



**Contesting Corporate Social Responsibility:
Public Challenges to the Modern Corporation in the 21st Century**

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To my parents, Shereen Elgamal & Ihab Saad

Abstract

This thesis argues that corporations have outgrown the theoretical frameworks that were devised to explain their dynamics at the turn of the 20th century. Contemporary conditions result in crises of legitimacy between corporations and their public contexts. With their amplified scales of operation and wide-reaching physical, economic, political, and social consequences, corporations of the 21st century demand revised theoretical, legal, and pragmatic interpretations that are better suited to grappling with present-day dynamics and to addressing critical challenges. This research examines contemporary controversies between corporations and publics from a critical legal perspective. Analysis of corporate dynamics is informed by geographically oriented themes of space and scale, contingency and attribution, and materiality and risk as they bear relevance to theoretical and real enactments of the corporation. This thesis grounds its claims with reference to the Corporate Social Responsibility (CSR) discourse; taking advantage of its reach and popularity while maintaining enough distance to note its limitations and internal contradictions.

This thesis finds that the present-day account of CSR is originated and advanced by an ideological orientation that is universalizing, materialist, positivist, formalist and rationalist. Such an orientation is confronted and contested in this work by a more critical rationality that is concerned with power dynamics, as well as questions of agency and self-determination. This rationality is elaborated through four empirical chapters which find that: 1) appeals to a CSR agenda as an effective mechanism for addressing the corporation's public impacts assumes the existence of a modern, liberal political context; 2) community 'materiality' presents an opportunity to bridge the notional public/private divide that is a core tenet of liberal theory; 3) the global corporation extends into plural territorialities and legal jurisdictions, and its public identity as interpreted through legal text sets the parameters for the accountability regimes devised to manage its impacts 4) pragmatist and aspirational legal agendas might be coordinated to advance issue-focused as well as case-based corporate liability reform. This work advances an account of the corporate-public relationship that carries relevance to a range of actors; corporations, public communities, policy makers and legal scholars. Each group has an integral part to

play in addressing the challenges presented by the modern corporate arrangement and devising regimes that contain its public implications.

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List of Acronyms

ADR – Alternative Dispute Resolution

CEMP– Community Environmental Monitoring Program

CLG – Critical Legal Geography

CLS – Critical Legal Studies

CSR – Corporate Social Responsibility

FDI – Foreign Direct Investment

ICJB – International Campaign for Justice in Bhopal

ICT – Information and Communication Technologies

MNC – Multinational Corporation

MNE – Multinational Enterprise

NCP – National Contact Point

OECD – Organization for Economic Cooperation and Development

SEC – Securities and Exchange Commission

SRI – Socially Responsible Investment

UCC – Union Carbide Corporation

Acknowledgments

It has been a true privilege exploring the themes of this work with the guidance of Professor Gordon Clark. His encouragement of my myriad detours in attempting to get to the heart of these issues, and his forthcoming conversations about the bigger picture, have made this experience a process of academic and personal growth. I thank him for his kind mentorship, enlightening insights and generous wisdom. Sincere thanks to Amanda Diener, who made the gears of this process run perfectly, always with grace and warmth.

I owe a debt of gratitude to the Rhodes Trust for their financial support of my studies, and to Mary Eaton, and the Porters of Rhodes House, John, Bob, and Colin for their contagious optimism through the grayest days of Hilary Term. Thanks also to the American Friends Scholarship for supporting my fourth year of study and to Melanie Radburn for coordinating all the details of my stay at Christ Church.

My deepest gratitude goes to my family. My mother, Shereen Elgamal, has been my biggest champion throughout this project, always the first audience to my work; providing a sounding board at every step of the way, and reading every single page with care and interest. She has maintained a keen curiosity in learning, along with me, about Geography, Corporations, and Social Responsibility. I am eternally grateful for the tradition of spirited debate with my father, Ihab Saad, who has taught me to be an independent and rigorous thinker. My siblings have provided comfort and inspiration along the way. With his earnest commitment to social change, Mohammad reminds me that the life of the mind must also be grounded by feet on the ground. Ahmad's sensitive soul has provided needed company as I grappled with the moral questions. Mahmoud's respect for rigorous work ethic and lofty ambitions reinforced my confidence in this pursuit, and Amena's joyful spirit reminded me to have fun along the way.

Thank you to those who made the actual process of discovering and writing this project more enjoyable through their company and support, Amina Magdy, Kawther Alfasi, Salma Khan, Caitlin Mullarkey, Sarra Hassan, and Omnia Radwan. Nareman Amin, offered thoughtful insights in the final stages of this work. A heartfelt thanks to Mary Wolschlag, who has made it possible for me to partake in every family occasion these past years, graciously arranging my many trips back and forth between LHR and RDU.

And finally, my gratitude goes to activists and victims of the Union Carbide disaster in Bhopal – particularly Rashida Bee and Champa Devi Shukla – for giving life to these issues in the summer of 2008. They helped me find my place within the complex questions that I set out to answer.

All mistakes in this work I claim as my own.

Aisha I. Saad
Oxford, July 2013

1 - Introduction

The business corporation has a storied legacy. The corporate imagination is rich with tales of power and intrigue, beginning with global plunder and conquests of the British East India Company¹ and the Dutch East India Company and continuing through to the Promethean status of the modern corporations. With their pervasive global reach, contemporary corporate actors wield considerable cultural and political clout. The expanding role of corporations into political lobbying and campaign finance, athletic and arts sponsorships, and social and educational programming positions them as arguably the most influential institutions in modern society. The scale of mega-corporate employers grants them influence at the national and community levels and positions them as dominant architects of local relationships and livelihoods. With the increased visibility and notoriety of corporations also comes a heightened awareness of their externalities and a popularized recognition of their social and political power. The corporation of the 21st century appears as both hero and villain in contested narratives and its contemporary persona no longer fits within the business-managerial discourses that contained it for the large part of the 20th century. It is against such a colorful backdrop that this work unfolds, as an effort to grapple with the realities of the modern corporation and to consider its role within a complex societal fabric.

1.1 PROJECT OVERVIEW

The modern corporation is, in the simplest sense, a legal construct. The contractual corporate arrangement manifests into organizational structures, which in turn

¹ Nick Robbins' history of the British East India Company in *The Corporation that Changed the World* (2012) offers a vivid narration of the first global corporation and reveals its enduring influence on the modern corporation.

extend into relational networks and enable complex social realities. In this research project, the legal definition of the corporation is taken to set parameters for the expression of real corporate forms which, when interpreted in accordance with a given ideology, animate expectations of a corporation's public and private identities. Controversies arising over the course of a corporation's interactions with the public allow for revision, re-interpretation and reformulation of corporate identity and public responsibility. From this perspective, case law dealing with corporate controversies informs the manifestations of social reality and is challenged and revised in light of them.

This thesis aims to identify and assert the substantive and foundational questions underlying debates over the corporation's public identity and its role in society and to put them at the center of conversation. The critical legal tradition is identified as being well suited to such an endeavor. The intellectual traditions of Critical Legal Studies (CLS) and Critical Legal Geography (CLG) address the structure of the law and identify how certain ideologies are uncritically assimilated into its formulation. These traditions note how the privileging of certain values in the process of legal interpretation enables and legitimizes political and social advantages for certain groups while disadvantaging others. The CLS and CLG schools are concerned with contesting legal interpretations to excavate embedded ideologies and to subject them to more critical democratic deliberation. In "Reconstructing American Law" Bruce Ackerman asserts that in order to locate and contest the structural injustices and inequalities embedded in the law and perpetuated through its enactment, it is necessary to look beyond the discrete details of a case and to restate the facts in a way that reveals the inefficiencies and injustices of the activity under scrutiny. This dissertation aspires to follow in the tradition of such post-structural legal

analyses, setting out to interrogate the modern corporation by observing the public identities and social expectations attributed to it through the examination of specific legal interpretations. It draws upon themes from the geographic tradition to develop a critique of the corporation that recognizes it as an entity with dynamic feedback relationships that have both universal and particular dimensions, physical as well as political/social implications.

Early chapters of this project deconstruct and interrogate the modern multinational corporation with reference to key foundations of corporate legal theory, while identifying the public identities that these legal origins enable. Later chapters examine the enactment and contestation of corporate identities and relationships through specific case examples.

The corporation referenced throughout this work refers to the modern, multinational arrangement that finds its roots in English common law. In contrast to a civil law tradition that relies on codified statutes as the primary source of law, the common law takes case precedent as its primary reference for rulings. Throughout this work, the corporation is variably referred to as the multinational corporation, the corporate assemblage, the corporate enterprise, and the firm. All of these are used in reference to the legal entity created under charter of the state, characterized by a separation between ownership and control, and holding privileges and liabilities distinct from those of its members. While corporations exist at all scales and for a range of functions, the ‘corporation’ intended here is of the class characterized by a wide shareholder base and multi-national operations.

For the purposes of analysis, the Corporate Social Responsibility (CSR) discourse emerging in the 20th century is identified as a vehicle for interrogating the corporation's public identity and impacts. The CSR discourse manifests at various levels of decision-making, and in a host of venues, as a means to engage the social dimensions of the modern corporation. It is developed and expressed through international guidelines and agreements, voluntary codes of conduct, managerial strategy guides, and a wealth of academic articles particularly from the business/management disciplines. Rather than invent a new discourse to consider the themes of this work, the conventionally business/managerial CSR is reappropriated to serve a radical interrogation of the corporate assemblage. The CSR discourse already carries familiarity in civil society, business, and policy contexts and enables a space for beginning to consider questions of business interfacing with society. Accordingly, it bears value as a starting point for pursuing the aims of this project.

Section 1.2 of this chapter presents the significance of the overall project, while section 1.3 lays out some contextual background through a broad-strokes overview of how the corporate arrangement came to present a contemporary dilemma in a modern context. Section 1.4 introduces the relevance of re-examining the corporate-social relationship in light of contemporary dynamics while section 1.5 identifies the need for an alternative analytical framework to negotiate the corporate-public relationship and section 1.6 asserts that a critical geographic perspective offers the analytical tools to enable such a project. Section 1.7 introduces the methods used to devise and develop such a framework while section 1.8 lays out the forthcoming dissertation structure.

1.2 SIGNIFICANCE OF THIS PROJECT

This project aims to reframe the mainstream approach to CSR such that it is more meaningful as an intervention for corporate-social interaction and, beyond that, for envisioning alternative institutions and arrangements suited to contemporary dynamics. This project must include normative, socio-political, and structural dimensions. Each dimension presents an opportunity for contestation and provides distinct leverages/entry points for intervention. The normative projects aim to agitate theories of the corporate persona as captured in the legal tradition and as revived in the arguments of contemporary case law. Such projects are geared towards a more effective system of accountability for recognizing and dealing with those externalities that pose a burden on constituencies who have, often by no choice of their own, become implicated discretely or systemically in the consequences and contingencies of corporate operations. Relying on voluntary enforcement of public interests via CSR does not grant recourse to the most vulnerable citizens whose interests may not be recognized or adopted by the socially responsible investors. Challenges to prevailing accounts of the corporate persona may take active form through campaigns to legitimate or de-legitimate particular contingencies in order to modify the scope of legal attribution. The CSR regime has been successful in garnering global attention to the question of the corporation's role in society and in creating a space for considering opportunities to redefine this role. It has not gone far enough, however, in providing solutions that adequately acknowledge complexities of the corporate-social interface. A critical perspective on CSR is needed in order to salvage this opportunity and prevent it from becoming obsolete, or worse yet, a caricatured response to the idealistic and aspirational perspectives that initiated this endeavor. A critical and contextualized perspective on CSR is imminently necessary. Structural-legal

opportunities for engagement must recognize that the goal of such an agenda is not to achieve perfect institutions, but rather to enable conditions that allow for a wider base of participation and for the continual redefinition and presentation of new publics.

1.3 THE RISE OF THE CORPORATION AND THE CONTEMPORARY DILEMMA

To contextualize the directions that this project aims to pursue, it is necessary first to begin with some contextual background to the corporate arrangement and the conditions of its contemporary operations. The business corporation was originally conceived as an arrangement enabling productive activity through the aggregation of wealth to finance large projects. 19th century corporations were typically financed by few individuals, characterized by ownership wedded to management, governed by a limited bureaucracy, focused on a single function, and contained to a narrow geographic range in their operations and sales. The corporate model changed in structure and objective, however, around the turn of the 20th century with a “Corporate Revolution” that prompted radical transformations in ownership, operations, and decision-making for the business firm (Berle 1965). The consolidation of businesses, characterized by vertical and horizontal integration, led to the rise of the massive corporate structure witnessed today. The corporation became noted for having dispersed shares amongst a large number of investors, a separation of ownership from control, an emergence of formal administrative structures led by a managing class, an agenda of diversified operations, and activities with far-reaching geographic extension. These descriptive tenets continue to characterize the corporations of the 21st century. Armour et al. (2009) further outline the structural characteristics of the rights-bearing and rights-circumscribed business corporation: these

are legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership (p5). Both structurally and functionally, a corporation holds dual identities as both owner and property; it is both subject and object. At the same time that it is functionally an item of property in itself, the corporation is also a legal entity capable of exercising rights (Tomasic, et al. 2002, p52).

Yet, a functional account of the business corporation does not do justice to the definitive role it plays in shaping the social and economic realities of the 21st century. Impacts of the corporate apparatus reach nearly every corner of the globe either directly or indirectly. In the 20th century, the corporation was largely designated as a private economic entity with a defining objective of generating returns for its shareholders. More recently, the recognition of corporate impacts beyond the strictly transactional economic sense – with notable influences on livelihood, environmental quality, and the democratic process - has animated discussion on the social responsibility of the corporate actor. Cowling and Tomlinson (2005) note that “the present globalization process (and the ensuing concentration of corporate power) has not met the wider interests of the global community: indeed it has contributed to a series of ‘strategic failures’ throughout the world economy” (p33). The trends in increased global wealth disparity, the global economic crises of 2008-2009, and a number of high profile court cases charging corporations for large-scale damages (Kiobel v. Royal Dutch Petroleum Co., Wal-Mart v. Dukes, among others) all present correlations in support of this claim. In this work I will argue that in order to meet the needs of an increasingly interdependent global order and an increasingly muddled public/private prerogative, the project of defining and implementing regimes for corporate social and/or public responsibility must be

approached with fresh theoretical insights that are geographically sensitized and critically executed.

The narratives attempting to account for a corporation's impacts and its perimeters of contingency are many. Increasingly, questions over a corporation's direct and indirect relationships to the formal state apparatus are called to question. Instances of contingent impacts overflowing the perimeters of traditional legal attribution have also been numerous. In January 2010 the corporation's right to free political speech became the object of public scrutiny with a landmark ruling by the United States Supreme Court in the case of *Citizens United v. the Federal Election Commission* (130 S. Ct. 876 (2010)). The court issued a highly controversial decision holding that corporate funding of independent political broadcasts in candidate elections was not limited under the First Amendment of the US Constitution. This ruling prompted public alarm over the unchecked meddling of corporations in the democratic process and the threat of aggregate wealth in hijacking the political process. Just three years later, the US Supreme Court ruled on another major case that carried significant implications for the citizen standing of a corporation. In *Kiobel v. Royal Dutch Petroleum* (621 F.3d 111 (2d Cir. 2010)), the courts addressed the prosecutability of multinational corporations in US courts for human rights abuses committed abroad. The decision being appealed was the Second Circuit's ruling that corporations are not prosecutable under the Alien Torts Statute in the same way that human individuals would be, with the reasoning that "corporate liability is not a discernible—much less a universally recognized—norm of customary international law". While in Citizens United the Supreme Court had defended the corporation's rights as a citizen, inclusive of the right to free speech, the Court took a more conservative stand

in *Kiobel*. The majority opinion found that the defendant's "mere corporate presence" in the United States did not create sufficient reason to "displace the presumption against extraterritorial application". The Court's decision was intended to restrain the US judiciary from intervening in foreign policy. The *Kiobel* opinion found that the plaintiffs' "case seeking relief for violations of the law of nations occurring outside the United States is barred." suggesting that future claims brought against US corporations for extraterritorial violations are as likely to be struck down.

[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. (...) Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 14 (2013)

The question of a corporation's obligations to a public citizenry has also entered debate in the context of information service providers including telecommunications companies and social media. In a February 2010 law review article, Anupam Chander extends the arguments concerned with Corporate Social Responsibility (CSR) to engage beyond conventional understandings of global supply chains, and to frame global information services as a form of critical infrastructure. Chander advocates for a theory of the political obligations of multi-national corporations, promoting the duty of information service providers to protect the free speech rights of political dissidents (p8). In 2011, the historically unprecedented Internet and mobile services blackout enforced by the Mubarak regime during Egypt's January 25 revolution generated debate over the corporation's role in situations of political instability (elaborated in an extended case study in Chapter 4). The apparent complicity of mobile phone and Internet service providers in carrying out the repressive demands of the political authorities raised questions about the status of private services as a public utility, the legal and ethical

implications of commercial contracts brokered with repressive regimes, and the public's expectations of a corporation's social responsibility. This same narrative recently arose in a Western context with leaked documents from the United States National Security Agency (NSA) revealing that its code-named PRISM project collected user data with the help of major companies including Microsoft, Yahoo, Google, Facebook, AOL, Skype, Youtube and Apple. (Washington Post 2013) This story came on the tails of another leak exposing the NSA's collection of call data from customers of the telecommunications provider Verizon. (The Guardian 2013) The collaboration between private companies and national security institutions to undermine personal privacy opens up a global narrative that questions the duty of private service providers to their consumer base.

1.4 PRAGMATIC REFORM OF THE CORPORATE-SOCIAL RELATIONSHIP

Both critics and supporters of the corporate assemblage acknowledge the hard facts of its reach, aggregate wealth and economic influence. Interpretation of these diagnostics as favorable or condemnable, however, depends on the subject's referential expectations for the legitimate role and behavior of the firm. Bryan Horrigan (2010) samples the polarized positions fervently supporting or vehemently condemning the corporation and its impacts on society. John Micklethwait and Adrian Wooldridge describe the corporation as “the most important organization in the world”; “the basis of the prosperity of the West and the best hope for the future of the rest of the world” and “one of the greatest inventions of all time” (in Horrigan 2010 p5). Andrew Lumsden and Saul Fridman agree: “the capacity of the limited liability corporation to facilitate large-scale enterprise has contributed greatly (...) to the rapid improvement in the human condition (at least materially) in the last two centuries” (in Horrigan 2010 p5). At the

same time, the corporate structure is maligned as posing some of the greatest risks to modern liberal democracy. The drive to maximize profits for shareholders, “not only destroys the corporation [but] also destroys our social fabric” (Mitchell 2001 as cited by Horrigan 2010 p5). The power of cooperative association that enables shareholders to contract together in co-dependent relationships results in a collective self, described by Joel Bakan (2004 as cited by Horrigan 2010 p5) as a “psychopathic creature” with “predatory instincts” that “valorize self-interest”. The very infrastructure that maximizes efficiency in bargaining is at the same time described by shareholder activist Robert Monk as “an externalizing machine” that is “potentially very, very damaging to society.” The fiduciary relationship establishing shareholder primacy as a means to keep corporate managers at bay from self-interest becomes identified as “a major design flaw in the corporation” that when left unmitigated “means that virtually all large publicly traded corporations present an inherent danger to society” knowing “no limits and boundaries” (The Report of the Citizen Works Corporate Reform Commission) (all references are cited in Horrigan 2010, p5).

Such totalized accounts of the corporation may be rhetorically compelling, but they are disempowering for meaningful engagement with this multi-dimensional corporate entity. Challenges to a firm’s operational ‘legitimacy’ often make ambiguous use of the term, with their varying positions typically animated by very different accounts of the corporation’s purpose, its identity, and its constitutive relationships. This results in a cacophony of arguments and positions all using similar diction to express different and often contradictory expectations. Radical opposition to the corporate model of business arrangement demonizes and dismisses existing structures and reminisces for a nostalgic

era preceding the dominance of the mega-corporation. These arguments are typically espoused by anti-corporate activists who vilify the corporation, treating it as a monolithic entity and elide the nuance that might allow for innovative policy considerations and for the insertion of effective policy wedges. At the other extreme, an assimilative approach to reform conceives of its agenda within the theoretical and operational boundaries presented by a dominant discourse and panders to the prevailing political and economic order. At best, these reforms might improve legitimacy of the outcomes of corporate decision making by subjecting them to a higher threshold for disclosure, and might also improve the efficiency in resource use and environmental quality. These interventions lack a key consideration, however, and that is recognition of the political, procedural, and sovereignty implications of corporation-based development patterns. The results of such reform efforts often manifest in ironic and hypocritical practices by corporations who are efficient energy users yet have stifling labor policies or who promote visible philanthropic operations in a few communities that are not relevant to their core production while reinforcing social stagnation at the majority of their operating sites.

The paradigms and theories that have long guided efforts for corporate reform are no longer suited to providing guidance for working through contemporary dilemmas and controversies. The most prevalent responses to the corporate crisis tend to be either dismissive of existing institutions as irredeemable through reform, or excessively assimilated to the point where they do not recognize or simply fail to challenge systemic or structural aspects and instead opt for discrete and ultimately ineffective interventions. A more critical yet constructive approach might allow for an account of the modern corporation that is more representative of the networks and consequences it engenders,

and that accordingly informs institutions and practices that are more suited to contemporary needs.

As a departure from both radical and assimilative camps, this project adopts an orientation that is aspirational yet pragmatic; recognizing the opportunities for reform within existing structures, while questioning their very objectives and purposes and not merely their efficiency. This thesis aspires to contribute to the development of alternative analytical accounts of the corporate assemblage, which are neither overly simplistic such that they overlook the complex externalities and systematic contingencies, nor overly polemical or dogmatic such that they withdraw fully from mainstream opportunities for reform. It proposes a different way of thinking about corporate relationships and regulation and advocates for considerations beyond legal and business perspectives, which often use an outdated understanding of fixed boundaries and static temporality in their characterization of corporate identities. While being acutely aware of the limitations to a CSR paradigm of the 21st century and noting its inadequacy for addressing the fundamental challenges presented by corporate development patterns, this thesis highlights a number of opportunities for agitating and challenging some of its most problematic assumptions.

1.5 DEVELOPING AN ANALYTICAL FRAMEWORK FOR CORPORATE-PUBLIC RELATIONSHIPS IN THE 21ST CENTURY

The contemporary corporation faces a crisis of legitimacy. The contingent consequences of a corporation's operations yield environmental, social and political consequences that increasingly undermine the public/private divide at the heart of western, liberal capitalist democracies. According to reports from the Gallup Poll and the Harris Survey, public confidence in the modern corporation has been on a steady decline

over the past years. A 2011 Gallup Poll showed 67% of those polled reporting that major corporations have “too much” power (Saad 2011). This was the highest reported response to the question regarding size and influence of the corporation since Gallup first asked the question in 2001.² Similarly, a 2008 Harris Survey found 71% assessing the reputation of Corporate America to be “poor” while a 2009 Harris Survey found 63% of respondents blaming large corporations for their personal financial situation (The Harris Poll 2011).

The most popular response to this crisis of legitimacy has taken the form of a Corporate Social Responsibility (CSR) regime. Long-standing debates about the proper scope and role of corporations in society have been reactivated in the context of assessing merits of the CSR agenda. CSR receives at least passing mention by a majority of globally dominant, mega-corporations.³ It is the subject of deliberation from the level of individual firms to negotiating arenas at the transnational scale where the overtures of global governance are most visibly performed. In its most popular form, the CSR discourse acknowledges that corporations play a social role in contemporary society. At the same time, the mainstream CSR narrative reinforces a corporation’s non-political status and places it in the realm of the private. This non-political designation does not challenge the default relationships between corporations and their stakeholders and renders CSR a tool for legitimating this order.

Supporters and critics of CSR defend or criticize the doctrine from a range of ideological orientations. Supporters of the CSR agenda feature CEOs alongside liberal

²2001 results of the Gallup Poll began with 48% of respondents indicating dissatisfaction and 48% indicating satisfaction with the size and influence of major corporations in the U.S. In 2011 67% indicated dissatisfaction while 29% indicated satisfaction. In response to the question “Would you like to see major corporations have more influence in this nation, less influence, or keep their influence as it is now?” 2001 polls indicated 52% ‘less influence’, 36% ‘same influence’, 10% ‘more influence’. 2011 data showed 62% indicating ‘less influence’, 24% ‘same influence’, and 12% ‘more influence’.

³ KPMG International Survey of Corporate Responsibility Reporting 2008 found that nearly 80% of the Global 250 companies issued separate CSR reports.

social justice advocates and communitarian academics, while the opposition includes anti-globalization, anti-neoliberal activists as well as free-market crusaders and libertarians. Their diverging agendas make use of a consistent language to express what are, in reality, conflicting expectations about the social responsibility of the corporation, and, more broadly, different understanding of the role of business in society. Such diverse agendas are motivated by differing accounts regarding the normative corporate actor and the scope of its legitimate constituencies, and consequently hold different expectations of the goals that a CSR agenda aims to bring about. By and large, evaluation of the CSR agenda tends to elude the theoretical and legal debates framing the identity of a 'socially responsible' corporation, and instead choose to focus on arguments in support of financial efficiency and legalistic protection of the fiduciary relationship. At present the opportunity for substantive critique of the corporation, through the vehicle of CSR, falls far short of its promise. If the higher order debates are dismissed with rhetorical flourishes and apparently altruistic gestures, then CSR will fail to offer a model of corporate citizenship that aligns corporate interests with those of the wider populace.

Global economic expansions, along with proliferation of the apparatuses of the neoliberal project, have far outpaced the legal and political mechanisms in place to maintain a balance between the market and the state. In response to this gap in governance, CSR has been established as a means to mediate the relationship between mega-corporations and the public sector. It provides a generic governance structure that operates in a hierarchical manner, with greater emphasis on material outcomes rather than immaterial questions of sovereignty and autonomy. While CSR presents a discrete intervention for promoting greater responsibility among global corporations, it does not

provide a helpful paradigm for considering the causal and interactional dimensions of those very consequences it aims to address. Its implicit characterization of the corporate actor, informed by the theory of the ‘modern corporation’, is no longer adequate for understanding the corporation of the 21st century and discerning its public responsibilities. The self-regulation of corporate entities is not a natural process that will reach some utopian equilibrium on its own. If present trends are maintained, the trajectory of aggregation in wealth and power is expected to result in further wealth polarization and exploitation of a larger proportion of the global population.

This project chooses to engage the existing CSR discourse seriously rather than discount it as being inherently compromised as radical critics might argue. It aligns with existing critiques of CSR in highlighting discrepancies between theory and practice and in identifying shortcomings of present practice and ideology relating to the corporation’s role in public life. It is different from existing critiques, however, in that it takes the additional step, beyond interrogating the CSR discourse on its own terms, to interrogate the more foundational assumptions of the corporation’s legal identity and standing and to relate these theoretical dimensions to their manifest implications. Rather than pursue this critique as an entirely new discourse, this project finds value in taking advantage of an existing discursive space that begins to address questions regarding the corporation’s role in society and sees this as an opportunity to expand the scope of such a space while benefitting from the legitimacy it already appreciates among mainstream business and policy communities.

1.6 CONTRIBUTIONS OF A CRITICAL-GEOGRAPHIC PERSPECTIVE

A progressively oriented project aiming to mediate the relationship between corporations and society such that this relationship is more responsive to the public good and the public welfare demands interventions initiated at multiple levels and in multiple spaces. Such a project must involve normative, socio-political and legal-structural components. These elements are of course interrelated and complementary, but they may find their respective opportunities for engagement in disparate spaces and among different groups. A geographic perspective might orient these interventions such that they grapple with key defining attributes of the corporation in a meaningful way.

1.6.1 Normative contributions

With its myriad associations and differentiated commitments, the modern multinational corporate assemblage is deeply implicated in ethical questions concerning the relationships and associations within which it is implicated. These questions concern the determination of a corporation's proper constituencies, both those internal and external to its formal structure, and the duties and responsibilities afforded to each of them. Normative assumptions concerning the corporate persona tend to be ideological in nature. In lieu of more empirically informed assessments of real interactions and outcomes, these ideological corporations are appealed to in the justifying accounts of legal decisions and policy positions. The normative questions become further complicated when we take into account synergistic and emergent relationships that result from interaction between different entities and human as well as nonhuman elements of their contexts. A scale-sensitive analysis of the corporation does not lead to conclusive answers to these normative questions, but it does provide alternative perspectives on the organization of

social reality and the differentiated networks and relationships that comprise it. Geographic analysis puts into context the contingency of theoretical frames in light of their ideological premises. Scale of ownership, operations and governance has changed dramatically over recent decades, owing in large part to the moves towards deregulation beginning in the 1980s and to shifts towards liberalized economies that enabled market expansion and minimized government regulation. Accordingly, an analysis that focuses on the spatial extension (space) and the scales at which operations and dynamics play out (scale) reveals an array of relationships that are implicated in corporate operations and proposes narratives prioritizing which of these relationships become relevant to decision-making. Such analysis may provide opportunities for understanding how the global and the local co-constitute one another, and in turn what opportunities and entry points are available for initiating interventions/campaigns.

1.6.2 Sociopolitical contributions

The geographic discipline's blurring of a strict 'nature/society' divide is helpful in expounding some of the defining categories of the modern corporate capitalist reality. Empirical scientific measurement of environmental impacts and health-contingencies challenge the taxonomies and divisions of 'agent', 'capital', 'labor', by creating new categories of associative communities bound by their mutual implication in environmental processes and their shared exposure to externalities. This approach brings to light contingency networks beyond those conventionally assumed to be relevant to the interests of corporate decision-makers. The consideration of physical connectivity between traditionally unconnected entities allows for the emergence of new 'publics' and is a first step towards making the case for more pluralistic standing of differentiated

communities. As a note of caution, the sociopolitical project must avoid excessive flattening of contingency such that there are no centers of power to be engaged for reform. As Tom Mels cautions, “in the same breath as I mention this broad scholarly acceptance of the importance of discursive ordering, I do not want to ignore difficulties arising from its attendant tendencies towards discursive dematerialisation and political relativism” (p387). Contemporary philosopher Graham Harman also warns against an excessively flattened metaphysics, “against any severe form of holism, we must re-establish the boundaries that protect every entity from its neighbors.” These boundaries might refer to the territorial demarcation of issues, and appropriately become the function of activated ‘publics’.

1.6.3 Structural-legal contributions

Normative understandings, properly checked by descriptive accounts of socio-political dynamics, establish guiding principles for structural-legal institutions. Structural-legal interventions are aimed at institutionalizing a corporate-social relationship more appropriate to the needs and realities of contemporary conditions. Such a structural-legal project fits well within a larger discourse of contestation aimed at unraveling the myth of ‘neoliberalism’. It aspires to articulate an account of economic reality that resists hegemonic agendas for global development characterized by market fundamentalism and a minimal role for the state. In considering the structural-legal aspects of the corporation and the potential for modification while working within existing boundaries, reformist efforts advanced here are less concerned with achieving a perfect end-state of the relationship between the corporation and the state, or with discovering some ideal balance between public and the private spheres. Instead, they

recognize that ultimately the answers to such questions are not static. The aspirational project aims to create those conditions that are amenable to the continued contestation and deliberation over such dynamics, continually revisiting them as new information and relationships become apparent. In contrast to the more radical approaches to progressive change, the pragmatic approach adopted here does not dismiss the engagement with existing establishments as futile for bringing about meaningful change. It views such engagement, and the capacity to criticize flawed institutions without utterly rejecting them, as necessary for understanding the complex interplay between disparate entities and for identifying opportunities for agitation, manipulation and reorientation. Rather than dismiss rules and rhetoric as mere window-dressing, this approach instead engages their particularity in a concerted effort towards a more substantial paradigm shift (Kennedy 1983).

1.7 METHODS OF INQUIRY

This research situates itself within a tradition of critical theory and accordingly adopts a critical qualitative methodology. It begins with a review of the theoretical legal debates concerning the identity and nature of the modern corporation, assembling them into an organizational flowchart identifying a range of dispositions to the public identity of the corporation, in Chapter 2. Parallel to this, it builds a theoretical framework, in Chapter 3, drawing upon the geographic literature to elaborate the relevance of a set of themes – space and scale, contingency and attribution, materiality and risk – as they bear on the public dimensions of the modern multinational corporation. This framework is later used to interpret the geographic dimensions of the corporate arrangement. These tools will be applied in the subsequent four chapters with one critical case study

developed in each, in order to explore what a critical legal geography of the modern multinational corporation might look like.

1.7.1 Devising a Theoretical Framework Through Discourse Analysis

Present debate over the nature of the corporation is of a heavily ideological nature. While the corporation is recognized formally and functionally as a singular institution, it exists in plural normative forms. Legal attributes are interpreted through differentiated ideological filters in order to determine relational expectations and impacts that are subject to attribution. Accordingly, this thesis takes as its starting point a conceptual mapping and deconstruction of the modern multi-national corporation. It identifies the framing features of the corporations, which were presented as dualistic debates that set a range of possibilities for normative interpretations of a corporation's 'social responsibility'. The five key debates framing the corporate identity were extracted and various combinations of these axes were demonstrated, with corresponding corporate accountability regimes mapped onto them. The differentiated theories of the corporation and the varied corporate-public relationships that these theories legitimate were organized into a guiding concept-map. This work identifies and aligns with a "radical" or "situated" approach to corporate-public relationships, concerning itself with the substantive dynamics and legal contests of corporate assemblages rather than focusing solely on business or managerial considerations of Corporate Social Responsibility (CSR).

The CSR discourse was subsequently identified as a subject for Critical Discourse Analysis in order to better interpret and intervene in the corporate-public relationship (Chouliaraki and Fairclough 1999). CDA is identified as best meeting the theoretical orientation of this work given its attentiveness to the ways that legal discourse is both

constituted by and constitutive of social reality. It aligns with Bourdieu's 'constructivist structuralism' or 'structuralist constructivism', cited by Chouliaraki and Fairclough (1999) as "a way of seeing and researching social life as both constrained by social structures, and as an active process of production which transforms social structures." (p3) This form of scholarship is necessarily activist in nature, and in the tradition of critical social science it seeks to "contribute to an awareness of what is, how it has come to be, and what it might become, on the basis of which people may be able to make and remake their lives (Calhoun 1995)" (Chouliaraki and Fairclough 1999 p4). It does not assume a position of value neutrality and couches itself within a progressive tradition and an activist academic orientation in line with the Frankfurt School (Geuss 1981).

The relationship between discourse and economic, social and political dimensions is taken, in this work, to be co-constitutive. Discourse shapes these processes, at the same time that it is also shaped by them. Discourse in this work does not solely refer to language, but to the institutions marshaled by that language and the relationships and entities created through its assemblages. In this sense, CDA may offer a meaningful contribution to highlighting problems in contemporary democratic assemblages, while enabling "effective forms of public space, effective forms of dialogue across difference" and bringing under democratic consideration "aspects of the contemporary social use of language which are currently outside democratic control" (Chouliaraki and Fairclough 1999 p9). Texts incorporated in this CDA are varied in form, with emphasis on the legal text as a performed discourse of power. Each chapter engages a particular aspect of legal discourse; securitization as performed through law and regulation in Chapter 4, legal designations of public and private standing in Chapter 5, reinforcement of territoriality

through the implementation of jurisdiction in Chapter 6, and pragmatist and constructivist functions of litigation projects in Chapter 7.

1.7.2 Selecting Cases and Assembling Case Narratives

A combination of engaged theory and qualitative case studies was identified as the appropriate method to pursue the aims of this research. Engaged theory is reflexively critical of its own foundations and follows in the scholarship of Pierre Bourdieu and Benedict Anderson. Case studies are developed with the intent of deriving theory through the examination of particular events. George and Bennett define case studies as instances of a specific class of events that are elaborated with the aim of developing theory “regarding the causes of similarities or differences among instances (cases) of that class of events. A case study is thus a well-defined aspect of a historical episode that the investigator selects for analysis, rather than a historical event itself” (2005 pp.17-18). Baxter and Jack point to the potential for case studies to deconstruct and subsequently reconstruct various phenomena (2008 p544). In this research, selected events fall at the nexus of corporate-public disputes. Analysis is conducted both within cases (in the individual case chapters) as well as between cases (in the concluding chapter).

The case study approach allows for deep contextualization, supporting the development of analytical equivalence across a range of geographic, and socio-political contexts (George and Bennett 2005 p19). The openness of this approach is also well suited to the conceptual complexity of the themes under consideration. Cases are selected based on their success in deviating from conventional narratives and evidence of disruption in relational norms, with the intent of providing new theoretical insights. A potential pitfall of the case study method is that conclusions and theories extrapolated

from one case in a particular geographic context might be simplistically superimposed onto other contexts. I am alert to this problem, and while certain commonalities might be noted between the case studies, I also recognize the specificity of each national context and industry dynamic at play in the given cases. While the companies studied are distinct in terms of industry affiliation, sites of activity, and operational structure, they are all domiciled in Western common law countries and maintain operations and subsidiaries with global reach. The selected examples share more than general corporate structure and legal origin, however. They all involve manifestations of dispute between public interests and corporate interests; they all transcend national boundaries and entail contests to the public identity of the corporation.

I begin each of critical case studies with a rehearsal of the theoretical backdrop and presentation of a set of ideas for interpreting the dynamics in play. I then draw upon primary and secondary materials to construct a case narrative. When possible, I supplement these narratives with key-informant interviews. I then analyze the case narrative with reference to the theoretical frame in order to draw out relevant interpretations and conclusions. While I attempt to draw out generalized themes that bear relevance to other contexts, I am also cautious to couch conclusions derived from each case study within the particularities of its context and the specificity of its dynamics.

All of the corporations examined share a number of features; they are publicly traded, maintain global operations, and are domiciled in western countries (with the exception of the telecommunications provider Etisalat in Case 1 which is based in the United Arab Emirates). Each of the four cases was selected in accordance with several criteria: relevance to examining different aspects of the theoretical frame, geographic

variance, availability of information, and potential for original contribution. I selected cases where I had prior personal immersion and linguistic proficiency in the context so as to avoid superficial interpretations that are not historically or politically informed. This presents a challenge, of course, of maintaining sufficient distance from the issues under examination, but I judged that the depth of context I could bring to the cases offset this potential pitfall. Cases were researched through use of primary and secondary materials. Legal documents were obtained in their original language, (Case 1 in Arabic, Case 3 in Spanish, Cases 2 and 4 in English) through online sources or archival research, and translated by the researcher for personal use.

In constructing the case studies I relied on academic literature, legal documents, online recordings, reports and newspaper archives. I supplemented the narrative cases with direct interviews and direct correspondence. Interviews were largely informal and conversational in nature, guided by prepared questions. Interviews are not intended to represent all the parties that could be included for a holistic and balanced account of events, but were pursued as an opportunity to obtain material where it was not available in the form of direct transcripts or audio/video. The list of questions used to guide discussion is included in Appendix D. Discussion was not restricted to the prepared questions, which served as a loose framework for conversations and not as a strict template. This is in keeping with the overall iterative approach to research questions, which were open to amendment and revision such that the investigative process was not one-directional but dialogical and self-critical.

Interview transcripts are not included as conversations were kept off the record for security purposes as well as to permit greater openness in conversation. The content

obtained from interviews was intended to provide substantive context to the research process as well as an opportunity to present interpretations and conclusions from research to rigorous discussion in a dialogical format. I took the decision to forego interview recording and with it the opportunity for direct referencing and quotes in the research materials, in favor of greater access to interviewee experiences, perspectives, and insights. Interviews provided uncensored insights and context for each of the cases, while also creating an arena for my own theoretical interpretations and assumptions to be subject to questioning and discussion with the interviewees.

I faced a number of challenges in the process of case assembly. With respect to research material, it was challenging to filter the dimensions of the issue examined in order to give it shape, and to draw appropriate boundaries around the scope of controversy. These boundaries are necessary for delineating the dimensions of the system or event under consideration, for elaborating the case as “a specific, a complex, functioning thing” (Stark 1995, p2). It was equally challenging to decide what information to include, as it was to decide what information to leave out while maintaining integrity of the narrative. The challenge of drawing boundaries around an issue without further reinforcing ideological bias was checked through conversations with parties involved directly in the informant interviews.

1.7.3 Analyzing Cases Relative to Theoretical Frame

Following the first step of elaborating a theoretical framework, and the second step of developing an expository case narrative, the third step was to draw the theoretical propositions through the case narrative in order to provide an explanatory account to and highlight opportunities for theoretical contributions advanced in the case at hand. The

challenges of this stage primarily deal with personal subjectivity in engaging with research materials. I attempted to account for this subjectivity by sharing draft chapters with individuals bearing some relation to the respective cases and engaging in open conversation where I left my analyses and conclusions open to challenge and revision.

1.8 DISSERTATION STRUCTURE

Chapter 2 of this thesis begins by with a review of the relevant literature, first situating this work in the law and geography literature, subsequently focusing on the legal theory of the corporation, and finally turning to the theory of Corporate Social Responsibility. Part 1 surveys critical legal theory as well as the law and geography literature to present the theoretical backdrop of this thesis. Part 2 unpacks definitions of the corporation as portrayed in legal theory to present its mutability as a theoretical assemblage, making the argument that the notional concept of the corporation becomes reified through ideological interpretation. Part 3 looks at the way dominant discourses of corporate legitimacy and corporate social responsibility consider corporations as the subject of legitimacy (is CSR legitimate?) while noting the missing questions over the use of CSR as an object of legitimacy (what is CSR legitimating?) and as an instrument of depoliticization.

Chapter 3 develops a theoretical framework to guide analysis of the four subsequent case studies. It outlines the contributions of a geographic perspective towards understanding the multinational corporation, and goes on to introduce three key themes for further analysis; space and scale, contingency and attribution, materiality and risk. Part 1 of this chapter examines the use of space and scale in distinguishing ‘relevant’ corporate dynamics and examines ways they are manipulated in current CSR discourse to

obfuscate the negative contributions of corporate benefactors in a deepening neoliberal trajectory of development. Part 2 considers contingency and attribution as they originate from the ideological definition of a corporation and inform its public identity. The interpreted corporation dictates relational dynamics, which subsequently become ossified through path-dependent policy. While geographic analysis of the corporation's impact may bolster a case for contingency of relationships, the further step of determining attribution is a legal and political task. Part 3 takes a critical approach to the notion of materiality as it is used to further an implementation of 'Risk Society' characterized by systematic discrimination through social risk positioning. In each of the core parts, sample anecdotal cases will be presented to illustrate the themes considered and to highlight opportunities for intervention and reform.

Chapters 4 through 7 each elaborates a specific case study and analyses it with respect to relevant dimensions of the theoretical framework elaborated in Chapter 3. Chapter 4 examines Egypt's telecommunications shutdown in 2011 and considers implications and prospects for CSR in a military-dominated context. This chapter underscores the importance of contextual specificity in understanding the relationship between corporation and society. Chapter 5 elaborates the case of Rio Tinto's Eagle Mine and the innovation of the Community Based Environmental Monitoring arrangement. This chapter picks up on the thematic of materiality and risk as they operate as a bridge between public and private spheres. Chapter 6 looks at the Organization for Economic Cooperation and Development's National Contact Point (NCP) complaint mechanism utilized to bring action against Shell's operations at Villa Inflammable in Argentina and potential for this instrument to serve as a transnational governance mechanism for

negotiating public responsibilities of a global corporation. This chapter picks up on the thematics of space and scale as they determine valid legal jurisdictions for bringing claims against a corporation. Chapter 7 looks at legal activism and social movements prompted by Union Carbide's 1984 chemical disaster in Bhopal, India and the case's legacy for corporate liability. This chapter picks up on the thematic of contingency and attribution as it is variably interpreted in a pragmatic versus an aspirational legal project.

Chapter 8 is the concluding chapter of the dissertation and draws together key findings from each of the four comprising cases while highlighting crosscutting themes that elaborate the proposed alternative framework for interpreting social and environmental accountability for the modern multi-national corporation. It notes a number of opportunities for destabilizing and challenging the status quo interpretation of the corporation towards a model that is more compatible with democratic ideals and a widely informed public interest.

1.8 LIMITATIONS OF THIS WORK

This research focuses specifically on western-domiciled, publicly traded corporations and does not look at state-owned corporations, which admittedly discounts the increasingly relevant Chinese corporations. Time and budget limitations allowed for short periods of fieldwork and this work could have benefited from more extensive on-site observation at the main locations of each case. The four cases are by no means exhaustive of potential scenarios and dynamics that could have been explored, but they serve as a template for further case-based inquiry. Case Study 1 was written as the Egyptian political transition, which began in February 2011, continued to evolve with great unpredictability. It benefits from being in close step with the evolving events but is

also disadvantaged by the myopia of these same circumstances. Case Study 2 looks at a recent innovation in corporate-community relations established by Rio Tinto in 2012 and would benefit from a retrospective study to the same case once the program has been in effect longer and evaluative data records are more expansive. Case Study 3 looks at one specific example of a NCP Specific Instance and could benefit from additional examples for comparison. It would also benefit from more extended examination of other alternative dispute resolution fora like the World Bank Compliance Advisor/Ombudsman. The outcome of Case Study 4 continues to evolve with ongoing appeals in US and in Indian courts, and a complete retrospective analysis would be relevant once legal proceedings have concluded. This case study focused on US-based legal proceedings and would also benefit from an extended examination of the legal proceedings in Indian courts and the ways those too have informed understandings of corporate liability.

This work does not claim to be comprehensive in its scope and depth on the subject of CSR and the public identity of the corporation. Rather, it seeks to serve as a step towards a new approach to considering the construction and attenuation of the modern corporation and its public impacts and to highlighting opportunities to contest existing dynamics.

1.9 LOOKING AHEAD

This thesis proposes that a critical, geographically sensitized perspectives on the modern multinational corporation might inform alternative critical accounts of the corporation, and provide relevant tools for determining its proper relationship with public constituencies. The geographic perspective engages thematics of space and scale,

contingency and attribution, materiality and risk to shed light on the ‘nature of the corporation’ and the agendas promoted through its operations. The dominant interpretation of the corporation, originating in 20th century corporate theory, continues to inform instruments and interventions of a Corporate Social Responsibility regime that legitimates the corporate-public interface in a market-driven minimalist State. This interpretation is no longer representative of global corporate empires that rival or supersede many of the world’s nation-states in economic and political might, and is not adequate to mediating the contemporary dilemmas posed by corporate expansion. Geographic insights on the normative, socio-political and structural-legal aspects of the corporation confront the real attributes and interventions of the CSR regime, highlighting its limitations as well as entry points to meaningful engagement that may become a first step in the project for more ambitious reform.

The tools of a geographic perspective are useful for confronting paradoxical aspects of the corporation. Only by acknowledging and engaging these aspects, can an agenda for Corporate Social Responsibility truly expect to usher in meaningful change. The challenge taken on in this thesis is to claim the arena created by CSR discourse, taking advantage of its reach and popularity, while maintaining enough distance to question its limitations and internal contradictions. Through its critique of the CSR regime, this project aims to take the first steps towards developing framing questions for a new theory of corporate responsibility to public society. Such a theory must be attentive to the myriad material consequences and contingencies of corporate operations, while taking into account the implications for popular sovereignty and participatory governance.

2 - Review of Literature

This chapter embarks on a critical deconstruction of the modern multi-national corporation, and of its public identity as manifest through the Corporate Social Responsibility (CSR) discourse. It identifies the CSR regime as a pragmatic space to begin developing oppositional analytics to what is at present a closed legal norm lacking in geographic sensitivity with respect to space and scale, contingency and attribution, materiality and risk. The intellectual orientation of this thesis follows in the theoretical traditions of Critical Legal Studies (CLS) and Critical Legal Geography (CLG). Part 2.1 of this chapter introduces CLS and CLG in order to frame the intellectual orientation of the project. Part 2.2 surveys the literature on the theory of the modern corporation as a legal notion with the purpose of unbracketing the ‘corporation’ that remains the central subject of CSR discourses, yet seldom complexified as an object itself. The review of theoretical corporate public identities leads into a narrowed focus on CSR theories in Part 2.3, and presents an account of the ways they are instrumentalized to address the modern corporation’s public identity crisis. This chapter is intended to provide a meta-perspective while also deconstructing the governing concepts at the heart of this research endeavor. Part 2.4 concludes with a roadmap to the coming chapters.

2.1 CRITICAL LEGAL GEOGRAPHY AND THE CORPORATION

The corporation is at heart a legal construct. It is also an economic, political and social entity, but its existence is enabled by legal recognition and validation. Both the Critical Legal Studies (CLS) and the Critical Legal Geography (CLG) traditions

contribute theoretical tools that enable contextualization and politicization of the corporate enactment and the realities it engenders.

The Critical Legal Studies movement of legal interpretation, emerging in the United States in the 1960s and 70s situated legal rulings within historical context in order to support its guiding thesis that “all law is politics”. This philosophy of legal interpretation was motivated by a progressive agenda that rejected the positivist readings of the law and sought to unsettle the a-historical claim to legal neutrality. The objective of this movement is to reveal latent agendas and embedded ideologies in existing legal institutions. A core theme of the CLS tradition is that law and legal institutions serve the interests of the powerful while subverting the interests of the poor and marginalized. Another core theme contests the foundational assumptions of the liberal legal ideology such as the autonomy of the self-interested individual, the distinction between public and private spheres, etc. Key scholars of the Critical Legal tradition, cited throughout this work are Duncan Kennedy, David Kennedy, Morton Horwitz, and Gary Peller. While major threads of the movement have been dismissed as unhelpfully deconstructive without presenting viable alternatives, some CLS scholars like Roberto Unger have ventured to draw the strokes of alternative institutions. This work accepts the claims of the CLS tradition that law is not external to society and politics, and that the legal project – in this case the corporate legal project – is at heart necessarily a social and political project as well.

If Critical Legal Theory challenges legal closure through historicization, then Critical Legal Geography challenges legal closure through spatialization. The critical legal geography perspective was developed in the work of Nick Blomley, who argues that

embedded within legal thought, are various representations, “[o]f the spaces of political, social, and economic life. In much the same way that law relies in various ways on claims concerning history, so it both defines and draws upon a complex range of geographies and spatial understandings” (1994 pp.xi).

Blomley’s efforts to develop a critical legal analysis that is geographically informed, adds the dimensions of spatiality and temporality in addition to the historical situatedness recognized by CLS scholars. Blomley observes that mainstream legal analysis evades “the specificities and bonds of place and community” (1994 p53). He argues instead that, “embedded within law are a rich and complex set of “maps” of social life. Legal categories are used to construct and differentiate material spaces which, in turn, acquire a legal potency that has a direct bearing on those using and traversing such spaces” (pp.53-54).

The aims of this thesis build off of this claim, examining the manifestations and implications of the law in particular cases while paying attention to the political and historical particularities of context. Blomley charges that an opening up of the legal regime, through historicization or spatialization, is not sufficient, and that it must enable an “analytical *opposition*” to the observed oppressions such that critical geographic analysis not only documents but also contests the closed legal map (1994 p56).

Commentary on the modern corporation in CLS and CLG literature is limited. Neither tradition has developed a particularly robust analytical agenda that focuses specifically on the modern corporation. Their analyses, aimed at revealing embedded ideologies in the construction of the law, typically engage themes of privilege and marginalization with respect to class, race, and gender. Substantial commentary exists in

the CLS literature on the public/private divide, which relates directly to the corporation (and is elaborated in Chapter 5 of this project). It will be the aim of this project to extend the types of analysis begun in CLS and CLG while taking a focus on the corporation as a legal construct and examining how the ideologies embedded into its definitions and enacted through its interpretations bear on matters of social inclusion and democratic agency. It provides an important addition to the aims of the critical legal tradition and encourages a new direction of scholarship on one of the most important institutions in modern life.

The CLS and the CLG traditions informed the theoretical orientation of this work and directed its aims to agitate the CSR narrative. Each of four empirical chapters attempts to contextualize the examined dimensions of CSR and to open up opportunities for its development to better suit the needs and realities of the corporate enactment. In **Chapter 4**, the example of Egypt's telecommunications sector reveals how the ideological contingency of CSR on the pre-existence of a modern, liberal context is challenged by the specific context of a securitized military-dominated economy within which the telecommunications corporations are embedded. The entrenchment of a securitized rationality through promulgation of sweeping laws as well as specific regulations with respect to the telecommunications sector carves out what would, in a functioning modern liberal democracy, be considered democratic questions, while displacing them to a militarized space. In this sense, the legal framework within which multinational corporations operate circumscribes the scope of public identity and public responsibility that these corporations can manifest. In **Chapter 5**, the legal relationship between shareholders and managers restricts decision-making to fiduciary boundaries,

such that all external relationships are defined in terms of materiality. An issue external to the core considerations and decision-making of a corporation may become inducted and translated into terms that bear internal relevance through an interpretive process that recognizes its material dimensions. This process of interpretation and induction may be catalyzed by civil society actors who agitate and redraw the boundaries of an issue, and, by extension, force a negotiation of the corporation's public/private identity as it is forced to consider what variables are internal to its identity (private) and which ones are external (public). In **Chapter 6**, the recognized jurisdictions for dealing with grievances between public constituencies and corporate actors are constituted by and constitutive of the legitimated linkages between core and peripheral components of the corporation. On the one hand, state-bounded, territorialized legal regimes reinforce an entity theory of the corporation, while on the other hand a transnational soft-law regime activates the conceptualization of a constellated enterprise with extended liabilities. In **Chapter 7**, the legal projects relating to the Bhopal case demonstrate how pragmatist and constructivist orientations to legal activism enable different parameters for conceptualizing and challenging the corporate enactment. The former restricts the contestation of corporate infractions to the realm of the courts and acquiesces to the hegemonic definitions of the corporate entity and its relation to the public. The latter, however, allies an aspirational litigation project with a grassroots social movement that extends the boundaries of contestation and carries the question of corporate public identity outside of the courts while subjecting it to civil society activism where it undergoes more foundational scrutiny. For each of these cases, neither a legal analysis nor a geographic analysis on its own captures the complex dynamics in play. A critical legal geographic analysis engages

the legal foundations of the corporate assemblage, while at the same time remaining sensitized to the manifestations of theory into relational networks and material consequences.

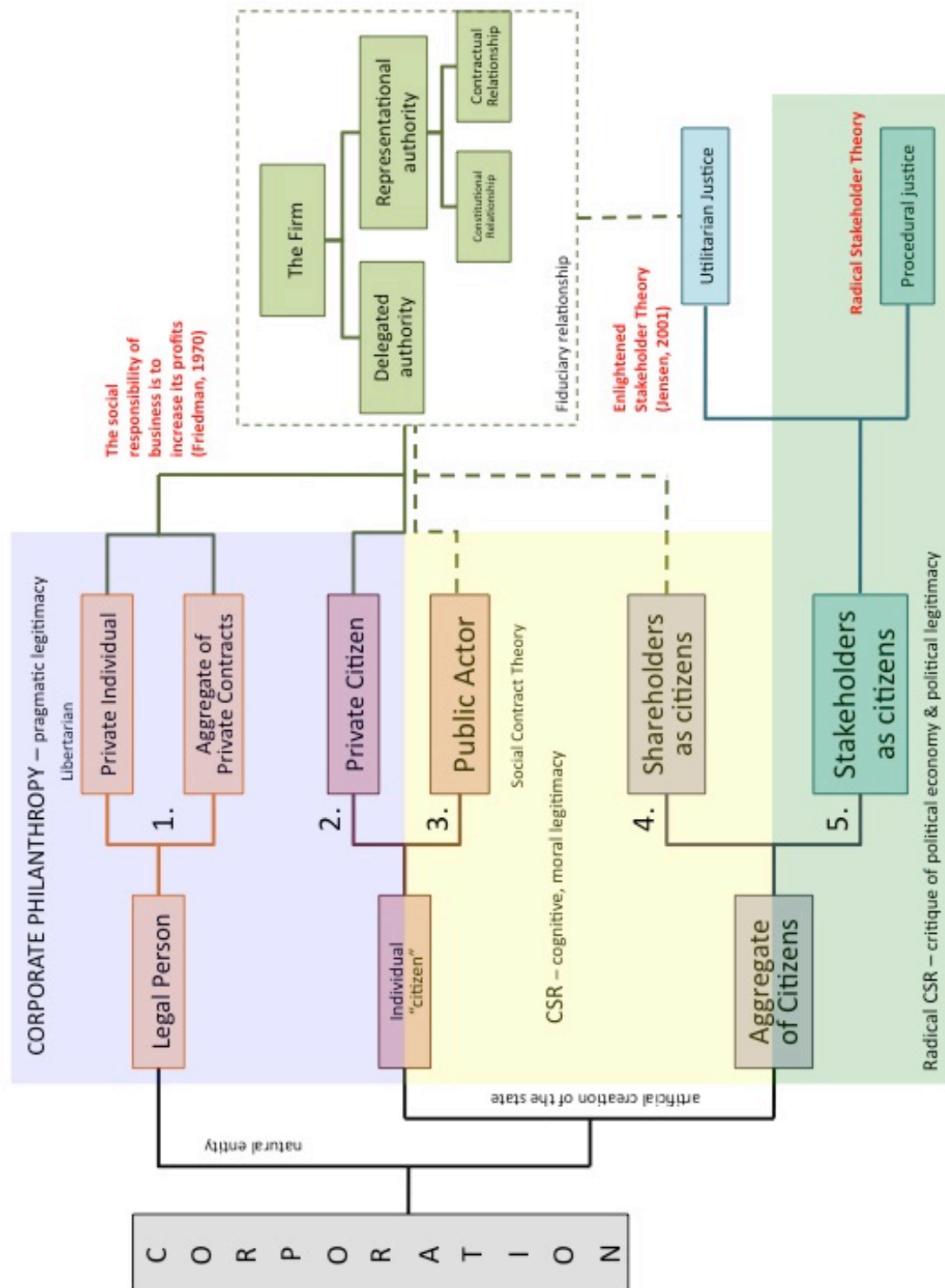
2.2 THEORIES OF THE CORPORATION AND THE PUBLIC IDENTITIES THEY ENGENDER

Present debate over the nature of the corporation is of a heavily ideological nature. While the corporation is recognized formally and functionally as a singular institution, it exists in plural normative forms. Legal attributes of the corporation are interpreted through differentiated ideological filters. Such interpretations entail a set of expectations that determine relational dynamics of a corporation as well as the impacts that might be legitimately attributed to it. Key debates framing the normative definition of the corporation are well founded in the tradition of Anglo-American legal theory. In this section, five key framing features of the corporations are presented as dualistic debates that set a range of possibilities for normative interpretations.

- The corporation as the natural product of private initiative versus the corporation as an artificial creation of the state;
- The corporation as a singular acting entity versus the corporation as an aggregate of individuals;
- The corporation as a private citizen versus the corporation as a public institution;
- Corporate accountability as internally directed (shareholder primacy) versus corporate accountability as externally directed (stakeholder theory);
- The corporation as defined by economic rationality (a nexus of contracts) versus the corporation as defined by political rationality (comprised of constitutional relationships).

Figure 1.0 presents the five key debates framing the corporate identity in the form of a diagram mapping possible combinations of these axes and the corporate accountability regimes they engender. It identifies three main accountability regimes: corporate philanthropy, a liberal, pragmatic business-case CSR and a radical CSR. In the first divergence of interpretation the corporation is differentiated as ‘natural entity’ versus as ‘artificial creation of the state’. The ‘legal person’ becomes further differentiated as a ‘private individual’ or ‘aggregate of contracts’ between individuals. These interpretations of the corporation accord with a libertarian ideology that upholds a strict public/private divide and identifies with a corporate philanthropy interpretation of CSR. The natural entity is further differentiated into legal person or individual citizen while the artificial creation is acknowledged as an aggregate of citizens or an individual citizen. The consideration of the corporation as ‘public actor’ and of ‘shareholders as citizens’ accords with a social contract theory that conceives of the corporation as implicated in a network of relations with other citizens. This approach typically makes a pragmatic, business case for CSR that identifies linkages between core operations and public interests. The ‘aggregate of citizens’ interpretation that considers stakeholders as citizens highlights the power relations involved in corporate arrangements and promotes a radical CSR that takes considerations of political economy and political legitimacy as its core questions.

Figure 1.0 Mapping Corporate Responsibility Regimes onto Ideological Interpretations of Corporate Legitimacy



2.2.1 Axes of the Corporate Identity

The corporation as the natural product of private initiative versus the corporation as an artificial creation of the state.

The ‘natural entity theory’ conceives of the corporation as the result of private initiative, rather than the product of state power. The landmark case of *Dartmouth College v. Woodward* in 1819 set a precedent for considering the corporation as an independent, private entity. The case determined that the College’s corporate charter, which was established between King George III and the College trustees, qualified as a contract between private parties and one in which the legislature could not interfere. In the court’s decision, Chief Justice Marshall referred to the corporation as “an artificial being, invisible [and] intangible” and its “individuality” being manifest through such features as holding the power to sue and in a durational existence extending beyond the lives of its shareholders. Justice Marshall emphasized that the term “contract” referred to transactions involving individual property rights, not to “the political relations between the government and its citizens.” Thus, the corporation maintains itself independently of the state’s recognition of its existence; the state does not create a corporation. Consistent with this conception of the corporation as the natural product of private initiative, there is consequently no reason for it to be regulated according to a scheme that is any different from that used for individuals or partnerships (Tomasic, et al. 2002, p60).

Alternately, “concession theory”, “privilege theory” and “fiction theory” all frame the corporation as an artificial entity that is subject to regulation. These accounts regard the corporation as a creation of the state granted privileges, or concessions, by legal license. Concession theory highlights that the corporation’s existence as a legal entity is

contingent upon the law, and emphasizes that “Corporate personality exists merely for legal and business convenience” and consequently may allow for an emphasis on the public interest over the private interest of corporate shareholders (Tomasic, et al. 2002, p53). This perspective provides the legitimation demand necessary for public and regulatory intervention in the jurisdiction and affairs of the corporation. Fiction theory distinguishes between actual persons and corporate entities with person-attributes; the status of “person” is denied to corporate entities because they do not accord with dominant conceptions of personhood (Dewey 1926). Privilege theory, introduced by Maurice Wormser in the early 1900s, argues that the corporate charter is a privilege granted by the state, and as a privilege it can be revoked if abused. Under privilege theory, corporate agendas are “in accordance with the public interest, strictly pursuant to the purpose for which the charter was granted” (Wormser 1927).

A subsidiary debate within the natural v. artificial entity debate is that of corporate ‘personhood’. Debates over corporate personhood are necessarily tied up with dominant understandings of the human “self” considered in public opinion and intellectual and academic thought. This debate takes root in questions about collective responsibility as raised by philosophers and social critics. It would seem logical if the verdict over a corporation’s moral personhood fell along the same lines as the ‘natural v. artificial’ debate, with those contending that the corporation is a natural entity also acknowledging its capacity for moral agency. This is not the case. The argument for moral personhood is associated with the recognition of ‘nonrandom collectives’ as moral agents. Rita Manning (1984) asserts that the assignment of fault responsibility does not hinge on the corporation’s standing as a metaphysical person. Instead, she appeals to

fairness conditions for applying fault to a corporate entity. Pursuing accountability for such fault must distribute it to the individuals involved, which necessitates a greater understanding of the behaviors and functions of collectives (p83).

The corporation as an entity v. the corporation as an aggregation of individuals.

The question of whether the corporation is a collective entity or a collective of entities, gets at one of liberalism's core philosophical tensions. Liberal theory as promoted by John Stuart Mill asserts that society is comprised of private rights-bearing individuals, who owe duties to one another, and who should be held personally and individually liable for their actions. In a legal system built upon liberal principles, the endeavor of group enterprise confronts an existential tension. Tomasic et al. posit that modern corporate law can be interpreted as a series of attempts to address this fundamental question (p2). Phillips (1993-1994) describes two ideological orientations that corral divergent interpretations of the corporation into two primary camps, the 'methodological individualists' and the 'holists'. Methodological individualism describes individual people as the "ultimate constituents of the social world" and Phillips carries this through to the logical conclusion that if individual human components fully describe aggregate groups, then the existence of a distinct corporate entity is superfluous (p1067). Alternately, the holists promote a synergistic perspective that recognizes the whole as being more than, or different from, the sum of its parts (p1068).

The entity theory and the aggregate theory of the corporation have taken different approaches in framing their answers. The real entity theory, which dominated early in the 20th century views corporations as "real, naturally occurring beings with characteristics not present in their human members" (Phillips 1993, p1062). From this perspective, the

corporation may be endowed with moral attributes and public responsibilities not expected of its individual members. Alternately, the aggregate theory perspective asserts the individual's primary status as well as the corporation's private status. It describes the corporation as "an exercise of an individual's right of association rather than an act of the state" and sees the role of law to be appropriately limited to facilitating the formation of such contractual relationships (Tomasic, et al., p55).

The corporation as a private citizen v. the corporation as a public institution

Morton Horwitz provides an incisive "History of the Public/Private Distinction" (1982) in which he traces the origin of the separate public/private realms in American legal and political theory to the 19th century (p1424). At this time, with the market emerging as a central legitimating institution, legal thought began to cleave into public law (constitutional, criminal, regulatory) and private law (torts, contracts, property, commercial). One of the main drivers of this project was the attempt of judges and jurists to separate law and politics in order to create "a neutral and apolitical system of legal doctrine and legal reasoning" free from the "dangerous and unstable redistributive tendencies of democratic politics" (p1425). Private law conferred legitimate neutrality on free market transactions that were deemed to be apolitical. In the 1920s and 30s notable judges and legal theorists attacked the premises lying at the foundation of the public/private distinction. They acknowledged the coercive and distributive effects of all law, private and public, and argued that even 'contract' was the delegation of public power to individuals, and must be justified by public purposes. Horwitz credits the unlikely resurgence of this seemingly arbitrary public/private distinction to the post

World War II and cold-war era, which caricatured public interest and active regulation as the early stages of totalitarian rule (p1427).

Alan Wolfe asserts that the key distinction in theoretical divergences over the corporation's role in society stem from ambiguity over the public-private distinction in an era of big business. He writes,

Corporations really are both private and public simultaneously. They are not states; they carry out economic activities for a profit, a profit that justifiably is returned to those who take the risk of investing in what they do. At the same time, corporations are not purely private individuals. They are institutions that sometimes act as quasi-governments and, even when they do not, they take actions that affect every aspect of people's lives, including people who have no formal contractual relationship with them. (1993, p1692)

Those who champion a public role for the corporation are largely of the persuasion that incorporation is a privilege granted by the state “not simply for the private benefit of the incorporators, but also to further the general welfare” (Millon, p207).

The argument in support of the corporation as a private citizen protests those claims on the political accountability of ‘welfare considerations’ as deviations from the profit motive of the private corporation. Frank Abrams, former Chairman of the Board of Standard Oil Company captures the dilemma in stating that “The lofty sentiments of the mid-century “corporate statesmen” may have sounded admirable, but they posed a dilemma for democracy because these statesmen were unelected (...) it was impossible to know where corporate responsibility ended and political responsibility began” (quoted by Reich 1998), Adolph Berle held a nuanced position on the dual public and private functions of the corporation. In most contemporary debates, however, his position is caricatured as strictly upholding shareholder primacy over social burdens. Berle elaborated the role of the corporation in a corporatist state where management upholds its duties to a shareholder constituency, while also serving as the representatives of their interests at a larger negotiating table with other corporatist bodies. In this larger

negotiation, social welfare considerations obtained through the democratic process override particular firm interests. However he does not confront those situations in which the interests of the shareholder constituency and those of the public interest are strictly at odds. With respect to contemporary CSR, it might be assumed that Adolf Berle would place the charge for social welfare considerations on external regulatory demands of the corporation rather than as a determination to be handled within the purview of corporate management. Bratton and Wachter infer that Berle would be an advocate of federal regulatory reform, while upholding the legal model of the corporation (2008-2009).

Corporate accountability as internally directed (shareholder primacy) v. corporate accountability as externally directed (stakeholder theory)

In the realm of corporate reform, parties differ in their orientations towards promoting greater accountability. Some view reformist campaigns to be appropriately aimed at increasing individual shareholder participation as a check on the corporation's priorities and governance, while others promote an increase in the corporation's accountability to external stakeholders and community priorities. It is worth noting that the camp promoting checks and balances from within the corporate body and the camp promoting accountability from without, often support differing conceptions of the corporation's animating objective and normative orientation.

The shareholder primacy approach reduces the corporation to consider solely the private financial interests of its shareholders (Millon 1990, p224). This assumption lies at the heart of the Berle and Means Corporation⁴ and largely motivates the campaigns for greater accountability in corporate governance. The priority of such an agenda is located in the protection of investors from special interests and from the co-optation of decision-

⁴ The corporation as defined by Adolf Berle and Gardiner Means in the seminal text "The Modern Corporation and Private Property" (1932).

making by management's personal interests. For this camp, the defining feature of a well-regulated corporation is maximal efficiency in its transactions.

