FILE NAME: Eternit (ETER)

DATE: 2012

DOC#: ETER074

DOCUMENT DESCRIPTION: Social & Legal Studies Journal Article - Linking Corporate Power to Corporate Structures

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Social & Legal Studies published online 25 September 2012
DOI: 10.1177/0964663912458447

Article

Social & Legal Studies
1–25

DOI: 10.1177/0964663912458447
sls.sagepub.com
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Linking Corporate Power to Corporate Structures: An Empirical Analysis

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Abstract

Corporations are contested legal entities. Many see them merely as vehicles for financial and business elites to acquire and maintain unfettered power. In this paper, I look at the relationship between corporate power and corporate structures, and argue that corporate power is importantly located in the exploitation of the principles of separate personality of corporate entities and shareholder limited liability. Courts' unwillingness to pierce the corporate veil and to extend the liability of parent company/principal to the acts of a subsidiary/agent contributes to enabling the creation and exploitation of corporate networks. This is particularly problematic when the corporate creditors are tort victims, who do not assent to limited liability through voluntary transactions. The argument is supported by empirical evidence of the strategies of three asbestos firms to avoid accountability for their tortious conduct. These strategies were curbed only by recourse to criminal law by holding corporate personnel directly responsible for their corporate activities in question and by boycott and political mobilization.

Keywords

Corporate law, limited liability, asbestos compensation, off shoring, tort creditors, corporate power, transnational corporations

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Corporate Power and Tort Creditors

Corporations are contested legal entities (Fleming and Spicer, 2007; Bose and Lyons, 2010). Some consider corporations to be necessary ingredients for the flourishing of private ventures. Others are critical of their role in society. A strand of critiques in particular sees them as vehicles for financial and business elites to acquire and maintain unfettered power. Canadian legal scholar Joel Balkan talks about corporations' pathological pursuit of profit and power, and states that corporations now govern society (Bakan, 2005: 25). Corporations' power and influence are further seen as a threat to 'the expectations of cosmopolitan democracy'(Macleod and Lewis, 2004: 77), especially considering that transnational corporations 'remain largely unaccountable within international law for human rights abuses'(Farnsworth, 2010: 165). In *The Assault on Social Policy*, Roth (2002: 33) defined the corporate-dominated systems as 'corpocracies'. Echoes of this position can certainly be found in the voices of the Occupy Movement, which since 2011 has highlighted the link between corporations and rising inequality, decreasing mobility, and rampant economic insecurity in the United States and elsewhere.

In this paper, I look at the relationship between corporate power and corporate structures, and argue that corporate power is importantly located in the exploitation of the principles of separate personality of corporate entities and shareholder limited liability (Blumberg, 2000: 301–304). Courts' unwillingness to pierce the corporate veil and to extend the liability of parent company/principal to the acts of a subsidiary/agent contributes to enabling the creation and exploitation of corporate networks. This is particularly problematic when the corporate creditors are tort victims as they often prone to be vulnerable subjects both because they do not assent to limited liability through voluntary transactions (Alexander, 1992: 390) and because they may have suffered significant bodily harm. Corporations' incentive to avoid accountability for tort liabilities generated by their operations stems from corporations' primary object, which is to 'safeguard or promote the fundamental needs of business' (Holden and Lee, 2009: 329). The tort victim/corporate entity offers an opportunity to (a) study corporate power that undermines the expectations of democracy and (b) investigate the role that corporate law has played in generating opportunities for corporations to acquire, maintain, and exercise such power. Is the corporate structure in itself a resource that corporations can use to acquire, maintain and exercise power and influence? The argument is supported by empirical evidence of the strategies of three asbestos firms to avoid accountability for their tortious conduct. These strategies were curbed only by recourse to criminal law by holding corporate personnel directly responsible for their corporate activities in question and by boycott and political mobilization.

What is power? Power is a complex and contested concept. As Lukes (2005: 30) pointed out, it is certainly 'ineradicably value-dependent' as 'its very definition and any given use of it, once defined, are inextricably tied to a given set of (probably unacknowledged) value-assumptions that predetermine the range of its empirical application'. Mindful of this methodological premise and the inability to articulate all value-assumptions that frame my research, I only sketch the operative definition of power that I have used to frame the case studies and analyse empirical evidence. This definition is based on Lukes's account of power as a three-dimensional concept. This view sees power as a powerful actor's ability to shape her relation with a non-powerful actor by (a) influencing a decision-maker to enforce an outcome that is contrary to non-powerful actors' interests; (b) imposing the political agenda of the process that eventually determines an outcome that is contrary to non-powerful actors' interests; and (c) shaping a socially structured and culturally patterned environment as well as institutional practices that may be manifested by inaction on the part of non-powerful actors, who decide not to pursue a certain agenda (Lukes, 2005: 27).

The first dimension echoes Dahl's writings (1957: 202–203) and his emphasis on measuring the respective power of actors who compete in the political process (in the case of asbestos compensation, in the legal process) for a certain outcome. Polsby (1963: 4) conceptualized this conception of power, 'the capacity of one actor to do something affecting another actor, which changes the probable pattern of specified future events'. The second dimension looks beyond decision-making at the ways in which the powerful control the agenda of politics, potential issues are kept out of the political process and 'decisions are prevented from being taken on potential issues over which there is an observable conflict of (subjective) interests' (Lukes, 2005: 20). The third dimension of power looks at how manipulation and authority are used by the powerful to shape the wishes and desires of the non-powerful, which may result in non-powerful actors' inaction (Lukes, 2005: 27). This dimension stresses the link between power and social structures, cultural forces and institutional practices.

While questions of corporate structure in the context of corporate power have certainly been narrowly construed in legal scholarship – the focus being narrowly tailored on the 'piercing the corporate veil' doctrine and the consequential judicial power to disregard the corporate entity and hold shareholders personally liable for the debts of the 'disregarded' entity – scholars of sociology of business and society have paid attention to the issue of the structural power of corporations. These scholars define it as the ability of businesses to make free investment decisions by mobilizing corporate investment (Farnsworth and Holden, 2006: 474–475). For instance, Holden and Lee (2009: 329) point out that '[m]oving a manufacturing plant to another (perhaps lower cost) country increases corporate structural power'. The same scholars have theorized and demonstrated that, 'where structural power is insufficient to protect a corporation's interests, corporations may turn to agency power', which consists of 'direct business inputs into social policy'(Holden and Lee, 2009: 330)

The case studies presented in this paper discuss how three asbestos firms used their corporate structures to acquire and maintain corporate power. Each of them is a transnational asbestos conglomerate that shaped and reshaped its corporate structures to escape accountability for tort liability stemming from manufacturing products containing asbestos. The case studies are rich and multilayered thick descriptions that study how corporations create and maintain power in the context of various business decisions, political environments and legal systems. The notion of a 'thick description' refers to empirical and analytical approaches that identify the study of a human behaviour that explains both the behaviour and its context so that behaviour becomes meaningful to an outsider by virtue of knowing the context in which behaviour takes place. Originally developed in the field of anthropology (Geertz, 1973; Jenks, 2002), thick descriptions are routinely used by socio legal scholars (Hertogh, 2009; Jacob and Prainsack, 2010; Johnstone and

Quirk, 2012; Zedner, 1995) to develop cultural analyses of legal behaviour. For instance, Johnstone and Quirk (2012) recently used them to provide the 'full picture' of reparations for historical wrongs.

Asbestos Companies and Their Liabilities

Asbestos is a naturally occurring mineral with such extraordinary insulating properties that, from the early days of its modern use, it was labelled as the 'magical' mineral (Tweedale, 2000). Its remarkable insulating properties, as well as its abundant, relatively cheap availability and its adaptability, made this product an almost indispensable ingredient of the wave of industrialization that has taken place in many nations since the 1890s. Asbestos use became so widespread that its presence is truly ubiquitous and it can be found in everything from houses, cars, ships and planes to cigarettes.

A well-established body of medical evidence shows, however, that asbestos is a highly toxic substance: exposure to asbestos fibres may cause various respiratory problems, eventually leading to death from lung cancer or from mesothelioma, a rare and untreatable form of cancer of the pleura. An estimated 20,000 asbestos-related lung cancers and 10,000 cases of mesothelioma, an invariably deadly form of cancer, occur annually across the population of Western Europe, Scandinavia, North America, Japan and Australia. The asbestos epidemic kills one person every two hours in the United States, one every four hours in the UK, three every day in Italy and Germany, two every day, in France, Japan and Australia, and one a day in the Netherlands.

Evidence of asbestos toxicity became public despite industry efforts to conceal it. Business historians have demonstrated that asbestos firms are substantially responsible for the surge in asbestos-related disease in modern times: the industry has concealed, misrepresented, underplayed and manipulated evidence of asbestos toxicity since the early twentieth century (McCulloch and Tweedale, 2008). While employing thousands of workers in asbestos production, the industry has tried to minimize knowledge of asbestos toxicity by withdrawing key medical information, lobbying governments, defending claims brought against them in courts, relocating their business to escape liabilities, filing for bankruptcy, settling cases, setting up voluntary compensation schemes and paying damages to asbestos victims (usually only after victims had secured verdicts after extensive litigation). In these ways, asbestos firms have made use of various corporate screens to limit their accountability with regard to the asbestos epidemic, and, with regard to firms' contribution to the emergence of the asbestos epidemic, we know that, before the public became familiar with asbestos toxicity, the industry successfully coordinated efforts to mislead the public about the real dangers of asbestos, pushed back regulation of the industry, and ultimately caused unnecessary deaths and suffering. In other words, asbestos firms have avoided confronting their liabilities for decades by dismissing, quietly compensating and avoiding *tout court*, legal claims for compensation (Boggio, 2013).

