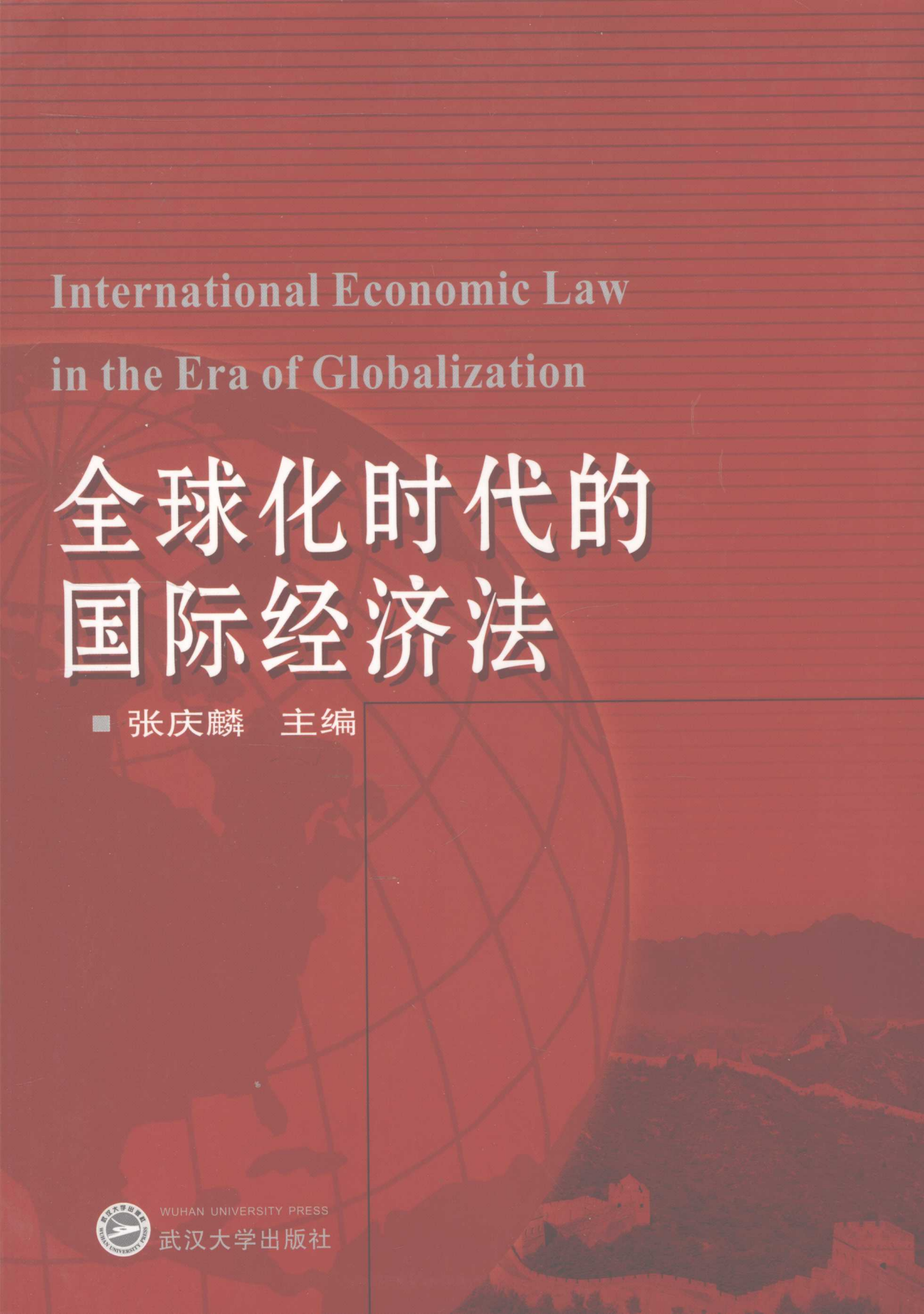
International Economic Law in the Era of Globalization