Alternative to the shareholder primacy theory are those concerned with the social impacts of corporate operations beyond the aspect of financial accountability. Edward Freeman introduced the "stakeholder theory", also identified as the communitarian theory, in his 1984 book *Strategic Management: A stakeholder approach*. This theory regards corporations as comprised of competing constituencies beyond the shareholder base. These constituencies include corporate employees, creditors, customers, clients, and the local communities at the site of corporate operations (Tomasic, et al. 2002, p60). The priority for this group is on maximizing the corporation's benefit to a collective community defined not by direct ownership, but by reasonable impact. They tend to emphasize the official as well as unofficial 'contracts' between corporate managers and shareholder, labor, community constituencies.

The corporation as defined by economic rationality (a nexus of contracts) v. the corporation as defined by political rationality (comprised of constitutional relationships).

The 'economic rationality' understanding of the corporation is consistent with Phillips' 'methodological individualist' introduced earlier. The 'nexus of contracts' theory extends a freedom of contract metaphor to legitimize shareholder primacy and an anti-regulatory policy position (Millon, p203). The corporation is then "nothing more than a shorthand expression for a multiplicity of private, consensual, contract-based relations between economic actors, each seeking to maximize his or her own benefits" (Tomasic, et al. 2002, p59).

An alternative political understanding of the corporation, advocated by Stephen Bottomley, advances a “corporate constitutionalism” that challenges the conventional shareholder primacy model and builds up around principles of accountability, deliberation and contestability (2007, p171). Bottomley argues that economic and financial arguments for corporate governance deserve attention, but are “too often assumed to have precedence over other considerations” and “to the extent that more politically-oriented arguments have been taken into account, this has only been done within the parameters set by those economic arguments” (Bottomley 2007, p173). Bottomley challenges the conventional assumption that the corporate world is inhabited solely or even primarily by self-interested investors, and supports the pursuit of an alternative vision “of shareholders who, while mindful of their investments, also have other concerns and who take steps to bring them to the attention of directors and managers” (p176).

A fundamental difference between constitution and contract in light of the corporate identity is the transactional nature of a contract emphasizing economic rationalism, versus the emphasis on negotiation and redefinition of power relations characteristic of a constitutional framework. Inherent to the contractual versus the constitutional debate is a more fundamental question over the nature of property itself. Bill Maurer (1999) discusses the evolving understanding of property as it comes to influence corporate theory and securities regulation. The Enlightenment conception of property as a thing in itself, built on a Lockean and Hegelian definition of property as a relationship between person and object of labor, evolved into a late 19th century emphasis on the market value of property and its generation of returns. Charles Mooney advances

the view that the objects of property, namely securities, are themselves constituted by relationships among persons (1990). Securities ownership in a corporation is comprised of a complex chain of fiduciary obligations. Characterizing ownership in a corporation would be more accurately captured by the nature of these relationships than the property interests captured in stocks. The Enlightenment-era understanding of property thus becomes reconcilable with a contractual interpretation of the corporation that governs the transactions of corporate property shares. Alternately, an understanding of property units as defined by ownership in the corporation is more amenable to the constitutional interpretation of the corporation with its emphasis on negotiation as a means to navigate complex relationships and anticipated conflicts of interest.

2.2.2 Public Personalities of the Corporation

The axes of debate framing an interpreted corporate identity may be read through the filter of an ideological⁵ orientation that provides a comprehensive characterization of the corporate actor. According to political theorist Michael Freeden, an ideology may be understood as a means of organizing our perceptions of reality and imposing a form or pattern on events, political facts, actions, etc. These ideological schemas fall short of capturing an objective account of reality but they do provide a comprehensive and intelligible narrative that enables mobilization and action to further particular political agendas (2003, p3)

With the advent of the corporation as a means to organize private property under capitalist democratic regimes in the late 19th and early 20th century, the prevailing

⁵ For a concise account and background on ideology, see Michael Freeden's "Ideology: a very short introduction" (2003) and for an account of democratic ideologies see John Dryzek's "Democracy in capitalist times: ideals, limits and struggles" (1996).

ideologies interpreting the corporate form have been liberal varieties upholding the public/private distinction and emphasizing the individual unit of social organization. Conservative accounts on the right and social-democratic accounts on the left compete with the liberal narrative to challenge the organization of society furthered by a conventional understanding of the corporation. Each of these discourses aspires to enact the proper understanding of democratic principles through its proposed program for public policies. Each corporate personality carries a set of expectations with respect to the corporation's orientation as a private actor interfacing with a public sphere. This section will elaborate on these public personalities while inferring the implications that such personalities have on the expectations for a social responsibility and the institutional demands necessary for its implementation.

The Conservative Corporation

The Conservative ideology is characteristically averse to 'unnatural' change and instead favors a "continuous organic growth" (Freeden 2003, p88). Conservatism downplays the capacity of the human will to animate grand schemes of progress and rests in the conviction that "social order is founded on laws that are insulated from human control" drawing upon religion, biology, history and economics as sources of such laws. An economic rationalism dominates the conservative account, which considers the firm to be an artificial creation of the state, an aggregate of individual shareholders bound to one another through bi-lateral contracts. This corporation exists for the purpose of maximizing efficient transactions, and is almost exclusively concerned with the profit motive and representing the interests of its shareholders. The sole obligatory commitment

of the Conservative Corporation is to uphold shareholder rights; any participation in a public arena is purely elective.

A conservative account of the corporation aligns with the ‘Corporate Philanthropic’ model of social responsibility. The ‘Corporate Philanthropist acts out of enlightened self-interest and is ultimately aiming at improving shareholder returns. Sponsored projects are not necessarily affiliated with the corporation’s core operations and mostly take the form of charitable initiatives in the areas of education or health. This falls within the pragmatic legitimacy tradition elaborated in the previous chapter, and caters to the utility interests of a shareholder constituency. This corporation justifies all decision-making with reference to investor interest. More progressive views in this strand advocate social responsibility as part of a firm’s long-term financial planning and a counter to short-termism.

The Liberal Corporation

The Liberal ideology is underpinned by several core concepts: ‘the individual’ as the unit of social organization, the human as a self-interested rational actor, liberty in thought and action as a central tenet, promotion of human and social progress, an appeal to the public interest, and wariness about power unless it is adequately controlled and subject to checks on its accountability (Freedman 2003, p81). One strand of the liberal tradition, characterized by President Roosevelt’s New Deal in the 1930s, emphasizes the role of governments and the necessity of governmental intervention to secure liberty and justice for a citizenry. The dominating strand of the liberal tradition in a contemporary context, however, defers to the structures of the free market and to economic

entrepreneurship as the means of achieving human welfare with minimal intervention by the bureaucratic machinery of the state.

Consistent with the New Deal Liberalism, the liberal corporation in the form of a “public citizen” is understood to be an artificial creation of the state, an individual “citizen” with a public inclination. This corporation is most prevalent in the Continental European context, and is committed to the demands of a publicly oriented social contract theory. This corporation attempts to meet dual commitments to shareholder dividends as well as to the public good. It is concerned with a utilitarian justice and the distributive outcomes of corporate, and more broadly market, operations. The more dominant Liberal narrative emphasizing the merits of the free market and the importance of perfecting the conditions for its operations, takes the form of a ‘private citizen’. This corporation is interpreted to be a natural, legal “person”, who is either an individual actor or the aggregate of private contracts. It privileges the profit motive as its *raison d’être*, and upholds the fiduciary relationship as the defining feature of the corporate agenda. It claims the same rights as an individual and operates by the principle of rational self-interest. This account is consistent with Ronald Coase’s theory regarding the corporation as an institution to maximize efficient transactions (1988). A legitimate liberal corporation is internally accountable to its shareholders, but holds no social obligation beyond the necessary legal compliance that ensures its operational viability.

The liberal account of the corporation is the primary impulse behind today’s version of the CSR regime. It conceives of the corporation as an actor implicated in a social contract; the nature of the contract ranges from a minimalist type to a demanding type. The nature of this social contract varies depending on the perceived private or

public nature of the corporation. Most CSR campaigns feed into this demand for legitimacy. By providing social services – such as health, education, and workforce development – these initiatives bolster the corporation’s public image and position it as an altruistic citizen. Carroll and Shabana’s 2010 review of the history of CSR concepts observe that throughout its phases of evolution CSR has maintained consistency with business rationality while maintaining a clear division between the public and private mandates. (2010) Carroll asserts, “Before anything else, the business institution is the basic economic unit in our society. As such, it has a responsibility to produce goods and services that society wants and to sell them at a profit. All other business roles are predicated on this fundamental assumption” (Carroll 1979, p500).

The Social-Democratic Corporation

The Socialist ideology identifies ‘the group’ as the basic unit of social organization. Key features of this ideology are: its emphasis on the constitution of individuals through their relationships to other humans and to the non-human environment; its animation by the pursuit of equality and the redistribution of resources to meet human need; its emphasis on the ideal of human welfare through the elimination of material need and the actualization of humanity. The contemporary project of social democracy intends to use the apparatus of the state towards the gradual restructuring of society (Freedman 2003, pp.83-86). The Social Democrat Corporation is understood to be an artificial creation of the state comprised of stakeholder citizens who legislate action that is oriented towards the ‘common good’. This verges on appropriation of the corporate mandate by a public agenda. The constituency of this corporation extends

beyond shareholders and may include employee stakeholders, citizen stakeholders, and others. This corporation questions the political economy of exclusive privatization and challenges the exclusivity of property rights. It is concerned with the procedural justice of corporate decision-making.

Some have advanced the ‘stakeholder theory’ of the corporation as a means to integrate a plurality of social interests in decision-making. In a 2001 paper, however, Michael Jensen criticizes stakeholder theory for playing into the hands of special interests, and argues that in order for a corporate entity to exercise purposeful behavior, it must direct its operations towards a singular function. He notes that stakeholder theory fails to provide guidelines for mediating between competing constituencies, and instead proposes a relationship between value maximization and stakeholder theory that he terms “enlightened value maximization” or “enlightened stakeholder theory”. This notion accepts the guiding objective for the firm as that of maximizing its long run value. Jensen argues that even if stockholders are not afforded some special status as a constituency, long-term stock value is a key determinant of a firm’s long-term value, “value creation gives management a way to assess the tradeoffs that must be made among competing constituencies” (pp17). Jensen elevates the utilitarian calculus as a guarantor for justice. Peter Ulrich contends that, “utilitarianism – even in its more refined form of Pareto optimality – is incompatible with the liberal ideas of inviolable individual liberty and equality of opportunity which are appropriate to a modern liberal and democratic society” (p26). Ulrich argues, “ethics may not be argued from the purely functional point of view of its usefulness – which would be a reduction of morality to interest” (pp31).

Instead, he promotes a ‘discourse ethics’ as the normative foundation for a political economy.

With respect to institutional reform, the social democratic narrative supports a politicized account of CSR and places greater emphasis on enforceable government regulation. This political rationality of the corporation is essentially promoting a hierarchy of contracts between the corporation’s social contract motivated by aspirations to fairness, and its internal contracts motivated towards efficient performance. This notion is captured in Buchanan’s consideration of the social contract as a *supraordinate constitution* and private contracts between economic subjects on the free market as *postconstitutional* (1975, pp17). The politicized corporation is thus characterized by a public/private hybridity.

2.3 THEORIES OF CSR

In a 1999 article, “Corporate Social Responsibility: Evolution of a Definitional Construct”, Archie Carroll provides a nearly 50 year history of the popular definitions of CSR starting with accounts from the 1950s when formal writing on social responsibility gained wider appeal. He proceeds with a decade-by-decade analysis in order to trace the evolution of CSR as a concept. Beginning in the 1950s with the publication of Howard Bowen’s “Social Responsibilities of the Businessman”, the notion of Corporate Social Responsibility has acquired growing currency as an attempt to mediate the public impacts of the corporation. In the 1960s Keith Davis argued for considering CSR in a managerial context, and advanced the idea that social responsibility can yield long-term financial benefit. Most of the definitional literature on CSR during this decade was produced by

academics. In the 1970s, CSR definitions became more specific and in the 1980s the discourse turned more to empirical research and measurement. In the 1990s themes of stakeholder theory, business ethics theory and corporate citizenship gained greater traction, and efforts to further operationalize CSR continued to build on the work begun in earlier decades. This section will examine the function of CSR in meeting the legitimacy crisis of the corporation while assessing its merits as both subject and object of legitimacy.

2.3.1 Legitimacy and the CSR Solution

The relationship between Corporation and Society has been activated in the contemporary conceptualization and enactment of a global Corporate Social Responsibility (CSR) regime. The legitimacy of a CSR regime has been vigorously contested and rationalized in accordance with the nature, duties, and objectives of the corporate economic assemblage. Despite their high level of conceptual innovation and an often expanded scope in considering externalities in production and operation, justifying accounts of the CSR agenda are notably lacking in self-awareness of the corporation's embedded and contingent relationships at a macro scale. Theories of CSR legitimacy largely operate within a paradigm that is confident in the potential for market-based regulations to achieve desired outcomes in an efficient manner. Mainstream CSR literature does not deviate from this paradigm to interrogate the ideological agendas furthered through corporate expansion as facilitated by CSR. It does not rigorously question the corporation's role in securing and sustaining proprietary patterns to material resources, nor its implications for popular sovereignty, distribution of power and inequality in wealth. Without stepping outside the mainstream paradigm, it is difficult – if

not impossible – to conceive of the corporation’s capacity for radical reinvention to meet the needs of a contemporary global order. Such a project is imminently needed as corporations confront a crisis of legitimacy that is not adequately addressed by the CSR regime.

In order to pursue an interrogation of the corporate apparatus and its social responsibility in a manner that goes beyond matters of efficiency and access, it is necessary to agitate the paradigm within which CSR is treated as the subject of legitimacy critique. Such an endeavor questions the objectified treatment of the corporation, and challenges the universalizing nature of its operations at a global scale. It is less interested in the question of *whether CSR is legitimate* and more interested in the question of *what patterns of development and distribution CSR helps to legitimate*. A critical assessment of the corporation’s social and political nature may reveal the influence of ideology in shaping its relational aspirations and responsibilities. In recognizing the blurring separation between the public and the private jurisdictions as marked by an eroding interface between the two spheres, such a perspective opens up a space to conceive of the corporation as a political agent and to question the grounds of its political legitimacy. In order to tackle the question of corporate political legitimacy in a meaningful way, it is necessary to assess the influence that scale of operations and aggregation of wealth have on reshaping the political landscape and distribution of democratic capacity.

This section aims to reframe those questions that are necessary to guide an interrogation of the corporate apparatus and the legitimacy of a CSR agenda. A geographic turn to CSR emphasizes its use as the object of legitimacy rather than as the

subject of legitimacy. It aims to move beyond conventional arguments in support of/opposition to CSR and to present opportunities for the modification of CSR projects such that they incorporate considerations of governance and political legitimacy of both agents and subjects of corporate expansion. This work takes a first step towards developing an analytical framework that may enable better understanding of the function of CSR in establishing and maintaining corporate legitimacy, and the ways it extends the reach of private actors to create public policy. Section 2.3.2 begins by outlining the legitimacy crisis of the corporation. It goes on to draw upon pragmatic, moral, and cognitive legitimacy as developed in organizational sociology in order to provide background for the primary theoretical arguments justifying a CSR agenda. Part 2.3.3 summarizes the dominant defenses for the legitimacy of CSR and notes the neglect of political legitimacy as a relevant consideration. Part 2.3.4 steps outside the conventional paradigm to consider CSR as an object of legitimacy and to critique the market-based ideology it helps to intensify.

2.3.2 Legitimacy Crisis of the Corporation

The notion of a “legitimation crisis”, introduced by Jurgen Habermas, typically refers to failing legitimacy in the political will of the nation-state as reflected by the loss of public confidence. Habermas describes the Western states as attempting to respond to the increasing, often conflicting demands of modern society, while maintaining loyalty and support from their citizens (Habermas 1976). Considering the parallels in scale, scope and responsibilities between the modern corporation and the nation state, it is not too much of a stretch to extend his diagnosis to the crisis of corporate legitimacy.

The dominant response to the corporation's crisis of legitimacy has come in the form of a global CSR regime that attempts to bridge the discrepancy between the perceived contingency of corporate operations and the perceived attribution of those operations through 'corporate responsibility'. Over the past 40 years, interventions have taken the form of a number of non-governmental regulatory regimes including the UN Global Compact⁶, ISO 26000⁷, the Principles for Responsible Investment⁸, OECD's Guidelines for Multinational Enterprises⁹, the International Labor Organization's Tripartite Declaration¹⁰, the Global Reporting Initiative, the Millennium Development Goals, UNSRSG's mandate on business and human rights, as well as a host of third party entities providing reporting, measurements and evaluations of various aspects of corporate performance and impact. Voluntary 'soft law' regimes play off of the market incentives for CSR by enabling competition-based peer pressure amongst corporations. These regimes promote practices and initiatives that are in accordance with economic growth, and make the case for enhanced financial performance and mutual benefit from adoption of Environmental and Social Governance (ESG) principles. The dominant strains of argument in defense of CSR tout its benefits for the long-term viability of a

⁶ The UN Global Compact is the largest voluntary corporate responsibility initiative in the world. It consists of ten principles concerning human rights, labor, environment and anti-corruption. The policy initiative intends to promote collaboration between business and government, civil society, labor and the UN towards a mode of business-driven globalization that benefits economies and societies. In 2011 the Global Compact had over 8700 corporate participants and stakeholders from over 130 countries.

⁷ ISO 26000 provides voluntary guidance to the public and private sectors, in developing and developed countries, with the aim of assisting efforts to operate in a socially responsible manner. The standard currently has 83 signatories and 16 observer countries and 42 liaison organizations.

⁸ The voluntary PRI Initiative consists of a network of international investors backed by the UN, who work to implement six principles on environmental, social, and corporate governance in managing their investment portfolios.

⁹ The Guidelines provide a set of voluntary principles and standards authored by governments and directed to multinational enterprises in order to guide responsible business conduct and to promote participation of multinational enterprises in sustainable development.

¹⁰ The ILO Governing Body first adopted the declaration in 1977. Principles elaborated in the instrument provide guidance on issues of employment, training, work conditions, living conditions, and industrial relations to MNEs, governments, and employer and worker organizations.

corporation's license to operate, and advance arguments that reconcile the mandate for fiduciary duty with that of social responsibility.

All the regimes listed above recognize the need for reform in the management of externalities for corporate operations, and posit that such reform is fully compatible with the classical theory of the firm. These discussions are concerned with making a case for the legitimacy of CSR to the interests of an investor audience. To do so, they appeal to the need to meet demands for legitimacy, as consistent with the theories of organizational legitimacy advanced by Mark Suchman (1995). Suchman defines legitimacy as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions” (p574). He emphasizes the social construction of legitimacy and its reflection of “a congruence between the behaviors of some legitimated entity and the shared (or assumedly shared) beliefs of some social group” (p574).

The social support for a legitimate entity is guided by shared understanding of its orienting objective captured in a collective rationale or a shared account of the entity's purpose and function. The *aim* of legitimation thus takes central focus with conditions and practices being mobilized to reflect pursuit of this aim. Suchman theorizes that the case for an organization's accordance with this aim may appeal to one of three broad types of legitimacy; pragmatic, moral, and cognitive (p577). Each type rests on a distinct behavioral dynamic, and resonates with a different type of audience. Pragmatic legitimacy is an exchange legitimacy that appeals to the motive of self-interest. Pragmatic support for an organization is conferred on the understanding that it provides favorable value to a set of constituents (p578). Moral legitimacy is concerned with making the case

for an activity's promotion of 'larger cultural rules' and the public interest, not just the interests of a contained constituency. Moral support for an organization is conferred with the assumption that consequential, procedural, structural, or personal aspects of its function serve societal welfare at large (p579). Cognitive legitimacy is concerned with the "comprehensibility" of a particular arrangement in granting stable, coherent meaning to social relations. Cognitive support is conferred on an organization that is seen to be "necessary" or "inevitable" to the functioning of society. Suchman refers to this phenomenon as a 'taken-for-grantedness' (p582).

The dominant CSR regimes adopt as their animating aim the support of an expanded globalization that is harmonized among a range of stakeholders and sustainable in its development of social and environmental resources. They effectively play to notions of pragmatic, moral, and cognitive legitimacy. The pragmatic appeal, directed to investors and shareholders, asserts that CSR regimes may deal with social contingency and consequences of corporate development while improving the long-term value of corporate stock through greater efficiency, continued access to resources, and protection of brand and reputation. The moral appeal, largely targeted to civil society, NGOs, and the wider public, redeems the status of the corporation by positioning it as a benefactor of sorts with a mandate to 'do good' at the same time that it makes profit. The cognitive appeal resonates with national leadership and policy makers who are captured in the mindset that despite the downfalls of corporate expansion and the consequences of concentrated wealth and decision-making, there is no other viable conception of the national and global economies and no future that is independent of corporate-based production. The 'global community' supporting such voluntary regimes makes them

anything but voluntary if a reasonable country seeks to maintain its membership in a global marketplace. In this manner, CSR becomes an acceptable option for mainstream stakeholders of all affiliations and persuasions, legitimating continued corporate expansion while neutralizing political implications of this mode of development.

2.3.3 CSR as the Subject of Legitimacy

In the past decade, academic literature and policy debates have been rife with evaluations of legitimacy demands for CSR, considering it as the *subject* of legitimation. These debates are concerned with justifying CSR projects relative to the needs of a corporation's internal constituency (its shareholders). A minority opinion continues to defend a caricatured version of Milton Friedman's dictum against corporate social responsibility¹¹, but majority views see the outdated polemic as no longer relevant to evaluating the merits of CSR. They follow a line of argument that considers social responsibility and fiduciary commitment to be mutually compatible. This class of arguments defends CSR as a public relations tactic that enables brand differentiation (appealing to moral legitimacy), a streamlining of operations to increase efficiency and cut costs (appealing to pragmatic legitimacy), or an evolutionary adaptation that allows for the continued co-dependence between corporate capitalism and liberalism (appealing to cognitive legitimacy).

David Vogel provides an exposition on the "Market for Virtue" that locates the place for 'moral legitimacy' in CSR efforts. He asserts that while empirical evidence does not make a case for correlation between profitability and responsibility, CSR is

¹¹ Milton Friedman is notorious for his still-cited article published by The New York Times Magazine in September 1970 with the title "The Social Responsibility of Business is to Increase its Profits." David Vogel argues that were Milton Friedman alive today, he would not be opposed to the business-case CSR touted across business publications nowadays, and that he would only oppose those socially responsible initiatives motivated by altruistic motives rather than business strategy. (2005 pp 19)

strategically advantageous for certain businesses. For some companies, social responsibility is an instrument of corporate strategy and business identity. CSR enables these companies to gain access to a consumer base that values the moral baggage associated with their brand (2005). It is a means of attracting and retaining customers and/or employees (p73). For another class of companies – those who have high visibility and a large amount of intangible value captured in their brand – CSR provides an insurance of sorts. It deflects criticism by activists and reduces risk of brand tainting (p73). These functions are less euphemistically captured by Peter Frankental’s labeling of CSR as “an invention of PR” due to its use as an amorphous marketing slogan (2001, p23). He reveals a number of paradoxes that must be resolved before CSR may be claimed as a practice beyond public relations,

CSR can only have real substance if it embraces all the stakeholders of a company, if it is reinforced by changes in company law relating to governance, if it is rewarded by financial markets, if its definition relates to the goals of social and ecological sustainability, if its implementation is benchmarked and audited, if it is open to public scrutiny, if the compliance mechanisms are in place, and if it is embedded across the organization horizontally and vertically (p23).

The notion of a ‘strategic CSR’ makes a case for the long-term payoff to a firm’s investment in its stakeholders and society (Burke and Logsdon 1999). Michael Porter and Mark Kramer herald the idea of creating shared value and promote a harmonized relationship between business and society that couples social responsibility with profit. In a 2006 article on “The Link Between Competitive Advantage and Corporate Social Responsibility” Porter and Kramer emphasize the opportunities for interdependence between people and profit. Their work epitomizes the appeal to pragmatic legitimacy in outlining a framework for strategic CSR that is overly simplistic in its identification of social issues as discrete phenomena. While providing innovative solutions for business strategy, this pragmatic approach elides a political fulcrum that sits at the heart of CSR

debate which concerns the role of business in society and the degree of agency afforded to stakeholders beyond the company's shareholder base and management structure. Porter and Kramer consider the solution to these business-society conflicts to be largely strategic and communications based without recognizing the possibility of irreducible power struggles and claims for agency that must be resolved at a more substantive political level

John Ruggie advances the notion of an inherent compatibility between corporate-style market economies and the thriving of liberalism (2008). He emphasizes the relationship of co-dependence between social community and markets, and frames CSR as the inevitable intervention to recalibrate this symbiotic relationship in light of modern globalized conditions. "The Corporate Connection" is an extension of his 1982 thesis on embedded liberalism. Ruggie emphasizes the opportunities presented by the scale of multinational corporations, their global reach, and the efficiency of the market mechanism of self-regulation in translating the demands of civil society into better business practices. The relationship between the corporation and its social/political environment is made valid based on a set of assumptions that the corporation is a necessary and efficient arrangement conducive to the net prosperity of the national economy and welfare.

Notably absent among these dominant paradigms for understanding and legitimating CSR agendas is a concern with political legitimacy and power distribution. Even the most progressive of CSR theories deals primarily with responsibility as measured through material outcomes, and neglect to consider the decision-making process behind these outcomes and the legitimacy of corporate 'representation'. In

attempting to address this question within the paradigm of CSR discussion, Scherer and Palazzo (2008) described the impact of corporations on democratic institutions as the ‘politicization of the corporation’ and advanced the notion of ‘political CSR’ (2007) as being distinct from scholarship on ‘corporate citizenship’. While corporate citizenship does hold potential for capturing a political dimension of CSR, Scherer and Palazzo suggest that using an even broader notion of CSR may allow for a necessary paradigm shift in the field of business and society that is more in line with contemporary reality. (p2) Scherer and Palazzo note that the prevailing use of CSR is consistent with the economic theory of the firm and that it draws a clear line between the private domain of business activity and the public domain of political responsibilities (2008). Accordingly, corporations become exempt from political legitimacy demands so long as they follow the moral and legal rules of social convention. This treatment of private businesses, contained within the free choice framing of the economic sphere, de-politicizes its undeniable public role. Scherer and Palazzo challenge the public/private division and seek to re-open debate over the conditions of corporate political legitimacy. They note the role of corporations today in the process of public will-formation, and claim it as sufficient grounds to re-engage questions of a corporation’s responsibilities and the conditions of its legitimacy (p2).

By labeling corporations as political actors, it may be possible to move past considerations of CSR as a voluntary act. Such recognition may advance a more sophisticated debate on corporate legitimacy that takes into account the corporation’s role as a producer of public goods and as an active political entity. Revisiting the objectives of CSR relative to these acknowledgments necessitates integration of the scale of impacts of

corporations and the effect of their participation in the political process and on the question of sovereignty. A scale-conscious approach to CSR must consider the aggregate and emergent political and ecological effects of global corporate operations on the wider public.

2.3.4 CSR as the Object of Legitimacy

The case for CSR has been defended on grounds of its moral, pragmatic, and cognitive merits. These accounts address CSR as the subject of legitimacy and put to rest concerns that the practice of social responsibility must compromise management's position as the guardians of shareholder interest, in accordance with the principle of fiduciary duty. Turning now to the case for CSR as the object of legitimacy, we are more interested in identifying those normative positions which the practice of CSR helps to legitimate; namely, the shareholder primacy argument, the practice of self-regulation through a market structure, determinist accounts of poverty and resource scarcity, and the narrative of economic growth and market expansion.

The rationalist-efficiency arguments in support of CSR adapt it to fit within the boundaries of a shareholder primacy paradigm¹². Protests against a CSR agenda appeal primarily to the challenges and potential threat that these extra commitments pose to fiduciary duty by allowing for an induction of special agendas in corporate decision-making, thus diluting the interests of shareholders¹³. While such accounts are unreasonably purist in their conception of a shareholder interest detached from wider public welfare, they raise valid concerns regarding the accountability of a license for

¹² For a discussion on the arguments surrounding shareholder primacy from the Berle-Dodd debate to present, see Lynn Stout's "Bad and Not-so-Bad Arguments for Shareholder Primacy".

¹³ Mark Roe warns that "a stakeholder measure of managerial accountability could leave managers so much discretion that managers could easily pursue their own agenda, one that might maximize neither shareholder, employee, consumer, nor national wealth, but only their own." (2001, p.149)

‘altruism’ that could easily be exploited. This recognition could lead to the popular conclusion that protecting shareholder primacy by narrowing management’s purview is the only way to keep self-serving agendas in check. An alternative response might challenge the representational and procedural legitimacy of intra-firm decision-making, questioning the mandate granted to managers who are affecting policies with wide implications for a general public. The question of public mandate falls in the purview of ‘political legitimacy’, which has been prematurely bracketed out of the CSR discourse.

CSR fits within a wider narrative of market-based self-regulation in accordance with a liberalized market ideology. This narrative accepts a naturalized view of market forces and is not overly concerned with notions of distributive justice. Prognoses of present ecological and economic crises, like climate change and persistent poverty, suggest that they result from emergent relationships among a range of actors. Accordingly, it is not reasonable to expect a single firm or a collective of firms acting individually to effectively assess their contribution or to meaningfully strategize sufficient intervention. The popularity of CSR as an intervention in lieu of government-imposed regulation parallels the criticism presented by Raymond Dart concerning the popularity of social enterprise in contrast to traditional NGOs. Dart finds that there is an “evolution away from forms that focus on broad frame-breaking and innovation” and towards “an operational definition more narrowly focused on market-based solutions and businesslike models because of the broader validity of premarket ideological notions in the wider social environment” (2004, p412). Proper consideration of the social responsibilities of the corporation must enable engagement with questions about the corporation’s appropriate role and political function in democratic society, the

relationships captured by the corporate structure, and legitimate demands and obligations which would be owed to these relationships. Reliance on self-regulation by market forces may complement, but does not sufficiently displace, the role of orchestrating government oversight.

Accounts of poverty and resource scarcity at the heart of many CSR interventions have the effect of depoliticizing these themes. An emphasis on the geographic and environmental conditions enabling persistent poverty and resource scarcity obscures the political dynamics behind these phenomena. It also obscures the ways that corporate actors are implicated in enabling these dynamics as agents of a liberalized market agenda. A macro examination of the implications of corporate expansion on a global public must recognize the patterns of resource distribution and the trends of increasingly divergent wealth inequality that have a corresponding, if not causal, relationship with corporate development. Thomas Pogge (2008) writes about the consequences of rising wealth inequality and power concentration, at the national and international levels, in light of social structure and political advantage. He observes the decline in relative share of GNI¹⁴ of the bottom decile in most of the world's countries. The impact this has on the world's poor is twofold; it reduces gains in the absolute shares, while also diminishing relative share. "Many things money can buy are positional or competitive: political influence, for instance, and access to education and even health care depend not merely on how much money one has to spend but also on how much others are willing and able to spend on those same goods." Accordingly, those with favorable economic positioning are favored in their bargaining power and influence in designing the rules of the global

¹⁴ GNI refers to Gross National Income – a measure of the value of all products and services a country generates for one year in plus the net income it receives from other countries. For a listing of national GNIs for 2010 see <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNI.pdf>

economy (2008). A politicized account of CSR must take into account the topography of power relations and not merely the topography of poverty and environmental processes.

The narrative of economic growth and market expansion is favored in CSR accounts over the narrative of economic parity and equity in distribution. Cowling and Tomlinson lay the groundwork for developing a paradigm that confronts the interactions between globalization, market expansion and corporate power as they shape the modern economy and define its winners and losers. They acknowledge, “control of the global policy agenda has become increasingly concentrated within the corporate sector” and make some headway towards procuring empirical evidence for the assertion that the economic and industrial strategy of the large multi-nationals creates a “conflict of interests between the aims and objectives of the corporate sector and the general welfare of society” (p50). By amassing a large enough size through concentration of capital and control, the corporation is able to exercise a power in shaping political landscape that so far has not met the interests of the wider global community. Accordingly, critiques of CSR as an object of legitimacy are less concerned with its efficacy in meeting material welfare needs, and rather question the immaterial externalities of a widening wealth gap catalyzed by corporate-style compensation, as well the consequences for sovereignty in decision-making.

With the widespread interest in identifying shared norms and criteria for corporate social responsibilities and establishing a global CSR regime¹⁵ for the 21st century, circumstances presently enable an opportune moment to critically examine CSR

¹⁵ The theme of Davos 2011 was “Shared Norms for the New Reality”, with the declared intention of addressing the needs of “a world that is becoming increasingly complex and interconnected and, at the same time, experiencing an erosion of common values and principles that undermines public trust in leadership as well as future economic growth and political stability.”

objectives in a normative sense. Such an exercise may allow for clearer understanding of the relationships between a corporation's economic and political power, the public expectations of corporate jurisdiction and accountability, as well as the sufficiency of existing institutions and regimes to guide and enforce these expectations.

2.4 LOOKING AHEAD

This chapter began by contextualizing research aims within the Critical Legal Studies and Critical Legal Geography traditions. It went on to survey the modern corporation as a legal notion that is subject to variable theoretical interpretations. It distilled key axes of the corporation's identity and demonstrated how these might inspire various functional models, each with a different relational orientation to the wider public interest. A review of the legal theories of the corporation revealed the considerable role that ideology plays in distilling dynamic theoretical debates into static, functional models and in determining their corresponding public identities. Acknowledging the plasticity of interpretation conceivably allows for the development and promotion of corporate identities alternative to the one currently dominating the public imagination and the legal canon.

After reviewing literature on the legal corporation, this chapter turned to the notion of Corporate Social Responsibility. It summarized arguments relating to the legitimacy of CSR as a social expectation and as a component of the corporation's agenda and decision-making. The different forms and expectations of a CSR agenda correspond with various interpretations of the corporate actor as elaborated in Part 2.2. The radical approach to CSR that is adopted in this project is set apart from philanthropic CSR and business-managerial CSR. Following an account of the legitimacy of CSR

agendas, the question of legitimacy was turned on its head to examine how CSR operates as a legitimating feature of a wider neoliberal economic ideology.

In the next chapter, I will introduce and develop the components of an alternative analytical framework that reveals complex dynamics of corporate realities and that challenges ideological assumptions embedded in the operant interpretations of the modern corporation. This framework draws from critical geography, identifying themes of space and scale, contingency and attribution, materiality and risk, and arguing that each of these themes can be applied to contest prevailing accounts of the corporation's identity and to enable alternative perspectives on its public dynamics and implications. The following four chapters elaborate a series of case studies that deal with situations of corporate-public controversy. These cases are interrogated through the critical geographic framework in order to agitate the normalized ideologies underpinning the modern liberal project. Together, the themes derived from these cases point to an alternative characterization of the public implications of the modern corporation.

3 - Theoretical Framework

The modern multinational corporation (hereafter referred to as ‘the corporation’) presents a fundamental interdisciplinary challenge for the 21st century. It is characterized by expansive operational scale and far-reaching capacity to influence and direct physical, economic, political and social landscapes and relationships. The complexity of corporate dynamics defies conventional narratives that are couched in exclusively managerial, historic, economic, political or sociological disciplines. The corporation is well suited to examination through a geographic perspective that considers spatial linkages and impacts of scale at the heart of its disciplinary endeavor. Such a perspective might inform theoretical frames and analytical tools that grapple with the geographic reach of corporate networks, thus engaging the physical and human dimensions of corporate development. The analysis carried out in this project places the spatial and scalar, relational and material features that define the corporate assemblage at the center of analysis and interpretation rather than relegate them as peripheral considerations.

A geographic perspective offers a set of tools that can help bridge the material and social aspects of corporate development, while also recognizing the physicality of territorial relationships and the plurality of constituencies they engender. The geographic analysis presented in this work is intended to challenge some of the dominant narratives that justify the process of a corporation’s structure, operation, and governance. This chapter will outline a framework that intends to assimilate the most animated debates surrounding corporate governance and regulation in the modern era. Such analysis will be helpful to anticipating the form and function of institutions necessary to deal with the corporation’s consequential externalities. Parts 1 through 3 will consider contributions of

the geographic perspective as they bear on various aspects of the corporation; space and scale in Part 3.1, contingency and attribution in Part 3.2, and risk and materiality in Part 3.3. Each of these themes, properly considered, reveals insights on the nature and function of the corporation. Part 2.4 brings these three thematic strands together while Part 3.5 looks ahead to how this theoretical framework will be applied to four analytical case studies in the subsequent four chapters.

3.1 SPACE AND SCALE

The phenomenon of multi-national corporate development in the modern age is essentially defined by the capacity to connect disparate spaces in productive relationships, while expanding scale to maximize the efficiency of production and the reach of markets.¹⁶ To get a sense for the scale of multinational corporations as participants in the global economy, it may be useful to compare their magnitude relative to the economies of sovereign nation-states. In 2010 a survey of the world's top 100 economies indicates that 42 of them are not countries, but in fact public corporations.¹⁷ Considering the geographic spread of ownership shares, management centers and spaces of production that defines a multi-national corporation, and taking into account the magnitude of capital captured by such an operation, space and scale become critical considerations to any effort aiming to provide insight on the corporate assemblage. Together, the dual concepts of space and scale provide a platform to consider the relative and the absolute aspects of corporate impact.

¹⁶ For a collection of graphics relating to spatial aspects of multi-national corporations, see Global Inc.: An Atlas of The Multinational Corporation (2003).

¹⁷ As measured by national GDP in Millions of USD listings in the CIA World Factbook (2010) and company listings in Forbes Global 2000 (2010).

3.1.1 Space

As a matter of theoretical inquiry, space may be considered in an absolute or in a relative sense (Marceau 1999). In an absolute sense, space is conceptualized as a container that exists independently of the matter that it contains, and according with the rules of trigonometry as consistent with Euclidean space. Absolute space stands independently of the observer's vantage point or frame of reference and is considered to be objective (Sack 1980). The representation of space in the absolute sense dominated theoretical conceptualizations until Einstein's theory of relativity at the start of the 20th century gave rise to the notion of a relative space. This approach assumes a dependency between the properties and descriptions of space with the distribution of mass and energy; space exists with reference to those entities and processes under consideration.

Absolute and relative theoretical orientations to space take different approaches in their consideration of object entities. With reference to the absolute sense, objects are located *in* a container-like space. Alternately, the relative sense considers space as the relationship *between* objects. While absolute space might be a neutral observation, relative space emphasizes context and thus suggests some sort of a motivating teleology behind observation (Pequet 1994). Adopting the measurement of relative space, two physical areas may be separated by considerable distance in absolute terms, yet be quite proximate in a relative/functional sense. The converse is also true. While physical spaces may be proximate in an absolute sense, their separation through a barrier may create distance as a function of time, rate and interaction, and thus result in considerable relative space (Meentemeyer 1989).

Turning now to the multi-national corporation, the notion of absolute space comes into play in considering the physical distances between management headquarters located in a home country and affiliated operations taking place in disparate host countries. The physical sites of headquarters and subsidiaries are noted to exist *in* space. Considerations of relative space become particularly relevant in light of innovations in mobility, technology and legal architecture. Spatial distance in an absolute sense becomes collapsed, expanded, distorted, and generally redefined resulting in new relational dynamics with physical, legal and moral implications (Marceau 1999, p3). A multi-national corporation might extract resources in the mineral-rich countries of Africa, process them in the cheap labor markets of Asia, and market commodities to absorb the disposable income of consumers in the United States. Its environmental externalities in the form of air pollution, chemical discharge, or land degradation might have dispersal patterns and synergistic interactions that place geographically differentiated burdens on particular communities while transcending territorially-bounded legal jurisdictions. A corporate “citizen” domiciled in one country and contributing to the campaigns of its representative politicians might be comprised of owners spread across the globe with hundreds of different citizenships. Space – in both an absolute and relative sense – comes to be definitive of, and defined by, the modern corporation.

3.1.2 *Scale*¹⁸

Scale builds on the notion of space and allows for observation and interpretation of patterns and processes. With reference to absolute space, scale becomes a way to operationalize discrete spatial units. A lower scale ratio limits the amount of space in

¹⁸ Scale is used to referred to both physical scale (as in a spatial sense) as well as magnitude (as in economics of scale).

consideration but allows for greater attention to detail, while a higher scale ratio limits the amount of detail under observation while presenting a greater amount of space for consideration. With reference to relative space, scale is selected in accordance with the needs of an investigator's inquiry. The selected order of magnitude might present a particular vantage point towards a geographic reality or capture a particular relationship, or dynamic. There is no clear method for selecting 'ideal' framing in the form of a single scale (Marceau 1999, pp 3-4), yet it is reasonable to assume that some scales will be more appropriate than others depending on the objective of inquiry and the phenomenon under consideration. A 'politics of scale' thus disputes the most appropriate level to examine a particular phenomenon and its contingent relationships. Delaney and Leitner (1997) assert that scale "is not simply an external fact awaiting discovery" but rather "a way of framing conceptions of reality" (p94). Scales are not ontologically pre-given, but are the product of social construction that becomes "implicated in the constitution of social, economic and political processes" (Leitner 1997, p125). This assertion does not undermine the physical existence of processes and phenomena observed at variable scales, but it does clarify that the scale that is deemed most suitable for capturing certain 'relevant' activities is identified through the lenses of ideology and political interest.

In the case of the modern corporation, differing interpretations of its normative identity imply variable determinations as to their relevant constituency and different spaces of responsibility. Though the legal framing of the corporate entity accommodates a range of interpretations regarding the corporate personality, the driving ideology of the interpreter is reflected in the spatial and scalar orientations used for observation and decision-making. This theoretical interpretation results in material realities with direct

influence on the social landscape. A key consideration of scale with respect to the corporation concerns identification of the optimal scale of operations for maximizing productive efficiency. This is captured in the discourse on ‘Economies of Scale’ in neoclassical economics, and in Ronald Coase’s theory on transaction costs with its elaboration on ‘constant returns to scale’ and ‘increasing returns to scale’ (1937). The spatiality of scale tends to get neglected in these considerations of economic scale. Sayre (2009) notes that scale is not a static level that we should desire to approximate, but rather that “the kernel of the problem is theorizing and understanding process” (p103). This perspective encourages an ecological consideration of relationships with political and economic dimensions for determining appropriate scales of governance and regulation. For the purposes of this thesis, critiques of scale are not intended to move ‘beyond’ national spatial scale, but rather to articulate scale “with the subnational and supranational spatial configurations on which it is superimposed” (Brenner 1997, p299). The relationships between ‘scale’ and ‘process’ are tied up one with the other as processes create patterns, which in turn have scales (Sayre 2009, p103).

It might be assumed that inquiries will adopt different scales of operational analysis depending on the orienting objective placed at the center of analysis. An inquiry that aims to maximize efficiency would likely focus on different processes (and thus patterns, scales, and consequences) than an inquiry which places equitable distribution, resource sustainability, popular sovereignty at the center. Turning to the modern business corporation, the profit motive occupies the central position and operational mandate. Accordingly, scales of analysis adopted to evaluate performance are defined through a scale concerned with the ‘relations’ that are most relevant to pursuing this objective.

Thus, the fiduciary mandate of the corporation informs its interpretation of space and its construction and adoption of scale. This becomes problematic when corporations attempt to use the same understanding of scale to push ‘social’ or ‘public’ agendas without revisiting the lenses through which they are viewing the target under consideration.

3.1.3 CSR through the lenses of space and scale, 2 Cases

To provide better grounding to the themes developed above, two anecdotal cases are presented along with reflections on the relevance of space and scale in engineering CSR initiatives. The examples come from The Coca Cola Company and The Monsanto Company. Both firms operate at a transnational scale and have high value captured in their brands and distribution networks; they have also been implicated in many high profile legal battles with a range of stakeholders and communities. Their CSR efforts present benefits for moral, pragmatic and cognitive legitimacy, but do not contribute to political legitimacy.

The Coca Cola Company: Water Scarcity

The Coca Cola Company is one of the most globally recognized corporations in the world.¹⁹ With over 500 brands franchised in more than 200 countries, Coca Cola employs nearly 140,000 individuals and has annual revenue in excess of US \$35 billion (US SEC 2010). Since the early 2000s Coca Cola has faced numerous controversies regarding its operations and products. Consumer as well as watchdog groups have campaigned against health effects of Coca Cola’s products, questionable labor practices, environmental impacts, business monopoly, marketing strategy, and intellectual property rights. Such controversies jeopardize Coca Cola’s brand value and have elicited

¹⁹ For a comprehensive background on the Coca Cola Company, see Mark Pendergrast’s “For God, Country and Coca-Cola: The History of the World’s Most Popular Soft Drink” (2000).

responses in the form of consumer boycotts and shareholder resolutions. A subject of persistent activism and mobilization, particularly in Mexico (Nash 2007, Soto 2005) and India (Burnett 2007, Shivarajan 2011), has been the water privatization practices of Coca Cola bottlers, depletion of the water table due to the scale of bottling operations, contamination of groundwater due to the dumping of waste, and presence of pesticide in beverage products. Coca Cola's response has come not through legal concessions but through philanthropic overtures.

In 2009, the Coca Cola Company pledged \$30 million to be allocated over a six-year period to provide communities throughout Africa with access to safe drinking water. The RAIN (Replenish Africa Initiative) projects benefiting 2 million Africans with clean water and sanitation by the year 2015. The Coca Cola Company's emphasis on the macro-scale in its CSR campaigns presents an example of the manipulation of scale to diffuse politicization of localized impacts. While the company faces opposition and controversy at the regional scale, particularly from farmers and activists opposing its privatization and of water resources, and most notably in regions outside of Africa, it simultaneously responds with an 'intervention' that effectively distracts its consumer and investor base away from the local. The RAIN initiative serves as a high-profile global publicity gesture; the project aims to improve water sourcing and use through community-based interventions. Between 2005 and 2011, the Coca Cola Africa Foundation took part in 34 water projects in 19 countries. The selection of Africa as the target of the RAIN initiative plays well as a public relations initiative. The initiative does not draw parallels between Coca Cola's operations and water allocation/distribution policies with the conditions of water scarcity and inadequate infrastructure. This fits well

within the de-politicized narratives on poverty and resource scarcity that exist within the International Development literature (Coe, Kelly and Yeung 2007, pp.7-29). In this way, manipulation of scale allows for evasion of meaningful structural reform and ignores the role that Coca Cola plays in enabling the very conditions of scarcity that it is claiming to address.

The Monsanto Company: Food Shortage

The Monsanto Company is one of the world's largest agricultural biotechnology firms and the leading producer of genetically engineered seed. The U.S.-based multinational corporation has operations in more than 80 countries, employs over 20,000 individuals and grosses annual revenue in excess of US \$10.5 billion. Monsanto has a long history of high profile lawsuits in the United States and abroad. The company has faced charges over product safety, monopolization of markets and distribution of unauthorized Genetically Modified Organisms (GMOs). Monsanto's record as plaintiff in legal action against farmers was the subject of a 2008 documentary, "The World According to Monsanto". Activism against Monsanto, particularly in the United States and India, attacks its alleged exploitation of small farmers in the global North and the global South through market dominance and gene patenting. Monsanto has responded with high profile CSR initiatives, most notably its "New Monsanto Pledge" emphasizing commitments to dialogue, transparency, respect, sharing and benefits (Glover 2007, p857). While Monsanto's corporate reports and publicity efforts herald the notion of 'sustainability', the nature of its operations appears to run against an integration of this principle at the core of operations rather than at the periphery.

In its 2010 Sustainability and Corporate Responsibility Report, Monsanto reaffirmed its commitment to “share knowledge and technology to advance scientific understanding, to improve agriculture and the environment, to improve crops and to help farmers in developing countries” (p3). Its declared commitment to ‘sustainable change’ highlights a need to increase global food production, the importance of preventing habitat loss, and concern for the quality of life for farmers and resource-poor families (p7). Such commitments make an ironic contrast to Monsanto’s notorious reputation for aggressive litigation against small farmers²⁰, its use of terminator genes to protect patents, and its tendency to monopolize the agricultural market²¹. Monsanto’s interventions operate in an interpretation of global interactions that is a one-dimensional closed system. Its narrative of poverty and food shortage emphasizes notions of scarcity rather than distribution. Accordingly, its interventions are concerned with increasing production and do not recognize the firm’s more complex entanglement in a global agricultural industry that is by design antagonistic to small producers and traditional methods.

3.1.4 Integrating Scale into the CSR Paradigm

The Coca Cola Company and Monsanto Company were considered as examples of firms that support high profile CSR initiatives with limited ‘sustainability’ in their pay-off. Both firms portrayed water scarcity and food scarcity as discrete phenomena that needed to be addressed through supply-side initiatives. Both CSR campaigns were launched as a reaction to public controversy, and attempted to depoliticize those

²⁰ In a 2007 report update, the Center for Food Safety reported that Monsanto had filed 112 lawsuits involving 372 farmers and 49 small farm businesses “for alleged violations of its Technology Agreement and/or its patents on genetically engineered seeds.”

²¹ In an unprecedented collaboration to explore the anticompetitive effects of concentration in agriculture, the United States Department of Agriculture as well as the Department of Justice initiated an anti-trust investigation of Monsanto in 2010.

externalities and relationships that have a tainting effect on their firms' identities. By framing the situations of water crisis and food shortage as consequences of environmental forces, rather than as the consequence of concentrated decision-making with limited accountability to a wider public, Coca Cola and Monsanto effectively de-personalize these highly politicized conflicts. Integrating a more-macro understanding of ecological systems and economic relationships, based in a wider interpretation of physical as well as operational scale, as well as a more reflexive understanding of contingency that recognizes complexity of relationships would enable CSR interventions to deliver more meaningful results. As a departure from the current focus on strategically framed material outcomes, a deeper consideration of CSR would also include a concern for the participatory process, and attentiveness to notions of agency and sovereignty.

Moving beyond projects that merely address discrete outcomes without acknowledging the processes and systems that yield such situation, will demand consideration for “the norms, visions, concepts and paradigms of modernity that are argued to cause environmental and social problems” (Korhonen 2006, p212). Integrating the variable of physical ‘scale’ into analytical frames would enable a more critical understanding of environmental and social processes that may not be observable at the micro-level. The notion of ‘contingency’ also becomes particularly relevant in considering how externalities result as the emergent effects of multiple actors and variables. The emphasis on procedural and representational legitimacy becomes particularly important given the difficulty of determining quantitative measures and thresholds that adequately capture the qualitative aspirations expressed by progressive development agendas (Korhonen 2006).

3.2 CONTINGENCY AND ATTRIBUTION

The question of corporate legal liability entails both normative as well as descriptive claims regarding contingency of the physical, social, political, and economic aspects of a firm's operations. Global and local aspects of corporate operations may be appropriately considered through a lens which "suggests a stance toward the general and particular that is not either/or – but both/and" as consistent with Jones and Hanham's account of contingency. This approach "rejects one-sided stances in favor of a position that considers both the general and the particular as necessary elements of social explanation" (1995, p190). With that in mind, appraisal for the contingent relationships implicated into a corporation's structure and operations provides grounds for determining the perimeter of formal attribution and legal liability.

Contingency and attribution have geographic dimensions in that the presence of a relation between two entities may be revealed or masked depending on the magnitude of observation and interpretation adopted. A lens of interpretation that takes into account global dimensions and dynamics, for example, bears different implications for the legal jurisdiction of a corporate actor than one that is solely focused on local impacts. Attribution, in turn, depends on establishing the materiality of significance granted to a contingent relationship.

3.2.1 Contingency

The notion of ‘contingency’ has been deployed with considerable imprecision in the Social Sciences.²² The term might be used to account for contributions that, while not directly causal, have significant impact in their emergent interaction with other factors. An example of this, in the context of industrial development, would be the contingent contributions of a highly emitting industry to the emergent phenomenon of global climate change. Emissions which perhaps would have no significant impact on climate were they to come from a singular entity, combine with emissions from other entities, some of them natural and some of them man-made, and go through a process of chemical interaction with other particles in the atmosphere to result in significant alteration of climatic trends around the globe. No singular emitting industry singularly ‘causes’ climate change, nor might it be held singularly ‘liable for’ global climate change, however a measure of responsibility for the synergistic outcome might become ‘attributable’ to each of these actors.

This thesis will also refer to ‘contingency’ in accordance with the definition elaborated by Jones and Hanham, “the possibility of multiple outcomes derived from similar causal processes due to the complexity of social relations embedded in spatially differentiated contexts. These relations transmit processes with a difference, that is, they “interact” with the processes to create differentiated outcomes” (1995, p187). The interface between the general and the particular results in the differentiated outcomes for uniform exposures. Determinations of a general nature are mediated by the contextual particularities of a specific situation. Jones and Hanham note, “Contingencies interrupt the operation of processes, thereby producing different empirical outcomes in different

²² For a review of the uses of ‘contingency’ and a conceptual theme to organize and typify these uses, see Clint Ballinger’s “Classifying Contingency in the Social Sciences” (2008).

contexts. In geography, the concept signals a diverse field of either environmental or sociospatial differences that intervene in the unfolding of more general processes” (p186). To continue the example of the emitting industries introduced above, the generalized phenomenon of climate change manifests itself differently depending on the particular physical, economic, and social contexts at hand. Physically this means that differences in temperature might have variable implications for agricultural yield or water availability. Socially, it might mean that populations most disposed to bear the burden of flooding and erosion is the more socio-economically disadvantaged and thus the least resilient to risk. Economically, it might lead to innovation in new commodities taking the form of a Clean Development Mechanism (CDM)²³, which create regions of opportunity based off of industry density and natural resource features.

With respect to the modern corporation, contingency refers to the full range of possible situations in which direct decisions and effects of the corporation interact with other factors to produce new relational associations. Combined with other factors, the effects of corporate operations have a bearing on distributive patterns of resource allocation, social inequality, economic parity and environmental quality. The contingent connections characterizing operations of the corporate apparatus result from a global supply chain that integrates markets and creates increased complexity in the networks of production. A key challenge presented by this integration and interdependence comes in situations when legal attribution must be determined to deal with physical and social externalities.

²³ Elaborated by the UNFCCC, “The Clean Development Mechanism (CDM), defined in Article 12 of the Protocol, allows a country with an emission-reduction or emission-limitation commitment under the Kyoto Protocol (Annex B Party) to implement an emission-reduction project in developing countries. Such projects can earn saleable certified emission reduction (CER) credits, each equivalent to one tone of CO₂, which can be counted towards meeting Kyoto targets.”

3.2.2 Attribution

The attribution of relationships and consequences, which may be the result of corporate operations analyzed at a higher order scale of magnitude, has been the subject of two U.S. Supreme Court decisions in the last 2 years alone (*Citizens United v. FEC* in 2010 and *Dukes v. Walmart Stores* in 2011). When one party has suffered some injury due to the causal behavior of another actor, the legal tradition provides a rational procedure for determining enforceable attribution. However, causation of an event is not by itself sufficient grounds for pursuing legal attribution or liability. In most cases, it is necessary to establish factual causation as well as legal causation in order to pursue legal liability. Causation might be understood as distinct from contingency in that it involves a relationship that has been supported by sufficient evidence - both legal and formal - to make the case for a significant and directional connection between cause and effect.

In building the case for sufficient evidence, the measure of ‘attribution’ depends on a number of factors. One of these factors is the political ideology of the legal interpreter(s) who is determining the scope of an individual actor and the expectations of its interaction with other actors, as well as the will of the ‘attributing’ system in establishing laws governing attribution. Another factor concerns the known versus unknown factors and the availability of scientific knowledge regarding factors involved in the emergent process, the ways in which they interact, and the proportional contributions of each singular factor to the aggregated outcome. A third factor concerns those metaphysical persuasions of the legal enterprise, which have bearing on the scope of interpretation to determine attribution. Gary Peller notes, “Legal thought distinguishes itself from open-ended ideological discourse by implicitly denying the contingency of the

representational metaphors, such as the public/private or fact/value distinctions, on which its persuasiveness depends. When these background structures are taken as that which “goes without saying,” they work as metaphysical assumptions about the world” (1985, p1154).

Legal rationality assimilates some socially contingent metaphors as its foundational postulates, while excluding others. The philosophical and rational assumptions underpinning the legal position, informed by a particular orientation to the social world, deem particular interactions as relevant for attribution while excluding others. Consequently, social reality becomes reified, and amenable to legal enforcement. “Reification refers to the process by which social reality is experienced as fixed or objective. Social relations are reified when their socially created, contingent character is forgotten or suppressed” (p1157). This process is necessary for determining some connections as valid and others as arbitrary in a systematic manner. The expansive nature of contingent relationships and the limitations of legal accountability to contain complex relationships may be illustrated in the case of the BP Gulf Coast Oil Spill of 2010. The perimeters of impact of the spill were actively disputed especially with respect to determining financial liability to a wide range of claimants including fishermen, business owners, and homeowners among others (NPR 2010). The boundary determining those claims that may be deemed ‘legitimate’ and eligible for compensation, like fisherman whose source of income was compromised directly due to effects of the spill, separated them from others who were considered too far removed in their contingency to the physical oil spill. Without such limitation BP could have been held legally liable *ad infinitum*.

3.2.3 Contingency and Legal Attribution, Three Applications

The legitimacy crisis of the corporation may be interpreted as a byproduct of the dissonance between contingency and attribution of a corporation's operations. When the perceived effects of a corporation's actions do not correspond to the scope of its legal attribution to such consequences, it may be labeled as a deviant actor. To account for the discrepancy between these two perimeters of accountability – one determined by public perception (contingency), and the other enforceable by the law (attribution) – the notion of Corporate Social Responsibility was developed as a means to extend perceived social commitment without carrying the risk of enforceable liability. The CSR narrative thus limits the scope of deliberation to consider the legitimacy of “social responsibility” without subjecting the operant definition of the “corporation” to the same level of public scrutiny. In order to truly tackle the questions at the heart of contemporary corporate discourse, the normative definition of the corporation must be interrogated in light of a longstanding debate on the theory of the corporation, with due reflection on a present context that demands its reinterpretation.

Observing a corporation's contingent relationships is a descriptive process. On the other hand, designating of some of these contingencies as relevant for monitoring and regulation is a prescriptive determination interpreted through an ideological lens. The scope of contingencies deemed relevant for formal attribution will vary depending on the ideological persuasion of the interpreter and his/her normative understanding of the corporation's relationship to the public. The interpreted normative identity of the corporation determines a public orientation – or public personality – of the corporate actor.

This public personality informs expectations of the ways that power is exercised within a corporation and between the corporation and society. The dominant corporate personalities will be summarized as the Conservative Corporation, the Liberal Corporation, and the Social-democratic Corporation. Each of these orientations lends itself to a particular model of social responsibility: corporate philanthropy (Conservative), corporate social responsibility (Liberal), and corporate citizenship (Social-democratic). In order to promote a definition of the corporation that is better suited to addressing the pressing questions of our contemporary context, it is necessary to identify and re-engage the normative assumptions projected into existing debates.

Contingency becomes relevant in making the case for attribution as legal responsibility. Establishing new legal precedence through case law allows challenges to existing norms and creates potential to revise normative definitions in light of new contexts. The cases elaborated below have been selected to highlight three aspects of contingency emerging in a contemporary context. The Wal-Mart Class Action Case decided in March 2011 highlights the contingency of a corporation's employee base. It attempts to expand the corporation's liability for systemic discrimination that results from a policy of *not* having an employment policy common to all stores (Opinion of the Court, p14). The ongoing Sahu v. Union Carbide case, initiated in 2004, attempts to connect persistent contamination of water resources and health injuries suffered as a consequence of mismanagement by the Union Carbide India Limited (UCIL) subsidiary to its parent corporation. This case is not so much groundbreaking in making the case for health contingency, which is preceded by considerable environmental law case history, but in its attempt to "pierce the corporate veil" (Opinion of the Court 2005, p408) protecting the

parent company from claims against its international subsidiary. The Vodafone/Mobinil/Etisalat Telecommunications Case of 2011 considers the status of telecommunications as a public utility and their liability in disrupting the freedom to assemble. This case falls within the frame of concern proposed by Anupam Chander in a 2010 law review article in which he argues for the political obligations of information service providers to ‘unfree people’ and political dissidents. This case taps into the ethical contingency assumed when communication utility providers obstruct public access to information access, exchange and political dissent. The three selected cases are presented as opportunities to challenge ideological accounts of the corporate personality. It is hoped that such cases might advance the discussion over corporations’ complex entanglement in social, environmental, and political situations which undermine the public/private divide, and might further imaginative consideration of corporate attribution.

Social Contingency: The Wal-Mart Class Action Case

The *Dukes v. Wal-Mart Stores* case filed in 2000 and decided by the United States Supreme Court in 2011, was the largest civil rights class action suit in United States history. The case, brought on behalf of 1.5 million female Wal-Mart employees, charged the company with violating Title VII of the United States Civil Rights Act of 1964 by discriminating against women with respect to promotions, pay and job assignments. The court issued a unanimous decision in Wal-Mart’s favor in June 2011 on the grounds that due to the variability of circumstances among plaintiffs, they did not have enough in common to constitute a class.

In a majority decision by conservative Justice Antonin Scalia partly supported by the entire court, the majority held that bundling together such a diverse group of

employees into a single class failed the test of commonality as required in class actions. The court deemed it impossible for plaintiffs to prove that every single plaintiff was the victim of discrimination when Wal-Mart left most decisions up to regional managers at over 3,400 individual stores. Dissenters, led by Justice Ruth Bader Ginsburg, agreed that the case never should have been certified as a 23(b)2 class action. They disagreed with the court's finding, however, that the plaintiffs' evidence was insufficient to certify them as a class, asserting that this certification might be possible under other theories. The case was unique in raising the question of de facto discrimination resulting from the scale of Wal-Mart's human resources practices, which effectively promote a 'public' policy of hiring, promotion, and compensation practices. While the decision marks a significant setback in class action cases in the United States, it does highlight the situation of contingency resulting from aggregate labor practices across disparate properties of a singular firm.

Environmental and Health Contingency: The Union Carbide Bhopal Case²⁴

Victims of the 1984 Union Carbide industrial disaster in Bhopal, India initially filed the case of *Sahu v. Union Carbide Corporation* in New York Federal Court in 2004. The case claims damages against Union Carbide and its former CEO, Warren Anderson. In addition to claims over international human rights violations, environmental law and international criminal law relating to the 1984 disaster, plaintiffs seek compensation for ongoing pollution and contamination at the site of the disaster. They also seek to 'pierce the corporate veil' between the perpetrator of the notorious 1984 gas leak, Union Carbide India Limited, and its parent company at the time, Union Carbide Corporation.

²⁴ This case is used for illustrative purposes here and will be elaborated in more extended form in Chapter 7.

Environmental health arguments and evidence of physical and ecological impact go far in providing evidence for contingency of corporate operations. The leap to claiming attribution and thus compensation or indemnification rests on legal support and public pressure. In the case of Union Carbide's disaster in Bhopal, the scientific and health evidence presents a strong case for contingency. However, the protection of limited liability currently prevents these charges from being attributed to the parent Union Carbide Company. This case has the potential for setting groundbreaking precedence regarding liability of multinational corporations in their home jurisdictions, where media coverage and settlement payout are likely to have heavier bearing on the defendant.

Political Contingency – The Vodafone/Mobinil/Etisalat Case²⁵

During Egypt's revolutionary uprisings in late January and early February of 2011, the country's telecommunications giants Vodafone, Mobinil and Etisalat, cut all phone and Internet services in compliance with the orders of former president Hosni Mubarak. The telecommunications shutdown was unprecedented in magnitude and duration, literally taking the country off the grid and disrupting intranational and international communications, attempting to suppress the uprisings against his regime (Arbor Networks). In April, the Egyptian Centre for Housing Rights filed a lawsuit on behalf of a number of plaintiffs against the three telecommunications companies (as well as several current and former Egyptian officials) claiming damages due to the shutdown of communications. In May 2011 Egypt's Administrative Court issued summary

²⁵ This case is used for illustrative purposes here and will be elaborated in more extended form in Chapter 4.

judgment fining Hosni Mubarak and 2 former regime officials, but did not rule in favor of charges against the telecommunications companies.

The wider question has persisted, however, concerning the status of telecommunications and social media services and their obligations to the public during times of political instability. Questions regarding the telecommunications case have been raised regarding the possibility of pursuing the case in U.S. courts under the Alien Tort Claims Act (ATCA) which allows non-US citizens to sue a corporation for compensation in US courts for aiding and abetting violations of international law anywhere in the world. Claims based on free speech and association rights are not likely to meet that test. What may provide sufficient grounds for such a case, however, are claims that shutting down communications implicate the telecom companies in knowingly taking part in a campaign designed to inhibit and deny Egyptians the freedom to associate and organize (Gado 2011). Already, Vodafone has suffered considerable financial consequences due to the tainting of its public image. Since January when Vodafone cut voice and text services and distributed propaganda text messages in accordance with demands of the regime, the firm has faced an 80% fall in its growth rate in Egypt, losing millions in both customers and revenues (Rushton 2011). While the financial damages send a message to the telecommunications provider, they are not sufficient for revising wider policy. This example attempts to take a first step in making the case for greater political liability for corporate operations.

3.2.4 From Ideology to Pragmatism

The legal cases of *Dukes v. Walmart Stores Inc.* (2011), *Sahu v. Union Carbide Corporation* (2010), and *The Egyptian Center for Housing Rights v. Vodafone, Etisalat,*

& Mobilinil (2011) have challenged the scope of attribution of the corporate personality by respectively claiming social, environmental, and political contingency of the corporate actor's operations. These cases, and the types of arguments they attempt to advance, may provide an example for opportunities to move beyond ideological accounts towards pragmatic reinterpretation of the corporate identity.

Contests over the proper public role and responsibilities of the corporation in democratic society must recognize the conflicting ideologies that underlie debate. It must be noted that beneath the surface of one monolithic debate concerning the social responsibilities of the corporation, there are actually several different ideologies contending in the battle of ideas. Such ideologies offer accessible accounts of the corporate persona, though they do more to promote wider political agendas than to approximate a more accurate characterization of the corporate actor. Ideological accounts of the corporation may provide concrete narratives, but they undermine democratic values under the guise of intellectual consistency. Identifying the variable definitions of the corporation and the variable social commitments they engender is a necessary first step towards understanding the challenges and debates confronting contemporary corporate operations.

It is proposed that by appealing more immediately to the notion of contingency through empirical measure of the corporation's impact, a more useful understanding of its scope of operations – and consequently its scope of legal attribution - may be determined. Until this is recognized, debates will continue to miss the substantive points that deserve rigorous debate towards the formulation of legal and policy guidance. While the present operating agenda of CSR allows corporations to claim a thicker commitment to the public

interest, it is limited by minimalist public obligations as enforceable by formal law. The most popular legal site for debating relevance of corporate impacts to legal liability is captured by the notion of ‘materiality’. The next section will discuss ‘materiality’ as it is employed to depoliticize stakeholder participation and the ways that its use as an instrument of risk management and cost-benefit analysis plays into an overarching discourse on risk society and distribution of burdens.

3.3 MATERIALITY AND RISK

The extensive contingency networks for multinational corporations that operate across disparate geographic spaces have prompted the emergence of a globalized legitimacy regime in the form of a Corporate Social Responsibility. This regime relies on the regulatory forces of the market to favor ‘responsible’ corporations that gain social and investor favor. The availability of public information regarding various aspects of a corporation’s function is essential to the operations of such a system. Accordingly, corporations are pressured to disclose those aspects of their operations and public impact that would be deemed relevant to investors. This information becomes ‘material’ to informed risk assessment and to the efficient performance of the market. As an instrument of risk management and cost-benefit analysis, materiality plays into an overarching discourse on risk allocation distribution across social groups.

3.3.1 Materiality

The contemporary debate over material status of objects and phenomena - the static meaning conferred to particular clusters - and the political implications of such status are part of a long tradition of debate on the nature of the ‘material’. Anderson and Wylie (2009) note that scholarship concerning materiality consists of three main

discussions; 1) “meaningful practices of use and encounters with objects and environments”, 2) “the varied intertwined materialities of nature, science, and technology”, 3) spatialities of the lived body, practice, touch, emotion, and affect”. The “turbulent” material imagination presented by Anderson and Wylie adopts a constructivist orientation that notes “how heterogeneous materialities actuate or emerge from within the assembling of multiple, differential, relations and how the properties and/or capacities of materialities thereafter become effects of that assembling” (2009, p320). Such an approach brings into relief a multiplicity of relations that constitute an object or a phenomenon’s material boundaries. The perimeters containing certain relationships and reifying them as entities or objects are the product of philosophical and political determinations. Latour further notes that the ‘material’ continues to be contested through dualistic debates on the discursive/material, cultural/social, theory/praxis. (2005)

Marxist geographers take particular interest in social and historical aspects of the ‘material’ and engage considerations of the material fabric of society to reveal structural conditions of inequality and class struggle (Harvey 1973). They view the material fabric of society as leading to social differentiation and to economic disparity. The focus of these perspectives is overwhelmingly human-centered. An alternative approach to materially extends consideration to the non-human. Its radically decentered epistemology considers non-human entities as animated not through their innate properties, but rather through the way they are embedded in a wider set of socio-technical relations (Castree 1995, p13; Rose and Wylie 2006, Whatmore 2006). Neither the pure materialism of the Marxist approach, nor the pure constructionism of an ‘immanentist’ philosophy (the view that entities are the result of a process of constitution, advanced by Serres, Latour,

Deleuze, Guattari) is fully adopted in this work. A more compromising view advanced in this section accepts that society is neither purely determined by material aspects, nor fully de-centered into a relationally indeterminate soup.