Notwithstanding corporate resistance and opposition, asbestos compensation has become progressively routinized in the last few decades, throughout the Western world, albeit with substantial variation between countries (Boggio, 2013). For the past 20–40 years, companies have faced an increasing number of claims, as it is litigation that has largely driven the routinization of asbestos compensation, which has facilitated victims' claim consciousness and has, in turn, eased access to legal redress. The number of asbestos deaths nevertheless continues to increase (in the Western industrialized world, the peak of the epidemic is predicted to be between 2015 and 2020). However, asbestos firms have not been passive in the face of these developments. On the contrary, they have designed and deployed various legal strategies to avoid full accountability under the law. The three sections that follow look more closely at how three asbestos firms (James Hardie, Cape and Eternit) pursued these legal strategies by implementing changes to the corporate structures to minimize their liabilities and avoid enforcement of adverse tort judgements.

James Hardie's Machiavellian Corporate Restructuring

In Australia, James Hardie is synonymous with asbestos. A leader in fibre cement building products with operations in Australia, the United States, New Zealand, Indonesia, Chile, and the Philippines, James Hardie mined, manufactured and distributed the majority of Australian asbestos, thus dominating the domestic asbestos industry for decades. The firm assumed the parent/subsidiary structure in the 1930s. James Hardie Industries Limited (JHIL) held all of the shares of two subsidiaries, James Hardie and Company Pty Limited (Coy) and Jsekarb Pty Limited (Jsekarb), which run the operations of the business. Coy manufactured fibrecement building products and asbestos cement pipes and Jsekarb manufactured brake linings for motor vehicles, railway wagons and locomotives (Jackson, 2004: 123). The company reached the peak of its growth by the mid 1950s, when 'more than half of the new homes built in New South Wales were made from Hardie's asbestos cement sheets' (McCulloch, 2007: 113).

Since its business generated significant asbestos liabilities, Hardie began being targeted by lawsuits in the 1970s. In a matter of a few years, Hardie realized the magnitude of its asbestos liabilities and began enacting stratagems to avoid accountability. The first stratagem involved settling cases of union members for small amounts. Thus, in 1979, Hardie and the Federated Miscellaneous Workers Union agreed that any Hardie employee who was diagnosed with an asbestos disease recognized by the Dust Disease Board of New South Wales would receive an out-of-court lump sum award of AUD$14,000 (McCulloch, 2007: 119). The stratagem, however, was ineffective. Rather than turning off victims, the agreement invited victims to come forward. Asbestos lawsuits increased dramatically and, from 1981 to 2000, James Hardie paid out over AUD$130m to more than 2000 asbestos victims. This wave of cases led Hardie to enact a second stratagem involving a substantial amount of conglomerate restructuring and effectively shielding Hardie from asbestos liabilities for a decade.

This stratagem was put to work in 1996 and consisted of four stages. The first-stage (1996–2001) strategy entailed modifying the existing conglomerate structure (Figure 1) by transferring the lucrative operating business (that is all non-asbestos assets of Coy and Jsekarb) to James Hardie NV (JHNV), a subsidiary of RCI Pty Limited, a Dutch company that was fully owned by JHIL. At the end of this stage, JHIL, which retained all shares in the two subsidiaries, owned two empty boxes soaked in asbestos liability (Figure 2). The second stage (February 2001) entailed Jsekarb becoming a subsidiary

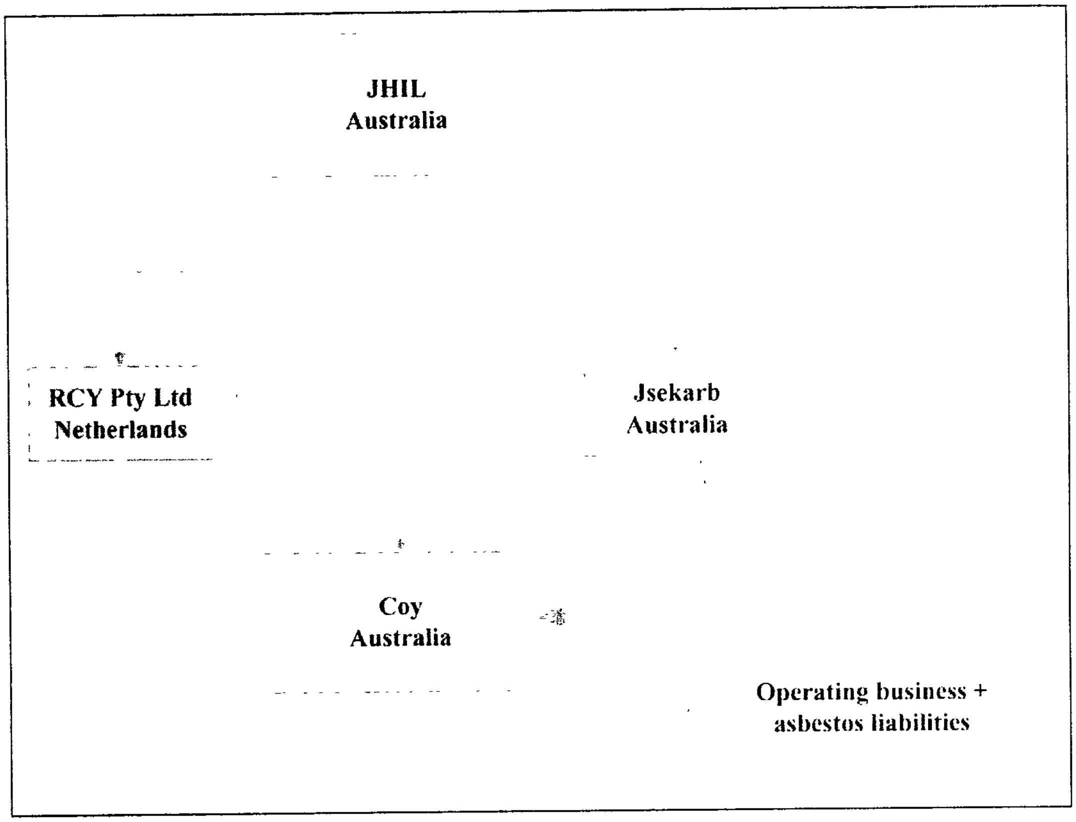

Figure 1. James Hardie: pre-1996.

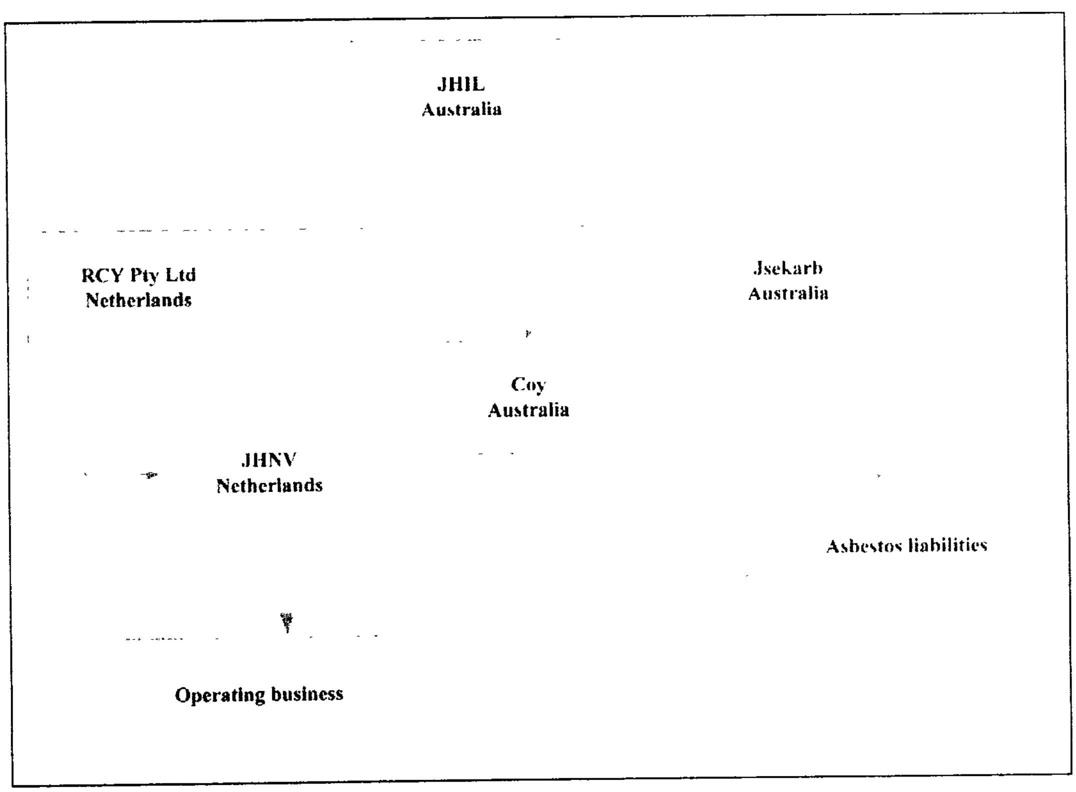

Figure 2. James Hardie: 1996–2001.

