

## **Enabling ESG Accountability: Focusing on the Corporate Enterprise**

**Rachel Brewster\***

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### *Abstract*

*Environmental, social, and governance (ESG) accountability has become an important topic in popular and academic debate about the role of corporations in modern society. The idea that corporations should have ESG goals has been embraced by major investment companies, employees, and many corporations themselves. Yet less attention has been focused on how corporate enterprise law—the rules that govern how corporations structure their relationships between parent corporations and their subsidiaries—creates or contributes to the ESG concerns that the public has with corporations in the first place. Modern enterprise law allows corporations, particularly those operating across national borders, to use their subsidiaries to avoid the responsibility for their public and private obligations.*

*This Article examines how a governance aspect of ESG—corporate enterprise law—creates social and environmental concerns through three lenses: limited liability, international tax, and environmental law. The major contribution of this Article is to identify how the internal form of the corporation itself creates ESG concerns and to sketch out how current law could be adapted to limit those harms. Using the Foreign Corrupt Practices Act as a model, this Article explains how creating an obligation on a parent company to supervise their subsidiaries*

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\* The Jeffrey and Bettysue Hughes Professor of Law, Duke Law School; Co-Director of the Duke Center for International and Comparative Law. The author would like to thank Diane Amann, Anu Bradford, Christopher Bruner, Harlen Cohen, MJ Durkee, Gwendolyn Gordon, Jayne Huckerby, Katerina Linos, James Mulholland, Eric Orts, Paul Stephan, Cora True-Frost, and Leslie Wexler as well as the participants in the Columbia Law School's Comparative and International Law Workshop, the University of Georgia's International Law Colloquium, Syracuse Law School's International Law Distinguished Lecture, the American Society of International Law's Annual Research Forum, and the Wharton Legal Studies Workshop for comments on earlier drafts. All errors are my own. Katy Baker, Alex Bednar, Brett Crow, Bailey Williams Newman, and Zach Sanfilippo provided exceptional research assistance.

*could provide for greater global corporate responsibility while minimizing corporations' competitiveness concerns. Rather than harming corporate enterprises, such governance reforms can enable corporations to pursue ESG goals without suffering competitive losses.*

## I. Introduction

Consider the follow two examples:

1. Apple transfers much of its intellectual property, developed in the United States, to its Irish subsidiary, making income from those assets “foreign income,” and then routes those foreign revenues through more Irish and Dutch subsidiaries to a subsidiary in Bermuda.<sup>1</sup> By doing so, Apple significantly decreases the amount of “domestic income” it has to pay tax on to the United States government, and it does not pay any taxes on this “foreign income” to any government for over five years.<sup>2</sup>
2. A global shipping company has multiple vessels that it operates, transporting products from oil to automobiles worldwide. While the shipping company is the financial beneficiary of the revenue of all its ships, the industry practice is now for a firm to incorporate each of its vessels as an independent subsidiary, making each ship a separate legal entity under national law.<sup>3</sup> If a ship is involved in an accident, creating environmental damage or injuries, the parent company can disclaim responsibility for the accident beyond the value of the subsidiary (the one ship). Governments and individuals harmed are left bearing the costs of the damage. A recent study estimates that nearly 90% of all global shipping vessels are now single-vessel subsidiaries.<sup>4</sup>

In both situations, corporations use their enterprise law – national legal principles that allows corporate parents to create legally separate subsidiaries – to accomplish financial goals that they could not if they were acting as a single entity.

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<sup>1</sup> Charles Duhigg & David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, N.Y. TIMES (April 28, 2012) (discussing Apple’s tax planning of routing of “patents developed in California” to Irish subsidiaries and then transferring income tax free to other low-or-no-tax jurisdictions).

<sup>2</sup> Danny Yadron, Kate Linebaugh & Jessica E. Lessin, *Apple Avoided Taxes on Overseas Billions, Senate Panel Finds*, WALL ST. J. (May 20, 2013) (describing the Senate report that found Apple had not paid tax on its foreign income to any government from 2009-2012). For a discussion of Apple’s “stateless income” tax strategies, see Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT’L L. 353, 358 (2020).

<sup>3</sup> Guillaume Vuillemeys, *Evading Corporate Responsibilities: Evidence from the Shipping Industry*, CEPR Discussion Paper 15291 (September 25, 2020). Available at SSRN: <https://ssrn.com/abstract=3691188>.

<sup>4</sup> *Id.* at 3.

Although popular and academic commentary is now focused on how corporations can and should have a corporate purpose that involves environmental, social, and governance (ESG) goals, there is less attention on how the corporation's own internal form can undermine these goals. Corporations regularly organize themselves into enterprises, with a "parent" corporation sitting atop a network of subsidiaries (sometimes numbering in the hundreds and commonly located in multiple countries) that run the corporation's worldwide operations. Many corporations that we describe as singular –Apple, Google, Royal Dutch Shell, GE– are corporate enterprises coordinating hundreds of subsidiaries.

This Article highlights and explores how a governance aspect of ESG—corporate enterprise law—creates many of the environmental and social concerns that the public has with corporations. National laws allow corporations to organize themselves into enterprises, where a parent corporation can create and control a legally separate subsidiary for whose actions the parent is not legally responsible. As the opening examples illustrate, this structure can create environmental and social problems. Corporations can use their enterprise to engage in tax avoidance which undermines states' ability to pay debt and pursue social and economic goals. Corporate enterprises can also shield parent corporations from financial responsibility for the actions of their subsidiaries, leading the corporation to engage in riskier activities (as it does not expect to internalize the damage) and leaving tort victims (often in developing countries) without compensation for personal or environmental injury. This phenomenon of enterprise law creating ESG concerns occurs over a wide range of industries: from modern technology companies and major oil producers to textile manufactures and transport companies.

This Article argues that current corporate enterprise law rewards "irresponsible" corporations by providing them with greater market returns for shirking their social and environmental responsibility through their subsidiaries. By doing so, enterprise law undermines the ability of corporations to achieve ESG goals. Corporate leaders face market pressures not to unilaterally give up the latitude that enterprise law provides when their competitors may not. Parent corporations are therefore incentivized to retain their limited liabilities, even if they come at significant societal costs. "Responsible" corporate leaders are understandably concerned that they will face an unbalanced marketplace unless other corporations (foreign and domestic) are also bound to similar rules.

This Article outlines how corporate enterprise law could be reshaped to increase parent corporations' responsibilities to supervise their subsidiaries through a set of ground rules that are compatible across national markets. Such rules would be ESG enabling for corporations. They would allow corporate leaders to achieve meaningful social and environmental goals without suffering market losses to less

responsible competitors. Using the Foreign Corrupt Practices Act (FCPA) as a model, this Article explain how the United States could implement its own set of rules in a manner that provides for greater corporate responsibility while minimizing competitiveness concerns. The European Union is currently drafting legislation that would limit corporate enterprises' legal protections. Together, American and European rules would provide a floor for enterprise operations.

This Article seeks to start a conversation about how the operation of corporate enterprises is critical to meaningful ESG progress. Discussions of the role of enterprise law have largely been absent from discussions of corporate purpose and ESG goals. The major contribution of this Article is to identify how the internal form of the corporation itself creates ESG concerns and to sketch out how current law could be adapted to limit these harms. The Article also highlights how corporate support for enterprise reform could lead to far more meaningful progress towards ESG goals than many current corporate ESG pledges do.

This Article proceeds in four parts. Section II briefly discusses the ESG responsibility and corporate purpose movement and how competitive market pressures can undercut corporation's ESG aspirations. Section II then discusses how national laws allow corporations to create subsidiaries as separate legal persons that each have limited liability. While corporate enterprises are centrally managed, the parent corporation generally does not need to fully internalize the cost of the subsidiary's business operations because the parent is not responsible for liabilities beyond the value of the subsidiary.

Section III focuses on how corporate enterprise principles create many of the ESG concerns that the public has with corporations, using examples from international tax, environmental law, and torts. While not all corporations abuse enterprise principles, even socially-minded corporate leaders can feel competitive pressure to minimize their corporation's tax and business liabilities at a social and environmental cost, undermining that corporation's ESG aspirations.

Section IV turns to possible solutions to this problem. This section examines how governments can reshape enterprise law and reviews how some governments, including the United States, have already done so in a limited manner. This section draws on examples of extraterritorial regulation from the FCPA, the French Duty of Vigilance law, and European regulatory proposals to discuss how governments have imposed a duty on parent corporations to monitor their subsidiaries, foreign and domestic. In these examples, governments continue to respect the legal separation between the parent and the subsidiary, but no longer allow the parent corporation to deflect responsibility for its subsidiary's actions. These laws can set a floor for minimum corporate enterprise responsibility for all corporations. In

doing so, the reforms can also empower corporate leader that want to achieve ESG goals by minimizing their losses to competitors who do not follow suit.

The Article concludes by examining how these legislative proposals fit with popular calls for corporations to engage in more socially constructive behavior. Reshaping corporate enterprise principles arguably should be a minimum of responsible corporate behavior: requiring the corporate enterprise to internalize the costs of its global operations. But doing so would also provide important tools to ESG-minded corporations. By credibly establishing a common standard across major national markets, corporations can more easily achieve their ESG goals without losing their competitive edge.

## II. ESG Goals and Corporate Enterprise Law

### A. Corporate Purpose and ESG Accountability

In the last couple of years, popular and academic discussion of corporations' environmental, social, and governance effects has gone from the edges of corporate law to the center.<sup>5</sup> This discussion has followed demands by many powerful American institutional investors and government leaders that corporations adopt social and environmental accountability mechanisms to ensure longer-term sustainability and profitability. Institutional investors like Larry Fink at Blackrock have demanded that corporate boards be more responsive to social, environmental, and governance goals.<sup>6</sup> Corporations have responded to such demands, publicly

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<sup>5</sup> See Ed Rock, *For Whom is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 BUS. LAWYER 363 (2021); Jill E. Fisch & Steven David Solomon, *Should Corporations Have a Purpose?* TEXAS L. REV. (forthcoming 2022) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3561164](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561164)) (discussing the many recent demands on corporations to have social and environmental purpose); Jonathan R. Macey, *ESG Investing: Why Here? Why Now?*, George Mason Law & Economics Research Paper No. 21-22, Yale Law & Economics Research Paper Forthcoming, available at <https://ssrn.com/abstract=3942903>; Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401 (2020) (discussing how socially responsible action can limit downside risks); Elizabeth Pollman, *Corporate Social Responsibility, ESG, and Compliance* (2021), available at [https://scholarship.law.upenn.edu/faculty\\_scholarship/2568](https://scholarship.law.upenn.edu/faculty_scholarship/2568).