Acknowledging the constructed nature of the ‘material’, this work considers the notion as it bears relevance for both financial as well as legal materiality in relation to the corporation. Contemporary trends employ the concept of materiality, with respect to corporate decision-making, as a reference to discrete and enumerated types of information that have passed a screening test that makes them for disclosure to an investor class. The “material” is produced through a politics of knowledge production, and is informed by the socio-political context and the relationships, effects, and feedbacks deemed relevant by active producers of normative and prescriptive agendas. This may be noted in the construction of ‘financial materiality’ which isolates those effects and benchmarks that impact the appraisal value of an ownership share. In the legal literature, materiality also appears as a key concept referring to content that is relevant and significant to a legal argument.

3.3.2 Risk

The notion of risk refers to the potential losses resulting from a particular action or activity as it weighs into a decision-making process. Environmental, political, reputational, and regulatory risks, among others, are factored into a firm’s decision-making calculus in monetized form. Georg Simmel (1990) comments on the monetization of risk that is characteristic of the modernist understanding and approach to risk management; monetization of risk provides a way for the value of goods or services to appear objective and inherent. Ruth Levitas (2000) notes that if risks are perceived as

external, then only consequences are addressed, whereas if they are perceived as manufactured then the causes themselves are called into question. In the dominant financial paradigms, risk operates as a legitimization of the existing system; who wins and who loses becomes understood as a matter of luck and natural market forces. Any aspirations for change become focused on changing one's position in the system rather than changing the system itself.

American legal scholar, Cass Sunstein, attempts to step past the competing narratives of materiality and publics by claiming the centrality of Cost Benefit Analysis as a rationality of the regulatory state (2002, p35). "The effect of CBA is to subject a public demand for regulation to a kind of technocratic scrutiny, to ensure that the demand is not rooted in myth, and to ensure that government is regulating risks even when the public demand (because insufficiently informed) is low" (p39). This approach accords with Levitas' notion of external risk, and accordingly focuses on consequences of manufactured risk rather than on the manufacturing process. While greater license to cost-benefit analysis does safeguard against emotive decisions that might go against the best interest of the public, Sunstein's view does not adequately contend with the power relations that govern a process of framing "interests" and "effects". The demarcation and valuation of costs and benefits considered later in a utilitarian analysis may not be characterized so simply as a matter of scientific questions, and typically involves deeply rooted ethical questions. Sunstein's emphasis on the need for greater technical expertise and sound science and his "plea for a large role for technocrats" (p7) attributes divergence between technocratic and lay views of risk to a public ignorance about probability. Kristin Shrader-Frechette challenges this assumption, "many quantitative

sociologists and psychologists (Riley Dunlap, Gene Rosa, Paul Slovic) have shown, the views diverge not because of differences over probabilities, even though laypeople often get their probabilities wrong. Rather, evaluations diverge because frequently the public does not trust government risk estimates; does not believe a risk is “worth” the benefit; claims a risk imposition is unfair; or does not enjoy rights to full compensation for industry-imposed risks” (2003).

The structures of regulatory institutions, largely following a rationality consistent with that proposed by Sunstein, further intensify a market-based ideology. This fits into the theory advanced by Philip Bobbitt of the emerging “market-state” as a replacement to the “constitutional order of the nation-state” (2002). He characterizes the market-state as dependent on “the international capital markets and, to a lesser degree, on the modern multinational business network to create stability in the world economy, in preference to management by national or transnational political bodies.” With respect to its identification of a defining objective for the nation, Bobbit notes,

Like the nation-state, the market-state assesses its economic success or failure by its society’s ability to secure more and better goods and services, but in contrast to the nation-state it does not see the State as more than minimal provider or redistributor. Whereas the nation-state justified itself as an instrument to serve the welfare of the people (the nation), the market-state exists to maximize the opportunities enjoyed by all members of society (p229).

These features are well represented in the evolving regulatory trends of the United States. The disclosure-based structure of regulation through the Securities and Exchange Commission, through voluntary corporate disclosures and third-party whistle-blowers, places the capacity for self-regulation and self-correction in the instruments of the ‘market’. The relationship between this ‘market’ and the ‘state’ appeals to an antiquated division between public and private that is no longer represented by the reality of

encroaching and hybrid ‘market-states’. Risk-management thus becomes a playing field for political contestation without meeting the conventional criteria for democratic legitimacy as established through principles of participation, representation, and accountability. It is in this context that CSR debates attempt to address problems that fall outside their narrow framing assumptions and end up looking to markets for the solutions that states should be providing.

3.3.3 Materiality as a Conduit Between Public and Private Spheres

Earlier discussion has recognized the use of CSR as a means of legitimating corporate expansion and market intensification. Increased attention to the relational patterns and systemic dynamics that CSR helps to normalize was proposed as a first step towards developing scale-sensitive diagnostics of CSR effectiveness. Later analysis considered the role that CSR fulfills in reconciling a disparity between the perceived contingent effects of corporate operations and the formal perimeter of liability enforceable through legal or political means. Reliance on voluntary disclosure as a way to account for ‘social responsibility’ relegates the disciplining of corporations to a market apparatus, while minimizing the use of coercive instruments. Proponents of disclosure-based regulation advocate its dynamism as a flexible way to monitor and manage a range of corporate externalities.²⁶ The questions embedded in such a regulatory regime, regarding why and how particular contingencies and relationships come to be deemed as sufficiently relevant or ‘material’ for measurement and disclosure, are of key interest in this work.

²⁶ David Weil provides an analysis considering the costs and benefits of information disclosure for both disclosers and consumers of information. (2002)

In a theoretical sense, materiality might refer to the aspects of a phenomenon that matter. Philosophers, historians and sociologists have long debated the notion of materiality and its bearing on the construction of meaning and reality.²⁷ One thread of this literature considers how the material representation of an object or a phenomenon is encumbered by the subjectivity of its interpreter (Chandler 2002). This work understands codified aspects of materiality to operate as ‘signs’ in a manner consistent with the propositions of Charles Sanders Pierce (Keane 2005, p186). Pierce considers the ‘sign’ as

[S]omething which stands to somebody for something in some respect or capacity. It addresses somebody, that is, creates in the mind of that person an equivalent sign, or perhaps a more developed sign. That sign which it creates I call the *interpretant* of the first sign. The sign stands for something, its *object*. It stands for that object, not in all respects, but in reference to a sort of idea, which I have sometimes called the *ground* of the representamen.²⁸

Pierce’s more theoretical explication of granting symbolic signification to the material object bears relevance for a more operationalized pragmatic engagement with ‘materiality’ in the financial and legal senses. Materiality is a key element in US corporate law and securities law.²⁹ Material information is considered to be relevant to an investor in making decisions regarding his/her shares in a firm. The scope and objective of ‘the material’ has long been a subject of contestation in U.S. case law. In the landmark decision of *TSC Industries v. Northway, Inc.* (1976) Judge Marshall writes,

The issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts. (...) [W]e must bear in mind that the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality (...) Only if the established omissions are “so obviously important to an investor, that reasonable minds cannot differ on the question of materiality” is the ultimate issue of materiality appropriately resolved.

²⁷ For a more extended discussion of Materiality, see Daniel Miller’s edited work by the title “Materiality” (2005).

²⁸ As quoted by Daniel Chandler in “Semiotics: the basics” (2002, p.29).

²⁹ Alison Grey Anderson asserts that “disclosure makes available the information needed for accurate investment analysis, thus promoting efficient securities markets which in turn result in better allocation of the nation’s capital resources.” (1974, p.314)

Both the theoretical as well as the legalistic senses of materiality are relevant to this analysis. Determinations of materiality entail the interpretation of interactions and relationships into discrete, observable indices. In this capacity, materiality operates as a conduit between those phenomena that may be relatable to the firm in a causal or consequential manner, and a list of discrete, measurable indicators that factor into private risk-assessment. In moving towards a less ideological and more pragmatic, empirically informed account of the corporation's impacts, it is important to recognize the political exclusions that are part of determining the parameters of 'materiality' for some event or phenomenon.

This section takes a critical look at the notion of 'materiality' and how it engages the contradictions of a public-private divide, while upholding the two spheres as distinct entities. It suggests that controversies over the interpretation of material meaning, with reference to physical and social consequences of a corporation's operations, may present an opportunity to unsettle power dynamics and engage with a plurality of impacted constituencies. This section will adapt the theoretical framework developed by Bruno Latour concerning the political moments in the evolution of a controversy. It will examine how interests are represented in the process of building a case for 'materiality' and it will identify opportunities for participation by a wider range of constituencies. Part I begins by outlining the sequence of 'political moments' proposed by Latour in reference to evolution in the politicized aspects of a phenomenon from its initial state as a controversy to its fruition in depoliticized, codified form. Part II considers this framework in the case of defining Climate Change Materiality for financial disclosure as determined by the United States Securities and Exchange Commission in February 2010. Part III

identifies the way that ‘materiality’ can be instrumentalized to propagate a narrative of depoliticized risk and suggests the need for radical institutional reform that is sensitized to the dynamics of risk distribution and risk disposition effected through corporate expansion.

3.3.4 Politicized Perspectives on Materiality

The descriptive reality of an eroding public/private divide in the 21st century is captured in active debates regarding the proper role of the corporation in democratic society. Contemporary critics have begun to note the emerging ‘political’ aspect of the corporation, but characterization of this aspect is typically ambiguous. ‘Political’ becomes used in reference to a range of qualitatively different types of interactions, with no consistent determination of the issues and relationships at stake. In beginning to address the demands for a political and procedural legitimacy of the corporation (as proposed in Chapter 2), it will be necessary to develop a more complex understanding of the variable meanings that the term ‘political’ could take on. Too imprecise an application of the term risks ambiguous – and dangerously ambitious - overreach such that everything becomes subsumed in the realm of formal Politics and subject to the jurisdiction of the State.

Rather than define politics as “a profession, a sphere, an activity, a calling, a site, or a procedure”, this section will consider politicization in accordance with the pragmatist school, as a qualifying adjective for a “type of situation” (Latour 2007, p814). This section will outline a sequence of distinctive ‘political’ stages in the process of interpreting the ‘material’ attributes of a phenomenon, in this case Climate Change. It will draw reference from Bruno Latour’s proposed analytic which maps out a trajectory

for the political evolution of a contested issue; disrupting the social landscape (political-1), mobilizing contested issue frames (political-2), determining the matter of popular will (political-3), undergoing technocratic deliberation (political-4), and finally reaching stabilization as a static assemblage in the form of law, policy, or norm (political-5). A more refined understanding of particular ‘political moments’ and consideration of how each moment inducts and excludes certain constituencies and agents of a corporate entity might allow for greater nuance of perspectives on political legitimacy as reflected at each of these decisional stages.

Political-1: Controversy and the disrupted landscape of social relations

At the outset of a controversy, a new entity (population, technology, innovation, overflow group) modifies the existing collective³⁰ and produces new associations between humans and/or non-humans. This novelty agitates existing relationships and reconfigures the existing material and social landscape. It is ‘political’ in a sense that falls outside the bounds of conventional political science. Though it is not limited to a fundamentally physical interpretation of reality, this framework is inspired by Marxist understandings of materialism in suggesting that phenomena may result through interaction between physical materials. By revealing new contingencies and relationships, a political situation of this nature may involve actors who are not really ‘new’ but who were previously kept in the margins and who now take advantage of the controversy to reenter the ‘political’ scene in a legitimate capacity. Controversies make the network of issues associated with a problem both visible and debatable, and thus present an

³⁰ “Collective” here is adapted from Latour’s “Politics of Nature: How to Bring the Sciences into Democracy” (2004). Latour uses the term in reference to a “new Constitution”. This allows individuals to assemble democratically with an orientation to nature and scientific knowledge that transcends the dualisms of the “Modern Constitution”. It allows for a new bearing on the understanding of facts and values.

opportunity to establish new connections between the problems of immediate focus, and wider issue frames with which an activated group strives to establish links (Callon, et al., 2009).

Political-2: Issue-framing and the scope of signification

Once an issue generates concerned and unsettled publics, these constituencies become active in defining the boundaries of reaction and the scope of subsequent demands (Callon 2009). This is the stage most associated with conventional modes of social movement organizing, as elaborated in the literature on ‘issue-framing’ by Benford and Snow (2000, p615).

Collective action frames are constructed in part as movement adherents negotiate a shared understanding of some problematic condition or situation they define as in need of change, make attributions regarding who or what is to blame, articulate an alternative set of arrangements, and urge others to act in concert to affect change. (...) Snow & Benford (1988) refer to these core framing tasks as “diagnostic framing” (problem identification and attributions), “prognostic framing,” and “motivational framing.” By pursuing these core framing tasks, movement actors attend to the interrelated problems of “consensus mobilization” and “action mobilization” (Kandemans 1984).

By situating an issue in the context of its own history, or by redefining the parameters of its context, controversies bring to light the possibilities that were not previously taken up (Callon 2009). In topics of scientific significance like Climate Change materiality, or some other issue with specialized technical relevance, experts often monopolize the definitional stage. This is a means of excluding a wider public by emphasizing certain qualifications as a way of gate keeping against ‘illegitimate’ or ‘unsubstantiated’ interests.

Political-3: The problem of the publics

The third political moment concerns the ‘problem of the publics’ (Dewey 1926) and questions of public sovereignty. At this stage, the machinery of a governing authority

tries to turn the problem of the public into a clearly articulated question of common good and/or general will. This ‘moment’ is prefaced on the assumption that issues of public controversy cannot be dealt with as mere technical puzzles to be solved by subject-matter experts or government bureaucrats. Political-3 maintains that a question of ‘public will’ exists at the heart of technical controversy, and must be answered through democratic deliberation. It is insufficient to replace this stage with technocratic ‘governance’ administered by assemblies of well-behaved problem-solvers, as is the preference of those attempting to minimize the errors of human bias.³¹ A key issue in the development of a technical controversy is the establishment of a clear and widely accepted border between the “unquestionably technical” and the “unquestionably social”. To declare that an issue is technical is to remove it from the realm of public debate, and to recognize its social dimension restores its chance of being subject to public scrutiny. Often, controversies of a scientific nature are inseparably both technical and social. In the case of an environmental phenomenon like climate change, one strategy for narrowing the scope of controversy attempts to further purify the division between science and politics and to extend the reach of the scientific jurisdiction. “Overflow” groups which are created by new tectonics of the social and political landscape (Political-1) and contained as new groups by redrawn boundaries (Political-2) bring to prominence previously

³¹ In “Risk and Reason” (2002) Cass Sunstein advocates for the expanded use of Cost Benefit Analysis and greater emphasis on technical decision-making in public policy, “Cost-benefit analysis is a natural corrective, above all because it focuses attention on the actual benefits of regulation, including in some cases, the existence of surprisingly small benefits from regulatory controls. To this extent, cost-benefit analysis should not be taken as undemocratic but, on the contrary, should be seen as a means of fortifying democratic goals, by ensuring that government decisions are responsive to well-informed public judgments. (...) an accounting of the costs and benefits, both qualitative and quantitative, can overcome public ignorance. If the public wants to proceed after it has received that accounting, nothing here suggests that it is prohibited from doing so.” (p.35)

unforeseen effects to expand the scope of ‘relevant’ participation and to induct new information that might challenge the seemingly closed set of facts and values.

Political-4: Legitimizing material impacts in light of the public good

The fourth political moment falls in the purview of ‘deliberative assemblies’ of conscious and informed citizens. Latour refers to this as the point when issues have been “metabolized to the point when they can be absorbed by the normal tradition of deliberative democracy” (2007, p817). In the relevant political theory traditions of Arendt, Habermas and Rawls, this stage of deliberation involves individuals who are themselves freed from attachments and biases before entering the debate. Behind Rawls’ ‘veil of ignorance’ (1972) one does not know how various alternatives will affect his/her own particular case. For Arendt, persons who discuss the common good must be freed from all material contingencies. (1958) Habermas likewise envisions human beings entirely absorbed in their will to communicate. By contrast, Latour takes the position that deliberative procedures do not require disembodied beings. While it does privilege debate, discussion, exchange of arguments and the will of participants to understand and listen to each other, this deliberation does not specify that participants be divested of every particular quality, and detached from networks of sociability. In the context of climate change materiality (to be further elaborated in the next section), the Political-4 stage plays out in the differentiated venues of public hearings and in the filing of shareholder resolutions with the SEC.

Political-5: Stabilizing material relationships through regimes of depoliticization

The final political moment described by Latour is equivalent to Michel Foucault’s notion of ‘governmentality’ (Lemke 2000); the stage at which an issue and the

technologies for dealing with it have become embedded in bureaucratic operations; it appears to be apolitical but may be reopened at any moment. This view may be complemented by Andrew Barry's account of metrological regimes as conduits between the political and the non-political (2002). This stage becomes challenged through recourse to reframing in political-2 and public deliberation in political-3. Barry poses the questions: "In what way can the organization and operation of markets become either a political matter, or be prevented from becoming so? And what role does scientific and technical calculation have in these processes?" (p272). Science may play a political role in demonstrating the weakness of an existing metrological regime; thus opening up the space of contestation (p275). Disclosure renders particular dimensions more 'visible' or 'material' through measurement and through laws and regulations that build up concrete consequences of a phenomenon; the intent is such that the disclosed object will enter the frame of the financial actor's decision (p272). "Through measurement, a whole range of objects and problems is brought into the frame of economic calculation" (p273). Legislation and technical regulation have the effects of placing actions and objects (provisionally) outside the realm of public contestation --- regularizing the conduct of economic and social life, with both beneficial and negative consequences. In this sense materiality as a measure becomes a "conduit for the cross-contamination of the economic and the political" (p280).

3.3.5 The Case for Climate Change Materiality

The case of climate change disclosure guidance provides a useful example for examining the politics and production of materiality as it relates to the phenomenon of climate change. Adopting the semiotic perspectives of Charles Sanders Pierce, the case of

climate change materiality as relevant to financial disclosure is understood to capture certain aspects of climate change in the enumerated criteria of a guidance document (a “sign”). In this way it signals a particular understanding of the phenomenon of climate change (the “interpretant”) to registered corporations, that is derivative of a wider notional phenomenon of Climate Change (“ground of the representamen” or more generally “the object”). As such, the ‘climate change materiality’ referenced from this point forward might capture certain elements - but does not assume to contain the range - of material phenomena, relationships and contingencies associated with climate change as a ‘real’ occurrence. The subject of climate change materiality is an appropriate example for examining the 5 political stages outlined above due to the highly controversial nature of climate change in contemporary debate, the presence of documentation for each stage of the controversy, and full passage through all five stages to reach ‘stabilization’ in the form of official disclosure guidance.

Political-1: Climate change as an active controversy

The controversy over global climate change entered popular media (as global warming) in the late 1980s following a Senate testimony by James E. Hansen (1988) drawing a connection between “abnormally hot weather” and the phenomenon of “global warming”. Ratification of the Kyoto Protocol in 1997 formally marked the commitment by 84 nations to reduce their greenhouse gas emissions. Since then, global climate change has been the subject of international policy, scientific research, market innovations and public comment among other reactions. The phenomenon has redefined relationships between developed and developing countries (designated into Annex I and Annex II classification), between industry and government (through regulation of carbon

emissions), between the market and carbon-producing industries (creating cap-and trade carbon shares), etc.

More narrowly, the case for financial materiality of climate change has been building with advances in climate policy on national and international fronts. Most recently, the U.S. Environmental Protection Agency (EPA) released a mandatory greenhouse gas (GHG) reporting rule that requires nearly 10,000 ‘large GHG emitters’ to report their emissions to the EPA beginning January 2010. In the U.S. insurance industry, insurers with annual premiums of \$500 million or more have been required to disclose climate risks to regulators, shareholders and the public since May 2010. Parallel to these changes, investors have been filing a record-breaking number of shareholder resolutions demanding information on company contributions to climate change, and related responses. There has also been a parallel increase in lawsuits that are related to climate disclosure. (EDF 2010) Accordingly, climate change as a real phenomenon and as a body of affiliated regulations and political/economic changes has disrupted the scope of consideration of corporate impacts, demanding extension of the variables considered in appraising a firm’s financial risk. As a consequence of expanded understandings of risk, climate change materiality emerged as a political question and not merely a technical question of scientific or legal fact. It is political in the way it is framed, in the way that it mobilizes ‘overflow’ populations impacted by externalities, and in the way that it solidifies ‘anti-political’ measures and policies for governance.

Political-2: Framing climate change materiality in the language of risk

In order to understand the issue framing for climate change disclosure, it is necessary first to understand the objective and basic function of the United States

Securities and Exchange Commission (SEC), the federal agency charged with regulating the disclosure process. Established in the aftermath of the stock market crash and the Great Depression of 1929, the SEC was intended to provide clear rules and reliable information for markets and investors, with the understanding that ‘there cannot be “honest markets without honest publicity” (Geltman 1992, p129 citing *Basic, Inc. v. Levinson*). Cynthia Williams notes, “The acts were designed to reassert social control over capital that had been used for the private benefit of relatively few people, to the detriment of millions, and had been misallocated to fuel speculation on Wall Street.” (1999, p1227) Section 14(a) of the Securities Exchange Act authorized the SEC to regulate proxy disclosures “as necessary or appropriate in the public interest or for the protection of investors” (p100). In such an environment of distrust, a primary objective of the Securities Act was to make corporate officers and directors subject to higher standards of public accountability (Williams 1999, p1229). A recurring question of interest, then and now, is the reach of the SEC in protecting the public; and to which “public” it is accountable. While legal dispute has contested this question over the years, the most popular contemporary interpretation refers to materiality standards for disclosure elaborated in the 1970s and 80s. These deemed information “material” if there is “substantial likelihood that a reasonable investor would consider it important in deciding how to vote or make an investment decision” (SEC 2010, pp.10-11).

As early as June 2006 (Maitland 2006) investors began to recognize that climate change would have material implications for their risk appraisal of investments. In 2007 a formal petition was filed with the SEC on behalf of 22 petitioners with investment assets in excess of \$1.5 trillion (INCR 2010). The 2007 petition marks a Political-2 stage where

an ‘overflow population’ consisting primarily of Institutional Investors recognizes themselves as holding a shared interest, and takes steps towards framing the issue to meet that interest. The petition called on the Securities and Exchange Committee to begin “scrutinizing the adequacy of registrants’ climate disclosures” and to require all publicly traded companies to assess and disclose financial risks from climate change. Petitioners positioned their case within the frame of existing law, arguing that unequivocal, far-reaching regulatory developments, and extensive business recognition related to climate change presented new risks and opportunities to corporations. This information is considered material to shareholder investment decisions and accordingly must be disclosed under existing law. The petition, supplemented by nearly 300 shareholder resolutions over the past decade, helped to determine the parameters of information that would be of ‘material’ interest.

Political-3: Institutional investors as a legitimate ‘public’

In making demands for climate change disclosure, institutional investors defined themselves as a class with shared interests; appealing for the same information regarding climate change that has a bearing on the risks attached to their shares in particular corporations. The capacity of investors to identify as part of a coalition or ‘class’ of ethical investors changed dramatically following the issuing of 1992 shareholder proxy rules by the SEC, which allowed shareholders to communicate directly with each other (Gillan & Starks 2000, p279). By aggregating dispersed ownership through synergistic decision-making, these rules allowed institutional investors to overcome informational transaction costs and shifted power from managers to shareholders by way of their fiduciary guardians (Sharara & Hoke-Witherspoon 1993, p355). This marked a turning

point in the balance of power in corporate governance, laying the groundwork for shareholder coalitions of later years, and setting the stage for pension-fund activism (Sharara & Hoke-Witherspoon 1993, p353; Hebb 2006, p389). Since 1992, Socially Responsible Investment (SRI) has gained considerable popularity. In 1970 the “ethical investor” base contributed only 0.0005% of the money under management in mutual funds. In 2007, the Social Investment Forum reported that 11% of U.S. assets under professional management were involved in SRI (2007, pii). The effects of these amended regulations have redefined the landscape of influence and decision-making as apparent in the example of the SEC’s climate change interpretive guidance, which was largely driven by an institutional investor backing.

The ‘public good’ claim behind investors’ demand rests on a premise from Section 14(a) of the Securities Exchange Act, which authorized the SEC to regulate proxy disclosures “as necessary or appropriate in the public interest or for the protection of investors”. The second portion of this statement, concerning the “protection of investors” is seen as valid for disclosure appeal.³² Despite the wide public consensus over the necessity of appropriate disclosure to ensure the proper functioning of markets, this position provoked controversy within the SEC. When the Commission ultimately issued the guidance, it was on a party-line vote of three to two. The dissenting opinion of Republican Commissioner Kathleen Casey deemed the release unnecessary as it “addresses concerns unrelated to investor protection”. She expressed concern about the timing of the release, “our consideration of this release today sends a curious signal to the

³² The reference to “public good” currently holds no political leverage but was appealed to in the 1970s for disclosure of civil rights and environmental information. This is the result of a series of drawn out legal disputes between the Natural Resources Defense Council and the Securities and Exchange Commission (from 1971-1979). Though presently moot, the reference to “public interest” presents an opportunity for future challenge regarding the role of the corporation with respect to the public interest.

investment community about what we view as the most pressing issues facing the Commission.” Casey criticized the apparent influence of a “constituency that is interested in, and has long pressed the Commission to require, more extensive disclosures on environmental issues in order to drive particular environmental policy objectives” noting that the release came at a time “when the state of the science, law and policy relating to climate change appear to be increasingly in flux”. She concluded, “the purpose of this release is to place the imprimatur of the Commission on the agenda of the social and environmental policy lobby, an agenda that falls outside of our expertise and beyond our fundamental mission of investor protection” (2010). Commissioner Troy Paredes similarly found the release redundant to what is already provided in Regulation S-K items 101, 103, 303, and 503(c). Paredes draws attention to the situation that “the climate change debate remains unsettled and that many have questioned the appropriateness of the regulatory, legislative, and other initiatives aimed at reducing emissions that the release features” (2010).

Ultimately, the concerns raised by Commissioners Casey and Paredes that the guidance would be redundant based on current disclosures, are not founded in the evidence of form 10-K disclosures. Regulation S-K, which was promulgated by the SEC to facilitate consistency of corporate disclosures, (U.S. SEC 2009) informs form 10-K used for filing a company’s annual report (U.S. SEC 2009). Prior to the new interpretive guidance on disclosure, a review of 10-K filings of S&P 500 companies between 1995 and 2008 found a consistent pattern of corporate non-disclosure with respect to climate change risk. In 2008, 76.3% of surveyed corporations did not even mention climate change in their SEC filings, let alone provide an analysis of potential impacts and

interventions (Doran & Quinn 2009, p143). Political-4 will show how investors built their case for material relevance of climate change through the filing of nearly 300 resolutions concerning the topic.

Political-4: Public hearings and shareholder resolutions

The two forms of ‘deliberative engagement’ surrounding the climate change disclosure guidance may be observed in formal public hearings and in the filing of shareholder resolutions by investors. In October 2007 a hearing was conducted by the United States Senate Committee on Banking, Housing & Urban Affairs on “Climate Disclosure: Measuring Financial Risks and Opportunities”. The most sustained effort to define climate change materiality has been through the filing of shareholder resolutions with targeted companies. Shareholder resolutions are non-binding proposals submitted by shareholders, through the SEC, for vote at a company’s annual meeting. They are a key instrument of activist campaigns due to their usefulness in raising public awareness and attracting media attention, which imposes pressure on corporate management. Beginning in 1999 and increasing dramatically in 2006, record-breaking numbers of shareholder resolutions³³ have been filed by investors demanding information related to climate change and greenhouse gas emissions. These resolutions enable a political-4 dynamic by allowing ‘relevant publics’ to weigh in on the discrete categories or types of information that they find meaningful in determining climate change materiality. In a review of the climate change related resolutions filed between April 1999 and February 2010, the most popular disclosure demands were noted to be:

- “Report on/reduce greenhouse gas emissions”

³³ These resolutions have been compiled by the author in spreadsheet format, using data received through email contact with Douglas Cogan of the Investor Network on Climate Risk (June 2010). For a full database, see Appendix B.

- “Set GHG emissions reduction goals”
- “Report on climate change leadership benefits”
- “Report on climate change challenges to business”
- “Report on climate change science”

These demands are reflected point-by-point in the final guidance criteria.

Political-5: Stabilizing criteria for materiality through the release of disclosure guidance

In January 2010, the U.S. Securities and Exchange Commission (SEC) released an official guidance determining the criteria for climate change disclosure. The guidance flags some of the ways public companies may amend their disclosure practices, in accordance with the Commission’s existing requirements, to include climate change impact and risk (SEC 2010, p3). The new interpretive guidance recognizes the materiality implications of escalating concern with climate change and reduction of greenhouse gas emissions (SEC 2010, p1). The guidance identifies those rules that require disclosure of climate change issues:

- Description of business (Item 101 Regulation S-K)
- Legal proceedings to which a firm or its subsidiaries are party (Item 103 Regulation S-K)
- Risk factors (Item 503(c) of Regulation S-K)
- Management’s Discussion and Analysis of Financial Condition and Results of Operations (Item 303 of Regulation S-K)

The guidance also outlines climate change related issues that may impact the way each of these areas of disclosure is considered:

1. Potential impact of federal, state and local legislation and regulation; relating to costs and profits from a 'cap and trade' system, equipment and retrofits to reduce emissions, and profits or losses from changing demand patterns for goods and services. (p22)
2. Potential impact of international accords such as the Kyoto Protocol and the EU ETS. Even if the U.S. is not a signatory to these bodies, companies must consider their relevant operations outside the U.S., which may be subject to its standards. (p24)
3. Indirect consequences of regulation or business trends such as new opportunities or risks, as well as potential reputational impacts on a company. (p25)
4. Physical impacts of climate change that may affect a company's operations and results. (p26)

The released guidance does not end controversy regarding climate change materiality for financial interests, but it does mark a moment of 'stability' regarding the meaning of climate change for companies in their internal risk appraisal and disclosure.

3.3.6 Materiality and the Mediation of Risk

The outcome of the climate change disclosure case suggests that overflow publics might be activated to challenge convention regarding the types of information deemed relevant for financial decision-making. When properly activated under the leadership of the Environmental Defense Fund (EDF) and Ceres, a class of institutional investors recognized their shared interest and their leverage power as an aggregate lobby. They mobilized an aggressive campaign that was ultimately successful in securing the disclosure of 'material' information. The fact that the SEC interpretive guidance expands

current disclosure guidelines to include climate change impact and risk as relevant to a firm's securities valuation is evidence of increasing acknowledgment of the contingency and complexity between financial securities and social as well as environmental contexts.

It must be noted, however, that clear limitations still exist to relying on SRI as the primary means of reforming corporate social responsibility such that it is responsible and effective for wider populations of the 'public'. SRI campaigns are still first and foremost responsive to the interests of investors with whom they are bound in a fiduciary relationship. SRI activism might improve the conditions for better financial decision-making and it might even promote the security of long-term investments, though the empirical case has not been a robust one. It is conceivable, however, that efficient operations and favorable investment returns or any measure of material benefit could be beneficial to society in the utilitarian aggregate while upholding a systemic positional disadvantage for particular 'publics' in society and/or maintaining skewed distribution of political agency. The task of regulating risk not merely as a financial attribute but as a burden – or opportunity – with social and political implication falls under the purview of the State.

3.4 INTERROGATING A CORPORATION'S PUBLIC ROLE IN THE 21st CENTURY

This chapter has argued that corporate operations in a contemporary age have outgrown the theoretical frameworks that were originally devised to explain them at the turn of the 20th century. The policies and rulings attempting to quarantine business corporations and public society in two distinct spheres, one private and one public, do not represent a reality which consists of deeply intertwined aspects from both. This situation

has resulted in crises of legitimacy between the corporation and its public society. With their amplified scale of operations and impacts, and wide-reaching physical, economic, political, and social consequences, corporations of the 21st century demand a revised explanatory theory, and policies and institutions that are more appropriate for grappling with present-day dynamics and mediating critical controversies. This chapter has advanced that the geographic perspective is well suited to informing key aspects of such an endeavor. Its attention to space and scale, contingency and attribution, and risk and materiality help explain the way that corporations operate as both structure and agent in the global economy. Relevant aspects of the geographic perspective were introduced, with particular attention granted to their bearing on the corporate assemblage and its enacted functions and relationships. The Corporate Social Responsibility regime was identified as the most discursively and institutionally developed intervention attempting to mediate the relationship between corporation and society. While opportunities for pragmatic contestation and direct engagement have been recognized, shortcomings and limitations of the CSR discourse have also been highlighted.

This chapter began by identifying the geographic dimensions relevant to a more critical analysis of the corporation. These were noted to be space and scale, contingency and attribution, materiality and risk. Part 3.1 focused on the space and scale thematic as it relates to questions of CSR legitimacy and corporate legitimacy. The geographic notions of space and scale were noted to provide helpful insights on the scope of corporate operations as contrasted to the scope of their related social-responsibility interventions. Two cases were considered, the Coca Cola Company's Africa RAIN initiative promoting access to water, and Monsanto Company's knowledge sharing initiative aimed at

improving the lives of small farmers. Analysis noted the manipulation of ‘scale’ of impact in framing CSR initiatives, to present discrete projects that improve the status of corporations as willfully responsible agents, while absolving themselves of causal blame for the very problems they claim to be mediating. Analysis of the socio-political dynamics that recognizes how social impacts are not merely additive but also emergent, and that patterns adopted by a mega-corporation have amplified particular development agendas, could provide meaningful context to the real and embedded contributions of CSR interventions.

Part 3.2 drew upon the themes of contingency and attribution to contextualize the function that a CSR regime serves in bridging perceptions of dissonance between effected consequences and legal liability. Contemporary legal challenges to conventional perimeters of attribution were presented through three cases; the Walmart Class Action suit seeking legal attribution to new ‘publics’ formed as a consequence of corporate operations, the Union Carbide Bhopal case challenging the severance of relationship between subsidiaries and their parent companies in outlying jurisdictions, and the Vodafone/Mobinil/Etisalat case challenging the corporation’s protection from political culpability due to its standing as a private entity. These cases underscored the need to move beyond ideologically grounded arguments and to develop theories of attribution that are better informed by empirical study of causal, complementary, and indirect connections. Part 3.3 went on to examine how the notion of ‘materiality’, as it factors into financial disclosure and market-based regulation of the corporation, presents an opportunity for mediating between public and private aspects of the corporation. It outlined a framework for considering the political aspects of ‘materiality’ construction,

drawing upon a theoretical guide from Bruno Latour that differentiates the ‘political’ into a sequence of five stages in the lifecycle of a contested entity. This theoretical framework was adapted to the case of climate change materiality as defined in a guidance document for climate change disclosure by the United States Securities and Exchange Commission in January 2010. The recognition of different types of ‘political’ revealed a range of opportunities for accessing the process of ‘meaning construction’ to integrate alternative constituencies and ‘publics’.

3.5 ELABORATING THE THEORETICAL FRAMEWORK THROUGH CRITICAL CASE STUDY DEVELOPMENT

The four subsequent chapters of this project each adopt and develop a particular theoretical theme and interrogate it through the details of a specific case study. **Chapter 4** begins by considering the socio-political dynamics within which corporate-public relationships are examined. It explores the theme of liberal context and the positioning of the corporate actor in relation to the State. It demonstrates how a securitized legal and political context that undermines the premises of economic and political liberalism challenges the development of a substantive CSR narrative. It considers the corporate legal entity as embedded within a wider legal ecology that is overwhelmed by a militarized rationality. **Chapter 5** accepts as its guiding paradigm an economic and political liberalism in the United States. From within that context it interrogates the public/private divide at the heart of the liberal theory, exploring its implications for the relationship between corporations and wider society and developing an argument for how these two theoretical spheres might be bridged through the notion of materiality.

Chapter 6 considers the frictions that occur between diverse ideological orientations as they manifest in legal theory. It explores the entity theory of the firm,

premised on the notion of liberal individualism, as it contrasts with a more relationally embedded enterprise theory. Each of these theories conceives of the relationship between corporate components in a different manner and thus results in differing interpretations of a corporation's liability. In the context of a globally integrated economy with transnational actors, these conceptualizations bear implications for judicial form and jurisdictional boundaries, and reflect territorial implications of the corporate identity. While the influences of legal form and ideological interpretation shape corporate manifestation, as illustrated in Chapter 4 and developed in Chapters 5 and 6, the actual functions of the law itself may also be instrumentalized to contest and revise the corporation. **Chapter 7** takes a more deliberate look at the process of devising and contesting legal boundaries of corporate liability through the actual practice of the law. It considers how orientation towards the law itself shapes the aims and aspirations of legal practitioners and civil society activists. The theoretical threads developed in the individual chapters add up to a larger discourse that is more fluid, plastic and emphatic about the importance of context and detail, running counter to a closed, normalized neoliberal discourse.

4 – Lessons from Egypt’s Internet Shutdown: Implications and Prospects for CSR in a Military-Dominated Economy

4.1 INTRODUCTION

January 25th 2011 civilians across Egypt took to the streets on National Police Day demanding “bread, freedom, and social justice”. The widespread popularity of public marches surprised even participants and organizers as they clashed with State and Central Security officers around the country. By day’s end, demonstrators had become emboldened to carry on the momentum of a nascent movement and to escalate pressure on the 30-year authoritative regime of Hosni Mubarak. Activists called for a mass mobilization on Friday the 28th of January designated a “Day of Rage”, which witnessed millions taking to the streets in peaceful demonstration and sending the regime into a panic. In an attempt to disrupt mobilization networks and to quell the demonstrations which were extending their reach and deepening their demands day after day, security forces ordered a suspension of voice and SMS services for all three of Egypt’s mobile phone companies – Vodaphone, Mobinil, and Etisalat. They also called for an abrupt shutdown of all Internet services with the exception of one small provider, Noor (ISP)³⁴. 71 million Egyptians immediately lost mobile phone service due to the blackout³⁵, and 23 million Egyptians lost Internet service³⁶ (MCIT 2011). As a result, virtual communication channels between activists were disrupted, the Egyptian public was completely isolated

³⁴ Noor ISP, which is used by Egypt’s Stock Exchange, was later also shutdown on January 31st.

³⁵ Egypt has 91% penetration of mobile service. (MCIT 2011)

³⁶ Egypt has 30% Internet penetration across the country. (MCIT 2011)

from media responses outside the country's borders, and economic activity including Egypt's Stock Exchange came to a complete standstill.

For five days Egypt was eliminated from the virtual world. Mobile phone voice services were restored one day later, on the 29th of January, and Internet services were restored on February 2nd. The more popular SMS services were not restored until the 6th of February. This blackout episode represented “the most holistic attack on national-level media infrastructures ever perpetrated by a government” (Dunn 2011, p19). The case opens up a number of questions related to the connections, dynamics, and responsibilities of private service providers and public military-political powers³⁷. More broadly, the incident reanimates questions that have emerged from other recent international episodes, regarding the responsibility of private telecommunications companies to public welfare particularly in situations of political strife³⁸. In the months following Mubarak's overthrow, these questions find their place within a wider debate over the relationship between market liberalization and securitization, and are bringing attention to the interface between broad global guidelines and particular local dynamics as they relate to defining a corporation's social responsibility.

Initially, the Egyptian public's reaction to the telecommunications shutdown took aim at the Internet service providers and mobile phone operators, as well as key cabinet ministers. Lawsuits in response to the shutdown have been aimed both at government

³⁷ References to ‘military-political’ powers in place of ‘political’ powers are in accordance with Steven Cook's 2007 thesis describing Egypt as a military-dominated state where “The democratic facades and authoritarian institutions of [its] political systems serve to defuse and deflect challenges to the status quo by sheltering those truly wielding power – the military.” (p2)

³⁸ Anupam Chander's 2011 law review article “Googling Freedom” discusses the question of whether Western media companies have an obligation to people in unfree societies. Corporate-led initiatives such as the Global Network Initiative (established by Google, Microsoft and Yahoo! in 2008) acknowledge these obligations and aim to popularize audits and standards ICT companies with operations in authoritative political environments.

figures and at the private service providers. In February 2011 the Arab Network for Human Rights Information filed a complaint with the Prosecutor General Abdel Meguid Mahmoud demanding investigation of the Minister of Communications, the Chairman of the National Telecommunications Authority, the CEO's of the three mobile phone carriers, and the CEOs of Internet Service Providers LINKdotNET and TE Data "for criminal liability in participation in harming and killing demonstrators by cutting off Internet and telecommunication services in Egypt arbitrarily."³⁹ In April 2011, the Egyptian Center for Housing Rights (ECHR) filed a case on behalf of other plaintiffs against Egypt's three telecommunications companies and a number of current and former Egyptian officials, for the damages suffered due to communications shutdown (Ahram 2011). In May 2011 a Cairo administrative court fined Hosni Mubarak LE200 million EGP, Ahmed Nazif LE40 million and Habib al-Adli LE300 million for damaging the economy by shutting down Internet and mobile phone services (The Egyptian Gazette 2012). No fines were levied against the private companies. To the contrary, domestic mobile-phone operators were compensated LE100 million for the five days that their services were disrupted. The ECHR also gestured towards bringing suit against the mobile companies in US courts under the Alien Torts Statute.⁴⁰

From their part, mobile phone providers launched a reactionary advertising campaign around the country, plastering billboards with patriotic slogans and nationalist iconography accompanied by their respective logos. Companies scrambled to affirm that they had always been on the right side of the Revolution and that their hands had been chained by legal statues forcing them to suspend services. Vodaphone, Mobinil and

³⁹Full text in Arabic at <http://qadaya.net/?p=918>

⁴⁰ The use of ATS to sue multi-national corporations has come into recent question in the case of *Kiobel v. Royal Dutch Petroleum*, presently being heard before the U.S. Supreme Court.

Etisalat sent out apologetic text messages to subscribers and issued a nominal amount of free credit to subscribers as a gesture of solidarity. The even-keel pragmatism may be witnessed in Vodafone's 2011 CSR report (March, p10):

Vodafone, along with all other telecoms operators, complied with the request because we judged this to be in the best interests of our employees – to ensure their safety – and our customers. Non-compliance would have resulted in imprisonment of employees or suspension of our operating license. It was also likely that the government would have taken direct action to switch off mobile networks as they had the technical capacity to do this, which would have meant that restoring communications would have taken much longer. (...) Vodafone and other operators also complied with government requests to send a series of SMS messages. However, in the case of the last message transmitted about a pro-Mubarak march, we declined to let the message be sent in Vodafone's name and limited its circulation. We then formally informed the Egyptian authorities that any future instructions to send SMS messages must clearly show the authority requiring the message to be sent.

Given the history of telecommunication companies and internet providers in complying with the ministries of Interior, Telecommunications, and Mass Communications to test such blackouts as early as 2008, it is doubtful that the incident would have even received passing mention in the CSR reports if history had taken a different turn and Mubarak successfully suppressed the uprising.

To date, researchers and commentators have examined the telecommunications shutdown as an example of the resilience of political organizing and the adaptability of public communication that was able to shift from technical to more traditional means of disseminating information in the face of technological obstruction. This case has not, however, been sufficiently examined for its lessons in thinking about how private firms become the extended instruments of – or collaborators with - an authoritarian military-dominated regime. In this chapter, the Egyptian telecommunications sector will be employed as an analytical vehicle to shed light on the correspondence between market

liberalization and securitization as it plays out in the modern security state⁴¹. Aspects of the corporation's interactions in an Egyptian context aim to develop a substantive understanding of Corporate Social Responsibility that is oriented towards supporting a democratically accountable and popularly legitimate development trajectory.

Part 4.2 of this chapter will consider the emergence and intensification of a securitization agenda, which parallels a project of economic liberalization. It will consider how securitization as an underlying infrastructure to economic liberalization preserves centralized decision-making and results in little more than a cosmetic modernization without substantively altering authoritative dynamics. Part 4.3 will look specifically to securitization in the Egyptian telecommunications industry, as it was unrolled over the past two decades and will outline the background conditions that allowed for efficient and legally backed execution of the telecommunications shutdown. Part 4.4 will present some lessons learned from this case for the Corporate Social Responsibility agenda, emphasizing the need to locate an approach to CSR that takes more care for context than what is presently a universalized CSR project. Part 4.5 will conclude this chapter with gestures towards the prospects for CSR in a contemporary Egyptian context.

4.2 SECURITIZATION AS THE SHADOW OF NEOLIBERALISM

It is unclear what practical lessons – if any - have been learned from the telecommunications shutdown of 2011. The Egyptian military continues to benefit from a

⁴¹ The notion of the 'National Security State' will be used here as consistent with the definition outlined by Daniel Yergin (1977) in reference to national organization as pursued by the United States during the Cold War to ready itself "for perpetual confrontation and for war." "National Security State" was coined in reference to a "pattern of attitudes, policies, and institutions by which this task was to be effected"; featuring policies pursuing "containment, confrontation, and intervention", and institutions including "those government bureaucracies and private organizations that serve in permanent war preparedness." (p5-6)

policy of non-disclosure regarding its economic activities and appears intent on maintaining a privileged status outside and above publicly elected democratic bodies. In November 2011, the ruling Supreme Council of the Armed Forces backed a draft decree of supra-constitutional principles (Al-Selmi Document), which would formally institutionalize the positioning of the military above popular democratic institutions. The document would grant the Supreme Council of the Armed Forces (SCAF) veto power over the new constitution and protect the military budget from inspection by the public or by future Presidents or Parliaments. The action provoked outrage across political factions and was eventually rescinded. Such scenarios have become commonplace in a constant tug of war between the military establishment and newly emerging political rivals. Apparent flexing of the military's domination since January 2011 is exceedingly problematic in an economic context where military activities are estimated to comprise between 30% and 40% of the national GDP. A sweeping obsession with security continues to be marshaled to justify heavy-handed crackdown on civil liberties and to hedge in the military's dominant role. SCAF leadership appears keen to preserve its grip on legislative, executive and judicial powers as well as to protect its deep roots in the market. In the Egyptian case, the authoritative state has endured in substance while evolving in form; under the Ottoman Empire, continuing under French then English Occupation, through the years of Monarchial rule, and most recently under Egypt's four military-groomed presidents; each governing system has adapted its respective dynamics to preserve an authoritative order that places executive power out of reach to popular accountability. Now during a period of turbulent political transition, the discursive as

well as actionable appeals to security must be critically examined in the move towards an open political environment with democratically accountable institutions.

4.2.1 Securitization as Governance Strategy – Unpacking the National Security State

The notion of Securitization has been revisited and redefined since the end of the Cold War. With the advent of globalization and integrated economic systems, an appeal to the securitization of the state is asserted to balance the perforation of borders through the removal of trade barriers. At the same time, the security of the Nation is asserted to counter the changing demographic realities whether as a consequence of immigration or the polarized distribution of capital. On the part of the state it becomes necessary to assert power through coercive mechanisms; if the state authorities no longer have access to direct levers for economic coercion, then the national security imperative becomes an effective indirect mechanism in pursuit of the same objective. These dynamics manifest in an inverse correlation between economic liberalization and militarization/securitization of society.

Securitization as a discursive project defines a referent object that risks existential threat. As a governance strategy, this object then becomes a justification for subjugating legal rights and principles as necessary tradeoffs for protection against an existential threat. The securitization of a state that recognizes public welfare and sovereignty as one of its features becomes paradoxical, undermining the mechanisms of democracy in order to preserve and maintain existential viability of the Republic. Securitization as a governance strategy privileges existential concerns above democratic machinations, reducing the function of the state to mere preservation. Checks and balances that would

ordinarily be considered key or even defining features of the state are subsumed in the interest of national security. Buzan et al note,

[S]ecurity is about survival. It is when an issue is presented as posing an existential threat to a designated referent object (traditionally, but not necessarily, the state, incorporating government, territory, and society). The special nature of security threats justifies the use of extraordinary measures to handle them. The invocation of security has been the key to legitimizing the use of force, but more generally it has opened the way for the state to mobilize, or to take special powers, to handle existential threats. Traditionally, by saying “security,” a state representative declares an emergency condition, thus claiming a right to use whatever means are necessary to block a threatening development (Wæver 1988, 1995b) (in Buzan et al 1998, p21).

Wæver advances the definition of “security problems” as “developments that threaten the sovereignty or independence of a state in a particularly rapid or dramatic fashion, and deprive it of the capacity to manage by itself.” Such a threat “undercuts the political order” and “must therefore be met with the mobilization of the maximum effort” (1995, p54). Operationally, he asserts that the naming of a problem as one of relevance to “security” relegates its definition to the control of the state and its elites.

Trying to press the kind of unwanted fundamental political change on a ruling elite is similar to playing a game in which one’s opponent can change the rules at any time s/he likes. Power holders can always try to use the instrument of *securitization* of an issue to gain control over it. By definition, something is a security problem when the elites declare it to be so (p54).

In Egypt, these elites are dominantly affiliates of the military establishment. Steven Cook examines the Egypt’s military-dominated systems, noting that while the military has apparently returned to the barracks, “they have overseen the development of an institutional setting – a system – that ensures the predominance of the officers. Institutional alterations have taken place, but both the broad contours of the military-founded regime and the institutions that enable the military’s influence remain” allowing them to “rule but not govern without ever having to step beyond the boundaries of their barracks” (Cook 2007, p8). The relevance of a securitization agenda manifests in two

key ways. The first concerns a securitization of the economy in service of special interests, which has been systematically defended by the military sector since the 1952 Free Officers Coup. The sheltering of a wide military economic empire towards the objective of ‘readying the nation for war’ allows for the removal of the firm from the public exposure and vulnerability to popular opinion that it becomes subject to once it enters the market economy. This securitization project is legitimated through appeal to a nationalist narrative and an amplification of the external threats and geopolitical opportunities for exploitation by outside powers. I refer to this first question as the ‘economic objective’ to securitization. Buzan et al (1998, p38) affirm that with respect to economic securitization,

[F]irms rarely have a strong claim to a right of survival. If the survival of a firm is threatened, the firm will not be able to legitimize action beyond the normal, legal rules of the game. We rarely see middle-level security policy in this field except when economic arguments can be linked to what in economic terms is the secondary unit – the state – which can claim a natural right to survive, to defend its existence, and to take extraordinary measures (protectionism and the like) on a national issue (such as maintaining the capability for military mobilization) if deemed necessary.

The second security question – which I refer to as the ‘political objective’ to securitization - concerns the liberalization of Egypt’s national economic agenda more widely, through deregulation and the opening of trade barriers as consistent with stipulations by World Bank and IMF loans, and the requirements of Structural Adjustment Programs. This process is paralleled by a deepening centralization of control through a securitization agenda that appeals to a global liberal economic elite, which legitimizes its adherence to a narrative of reform.

The practice of superficial reforms is instrumental to the ruling military classes as it allows them to satisfy demands emerging from society, or from the international arena, without actually changing the character of the political order. Reformed institutions that

apparently resemble democratic ones protect an insulated military establishment from exposure and criticism in everyday politics and instead deflect opposition to the formal, public face of the government (Cook 2007, p9). This dynamic puts to question the presumed intentions of active liberalizing agendas that correlate market liberalization with political and institutional liberalization. In reality, the enactment of market liberalization and associated concessions against the traditional order come packaged with security fortifications that actually work against meaningful political reform.

Accordingly, anti-liberal political measures become not incidental to, but necessary for economic liberalization. In the case of ‘modernizing’ Egypt, the power landscape itself is not substantially altered; rather control of the national economy is brokered between a domestic military-political elite, and an international investor elite. The correspondence between market liberalization and the gutting of control from a formal, elected political apparatus appears to correspond with intensification of a considerably less accountable and more authoritative military control. This dispels the myth of ‘deregulation’ and instead suggests that monopolized control merely shifts in locus and tactics rather than being reallocated. The substance of political debate relocates from the statehouse to the war room, doing away with transparency. Given the relationships between domestic agents of multi-national enterprises and a monopolizing military agent, the agenda of the firm naturally becomes coupled with the agenda of the state as defined by its elite representatives. The double move of liberalization and securitization takes the emphasis off matters of populist concern such as distribution and equity, and favors an elite concern with preservation of power and productive efficiency.

In light of this, the aim of political reform should be what Wæver describes as “de-securitizing politics” rather than “securitizing problems” (1995, p57). Wæver cites the helpful example of Cold War Europe in describing how a securitization agenda may be contained to a militaristic context, or may alternately take the form of a metastatic and embedded governance strategy. “Since the West could not be destabilized from within (...) security concerns became focused on the “high politics” of military threats (...) while in the East it was broadened to incorporate economic security and various types of interference in domestic affairs” (p59). The Egyptian case is similar to the Eastern European approach to securitization. Accordingly, contemporary western efforts to encourage de-securitization in Egypt could learn from the Eastern European reforms of the 1980s that worked to minimize the use of the term “security” in reference to issues of national concern and instead to subject these issues to more open political struggle.⁴²

4.2.2 Faux-Modernization: The Anti-Liberal Nature of the Militarized Economy

Since the 1980s, Egypt has been on the path of market liberalization as stipulated by its loan guidelines and Structural Adjustment Programs from the World Bank and IMF. Egypt turned to the IMF in the 1990s in the face of a crippling national deficit, finalizing an agreement with the IMF in 1991 and an agreement with the World Bank in the same year. The crony capitalism of the Mubarak era featured mass privatization and the brokering of special business deals with insiders and leaders of the ruling National Democratic Party. While these strategies have been aimed at disassembling the socialist legacies of Gamal Abdel-Nasser’s rule, their success in improving general public welfare

⁴² Ole Wæver discusses the example of de-securitization in Central and Eastern Europe during the Cold War, and the attempts to “bring about change without generating a “securitization response by elites”, the impetus of which was to “turn threats into challenges; to move developments from the sphere of existential fear to one where they could be handled by ordinary means, as politics, economy, culture, and so on.” (p55) This strategy bears lessons for the present Egyptian context.

has been only nominal, with returns to economic growth falling largely in the hands of a minority business elite. At an observable level, poverty rates have skyrocketed and wealth distribution has become further polarized. Anwar Sadat's policy of economic *infitah* (opening) in the 1970s enabled a convergence between military development and private economic interests. Commissions for foreign investments into Egypt benefited members of the military enclave and Egypt's economic elite. In exchange for their commissions, officers have ensured continued contracts from the military (Cook 2007, p19).

The marriage between capital and military serves as a backdrop to the modern Egyptian state and is largely due to the military's mythical, untouchable standing in society. Reverence of this national institution began with the modernization of Egypt in 1805 under the rule of Muhammad Ali Pasha, which included the building of a strong military establishment (Farah 2009, pp.25-26). Mythology surrounding Egypt's military is given credence by the consistent characterization of Egypt as a nation that is constantly vulnerable to manipulation by outside forces due to its geostrategic significance. The country's devastating experiences of war with neighboring Israel further underscore a psychology of securitization and strategic emphasis on military might. The pre-eminent objective of readying Egypt for war, and maintaining the country's existential viability has dominated political decision-making since at least the 1950s. Egypt's modern history has witnessed the entrenchment of a militaristic logic to the country's national economy, which becomes fundamentally tied up with a national political project and the interests of the ruling elite. While the projects for development have varied dramatically from Abdel

Nasser's socialism to Mubarak's neoliberalism, the status of the military and its privileged position in the economy has been a constant.

Steven Cook characterizes the Egyptian political system as 'military-dominated' (as distinct from an overt military dictatorship), noting

The officers of the military enclave, along with their civilian allies, strategically created political systems that have benefited themselves at the expense of the rest of society. By overseeing the development of political institutions that allow for the *appearance* of pluralism but also incorporate key mechanisms for oversight and political control, the officers sought to guarantee the maintenance of their political order. Over time, the officers sought to conceal themselves behind the veneer of democratic institutions, representative structures, and legitimizing institutions that came to characterize their respective political systems. During periods of crisis, however, the military elite tend to strip away this façade, revealing themselves as the locus of power and reinforcing the authoritarian core of the political order (p15).

4.2.3 Enshrining Securitization in the Law

This dynamic has been preserved in the aftermath of the January 25th revolution as the military has maintained a dominant position in steering the direction of the political transition, clashing with activists and civilian political powers in what many interpret as a strategy in defense of its vast economic empire. The securitization narrative is not merely rhetorical, but finds firm backing in the legal system. Three key laws underpinning the securitization imperative and military rationality are discussed in brief for the implications they have on mediation between public/private sector and positioning of the military as an entrenched intermediary between the two:

Law 162/1958 - Emergency Law

Law 87/1960 – Law for National Mobilization

Law 4/1968 – Law Organizing the Defense Forces

Law 162/1958

Emergency rule has been a central feature of Egyptian governance since the earliest declaration of martial law by the British occupation in 1914. Egypt's first post-independence constitution in 1923 adopted the declarations of martial law. Emergency Law was formally ratified in 1958 (Law 162) and has been continually in place except for three years between 1964 and 1967 and 1 year between 1980 and 1981. Sadiq Reza gives an incisive account into the use of "Endless Emergency" in Egypt, noting that it is not so much a means of "exceptional authority" but that it is more accurately a normalized instrument used to suppress violent as well as nonviolent opposition against ruling powers, "they have been a vehicle for the creation of the modern Egyptian state and a tool for the consolidation and maintenance of political power by the government" (2007 p532). Emergency Law grants all power to declare a state of emergency to a Presidential authority and grants him/her license among other powers, to suppress virtually all civil liberties including preventing public assembly and movement, to search people and places without restrictions of the Criminal Procedure Code, arrest and detention without warrant or charge, the right to monitor and censor all communications and publications including all forms of media, to impose curfew, to seize assets and delay loan repayment, to isolate regional areas and suspend transportation (Article 3). Law 162 allows for the establishment of exceptional courts such as the State Security Courts and Supreme State Security Courts of Emergency and for the inclusion of members of the military in the formation of these courts (Article 7).

Law 87/1960

The law for General Mobilization (Law 87) was signed by Gamal Abdel-Nasser instating measures for national mobilization to war. Article 1 grants the President the

right to call for the general mobilization in response to “strained international relations or the risk of war or the outbreak of war or the occurrence of disasters or crises that threaten national security”. Mobilization entails the ‘militarization’ of all aspects of civilian life as well as public and private means of production towards the objective of national defense, with consequences of imprisonment and fines for anyone who violates directives of the President and the Armed Forces. When Egyptian authorities ordered the telecommunications network shutdown on January 27th 2011, it was legally unambiguous that the executive had the right to issue such a declaration. According to Article 67 of the Egyptian National Telecommunications Regulatory Act (2003),

The State competent authorities shall have the power to subject to their administration all Telecommunication Services and networks of any Operator or Service Provider and call operation and maintenance employees of such services and networks in case of natural or environmental disasters or during declared periods of general mobilization in accordance with the provisions of **Law No. 87 of 1960** or any other cases concerning National Security.

This is perhaps the biggest carte blanche currently extended to the Security bodies.

Law 4/1968

In the aftermath of Egypt’s defeat to Israel in June 1967, Abdel-Aziz (2011) notes that Egypt’s leadership was forced to scrutinize the organizational and systemic factors that had resulted in its national humiliation. This situation prompted investigation about the disorganization of the security sector, ambiguity about its chain of leadership and the scope of its powers. As a response to these concerns, Law 4 of 1968 was passed “Regarding the Control of State Defense Matters and the Armed Forces”, dealing with all strategic matters in a political and military sense including laying out provisions for the establishment of the Supreme Council of the Armed Forces. Law 4 prioritized all national resources to preparing for war; its lands, military, populace and economic enterprise.

While the Emergency Law is popularly the most cited target of security-related criticism, and while many argue for its repeal by virtue of its exploitation in order to silence political expression, prevent assembly among opposition, and quell dissent more generally, Law 4/1968 rarely passes the same degree of scrutiny though it arguably enables a similar ‘chilling effect’ in its claims to public and private property for military interests. Defensive security rationality continues to dominate and to legitimate arbitrary seizures of land and industries for ‘security interests’. Overt challenge of this status quo can dangerously lead to detention and trial before military courts. The military’s popular and largely well-respected standing in Egyptian society largely places it beyond reproach (Cook 2007, p74).

These three laws are part of a more expansive body of legal architecture and bureaucratic arrangement that privileges the military’s role in public, political, and economic affairs of the Egyptian state. While the absence of public records regarding military assets and expenditures makes impossible any accurate disclosure or monitoring of the military’s financial affairs, recent estimates observe that the army’s holdings extend to housing compounds, resorts, gas companies, consumer goods and electronics, estimating their control of 30 to 40% of the state’s economic activities. In a context where the State and the Military are two sides of the same coin, the extensive and corruptible powers that are granted to ruling authorities are further shielded from public accountability through appeals to national security. If a substantive structural revolution is now to take place, these underlying legal architectures will need to be brought to the surface and the military will need to be placed underneath the umbrella of the state rather than above it. This requires acknowledgment and de-normalization of the securitizing

rationality, which has been systematically programmed into the state identity for the better part of six decades.

4.3 SECURITIZING THE TELECOMMUNICATIONS INDUSTRY

James Der Derian's work on Security (1995) traces the theoretical genealogy of the concept through the work of Thomas Hobbes, Karl Marx, Friedrich Nietzsche, and Jean Baudrillard. He notes that for Baudrillard, "the task of modernity is no longer to demystify or disenchant illusion (...) but to save the reality principle, which in this case means, above all else, the sovereign state acting in an anarchical order to maintain and if possible expand its security and power in the face of penetrating, de-centering forces" (p38). The telecommunications networks are one such example of these de-centering forces, which challenge the totalized power of the state. In this section, Egypt's telecommunications blackout will be examined as an illustrative case of the country's systematic and correspondent 'liberalization' and 'securitization' as it has played out in the Information and Communications Technology (ICT) sector.

4.3.1 Securitizing ICT as Critical National Infrastructure

On the night of January 27th, 2011 James Cowie (2011) chronicled the sequence of shutdown as Egypt was systematically blacked out of the World Wide Web. He noted that between 22:00 and 23:00 UTC (midnight to 1am in Cairo) the night of the 27th, Egyptian service providers sequentially removed themselves from the along the following timeline:

- 22:12:34 exit Telecom Egypt
- 22:13:26 exit Raya
- 22:17:10 exit Link Egypt
- 22:19:02 exit Etisalat Misr
- 22:25:10 exit Internet Egypt

The sequential removal, with providers exiting one after the other, spaced a couple of minutes apart, suggests that the shutdown was not enacted by an automated system taking down all providers instantaneously, but rather that each service provider shut down its part of the Egyptian Internet separately, presumably in response to phone calls from the ruling authorities. The efficiency of the shutdown, while alarming, is also impressive and demonstrates the centralization and effectiveness of the chain of command.

The securitization of Egypt's telecommunications network and the legal infrastructure put in place to enforce it does not come as a particular surprise in the context of global telecommunications governance. Worldwide, the notion of Critical National Infrastructure (CNI) has been expanding in scope since it first emerged in the 1980s, and now includes, in addition to physical roadways, bridges, energy systems, also the infrastructure of communications. Andrew Jones notes that in the late 20th century, physical installations no longer sufficiently captured the 'critical' elements of national infrastructure and that it was with "advances in technology and in particular, the Internet, when people started to realize that this protection was not enough" (2007, p131). In accordance with a larger securitization agenda and its instruments, governance of this infrastructure becomes subject to centralized executive oversight and plans for its emergency protection are put in place. At the heart of governance challenges to protecting CNI is the reality that "many of the elements of the CNI are owned by a range of independent, mostly commercial, organizations." and that "While each of these individual organizations take security measures to protect their individual interests and those of their shareholders, it would be unreasonable to expect that they would invest in measures to secure those aspects that are of relevance to the nation state" (2007, p12).

Securitization of infrastructure is usually justified by executive powers a preventative measure against attacks or hijacking by an external enemy, which may threaten national stability. More recently, however, we have witnessed this rationality extending to uses of this infrastructure by civilians in violation of the ruling authorities. In the United States, recent debate over an Internet ‘kill switch’ has revived debate over regulation of critical national infrastructure, as it would extend to more technologically advanced forms of national connectivity. The Telecommunications Act dating from 1934 allows that in the case of a national emergency, the President may take over any line of communication. In 1998, President Bill Clinton issued a Presidential directive (PDD-63) on Critical Infrastructure Protection, recognizing parts of the nation’s infrastructure as critical to national and economic security, and outlining key steps to protect it. In 2003 the definition of infrastructure was updated in President Bush’s Homeland Security Presidential Directive (HSPD-7) for Critical Infrastructure Identification, Prioritization and Protection. Similarly, in the European Union, the European Commission issued a 2006 directive designating European critical infrastructure (EU COM 786). It is of course essential to consider national security and to maintain oversight and protection of national infrastructure; however, the tradeoffs between this priority and the maintenance of popular sovereignty in the face of encroaching securitization must be subject to critical examination.

4.3.2 Liberalization/Securitization of Egypt’s ICT Sector

A number of features make the Egyptian ICT sector suitable for analysis; the sector was entirely state-owned and controlled until the 1990s, its liberalization has been encouraged and heralded by the IMF and World Bank as a success story, and most

recently it has been the target of public concern regarding the intersection between public and private governance in the aftermath of the 2011 telecommunications blackout. While the emphasis will be on the particularity of the Egyptian Internet and mobile phone industry as well as the corresponding laws and regulations governing it, relevant connections and/or implications to the ICT sector in other regions may be extrapolated.

Until the early 1990s, Egypt retained an antiquated state-owned ICT infrastructure. In 1991 Egypt signed the World Trade Organization's Basic Telecommunications Agreement, making steps to integrate its ICT sector into the global economy. The process of ICT liberalization has been a largely technocratic one. In 1998 Telecom Egypt, the state-owned and incumbent operator, was turned into a joint stock company through Law 19/1998 and Presidential Decree 101/1998. The Ministry of Communication and Information Technology was established in the same year, and in accordance with Decree 10/1998, MCIT established the Telecommunications Regulatory Authority (NTRA) as an independent regulator of the telecommunications industry. Law 10/2003 further developed regulation of the telecommunications industry through establishment of the National Telecommunication Regulation Law and the National Telecommunications Regulatory Authority (replacing the 1998 Telecommunications Regulatory Authority). It was under authority of this institution that the telecommunications blackout was perpetrated in 2011. Article 67 of the NTRA notably grants the state "the power to subject to their administration all Telecommunication Services and networks of any Operator or Service (...) in case of natural or environmental disasters or during declared periods of general mobilization in accordance

with the provisions of Law No. 87 of 1960⁴³ or any other cases concerning National Security.”

In the mobile phone industry, Vodafone Egypt (parent company Vodafone Group) and Mobinil (parent company Orange) entered the Egyptian market in 1998, and Egypt’s third mobile provider Etisalat Misr (a subsidiary of Etisalat U.A.E.) entered the market in 2006. Data networking services became liberalized in 1999. Currently, four companies own the Internet infrastructure and are licensed as class A Internet Service Providers (Egynet, LINKdotNET, TE Data, and NOL). Eight companies are categorized as class B ISPs, meaning they purchase bandwidth from the class A providers and sell bandwidth to the rest of Egypt’s 208 ISPs. Despite the relative success of liberalization in Egypt that takes form in a diversity of service providers, “the nation still had too few providers with direct interconnections to international carriers, and lingering reliance on Telecom Egypt for much of the underlying physical infrastructure” (Cowie 2011). This made the infrastructure more vulnerable to swift and efficient shutdown; alternately, diversification of infrastructure ownership would have served as a protective barrier making holistic shutdown more difficult.

The status of Internet as a public utility was formalized in Egypt in January of 2002 with the launching of the “Free Internet” which provides low-speed dial-up Internet access at the cost of local calls. This cosmetic liberalization in the promotion of an “Information Society” was oddly paradoxical to the climate of repression to civil liberties, particularly free speech and assembly. Leila Hassanin of the Global Information Society Watch notes, “There is, in effect, a dichotomous approach towards liberalization in Egypt: liberalization of services and technical applications, but limitations on the

⁴³ Discussed in Part One.

“liberalization” of expression and on the inclusion of public involvement in the decision- and policy-making processes in the sector” (2007). Even now, calls for reform of the ICT sector appear heavily infiltrated by the security agenda.

