Introduction

This book examines the tort liability of multinational enterprises (MNEs). Although the discussion of liability has increased in recent decades, the laws that apply to MNEs liability cases are not sufficiently developed to offer a satisfactory solution to MNEs’ tort problems. The reason for the failure to find a solution to the tort liability problems can be found in the lack of understanding of the concept of MNEs in interdisciplinary studies. Accordingly, the statement of the book is that there is a conflict between the understandings of basic features of MNEs in legal studies and the realities of the modern concept of MNEs. Thus this book aims to provide interdisciplinary examination of MNEs and test the existing liability rules to see whether they are adequate to solve the problems and, as a result, it aims to propose solutions to the liability problems in the context of MNEs. Overall, there is a quest to discover if legal theories applied to corporate groups’ liability are applicable to modern MNEs and, if not, where potential solutions may lie.

BACKGROUND TO THE CONCEPT OF MNE

The recent movement in world trade is opening up domestic markets for investors from other countries. States are liberalizing their markets by offering generous and specific investment incentives designed to attract investors. International economic theory claims that overseas investment is good for MNEs for a number of profit-creating benefits while it is good for host countries as the capital and technology brought by MNEs is crucial for the economic development of countries and regions. Accordingly, there has been a progression to a more international economic world order, creating the concept of globalization.

Economic globalization, the linked process of trade and investment liberalization, privatization and deregulation, developed on the idea of open markets has brought huge increases in movements of capital, goods and services. MNEs are the vehicles for much of these globalized economic activities, and in turn, foreign direct investment (FDI) by MNEs accounts for an increasing proportion of global economic activity.

At a global level the world economy was in constant growth, with some intervals, in the 19th and 20th centuries. There were a number of factors and actors
for this growth process. One of the main factors for international economic growth was the efficiency of considering companies as centres for capital creation. This practical usage of companies was one of the important reasons for the emergence and survival of economic capitalism. In the early stages of emergence of modern market economies, the clever use of companies as a capital creating tool was very efficient at the domestic level. Companies at a domestic level transformed themselves first into corporate groups with the help of rules allowing a trouble-free approach to the emergence of corporate groups. Corporate groups accumulated huge domestic savings with the ability to use it wherever possible and whenever profitable. Thus once the groups are comparatively large, they consider investing in foreign markets. While doing this they use every power they have accumulated in order to create more beneficial business environments for themselves. The key factor in determination of the relative efficiency of foreign incorporation derives from many internal and external factors. The most important reason for FDI is the ever-growing market pressure to increase their profits.

Since the first emergence of companies with modern company laws in the middle of the 19th century, there has been constant transformation of MNEs’ investment strategies and organizational structure. An interesting point in this process was that neither political nor legal developments have been able to match this dynamic self-transformation in corporate groups’ structure. Consequently, MNEs have acquired unique legal and political status in the world. Presently, despite the arguments, it is true that MNEs are one of the biggest actors in both developing and developed economies. In some situations, MNEs can even be in conflict with states, the most advanced social institutions created by humankind. This modern image of the corporations has been developed since the time companies first emerged. Hobbes, who found the rise of corporations threatening to the state’s authority, noted ‘the great number of corporations; which are as it were many lesser commonwealths in the bowels of a greater, like worms in the entrails of a man’. The difference between that time and today is the greater internationalization of corporate activities and thus the emergence of bigger and more powerful corporate groups. Accordingly, MNEs are a phenomenon of the modern world and they raise some specific economic, financial, social legal and human rights problems. Their multinational nature, their economic and legal flexibility, their massive economic and financial power and their great political and social influence are important obstacles to any attempt to apply legal control to them.