<sup>6</sup> Larry Fink, *A Fundamental Reshaping of Finance*, Letter from Blackrock to CEOs (2020) <https://www.blackrock.com/us/individual/larry-fink-ceo-letter>, [hereinafter *Blackrock Letter*]; See also Barzuza et al. *Shareholder Value(s): Index Fund ESG Activism and the*

announcing through the Business Roundtable that corporations would more actively take into account the interests of stakeholders as well as shareholders.<sup>7</sup> In addition, many investors have incorporated these concerns through the selection of their own portfolios, creating a demand for ESG funds as well as generating questions about whether such investing is effective.<sup>8</sup>

Yet for all the public statements, there is significant skepticism about whether calls for corporate purpose or demands for greater ESG accountability have or will lead to material changes in corporate behavior.<sup>9</sup> One of the major sources of this skepticism is that corporations will continue to operate in competitive markets where their success is still judged by their profitability. As Jonathan Macey argues, incentive-based executive pay, the threat of corporate take-overs, and the election of corporate boards all discipline the corporation to maintain its focus on profits rather than non-economic concerns.<sup>10</sup> He argues that our current institutional incentives do not give corporate leaders the freedom to effectively pursue ESG goals.<sup>11</sup>

If corporate actions are still tightly constrained by pressures to achieve competitive returns, then executives are likely to announce ESG pledges that are aimed at public relations but do not fundamentally change the corporation's operations.<sup>12</sup> Moreover, corporate executives that are sincerely motivated to address ESG issues will face resistance if it comes at the cost of greater returns.

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*New Millennial Corporate Governance*, 93 S. CA. L. REV. (forthcoming 2022) (discussing the incentives of institutional investors to push for ESG reforms).

<sup>7</sup> See Business Roundtable Press Release, *Business Roundtable Redefines the Purpose of the Corporation to Promote 'An Economy That Serves All Americans'*, (Aug. 19, 2019) (available at <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>).

<sup>8</sup> See Macey, *supra* note 5, at 1.

<sup>9</sup> See Lucian Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020); Macey, *supra* note 5, at 1-31, but see Stavros Gadinis & Amelia Miazad, *A Test of Stakeholder Capitalism*, 47 J. CORP. L. 47 (2021) (discussing how managers can gain informational benefits by incorporating the views of larger community).

<sup>10</sup> See Macey, *supra* note 5, at 4 & 25-31.

<sup>11</sup> *Id.* at 30.

<sup>12</sup> See Bebchuck & Tallarita, *supra* note 9, at 92-99.

This Article argues that one of the most effective means of achieving real improvement in environmental and social accountability would be to reshape the laws addressing the “governance” aspect of ESG: in particular, the rules governing corporate enterprise principles. As this Article describes in the next section, current corporate enterprise principles create some of the most significant environmental and social concerns that the public and investors have with corporations. Reshaping these rules could address these concerns meaningfully without leading to competitiveness concerns. Corporate executives would have more freedom to reform their business operations to improve corporations’ environmental and social practices without sacrificing their competitive edge.

## **B. Corporate Enterprise Principles**

This part discusses the nature of corporate enterprises and the ESG challenges they pose. It first describes the current state of corporate enterprises among the world’s leading companies. It then describes the key characteristics of the corporate enterprise – the parent corporation’s unlimited ability to create subsidiaries that allows the enterprise to engage in commercial activity on a global scale but splinters responsibility for the enterprise’s activities. This part examines two key aspects of the subsidiaries: (1) that they have limited liability, which allows parent companies to limit downside financial risks, and (2) that they are legally separate from the parents, which allows parent corporations to transfer assets to low-to-no-tax jurisdictions.

Section III discusses how corporate enterprises create significant ESG concerns through the lens of international tax and environmental law. In Section IV, the article turns to how states can more effectively regulate corporate enterprises to address these governance issues.

### **1. Enterprise Law and the Corporation**

Corporate enterprises include parent corporations, which directly or indirectly hold an ownership stake in a host of subsidiaries.<sup>13</sup> Most public

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<sup>13</sup> Phillip Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573 (1986); Henry Hansmann & Richard Squire, *External and Internal Asset Partitioning: Corporations and Their Subsidiaries*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 251 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) (describing a corporate group as “a firm organized as a parent entity plus one or more wholly owned subsidiaries.”).



multinational companies are organized as corporate enterprises.<sup>14</sup> In 2010, the largest 100 American multinational corporations (MNCs) each owned an average of 245 subsidiaries.<sup>15</sup> This is not simply an American phenomenon. In 2005, Japanese public companies each owned an average of 108 subsidiaries, and in France, large public firms owned an average of 68 subsidiaries.<sup>16</sup> MNCs with thousands of subsidiaries are not unheard of. Dun & Bradstreet reports that Royal Dutch Shell currently has 5,526 subsidiaries in its corporate enterprise,<sup>17</sup> General Electric has 4,407,<sup>18</sup> Exxon Mobile has 2,543,<sup>19</sup> and Mitsubishi has more than 1,700.<sup>20</sup>

As the owner, parent corporations have wide ranging powers to control their subsidiaries.<sup>21</sup> Parent corporations can appoint (and fire) all the managers of their subsidiaries (including appointing the same individuals who are managers of the parent corporation), can set enterprise-wide policies for all their subsidiaries, can demand to approve any loans or distributions, and can set the terms for how subsidiaries interact with one another.<sup>22</sup> For instance, parent corporations can require that one subsidiary sell its assets to another subsidiary and can set the price

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<sup>14</sup> Hansmann & Squire, *supra* note 13 at 259.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Dun & Bradstreet Company Report on Royal Dutch Shell (available at [https://www.dnb.com/business-directory/company-profiles.royal\\_dutch\\_shell\\_plc.2f05eb391b7c3aa5291918c251070e46.html](https://www.dnb.com/business-directory/company-profiles.royal_dutch_shell_plc.2f05eb391b7c3aa5291918c251070e46.html))

<sup>18</sup> Dun & Bradstreet Company Report on General Electric (available at [https://www.dnb.com/business-directory/company-profiles.general\\_electric\\_company.5ef217c38d9af399be5d32861ac10949.html](https://www.dnb.com/business-directory/company-profiles.general_electric_company.5ef217c38d9af399be5d32861ac10949.html))

<sup>19</sup> Dun & Bradstreet Company Report on Exxon Mobile (available at [https://www.dnb.com/business-directory/company-profiles.exxonmobil\\_oil\\_corporation.e836ceebcbe7884dc478a209a770ce09.html](https://www.dnb.com/business-directory/company-profiles.exxonmobil_oil_corporation.e836ceebcbe7884dc478a209a770ce09.html))

<sup>20</sup> Dun & Bradstreet Company Report on Mitsubishi (available at [https://www.dnb.com/business-directory/company-profiles.exxonmobil\\_oil\\_corporation.e836ceebcbe7884dc478a209a770ce09.html](https://www.dnb.com/business-directory/company-profiles.exxonmobil_oil_corporation.e836ceebcbe7884dc478a209a770ce09.html))

<sup>21</sup> *United States v. Best Foods*, 524 U.S. 51 (1998)

<sup>22</sup> *Doe v. Unocal*, 248 F.3d 915 (9th Cir. 2001).

for that sale.<sup>23</sup> None of these actions are viewed as breaching the legal separation between the parent and its subsidiary.<sup>24</sup>

As a result, the parent corporations can, and almost always do, make the corporate enterprise act as a single corporation. As Reuven Avi-Yonah argues, “[m]ultinationals operate as a unitary business in most cases and most decisions are made at the parent level.”<sup>25</sup> Henry Hansmann and Richard Squire agree, concluding that “the typical corporate group is a single business firm organized as a collective of legal entities.”<sup>26</sup> The centrality of the parent is reflected in the fact that most MNCs only issue financial reports for the entire corporate enterprise, not for each subsidiary, highlighting the fact that the value of each subsidiary is less important than its role in supporting the financial health of the corporate enterprise.<sup>27</sup>

The result is a vast set of relationships that crisscross the globe.<sup>28</sup> The corporate enterprise is unified and centrally controlled in its aim to maximize profits, taking into consideration different national regulatory rules, tax systems, and liability regimes.<sup>29</sup> One parent corporation can control thousands of subsidiaries, engaged in a staggeringly elaborate set of relationships.<sup>30</sup> These

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<sup>23</sup> This is a common feature in international tax transfers. See Mason, *supra* note 2, at 355-64.

<sup>24</sup> *Doe v. Unocal*, 248 F.3d 915 (9th Cir. 2001).

<sup>25</sup> Reuven S. Avi-Yonah, *Hanging Together: A Multilateral Approach to Taxing Multinationals*, 5 MICH. BUS. & ENTREPRENEURIAL L. REV. 137, 142 (2016)[herein after *Taxing Multinationals*].

<sup>26</sup> Hansmann & Squire, *supra* note 13, at 262.

<sup>27</sup> *Id.* at 261–62 (noting that “In practice, however, most firms do not maintain informationally relevant internal partitions. Instead of preparing subsidiary-level financial records and sharing them with creditors, firms neglect entity-level accounts and report results only on a consolidated basis.”); Avi-Yonah, *Taxing Multinationals*, *supra* note 25, at 142 (noting that, for financial reporting purposes, MNCs are single unified enterprises).

<sup>28</sup> See Phillip Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT’L & COMP. L. REV. 297, 303 (2001).

<sup>29</sup> Hansmann & Squire, *supra* note 13, at 262.

<sup>30</sup> See Blumberg, *supra* note 28, at 303 (describing corporate entities as,

“In the modern world, parent corporations operate multinational groups of enormous dimensions through multi-tiered corporate structures of

families are often known by a common name, but they are, in fact, a complex extended enterprise of legally separate individual firms.

Notwithstanding the centralized control the corporate parent has over its subsidiaries, the corporate enterprise gets the benefit of claiming that its subsidiaries are separate firms, each with its own claims to limited liability and its own legal personhood.<sup>31</sup> The next part explores these two characteristics.

## 2. Legal Characteristics of Corporate Enterprises

National laws that allow corporate enterprises to create subsidiaries offer the parent corporation significant economic benefits, including (1) limiting the parent corporation's liability for its worldwide business, and (2) creating "nationals" in foreign states that allow the parent corporation to strategically locate its assets abroad to engage in regulatory arbitrage, particularly in tax. Together, these elements of national enterprise law permit corporations to profit from worldwide commercial operations while limiting its financial liability and regulatory accountability. While not all corporations use subsidiaries to deflect tort or tax liabilities, large corporate enterprises are increasing using foreign subsidiaries to engage zealous tax avoidance<sup>32</sup> and to shield themselves from the costs of environmental damage.<sup>33</sup>

### a. Limited Liability

The first and most well recognized benefit of forming a subsidiary is the ability to limit the liability to the parent corporation of operations undertaken by the subsidiary.<sup>34</sup> As a separate legal person, the subsidiary is responsible for its own

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"incredible complexity" 5 composed of dozens or hundreds of subsidiaries organized under the laws of scores of countries collectively conducting assigned segments of a single business under the "control" of the parent corporation.")

<sup>31</sup> *Id.*

<sup>32</sup> See Section III.B. *infra*

<sup>33</sup> See Vuilemey, *supra* note 3, at 2-5.

