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# Legal Hurdles in Bringing a Successful Claim with regard to Foreign Direct Liability against the Host Country under International Law

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**Abstract:** The subject of foreign direct investment occupies a central place in international law. It is often seen as important catalysts for economic growth in developing countries and it is an important vehicle of technology transfer from developed countries to developing countries. Its basic principle, now well established, provides that foreign direct investment stimulates domestic investment and facilitates improvements in human capital and institutions in the host countries. One of the most controversial problems regarding the foreign direct liability concerns the legal hurdles that need to be overcome when a foreign plaintiff is to bring a successful foreign direct liability claim against parent company. Foreign direct liability provides that parent companies will be accountable in their home jurisdiction for negative environmental or health and safety impacts, or complicity in human right abuses in developing countries where they operate. This article examines the legal obstacles of foreign direct liability claims that focusing on choice of Law, jurisdiction of the court, political corruption and risk of human rights abuse, lack of access to justice and establishing a duty of care on the part of the parent company over the subsidiary. The present paper takes the views that the absence of domestic laws that promote responsible corporate activity has caused recalcitrant businesses to engage in activities that violate environmental laws, health and safety laws as well as human rights law. Finally, the current study identifies and analyzes legal cases in regard to these legal problems that resulting in the difficulty for victims to bring foreign direct liability claims before the court against parent company.

# العقبات القانونية أمام رفع دعوى المسؤولية الاجنبية المباشرة ضد الدولة المضيفة بموجب القانون الدولي

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**الكلمات المفتاحية :**
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- مطالبة المسئولية الأجنبية المباشرة.
- المساءلة وواجب العناية.

**الخلاصة:** يحتل موضوع الاستثمار الأجنبي المباشر مكانة مرموقة في القانون الدولي. غالبًا ما يُنظر إليه على أنه محفزات مهمة للنمو الاقتصادي في البلدان النامية ، وهو وسيلة مهمة لنقل التكنولوجيا من البلدان المتقدمة إلى البلدان النامية. مبدأها الأساسي ، الذي أصبح راسخًا الآن ، ينص على أن الاستثمار الأجنبي المباشر يحفز الاستثمار المحلي ويسهل التحسينات في رأس المال البشري والمؤسسات في البلدان المضيفة. واحدة من أكثر المشاكل إثارة للجدل فيما يتعلق بالمسؤولية الأجنبية المباشرة تتعلق بالعقبات القانونية التي يجب التغلب عليها عندما يقوم المدعي الأجنبي برفع دعوى مسئولية أجنبية مباشرة ضد الشركة الأم. تنص المسؤولية الأجنبية المباشرة على أن الشركات الأم ستكون مسؤولة في ولايتها القضائية عن الآثار السلبية على البيئة أو الصحة والسلامة ، أو التواطؤ في انتهاكات حقوق الإنسان في البلدان النامية التي تعمل فيها. تبحث هذه الدراسة في العقبات القانونية لمطالبات المسؤولية الأجنبية المباشرة التي تركز على اختيار القانون ، واختصاص المحكمة ، والفساد السياسي ، وخطر انتهاك حقوق الإنسان ، وعدم الوصول إلى العدالة ، وإرساء واجب الرعاية من جانب الشركة الأم على الشركة التابعة. تأخذ هذه الدراسة وجهات النظر القائلة بأن غياب القوانين المحلية التي تعزز نشاط الشركات المسؤول قد تسبب في قيام الشركات المتمردة بالانخراط في أنشطة تنتهك قوانين البيئة وقوانين الصحة والسلامة وكذلك قانون حقوق الإنسان. أخيرًا ، تحلل هذه الدراسة القضايا القانونية فيما يتعلق بهذه المشاكل القانونية التي أدت إلى صعوبة تقديم الضحايا لدعاوى المسؤولية الأجنبية المباشرة أمام المحكمة ضد الشركة الأم.