Egyptian technology and telecommunications blogger Baher Esmat writes a critique of law 10 of 2003, which established the National Telecommunications Regulatory Act (2011). This law ultimately allowed for the Internet and mobile phone shutdown in late January and early February 2011. While the focus of mainstream and official criticism and discussion of reform is limited to Article 67, Esmat draws attention to the larger power dynamics that allowed for the pursuit of an ‘official decision’ seeking to be legitimated by this Article. He argues that authoritarian control of the telecommunications sector is not limited to this single Article, but actually reflective of a larger institutional complex. The present political situation, where an Executive has yet to be elected and where rule is carried out by military officials and appointees, is not the appropriate context to carry out this review and reform. In the present context, it is likely that attempts at reform would lead to an outcome with an even more stringent law that plays to the hands of the military/security sector.

Notably, in May 2011 the National Telecommunication Regulatory Agency suggested revision to the telecommunications law, which would subject the power to shut down the telecommunications network to the Council of Ministers and the President (Shorouk News 2011). This revision did not, however, provide any further clarification to the clause in the existing law, which refers to ‘threats to national security’ and leaves it open to its wide interpretation. In August 2011 the Egypt Independent reported that the National Telecommunications Regulatory Agency would be establishing a committee of

the National Security forces to revise Law 10/2003, specifically regarding article 67. This appears to be an effort to maintain the military/security sector's dominance in controlling questions that should be subject to democratic will. In August 2011, an updated draft of the law revised article 67 to read,

The President of the Council of Ministers shall determine the competent authority in the State which shall be specified to its control all telecommunications networks, to cope with cases of general mobilization referred to, and in all cases, to prohibit all or certain types of telecommunications services or stop the operation in whole or in part only upon the written decision issued by the President of the Republic, at the suggestion of the Council of Ministers, which must provide a detailed report to the People's Assembly of the reasons called for within 30 days from the issuance of the decision, and it is to the People's Assembly to realize its powers in this case, and it is not permissible to cut off emergency and relief services (Mogahed 2011).

The draft revision includes an additional paragraph to the article, clarifying cases of general mobilization which may allow the management of communications networks to be subordinated to the political powers; including [cases of] “tensions in international relations, the threat of war, natural and environmental disasters, crises threatening national security.” Again, the “national security” clause is not restricted or detailed any further, nor is it subject to legislative or judicial oversight. The revisions do not guarantee in any way that the events of late January/early February 2011 would not be permitted by the new law, as was the stated intention by Maged Othman, Minister of Technology and Telecommunications, in April 2011 (Khalaf 2011).

Egypt's telecommunications blackout demonstrates the efficacy of the securitization process and its apparently seamless implementation during a time of ‘national crisis’. It is particularly alarming how the machinations of securitization, when removed from a system of public accountability, may serve to ‘securitize’ an authoritative regime not against a clear outside enemy, but against the ‘threats’ of its own populace. Here the complexity of an ownership structure, which is controlled by ‘private’

entities to provide a ‘public’ service under the oversight of a ‘political’ authority raises questions that have thus far been scantily considered in CSR literature which does not tend to unpack the potential clashes between ‘political accountability’ and ‘social responsibility’. If the relationships and contracts underwriting corporate operations are themselves counter to the public interest, what is then the ‘social responsibility’ of such corporate entities?

4.4 LESSONS DERIVED FROM AN EGYPTIAN CSR

The telecommunications blackout highlights some of the key dynamics that enable a communications crackdown in Egypt and may be useful to informing the types of reforms that are called for in light of these dynamics. This case also provides useful comment on a wider phenomenon of the increasing securitization of telecommunications infrastructure and the tensions faced by private operators in mediating the objective of profit maximization and a legitimacy demand in service of the public good. Thus far, the main reactions to the blackout have taken the form of ambitious lawsuits, vigorous public relations campaigns for telecommunications providers, and sporadic consideration of related CSR issues that touch on the role of business in society. Beyond these responses, this episode provokes a critical engagement with underlying questions about the identity of the Corporation and its role in the enactment and perpetuation of a securitized military-state. CSR debates typically revolve around a fulcrum contesting the corporation’s obligations to its investors versus its obligations to the public. While the fiduciary relationship is a complex one, and rightly the focus of interrogation relative to conceptions of a wider audience, the fulcrum of the state/citizenry is more relevant to the questions in this analysis.

4.4.1 *Market-based CSR v. Structural CSR*

The question of legitimacy for the modern corporation may be differentiated into three dimensions: state legitimacy (in accordance with law and regulation), constituent legitimacy (in accordance with shareholder interests), and public legitimacy (in accordance with consumer or ‘community’ interests). Legal/political legitimacy grants the existential right to operate, constituent legitimacy is most familiarly established through the fiduciary relationship, and now the increasingly salient relevance of public legitimacy is addressed through the CSR agenda. The case for CSR has been defended on grounds of its moral, pragmatic, and cognitive merits.

CSR discourse continues to concern itself primarily with the tensions between fiduciary duty and primacy of the profit motive on the one hand, and how to reconcile their potential conflict with pursuit of the social good on the other hand. The staunchest arguments against CSR conceive of an arrangement where the legitimate function of the business sector is to pursue a profit for its shareholders while considerations of the broader ‘public good’ are a responsibility of the state, monitored and mediated by its respective institutions.

The dominant position in favor of CSR may be summarized by the business-managerial argument advanced by Porter and Kramer (2006) which states that profit and public good are not contradictory aims and that corporations may simultaneously pursue a profit while it is addressing the public good. Their argument builds onto the premise that the singular defining objective of the corporation is to generate profit. It is notable that this camp does not challenge the social framework claimed by CSR opposition; they do not deny that the defining objective of the corporation is to generate profit for its

shareholders. Rather, there is a utilitarian argument claiming that even in the exclusive pursuit of profit, returns can be augmented through support for the social good.

An alternative conception of CSR challenges this framing, taking to task the starting definition of the Corporation as solely a generator of profit, and arguing that this arrangement holds a wider social function with particular dynamics and responsibilities that are being manifested in the various contexts of its operation. This camp seizes the CSR doctrine as an opportunity to challenge the strict division of functions claimed by a liberal public/private paradigm and to assert a wider public responsibility for the private business corporation. The divergence between the two camps advocating for CSR is a significant one. The former takes as a given the existing laws and limits circumscribing a corporation and defining its operations, while the latter attempts to augment the rights-bearing corporation with a considerably thicker set of duties to its impacted public(s).

4.4.2 Identifying pre-conditions for meaningful CSR

CSR fits within a wider narrative of market-based self-regulation in accordance with a liberal market ideology. This approach is contingent upon certain preconditions being met; 1) commitment to shareholders and commitment to a wider social interest do not come into conflict, 2) legal commitments to the state do not come into conflict with a moral commitment to wider social interests. In the case that these premises are fulfilled, then CSR would then be a meaningful notion for encouraging corporations to evaluate and act upon their capacity to effect social good in their areas of operation. In the absence of one or both of these preconditions, however, CSR becomes little more than a managerial strategy with a narrowly circumscribed conception of the “Social” referent object of Corporate Social Responsibility.

In the Egyptian case, the second precondition comes into question as the core conflict comes between the state and the citizenry. The private telecom and Internet firms, who hold multi-million dollar contracts with the state, chose to favor direct legal compliance to a more broadly conceived public interest. These firms are perhaps some of the entities best positioned to pressure for more democratically compatible norms in the telecommunications industry. In this case example, the public outrage against private companies acknowledges the agency of these entities in taking decisions that are more in favor of the public interest. However, it also depoliticizes the role of the military and shifts the emphasis away from the regulatory and distributive imperative of the state to the efficiency and profit-oriented imperatives of the market. At issue here is not the legal commitment of a corporation to its shareholders at the expense of the public, but rather the legal commitment of a corporation to its host state at the expense of its citizenry.

When a corporation enters into a contractual agreement with the state, it is established as a singular legal entity with particular legal commitments to the public through its representing state. This is contingent on the assumption that the state is a legitimate agent of its citizenry and their interests. In the case that the state does not actually represent the best interest of its 'public', then these two commitments come in conflict. In the strict fiduciary understanding of the Corporation, the firm has no license to privilege a commitment to the public, over a legal contract brokered with the state. When multi-national corporations become involved in authoritarian states, the commitment to the state and the commitment to the social good might – and often do – come at odds. This conflict between the state and the citizenry presents a case of moral

ambiguity for the corporate “citizen” in negotiating between its legal responsibilities and its social responsibilities.

Engagement with a substantive legal-political CSR agenda will have to acknowledge certain preconditions; the one most notably observed in this case study is that CSR requires the pre-existence of independent democratic institutions, that are subject to public oversight, and that are not captured by military authoritarianism. CSR might also be expanded to become a vehicle through which this condition is actually brought about.

4.5 CONCLUSIONS

In its current framing, the Egyptian CSR discourse is not particularly helpful for effectively addressing those corporate behaviors that contradict the public welfare. In 2004, the Egyptian Corporate Responsibility Center (ECRC) was founded as an initiative between the Ministry of Investment (MOI) and the United Nations Development Program (UNDP). The affiliation of the ECRC as an extension of a government ministry casts skepticism on its independence and effectiveness.

CSR alone will not be able to challenge the crony capitalist practices of the Egyptian State unless it is accompanied by more fundamental reforms. A first step for reform is to confront the military’s rooted legacy and its instrumental powers within the formal political establishment. The global CSR network and sector-specific initiatives like the Global Network Initiative may be well positioned to de-normalize the appeal to national security and the militarized orientation as a means to outweigh matters of popular sovereignty. The present political context and the vivid memory of the shutdown

present an opportunity for reforms to the National Telecommunications Regulatory Act in pursuing greater accountability of the telecommunications sector.

The legal backing to the telecommunications blackout, the speed and efficiency with which it was imposed across Egypt, and the absence of any publicized resistance from private service providers suggests a coherence and internal reinforcement for a centralized, organized security rationality guiding the political maneuvers. While the lawsuits prompted by the telecommunications shutdown in Egypt might be effective in raising public expectations of private companies, they must not shift attention away from the backdrop of the securitized state and the militarized economy it enables. The relationship between market liberalization and heightened intrusion of an authoritative military has direct relevance for any attempts to renegotiate the market/state/military relationship. Attempts to target private corporate entities for public accountability must be complemented by reforms across national governmental infrastructure.

More than a year after the removal of key figures in the Mubarak regime, it appears that aspirational policy questions have once again become sidelined under pressures to stimulate economic growth and attract foreign direct investment. Common investment lore implies an alignment of objectives between Western investors and the firms they represent, with a promotion of political liberalization in host countries. It is suggested that authoritative regimes seeking to attract foreign investment comply with global regulatory standards, lifting repressive statutes like article 67. A closer look casts skepticism, however, on this presumed alignment of objectives between investors and the citizenry of repressive regimes. Investors might find that the better bargain is the one brokered with repressive elites whose authoritative clampdowns favor long-term investor

interests by maintaining predictable market conditions. It is more likely that a freer people, who are more unpredictable in their ideological and strategic alliances, would actually pose greater market risk. An authoritative regime might be the more secure ally given its dependence on an international legitimacy to offset its dearth of domestic legitimacy. With these dynamics taken into account, the narrative of social responsibility as fiscally rewarding begins to unravel.

If the corporate sector in Egypt is to leverage its capital power to pressure for a more democratically conducive operating environment, it will need to adopt a policy agenda that extends beyond its managerial concerns and that rigorously interrogates the structure and tools of the militarized economy. Looking beyond conventional debate over the legitimacy of CSR practices within the fiduciary and productive analyses of the corporate imperative, it is essential to acknowledge and caution away from CSR becoming a means of legitimating a depoliticized and increasingly securitized economic sphere. In order to develop and pursue a CSR agenda that is meaningful to the Egyptian context, analysts, activists and strategists must look beyond cosmetic adaptation of the corporate arrangements to the peripheral economies, and must instead formulate an authentic, locally rooted and historically informed backing to this socially progressive notion.

5 - Materiality as a Bridge Between Public and Private Spheres: The Case of Rio Tinto's Eagle Mine

5.1 INTRODUCTION

The public/private distinction is a foundational feature of the modern liberal arrangement. In accordance with this rationale, the commercial corporation is designated as a private entity while the municipal corporation – the city, or community – is designated as a public entity. The differentiation between private commercial corporations and public municipal corporations is a product of historical circumstance and legal innovation as rigorously documented by Gerald Frug in “The City as a Legal Concept” (1980). Preservation of the private status of the commercial corporation - and more broadly of the market - from encroachment by public intervention is intended to protect liberal democracy by maintaining an oppositional balance between public governmental and private market spheres. This notional divide between public and the private spheres is increasingly blurred through popular expectations that large corporations account for the public interest when considering their operational impacts and formulating their internal strategies.⁴⁴ A range of positions have emerged opining on the perceived incongruity between public interests and private demands with respect to the modern corporation, and several possibilities have been proposed for how these might be reconciled. A popular version of these conciliatory arguments advances that the ‘public interest’ and the ‘private interest’ might be functionally bridged by a ‘social risk’ consideration that captures community’s material relevance to corporate operations and incorporates it into managerial and financial decision-making. In this chapter I will argue

⁴⁴ The public-private distinction in law has been documented by Morton Horwitz and critiqued in the work of Duncan Kennedy.

that the notion of social risk or ‘community materiality’ offers a conceptual infrastructure that translates between public and private interests, and that its effectiveness as a bridging mechanism is due to the success of civil society activism in propelling change within both realms.⁴⁵

This chapter takes a critical look at the theoretical basis of the public/private distinction as it relates to the modern corporation, and examines the notion of community materiality and the ways that it engages contradictions of a public-private divide. It argues that materiality holds the potential to bridge the interests of the public and private spheres as they are presently conceptualized, while simultaneously upholding and reinforcing their distinct imperatives. It suggests that the process of interpreting the ‘material’ dimensions of a corporation’s social context presents an opportunity for civil society activists to unsettle existing power dynamics and to elevate the relevance of certain impacts or to increase the visibility of certain constituencies at an operating site. This case study will adopt the theoretical framework elaborated earlier in Chapter 3 characterizing different ‘political moments’ in the evolution of an emerging controversy from its initiation to its resolution or stabilization. It will examine how the parameters of a community are determined through assessment of its material relevance with respect to a company’s operations and how strategies are formulated to neutralize emerging social risks. Analysis will focus on the community context of Rio Tinto’s Eagle Mine in Marquette, Michigan and the innovation of a Community Environmental Monitoring

⁴⁵ Amitai Etzioni (2013) argues that the public/private distinction is becoming increasingly obsolete “because the two realms are intertwined, move in tandem, and seem to be codetermined.” (2013, p.39) Etzioni advances that a third force – social movements – has the capacity to shape both public and private realms. According to this argument “a key reason that both [public and private] realms tend to move mainly in tandem, despite significant differences in the pace and scope of change, is that major changes in both realms are, to a significant extent, initiated and propelled by communal factors, in particular, social movements.” (2013, p.63)

Program (CEMP) and a Community Scorecard to address local grievances regarding the site's environmental impacts. On the one hand, the notions of social risk or community materiality highlight a pragmatic opportunity for civil society actors to penetrate and influence the parameters of a private corporation's self-interest, while leaving unchallenged its commitment to fiduciary primacy. On the other hand, reliance on a privatized risk rationality to account for public impacts and externalities of a corporation's operations renders communities systemically vulnerable as diminished capacities of local government weaken a guarantee for rights-based protections. Relying on a private risk rationality to account for public impacts of corporations reinforces a public/private distinction while expanding the scope of the latter at the expense of the former.

Part 5.2 of this chapter begins with a theoretical account of the public/private distinction as it relates to commercial corporations, identifying landmark decisions throughout the legal history of the United States as they inform the identity of the modern corporation. It goes on to identify how Corporate Social Responsibility (CSR) has attempted to bridge the conceptual public/private divide in a functional manner, most recently through the notions of community materiality and social risk. Finally, it notes the politicized dimensions involved in the process of translating a contested phenomenon – in this case community materiality – from complex abstraction to simplified institution. Part 5.3 elaborates the case of Rio Tinto's Eagle Mine in Marquette, Michigan, noting the significance of the public/private distinction as it is reflected in the community/mine relationship and the expectations each one has of the other. It examines Rio Tinto's strategy for managing community and social dimensions as reflected through its

operational guidelines and procedures, directing focus to the CEMP and the Community Scorecard as mechanisms for abating controversies that emerge through civil society activism and legal action. Part 5.4 analyzes the steps and procedures entailed in defining and acting on community materiality at Eagle Mine, elaborating how a multi-faceted social context becomes assimilated to a stabilized, institutionalized form. It identifies the merits of community materiality in bridging public and corporate interests, while noting that materiality is couched within a broader narrative of privatized risk management that propagates a distinctly neoliberal governance pattern. Part 5.5, the concluding section of this chapter, revisits the public/private distinction at a more essential level and points to its inadequacy in explaining the political identity and realities of the modern corporation. It notes that the hollowing out of localized community power is less the result of private prerogative eclipsing public prerogative and more due to a transfer of decision-making from lower to higher scales of governance. The focus on a two-dimensional consideration of public versus private, discounts the essential relevance of political scale in determining decision-making agency. The scale of decision-making determines local power, while the public or private nature determines its durability.

5.2 CORPORATIONS AND THE PUBLIC/PRIVATE DISTINCTION

This section provides an account of the public/private distinction as it relates to commercial corporations in the U.S., noting the evolving identity of the corporation in the law and putting in context considerations of materiality and social risk as they attempt to bridge this divergence. Section 5.2.1 provides an account of five key court cases that have enabled a shift in the commercial corporation's legal standing from public to private entity over 200 years of case law. Section 5.2.2 demonstrates that CSR emerged and

evolved as a means to maintain coherence across public and private prerogatives, focusing on community materiality and social risk as the most recent incarnations of the CSR agenda. It draws attention to the process by which this materiality is produced, through translation of a complex issue into discrete variables for measurement and management.

5.2.1 Legal production of the corporation's private standing

In the early years of the American Republic, the corporate arrangement was enacted to fulfill public ends. Corporate charters were granted by state legislatures for the purpose of providing public services such as infrastructure and industrial projects. States issued charters only if organizers could provide convincing civic justification for their projects, and groups petitioning for a charter often had to appeal directly to the public to make the case for their social utility (Bloch & Lamoreaux 2004, p19). Critics attacked the monopolistic tendencies of the 19th century corporate arrangement and feared that state authorities might favor an elitist, exclusivist approach to granting corporate rights. In lieu of the customized process of state-issued incorporation charters, general incorporation laws were passed to appease populist concerns and to extend general incorporation rights to any group meeting a set of basic requirements. This expansion of incorporation rights eroded the idea that corporations held special privileges granted by the state, and also diminished the public interest requirement that had been previously required to justify a corporation's founding (p30). With the elimination of requirements to prove their social utility, corporations increasingly came to act as ordinary private enterprises. In this manner the private sphere was expanded with the increase in corporate

activity, while the public authority of the state was diminished as its capacity to oversee a corporation's internal affairs became restrained.

The evolution of the corporation's public to private transformation unfolded over nearly 200 years of legal rulings in the US courts. Over the course of their legal existence, corporations have evolved from quasi-public entities, to quasi-private ones, and now appreciate the status of individual citizens with constitutionally protected rights. In a 2011-2012 article in the Kentucky Law Journal, John Powell⁴⁶ and Stephen Menendian chronicle the evolution of the public-private divide in U.S. legal history, arguing that this unreflective discourse in law and popular culture has enabled an expansion of "excessive corporate prerogatives". Beginning with *Dartmouth College v. Woodward* and culminating with *Citizens United v. Federal Election Commission*, they demonstrate how the public/private distinction has allowed for an expansion of corporate power and influence, while at the same time insulating corporate prerogatives from government regulation by asserting their rights as private citizens (p84). Five landmark cases, *Dartmouth College v. Woodward* (*Dartmouth*), *Louisville, Cincinnati & Charleston Railroad Co. v. Letson* (*Letson*), *Santa Clara County v. Southern Pacific Railroad Co* (*Santa Clara*), *Lochner v. New York* (*Lochner*), and *Citizens United v. Federal Election Commission* (*Citizens United*) are noted to have had enduring impact on the identity of the modern corporation. I selected the first four cases for consideration because of their enduring precedence-setting influence and their relevance for later legal interpretations of the corporation's public/private standing. The fifth case is selected due to its consideration as the most significant contemporary interpretation by the U.S. Supreme

⁴⁶ The author chooses not to capitalize his name.

Court of the corporation's public/private standing. I will consider each of these cases in turn and summarize the implications it has had on corporate identity.

Dartmouth College v. Woodward

The case of *Dartmouth College v. Woodward*, heard by the US Supreme Court in 1819, resulted in a landmark decision regarding the private status of the corporation. The case concerned the right of the state legislature of New Hampshire to revise a charter granted to Dartmouth College by the King of England in 1769. In the majority opinion, Justice John Marshall defended the validity of the charter as a contract between the College's trustees and the King of England, preventing amendment by the state legislature in keeping with the constitution's protection of private contracts.

Justice Marshall's opinion referred to the corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law." The corporation's origin as a creation of the legislative charter made it "no more a state instrument than a natural person exercising the same powers would be." In his concurring opinion, Justice Joseph Story affirmed that the private standing of corporations did not place them "beyond the reach of the law" but that it did prevent the government from intervening in the internal affairs of private corporations,

When the corporation is said, at the bar, to be public, it is not merely meant that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control and direct the corporation and its funds and its franchises at its own good will and pleasure. Now such an authority does not exist in the government except where the corporation, is, in the strictest sense, public -- that is, where its whole interests and franchises are the exclusive property and domain of the government itself (pp.672-673).

Justice Marshall's position regarding the status of the corporate charter as a contract with constitutional protections is premised on the assumption that in their relationship to the state, corporations appreciate similar standing as individuals. The

conception of the corporation underlying the Dartmouth decision had far reaching implications for later rulings on the corporation's status as a legal person.

Louisville, Cincinnati & Charleston Railroad Co. v. Letson

In the Letson case, decided in 1844, a citizen of the state of New York brought suit against the Louisville, Cincinnati and Charleston Railroad Company for a failure to fulfill the terms of a contract regarding road construction. When the suit was brought before the Circuit Court of South Carolina, questions of jurisdiction were raised. Opposition raised the points that some of the members of the corporation were not citizens of South Carolina, and also that the state of South Carolina itself was a member of the corporation and that a state does not have standing as a citizen. The case concerned the right of corporations to sue and be sued if its members come from more than one state. The headnote to the case captures the key rationale of its ruling,

A corporation created by, and transacting business in a State, is to be deemed an inhabitant of the State, capable of being treated as a citizen, for all purposes of suing and being sued, and an averment of the facts of its creation and the place of transacting business, is sufficient to give the circuit courts jurisdiction.

The key take-away from this case was that for the purposes of lawsuit, corporations could be treated as citizens.

Santa Clara County v. Southern Pacific Railroad Co

The case of Santa Clara County dealt with changes to the taxation of railroad properties in the state of California in 1878-79. At the time, railroads were denied the same tax rights as were granted to individual citizens. In the Supreme Court hearing, the defense appealed to the Equal Protection Clause of the Fourteenth Amendment to the US constitution, claiming the same protections for corporations as are granted to natural persons.

the provisions of the Constitution and laws of California in respect to the assessment for taxation of the property of railway corporations operating railroads in more than one county, are in violation of the Fourteenth Amendment of the Constitution insofar as they require the assessment of their property at its full money value without making deduction, as in the case of railroads operated in one county and of other corporations and of natural persons, for the value of the mortgages covering the property assessed, thus imposing upon the defendant unequal burdens, and to that extent denying to it the equal protection of the laws.

While the Supreme Court's decision was not actually hinged on the Fourteenth Amendment, the Santa Clara case is typically referenced as the first instance where the Supreme Court affirmed extension of the Equal Protection Clause to corporations as well as to natural persons. The actual text of the decision does not even refer to the Fourteenth Amendment, but a part of the headnote⁴⁷ to the case reads,

One of the points made and discussed at length in the brief of counsel for defendants in error was that 'corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States.' Before argument, Mr. Chief Justice Waite said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.

Lochner v. New York⁴⁸

The 1905 Lochner case brought suit against New York's Bakeshop Act, claiming that the act's limitations of the number of hours a baker could work each day was an illegitimate intrusion of the State into private contract. The Supreme Court ruled that the Act was invalid and that it went beyond the legitimate police powers of the State. The court's decision is one of the most controversial in the history of the Supreme Court's

⁴⁷ The headnote to the case is prepared by the court reporter as a short case summary and is not an actual part of the Court's ruling. It is particularly interesting, then, that in the legal tradition of stare decisis (reliance on precedence) such a key position would derive from the text of a headnote and not the content of the majority or minority decisions.

⁴⁸ The *Lochner* decision is one of the most controversial in the U.S. Supreme Court's history and has inspired extensive commentary and analysis. David Bernstein provides a critical retrospective of the case in "Lochner v. New York: A Centennial Retrospective" (2005).

rulings. In its ruling, the Court held that “liberty of contract” is protected as part of the Equal Protection Clause,

The general right to make a contract in relation to his business is part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power.

In a dissenting opinion, Justice Oliver Wendell Holmes, Jr. attacked the majority’s interpretation that the Fourteenth Amendment enshrined the liberty of contract, noting the ruling to be an exercise of judicial activism built on a laissez faire economic theory,

[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. (...) I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law (pp.76-77).

This case set precedent for Equal Protection of commercial contracts and furthered a minimalist approach to State intervention in matters of economic agreement.

Citizens United v. Federal Election Commission⁴⁹

The Citizens United case, between the conservative lobbying group Citizens United and the United States Federal Election Commission (FEC), disputed the FEC’s decision to prevent Citizens United from airing a political film, which it deemed to constitute an “electioneering communication”. The FEC claimed that airing the film would violate the Bipartisan Campaign Reform Act (BCRA). The Supreme Court decision, however, struck down provisions of the BCRA that had previously prohibited

⁴⁹ The Citizens United decision has instigated extensive public controversy, discussed and analyzed by Zephyr Teachout in “The Historical Roots of Citizens United v. FEC: How Anarchists and Academics Accidentally Created Corporate Speech Rights” (2011).

independent expenditures and electioneering communications by corporations, arguing that constitutional protection of free speech under the First Amendment extends to associations of individuals and not just to individual speakers. This interpretation meant that the speech of corporations, associations and unions are also protected under the First Amendment.

Justice Stevens authored an extended dissenting opinion to the decision in which he argues that “corporate electioneering” is likely to “impair compelling governmental interests” and that “restrictions on that electioneering are less likely to encroach upon First Amendment freedoms”. He engages with the matter of the corporation’s complexity as an entity, challenging the simplistic equivalency between individuals and corporations under status of corporate protection.

The basic premise underlying the Court’s ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker’s identity, including its “identity” as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law (...) It is an interesting question “who” is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. Some individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful.

These five selected cases, spanning nearly 200 years of contestation over the legal identity of the corporation, demonstrate that the public/private status of the modern corporation is not naturally self-evident but actually the subject of vigorous debate and the product of contested case law. Over a series of rulings, the corporation, once a state-sanctioned entity with public ends, has acquired legal standing as a private individual with the constitutional protections of a human citizen.

5.2.2 Bridging public and private through the production of community materiality

The corporation's increasingly private legal standing contrasts with continued expectations from the wider public that it assumes a socially responsible agenda. One of the most explicit responses attempting to bridge this divergence has been expressed in the form of the CSR regime. The evolving CSR narrative can be roughly divided into three successive eras, each with a different conception of the corporate-community. Corporate interest in communities entered the mainstream with the popularization of first-wave CSR. The motivating argument behind this argument for community engagement is that philanthropic initiatives at a company's sites of operations are an investment in its reputational legitimacy. These activities in turn protect the company's license to operate and engender goodwill among consumers and investors. Second-wave CSR, prompted by arguments from Porter and Kramer, emphasizes linkages between core operations and public benefit, advancing the proposition that doing good for the community is also good for the company's bottom line and that investments in employees, the environment and local constituents reinforce strong company operations. The most recent wave of corporate interest in communities – relevant to this case study - has been prompted by the notion of social risk. Popularized by CSR icon John Ruggie, this wave argues that social risk is directly linked to financial materiality. A social risk framework moves 'social engagement' from the sphere of philanthropic or accessory CSR to assimilate it as a core element of operational risk. Kytle and Ruggie (2005) note the relevance of incorporating the social dimension in risk considerations for companies in an increasingly globalized context. Bekefi et al identify social risk as an area of strategic potential for companies (2006). Incorporating community as an element of social risk entails translating the social

context into measurable indicators that can be factored into return on investment calculations (Bekefi & Epstein 2006). Risk calculations attempt to capture those variables that jeopardize a corporation's operations. When community grievances and actions constitute material impact on a corporation's operations, an abstracted Community or Social Context becomes translated into discrete elements of community or social risk.

Social risk has quickly acquired momentum in corporate strategy, and with it abundant reference is made to the 'community',⁵⁰ and its importance to successful business operations. Today it is quite mainstream to find mention of community value, community engagement, and community participation, among other iterations of the value of 'community' in the public statements of corporate leadership. Social performance publications and sustainability reports for corporations typically feature a Communities section that highlights philanthropic projects and corporate investments in community training or welfare (Jenkins 2004). Despite prolific reference to 'community', the notion is seldom defined with much specificity. Beyond assumptions of its implicit significance and positive value, a functional elaboration of community is often bracketed out of discussion. This definitional obscurity results in applications of the term that are rhetorically euphemistic but practically anemic.

⁵⁰ The Across the range of its variable disciplinary applications and ideological expressions, community is consistently treated as an emotionally charged and evaluatively favorable notion. Raymond Williams comments that "unlike all other terms of social organization (state, nation, society, etc.) [community] seems never to be used unfavourably, and never to be given any positive opposing or distinguishing term" (1976, p.66). Raymond Plant similarly describes community as "an evaluative concept that plays a major legitimating role in our talk about institutions. (...) When the term is used in ordinary discourse, it is used not only to describe or to refer to a range of features in social life but also to put those features into a favorable perspective" (1978, pp.80-81). As a valued social state, community is central to discussions on social policy and is widely used to characterize and legitimate almost any valued social achievement. Despite – or perhaps because of – its rhetorical elasticity, 'community' is rather ambiguous as an operational concept.

The thin⁵¹ definition of community that appears in CSR and Sustainability reports distills the complexity of a more thickly contextualized consideration of the term. In fact, the translation of an abstract Community into simplified material form for internal risk assessment occurs against a background of dense dynamics and relationships. Physical attributes of community influence non-physical political dynamics. For example, a community's proximity to centers of power often means easier access to policy-makers. Its population size and electoral demographics influence its political capital. In mining operations, specifically, the physical location of minerals targeted for extraction determines the immediate physical population that will be disrupted by new developments. Scale of a community has relevance to power and agency. The political power granted to a particular unit or level of government is a legacy of its political and ideological system. In liberal societies for example, public power is conferred to individuals and to the State, with more limited venues for autonomous exercise of power at the intermediate level. Community also has a significant symbolic dimension⁵²;

⁵¹ The contrast between thick and thin has considerable precedent in philosophy and the social sciences. In philosophy Bernard Williams coined the 'thick concept' in reference to those concepts that bear a descriptive and evaluative meaning. Michael Smith's critique of the difference between thick and thin concludes that there is merely a thinner thick and a thicker thick. Joseph Ponterotto traces the varied uses of the term 'thick description' in the social sciences, from its original use by Gilbert Ryle in philosophy to its popularization by Clifford Geertz in anthropology and its subsequent adoption across the social sciences. Both uses of 'thick' share an appreciation for context, history, depth and interpretive or normative significance. This is the sense adopted in this work; thin refers to formalist arrangement, while thick is more deeply contextualized and captures implications and experiential significance.

⁵² In his seminal work *Imagined Communities* (1983) Benedict Anderson outlines the strategies that created the modern concept of the nation as "an imagined political community (...) imagined as both inherently limited and sovereign." (Anderson 1983, p.6) By Anderson's account, national community emerged as a way to link fraternity, power and time. (1983, p.36) Though Anderson's argument explains the construction of nation, his theories are transferrable to communities of a sub/supra national scale. The imagined community is a product of interlinked symbols,

the census, the map and the museum illuminate the late colonial state's style of thinking about its domain. The 'warp' of this thinking was a totalizing classificatory grid, which could be applied with endless flexibility to anything under the state's real or contemplated control (...) The effect of the grid was always to be able to say of anything that it was this, not that; it belonged here, not there. It was bounded, determinate, and therefore – in principle – countable. (Anderson 1983, p.184)

cohesion between members is forged through shared spaces, symbols, and repertoires constituting some coherent identity. The coherence of a community's symbolic identity strengthens its capacity to unite among disparate constituencies and interests for a collective agenda.

In the case of mining companies, discontented locals constitute both a proximate and an extended risk to site accessibility and to company operations. More immediately, organized locals can physically block access to a mining site, pursue legislative or legal obstructions, or undertake tactics to sabotage a mining operation and to prevent its perceived threats from impacting their community livelihood. In the case of large global corporations, localized social risks bear implications for a firm's global brand and reputation. If these intangible assets are compromised, then access and operations at other extraction sites might be jeopardized, and stock values and investor confidence might be threatened. Increasingly, companies are approaching social risk as a systematized feature of routine assessments. Interpreting social dynamics and demands at an operational site such that they are relevant to corporate performance necessitates that 'community' is translated from a vaguely evaluative label to specific procedures or indicators that are relevant to managerial decision-making and financial performance. In this sense, materiality functions as a conduit for interpreting those dynamics external to the operations of a firm and presenting them in the form of variables that are more immediately relevant to internal risk-assessment and decision-making. The sequence of 'political' stages in the process of interpreting the 'material' attributes of a phenomenon has been elaborated in Chapter 3 of this dissertation. Later on in this chapter, Part 5.4 will

draw on this framework to examine the production of ‘community materiality’ in the case of Eagle Mine.

5.3 PUBLIC/PRIVATE DYNAMICS AT RIO TINTO’S EAGLE MINE

This section turns from a theorized account of corporate legal and popular standing in relation to the public, to look at these dynamics in the specific case of Rio Tinto’s Eagle Mine in Marquette, Michigan. It looks at how the public/private distinction bears on the political and the commercial considerations with reference to the local constituencies involved. Section 5.3.1 begins with contextualization of Eagle Mine’s regulatory environment and its positioning in relation to the State and to the local community. Section 5.3.2 elaborates the local ‘public’ reaction to Rio Tinto’s entrance at the Marquette site. Section 5.3.3 looks at Rio Tinto’s response to the increasingly ‘material’ community context, while Section 5.3.4 focuses on the CEMP and the Community Scorecard as specific mechanisms for managing this source of operational and reputational risk.

5.3.1 The regulatory context at Eagle Mine

Michigan’s Upper Peninsula comprises a third of the state’s landmass but is home to a mere 3% of its population. The town of Marquette, with a population size of 21,000 (US Census 2010), and at a geographic distance of roughly 400 miles from the State Legislature in Lansing does not garner much political clout at the state level. This was long reflected in the State’s legislative agenda, which took little consideration of the northern region, until a recent boom in mineral mining prospects made the area more economically, and politically, relevant to the State’s interest.

This newly discovered relevance was followed by enactment of legal and regulatory statutes to grant to the State government greater control over local resources and development plans. A 2004 amendment - Part 632 - to Michigan's Natural Resources and Environmental Protection Act removed any potential community agency from local government units, granting authority to the State Department of Environmental Quality. Eagle Mine was the first project to be permitted under Part 632 mining regulation law.

Sec. 63203. (1) The department shall administer and enforce this part. In addition to other powers granted to it, the department shall promulgate rules to implement and administer this part, including standards for construction, operation, closure, postclosure monitoring, reclamation, and remediation of a mine. (...) (3) A local unit of government shall not regulate or control mining or reclamation activities that are subject to this part, including construction, operation, closure, postclosure monitoring, reclamation, and remediation activities, and does not have jurisdiction concerning the issuance of permits for those activities. A local unit of government may enact, maintain, and enforce ordinances, regulations, or resolutions affecting mining operations if the ordinances, regulations, or resolutions do not duplicate, contradict, or conflict with this part (MI HB6243 2004).

In July 2011, Michigan's State Legislature passed Bill No. 4746 which prevents local governments from zoning out unwanted mining activity. Section 205(3) reads,

An ordinance shall not prevent the extraction, by mining, of valuable natural resources from any property unless very serious consequences would result from the extraction of those natural resources. Natural resources shall be considered valuable for the purposes of this section if a person, by extracting the natural resources, can receive revenue and reasonably expect to operate at a profit.

The bill was introduced and passed through the legislature in a period of just two weeks. This action pre-empts potential conflict between local interests and state interests, privileging the latter. State Representative Matt Huuki expressed his support for the bill, noting that local opposition to businesses that are not tied to specific geographic sites is a different matter from extraction-based business because while other businesses can change location, the extractive sector is highly site-specific (Malewitz 2012).

In December 2012 Michigan's Governor Rick Snyder signed Public Act 414 of 2012 replacing local property taxes, corporate income tax, sales tax and use tax for non-

ferrous metallic minerals with a 2.75% severance tax. Of the revenue generated, local units of government such as counties, townships, school districts and the school aid fund, retain 65%, while 35% goes to a rural development fund administered by the state. The Act eases up-front costs on mining companies who no longer pay taxes until they actually start extracting minerals. The severance tax is promoted as being simpler and more reasonable than the old structure and is expected to promote further mining ventures in the Upper Peninsula. These legal and regulatory advances aim to promote an environment that is industry-friendly and that provides predictable, stable operating conditions. The power to set these terms is perceived to be more securely placed in the hands of an ‘impartial’ centralized government rather than subject to the sensitivities and unpredictabilities of local interests.

5.3.2 Community reactions to Eagle Mine

The Eagle Mine case begins in 2002 with the discovery of the ore body at Eagle Mine by Rio Tinto exploration. Land and Mineral rights were purchased in the period between 2003-2005. In 2006 Rio Tinto applied for government mining permits. Permits were approved in 2007, and the following year community groups brought suit against Rio Tinto challenging the validity of the permits. The courts ruled in 2009 to uphold the permits and mine surface construction began in 2010, with underground mine construction commencing the following year. Mine production is expected to begin in 2014, with anticipated extraction of up to 2,000 tons of ore per day,⁵³ with the life of the mine projected to be about 8 years.

⁵³ Sale of Eagle Mine to Toronto-based Lundin Mining was announced in June 2013. (Pepin 2013) This is part of a larger strategy by Rio Tinto to divest of non-core projects as a response to earlier overspeculation of the minerals market and financial cut-backs. Since February 2013 Rio Tinto had been operating the mine

The first lawsuits, in December 2007, were initiated in response to permits being approved for Eagle Mine's construction. A coalition of community groups, National Wildlife Federation, Huron Mountain Club, Keweenaw Bay Indian Community (KBIC), and Yellow Dog Watershed Preserve filed administrative appeals contesting issuance of the Mining Permit and Groundwater Discharge Permit by Michigan's Department of Environmental Quality (DEQ) for the Eagle Mine project. The four parties also filed a lawsuit in Ingham Circuit Court contesting the DEQ's issuance of the Air Use Permit. These groups identified Rio Tinto's entrance into their local as a threat to the area's environmental quality and their traditional use and identification with the land. They sought procedural and regulatory obstructions to put a stop to the mine's development.

In March 2009 the National Wildlife Federation, Yellow Dog Watershed Preserve, Inc., Keweenaw Bay Indian Community, and The Huron Mountain Club challenged the DEQ permit before Administrative Law Judge Richard Patterson who ruled to uphold the permits in August 2009. The case was then appealed to Ingham County Circuit Court. The case was appealed in Michigan's Court of Appeals in March 2011. The court's ruling reads

We are not persuaded by plaintiffs' claim that defendants waived the question of subject matter jurisdiction. (...) We are also not persuaded by plaintiffs' claim that a decision by the DNR could never be effectively challenged on appeal on the basis of the public trust doctrine because it is a fact-intensive claim that should be tried as an original action. (...) In light of our conclusion that the trial court properly granted summary disposition of Count III under MCR 2.116(C)(4), we decline to address plaintiffs' argument that the public trust doctrine applies to the land leased by the DNR.

with moderated construction, but the pace of construction and operation will now be accelerated with the sale to Lundin. Both companies have expressed a commitment to maintain agreements previously instated by Rio Tinto and the Marquette community. Rio Tinto's ability to sell the mine to Lundin, which has adopted a strategy of acquiring "high quality, advanced stage assets in low risk, mining oriented jurisdictions" is a mark of the success of the community strategy and the CEMP in reducing risk at the site.

The Huron Mountain Club filed a lawsuit against the U.S. Army Corps of Engineers in U.S. District Court, W.D. Michigan, Northern Division in May 2012 alleging that the Rio Tinto Eagle Mine did not obtain the necessary federal permits that should be required of it under the Clean Water Act and the Rivers and Harbors Appropriation Act. A federal judge refused the claim, and declared that the Club did not present a convincing argument that the suit would be successful in actual trial proceedings. District Judge Robert Holmes Bell found in July 2012 that “Upon consideration of all the relevant factors, the Court concludes that the plaintiff has not met its heavy burden to show that it should be granted preliminary injunctive relief. Plaintiff’s motion for a preliminary injunction will accordingly be denied.” These lawsuits were intentionally obstructionist, seeking to delay the initiation of mine construction in order to elevate operating standards or to prevent the project altogether. The public constituencies bringing suit in these cases perceived a threatening and adversarial relationship with Rio Tinto and accordingly sought backing from State bodies.

5.3.3 *Rio Tinto⁵⁴ and the Community variable*

Rio Tinto’s notoriously disastrous experience at the Bougainville Copper Mine in Papua, New Guinea in the 1970s and 80s and the closing of the mine in 1989 at a time when the company was implicated in the country’s civil war, informs a legacy of the relevance of social and political risk at a site of extractive operation. Today’s Rio Tinto was formed in 1995 through a merger between Rio Tinto-Zinc Corporation (RTZ) and the subsidiary Conzinc Riotinto (CRA) of Australia as a dually listed company. CRA’s

⁵⁴ Present day Rio Tinto or Rio Tinto Group is a British-Australian multinational corporation, presently the second-largest publicly listed mining company in the world, after BHP Billiton, with a 2013 market value of \$98.5 billion USD (Forbes 2013). It is headquartered in London and has a management office in Melbourne. Rio Tinto is listed on both the London Stock Exchange and the Australian Securities Exchange.

experience in the 1980s and early 1990s with Aboriginal groups in Australia demonstrated evolution in community expectations leading to greater demands for “control of exploration and mining access to land” (Harvey 2002, p1). This experience informed a cultural change within the firm with respect to its relationships with global stakeholders. A 1995 speech by Leon Davis, Rio Tinto’s Managing Director and Chief Executive Officer, at the Australian Institute of Company Directors, marks a shift in Rio Tinto’s mindset towards the community and social dimensions of its operations. An extract from the speech, below, demonstrates how community needs and concerns became elevated in the sector’s considerations to reach a level of importance on par with more technical expertise such as geology and engineering.

Perhaps we didn’t see early enough the need to align our technical and engineering skills with those concerned with relating to our own people as well as to our own and other communities. It’s not that we have been blind to changing social attitudes. Rather, we did not understand early enough that relationship-building competencies would be at the core of what makes a first class mining company. We know now this was wrong. We know that the so-called ‘soft’ skills are, in fact, ‘hard’ skills: hard to acquire and hard to practice. They are essentially people skills and we now know that they must be integrated into the core competencies of any enterprise that wishes to grow.

Since 1995 Rio Tinto’s increased attentiveness to the community variable has led to the creation of a Chief Advisor Community Relations position at the company’s London headquarters and the development of a worldwide Communities Policy, in addition to the adoption of procedures and strategy documents to guide community strategy, engagement, and communications. Bruce Harvey documents the features of Rio Tinto’s elaborated architecture for developing social competency,

[A] cascading set of global, regional and business unit community policies that are consistent with each other and with local circumstance; a set of values-based principles called ‘The Way We Work’ that guide operations interface with their workforces, their neighbours and the wider world; annually updated five-year business unit community plans that encompass defined local objectives and timeframes; annual local community reports for each business unit; an annual Rio Tinto global Health Environment and Community report that aggregates performance and highlights positive and negative

examples; six-monthly social and environmental reporting that flags significant issues to management and Rio Tinto; assurance questionnaires for each operation; Health, Environment and Community Reviews focusing on long-term issues at least once every four years for all operations; and more frequent internal and external audits of the operations that focus on current performance (p2).

Notwithstanding, Harvey's 2002 survey of Rio Tinto's social competency notes the need to develop second-tier competencies in the company, particularly at the level of middle management that tends to emphasize technical competence over 'softer' aspects of operations. Since 2002 Rio Tinto's approach to community has witnessed some significant milestones. In 2006 the company shifted to a Social Performance approach, which includes audits by a site managed assessment (SMA) evaluating the extent to which a business unit's Communities policy meets the company's Social Performance standards. In 2010, Rio Tinto established the Stakeholder Engagement Academy (SEA) in partnership with Georgetown University's McDonough School of Business, which enrolls Rio Tinto employees into a four-day residential course as an effort to embed stakeholder-inclusive decision-making at all levels of company operations. In 2012 Rio Tinto innovated the third-party monitoring arrangement at the Eagle Mine site in Marquette, Michigan, in partnership with community organizations. The Community Environmental Monitoring Program establishes an independent third party body that would maintain environmental monitoring over the site. These advances demonstrate a commitment by Rio Tinto to create greater harmonization between its internal firm identity and its external social interactions. It is with this company culture and legacy in mind that we turn now to Eagle Mine.

5.3.4 *Eagle Mine and the CEMP solution*

In a 2012 case study, commissioned by Rio Tinto and the Superior Watershed Partnership (SWP), Peter Plastrik produced an official narrative of the Eagle Mine and CEMP arrangement. The first in a forthcoming series of case studies, “The Unity of Place” draws a conventional storyline, beginning with conflict between community and corporation, followed by a mediating intervention, and concluding peaceable resolution. While the illustrative account conveys an encouraging arc from controversy to resolution, it distills some of the messier, and most insightful, elements of controversy that overspill the narrative boundaries.

The community-based monitoring arrangement was devised to create a space for collaborative cooperation between community and corporation by granting to the community greater oversight of the impacts of the mine construction and operation. In the CEMP arrangement, the 24-year-old Marquette County Community Foundation (MCCF) was identified as an independent, intermediary body to manage the funds contributed by Rio Tinto for environmental monitoring. According to the arrangement, Rio Tinto would contribute \$1.2 million in the first three years of the agreement, paid out according to terms agreed to by all three parties. The Marquette County Community Foundation selects a five-member board to oversee execution of the CEMP arrangement. The board is also tasked with settling any disputes between the Partnership and Rio Tinto relating to the monitoring agreement. The board is intended to bring together membership from the relevant community sectors with one member from each: the foundation board, the Keweenaw Bay Indian Community, environmental science background, the mining

sector, and the community at large. The first board was appointed in December of 2012, with a notable absence of participation from the KBIC (The Mining Journal 2012).

In mid-August 2012 Rio Tinto, The Superior Watershed Partnership, and Marquette County Community Foundation all signed off on the monitoring agreement and on October 1, the agreement officially took effect. The CEMP was devised as a resolution to the Eagle Mine controversy based on the physical consequences of the mine's operations. This emphasis on environmental monitoring granted primacy to the material aspects of community and emphasized the physical elements impacting a community's identity and integrity. In this way, using the physical environment as a material embodiment of the community enabled a space for participatory decision-making and accountability without agitating the questions of more symbolic and immaterial aspects of community identity, function, resilience and impact.

In 2013 Rio Tinto launched the Community Scorecard initiative at Eagle Mine. This is the first site where the Scorecard innovation has been implemented. It is designed to be a mechanism for regular community feedback on mine operations and to allow attendees at community meetings to vote in real-time "whether Rio Tinto exceeds, meets or falls below expectations or whether they needed more information on the following five areas: environmental performance, safety, local hiring, transparency/communication and "leaving more wood on the woodpile" - or leaving more jobs in the area outside the mining industry to combat the boom and bust that often comes with mining" (Anderson 2013). The Scorecard is to be administered every six months, with company workers or contractors excluded from participation. Results of Community Scorecard data is published on Rio Tinto's Eagle Mine website.

For both Rio Tinto and the local community, Eagle Mine bears considerable precedence-setting and symbolic significance. For Rio Tinto, this site is one among many others in the Lake Superior basin that hold potential for mineral exploration and mining. Peter Plastrik writes that “At the Partnerships board meeting, Carl Lindquist reminded his directors of the bigger stakes involved, showing them a 2009 map of the Lake Superior basin marked with more than 60 red dots for potential mineral exploration and mining” (2012 p11).

5.4 BRIDGING PUBLIC AND PRIVATE THROUGH COMMUNITY MATERIALITY

The controversies surrounding Rio Tinto’s Eagle Mine provide a useful example for examining ‘social risk’ and the corresponding process of producing community materiality. The aims of this section are two-fold. First, in Section 5.4.1, it will consider how materiality – in this case community materiality – becomes interpreted and defined over the course of an unfolding controversy. It will follow how the case of Rio Tinto’s Eagle Mine was able to cross from a state of community opposition to the mine, to reach a stable dynamic in the form of a CEMP. It will interpret the process through which Community became translated from a set of relational dynamics to a concrete procedural arrangement through the theoretical framework elaborated in Chapter 3. This analysis is intended to demonstrate how materiality serves as a conduit for interpreting public community interests into private corporate interests while highlighting the political moments encompassed in that translational process. The second aim of this section, elaborated in Section 5.4.2, is to go beyond the public/private paradigm to observe the larger power-shifts that the CEMP arrangement helps to legitimize, and to also note the

manner in which these dynamics reinforce a form of community participation while undermining the substance of local political agency.

5.4.1 Community, from public interest to private arrangement

Issue emergence with the filing of permits for mine construction

The discovery of ore at the Eagle Rock site in Marquette, Michigan was the first material incident changing the conditions in Marquette. It was the filing of permits for mining by Rio Tinto, however, that provoked a clear reaction from the local community. The entry of the new mining operator into the community marked a ‘political’ instant. It disrupted the pre-existing pattern of relations and provoked opposition to the mine as a reflection of an agitated relational landscape.

Framing the Eagle Mine controversy as an environmental issue

It was through deliberate decision that the community controversy became framed with respect to its environmental dimensions. At the outset of controversy, opposition to the mine related to Eagle Rock’s religious significance to the Keweenaw Bay Indian Community, changes to the local culture and character of the town of Marquette, as well as potential contamination of the Salmon Trout River. Alternative framings to the environmental quality grievance were presented in the Public Trust appeal of the lawsuits in Michigan courts.

At the earliest stage of community controversy, a host of issues arose in addition to environmental impact and quality. Among these issues was the sacred relevance of Eagle Rock to the KBIC. There was a wide range of positions within the Eagle Mine community with respect to support and opposition to mining in the area. Two economics professors from Northern Michigan University, Tawni Ferrarini and Marcelo Siles,

conducted focus group interviews among community members in 2010 and in 2012. In these focus groups the environment became salient as the most sensitive issue. Since changes to the site require re-application to permitting, this process could quickly become obstructive if community brings up active resistance at each comment period. Rio Tinto wanted to pre-empt this by proactively engaging with the environmental issues. In 2011, two community members attended Rio Tinto's Annual General Meeting and requested independent monitoring of the site. Already, a community group was gathering funds to conduct independent monitoring. Rio Tinto decided to get ahead of this process and to establish scientific standards (poor results, even if collected inaccurately pose a threat to the company reputation/brand) and began pursuing the third-party monitoring scheme in a manner that would allow them to retain greater control. Social license to operate should focus on one or two specialized areas where a company can be particularly effective. By recognizing the limited political claims of the KBIC, Rio Tinto chose to focus on appeasing the environmental lobby. 'Opposition' was then narrowed to 'opposition due to environmental impact'.

Defining the public interest and identifying the legitimate 'public'

Opposition to mining developments typically consists of alliances between indigenous tribes and environmental lobbies. By addressing the grievances of one of the two parties, opposition becomes fragmented and one group on its own is less likely to pose grievous obstruction. In the US, as contrasted with Australia, tribal interests do not count off of the reservation. Therefore at Eagle Mine it was more meaningful to sideline tribal interests while addressing the environmental lobby. The KBIC, with a size of 3,552 members, is appealing to the Federal Government, which divests its involvement with

tribal communities to the State level. KBIC claims rights of traditional lease to the land because the mine is on ceded treaty lands. The land in the western half of Michigan's Upper Peninsular was given to the U.S. government by the Chippewa under the Treaty of 1842. Under the agreement the tribes were compensated for the land and allowed to maintain hunting, fishing and gathering activities. Kennecott/Rio Tinto owns 1,600 acres of that land, including the Eagle Mine site (Bienkowski 2012). Seeing as how KBIC does not wield political standing in this case, there is active racism/exclusion on the part of Rio Tinto's lack of engagement with the community and its concerns. KBIC is currently in litigation against Eagle Mine, and until that process resolved there are no open pathways of engagement between the two parties. In the litigation process, Rio Tinto is on the record rebutting that the Eagle Rock is not sacred as the KBIC claim it to be. There is no institutionalized conversation in the US about treaty rights with Native American communities.

Deliberative legitimacy through community listening sessions

Rio Tinto conducted a series of community forums and listening sessions in anticipation of and after setting up the CEMP. Community listening sessions are organized to create deliberative legitimacy. These are conducted within the context of MCCF and SWP. Community forums were held in April 2011, September 2012, December 2012 May 2013.

The Community Scorecard is intended to further the deliberative legitimacy to Rio Tinto's relationship with the public. The Community Scorecard captures aspects of controversy overspill that the CEMP does not capture. It includes the five categories of: transparency and communication, safety, environmental performance, local hire, and

leave more wood on the woodpile. The Community Scorecard process, touted by Rio Tinto for its deliberative inclusiveness, is criticized by community members as being unscientific and non-representative. Kathleen Heideman of the Save the Wild U.P. comments,

Rio Tinto portrays this data as scientific -- but that could not be farther from the truth (...) Their 'data' from the last round polled less than 300 people -- hardly representative of the 76,502 residents of Marquette and Baraga counties. It's a global mining corporation's idea of democracy: first they show slides about how great they are -- then we should click to indicate our agreement. That's meaningless. It's not voting.

Issue stabilization in the form of the CEMP

Community outreach is institutionalized in the form of CEMP and Community Scorecard. The procedural routines established by the CEMP narrows the range of community concerns to the environmental dimension, and it enshrines an adherence to 'scientific standards' through independent monitoring as the means to address the community's grievances. By providing arenas that are conducive to communication between community and company, and lending social approval to the company's involvements in the area, the CEMP neutralizes a major variable of community risk at the Eagle Mine operation. It effectively changes the culture of dialogue between company and community, but in essence does not grant the community any greater formal governing authority over the company.

Community resistance to the mine has not simply disappeared with the establishment of the CEMP. At the fourth and final community forum relating to the SWP held in Marquette in December 2012, some attendees criticized the SWP for affirming Rio Tinto's social license to operate. Jon Saari, of the Upper Peninsula Environmental Coalition commented,

They are cheering this. This is their entrance into our community, and that's the price that the SWP has, in a sense, paid, and I hope the substance of it is going to work in our favor (...) But the interpretation of it now has essentially given Rio Tinto a social license in our community, and they couldn't be happier with this... (Stark 2012)

Community opposition notes that the SWP will be conducting verification monitoring, but that the criteria that are monitored in the first place are inadequate in themselves, “Unfortunately, government regulators have failed to properly regulate these operations. Now Rio Tinto wants you to believe that's not the case by having an independent review of a failed regulatory process” (Loman 2012).

Rio Tinto's interventions have, for the most part, stabilized the parameters of controversy and created spaces for dispute that are carefully controlled for scope and content. It has succeeded in neutralizing social risk in order to maintain its operations, but it has not – and does not need to – eliminate the substance of that controversy altogether. The instrumental value of Eagle Mine's community legitimacy enables a spillover effect to other targeted mine developments; high-grade copper has been identified by Rio Tinto in the Mid-continental Rift and in Minnesota. Success at Eagle Mine is a door opener to a bigger venture of copper prospecting. The investment in developing Eagle Mine as a successful icon has also neutralized risk in a manner that makes the site more saleable to a company like Lundin who looks for low-risk sites.

5.4.2 'Community Materiality' as a bridge between public and private imperatives

While corporate engagement with community traditionally lends a euphemistic legitimacy to corporate-public relationships, it also creates an opportunity for oppositional organizing, and for assembly of social networks that interrogate a corporation's vision of local interest. Accordingly, the stages of defining community materiality may present opportunities for challenging the parameters of a corporation's

‘private’ interests. As demonstrated in the previous section, the process of interpreting materiality is not a direct exercise in translation, but a series of political moments informed by different interests and constituencies. Each political moment is an opportunity for exclusion of particular contingencies or overflow groups, at the same time that it is a process for inclusion of particular pieces of measurable evidence that might inform more comprehensive risk assessment.

While the notion of materiality effectively bridges public and private imperatives by translating public demands into the private rationale of self-interest, it does not address the wider phenomenon of expanded corporate power and political determination. Materiality legitimizes consideration of social agendas for corporate managers and decision-makers. At the same time, it also legitimizes a wider ideological approach that subjects community interests to the priority of the corporate bottom line. This makes the relevance of the community vulnerable to the fluctuations of the market and the attention that can be granted to secondary considerations. The current decline in the mining sector marks a shift in focus, away from the establishment of new mine sites (greenfields) and towards the maintenance of core operations at large-scale established mine sites (brownfields). Given this change in strategy, it is far more difficult to change existing operations and to make the case for community-focused initiatives to internal company decision-makers. Considering materiality as more than a static, objective measure and understanding its function as ‘sign’ or ‘interpretant’ for a phenomenon is a first step to understanding how it feeds into a larger system of risk management.

5.5 CONCLUSIONS – BEYOND PUBLIC/PRIVATE

This chapter has considered the case of community materiality and the ways it both challenges and reinforces the public/private divide that underpins the liberal corporate arrangement. It has argued that different manifestations of CSR attempt to bridge the public and private spheres in response to discontent over the diminished public prerogative of the corporation. It focused particularly on ‘community materiality’ and ‘social risk’ and explored how these notions are operationalized as functional concepts to assimilate public concerns into metrics and indicators that correspond with considerations of private risk assessment and management. It examined these themes through the case of Rio Tinto’s Eagle Mine, noting how the process of defining, assimilating, and normalizing the ‘public’ into terms that accord with a ‘private’ rationality entails translational steps that are ‘political’ in several different senses.

Earlier sections have highlighted the inadequacy of the public/private distinction for understanding the corporation’s public identity. In this final section I turn away from the public/private dichotomy and towards the possibility of a more complex heuristic for explaining the political identity of the modern corporation. powell⁵⁵ and Menendian propose a four-dimensional alternative to the public/private distinction, introducing an organizational framework that consists of public, private, non-public/non-private, and corporate. They note that private space is “conceived largely as being free from the coercive, concentrated power of the state”, and that privatization ostensibly shifts something from the realm of the public space into the private space. powell and Menendian argue, however, that in reality privatization expands corporate space such that “what replaces the state in corporate space is the coercive, concentrated power of the

⁵⁵ The author does not capitalize his name.

corporation” (p139). In this sense, “The privatization of public entities or the delegation of vital governmental services is more than a mere shift in categories of domains – public to private – it is a shift in power.” The four categories proposed as an alternative to the public/private heuristic more accurately capture these shifts in power which are, in effect, not from public to private, but from public to corporate (p142). This heuristic effectively allows for a more revealing interpretation of the role of corporations in the US and in the world.

This heuristic is helpful for beginning to conceptualize the corporate realm as distinct from the realm of private individual protections. Taken one step further, another version of this heuristic would distinguish between scales within the public realm into national-public and local-public. To publicize something – to shift it from the private to the public space – ostensibly subjects it to considerations of the collective good rather than to individual self-interest. However, the scale at which public authority is exercised determines the nature of the public interest. In a purely consequentialist consideration, consistent with the utilitarian bent of contemporary public policy, the good for the greatest number becomes necessarily majoritarian in conceiving of the public good. The more specific a unit of decision-making is to a particular population group, the greater the likelihood that ‘public interest’ might align with ‘individual interest’.

Harm and benefit in the extractive industry is a scaled experience. In the case of the mining sector, there is a distinct geographic concentration of social and environmental impacts on a physical (local) community unit that does not necessarily line up with the distribution of financial benefits allocated across a larger (state) political unit. When assessments of the costs and benefits of an economic development are retained at

the State level, particular community interests are considered in relation to a larger collective interest. In order to relegate agency and self-determination to the ‘community’, decision-making power needs to shift from national-public and corporate to local-public and private.

When considering matters of corporate-public relations, the key point in question is not the public/private designation but the scale of control/decision-making. The hollowing out of localized community power is due less to a shift towards private rather than public dominance, and more to shifted emphasis on the scale at which decision-making takes place, whether with a public or with a private prerogative. The scale of decision-making determines local power, while the public or private nature determines its durability. In the Eagle Mine case we note that both public and corporate spaces are expanded while localized public and private are narrowed. The Part 632 amendment to Michigan’s Natural Resources and Environmental Protection Act (2004) and House Bill 4762 (2011) limit the authority of local government over the mining sector, placing it within the control of the state-level authority. Under Bill 4762, local governments can regulate but in very rare cases prohibit extraction of natural resources. If costs imposed on the public are outweighed by benefits of extraction, local government cannot deny an application for resource extraction. The exception is for cases where “very serious consequences” would result from the mining operation; with the “cost” being based on public expenses resulting from extraction while the “benefit” is based on demand for the extracted resource. At the same time that the private corporate sector makes gestures in support of community ownership and oversight of mining operations, the very substance of this agency is undermined by such policy centralization. It is notable that in this case,

the corporation reinvigorates the variable of geography (local community) in their interest while the State attempts to diminish its effect. It is by acknowledging *and engaging* such paradoxical dimensions of the modern corporation, that we can begin to identify nodes, leverage points, and ‘political moments’ to challenge and reinterpret institutions and theories that have been undermined by contemporary conditions and crises.

6 - Towards a Transnational Governance Mechanism for Negotiating Public Responsibilities of the Global Corporation: the OECD's National Contact Point Mechanism and the Case of Villa Inflammable

6.1 INTRODUCTION

The modern multi-national corporation is at once a singular unit as well as a constellation of entities. For the purposes of brand unity and global recognition, corporate strategists work to manufacture a coherent narrative that translates their firm's identity across cultural and geographic barriers. With respect to legal identity, however, this constellation of related entities fractures into self-contained units, each of which answers to the particular legal and operational jurisdiction in the area where it operates. A single corporation might simultaneously fall under the jurisdiction of the country where it is incorporated, the disparate jurisdictions at sites where it maintains operations worldwide, and the multiple discursive umbrellas of international bodies and investor coalitions that lend oversight and accreditation to multinational firms. This dynamic transcends the mechanisms for direct regulation of business that were originally devised to operate within a territorialized conception of the State and its legally sanctioned private enterprises. This complex corporate identity and the plurality of affiliations that it encounters are not matched with a sufficiently complex legal identity and formal transnational regulatory framework.

The plurality of citizenship identities conferred on a single multi-national corporation engenders a host of differentiated 'publics' and social contracts to which it is accountable. The matter of a corporation's public legal identity becomes iteratively

defined through the efforts of social movement campaigns, through media coverage, through investor petitions and shareholder resolutions, through law and policy innovations, and increasingly through international forums and global codes of conduct. The academic literature has considered at length the role of each of these interventions in influencing norms and pursuing grievances for infractions committed by corporations against public constituencies. With respect to legal mechanisms, the role of the courts and litigation projects in contesting the corporation and its public obligations has been examined from a number of different angles. Legal scholar Philip Blumberg highlights the incongruity between the manifest networks and operations of a multinational enterprise, and the legal tools available to manage these realities,

[E]ffective regulation of corporate groups or their activities inevitably requires control of all the components participating in the enterprise. Where multinational groups are concerned, this inevitably means extraterritoriality. (...) From the viewpoint of effective economic regulation, it is not merely appropriate, it is essential that the legal structure match the economic structure of the enterprise subject to the regulatory system. However, the extraterritorial assertion of national law inherent in the application of enterprise principles to components of multinational groups inevitably will engender international confrontation and disrupt international trade and relations (1993, p201).

The challenges of relying on national legal structures to address transnational economic realities are highlighted in the example of Argentina's Villa Inflamable. The local community in this case, as in many other examples worldwide, is implicated in a complex legal and governance landscape. For more than eight decades, Inflamable residents along with other communities in the Matanza Riachuelo Basin area have experienced health impacts from the operations of a petrochemical industry at the neighboring Polo Petroquimico y Puerto Dock Sud compound. In addition to compromised water, soil, and air quality, inhabitants report health impacts such as lead poisoning, skin rashes, chronic headaches, and other ailments. The question of

jurisdiction has been a persistently controversial matter in attempting to negotiate for more extensive public responsibilities from the petrochemical operators, the most visible of them being Shell's Argentine subsidiary (Shell CAPSA). The global nature of a corporation like Shell and its identity both as a unitary brand entity and as a collective of differentiated component enterprises highlights the challenges of identifying appropriate jurisdictions and forums – both legal and non-legal – to mediate between the affiliates of global corporations and local publics who seek to have their grievances acknowledged and addressed. Accordingly, the case of Villa Inflamable is instructive for unpacking dynamics of the transnational corporation and exploring the opportunity for developing a corresponding mechanism to mediate between these dimensions.

In Part 6.2 of this chapter, I will summarize and contrast the entity and enterprise theories of the modern corporation while paying attention to their implications for interpreting and devising mechanisms to deal with corporate legal liability. I will consider these two theories with reference to the Argentine legal context. In Part 6.3, I will look at one example of an international mechanism attempting to confront and mediate the realities of the global corporate enterprise, specifically the Organization for Economic Cooperation and Development (OECD) and its Guidelines for Multinational Enterprise. In Part 6.4, I will present an account of the Villa Inflamable case in Argentina, paying attention to its social and legal context, and finally focusing on the Specific Instance complaint filed with the Argentine and Dutch NCPs to address alleged infractions by Royal Dutch Shell and its Argentine subsidiary Shell CAPSA. In Part 6.5 I will examine how this case, and the NCP mechanism more broadly, present an opportunity to consider the modern corporation as a global enterprise rather than as a

collection of distinct operating entities. I will also consider the potential and limitations of the NCP as an effective Alternative Dispute Resolution mechanism for dealing with conflicts between corporations and local communities. I will conclude with Part 6.6, which gestures towards the ways that the NCP mechanism might be further developed to meet the realities of jurisdictional pluralism and to address transnational disputes between corporations and public constituencies.

6.2 ENTITY VERSUS ENTERPRISE THEORY OF THE MODERN CORPORATION

The rise of the global corporation has witnessed the classical entity theory of the firm becoming increasingly contested by activists and legal advocates advancing an enterprise theory of the firm. Philip Blumberg elaborated the relevance of this tension between entity and enterprise theories in a 1990 article in the *Delaware Journal of Corporate Law* by the title “The Corporate Entity in an Era of Multinational Corporations”. He observed that the corporations law devised in the political and economic conditions of past eras no longer corresponded to a complex, modern corporate system and the realities and challenges that it engenders. This new reality calls for updated legal concepts that are more in line with the needs of modern societies than those at the time of the original corporate construct (Blumberg 1990, p285). The key challenge in these legal modifications and innovations is determining the appropriate balance between entity and enterprise notions; “the extent to which the legal consequences of the actions of any subsidiary corporation should extend to its parent and affiliated companies in order to implement effectively the policies and objectives of the law in the area involved.” Section 6.2.1 begins with a rehearsal of the entity and enterprise theories of the corporation and their respective implications for corporate liability. Section 6.2.2 goes

on to consider entity versus enterprise theories in the context of the Argentine legal system to provide some context for the forthcoming Villa Inflamable example and to demonstrate the way that political ideology manifests through the selection and application of these theories.

6.2.1 The Modern Corporation: Entity versus Enterprise

Entity Theory

The entity theory of the firm conceives of a corporation as being comprised of separate, legally independent constituent units. Each component of a corporate assemblage is protected from the liabilities incurred by another constituent unit. Legal independence might be maintained between units even where ownership is in a very functional sense retained by the same parties; such as the case that a parent corporation holds the majority or all the stock in a subordinate corporation or that the same group of individuals controls all the stock of two separate corporations. Ballantine observes that in order to draw legal unity between two entities in a corporate assemblage,

There must be some ground in addition to mere unity of interest and ownership. Even when two or more corporations are associated together under common control as several branches or departments of a single common enterprise, they are still normally to be regarded as separate and independent legal entities (1925, p17).