<sup>34</sup> This is a well-established point in the literature on limited liability. See William J. Carney, *Limited Liability*, ENCYCLOPEDIA OF LAW & ECONOMICS (1998); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHIC. L. R. 89, 93-97 (1985); Philip Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573 (1986); Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for*

debts, and the parent corporation is not responsible for any unpaid debts if the subsidiary becomes insolvent, except if creditors can “lift the corporate veil.”<sup>35</sup> The ability to divide the corporation’s business into hundreds (if not thousands) of smaller operations, each of which has limited liability, allows the parent company to limit its own financial risk, pushing the costs of risky activity or poor monitoring onto tort or contract creditors.<sup>36</sup> Limited liability for corporations exists not only in the United States but in virtually all nations.<sup>37</sup>

Many commentators view limited liability as justified in the case of a public parent corporation as a necessary legal requirement for developing robust capital markets. Passive investors are unable to monitor corporate activity, and thus must be protected from the post-bankruptcy debts of public corporations to be willing to invest.<sup>38</sup>

While this rationale applies to publicly-held parent corporations, the same logic does not apply to subsidiaries.<sup>39</sup> As multiple commentators have noted, parent corporations have the ability to monitor subsidiaries actions, and providing limited liability to each subsidiary shifts the risks of a subsidiary’s actions to contract and tort creditors without an offsetting benefit to passive investors.<sup>40</sup> As a result, several

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*Foreign Subsidiaries’ Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769 (2015).

<sup>35</sup> See Carney, *supra* note 34, at 667.

<sup>36</sup> See Carney, *supra* note 34, at 667; Easterbrook & Fischel, *supra* note 34, at 110–11; Hansmann & Squire, *supra* note 13, at 265.

<sup>37</sup> See Carney, *supra* note 34, at 664.

<sup>38</sup> See Carney, *supra* note 34, at 665–66. For a fuller discussion of all the benefits of shielding investors from corporate debts (which the authors call “external partitioning”), see Hansmann & Squire, *supra* note 13, at 254–58. For a discussion of the comparative benefits and costs of allowing unlimited liability even for public companies, see Henry Hansmann & Reinier Kraakman, *Towards Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L. J. 1879 (1990).

<sup>39</sup> Carney, *supra* note 34, at 667; Easterbrook & Fischel, *supra* note 34, at 111; Hansmann & Squire, *supra* note 13, at 259–63.

<sup>40</sup> See Carney, *supra* note 34, at 667; Easterbrook & Fischel, *supra* note 34, at 111 (noting that “If limited liability is absolute, a parent can form a subsidiary with minimal capitalization for the purpose of engaging in risky activities. If things go well, the parent captures the benefits. If things go poorly, the subsidiary declares bankruptcy, and the parent creates another with the same managers to engage in the same activity. This asymmetry

commentators have questioned whether the current black letter law on limited liability should be extended to subsidiaries.<sup>41</sup> Frank Easterbrook and Daniel Fischel argue that subsidiaries should not receive the same benefits as parent companies because subsidiaries lack passive investors and shielding the parent from the subsidiaries actions creates moral hazards.<sup>42</sup> More recently, Hansmann and Squire extended Easterbrook and Fischel's analysis by considering more functions that the subsidiaries can perform, but they continue to agree that a cost-benefit analysis does not support protecting parent company's assets from subsidiaries' creditors.<sup>43</sup> Doing so shifts the costs of the enterprise from parent to creditors, particularly less sophisticated creditors (such as employees or tort victims) who have not had their debts secured.<sup>44</sup> Hansmann and Squire note that subsidiaries can provide parents with non-asset protection goals, specifically, establishing foreign domiciles and easing the spin-off of business operations, but that these limited functions do not warrant the degree of asset protection the parent currently possesses.<sup>45</sup>

Currently, creditors of subsidiaries can only access the parent's assets if they can "pierce the corporate veil," but existence of a parent-subsidiary relationship on its own does not accomplish this. Veil piercing may be easier when there is a parent-subsidiary relationship than when seeking to recover from the

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between benefits and cost, if limited liability were absolute, would create incentives to engage in a socially excessive amount of risky activity.")

<sup>41</sup> See Carney, *supra* note 34, at 667; Blumberg, *supra* note 42, at 623–26; Hansmann & Squire, *supra* note 13, at 274, 269–71 (discussing how corporation's benefit from limited liability protections between corporate family members (what the authors term internal partitions) unless creditors can pierce the corporate veil).

<sup>42</sup> Easterbrook & Fischel, *supra* note 34, at 111 (noting that "Allowing creditors to reach the assets of parent corporations does not create unlimited liability for any people. Thus the benefits of diversification, liquidity, and monitoring by the capital market are unaffected. Moreover, the moral-hazard problem is probably greater in the parent-subsidiary situations because subsidiaries have less incentive to insure.")

<sup>43</sup> Hansmann & Squire, *supra* note 28, at 259–63 (discussing how internal partitioning limited liability protections for intra-corporate group shareholders] does not provide the same benefits as external partitioning [limited liability protections for individual shareholders]). Hansmann & Squire also provide additional characteristics of corporate groups that Easterbrook and Fischel do not examine and agree with Easterbrook & Fischel that "the case for enforcing external partitions is stronger than the case for enforcing internal partitions." *Id.* at 252.

<sup>44</sup> *Id.* at 265.

<sup>45</sup> *Id.* at 266–67 (discussing other subsidiary functions).

personal assets of individual investors in a public parent company, but it is hardly routine. Courts' analyses of when it is appropriate to lift the corporate veil are notoriously vague with few bright line rules,<sup>46</sup> and success is far from certain.<sup>47</sup> Empirical studies of veil piercing in the parent-subsidary context find that creating subsidiaries is an effective means of protecting the parent's assets.<sup>48</sup> In a recent study, John Matheson found that courts lifted the veil between corporate family members less than sixteen percent of the time.<sup>49</sup> He concludes, "[t]here does not appear to be any judicial trend toward finding unlimited liability of parent corporations for the operation of their subsidiaries; rather, the opposite continues to be the law and the case result."<sup>50</sup> Similarly, Jonathan Macey and Joshua Mitts found that courts accept that "corporations legitimately can be established for the sole purpose of avoiding personal or corporate liability on the part of investors."<sup>51</sup>

As Section III discusses in more depth, corporations have used the limited liability advantages of enterprise law to shield the parent corporation from the operational losses. Shipping companies can make each vessel its own subsidiary. Textile manufacturers can make each factory its own subsidiary. Oil companies can make each drilling site its own subsidiary. If there is an accident that results in significant human or environmental damages, the parent corporation can limit its liability to the value of the subsidiary. This leaves those injured by the subsidiary's

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<sup>46</sup> See Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 510–13 (2001) (arguing that veil piercing principles lack bright line rules, involve "little concrete analysis," and the vague standards "give judges little guidance, but wide discretion."); John H. Matheson, *Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil*, 7 BERK. BUS. L. J. 1, 4 (2010) (arguing that "common law piercing is complex, inconsistently applied and often poorly understood.").

<sup>47</sup> See Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study* 76 CORNELL L. REV. 1036, 1070–74 (highlighting that "something must affirmatively displace the presumption of limited liability" and that courts can be "ill-equipped" to apply determine when limited liability should be displaced).

<sup>48</sup> See *id.* at 1070–74 (finding that more than ownership is necessary to successfully pierce the veil); John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091, 1153–55 (2009) (finding that only a small minority of cases result in veil piercing due to a parent-subsidary relationship).

<sup>49</sup> Matheson, *supra* note 48, at 1154.

<sup>50</sup> *Id.*

<sup>51</sup> Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 153 (2014).

action uncompensated and, arguably, makes parent corporations more willing to engage in risky activity as they do not fully internalize the costs of their operations.

The mix of limited liability with “jurisdictional splitting” aspects of subsidiaries (discussed next) makes the corporate enterprise structure particularly advantageous.

*b. Legal Separation: Limiting National Jurisdictional Reach*

The formation of a subsidiary also creates a separate legal person. Subsidiaries can be created in virtually any nation under that state’s domestic laws. As a result, corporate enterprises can be very international. In any country that the parent wants to do business, the enterprise can create a subsidiary that will perform commercial activities within that national jurisdiction.

The creation of foreign subsidiaries allows the corporate enterprise to engage in regulatory arbitrage. If one jurisdiction offers better regulatory treatment (e.g., tax, limits on carbon emissions, or labor law), then the corporate enterprise can locate its operations in that jurisdiction. Modern production processes allow corporations to splinter different aspects of production into different countries. For instance, a company performing research and development in a jurisdiction that invests heavily in education can move the resulting intellectual property to a low-tax jurisdiction, and then lease that technology to a subsidiary that is producing a good in a low carbon emissions regulation jurisdiction. The next section discusses these challenges in more depth.

### **III. The ESG Concerns of Corporate Enterprises**

This section discusses how corporate enterprises create ESG concerns using examples of international shipping, technology companies, and carbon emissions in manufacturing. This section illustrates how enterprise law allows corporations to use the limited liability and separateness of subsidiaries to limit their liability from accidents, avoid national taxes, and skirt carbon emission regulations. The globe-spanning nature of the corporate enterprises gives the parent corporation the power to choose a jurisdiction in which to place different economic activities. Through subsidiaries, parent corporations can thereby arbitrage differences in national laws to minimize taxes, as well as avoid environmental or other national regulatory requirements. The mobility of many multinational corporations additionally creates competition between national jurisdictions to attract corporate activity, which can further drive down national standards.

### A. Limits on Liability: The Global Shipping Industry

One of the clearest examples of enterprise law giving corporations the ability to limit their tort and environmental damage liability lies in the global shipping industry. Guillaume Vuillemeys has documented how global shipping firms have restructured their corporate form over the forty years to minimize their potential liability for operational losses.<sup>52</sup> Vuillemeys's important work details how companies in the shipping industry have structured their corporate enterprises by making each vessel its own subsidiary, thereby protecting parent corporations from the liability from a maritime accident beyond the value of the ship.<sup>53</sup> Vuillemeys estimates that currently 89.9% of shipping vessels are one-ship subsidiaries.<sup>54</sup>

Two issues from Vuillemeys's study deserve to be highlighted. First, as Vuillemeys emphasizes, the use of subsidiaries to protect the parent's assets pushes the costs of environmental damage or other torts from maritime accidents onto the injured parties.<sup>55</sup> The costs of an oil spill or other environmental damage is shouldered by the residents where the accident occurred. This can often be poorer countries where the ability to pay for clean-up or otherwise compensate local industries is more limited. Vuillemeys underscores that corporations are evading their corporate responsibilities by using their internal corporate structure to deflect operating liabilities onto tort creditors.<sup>56</sup>

The second point worth highlighting is how dominant the single-vessel subsidiary form has become in this competitive industry. Here, almost the entire industry, not just a few firms, are making use of the limited liability advantages provided by enterprise law. This has important implications for corporations that are more ESG-minded and would ideally take responsibility for damage incurred by accidents. In competitive industries, corporate executives are evaluated based on their returns as compared to those of their peers. If only a few companies adopt policies of accepting responsibility (either by avoiding the single-vessel structure or offering to compensate losses not covered by the value of the subsidiary), then those firms will, overall, be less profitable. This would be true even if the responsible firm did not experience any accidents. In the expectation that they

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<sup>52</sup> See Vuillemeys, *supra* note 3, 1-5.