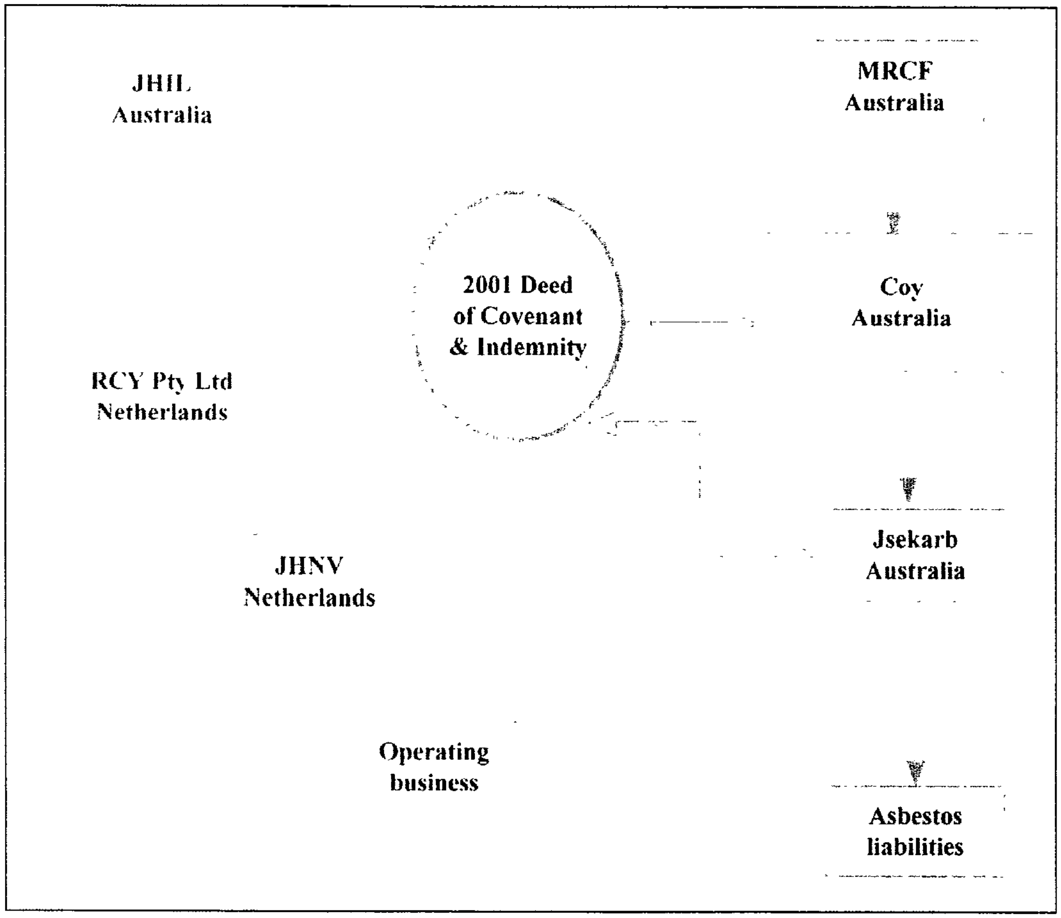

Figure 3. James Hardie: 2001, second stage.

of Coy, and Coy's, shares being transferred to the Medical Research and Compensation Foundation (MRCF), a charitable trust set up for the purpose of conducting research on asbestos toxicity and compensating asbestos victims. Later, Coy and Jsckarb wcrc respectively renamed Amaca Pty Ltd and Amaba Pty Ltd. The second stage only entailed the signing of the 2001 Deed of Covenant and Indemnity, an agreement between Coy, Jsekarb and JHIL under which 'JHIL undertook to make payments totaling AUD$112.5 m over 42 years in return for an indemnity and covenant not to sue in relation to certain asbestos claims and inter-company transactions' (James Hardie (Investigations and Proceedings) Bill, 2004). As a result, the operating business and asbestos liability were separated into different corporate entities: the asbestos liabilities went to MRCF and the operating businesses stayed with the James Hardie group (Figure 3). The third stage (October 2001) entailed rearranging the parent/subsidiary structures within the James Hardie group. To do so, the Dutch company RCI Pty Limited was renamed James Hardie Industries NV (JHINV) and became a subsidiary of JHIL. Its shares in JHNV – the company that held all operating businesses – however were transferred to JHIL. At this point, JHINV became the parent company of the conglomerate, holding, amongst others, all shares in two subsidiaries: JHIL and JHNV (Figure 4). This meant that AUD$1.9b left Australia for Europe. The small European state had not been chosen

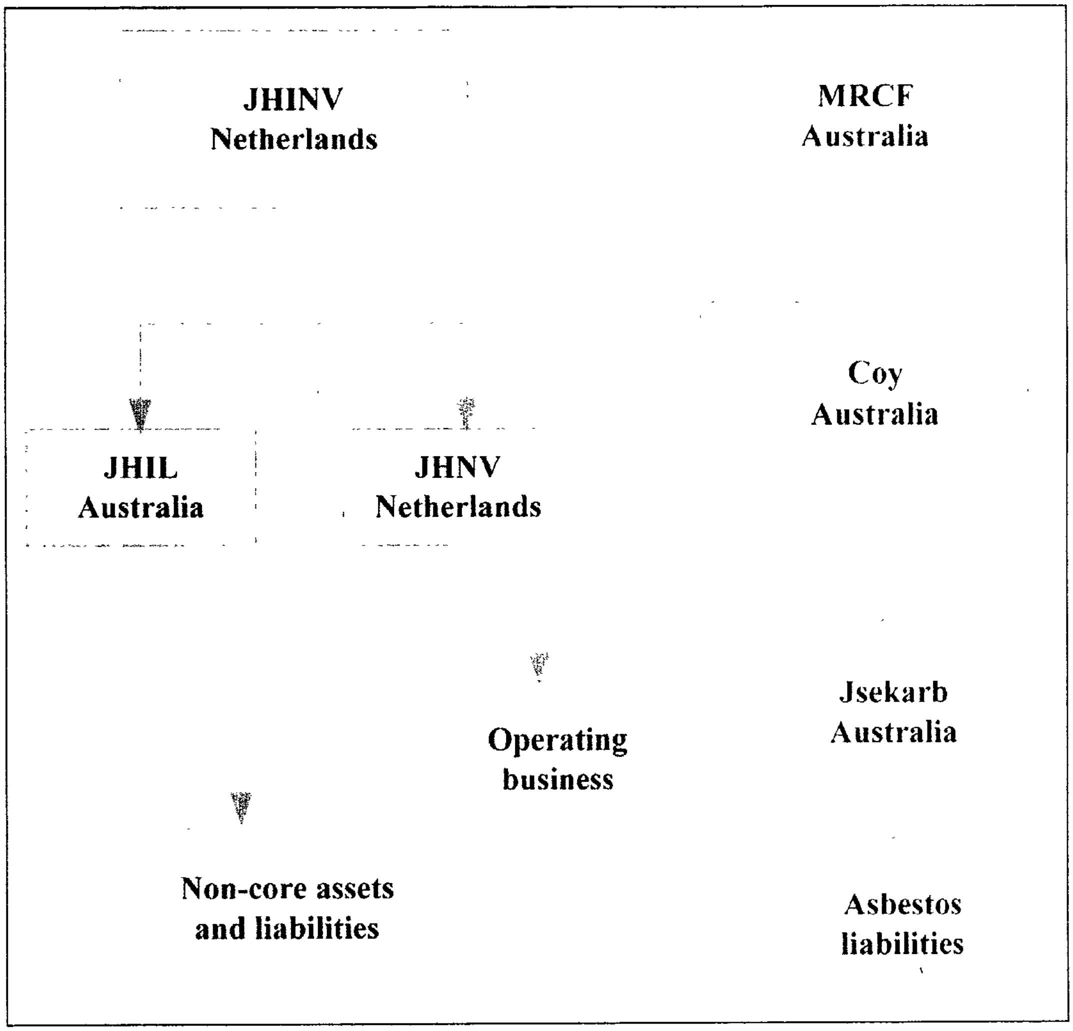

Figure 4. James Hardie: 2001, third stage.

randomly: at the time, the Netherlands was one of the few countries around the world that had not signed a treaty for the enforcement of judicial orders with Australia. The fourth and final stage (2003–2004) entailed changing JHIL's name into ABN 60 Pty Ltd (ABN60) and separating it from the (now Dutch-based) James Hardie group (Figure 5). ABN60 cancelled all shares held in it by JHINV. As a result, ABN 60 became a wholly owned subsidiary of ABN 60 Foundation Pty Limited and ceased to be a member of the James Hardie Group. Immediately prior to the cancellation of shares, ABN 60 entered into a Deed of Covenant, Indemnity and Access with JHINV. The combined reading of the 2003 Deed of Covenant, Indemnity and Access and its 2004 Rectification stipulates that ABN60, which had negligible assets, renounced its right to be indemnified for asbestos claims by JHINV.