全球化时代的国际经济法

张庆麟 主编



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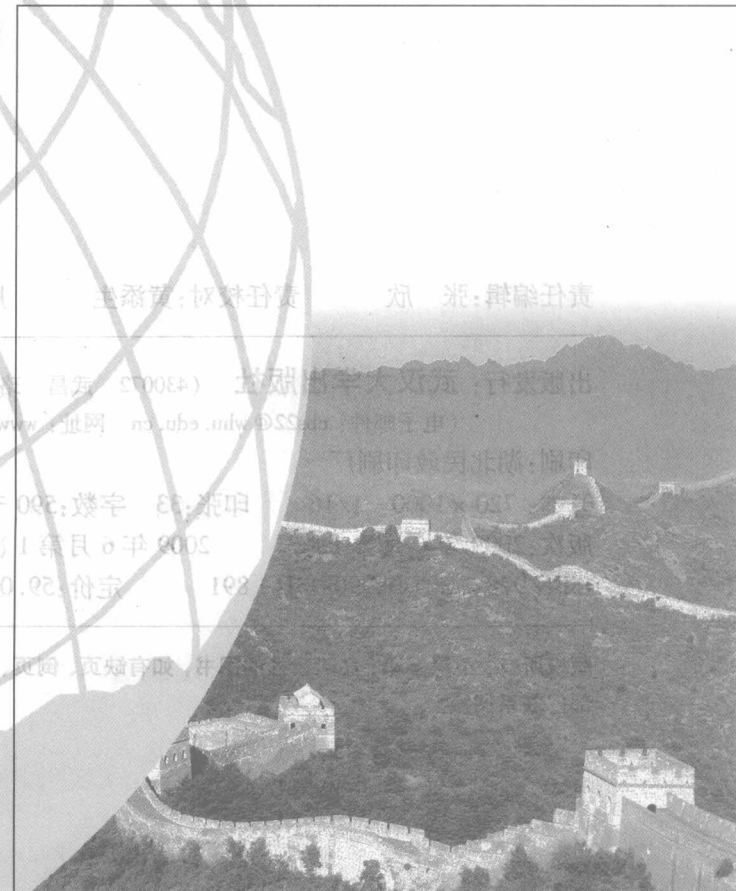

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前　言

世界历史的发展就是市场经济秩序不断扩展的过程，即国际经济一体化的过程。哈耶克认为，市场经济的实质是人类合作的扩展秩序，一方面是专业化分工的深化，通过市场交换实现分工的效益，相互依赖的合作关系得到发展；另一方面是交换关系与合作秩序在空间范围的扩展，从部落或村落内部的偶然交换一直发展到国际范围内的交换与合作。随着市场经济向世界的扩张和全球性相互依存的形成与日益强化，全球相互依存已成为当代人类的生存方式和基本规律，从而内在地决定了全球主义的勃兴。这里的相互依存是指国家行为体和非国家行为体在经济、政治、军事、文化诸领域内形成的相互联系、相互渗透、相互影响的关系与状态。相互依存首先表现为经济上无法割断的联系，它是市场经济向全球扩张的必然结果。市场经济早已突破一国的界限，要求在全球范围内优化配置诸生产要素，以获得最佳效益和更大的利润。于是，全球生产、全球贸易、全球金融，以及在这些经济活动中扮演重要角色的跨国公司得以迅猛发展，而发展的必然趋向之一就是大大加强经济上的相互依存。前世界银行首席经济学家约瑟夫·斯蒂格里茨指出，从根本上来说，经济全球化是将世界各国和人民更加紧密联系在一起的综合进程。在这一进程中，阻碍各国之间货物、服务、资本和人员自由流动的人为障碍将被打破，交易成本（包括运输和通讯成本）将大大减少。新型的国际机构和国际民间组织将被创造和涌现，跨国公司是这一进程的强有力的推动者。