<sup>53</sup> *Id.* at 2-4.

<sup>54</sup> *Id.* at 3.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 5-6.



would have compensate tort victims (internalizing the expected costs of the company's operations), these companies would engage in costly risk mitigation and be less profitable.

When an industry is dominated by a corporate enterprise form that deflects responsibility, competitive pressures can undermine executives from achieving their ESG aspirations. Corporations that act responsibly may lose business (as they are not able to be cost competitive) and their executive may be pressured into following the industry standard to meet returns expectations. Here, the latitude provided by enterprise law to protect the parent company's assets by creating multiple subsidiaries is not enabling to corporate executives, but undermining of their goals to act responsibility. Enterprise law makes it more likely that "irresponsible" companies will be the most successful and can, thereby, drive responsible firms out of the market.

The use of single-entity subsidiaries is not limited to the shipping industry. Textile companies can have single-factory subsidiaries. Parent companies can spin-off a risky venture into its own subsidiary. Enterprise law puts few restrictions on corporations' ability to create multiple subsidiaries, each of which possesses limited liability.

## **B. Tax Avoidance through Enterprise Structures: Technology Companies**

Corporations can also use a subsidiary's status as a legally separate entity to engage in regulatory avoidance. The clearest example of this dynamic is in international tax where technology companies have been particularly aggressive moving intellectual property assets to low-or-no-tax jurisdictions.

Tax scholars have long highlighted the role of subsidiaries in multinational corporations' planned tax avoidance.<sup>57</sup> Nations generally tax the profits of

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<sup>57</sup> See Mason, *supra* note 2, at 355–64; Kimberley Clausing, *Multinational Firm Tax Avoidance and Tax Policy*, 62 NAT'L TAX J. 703 (2009) (hereinafter *MNC Firm Tax Avoidance*); Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, 63 Nat'l Tax J. 727, 732–35 (2009), Kimberly Clausing, Emmanuel Saez & Gabriel Zucman, *Ending Corporate Tax Avoidance and Tax Competition: A Plan to Collect the Tax Deficit of Multinationals*, (January 20, 2021) at 2, UCLA School of Law, Law-Econ Research Paper No. 20-12, Available at SSRN: <https://ssrn.com/abstract=3655850> (noting that MNCs "shift paper profits between their various subsidiaries, including subsidiaries based in tax havens with zero or close to zero rates.")

corporations based on residence.<sup>58</sup> However, multinational corporate enterprises have subsidiaries in many countries and can create new subsidiaries in tax havens simply for the tax benefits. As a result, multinational corporations can shift where they “book” their profits between their subsidiaries in a manner that lowers their global tax burdens. As Ruth Mason summarizes, “[i]n a world where states set their tax rates independently from each other, a company that can choose where to declare its income also can choose its tax rate.”<sup>59</sup>

Multinational corporations’ profit-shifting to lower tax jurisdictions can occur through several mechanisms.<sup>60</sup> Most famously, MNCs can move their intangible assets, including trademarks, patents, copyrights, or other intellectual property, to subsidiaries in low-tax jurisdictions.<sup>61</sup> The MNC’s other subsidiaries must then license the intellectual property from that subsidiary. The parent corporation can set the price of this licensing and then classify the profits as “foreign income.”<sup>62</sup> High licensing costs allow profits to accumulate in low-tax jurisdictions while subsidiaries in higher-tax jurisdictions report lower profits.<sup>63</sup>

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<sup>58</sup> See Clausing, *MNC Firm Tax Avoidance*, *supra* note 57, at 703; *see also* Mason, *supra* note 2, at 355–56. Corporate taxes can be based on residence, source, or consumption and different nations adopt different approaches. *Id.*

<sup>59</sup> *See* Mason, *supra* note 2, at 357.

<sup>60</sup> Gravelle, *supra* note 57, at 732–35; Mason, *supra* note 2, at 355–64; Clausing, *MNC Firm Tax Avoidance*, *supra* note 57, at 703.

<sup>61</sup> Mason, *supra* note 2, at 357–58, *see also* *Slicing up the pie What could a new system for taxing multinationals look like?*, *The Economist* (May 15, 2021)(hereinafter *Slicing Up the Pie*) (noting that “Parents can allocate paper profits to affiliates in tax havens by having them hold intellectual property that is then licensed to other affiliates in high-tax places.”)

<sup>62</sup> Mason, *supra* note 2, at 357; *see also* *Double Irish With a Dutch Sandwich*, *N.Y TIMES BUSINESS DAY* (April 28, 2012) (explaining that “If the profits from the sale of a product stay in the United States, they would be subject to a federal tax rate of 35%. But if the money is paid to an Irish subsidiary as royalties on patents the company owns, it can ultimately be taxed at far lower rates.”)

<sup>63</sup> Mason, *supra* note 2, at 357–58 (“Multinational groups shift profits by, for example, moving valuable intellectual property to low-tax jurisdictions and then charging artificially high licensing fees to related companies in high-tax jurisdictions. The related group member in the high-tax state gets a large deduction, and, by design, the recipient of the fee is taxable in a low-tax state. The group’s overall profit remains the same, but it saves tax due to the rate differential.”)

This highly centralized tax planning on the global family level minimizes the MNC's worldwide tax bill.

MNC's can route profits through holding companies in other low-tax jurisdictions to further reduce the company's tax bill.<sup>64</sup> The "double Irish Dutch sandwich" tax scheme infamously was used by Google, Apple, and other major MNC's to reclassify the profits from intellectual property developed in the United States as foreign income and pay taxes on this income in low-or-no-tax havens.<sup>65</sup> Although the Irish government closed this particular tax option in 2020, other tax planning options produce the same result.<sup>66</sup>

Examples of such intellectual property transfers to foreign subsidiaries abound among prominent corporations. Bristol Myers Squibb moved its pharmaceutical patents to Ireland to save \$1.4 billion in taxes (a move that the I.R.S.

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<sup>64</sup> Charles Duhigg & David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, N.Y. TIMES (April 28, 2012) (discussing Apple's tax planning of routing of "patents developed in California" to Irish subsidiaries and then transferring income tax free to other low-or-no-tax jurisdictions); Gabriel Zucman, *How Corporations and the Wealthy Avoid Taxes (and How to Stop Them)*, N.Y. TIMES (Nov. 10, 2017) (discussing how Google transferred intellectual property to Irish subsidiaries and moved profits through Ireland and Dutch holding companies to a holding company in Bermuda.)

<sup>65</sup> Edward Helmor, *Google Says it Will No Longer Use 'Double Irish, Dutch Sandwich' Tax Loophole*, THE GUARDIAN (Jan. 1, 2020) (describing the tax scheme as "Under the Double Irish, companies shift taxable incomes from an operating company in Ireland to another Irish-registered firm in an offshore tax haven. Dutch tax law allows untaxed profits to be moved to a tax haven without incurring a withholding tax, so a Netherlands-based company is used in the middle of this "sandwich." The Dutch Google subsidiary was used to shift revenue from royalties earned outside the U.S. to Google Ireland Holdings, an affiliate based in Bermuda, where companies pay no income tax. This allowed Google to legally avoid triggering U.S. income tax or European withholding tax on the bulk of its overseas profits."); *see also Double Irish With a Dutch Sandwich*, N.Y. TIMES BUSINESS DAY (April 28, 2012) (providing a graphic of the tax transfers).

<sup>66</sup> Richerd Waters, *Google to End Use of 'Double Irish' as Tax Loophole Set to Close*, FINANCIAL TIMES (Jan. 1, 2020) (noting that companies are "replacing their double Irish arrangements with new structures that have the same benefits."); *see Zucman, supra* note 99 (highlighting that MNCs will use strategies similar to the double Irish with a Dutch sandwich to achieve tax avoidance goals and noting how Apple is designing a new tax avoidance system through the English Channel island of Jersey); Helmore, *supra* note 65 (same).

is challenging).<sup>67</sup> Even firms that we do not necessarily consider “technology firms” but which rely heavily on branding can benefit from transferring their trademarks offshore. Nike moved the ownership of its “swoosh” trademark to a Bermuda subsidiary and charged its European subsidiaries hefty licensing fees to minimize those subsidiaries’ tax liability.<sup>68</sup> Starbucks was able to claim that it had essentially made no income over all its operations in the United Kingdom for 14 years due to the licensing fees its stores pay to Starbuck’s Dutch subsidiary for intellectual property.<sup>69</sup> As *Financial Times* columnist Martin Sandbu concludes, “[t]he marvels of intellectual property accounting let multinationals spirit away profits from exceedingly tangible goods and services, from coffee to taxi rides.”<sup>70</sup>

Other means of profit shifting exist, including creating financial instruments where subsidiaries in high-tax jurisdictions take out debt (which lowers its taxable income) and pay dividends in low-tax jurisdictions.<sup>71</sup> Tax planners can also engage in legal arbitrage, leveraging different definitions of residence between nations to further reduce tax burdens, producing headline grabbing results. For example, Ruth Mason continues to document Apple’s claims that its corporate profits are “stateless” for corporate tax purposes.<sup>72</sup> Such aggressive tax planning has led

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<sup>67</sup> Jesse Drucker, *An Accidental Disclosure Exposes a \$1 Billion Tax Fight With Bristol Myers*, N.Y. TIMES (Apr. 1, 2021).

<sup>68</sup> Elisabeth Gamperl, Frederik Obermaier, & Bastian Obermayer, *Just Do It*, *Süddeutsche Zeitung* (Nov. 6, 2017) (available at <https://projekte.sueddeutsche.de/paradisepapers/politik/nike-and-its-system-of-tax-avoidance-e727797/>); see also Gabriel Zucman & Gus Wezerek, *This is Tax Evasion, Plain and Simple*, N.Y. TIMES (Jul. 7, 2021) (highlighting Nike use of its Bermuda subsidiary to shift corporate profits to low-tax jurisdictions).

<sup>69</sup> Edward D. Kelinbard, *Through a Latte Darkly: Starbucks’ Stateless Income Planning*, *Tax Notes* (June 24, 2013); see also Mason, *supra* note 2, at 364–65.

<sup>70</sup> Martin Sandbu, *The Good, the Bad, and the Ugly of the Global Tax Reform Deal*, *FINANCIAL TIMES* (Jul. 4, 2021).

<sup>71</sup> Mason, *supra* note 2, at 376; see also Gravelle, *supra* note 57, at 734.