The legal picture that emerges from the conglomerate restructuring is both frightening and depressing: what was once the parent company of subsidiaries that had dealt in asbestos for more than half a century became a company estranged from the conglomerate, with no operating business, and negligible assets. The four-stage Machiavellian

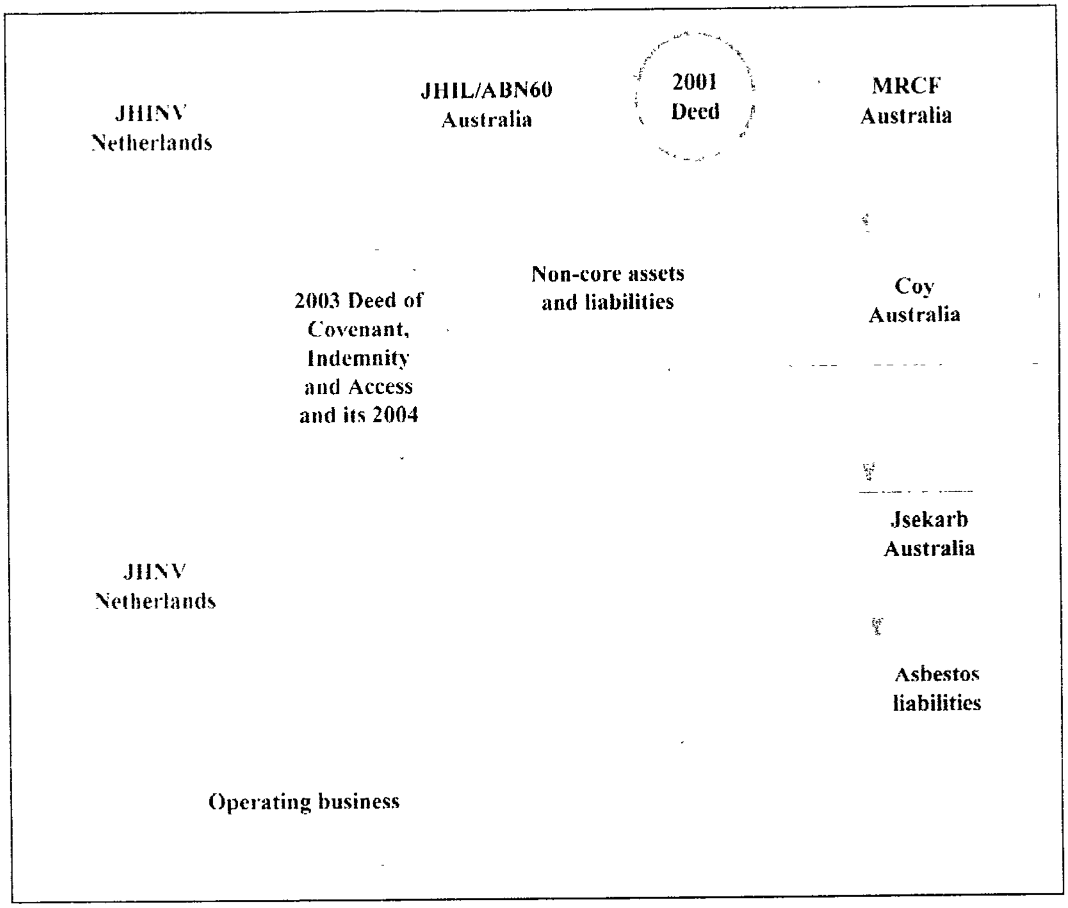

Figure 5. James Hardie 2003–2005.

exit strategy left victims with no remedy against a profitable conglomerate that had generated a substantial amount of unmet asbestos liabilities.

The plan did, however, did not go unchallenged. In reaction to such grim prospects of recovery, unions and asbestos victim advocacy groups organized public protests and a successful boycott of James Hardie products in 2004 (Gibbs, 2004). By May of 2005, James Hardie had lost 2 per cent in annual net profit as a consequence of the boycott (AAP, 2012a). The loss exceeded AUD$1b (Hills, 2005). The protests and boycotts also found allies in the political world. The State of New South Wales established a Commission of Inquiry with the mandate to look into MRCF and the circumstances 'in which MRCF was separated from the James Hardie Group and whether this may have resulted in or contributed to a possible insufficiency of assets to meet its future asbestos-related liabilities... and the adequacy of current arrangements available to MRCF under the Corporations Act'(Jackson, 2004: 3). The inquiry concluded that James Hardie had engaged in deceptive conduct that misled the stock exchange to understate the extent of future asbestos liabilities. This finding was reinforced in 2012 when the High Court of Australia upheld the conviction of seven Hardie directors, including the former chairman Meredith Hellicar, for making misleading statements, and thus breaching their duties as directors, when in 2001 they shifted the company to the Netherlands with the promise that they had formed a "fully funded" body to meet all future compensation claims (Verrender, 2012). As the inquiry had already established, the Fund was far from being fully funded: 'Within three years, the compensation fund cupboard was empty, short by an estimated $1.5 billion'.

The inquiry, however, left James Hardie with few options. In 2006, the conglomerate negotiated the establishment of a new, more generously funded charitable trust with the government of New South Wales. This trust, called the Asbestos Injuries Compensation Fund (AICF), is a public–private partnership between James Hardie and the NSW government and its terms mandated that, after an initial deposit of AUD$184,000, James Hardie would fund it for 40 years with a yearly sum drawn from up to 35 percent of the company's annual cash flow (James Hardie Industries, 2009). In 2009, AICF reported that all personal injury claims caused by exposure to asbestos in Australia 'in respect of which final judgement has been give against, or a binding settlement has been entered into by [any company of the James Hardie group]' were being paid (James Hardie Industries, 2009). Compensation was further guaranteed against corporate stratagems to avoid liability by the provision that events such as bankruptcy and restructuring of the holding company, which is the signatory of the trust deed, would have no effect as to James Hardie's obligation to Fund.

In 2009, however, James Hardie's willingness to stick to its obligation was tested when the global economic crisis weakened its commitment financially to support the Fund. The collapse of the housing market in the United States, with the resulting collapse of orders in the homebuilding industry, dried up cash flow, and in April 2009 the company made public statements warning that it was unlikely to contribute to the Fund: 'With assets of just AUD$140 m at the end of March, the fund says it may be unable to meet all of its commitments within two years' (Editorial, 2009). Fortunately for asbestos victims, in 2012 Hardie received a generous tax refund in the amount of AUD$369.8 million, 35 percent of which was directed to the AICF (AAP, 2012b). This influx of money replenished the pockets of the fund, which in the nine months to 31 December 2011 paid out AUD$73.9 million in compensation (AAP, 2012b). In 2011, Hardie relocated one more time, moving its domicile in Ireland allegedly for reasons having to do with taxes and management (Sands, 2010). Overall the establishment of the fund is certainly good news for Australian asbestos victims: it is an achievement that was obtained *in spite of* corporate law.

Cape's Successful Exit Strategy from the American Asbestos Litigation

Registered in England and Wales, Cape plc is the holding company of a network of subsidiaries that do business in the UK, North Africa, the Middle East and the Far East. Currently this conglomerate specializes in insulation, fire protection, abrasive blasting, refractory, coatings, cleaning, training and other essential non-mechanical services. While its current business is not connected to its asbestos heritage, Cape used to be a leading asbestos firm. The firm was founded in 1893 to control a syndicate that operated South African crocidolite mines and then expanded to manufacture insulation products containing asbestos. It mined most of the world's amosite asbestos and was

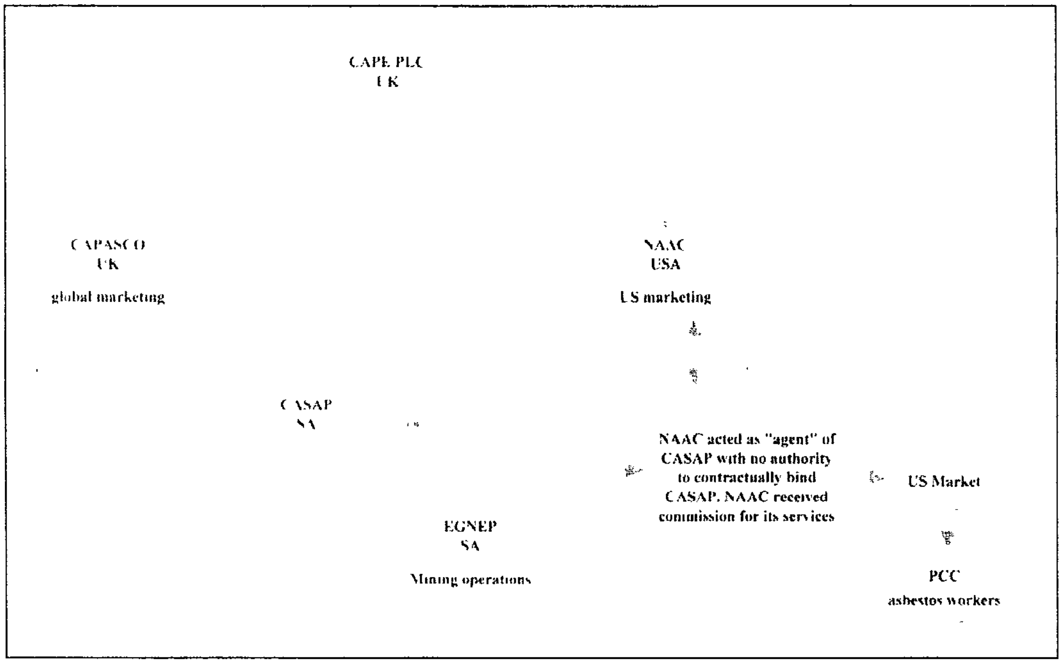

Figure 6. Cape: pre-1975.

a leading producer of crocidolite. Its manufacturing and sales expansion reached its peak after World War II with operations in the UK, the United States, South Africa, France, Germany and Italy. While the business reach and asbestos liabilities of Cape are global, in this paper I only focus on corporate restructuring that was implemented by Cape headquarters as an exit strategy with regard to asbestos liabilities in the United States.