## Introduction

One of the most notable developments taking place in the global economy is the rise of foreign direct investment. It is a "form of equity investment which gives the investing firm control over its assets, property and subsidiaries in the host country".[1] In other words, foreign direct investment is the process whereby residents of the home country acquire ownership of assets for the purpose of controlling the production, distribution and other activities of a firm in the host

[1] Harrison, A and Dalkiran, E and Elsey, E *International Business* ( Oxford University press 2000) at page 13

country. As a result of globalization, international corporations are now free to establish subsidiaries in other foreign countries and conduct its businesses there.[1] While this is certainly commendable progress, nevertheless more and more multinational corporations have been caught establishing subsidiary companies in developing countries in order to take advantage of the laxity of laws from these areas. This has resulted, to some extent in the corporate exploitation of poor social and environmental governance of these countries.

When a business enters a foreign market through foreign direct investment issue will arise as to the liability of the various activities of that business. For instance, which laws will govern the actions of the activity in the national territory where the business is being conducted, which jurisdictions seek to exert liability on the conduct of business and how far the parent companies are liable for action of the subsidiaries. This is an area of law which hugely controversial and increasing international pressure is being put on parent companies to be liable for the acts of their subsidiaries. Furthermore, a new wave of legal actions in the UK, US, Canada and Australia aims to hold parent companies legally liable in developed country courts for negative environmental, safety and health, labor or human rights impacts linked with the operation of members of their company family in developing country.[2] There are increasing attempts to establish foreign direct liability-holding parent companies responsibility in the court of home country to people affected by their environment, health and safety impacts or human rights abuses in other countries.[3]

Foreign direct liability allows a claim to be made against an offending company (whether parent or subsidiary), even where the host country does not have similar regulatory standards with that of the home country. This is especially true with respect to environmental law and human rights law, in which developing countries are particularly lax in comparison with developed countries. However, there are a variety of legal problems and obstacles need to be overcome when a foreign plaintiff is to bring successful foreign direct liability claim against parent company based on environment or health and safety impacts or involvement in human rights abuses in other countries. This

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[1] Broecker, C 'Better the Devil You Know: Home State Approaches to Transnational Corporate Accountability' (2008) Journal of International Law and Politics 41 (2) 165

[2] Ward, H ' Governing Multinationals: *The Role of Foreign Direct Liability' The Royal Institute of International Affairs Briefing Paper* No. 18 February 2001, at page 1

[3] Ward, H 'Corporate accountability in search of treaty? Some insights from foreign direct liability' *The Royal Institute of International Affairs Briefing Paper* No. 4 May 2002, at page 2

essay will examine problems and obstacles which need to be overcome when foreign plaintiff is to bring a successful foreign direct liability against parent company, and identify and explain legal cases in regard to these problems and obstacles.

## 1.Legal Hurdles in Bringing a Successful Foreign Direct Liability Claim

The human rights and environmental dilemmas provoked by experiences of global corporate impunity have stimulated growing interest in the ability to apply domestic legal systems to account for violations abroad. The transnational human rights litigation has predominantly arisen in common law countries, where courts may exercise jurisdiction over foreign companies regarding extra-territorial actions. In civil law countries the tortfeasor must be domiciled within the jurisdiction. The most controversial issues in regard with foreign direct liability is the legal hurdles that must be overcome when a foreign plaintiff is to bring a successful foreign direct liability claim against parent company. Therefore, it is quite necessary to demonstrate and evaluate these legal hurdles at international level.

### 1-1 Choice of Law

Any business transaction crossing a national border is subject to two kinds of law: that of the home country or domestic law; and that of the foreign or host country. This is referred to as a question of the choice of law. It is more complex issue from one nation to another and there are no universal rules for choosing the appropriate law to govern international business disputes.[1] For instance, a parent company will be regulated by the law of the home country , while the subsidiary being as separate legal entity, will be regulated by the law of the host country. The legal hurdles which arise at the stage is that the court has to decide which country law applies to determining the essence of the case and size of any ultimate damage awarded.[2] In other words, it is difficult for a foreign direct liability claim to succeed because the claimants must convince the court as to which country's law should be applicable to the case. This is necessary in order to decide the substance of the case as well as the size of any eventual damages award. In the *Barcelona Traction*[3] case, the question of choice of law was discussed before the International Court of Justice.