<sup>72</sup> As Mason describes, “Ireland considered a company to be a tax resident only if it was managed and controlled in Ireland. In contrast, the United States determined residence by place of incorporation. By incorporating subsidiaries in Ireland, but managing and controlling them from the United States, Apple created companies that resided *nowhere* for tax purposes. By shifting income to these stateless subsidiaries, Apple moved a large portion of its global profits to nowhere, thereby escaping tax.” Mason, *supra* note 2, at 358.

commentators to argue that this goes well beyond legitimate tax planning to outright abuse and tax evasion.<sup>73</sup>

These aggressive tax moves have important effects on nations' social policies. Corporate enterprises' tax avoidance has significantly reduced the corporate tax base in the United States and other high-tax jurisdictions, including many European states. The OECD estimates that in 2015 alone, multinational corporations' tax avoidance strategies decreased tax revenue into government coffers by \$100 billion to \$240 billion.<sup>74</sup> This has occurred both because parent corporations have become better at making their profits "foreign" by basing their intellectual property in low-tax jurisdictions and because this corporate flexibility has created a competition between nations to further lower corporate tax rates to attract corporations' paper profits.<sup>75</sup> Tørsløv, Weir, and Zucman found that 40% of MNC's foreign profits were relocated to tax havens in 2015<sup>76</sup>, and Wright and Zucman found that American MNCs have relocated 50% of their foreign profits to tax havens (up from 20% in the 1990s).<sup>77</sup> The level of tax avoidance is so large that

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<sup>73</sup> Gabriel Zucman & Gus Wezerek, *This is Tax Evasion, Plain and Simple*, N.Y. TIMES (Jul. 7, 2021) (arguing that "This is tax evasion, plain and simple. When a company logs billions of dollars in profits in a shell company, it violates the spirit of the Internal Revenue Code's economic substance doctrine.")

<sup>74</sup> *Slicing Up the Pie*, *supra* note 61; Paul Hannon & Kate Davidson, *U.S. Wins International Backing for Global Minimum Tax*, WALL ST. J. (Jul. 1, 2021).

<sup>75</sup> See Thomas Wright & Gabriel Zucman, *The Exorbitant Tax Privilege*, NBER Working Paper, 1–10 (Sept. 2018) (available at [www.nber.org/papers/w24983](http://www.nber.org/papers/w24983)). The authors highlight that the fall in U.S. multinationals foreign effective tax rate is due overwhelmingly to the competition to decrease foreign corporate tax rates and the rise of profit shifting by MNCs to tax havens. *Id.* at 9. See also Thomas R. Tørsløv, Ludvig S. Wier, & Gabriel Zucman, *The Missing Profits of Nations*, NBER Working Paper 24701 (Apr. 2020), at 1–5; Clausing et al, *The Tax Deficit of Multinationals*, *supra* note 91, at 1.; Clausing, *supra* note 62, at 1 (noting that "Multinational firms adroitly and aggressively respond to differential tax treatment, changing the geographic location of both economic activity and profits. Governments, realizing the mobility of global business, set tax policies that explicitly (or often, less transparently) lower tax rates on global firms.").

<sup>76</sup> Tørsløv et al, *The Missing Profits of Nations*, *supra* note 75, at 3.

<sup>77</sup> Wright & Zucman, *The Exorbitant Tax Privilege*, *supra* note 75, at 3 ("[T]he profits booked in tax havens have surged, from 20% of all foreign profits in the first half of the 1990s to 50% in recent years—boosting the after-tax returns of the United States on its foreign assets."). Other estimates are higher. See *Slicing Up the Pie*, *supra* note 61 (noting "The share of American multinationals foreign profits booked in tax havens has risen from 30% two decades ago to about 60% today.").

it now significantly distorts the global balance of trade statistics.<sup>78</sup> The combination of increasing global competition among nations to reduce their corporate tax rates and the greater ease with which corporations can shift profits have effectively halved the global average corporate tax rates over the last 35 years from 49% to 26%.<sup>79</sup>

Lower corporate tax payments together with competition that lowers corporate tax rates have significant social and distributional effects for national economies. The ability of national governments to provide the type of public social programs that its citizens desire in education and infrastructure is undermined by such tax avoidance. The U.S. lost approximately 30% of corporate tax revenues (between \$70 billion and \$111 billion) to MNC's profit shifting in 2012 alone.<sup>80</sup> This loss of tax income places an additional burden on other members of society, either through higher taxes, deficit spending, or budget cuts.<sup>81</sup>

None of the global tax avoidance systems would be possible without enterprise law's robust recognition of subsidiaries as separate legal entities. The ability to transfer assets between subsidiaries is a central dilemma of modern corporate tax policy. For instance, Apple CEO, Tim Cook, can declare in 2013 that Apple pays every dollar it owes to the U.S. Treasury,<sup>82</sup> and be legally correct, even though it had not paid any taxes on overseas income to the U.S. or any national

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<sup>78</sup> Tørsløv et al, *The Missing Profits of Nations*, supra note 75, at 34

<sup>79</sup> Tørsløv et al, *The Missing Profits of Nations*, supra note 75, at 1 ("Between 1985 and 2018, the global average statutory corporate tax rate has fallen by half, from 49% to 24%."); see also Clausing et al, *Tax Deficit of Multinationals*, supra note 57, at 1 (same).

<sup>80</sup> Clausing, *The Effect of Profit Shifting*, supra note 57, at 906 (estimating between \$77 billion - \$111 billion). Gabriel Zucman puts the figure at \$70 billion annually, see Gabriel Zucman, *How Corporations and the Wealthy Avoid Taxes (and How to Stop Them)*, N.Y. Times (Nov. 10, 2017) (noting that "The United States loses, according to my estimates, close to \$70 billion a year in tax revenue due to the shifting of corporate profits to tax havens.")

<sup>81</sup> Clausing, *The Effect of Profit Shifting*, supra note 57, at 905 ("Corporate tax base erosion due to profit shifting is a large and consequential problem. Reduced revenues from one source must be compensated for by higher tax revenues from other sources or lower government spending or increased budget deficits; none of these possibilities is particularly attractive.") This system also privileges MNCs over smaller domestically based corporations, which pay the corporate tax rates in high-tax jurisdiction states.

<sup>82</sup> Danny Yadron, Kate Linebaugh, and Jessica E. Lessin, *Apple CEO Defends Tax Practices as Proper*, WALL ST. J.. (May 21, 2013)

government between 2009-2012.<sup>83</sup> However, it is only the existence of subsidiaries (and the transfer of assets between them) that allows for a principle of “not paying more taxes than you owe” to lead to paying nearly no tax to the corporation’s home nation. Without the existence of the corporate enterprise law, this tax avoidance strategy is not possible.

As Section IV discusses in more depth, measures like the global minimum tax can minimize some of these effects by allowing the country that houses the parent corporation to impose taxes below the minimum rate on the parent.<sup>84</sup>

### C. Shopping Climate Standards

Similar concerns exist for multinational corporations regarding environmental standards, particularly those dealing with carbon emissions. While national governments can demand that companies abide by carbon production limits in their territories, these limits almost never extend to a corporation’s subsidiaries in other nations. The existence of subsidiaries in other jurisdictions facilitates the avoidance of environmental regulations by moving production offshore to territories with lower environmental regulation.

The relocation of manufacturing to lower regulation territories results in “carbon leakage.”<sup>85</sup> Carbon leakage refers to a situation where higher environment standards in some states does not result in cleaner production processes but in the transfer of pollution to other regions.<sup>86</sup> For greenhouse gas emissions, carbon leakage undermines the benefits of climate regulation because the carbon is still emitted into the atmosphere. Carbon leakage can also exacerbate climate concerns

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<sup>83</sup> Danny Yadron, Kate Linebaugh & Jessica E. Lessin, *Apple Avoided Taxes on Overseas Billions, Senate Panel Finds*, WALL ST. J. (May 20, 2013).

<sup>84</sup> See Daniel Bunn, *What’s in the New Global Tax Agreement?*, Tax Foundation (July 1, 2021) (explaining that the global minimum tax includes “an income inclusion rule, which determines when the foreign income of a company should be included in the taxable income of the parent company. The effective tax rate should be “at least 15 percent,” otherwise additional taxes would be owed in a company’s home jurisdiction.”).

<sup>85</sup> Mustafa H. Babiker, *Climate Change Policy, Market Structure, and Carbon Leakage*, 65 J. INT’L ECON. 421 (2004); Jonathan B. Wiener, *Property and Prices To Protect the Planet*, 19 DUKE J. COMP. & INT’L L. 515 (2009); Michael A. Mehling et al, *Designing Border Carbon Adjustments for Enhanced Climate Action*, 113 AM. J. INT’L L. 433, 434-35 (2019) (discussing carbon leakage from high regulation countries to low regulation countries).

<sup>86</sup> See Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 692-93 (1999).

if the production process produces more carbon after the relocation than it did in the original location.<sup>87</sup>

Carbon leakage also includes a political dynamic.<sup>88</sup> Uneven adoption of emission restrictions carbon taxes introduces a free-riding problem. Countries will be incentivized to keep low environmental standards (or not enforcing environmental standards) to draw in producers seeking low production costs. This can put corporations that choose to remain in high regulation territories at a competitive disadvantage in terms of the costs of production. Both factors can undermine support for environmental regulations in countries that are genuinely concerned about climate change.<sup>89</sup> The dual propositions that their higher regulations will not lead to lower global greenhouse gas emissions and that the country may lose its industrial base can deter countries from acting on climate change or weakening the regulations that they propose.

Carbon leakage regularly occurs outside of the corporate enterprise context. For instance, the higher production costs associated with stricter environmental standards can lead companies to change suppliers (from companies in high regulation to low regulation countries) or decide to outsource production of certain goods.<sup>90</sup> However, for multinational corporations that desire to maintain control over their own production processes, the ease in establishing foreign subsidiaries facilitates the escape from home countries' environmental standards.

Some countries are now moving to impose carbon border adjustment measures to mitigate the effects of carbon leakage.<sup>91</sup> The idea of a carbon border measure is to equalize the costs of production between jurisdictions that have high

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<sup>87</sup> Richard B. Stewart & Jonathan B. Wiener, RECONSTRUCTING CLIMATE POLICY: BEYOND KYOTO 83–94 (2003) (arguing that climate measures must be judged on global, not local emissions effects).

<sup>88</sup> See Mehling et al, *Designing Border Carbon Adjustments*, *supra* note 85, at 441 (discussing the political elements of carbon leakage).

<sup>89</sup> For a discussion of some of the political dynamics, see Martin Sandbu, *Time is ripe for EU to start a carbon club*, FIN. TIMES (March 30, 2021)(noting that “Carbon leakage would make carbon pricing self-defeating, not just economically but also politically.”)

<sup>90</sup> See Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1974 (2007).

<sup>91</sup> See Mehling et al, *Designing Border Carbon Adjustments*, *supra* note 85, at 435-36 (discussing the role of carbon border adjustment measures in addressing carbon leakage).



or low carbon regulations.<sup>92</sup> For instance, the European Union has a cap-and-trade system for carbon emissions in which the price for a metric ton of carbon is as high as €50.<sup>93</sup> The EU has proposed a carbon border measure that would tax imports of carbon-intensive goods (e.g., cement, steel, chemicals) from countries that do not have a cap-and-trade or carbon tax system.<sup>94</sup> Importers of a carbon-intensive good would have to pay a tax equal to how much the producer would have had to pay in carbon credits if the good had been produced in the EU<sup>95</sup> Essentially, the imported goods must “buy” sufficient carbon credits at the EU border to cover the emissions produced in the good’s production in the lower regulation country.