Cape has done business in the United States since the 1930s. It sold its asbestos to various clients through the Union Asbestos and Rubber Company (UNARCO), which was the exclusive distributor of Cape's asbestos in North America. As a consequence of the success of this business venture, the London headquarters decided, in 1953, to establish a fully owned subsidiary in Chicago: the North American Asbestos Corporation (NAAC). For several decades, NAAC successfully acted as 'agent' of Cape Asbestos South Africa (CASAP), which was based in South Africa and fully owned by Cape, and which in turn fully owned Egnep, another South African part of Cape's conglomerate that ran the mining business. NAAC acted with no authority to bind CASAP contractually and received commission for its service (Figure 6). Between 1953 and the late 1970s, Cape sold 'nearly half-a-million tons of asbestos in the United States' (Tweedale and Flynn, 2007: 276). One of the buyers of Cape's asbestos was Pittsburg Corning Corporation. Some of the asbestos originating from Cape's mines was used in a Texas-based plant manufacturing asbestos pipe insulation materials (Levin et al., 1998: 156). Over the years, many of the employees of this plant developed asbestos-related disease and, in the early 1970s, approximately 2000–3000 victims filed tort lawsuits. Cape was named defendant in most of them. One in particular became particularly insidious. In 1977, a group of 462 forced Cape and its business partners to settle the claims for more than US$20m. Along with NAAC and Egnep, Cape contributed to the settlement with

US$5.2 m. Most of the money came from NAAC's insurance. The remaining US$1.2m was paid by Cape. This settlement, pricey by 1970s standards, exhausted available asbestos insurance for business operations in the United States. Acquiring new insurance looked too expensive to Cape. Very conscious of the implications of a prospective settlement – after the settlement asbestos lawyers would have predictably tried to reach Cape's deep pocket for more – Cape turned to a different strategy just before agreeing to settle: corporate restructuring.

By the time the 1977 settlement was reached, Cape had implemented an exit strategy that involved abandoning the corporation with all the asbestos liabilities, moving the ownership of any business assets left to Liechtenstein, and running the business through new companies owned by trustworthy individuals who had no formal links with the conglomerate. The restructuring, which aimed to separate the conglomerate from its US liabilities by removing the group from the jurisdiction of US courts, was rather simple. The parent company changed its name from Cape Asbestos Company to Cape Industries, sold all of NAAC's assets, and transferred the NAAC's share it owned to Cape International and Overseas Ltd (CIOL), a newly established and vastly undercapitalized English company. All of the parent company's shares in CASAP also went to CIOL with its mining business. On the American front, Cape incorporated Continental Products Corporation (CPC), a corporation set up to market Cape's asbestos in the United States, and established Associated Minerals Corporation (AMC), a Liechtenstein-based company that would appear as the 'seller' in all sales of asbestos in the US market. All of CPC's shares were given to Mr Morgan, the former Vice President of NAAC, and all of AMC's shares were owned by a Liechtenstein lawyer named Ritter, 'who agreed to vote as instructed by Cape' (Tweedale and Flynn, 2007: 284). The plan was to have CPC acting as the 'agent' of AMC with no authority contractually to bind AMC in exchange for commission for any service rendered. Through the medium of AMC and with the assistance of CPC, Cape's amosite asbestos continued to be sold into the US until Transvaal Consolidated Exploration Co. Ltd become the owner of the South African mines in 1979. Yet Cape carefully avoided establishing any link between the conglomerate and the corporate entities created ad hoc to operate in the US market so that no contractual or tort liability could flow from its North American operations to the conglomerate (Figure 7).

While Cape was busy getting its business in order, a new wave of asbestos victims was filing lawsuits. Between April 1978 and November 1979, 206 plaintiffs filed lawsuits naming Cape or one its subsidiaries as defendants. Cape did not appear in court, however, maintaining that the Eastern District of Texas lacked jurisdiction over the company. After securing default judgements against Cape, the asbestos victims (now judgement creditors) tried to enforce them in England. The English judges were confronted with the issue of whether, after the restructuring, Cape conducted business in the United States by using *alter ego* corporations in a way that allowed a US court to pierce the corporate veil and assert jurisdiction over the conglomerate. If indeed Cape had used *alter ego* corporations, the default judgement issued in Texas against Cape would have been proper. The English judges, however, disagreed with this assertion, and concluded that the facts were insufficient for English courts to disregard the corporate entity, pierce the corporate veil, and allow the asbestos victims from Texas to attach Cape's assets in England based on the default judgements. Justice Scott contemplated but rejected the argument that Cape had set alter ego companies:

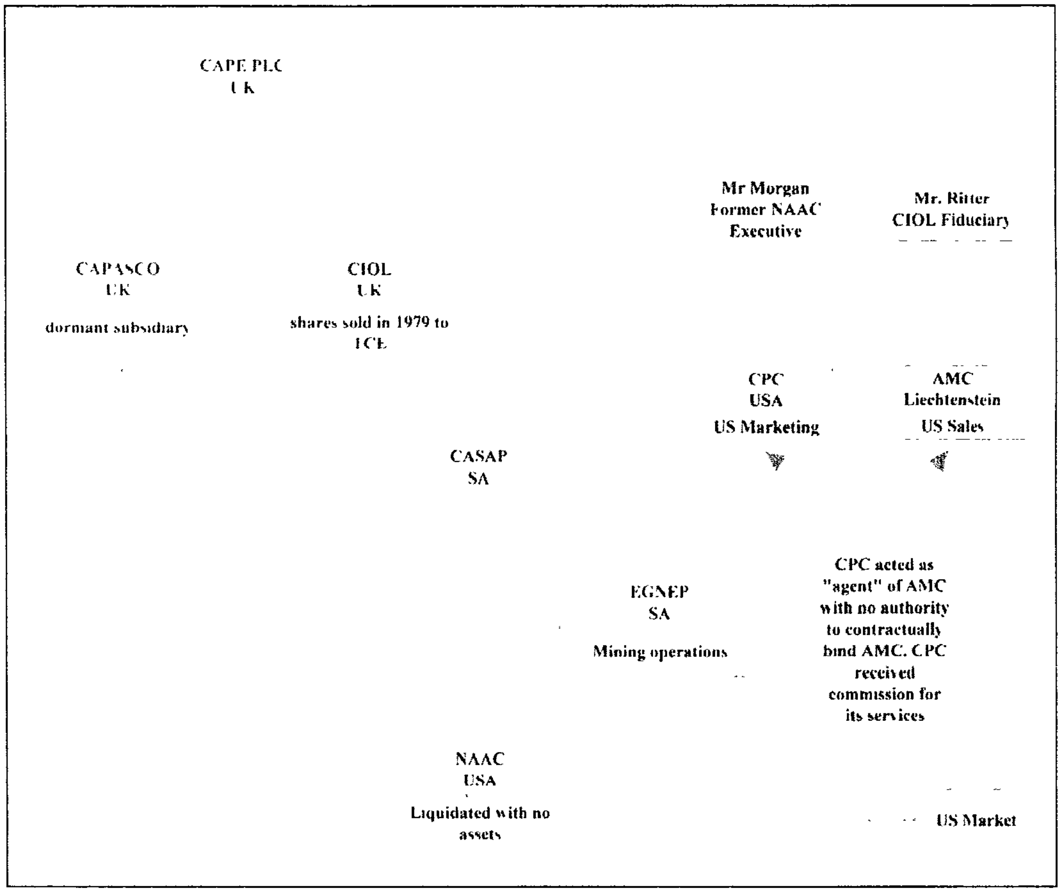

Figure 7. Cape: post-1975.

> CPC's conduct was much the same as NAAC's had been. It paid the rent for its offices and paid its employees. It received commission from [Associated Minerals Corporation] as well as incurring expenditure and receiving payments in connection with its independent trading activities ... I do not think, on analysis, that the plaintiffs' case is any stronger than their case regarding NAAC. If anything, I think the case is weaker. NAAC was at least a wholly owned subsidiary. CPC, even if incorporated and launched with Cape money, was ... an independently owned company. Like NAAC, CPC acted as agent for the purpose of facilitating the sale in the United States of Cape's asbestos. The seller of the asbestos in NAAC's time was Egnep or Casap. The seller in CPC's time was, nominally, [Associated Minerals Corporation] but, in reality, still, I think, Egnep or Casap. C.P.C., like NAAC, had no authority to bind Egnep, Casap or any other of the Cape subsidiaries to any contract. CPC like NAAC carried on its own business from its own offices at 150, North Wacker Drive. The provision by Cape of the US$160,000 as a starting-up fund does not make the offices Cape's offices or the business Cape's business (Adams and others v Cape Industries plc and another [1991] 1 All ER 929).

That was the end of the story. The opinion killed US asbestos victims' ambition of satisfying their demand for compensation by attaching Cape's assets in England. Furthermore, the restructuring made any effort to collect money in the United States futile.

All assets disappeared, and the few lawsuits in which CPC or Cape were named as defendants, along with dozens of other asbestos defendants, aimed not to obtain enforcement against Cape but to establish its liability in order to trigger coverage of the limited insurance policies from the NAAC period that had not been exhausted.

