 meters. How do British Airways, for instance, have regard to" this undesirable side-effect of their normal business? The engine manufacturers may continue to develop engines with high bypass ratios and better propulsive efficiency, and turbine inlet temperatures may be increased by surface cooling and new alloys that retain their properties at higher temperatures, but these technological advances serve to reduce the unit cost of air travel – and thus, by expanding the market, paradoxically make things worse. Friends of the Earth says that, in the UK, passenger numbers are expected to grow from 200 million a year today to 500 million by 2030, with carbon emissions going up by 100 per cent in consequence.[67]

For the UK this conundrum is intractable, however the Directors' report found in sections 415–419 links directors' duties with section 172. By this route the director must consider a number of stakeholders including the environment. The fact that in

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[64] We do not have a definite definition of 'success'; Ian Havercroft & Arad Reisberg, *Directors' Duties Under the UK Companies Act 2006 and the Impact of the Company's Operations on the Environment*, http://dx.doi.org/10.2139/ssrn.1274567 (15 Dec. 2010).

[65] Hansard, Grand Committee Official Report (6 Feb. 2006) coll GC273.

[66] UK Government, *Reducing the UK's Greenhouse Gas Emissions by 80% by 2050*, https://www.gov.uk/government/publications/government-response-to-the-fifth-annual-progress-report-of-the-committee-on-climate-change-meeting-the-carbon-budgets (10 Jan. 2013).

[67] Havercroft & Reisberg, *supra* n 64, 10, citing a debate in Hansard (Hansard, Grand Committee Official Report, 6 Feb. 2006, coll GC266–267 (Lord Avebury)).

2014 this initiative is still being considered[68] shows that greening companies in the UK is a very slow process. The implications of section 172 is still a live debate[69] and still constitutes one of the most crucial and somehow controversial parts of the new Act as it provides that:

> A director of a company must act in the way he considers, in good faith, would be most likely to promote the success[70] of the company for the benefit of its members as a e whole and in doing so have regard (amongst other matters) to –
>
> (a) the likely consequences of any decision in the long term,
> (b) the interests of the company's employees,
> (c) the need to foster the company's business relationships with suppliers, customers and others,
> (d) the impact of the company's operations on the community and the environment,
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
> (f) the need to act fairly as between members of the company.[71]

The very fact that for the first time a variety of actors were included in the section which appears to be the legislative cornerstone of directors' duties in the UK led to discussion of a shift in the relevant landscape possibly bringing the country closer to a German-style stakeholder model[72] and where shareholder primacy might be gradually eroded giving way to a model where all the relevant actors find their place in the governance structure of the British corporation. And despite the first rather enthusiastic analysis of the section the reality is quite different, revealing a rather minimal reform from the previous regime. The government of the day said that it was a paradigm shift for company governance and after the shift a new model of 'enlightened shareholders' value.[73] However many scholars do not believe a significant shift has happened. The UK did not betray its faith to the shareholder primacy model to adopt a more pluralist stakeholder oriented approach. Quite in contrast to that, section 172 – despite its wide ambit and explicit inclusion of actors that did not appear in any respective provision alongside the directors in the past – re-confirmed in a spectacular manner the principle of shareholder primacy and the clear subordination of the interests of other actors to the respective interests of the members i.e. the shareholders.

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[68] UK Government, *supra* n 66.

[69] Havercroft & Reisberg, *supra* n 64.

[70] Andrew Keay, *The Duty to Promote the Success of the Company: Is it Fit for Purpose?*, University of Leeds School of Law, Centre for Business Law and Practice Working Paper, http://dx.doi.org/10.2139/ssrn.1662411 (20 Aug. 2010).

[71] Company Act 2006, s. 172.

[72] Dine & Koutias, *supra* n 44, Ch. 5.

[73] See *supra* n 65.

Therefore there should be no doubt that shareholders retain their status as the exclusive 'members of the company'. In addition to that the duty of directors to have regard to the interests of other stakeholders is still owed to the company and *only* to it. The importance of this statement is twofold; firstly the interests of stakeholders other than the shareholders can be taken into account in so far as they are deemed compatible with the interests of the company. If they happen to conflict with the interests of the company then priority is to be given to the interests of the latter. Secondly, if the duty imposed by section 172 to have regard to other actors' interests is breached, it is again for the company – which basically means its members and namely the shareholders – to act. Therefore, the only appropriate litigants are still the shareholders and in practice the majority ones; alternatively a minority shareholder raising either a derivative action on behalf of the company or acting in accordance with section 994 and a liquidator acting on behalf of an insolvent company. It is very unlikely that the shareholders will act against the directors for having breached their duty to take into account the interest of the outsiders, especially if the directors have been effective in pursuing the interests of the members of the company. Therefore the new section 172(1):

> [P]oses little threat to directors' intent to maximising profits at the expense of stakeholder relationships, but provides a strong normative element which couple with other forms of stakeholder pressure and the prevailing business climate will encourage boards to consider an increasing range of interests.[74]

2. *Albania Company Law on Directors' Duties*

Article 14 of the law On Entrepreneurs and Companies No. 9901 (14 April 2008) (the Albanian Company Law) is in the part in the general section regulating the duties for administrators in partnerships, different companies. The article details the duties for 'partners, members and shareholders'. Here the term *'partners'* has a particular resonance because the duties are inclusive, the duties bind all in the enterprise including creditors, employees, suppliers and other stakeholders. Article 14 reads:

> (1) When exercising their membership rights, partners, members and shareholders are obliged to adequately take into consideration the interests of the company and of the other partners, members or shareholders. The same duty applies to managing members and directors and member of the Board of Directors and Supervisory Board.
> (2) Unless otherwise provided by this law or the Statute, partners, members and shareholders have the same rights and duties under the same circumstances and shall be treated equally.