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[1] Hotchkiss, C International Law For Business ( McGraw- Hill 1994) at page 39

[2] Ward, H ' Governing Multinationals: *The Role of Foreign Direct Liability'*, *Op. cit.*, at page 3

[3] *Barcelona Traction (Belgium v Spain)* [1919] ICJ, Reports.

In this case, Barcelona Traction was incorporated as a holding company in Canada. It had formed several subsidiary corporations under Canadian and Spanish law and majority of stokes were controlled by Belgian nationals. In 1948, the Spanish bondholder obtained for bankruptcy and as Spanish court authorized seizure of the assets of the company. The Canadian court refused to recognize the validity of the bankruptcy proceeding and Canada, Great Britain and United States commenced an action against the Spanish in ICJ, alleging breaches of the international law by the Spanish. The court held that Canada was the only government capable of negotiation on behalf of the corporation and not Belgium despite the fact that the majority of shareholder was controlled by Belgium nationals.[1] From this case, it would strengthen the position that the substantive law that should govern foreign direct liability claims is that of the home country and not the host country.

### 1-2 Jurisdiction of the court (*forum non conveniens*)

One of the essential conditions of succeeding in a foreign direct liability claim is the ability to prove that the parent company is indeed accountable over the actions of its subsidiary. This can be done through lifting the veil of incorporation of the subsidiary in order to discover the conduct of the parent company.

But before complainants can get into essential issues, they are likely to face claims by the defendant parent company to effect that the action has been brought in the wrong forum, which means that the country where the injuries occurred is the more appropriate and suitable place to bring the action.[2] The legal doctrine which is applied to these kinds of claim is called *forum non conveniens.* In the essence, the doctrine allows a court to refuse to hear a case where there is some other available legal forum "in which the case may be tried more suitably for the interest of all parties and for the ends of justice''.[3] Hence, the court of home country may sometimes refuse to hear the case relating to foreign direct liability claim on the basis that it can be better or more conveniently that such cases should be heard at the host country.[4] This is,

[1] *Barcelona Traction (Belgium v Spain)* [1919] ICJ, Rep. 3

[2] Ward, H, Ward, H ' Governing Multinationals: *The Role of Foreign Direct Liability'*, *Op. cit.*, at page 3

[3] *Spiliada Maritime Corporation v Cansulex. Ltd* [1987] AC 460.

[4] Alam, S and Klein, N and Overland, J *Globalization and the Quest for Social and Environment Justice: The relevance of international law in an evolving world order* (1st ed. Routledge 2011) at page 137

possibly no better illustrated than by Bhopal disaster case of 1984 and the subsequent attempt by those who injured as a result of the horrific chemical disaster in the Bhopal region of Indian to instigate legal proceedings against United States parent company whose subsidiary based in India.[1] In this case, 2000 peoples had died as result of a poisonous gas leak from a chemical plant in Bhopal and over 200,000 Indian citizens had been injured by breathing in poisonous gas. The litigation was commenced by the government of India on behalf of injured victims in U.S. court. The Indian government decision to commence the action in the U.S was primarily based on the fact that the Indian court did not have jurisdiction over Union Carbide Corporation on U.S. But the Union Carbide Corporation, the parent company, argued the litigation in the U.S should be ousted on the ground that the court of Indian where appropriate place to deal with the action.[2] After reviewing both public and private interest by the district court, it concluded that the courts of India were proper and suitable place for trail and judgment.[3] Circuit judge Mansfield illustrated that vital parts of Bhopal plant, including its storage tank, monitoring instrument and vent gas facilities were manufactured by Indian in Indian.[4]. In addition, the majority of the material witness and documentary proof was based in Indian.