Eternit's Preemptive Corporate Structuring

Eternit, the last asbestos firm to be considered in this article, provides a rather different yet fascinating case study. In fact, its corporate structure was rather different from the previous two cases. Rather than a conglomerate with subsidiaries propagating from a single parent company, Eternit was structured from its inception as a cartel of companies that coordinated their business activities through the sharing of licences, shareholders and directors.

The business history of Eternit began when Ludwig Hatschek, an Austrian businessman, obtained patent protection for a cement-asbestos that he had invented. To exploit the product's profitability, Hatschek established a small company in Austria, entered into an agreement with Russian asbestos mines, under which he agreed to purchase the entire production of asbestos in exchange for the Russians refraining from selling it to competitors that were not licensed to use the Eternit patent, and licensed the product to other businessmen interested in manufacturing it in other countries without becoming himself a shareholder of those companies.

By the time of Hatschek's death in 1914, the product was quickly becoming a sensation. Business men in several European countries jumped on the cement-asbestos bandwagon. The licensees were a handful of hand-picked businessmen who set up independent companies in various parts of Europe and beyond, all of which included Eternit as part of their trade name. Among them, members of two families dominated the Eternit cartel over the years: the Emsens family, which established Eternit Belgium, which was later acquired by the Etex Group, and the Schmidheiny family, which established Eternit Switzerland, which was later acquired by the cement group Holcim. Founded in 1905 by the Emsens family, an exceptionally wealthy and well-connected family belonging to the 'old nobility' (Krols and Teugels, 2007b), Eternit Belgium operated plants in Belgium, controlled Eternit France and its operations, and contributed to establishing Eternit-Brazil. In 1969, it established a company in Luxembourg, TEAM, by joining forces with two other major asbestos firms, John-Manville and Turner and Newall. TEAM went on to develop Eternit businesses in Pakistan, Indonesia, Japan, China, Nigeria and Senegal (Ruers, 2004). By 1989, Eternit Belgium held 86 percent of TEAM's shares. Acquired in 1920 by the Schmidheiny family, Eternit Switzerland operated plants in Switzerland, bought shares of a crocidolite mine in South Africa, and owned significant shares of Eternit Belgium until 1989, when Stephan Schmidheiny sold his shares to Belgian shareholders (Ruers, 2004). In South Africa, the Schmidheinys owned and operated the third largest mine after Cape's and Gencor's through two subsidiaries, Kuruman Cape Blue Asbestos (KCB) and Danielskuil Cape Blue Asbestos (DCBA) (Kazan-Allen, 2005). In 1985, Eternit Switzerland was the world's second largest seller of asbestos (Kazan-Allen, 1999). The Schmidheiny brothers are or have been major shareholders and board members in other key Swiss companies such as Swissair, Nestlé, Swatch, UBS Asea Brown Boveri and Holcim. Stephan is the fifth richest Swiss businessman, a resident of Costa Rica, a philanthropist (in 2009, Forbes profiled him as 'the Bill Gates of Switzerland'; Serafin, 2009: 58) and a recently convicted defendant in a criminal trial in Torino, Italy concerning almost 3000 asbestos deaths among Italians. Thomas is currently a director of Holcim.

Throughout the twentieth century, these Belgian and Swiss companies led a very successful business relationship that involved sharing licences to the Eternit patent, engaging in anticompetitive cartelization, joining investments in new manufacturing facilities, hand-picking shareholders among a restricted number of powerful and well-connected families (the Emsenses, the Schmidheinys, the Hatscheks and the Cuveliers), and appointing interlocking directorates. Krols and Teugels (Krols and Teugels, 2007a) describe Eternit-Belgium as a 'feudal' company in which '[t]op management had far more direct contact with leading political officials than with ordinary workers'. An investigative report commissioned by the Dutch Socialist Party concluded that four families had owned shares in Eternit companies since the early twentieth century and exercised influence over, and in many cases controlled, the Eternit business worldwide (Ruers and Schouten, 2006). Members of the four prominent families have rotated for three generations on boards of the various Eternit companies around the world (Krols and Teugels, 2007b). Shareholders of one Eternit company would sit on the board of a different Eternit company so that each company could easily collaborate with and keep an eye on other Eternit businesses. Even today, an Emsens sits on the board of Etex, a Schmidheiny sits on the board of Holcim, and two of the Hatscheks sit on the board of Eternit Austria, which is currently led by a Swedish manager who was employed by Eternit Germany and Eternit Switzerland before landing in Austria.

Business coordination was facilitated by a cartel that was formalized in 1929, and over the years the various Eternit companies agreed to share technology, purchase raw asbestos together and divide up the market to reduce competition. This agreement, a cartel, was named SAIAC. Ernst Schmidheiny, the majority shareholder of Eternit Switzerland, was appointed secretary and meetings were often held in Zurich. SAIAC was intended as a tool to divide the market horizontally among asbestos 'competitors'. As the 1929 Annual Report of Tuner and Newall reveals, SAIAC divided the world market into a 'miniature League of Nations' (Ruers, 2004). Furthermore, through SAIAC, Eternit companies coordinated a strategy of deception, influence and – as was customary in the asbestos industry – deception. It is not a coincidence that SAICA was established in 1929, the year in which 'independent researchers identified the symptoms and causes of asbestosis' (McCulloch and Tweedale, 2008: 79). Membership in SAIAC of various Eternit businesses was certainly instrumental to protecting their interests through coordinated lobbying efforts. SAIAC members met regularly to decide a response to attacks by scientists, trade unions, the press and governments. Meetings organized at European level by Eternit's Belgian and Swiss officials were always on the theme of 'asbestos and health'. During a review of the situation in Paris in 1979, company representatives decided that '[s]ubstantial investment will be necessary at various European levels to maintain the asbestos lobby against workers, unions, clients and politicians. In the long term, it will be in the industry's interest to find substitute products, but it is essential that no company abandons asbestos' (Krols and Teugels, 2007b).

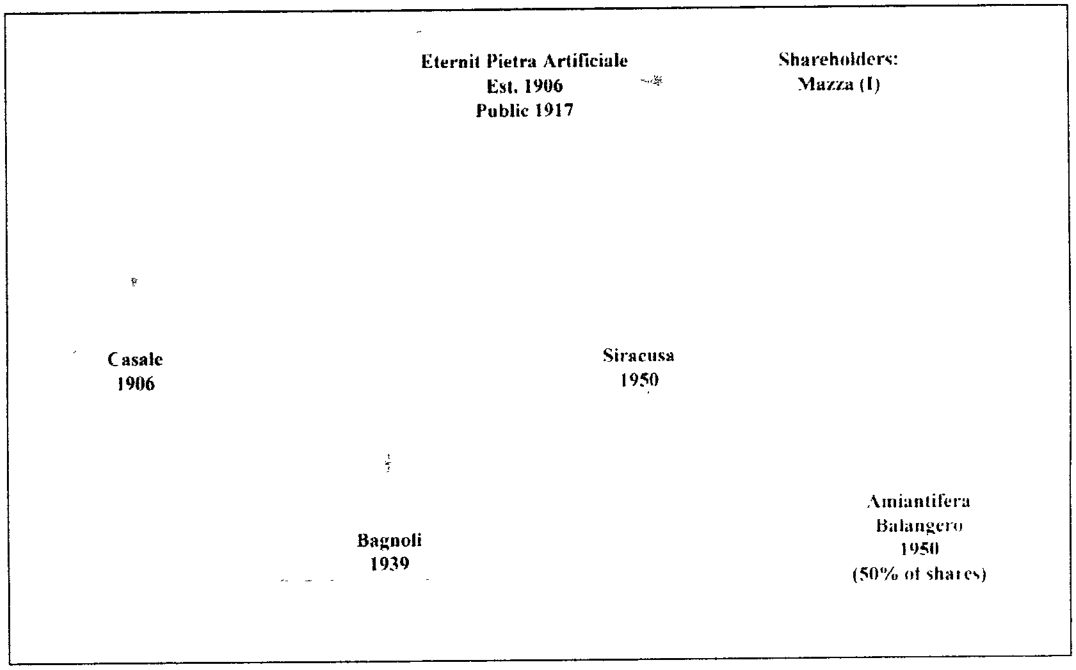

Figure 8. Eternit: 1906–1952.

One of the few 'outsiders' that entered the business circle created by the Emsenses and the Schmidheinys was Adolfo Mazza, an Italian engineer who, as an Eternit licensee, set up the asbestos firm Eternit Pietra Artificiale (renamed Eternit Spa in 1942) and later invented and patented the first machine manufacturing cement-asbestos pipes. Mazza's venture prospered over the years and Mazza gained his place in the Eternit's circle. To strengthen its business, in 1952 Mazza solicited capital contributions from the Emsenses and the Schmidheinys, who accepted and became shareholders in and directors of Eternit Spa. After investing in Eternit Spa, the Emsenses and the Schmidheinys slowly took control of the company. By 1966, the Belgians were responsible for most managerial decisions. In 1972, the year in which the Mazza family sold its shares to the other shareholders, the managerial torch was passed to the Swiss family, which had taken the lead in investing in the Italian business even though it was losing money (Figure 8).