随着经济全球化的发展，国际经济交往日益呈现出其独特的性质，对国际经济法带来了较大的冲击，深刻地影响着国际经济法的理论与实践的发展。著名国际经济法学家杰克逊教授曾经预言，20 世纪的最后十年和 21 世纪第一个十年对于普遍接受的国际法概念来说或许不是最具挑战的时期，但这一时期将可能是一个极为重要的阶段。经济增长的力度，经济变化的速度以及全球化所导致的调整，伴随着政府架构的巨大变化、市场经济观念的不断强化都已经深深影响着已被广泛接受了几个世纪的国际法律体制的理论基础。面对经济全球化的新形势，传统的国家主权内容发生了一定程度的改变。原本是一国独有的

权力，日益成为国际社会共同拥有的权力。各国的经济活动越来越多地遵循国际条约、协定、规范和惯例来运作；跨国公司在各国经济生活中地位的提高，使国家对产业政策的干预作用在减弱。在国家存在的情况下，出现了主权共享与让渡的现象。共享是让渡的前提，没有共享也就不会有让渡。经济全球化迫使各国把二者结合起来，出现了相互协调，使它逐步成为各国处理对外经济贸易关系的基石。随着乌拉圭回合谈判的结束和世界贸易组织的建立和运行，协调管理贸易政策在国际上和各国贸易政策中开始成为主流。与此同时，国际机制的权威性却与日俱增，它体现为国际法、国际条约、国际组织对各国约束力的加强，国际社会的无政府状态在被逐步控制与改变。不同国家的利益虽有冲突性的一面，但并非没有相容性的一面。更何况人类共同利益日渐凸显，它要求摆脱自助性而走向对话与合作，否则在人类的共同利益（尤其是生存利益）无法保障时，各国的国家利益将变得毫无意义。在此环境中，国际经济法的发展趋势明显加强，国际经济立法与其他各领域立法的联结和互动日益完善，国际经济法与国内经济法的融合日趋加深，国际经济法立法主体也逐渐多元化。总之，在当前经济全球化的背景下，国际经济交往日益独特的性质对国际经济法带来了较大的冲击，对传统的法律分科提出了较大的挑战，深刻地影响着国际经济法的理论与实践的发展。在这种背景下武汉大学法学院以及武汉大学国际法研究所联合英国曼彻斯特大学法学院于2008年5月3日至4日，在武汉大学举行了“全球化时代的国际经济法”国际学术研讨会，就目前国际学术界所关注的国际经济法的若干热点与重大问题进行了深入的探讨，以期对科学的构建国际经济法理论体系，对国际经济交往中的重要实践问题提供帮助与指导。

本论文集既是这次国际会议的成果，也是我所主持的“货币跨国流通中的若干重大国际法律问题研究”项目的阶段性成果。限于篇幅，没有将所有的论文全部收集，只是挑选了若干具有一定代表性的论文以飨读者，展现会议的风貌。这次会议得到了武汉大学国际法研究所和法学院的大力支持，得到了“国际法与国际新秩序”985创新基地项目的鼎立资助，在论文集的出版过程中得到武汉大学出版社张琼编辑的大力支持，在此一并表示感谢！

张庆麟

武汉大学国际法研究所

2008年12月17日

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Property Rights, Human Rights, and the New International Trade Regime*

Razeen Sappideen**

This paper advances the view that the underlying purpose of the WTO agreements is as much about empowering the multinational corporation (MNC) to operate freely as it is about promoting free trade between nations. The empowerment of MNC on such a grand scale has had downside effects on least developed countries (LDC) who when seeking IMF and World Bank assistance are required to apply for membership to the WTO. The paper explores this problem with particular reference to the limited liability of the MNC in respect of personal injury based tort liability, and the need to access much needed basic medicines by LDC. It highlights in this context the conflict between the interests of the MNC and LDC, and of human rights and property rights with respect to pharmaceutical patents, and examines ways of addressing these problems.