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[74] Deryn Fisher, *The Enlightened Shareholder – Leaving Stakeholders in the Dark: Will Section 172(1) of the Companies Act 2006 Make Directors Consider the Impact of their Decisions on Third Parties?* 20(1) International Company and Commercial Law Review 10 (2009).

The general principles embedded in the Albanian Company Law are significantly different from the UK Company Law system. The centrality of the 'company' cannot be overlooked because it signals the importance of the legal contractual nature of UK corporate governance as against the German concept of community enterprise. In the UK the company is just a legal fiction drafted by lawyers; an empty shell. The lawyers can fill up the shell and the legal constraints are few, at least in private companies. This came from the *Laissez Faire,* philosophy where individualism trumped the public interest.[75] The difference between the two systems informs the whole of the corporate governance in different jurisdictions. To make decisions for the business of the company individuals are appointed in both systems however after that the systems diverge. The representation of the managers and therefore their duties are very different. The UK uses an agency concept derived from Roman law and later embedded in the Napoleonic codes.[76] By this the company authorises an agent to conduct business for the company. The company is the principal. The agent is limited by contract theoretically drafted by the company but actually by the founders or their lawyers. This is in contrast to the German idea of *'Organtheorie'* by which the company conducts its business by appointing organs. The company expresses its will and acts by setting up organs which cannot be restricted by contract only by legislation. The company is a living entity having a will and mind and is therefore part of society. The corporate governance system in Germany took its current shape in the post war period when successive governments made the conscious choice to construct an inclusive governance system based on consensus between its various constituencies. Cooperation as a concept is integral to the philosophical foundations of the German economy. Company stakeholders are integral for the German philosophy and economy. The Albanian Company reflects the German philosophy rather than the UK contractual agency concept. Article 14 is integral for the coherency of the law and reflects these principles: *mutual trust between stakeholders involved plus common responsibility for the interest of the company as such*. These duties also apply to managing directors in partnerships – they are partners – and they set the general standard for the duties of managing directors – in LLCs and JSCs – and of JSC members of board of directors and supervisory boards, which are further specified by Articles 98, 163, 164 and 167.

The duties expressed by Article 14(1) therefore also imply fiduciary duties of majority shareholders as against minority shareholders. If, for example, dividends are withheld from shareholders for an extended period of time, this may amount to an oppression of a minority which fiduciary duties are supposed to control. Articles 15 to 18 are special regulatory expressions of this general principle of 'mutual trust.'

Article 14(2) is one of the major provisions which are dedicated to protecting a company's membership and in particular to control the dominant influence of voting majorities. This article also reflects Article 1087 Civil Code which provides that any agreement that excludes one or more partners from the participation in the profit or

[75] Dine & Koutias, *supra* n 44, Ch. 4.

[76] V Edwards, *EC Company Law* 34–45 (Clarendon Press 1999).

loss, is invalid. The Statute cannot abolish the principle of equal treatment as such. It can certainly apply differences as long as they are not arbitrary, based on sufficient reasons and proportional with respect to the balance between the interests of the company and the interest of the partners, members or shareholders.

Any decisions which violate the principle of Article 14(2) can be challenged in court by minority members and shareholders according to Articles 91 to 94 (LLCs) and 150 to 153 (JSCs).

3. *The Accountability of Directors in the UK and Albania*

The lack of accountability mechanisms for directors in the UK is woeful. There are two systems which are confused and very restricted and made worst by shareholder apathy. The fact that the finance for companies comes from a loan or shares means that the system is an 'outside' system.[77] The banks which provide loans are not part of the structure of the companies unlike Germany where banks often have representatives on the board. The shareholders may be diverse and often are institutional shareholders more focussed on dividends for their members. The last thing that institutional shareholders want is an argument between the directors and the members, if that happens the share price is likely to fall significantly. Selling the stake is often a better strategy. Minority shareholders are therefore left basically with the choice to found their claims on either section 994 – in the case of private companies – when the company is being run in an 'unfairly prejudicial manner' for their own interests or to raise a so called derivative action on the basis of sections 260–263. As it is evident from the analysis of the relevant sections of the Companies Act 2006 the two sets of Articles have been applied and interpreted by the courts in a way that severely limits the ability of minority shareholders to exercise an effective control on the powers of the management. In the case of ection 994 – a remedy suitable for private limited companies – the basic aim of the shareholder who resorts to such form of protection is to avail himself of the opportunity that this set of articles offer which is to release himself from the badly managed company while retrieving his investment. Its analysis is useful since it mirrors the dominant judicial attitude towards statutory provisions in relation to minority shareholder protection.

(a) *The Unfair Prejudice Action*

Sections 994–996 replaced sections 459–461 Companies Act 1985, providing a remedy for a member when 'the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members'. Consideration was given to the meaning of unfair prejudice in *Re Macro*;[78] the court held that where conduct was unfairly prejudicial to the financial interests of the company then it would also be unfairly prejudicial to the interests

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[77] Dine & Koutias, *supra* n 44, 188–9. The term an 'outside system' denotes a system where the investors come from a wide constituency.