While a carbon border measure can moderate the effects of carbon leakage, it does not eliminate the financial incentive that corporate enterprises have to move production to low regulation states.<sup>96</sup> Corporate enterprises can still lower their production costs by relocating production to a subsidiary (or a separate producer altogether) if they plan to export their goods to countries that do not have carbon border measures. The corporate enterprise would have to pay the border tax for the

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<sup>92</sup> *Id.* at 440-48 (discussing how border adjustment measures interact with domestic carbon mitigation measures and seek to level the playing field); *see also* Jennifer A. Hillman, *Changing Climate for Carbon Taxes: Who’s Afraid of the WTO?* (Climate & Energy Policy Paper Series, July 2013) (discussing how to design such measures to be WTO compliant)

<sup>93</sup> Matthew Dalton & Sha Hua, *EU, China Unveil Sweeping Plans to Cut Greenhouse-Gas Emissions*, WALL ST. J. (July 15, 2021) (discussing the European emissions trading system and carbon pricing and noting that European officials aim to raise the price of a metric ton of carbon to over €60.) The United States is also considering a border adjustment mechanism to account for its higher energy standards even though the U.S. does not have a carbon tax or a national cap-and-trade system for carbon emissions. *See* Lauren Fedor & Aime Williams, *Democrats eye carbon border tax to help fund \$3.5tn spending package*, FIN. TIMES (July 14, 2021) (discussing the Democrats plans to include CBAM to help pay for domestic programs).

<sup>94</sup> Brad Plumer, *Europe Is Proposing a Border Carbon Tax. What Is It and How Will It Work?*, N.Y. TIMES (July 14, 2021) (discussing the European plan to require importers of carbon-heavy goods to pay a tax at the border); Mehreen Kah, *EU carbon border tax will raise nearly €10bn annually*, Fin. Times (July 6, 2021) (same).

<sup>95</sup> *See* Dalton and Hau, *supra* note 93 (noting that importing companies would have to audit their domestic production processes to determine the company’s greenhouse gas emissions).

<sup>96</sup> Carolyn Fischer & Alan K. Fox, *Comparing policies to combat emissions leakage: Border carbon adjustments versus rebates*, 64 J. ENVIR. ECON. & MANAG. 199, 199–200, 214 (2012)(discussing the effects on border carbon adjustments and other measures on carbon leakage).

goods entering markets with border measures (although the border measure is designed not to be higher than the costs of producing that good within that state<sup>97</sup>) and still receive financial benefit from the goods exported to non-border measure countries.<sup>98</sup> As a result, the imposition of carbon border measures are unlikely to lead corporate enterprises to redirect production to high regulation jurisdictions if they are producing goods for sale in multiple regions.

Corporate enterprises can also create environmental concerns outside of the climate change context. For instance, corporate enterprises may engage in greater local pollution, often violating community standards, when the parent corporation understands that it will not be held liable for the actions of its subsidiary. Akey and Appel found that corporate subsidiaries increased their production of toxic emissions by 10% post-*Bestfoods*, a case that clarified that parent corporations did not have any special responsibilities for its subsidiaries under the EPA's Superfund rules.<sup>99</sup> Akey and Appel's study provides evidence that corporate parents do not fully internalize the costs of environmental pollution produced by their subsidiaries and, thus, are more likely to engage in greater pollution than they would if they believed they were responsible for the full costs of their enterprises' operations.

In sum, enterprise law allows corporate parents to deflect environmental and tort costs of their global operations as well as engage in tax avoidance. These aspects of the current law have real environmental and social costs. For ESG-minded corporations, enterprise law is constraining, not enabling. In competitive markets, corporate leaders can feel pressure to act less responsibly to maximize returns, shirking ESG goals in the process. As a result, more responsible corporations can suffer competitive harm as less responsible companies gain a market advantage. The next section turns to how government action can be useful to resolve this situation.

#### **IV. RESHAPING ENTERPRISE PRINCIPLES: A DUTY TO MONITOR**

Reshaping corporate enterprise law performs two important functions. First, for corporations that are not ESG-oriented, it provides a floor for regulating business operations that mitigates some of the most socially and environmentally

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<sup>97</sup> See Mehling et al, *Designing Border Carbon Adjustments*, *supra* note 85, at 440–48.

<sup>98</sup> Fischer & Fox, *supra* note 96, at 214 (noting that “Border adjustment for imports only affects the relative price of domestic and foreign goods in the home country.”)

<sup>99</sup> Pat Akey & Ian Appel, *The Limits of Limited Liability: Evidence from Industrial Pollution*, 76 *Journal of Finance* 5 (2021).

detrimental aspects of current enterprise law. Second, for corporations that seek to achieve ESG goals, it is enabling. It provides these firms with a means to be conscientious stakeholders without suffering competitive losses to firms that do not follow suit. Thus, such legislation can minimize some of the worst downside risks of the current enterprise law, while empowering ESG-minded corporations to achieve their goals.

This section sketches some approaches reshaping enterprise law. There is not a single approach that is likely to be effective across all issue areas. Thus, this section discusses two related policy options: (1) imposing greater obligations on the corporation to monitor or control the subsidiary and (2) weakening the legal presumption that the parent and subsidiary children are legally distinct. In both areas, the proposals need to be politically feasible, and both proposals in this section already exist, in some form, in American or European law. Thus, both are in the realm of political possibility, and it is important to work out the contours of these policy proposals to ensure they are better developed when a nation is ready to regulate.<sup>100</sup>

Part A discusses how the FCPA can be a model by implementing ex ante requirements that corporate parents establish basic standards for monitoring their subsidiaries' operations. This imposes a baseline of parental obligations over the corporate enterprise's worldwide activity. Other countries and polities, most notably France and the European Union, have adopted or are considering adopting similar measures. This part also discusses how coordinated action between the European Union and the United States could create minimum standards for corporate enterprises that would apply across major developed markets. Part B discusses how enterprise law may also be reshaped to lessen the legal separateness of corporate enterprises, particularly in the tax area, and discusses how the proposed treaty establishing a global minimum tax partially achieves this goal.

#### **A. Obligations on Parent Corporations to Monitor/Control Their Subsidiaries**

This part outlines how regulations can require parent companies to establish procedures to monitor subsidiaries' operations. Such regulations can cast a broad

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<sup>100</sup> Governments are often unwilling to consider policy proposals in an area until there is a political crisis or scandal that creates popular demands for the government to take action. When such conditions are met, politicians often turn to "on the shelf" policy proposals that provide credible signals that the government is taking meaningful action. See John C. Coffee, *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019 (2012) (discussing why crisis upset normal politics and allow for previously politically impossible reforms).

net over national and international firms by applying to parent corporations that are based in their territory,<sup>101</sup> enter their consumer market,<sup>102</sup> or access their capital markets.<sup>103</sup>

In the area of foreign anti-corruption law, the United States government has long leveraged the internal structure of corporate enterprises to demand that parent companies implement rigorous accounting standards on all of their wholly-owned or majority-owned subsidiaries. As part of the Foreign Corrupt Practices Act (FCPA), the United States government requires any corporation, which lists directly or indirectly on an American exchange, to keep accurate books and records as well as internal controls such that management is able to monitor, control, and accurately report the corporation's assets.<sup>104</sup> These requirements were updated and tightened with the passage of the Sarbanes-Oxley Act in 2002.<sup>105</sup> Additionally, the public corporation's legal requirements under the FCPA's accounting provisions are not restricted to its own books and internal controls. The FCPA requires that corporations ensure that all of their wholly-owned and majority-owned subsidiaries or joint ventures also comply with these accounting provisions.<sup>106</sup>

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<sup>101</sup> It is a basic tenant of territorial prescriptive jurisdiction that governments can demand that corporation that are incorporated within the nation's territory can directly regulate corporation's activities as well as their supervision of their assets.

<sup>102</sup> Several nations have made access to the nation's consumer market a basis for jurisdiction over the corporation's worldwide activities. The most well-known example of this is the UK Bribery Act, which grants the UK government jurisdiction over corporations' possible corruption anywhere in the world based on the company's engagement with the UK market. The Netherlands similarly bases jurisdiction for its regulation over the corporation's use of child labor in its worldwide supply chain on access to the domestic market.

<sup>103</sup> The United States bases the application of the FCPA's accounting and anti-bribery provisions on multinational corporations on the corporation's listing on American public exchanges, either directly or through ADRs. See Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611 (2017).

<sup>104</sup> See Department of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 38-55 (2d ed. 2020).

<sup>105</sup> *Id.* at 42-43.

<sup>106</sup> *Id.* at 43-44. In addition, the FCPA imposes an obligation on parent corporations to act in good faith to implement these types of accounting provision in minority-owned subsidiaries. *Id.* at 44.

Under the FCPA, corporate parents have an obligation to regulate how their subsidiaries do business. This obligation is legally enforceable even in the absence of corrupt actions.<sup>107</sup> A failure to implement these accounting requirements in any part of the corporate enterprise's operations is a free-standing violation of the FCPA, even if the corporation has not engaged in foreign bribery.<sup>108</sup>

The FCPA can serve as a model for how to leverage the corporation's internal form to demand that corporate parents ensure a minimum standard of behavior for all their subsidiaries, wherever located. While the FCPA's ex ante controls are limited to accounting and other internal control provisions, this is not a necessary subject matter constraint on the power of the state to regulate a corporate enterprise. A parental duty of care with regards to subsidiaries can include specific standards, including a due diligence analysis evaluating the likely risks and harms across a range of issues.

A parental duty of care regime would address some of the ESG concerns raised by corporate enterprise law. For instance, a due diligence standard in the shipping industry could require that parents evaluate the liability risks faced by their single-vessel subsidiaries. If the likely harms from an accident are not covered by the subsidiary's assets (the value of the ship), then the parent would be obligated to provide additional insurance. In the environmental area, parent corporations could be responsible for monitoring their subsidiary's compliance with local pollution laws, and subsequently be held directly liable if the subsidiary's operations violated environmental regulations.

National governments can, and some have, made such demands on parent corporations in their jurisdiction. The most notable example of a national law requiring parent corporations to monitor their subsidiaries is the French Duty of Vigilance Law. The French statute imposes an ex ante obligation on corporations of a certain size incorporated in France to develop a due diligence plan for the entire corporate family.<sup>109</sup> The law requires the corporation to have internal procedures that consider the possible human rights and environmental risks of the activities the

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> See Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69 INT'L COMP. L. J. 789 (2020); Sandra Cossart et al, *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. & HUMAN RIGHTS J. 317 (2017).

parent company and its subsidiaries are engaged in worldwide.<sup>110</sup> The failure to develop a plan can itself be a violation of the due diligence law even in the absence of serious harm to human rights or the environment.<sup>111</sup>

This *ex ante* regime creates a means by which the parent corporation can be directly liable for the actions of its subsidiary, notwithstanding the legal separation of family members. It creates liability for the parent for human rights abuse or environmental damage that *the parent could have avoided if it had adequately engaged in due diligence*.<sup>112</sup> Here, the parent corporation's liability is based on its failure to monitor and supervise the subsidiary.<sup>113</sup>

The French law is path breaking in its creation of a legal obligation on parent corporations for their family's activities. However, the law does put the heaviest evidentiary burden on the plaintiff, requiring the plaintiff to prove that (1) there was damage from the subsidiary's actions and (2) the parent could have prevented such damage by undertaking the required due diligence analysis.<sup>114</sup> This is significantly different from a hypothetical alternative regime, which would require the corporation to show that it had taken adequate measures. For instance, the law could create a liability regime for the parent with a due diligence defense.<sup>115</sup> Such a regime would be closer to the FCPA, which has strict liability and permits the corporation to argue that it had an "adequate compliance program" as a

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<sup>110</sup> Bueno & Bright, *supra* note 109, at 11-13. The law applies to corporations incorporated in France that employ (directly or through their subsidiaries) more than 5000 people in France or more than 10,000 people worldwide. Cossart et al, *supra* note 109, at 320.