In theory at least, the courts do acknowledge that if this license is abused, for example with subsidiaries becoming established as adjuncts for the intended evasion of liability when in reality they operate as agents or instruments of a parent company, then the formality of distinct corporate structures may be disregarded and both corporations may be treated as one, especially for the purposes allocating responsibility (Ballantine 1925, p17).

The doctrine of limited liability is contingent on the existence of entity theory as it conceives of independent and separate corporate units and creates a protective barrier between a company and its shareholders. This doctrine was devised prior to the era of corporate expansion and global integration of multinational enterprises witnessed today. Phillip Blumberg argues that despite present applications to the contrary, the doctrine of limited liability was never intended as a means of insulating the liabilities of components making up an enterprise. Muchlinski notes that a consequence of extending limited liability is that risk of liability becomes shifted onto involuntary creditors (p16). To use the doctrine of limited liability to insulate subsidiaries of an enterprise creates a jurisdictional veil between subsidiary and parent company that effectively protects parents from violations committed by their subsidiaries in other jurisdictions (p17).

Enterprise Theory

The contemporary context is marked by an increasing divergence between the entity theory of the corporation, which affirms the separate legal nature of a corporate unit, and the operational economic reality of an integrated, global corporate operation that brings together corporate groups in the form of “parent companies, sub-holding companies, and innumerable subsidiary companies” (Blumberg 1990, pp.285-286).

The enterprise theory, elaborated by Adolf Berle, acknowledges the reality of large-scale corporate operations as being a constellation of units that are jointly managed by a central holding company. Each of the component units are separately incorporated for any one of a number of reasons, “either because they were once independent and have been acquired, or because the central concern, entering new fields, created new

corporations to develop them, or for tax reasons” (1947, p343). Berle’s three-part thesis argues,

That the entity commonly known as “corporate entity” takes its being from the reality of the underlying enterprise, formed or in formation; That the state’s approval of the corporate form sets up a prima facie case that the assets, liabilities and operations of the corporation are those of the enterprise; But that where the corporate entity is defective, or otherwise challenged, its existence, extent and consequences may be determined by the actual existence and extent and operations of the underlying enterprise, which by these very qualities acquires an entity of its own, recognized by law (1947, p344).

An example of this would be a case in which a parent corporation becomes subject to liabilities of one of its subsidiaries. Such cases involve a “piercing of the veil” that separates the two separate legal entities, and a disproving of the corporate fiction that protects a stockholder from the liabilities of a component of the corporate operation. Berle rationalizes,

This category of cases stands still more squarely on the foundation of economic enterprise-fact. The courts disregard the corporate fiction specifically because it has parted company with the enterprise-fact, for whose furtherance the corporation was created; and, having got that far, they then take the further step of ascertaining what is the actual enterprise-fact and attach the consequences of the acts of the component individuals or corporations to that enterprise entity, to the extent that the economic outlines of the situation warrant or require (1947, p348).

6.2.2 Entity versus Enterprise in the Argentine Context

In past decades, Argentine law has witnessed a rich debate over the proper relationship between corporate enterprise and the public interest. This tension is perhaps best demonstrated in the Deltec meatpacking case. Michael Gordon (1974) and Philip Blumberg (1993) document the Argentine Deltec case as an example where the enterprise theory of the corporation was connected between components of an economic enterprise as one unit for the purposes of legal consideration. The case began in 1970 and was heard by the Argentine Supreme Court the year of Juan Peron’s second election in 1973. At that time, the country was experiencing a return to the planned economic policies of Peron’s

earlier presidential tenure in the 1940s. The judiciary during Peron's second term in 1973-74 reflected a critical orientation towards Western capitalism and foreign investment (Blumberg 1993, pp.187-188, Gordon 1979, p45). The case of Deltec Meatpacking Company demonstrated the practice of host country (Argentina) extraterritoriality for the implementation of enterprise principles in contrast to the globally prevailing entity theory, which recognizes the liability of a parent as being separate from that of its subsidiaries.

In the Deltec case, Argentina's largest meatpacking company, Compania Swift de La Plata (Cia-Swift) was acquired as the largest subsidiary of the Canadian conglomerate group Deltec International Limited and was facing reorganization. In 1970 Cia-Swift applied for *convocatoria*⁵⁶ – a form of bankruptcy proceedings – with the aim of making the company more marketable (Gordon 1974, p323). The concordato, or creditor's agreement, was approved by an 86% majority. However, it was rejected by the National Commercial Court of Buenos Aires, which had taken control of the company, decreed its bankruptcy, removed its Board of Directors, and designated the Federal Government as receiver-liquidator (Gordon 1974, p324).

The Court's ruling extended financial liability to other Deltec companies observing a unified interest and decision-making structure that made the enterprise effective as a single unit and thus allowed for penetration of its corporate personality (Blumberg 1993, p188). The case was appealed by Deltec International and other members of the group, and the Court of Appeals confirmed the earlier bankruptcy ruling

⁵⁶ "Convocatoria is a form of reorganization. When granted, the company ceases payment of non-secured and non-preferential debts but continues business under its own management with a court appointed referee who determines the amount of assets and liabilities. A concordato follows; a creditor's agreement for the repayment of the debts which must be approved by the court." (Gordon 1974 p329)

citing “the general interest” as justification for the judge’s statutory authority to deny the concordato (Gordon 1974, p324). The Court of Appeals reversed the lower court’s earlier decision to extend liability to Deltec companies, citing procedural grounds since those companies had not been present to defend their interests in court (Gordon 1974, p324).

The case was then appealed to the Argentine Supreme Court with Deltec claiming violation of due process and arbitrariness of the bankruptcy ruling. At the time, Argentina’s Supreme Court was comprised of supporters to the Peron regime and was guided by an economic ideology critical of Western capitalism. The court’s ruling, in accordance with an enterprise theory, found that the Deltec group comprised a “unified socio-economic entity”. The court perceived this case to represent a risk to the interests of Argentine society and in a 1973 ruling it upheld the judgment of the Court of Appeals in its determination of bankruptcy for Cia. Swift. and reversed the lower court’s ruling, which had absolved Deltec International and Deltec Argentina of the Commercial Court’s ruling for collective bankruptcy (Gordon 1974, p325). The Supreme Court reinstated the decision of the lower court and remanded the case to lower courts for the other Deltec companies to be subjected to the liabilities of the bankrupt country. Upon remand, the lower court subsequently included the Deltec parent as well as other subsidiaries that were involved in a range of industries aside from meatpacking. Though the multinational was structured as a conglomerate, this did not prevent foreign affiliates from being considered as part of the enterprise (Blumberg 1993, pp.188-189).

In their commentaries on the iconic Deltec case, Blumberg and Gordon both note political overtones to the court’s decision. Gordon observes the Supreme Court’s frustration with a multinational entity being controlled from abroad and eclipsing the

Argentine government's control over its operations in Argentina. He interprets the Deltec ruling to be a reaction to this realization and a rejection of granting immunity to the appendages of a group that is collectively controlled by a centralized decision-maker. Blumberg writes, "This episode illustrates, in some degree, the economic restraints of world markets on the national legal policies of developing nations." Argentina's assertion of extraterritorial enterprise principles indeed created disincentives to foreign investment and contributed to the country's severe economic downturn. After the fall of Peron's government, the new administration reverted to the prevailing legal principles of the developed nations – including the entity considerations for multinational companies - in order to improve Argentina's appeal to foreign investors (Blumberg 1993, p189). In Argentina's present climate, there appears to be a strain between these two poles; on the one hand demanding an expansive claim to the public interest, while at the same time maintaining a business climate that is amenable to foreign direct investment.

6.3 REGULATING THE CORPORATE ENTERPRISE THROUGH THE OECD GUIDELINES AND THE NCP MECHANISM

In response to the increasing relevance of international cooperation for corporate regulation, and in the absence of a substantive regime being provided by the UN, the original Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (hereafter referred to as the Guidelines) were introduced in 1971 as "the first international legal document on corporate responsibility"⁵⁷ (Cernic 2008, p77). The Guidelines, and their corresponding NCP mechanism provide an

⁵⁷ Kathryn Gordon compares the Guidelines to six other global instruments for corporate responsibility – the Caux Principles for Business, the Global Reporting Initiative, Global Sullivan Principles, the Principles for Global Corporate Responsibility: Benchmarks, Social Accountability 8000 (SA 8000) and the United Nations Global Compact. She identifies the Guidelines as having wider coverage than most of the other instruments and as providing detailed recommendations in contrast to the general principles provided by the Global Compact and the Sullivan Principles. (2001)

illustrative example for how an enterprise theory of the firm might be enacted in the form of a transnational voluntary regime. Section 6.3.1 provides a summary of the Guidelines and key theoretical and pragmatic changes that they have undergone in the nearly five decades since their adoption. Section 6.3.2 elaborates the National Contact Point (NCP) mechanism devised to further implementation of the Guidelines at a global level.

6.3.1 The OECD Guidelines for Multinational Enterprises

The Guidelines were first adopted in 1976 as recommendations by governments addressed to multinational enterprises operating in or from OECD countries and other adhering countries. They constitute a set of non-binding principles and standards representing a consensus on good corporate behavior. The Guidelines address a reality in which “the expansion of global markets has not been matched with sufficient protection for the people and communities who are victims of corporate human rights abuses”, where “victims of corporate human rights abuses have limited access to justice either in their home country or in the country where the company in question is registered”, and where voluntary initiatives are constrained due to “limited coverage in terms of companies and rights, lack of robust reporting or monitoring criteria to demonstrate compliance, and failure to address the problem of companies who persist in their unwillingness to respect human rights” (Cernic 2008, p95).

Since adoption, The Guidelines have undergone review six times, most recently in 2011 (Cernic 2008, p77). The Guidelines apply to the territories of OECD member States and to the territories of non-OECD States where OECD-domiciled corporations carry out their operations. This jurisdiction covers most of the largest corporations in the world, which are mainly domiciled in the Global North. (Cernic 2008, p78) Jill Murray

comments on revisions made to the OECD Guidelines in the 2000 and notes some significant contrasts between the aims of the revised draft and those of the original 1970s version. Murray identifies four themes in the originating debates surrounding the establishment of the OECD Guidelines: The first theme concerns the balance of power between MNEs and host States, particularly developing countries,

Developing States and their advocates wished to ensure that States were able to exercise controls over Foreign Direct Investment (FDI) and the behavior of MNEs within their boundaries. They wished to secure binding rules which would forbid various kinds of inappropriate interference in domestic policy and politics by foreign firms, and were particularly concerned to limit the role of the MNEs as 'conduits for the policies of a foreign State' (2001, p257).

The second theme concerns the interest of protecting Multinational Enterprises and Foreign Direct Investment from intervention by host state governments. Murray notes that this underscores the overriding objection of the Declaration in promoting transnational investment (Murray 2001, p258). The third theme concerns the priorities of leading parties, like the US and the European Union, in the OECD negotiations and the extent to which those dominate the framing of the Guidelines (Murray 2011, p259). The fourth theme concerns legal enforceability of the OECD Guidelines, a proposal that faced opposition from most OECD States and MNEs who maintain support for a voluntary regime (Murray 2001, p260).

In June 2000 the OECD adopted a thoroughly revised draft of the Guidelines for Multinational enterprise. Murray observes that the two major themes underpinning the original Guidelines lose emphasis in the new version (p261). While the original Guidelines focused on the compliance of MNEs to national law and practice, the revised draft focuses on the compliance of MNEs to international standards but does not deepen

their legal standing, “Instead, the Guidelines adopt the jargon of modern management theory to make explicit their principle of self-regulation” (Murray 2001, pp.264-265).

Murray argues that the revised Guidelines reflect a changed conception of the subject being regulated by this instrument. She notes that the subject of the MNE is conceptualized differently in the 1971 draft and in the 2000 revision. The 2000 version does not confer the same conception of ‘otherness’ on the MNE as is the case in the 1971 version, and instead portrays the MNE as “a free ranging ‘citizen’ of the world” (p265). She also advances that “the ‘problem’ of transnational business organization has been fundamentally recast” (p255). While the revised guidelines are wider in scope than those of the founding document, the instrument itself is not granted any greater binding capacity. In a sense, the Guidelines extend the scope of “non-regulation”. The reforms and nature of the revised Guidelines suggest that, “on a deeper level, the desire of States to encourage the unfettered flow of FDI and other transnational economic activity is the fundamental motivation given expression in the Guidelines” (p266).

Notably, the 2000 version emphasizes international standards rather than an earlier focus on national jurisdictions. This change demonstrates a shift in political discourse away from challenging free enterprise as a system, and towards acceptance of its value while challenging the legitimacy of certain negative roles that it might take; as polluter, abuser of market power, corrupter of state officials, exploiter of workers, accomplice to human rights abuses, etc (Murray quoting Muchlinski 2001, p265). The May 2011 revision of the Guidelines passed approval by 34 OECD countries and 8 additional participants, Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania. With oversight from the OECD’s Committee on International Investment and

Multinational Enterprises, the updated Guidelines constitute the first inter-governmental agreement addressing a company's responsibility for its supply chains

The Guidelines establish that firms should respect human rights in every country in which they operate. Companies should also respect environmental and labour standards, for example, and have appropriate due diligence processes in place to ensure this happens (OECD 2011).

The OECD Guidelines conceive of the firm from the lens of enterprise theory as contrasted with entity theory. The defining objective of the Guidelines is to account for operational consequences of interrelated enterprises operating across a global landscape. This is an important distinction for several reasons. The enterprise theory allows for a regulatory approach that is more geographically sensitive in that it looks at real dynamics of operationally contingent units rather than considering these impacts at the level of atomized units. Thus, the Guidelines and their adherence to enterprise theory could actually bear greater implication for larger considerations of corporation theory and the public liabilities of corporations.

6.3.2 The National Contact Point Mechanism

The OECD Guidelines provide a complaint procedure and a forum for addressing and potentially resolving conflicts between aggrieved parties and multinational enterprises domiciled or operating in OECD and other adhering countries, termed the National Contact Points (NCPs) (OECD Watch 2013). NCPs emerged in 2000 and are structured as voluntary mediating fora with a future-oriented, non-coercive approach. The National Contact Point was established as the implementation mechanism for the OECD Guidelines and as such it is charged with furthering their effective implementation in accordance with the core principles of “visibility, accessibility, transparency and accountability” (OECD 2012, p85). The Procedural Guidance instructs that NCPs

[W]ill offer a forum for discussion and assist the business community, worker organisations, other non-governmental organisations, and other interested parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law (OECD 2012, p87).

A country may organize its NCP as it finds appropriate and effective given its national context and existing institutions. The intent behind this flexibility is to allow for functional equivalence between NCPs while still allowing them to be suited to their country contexts. To give an example of the two NCPs most relevant to the following case, the Argentine NCP consists of a single department located at the Ministry of Foreign Affairs, International Trade and Worship. The Dutch NCP consists of an Independent Board with a Secretariat housed at the Ministry of Economic Affairs. It also has a governmental advisory board comprised of representatives from the Ministries of Economic Affairs, Foreign Affairs, Social Affairs and Housing, Spatial Planning and Environment.

Cernic notes that despite agreement on the functional objective of NCPs, “Opinions still differ on the desirability of enhancing the legal quality of the instrument, with France proposing mandatory standards and the UK preferring an essentially moderate approach.” In its latest review of the Guidelines, the Business and Industry Advisory Committee (BIAC) opposed the proposal for a sanctions regime that would render the Guidelines more compulsory and instead argued for a form of advocacy that would make businesses more aware of their own self-interest in adhering to the Guidelines. The OECD Investment Committee (CIME) carried the same message, touting the benefits of market discipline and noting that the expectations of host government would also provide adequate enforcement capacity (Cernic 2008, p83).

Procedure for the Implementation in Specific Instances is detailed in five steps; 1) initial assessment, 2) facilitating the resolution of issues and seeking necessary consultation, 3) publicizing results of the procedure, 4) protecting the confidentiality of sensitive information involved in the proceedings, 5) when possible to extend the proceedings to non-adhering countries (OECD 2012, pp.87-89). The initial assessment entails evaluating whether an issue is relevant to implementation of the Guidelines and merits further examination (p87). This threshold is influenced by a number of factors; “the identity of the party concerned and its interest in the matter; whether the issue is material and sustained; the relevance of applicable law and procedures, including court rulings; how similar issues have been, or are being, treated in other domestic or international proceedings; whether the considerations of the specific issue would contribute to the purposes and effectiveness of the Guidelines” (p101). The criteria are not made more detailed than that, and evaluation is not conducted with much transparency.

If the threshold is met at the stage of assessment and the NCP decides to proceed with a complaint then it may

- a) Seek advice from relevant authorities, and/or representatives of the business community, worker organisations, other non-governmental organisations, and relevant experts; b) Consult the NCP in the other country or countries concerned; c) Seek the guidance of the Committee if it has doubt about the interpretation of the Guidelines in particular circumstances, d) Offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues (pp.87-88).

Depending on the outcome of the evaluation, one of three outcomes might be reached, each requiring a different procedure from the NCP. In the case that an issue is not found to merit further consideration, the NCP must issue a statement describing the issues raised and reasons for its dismissal of these issues. In the case that parties reach

agreement on the issue raised, the NCP must issue a report describing the contested issues, the procedures followed by the NCP and parties involved, and the content of the outcome agreement to the extent that parties involved might agree to. If no agreement is reached between parties or if relevant parties do not agree to take part in proceedings, then the NCP must issue a statement describing the issues in dispute, the procedures pursued by the NCP, when relevant the reasons that an agreement could not be reached, and recommendations by the NCP for implementing the Guidelines (p88).

Without legal backing, it may be assumed that the Guidelines aim to provide a sort of shadow regulation. Gordon (2001) identifies the underlying premise of developing the Guidelines as a set of international principles that “can help to prevent misunderstandings and build an atmosphere of confidence and predictability among business, labor, governments and society as a whole” (p2). Cernic (2008) advocates for the relevance of quasi-judicial bodies in mediating human rights violations committed by, or involving the participation of corporations. A quasi-judicial body is different from a judicial body in that it carries out some judicial functions, but does not necessarily appreciate complete independence or maintain enforcement powers to back its decisions. Given the present context where judicial bodies do not exist at the international level to arbitrate cases of corporate responsibility for human rights, it is through quasi-judicial bodies like the NCPs that this role might be fulfilled (Cernic 2008, p87).

In 2007 the international OECD Watch network issued a report on the Model NCP (MNCP) reporting the results of a survey of NCPs from 20 countries of the 39 signatories to the Guidelines. The survey was intended to identify the features of a Model

NCP with the intent of promoting best practices and improving coordination between the different NCPs (p5).

The survey identified the inherent difficulty NCPs face when they have two essentially incompatible roles: promoting the interests of national companies and acting as impartial assessors of company behaviour. The Dutch government has adopted a distinctive model: an independent NCP with government officials providing guidance and support. While the survey showed that there was a strong preference for inter-departmental NCPs, concerns were expressed that in countries with little experience of collaboration between ministries, this structure could slow the process down (OECD Watch 2007, p8).

The survey also raised some contentious issues:

- “[I]nvestment nexus’ and supply chain responsibilities: in what precise cases do the Guidelines apply?
- Parallel procedures: could NCP procedures prejudice legal proceedings?
- Confidentiality: which aspects of the proceedings are confidential?
- Adjudication: ultimately if mediation is not possible, should the MNCP determine whether a company has complied with the Guidelines?” (OECD Watch 2007, p14)

In 2011 the OECD Guidelines revision extended the supply chain responsibility for multinational enterprises. Prior to that point only investment relationships were included, now trade relationships and business relationships are also included in considering the extended responsibilities of multinational corporations. The NCP’s “Ten Years On” report released in 2010-2011 notes that the NCP procedure still allows companies to turn a blind eye to complaints. Often, companies do not engage in the complaint process because it bears no consequences for them. The number of success stories over the period of the NCP’s history is limited. The NCP mechanism also has limitations in terms of the kinds of cases it might take on. Mediation is not suitable to all cases, like corporate manslaughter for example, which are not appropriate to private mediation and must be considered by the courts. If we think of interventions as falling on a continuum with company-level grievance mechanisms being applied to cases with minimal public-policy implications and state-sanctioned courts being applied to cases

with substantial public-policy implications then ADR mechanisms fall somewhere in between and are best suited to address cases relating to preventative agendas, due diligence and company guidelines.

6.4 THE CASE OF VILLA INFLAMABLE

The Villa Inflamable case has been the subject of a recent precedence-setting ruling by the Argentine Supreme Court, which resulted in direct policy action and innovative means for redress. The bureaucratic obscurity attenuated by plural jurisdictions was addressed through establishment of a specialized national committee to address the case, and the elevated media profile of the case has prompted wider consideration of environmental rights and regulation. Section 6.4.1 begins with an account of the relationship between Shell Corporation and the Villa Inflamable community. Section 6.4.2 goes on to consider the wider litigation context against which the NCP Specific Instance emerges, and Section 6.4.3 concludes with a summary of the NCP proceedings against Shell.

6.4.1 The Case of Villa Inflamable and Shell Corporation

The Shell Oil refinery has been operating in Villa Inflamable's petrochemical compound since 1931. Over the years, other companies involved in various aspects of chemical production have also set up operations within the compound, but Shell has remained the most visible among them. Shell's presence in Villa Inflamable distinguishes it from other impoverished communities. The company maintains a division for community relations, which attempts to pursue a "good neighbor policy". Auyero and Swistun write, "The dimensions of the material and symbolic relationship between the neighborhood and Shell, or "the company" as inhabitants like to call it, are many." Shell

has been a longtime employer in the community, providing opportunities to the men at its refinery facility as well as informal opportunities to women from the community who worked as domestic workers and child caretakers for Shell professionals. The company became a fixture in the community landscape through its health center, which was established on company property including its 24-hour security and ambulance service. It also acquired the role of a benefactor or provider to community members who received potable water, building materials, and pipes from the company. Even after many of Shell's operations became automated, it continued to hold a prominent presence in the community by supporting local schools through funding graduation trips as well as donating windows, paint, and heaters; by supporting a nutritional program and providing food for poor mothers; by providing computer classes for students (held within the Shell compound); by supporting local recreation by providing t-shirts emblazoned with the company's logo for school soccer, volleyball, and handball teams; and by distributing toys on Children's Day (translated from Spanish original 2006, p22).

Through their three-year ethnographic study of the Villa Inflamable community, Javier Auyero and Débora Swistun concluded that this case does not fit into the romanticized framing of community organizing and resistance highlighted in environmental justice literature (2009). They note that various actors at local, national, and international levels – including lawyers, journalists and government officials – have played a role in perpetuating a culture of confusion and inaction among residents. In the absence of clear framing and direction to a social campaign, there was no movement and no progress in mobilizing change for the community as observed by Auyero and Swistun. This case may be contrasted to examples such as Union Carbide's infractions in Bhopal

where a social movement that was both local and global enabled the case to rise to the level of international discourse and to gain access to U.S. courts. Additionally, mobilizational incapacity was obscured by what Auyero and Swistun (2008) describe as Shell's complex relationship with the Villa Inflamable community. The structure of the company and its operations makes it difficult to pursue grievances and accountability through one political or jurisdictional forum. For decades mobilization framing was obscured and citizen action was rendered ineffective. In the case of Bhopal, a successful social movement was also enabled and fomented in part through the activists' connection to transnational networks.

Since 2004 this narrative of confusion and passive adaptation has shifted with the initiation of legal action before the Argentine Supreme Court leading to landmark structural decisions regarding governance and cleanup of the Matanza-Riachuelo River Basin. In 2006 two Argentine NGOs initiated a formal complaint against Shell and filed Specific Instance Reports with the OECD's National Contact Points in Argentina and in the Netherlands, Shell's country of domicile. I argue in this chapter that such efforts have the potential to contribute to an international infrastructure for dealing with corporate grievances across jurisdictions. I also assert that these proceedings indirectly influence the public legal identity of the multi-national corporation in Argentina.

In May of 2008 two Argentine NGOs, the Argentine Institute for Participation and Development (INPADE) and Friends of the Earth Argentina, filed a complaint against Shell with both Argentine and Dutch National Contact Points for violating several sections of the OECD Guidelines. The Villa Inflamable community - on whose behalf the complaint was filed - sought reparation for damages, environmental cleanup of the site,

relocation of the refinery to a site that is more environmentally safe, financial support for community health needs, financial support to relocate the community to an uncontaminated site, and the establishment of a mechanism to facilitate between Shell and the community in order to enable redress for the company's impacts on health, environment, and residences (ENS 2008).

The complaint alleges violations of content in the Preface, Chapter II (General Principles), Chapter III (Disclosure), and Chapter V (Environment) of the Guidelines. The NGOs charged Shell's Argentine subsidiary, Shell Compañía Argentina de Petróleos SA (CAPSA), for violating Argentine laws and policies protecting the environment and promoting sustainable development (Specific Instance 2008). The Guidelines identify compliance with domestic law as the foremost obligation of business enterprises. On this basis, the Specific Instance claim demonstrates a lack of compliance between Argentine law and Shell CAPSA operations at Dock Sud. The violations are evidenced by findings from a series of 13 audits conducted by Argentina's National Environmental Authority (the SAYDS), which reveal divergences between relevant environmental law and Shell CAPSA's performance. SAYDS audits reveal violations of the following Argentine laws:

- National Constitution art. 75 par. 22 and 41.
- Argentine Civil Code, 1.171, 1113, 902-904, 183/184.
- National Law 24.051 of Dangerous Waste.
- General Law of the Environment 25 775.
- National Law of Industrial Waste.
- Water Code of the Province of Buenos Aires.
- Law 11.720 of the Province of Buenos Aires.
- Resolution SPA 231/96.

(Specific Instance Report 2008, pp.7-8)

Shell CAPSA's facilities were inspected by government authorities in September 2007, and were subsequently shut down by the National Environmental Authority of

Argentina (SAyDS) for a failure to comply with national environmental laws (Wilde-Ramsing 2009, pp.12-13). Though Shell denied the Environmental Authority's findings and rejected the resulting closure of its facilities, significant losses due suspension of its operations pressured the company to address the violations and to invest in improving its environmental management system. Wilde-Ramsing writes, "following the closure of its refinery by the environmental authorities, Shell signed an agreement to correct its violations and invest US\$80 million to improve its environmental management. In November 2007, as required by the environmental authorities, Shell submitted a Corrective Action Plan in which it addressed the SAyDS' reasons for the closure of the refinery. Wilde-Ramsing notes, Shell is also currently pursuing an administrative claim against the environmental authorities in which the company claims that the closure was "arbitrary and illegal" (2009, p13).

The complaint also cited Shell's record of controversies around the world, emphasizing a need to address the violations as systemic and historically enduring (CEDHA 2008). It noted that Shell's violations of the OECD Guidelines were of a systematic and repetitive nature, and that accordingly,

[T]he present Specific Instance should be seen, not as a complaint brought by a single community against a local affiliate of a national corporation based in the Netherlands but operating in Argentina, but rather, as the reflection of a recurring and systematic problem perpetrated by a multinational enterprise with a great many affiliates in a great many countries, and in which many have similar and recurring violations of the Guidelines, of international and a national law and of internationally recognized human rights.

On this basis, it was relevant to engage with NCPs in both Argentina as well as the Netherlands such that the local Argentine subsidiary as well as the Dutch mother company would be taken into considerations for redress (Specific Instance Report 2008, p.15).

The Specific Instance complaint points to Shell's extensive involvements in the social sphere and its philanthropic donations and special programs offered to the Villa Inflamable community. Despite Shell's gestures to social commitment, the complaint notes that its negative impacts manifest at an amplified scale and are of a systemic nature while positive impacts are of a discrete nature, "Shell has an enormous negative impact on the health of the residents of Villa Inflamable and on the poor quality of the environment that surrounds them, which surpasses any philanthropic activity that can be credited to the corporation" (Specific Instance 2008, p6).

6.4.2 Legal Actions Concerning Villa Inflamable – The Government Avoids Corporate Retribution

The case against Shell CAPSA must be contextualized within wider legal action in the Matanza Riachuelo River Basin through the Mendoza litigation case. In December of 2004, a group of seventeen residents and health workers from Villa Inflamable – headed by Beatriz Mendoza – filed suit against the Argentine government, the city and province of Buenos Aires, and forty-four industrial operators in the area. Private lawyers representing the case attempted to elevate its visibility and increase the chances of effective redress by seeking jurisdiction of the Argentine Supreme Court under Section 117 of Argentina's Constitution which prescribes that "in all matters concerning foreign ambassadors, ministers and consuls, and in those in which a province shall be a party, the Court shall have original and exclusive jurisdiction".

The claim was filed as a tort suit demanding compensation, "for damages and prejudice that, as [the plaintiffs] allege, they have been subjected to, and that accumulate to the expectation that defendants would be sentenced to put an end to and mend the

reported situation” (translated from Spanish original in Corte Suprema, Mendoza 2006, p1).⁵⁸ The Supreme Court, which at that time was headed by a renowned expert in environmental law, picked up the case, and consequently advanced a political agenda for environmental rights. The Court agreed to consider a collective damages claim,

By virtue of what has been expressed, the present lawsuit will have as its exclusive object the guardianship of the collective good. In this sense, it takes as absolute priority the prevention of future harm, which, according to allegations, presently deals with continuing actions that are producing contamination. In the second place, it will pursue remediation of environmental pollution in accordance with existing legal mechanisms, and finally - for the case of irreversible damages – it will deal with the issue of compensation⁵⁹ (p16).

The Supreme Court issued its first decision in June of 2006. The decision was groundbreaking for several reasons. It acknowledged an insufficiency of information to rule on charges alleging violation of Articles 41 and 43 of the Argentine Constitution and violation of Law 25,675 on National Environmental Policy. Accordingly, the Supreme Court instructed the forty-four defendant companies to generate environmental impact studies allowing for substantive material for review. The court also recognized a functional obscurity resulting from the coincidence of three overlapping jurisdictions, none of which was willing to assume primacy in addressing public complaints. The Court tasked the city, province, and national governments and the Federal Environment Council (COFEMA) with producing an environmental plan for the Matanza-Riachuelo River

⁵⁸ “por los daños y perjuicios que, según sostienen, se les han ocasionado, y acumulan a dicha acción la pretensión de que se condene a los demandados a fin de dar término y recomponer la situación que denuncian.”

⁵⁹ “en virtud de lo expresado, la presente causa tendrá por objeto exclusivo la tutela del bien colectivo. En tal sentido, tiene una prioridad absoluta la prevención del daño futuro, ya que - según se alega - en el presente se trata de actos continuados que seguirán produciendo contaminación. En segundo lugar, debe perseguirse la recomposición de la polución ambiental ya causada conforme a los mecanismos que la ley prevé, y finalmente, para el supuesto de daños irreversibles, se tratará del resarcimiento.”

Basin in accordance with Law 25,675. The Court further instructed that the plan's main points be presented in a public hearing to follow the decision.

During 2006-2007, the National Environmental Authority (the SAyDS) increased its efforts to identify and address the sources of contamination. The SAyDS recognized the enduring nature of social and environmental degradation in the basin and devised a comprehensive solution in the form of an Integrated Plan for the Clean-up of the Matanza Riachuelo Basin (Plan Integral de Saneamiento de la Cuenca Matanza Riachuelo)" (Specific Instance Report 2008, p4). In July of 2008, after four total hearings the Court issued a final judgment in the Mendoza case. The decision did not include a judgment on compensatory collective damages, and instead focused its rulings on prevention and reparatory actions (Mendoza July 2008).

6.4.3 NCP Actions Against Shell

While the judiciary addressed collective damages and reparatory actions, it did not levy charges against the 44 specific enterprises listed in the complaint, of which Shell CAPSA was the most visible. The NCP Specific Instance complaint was filed a couple of months after the court's ruling in September 2008. Both Argentine and Dutch NCPs accepted the case, with Argentina taking the lead on procedures. The Argentine NCP proceeded to prepare a list of "considerations" from the complaint and responses were requested from parties initiating or implicated in the complaint. Both complainants and complainees responded to the request. Three members of the NCP visited Villa Inflammable in April 2009 to survey the situation through interviews with residents and observation of the manifest conditions.

Shell CAPSA's response to proceedings has been a refusal to participate in the

process while also rejecting the Argentine NCP's offer for mediation. The existence of parallel legal proceedings relating to Shell CAPSA in Argentina's Federal Courts made the company apprehensive about compromising its own position in the ongoing case. Shell CAPSA requested that proceedings from the Argentine NCP be suspended until the ongoing legal cases have been settled.

From its part, the Dutch NCP proposed an informal dialogue between parties to address those issues which it deemed to be of a "supra legal" nature and which are not covered by the judicial cases. It suggested that this dialogue occur outside the Specific Instance process. However, parties were unable to settle on mutually acceptable scope and content for the dialogue. Complainants sought a discussion on matters included in the complaint, but Shell CAPSA did not agree to take part in informal conversations while legal action was ongoing and did not recognize the NCP as an appropriate body for addressing the complaint. Unable to reconcile the standstill, the Argentine and Dutch NCPs agreed to wait for the courts to issue a decision in the open cases prior to proceeding with the complaint. (OECD Watch 2008) In November 2009 the Argentine NCP was set to close the case while issuing a report of its findings. More than three years later, the NCP has still neither issued a report nor formally closed the case. In June 2012 the NCP requested that Shell issues an update on the legal proceedings and a report covering the steps it has taken in response to the complaint.

6.5 NCPs AND THE ENTERPRISE THEORY OF THE FIRM

The NCP proceedings in the Villa Inflammable case reveal possibilities for legal innovation beyond the dominant entity-focused theory of the corporation. This section analyzes the merits of the NCP mechanism and its potential to be developed to greater

effectiveness. Section 6.5.1 explores how the NCP mechanism informs government and civil society approaches to corporate liability. Section 6.5.2 goes on to assess the merits and limitations of the NCP system as a mechanism for Alternative Dispute Resolution (ADR) and Section 6.5.3 will conclude with opportunities for continued development of the NCP system to increase its efficacy.

6.5.1 NCP Influences on Governance and Civil Society

The NCP infrastructure allows for greater coordination and mobilization against Shell's social and environmental abuses worldwide. This coordinated action on a shared platform with clearly defined expectations presents an opportunity to promote systemic, enterprise-wide reform rather than advancing singular isolated grievances. The network enabled by the NCP mechanism and its representatives creates a concrete set of relationships that may be tapped by social movements to enact pressure both against their own governments and against the countries of origin of their local operating industries.

One example of this type of organizing has been the work advanced by the watchdog organization OECD Watch. The group was established in 2003 as a network of civil society organizations with the objective of fostering global collaboration, building capacity among partners and promoting a framework for corporate accountability that advances sustainability and poverty eradication. It gained recognition as an official stakeholder with the 2011 revision of the Guidelines, and by joining ranks with the two other official stakeholders, trade unions and businesses. This designation affords OECD Watch greater access to proceedings of the NCP Annual Meetings and revisions of the Guidelines. The official status now enables OECD Watch to request clarification for

interpretations of the Guidelines and for interpretations of the NCP decisions (which has the effective function of an appeal). This capacity has precedence-setting influence.

In addition to participatory benefits, this status change elevates the profile of OECD Watch and improves fundraising efforts. However it also creates a risk that OECD Watch would become “captured” within the OECD framework, compromising its contesting capacity in order to protect access to forum.

The epistemic contribution of the OECD Guidelines and the enterprise framing for considering corporate violations is significant in that it allows for an expanded demand that looks beyond national boundaries. The complaint against Shell CAPSA initiated by the two Argentine NGOs through the NCP mechanism extends from an enterprise theory of the firm. The filing of the complaint with both Argentine and Dutch NCPs reinforces the linkage between the parent and the subsidiary companies. Additional commentary on the complaint underscores the need for industrialized nations to take responsibility for their home-country domiciled enterprises as well as their affiliates towards the objective of sustainable development. This trend, while creating more opportunities for extended liability and accountability, runs counter to an increasingly contractual and atomized conception of the corporate apparatus and its components. By addressing both Argentine and Dutch authorities, the complaint makes a point that accountability should not lapse between jurisdictions and must be confronted by both subsidiary and parent entities. Acknowledgment of the complaint by both contact points suggests that the international network may become a forum for government-sanctioned collaboration and cooperation between the national entities. This feature is unique to NCPs which have political legitimacy in their respective countries of operation, while

also being party to an international forum and expressing support to a code of conduct for multinational enterprises domiciled in their jurisdictions and extending their operations in other jurisdictions.

The international attention a case might attain through NCP proceedings also grants further opportunities to pressure domestic political institutions. The reverse is also possible, as demonstrated in the Villa Inflamable case. In 2007, Argentina's National Government, the Province of Buenos Aires, and the Autonomous City of Buenos Aires cooperated to assess the situation in the Matanza Riachuelo River Basin and to establish a regulatory framework and a remediation plan to address the woeful living situation in the area (Lorenzetti et al 2008, p17). A "River Basin Authority" was established with aims to eliminate the major causes of contamination and to advance a more effective and more transparent environmental management system (Specific Instance 2008, p8). This precedent of intervention and the press coverage it instigated elevated the profile of the complaints and granted greater relevance and priority for the Argentine NCP and the Dutch NCP to acknowledge the complaint.

6.5.2 Potential and Limitations of NCP as a form of Alternative Dispute Resolution

Given the challenges confronted by courts in addressing transnational corporate grievances, it is meaningful to explore the potential for Alternative Dispute Resolution mechanisms (ADR) to inform standards for multinational corporate operations and to serve as a forum for contesting the public identity of the firm. ADR allows for transnational conflict mediation, which might be well suited to the transnational nature of global corporate operations. In such cases where national legal structures are foiled by questions of jurisdiction and complainants are limited by requirements for standing, ADR

might provide an alternative venue for developing legal theory relating to multinational corporations.

Procedural Advantages and Disadvantages

Alternative Dispute Resolution in the modern era is conceived as an alternative to litigation. It exists in a range of forms worldwide, with forums for ADR ranging from tribal or religious venues to trade guilds or commercial arbitrators independent of the state. ADR as we think of it today in the context of corporate disputes became popularized in the 1960s United States. This period was marked by an increase in promulgated statutes generating new opportunities for legal action, by a decline in the role of traditional mediating institutions like the church and the family, and by elevated protest and public strife in response to events such as the Vietnam War and the Civil Rights Movement. These shifts in the sociopolitical context made relevant the need for dispute resolution forums beyond the traditional court system (Sander 1985, pp.1-2). With the courts confronting a flood of new filings and a “judicial congestion”, parties increasingly turned to alternative forums for dispute resolution (Sander 1985, p3). Sander distills four primary objectives that are driving popularization of the ADR movement: 1) relieving pressure from the formal courts and avoiding undue cost and delay, 2) increasing community participation in the process of resolving disputes, 3) facilitating access to justice by creating additional venues for resolution 4) providing more effective and efficient alternatives for dispute resolution (1985, p3). Since the 60s, a host of forms, including conciliation, mediation, adjudication/arbitration, and ombudsman mechanisms, have emerged to fulfill these objectives.

Alternative Dispute Resolution provides some advantages over what can become bureaucratic and drawn-out litigation procedures in the courts. However, in cases with a salient public interest, ADR limits the amount of press and public scrutiny that a formal trial is likely to draw. On the one hand this can be advantageous to companies that seek to protect their reputations and who may cooperate in settlement in order to avoid public exposure. On the other hand, the more limited transparency stifles the symbolic power of a case that might activate public indignation or elicit political attention.

Power Dynamics and the Restructuring of Relationships

Within ADR, adjudication and mediation are each best suited to handling different types of cases. Adjudication allows for definitive decisions on past events, while mediation allows for a restructuring of the relationship between disputing parties and is well suited to those conflicts where there is an enduring relationship between parties. Sanders cautions, however, that in cases where bargaining power between disputants is disparate, mediation might be ineffective, or worse yet, that it “threatens to take undue and unfair advantage of the weaker party” (1985, pp.13-14).

Furthermore, many advocates of ADR align with a theory of dispute that attributes conflict to failures in communication, rather than to matters of substantively irreconcilable difference. This “broken-telephone” theory positions the role of the mediator as a facilitator of communication between adversaries. Edwards notes, however, that dispute can be more than mere misunderstanding and that opponents can differ on foundational grounds, reflecting what are essentially conflicting positions about fundamental public values that will not be resolved by greater understanding between disputants (Edwards 1985-1986, p678). In such cases of irreconcilable difference,

lawmakers must negotiate and ultimately choose between different conceptions of the public interest. If ADR does not acknowledge these dimensions, then dispute resolution might ignore the public values in question and thus serve as an inadequate replacement or supplement to the rule of law (Edwards 1985-1986, p679).

The Public Dimension of Dispute

A key distinction between ADR and judicial procedure is that ADR is primarily concerned with resolution while judicial procedure is concerned with levying justice and reinforcing principles and values of its sanctioning state. It is also important to recognize that courts are not merely functional technocratic entities that resolve disputes, but that their outcomes also enter the public record and thus may take on symbolic relevance in the public consciousness and with respect to legal and political legacy.

The gap between legal and non-legal values has particular relevance when it comes to disputes involving the socially marginalized. If the parties to a dispute are not afforded the same power and resources in a private forum that they would be accorded in a public forum, there is a risk that ADR would diminish the development of legal rights for the disadvantaged rather than enhancing justice or substituting for the functions of the public judiciary. Those features that enable ADR to serve as an efficient, inexpensive alternative to the courts might then be positioning it to function as mere reinforcement of an existing power structure and as legitimation for its decisions. If the public courts are intended to endorse and implement societal principles and values reflected through the law then the expansion of ADR results in a dynamic where the legal rights of the poor and the disenfranchised are subject to definitions originated by the powerful, and informed by their interests and experiences (Edwards 1985-1986, p679).

Critics of ADR note that it takes a simplified consideration of disputes and lawsuits as compared with state-sanctioned courts in Western democracies. Owen Fiss observes that while mediated settlement and arbitrated judgments might both yield resolution in a given dispute, lawsuits provide an additional social function, which private resolutions do not. Fiss cautions that settlement might result in the termination of a dispute without necessarily achieving justice (1984, p1085). US Circuit Judge Harry Edwards elaborates that private settlements might be based on non-legal values, which contrasts to a key virtue of adjudication in that it is charged with the endorsement and application of public values (Edwards 1985-1986, p676). In cases with a strongly public dimension, such as environmental rights violations, ADR risks subjecting public – in this case environmental standards - to the control of private groups who are not accountable to the checks of democratic governance (1985-1986, p677).

In response to ADR advocates who defend its use in matters of private dispute, Edwards highlights that even seemingly private dispute cases often involve some aspect of public law concern (Edwards 1985-1986, p672). He notes a key difference between the respective private and public natures of ADR and legal arbitration; observing that “rule of law” is determined through public, legitimate institutions of government. One of the risks of expanded reliance on private institutions of ADR is the forum’s unsuitability and the lack of equitable participation in cases of a public nature. Where public rights and public duties are involved, there is the risk that private actors participating in ADR forums would be the authors of those public safeguards that are intended to regulate their activities (Edwards 1985-1986, p671). Fiss similarly notes that parties involved in adjudication attain legitimacy through the procedures of their appointment; a process

which is ultimately accountable to the public. Distinct from the private parties that dominate ADR procedure whose roles are determined through private agreement, the power of these public parties is defined and conferred by public law. These public agents are guided by legal values that seek as their ultimate objective “not to maximize the ends of private parties, not simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts” and “to interpret those values and to bring reality in accord with them” (Fiss 1984, p1085).

If the NCP mechanism is to achieve wider popularity as a forum for ADR, it will become increasingly important to discern between matters of technical or strictly private dispute, which may find their place in this arena, and matters that bear significant implications for public law and public interest and that must be evaluated before the courts. In most countries, NCP offices are attached to a specific government office, and accordingly are part of the formal architecture of governance at a national level. Thus, it is conceivable that functions could be coordinated between political offices and the judiciary.

6.5.3 Reforming the NCP Mechanism

The expanding scope of OECD Guidelines signatories beyond OECD member states holds some opportunity for the extension of the NCP mechanism and its elaboration into an international regime for mediating infractions committed by multinational enterprises at any of their respective sites of operation. One evident pitfall to this growing network, however, is noted in the Specific Instance complaint filed in the Villa Inflammable case. As developing countries enter the OECD framework, and as some of them establish their own NCPs, there is a risk that industrialized nations will defer

Specific Instance complaints to the mediating fora of developing countries. Instead, those home countries of multinational enterprises with operations abroad should be more active in addressing and resolving complaints rather than deferring them to other NCPs (Specific Instance 2008, p16). The Argentine NGOs filing the Specific Instance report added a note of strong caution to the Dutch NCP not to defer consideration solely to the Argentine NCP. They urged the Dutch NCP to take up the case independently or to work in collaboration with the Argentine NCP in pursuing the complaint and in engaging with Shell Netherlands as well as with its subsidiary Shell CAPSA (Specific Instance 2008, p16).

The NCP mechanism might be reformed in a number of ways to allow it to better meet the realities of jurisdictional pluralism and to address transnational disputes between corporations and public constituencies. The work of civil society groups like OECD Watch in this case reveals the gaps and inadequacies of a soft law mechanism. Joseph Ramsing of OECD Watch highlights the necessity of a system of consequences that holds companies more accountable to the Guidelines and that keeps NCPs accountable to due procedure. For companies, a system of consequences would target those firms who abstain from participating in a complaint process and those who are found to be in breach of the Guidelines. For NCPs, a system of consequences would take effect if they fail to make determinations or to reach conclusive evaluations of a given case and of its breach of the Guidelines. As of now, the Guidelines read that NCPs “can make determination” but they do not mandate this function. Effective implementation of this function requires development of fact-finding and research capacity as is presently observed with the Norwegian and UK NCPs. The aspired end to the campaigns and advocacy promoted by

OECD Watch is a convention to establish a binding treaty for the Guidelines. This might take the form of a Corporate Crimes convention following a similar pathway as the anti-bribery convention: it began at the OECD level before eventually becoming elevated to the international level. In this type of evolutionary process, the efforts of the OECD and OECD Watch are those of “an incubator” that develops models and legacies that might be scaled up and granted greater enforcement power.

The Dutch NCP would benefit from oversight by an independent stakeholder body. One such example where this occurs is the case of the UK NCP, which has a steering committee that consists of representatives from different stakeholder groups. An oversight body may judge the procedure and provide a check on NCP decisions. Effectiveness of the NCP would be strengthened further with the use of external mediators who can be completely independent rather than the performance of mediation function by the NCP itself. It is preferable that mediators should not also be a party in the proceedings as is the case with the NCP which is charged with an agenda and that is to further the implementation of the Guidelines. A totally impartial mediating body would have no agenda of its own. The final statement is issued by the NCP and is a joint statement that comes from participating parties; if the process involves external mediators, then the use of an external mediator would provide greater protection for confidentiality. Dutch NCP Secretariat Sylvia Deepen notes that functional equivalence of NCPs, as laid out in the OECD Guidelines, allows for particularity of the respective systems while also enabling collaboration between the NCPs of different countries. She elaborates that NCPs should not be working in isolation in their respective countries; otherwise this may result in forum shopping. Some NCPs are further extending their

enforcement power by adopting a legal dimension: notably, the Danish NCP appreciates formal prosecuting capacity. This direction of soft law to hard law evolution combined with greater collaboration between NCPs may allow for the kind of integrated transnational mechanism that would match the structure of multinational corporate operations.

6.6 CONCLUSIONS

The Villa Inflamable case is in many ways rather typical of global corporate disputes that face the challenges of complex operational dynamics, disputed jurisdictions and differentiated demands. It demonstrates a need for greater synergies and collaborations between domestic, national, and transnational institutions to develop legal narratives that address the realities of infractions by multinational corporations and their affiliates in developing country contexts. Inflamable is also quite unique, however, in the way that it activates a potential for transnational quasi-diplomatic cooperation through the infrastructure of a multi-jurisdictional ADR forum. Collaboration between the various NCPs has the potential to further an enterprise theory of the corporation that goes beyond the limits of the entity theory dominant in contemporary cases of corporate litigation. The NCP infrastructure neither appreciates formal judicial power, nor provides a hard-law mechanism for securing transnational justice. It does, however, offer a foundation for deepening soft law procedure while also establishing precedence for a transnational, politically endorsed, cooperative mechanism that holds corporations accountable both in their home and host country jurisdictions.

In the case of Villa Inflamable, it may be posited that the neoliberal architecture that has enabled expansion of petro-chemical industrial operations to a global scale also

provides the instruments for contesting and even undermining that very infrastructure. The ideological flexibility of anti-corporate campaigns allows them to oppose a neoliberal and integrative system of global development while also appealing to a global judicial system for protecting citizens' welfare in the global South. Corporate liability campaigns lobby for home country extraterritoriality, which extends the operational standards that are established in a corporation's country of domicile to be implemented at the sites of its operations worldwide. The logic of this expectation is that citizens living in what are mostly advanced industrialized home countries benefit from higher operational standards than those afforded to citizens in host countries. Accordingly, activists demand that a company extend the standards that it is held to in its country of incorporation (primarily in the global North) to operations in its host countries (especially those in the global South).

The capacity to engage with the manifest structures and consequences of corporate activities while envisioning reforms that realign these machinations to a more desirable reality, as demonstrated by the efforts of social movements and civil society initiatives like OECD Watch, must likewise be extended to reformist efforts within the formal legal sphere. Foundational legal doctrines that regulate modern corporations were developed at a time when multinational corporations did not dominate global enterprise to the extent that they do today. It was also a time when regulatory expectations were largely contained to single country jurisdictions. The present reality of intensified corporate operations and expanded human rights standards and expectations (including environmental rights) renders corporate legal geographies problematic in both theoretical and practical senses. Production and business operations are no longer functionally co-

extensive with the territory of a single national legal jurisdiction. If a parent company and its subsidiaries are only held accountable to the laws of their home country then foreign affiliates that directly contribute to a firm's operations are granted impunity in their capacity to "evade any national law by having the proscribed activity conducted by a foreign component" (Blumberg 1993, pp.171-172).

Blumberg aptly notes the necessity of formulating "enterprise principles and a new doctrine of enterprise law in order to deal with the legal problems presented by transnational enterprises." (p205) He observes that this does not merely entail a cosmetic revision but that it requires a more fundamental reformulation that grapples with the foundational tenets of Western legal thought, "It requires a reexamination of the traditional views of what has been referred to as the corporate entity, or the corporate personality, and a reconsideration of the fundamental principles of the legal system" (Blumberg 1993, p205). This process has notably been initiated in academic circles, in court proceedings, and within civil society, but it is proceeding in a slow and piecemeal manner. The OECD Guidelines and the NCP mechanism contribute one such advancement in the direction of furthering legal complementarity for dealing with global corporations. The challenge of such efforts will be to devise systems that preserve the sovereignty of participating legal regimes, while allowing for sufficient collaboration to manage a corporate phenomenon that is, by its very nature, transnational and multi-jurisdictional. It is conceivable that with greater political capital, functional independence, and enforcement power, the Guidelines and the NCPs could lay the early templates for the differentiated but complementary legal network to which Blumberg alludes.

7 - Legal Pragmatism, Legal Activism, and Bhopal's Legacy for Corporate Liability

7.1 INTRODUCTION

On the night of December 2 of 1984 a leak of methyl isocyanate gas at the Union Carbide India Limited (UCIL) pesticide plant dispersed clouds of the toxic substance over the north-central Indian city of Bhopal. More than 7000 residents in the surrounding neighborhoods were killed within days. Hundreds of thousands more suffered from related health problems over subsequent years. Bhopal's experience has become memorialized as one of the worst industrial disasters of the 20th century, and has prompted nearly three decades of legal dispute and activist mobilization in pursuit of relief, remediation, and restorative justice. Today, the former Union Carbide plant continues to rust at the epicenter of sprawling slums in Bhopal, while its uncovered solar evaporation ponds leach chemicals into the area's soil and groundwater.

Four hundred meters south of the plant sits the Sambhavna Trust Clinic, a member institution of the International Campaign for Justice in Bhopal (ICJB), and a resource hub providing medical treatment and assistance for the Bhopali community since 1996. The non-governmental community-based clinic documents cases and provides treatment to thousands of affected gas leak victims. The larger ICJB coalition coordinates actions for restitution and reparations to gas leak survivors and their families. It seeks to put pressure on Union Carbide Corporation (UCC) and Dow Chemical Company (Dow) as well as governments of the U.S. and India to provide "adequate healthcare, a safe environment and proper rehabilitation for the survivors of the disaster and their children." The ICJB seeks to set precedent with the case of UCC/Dow in order

to deter multinational-corporations, their executives, and government supporters from repeating the same situation.

Twenty-eight years after the Union Carbide gas leak, the events and impacts of the disaster remain vivid in the imaginations of successive generations of Bhopalis. Communities continue to understand themselves in relation to the disaster, and the survivor identity is embraced by successive generations of Bhopal's residents. Bhopal endures as a symbol of environmental injustice and contributes to a global discourse on developmental (in)equity. This manifest reality is the product of sustained movements and initiatives across a range of actions including lawsuits, health initiatives, political protests and NGO campaigns. Among these initiatives, the legal agenda pursued in U.S. courts has perhaps granted the Bhopal case its farthest-reaching international exposure. Three decades of lawsuits have elevated what might otherwise have become another forgotten corporate infraction in an impoverished region to a level of global notoriety that it maintains today.

Over the course of Bhopal's legal history, the choice for social movement activists and legal advocates has been presented as one between securing immediate and pragmatic relief for victims, and pursuing a landmark precedent for the environmental liability of a corporate subsidiary. This duality between direct relief, promoted by pragmatists, and restorative justice, promoted by constructivists, appears as a more general trend in the environmental law literature and assumes that the two aims – one more practical and the other more principled - are mutually exclusive. In wider legal discourse, the role of the courts in promoting social change is a subject of active debate. On the one hand, legal conservatives defend the courts as a politically neutral arbiter of

justice charged with narrow interpretation of legislation and efficient resolution of disputes. On the other hand, legal activists protest the possibility of institutional neutrality in a politically weighted context. Activists advance a characterization of the law and the courts either as reinforcement to the status quo, or alternately as disruptors of the status quo in pursuit of some agenda for social change. As the Bhopal case will demonstrate, these perspectives do not have to be at odds. Legal campaigns of the Union Carbide Bhopal disaster demonstrate interplay between these two orientations in the evolution of a long-running litigation project.

At surface level, lobby efforts for relief and reparation to Bhopal victims have been unsuccessful in securing a favorable ruling through U.S. courts. To reduce legal success solely to litigious outcomes, however, would be incomplete. Such a view overlooks the nuance of case proceedings and the way they have been instrumentalized to educate and agitate local populations in challenging the normalized standing of the corporation, and to foment a broader agenda in support of greater development justice. Perhaps the most instructive outcome of Bhopal's legal epic has not been a conclusive verdict reached through the actual trials, but rather its contributions to debates on the transnational identity and the contingent liabilities of the corporation. The classification of the Bhopal episode as an environmental disaster reveals multi-dimensionality to its associated damages and demonstrates a complex interplay between social, economic and political disputes. It also sheds light on the difficulties of attributing liability to a culpable agent, and the challenges of mediating physical and reputational impacts of large-scale industrial disasters.

Part 7.2 of this chapter examines pragmatist and constructivist orientations in legal theory, evaluating their contributions to the development of an activist approach to corporate liability litigation. Part 7.3 looks specifically to the legal proceedings of the Bhopal cases from 1984 to 2012 as they developed in U.S. courts, highlighting the key themes that emerged over the course of the legal proceedings. Part 7.4 looks broadly to how the legal project of the Bhopal appeal was deployed in coordination with instruments of a wider social movement to the aim of advancing a more demanding agenda for corporate environmental liability. This chapter will conclude with Part 7.5, which argues that pursuing a more demanding interpretation of corporate liability requires an activist approach that transcends ideological purism to include both pragmatic and constructivist influences. This approach must be both grounded and aspirational, attuned to the needs of the short-term while demonstrating foresight in contesting some of the modern corporation's most undesirable realities.

7.2 THEORIZING LEGAL ACTIVISM

The modern corporation is subject to active contest over its identity, its relational dynamics, and its direct as well as its contingent responsibilities to public society. Contemporary corporate legal disputes feature debates over corporate criminality, corporate speech rights, and the public versus private political and legal designation of the modern multinational corporation. Lawsuits against the corporation may be grouped under coherent thematic umbrellas – governance, environment, labor, etc - but closer examination reveals wide divergence in their particular aims and strategies. The legal theories that are selected in framing a case, and the outcomes and objectives that are pursued by plaintiffs within the context of a particular case emerge from the grounding of

a referent ideology and adopt a particular normative understanding of the corporation. This section argues that the significance of the courts as an arena for contesting and redefining corporate norms, and the relevance of legal verdicts to the reform advocates who fight for them, must be appreciated with reference to the theoretical orientation motivating such actions. It identifies and summarizes the two most pervasive orientations to legal theory, pragmatism and constructivism, rehearses core arguments of each legal philosophy, and derives conclusions on the forms of advocacy that each is likely to inspire. After elaborating pragmatist and constructivist orientations to legal theory, this section will argue that effective corporate reform campaigns must draw upon the strategies of both philosophies. It will identify the Bhopal justice project as an example of this hybrid approach and will argue that this strategy has enabled the project to agitate dominant theories of the corporation while advancing incremental gains in corporate liability reform.

7.2.1 Legal Pragmatism: Interpreting Facts and Consequences

The pragmatist school of legal theory dominates contemporary American jurisprudence. Pragmatism emerged as an American school at the turn of the twentieth century advocating for an approach to philosophy that is useful and practical, and that provides tools for grappling with life's problems. The understanding of pragmatist legal theory varies along a continuum with scholarship ranging from deeply contextualized approaches to more empirically inclined ones.

Renowned legal theorist Richard Posner ascribes to a pragmatic view “in which propositions would be evaluated by their observable, their demonstrable, consequences rather than by their antecedents.” This approach is essentially “an extension of the

scientific method into all areas of inquiry” (2004, p148). Posner notes that “The core of legal pragmatism is pragmatic adjudication, and the core of pragmatic adjudication is heightened judicial awareness of and concern for consequences, and thus a disposition to ground policy judgments in facts and consequences rather than in conceptualisms and generalities” (2004, p150). Posner notes, “The ultimate criterion of pragmatic adjudication is simply reasonableness with reference to social policy. Law is understood by the pragmatist as a social tool oriented to social end” (2004, p151)

Ronald Dworkin recalls the pragmatist tradition to a critical reference, noting that social ends are not self-evident and that it is necessary to justify the legitimacy of the ends that are selected to guide adjudication. In the same line of argument, Sullivan and Solove suggest that “Posner’s pragmatism offers little help when it comes to evaluating and selecting ends” and that “this failure results from Posner’s attempt to excise pragmatism’s theoretical dimension” resulting in a complacent rather than a critical brand of pragmatism (2003, p691). Where the pragmatist is critical of the normative nature of traditional legal procedure, he/she does not subject the outcomes selected for pragmatist consideration to the same extent of ideological scrutiny (Sullivan and Solove 2003, p696). It is not enough to merely claim an empirical and objective position without acknowledging that facts become selected and that consequences gain relevance based on the visibility of affected parties. Posner’s account of pragmatism does not provide answers as to which normative ends will be adopted to guide the assembly of facts into meaningful narratives, and to justify particular decisions and rulings. In recognizing this caveat Sullivan and Solove attempt to reclaim pragmatism as a philosophy that, when rigorously interpreted and applied, is not conservative and a-political in the way Posner

suggests and may in fact have radical implications. If politics is sidelined in the selection of legal theory and the interpretation of relationships, then it does not become eliminated but rather re-enters subversively in the selection of the very ‘facts’ and ‘consequences’ making up an argument.

Posner’s pragmatist approach to legal theory allows for a ‘tinkering’ with the details, rather than advancing a radical overhaul of legal doctrine⁶⁰, “A judge confronting a novel claim will ask himself (more often unconsciously than consciously) how he can accommodate it with minimum disturbance to accepted understandings of the law as reflected in precedents and authoritative enactments” (Posner 2004, p150). Accordingly, if legal advocates understand the courts as a space for discrete pragmatic advances, they are likely to take a more conservative approach in framing their grievances. They are more likely to work within the bounds of existing law and precedent and to direct their appeals towards demonstrating how previous rulings lead by extension to the outcome desired in their case. From this perspective, the emphasis on case outcome weighs heavily, and a successful outcome to the case becomes equated with a formal litigious victory.

Examples of the pragmatism orientation may be found in the aims and arguments of lawsuits pursuing corporate environmental liability. In cases claiming corporate environmental liability in international jurisdictions, pragmatist legal advocates are not so concerned with redefining the reach and scope of liability as it relates to the increasingly

⁶⁰ Notably, commentary by Ernest Young (1994) identifies that the legal conservatism demonstrated by Justice Scalia on the present Supreme Court claims original constitutionalism and sees itself as adhering to the original intents of the framers of the U.S. Constitution while in fact such modern judicial “conservatives” hold views that are antithetical to the positions of classical conservatism as advanced by Edmund Burke. (1994) Though pragmatism rejects the idea of a priori meanings promoted by the legal conservatives, it faces a similar criticism of carrying more ideological implications that it recognizes.

transnational nature of corporate assemblage and the power differentials created by this process. They are more concerned with proving that the case at hand violates existing liability standards. One such example is the appeal to the Alien Torts Claims Act in order to make environmental claims against multinational corporate actors.⁶¹ In an important article titled “Litigating Environmental Abuses Under the Alien Torts Claims Act“, Richard Herz provides a framework for prosecuting environmental torts that violate customary international law, whether they are committed in the U.S. or abroad, by a U.S. citizen or the citizen of another nation. He advances that ATCA may be suitable for pursuing these civil suits in federal courts (1999, pp.449-550). Herz cautions that plaintiffs “should craft their claims narrowly” and notes, “Limiting the scope of claims in the initial ATCA environmental cases, assures these cases the best chance of success” (Herz 1999, p638). This strategy aligns with the criteria of a pragmatist orientation. If the measure for successful actions against environmental damages is litigious success, then a more conservative approach that frames damages within the bounds of established legal precedence is to be favored.

7.2.2 Legal Constructivism: Challenging Structural Foundations

As a foil to the grounded conservatism of the pragmatist school, the constructivist school takes a vigorously establishment-critical perspective and attempts to make architectural shifts in the prevailing socio-political paradigm. It assumes a contingency of terms and subjectivity to the process of defining and interpreting them. In the legal realm, this thesis lies at the center of the Critical Legal Studies movement, which emerged in the

⁶¹ “The Alien Tort Claims Act grants federal district courts jurisdiction to hear “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States” (Herz 1999, p552).

1960s and 70s. CLS asserts that “all law is politics” and offers a sharp contrast to Posner’s claims to pragmatism’s neutral political valence. The constructivist approach is highly critical of a pragmatist, positivist view that often reads legal disputes through the lens of economic consequentialism. On that point, Mark Kelman asserts, “The commitment to Pareto efficiency is thought, generally, to be utterly uncontroversial politically. (...) If (but only if) we do not have to inquire into either the formation of our desires or the background conditions under which trades are made (that is, if we assume that “voluntariness” is a simple, self-defining concept), then we have the reasonably technical, politically uncharged welfare criterion that technocratic legal economists seek, albeit one that would rarely be applicable to concrete controversies, since most choices in legal decisions clearly harm *someone*” (Kelman 1987, pp.120-122).

Bruce Ackerman argues that legal Realism (a precursor to the contemporary pragmatist school) became a way to legitimize laissez-faire economics in the aftermath of the New Deal without undergoing a foundational self-questioning of the law in the way that a radical political shift would necessitate. He argues that Realism has resulted in a reactive approach to lawyering that leaves legal argument restricted, as “No legal argument will be acceptable if it requires the lawyer to question the legitimacy of the military, economic, and social arrangements generated by the invisible hand” (1984, p25). Accordingly, the legitimacy of the background practice never comes under question, and only the details are interrogated with respect to their correspondence, or lack thereof, to the background principle. “So far as lawyers are concerned, the only thing worth talking about is the particular trouble generated by the actions of particular people at a particular time. The cumulative impact of these decisions upon the ebb and flow of

institutional life is something that no reactive lawyer would discuss in a professionally disciplined fashion before a legally authoritative tribunal” (1984, p26).

Contrastingly, a constructivist approach to legal activism is concerned with agitating the very foundations of legal discourse. It acknowledges that absent such core interrogation, legal discourse becomes blinded to its own underlying political and philosophical dilemmas with the assumption that the judicial exercise is applying politically neutral norms to arbitrate between sets of objective facts (Kelman 1987, p289). The constructivist approach deems this view exceedingly reductionist as the operant body of law results from a range of influences contributed by the market and by social, psychological, and other forces, which yield various assemblages of rules and policies (Hirokawa 2003, p401). Rather than limiting itself to the description of particular aspects of fact, the constructivist approach aims to develop a “*structural* account – a statement of the facts that reveals the ways an activity might be feasibly reorganized to avoid or ameliorate the inefficiencies and injustices it may be generating” (Ackerman 1984, p29).

Ackerman acknowledges that an aspiration to transform the law is often restricted by the lack of precedent and that the legitimacy of the practice of the law is never subject to legal question, leaving lawyers as “reactionary” parties within a constrained legal discourse. Reactivist lawyers work well within the confines of doctrine and precedent, and acknowledge facts and meanings to the extent that they can fit into an existing body of law. By contrast, the activist/constructivist lawyer provides a “structural account” of the facts as they may be seen from a different, often marginalized, perspective. This account emphasizes “the ways an activity might be feasibly reorganized to avoid or ameliorate the inefficiencies and injustices it may be generating” (Hirokawa 2003, p403).

Activist lawyering seeks to widen the temporal frame of analysis, as well as the scientific frame of analysis to make the case for consequences which are being questioned by victims, and which should have been anticipated by the perpetrator.

Corporate environmental liability litigation that emerges from a constructivist reference is concerned with critiquing the social and economic arrangements that result in systemic discrimination against minority groups. With its attention to the aggregate, the systemic, and the structural, a constructivist reference becomes well suited to the aspirations of environmental justice movements and their concern with distributional equity of risks and benefits. Coming from a constructivist perspective, a legal strategy will not find it adequate to frame a grievance from within the confines of existing law. A legal advocate might instead reach deliberately beyond existing case law with the intent of securing a landmark precedent or even for the symbolic significance of elevating a case of high-profile violation through the use of the courts to attract wider attention. The questions addressed by such a lawsuit will be more theoretical and definitional in nature rather than consequential and outcomes-based.

7.2.3 The Bhopal Appeal: Bridging Pragmatism and Constructivism

The nature of public, notably environmental, grievances against the modern multinational corporation demands a strategy that is attentive to immediate impacts and short-term relief as well as responsive to structural dynamics and long-term restorative justice. Posner's directionally neutral pragmatism, which limits its concern to consequences and to arguments that fall within precedent, is not conducive to such a strategy. More suited to this collaboration is a strain of pragmatism that acknowledges and orients towards a particular set of values. This may be found in John Goldberg's

“inclusive pragmatism” which contrasts with the “brass-tacks pragmatism” of Justice Holmes, Karl Llewellyn, and Duncan Kennedy (2012). Goldberg asserts, “a distinct way to be pragmatic is to stick close to everyday practices and to be wary of concepts, categories, or methods that claim for themselves a certain kind of essential validity or primacy.” Goldberg’s “inclusive pragmatism” acknowledges the complex nature of reality and the significance of interrogating the larger conceptual paradigms with its assumptions (2012, p1650). The “inclusive pragmatist” described by Goldberg “supposes that law is a matter of both concepts and action.” This approach to pragmatism bears strong similarity to CLS constructivism.

At the same time, a constructivist approach that aggregates incremental victories in the legal and social realms rescues CLS from its gravest criticism; that it is rigorously critical and deconstructive without making pragmatic headway. Stating the facts in a new way as Ackerman proposes assumes a certain receptiveness from the judicial bodies that is not noted in contemporary U.S. courts. This approach may be more realistically discovered beyond the courts and in the strategies of social movement campaigns. By tethering theory to the machinations of a social movement, abstract ideas are translated to more concrete renditions that are capable of mobilizing and animating a concerned public.

It is conceivable that both pragmatist and constructivist approaches might reinforce a shared activist methodology with the approach of inducting “new” facts through the collection of health data and scientific data; and using the pragmatist instruments of Law and Economics to inform options, without dictating particular outcomes. It is possible for pragmatically framed actions to be used as gateways for

greater precedent-setting challenges. For example, Natalie Bridgeman argues for the use of the Alien Tort Claims Act as a mechanism for litigating corporate environmental torts abroad (2003). Her argument bears both pragmatic and constructivist influences. From a pragmatist perspective, she acknowledges that while environmental liabilities are unlikely to find litigious success in U.S. courts, human rights claims have been developed more extensively and provide firmer grounds for building lawsuits,

Until courts accept environmental principles as part of the “law of nations,” and therefore actionable under the ATCA, plaintiffs should use remedies available for human rights claims as proxies for their environmental claims. Because corporate international environmental law violations are frequently linked to human rights abuses, well-established human rights causes of action should be used to usher in the emerging justiciability of environmental claims.