[78] *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354.

of its members. In assessing the fairness of the conduct the court had to perform a balancing act in weighing the various interests of different groups within the company. The court did not interfere in questions of commercial management but where the mismanagement was sufficiently significant and serious to cause loss to the company then it could constitute the basis for finding unfair prejudice. The important case of *Re Saul D Harrison*[79] contains an extensive analysis of the operation of s. 459 (s. 994 under the Companies Act 2006) to protect 'legitimate expectations'. Hoffman LJ said:

> In deciding what is fair or unfair for the purposes of Section 459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other … Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point on any case under Section 459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association … Although one begins with the articles and the powers of the board, a finding that conduct was not in accordance with the articles does not necessarily mean that it was unfair, still less that the court will exercise its discretion to grant relief. In choosing the term "unfairly prejudicial", the Jenkins Committee (para. 204) equated it with Lord Cooper's understanding of "oppression" in *Elder*[80]: "A visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.[81]

These rulings clearly indicate the initial intention of the courts to interpret the concept of unfairness in a particularly broad manner. It was therefore, believed at least at that stage that the respective ambit of application of what is today section 994 would have been particularly extensive since it would allow minority shareholders to resort to the court on the basis of the remedy of the section in question on every occasion that a directors' behaviour had led to the 'value of shareholding seriously diminishing'. That would have provided an effective tool on the hands of every shareholder to monitor the management very closely. The concerns that this approach will simply open the flood gates of litigation – leading to a significantly increased shareholder activism that would have undermined the ability of directors to run the company as they consider suitable on the basis of their personal knowledge and experience – granting the courts with the evidently heavy task of acting as the mediating actor between shareholding and management in an ever increasing number of companies have led to a significant change in judicial approach. However, in practice the court introduced a limitation on the scope of s. 994 as from that point the existence of legitimate expec-

[79] *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14.
[80] *Elder v. Elder and Watson* (1952) SC 49.
[81] *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14.

tations to participate in the management served as a necessary prerequisite for the invocation of s. 994. An additional requirement which is not included in the actual wording of s. 994 was added. This principle was further confirmed in *Re Leeds United Holdings plc* where the court clarified that the meaning of 'legitimate expectations' entailed 'an expectation of being allowed to participate in the affairs of the company'.[82] Therefore, a minority shareholder who wishes to invoke s. 994 would have to prove that he has a legitimate expectation to be allowed to participate in the management himself. The courts did not provide additional information on whether there is a threshold above which a certain shareholding can justify such expectations. Can any shareholder holding 15% of the shares satisfy this requirement and therefore bring himself closer to the successful invocation of s. 994? The truth is that the reply to this question is not clear even now. As a result of this incertitude in relation to the exact scope and the precise interpretation of s. 994 the only shareholders who can clearly and unambiguously fulfil the aforementioned criterion are the ones who have already been participating in the management but were for some reasons removed from that. A former director who has been voted out of the board can easily resort to the remedy of s. 994. This is the case even when the director in question has been removed due to an alleged breach of duty. This can be found astonishing as it could clearly come into conflict not only with the intentions of the legislator when drafting this section but also and most importantly with the purpose of minority shareholder protection which is to safeguard the interests of shareholders from a management that has clearly proved to be inadequate or even in breach of its legal obligations. The introduction of the requirement to have legitimate expectations to participate in the management in order to successfully invoke the remedy of s. 994 has discouraged what was the initial target group of this provision namely the shareholders to resort to the section in question. Section 996 grants the ability to have one's shares bought at a fair price by another member of the company. Basically, what the shareholder would achieve at this stage is the retrieval of his investment at levels higher than the current price significantly reduced due to directors' acts, rather than a shift in the management of the company. Therefore, a shareholder who is successful in exercising the remedy in question will not contribute to either a change in the policies of the company that have led to losses or to the removal of directors who have been found in a potential breach of duty. He will simply manage to release himself from the mismanaged company and potentially invest his capital elsewhere. This constitutes a fundamental flaw inherent in the British system of internal management control and checks as it deprives the members of the company of a significant tool to effectively control the management and monitor its activities. Directors will feel relatively free of most forms of internal controls and continue with patterns of behaviour that have already proven particularly problematic both in legal and economic terms.

[82] *Re Leeds United Holdings plc* [1996] 2 BCLC 545.

(b) The UK Derivative Action

The system of internal checks on the management suffers from another setback with the judicial and legislative shaping of the other pillar of shareholder control; namely the so-called derivative action. Sections 260 to 263 of the Act re-define the remedy in question creating a new landscape in the relevant part of the law. The new provisions reflect and incorporate a significant part of the pre-dating case law but introduce certain novelties as well. Time will show how the new provisions have been received and interpreted by the courts. It is clear that the restrictions in the sections are significant. A derivative action simply lets the minorities within the company to exercise control on the management if they fulfil a list of requirements set jointly by the statute and the courts. It is called derivative as the plaintiffs do not seek to enforce a right that belongs to them but a right that belongs to the company and due to the special circumstances the company simply delegates to the minorities. A direct repercussion of this that undermines its appeal as an aspect of internal control is simply the fact that since the right to raise the action belongs naturally to the company, if the plaintiff is successful in his attempt then the money is not going to him but instead to the company. Therefore, the plaintiff basically gains the moral satisfaction of having successfully confronted the malaise at the top of the corporate structure and potentially his right to exist in a company that in the future is likely to enjoy a more effective management. Whether that would constitute a sufficient motivation on the part of the plaintiff to actually put him through the rather onerous process of raising a derivative action is highly doubtful. Not only he will need to satisfy the very strict requirements that are necessary in order to be able to resort to the remedy in question and deal with a breach of directors' duty but at the end if successful he will enjoy a victory of mostly moral character.