<sup>111</sup> Cossart et al, *supra* note 109, at 320-21.

<sup>112</sup> Bueno & Bright, *supra* note 109, at 11-13.

<sup>113</sup> The French Parliament has recently clarified that Paris Civil Court has jurisdiction to enforce the law. See *Duty of Vigilance: the French Parliament confers jurisdiction on the Paris Civil Court only*, JDSUPRA (Nov. 3, 2021) (available at <https://www.jdsupra.com/legalnews/duty-of-vigilance-the-french-parliament-1092306/>).

<sup>114</sup> Bueno & Bright, *supra* note 109, at 13.

<sup>115</sup> *Id.*

mitigating factor in sentencing,<sup>116</sup> or the UK Bribery Act, which adopts a strict liability regime with an “adequate procedures defense.”<sup>117</sup>

The European Union is currently drafting its own duty of care legislation for corporate enterprises (as is the Netherlands).<sup>118</sup> Germany has recently passed similar legislation that will come into force in 2023.<sup>119</sup> The EU legislation would cover all public companies incorporated in Europe as well large private corporations<sup>120</sup> and would mandate that these corporations engage in due diligence regarding their enterprise’s worldwide human rights and environmental impacts.<sup>121</sup> The law would be enforced through civil fines as well as the possibility of being excluded from bidding on public procurement contracts.<sup>122</sup>

The United States could make a similar law applicable, like the FCPA, to all corporations that list on American exchanges. The parent corporation would have an obligation to make sure that its subsidiaries investigate and adopt policies that consider its operational liabilities and environmental impacts and take reasonable measures to avoid harm. Further, the parent corporation would be liable for the subsidiary’s failure to undertake such an analysis but have access to a due diligence defense. This regime would maintain the legal separation between the parents and subsidiary while also imposing an oversight obligation on parents. An oversight obligation balances the benefits of enterprise law’s extension of limited liability to subsidiaries with a duty on parents not to exploit this structure.

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<sup>116</sup> See Sean J. Griffith, *Corporate governance in an era of compliance*, 57 WM. & MARY L. REV. 2075 (2015) (discussing the development of the adequate compliance defense in the U.S. sentencing guidelines).

<sup>117</sup> See Jon Jordan, *The adequate procedures defense under the UK Bribery Act: A British idea for the foreign corrupt practices act*, 17 STAN. J.L. BUS. & FIN. 25 (2011).

<sup>118</sup> Lavanga Wijekoon et al, *Europe and Canada Seek to Mandate Human Rights Due Diligence and Transparency Obligations on Companies and their Global Partners*, LITTLER INSIGHTS (Oct. 28, 2021).

<sup>119</sup> *German parliament passes act on corporate due diligence in supply chains*, CLIFFORD CHANCE INSIGHTS (June 15, 2021). The law creates due diligence obligations for the corporate enterprise and applies to all Germany companies that employ more than 3000 people. *Id.*

<sup>120</sup> See EU Draft Directive, Art. 2 (available at [www.europarl.europa.eu/doceo/document/TA-9-2021-073\\_EN.pdf](http://www.europarl.europa.eu/doceo/document/TA-9-2021-073_EN.pdf))

<sup>121</sup> Wijekoon et al, *supra* note 118, at 1.

<sup>122</sup> See EU Draft Directive, Art. 18.

Such legislation is viable. First, by imposing the obligation on all publicly listed corporations, the law would bind American and non-American companies, making the law competition neutral. For corporations competing in global markets, the relevant question is less about how much regulations cost and more about how much they asymmetrically cost the company relative to its competitors. If the costs of a proposal are equally costly on most public companies, then political resistance to the proposal is lessened. Almost all major public corporations (American and non-American) list on American exchanges, at least indirectly.<sup>123</sup> Because of the dominance of American capital markets, the U.S. government can cast a wide net over most large public corporations and bind them all to the same due diligence rules. Such a competition-neutral application of the FCPA has allowed the United States to be the leading enforcer of foreign anti-corruption laws for American and non-American public corporations without putting American corporations at a strategic disadvantage, and, thereby, maintain strong political support for robust global anti-corruption enforcement.<sup>124</sup> A similar strategy is possible here.

Second, the proposal's political viability would increase if it were adopted in coordination with European Union-wide regulation. This would reinforce the competition-neutral nature of the regulation. The EU legislation would cover any European public corporation that did not list on an American exchange as well as large private European corporations.<sup>125</sup> Together, American and EU legislation could cast a broad jurisdictional net creating a common standard for corporations operating in the largest developed markets.<sup>126</sup>

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<sup>123</sup> Firms can list indirectly on American exchanges through American deposit receipts (ADRs). The SEC has determined that ADR listings is sufficient to qualify as listing on an American exchange under the FCPA. See General Rules and Regulations, Securities Exchange Act of 1934, 48 Fed. Reg. 46,738, 46,739 (Oct. 14, 1983) (modifying 17 C.F.R. § 240.12g3-2).

<sup>124</sup> See Brewster, *supra* note 163, at 108 (exploring the role of a competition neutral enforcement strategy in maintaining political support for the robust enforcement of the FCPA).

<sup>125</sup> See EU Draft Directive, *supra* note 120, Art. 2.

<sup>126</sup> Once there are enough politically powerful "foreign" companies covered by these laws, there may be greater momentum to pass similar laws in other states to cover the company's domestic competitors. For a theoretical discussion of such a dynamic, see Sean J. Griffith & Thomas H. Lee, *Toward an Interest Group Theory of Foreign Anti-Corruption Laws*, 2019 U. ILL. L. REV. 1227 (2019).



*Substitution Effects? The Choice between the Corporate Enterprise and Supply Chains*

There may be some concern that due diligence laws will lead to substitution effects, where corporate enterprises spin off their subsidiaries in favor of supply chains with unaffiliated companies. Such heavy reliance on supply chains, instead of subsidiaries, are common in the apparel industry but are less common in more high-value industries. Concerns about devolving governance from corporate enterprises to supply chains should not prevent regulation for two reasons. First, a corporation's decision of whether to produce a good or service within the corporate enterprise or to rely on outside contractors involves many factors, regulatory control being only one.<sup>127</sup> Internal firm production and distribution provide corporate enterprises with many benefits, including strategic control, the ability to make high fixed cost investments, quality assurance, IP protection, control over transfer pricing, and myriad other issues. At the margin, greater liability for corporate enterprises' operations will motivate firms to devolve more of their operations to independent entities. However, the benefits of outsourcing must be weighed against the benefits of internal operations. For most major multinational corporations, shifting from the high level of internal governance control that the parent has over subsidiaries to a contract-based relationship with an independent firm is not a realistic option given their business models. For instance, Royal Dutch Shell cannot realistically devolve its corporate enterprises into a set of independent supply chain contractors.

Second, supply chains are unlikely to remain outside national regulations for long. There are already several transparency-oriented regulations covering supply chains, such as the California Transparency in Supply Chains Act<sup>128</sup> and the Transparency in Supply Chains provision of the British Modern Slavery Act.<sup>129</sup> Other laws are going further, directly regulating supply chains' practices on specific issues. For instance, the Dutch Child Labor Due Diligence Law is set to come into effect in 2022. The law obligates any company that sells or supplies goods or services to Dutch consumers to produce a plan detailing how they will monitor their

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<sup>127</sup> The question of whether to produce internally or contract on the market is itself analyzed in the large literature on "the theory of the firm."

<sup>128</sup> For an analysis of the California law and the effectiveness of transparency regimes, see Adam S. Chilton & Galit Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT'L L. 1 (2017).

<sup>129</sup> See UK Home Office, *Transparency in Supply Chains: A Practical Guide*.

worldwide suppliers to ensure that child labor is not used in their supply chains.<sup>130</sup> The Dutch law does not create private rights of action, but government regulators can fine companies that fail to develop an adequate plan.<sup>131</sup> The law provides for fines of up to 10% of the companies worldwide revenue and up to two years imprisonment of the responsible corporate officer.<sup>132</sup> The new German due diligence law also applies to supply chains as well as subsidiaries.<sup>133</sup> Following the Dutch and German laws, there also seems to be momentum at the EU level in imposing due diligence requirements on supply chains as well as corporate enterprises.<sup>134</sup>

Consequently, the substitution effect between the corporate enterprise structure and supply chains should not prevent governments from regulating firm's internal operations. While due diligence laws may increase the incentive to move to supply chains on the margins, this margin is unlikely to move the status quo much for most major corporations.

## **B. Weakening the Corporate Enterprise's Legal Separation in Tax**

A second approach to addressing corporate families is to break down the legal separation between parent corporations and their subsidiaries more openly. Although a corporate enterprise can maintain individual legal personalities under different national legal regimes, they often function as a unitary economic unit.<sup>135</sup> In some circumstances, governments have regulated corporate groups as an

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<sup>130</sup> Allen & Overy Brief, *Mandatory human rights due diligence law: the Netherlands led the way in addressing child labor and contemplates broader action* (Sept. 2, 2020)

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Germany Passes Supply Chain Due Diligence Act*, Covington Alert (July 21, 2021) (available at <https://www.cov.com/en/news-and-insights/insights/2021/07/germany-passes-supply-chain-due-diligence-act>) (discussing how the German law applies to subsidiaries and first tier suppliers).

<sup>134</sup> *Id.*, Alan Beattie, *Trade Secrets: EU seeks to turn multinationals into labour rights enforcers*, FIN. TIMES (Dec. 10, 2020)(discussing the political dynamics of enacting EU level rules once national governments have acted).