The constructivist aspects of Bridgeman’s perspective emerge in her affirmation that these remedies are not the ultimate objective, and that the more long-term advocacy agenda entails securing global recognition for environmental claims such that they can be addressed on their own merits rather than through linkage to human rights abuses. It is possible that through the arguments linking corporate human rights violations to their associated environmental damages, corporate environmental impacts become regarded as personified damages rather than being dismissed as de-personalized externalities. Such a shift would mark a major discursive shift, and pave the way towards actionable developments (Bridgeman 2003, p1).

As the next sections will demonstrate, the Bhopal case may serve as a useful example of the interplay between pragmatist and constructivist agendas as they come together under an overarching strategy of cause-lawyering. The Bhopal justice project is pragmatist in the way that it selects and pursues theories and arguments with the attempt to secure relief and compensation. It is *also* constructivist in the way that it poses fundamental challenges to the identity of the corporation and characterizes the damages

resulting from corporate operations as part of a larger web of uneven relationships. In earlier stages of the lawsuits, Plaintiffs appear to pursue a bold, holistic justice that presents a foundational challenge to the role of the corporation in society. As the cases proceed, the focus shifts from pursuit of a holistic claim for justice to become more concerned with framing narrower claims in accordance with pragmatist objectives targeting specific details, operations and outcomes. Beyond the bounds of the legal dispute, the Bhopal movement adopts farther-reaching constructivist objectives in its attempts to develop a thicker and more updated interpretation of corporate liability.

7.3 THE BHOPAL CASES

The ‘Bhopal Cases’ refers to four successive cases that span the 28-year duration of the legal dispute pursued by Indian plaintiffs against UCC/Dow in U.S. District and Appeals level courts. The first case, heard by the Judicial Panel on Multidistrict Litigation⁶², consolidated 18 independent actions brought by Indian plaintiffs against UCC. The second Bhopal case is *Bano v Union Carbide*, which was initially filed in 1990 and later dismissed in Summary Order by the Second Circuit of the U.S. Court of Appeals in 2006. The third case is *Janki Bai Sahu v Union Carbide (Sahu I)*, which was originally filed in 2004 and last heard in the Southern District of New York in 2012. The fourth case is *Jagarnath Sahu v Union Carbide (Sahu II)*, which was originally filed in 2007 and is currently stayed, meaning that proceedings are suspended until a ruling has been reached in Sahu I.

⁶² “The Judicial Panel on Multidistrict Litigation determines whether civil actions pending in two or more federal judicial districts should be transferred to a single federal district court for pretrial proceedings” (www.usa.gov).

7.3.1 Consolidating the Bhopal Cases

On February 6, 1985 the Judicial Panel on Multidistrict Litigation consolidated 18 actions related to the Bhopal disaster, pending in seven district courts: six actions in the Southern District of New York, four actions in the Southern District of West Virginia, four actions in the District of Connecticut, one action in the Eastern District of Pennsylvania, one action in the Eastern District of New York, one action in the Northern District of Illinois, and one action in the Southern District of Florida.

The Bhopal case was moved to the Southern District of New York with the reasoning that Union Carbide is a New York corporation and that, accordingly, relevant witnesses and documents might be found at the nearby corporate headquarters located in Danbury, Connecticut. The decision also referred to the fact that this selected district faced more pending actions than any of the other districts and thus might be more convenient for more of the parties involved than any other single district would be.

In May 1986 the U.S. District Court of the Southern District of New York evaluated the suitability of U.S. courts as a forum for hearing the case, weighing private interest concerns against public interest concerns. Private interest concerns included: sources of proof being more readily accessible in India, witnesses based in India being easier to reach, the possibility of viewing the plant site in Bhopal being more feasible. Public interest concerns included: administrative difficulties of trying the case in the U.S., the public interest being better served if the case is heard in India rather than in the United States, the applicable law being more effectively administered by Indian courts.

The case was ultimately dismissed on the grounds of *forum non conveniens*. Forum non conveniens refers to the courts' discretionary power to dismiss a case in the situation

that another court, or forum, may be better suited for hearing the case. This legal doctrine extends to situations where the alternative forum is a court in a different country or where the alternative forum is a court of within a different jurisdiction of the same country.

(Cornell University Law School) The following stipulations supplemented the ruling:

1. “Union Carbide shall consent to submit to the jurisdiction of the courts of India, and shall continue to waive defenses based upon the statute of limitations;
2. Union Carbide shall agree to satisfy any judgment rendered against it by an Indian court, and if applicable, upheld by an appellate court in that country, where such judgment and affirmance comport with the minimal requirements of due process;
3. Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by plaintiffs.”

The case was appealed by plaintiffs to the U.S. Court of Appeals in 1986 but the appeal was dismissed.

The question of jurisdiction

This ruling affirmed that hearing this case in U.S. courts would undermine the sovereignty of Indian courts and that in the net consideration of public and private interests that the Indian courts would be better suited to hearing this case. The corporate defendant benefits from this ruling for a number of reasons. Trial in Indian courts does not subject the corporation to the same impact of negative media coverage that it would face in its home market. It also increases the likelihood that the defendant gets off with a lighter sentence or that a sentence would not be enforced as the defendant leverages its standing as a major industrial operation in the host country. Trial in Indian courts rather than U.S. courts also increases the likelihood that the judicial process is stalled due to bureaucratic impediments or to corporate or political unwillingness to cooperate with extradition or discovery requests, without means for effective recourse by plaintiffs.

7.3.2 *Bano versus Union Carbide*

The cases of *Bano Bi v Union Carbide Chemicals and Plastics Company Inc., et al.*, (hereafter referred to as Bano) and *Abdul Wahid, et al., v Union Carbide Chemicals and Plastics Company Inc., et al.* were filed in Texas State Courts in October 1990 and transferred to Texas Federal District Courts the following month. In January 1991 the Judicial Panel on Multidistrict Litigation transferred these two actions to the Southern District of New York before Judge Keenan. The selection of U.S. courts for the prosecution of Union Carbide was intended to ‘make an example’ of the corporation in a forum that attracts greater media recognition and carries heavier reputational consequences for the corporation than the legal forum provided by Indian courts. These cases were heard before the Second Circuit of the U.S. Court of Appeals in 1992 and the proceedings of that case affirmed the contested legitimacy of the Bhopal Gas Leak Disaster Act (Bhopal Act) which had been passed by the Indian Government in 1985 establishing the Union of India as a collective plaintiff holding sole legal representation for all claims relating to the 1984 disaster. Following are elaborations of four main issues raised by this case.

Standing and Representation

In May 1986, the U.S. District Court transferred litigation from U.S. courts to Indian courts. The decision was appealed to the U.S. Court of Appeals, which affirmed the transfer.

This precise issue is whether the federal and state courts of this country should defer to the judgment of a democratic foreign government that disputes arising from a mass tort occurring within its borders can be best resolved by according the foreign government exclusive standing to represent the victims of the disaster in the courts of the world. This question arises on an appeal by a class of tort victims from the March 4, 1992, judgment of the District Court for the Southern District of New York (John F. Keenan, Judge) dismissing two complaints on the ground of forum non conveniens. We conclude that the plaintiffs lack standing and on that ground affirm.

In the Bano case, it was again affirmed that the Bhopal Act barred claims for personal injury, and in accordance with the Bhopal Act it prohibited the filing of any subsequent lawsuits for personal injury against UCC and Warren Anderson. It wasn't until later in the 1990s that legal theory created the opportunity for a reopening of grievances against UCC by framing injuries with respect to environmental cleanup rather than the barred class of 'personal injuries' since environmental injuries were not covered in the Union of India case.

ATCA and the Fugitive Disentitlement Doctrine

Between 1992 and 2006 appeals were led by plaintiffs before the Second Circuit of the U.S. Court of Appeals and in the Southern District of New York, raising several points of contest. In the 2001 hearing, plaintiffs appealed to the Alien Torts Claims Act in considering "civil damages" to compensate dangers resulting directly from the gas leak disaster and the resulting violations of international norms and laws. Plaintiffs also appealed to the fugitive disentitlement doctrine in an attempt to prevent defendants from evading Indian courts to seek relief in U.S. courts. The fugitive disentitlement doctrine prevents a fugitive from justice from seeking relief from the judicial system he/she is evading. (28 USC § 2466) The court found this doctrine inapplicable to this case as the doctrine applies to individuals/entities fleeing from U.S. courts, and since UCC was fleeing from Indian Courts it could thus seek to defend itself in U.S. courts.

Environmental Contamination

On the plaintiffs' pursuit of relief for environmental contamination, the Appeals Court remanded environmental claims applying to Union Carbide and to Warren Anderson back to the District Court on procedural grounds as "The district court's

opinion gives no indication of the standard by which it dismissed the claims against Anderson or the aspects of the complaint or factual record it relied on to support that dismissal.”

Preference for settlement

The influence of legal pragmatism is notable in the text of the Bano decision, which emphasizes the importance of settlements “because they represent compromises and conservation of judicial resources, two concepts highly regarded in American jurisprudence”, noting that ““financial and judicial economy are at [the] core” of the Federal Rule of Civil Procedure 68, which governs offer-of-judgment proceedings”, and also taking note of “the urgency of [the public] policy [favoring settlements] in complex actions that consume substantial judicial resources and present unusually large risks for the litigants.” In this text, judges appear more concerned with reaching a settlement to deal with the consequences of the tort than with recognizing an opportunity to relate the facts of the case to a larger context and to set precedent for transnational corporate liability.

7.3.3 The 2003 Bano Appeal

The 2003 appeal of the Bano case upheld the district court’s ruling on the statute-of-limitations, its ruling on standing for class representation, and its ruling on the impracticability of equitable relief. On the issue of named plaintiff Haseena Bi’s claims for monetary and injunctive relief for injury to her property the district court remanded for further proceedings “including consideration of whether those claims may be pursued in a class action”. Three key issues, elaborated below, were raised by this case.

Statute of Limitations

The state-of-limitations issue was raised in the 2003 appeal heard before the Appeals Court. To counter restrictions imposed by the statute-of-limitations, which limited claims for damages, plaintiffs identified “continuing trespass” and “continuing nuisance” claims. A key point of debate centered on the instance at which Haseena Bi learned of, or should have learned of, damage to her property. In determining the period after which a statute of limitations becomes effective, the starting point for calculating time elapsed depends on whether injuries are patent⁶³ or latent⁶⁴. Though the statute-of-limitations does hold in cases of claiming damages to property, it does not apply to claims for injunctive relief.

Class Representation

In order to be valid, class representation must stand up to three tests:

1. Members must have standing to sue in their own right
2. Interests that an organization seeks to protect must be relevant to its purposes
3. The claim asserted and the relief requested must not require participation of individual members in the lawsuit

In the 2003 Bano appeal, it was found that claims for bodily harm and damage to property do in fact apply to specific individuals, and it was determined that these individuals must be involved in establishing proof of their claims. Therefore, the attempt at securing class representation was not successful.

Practicability of Enforcement

⁶³ an injury in which “there is no interval between the alleged exposure and resulting harm.” *Dabb v. NYNEX Corp.*, 262 AD2d 1079, 1079 (Fourth Dept. 1999)

⁶⁴ “a thing or condition that is present but not evident or manifest.” *Giordano*, 599 F3d 87, 98 (Second Cir. 2010)

Practicability of enforcing a judgment for an injunction came into consideration in determining the appropriateness of a ruling and in this case it was determined that enforcement of injunctive relief might violate India's national sovereignty.

7.3.4 2005 District Court

The 2005 District Court affirmed a Report and Recommendation by Magistrate Judge Pitman that denied claims for class certification by plaintiffs and denied the intervention of additional class representatives. The Court's ruling addressed issues regarding 1) Ownership of Property, 2) Representation and Resources, and 3) Practicability of Enforcement.

Ownership of Property

Since it was discovered that Haseena Bi did not actually own the property that she lived on, which is a requirement for pursuing a complaint, her claims for damages were dismissed. This finding sheds light on the reality that property ownership necessitates a certain level of privilege and social inclusion. In cases where disenfranchised citizens, for example inhabitants of slums, are exposed to toxic contaminants, not holding a title to property eliminates the ground on which they may appeal for injunctive relief.

Representation and Resources

The ruling against Haseena Bi's legitimacy as a representative for class action makes mention of her lacking "substantial financial resources" to fulfill this role. Once again, the state of disenfranchisement becomes further entrenched as it hinders the capacity to take action with the intent of preventing further harm and social exclusion.

Practicability of Enforcement

The impracticability of enforcement was raised once again in the District Court ruling as an obstacle to enforcing injunctive relief at the UCIL site. Despite receiving a letter from the Union of India in June of 2004 affirming that India did not have objections to remediation of the former UCIL site, the court stated, “A District Court sitting in New York cannot be expected to control a clean-up effort 8,000 miles away.” This reasoning promotes an imbalance in considerations of spatial efficiency: it affirms the spatial efficiency of economic relationships and transactions maintained by the transnational corporate assemblage, yet claims inefficiency in the legal enforcement of transnational remediation.

2006 Summary Order

The final Summary Order for the Bano case affirmed earlier rulings on 1) Property Ownership, 2) Practicability of Enforcement, and 3) Class Representation.

7.3.5 Sahu versus Union Carbide

The Sahu cases refer to two distinct actions that have lead plaintiffs with the same surname. *Janki Bai Sahu et. al v UCC and Warren Anderson* (filed in 2004 and referred to as Sahu I) and *Jagarnath Sahu v UCC and Warren Anderson* (filed in 2007 and referred to as Sahu II)

The Sahu I case seeks damages for personal injuries, demands cleanup of the former UCIL site, and seeks to hold UCC liable for the acts of UCIL. A decision was issued on the Sahu I case in June 2012, but the case is expected to face appeal in 2013. The Sahu II case pursues damages for remediating properties contaminated by leakage from the Bhopal plant including cleanup of property in adjoining colonies. The suit was

stayed in District Court pending a ruling on Sahu I and has not yet been reopened. Piercing of the corporate veil was the major issue raised in this case.

Attempts to Pierce the Corporate Veil

The case of Sahu I was heard before the U.S. District Court, Southern District of New York in December 2005. The plaintiffs' claims were all dismissed but for one exception relating to the piercing of the corporate veil, or breaching the separation of liability maintained between two distinct corporate entities in the forms of parent company and subsidiary company,

[T]he Court will stay, in accordance with Plaintiffs' request, a decision regarding whether the Court can pierce the corporate veil of a company in which Defendant corporation previously owned stock. Before the Court rules on this remaining claim,[1] Plaintiffs, pursuant to Rule 56(f), are granted additional time for discovery related solely to corporate veil piercing.

The key relationship under question, in testing for validity of piercing the corporate veil, is the nature of the relationship between the parent company (UCC) and its subsidiary (UCIL). In order to meet the terms for piercing the corporate veil, it has to be demonstrated that 1) UCC “exercised complete domination over [UCIL] with respect to the transaction at issue”, and 2) that “such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil.” UCC’s relationship to UCIL was not found to meet these terms.

Subsequent arguments presented before the Second Circuit of the U.S. Court of Appeals and the Southern District of New York from 2008 to 2010 primarily contested requests for summary judgment and requests for further time to conduct discovery. Again, the issue of “feasibility” of enforcement of relief was used to prevent injunctive relief, remediation, and medical monitoring. The last six years of the Bhopal legal

proceedings have been tied to technical and discrete issues of corporate relations that do not put focus on the actual wrongs claimed in the Bhopal disaster, but rather on details of the corporate-subsidiary relationship and on the statute of limitations. The 2012 district court ruling dismissed claims against UCC/Dow under all theories of liability – direct liability, concerted action liability, agent liability, alter ego liability, and individual liability for Warren Anderson. The defendants’ subsequent motion for Summary Judgment was granted, which marked a closing of the Sahu I case.

7.3.6 Key Issues Raised Through the Bhopal Cases

The Bhopal Cases have not yielded notable rulings in favor of plaintiffs, but they have presented a sustained opportunity for engaging with, challenging, and advancing key thematic arguments relating to corporate theory. Six key debates on corporate environmental violations are identified as having been highlighted and elevated by the Bhopal proceedings to acquire global recognition.

Determining the proper jurisdiction for hearing violations committed by multinational corporations outside their country of legal domicile

The issue of variable jurisdictions for infractions committed by multinational corporations and their subsidiaries outside the country of primary domicile was raised in the earliest Bhopal case. The court addressed a motion by UCC to dismiss consolidated action brought by more than 200,000 plaintiffs, on grounds of *forum non conveniens*. UCC claimed that Indian courts would be better suited for hearing the case, as India is the home jurisdiction of the foreign plaintiff Union of India.

Relevance of the Alien Torts Claims Act for pursuing environmental damages

The Bano case advanced six claims for civil damages under ATCA “to compensate for dangers caused by the gas leak disaster itself, and allege violations of

various purported international norms of environmental, criminal, and human rights law.” The suitability of prosecuting environmental violations under ATCA has been contested in court on several occasions without success. Presently, ATCA’s relevance for prosecuting human rights violations perpetrated by corporations is being heard before the U.S. Supreme Court in the case of *Kiobel v. Royal Dutch Shell*.

Interpreting the Statute of Limitations in a case of continued contamination

The issue of establishing the point at which Haseena Bi learned or should have learned of damage to her property was the most extensively debated point in the Bano appeal. The key issue under debate was whether the effects of injuries were patent or latent. This distinction subjects an injury to a different time lag before the statute of limitations sets in, depending on whether the injury falls under section 214 (patent effects) or 214-c (latent effects) of the New York Civil Practice Law and Rules (CPLR). Section 214, governing claims for personal injury or injury to property, maintains that action must be initiated within three years of the date of injury. Section 214-c modifies that in the case that personal injury or injury to property results from latent effects of exposure, then the three year period is calculated “from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff”. These time limits do not apply if a claim is for injunctive relief rather than a claim for monetary damages. The appeals court concurred with the District Court that section 214-c was applicable to this case, and since Bi’s injuries became manifest in 1990, allowing for a 10-year lag before she filed the suit in 2000, then her claims were barred by the three-year statute of limitations.

Practicability and enforceability of injunctions in international territory

The Court of Appeals held that the District Court could reconsider plaintiffs' request "for relief in the form of remediation of the former UCIL plant site." Subsequent to the Court of Appeals ruling, the Union of India sent a letter to the District Court (June 28, 2004) stating that India has no objection to remediation of the former UCIL site and that it would cooperate with any such clean-up effort. The letter maintained that India does not "submit...to the jurisdiction of the United States District Court...[and is] entitled to sovereign immunity under international law and do[es] not waive those immunities by this submission." The District Court maintained, however, that the letter did not automatically revive the claim and that it was under no obligation to reconsider onsite remediation. It cited again concerns with the practicality of ordering injunctive relief. This reasoning is problematic in that it sets a double standard enabling the operation of U.S. firms 8,000 miles away, yet claiming a concern with the impracticability of accounting for the consequences of operations at the same distance. If U.S. courts are able to ensure legitimacy of operations for a firm abroad, then it does not seem unreasonable that they would be expected to ensure accountability of those same firms to the communities in which they operate.

Legitimacy of class certification

The District Court denial of class certification to Haseena Bi due to inadequate financial resources highlights the financial burden of class certification. The Environmental Justice agenda claims that those groups who most likely to bear the burden of disproportionate contamination and damages are already economically marginalized. Accordingly, the requirement for a plaintiff to demonstrate financial

sufficiency in order to represent a class of injured parties may lead to a self-perpetuating cycle of repression against the most vulnerable citizens.

Piercing of the corporate veil

The attempt to pierce the corporate veil failed as 1) it was demonstrated that UCC did not overreach in its capacity as a parent company, and UCIL was responsible for the decision to manufacture pesticides, rather than only to process them, and that the decision was advocated by the Indian government and 2) there is no evidence of concerted action to commit fraud or wrong by UCC and UCIL. Plaintiffs' charges of "conspiracy and aiding and abetting" were found unsubstantiated by material fact. Ongoing challenges contest the limitations upheld by UCC regarding its relationship with UCIL.

7.4 LITIGATION AND THE BHOPAL JUSTICE PROJECT

The aftermath of the Bhopal disaster prompted a host of activist responses, both short-term and long-term in focus. In the days and months following the gas leak, activist groups and social movement campaigns assembled to target the causes and outcomes of the disaster and to advocate for the rights of victims. As lawsuits were filed in both Indian and U.S. courts, corresponding campaigns were maintained on the ground to advance the thematic claims brought against Union Carbide and later against Dow Chemical. This coordination reflects a sophisticated agenda that is both domestic and international in aims. Domestically, it creates political pressure and serves the immediate needs of survivors and successive generations of their descendants. Internationally, it is amplified to maximize impact and to pressure for structural reform of corporate relations.⁶⁵

⁶⁵ The definition of Social Movement adhered to here is identified by Dani and Bison (2004, p282), "networks of informal interactions between a plurality of individuals, groups, or associations, engaged in

7.4.1 Responses to the Bhopal Disaster

The first wave of activism following the Bhopal disaster mostly consisted of protests against UCC and the Indian government, demanding care and compensation for victims (Zavestoski 2009, p394). Within a year, it was mostly survivor-led organizations that remained active. By 1986, the Bhopal Group for Information and Action (BGIA) was formed by a core group of activists who had weathered the first year post-disaster. They recognized a need for centralizing organization and information at one focal point that could serve all groups working in Bhopal or on issues related to the disaster (p395). The BGIA's functions included collecting, documenting and disseminating information, commissioning and conducting research, lobbying for action, and collaborating with other groups working for the Bhopal cause. After the 1989 settlement with the Union of India, the movement spent much of its time and energy challenging the amount and terms issued in the settlement decision (p394).

BGIA worked to balance the demands of local organizing with the need to build a network of supporters beyond Bhopal (Zavestoski 2009, p395). On the ground, the primary objectives were securing healthcare and fair compensation for survivors of the disaster and their descendents. Beyond its localized objectives, the Bhopal lobby used the network of the global anti-toxics movement to extend awareness and consciousness of the Bhopal disaster, while simultaneously leveraging the visibility and notoriety of the disaster to lobby for international standards. In going up against a multinational corporation, the emerging movement faced a challenge of balancing the demands of

political or cultural conflict.” Social movements have three key features; “‘a sustained, organized public effort making collective claims on target authorities’, employment of combinations of various forms of political action, and concerted public efforts by participants to claim worthiness, unity, numbers (of supporters), and commitment (either their own or their constituents) to a cause”. (Tilly, 2004, 3-4). in Zavestoski, 2009” (p384).

transnational organizing with a commitment to a domestic constituency. In time, the loose-knit Bhopal movement began to experience internal tension over its guiding orientation. One faction was primarily concerned with demanding action from the UCC and the Indian UCC; critics deemed this group to be too political in its aims. Another faction was primarily concerned with providing livelihood to those families that had lost their sole earners; critics derided this faction for being too short-term in its focus.

In the 1990s the community's healthcare needs were strategically decoupled from the larger political struggle. It was more likely that health needs would be addressed if they were considered as a politically neutralized issue, separate from the other politically charged grievances against UCC. The International Medical Commission on Bhopal was formed in 1994, and in 1996 the Sambhavna Trust began operating a health clinic for affected communities that collected community health data and administered treatments. In 1994 the Bhopal Medical Appeal (BMA) was created through support from the Pesticide Action Network when Bhopal activists visited the UK to spread awareness about the lack of governmental response to the disaster and the need for community-based healthcare delivery. Presently, UK efforts of the Medical Appeal are led by Trustee Tim Edwards. The BMA raises money for the Sambhavna Trust Clinic in Bhopal and promotes sustained awareness of the case through its campaigns and publications.

Beyond Bhopal, international efforts were mobilized in parallel to the domestic movement, extending advocacy and activism to the U.S. and elsewhere. Local and global responses to the Bhopal disaster portray how the material nature of the transnational chemical industry results in a "global class of chemically exposed citizens" who demonstrated a capacity to organize solidarity networks and to create a global presence

that is rooted in the specific Bhopal disaster while transcending its particularity. Stephen Zavestoski notes, “the forces of globalization that facilitated the global expansion of the petrochemical industry are accompanied by counterforces in the form of social movement challenges to environmental hazards introduced by the industry.” (Zavestoski 2009, p402) He argues that in the case of Bhopal, transnational organizing does not merely have instrumental value and that the nature of the grievance that was perpetrated by a multinational corporation necessitates that restitution must also be of a transnational nature (p386).

The Bhopal case acquired even greater international currency after Dow chemical purchased Union Carbide in 2001 linking Bhopal activists to a “global chain of communities fighting for their health in the face of chemical contamination originating from Dow plants, its subsidiaries, or its products” (Zavestoski 2009, p399). International efforts adopted a range of motivating ideologies and operated at different scales. The Dow Accountability Network (DAN) consisted of Bhopal activists and members of the Pesticide Action Network, advancing objectives of corporate reform rather than an at-large overhaul of the corporate development paradigm. Other international organizations also established coordination with Bhopal activists with the purpose of relating the case and its symbolic significance to their own agendas. The slogan ‘No more Bhopals’ came to represent a call for corporate accountability and human rights and became imbued with grand, sweeping criticisms of globalization and of the petrochemical industry. In the 1990s Greenpeace placed Bhopal as a centerpiece of its ‘Global Toxic Hotspots’ campaign and in 1999 Greenpeace published a report, *The Bhopal Legacy*, featuring results from samples of solid waste, soil, and groundwater collected within and around

the former UCIL site. The organization also funded survivor tours to U.S. and to Europe. In 2004 Amnesty International made Bhopal a centerpiece of its corporate accountability campaign and published a report documenting injustices perpetrated in relation to the case over the previous decades (p398).

Of all the movements, the International Campaign for Justice in Bhopal has had the greatest staying power. It originated in late 1986 when Ward Morehouse's Bhopal Action Resource Center joined with a number of groups - Asian Regional Exchange for New Alternatives, the Bhopal Disaster Monitoring Group of Japan, Bhopal Never Again Action Group of the Netherlands, Bhopal Trade Union Solidarity Group and Bhopal Victims Support Committee both of the UK, and the International Organization of Consumers Union based in Malaysia - to unite under the umbrella of the International Coalition for Justice in Bhopal (Zavestoski 2009, p396). By 2000, the Coalition was revamped as the International Alliance for Justice in Bhopal, and in 2002 it was again rebranded as the International Campaign for Justice in Bhopal (p397). Since 2002 the ICJB has consisted of a network of international partners who are responsive to the agenda setting of four Bhopal-based survivor groups.

Today, the ICJB coalesces around five principles: 1) The Precautionary Principle, 2) The 'Polluter Pays Principle' - the idea that those responsible for polluting the environment and endangering health should also be held responsible for cleaning up that pollution and preserving health, 3) The 'Right to Know' - people should have easy access to information about potential or current threats to the quality of the environment and their lives, 4) International Liability - CEOs and Corporations should not be allowed to abscond from legal proceedings levied against them in other nations, 5) Environmental

Justice - poor, indigenous and people of color communities should not be targeted with polluting facilities, dangerous technologies and other threats to their health and community. ICJB's campaigns include: global Days of Action, provision of medical relief for survivors, clean-up of the abandoned factory, securing due compensation for survivors, securing provision of clean water for area residents, Jhadoo Maro Dow Koi (Whack Dow With a Broom!), and lobbying for the extradition of Warren Anderson. Most recently, the ICJB supported protests against Dow Chemical's sponsorship of the 2012 London Olympics, which was promoting itself as the most sustainable Games in history. Meredith Alexander, one of thirteen commissioners of the London 2012 sustainability, resigned from her position in protest over the relationship between the London Olympics and Dow Chemical as one of its most high-profile sponsors.

Over 28 years of activism, the Bhopal movement has faced several structural challenges that prompted adaptation and evolution. In its early years the movement needed to work through the challenges of operating at a range of levels while taking on a host of different issues and agendas. The movement was concerned with meeting the immediate medical needs of affected individuals, lobbying for compensation demands, monitoring the allocation of settlement funds, supporting the economic rehabilitation of survivors, confronting the legal challenges of the settlement, pursuing criminal trials against corporate executives, and strategizing broader efforts for corporate reform. Today, the movement maintains a constant struggle between balancing an international campaign that is critical for a globalized developmental structure, while being attentive to the core demands of the Bhopal organizations and their campaigns for discrete needs. It

works to advocate for the rights of survivors to fair compensation and care while advocating for international agreements to protect people from future Bhopals.

7.4.2 Coordinating Lawsuits and Social Action

In this section, examples of activist initiatives will be described in brief to demonstrate how the legal project and the social movement enable a complementary momentum that moves the Bhopal case forward while maintaining its relevance to the public as well as its political appeal.

A number of advocacy and awareness events were scheduled in the U.S. in 2003 around the time of the appeal of the Bano case. In April 2003, a Survivor's Tour coincided with the Bhopal Class Action appeal in New York. During the ICJB organized tour, survivors visited various communities affected by Dow Chemical and met with support groups and collaborators to discuss shared objectives and devise joint strategies. The Survivors Tour also traveled to Midland, Michigan for Dow's annual shareholder meeting to confront attendees about Dow's pending liabilities in Bhopal. In May 2003 a meeting was held on Capitol Hill between members of Congress, Bhopal survivors Rashida Bi and Champa Devi Shukla, and leading members of the ICJB. In July 2003, 18 members of the U.S. Congress sent a letter to Dow Chemical condemning the company for failing to address its liabilities in relation to the 1984 chemical gas disaster in Bhopal. In October of the same year 9 members of the U.S. Congress filed an amicus brief with the U.S. Court of Appeals for the Second Circuit urging the court to hold Dow Chemical responsible for the Bhopal disaster (Venkatesan 2003). In the brief, Congressmen noted the increasing prevalence of cases coming before U.S. courts that involve environmental pollution in foreign states or claims of harm caused by American multinational

corporations. The brief lamented that at the level of the District Court, substantive and novel questions regarding equitable relief for environmental remediation outside the U.S. had not been considered carefully. This series of events demonstrates how leaders of the Bhopal justice project were able to leverage a milestone in the case proceedings to engage a host of stakeholders, most notably Congressmen who could activate political pressure and elevate the case's political relevance.

The Sahu cases are primarily concerned with environmental damage to property incurred since the Bhopal disaster, as well as with piercing the corporate veil between Dow and UCC. This focus on the physical damages was complemented with increased publicity and scholarship relating to those dimensions. In September 2004, less than two months before the Sahu I complaint was filed, U.S. Congressman Frank Pallone introduced a bill in the House of Representatives "Recognizing the 20th anniversary of the Bhopal disaster and expressing the commitment of Congress to work with the Government of India and others to ensure that Union Carbide provides environmental and medical rehabilitation of the affected area and is held responsible for its actions." A year earlier, in November 2003, the Journal of the American Medical Association published a study carried out by the Sambhavna Trust Clinic demonstrating "selective growth retardation in boys, but not in girls, who were either exposed as toddlers to gases from the Bhopal pesticide plant or born to exposed parents" (Ranjan et al, p1857).

In December 2004 Boston Common Asset Management filed a shareholder resolution with Dow regarding disclosure of its potential risks and liabilities in relation to the 1984 Bhopal disaster. The resolution alleges that the Bhopal case could have bearing on the company's reputation, finances, and access to Asian markets. The California

Public Employees' Retirement System and New York City Employee Retirement System were among other institutional investors who supported the request for a report from Dow assessing potential impacts of the Bhopal case on the company. Calls for the report were prompted at least in part by a negative public image due to Dow's connection with Bhopal and the company's exposure to litigation through both civil and criminal cases in the U.S. and in India. In November of the following year the New York State Common Retirement Fund and the New York City Fire Department Pension Fund filed a joint shareholder resolution with Dow calling on the company's management to report to shareholders regarding "new initiatives instituted by management to address specific health, environmental and social concerns of Bhopal...survivors." Shareholders reason that corporate responsibility has a bearing on the long-term performance of companies in their portfolios.

Throughout the Sahu cases, activist campaigns aimed to reinforce a direct association in the public consciousness between Dow and the UCC disaster, claiming that, as the successor of UCC, Dow also became the inheritor of its damages and legacy. In 2007 and 2008 campaigns successfully pressured the Indian government to set up an Empowered Commission to address rehabilitation of Bhopal victims including medical care, employment support and clean-up of hazardous waste at the UCC site. In furtherance of the strategy to create a link between Dow Chemical and UCC, the prestigious Indian Institutes of Technology faced protests at campuses across the country opposing Dow's efforts to recruit students for employment or to sponsor events.

In 2009 the Bhopal Group for Information and Action (BGIA) organized a 42-day U.S. tour stopping in New York, Washington DC, San Francisco, and other cities to

highlight residual toxicity in Bhopal and to bring pressure on Dow to clean up the site. Two teenagers from Bhopal, Sarita and Sareen, met with officials, academics and politicians to share accounts of the contemporary state of the disaster site and its surrounding communities. Part of the tour included a meeting on Capitol Hill, and in June of 2009, 27 U.S. Congressmen signed on to a letter demanding that Dow Chemical clean up the Bhopal site, claiming that “As the parent company of Union Carbide, Dow bears the responsibility for Union Carbide's liabilities.”

These examples demonstrate how coordination between the Bhopal lawsuits and social movement campaigns reinforced each other over the course of the Bhopal justice project. At times, the advocacy and awareness campaigns prompted actions in support of the lawsuit, such as the amicus brief that was submitted by members of Congress or the medical studies that generate new data. At other times, the existence of the lawsuit instigated initiatives and demands from other actors like institutional investors and university students.

7.5 CONCLUSIONS

Part 7.2 of this chapter outlined pragmatist and constructivist philosophies in legal theory and argued that each of these orientations motivates a different approach and strategy to activist lawyering. It argued that the Bhopal justice project has drawn upon both pragmatist and constructivist trends to forge an agenda that confronts immediate grievances while also pursuing larger structural concerns. Part 7.3 summarized the proceedings and outcomes of the four Bhopal cases and identified the key issues emerging over twenty-eight years of trial. Part 7.4 situated the Bhopal legal project within a wider social movement context in order to demonstrate examples of coordination

between trials and lobby efforts to advance wider issue-based agendas. This collaboration has enabled the Bhopal justice project to contest the legal framing of the corporation by challenging particular statutes, while also leveraging these arguments beyond the courts to animate public indignation and foment political pressure.

7.5.1 Contesting the Corporation

By taking on the form of a movement that bears significance beyond the details of a particular case, the campaign against UCC/Dow has contributed towards a wider interrogation of corporate identity while taking into account aspects of spatiality, materiality, and contingency revealed by the Bhopal disaster. Questions relating to the proper jurisdiction for trial, and to responsibility and practicability of remediation for corporate operations abroad remain largely unanswered. The issue of materiality comes to bear on the Bhopal case in two distinct ways. One aspect is the financial materiality of the Bhopal campaigns and legal proceedings as they affect UCC/Dow's corporate reputation and affect the company's risk exposure. The second issue is the production of materials that redefine corporate contingency and liability in the context of existing legal framings. The contingent relationship between Union Carbide and Dow Chemical continues to be contested through legal challenges to the corporate veil.

In response to these challenges, Dow's key defense appears to be slightly more than an attempt to turn a blind eye with the expectation that the issue would disappear. The policy of reaffirming detachment from UCC and repeating the message that this case has already achieved closure is further evidenced in the resistance to offers for mediation. In 2007, counsel for plaintiffs advanced a proposal for mediation with UCC. Renowned mediator Kenneth Feinberg volunteered his services pro bono, but Dow rejected the offer.

Dow maintains that it has no formal attachment or affiliation with the actions of its predecessor UCC; accordingly this prevents it from entering any negotiations as an extension of UCC. While resolution of the Bhopal case would put to rest the grievances of hundreds of thousands of Indian citizens, it would also open the door to a host of claims against Dow, while jeopardizing its consistent narrative of detachment from and closure on the operational history of UCC.

7.5.2 Opportunities and Limitations of the Courts

In the project of reforming corporate theory such that it accords with the realities of existing grievances, the courts present a meaningful opportunity for progressive contestation. Legal challenges and the possibility of appeal buy time in a manner that may play to the advantage of plaintiffs who can use the additional time to assemble new evidence, draw upon new scientific discoveries, or anticipate the retirement of a Judge who has ruled consistently against their favor, as is the case of Judge Keenan who has presided over the cases in the Southern District of New York. In such a situation, a “win” is anything that happens that allows for a case to continue. As the case continues, it allows for the emergence of new arguments and variables that may alter the direction of proceedings. It also allows for an issue to remain active in the public consciousness and to animate concurrent campaigns in the political and social realms. An ultimate win in this case would be for Dow to acknowledge its liability to the Bhopal victims. Beyond the legal victory, this admission of liability sets a helpful precedent for similar litigious efforts in other cases.

Potential for corporate liability reform through the courts must not be overstated, however. The pressure to frame cases narrowly enough such that the desired ruling can

extend from the precedent of prior rulings and increase the chances of a litigious victory restricts the possibilities of pushing for bold rulings and newly contextualized interpretations. This makes it difficult to interrogate foundational definitions or to work outside the dominant rhetoric in order to challenge underlying norms. If a guiding objective is to maintain an overall coherence of the law as a structure, then it is difficult to challenge the foundations of just one clause without upending the entire framework. This was evidenced in the case of Haseena Bi, who was deemed to have inadequate legal standing due to lack of property rights and financial resources. Such examples demonstrate how discriminatory distribution of environmental burdens on the poor are difficult to challenge through the existing structure of the law. Instead, they become reinforced through the disenfranchising consequences of being a slum dweller in an informal community who holds no right to claim environmental injury.

Solely relying on efficient settlement through the courts also plays into reinforcement of a pre-existing power imbalance. Relying on settlements to resolve disputes assumes that both negotiating parties have comparable levels of agency and political collateral. When one of the parties holds more bargaining power than the other, however, it becomes less likely that the 'efficient' settlement is also the 'just' settlement. The more likely outcome is that negotiation will systematically yield favorable outcomes for the party that can better serve the short-term interests of an arbitrating power. This dynamic, normalized through repetition, habituates the more powerful actors to behave with impunity. In this vein, the Bhopal disaster sheds light on the inadequate representation of the Indian government for its affected citizens and its complicity in

accepting lower operating standards for foreign enterprises that hold a significant stake in the Indian economy.

7.5.3 Cause-Lawyering and the Importance of Alliances Beyond the Courts

Sarat and Scheingold's commentary on cause-lawyering puts in perspective some of the approaches of the Bhopal legal campaign. Departing from the conventional understanding of the legal profession as technically and morally neutral, cause lawyering aims to agitate and disrupt the status quo, and concerns itself with the implicit political question, 'whose interests are maintained through the dominant understanding enshrined in the law?' (p4). Sarat and Scheingold's description of 'mobilization lawyering' as a form of cause lawyering that pursues structural changes through the medium of the law and/or political action corresponds with the observed dynamics of the Bhopal legal project (p15).

Strategically, lawyers pursuing a case that is known to be a 'lost cause' might be working to further a more foresighted agenda with aims beyond the immediate contest at hand. "They see themselves as bearing witness to the injustices of the present, and they use litigation as a way of memorializing those injustices. They seek to "make a record" as a way of appealing to the future" (Sarat and Scheingold 1998, p20). This strategy is meaningful for issues that are expected to increase in relevance given the direction of social or economic development, as happens to be the case with the expansion of multinational corporate activities worldwide. In the case where lawyers are vulnerable to a hostile political climate, it is strategically favorable to ally with social movements or to become incorporated in them in order to move beyond defensive strategies (p9). The research of Michael McCann and Helena Silverstein on the effectiveness of cause-

lawyering highlights that cause lawyers may see their contributions through litigation and legal discourse, as resources to be allied with other instruments of broad-based movements and campaigns. “these cause lawyers did not simply accept as neutral prevailing ideological and discursive legal frameworks, but critically questioned and challenged the foundations of law.” While these lawyers do note the relevance of litigation, their legal perspective does not “foster an uncritical, singular, or even privileged reliance on a litigious strategy” (McCann and Silverstein 1998, p287). Litigation can carry indirect benefits for a broader advocacy effort. These benefits include: educating and mobilizing constituents, creating political pressure and publicity, increasing leverage in negotiations, and forging partnerships and alliances. In the case of high profile corporate cases, litigation can also excise a tax on the corporation by exposing it to negative publicity.

The importance of the legal venue in the campaign for corporate liability and responsibility is highlighted by the proceedings of the Bhopal cases from 1984 to 2012. This case study sheds light on how aggressive legal-advocacy campaigns can utilize the courts as an amplifying mechanism to reach global consumer and investor audiences who might be better positioned to demand higher standards of corporate performance than those communities where a direct violation has been perpetrated. Through collaboration between legal projects and social movement initiatives, these campaigns are going beyond the more limited traditional judicial procedure as a means of undercutting Corporate-State alliances. While none of the Bhopal Cases has attained a ruling in favor of Bhopal victims, it can hardly be claimed that the legal project has not been a success. Perhaps the most far-reaching legacy of the Bhopal legal struggle has been the narrative it

has provided to an international imagination, helping to shape an agenda that identifies and defines as unjust certain dynamics and consequences of globalized neoliberal development, while envisioning and advocating for alternative possibilities.

8 – Conclusions

Over the past half century, a private designation of the modern corporation emphasizing core fiduciary imperative has been increasingly contested by a public reaction that is discontented with the perceived impunities and amplified externalities of corporate operations. More and more, an abstracted divide between public and private power that sits at the heart of Western modernity becomes blurred as corporations are expected to assume public roles or to take decisions with the social welfare in mind. This project has attempted to grapple with such realities, seizing the Corporate Social Responsibility discourse as a vehicle for interrogating the public identity of the modern corporation and considering possible interventions for contesting and redefining its public role in light of contemporary context and dynamics. This chapter begins with a summary of project aims and objectives in Part 8.1. Key findings from each of the four analytical case studies are then rehearsed in Part 8.2, followed by more integrative analysis of the crosscutting conclusions. Part 8.3 continues with reflections on the research process and lessons learned, while Part 8.4 gestures towards opportunities for further inquiry in the directions inaugurated in this research. Part 8.5 concludes with implications of these research findings for a public policy agenda.

8.1 PROJECT SUMMARY

The inspiration for this project began in the summer of 2008 when I was first exposed to the Union Carbide case in Bhopal, India through a summer research project. With academic training grounded in an Environmental Health Science perspective, I approached this case as an essentially technical controversy, focusing on the physical

contamination of the UCC facility and the environmental and health damages endured by area residents. As I became more deeply involved with the case, and engaged in site visits and conversations with activists and victims, I developed a greater appreciation for sociopolitical and legal dimensions of a controversy whose consequences were not apparently contained by existing laws and regulatory regimes. With the Bhopal case as a vivid reference, this project sought to devise an account of the corporate-public relationship that is attentive to both material and immaterial dimensions of corporate-public controversy. Such an account also situates discrete cases in the context of systemic dynamics, and holds potential for informing regulatory and accountability regimes that contain the gravest consequences and public impacts of the modern corporate assemblage.

I began this research with the aim of finding answers to the question of the modern corporation's role in contemporary democratic society and the possibilities of securing transnational accountability for its violations. With that end in mind I initially sought to develop a theory of the modern corporation that acknowledged and elaborated its role as a public, political actor. At the outset, I held simplified assumptions about the structure and nature of the corporation and sympathized with positions characterizing it as a monolithic entity designed to concentrate capital and to evade public liabilities. Early conceptualizations of the corporate actor were challenged by a number of key texts. In "The Modern Corporation and Private Property" (1932) Berle and Means provide an account of the corporate revolution of the 20th century, elaborating their analyses from economic and legal perspectives. The "corporate revolution", by their account, departs from traditional understandings of 'property' and is characterized by the separation

between ownership and control, and the emergence of the managerial class. The notions of fiduciary capitalism advanced by Hawley and Williams (2000) and the constitutional corporation advanced by Bottomley (2007) added further layers of complexity to a characterization of the corporate entity, blurring the lines between powerful and populist designations that are ever present in the narratives pitting mega-corporations against an abstracted public. Throughout the early stages of research, it became increasingly apparent that a political characterization along conventional lines does not sufficiently account for the various modes of social impact and public consequence that the corporation affects in a complex contemporary reality.

With the aim of acquiring a grounded understanding of the corporation's essential nature, and of the variable interpretations of its role in contemporary political life, I began with a legal deconstruction of the corporate entity in order to clarify the dimensions of the notion being contested. Analysis revealed several different characterizations of the corporate assemblage. Initially I sought to locate an ideal definition as the point of departure for further analysis, but then determined that it is precisely this plasticity that makes the corporation so controversial, so conducive to analysis, and so compelling as a vehicle for practical reform. Early chapters of this work focused on deconstructing the corporate entity and on revealing connections between referent political ideology and interpreted expectations of a corporate-public relationship. This attentiveness to ideology was helpful both to interpreting how prevailing expectations are determined and to identifying opportunities to counter the dominant order with alternative interpretations that are themselves theoretically and legally coherent. The exploration of variable

mechanisms for contesting and defining the corporate-public relationship revealed pathways for amplifying radical counter-narratives.

The Critical Legal Studies (CLS) tradition was identified as being well suited to opening up the corporate entity and to observing the influence of ideology in informing legal interpretation and determining expectations of its public/social roles. CLS was notably helpful for exploring the historical contingency of the corporation's public identity, but it did not go far enough in providing the necessary tools for addressing spatial and territorial assumptions that are embedded in operant definitions of the modern multinational corporation. For this purpose I turned to the Critical Legal Geography (CLG) literature for more elaborate instruments of legal interrogation that confront the material geographic realities of corporate development. The geographic perspective was suitable to my research aims due to its effective bridging between physical manifest realities, and notional theoretical constructions. While CLG analyses already engage the spatiality of the law, I drew upon additional themes of universality and particularity, transnationality and contingency, territoriality and jurisdiction, as well as risk and materiality to devise a framework for interpreting the complex dynamics of the multinational corporation.

A key criticism of the critical legal tradition pursued in this work is that it serves primarily as an exercise in deconstruction without providing meaningful pragmatic applications. With the aim of pursuing aims that are both critically rigorous and pragmatically constructive, I adopted the CSR discourse as both subject and object of analysis. As a subject of analysis I critically evaluated and engaged it on its own terms, while as an object of analysis I used it as a vehicle for interrogating and revising the

corporate-public relationship. I noted that CSR is the most institutionally developed intervention attempting to mediate the relationship between corporations and society. Approaching CSR as a discourse requires considering it in the context of wider social dynamics and legal narratives within which it is implicated and the development patterns and political relationships that it reinforces. In its present form CSR is criticized for serving as a performative regime that does not seriously grapple with the substantive social, political, and environmental impacts of corporate operations. Although this discourse is dominantly approached as a business/managerial agenda, CSR maintains the potential to serve as a multi-dimensional and multi-layered contestation of a corporation's public identity. This work has argued that CSR can become more relevant as a means to mediate between corporate and public interests if it is explored as a politicized discourse that is attentive to legal geographies.

The four cases developed in Chapters 4 to 7 allowed for a grounded interrogation of the abstracted themes developed in the analytical framework and ushered in an alternative characterization of the corporation than what is available in a conventional neoliberal framing. Each of the case studies elaborated over the course of this project provided an opportunity to contest particular aspects of the corporation's public identity. The importance of informing CSR orientations with socio-political and legal context was explored through the 2011 shutdown of Egypt's ICT sector and the implications of a securitized rationality for CSR agendas in the contemporary Egyptian context. The translational functions of community materiality and social risk in reconciling public and private interests were explored through Rio Tinto's Eagle Mine and its Community Environmental Monitoring Program. Territoriality and jurisdiction of corporate

accountability regimes were explored through the alternative dispute resolution functions of the OECD's National Contact Point mechanism in the case of Argentina's Villa Inflammable. Finally, pragmatic and aspirational efforts to contest corporate liability were explored through the lawsuits and social movement campaigns initiated against UCC/Dow following the 1984 Bhopal gas leak in India.

These theoretical elaborations, developed through case narratives, contribute to an account of the corporation that diverges from what is found in existing literature. The present-day account of CSR is originated and advanced by a larger ideological orientation that I will label as the 'corporate rationality'. A corporate rationality is universalizing, materialist, positivist, formalist and rationalist. It makes use of symbolic power to construct corporate fictions and identities, it is perceived as centralized, negligent, and anti-democratic. The corporate rationality is confronted and contested in this work by a 'radical rationality' that is concerned with power dynamics, and questions of agency and self-determination. This work has argued that a radical rationality provides an account of the corporate-public relationship that carries relevance to a range of actors; corporations, public communities, policy makers and legal scholars; each of whom has a part to play in addressing the challenges presented by the modern corporate arrangement. Over the course of this research endeavor, I have acquired an appreciation for the notional and legal complexity of the corporation and for the diversity of responses and interventions that attempt to grapple with its consequences. This nuance challenges a more simplified indignation than the one I held at the start of this project, and enables in its place a more aspirationally idealistic, intellectually rigorous, and functionally pragmatic orientation towards the challenges of corporate development.

8.2 KEY FINDINGS

In this section I will begin with a summary of key findings from each chapter. I will then go on to identify crosscutting themes and conclusions that connect across the four theoretical strands while elaborating them with relevant examples drawn from the body of the dissertation.

8.2.1 Findings by Chapter Theme

Each of the four empirical chapters (4-7) developed a theoretical thread that is relevant to the project of advancing a deeper understanding of the corporate-public relationship and informing a more substantive CSR. Grounding each of the four themes in an illustrative example allowed for further interrogation and elaboration of the respective theoretical thread through the details of a particular case narrative.

Chapter 4 - The CSR Agenda Has Both Universal and Particular Dimensions

This chapter examined the importance of sociopolitical and legal context for understanding the role and positioning of the corporation relative to the institutions of the State. The selected case explored the connections between CSR and corporate-State relationships through examination of Egypt's telecommunications sector. It focused on the mobile phone and Internet shutdown of 2011 to consider how ICT companies had been legally positioned as subservient to the State's militarized imperatives as a function of the securitization agenda embedded in the sector's regulation and in the economy more broadly. This chapter observed how economic liberalization might be undermined by an expanded securitization agenda that seeks to preserve a centralized decision-making structure. This results in little more than a cosmetic economic modernization without altering the underlying authoritative dynamics. The chapter also demonstrated how legal

and political context informs the potential for expressing a ‘social responsibility’ agenda, and it argued for the importance of developing a regionally and politically sensitized approach to CSR.

The CSR agenda emerges in the context of a liberal market ideology with implied self-disciplining regulation. Its effectiveness as a mechanism for mediating between private business entities and public interests is premised on the fulfillment of two key assumptions. The first assumption is that an elective commitment to the public interest does not contradict a commitment to maximize profit in the interest of shareholders. This correspondence must hold in order for CSR to be considered legitimate, in keeping with the fiduciary principle. The second assumption is that the State entity, its laws, and its institutions are a legitimate representation and reflection of public or social interests. The condition of representational legitimacy must be met, with the State functioning as a symbolic and functional agent of the public, in order for the corporation’s social contract to carry any real meaning. As the Egyptian case demonstrated, these assumptions are not necessarily present in what is presumed to be a modern liberal market economy. In the absence of a functional democratic context and social protections, free trade and private property ownership easily mask deeper illiberal values, which prevent CSR from engaging with any ‘social’ or ‘public’ agenda in a critical sense.

When multinational corporations choose to operate in authoritative States, or when economically and politically liberal societies enforce authoritative agendas, CSR necessarily becomes a politicized endeavor. In such cases, the key tension with respect to the legitimacy of a CSR agenda is not the conventional stakeholder versus shareholder dilemma. Rather, it is a tension between a corporation’s obligations to the State that

enables its operations, and to the public whose interests are purportedly represented by the State. If corporations are to deviate from their legal contracts to favor the interests of a repressed ‘public’, then another set of legitimacy concerns arise with respect to national sovereignty and the selected definition of ‘social good’ or ‘public interest’. To allow corporations to interpret ‘social good’ or ‘public interest’ by their own measures rather than in accordance with State-sanctioned positions, would open the door to neo-colonial extension of Western values from a corporation’s home country context to a host country context. This license would allow for undermined national sovereignty under the guise of universal value promotion.

Chapter 4 demonstrated that a de-politicized managerial CSR discourse is a simplified myth and that some political values and pre-conditions must underlie the modern liberal corporate agenda. To acknowledge this is to open a host of questions regarding the political identity of the corporation and to leave it unaddressed is to relegate CSR to the function of cosmetic public relations initiatives. With the expansion of Western corporations into peripheral economies and political environments of diverse ideologies and orientations, it is necessary that corporate regulators and CSR strategists confront the particularity of these contexts and examine the role that corporations take in acquiescing or challenging, engaging or evading the values and agendas of these markets.

Chapter 5 – Community Materiality Presents an Opportunity to Bridge Public and Private Spheres

This chapter was framed within the liberal democratic context of the United States and engaged one of its key ideological foundations; the sanctity of the public/private divide. Through the illustrative example of Rio Tinto’s Eagle Mine, this chapter demonstrated how a CSR intervention that was framed within the rhetorical and

conceptual parameters of community materiality and social risk simultaneously challenges and reinforces the public-private divide at the heart of a contemporary liberal corporate identity. Approaching community variables through the lenses of materiality and social risk reorients these variables such that they align with corporate interests. Community variables that might typically be considered as peripheral matters prompting philanthropic activities become translated into technical social risk variables relevant to core company performance. This approach succeeds in granting greater practical leverage to community interests. At the same time, it intensifies a privatized approach to social risk management and diverts attention away from the roles and responsibilities of the State as a guarantor of social protections.

Furthermore, reliance on privatized risk management as a substitute for State protections assumes at least minimal political capital that the most marginalized of communities are not necessarily afforded. The financial relevance of ‘community materiality’ as a variable of risk can only manifest with the fulfillment of certain pre-conditions. Communities must be visible, vocal, appreciate a measure of political clout, and carry obstructionist capacity in order for their ‘interests’ to become material enough to a company’s operations. In cases where political repression prevents social organizing or media censorship diverts attention away from local resistance, then the implications of a ‘material’ interest on reputation or brand value are abated and community materiality is of marginal significance. With this dynamic in mind, reliance on privatized risk management in lieu of public protections that are traditionally provided by the state, renders public welfare vulnerable in situations where conditions do not elevate community interests to the threshold of financial relevance.

Materiality of community relations, as embodied in the CBEM solution, is an effective bridge between the public and the private operations of a corporate assemblage. It does not go far enough, however, in acknowledging that community is neither static nor uniform. Community is comprised of different interests and sub-groups. The process of interpreting community materiality entails distillation of a host of complex relationships and impacts into those particular interactions or dynamics that are relevant enough to measure and to address through strategic responses. This translational process is essentially political. Ultimately, what is being claimed in these conflicts between community and corporation is representational integrity, and participatory power. Being attentive to the different points of simplification, selection and distillation is important for recognizing which groups and voices are systematically silenced or ignored and thus made more vulnerable by a shift towards private risk management. These trends are significant for developing more nuanced understanding of the differentiated roles taken on by 'responsible industry' and State bodies.

The arguments of this chapter demonstrated two different levels of signification for transcendence of the public/private divide. The first was a pragmatic and operational sense that is advanced in the elaboration of materiality as a means to bridge community and corporate imperatives. The second was a theoretical sense pursued through the development of a conceptual alternative to the two-dimensional public/private heuristic. In its place, powell and Menendian introduced a four-dimensional heuristic that differentiates between private-individual and private-corporate. My own elaboration to their heuristic is to incorporate attentiveness to the scale of power transfer with respect to public, private and corporate designations.

Chapter 6 – The Corporation’s Theoretically Interpreted Identities Present a Challenge for Reconciling Its Plural Territorialities and Legal Jurisdictions

This chapter addressed the implications of the corporate identity on the territorial jurisdictions devised to address its contingent impacts and liabilities. It demonstrates how competing theoretical conceptualizations of a corporate actor bear practical consequences, such as the jurisdictional ambiguity examined in this case. It begins with a premise that the modern multi-national corporation is an entity with a complex identity and a plurality of affiliations. The conceptualization of a corporation’s legal identity as comprised of independent entities each with its own liabilities competes with an alternative conception of the corporation as a constellation of related entities with porous legal boundaries that allow for attribution of contingent liabilities. In considering the relationship between constituent components of a multinational operation, the debate over entity versus enterprise takes root in a more lasting tension in legal theory over contract versus status. In the case that contract is privileged as determining the standing and identity of a corporation, then a corporate constituent may be considered as its own independent entity. In the case that status is privileged and the separate corporate entities are acknowledged as having shared affiliation, the relational dynamics between the components and the larger operation carry greater relevance and legal liability shields become more permeable.

Entity versus enterprise theory carries implications for the form that legal jurisdictions must take in order to provide recourse for justice in the case of corporate infractions against public constituencies. An entity theory animates the present-day interpretation of limited liability which has enabled the global expansion of corporations as well as the aggregation of capital and entrepreneurial risk that is valorized in Western,

liberal economies. At the same time, this protective legal model enables conditions of impunity as corporations adopt variable standards of operation in various jurisdictions, often pursuing more reckless practices in the global South where operating standards are typically lowered in order to attract foreign investment. In such scenarios the formal legal independence maintained between subsidiaries and parent companies allows for corporate impunity as parent companies evade liability by conducting their operations through affiliates that are distinctly separate in form but not in function.

The enterprise theory, by contrast, conceives of the corporation as a constellation of entities operating as a concerted, collaborative unit. The enterprise theory is more representative of corporate operations and their interdependent dynamics, but it presents a fundamental legal challenge. The entities comprising a corporate enterprise fall under a number of disparate jurisdictions, including: the parent company's country of incorporation, the sites of its operating subsidiaries, as well as myriad formal and informal operating guidelines and oversight regimes at the regional and international levels. This complex reality creates a challenge for devising suitable legal regimes that appropriately deal with jurisdictional plurality without encroaching on the sovereignty of national judiciaries. Through the example of Argentina's Villa Inflamable, chapter 6 demonstrated how an enterprise theory of the firm is advanced through an international voluntary mechanism in the form of the OECD's National Contact Points.

The NCP's promotion of complementary differentiation for country offices allows each member state to develop the structures best suited to its own institutional capacity. At the same time these differentiated structures adhere to a shared set of standards that are expressed in the Guidelines, and follow procedures in keeping with a set protocol for

dealing with Specific Instances. In the absence of coercive enforcement capacity, however, most NCPs demonstrate limited effectiveness in yielding successful resolution and satisfactory outcomes to actual cases. While the NCP mechanism effectively sidesteps the challenges of legal costs and bureaucracy, this efficiency does come at the expense of precedence-setting capacity. The mediating mechanism aims to reach resolution rather than justice. The NCP's status as a mediating forum also limits the nature of cases that it can reasonably handle to those issues of modest conflict rather than those of criminal misbehavior. The NCP offers a helpful gesture towards alternative transnational and trans-jurisdictional fora for corporate dispute resolution, which demonstrates an encouraging confrontation with the realities of a contemporary corporate enterprise. Nevertheless it is only an early step towards a more comprehensive binding system for corporate justice.

Chapter 7 – Pragmatist and Aspirational Legal Agendas Can Effectively Collaborate Towards the Pursuit of Corporate Liability Reform

This chapter examined the actual practice of legal contestation and explored how pragmatist and constructivist orientations to the law prompt different strategies for pursuing an expanded corporate liability agenda. The Bhopal case explored contributions of the legal process to debates on the transnational identity and the contingent liabilities of the corporation. The chapter demonstrated how interplay between legally pragmatic and socially aspirational projects addresses the immediate impacts of a corporate infraction while also granting it a symbolic relevance that advances a more abstracted cause beyond a specific case-based agenda. In this case the immediate issue is securing restitution for the UCC/Dow gas leak in Bhopal, India, while the larger cause is setting symbolic precedence for transnational corporate liability and global accountability.

Analysis of the Bhopal litigation project in U.S. courts between 1984 and 2012 demonstrates how legal-advocacy campaigns can use the courts as an amplifying mechanism to advance more progressive interpretations of corporate legal theory. It notes the relevance of pursuing the Bhopal cases in U.S. courts as well as Indian courts. While the Indian courts provide a more proximate venue and a progressive legal tradition, U.S. courts are subject to greater media attention and are thus more likely to elevate an issue to the level of global concern.

Up to this point, the Bhopal lawsuits in U.S. courts have not yielded any rulings in favor of plaintiffs. Each appeal has led to greater pragmatism in adopted legal argument, evolving away from more ambitious precedence-setting claims. In a strictly litigious sense the plaintiffs have not been successful in advancing their claims. Taken in a wider context, however, the cases demonstrate how litigation projects can expand the meaning of a legal ‘success’ from strictly litigious victory to include as a ‘success’ the continuation of legal procedure over a prolonged period of time. A case’s sustained presence in the courts enables greater publicity as well as the activation of new ally groups such as politicians, consumers and investors. The range of actors that have become involved in the ‘Bhopal’ cause demonstrates great diversity of social and economic classes, interest groups and geographic locations. If the measure of success in legal dispute is defined as issue advancement, then the Bhopal case has been impressively impactful.

With the development of a broader Bhopal justice movement, the ambitious objectives formerly advanced in the courts have instead been adopted by a civil society network that continues to campaign for new discursive and legal parameters to issues of

global corporate liability. The Bhopal cases have achieved an extended legacy by inspiring a narrative of global corporate justice and transnational corporate liability that has endured for nearly three decades. A corresponding Bhopal justice movement has enabled a global awareness of corporate impunity, and of deficiencies in existing judicial recourse, that goes beyond the specific case of UCC's operations in Bhopal. Such an aspirational campaign elevates its associated issues to global importance where they might become adopted as internationally accepted norms and subsequently pave the way for more formal laws and coercive mechanisms that provide protections against corporate impunity.

8.2.2 Connecting Between Themes

The aim of this project is to develop a better understanding of the corporation's place in society, namely its relationship to the State and to civil society through social contract. It has been argued throughout this work that a critical legal geography perspective allows for a more meaningful exploration of corporate identity and dynamics than is attainable through existing theoretical accounts. It has also been posited that the contradictions inherent in CSR discourse create an opportunity to contest the prevailing, often unexamined, ideologies underpinning contemporary corporate-public relations. Viewed through the critical legal geography perspective, analysis of the four case studies reveals a number of crosscutting themes that contribute to understanding the present public standing of the corporation and to identifying opportunities for their contestation. These themes reinforce an overarching frame that departs from the ideologies and assumptions of a neoliberal narrative, while seeking to enact a different political vision and social reality. Pursuit of this vision undermines the public/private divide, the notion

of an absolutist liberal individualism, and the political neutrality of the market. Instead, it adopts a view of the corporation as an entity that is socio-politically embedded, that is constructively determined and contestable, and that is publicly implicated and politically valent. In this section I will lay out five crosscutting themes, each one supported with examples from the analytical case studies, informing an interpretation of CSR that promotes a progressive commitment to the public interest.

The corporation is not a closed, static unit but an open, contestable notion whose public identity is determined through ideological interpretation.

Problematizing the modern corporation as a legal entity reveals how its framing parameters become interpreted through ideological lenses to produce a range of operant definitions. Each of these definitions carries its own implications for the corporation's public identity and the social role it is expected to fulfill. Identifying the influence of ideology in shaping the corporate-public relationship demonstrates its plasticity and thus opens up possibilities for developing alternative interpretations of CSR. Chapter 4 explored the influence of legal and political context in orienting the corporation's relationship to the State. It demonstrated how the corporation's duties to the State and its responsibilities to the public interest can come in conflict, undermining the possibility of a politically neutral CSR. Chapter 5 noted the permeability of the barrier between public and private interests, observing that the public can be made private and the private made public. This occurs through the lobby efforts of affected groups who make their 'external' interests bear 'internal' relevance to company operations, and through corporate strategies that make 'internal' company evaluation 'public' in order to gain community trust. Several of Rio Tinto's recent initiatives – CEMP, the Community Scorecard, and the Stakeholder Engagement Academy – suggest a more essential shift in the way that

external stakeholders are being considered with respect to internal strategy and decision-making. Rather than considering local community and operating context as external to a corporation's productive operations, these initiatives demonstrate how operational context is increasingly approached as an ancillary dimension of core operations. In this manner, public identity can be observed to inform private identity as self-interests become redefined or at the very least reconceptualized in new terms. In chapter 6 the identity of the corporation shapes the form and scope of the legal regime required to regulate its impacts. Chapter 7 demonstrated how the normalized legal identity of the corporation might be destabilized through social movement campaigns that seek to develop alternative interpretations of liability. It explored the temporality of a corporate agent as it bears implications for its durability and contingent liabilities. The piercing of the corporate veil implicates a corporation in infractions committed by its subsidiaries. Questions about the threshold for sufficient involvement/affiliation to determine different units or operations as a singular corporate entity are essential to characterizing the independent versus contingent nature of the corporate actor.

The definition and identity of a corporate actor are contested through a range of legal and non-legal mechanisms. Combined, these mechanisms contribute to a multi-dimensional model of a corporation's public identity formation. The varied spaces of contestation activate a host of different groups to take part in problematizing and re-defining corporate identity.

Chapter 4 activates questions of a corporation's social contract. It highlights the relevance of 'deep-structures' in setting up the corporation's relationship with state institutions, the military, and the public. Legal and constitutional frameworks create parameters within which the public interest must be defined. In this case, legal reform that de-securitizes the economic sphere is essential to enable serious considerations of

‘social responsibility’. Chapter 5 demonstrates how demands and interests of local communities, even if undercut through state legislation, can be made ‘material’ to corporate interests through local obstructionism. In this manner, locals can seek rights-protection from ‘private’ rather than ‘public’ entities. Chapter 6 presents interplay between hard law and soft-law mechanisms, with soft law through the voluntary OECD Guidelines and the NCP serving as incubators for doctrines that might later be incorporated into binding treaties or binding international courts. Chapter 7 demonstrates the relationship between law and social movements and the interplay between pragmatic and symbolic agendas. While pragmatic legal projects allow for precedence setting, aspirational political project may ally with popular movements to change the terms of legality.

The spatial dimensions of the law determine the legitimate spaces for deliberating a corporation’s public identity; the boundaries of these spaces are themselves contestable.

In Chapter 4 the securitization of Egypt’s telecommunications sector, reinforced by legal statutes, results in the relocation of ICT regulation from the democratic apparatuses of the state to an exclusionary militarized sphere. The extension of a CSR agenda to the Egyptian setting assumes transferability of the liberal democratic context where these notions were originated. The economic liberalization encouraged by international bodies and western aid providers to the Egyptian development plan is assumed to come accompanied by a parallel political liberalization. The Egyptian case demonstrates that the particularity of context is essential to determining an effective CSR strategy that takes account of the corporation’s actual position in relation to the state. In Chapter 5 the grant of decision-making by state decree to central state legislatures rather

than local communities creates new spatialities of involvement and loci of agency. The effects of the law change the local community's formal relationship to the mining operators. Scale is also a key analytic in examining the Eagle Mine case as local interests of the 'community' and economic interests of the state come in conflict. In Chapter 6 the National Contact Point mechanism reveals contradictions between entity and enterprise theories of the firm in the way they deal with extraterritoriality and boundaries of liability for multinational corporations. These two theories result in varying conceptualizations of the corporate assemblage and accordingly they require different arbitration mechanisms to deal with complaints brought against a firm or one of its affiliates. Whereas the entity theory helps to limit the boundaries of liability, the enterprise theory opens up limitations to territoriality that, under the entity theory, would prevent parent companies from being prosecuted for infractions committed by their subsidiaries. In Chapter 7 the spatiality of jurisdiction comes into question through the litigation project against UCC/Dow pursued over nearly three-decades in U.S. courts. The Bhopal case highlights challenges to establishing standing for litigation in the case of transnational infractions, and the disjuncture between the space of incorporation and the space of operation as they confer or deny standing to aggrieved parties seeking damages. It reveals opportunities for extra-legal activism to draw linkages between parent and subsidiary companies in a manner that challenges the legal liability shield and pierces the corporate veil.

The spatial dimensions of the law also determine scope of material variables that inform internal decision-making. In Chapter 6, the enterprise theory informing an NCP arrangement expands the territorial scope of what variables are considered material to a corporate brand, and inducts transgressions of its peripheral subsidiaries into the core

concern of brand identity. This contrasts with an entity theory that limits the scope of contingency. In Chapter 7, the Bhopal litigation project challenges the temporal limits of the material; the Bhopal social movements elevate the visibility in order to make impacts more material to reputation and branding.

The present CSR discourse contains several contradictions that become activated in instances of public controversy.