Interestingly, it is worth nothing that such doctrine will not apply in certain jurisdictions; for instance, in the United Kingdom, the court will allow a case to be heard before it if the court considers that "substantial justice will not be done in the alternative forum."[5] This was seen illustrated in *Lubbe v. Cape case*[6], Cape industries, a multinational company based in England, through its subsidiary units was involved in mining blue and brown asbestos in South Africa. The claims were based on the negligent control of the company's asbestos and failure to take measure to decrease asbestos exposures to a safe level, resulting in many of people living there suffering from asbestos-related illness. However, Cape objected the claims on the ground of *forum non conveniens,* arguing that South Africa was appropriate place to hear the case. But, the House of Lords dismissed the argument of Cape Company and decided

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[1] *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal*[1987] 809 F. 2d 195 United State Court of Appeal (2d. Cir)

[2] Schaffer, R and Agusti, F and Earle, *B International Business Law and Its Environment* (7th ed. South-Western Cengage learning 20009) at page 27

[3] Folsom, R and Gordon, M and Fitzgerald, P *International Business Transaction* (9th ed. Thomson West 2006) at page 1275

[4] Schaffer, R and Agusti, F and Earle, *Op. cit.*, at page 27

[5] Ward, H, Ward, H ' Governing Multinationals: *The Role of Foreign Direct Liability'*, *Op. cit.*, at page 3

[6] *Lubbe & Ors v Cape Plc* [2000] 1 WLR.

the case should be continuing in the English court. It opined that there is a need to hear the case in the United Kingdom and not in South Africa; there are no legal aid available in South Africa which would fund the litigation nor are there any South African lawyers with the right experience willing to take on the case on a "no win no fee" basis. As of such, the House of Lords held that refusing to allow the proceedings to occur in England would be tantamount to a denial of justice.

Furthermore, in Europe, a coordinated system for deciding jurisdiction issues exists under Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968. It established general principle that defendant can be sued in the court of the Europe member's states where they are domiciled. However, English court have chosen not to apply the principle when the alternative court is in a non- Europe country.[1]

## 2.Political Corruption and risk of human rights abuse or persecution at home

One of the issues might appear is about the fact that some countries might not have well developed jurisdiction system or judges might be subjected to corruption.

Issues of corruption are particularly relevant in countries with less developed jurisdiction systems in which the judges are not accountable to the people. This effectively makes a host country particularly incapable of hearing a foreign direct liability claim. On this basis, it is possible that a claim could be brought in countries such as the United Kingdom on the grounds that justice would not be served in the host country. This is especially so if it can be shown that there is a risk of human rights persecution for bringing such case before the host country. In the case of *Wiwa v. Royal Dutch Petroleum Co.*[2], this issue was revealed when it was discovered that oil companies such as the Royal Dutch Shell plc were taking advantage of the political instability and corruption occurring in Nigeria. Due to this corruption, 90% of Nigeria's revenue is dependent on oil, allowing multi-national oil corporations to hold all the power with respect to national proceedings.[3]

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[1] Ward, H, Ward, H ' Governing Multinationals: *The Role of Foreign Direct Liability', Op. cit.*, at page 5

[2] *Wiwa v. Royal Dutch Petroleum Co.*[2000] 2d Cir.226 F.3d 88

[3] Ibid.

Even though foreign direct liability claims are not brought before the courts of a host country, victims coming from such host countries may nevertheless be reluctant to bring claims against transnational corporations in a foreign country (that is, the home country of the transnational corporation). This is because of a genuine fear that the victims would be persecuted or would suffer from human rights abuse once they return back to their home country. This is especially so where the transnational company has been collaborating with the government of the country. An example can be seen in the initial fear of the Wiwa claimants, due to the fact that the oil companies had been working directly hand-in-hand with the government of Nigeria, whose revenues are completely dependent on the works of the oil companies. Such actions, even if taken in a foreign country, may nevertheless antagonize an oppressive regime, resulting in the persecution or commission of human rights abuses against the claimants once they return home.