Under s. 261, a member of a company must apply to the court for the permission to continue with a derivative action. He will have to prove that there is a prima facie case for the continuation of the act for the court to permit it. In order to determine whether a prima facie case exists which means that permission for a derivative action can be granted the court is going to examine the criteria incorporated in s. 263. Section 263 basically puts in a statutory form principles and requirements previously formulated by the courts. Therefore, the Companies Act 2006 is the first legislative tool that provides a rather detailed set of provisions in relation to the derivative action clarifying aspects that were left vague before especially in relation to the issues that need to be clarified in order to proceed with the action; however at the same time having incorporated most of the principles already shaped by the judiciary it fails to introduce something radically new to what we already knew and therefore to fix some of the deficiencies of the previous regime. According to the Act the courts will grant permission to proceed on the basis of four requirements. It is interesting to note that these requirements have to be met not for the derivative action to be successful – something that would naturally entail an examination of the substance of the claim – but for the action to proceed. It is important to underline that resorting to the remedy is altogether a particularly challenging attempt demanding a high level of effort and respectively of legal skill on the part of the plaintiff. The latter will have to prove that

the derivative action will be for the benefit of the company as a whole. Similar to that, he will need to convince the court that a director acting under his principal duty to promote the success of the company under s. 172 would have indeed raised this particular derivative action. While it can be clearly argued that those two requirements are nothing more than the by-products of the separate corporate personality principle that defines the nature of the derivative action altogether, the mounting task to sufficiently fulfil them is evident. It is a task of particular difficulty to prove that raising a derivative action will be for the benefit of the company as a whole, especially if the entirety of the company would clearly include the majority elements that might have formed the management against whom the action is aimed anyway. Also, the reply to whether the raising of a derivative action would be compatible with the potential decision of a fictional director who would have acted in strict compliance to s. 172 poses problems as well. The aggrieved member will have to prove that a director acting on the basis of his principal duty as that is defined by s. 172 would have raised the derivative action on the exact circumstances as well. A very tough requirement to impose for an aggrieved member of the company attempting to bring an action against a very real director who might have indeed already violated and possibly heavily the aforementioned duty enshrined in the section in question. These questions impose a heavy burden on the member attempting to raise the action and undermine the effectiveness of a system of internal control on directors. They are highly hypothetical requiring the member of the company to upgrade his claims to the level of the behaviour of a fictional director acting under his principal duty or to prove that the company in its entirety would benefit from it. The reply to both questions can be argued one way or another and is likely to be negative therefore depriving the member of his ability to react to management misbehaviour but also the company of establishing a reliable system of internal checks on a management that has every right to feel increasingly uncontrolled. Is the lack of such a system that encourages directorial abuse for the benefit of the company as a whole? It is understandable that the courts would be unwilling to interfere in the everyday running of the company creating an atmosphere where the management will feel vulnerable to constant accusations real or calculated ones avoiding to take any risk and thus eroding business initiative and innovation but the judicial allergy to a system that guarantees even a minimal level of control on management has spread the wrong message to the top of the company encouraging patterns of behaviour that deviate significantly from the standards of the Companies Act 2006.

In addition to that, the member would have to prove that the action complained of has not been ratified or authorised by the company and that he is supported by the majority of the independent from the management shareholders. The third requirement refers to s. 239 of the Act which is one of the few jarring changes introduced by the particularly extensive and unexpectedly thorough Act of 2006. While previously, the directors could indeed vote for the ratification of their breach of duty at the relevant meeting (if of course they were members of the company), the Companies Act 2006 has effectively removed this ability. Section 239(7) is clear when establishing that the directors in question cannot vote in the relevant meeting; therefore they

cannot vote in support of the ratification of their own personal breach of duty. The provision of the Companies Act 1985 which rather scandalously set to an end any aspiration of raising a derivative action and holding the management liable for breaches of duty was finally removed paving the way for an, at least theoretically,s more advanced level of shareholder protection. The pre-2006 provision basically killed any attempt to hold directors liable for a breach of duty from the very beginning rendering any system of internal control of management simply a sham. It does not have to be repeated that including s. 239 in the list of requirements for the derivative action to succeed is indeed compatible with the nature of the company as a holder of a legal personality and consequently with the distinctive characteristics of the derivative action. The final requirement set by the law in order for the aggrieved member to pass the prima facie test and get the go ahead for his derivative action is to convince the court that his action enjoys the support of the majority of the independent from the management members. This is basically an incorporation of the principle previously set by the *Smith v. Croft*[83] case. Previously, the case in question imposed this requirement only to derivative actions aimed against a breach of fiduciary duty; however it appears from the new Act that now this requirement becomes universal including also breaches of duties of care and skill. Respectively, the pre-2006 Act requirement to prove personal profit from negligence introduced by *Pavlides v. Jensen*[84] is now effectively removed by the 2006 Act. This is a fortunate development as having to prove personal profit from negligence is not only highly challenging for the member who is raising the act but also not the case in most of the relevant complaints when the issue is purely negligence. Despite this, positive indeed, development the Act still imposes a tough set of requirements for the member to satisfy; and again these requirements are not attached to the judgement on the action which will be wholly founded on the substance of the claims but for the procedural question of whether the action can proceed or not.