The uniform assumptions of neoliberalism are neither stable nor static. These assumptions are agitated through debates over universal versus particular (Chapter 4), public versus private prerogative (Chapter 5), limited liability (entity) versus global accountability (enterprise) (Chapter 6). Chapter 4 explores the relationship between the state and the corporation either domiciled or operating in its jurisdiction. The social contract defined between a corporate ‘citizen’ and the state bears implications for standing, positive rights, and limitations. This social contract is underpinned by certain preconditions of a liberal society, which if unmet leave the citizenship status compromised. In Chapter 5 the operant conception of community determines how a corporation views itself relative to local constituencies; whether it is an outsider entering and disrupting a given collective, a central unifying agent around which a community coheres, or one among a range of citizens competing and comprising a community. In Chapter 6 the entity versus enterprise debate determines the range and reach of publics that a corporation is subject to as it formulates its public identity; whether it is national or global in nature. If an entity theory prevails, then the corporation’s primary responsibility is the maintenance of its public reputation in the country of its domicile while subsidiaries and affiliates are considered as their own separate entities. If an enterprise

theory prevails, however, a parent company is more directly implicated in the extended publics of its affiliates and acquires a global rather than domestic citizenship.

A politicized CSR discourse undermines the politically ‘neutralized’ claims of the neoliberal project - free market universalism, individual autonomy, privatization of rights, and sanctity of the public-private distinction – and subjects them to democratic deliberation that is informed by values and visions of the good society.

Neoliberalism attempts to excise political and value determinations and to contain them within bounded spheres. This is enacted through concepts such as individual and territorial autonomy, public and private distinctions, and the presumption of a politically neutral process of market self-regulation. By contrast, the critical, politicized orientation that is advanced in this project challenges the coherence and integrity of these contained spaces. It draws new, permeable boundaries emphasizing the connections between individuals and territories, the overflows between public and private spheres, and the political values and advantages that are embedded in legal neutrality and market self-regulation. Chapter 4 demonstrates the limitations of interchangeability and universality upheld by a liberal ideology. It also challenges the public-private divide by demonstrating how a militarized rationality to governance and economy corrupts this fictive separation. Chapter 5 agitates the question of whether it might be possible to have intermediate units between the individual and the State as a means of augmenting rather than compromising individual agency in a large republic such as the United States. Chapter 6 challenges the atomization of individual units propagated by the liberal narrative, introducing the possibility of contingent and collective obligations through an enterprise theory of the firm. Chapter 7 challenges conceptions of corporate citizenship and undermines a notion of citizenship that privileges rights over responsibilities.

8.2.3 Implications for CSR

The contemporary CSR discourse offers a deliberative arena for considering the public implications of corporate development and for contesting its consequences and externalities. The operant CSR regimes enable a pragmatic platform for a range of actors and ideologies to confront and grapple with the public impacts of commercial corporations and the roles of corporations in modern society. At present, the CSR discourse is captured by a business-managerial perspective couched in a liberal laissez-faire ideology. In order to respond to the needs of contemporary corporate-public controversies, a more nuanced and multi-disciplinary approach to CSR is imminently necessary. A critical, multi-sectoral approach to CSR might better enable effective instruments for managing and contesting the public identity of the modern corporation.

The politicized approach to CSR advanced in this work must include normative, socio-political, and structural-legal dimensions. Each dimension necessitates a different set of interventions and strategies. Normative questions concern the corporation's standing as a citizen, its state-sanctioned rights and responsibilities, as well as moral and pragmatic distinctions between corporate 'individuals' and human individuals. These determinations must be subject to rigorous democratic debate. Socio-political interventions prompted by a radical approach to CSR that is attentive to political dynamics and relationships must ground themselves in specific incidences and cases, while also extrapolating to build larger coalitions and issue-based campaigns. Structural reforms prompted by this approach to CSR must include revision of the legal framework circumscribing the corporation in light of critical geographic insights as I've begun to develop in this work. Most notably, questions of corporate citizenship, corporate

durability, corporate boundary and private standing must be considered in light of the inconsistencies that their present interpretations reveal.

This research suggests that a more effective CSR discourse and agenda also require a greater role for government. Privatized solutions, for dealing with corporate-public conflicts, such as alternative dispute resolution mechanisms in place of state-sanctioned courts and social risk management in place of regulatory protections, do not account for the questions of justice that are often at the heart of corporate-community conflicts. Privatized responses to the externalities generated by corporations-based development neglect responsibility for vulnerable parties and minority interests by assuming that these are met through private initiatives and laissez-faire self-regulation. This orientation furthers a wider neoliberal rationality aimed at responsabilization of the individual and erosion of the public mandate.

8.3 REFLECTIONS ON THE RESEARCH PROCESS

Each case study presented a different set of obstacles in the execution of this project. In developing the case of Egypt's telecommunications shutdown, the country's volatile political context has proven consistently challenging for securing relevant interviews and documents. Having been a direct participant in the popular demonstrations of January/February 2011 in Egypt, I found close connection to the themes of this case and was able to incorporate direct details into the case narrative. In April 2011, I spent a month interning with the Egyptian Corporate Responsibility Center (housed under the Egyptian Ministry of Investment), aiming to develop a topic-specific network and relevant contacts. My return to Cairo in November/December 2011 coincided with a period of escalated political violence that made it exceedingly difficult to schedule

interviews or meetings. I attempted to reschedule interviews for September 2012, but once again, this date coincided with strikes at the American University in Cairo and with political turmoil that resulted in several interviews getting cancelled. I was able to conduct off-the-record conversations with political activists during their trip to London in March 2012 as part of a political delegation. I also held meetings with representatives from the Association for Freedom of Thought and Expression and with the Egyptian Center for Economic and Social Rights in September 2012. The continued shifts in Egypt's political situation create a challenging context for attempting interpretive analysis. Most recently, in July 2013 the success of a military-executed coup in deposing the country's first freely elected president and the reassumed role of security forces in orchestrating the political transition reanimates the relevance of securitization and militarization highlighted in Chapter 4.

The Eagle Mine case study entailed trips to Washington, DC, arranged with the assistance of a contact established at the London Rio Tinto headquarters through my supervisor, Professor Gordon Clark. In June 2013 I met with senior representatives at the US head office for Rio Tinto Group and later was able to arrange a personal meeting with Simon Nish, a lead representative from Eagle Mine who happened to be in DC for a brief period of time. I was unable to spend time directly at the Eagle Mine site, which I think would have been helpful for informing the situational context of the case in providing opportunities to attend community meetings and participate in the routines and procedures surrounding mine operation and community and company interactions.

The Villa Inflammable case study entailed a trip to the Netherlands to meet with representatives from civil society (OECD Watch) in Amsterdam, government (Dutch

National Contact Point) in The Hague, and corporation (Shell Headquarters) also in The Hague. At first I faced challenges in connecting with a relevant contact to interview at Shell. I had attempted to call and email at the numbers/email addresses listed on the company website and in their 2012 Sustainability Report. These initial attempts yielded circular phone exchanges as the operator affirmed that I needed to identify a specific contact in order to be connected by phone and that she was not permitted to connect me to a general team or unit. A generic email response was similarly unhelpful, indicating that due to the large number of student requests for interviews they would be unable to accommodate my request, directing me to links on the company's website instead. It was through a coincidental connection established through an acquaintance that I was able to arrange an off-the-record meeting with a senior representative at Shell who works on matters related to community and social risk.

The Bhopal case study was inspired by an internship experience with the U.S. private equity firm Cherokee Investment Partners in the summer of 2008. In 2005 and 2008 Cherokee had attempted to intervene in a cleanup of the UCC Bhopal site. Bhopal activists perceived their campaign as a Western intrusion intending to foil corporate liability campaigns. As I took steps to engage with the case more directly, I found that my former affiliation with Cherokee cast me in suspect positioning. Upon concluding my internship, I traveled to India in July/August 2008. I met with environmental activists and NGO leaders in Delhi, and with staff as well as victims in the Sambhavna Trust Clinic in Bhopal. I also spent time in the clinic's extensive archives, visited the Union Carbide plant facility, toured the surrounding slums, interviewed key movement activists, and participated in protests at the Parliament building in Delhi. It took several years of

sustained interest in the case before I was able to build up trust with the grassroots movement. These direct experiences provided color and detail to my grasp on the realities of the case, while interviews conducted in August 2012 with U.S. lawyers working on the Bhopal lawsuits added new levels of exposure and insight. These interviews were further supplemented with a months-long email exchange and an extended visit with Tim Edwards of the Bhopal Medical Appeal in Brighton, UK. In assembling this case, I was challenged by the task of selecting between examined materials, as the legal record is very expansive, while also trying to acquire enough of the primary sources to gain a fair exposure to the original documents.

For the Eagle Mine and Villa Inflammable cases, greater immersion in the field would have enabled more extended direct observation and a wider range of narratives to challenge the orientations, assumptions, and conclusions of my analysis. Given the activist orientation of this work, it would have been beneficial to conduct case studies in collaboration with institutions native to respective research environments. Such an approach might allow for greater dialogue between academia and civil society, thus making research more directly relevant to relevant groups and pertinent processes that are reimagining and reshaping the landscapes and possibilities of the themes considered. This was not feasible within the scope of this project due to the limited research timeline and financial resources as well as the geographical spread of the cases.

Reflecting on the research process reveals some broader conclusions about my identity as a researcher. The experience with scheduling an interview at Shell made me attentive to the reality that the research process is, in many ways, non-egalitarian. It highlighted the advantages that social privilege afforded to me as a researcher with

extensive personal networks and a strong educational pedigree. In reaching out to make appointments with contacts, I was encouraged by my supervisor to identify myself as a Rhodes Scholar and to highlight my admission to Yale Law School, despite the fact that these affiliations having no direct bearing on my research. It became evident to me throughout my correspondence with interview subjects that this academic and social ‘elite capital’ granted me more extensive access than I would have received otherwise as a lay researcher. Similarly, with the Rio Tinto case, my positioning as an Oxford student and my supervisor’s generosity with his own personal connections granted me access into a corporate network that would have otherwise been very difficult to penetrate through my independent efforts.

Another interesting observation was the way that more corporate/professional versus activist/populist parties seemed to amplify one aspect of my identity while diminishing others over the course of our interactions. I hold dual Egyptian-American citizenship, dress in a conservative manner in keeping with Islamic guidelines, and speak with an American accent in English and with an Egyptian accent in Arabic. In more professional/corporate interactions, I was received as a privileged American student with a respected educational pedigree that earned me entry and legitimacy in these settings. My university affiliations and internship connections conferred an impression of ‘belonging’ and trustworthiness to these more elite communities. With more activist or populist interactions, I was received as an Egyptian, Muslim woman whose legitimacy came from appreciating minority status with respect to Western hegemony. In these interactions I came across as an ally rather than as an outsider and was perceived to have more ‘authentic’ interest in the social issues I was studying. I found these versatile

interpretations of my identity to be exceedingly helpful in navigating different spaces and bridging across professional/corporate and activist/populist spaces in a manner that was beneficial to the aims of my research and that appropriately blurred lines that might relegate other researchers to one space or the other.

8.4 OPPORTUNITIES FOR FURTHER INQUIRY

This thesis has noted a number of approaches for destabilizing and challenging the normalized definition and parameters of the corporation, ushering in an interpretation that is more conducive to protecting democratic values and to serving public interests. It further pursues the intellectual tradition begun by CLS and CLG scholars and looks specifically to the corporate assemblage; excavating the wider trends and dynamics that it enacts and that enact it. The conclusions advanced by this research prompt several directions for further investigation.

Related research might select themes introduced in this project and develop them to a deeper level of empirical and theoretical elaboration. On the empirical front, Louis Lowenstein's dictum that "you manage what you measure" (1996) suggests that it would be useful to propose a system of metrics that codifies the critical themes introduced in a system for standardized monitoring. This could be modeled on systems such as that developed by the company Trucost, which establishes metrics to capture environmental impacts of industry operations, and gathers standardized data that allows for comparison of performance records across different companies. Such an effort must be hedged by the recognition that metrics are inherently bound up in particular interests and exclusions. Notwithstanding, matrices and indices are useful for managing large amounts of information to reveal patterns and trends. More data on the distributions of risk, the

burdens of externalities, and the political financing of corporations would be useful to developing public policies that effectively manage these outcomes. A comparative perspective might build up a larger body of case studies to offer a useful supplement to the examples elaborated here. Throughout this thesis, case examples were used to interrogate the claims of a particular theoretical theme. A complementary research agenda might develop additional cases that illustrate and test the theoretical arguments laid out in each of the core chapters. Further analysis of the legal and regulatory mechanisms of different political and social traditions would offer greater insights into the interactions between national legal agendas and ideological orientations as they interface with the multi-jurisdictional spread of universal corporations.

This project also prompts further theoretical inquiries of the corporation's public identity beyond the focus taken here on the CSR regime. Comparative work grounded in legal scholarship can look at how the spatial realities of a corporation differ depending on the legal tradition where it is incorporated. Further analysis of the legal and regulatory innovations of different political and social traditions would provide further insights on negotiation between global and local standing in the case of multinational corporations. Additionally, a comparative analysis could focus on a singular multinational corporation and examine the corporate-social cultures of its subsidiaries in different political and legal contexts. Such analysis might provide insights on the two-way influence of situated ideology on transnational corporations and vice versa.

Analysis grounded in critical theory⁶⁶ is well suited to the aims of a project seeking to unpack the embedded corporation with its myriad complex and emergent

⁶⁶ The critical theory referenced here is in accordance with the definition advanced by Max Horkheimer (1993) identifying it as a pragmatic endeavor with explanatory, practical and normative aims.

relationships. In activating the ‘self-consciousness’ of a particular group of agents in a society, the conceptual project of a critical theory guides a transition from an ‘initial state’ towards a state of greater emancipation that is presented as being ‘theoretically’ possible and ‘practically necessary’ (Geuss 1981, p76). Such a project necessitates adaptation of 20th century materialist conceptions of critical theory to the hybrid materialities, subjectivities and identities that characterize the modern corporation. Applying critical theory to the corporate power matrix requires transcending conventional typologies ‘property-owner’ and ‘working class’ as found in the classical literature. In an era of ‘fiduciary capitalism’, state employees who might conventionally fall in with the ‘working class’ find their public pensions invested in a broad portfolio of companies. Accordingly, those subjects targeted for ‘enlightenment’ and ‘emancipation’ are ‘property-holders’ at the same time that they represent the ‘working class’. A critical theorization of the corporation would attempt to provide an account of the social, political and economic relationships that are engendered by the corporate structure in contemporary society. It would identify opportunities for intervening in these networks of interaction, and to steer systems and relationships towards a state of greater social, political and economic justice.

8.5 IMPLICATIONS FOR PUBLIC POLICY

This work sees itself as situated within a larger project of progressive reform, aimed at bringing about a political arrangement that is informed and motivated by the mandates of popular enfranchisement and economic and social justice. In a contemporary context, the progressive project has generally been fragmented, reactive, and largely overwhelmed by conservative agendas that are steeped in an ideology of hyper-

individualism and market-fundamentalism. Today, the public consciousness of conflicting interests between private agendas and public welfare, and the heightened self-awareness of new ‘publics’ activated during social and legal controversy, set the stage for an elaboration of the progressive agenda as it relates to the corporate entity. This project has aimed to develop a framework for examining the corporation in a manner that meets the needs of this 21st century challenge; renewing the aims of previous initiatives while responding to the particularities of a new context. Following a long tradition of debate over the role of business in democratic society, this newest wave of deliberation focuses on the socio-political role of the corporation and takes place against the backdrop of fiscal restraint in an age of austerity.

The extended aftermath of the 2008-2009 financial crisis witnesses many countries facing serious debt crises and some municipalities declaring bankruptcy while others implement extreme budget cutbacks and discipline their public expenditures in order to avoid a similar fate. This has resulted in the downsizing or elimination of many state-funded services and welfare programs. With the social safety net traditionally provided by the State becoming increasingly weakened, economically disadvantaged populations are rendered even more vulnerable in these new conditions. The drastic fiscal measures prompted by an age of austerity prompts a retreat of the State and a greater reliance on the Market to serve social ends. Even as the State cuts back its public services, its role as a regulatory overseer comes into sharper focus as the events leading up to and resulting in a collapse of the markets have been attributed to excessive deregulation and distorted market incentives. Investor short-termism and the financial crisis revealed the importance of regulatory oversight and debunked the myth of self-

regulating markets that naturally steer themselves towards the common good. These conditions present an opportunity to consider corporations within a larger conversation about the social obligations and responsibilities of the State and the Market.

Part of that conversation entails reconsideration of the corporation's role in relation to this leaner version of the state. Such conditions of fiscal austerity, market intervention, and regulatory government create an opportunity for corporations to re-envision their 'social responsibilities' and to consider expanding programs that extend direct services or capacity building opportunities to operating communities or that provide worker training and professional development programs. In their present form, such social interventions are often piecemeal and shortsighted, and typically do not engage with a wider understanding of the underlying dynamics and systemic needs. With rare exceptions, CSR project considerations do not account for sovereignty, participation, and agency of the communities in question. Instead, they pursue initiatives targeting community problems that are material and discrete. In a more sophisticated form, the CSR agendas draw linkages between public and private interests through considerations of community materiality that incorporate social risk considerations into internal company decision-making. Along the same lines, investors are taking a greater role in influencing the parameters of corporate responsibility in accordance with this impetus to account for risk variables. Institutional investors have a role to play in determining the parameters of a corporation's recognized self-interest. They can lobby for more comprehensive measurements and reports that take account of neglected externalities that may have long-term bearing on asset value. Effective developments on this front have been vividly demonstrated in the lobbying efforts led by institutional investors in the U.S.

who succeeded in securing recognition of climate change materiality as part of the routine reporting procedures required by the Securities and Exchange Commission.

A key shortcoming of relying on materiality as a means to account for negative externalities, including social and environmental impacts, is the lack of distributive sensitivity that such an approach to risk accountability carries. Treating risk as an indicator of financial stability or as a commodity to be priced and traded does not provide much insight on population-level distribution of such burdens or on the disproportionate impacts falling on particular, often disenfranchised, communities. The task of regulating risk not merely as a financial attribute but as a burden – or as an opportunity – that has social and political implications falls under the purview of the state. If we are attentive to the environmental and social impacts of development and to the values of distributive justice and distribution of benefits and costs, a shift in favor of comprehensive corporate impacts and the development of responsible corporate citizenship is surely necessary.

At one level, when the approach to CSR that is discussed above is properly executed, it confers the type of operating legitimacy that grants corporations access to resources, ensures investor confidence, and maintains consumer trust. Increasingly, however, the nature and identity of the corporation itself, in addition to the consequences of its operations, comes into public question. At this level of interrogation, questions of governance and political rights must be addressed in judicial, democratic and deliberative arenas. In the common law context of the U.S., which depends on case precedent to support new rulings, a proactive agenda addressing issues of corporate-public violations may be appropriately adopted by the U.S. Attorney General and the Department of Justice. While corporate crimes prevention from the Department of Justice typically

focuses on corporate fraud and anti-trust cases, a legal agenda that takes into account public impacts of corporations, while noting issues of distributive justice, would address cases like the ones investigated in this work.

The significance of legal interpretation in steering and validating a corporation's identity highlights the role of the nation's highest courts in a politically sensitive, democratically oriented approach to CSR. In the U.S., widespread public concern following the Citizens United ruling raises the importance of addressing the corporate questions through precedence-setting cases and a proactive legislative agenda. The Supreme Court's ideological composition is significant particularly in cases decided by a narrow majority. The present conservative majority of the court favors a kind of interpretive legal activism that claims to be originalist in adhering to the intentions of the constitution, but is in fact activist in that it discounts the relevance of context and thus imposes meanings that are out of line with those captured by originalist intentions. The ideological balance of the court presently breaks down to four liberal (Ruth Bader Ginsberg, Sonia Sotomayor, Elena Kagan, Stephen G. Breyer), four conservative justices (Samuel Alito, Chief Justice John G. Roberts, Antonin Scalia, Clarence Thomas) and one swing vote (Anthony Kennedy) that typically sides with the conservative bloc. In the three most recent Supreme Court decisions bearing direct implications for the corporate identity; *Citizens United v. FEC*, *Wal-Mart v. Dukes*, and *Kiobel v. Royal Dutch Petroleum*; the court's liberal/conservative breakdown has been consistently significant with respect to interpretation of the corporation's standing as citizen or the consideration of its public implications. Shifting the balance of the court to a liberal majority would reverse the precedence established in cases where the conservative bloc appears to favor

free market fundamentalism while the liberal bloc seems more critical in accounting for public implications.

This confluence of factors underscores the importance and significance of engaging CSR as a broadly conceived movement aiming to reconfigure the corporation's role in a contemporary society with professed democratic values. Such efforts demand involvement from civil society and corporations as well as politicians and jurists. The politicized CSR advanced here will be one of many efforts, emerging across disparate disciplines, in the larger project of interpreting present dynamics, envisioning new possibilities and engaging legal and political realities to bring about societies of greater equity and social justice.

Bibliography

Abdel-Aziz, K.S., February 27, 2012, 2012-last update, *Fighter from the Desert*, Volume 13: Results and implications of the June 1967 War. Available: http://www.moqatel.com/openshare/Behoth/Siasia2/Harb67Misr/sec14.doc_cvt.htm [June 15, 2012].

Ackerman, B., 1984. *Reconstructing American Law*. Cambridge, Massachusetts: Harvard University Press.

Al Jazeera English, August 17, 2011-last update, A new history of censorship in the West?. Available: <http://stream.aljazeera.com/story/new-history-censorship-west> [August 17, 2011].

Almasry Alyoum, August 13, 2011-last update, Government to amend law on communications [Homepage of Egypt Independent], [Online]. Available: <http://www.egyptindependent.com/news/government-amend-law-communications> [February 8, 2012].

Anderson, A.G., 1974. The Disclosure Process in Federal Securities Regulation: A Brief Review. *Hastings Law Journal*, **25**(2), pp. 311.

Anderson, B. and Wylie, J., 2009. On geography and materiality. *Environment and Planning*, **41**, pp. 318.

Anderson, B., 1983. *Imagined Communities*. 1991 edn. New York, NY: Verso.

Anderson, S., May 19, 2013-last update, Rio Tinto reports on progress of Eagle Mine [Homepage of The Mining Journal], [Online]. Available: <http://www.miningjournal.net/page/content.detail/id/587157/Rio-Tinto-reports-on-progress-of-Eagle-Mine.html> [June 10, 2013].

Arbor Networks, 2011-last update, Internet traffic to and from Egypt on January 27-28. Available: http://api.ning.com/files/wSGh2YbFOZyzXmSDUxVyuVRwp7qnEDB2ZNhlemJ5vWsru*-Bn7AFDIJs6kYJpwNW*WLMwJcWTwDqi3lFh3MoMnElwN99xOfT/egypt_graphic.jpg [February 1, 2011].

Arendt, H. and Charles R. Walgreen Foundation for the Study of American Institutions, 1958. *The human condition*. Chicago: University of Chicago Press.

- Armour, J., Hansmann and Kraakman, 2009. What is Corporate Law? In: Kraakman, R., Armour, Davies, Enrique, Hansmann, Hertig, Hopt, Kanda, Rock, ed, *The Anatomy of Corporate Law*. Oxford: Oxford University Press, pp. 1.
- Auyero, J. and Swistun, D., 2006. Tiresias en Villa Inflamable. Hacia una cronografia de la dominacion. *Cuadernos del CISH*, **19-20**, pp. 15.
- Auyero, J. and Swistun, D.A., 2009. *Flammable: Environmental Suffering in an Argentine Shantytown*. Oxford: Oxford University Press.
- Bakan, J., 2004. *The corporation: the pathological pursuit of profit and power*. London: Constable.
- Ballantine, H.W., 1925. Separate Entity of Parent and Subsidiary Corporations. *California Law Review*, **14**(1), pp. 12.
- Ballinger, C., 2008. Classifying Contingency in the Social Sciences: Diachronic, Synchronic, and Deterministic Contingency [Preprint].
- Bano v. Union Carbide Corp.* (2000) WL 1225789 - 2000
- Bano v. Union Carbide Corp.* (2001) 273 F. 3d 120 - Court of Appeals, 2nd Circuit
- Bano v. Union Carbide Corp.* (2003) WL 1344884 – 2003
- Bano v. Union Carbide Corp.*, (2005) US Dist. LEXIS 22871
- Bano v. Union Carbide Corp.*, (2006) 198 Fed. Appx. 32
- Bano v. Union Carbide Corp* (2004). 361 F. 3d 696 - Court of Appeals, 2nd Circuit.
- Barry, A., 2002. The anti-political economy. *Economy and Society*, **31**(2), pp. 268.
- Baxter, P. and Jack, S., 2008. Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers. *The Qualitative Report*, **13**(4), pp. 544.
- Beck, U., 1992. *Risk society: towards a new modernity*. London: Sage.
- Bekefi, T. and Epstein, M.J., 2006. *Management Accounting Guideline: Integrating Social and Political Risk Into Management Decision-Making*. Society of Management Accountants of Canada.
- Bekefi, T., Jenkins, B. and Kytte, B., 2006. *Social Risk as Strategic Risk*. Cambridge, MA: John F. Kennedy School of Government, Harvard University.

- Benford, R.D. and Snow, D.A., 2000. Framing Processes and Social Movements: An Overview and Assessment. *Annual Review of Sociology*, **26**, pp. 611-639.
- Bergallo, P., 2012. *The Comprehensive Approach: Health Rights in the Mendoza Litigation*. Thesis Draft edn.
<http://www.derecho.uba.ar/academica/posgrados/chapter5-bergallo.pdf>.
- Berger, B.M., 1988. Disenchanted the Concept of Community. *Society*, **25**(6), pp. 50.
- Berle, A.A., 1947. The Theory of Enterprise Entity. *Columbia Law Review*, **47**(3), pp. 343.
- Berle, A.A., 1965. Property, Production and Revolution. *Columbia Law Review*, **65**(1), pp. 1.
- Berle, A.A., Means, G.C. and Columbia University. Council for Research in the Social Sciences, 1932. *The Modern Corporation and Private Property*. New York: Macmillan.
- Bernstein, D.E., 2005. *Lochner v. New York: A Centennial Retrospective*. *Washington University Law Quarterly*, **83**, pp. 1469.
- Bhopal Survivors Movement Study, 2009. *Bhopal Survivors Speak: emergent voices from a people's movement*. Edinburgh: Word Power.
- Bi v. Union Carbide Chemicals and Plastics Co.* (1993) 984 F. 2d 582
- Bienkowski, B., June 12, 2012-last update, Sacred water, new mine: A Michigan tribe battles a global corporation [Homepage of Environmental Health News], [Online]. Available:
<http://www.environmentalhealthnews.org/ehs/news/2012/pollution-poverty-people-of-color-sacred-water-new-mine> [June 10, 2013].
- Bloch, R.H. and Lamoreaux, N.R., 2004. *The Public-Private Distinction in American History: The Privatization of the Corporation and the Problem of Minority Shareholders*. Paper for presentation at the Law, Economics and Organization Workshop of the Yale Law School on February 12, 2004 edn.
- Blomley, N.K., 1994. *Law, space, and the geographies of power*. New York: Guilford Press.
- Blumberg, P.I., 2005. The Transformation of Modern Corporation Law: The Law of Corporate Groups. *Connecticut Law Review*, **37**(3), pp. 605.
- Blumberg, P.I., 1993. *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality*. New York, NY: Oxford University Press.

- Blumberg, P.I., 1990. The Corporate Entity in an Era of Multinational Corporations. *Delaware Journal of Corporate Law*, **15**(2), pp. 283.
- Bobbitt, P., 2002. *The shield of Achilles: war, peace and the course of history*. London: Allen Lane.
- Boston Common Asset Management, December 03, 2004-last update, *Dow Shareholder Resolutions on Bhopal Liabilities and Chemical Body Burden Filed*. Available: <http://www.commondreams.org/cgi-bin/print.cgi?file=/news2004/1203-05.htm> [11/05, 2012].
- Bottomley, S., 2007. *The constitutional corporation: rethinking corporate governance*. Aldershot: Ashgate.
- Bourdieu, M., May 15, 2013-last update, Upper Peninsula citizens skeptical of Rio Tinto "Community Forums" [Homepage of Keweenaw NOW], [Online]. Available: <http://keweenawnow.blogspot.com/2013/05/upper-peninsula-citizens-skeptical-of.html> [June 10, 2013].
- Bourdieu, M., May 3, 2011-last update, Updated: Residents concerned about water quality question Rio Tinto-Kennecott at community forum [Homepage of Keweenaw NOW], [Online]. Available: <http://keweenawnow.blogspot.com/2011/05/residents-concerned-about-water-quality.html> [June 10, 2013].
- Bratton, W. and Wachter, M., 2008-2009. Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation. *Journal of Corporation Law*, **34**, pp. 99.
- Brenner, N., 1997. State territorial restructuring and the production of spatial scale: Urban and regional planning in the Federal Republic of Germany, 1960–1990. *Political Geography*, **16**(4), pp. 273-306.
- Bridgeman, N.L., 2003. Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims. *Yale Human Rights and Development Law Journal*, **6**, pp. 1.
- Buchanan, J.M., 1975. *The limits of liberty: between anarchy and Leviathan*. Chicago; London: University of Chicago Press.
- Burke, L. and Logsdon, J., 1999. How corporate social responsibility pays off. *Long Range Planning*, **29**(4), pp. 495.

- Burnett, M. and Welford, R., 2007. Case study: Coca-Cola and water in India: episode 2. *Corporate Social Responsibility and Environmental Management*, **14**(5), pp. 298-304.
- Bush, G.W., 2003. *Homeland Security Presidential Directive/HSPD-7*. Presidential Directive edn. USA: United States of America.
- Buzan, B., 1991. *People, states, and fear: an agenda for international security studies in the post-cold war era*. 2nd edn. Boulder, CO: L. Rienner.
- Callon, M., Lascoumes, P. and Barthe, Y., 2009. *Acting in an uncertain world: an essay on technical democracy*. Cambridge, Mass; London: MIT Press.
- Carroll, A.B., 1979. A three-dimensional conceptual model of corporate social performance. *Academy of Management Review*, **4**, pp. 497.
- Carroll, A.B. and Shabana, K.M., 2010. The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice. *International Journal of Management Reviews*, **12**(1), pp. 85-105.
- Casey, K., January 27, 2010-last update, Statement at Open Meeting - Interpretive Release Regarding Disclosure of Climate Change Matters (Speech by SEC Commissioner) [Homepage of United States Securities and Exchange Commission], [Online]. Available: <http://www.sec.gov/news/speech/2010/spch012710klc-climate.htm> [April 2, 2010].
- Castree, N., 1995. The Nature of Produced Nature: Materiality and Knowledge Construction in Marxism. *Antipode*, **27**(1), pp. 12-48.
- Center for Food Safety, 2011-last update, Corporate Control and Seed Monopolies. Available: <http://www.centerforfoodsafety.org/campaign/save-our-seeds/corporate-control-and-seed-monopolies/> [July 8, 2011].
- Center for Food Safety, 2007. *Monsanto vs. U.S. Farmers: November 2007 Update*.
- Center for Food Safety, 2005. *Monsanto vs. U.S. Farmers*.
- Center for Human Rights and Environment (CEDHA), May 29, 2008-last update, *Shell Denounced Internationally for Human Rights and Environmental Violations in Argentina* [Homepage of CEDHA], [Online]. Available: <http://www.commondreams.org/news2008/0529-07.htm> [02/06, 2013].
- Central Intelligence Agency, 2010-last update, CIA World Factbook. Available: <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> [March 15, 2011].

- Cernic, J.L., 2008. Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational enterprises. *Hanse Law Review*, 4(1), pp. 71.
- Chander, A., 2011. Googling Freedom. *California Law Review*, 99(1), pp. 1.
- Chandler, D., 2002. *Semiotics: the basics*. London: Routledge.
- Chouliaraki, L. and Fairclough, N., 1999. *Discourse in Late Modernity: Rethinking Critical Discourse Analysis*. Edinburgh: Edinburgh University Press.
- Citizens United, Appellant, v. Federal Election Commission* (2010) Supreme Court of the United States
- Clark, G.L., Dixon, A.D. and Monk, A.H.B., 2009. *Managing financial risks: from global to local*. Oxford: Oxford University Press.
- Clinton, B., 1998. *Presidential Decision Directive/NSC-63*. Presidential Directive edn. USA: United States of America.
- Coase, R.H., 1988. The Nature of the Firm: Meaning. *Journal of Law, Economics and Organization*, 4(1), pp. 19.
- Coase, R.H., 1937. *The nature of the firm*.
- Coe, N.M., Kelly, P.F. and Yeung, H.W., 2007. *Economic geography: a contemporary introduction*. Oxford: Blackwell.
- Cohen, A.P., 1989. *The Symbolic Construction of Community*. London: Routledge.
- Commission of the European Communities, 2006. *Communication from the Commission on a European Programme for Critical Infrastructure Protection*. Brussels: Commission of the European Communities.
- Cook, S.A., 2007. *Ruling But Not Governing: The Military and Political Development in Egypt, Algeria, and Turkey*. Baltimore, Maryland: Johns Hopkins University Press.
- Cornell University Law School, August 19, 2010-last update, Forum Non Conveniens [Homepage of Legal Information Institute], [Online]. Available: http://www.law.cornell.edu/wex/forum_non_conveniens [November 24, 2012].
- Cornell University Law School, 28 USC § 2466 - Fugitive disentitlement [Homepage of Legal Information Institute], [Online]. Available: <http://www.law.cornell.edu/uscode/text/28/2466> [November 24, 2012].

- Cowie, J., January 27, 2011, 2011-last update, *Egypt Leaves the Internet* [Homepage of Renesys blog], [Online]. Available: <http://www.renesys.com/blog/2011/01/egypt-leaves-the-internet.shtml> [February 3, 2012, 2012].
- Cowling, K. and Tomlinson, P., 2005. Globalisation and Corporate Power. *Contributions to Political Economy*, **24**(1), pp. 33.
- Dabb v. NYNEX Corp.* (1999) 262 AD2d 1079, 1079
- Dart, R., 2004. The legitimacy of social enterprise. *Nonprofit Management and Leadership*, **14**(4), pp. 411-424.
- Delaney, D. and Leitner, H., 1997. The political construction of scale. *Political Geography*, **16**(2), pp. 93.
- Der Derian, J., 1995. The Value of Security: Hobbes, Marx, Nietzsche, and Baudrillard. In: R.D. Lipschutz, ed, *On Security*. New York: Columbia University Press, pp. 24.
- Devraj, R., June 18, 2009-last update, *US Congressmen Tell Dow to Clean Up Bhopal* [Homepage of Inter Press Service News Agency], [Online]. Available: <http://www.ipsnews.net/2009/06/india-us-congressmen-tell-dow-to-clean-up-bhopal/> [November 25, 2012].
- Dewey, J., 1926. The Historic Background of Corporate Legal Personality. *Yale Law Journal*, **35**(6), pp. 655.
- Dewey, J., 1926; 1988. *The public and its problems*. London: Allen & Unwin.
- Donald, D.C., 1991. Company Law in the European Community: Toward Supranational Incorporation. *Dickinson Journal of International Law*, **9**(1), pp. 1.
- Doran, K. and Quinn, E., 2009. Climate Change Risk Disclosure: A Sector by Sector Analysis of SEC 10-K Filings from 1995-2008. *North Carolina Journal of International Law and Commercial Regulation*, **34**, pp. 101.
- Dryzek, J.S., 1996. *Democracy in capitalist times: ideals, limits, and struggles*. New York; Oxford: Oxford University Press.
- Dunn, A., 2011. Unplugging a Nation: State Media Strategy During Egypt's January 25 Uprising. *The Fletcher Forum of World Affairs*, **35**(2), pp. 15.
- Dworkin, R., 1986. *Law's Empire*. Cambridge, Massachusetts: Belknap Press of Harvard University Press.

- Edwards, H.T., 1985-1986. Alternative Dispute Resolution: Panacea or Anathema? *Harvard Law Review*, **66**, pp. 668.
- Egyptian Corporate Responsibility Center, 2009-last update, *Who We Are* [Homepage of ECRC], [Online]. Available: http://www.ecrc.org.eg/Who_we_are.aspx [February 10, 2012].
- El-Wardani, S., June 1, 2011-last update, *Outrage over exoneration of Egypt telecom giants in communications shutdowns* [Homepage of Ahram Online], [Online]. Available: <http://english.ahram.org.eg/News/13296.aspx> [July 7, 2011].
- Environment News Service, May 30, 2008-last update, *Buenos Aires Citizens Seek Cleanup of Shell Refinery*. Available: <http://www.ens-newswire.com/ens/may2008/2008-05-30-02.asp> [February 02, 2013].
- Environmental Defense Fund, January 27, 2010-last update, *SEC Issues Ground-Breaking Guidance Requiring Corporate Disclosure of Material Climate Change Risks and Opportunities* (Press Release). Available: <http://www.edf.org/pressrelease.cfm?contentID=10753> [March 19, 2010].
- Esmat, B., August 21, 2011, 2011-last update, *No to Reforming the Telecommunications Law* [Homepage of Baher Esmat Internet Policies & Politics], [Online]. Available: <http://www.baheresmat.com/?p=117> [November 20, 2011].
- Etzioni, A., The Bankruptcy of Liberalism and Conservatism. *Political Science Quarterly*, **128**(1), pp. 39.
- Fairclough, N., 2001. Critical discourse analysis. In: A. Mchoul and M. Rapley, eds, *How to Analyse Talk in Institutional Settings: A Casebook of Methods*. London: Continuum, pp. 25.
- Farah, N.R., 2009. *Egypt's Political Economy: Power Relations in Development*. Cairo, Egypt: The American University in Cairo Press.
- Federal Communications Commission, 1934. *Communications Act of 1934*. USA: United States of America.
- Feeney, P., 2007. *Model National Contact Point*. UK: OECD Watch.
- Ferrarini, T.H., Siles, M., Eyzaguirre, H., H. and Lion, R., 2012. *2012 vs 2010 Modern Mining in This Community: Select Areas of Marquette and Baraga Counties*. http://miningandcommunities.org/Reports/MiningCommunity2012_ExecutiveSummary.pdf: Independent Economic and Community Consultants.
- Fisher, D., June 20, 2011-last update, *Supreme Court Dumps Wal-Mart Sex-Discrimination Class Action*. Available:

- <http://www.forbes.com/sites/danielfisher/2011/06/20/supreme-court-dumps-walmart-sex-discrimination-class-action/> [June 22, 2011].
- Fiss, O.M., 1984. Against Settlement. *The Yale Law Journal*, **93**(6), pp. 1073.
- Forbes, April 21, 2010-last update, *The Global 2000*. Available: http://www.forbes.com/lists/2010/18/global-2000-10_The-Global-2000_Rank.html [March 15, 2011].
- Foro Ciudadano de Participacion por la Justicia y Los Derechos Humanos and Amigos de la Tierra Argentina, 2008. *OECD Guidelines for Multinational Enterprise: Specific Instance (Translation from Spanish)*. Buenos Aires, Argentina: OECD Watch.
- Frankental, P., 2001. Corporate social responsibility - a PR invention? *Corporate Communications: An International Journal*, **6**(1), pp. 18.
- Frazer, E., 1999. *The Problems of Communitarian Politics: Unity and Conflict*. New York: Oxford University Press.
- Freeden, M., 2003. *Ideology: a very short introduction*. Oxford: Oxford University Press.
- Freeman, R.E., 1984. *Strategic management: a stakeholder approach*. Boston: Pitman.
- Friedman, M., 1970. *The social responsibility of business is to increase its profits*.
- Frug, G.E., 1980. The City as a Legal Concept. *Harvard Law Review*, **93**(6), pp. 1059.
- Gabel, M. and Bruner, H., 2003. *Global Inc. An Atlas of The Multinational Corporation*. New York: The New Press.
- Gado, Y., May 24, 2011, 2011-last update, *Can Egypt's communication giants be sued in the US for the blackout early in the revolution?* [Homepage of Ahram Online], [Online]. Available: <http://english.ahram.org.eg/NewsContent/4/0/12779/Opinion/Can-Egypt's-communication-giants-be-sued-in-the-US.aspx> [March 15, 2011, 2011].
- Geertz, C., 1973. Thick Description: Toward an Interpretive Theory of Culture. *The Interpretation of Cultures*. New York: Basic Books, pp. 3.
- Gellman, B. and Poitras, L., June 7, 2013-last update, *U.S., British intelligence mining data from nine U.S. Internet companies in broad secret program* [Homepage of The Washington Post], [Online]. Available: http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html [June 10, 2013].

- Geltman, E., 1992. Disclosure of Contingent Environmental Liabilities by Public Companies Under the Federal Securities Laws. *Harvard Environmental Law Review*, **16**, pp. 129.
- George, A.L. and Bennett, A., 2005. *Case Studies and Theory Development in the Social Sciences*. Cambridge, Massachusetts: MIT Press.
- Gerring, J., 2004. What is a Case Study and What Is It Good for? *American Political Science Review*, **98**(2), pp. 341.
- Geuss, R., 1981. *The Idea of a Critical Theory: Habermas & the Frankfurt School*. Cambridge: Cambridge University Press.
- Gillan, S. and Starks, L., 2000. Corporate governance proposals and shareholder activism: the role of institutional investors. *Journal of Financial Economics*, **57**, pp. 275.
- Giordano v. Market America* (2010) 599 F.3d 87 (2010) United States Court of Appeals.
- Glover, D., 2007. Monsanto and Smallholder Farmers: A Case Study in CSR. *Third World Quarterly*, **28**(4, Beyond Corporate Social Responsibility? Business, Poverty and Social Justice), pp. 851-867.
- Goldberg, J.C.P., 2012. Introduction: Pragmatism and Private Law. *Harvard Law Review*, **125**(7), pp. 1640.
- Gordon, K., 2001. The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison. *OECD Guidelines for Multinational Enterprises: Annual Report 2001*.
- Gordon, M.W., 1974. Argentine Jurisprudence: The Parke Davis and Deltec Cases. *Lawyer of the Americas*, **6**, pp. 320.
- Gordon, M.W., 1979. Argentine Jurisprudence: Deltec Update. *Lawyer of the Americas*, **11**, pp. 43.
- Great Lakes Radio News, May 6, 2013-last update, *Rio Tinto Hosts Community Forums in Marquette And Baraga Counties* [Homepage of Sunny.FM], [Online]. Available: <http://wkqsfm.com/featured/the-sunny-morning-show/21786/rio-tinto-hopsts-community-forums-around-marquette-and-baraga-counties-this-month/> [June 10, 2013].
- Greenwald, G., June 5, 2013-last update, *NSA collecting phone records of millions of Verizon customers daily* [Homepage of The Guardian], [Online]. Available:

- <http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order> [June 10, 2013].
- Habermas, J., 1976. *Legitimation crisis*. London: Heinemann.
- Habermas, J. and Rehg, W., 1996. *Between facts and norms: contributions to a discourse theory of law and democracy*. Cambridge: Polity.
- Halley, M., August 18, 2009-last update, *Judge's Decision on Mining Application Made* [Homepage of Press Release], [Online]. Available: <http://www.yellowdogwatershed.org/blog/2009/08/19/judges-decision-on-mining-application-made/> [June 15, 2013].
- Halley, M., August 21, 2009-last update, *Petitioners Appeal MDEQ Decision* [Homepage of Press Release], [Online]. Available: <http://www.yellowdogwatershed.org/blog/2009/08/24/petitioners-appeal-mdeq-decision/> [June 15, 2013].
- Hamilton, R.W., 1970-1971. The Corporate Entity. *Texas Law Review*, **49**, pp. 979.
- Hansen, J.E., 1988. *Statement of Dr. James Hansen, Director, NASA Goddard Institute for Space Studies*.
- Harman, G., 2008. *Intentional Objects for Non-Humans*.
- Harvey, B.E., 2002. New Competencies in Mining - Rio Tinto's Experience. *Paper presented to Congress of Mining and Metallurgical Institutions Conference on 'International Codes, Technology and Sustainability for the Minerals Industry', Cairns, 27-28 May*. Available: <https://www.refworks.com/refworks2/default.aspx?r=references%7CMainLayout: :init#> [May 20, 2013].
- Harvey, D., 1990. *The Condition of Postmodernity*. Oxford, UK: Blackwell Publishing.
- Harvey, D., 1973. *Social Justice and the City*. London: Edward Arnold.
- Hassan, M.M., February 23, 2011, 2011-last update, *Notification Against the Minister of Communications and the Three Mobile Phone Companies with the Charge of Partaking in the Killing of Demonstrators* (translated from Arabic). Available: <http://qadaya.net/?p=918> [March 15, 2011].
- Hassanin, L., 2007. *Global Information Society Watch - Egypt*. Global Information Society Watch.
- Hebb, T., 2006. The Economic Inefficiency of Secrecy: Pension Fund Investors' Corporate Transparency Concerns. *Journal of Business Ethics*, **63**(4), pp. 385.

- Hedgcock, D., Hillier, J. and Wood, D., 1991. Planning, Postmodernism and Community Power. *Urban Policy and Research*, 9(4), pp. 220.
- Herz, R., 1999-2000. Litigating Environmental Abuses Under the Alien Torts Claims Act. *Virginia Journal of International Law*, 40, pp. 545.
- Hirokawa, K.H., 2003. Dealing with Uncommon Ground: The Place of Legal Constructivism in the Social Construction of Nature. *Virginia Environmental Law Journal*, 21, pp. 387.
- Horkheimer, M., 1993. *Between philosophy and social science: selected early writings*. Cambridge, Mass; London: MIT Press.
- Horrigan, B., 2010. *Corporate social responsibility in the 21st century: debates, models and practices across government, law and business*. Cheltenham: Edward Elgar.
- Horwitz, M.J., 1985-1986. Santa Clara Revisited: The Development of Corporate Theory. *West Virginia Law Review*, pp. 173.
- Horwitz, M.J., 1982. The History of the Public/Private Distinction. *University of Pennsylvania Law Review*, 130(6), pp. 1423.
- House Concurrent Resolution 503 (108th): *Recognizing the 20th anniversary of the Bhopal disaster*. Text as of Sept 29, 2004 (Introduced). Available: <http://www.govtrack.us/congress/bills/108/hconres503/text> [July 12, 2012].
- Huron Mountain Club, Plaintiff, v. United States Army Corps of Engineers* (2012) 2:12-CV-197 edn.
- Hutchens, W.C., 1998. Alienage Jurisdiction and the Problem of Stateless Corporations: What is a Foreign State for Purposes of 28 U.S. C. § 1332(a)(2)? *Washington University Law Review*, 76(3), pp. 1067.
- Huuki, M., 2012. *Enrolled House Bill No. 6012*. Public Acts of 2012 edn. Michigan: State of Michigan.
- Huuki, M., 2011. *Enrolled House Bill No. 4746*. Public Acts of 2011 edn. Michigan: State of Michigan.
- International Business Leaders Forum, 2006. *Rio Tinto: Tackling the Cross-sector Partnership Challenge*. London: International Business Leaders Forum.
- In re Union Carbide Corp. Gas Plant Disaster* (1986) 634 F. Supp. 842
- In re Union Carbide Corp. Gas Plant Disaster* (1987) 809 F. 2d 195

In re Union Carbide Corp. Gas Plant Disaster (1987) 484 US 871, 108 S. Ct. 199, 98 L. Ed. 2d 150

International Campaign for Justice in Bhopal, April, 2003-last update, *April 22nd Press Release: Bhopal Survivors Arrive in the US* [Homepage of www.bhopal.net], [Online]. Available: <http://www.bhopal.net/oldsite/tour03-1.html> [July 7, 2012].

International Campaign for Justice in Bhopal, *ICJB* [Homepage of [bhopal.net](http://www.bhopal.net)], [Online]. Available: <http://bhopal.net/icjb> [July 5, 2012].

International Campaign for Justice in Bhopal, *ICJB Campaigns* [Homepage of [bhopal.net](http://www.bhopal.net)], [Online]. Available: <http://www.bhopal.net/oldsite/campaigns.html> [July 5, 2012].

International Labor Organization, 2006-last update, *Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration)* - 4th Edition. Available: http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf [June 15, 2011].

International Organization for Standardization, 2011-last update, *ISO 26000 - Social Responsibility*. Available: http://www.iso.org/iso/social_responsibility [May 23, 2011].

Investor Network on Climate Risk, March 3, 2010-last update, *Investors Managing \$2.1 Trillion in Assets Praise SEC for Climate Disclosure Guidance*. (Letter). Available: <http://www.incr.com/Page.aspx?pid=1215> [March 10, 2010].

Janki Bai Sahu v. Union Carbide Corp. and Warren Anderson. (2005) United States District Court, S.D. New York.

Janki Bai Sahu v. Union Carbide Corporation. (2010) United States District Court, S.D. New York.

Janki Bai Sahu, Shanti Bai, Munee Bi, Qamar Sultan, Firdaus Bi, Nusrat Jahan, Pappu Singh, Jameela Bi, Meenu Rawat, Bano Bi, Maksood Ahmed, Babu Lal, and Kaval Ram v. Union Carbide Corporation, Warren Anderson. (2008) United States Court of Appeals, Second Circuit.

Jenkins, H., 2004. Corporate Social Responsibility and the Mining Industry: Conflicts and Constructs. *Corporate Social Responsibility and Environmental Management*, **11**, pp. 23.

Jensen, M.C., 2001. Value Maximization, Stakeholder Theory, and the Corporate Objective Function. *Journal of Applied Corporate Finance*, **14**(3).

- Jones, A., 2007. Critical infrastructure protection. *Computer Fraud & Security*, (April), pp. 11.
- Jones, A., 2007. Critical Infrastructure Protection - Developments Since the Inception of the Concept. In: D. Remenyi, ed, *Proceedings of the 6th European Conference on Information Warfare & Security*. pp. 131.
- Jones, J.P. and Hanham, R.Q., 1995. Contingency, Realism, and the Expansion Method. *Geographical Analysis*, **27**(3), pp. 185-207.
- Keane, W., 2005. Signs Are Not the Garb of Meaning: On the Social Analysis of Material Things. In: D. Miller, ed, *Materiality*. Duke University Press, pp. 182.
- Kelman, M., 1987. *A Guide to Critical Legal Studies*. Cambridge, Massachusetts: Harvard University Press.
- Kennedy, D., 1983. *Legal education and the reproduction of hierarchy: a polemic against the system*. Cambridge, Mass.: Afar.
- Khalaf, A., 2011. *Othman Vows Not to Cut Internet Service in Egypt*.
- Kiobel v. Royal Dutch Petroleum* (2013) Supreme Court of the United States.
- Korhonen, J., 2006. On the paradox of corporate social responsibility: how can we use social science and natural science for a new vision? *Business Ethics: A European Review*, **15**(2), pp. 200-214.
- KPMG International, 2008. *KPMG International Survey of Corporate Responsibility Reporting 2008*. The Netherlands.
- Kyle, B. and Ruggie, J.G., 2005. *Corporate Social Responsibility as Risk Management: A Model for Multinationals*. Cambridge, MA: John F. Kennedy School of Government, Harvard University.
- Latour, B., 2007. Turning Around Politics: A Note on Gerard de Vries' Paper. *Social Studies of Science*, **37**(5), pp. 811.
- Latour, B., 2005. *Reassembling the social: an introduction to actor-network-theory*. Oxford: Oxford University Press.
- Latour, B., 2004. *Politics of nature: how to bring the sciences into democracy*. Cambridge, Mass; London: Harvard University Press.
- Law 4/1968: Regarding the Control of State Defense Matters and the Armed Forces*. The Official Paper: United Arab Republic.

- Law 87/1960: Regarding National Mobilization.* The Official Paper: United Arab Republic.
- Law 162/1958: Regarding the State of Emergency.* The Official Paper: United Arab Republic.
- Law 10/2003: Egypt Telecommunication Regulation Law.* The Official Paper: Arab Republic of Egypt.
- Leitner, H., 1997. Reconfiguring the spatiality of power: the construction of a supranational migration framework for the European Union. *Political Geography*, **16**(2), pp. 123.
- Lemke, T., 2000. *Foucault, Governmentality, and Critique*.
- Levitas, R., 2000. Discourses of Risk and Utopia. In: Adam, Barbara, Beck, Ulrich, and van Loon, Joost, ed, *The risk society and beyond: critical issues for social theory*. London: SAGE Publications, pp. 198.
- Lipschutz, R.D., ed, 1995. *On Security*. New York: Columbia University Press.
- Lipsky, D.B. and Seeber, R.L., 1998. In Search of Control: The Corporate Embrace of ADR. *University of Pennsylvania Journal of Labor and Employment Law*, **1**(1), pp. 133.
- Loman, J., December 9, 2012-last update, *SWP misses mark* [Homepage of The Mining Journal], [Online]. Available: <http://www.miningjournal.net/page/content.detail/id/582450/SWP-misses-mark.html> [June 10, 2013].
- Loomis, C.P. and McKinney, J.C., 1957. The Application of Gemeinschaft and Gesellschaft As Related to Other Typologies. In: C.P. Loomis, ed, *Community & Society (Gemeinschaft und Gesellschaft)*. East Lansing: The Michigan State University Press, pp. 12.
- Lorenzetti, R.L., De Nolasco, Elena I. Highton, Fayt, C.S., Maqueda, J.C., Zaffaroni, E.R. and Arbigay, C.M., 2008. *Mendoza, Beatriz Silvia and others v/ the National State and others regarding damages suffered (injuries resulting from the environmental contamination of the Matanza-Riachuelo River)*. Translated by Michael Posner. Buenos Aires: Fundacion Ambiente y Recursos Naturales (FARN).
- Lowenstein, L., 1996. Financial Transparency and Corporate Governance: You Manage What You Measure. *Columbia law review*, **96**(5), pp. 1335-1362.

- Lumsden, A. and Fridman, S., 2007. Corporate Social Responsibility: The Case for a Self Regulatory Model. *Company & Securities Law Journal*.
- Mack, K.W., 2012. Law and Local Knowledge in the History of the Civil Rights Movement. *Harvard Law Review*, **125**(4), pp. 1018.
- Madbouly, A., May 28, 2011, 2011-last update, *Mubarak fined for mobile, Internet cut* [Homepage of The Egyptian Gazette], [Online]. Available: <http://archive.is/PT5V/image> [June 14, 2011, 2011].
- Maitland, A., 2006. *Companies urged to report climate risks*. Financial Times.
- Malewitz, J., May 25, 2012-last update, *As Mining Surges in Michigan's North, State Looks at Taking Control* [Homepage of Stateline: The Daily News Service of The Pew Charitable Trusts], [Online]. Available: <http://www.pewstates.org/projects/stateline/headlines/as-mining-surges-in-michigans-north-state-looks-at-taking-control-85899391194> [June 15, 2013].
- Manning, R.C., 1984. Corporate Responsibility and Corporate Personhood. *Journal of Business Ethics*, **3**(1), pp. 77.
- Marceau, D.J., 1999. The Scale Issue in Social and Natural Sciences. *Canadian Journal of Remote Sensing*, **25**(4), pp. 347.
- National Wildlife Federation, Yellow Dog Watershed Preserve, Inc., Keweenaw Bay Indian Community, and Huron Mountain Club v. Department of Natural Resources, and Kennecott Eagle Minerals Company*. (2011) No. 293779 edn. Court of Appeals of Michigan.
- Maurer, B., 1999. Forget Locke?: From Proprietor to Risk-Bearer in New Logics of Finance. *Public Culture*, **11**(2), pp. 365.
- McCann, M. and Silverstein, H., 1998. Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States. In: A. Sarat and S. Scheingold, eds, *Cause Lawyering: Political Commitments and Professional Responsibilities*. New York, NY: Oxford University Press, pp. 261.
- McCormick, R.L., 1981. The Discovery That Business Corrupts Politics: A Reappraisal of the Origins of Progressivism. *The American Historical Review*, **86**(2), pp. 247-274.
- McCoubrey, H., 2001. The 2000 Review of the OECD Guidelines for Multinational Enterprises. *International and Comparative Law Quarterly*, **50**(April), pp. 394.
- Meentemeyer, V., 1989. Geographical perspectives of space, time, and scale. *Landscape Ecology*, **3**(3/4), pp. 163.

- Mels, T., 2009; 2009. Analysing Environmental Discourses and Representations. *A Companion to Environmental Geography*. Wiley-Blackwell, pp. 385-399.
- Micklethwait, J. and Wooldridge, A., 2005; 2003. *The company: a short history of a revolutionary idea*. London: Phoenix.
- Miller, D., ed, 2005. *Materiality*. Duke University Press.
- Millon, D., 1990. Theories of the Corporation. *Duke law journal*, **1990**(2, Frontiers of Legal Thought I), pp. 201-262.
- Ministry of Communications and Information Technology, 2011. *ICT Indicators in Brief: January 2011*. Cairo, Egypt: Ministry of Communications and Information Technology.
- Mitchell, L.E., 2001. *Corporate irresponsibility: America's newest export*. New Haven; London: Yale University Press.
- Mogahed, M., August 19, 2011-last update, *"Egypt Today" publishes a draft of revisions to the Telecommunications Law* [Homepage of Almasry Alyoum], [Online]. Available: <http://www.almasryalyoum.com/node/487874> [March 15, 2012].
- Monsanto, 2011-last update, *Monsanto Facilities Round the World* [July 20, 2011].
- Monsanto, 2010. *United in Growth: 2010 Sustainability and Corporate Responsibility Report*.
- Monsanto Company, 2010. *2010 Form 10-K, United States Securities and Exchange Committee*.
- Mooney, C.W., 1990. Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled Intermediaries. *Cardozo Law Review*, **12**, pp. 305.
- Muchlinski, P., 2001. Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases. *International and Comparative Law Quarterly*, **50**(January), pp. 1.
- Murray, J., 2001. A New Phase in the Regulation of Multinational Enterprises: The Role of the OECD. *Industrial Law Journal*, **30**(3), pp. 255.
- Nápoli, A.M., 2009. *Una Política De Estado Para el Riachuelo*. Buenos Aires: Fundacion Ambiente y Recursos Naturales (FARN).

- Nash, J., 2007. Consuming Interests: Water, Rum, and Coca-Cola from Ritual Propitiation to Corporate Expropriation in Highland Chiapas. *Cultural Anthropology*, **22**(4), pp. 621.
- National Constituent Assembly, *Constitution of the Argentine Nation* [Homepage of Argentine Senate], [Online]. Available: <http://www.senado.gov.ar/web/interes/constitucion/english.php> [February 03, 2013].
- National Public Radio, July 28, 2010-last update, *Many in Gulf on Road to Uncertain Compensation*. Available: <http://www.npr.org/templates/story/story.php?storyId=128830924> [August 15, 2010].
- Netherlands National Contact Point, 2011. *Annual Report 2011*. The Hague: Netherlands National Contact Point.
- New York Civil Practice Law and Rules, Article 2, Section 214*: Actions to be commenced within three years: for non-payment of money collected on execution; for penalty created by statute; to recover chattel; for injury to property; for personal injury; for malpractice other than medical, dental or podiatric malpractice; to annul a marriage on the ground of fraud.
- New York Civil Practice Law and Rules, Article 2, Section 214-c*: Certain actions to be commenced within three years of discovery
- OECD, 2012. *2011 Update of the OECD Guidelines for Multinational Enterprise: Comparative table of changes made to the 2000 text*. www.oecd.org/daf/investment/guidelines: OECD.
- OECD, May 25, 2011-last update, *New OECD guidelines to protect human rights and social development* [Homepage of OECD], [Online]. Available: <http://www.oecd.org/daf/newoecdguidelinstoprotecthumanrightsandsocialdevelopment.htm> [February 1, 2013].
- OECD Directorate for Financial and Enterprise Affairs, May 25, 2011-last update, *Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context*. Available: <http://www.oecd.org/dataoecd/43/29/48004323.pdf> [June 15, 2011].
- OECD Watch, September 28, 2008-last update, *FOCO & Friends of the Earth Argentina vs. Shell Capsa* [Homepage of OECD Watch], [Online]. Available: http://oecdwatch.org/cases/Case_141 [February 02, 2013].
- OECD Watch, *About OECD Watch* [Homepage of OECD Watch], [Online]. Available: <http://oecdwatch.org/about-us> [February 20, 2013].

- OECD Watch, *NCP: National Contact Point Argentina* [Homepage of OECD Watch], [Online]. Available: http://oecdwatch.org/cases/Case_217/@@casesearchview?type=NCP&search=National%20Contact%20Point%20Argentina [January 31, 2013].
- OECD Watch, *The OECD Guidelines for Multinational Enterprises* [Homepage of OECD Watch], [Online]. Available: <http://oecdwatch.org/oecd-guidelines> [February 01, 2013].
- Palazzo, G. and Scherer, A., 2008. Corporate Social Responsibility, Democracy, and the Politicization of the Corporation. *Academy of Management Review*, **33**, pp. 733.
- Pallone, Frank et al (Congress of the United States, Washington, DC). *Letter to: Stavropoulos, William (The Dow Chemical Company)*. 2003 Jul 18. 3 pages. Request for Dow Chemical to cleanup the Union Carbide Corporation plant site in Bhopal, India.
- Pallone, Frank et al (Congress of the United States, Washington, DC). *Letter to: Liveris, Andrew and Members of the Board (The Dow Chemical Company)*. 2009 Jun 16. 4 pages. Request for a representative from Dow Chemical to appear in legal cases in India and for Dow to meet the demands of survivors.
- Pensions & Investments, November 30, 2005-last update, *The New York State Common Retirement Fund* [Homepage of Pensions & Investments], [Online]. Available: <http://www.pionline.com/article/20051130/DAILY/511300710> [November 14, 2012].
- Paredes, T., January 27, 2010-last update, Statement at Open Meeting - Interpretive Release Regarding Disclosure of Climate Change Matters (Speech by SEC Commissioner) [Homepage of United States Securities and Exchange Commission], [Online]. Available: <http://www.sec.gov/news/speech/2010/spch012710klc-climate.htm> [April 2, 2010].
- Park, R.E. and Burgess, E.W., 1970. *Introduction to the Science of Sociology*. Student Edition edn. Chicago: The University of Chicago Press.
- Peller, G., 1985. The Metaphysics of American Law. *California Law Review*, **73**, pp. 1151.
- Pendergrast, M., 2000. *For God, country and Coca-Cola: the history of the world's most popular soft drink*. New edn. London: Orion Business.
- Pensions & Investments, November 30, 2005-last update, *The New York State Common Retirement Fund* [Homepage of Pensions & Investments], [Online]. Available:

- <http://www.pionline.com/article/20051130/DAILY/511300710> [November 14, 2012].
- Pepin, J., June 13, 2013-last update, *Rio Tinto sells Eagle Mine* [Homepage of The Mining Journal], [Online]. Available: <http://www.miningjournal.net/page/content.detail/id/587932/Rio-Tinto-sells-Eagle-Mine.html> [June 13, 2013].
- Peuquet, D., 1994. *It's About Time: A Conceptual Framework for the Representation of Temporal Dynamics in Geographic Information Systems*. *Annals of the Association of American Geographers*, **84**(3), pp. 441.
- Phillips, M.J., 1993-1994. Reappraising the Real Entity Theory of the Corporation. *Florida State University Law Review*, **21**, pp. 1061.
- Plant, R., 1978. Community: Concept, Conception, and Ideology. *Politics Society*, **8**, pp. 79.
- Plastrik, P., 2012. *The Unity of Place: Giving Birth to Community Environmental Monitoring*. Rio Tinto; Marquette County Community Foundation; Superior Watershed Partnership and Land Trust.
- Pogge, T., 2008. Growth and Inequality: Understanding Recent Trends and Political Choices. *Dissent*.
- Ponterotto, J.G., 2006. Brief Note on the Origins, Evolution, and Meaning of the Qualitative Research Concept "Thick Description". *The Qualitative Report*, **11**(3), pp. 538.
- Porter, M. and Kramer, M., 2006. Strategy & Society: The Link Between Competitive Advantage and Corporate Social Responsibility. *Harvard Business Review*.
- Posner, R.A., 2004. Legal Pragmatism. *Metaphilosophy*, **35**(1/2), pp. 147.
- Powell, J.A. and Menendian, S., 2011-2012. Beyond Public/Private: Understanding Excessive Corporate Prerogative. *Kentucky Law Journal*, **100**, pp. 83.
- Preston, J., 2011, March 27. Ethical Quandary for Social Sites. *The New York Times Business*.
- Principles for Responsible Investment, 2011-last update, Principles for Responsible Investment. Available: <http://www.unpri.org/> [May 23, 2011].
- Ranjan, N.E.A., 2003. *Methyl Isocyanate Exposure and Growth Patterns of Adolescents in Bhopal*. <https://webdrive.service.emory.edu/users/vdhara/www.BhopalPublications/Health>

- %20Effects%20&%20Epidemiology/JAMA%20Research%20letter%20&%20cor
 respondence/Sambhavna%20JAMA%20letter.pdf
- Rath, Pramathesh (Consulate General of India, New York, NY). *Letter to: United States District Judge John F. Keenan (United States District Court, Southern District of New York, New York, NY)*. 2004 Jun 28. 3 pages. Re: Bano et al. v. Union Carbide, 99 Civ. 11329 (JFK). <http://old.studentsforbhopal.org/Assets/India-NYcourtletter-June30.pdf>.
- Rawls, J., 1972; 1971. *A Theory of Justice*. Oxford: Clarendon Press.
- Reich, R.B., 1998. The New Meaning of Corporate Social Responsibility. *California Management Review*, **40**(2).
- Reza, S., 2007. Endless Emergency: The Case of Egypt. *New Criminal Law Review*, **10**, pp. 532.
- Rio Tinto, 2013-last update, *Community Scorecard* [Homepage of Rio Tinto Eagle], [Online]. Available: <http://riotintoeagle.com/approach/community/community-scorecard/> [June 10, 2013].
- Robbins, N., 2012. *The Corporation that Changed the World: How the East India Company Shaped the Modern Multinational*. 2nd edn. London, UK: Pluto Press.
- Robin, M., 2008. *Le Monde Selon Monsanto (The World According to Monsanto)*.
- Roe, M.J., 2001. The Shareholder Wealth Maximization Norm and Industrial Organization. *University of Pennsylvania Law Review*, **149**, pp. 2063.
- Rose, Mitch and Wylie, John, 2006. Animating landscape. *Society and Space*, **24**(4), pp. 475.
- Rose, N. and Miller, P., 1992. Political Power beyond the State: Problematics of Government. *The British journal of sociology*, **43**(2), pp. 173-205.
- Ruggie, J., 1982. International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order. *International Organization*, **36**(2).
- Ruggie, J.G., 2008. *Embedding global markets: an enduring challenge*. Aldershot; Burlington, Vt.: Ashgate.
- Rushton, K., 2011, August 8. Egyptian riots put dent in Vodafone's growth. *The Telegraph Finance*.

- Saad, L., February 1, 2011-last update, *In U.S., Majority Still Wants Less Corporate Influence*. Available: <http://www.gallup.com/poll/145871/majority-wants-less-corporate-influence.aspx> [May 25, 2011].
- Sack, R., 1980. *Conceptions of Space in Social Thought: A Geographic Perspective*. Minneapolis: University of Minnesota Press.
- Sahu v. Union Carbide Corp. Class Action Complaint* (2004) Dist. Court, SD New York.
- Sahu v. Union Carbide Corp.* (2005) 418 F. Supp. 2d 407 - Dist. Court, SD New York.
- Sahu v. Union Carbide Corp.* (2006) WL 3377577.
- Sahu v. Union Carbide Corp.* (2006) US Dist. LEXIS 84475.
- Sahu v. Union Carbide Corp.* (2007) 475 F. 3d 465 - Court of Appeals, 2nd Circuit.
- Sahu v. Union Carbide Corp.* (2008) 548 F. 3d 59 - Court of Appeals, 2nd Circuit.
- Sahu v. Union Carbide Corp.* (2009) 262 FRD 308.
- Sahu v. Union Carbide Corp.* (2010) WL 2473585 – 2010.
- Sahu v. Union Carbide Corp. Civ. Action* (2011) Dist. Court, SD New York.
- Sahu v. Union Carbide Corp. Opinion and Order* (2012) Dist. Court, SD New York.
- Saleh, N., 2010. *Third World Citizens and the Information Technology Revolution*. New York: Palgrave Macmillan.
- Sandel, M., 1988. The Political Theory of the Procedural Republic. *Revue de Metaphysique et de Morale*.
- Sander, F.E.A., 1985. Alternative Methods of Dispute Resolution: An Overview. *University of Florida Law Review*, **37**(1), pp. 1.
- Sarat, A. and Scheingold, S.A., eds, 1998. *Cause Lawyering: political commitments and professional responsibilities*. New York, NY: Oxford University Press.
- Sayre, N.F., 2009; 2009. Scale. *A Companion to Environmental Geography*. Wiley-Blackwell, pp. 95-108.
- Scherer, A. and Palazzo, G, 2007. Toward a Political Conception of Corporate Responsibility - Business and Society Seen From a Habermasian Perspective. *Academy of Management Review*, **32**.