## 2-1 Lack of access to justice

In some jurisdiction, it is not just a corruption between government and multinational companies which prevent access to law, in most cases there is the lack of financial or legal resource in host country that make pursuit of a host country action a theoretical possibility only.[1]In other words, makes access to the justice impossible. The key factor in connection to the access to the justice is funding. It is also worth noting that the reason many cases fail to be brought to courts in the host country is not just due to the limits of the law but also economic obstacles. This is because countries with low rule of law are generally very weak economically – and such weakness extends towards its citizens. This might be due to the fact that even the victims are not entitled to enjoy basic personal freedoms within their own country. This hence limits the economical ability of victims to bring their claims to the national courts. Furthermore, in many developing countries “there are no legal aids system and public interest lawyer operate on shoe-string budget. They would simply unable to run the case on any things such as level playing field against a well- resourced multinational”.[2] Because of this low rule of law and economical power, access to law may be deemed as almost impossible.

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[1] Ward, H, Ward, H ‘ Governing Multinationals: *The Role of Foreign Direct Liability’*, *Op. cit.*, at page 4

[2] Richard Meeran ‘Corporation, Human Rights and Transitional Litigation’. 29 January 2003, http://www.law.monash.edu.au/castancentre/events/2003/meeranpaper.html.

This can be seen in *Connelly v. R.T.Z case*[1], the plaintiff worked for many years in Riot Tinto, the Namibia subsidiary of the English based parent company RTZ. He acquired cancer as a result of inhaling silica uranium, and obtained a legal aid certification to bring the claim for compensation against parent company in England. But based on the Legal Aid of 1988, the lower court sued a stay to allow proceeding in Namibia court not in English court. However, the plaintiff lacked the financial resources to conduct litigation in Namibia and the legal aid was not available for him in the country.[2] The House of Lords held that the plaintiff could pursue his claim for compensation in the English court even though Namibia was an appropriate place for the case because financial assistance was not available in Namibia.[3] Similarly, in the case of *Lubbe v Cape Plc*[4], the plaintiff argued that the claim should not be stayed in South Africa since the legal aid which is essential to continue the claim had been with drawn and no other source of funding would be available.[5] The court refused this argument and the plaintiff appealed to the House of Lords which held that, the claim must be allowed because there is no legal aid available in South Africa nor are there experience lawyers to deal with the issue sufficiently.

Furthermore, lake of capacity in the administrative of justice can be seen to present formidable obstacles. For instance, a host country may not have the requisite judicial system to cater for large multiparty claims. This can be seen in case *Aguinda v. Texaco*[6] in Ecuador. In 1993, a group of Ecuadorian citizens of the Oriente region sued Texaco in U.S court, arguing that between 1964 and 1992, Texaco oil operation polluted the rainforest and river in Ecuador, resulting in environment contamination and damage to the health of those who live in the region. But the claim was dismissed by the U.S court in 2002, holding that the litigation should be proceeding in the Ecuador. Therefore, the suit on behalf of approximately 30,000 rainforest in Ecuador field against

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[1] *Connelly v R.T.Z* [1996] 3 WLR 373.

[2] Sahni, B ‘Limitation of Access at the National level: Forum Non Conveniens’ (2006) Gonzaga Journal of International Law 92 (2) 124

[3] Muchlinski, P ‘ Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom’(2011) International and Comparative Law Quarterly 50 (1)6

[4] [4] *Lubbe & Ors v Cape Plc* [2000] 1 WLR

[5] Ward, H ‘Corporate accountability in search of treaty? Some insights from foreign direct liability’, *Op. cit.*, at page 7

[6]*Aguinda v. Texaco*[1993] Inc., Dkt. No.93Civ 7527(S.N.D.Y)

Chevron Company which had merged with Texaco.[1] But the obstacle is that the Ecuadorian law does not offer any special process for dealing with group action of this kind.[2] The court in Ecuador where any case would be heard is in Amazonian oil town of Lago Agrio. In addition, according to 1994 Affidavit in support of the plaintiff's law suit the court is a flight way from Quito or ten hours' drive. Moreover, the civil judge lives in "Quito and works in Lago Arigio two to four day a week. The court room is an office fifteen feet by ten and doubles as the judge chamber".[3]