This leaves the English company law with a significant vacuum at the level of establishing a system of internal control that would force the management to feel the necessary pressure to adhere to the behavioural standards set by the law paving the way for the emergence of other systems of directorial control of an external character such as a takeover or an acquisition that would eventually entail the removal of the management and it replacement with a new set of directors reflecting the new balance of power after the advent of the new owner.

(c) The Albanian Accountability Mechanisms

The Albanian accountability mechanisms for directors are found in Articles 91 to 94 (LLCs) and 150 to 153 (JSCs). Firstly it allows for a special investigation into “irregularities in the formation of the company or contract of business”. The General Meeting ‘may’ decide to start the process which will be done by an independent auditor. However this will not stop abuse where the majority of the shareholders or the man-

[83] *Smith v. Croft (no. 2)* [1988] Ch 114.
[84] *Pavlides v. Jensen* [1956] Ch 565.

agement are themselves abusing the company by fraud or negligence. Article 91(2) allows:

> [M]embers representing at least 5% percent of the total votes of the general meeting of the company, or a smaller percentage specified in the statute, may request the General Meeting to nominate a special independent auditor on the grounds that there is a serious suspicion of breach of law or Statute. If the General Meeting refuses to nominate the special independent auditor, the mentioned members or creditors may ask the court within 30 days after the refusal to provide for the nomination. If the General Meeting fails to render a decision within 60 days from the date of the request, this is considered a refusal".

This is a clear indication that creditors are stakeholders in the company. This is a radical innovation since a derivative action is normally reserved for actions between shareholders and the company. Certainly in the UK creditors cannot sue the company or the management, their rights are contractual only. Article 92 has a similar reach for majority shareholders and creditors and it is stronger; rather than *investigating* the affairs of the company it allows minority shareholders and creditors a right to sue the management via the company. Originally the percentage necessary to pursue the right was 5% for shareholders (or a smaller percentage specified by the statute), or any creditor but in 2013 a draft amendment of this Article was proposed (and the similar Articles for JSC, 150–153). The percentage of the creditors who have this right will be amended to: 'or company creditors whose unsatisfied claims against the company amount to at least 5 percent of the basic capital may request the general assembly to initiate court proceedings for the annulment of a decision of a Managing Director.'[85]

Although this step has widened the stakeholders' rights it is a small one. It is clear that the focus of the shareholders and the creditors will likely be financial however other jurisdictions could follow the path to an inclusive stakeholder company where stakeholders have real rights and power. Further innovative articles in the Albanian Company Law could have impact not only in national law but in a wider context.

IV. Conclusions

1. Stopping Jurisdictional Arbitrage by Multinational Companies: A National Solution?

As we have seen, the western world is in the grip of an aggressive capitalist model invented by modern neo-liberal economists but found originally in various religions characterised as a devil versus god struggle: material riches versus spiritual riches.[86]

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[85] J Dine, M Blecher, S Hoxa & Raca, *Commentary on Albania Law "On Entrepreneurs and Companies" Text with Commentary* (forthcoming 2014).

[86] See Dine & Koutsias, *supra* n 44, Chs 1, 5.

Now multinational companies (MNCs) are often more powerful than many states leaving the International Human Rights structure in disarray because states are unable to control these actors. Numerous solutions have been mooted; universal jurisdictions; corporate social responsibilities initiatives; voluntary codes and the Ruggie initiative. However, the power of MNCs makes accountability very difficult especially when they hide their irresponsibility in complex structures in other jurisdictions.[87] MNCs use jurisdictional arbitrage to avoid accountability for human rights and environmental outrages. Some jurisdictions have recently allowed plaintiffs in some situations to lift the veil between separate companies in a group.[88] This is because governments and the judiciary realise that the double protection afforded by the company group affords the MNCs too much power to avoid accountability and liability. Governments are anxious because their tax base is becoming eroded. This paper will moot another national solution. Governments should control and regulate all of business enterprises in their jurisdiction, the parent company and all of the subsidiaries. An expanded German *Konzernrecht* (a system lifting the company veil in particular situations) could allow more transparency and accountability for multinational companies. As globalisation has accelerated the numbers of companies which have become affiliated with international companies has increased significantly, while the laws of national Parliaments may not have legislated higher standards for companies and groups. While human rights and international law standards have challenged some of the worst outrages as CSR-NGOs communicate more effectively, there is obviously the ongoing need to cope with the undesired political, social and economic effects, or 'externalities' which such groups produce. It is essential to subject them to adequate national and international regulatory frameworks. However, as we have seen, there is as yet no international answer to the central problem of the extraterritoriality issue and 'jurisdictional arbitrage'.[89] In part, philosophical and political difficulties explain this failure – certainly in the EU context.[90] The EU has not, as a result, pursued the finalisation of its proposal for a Ninth Directive on Company Groups,[91] and there is