The WTO agreements are a watershed in the globalisation of investment and trade. It enables investment capital to move freely in and out of WTO member countries and with it the right to buy, sell, invest, and conduct businesses relating to both goods and services. The vehicle for this has largely been the multinational corporation (MNC),① operating in its host countries usually through subsidiary entities. Least developed countries (LDC) seeking IMF and World Bank assistance,

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* A note on terminology: acronyms used in this paper apply in the singular and plural depending on their particular context, e.g. LDC (least developed country/ies), and MNC (multinational corporation/s). Also used are PR (property rights), HR (human rights) etc.

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① This paper is not a critique of the MNC as such. Rather it seeks to investigate the evolving place of property rights as human rights and its impact on the overall human rights equation. In doing so, it distinguishes the role of the MNC as violator of HR from the state as violator of HR.

it must be noted, are required generally to also agree to apply for WTO membership. ① The underlying purpose of the WTO agreements has, therefore, been as much about empowering the MNC② to operate freely as it has been with promoting free trade between nations. The empowerment of the MNC on this scale has not been without downside effects on LDC citizens, and this paper examines its implications and how such downside may be minimised.

Two issues of concern to LDC have been access to much needed basic medicines, and MNC tort liability arising from personal injury. These highlight instances of where the interests of the MNC and the LDC diverge, and point to the existence at times of an uneasy relationship as between the parties. ③ At issue then is how state action attempting to enhance the welfare of its citizens can be justified in the face of the WTO agreements. Theories of utilitarianism, justice, and autonomy offer direction in this respect as they deal with the relationships of citizens with their state. This paper explores ways of employing these theories to justify action by LDC states as well as the international community to enhance the welfare of LDC citizens. The Paper is divided into four Parts. Part Ⅰ introduces the issues covered in the paper, Part Ⅱ examines the uneasy relationship between property rights (PR) and human rights (HR), Part Ⅲ explains why an increase in the PR quotient of HR through the statutory extension of PR causes an unfair imbalance in the overall HR equation, and Part Ⅳ concludes.

PART Ⅰ

An Introduction to the Issues

The WTO came into existence following the Uruguay Round of 1994, having had

① This requires the opening up of markets to investment by foreign companies with the right to move in and out freely in WTO member host country jurisdictions and all other benefits (if not more) accorded to a host country corporation.

② By ensuring safe access and conduct for its operations, as well as ease of exit with which to trade across member states of the WTO.

③ The related issue of occupational health and safety and employment conditions in MNC, though a separate issue in its own right, is treated here as being a subsidiary part of the discussion on MNC personal injury tort liability so as to avoid a congestion of issues discussed in this paper.

its antecedence in the GATT of 1947. Its cornerstones are the GATT, GATS, and TRIPS agreements. GATT and GATS open up the markets for goods and services respectively, while TRIPS gives enhanced protection to intellectual property rights especially through the Dispute Settlement Understanding system of the WTO. GATT enables the setting up of both Greenfield and Brownfield investments, the former aided by the free movement of investment capital into and out of countries, and the latter aided additionally by the mass privatisation of then existing State protected industries.

These changes, in combination with the benefit of limited liability associated with the corporate form, make it possible for corporate business entities to engage in activities that are not only financially highly risky, but which may also be hazardous to the health and safety of their employees and citizens of their host country. More importantly, they also enable corporations to externalise their costs to the state and citizens of LDC. Moreover, the extension of limited liability to each and every member of a group of companies serves only to encourage moral hazard① in corporate decision making, and has also led to the treatment of involuntary creditors less favourably than voluntary creditors. In other words, the widespread carrying on of business through especially created subsidiaries② has resulted in the treatment of tort

① See the discussion in the text at note 13 below.