Although, environmental pollution and human rights violation are the focus of this case, the substantive issue underlying this landmark case is company's liability, in particular, the accountability of multinational corporations operating in developing countries where regulation is often far more lax than standards a corporation operating in the U.S would be held to.[4]

Despite the legal vacuums that exist in many host countries in the effective control of multinational companies, there is a growing recognition in more developed countries that parent company could be legally liable for acts of its subsidiary in another jurisdiction.[5] For instance, in the U.S, claim can be commenced by foreign citizen against United States individuals under the Alien Tort Claim Act (ATCA) 1789. This Act allows for actions be to instigated in respect of violation of international law and U.S law. In one United States case, *Doe v. Unocal Corporation*[6], the plaintiffs from Tenasserim villager of Burma filed suit against the Burmese government and an American oil company which had entered into join venture for the construction of gas pipeline in Burma.[7] The plaintiffs argued that the oil company and government of Burma had conspired and acted in violating international law.[8] In addition, police forces had used violence in relocated the whole villages and the farmers were forced by the

[1] Whytock, C and Robertson, C 'Forum Non Conveniens and Enforcements of Foreign Judgment' (2011) Columbia Law Review 111 (7) 2

[2] Ward, H, Ward, H ' Governing Multinationals: *The Role of Foreign Direct Liability'*, *Op. cit.*, at page 4

[3] Ward, H, Ward, H ' Governing Multinationals: *The Role of Foreign Direct Liability'*, *Op. cit.*, at page 4

[4] Lyons, M 'Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress' (2004) Denver Journal of International Law and Policy 32(4) 702

[5] Ward, H, Ward, H ' Governing Multinationals: *The Role of Foreign Direct Liability'*, *Op. cit.*, at page 1

[6] *Doe v. Unocal* [1997] U.S. District Court. 963 F.Supp 880

[7] Folsom, R and Gordon, M and Fitzgerald, P, *Op. cit.*, at page 1106

[8] Forsythe, D, *Encyclopedia of Human Right* (Oxford University Press 2009) at page 227

Burma military to work for the oil company.[1] The plaintiffs alleged serious violation of international law and human right such as torture, rape, and assault, stolen property, the loss of their home and forced labor.[2] The district court held that jurisdiction over the plaintiffs' suit existed under the Alien Tort Claim 1789 and thus refused Unocal's attempt to dismiss the claim.

Even though there are no equivalent laws enacted within Europe offering similar protection as the Alien Tort Claims Act, this has not stopped claimants of attempting to invoke liability on the part of multinational corporations. For instance, the London High court recently had to hear a case against Trafigura (a shipping company) for the personal injuries caused by their subsidiaries in the Ivory Coast.[3]

However, foreign direct liability claims must take into account foreign policies of the two countries. This is because courts are not private actors, but are public in nature. Hence, the two sovereign states may find their territorial sovereignty violated from the foreign direct liability action. Under the principle of territorial sovereignty, a state has the right to regulate activities that occurs in their territory without the interference of other states. For instance, in 1993 ATCA case brought against Texaco in the U.S court by the Amazon's indigenous peoples in Ecuador. As a result the Ecuadorian Ambassador presented to the U.S a diplomatic protest in attempt to stop the case against Texaco in U.S. court.[4] He claimed that the lawsuit was an affront to Ecuador's national sovereignty that Ecuador had a major interest in formulating its own environment and industrial policies, and the courts of Ecuador were open to determine such dispute.[5]

Such situations are especially true in countries which consider themselves as having paramount interest in developing its own human rights or environmental policies. The state may also consider such lawsuit as politically motivated in order to prevent the developing country from profiting economically. Such a tension may also result from the fact that a state may be unwilling to enforce foreign judgments which relates to activities committed in its own territories.