The legacy of the involvement of the Emsenses and the Schmidheinys with Eternit Italia brought legal problems to both families. While in all other countries, companies of the Eternit group have substantially avoided accountability for their asbestos businesses, Eternit has experienced tough times in Italian courts, where a belligerent group of asbestos victims, often collaborating with a fierce criminal prosecutor, pursued compensation in ways unparalleled in other jurisdictions in which the Eternit business had flourished (Rossi, 2012: 18–22). Even in Italy though, where victim mobilization applied substantially more pressure than in other jurisdictions, the Eternit corporate approach, blending cartelization, lobbying and connections among the boards of the various companies participating in the cartel, contained the liability for many years. For the most part, victims' efforts to secure tort compensation could only target a single company, that is, the company owning and running the specific Eternit plant that had employed the

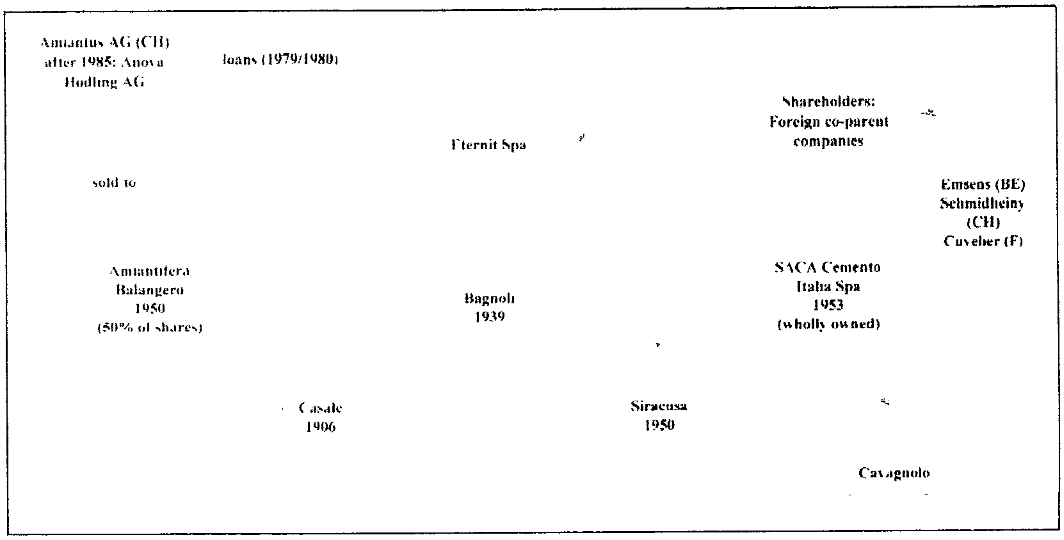

Figure 9. Eternit: 1972–1980.

victim. The absence of a parent company limited the victims' ability to target the decision-making centre and allowed for assets to be transferred from country to country, thus subtracting them from post-judgement attachment. With regard to the Italian case, as a result of increasing risk of adverse judgement, the Swiss and Belgian shareholders implemented a restructuring of the Italian business to diminish the risk of liabilities (Figure 9). Between 1980 and 1986, the single operating parent company, which had owned and operated four asbestos-cement plants (one of them was formally owned by a wholly owned subsidiary but effectively 'rented' and operated by the Italian parent company), sold its plants to four newly established subsidiaries and became a non-operating parent company with no assets. (The building hosting the production was not part of these assets, as it was given to a third party that cleaned up the site in exchange for the symbolic amount of €1.) By the time the first round of verdicts against Eternit Spa were enforceable, the holding company had been deprived of all of its assets, which in turn were then owned by the various companies established in 1981. The only step the law could take with Eternit Spa was to declare its bankruptcy and liquidate it in 1986 (Figure 10).

Since the bankruptcy created a substantial obstacle to further civil litigation, victims turned to the criminal justice system. A criminal trial took place in Casale in 1993. The trial led to the conviction of the managers of the local company but did not involve the Belgians or the Swiss, who had been the real decision-makers and certainly were the true deep pockets in the event of a conviction. At that point, some €3m was put together and divided among 1700 victims, all of whom were creditors of the bankrupt holding company. The bankruptcy proceedings lasted a few more years as claimants tried to attach the personal assets of Stephan Schmidheiny, the majority shareholder of both the Swiss company and its Italian branch. The bankruptcy court refused to disregard the corporate entity and hold any shareholder personally liable. Approximately €5.5m, most of which was made available by Stephan's brother, Thomas, was distributed to 500 claimants who had filed claims after the first round of payments in 1993. Victims who received payments signed releases of liability.

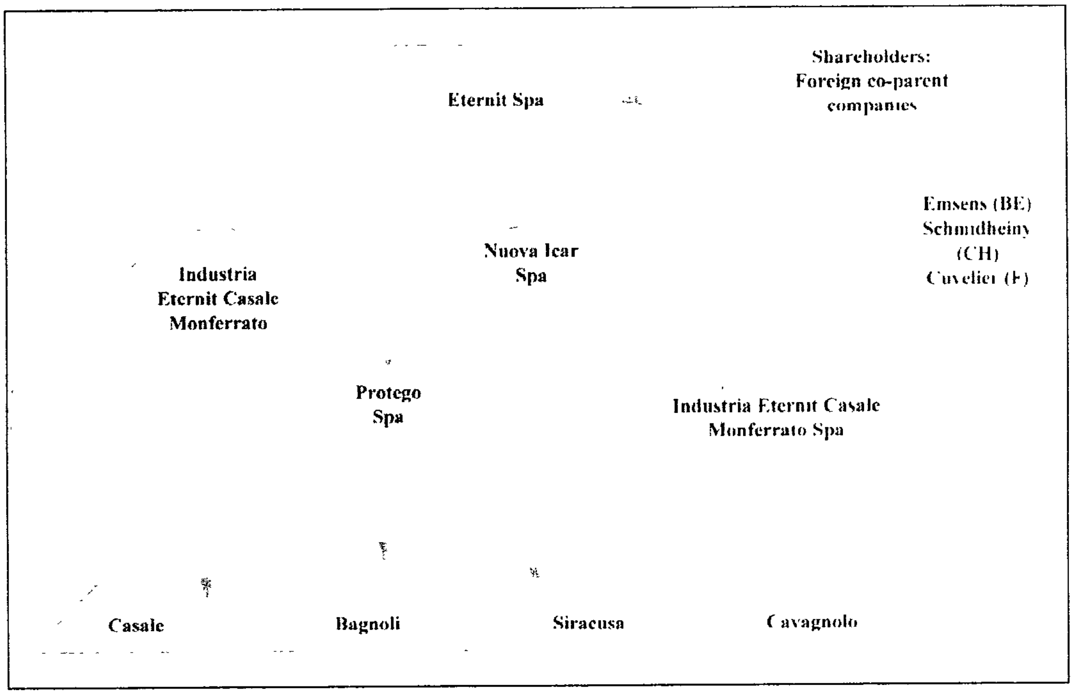

Figure 10. Eternit: 1980–1986.

It took nineteen more years for members of the Emsens and the Schmidheiny families to be found responsible for asbestos causalities caused by the operations of the Italian Eternit companies. Accountability came in 2012 when Stephan Schmidheiny and Belgian baron Jean-Louis de Cartier de Marchienne, who became involved with asbestos after marrying an Emsens in 1950, were convicted by a trial court in Italy (an appeal is pending). In 1998, the two businessmen were charged with harsh accusations originating from a criminal investigation of roughly 3000 asbestos deaths among Italians: over 2600 Eternit employees and more than 300 residents of communities located close to one of the four Italian Eternit plants (Office of the Prosecutor of Torino 2008). The trial started in 2009 and ended on 13 February 2012. Both defendants were found guilty of criminal negligence and sentenced to 16 years of jail time (Trial Court of Torino 2012). The defendants were ordered to pay damages to the over 6000 civil claimants (many of them are relatives of deceased victims) who had joined the criminal trial as victims seeking civil damages. For each death, damages awarded range between €30,000 and €35,000, for a total amount of €95 million. In addition, defendants were ordered to pay damages to the municipalities of Casale Monferrato and Cavagnolo, the Piemonte Region and various labour unions and nonprofit organization, as well as to indemnify the workers' compensation board to payments made to claimants throughout the years. The court also found four of the foreign co-parent companies (Etex, Anova, Amindus and Becon) that had held shares of Eternit Spa jointly and severally liable with Schmidheiny and de Cartier de Marchienne for damages caused to thousands of victims. This trial, which was quickly labelled the 'Great Asbestos Trial' (Allen and Kazan-Allen, 2012), brought key decision-makers behind the Eternit cartel and foreign parent companies to justice for the first time since the production of Eternit materials began. It is important to stress, though, that the theory of law that was deployed to achieve this result was not tort theory along with the 'piercing the corporate veil' doctrine. Rather the case was grounded on individual criminal liability of mangers/directors/shareholders of asbestos firms. Civil law alone was insufficient to deliver justice to Eternit victims. Furthermore, in the aftermath of the judgement, the defendants have refused to pay compensation to the victims, who are currently exploring strategies to attach defendants' assets and but also to find the financial resources to fight the enforcement battle (AFEVA, 2012).

Asbestos Firms' Structural Power

The aim of this paper was twofold: to identify examples of corporate power that undermines the expectations of democracy and to investigate the relationship between corporate structures and corporate power. The three case studies identified such examples as they featured corporate instances of corporate power use to avoid (Cape) or delay (James Hardie and Eternit) the legal demands of tort victims who were rightfully expecting recovery for damages caused by corporate operations. The case studies also showed that corporate power is importantly located in the exploitation of the principles of separate personality of corporate entities and shareholder limited liability. Courts' unwillingness to pierce the corporate veil and to extend the liability of parent company/principal to the acts of a subsidiary/agent contributes to enabling the creation and exploitation of corporate networks. Corporate structures were thus instrumental to the acquisition and exercise of such power.