② Blumberg, Limited liability and corporate groups, 11 *Journal of Corporation Law* 573 (1986) (cited hereafter as Blumberg), points out (p. 575, footnote 1) that in 1982, the 1000 largest American industrial corporations had an average of 48 subsidiaries each; that Mobil Oil Corporation (though an extreme example), operated in 62 different countries through 525 subsidiaries; see *Mobil Oil Corporation v. Commissioner of Taxes Vermont* 445 *US* 425, 428 (1980); that British based multinationals are even more complex, e. g. companies such as BP, Unilever, Bowater, Rank Organisation, and Reckitt & Colman reveal an "incredible complexity" involving "an intricate network of sub-holding companies, operating subsidiaries, sub-subsidiaries and service companies". BP has 1200 to 1300 subsidiaries, and Unilever has 800 subsidiaries; see, Hadden, Inside Corporate Groups, 12 *International Journal of the Sociology of Law* 271, 273 (1984). Another British scholar, Tricker, Corporate Governance, Chapter 3, cited in Hadden, Forbes, and Simmonds, Canadian Business Organizations Law 618 (1984), has estimated that the average number of subsidiaries in the top fifty British companies in 1981 was 230.

victims arising from personal injury less favourably than contract claimants①. Consequently, there has developed a growing tension between the property owning and labour employing MNC on the one hand and employees and consumers of their host countries on the other, between property right claims and their enforcement on the one hand, and the recognition and enforcement of human rights on the other. These tensions include working conditions, environmental degradation, and personal injury tort liability arising under GATT, and the affordability of vitally important drugs following TRIPS.

The problems have been further exacerbated by the ability of MNC to invoke the assistance of their governments not only to safeguard them against any interference from third world home jurisdictions, but to also actively push their agendas and operate almost totally free of any form of state control over the decisions they make. ② Also, given the corporate vision of profits for its shareholders, production by MNC in developing country facilities has invariably been with a view to satisfying the demands of the high profit yielding markets found in developed countries, and at times at the expense of the citizens of LDC. Examples of the former include the concentration on life style drugs needed in developed countries as against essential drugs needed in the developing for tropical borne diseases, and a the failure to produce drugs that are needed across the world at prices affordable to the developing world. Illustrations of

① For example, the lender to a subsidiary would require a guarantee from the parent which would ensure the lender priority over any tort claimant. Moreover, claims against the corporation can be structured such that even shareholders as creditors have priority over tort claimants, as e. g. where dividends are declared in anticipation of liability arising (given that dividends are payable out of annual profits as determined for each financial year), and by the Parent obtaining prior ranking security for funds advanced as loans to subsidiary.

② Examples abound of business organisations and MNC pressuring e. g. the United States Trade Representative (USTR) to act on their behalf by using its trade enforcement mechanisms such as s301 of its Trade Act 1974, and the Generalised System of Preferences under Title V of that Act against LDC. For example, the s301 action initiated by the USTR against Brazil in 1987 was in response to a petition by the Pharmaceutical Manufacturers Association (PMA). The PMA also filed a petition in 1988 against Argentina on the issue of patent protection that triggered a USTR investigation. See e. g. the USTR website at http: //www. ustr. gov. There is also a growing body of literature that documents the role of private sector actors in the shaping of TRIPS itself, see the literature cited in Drahos and Braithwaite, at 452.

activities prejudicial to the interests of developing world citizenry include the attempted patenting of traditional medicines and strains of grain seeds in use in developing countries, patenting of existing items with minor improvements, as well as the externalising of tort liability arising from hazardous activities. Given that the core role of government is to provide its citizens with the basic necessities of life such as food, clothing, education, and health services, it is understandable as to why developing countries may view the new international trade regime as being tilted in favour of the developed world and its business entities. At the time of the Universal Declaration of Human Rights in 1948 (Human Rights Declaration) following the Second World War, it was the State that was seen as the potential violator of HR. However, the establishment of the WTO has changed this, and the MNC has now emerged as a violator of HR, both on its own as well as in cooperation with some state governments. As this tension is brought into sharper focus in the background of MNC operating in LDC, this study will focus on them.