[87] Companies were founded to support commercial businesses allowing the economy to grow. The way that it was done was to change the balance of risk between creditors and investors. Companies and shareholders were protected by 'limited liability'. Once a share was bought and paid for the shareholder has no other liability. Similarly if the company had more liabilities than assets the creditors could not sue any other parties including the shareholders or the management. Where there is a group of companies this limited liability is extended to all of the companies in the group allowing the parent company to liquidate subsidiaries leaving creditors bereft. Furthermore, in a multinational situation each company in the group is jurisdictionally separate and because of the concept of company legal personality each company can manipulate national law. This double protection for multinational companies is further extended when some countries are unable to control large companies. See concerning the complex structures of MNCs: Tineke E Lambooy, Rosalien A Diepeveen, Kim Nguyen, Sander Van 't Foort, *The Opacity of a Multinational Company's Organization, Legal Structure and Power* 3 The Dovenschmidt Quarterly 121(2013).

[88] See in UK the cases of *Chandler v. Cape* [2012] EWCA 535; *Petrodel v. Prest* [2012] UKSC 34.

[89] J Dine, *Jurisdictional Arbitrage by Multinational Companies: A National Law Solution* 3 Journal of Human Rights and the Environment 44 (2012).

[90] See Dine & Koutsias *supra* n 44, Chs 1–2.

[91] The Proposal was strongly influenced by German *'Konzernrecht'*.

no EU legislation on group liabilities. Because of this, a solution in national company law is desirable, and such a system has been legislated in the Balkans (specifically in Albania). This author argues that if other jurisdictions could follow this model, more sustainable capitalism could ensue. The significance of the Albanian example, compared to the German *Konzernrecht*, is the added aspect of extraterritoriality. Still, there are some weaknesses with the Albanian reform in which will be pinpointed in the following section.

■ author: please check 'numbering' headings.

2. *The Albanian Example Modeled on German* Konzernrecht

a) *Introduction*

While the German law is normally understood to present the most sophisticated legislation on group liability, the drafting process of the provisions of the Albanian Law was conducted with all the scholarship on the limitations of transplanting laws vividly in mind, as well as the central importance of fair trading in the global international market.

Under the German *Konzernrecht,* a distinction is made between 'contractual' and 'de facto' groups of companies. In contractual groups, the creditors of the subsidiary are protected by a legal obligation of the parent towards the subsidiary to make good losses at the end of the year. Shareholders other than the parent company have a right to periodic compensation payments and must be offered the opportunity of selling their shares to the parent at a reasonable price. They have a right to an annual dividend, which is calculated according to the value of their shares at the time of the formation of the contractual group and the likelihood of the dividends without the formulation of the group. The board of the subsidiary has to give a report on all transaction, measures and omissions during the past year that result from its membership of the group.[92] The conclusion of the contract between members of the group is encouraged by the ability of the parent company to induce the subsidiary to act against its own interests, thus legitimizing the concept of the interests of the group as a whole.[93]

A key strength of Articles 207 to 212 of the Albanian Company Law[94] is that it takes account of 40 years of debate within the EU and between its member states, as well as debate at the global level[95] regarding the way in which MNCs or groups should be legally drafted. The philosophical tensions concerning various company models means that drafting legislative provisions concerning groups of companies is imbued with particular difficulty, especially concerning the complex issues of extraterritorial-

[92] Para. 212.

[93] K Hopt, *Legal Elements and Policy Decisions in Regulating Groups of Companies*, in C Schmittoff & K Wooldridge (eds), *Groups of Companies* (Sweet and Maxwell 1991).

[94] Albanian Law on Entrepreneurs and Companies No 9901, 2008, Arts 98, 163.

[95] UN Commission of Transnational Corporations or 'Group of Eminent Persons'; The Department of Economic and Social Affairs, *The Impact of Multinational Corporations on Development and on International Relations,* 25, http://unctc.unctad.org/data/e74iia5a.pdf (1974); OECD, *Guidelines for Multinationals Principles of Corporate Governance*, http://www.oecd.org/investment/mne/1922428.pdf (2005).

ity, the limitations of transplanting laws, the complications of transition economies and the operation of the company veil. This makes the drafting process especially challenging, but embedded in the Albanian legal provisions is, nonetheless, a robust attempt to address the realities (and by corollary the negative effects) of power relations which arise in company groups.[96]

(b) Fiduciary Duties and Company Interest

Even though the German *Konzernrecht* acknowledge the concept of a group interest, the Albanian example takes this a step further. In Albanian company law, Article 98, obliges Administrators[97] to consider their duties 'in good faith and the interest in the best interests of the company as a whole, paying particular attention to the impact of its operation on the environment'.[98] Furthermore Article 14 enacts principles for businesses. Article 14(1) reads; "When exercises their rights, partners, members and shareholders shall take into consideration the interests of the company and other partners, members or shareholders." Here the term 'partners' are envisaged as all of the stakeholders in society, not 'partners' in a narrow technical legal idea. The maximization of the company's own assets, and the question of compliance with legal expectations, moreover, is conceptualized within the legislation as being not only in the interest of all the investors (shareholders), but also in the interest of creditors, employees and the economic system as a whole. In short, the 'interest of the company' explicitly recognizes the social embeddedness of the company and its broader social parameters. Globalisation, however, presents a challenge to this more holistic national approach not least because of the common economic paradigm in the western world.