- Schmidt, V.A., 08/05, 2010-last update, CPLR Section 214 v. Section 214-c [Homepage of The Daily Record], [Online]. Available: <http://www.wolfordfirm.com/wp-content/themes/wolfordfirm/inc/cplr-section-214-v-section-214-c.pdf> [11/15, 2012].
- Seawright, J. and Gerring, J., 2008. Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options. *Political Research Quarterly*, **61**(2), pp. 294.
- Securities and Exchange Commission, 2010. *SI, 17 CFR PARTS 211, 231 and 241*.
- Sen, A., 2007, November 26-last update, *IITs boycott Dow Chemicals for Bhopal Gas Tragedy* [Homepage of IBN Life], [Online]. Available: <http://ibnlive.in.com/news/iits-boycott-dow-chemicals-for-bhopal-gas-tragedy/52998-3.html> [11/14, 2012].
- Sharara, Norma and Hoke-Witherspoon, Anne, The Evolution of the 1992 Shareholder Communication Proxy Rules and Their Impact on Corporate Governance. *Business Lawyer*, **49**, pp. 327.
- Shell Global, 2011. *Sustainability Report 2011*. Shell Global.
- Shell Global, December, 2009-last update, *HSSE and social performance - commitment and policy* [Homepage of Shell Global], [Online]. Available: <http://www.shell.com/global/environment-society/s-development/our-commitments-and-standards/hse-com-policy.html> [March 09, 2013].
- Shivarajan, S., 2011. Dynamic networks and successful social action: a theoretical framework to examine the Coca-Cola controversy in Kerala, India. In: Subhash, Jain C., and Kedia, Ben L., ed, *Enhancing Global Competitiveness Through Sustainable Environmental Stewardship*. Cheltenham, UK: Edward Elgar Publishing Limited.
- Shorouk News, 2011. *Telecommunications Agency proposes that communications shutdown authorization is between the Council of Ministers and the President of the Republic (translated from Arabic)*.
- Shrader-Frechette, K., 2003. Review of Cass Sunstein's "Risk and Reason". *Notre Dame Philosophical Reviews: an electronic journal*.
- SI, 15 U.S.C. § 78A ET SEQ., 1934. *Securities Exchange Act*.
- Simmel, G., Frisby, D., Bottomore, T.B. and Mengelberg, K., 1990. *The philosophy of money*. 2 enl edn. London: Routledge & Kegan Paul.

- Social Investment Forum, 2007. *2007 Report on Socially Responsible Investing Trends in the United States: Executive Summary*. Washington, D.C.
- Soto GC. La Coca-Cola en Mexico: El Agua Tiembla (Decima Parte). *Otros Mundos Chiapas*. 2005 January 7.
- Stake, R.E., 1995. *The Art of Case Study Research*. London: Sage Publications.
- Stark, J., December 7, 2012-last update, *SWP, Rio Tinto program challenged* [Homepage of The Mining Journal], [Online]. Available: <http://www.miningjournal.net/page/content.detail/id/582409/SWP--Rio-Tinto-program-challenged.html> [June 10, 2013].
- Staveland-Sæter, K., 2012. Can litigation clean rivers? Assessing the policy impact of "the Mendoza case" in Argentina. *CMI (Chr. Michelsen Institute)*, **11**(3).
- Stipanowich, T.J., 2004. ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution". *Journal of Empirical Legal Studies*, **1**(3), pp. 843.
- Stout, L.A., 2001-2002. Bad and Not-so-Bad Arguments for Shareholder Primacy. *California Law Review*, **75**, pp. 1189.
- Suchman, M.C., 1995. Managing Legitimacy: Strategic and Institutional Approaches. *The Academy of Management Review*, **20**(3), pp. 571.
- Sullivan, M. and Solove, D., 2003. Can Pragmatism be Radical? Richard Posner and Legal Pragmatism. *Yale Law Journal*, **113**, pp. 687.
- Sunstein, C.R., 2002. *Risk and reason: safety, law, and the environment*. Cambridge: Cambridge University Press.
- SustainAbility, 2004. *The Changing Landscape of Liability: A Director's Guide to Trends in Corporate Environmental, Social and Economic Liability*. London, UK: SustainAbility.
- Teachout, Z., 2011. Historical Roots of Citizens United v. FEC: How Anarchists and Academics Accidentally Created Corporate Speech Rights. *Harvard Law and Policy Review*, **5**, pp. 163.
- The Argentine Congress, 2002, *National Environmental Policy Law 25675* (translated from Spanish) [Homepage of Informacion Legislativa], [Online]. Available: <http://www.infoleg.gov.ar/infolegInternet/anexos/75000-79999/79980/norma.htm> [02/02, 2013].

- The Coca Cola Company, 2010. *2010 Form 10-K, United States Securities and Exchange Commission*.
- The Coca Cola Company, March 16, 2009-last update, *The Coca Cola Company Commits US \$30 Million to Clean Water Projects Across Africa* [April 20, 2011].
- The Egyptian Center for Housing Rights, August 7, 2011-last update, *Mubarak Appealed the Court's Decision on Cutting Communication Case*. Available: <http://173.193.120.160/~echreg/english/index.php?type=news&action=newsdetails&id=o2xsZg==> [August 7, 2011].
- The Harris Poll, January 6, 2010-last update, *Congress and Wall Street Are Blamed the Most for Americans' Current Financial Situation*. Available: <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Economy-Blame-Congress-2010-01.pdf> [May 23, 2011].
- The Hindu, August 9, 2008-last update, *Bhopal gas survivors end four-month dharna* [Homepage of The Hindu], [Online]. Available: <http://www.hindu.com/2008/08/09/stories/2008080955221100.htm> [November 14, 2012].
- The International Campaign for Justice in Bhopal, *The International Campaign for Justice in Bhopal* [Homepage of bhopal.net], [Online]. Available: <http://www.bhopal.net/oldsite/icjb.html> [July 5, 2012].
- The Mining Journal, December 28, 2012-last update, *MCCF appoints CEMP board* [Homepage of The Mining Journal], [Online]. Available: <http://www.miningjournal.net/page/content.detail/id/582920/MCCF-appoints-CEMP-board.html> [June 10, 2013].
- The Mining Journal, September 9, 2012-last update, *Mine forums chance to learn, sound off* [Homepage of The Mining Journal], [Online]. Available: <http://www.miningjournal.net/page/content.detail/id/579548/Mine-forums-chance-to-learn--sound-off.html> [June 10, 2013].
- The United Nations, April 30, 2011-last update, *Overview of the UN Global Compact*. Available: <http://www.unglobalcompact.org/AboutTheGC/index.html> [May 23, 2011].
- Tomasic, R., Bottomley, S. and McQueen, R., 2002. *Corporations law in Australia*. 2 edn. Sydney: Federation Press.
- Tönnies, F., 1957. Part Five: The Summing Up. In: C.P. Loomis, ed, *Community & Society (Gemeinschaft und Gesellschaft)*. East Lansing: The Michigan State University Press, pp. 237.

Trustees of Dartmouth College v. Woodward (1819) Supreme Court of the United States.

TSC Industries, Inc. et al. v. Northway, Inc. (1976) Supreme Court of the United States

Ulrich, P., 1996. Towards an Ethically-Based Conception of Socio-Economic Rationality: From the Social Contract Theory to Discourse Ethics as the Normative Foundation of Political Economy. In: Gasparski, W. and Ryan, L., ed, *Human action in business: praxiological and ethical dimensions*. New Brunswick, New Jersey: Transaction Publishers.

UNFCCC, 2011-last update, *Clean Development Mechanism*. Available: http://unfccc.int/kyoto_protocol/mechanisms/clean_development_mechanism/items/2718.php [August 15, 2011].

United States Government, January 02, 2013-last update, *Judicial Panel on Multidistrict Litigation* [Homepage of USA.gov], [Online]. Available: <http://www.usa.gov/directory/federal/judicial-panel-on-multidistrict-litigation.shtml> [January 10, 2013].

United States Securities and Exchange Commission, March 30, 2009-last update, *Division of Corporation Finance: Rules, Regulations and Schedules*. Available: <http://www.sec.gov/divisions/corpfin/ecfrlinks.shtml> [March 26, 2010].

United States Securities and Exchange Commission, June 26, 2009-last update, *Form 10-K*. Available: <http://www.sec.gov/answers/form10k.htm> [March 26, 2010].

Venkatesan, V., 2003. Nine United States Congressmen file an amicus brief demanding the indictment of Union Carbide Corporation, after a district court rejects the Bhopal gas disaster survivors' plea for compensation. *Frontline*, **20**(24).

Vodafone Group, 2011. *Sustainability Report: For the year ending 31 March 2011*. Berkshire, England: Vodafone Group Plc.

Vogel, D., 2005. *The market for virtue: the potential and limits of corporate social responsibility*. Washington, D.C.: Brookings Institution Press.

Wal-Mart Stores, Inc., Petitioner v. Betty Dukes et al (2011) Supreme Court of the United States.

Wæver, O., 1995. Securitization and desecuritization. In: R.D. Lipschutz, ed, *On Security*. New York: Columbia University Press, pp. 46.

Weatherspoon, F.D., 2011. The Impact of the Growth and Use of ADR Processes on Minority Communities, Individual Rights, and Neutrals. *Capital University Law Review*, **39**, pp. 789.

- Weil, D., 2002. *The Benefits and Costs of Transparency: A Model of Disclosure Based Regulation*.
- Weissbrodt, D. and Kruger, M., 2003. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. *The American Journal of International Law*, **97**(4), pp. 901.
- Whatmore, S., 2006. Materialist returns: practising cultural geography in and for a more-than-human world. *Cultural Geographies*, **13**, pp. 600.
- Wilde-Ramsing, J., 2009. *Shell: Overview of Controversial Business Practices in 2008*. Amsterdam, Netherlands: Centre for Research on Multinational Corporations (SOMO).
- Williams, C., 1999. The Securities and Exchange Commission and Corporate Social Transparency. *Harvard Law Review*, **112**, pp. 1197.
- Williams, R., 1976. *Keywords*. London: Fontana/Croom Helm.
- Wolfe, A., 1993. The Modern Corporation: Private Agent or Public Actor. *Washington and Lee Law Review*, **50**, pp. 1673.
- World Bank, 2010. *Gross national income 2010, Atlas method*.
- World Economic Forum, January, 2011-last update, Shared Norms for the New Reality [May 25, 2011].
- Wormser, M.I., 1927. *Disregard of the Corporate Fiction and Allied Corporation Problems*. New York: Baker, Voorhis and Company.
- Wyant, D., 2004. *Michigan's Nonferrous Metallic Mining Regulations. Natural Resources and Environmental Protection Act: Act No. 451 of the Public Acts of 1994, as amended. Part 632*. Lansing, Michigan: State of Michigan.
- Yergin, D., 1977. *Shattered peace: the origins of the cold war and the national security state*. London: A. Deutsch.
- Young, E. *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*. North Carolina Law Review, **72**, pp. 619.
- Young, I.M., 1990. *Justice and the Politics of Difference*. Princeton, New Jersey: Princeton University Press.
- Zavestoski, S., 2009. The Struggle for Justice in Bhopal: A New/Old Breed of Transnational Social Movement. *Global Social Policy*, **9**(3), pp. 383.

Appendix A - Shareholder Resolutions* Related to Climate Change Disclosure (April 1999 to June 2010)

COMPANY	REQUEST	OUTCOME (% shareholders supporting the resolution)	MEETING DATE
Amoco	Report on global climate change risk	Cancelled	04/01/99
Texaco	Report on global climate change risk	Withdrawn	04/27/99
ChevronTexaco	Report on global climate change risk	7.40%	04/28/99
Ford Motor Company	Report on global climate change risk	2.30%	05/13/99
Allegheny Energy	Report on global climate change risk	7.40%	05/13/99
Reynolds Metals	Report on global climate change risk	7.00%	05/20/99
Exxon Mobil Corporation	Report on global climate change risk	5.30%	05/27/99
Mobil	Report on global climate change risk	5.20%	05/27/99
General Motors	Report on global climate change risk	4.60%	06/07/99
Goodyear Tire & Rubber	Report on global climate change risk	Omitted	04/10/00
Duke Energy	Report on global climate change risk	Withdrawn	04/20/00
ChevronTexaco	Report on global climate change risk	8.80%	04/26/00
Texaco	Report on global climate change risk	Withdrawn	04/26/00
CSX	Report on global climate change risk	Withdrawn	04/27/00
Cinergy	Report on global climate change risk	Withdrawn	04/27/00
Eastman Chemical	Report on global climate change risk	7.00%	05/04/00
Norfolk Southern	Report on global climate change risk	6.80%	05/11/00
Allegheny Energy	Report on global climate change risk	8.90%	05/11/00
Union Pacific	Report on global climate change risk	Withdrawn	04/20/01
Chevron/Texaco	Report on global climate change risk	9.60%	04/25/01
CSX	Report on global climate change risk	Withdrawn	05/01/01
Eastman Chemical	Report on global climate change risk	7.90%	05/03/01
Allegheny Energy	Report on global climate change risk	12.40%	05/10/01
Norfolk Southern	Report on global climate change risk	7.90%	05/10/01
United Technologies	Report on greenhouse gas emissions	Withdrawn	04/10/02
Caterpillar	Report on greenhouse gas emissions	Withdrawn	04/10/02
Spring	Report on greenhouse gas emissions	7.30%	04/16/02
American Electric Power	Report on greenhouse gas emissions	Withdrawn	04/23/02
CSX	Report on greenhouse gas emissions	Withdrawn	04/23/02
Exelon	Report on greenhouse gas emissions	Withdrawn	04/23/02
General Electric	Report on greenhouse gas emissions	19.20%	04/24/02
AES	Report on greenhouse gas emissions	Withdrawn	04/25/02
Eastman Chemical	Report on greenhouse gas emission	29.40%	05/02/02
Wisconsin Energy	Report on greenhouse gas emissions	Withdrawn	05/02/02
American Standard	Report on greenhouse gas emissions	29.60%	05/02/02
Occidental Petroleum	Report on greenhouse gas emissions	18.90%	05/03/02
Dynegy Inc.	Report on/reduce greenhouse gas emissions	Withdrawn	05/07/02
Bristol-Myers Squibb	Report on greenhouse gas emissions	Withdrawn	05/07/02
Allegheny Energy	Report on greenhouse gas emissions	8.30%	05/09/02
ChevronTexaco	Report on greenhouse gas emissions	Withdrawn	05/15/02
Unocal	Report on greenhouse gas emissions	Withdrawn	05/20/02
Southern	Report on greenhouse gas emissions	Withdrawn	05/22/02
General Motors	Report on global climate change risk	Omitted	06/04/02
General Mills	Report on greenhouse gas emissions	Withdrawn	09/23/02
Campbell Soup	Report on greenhouse gas emissions	not in proxy	11/22/02

Caterpillar	Report on greenhouse gas emission risks	Withdrawn	04/09/03
United Technologies	Report on/reduce greenhouse gas emissions	Withdrawn	04/09/03
Weyerhaeuser	Report on greenhouse gas emissions & FSC	7.70%	04/15/03
PG&E	Report greenhouse gas, other emission risks	9.10%	04/16/03
Cinergy	Report greenhouse gas, other emission risks	Omitted	04/22/03
American Electric Power	Report greenhouse gas, other emission risks	26.90%	04/23/03
General Electric	Report on/reduce greenhouse gas emissions	22.60%	04/23/03
Occidental Petroleum Corporation	Report on greenhouse gas emission risks	Withdrawn	04/25/03
Reebok International	Report on greenhouse gas emission risks	Withdrawn	05/06/03
ConocoPhillips	Report on greenhouse gas emission risks	Omitted	05/06/03
Sprint	Report on/reduce greenhouse gas emissions	Withdrawn	05/13/03
Gillette	Report on greenhouse gas emission risks	Withdrawn	05/15/03
Marsh & McLennan	Report on greenhouse gas emission risks	Withdrawn	05/15/03
TXU	Report greenhouse gas, other emission risks	24.20%	05/16/03
Exxon Mobil Corporation	Report on global climate change risk	22.20%	05/28/03
Southern	Report greenhouse gas, other emission risks	23.70%	05/28/03
General Motors	Report on/reduce greenhouse gas emissions	6.20%	06/03/03
Staples	Report on greenhouse gas emission risks	Withdrawn	06/09/03
Xcel Energy	Report greenhouse gas, other emission risks	Omitted	06/11/03
Ford Motor Company	Report on/reduce greenhouse gas emissions	Withdrawn	06/16/03
Cummins	Report on greenhouse gas emission risks	Withdrawn	09/16/03
The Chubb Corporation	Report on global climate change risk	Omitted	04/27/04
American Electric Power Company, Inc.	Report on global climate change risk	Withdrawn	04/27/04
Valero Energy Corporation	Report on/reduce greenhouse gas emissions	9.30%	04/29/04
Apache Corporation	Report on/reduce greenhouse gas emissions	37.10%	05/06/04
Ford Motor Company	Report on global climate change risk	Omitted	05/13/04
Ford Motor Company	Report on/reduce greenhouse gas emissions	Withdrawn	05/13/04
American International Group, Inc.	Report on global climate change risk	Omitted	05/19/04
Exxon Mobil Corporation	Report on global climate change risk	8.80%	05/26/04
The Southern Company	Report greenhouse gas, other emission risks	Withdrawn	05/26/04
Analog Devices, Inc.	Report on/reduce greenhouse gas emissions	Withdrawn	03/08/05
Lennar Corporation	Report on/reduce greenhouse gas emissions	2.30%	03/29/05
The Ryland Group, Inc.	Report on/reduce greenhouse gas emissions	7.90%	04/20/05
Dominion Resources, Inc.	Report on/reduce greenhouse gas emissions	8.30%	04/22/05
Allergan, Inc.	Report on/reduce greenhouse gas emissions	Withdrawn	04/26/05
Wells Fargo & Company	Report on global climate change risk	Omitted	04/26/05
Avery Dennison Corporation	Report on/reduce greenhouse gas emissions	Withdrawn	04/28/05
Corning Incorporated	Report on/reduce greenhouse gas emissions	Withdrawn	04/28/05
Tesoro Corporation	Report on/reduce greenhouse gas emissions	Withdrawn	05/04/05
Apache Corporation	Report on/reduce greenhouse gas emissions	Withdrawn	05/05/05
Simon Property Group, Inc.	Report on/reduce greenhouse gas emissions	7.50%	05/11/05
Progress Energy, Inc.	Report on/reduce greenhouse gas emissions	Withdrawn	05/11/05
Newell Rubbermaid Inc.	Report on/reduce greenhouse gas emissions	Withdrawn	05/11/05
Ford Motor Company	Report on/reduce greenhouse gas emissions	Withdrawn	05/12/05
Anadarko Petroleum Corporation	Report on/reduce greenhouse gas emissions	Withdrawn	05/12/05
HCP, Inc.	Report on/reduce greenhouse gas emissions	8.90%	05/12/05
Ford Motor Company	Report on lobbying against tighter fuel economy	6.20%	05/12/05
Southern	Report on global climate change risk	Withdrawn	05/12/05
The Dow Chemical Company	Report on/reduce greenhouse gas emissions	Withdrawn	05/12/05
Ford Motor Company	Report on climate change science	Omitted	05/12/05
Nucor Corporation	Report on/reduce greenhouse gas emissions	Withdrawn	05/12/05
JP Morgan Chase & Co.	Report on global climate change risk	Omitted	05/17/05
XTO Energy Inc.	Report on/reduce greenhouse gas emissions	Withdrawn	05/17/05

FirstEnergy Corp.	Report on/reduce greenhouse gas emissions	Withdrawn	05/17/05
Liberty Property Trust	Report on/reduce greenhouse gas emissions	7.50%	05/19/05
Exxon Mobil Corporation	Report on climate change science	10.30%	05/25/05
Exxon Mobil Corporation	Report on Kyoto compliance plans	28.40%	05/25/05
Motors Liquidation Co.	Report on climate change science	Omitted	06/07/05
Motors Liquidation Co.	Report on/reduce greenhouse gas emissions	5.60%	06/07/05
Wells Fargo & Company	Report on climate change challenges to business	Omitted	04/25/06
General Electric Company	Report on climate change science	6.90%	04/26/06
Dominion Resources, Inc.	Report on/reduce greenhouse gas emissions	22.60%	04/28/06
Great Plains Energy Incorporated	Report on/reduce greenhouse gas emissions	Withdrawn	05/02/06
Great Plains Energy Incorporated	Review/report on carbon tax impact	Omitted	05/02/06
Sempra Energy	Report on/reduce greenhouse gas emissions	Omitted	05/04/06
Occidental Petroleum Corporation	Report on climate change science	7.30%	05/05/06
Peabody Energy Corporation	Report on/reduce greenhouse gas emissions	Withdrawn	05/05/06
Ford Motor Company	Report on lobbying against tighter fuel economy	7.30%	05/11/06
Ford Motor Company	Report on climate change science	4.30%	05/11/06
Anadarko Petroleum Corporation	Report on/reduce greenhouse gas emissions	Withdrawn	05/11/06
Alliant Energy Corporation	Report on/reduce greenhouse gas emissions	Withdrawn	05/12/06
Integrus Energy Group, Inc.	Report on/reduce greenhouse gas emissions	Withdrawn	05/18/06
MGE Energy, Inc.	Report on/reduce greenhouse gas emissions	Withdrawn	05/23/06
Exxon Mobil Corporation	Report on Kyoto compliance plans	Withdrawn	05/31/06
Exxon Mobil Corporation	Report on/reduce greenhouse gas emissions	Withdrawn	05/31/06
Exxon Mobil Corporation	Report on climate change science	Withdrawn	05/31/06
Exxon Mobil Corporation	Reduce GHG emissions from production & products	Omitted	05/31/06
Motors Liquidation Co.	Report on/reduce greenhouse gas emissions	Withdrawn	06/06/06
Motors Liquidation Co.	Report on climate change science	2.90%	06/06/06
Motors Liquidation Co.	Reduce GHG emissions from production and products	Omitted	06/06/06
Devon Energy Corporation	Report on/reduce greenhouse gas emissions	Withdrawn	06/07/06
FedEx Corporation	Report on climate change science	5.60%	09/25/06
Hewlett-Packard Company	Report on greenhouse gas emissions	Omitted	03/14/07
Wells Fargo	Set GHG emissions reduction goals	Withdrawn	04/24/07
EOG Resources, Inc.	Report on/reduce greenhouse gas emissions	Withdrawn	04/24/07
The Chubb Corporation	Report on climate change challenges to business	Withdrawn	04/24/07
Ameren Corporation	Report on/reduce greenhouse gas emissions	Withdrawn	04/24/07
Chevron Corporation	Set GHG emissions reduction goals	8.50%	04/25/07
General Electric Company	Report on climate change science	6.40%	04/25/07
E.I. du Pont de Nemours and Company	Report on climate change science	5.00%	04/25/07
Arch Coal, Inc.	Report on/reduce greenhouse gas emissions	Omitted	04/26/07
Sempra Energy	Report on/reduce greenhouse gas emissions	Withdrawn	04/26/07
Dominion Resources, Inc.	Report on/reduce greenhouse gas emissions	21.70%	04/27/07
CONSOL Energy Inc.	Report on/reduce greenhouse gas emissions	6.80%	05/01/07
Great Plains Energy Incorporated	Review/report on carbon tax impact	Omitted	05/01/07
Bemis Company, Inc.	Report on greenhouse gas emissions	Withdrawn	05/03/07
Occidental Petroleum Corporation	Report on climate change science	6.20%	05/04/07
Prudential Financial, Inc.	Report on climate change challenges to business	Withdrawn	05/08/07
Ford Motor Company	Report on climate change science	3.60%	05/10/07
Ford Motor Company	Set GHG emissions reduction goals	14.10%	05/10/07
The Hartford Financial Services Group, Inc.	Report on climate change challenges to business	Withdrawn	05/16/07
Anadarko Petroleum Corporation	Set GHG emissions reduction goals	Withdrawn	05/16/07
Allegheny Energy, Inc.	Report on/reduce greenhouse gas emissions	39.50%	05/17/07
Massey Energy Company	Report on/reduce greenhouse gas emissions	18.10%	05/22/07
The Southern Company	Report on/reduce greenhouse gas emissions	10.90%	05/23/07

Starwood Hotels & Resorts Worldwide, Inc.	Report on/reduce greenhouse gas emissions	Withdrawn	05/24/07
Teradyne, Inc.	Report on climate change challenges to business	Withdrawn	05/24/07
Exxon Mobil Corporation	Set GHG emissions reduction goals	31.10%	05/30/07
Exxon Mobil Corporation	Report planned response to California climate law	Omitted	05/30/07
Exxon Mobil Corporation	Report on climate change leadership benefits	Withdrawn	05/30/07
Exxon Mobil Corporation	Disclose GHG emissions from company products	7.10%	05/30/07
Motors Liquidation Co.	Set GHG emissions reduction goals	29.10%	06/05/07
FedEx Corporation	Report on climate change science	3.80%	09/24/07
KB Home	Report on/reduce greenhouse gas emissions	Withdrawn	04/03/08
Kirby Corporation	Report on climate change challenges to business	Withdrawn	04/22/08
Citigroup Inc.	Cease financing coal operations	3.90%	04/22/08
Bank of America Corporation	Cease financing coal operations	Omitted	04/23/08
The Ryland Group, Inc.	Report on/reduce greenhouse gas emissions	25.40%	04/23/08
General Electric Company	Issue global warming report	3.60%	04/23/08
Arch Coal, Inc.	Report on/reduce greenhouse gas emissions	Omitted	04/24/08
Johnson & Johnson	Issue global warming report	Omitted	04/24/08
Harley-Davidson, Inc.	Report on climate change challenges to business	Withdrawn	04/26/08
CONSOL Energy Inc.	Report on/reduce greenhouse gas emissions	39.60%	04/29/08
Exelon Corporation	Issue global warming report	3.70%	04/29/08
E.I. du Pont de Nemours and Company	Issue global warming report	3.30%	04/30/08
Dover Corporation	Report on climate change challenges to business	34.20%	05/01/08
Ryder System, Inc.	Report on climate change challenges to business	Withdrawn	05/02/08
Occidental Petroleum Corporation	Report on climate change science	4.30%	05/02/08
PepsiCo, Inc.	Issue global warming report	2.70%	05/07/08
Duke Energy Corporation	Issue global warming report	Omitted	05/08/08
Ford Motor Company	Issue global warming report	3.00%	05/08/08
Ford Motor Company	Report on/reduce greenhouse gas emissions	Omitted	05/08/08
Alcoa, Inc.	Issue global warming report	5.20%	05/08/08
Parkway Properties, Inc.	Report on/reduce greenhouse gas emissions	Withdrawn	05/08/08
Ford Motor Company	Set GHG emissions reduction goals	Withdrawn	05/08/08
Massey Energy Company	Report on/reduce greenhouse gas emission	30.80%	05/13/08
El Paso Corporation	Set GHG emissions reduction goals	Withdrawn	05/14/08
ConocoPhillips	Set GHG emissions reduction goals	29.40%	05/14/08
PG&E Corporation	Issue global warming report	Omitted	05/14/08
Standard Pacific Corp.	Report on/reduce greenhouse gas emissions	33.70%	05/14/08
ConocoPhillips	Issue global warming report	3.70%	05/14/08
El Paso Corporation	Report on/reduce greenhouse gas emissions	Withdrawn	05/14/08
Pulte Group, Inc.	Report on/reduce greenhouse gas emissions	22.00%	05/15/08
The Williams Companies, Inc.	Set GHG emissions reduction goals	Withdrawn	05/15/08
ONEOK, Inc.	Report on/reduce greenhouse gas emissions	Omitted	05/15/08
ONEOK, Inc.	Set GHG emissions reduction goals	35.80%	05/15/08
The Dow Chemical Company	Issue global warming report	Omitted	05/15/08
Ultra Petroleum Corp.	Report on greenhouse gas emissions	36.60%	05/16/08
Dillard's, Inc.	Report on climate change challenges to business	Withdrawn	05/17/08
OGE Energy Corp.	Report on climate change challenges to business	Omitted	05/22/08
OGE Energy Corp.	Report on greenhouse gas emissions	Withdrawn	05/22/08
NextEra Energy Inc	Issue global warming report	not presented	05/23/08
Exxon Mobil Corporation	Contribute to sustainable energy independence	9.40%	05/28/08
Exxon Mobil Corporation	Report on climate change leadership benefits	10.40%	05/28/08
Chevron Corporation	Set GHG emissions reduction goals	10.40%	05/28/08
Exxon Mobil Corporation	Set GHG emissions reduction goals	30.90%	05/28/08
Exxon Mobil Corporation	GHG emissions from company products	7.00%	05/28/08
The Southern Company	Set GHG emissions reduction goals	12.30%	05/28/08

Big Lots, Inc	Report on climate change challenges to business	Withdrawn	05/29/08
Lowe's Companies, Inc.	Report on climate change challenges to business	Withdrawn	05/30/08
Motors Liquidation Co.	Report on/reduce greenhouse gas emissions	Omitted	06/03/08
Motors Liquidation Co.	Set GHG emissions reduction goals	15.00%	06/03/08
Wal-Mart Stores, Inc.	Issue global warming report	Omitted	06/06/08
Caterpillar, Inc.	Issue global warming report	Omitted	06/11/08
The Kroger Co.	Report on/reduce greenhouse gas emissions	39.60%	06/26/08
Legg Mason, Inc.	Report on climate change challenges to business	Withdrawn	07/22/08
Hormel Foods Corp.	Disclosure GHG emissions from company products	2.30%	01/27/09
Tyson Foods, Inc.	Disclose GHG emissions from company products	1.10%	02/06/09
Apple Inc.	Report on climate impact assessment	Omitted	02/25/09
Lennar Corporation	Set GHG emissions reduction goals	9.90%	04/15/09
CONSOL Energy Inc.	Report on/reduce greenhouse gas emissions	Omitted	04/28/09
MetLife, Inc.	Report on response to climate change	Withdrawn	04/28/09
Noble Energy, Inc.	Report on response to climate change	Withdrawn	04/28/09
The Ryland Group, Inc.	Set GHG emissions reduction goals	29.90%	04/29/09
Assurant, Inc.	Report on response to climate change	Withdrawn	05/01/09
Westar Energy, Inc.	Report on/reduce greenhouse gas emissions	Withdrawn	05/01/09
Range Resources Corporation	Report on response to climate change	Withdrawn	05/01/09
Alpha Natural Resources, Inc.	Report on/reduce greenhouse gas emissions	Omitted	05/01/09
Dominion Resources, Inc.	Set GHG emissions reduction goals	Withdrawn	05/05/09
Dover Corporation	Report on climate change challenges to business	40.50%	05/07/09
Spectra Energy Corp	Set GHG emissions reduction goals	Withdrawn	05/07/09
Mirant Corporation	Report on/reduce greenhouse gas emissions	42.20%	05/07/09
Standard Pacific Corp.	Set GHG emissions reduction goals	15.30%	05/13/09
ConocoPhillips	Set GHG emissions reduction goals	27.40%	05/13/09
Pulte Group, Inc.	Set GHG emissions reduction goals	Withdrawn	05/14/09
Massey Energy Company	Report on/reduce greenhouse gas emissions	45.60%	05/19/09
International Coal Group, Inc.	Report on/reduce greenhouse gas emissions	7.70%	05/20/09
Hertz Global Holdings, Inc.	Report on feasibility of GHG reduction goals	Withdrawn	05/21/09
IDACORP, Inc.	Set GHG emissions reduction goals	51.2% (p)	05/21/09
Ultra Petroleum Corp.	Report on plans to address climate change	not presented	05/21/09
Dynegy Inc.	Report on/reduce greenhouse gas emissions	17.20%	05/22/09
Exxon Mobil Corporation	Report on climate change leadership benefits	10.00%	05/27/09
The Southern Company	Report on/reduce greenhouse gas emissions	11.50%	05/27/09
Exxon Mobil Corporation	Set GHG emissions reduction goals	29.00%	05/27/09
Exxon Mobil Corporation	Contribute to sustainable energy independence	Withdrawn	05/27/09
Chevron Corporation	Set GHG emissions reduction goals	Withdrawn	05/27/09
Avis Budget Group, Inc.	Report on feasibility of GHG reduction goals	11.80%	06/12/09
Cagles, Inc.	Disclose GHG emissions from company products	0.80%	07/17/09
Motors Liquidation Co.	Set GHG emissions reduction goals	mtg cancelled	08/04/09
Toll Brothers, Inc.	Set GHG emissions reduction goals	29.30%	03/17/10
Lennar Corporation	Set GHG emissions reduction goals	8.90%	04/14/10
American Express Company	Report on principles to stop global warming	Withdrawn	04/26/10
MDU Resources Group, Inc.	Set GHG emissions reduction goals	Withdrawn	04/27/10
The Ryland Group, Inc.	Set GHG emissions reduction goals	37.40%	04/28/10
CONSOL Energy, Inc.	Report on/reduce greenhouse gas emissions	Withdrawn	05/04/10
NVR, Inc.	Set GHG emissions reduction goals	Withdrawn	05/04/10
Kimco Realty Corporation	Set GHG emissions reduction goals	Withdrawn	05/05/10
Dover Corporation	Report on climate change challenges to business	Withdrawn	05/06/10
Mirant Corporation	Set GHG emissions reduction goals	38.20%	05/06/10
3M Company	Report on principles to stop global warming	Withdrawn	05/11/10
ConocoPhillips	Set GHG emissions reduction goals	25.50%	05/12/10

Murphy Oil Corporation	Report on plans to address climate change	Withdrawn	05/12/10
Standard Pacific Corp.	Set GHG emissions reduction goals	17.40%	05/12/10
CVS Caremark Corporation	Report on principles to stop global warming	Withdrawn	05/12/10
ConocoPhillips	Report on climate change financial risks	7.50%	05/12/10
Portland General Electric Company	Set GHG emissions reduction goals	Omitted	05/13/10
Norfolk Southern Corporation	Set GHG emissions reduction goals	Withdrawn	05/13/10
JPMorgan Chase & Co.	Report on implementation of carbon principles	Withdrawn	05/18/10
Dominion Resources, Inc.	Set GHG emissions reduction goals	5.60%	05/18/10
Massey Energy Company	Set GHG emissions reduction goals	53.20%	05/18/10
Alpha Natural Resources, Inc.	Report on/reduce greenhouse gas emissions	Withdrawn	05/19/10
Safeway Inc.	Report on principles to stop global warming	7.80%	05/19/10
International Coal Group, Inc.	Report on/reduce greenhouse gas emissions	awaiting tally	05/19/10
The Home Depot, Inc.	Report on principles to stop global warming	Withdrawn	05/20/10
CMS Energy Corporation	Set GHG emissions reduction goals	35.10%	05/21/10
Dynegy Inc.	Set GHG emissions reduction goals	16.10%	05/21/10
The Southern Company	Report on/reduce greenhouse gas emissions	awaiting tally	05/26/10
Exxon Mobil Corporation	Report on risk of lower fossil fuel demand	awaiting tally?	05/26/10
Chevron Corporation	Report on climate change financial risks	awaiting tally	05/26/10
Exxon Mobil Corporation	Report on principles to stop global warming	Withdrawn	05/26/10
Exxon Mobil Corporation	Set GHG emissions reduction goals	awaiting tally?	05/26/10
Exxon Mobil Corporation	Report on climate change financial risks	Withdrawn	05/26/10
Wal-Mart Stores, Inc.	Report on principles to stop global warming	Omitted	06/04/10
Expedia, Inc.	Report on climate change management	Withdrawn	06/08/10
Target Corporation	Report on principles to stop global warming	Withdrawn	06/09/10
The Kroger Co.	Report on climate change management	Pending	06/24/10
Best Buy Co., Inc.	Report on principles to stop global warming	Withdrawn	06/24/10

*Key to color-coding of resolutions according to type of requested information

Related to financial risks or challenges to business
Related to disclosure/reporting of emissions or greenhouse gases
Related to policies/regulations/treaties
Related to climate change science
Related to leadership benefits
Related to energy decisions

Appendix B - Summary of Bhopal Court Cases (1986-2012)

In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984

The court addressed a motion by the defendant – Union Carbide Corporation (UCC) – to dismiss consolidated action brought by more than 200,000 plaintiffs, on grounds of “forum non conveniens”. This legal doctrine allows courts to deny taking jurisdiction over a case where an alternative forum, whether in the same country or in a different country, is deemed appropriate to hear the case. UCC claimed that the case would be more suitably heard by Indian courts, as the home jurisdiction of the foreign plaintiff Union of India.

A district court must first determine whether the proposed alternative forum “adequate”. In this case the Indian courts were deemed adequate due to the following factors - Piper Aircraft Co. v. Reyno (1981)

- Union Carbide acknowledged that it is subject to the jurisdiction of the Courts of India
- Evidence suggests the existence of a developed and independent judiciary
- The Indian system may be creative and flexible in dealing with the Bhopal case. Already it has established the Bhopal Act allowing for cases to be handled “speedily, effectively, equitably and to the best advantage of the claimants.”
- In response to plaintiffs concern that Indian courts limit discovery, which could limit the victims’ access to sources of proof, the District Court conditions its

dismissal of the court on UCC's "consent to submit to discovery on the American model, even after transfer to another jurisdiction."

- The District Court adds a further stipulation that the grant of dismissal on forum non conveniens be conditioned on "Union Carbide's agreement to be bound by the judgment of its preferred tribunal, located in India, and to satisfy any judgment rendered by the Indian court, and affirmed on appeal in India."

If the alternative forum is deemed accurate, then the district court must consider and balance public and private interest factors - *Gulf Oil Corp. v. Gilbert* (1947)

The District Court considered three areas of private interest:

1. The location of evidence was taken into account and it was determined that "In the aggregate, it appears to the Court that most of the documentary evidence concerning design, training, safety and start-up, in other words, matters bearing on liability, is to be found in India."
2. Access to witnesses was also deemed to favor the Indian jurisdiction, "Relatively fewer witnesses reside in the United States than in India. Almost all of the witnesses located in this country [U.S.] are employees of defendant, and would be subject to compulsory process in India as a result."
3. The possibility of viewing the plant site favors the convenience of an Indian jurisdiction. "A viewing may not be necessary, but conceivably could be called for later in the litigation. An Indian court is in a far better position than this Court to direct and supervise such a viewing should one ever be required."

The District Court also considered three areas of public interest:

1. With respect to the administrative burden borne by the courts, it was determined that “The substantial administrative weight of this case should be centered on a court with the most significant contacts with the event. Thus, a court in Bhopal, rather than New York, should bear the load.”
2. Regarding the public interests of India and the United States, the Court concluded, “the public interest of India in this litigation far outweighs the public interest of the United States. This litigation offers a developing nation the opportunity to vindicate the suffering of its own people within the framework of a legitimate legal system.”
3. This being a case of multidistrict litigation, the Court is required to apply “various choice of law rules of the states in which the actions now consolidated before it were brought.” Allowing that Indian law would most likely emerge as the operative law, it was found that “an Indian court “would be better able to apply the controlling law than would this United States Court, or a jury working with it.”

The District Court concluded that conditions were adequate to dismiss the case on grounds of *forum non conveniens*.

Bano Bi, Individually and on Behalf of the Children of Rashid Khan, and Representative of the Estate of Rashid Khan, et al., Plaintiffs-Appellants, v. Union Carbide Chemicals and Plastics Company Inc., et al., Defendants-Appellees.

Abdul Wahid, et al., Plaintiffs-Appellants, v. Union Carbide Chemicals and Plastics Company Inc., et al., Defendants-Appellees.

This case plainly asserts the plaintiffs' objective of 'making an example of' Union Carbide and find that U.S. courts would be more suited to this objective.

In October 1990 two separate class representatives, Abdul Wahid and Bano Bi, filed lawsuits in Texas state courts seeking compensation for injuries caused by the Bhopal disaster. They claimed that the 1989 settlement between Union Carbide Corp and the Union of India was unacceptable as the Indian Government maintained a conflict of interest due to its partial ownership of UCIL. The \$470 million settlement was seen as grossly inadequate by most of the Bhopal victims. The key point in contest was the standing of plaintiffs to pursue action in US courts after the Bhopal Act had delegated exclusive representation of Bhopal victims to the Indian Government.

The court of appeals faced the question of whether to "give effect to the statute of a foreign government that purports to grant that government exclusive standing to represent the victims of a mass tort that occurred within its borders."

The court held that "when a recognized democracy determines that the interests of the victims of a mass tort that occurred within its borders will be best served if the foreign government exclusively represents the victims around the word, we will not pass judgment on that determination, and we will permit only the foreign

government access to our courts to litigate those claims, subjects of course to our own requirements for standing.”

This was argued to be in essence a matter of respecting India’s national sovereignty and its democratic systems. Since the Indian Supreme Court had not found the Bhopal Act to be unconstitutional, then the Foreign Relations Law of the United States does not allow for an undermining of such ruling, and thus no standing can be granted to individual Indian claimants in U.S. courts.

Sajida Bano et al Plaintiffs-Appellants, v. Union Carbide Corporation and Warren Anderson, Defendants-Appellees.

Plaintiffs seek release under the Alien Torts Claims Act for violations of international law in the defendants’ conduct leading up to the Bhopal disaster.

Plaintiffs filed a complaint with 15 claims falling into 3 general categories:

1. ATCA claims (1-6) “seek civil damages under the ATCA to compensate for dangers caused by the gas leak disaster itself, and allege violations of various purported international norms of environmental, criminal, and human rights law.”
2. Civil Contempt and Fraud (7-8) “in connection with Union Carbide’s alleged failure to honor the conditions under which the Southern District of New York dismissed the consolidated class actions in Bhopal I”

3. Additional Environmental Claims (9-15) “seek monetary and equitable relief under various common-law theories for environmental harms allegedly attributable to the UCIL plant in Bhopal but not related to the gas leak disaster.”

Plaintiffs attempted to strike the defendants’ motion to dismiss these claims through appeal to the fugitive disentitlement doctrine. This doctrine provides that a fugitive from justice [in this case Union Carbide and Warren Anderson] cannot seek relief from the judicial system he/she evades.

On this point, the District Court ruled “the fugitive disentitlement doctrine does not prevent the defendants from defending this action”

The Appeals Court affirmed “No case has been called to our attention, and we have found none ourselves, in which the doctrine was applied by a court of the jurisdiction to which, rather than from which, the alleged fugitive had fled.” And thus affirmed “There is therefore an insufficient nexus between the defendants’ alleged fugitive status and the proceedings in the district court to support the court’s use of fugitive disentitlement to deprive the defendants of their full right to appear in and defend this action.” Thus, “It is the courts of India (...) not the United States District Court for the Southern District of New York, that would have the authority in this case to defend their own dignity by sanctioning the defendants’ alleged acts of defiance, which occurred solely within their domain.”

With respect to ATCA claims brought by the plaintiffs (1-6) the Court of Appeals finds these claims “barred by the Indian settlement, which encompasses all civil claims related to the disaster”. The Appeals Court further clarifies that “it is axiomatic that the law encourages settlement of disputes”, that “The public interest in amicable resolution of cases is particularly strong in the context of mass tort and similar litigation”, and that were the courts to grant the plaintiffs’ the right to pursue action against defendants without proof that such action is not covered under the Union of India settlement, then “we would not only fail to vindicate the ability of defendants generally to gauge in advance the finality of settlements, and might thereby jeopardize the effective and efficient settlement of future claims arising from other disasters.”

With respect to charges of Civil Contempt and Fraud (7-8) the Court of Appeals affirmed the lower court’s ruling on grounds that Union Carbide “did not breach any contractual commitment to which it was bound”, neither with respect to charges of evading criminal prosecution (which was determined not to be a condition of the settlement) nor with respect to charges of breaching settlement agreement regarding the establishment of a hospital in Bhopal (this too was determined not to be a stipulation in the settlement).

With respect to the Additional Environmental Claims brought by plaintiffs (9-15), the Court of Appeals remanded to the District Court to consider these claims, which had previously been dismissed without consideration. The remand also extends to

complaints against Warren Anderson for environmental claims since “Under New York law, “a corporate officer who commits or participates in a tort, even if it is in the course of his duties on behalf of the corporation, may be held individually liable.””

The influence of legal pragmatism is notable in the text of this decision, which emphasizes the importance of settlements “because they represent compromises and conservation of judicial resources, two concepts highly regarded in American jurisprudence”, noting that ““financial and judicial economy are at [the] core” of Fed.R.Civ.P. 68, which governs offer-of-judgment proceedings”, and taking note of “the urgency of [the public] policy [favoring settlements] in complex actions that consume substantial judicial resources and present unusually large risks for the litigants.” The judges are more concerned with reaching settlement to deal with the consequences of the tort than to set precedent for blame or legal liability.

APPEALS COURT: Sajida Bano et al, Plaintiffs-Appellants, v. Union Carbide Corporation and Warren Anderson, Defendants-Appellees.

On appeal, plaintiffs contend:

- (a) that the district court’s statute-of-limitations ruling was erroneous because Bi’s personal injury claims are timely under, inter alia, a continuing trespass theory or a continuing nuisance theory, and because defendants failed to carry their burden of showing when Bi’s property damage claims accrued”

The issue of establishing the point at which Bi learned or should have learned of damage to her property was the most extensively discussed and complex in the appeal.

The key point in contention was whether the effects of injuries were latent (appearing after a period of exposure) or patent (appearing immediately upon exposure). The designation of the injury subjects it to a different term for the statute of limitations depending on whether it falls under section 214 (patent effects) or 214-c (latent effects) of the New York Civil Practice Law and Rules (CPLR). Section 214, governing claims for personal injury or injury to property, maintains that action must be initiated within three years of the date of injury. Section 214-c modifies that in the case that personal injury or injury to property results from latent effects of exposure, then the three year period is calculated “from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff”. These time limits do not apply if the claim is for injunctive relief rather than a claim for monetary damages. The appeals court concurred with the District Court that section 214-c was applicable to this case, and since Bi’s injuries manifested in 1990, allowing for a 10-year lag before she brought suit in 2000, then those claims were barred by the three-year statute of limitations.

With respect to Bi’s claims for damages to property, the appeals court found that there were outstanding questions of fact as to the relationship between Bi’s

discovery of personal harm and her discovery of property damage. There being material factual disputes regarding contamination of the property due to conflicting reports by NEERI and by Greenpeace, the appeals court also found that with respect to seeking injunctive relief “there are questions of fact to be resolved as to when Bi learned, or with reasonable diligence should have learned, of the alleged damage to her property”. Furthermore, the CPLR Section 214-c time restrictions apply to claims for damages, they do not extend to claims for injunctive relief. The question of Bi’s claims to property damages was thus remanded to the district court for further review.

(b) that the court’s ruling on standing was erroneous because the Bhopal organizations should be allowed to pursue damages claims as putative class representatives; and

The appeals court applied a three-pronged test to determine whether an association had standing to redress injuries to its members through a suit. The Hunt test grants an association standing under three conditions:

1. its members would otherwise have standing to sue in their own right
2. the interests it seeks to protect are germane to the organization’s purpose
3. neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit

Since the claims for bodily harm and damage to property apply to specific individuals, it was found that these individuals must be involved in establishing

proof of these claims and thus criterion 3 is violated and the organization lacks standing.

(c) “that the court’s conclusion as to the impracticability of the requested equitable relief was unsubstantiated.”

The appeals court concurred with the district court that practicability of enforcing a judgment for an injunction may be taken into account in determining whether that is an appropriate ruling, asserting that “injunctive relief may properly be refused when it would interfere with the other nation’s sovereignty” and maintaining that “the district court should be free to revisit its dismissal of the claim for plantsite remediation in the event that the Indian government or the State of Madhya Pradesh seeks to intervene in the action or otherwise urges the court to order such relief.”

The Court of Appeals held decisions of the District Court on (b) and (c), but found merit that Bi’s claims for property damage may be timely, remanding that issue to the district court for further proceedings and affirming that the district court may reconsider the “plaintiffs’ request for relief in the form of remediation of the former UCIL plant site.”

DISTRICT COURT: Sajida Bano, et al., Plaintiff, v. Union Carbide Corp. and Warren Anderson, Defendants.

Plaintiffs seek:

1. “intervention of additional class representatives”

2. “class certification for clean-up of the UCIL site and the aquifer below the site of a class comprised of “present residents” of 14 townships that are “contiguous with the UCIL plant”
3. “intervention in and certification of a claim for remediation, not of Bi’s property, for it appears Bi does not own any affected property, but of the UCIL site and an aquifer located under the site.”

One of the problems with this finding is the that the designation of property ownership assumes a certain level of privilege and in cases where inhabitants of slums of example are exposed to toxic contaminants, there is no ground on which to appeal for injunctive relief. Already marginalized in one capacity, they become further marginalized by virtue of having no standing to pursue injury.

The District Court finds:

1. Plaintiffs’ claims for intervention and class certification are denied.
 - a. “Rule 23(a)(4) allows certification only if “the representative parties will fairly and adequately protect the interests of the class””
 - b. “Plaintiff Bi admits that she lacks substantial financial resources” and Plaintiffs have not submitted evidence “establishing their awareness of and responsibility for the class action costs.”

It may be implied from this statement that the financial burden of class certification presents a prohibitive barrier for Bi. This is problematic because if the thesis of Environmental Justice advocacy holds that those who would most likely be faced with the burden of disproportionate contamination and damages are those who are also economically marginalized, then this becomes a self-perpetuating cycle of impunity.

2. Agreement with Judge Pitman who “concluded that Plaintiffs could not intervene in or certify a class for a claim of onsite remediation because onsite remediation was dismissed from the case.”
 - a. “The Second Circuit affirmed this Court’s dismissals of all injunctive relief, with one narrow exception; with regard to “Bi’s claims for monetary and injunctive relief for alleged injury to property.” (...) Plaintiffs’ claims do not meet this narrow exception.”
3. It does not choose to reconsider onsite remediation. The Court of Appeals had held that the District Court could choose to reconsider the “plaintiffs’ request for relief in the form of remediation of the former UCIL plant site.” Subsequent to the Court of Appeals ruling, the Union of India sent a letter to the District Court (June 28, 2004) stating that India has no objection to remediation of the former UCIL site and that it would cooperate with any such clean-up effort. The letter maintained that India does not “submit...to the jurisdiction of the United States District Court...[ad is] entitled to sovereign immunity under international law

and do[es] not waive those immunities by this submission.” The District Court maintained, however, that the letter did not automatically revive the claim and that it was under no obligation to reconsider onsite remediation. It cited again concerns with the practicality of ordering injunctive relief, “A District Court sitting in New York cannot be expected to control a clean-up effort 8,000 miles away.”

This reasoning is problematic in that it sets a double standard enabling the operation of US firms 8,000 miles away, yet claiming a concern with the impracticability of accounting for the consequences of operations at the same distance. If US courts are able to maintain legitimacy of operations for a firm abroad, then surely they can maintain accountability of those same firms to their foreign communities. This decision presents a court position that is disinclined to international cooperation in order to ensure popular welfare. It is conceivable that agreements could be struck between the country of a corporation’s domicile and the country of its operations such that collaboration between them would ensure better accountability both ways.

APPEALS COURT: Summary Order Sajida Bano, et al., Plaintiff, Haseena Bi, Plaintiff-Appellant, Sultan et al., Movant-Appellants v. Union Carbide Corp. and Warren Anderson, Defendants.-Appellees

The Appeals Court affirmed the judgment of the District Court.

- The District Court was justified in dismissing Bi’s claims for property damages.

“In any event, the record reflects that Bi resides illegally on government-owned

ground. She therefore cannot sustain claims for trespass or private nuisance under New York law.”

- In response to the District Court’s refusal to reinstate Bi’s claims for remediation of the former UCIL plant site and the groundwater beneath it, “We have already affirmed the dismissal of these claims because of the impracticality of a court-supervised clean-up project on land owned by a foreign sovereign.”
- With respect to the Indian government’s letter, “that letter does not obviate any of the sensitive and severe difficulties identified by the district court and by this court regarding the administration of remediation of land owned by a foreign sovereign in its own country.”
- “The district court properly denied the motion for class certification because the only relief sought by the class related to the claims for relief that had been dismissed as impracticable. As the district court observed, any clean-up of the aquifer or groundwater would affect the public generally and could not be undertaken without the permission and supervision of the Indian government.”

DISTRICT COURT: Sahu, et al., Plaintiff, v. Union Carbide Corp and Warren Anderson, Defendants.

In a Class Action Complaint, Plaintiffs “claim that contamination of the soil and drinking water supply of sixteen communities in the vicinity of the former UCIL plant caused injury to the communities’ residents”.

They hold UCC and Warren Anderson liable for these injuries on three grounds:

1. "UCC "was a direct participant and joint tortfeasor in the activities that resulted in the environmental pollution."
2. "UCC "worked in concert with UCIL to cause, exacerbate and/or conceal the pollution problem in Bhopal."
3. "Defendants are liable on the ground that UCIL acted as Union Carbide Corporation's alter ego, justifying the piercing of UCIL's corporate veil."

The Court dismissed all claims with the exception of staying a decision regarding piercing of the corporate veil between UCC and its subsidiary UCIL.

- The Court maintained that material facts were essentially identical to the Bano case, and that as such the infeasibility of claims for injunctive relief, remediation and medical monitoring was maintained since overseeing cleanup of the site would be infeasible or impracticable.
- With respect to corporate veil-piercing, there is a 2-part test derived from *Beck v. Consolidated Rail Corp* which must show that 1) "the owner exercised complete domination over the corporation with respect to the transaction at issue, and 2) "such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil."
- The attempt to pierce the corporate veil failed as 1) it was demonstrated that UCC did not overreach in its capacity as a parent company, and UCIL was responsible for the decision to manufacture pesticides, rather than only to process them, and that the decision was advocated by the Indian government and 2) there is no evidence of concerted action to commit fraud or wrong by UCC

and UCIL. Plaintiffs charges of “conspiracy and aiding and abetting” were not found to be backed by material fact.

The court did grant Plaintiffs additional time for discovery relating to Eveready Industries India Limited (UCIL’s new name) and it’s relationship to UCIL and UCC. Plaintiffs seek to challenge Defendants’ claim that EIL is a “financially viable, corporation” that is fully capable of responding to their claims.

APPEALS COURT: Sahu et al., Plaintiffs-Appellants, v. Union Carbide Corporation, Warren Anderson, Defendants-Appellees

The appeals court remands the case to the district court for further proceedings after it had been vacated, due to disagreement with the procedural basis on which the appellants’ claims had been dismissed. This was a procedural case and does not add to the consideration of corporate identity, damages or veil piercing.

DISTRICT COURT: Sahu et al., Plaintiffs, v. Union Carbide Corporation, et al., Defendants

This was also a procedural issue relating to the Plaintiff’s ability to amend a pleading.

DISTRICT COURT: Sahu et al., Plaintiffs, v. Union Carbide Corporation et al., Defendants

Plaintiffs requested “Documents referring or relating to the Foreign Collaboration Agreement regarding the Bhopal plant” as well as “All documents concerning the technology transfer agreement, if any, between UCC and UCIL.”

Plaintiffs object that “Magistrate Judge Pitman failed to consider the relevance of the challenged documents to agency and concerted action theories of liability” in the July 23, 2010 Order.

- With respect to Agency Theory: Plaintiffs attempt to establish a principle-agent relationship between UCC and UCIL but the Court finds that “none of the categories of unproduced documents would permit a jury to draw an inference of agency liability.”
- With respect to Concerted Action Liability: “Under either a conspiracy or aiding and abetting theory of concerted action, “the defendant must know of the wrongful nature of the primary actor’s conduct.”” The Court finds that “none of the four categories of challenged documents are relevant to agency, conspiracy, or aiding and abetting theories of liability.”

The District Court agreed with Magistrate Judge Pitman that “documents concerning non-design services provided [by UCC to UCIL] under the Technical Services Agreement are not relevant to the issues on summary judgment.”

DISTRICT COURT: Sahu et al., Plaintiffs, v. Union Carbide Corporation, et al., Defendants

Plaintiffs requested time for another round of discovery relating to UCC entities; Worldwide Agricultural Products Team, the Union Carbide Agricultural Product Company, the Agricultural Products Division, and Union Carbide Eastern; arguing that these entities “exercised plenary control over UCIL”.

In accordance with Rule 56(d) of the Federal Rules of Civil Procedure, a party seeking discovery “must file an affidavit explaining “(1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort the affiant has made to obtain them, and (4) why the affiant was unsuccessful in these efforts.”” According to the District Court, the affidavit submitted by Plaintiffs does not warrant requested relief.

DISTRICT COURT: Sahu et al., Plaintiffs, v. Union Carbide Corporation, et al., Defendants (June 26, 2012)

This ruling dismissed claims under all theories of liability and the Defendants’ motion for summary judgment was granted, closing the Sahu case.

Direct Liability; evidence was presented to prove that the relationship between UCC and UCIL/EIIL was not unusual and that consequently there were not grounds to pierce the corporate veil and claim liability from UCC. Evidence addressed five points of contention raised by plaintiffs:

- Approval of Back-Integration
- Design of Waste Disposal Systems
- Technology Transfer
- UCC’s Knowledge of Waste Disposal Problems
- UCC’s “Intimate Participation” in Site Rehabilitation

Concerted Action Liability; This theory of liability “provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to

participate in a common plan or design to commit a tortuous act.” The court did not find any evidence to support this.

Agent Liability; “Suing a parent corporation on an agency theory is quite different from attempting to pierce the corporate veil. (...) To establish an agency relationship, plaintiff must put forth “facts sufficient to show (1) the principals manifestation of intent to grant authority to the agent, and (2) agreement by the agent.”

- The court finds that no evidence “indicating that UCIL manufactured pesticides on UCC’s behalf, entered into contracts or other business dealings on UCC’s behalf, or otherwise acted in UCC’s name.”

Alter Ego Liability; “It is a bedrock principle of New York law that a parent corporation is not liable for the actions of a subsidiary absent extraordinary circumstances justifying piercing the corporate veil.”

- “Under New York law, plaintiff may pierce the corporate veil where there is evidence showing “1) that the owner exercised complete domination over the corporation with respect to the transaction at issue; and (ii) that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil.””
- It was found that “UCC played a minimal role, if any, with respect to the decision to back-integrate the Bhopal Plant, the design of the plant’s waste disposal system, the choice and development of process technology used at the plant, and

the burial of waste in a landfill” and thus that conditions for piercing the corporate veil were not met.

Defendant Anderson; was not found to have individual liability as his “approval of the Capital Budget Proposal does not rise to the level of participation in the commission of a tort.”

Equitable Relief; was denied for reasons of being “impracticable” since “any clean-up of the aquifer or groundwater would affect the public generally and could not be undertaken without the permission and supervision of the Indian government”. Since the Indian government would need to be involved in implementing an injunction yet is not party to the suit, it cannot be subject to a decision by the district court. Medical monitoring of was deemed “an impossible task” given the number of residents in the Bhopal area who might be eligible for monitoring.

Appendix C - List of Interviews

Chapter 4

Egyptian Political Delegation
London, UK
March 26-29, 2012

Egyptian Free Speech Activists
World Press Freedom Day
Tunis, Tunisia
May 3-5, 2012

Phone Interview
National Telecommunications Regulatory Authority
Cairo, Egypt
September 8, 2012

Mahinour El Badrawi,
Egyptian Center for Economic and Social Rights
Cairo, Egypt
September 9, 2012

Emad Mubarak
Association for Freedom of Thought and Expression
Cairo, Egypt
September 23, 2012

Chapter 5

Jeffrey Hopkins
Principal Adviser, International Energy and Climate Policy
Rio Tinto, Washington, DC
June 13, 2012

Judy Brown
Chief Advisor for Stakeholder Engagement
Rio Tinto, Washington, DC
June 13, 2012

Simon Nish
Director of Communities, Communications and External Relations
Washington, DC
June 20, 2013

Chapter 6

Shell Global
The Hague
February 28, 2013

Joseph Wilde-Ramsing
OECD Watch
Amsterdam, The Netherlands
March 1, 2013

Sylvia Deepen
Dutch NCP
The Hague
March 4, 2013

Tricia Feeney
Right and Accountability in Development
Oxford, UK
April 11, 2013

Chapter 7

Matthew Handley
Cohen Milstein
Washington, DC
August 27, 2012

Reena Gambhir
Hausfeld LLP
Washington, DC
August 28, 2012

Tim Edwards
Bhopal Medical Appeal
Brighton, UK
November 9, 2012

Appendix D – Interview Questions

Chapter 4

Questions for NGO, Political and Free Speech Activists

Personal Background

- Can you tell me about your background and work?
- What are the guiding objectives of your organization?
- How do you consider your work relative to the broader social and political context in Egypt?
- What challenges do you face in pursuing this work?

Telecommunications Shutdown and NTRA Revision

- What was the nature and extent of your interaction with security forces prior to January 2011?
- Were you personally affected by the shutdown in January/February 2011?
- What has been the nature of your participation in the revisions to the telecommunications regulatory laws?
- What has been the nature of your participation in discussions relating to the constitutional drafting?
- What has been your response to the ICT providers in Egypt?
- What longer-term agendas or campaigns have been prompted as a result of this episode?

Perspectives on the Security Sector More Broadly

- I'm particularly interested in the role that the security sector takes in Egypt and its relation to the country's economic and political planning more broadly, what implications does the security sector have for your work?
- What is your assessment of the security sector's role in relation to civil society?
- With respect to the security sectors political and economic capacity, what kinds of changes do you want to see in a revised constitution?
- With respect to the private sector, particularly ICT, what roles and responsibilities do you assign to it with respect to the public interest?
- How are you directly involved in lobbying for or advancing these changes?

Chapter 5

Questions for Rio Tinto

Community Environmental Monitoring Program (CEMP)

- Can you tell me about the process of coming up with the CBEM arrangement?
- Who was excluded from this arrangement?
- How did you shift from general abstract controversies to environmental dimensions in particular?
- Are there transferrable lessons/themes that can be derived from this case?
- Is this model replicable/transferrable to other contexts? What are limitations to transferability?
- How does this case affect Rio Tinto's access to other potential mine sites? Does it allow for spillover in terms of positive reputational impact?

Efficacy of CEMP and Community Scorecard

- Has there been participation from the KBIC? Do they have a member on the board?
- What opposition is still present in the area?

Eagle Mine

- Why put so much money into such a small site?
- How does this site create reputational value/access at other sites?
- What is Rio Tinto's involvement in Michigan State Politics?
 - o Bill 4746 (2011) on local community control
 - o Mining Severance Tax (2012)
- Do the legislative changes counter the intended efforts to grant greater control to local communities?

Sale of the Mine

- Did the lowered community risk help with the saleability of the mine?
- What will happen now to the CEMP?
- Will the pledged \$300,000 still be granted to the SWP?

Chapter 6

1 of 3 - Questions for OECD Watch

The role of the National Contact Point mechanism in advancing the Villa Inflammable case

OECD Watch

- How long have you been with OECD Watch and in what capacity have you worked there?
- Can you tell me about the founding and history of OECD Watch?
- How are operations coordinated with affiliate organizations?
- What is the nature of OECD Watch's relationship with the OECD and with NCPs?
- What role does it take on in the Annual Meetings?
- What if any role did it play in the 2011 revision to the Guidelines?
- What do you think of these revisions?
- How are OECD Watch and its projects funded?

NCP

- Do you think the NCP is effective as an ADR mechanism?
- What are its strengths and what are its shortcomings?
- How effective is the NCP forum for addressing cases of a public nature?
- What opportunity does this enterprise theory of the corporation, advanced through the Guidelines, present for holding corporations globally accountable?
- You authored the 2008 report "Shell: Overview of controversial business practices in 2008" which compiles a summary of recent Shell violations worldwide. The NCP infrastructure allows for greater coordination and mobilization against Shell's social and environmental abuses worldwide. Do you think there is an opportunity for coordinated action on this common platform to promote systemic, enterprise-wide reform rather than advancing singular isolated cases of protest?
- The NCP network creates a concrete set of relationships that may be tapped by social movements to enact pressure both against their own governments as well as the countries of origin of their local operating industries. What role do you see for OECD Watch in this process?

Villa Inflammable

- I'm particularly interested in the Shell CAPSA case and the pathways it might open for collaboration between NCPs of home and host countries in confronting a single company. Is this an overly idealized reading of the case?
- Can you tell me more about the Shell CAPSA case?
- Can you direct me to contacts or resources that might be of help in learning more about this case?
- Are there other cases that activate this same collaborative dynamic?

2 of 3 - Questions for Dutch NCP

Legal and non-legal mechanisms accounting for the public responsibilities of multi-national corporations

Dutch NCP

- How long have you been with the Dutch NCP and in what capacity?
- Can you tell me about the history of the NCP?
- How has it evolved over the years?

Set-up

- The Dutch NCP allows for a unique multi-ministerial collaboration; how does this work out in practice?
- Can you walk me through the process for receiving and addressing a Specific Instance Complaint?
- What role does the Dutch NCP play with Dutch companies like Shell?

Effectiveness

- Do you think the NCP is effective as an ADR mechanism?
- What are its strengths and what are its shortcomings?
- What reforms do you think would allow the NCP mechanism to be more effective?
- How effective is the NCP for addressing cases of a public nature?
- What opportunity does this enterprise theory of the corporation, advanced through the Guidelines, present for holding corporations globally accountable?

CAPSA

- What was the nature of coordination with the Argentine NCP over the Shell CAPSA case?
- Are there other cases where the Dutch NCP has collaborated with other NCPs in addressing a specific instance complaint?
- Acknowledgment of the complaint by both contact points suggests that the international network may become a forum for government-sanctioned collaboration and cooperation between the national entities, do you think this is possible?
- NCPs which have political legitimacy in their respective countries of operation, while also being party to an international forum and expressing support to a code of conduct for multinational enterprises domiciled in their jurisdictions and extending their operations in other jurisdictions; is this a fair characterization?

3 of 3 - Questions for Shell Global

Nature of the global corporation and different mechanisms used to define and pursue social responsibility

Shell Global

- How long have you been with Shell and in what capacity?
- What does this role entail? What does this unit do day-to-day?
- What is the size/function of the SP unit?
- What is its relationship to other units at Shell?
- What is its relationship with SP units worldwide?

SP Standards

- How/Do international regimes and standards inform Shell's social responsibility strategy?
- What is the significance of OECD Guidelines/NCP mechanism to Shell Global internal policy?
- The OECD Guidelines operate off of an enterprise theory of the firm which considers all the component firms involved in a single global operation, how does this compare with Shell's understanding of the relationship between component entities.
- Shell launched a new Health, Safety, Security, the Environment (HSSE) and Social Performance (SP) Control Framework in 2009 that contains environmental and social requirements that apply to every Shell company and to joint ventures where Shell has operational control; what was the motivation for this revision?
- What have been some of the benefits and challenges of implementing this standardization?

Relationship Between HQ and Subsidiaries

- What is the relationship between HQ and communities worldwide? Specifically on SP plans?
- How are international complaints handled and communicated internally?
- How does Shell Global coordinate with its subsidiaries in such cases?
- Beyond immediate crisis management, how do infractions that occur worldwide impact Shell Global's policy and guidelines?
- Are social performance plans made public?

CAPSA

- Do you have familiarity with the Shell CAPSA (Argentina) case?
- In this case there was collaboration between Argentine and Dutch NCPs, was there similar collaboration between Shell CAPSA and Shell Global?
- How does Shell Global communicate with CAPSA in handling this Specific Instance?

Chapter 7

Questions for Bhopal Attorneys

Involvement with the Case

- How long have you been involved with this case, and in what capacity?
- Can you give me an account of the main milestones in the case proceedings?
- What have been some of the key challenges to this litigation project?
- How has the legal strategy evolved over the past three decades?

Pragmatic Objectives of the Bhopal Litigation Project

- How do you coordinate with other lawyers and firms involved with this case?
- How has the actual theory of the corporation informing your legal strategy evolved over the course of 30 years of litigation?
- Do you find that the ideological orientation of the courts informs the rulings? If so, how?
- What is the current state of lawsuits? What is the strategy moving forward?

Aspirational Objectives of the Bhopal Litigation Project

- I'm interested in understanding how the litigation project has informed and been informed by the wider social movement campaigning for justice in Bhopal. What is the nature of your involvement and coordination with the Bhopal justice movement in India?
- What advancements and victories to the Bhopal 'cause' do you see coming from the extended litigation process?
- Do you recognize a symbolic value to the lawsuits beyond the direct pragmatism of case proceedings?
- What do you envision as the most ideal outcome from here?

Appendix E – Bhopal Photos



1) Bhopal Protestors' camp at Jantar Mantar in Delhi, India. (2008)



2) Bhopal hunger strikers at Jantar Mantar in Delhi, India. (2008)



3) Graffiti on fence surrounding the UCC plant in Bhopal, India. (2008)



4) Slums surrounding the Sambhavna Trust Clinic in Bhopal, India. (2008)



5) Women surrounding water tank in slums around the UCC facility in Bhopal, India. (2008)