[1] August, R and Mayer, D and Bixby, M *International Business Law : Text, Cases and Reading* (5th ed. Pearson Education, Inc. 2009) at page 421

[2] Ku, J ' The Curious Case of Corporate Liability Under the Alien Tort Statute : A Flawed System of Judicial Lawmaking' (2010) Virginia Journal of International Law 51(2) 365

[3] *Trafigura case* [2008] London High Court.

[4] Eade, D and Sayer, J *Development and the Private Sector: Consuming Interest* (Kumarian Press 2006) at page 82

[5] Ward, H, Ward, H ' Governing Multinationals: *The Role of Foreign Direct Liability'*, *Op. cit.*, at page 3

This is because such foreign judgments may be seen as an intrusion into their state sovereignty.

It must be noted that one of the most difficult hurdles that a foreign direct liability claim can encounter is the enforcement of verdict in host countries. This is especially so where the host country's law is fraught with problems when it comes to enforcing judgments, such as in war-torn countries which oil companies are often based in. In other cases, a state may be unwilling to enforce foreign judgments that relates to activities committed in its own territories due to a view that the enforcement of such foreign judgments may constitute an intrusion into their state sovereignty. In the *Thor Chemicals case*[1], the claimants were South Africans who alleged that Thor had moved its working practices from the United Kingdom to South Africa in order to make use of harmful technologies. In the case, a total of 41 former workers of a site operated by Thor Chemical's subsidiary, Thor Chemicals South Africa, brought a claim against Thor Chemicals and its chairman. The claimants sued for compensation arising out of mercury poisoning allegedly suffered while working at Thor facilities in South Africa. Even though this case relates to an out-of-court settlement and not an actual foreign judgment, nevertheless, it can hence be seen that there are difficulties in enforcing a situation in foreign jurisdictions.

## 2-2 stablishing a Duty of Care on the Part of the Parent Company over the Subsidiary

Unlike the United States which as a dedicated Alien Tort Claims Act of 1789 to form the basis for an action on foreign direct liability, the United Kingdom (and other countries) do not have such a statutory authority to allow foreign direct liability claims. Hence, usually foreign direct liability claims are brought under the doctrine of "duty of care" in order to make a parent company accountable over the conduct of its subsidiary.

Despite the difficulty in establishing a duty of care on the part of the parent company and its subsidiary such an approach has succeeded in Canada, where a claim was made against Cambior[2] on the grounds of pollution occurring in its gold mine in Guyana. In Australia, a claim was made against BHP for causing pollution in Papua New Guinea. Actions have also been taken against Rio Tinto in England due to its conduct in Rossum Uranium Mine in Namibia.[3]

[1] *Moses Fan Sithole v. Thor chemical Holdings Ltd* [2000] WLR 1421183

[2] *Recherches Internationales Québec v. Cambior Inc*. [1998] Q.J. No. 2554

[3] Ward, H, Ward, H ' Governing Multinationals: *The Role of Foreign Direct Liability', Op. cit.*, at page 3

Under this principle, liability can be established by showing that although the subsidiary and the parent company are two separate units, nevertheless as the parent, there is a need to take due care to ensure that its subsidiaries do not breach certain laws which govern the parent company. Hence, in this case, the liability belongs squarely to the parent company for failing to exercise due care, and there is no need to impose on the jurisdiction of the host country or lift the veil of incorporation of the subsidiary company.[1]

There are several cases in which foreign direct liability claims have been considered which revolves around establishing duty of care. For instance, in *Moses Fan Sithole v. Thor chemical Holdings Ltd case*[2], twenty one residents in South Africa initiated proceeding against Thor chemical, for injury suffered as a result of exposure to mercury by its subsidiary company, which operating in South Africa. The subsidiary was established because of the problem with Safety and Health Executive in England. In other words, the parent company relocated to South Africa and established a subsidiary because health and safety regulation are much weaker than England. The plaintiff argued that the parent company should be held responsible because of its negligent design, transfer, set up operation, supervision and monitoring of an intrinsically hazardous process which they knew or must have know would be unsafe for people worked there. [3] The case involved the requirements of disclosure of documents and when these were duly ordered by the Court of Appeal, Thor Chemical settled out of court. Similarly, In *Connelly v RTZ* case[4], the court noted that it will recognize a duty of care on the part of the parent company if it knows about the violations and have in fact exercised direct as well as close control over the operations of its subsidiaries.