(c) The Albanian Concept of a 'Control Group'

Another extension of the German *Konzernrecht* is the Albanian definition of a 'control group'. Article 207(1) is the most innovative part of the Albanian structure. This explicitly defines the first form of parent-subsidiary relationship, known as a 'control group'. The concept merges the concept of dominance from German Law on groups (*Konzernrecht*) and deploys the notion, drawn from other jurisdictions of the 'controlling influence' or 'dominance', in order to determine whether 'a subsidiary is "accustomed to act in accordance with the directions or instructions" of the parent company'.[99]

The Albanian provisions found between Articles 207–212 go beyond the German approach. Article 207(1) do not necessarily require a system based on shareholding. Control can be based on shareholdings, agreements or contract, but also based on power balances, thus improving on the German concept which has proved too restrictive (it accepts special group regulations only where dominant influence and control

[96] JG Gillespie, *Transplanting Commercial Law Reform* (Ashgate 2006); David M Trubek & Marc Galanter, *Scholars in Self-Estrangement: Reflections on the Crisis in Law and Development Studies in the United States* Wisconsin Law Review 1062 (1974); Dine, *supra* n 8.

[97] In Albania, companies are managed by 'directors' or 'administrators'.

[98] Limited Company provisions, Art 163 mirrors the same articles in Joint Stock Companies.

[99] In particular it uses the concept of 'shadow directors' found in the Company Law 2006 (UK), s. 251(1).

are mediated by a shareholding relationship or based on contract).[100] The Albanian approach is more realistic and critical. It accepts that one of the most important factors defining the existence of a significant relationship between companies is the flow of money and power rather than the share structure, and accordingly deploys a dominance concept without referring to significant ownership and voting powers.[101] The concept is broad enough, moreover, to include relationships such as franchising or other kinds of supply or distribution, outsourcing of certain enterprise functions or quality-assurance systems which 'at the surface' are using the contractual instrument, but which 'in reality' build organisations which may be treated according to group parameters.[102] Article 207(1) reads: 'A parent-subsidiary relationship shall be deemed to exist where one company regularly behaves and acts subject to the directions or instructions of another company.'[103]

While Zerk has argued that there is no reason why an enterprise theory might be constructed on a control basis rather than on an equity basis,[104] she arguably misses a significant point. She argues that:

> [w]hat is crucial in each case is the presence of a "control" relationship between parent and foreign affiliate (however related) that is sufficient to justify the imposition of liability on the parent in the particular case…to establish "primary" liability, the plaintiff would need to demonstrate the parent company's familiarity with the risk associated with the relevant activities and close involvement with the day-to-day operation of its foreign affiliate[105]

The radical change presented by Article 207 is closer to the reality that the enterprise theory needs to encompass: once the group is recognized as an enterprise, the *whole of the group*, *not just the parent company*, could be sued, whatever its business is.[106] This means that once the relationship between the constituent companies are set, it doesn't matter what the particular activity or risk or liability facing the company, thus the problems of causation are considerable less if not eliminated. Of course, there would be exceptions, but these could be controlled, perhaps using a concept such as the affiliates being on a 'frolic on their own'.[107] In this way, some of the intractable

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[100] *TBB Zeitschrift fur Wirtschaftsrecht* 589 (1993).

[101] See also J Dine, *The Governance of Corporate Groups*, 181 (Cambridge University Press 2000).

[102] E Weitzenboeck, *Between Contract and Partnership: Dynamic Networks as Collaborative Contracts and More,* Oslo University PhD thesis (April 2012); E Weitzenboeck, *A Legal Framework for Emerging Business Models: Dynamic Networks as Collaborative Contracts* (Edward Elgar 2012). The German system excludes profit pooling, partial profit transfer and business leasing contracts, see M Andenas & F Wooldridge, *European Comparative Company Law*, 434 (Cambridge University Press 2009).

[103] Albanian Company Act, Art. 207(1).

[104] Zerk, *supra* n 12, 235.

[105] *Ibid.*

[106] Art. 208(4) of the Albanian Company Act reads "Creditors of the subsidiary include victims of wrongs done by the subsidiary wherever the subsidiary is registered".

[107] *Joel v. Morison* [1834] EWHC KB J39. This is a legal term denoting a situation where an employee is acting outside the employer's remit.

obstacles and difficulties that dogged the Alien Tort Claims Act (ATCA)[108] and other universal jurisdiction system could be removed. One crucial difference of approach in the Albanian law concerns the role of the chain of causation. There would not be any reason to prove a link between individual companies, but rather there would be a defeasible presumption of liability placed upon each entity in the MNC group. The parameters of the definition of a parent-subsidiary relationship or group relationship remain open to interpretive dispute, of course. Control must actually be realized by concrete 'directions or instructions' which are not only carried out in one or a few cases but require some degree of repetition: the subsidiary must be 'accustomed' to, or used to, acting in compliance with them. This particular approach was built on an insolvency provision in the UK[109] merged with the German formal and 'de facto group' rule.[110]

(d) The Importance of Extraterritoriality

Viewed in the light of the global context, Articles 207(1) and (4) of the Albanian Company Act are perhaps the most innovative provision because of the inclusion of extraterritoriality. Article 207(1) uses the control group concept and stipulates that '[c]reditors of the subsidiary shall include persons who have incurred damage due to a subsidiary's action wherever the subsidiary is registered'. This means that tort victims of an MNC, including subsidiaries or entities, are conceptualised as creditors as a result of their claims. This is indeed a ground-breaking approach, but still requires further regulations in order to consolidate the definitions deployed and, particularly to draft tighter definitions concerning 'control'.[111]