<sup>135</sup> See discussion in Section I.A.

economic unit, establishing a presumption that the corporate family acts as one unless the parent corporation can show that its subsidiary acts autonomously.<sup>136</sup>

EU competition law is the most prominent example of where the legal separation between parents and subsidiaries is discounted in favor of a more functional analysis that focuses on the economic goals of the entity.<sup>137</sup> The European Court of Justice (ECJ) has long held that subsidiaries' actions can be imputed to parent corporations under its "single economic entity" doctrine.<sup>138</sup> Indeed, as far back as 1969, the European Commission has held the parent corporation liable for the anticompetitive actions of the extended corporate family.<sup>139</sup> The ECJ developed its jurisprudence regarding when subsidiaries' actions could be imputed to parent corporations based on "decisive control" throughout the 1970s,<sup>140</sup> and then established a strong presumption that parents exercised such control in 2009 in *Akzo Nobel v. Commission*.<sup>141</sup> To overcome the presumption of control, the parent corporation must show that its subsidiary acts "independently on the market."<sup>142</sup> If a parent corporation is not able to overcome this presumption (and corporations often argue that it is not rebuttable in fact<sup>143</sup>), then the parent corporation and the subsidiary are jointly and severally liable for

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<sup>136</sup> Andriani Kalintiri, *Revisiting Parental Liability in EU Competition Law*, 43 EUROPEAN L. REV. 145 (2018); Carsten Koenig, *Comparing Parent Company Liability in EU and US Competition Law*, 41 WORLD COMPETITION 69 (2018); Carsten Koenig, *An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law*, 13 J. COMP. L. & ECON. 281 (2017).

<sup>137</sup> Kalintiri, *supra* note 136, at 147–156; Koenig, *supra* note 136, at 284–90.

<sup>138</sup> Koenig, *supra* note 136, at 284–90; Koenig, *Comparing Parent Company Liability*, *supra* note 136, at 72-76.

<sup>139</sup> Kalintiri, *supra* note 136, at 147.

<sup>140</sup> Koenig, *Single Economic Entity*, *supra* note 136, at 284-90; Koenig, *Comparing Parent Company Liability*, *supra* note 136, at 72-76.

<sup>141</sup> Kalintiri, *supra* note 136, at 152-156; Koenig, *Single Economic Entity*, *supra* note 136, at 284-90.

<sup>142</sup> Koenig, *Single Economic Entity*, *supra* note 136, at 288-89; Kalintiri, *supra* note 136, at 146-47.

<sup>143</sup> Koenig, *Single Economic Entity*, *supra* note 136, at 288. Kalintiri, *supra* note 136, at 145-47.

any violations of E.U. competition law.<sup>144</sup> Although this dismissal of corporate form in legal analysis is currently limited to competition law,<sup>145</sup> the existence of this long-standing exception for corporate formalities demonstrates that not only is it politically possible to reach such an outcome, but also that the result is consistent with the European fundamental rights analysis.<sup>146</sup>

There are strong arguments for extending this analysis outside of the competition field to international tax. The ability of multinational corporations to engage in tax avoidance through their corporate structure has led multiple academics to advocate for treating multinational corporations as a single entity, effectively ignoring the legal separateness of subsidiaries for tax purposes.<sup>147</sup> For example, Reuven Avi-Yonah argues that multinational corporations should be treated as “a single unified enterprise controlled by the parent,” which is a more realistic approach because multinational corporations “operate as a unitary business in most cases and most decisions are made at the parent level.”<sup>148</sup> Similarly, Clausing, Saez, & Zucman argue parent corporations should be taxed by their home governments at the minimum rate for each jurisdiction their subsidiaries operate in.<sup>149</sup> Treating the multinational corporations as a single enterprise run by the parent would end multinational corporations’ ability to create a competition for lower taxes in other jurisdictions and create a more positive competition between nations for investment based on infrastructure, access to education, and research funding.<sup>150</sup>

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<sup>144</sup> Koenig, *Single Economic Entity*, *supra* note 136, at 288. Kalintiri, *supra* note 136, at 145-47.

<sup>145</sup> Koenig, *Single Economic Entity*, *supra* note 136, at 284.

<sup>146</sup> Koenig, *Single Economic Entity*, *supra* note 136, at 288. Kalintiri, *supra* note 136, at 145-47.

<sup>147</sup> See Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Article on Comity, Extraterritoriality, and Harmonization*, 42 COLUMBIA J. TRANSNAT’L TAX J. 5, 23–24 (2003); Reuven S. Avi-Yonah, *Taxing Multinationals*, *supra* note 25, at 141–47 (2016); Clausing et al, *supra* note 57, at 4–5.

<sup>148</sup> Avi-Yonah, *Taxing Multinationals*, *supra* note 25, at 142; see also Avi-Yonah, *supra* note 120, at 23–24 (arguing that the “solution is for home countries to tax their MNEs on an enterprise-wide basis, while granting a credit for source country taxation.”)

<sup>149</sup> Clausing et al, *Ending Corporate Tax Avoidance and Tax Competition*, *supra* note 57, at 4-5 (arguing that the government that hosts the parent corporation should “play the role of tax collector of last resort: it would collect the taxes that foreign countries chose not to collect.”)

<sup>150</sup> *Id.* at 5.

Under these proposals, the residence of the parent company would be where the management and/or board of directors of the parent are located, not where the parent is incorporated.<sup>151</sup> While incorporation abroad is easy, most MNCs would probably not move their management operations and boards out of the U.S. or other G20 nations to low-tax jurisdictions.<sup>152</sup>

### *Push for a Global Minimum Tax*

Countries are now starting to break down the barriers between parents and foreign subsidiaries in international taxation with the global push to adopt the OECD's proposal for a global minimum tax.<sup>153</sup> The core of the minimum global tax proposal is a requirement that the parent corporation pay a minimum tax on the multinational family's global profits, instead of allowing each subsidiary to be governed by the national jurisdiction in which the subsidiary resides.<sup>154</sup> The current global framework agreed to by the G7 and signed onto by 130 countries at the OECD involves a global minimum tax of 15% on MNCs with annual revenues over €750 million.<sup>155</sup>

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<sup>151</sup> *Id.* at 13 and fn. 23 (discussing anti-inversion rules.); *see also* Avi-Yonah, *Taxing Multinationals*, *supra* note 25, at 147 (arguing that the corporate residence of the parent should be the corporate headquarters).

<sup>152</sup> Avi-Yonah, *Taxing Multinationals*, *supra* note 25, at 147 (arguing that MNCs parents are based where their research and development is and thus are unlikely to relocate to tax havens).

<sup>153</sup> Reuven S. Avi-Yonah, *The New International Tax Framework: Evolution or Revolution?*, ASIL INSIGHT (July 7, 2021) (discussing the evolution of tax negotiations regarding Base Erosion and Profit Shifting (BEPS) at the OECD and how that forms the basis for the current framework for reforming international tax rules); *see* Bunn, *supra* note 84 (discussing the OECD "Pillar 2" proposal for a global minimum tax).

<sup>154</sup> Bunn, *supra* note 84, at 2–3.; *Slicing Up the Pie*, *supra* note 61 (discussing the Pillar 2 proposal).

<sup>155</sup> Emma Agyemang, Chris Giles, & Jonathan Wheatley, *Global Tax Deal Faces Challenges of Detail, Implementation and Holdouts*, FIN. TIMES (July 2, 2021) (discussing the scope of the global minimum tax). While the proposal currently establishes a threshold of €750 million annual revenues to build consensus, many governments expect for it to later be broadened to include more multinational corporations. *See Slicing Up the Pie*, *supra* note 61 (quoting a representative to the OECD that governments expect to include more multinationals over time.)

As momentum for a global minimum tax on corporations grows, countries are effectively weakening the presumption on legal separation between corporate families.<sup>156</sup> The motivating principle of the global minimum tax is that corporate enterprises should not be able to lower their tax burden by transfers to foreign subsidiaries.<sup>157</sup> More realistically, the global minimum tax puts a limit on (not an end to) the ability of corporate enterprises to lower their tax burdens by looking past the formal legal distinctions. It holds the parent accountable for paying a minimum level of tax in each country where the corporate enterprise has a subsidiary by directly taxing the parent for any underpayment by the subsidiary.<sup>158</sup>

The global minimum tax is likely to raise the level of taxes that governments can raise from corporations. The OECD estimates that the global minimum tax would raise an additional \$150 billion a year for governments.<sup>159</sup> The United States, as the host to the parent companies of most multinationals, is likely to be the biggest beneficiary.<sup>160</sup> While there certainly are distributional winners and losers from a global minimum tax (low-to-no-tax jurisdictions are expected to lose tax income and demand for local services), limits on the national competition to drive down corporate tax rates increases the level of tax that corporations will be expected to pay *somewhere* going forward. This allows governments to demand a minimum level of tax revenue from corporations and, thereby, can decrease the tax burden on other members of society. As Janet Yellen summarized in her advocacy for the global minimum tax, it makes “sure that governments have stable tax systems that raise sufficient revenue to invest in essential public goods and respond to crises, and that all citizens fairly share the burden of financing government.”<sup>161</sup>

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<sup>156</sup> *Slicing Up the Pie*, *supra* note 61 (noting that “the OECD’s [Pillar Two proposal] does take the radical step of considering companies as a whole, rather than separated into affiliates”).

<sup>157</sup> Mason, *supra* note 2 at 355-64.

<sup>158</sup> Bunn, *supra* note 84, at 2–3.

<sup>159</sup> Agyemang et al, *supra* note 155, at 1; Liz Alderman, Jim Tankersly & Eshe Nelson, *U.S. Proposal for 15% Global Minimum Tax Wins Support From 130 Countries*, N.Y. TIMES (July 8, 2021).

<sup>160</sup> Agyemang et al, *supra* note 155, at 2. Depending on how MNCs respond to this change, there will be distributional issues between nations.

<sup>161</sup> James Politi, *Yellen Calls for Global Minimum Corporate Tax*, FIN. TIMES (April 5, 2021).

In sum, this Section sketches ideas of reshaping corporate enterprise law to hold parent corporations to a higher degree of responsibility for their subsidiaries both in tort liability, environmental law, and in tax. Such policy reformers are ESG enabling for firms that seek to be conscientious stakeholders but wish to avoid suffering market losses to less responsible competitors.

### *Conclusion*

ESG responsibility has become overwhelmingly popular topic of discussion in popular and academic debate about the role of corporations in modern society. The discussion takes seriously the idea that corporations should be accountable for the social, environmental, and economic consequences of their business operations and puts an obligation on them act as responsible stakeholders in the communities in which they operate. Yet, for all the discussion of ESG initiatives, corporate law scholars remain skeptical of the impact of ESG concerns on corporate operations.<sup>162</sup> They argue that the pressure to produce competitive returns will continue to discipline corporate leaders and make most ESG pledges mere public relations.<sup>163</sup>

This Article seeks to start a conversation about the role of enterprise law in achieving meaningful ESG progress. The current debate largely ignores how enterprise law can undermine ESG goals. One of the primary contributions of this Article has been to recognize how the corporation's internal form creates social and environmental concerns. Current enterprise law effectively advantages less responsible firms by allowing them to deflect tax, environmental, and other tort liability, thereby gaining a competitive edge over more responsible firms. Addressing this aspect of enterprise law is a necessary first step to achieving meaningful ESG goals.

This Article's other contribution has been to sketch out how current law could be reshaped to limit these harms. These laws can set a floor for minimum corporate enterprise responsibility for all corporations. In doing so, the reforms can also empower corporate leader that want to achieve ESG goals by minimizes their losses to competitors who do not follow suit.

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<sup>162</sup> See discussion in Section II.A.

<sup>163</sup> *Id.*