One of the main suggestions in ensuring that foreign direct liability claims can be applied regardless of jurisdiction is through the creation of a dedicated global foreign direct liability convention. However, it will be extremely difficult to build enough political will in order to ensure that a dedicated global foreign direct liability convention can be created. Even where such convention has been drafted and created, implementation is fraught with difficulties due to the need for individual states to ratify the convention. Further, there is a risk that states will ratify such conventions with limitations.

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[1] Ward, H, Ward, H ‘ Governing Multinationals: *The Role of Foreign Direct Liability’*, *Op. cit.*, at page 3

[2] *Moses Fan Sithole v. Thor chemical Holdings Ltd* [2000] WLR 1421183

[3] *Stihole & others v. Thor Chemical Holding LTD,* [1999] Court of Appeal, official transcript.

[4] *Connelly v R.T.Z* [1996] 3 WLR 373. AC 854

Moreover, various international organizations have issued codes of conduct for multinational company. For instance, in 1976 the Organization for Economic Corporation and development (OECD) adopted OECD Guiltiness for multinational companies, also in 1977 International Labor Organization adopted the Tripartite Declaration of principle concerning multinational enterprise and social policy. But both these are merely recommendation and voluntary in nature.[1]

## Conclusion

Despite the fact that the establishment of foreign companies has been said to bring benefit to developing countries, it is submitted that the absence of domestic laws that promote responsible corporate activity has caused recalcitrant businesses to engage in activities that violate environmental laws, health laws, safety laws as well as human rights law with almost total impunity. There is a need to address this accountability gap either through the enactment of international law, domestic legislation or through the judicial decisions of the home states of these companies.

It is interesting to note that although there are a lot of ways to overcome these legal hurdles, nevertheless such obstacles remain in existence, resulting in the difficulty for victims to bring foreign direct liability claims before the court. Interestingly, many of the cases containing legitimate claims on the grounds of foreign direct liability have yet to reach a judicial decision on their merits. Rather, these cases have either been stayed or settled out of court. It is submitted that the national courts of home countries must no longer sit on these issues and decide once and for all the merits of foreign direct liability claims so as to allow the law to progress in a positive manner.

## Recommendations

[1] Panesar, S ‘Regulating Foreign Direct Investment’ (2006) Coventry Law Journal 11(2) 6

1-Drafting a flexible and encouraging law to regulate the work of foreign investment and foreign companies without placing restrictions and conditions that impede the work of these companies, whether in Iraq or any other country.

2-It is necessary to establish terms and criteria that oblige foreign direct investment to contribute to the transfer of technology and training of individuals in the host country.

3-The host country for foreign direct investment must respect its international obligations to protect foreign investment, and not seek to harm foreign investors directly or indirectly, because this will have a significant negative effects and destroy a confidence which is a cornerstone in attracting investment. On the other hand, this leads to a large number of claims against it, which increase the percentage if paying of financial compensation to the investors, in addition to the financial costs it incurs for the sake of international litigation.

4-The decision maker must make way for foreign direct investment by activating the investment law, working with the principle of transparency, eliminating routine and fighting administrative and financial corruption.

5-Work to achieve security stability and stop political conflicts, as these matters are among the determining factors for the investment climate, in addition to rationalizing unnecessary government spending and directing it towards building infrastructure.

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1-Alien Tort Claim Act 1789
2-Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968

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*5- In Re Union Carbide Corporation Gas Plant Disaster at Bhopal* [1987] *809 F. 2d 195 United State Court of Appeal (2d. Cir)*
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