It is notable that all of the companies in the group and their directors will be bound by fiduciary duties, regardless of their private or public character.[112] By contrast, the German Law *Konzernrecht*[113] is applicable only to stock corporations and partnerships limited by shares although a vigorous body of developing law applies it to other companies. Articles 98 and 163 of the Albanian law deal with fiduciary duties of Directors or Administrators which are constructed as being common to all company forms and therefore part of any group company's Directors/Administrators. Such fiduciary duties are crucial in the design of company law, since they can be a way to balance the inevitable disadvantages in contractual bargains.

Article 209(2) of the Albanian Company Act establishes a breach of duty for representatives (Directors or Administrators) of the parent company. However, this

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[108] 28 USC § 1350.

[109] Company Law 2006 (UK), s. 251.

[110] *Aktiengesetz* (German Law on Shares) BGBI 1 S 1089, paras 311 et seq. (1965).

[111] Dine, *supra* n 8.

[112] Fiduciary duties are crucial in balancing the interests of the stakeholders in a company and between the company and society. Where a contractual company model is used as it is in the UK and the US, this is the way that disadvantaged stakeholder can have some redress.

[113] *Konzenrecht*: *Aktiengesetz* (German Law on Shares) BGBI 1 S 1089, paras 15–9, 291 et seq. (1965).

provision only extends to an 'equity group'[114] where the companies are linked by shareholdings.[115] The standard is; if no independent Directors of the subsidiary company could have reached the decision that was made, the representative will be liable. This standard allows the court to consider all the aspects of a business decision, including the long term advantages of a group decision even if measured against short term disadvantages – factors likely to influence the decisions of the independent Directors of subsidiary companies, who cannot but respect their company's embeddedness in the group.[116] The consequences for breach of duty of both the parent's and the subsidiary's 'Administration' (i.e. Managing Directors; Boards of Directors or Supervisory Boards and all of the Administrators) are provided by Article 210. The right to derivative action is provided by Article 211. It is clear that the Albanian law should extend the liabilities of representatives of control groups to the liabilities regulated in regard of equity groups (Articles 209, 210 and 211).

Clearly, more work needs to be done. Overall, it is apparent that the broader conception of the company envisaged by these provisions of Albanian company law borrows in part from the continental European social market – which is contentious in the UK – in which the company is a living entity with employees, shareholders, customers, suppliers, and where wider implications for human beings and the environment more naturally form part of the company's normative remit. That is why Administrators within Albanian company law are explicitly placed, moreover, under a duty to perform 'in good faith and in the best interests of the company as a whole, paying particular attention to the impact of its operation on the environment'.[117] It is crucial, however, that the Albanian model should be further refined and be followed by other jurisdictions which host groups of companies/MNCs. If such laws are to withstand international special interests, particularly the MNCs' lobbies, and any shocks that can be thrown in the path of courts and litigants, it is imperative that drafting should be stringent. This might need more legislation or case law to embed the concept into the cultural landscape. This is particularly vital in the light of the broader picture in which democracy stands imperilled by globalisation and in which MNC accountability is weakened by extraterritoriality principles.

Clearly the control of MNC power is a decisively important consideration. National laws present an opportunity for the construction of decisive sanctions and controls. While the proposed model put forward here requires refinement, it is very much to be hoped that the academic legal community, policy makers will analyse it and refine the possible legislative models, promote such reforms actively to governments and legislatures and also promote the international spread of a network of strong national accountability structures for MNC human rights and environmental liabilities.

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[114] Albanian Company Act, Art. 207(2).

[115] It was unfortunately not extended to 'control groups'.

[116] Albanian Company Act, Arts 14, 98, 163.

[117] *Ibid,* Arts 98, 163.

2. Challenging the Risk Formula for MNEs

While normal understanding of companies in a shareholder primacy system is that the shareholders bear the residual risk[118] many scholars dispute this.[119] However it seems that the protection of companies has been proliferating and companies have less and less risk, this section suggests that this protection for the company needs to be considered against societies' needs and particularly taking account of climate change. We start with the proposition that shareholders are protected my limited liability, this is the first 'veil' protecting them; next the company has (usually) limited liability, the second veil; if the company incorporates a subsidiary, this is a third veil because this subsidiary will be protected by limited liability; if the parent company incorporates a subsidiary in a different jurisdiction this will allow jurisdictional arbitrage, the fourth veil (this is not a company veil but it is a significant protection for the group); if some of the shareholders are institutional shareholders they will often be protected by limited liability, the fifth veil; a director of a company may be a company,[120] the sixth veil; and finally the company will have a accountants and lawyers who will be protected themselves by limited liability, the seventh veil!

It is clear that it is time that the protection should be revisited, a little more transparency is necessary!

[118] Keay, *supra* n 45, 87.

[119] G Kelly & J Parkinson, *The Conceptual Foundations of the Company: a Pluralism Approach,* in J Parkinson, A Gamble & G Kelly (eds), *The Political Economy of the Company* (Hart Publishing 2000).

[120] *Re Bulawayo Market and Offices Co Ltd* [1907] 2 Ch 58.