The following points on the relationship between the WTO and HR law and international law generally should be noted. First, that as the WTO is itself not a party to the various HR treaties it is not bound by them. It is, however, subject to the principles of general international law including HR law that is part of general international law. Secondly, given that only states are parties to the WTO, neither individuals nor corporations are directly subject to WTO law. However, states are entitled to protect individuals from HR violations by others. Thirdly, the WTO Dispute Settlement Understanding cannot be used to enforce HR treaty law, as its jurisdiction is limited to disputes arising under the WTO agreements. Nonetheless, pursuant to Article 3. 2 of the Dispute Settlement Understanding which prescribes the application of customary rules of interpretation of public international law (attracting thereby Article 31 (3) (c) of the Vienna Convention),① HR as are perceived to be part of general international law can be read into the Dispute Settlement Understanding.

① The article requires that account be taken of "any relevant rules of international law applicable to the relations between the parties".

PART II

MNC Limited Liability, Human Rights, and Property Rights

MNC Limited Liability and Personal Injury Tort liability

Two points are made in this section: First, the problem of moral hazard confronting corporate decision makers, and secondly how corporations are able to externalise the downside of their high risk activities and strategies to the LDC state and its citizens. In other words, limited liability which is beneficial to the corporation has a downside to it which is paid for by the state and its citizens generally. One way of handling the problem is to require corporations to internalise the consequences of their own decisions. It is useful in this context to see how tort claimants have come to be relegated behind contract claimants in their right to claim against the corporation.

The emergence of the large industrial corporations (referred to by Berle and Means① as the "modern corporation") in the early part of the twentieth century highlighted, especially in the US, the existence of two types of corporations — small Salomon type family corporations of varying size on the one hand , and larger corporations of varying size on the other. Secondly, these latter corporations came to be run by a professional class of managers subject to varying degrees of control by its shareholders, causing misgivings about managers having an agenda different from those of the corporation' s shareholders. This was aided by a wave of corporate mergers in the 1960s, and in the 1980s. Large corporations became larger still by acquiring other corporations, some in the same line and others in different lines of business all generally brought under one corporate umbrella of a holding company having under it numerous brother-sister, and subsidiary entities. Having started off with separate limited liability for each of these separate corporations, they continued to enjoy this status by reason of their separate legal status. This also made it possible to go about creating new independent subsidiaries, enjoying with it the ability to be able to stream losses across the Group structure in the most advantageous way, as

① The Modern Corporation and Private Property, (Harcourt Brace, NY, 1967 edn) .

well as to be able to externalise losses in the best possible way. ①

Corporations law itself evolved over the years by reinventing itself in the face of the many changes that had become a feature of the marketplace, attempting in the process to balance out the interests of shareholders and managers. The rise of financial economics in the 60s and the law and economics movement of the 70s further weight to the emergence of the post-modern corporation, where managers remain supreme but subject to shareholder control through the operation of the securities markets (stock market and the like), the takeovers market, the market for managerial employment, as well as the product market. This post-modern perspective saw the corporation as being no more than a nexus of contracts entered into between interested parties both within (directors, shareholders, managers, and employees), and without (financiers without voting rights, and other contractual creditors). This post-modern approach led to the transfer of significant power from shareholders to managers, with governance of the corporation left largely to the marketplace and freeing up managers from shareholder control.

In a typical financing transaction the parent or a especially created financing subsidiary of the Group would provide most of the financing needed for the venture by way of loans rather than equity capital (share capital) covered by a Debenture Trust Deed which grants its claim not only senior status in claims against the borrowing entity, but also priority in ranking over the claims of other secured creditors. The consequence of this would be to leave the culpable entity with adequate operational funds but not necessarily sufficient to cover claims of third party creditors and of tort claimants in the event of insolvency. Corporations' law also permits the further depletion of an entity's funds through its dividend payment rules. For example, corporations can pay out dividends to their shareholders out of their annual profits

① Blumberg sates that in the US, while limited liability had become firmly established by 1830, the power of a corporation to acquire and own shares of another corporation and form corporate groups was generally not available until after 1889, and that while subsidiary corporations were not unknown earlier, they increased in number by dint of express provisions in the special charters to the parent corporation. Moreover, he observes that the application of applying the doctrine of limited liability to insulate parent corporations from liability as well as the ultimate investors had apparently occurred unthinkingly: At 575.