In framing the questions of power, I relied on Lukes's three-dimensional account of this contested concept. Under this view, the powerful prevail in conflicts that have an institutional decision-maker, set the agenda against the interests of the non-powerful and manipulate the structural, cultural and institutional environment so that the non-powerful are forced into inaction. With regard to the first dimension, the three asbestos firms discussed in this paper emerge as 'powerful' actors for they were able to prevail regularly in litigation against victims' attempting to 'pierce' their 'corporate veil' and attach assets of foreign companies of corporate network. With regard to the second dimension, asbestos firms appear powerful as they implemented changes to the structural configuration that have set the victim compensation agenda in ways that trump victims' interests. The firms' strategies enabled them to set the tone of post-judgement enforcement and forced victims to play a game of catch-up rather than driving the process towards full compensation. All three firms disinvested and removed assets from jurisdictions in which victims had prevailed, and forced victims to engage in strenuous legal and political fights to obtain compensation. With regard to the third dimension, firms also emerge as being powerful by virtue of their ability to force victims into inaction. The Cape story constitutes the best example: victims were forced into inaction after unsuccessful attempts to enforce the US judgement in England. In the end, victims desisted from enforcing their judgements against the parent company. The termination of attempts to secure compensation is the result of Cape's ability to use the legal environment to reshape its business structures to avoid any direct liability for its US operations. Inaction was more subtle and ultimately incomplete in the case of James Hardie and Eternit. Cultural manipulation, institutional practices and other social structures were never perfect. Victims suffered various setbacks but kept fighting for compensation. Eventually, through creative strategies, which involved boycotting and government lobbying (against James Hardie) as well as involving criminal law and prosecutors (against Eternit), they succeeded in circumventing structural and institutional barriers.

It is important to note that in all three cases courts refused to wipe out two key structural pillars of corporate law – shareholders' limited liability and the separateness of corporate entities (Blumberg, 2000: 301–304). In fact, no individual shareholder or parent companies were held liable for what the operating subsidiaries owed to the tort victim-creditors. This is consistent with what we already know about courts' use of the piercing corporate veil doctrine: the doctrine is very rarely used against large corporations and conglomerates (Hodge and Sach, 2008: 362; Thompson, 1990: 1047). For instance, Thompson (1990: 1047) found that, in his entire data set, which was based on US case law, 'piercing did not occur in a publicly held corporation'. Also, courts are more reluctant to enforce the doctrine when the defendant is a corporation rather than an individual. As Thompson (1990: 1056) noted, '[w]hen potential defendants against whom liability is sought are grouped as either individuals or corporations, courts pierce the veil to get at individual defendants more often than they pierce to reach corporations'. Also Thompson found that courts are more willing to pierce in the contract situation than in the tort situation (Thompson, 1990: 1059). The corporate veils of the three asbestos firms were left intact notwithstanding the persistent challenges brought by victims. Only in the case of Eternit were controlling shareholders eventually held liable. However, the liability was direct, personal, and based on criminal law rather than on corporate law. These case studies confirm what some scholars have argued for a long time (Muchlinski, 2010; Branson, 2010; Blumberg, 2000), the suspicion that the principles of limited liability and entity separateness are rather inadequate tools to strike the balance between corporate interests and tort creditors' demands.

The conservative path taken by courts is, however, not ineluctable. The severe jurisprudential limitations of traditional corporation law are neither necessary nor inevitable. However, the justification of the two principles must be revisited in light of the fact that the historical context in which they emerged has very little bearing on the realities of current practices and that the rise of multinational corporate groups with global business operations has rendered these principles irrelevant and obsolete (Blumberg, 2000: 311).

With regard to the link between corporate power and corporate structures, asbestos firms structured their businesses by linking together corporate entities that as a whole form complex transnational firms. Cape's strategy was the most successful because, after initial payments to US asbestos victims, the firm was able to escape further accountability and restructure its operations in North America in a way that guaranteed impunity for existing and future asbestos liability in the face of continued asbestos sales in the region. In fact US asbestos victims have not been able to attach any assets since 1977. Also, it is important to remember that, as a whole, the payments that were made in the 1970s did not exceed Cape's insurance coverage. James Hardie also successfully engaged in restructuring when tort lawsuits were routinely filed in Australia. Under this stratagem, the profitable operations were transferred overseas, in a jurisdiction in which enforcement of Australian judgements was extremely difficult, and empty corporate shells were left behind in Australia. It was only after political pressure and consumer boycotts that the firm agreed to establish a compensation fund. The fund, however, was underfunded, notwithstanding the criminal promises that sufficient money had been allocated for compensation. Victims had to further lobby government to push James Hardie to pour in more money than it initially committed to allocate. The entire process took more than 10 years from when the exit strategy was deployed. Eternit organized its conglomerate in a way that proved to be the most resistant to accountability. Production in various countries was owned and managed by local companies, which were in turn owned by foreign holding companies whose shares belonged to a restricted group of wealthy families. Management decisions were coordinated through cartels and informal meetings rather than though an internal top-down chain of managers. Coordination was possible because key shareholders relied on complimentary patent licences, on mutually beneficial business ties, trust and shared decision-making practices. Also, the conglomerate quickly disinvested in Italy in the early 1980s when the spectre of lawsuits appeared at the horizon, leaving behind the former operating company with no assets and a series of newly established, undercapitalized operating companies that were devoted to a production (asbestos cement) that was about to be banned (Italy banned asbestos in 1992). Accountability for two key Eternit shareholders only came in 2012 by means of criminal law, which is a matter of personal liability and which was triggered for wrongdoing as a manager rather than a shareholder of a parent company. Criminal law's reach went further than tort liability, bankruptcy law or corporate law.

As the case studies illustrate, a single corporation, even if it is a large corporation, is unable to gain the means to acquire and maintain power. Asbestos firms acquired and maintained power with the help of networks of corporations. It is the association and coordination of corporations that generates opportunities for corporate power. These networks of corporations, which connect subsidiaries that are commanded by a parent company by way of ownership of shares, are the true holders of corporate power. Corporate law certainly enables on a very basic level the existence of these networks. The rules of incorporation and limited liability allow for the establishment of each single corporation. The rules of corporate ownership and governance allow firms to establish, operate, maneuver and dissolve subsidiaries for the purposes of avoiding legal accountability, as well as the relocation of James Hardie's corporate headquarters to a destination country, which, not casually, had not signed a judicial enforcement treaty with the origin country. The rule of limited liability and entity separateness guarantee immunity, for the most part, of the individuals who orchestrate the networks from the control room. Interestingly, the link between corporate power and corporate structures is remarkably consistent across all jurisdictions in which the three firms operated.

The case studies also show that corporate law is a powerful weapon when mixed with other legal ingredients. Agency law is certainly one of them, and often overlooked as a route to the imposition of liability on a parent corporation for acts of a subsidiary (Blumberg, 2000: 307–308). Cape set up an agency relationship in which the principal was an 'unaffiliated' fiduciary of the parent company. As we have seen, the principal was a highly trusted former Cape manager. Eternit exploited a different mechanism: interlocking directorates, that is, the practice of members of a corporate board of directors serving on the boards of multiple corporations. This strategy allowed key shareholders to control the company without the need to be personally exposed by holding executive offices. The interlocking directorates were reinforced by strong social ties. Directors were hand-picked from circles of business, aristocratic and diplomatic elites. As William Carroll showed in a recent study on the formation of a transnational capitalist class, interlocking directorates are a powerful tool that has been deployed by 'a inner circle of cosmopolitans' to create 'corporate affiliations [that] span national borders' (Carroll, 2010: 47). These affiliations, by means of simultaneous membership of key capitalist figures in board members of multiple corporations, created a network of enterprises that considerably reduced the distance among corporations, shrinking the space among corporate elites and facilitating sharing of power and influence among corporate elites (Carroll, 2010: 83). Interestingly, Carroll notes that the 'inner circle of cosmopolitans' has been thinning since the early 1970s, a decade in which the asbestos industry started its steep decline because evidence of asbestos toxicity became common knowledge and tort liability start growing significantly.

Conclusions

The ability of corporations to acquire and maintain power is a critical aspect of the modern corporation. Studying corporate power is an important task for legal scholars, especially because corporate law offers the structural tools that are needed to acquire and maintain such power. The case studies demonstrate that corporate structures are implicated in the process being corporate power importantly located in the exploitation of the principles of separate personality of corporate entities and shareholder limited liability. Thick empirical descriptions of how corporate power is generated and exercised prove to be useful, and more are needed. Legal scholars in particular ought to redirect their empirical focus to look beyond 'piercing the corporate veil' and agency law, and investigate the broader context in which abuses of corporate structures take place and eventually expose the enabling role of corporate law in permitting transnational corporations to strategically structure themselves to avoid accountability for torts, an outcome that is certainly highly problematic.

Acknowledgements

Early versions of this paper were presented at the 'Vulnerability and the "Corporation" – Vulnerability and the Human Condition/Feminism and Legal Theory Workshop', Emory University School of Law, 29–30 October 2010 and the 2012 Annual Conference of the North Atlantic Regional Business Law Association, Boston College, 31 March 2012. The author wishes to thank Fiona de Londras, Anna Grear and Martha Fineman, the conferences attendees, the editors of the journal, and the two anonymous reviewers for their valuable feedback. The author also wishes to thank Joseph Robertson for research assistance.

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