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Since international policy-making works to the benefit of MNEs in many senses, the power of MNEs is not entirely self-built. International organizations are helping companies to operate on a large scale; the adherence to open market economies in international economic policy-making is expanding territories with open market economies in the world. Thus the current domestic and international policies of developed economies depend on supporting more corporate activities through any means at domestic or international levels. The fierce support of privatizations and market liberalization by the International Monetary Fund (IMF) and World Bank are important factors in the expansion process of MNEs’ activities. Moreover the World Trade Organization (WTO), with ever-growing members, is changing the dimensions of international dispute settlement in trade matters, which gives MNEs more power to circumvent national court systems. Furthermore there has been an enormous increase in bilateral investment treaties (BITs) in the last two decades between developed countries and developing countries. The BITs grant power to MNEs to challenge host states according to dispute settlement provisions that mostly require international arbitration. MNEs have been given permission to use international dispute settlement tribunals such as the International Centre for the Settlement of Investment Disputes (ICSID). Regional and international trade agreements are designed to reduce the level of conflict related to MNEs’ activities to a minimum. In many cases, human rights, environment and even public health are considered as obstacles to international trade since any conflicts under these concerns are considered a deterrent to MNEs. Thus this immense power of MNEs, the aid of some of the chief world powers and the complicity of many governments, have made it possible for them to interlink the basic norms that are contrary to the national and international public law in force, in the shape of BITs for the protection of foreign investments and regional agreements such as the North American Free Trade Agreement (NAFTA).²

The complex appearance of MNEs in the world economy provoked a good deal of criticism. MNEs are accused of causing serious harm to the people of the world and exploiting national economies and societies and even undermining democracy. In reaction to these problems, some people and countries demanded abandonment of MNEs’ activities in their territories. On the other hand, most of the less-developed countries try to attract those companies to invest in their territories because MNEs are considered a basic source of technology, employment and capital and thus as main actors in economic development for their societies. This creates a dilemma, on the one hand, countries want to attract

more FDIs by giving economic and legal incentives but on the other hand, they have to protect their citizens against any breach of law and torts committed by MNEs.

It is not easy to attract MNEs to any territory; successful FDI attraction needs a very favourable scheme of economic and legal incentives. Sometimes exemption from liability for the breach of some basic human rights could be possible. In many countries, governments bend or remove their own labour and environmental legislation to allow MNEs a freer hand, or turn a blind eye to violations. States, such as Sri Lanka, have created export processing zones (EPZ), within which the state allows a separate system of law or waivers of national law. At worst MNEs and governments actively collude to operate profitable national sources; MNEs ignore abuses made by states in order to create better operating conditions, or even worse they demand any protest or civil activity be stopped at any cost. In many cases MNEs prefer less-developed countries as a primary place of investments to escape strict safety, labour and environmental regulations in developed countries. For example, San Diego based Sempra Energy decided to build its new natural gas-fired power plant just over the border in Mexico in order to avoid stringent air quality regulations in southern California and escape from completing detailed environmental impact statements. As a result, MNEs have acquired strong economic power and they are one of the centres of policy-making in the world. The effects of MNEs are felt at every level of society from the bottom to the top, which makes examination of MNEs as international economic, social and legal institution a necessity.

In a legal examination one will see that, while all these developments are taking place in the world, the general principles of company law, which are applied to MNEs, have not changed since its first emergence. Companies were considered basic institutional forms to convince people to invest and to create a cumulative capital to make the necessary investment required for large-scale economic activities. For this reason shareholders were granted immunity of liability to convince them to invest their capital. This immunity later was also given to corporate shareholders, which altered the area of corporate law fundamentally and irrevocably.

Thus the broad ranges of economic incentives given by countries are just the tip of a huge iceberg. The real incentives lie under the structure of law of developed countries, which are transplanted by many developing and less-developed countries because MNEs and governments in developed countries as well as international financial organizations first demand a modern company law in a

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country eager to attract FDI. It is interesting for example in even such small and politically conflicted countries or territories, such as Kosovo, there is a push to legislate modern company laws, even though these communities have virtually no international trade yet. Moreover big economic powers, such as China and Russia, had to change their company laws to western style company laws to attract more investments in their territory. There are also ongoing efforts in Turkey to change company law, which is already western, to make it more modern and up to date.

In contrast to slow developments within the law, in the area of MNE in economics and management, there have been huge dynamics inside MNEs to change their own structures. While economic activity in the 19th century was growing at domestic and international levels, there was a need for better-organized institutions. This gap was filled by allowing corporations to have shares in other corporations. The result was the emergence of corporate groups in domestic business while MNEs took their place in the international business world. Accordingly the organization grew gradually while changing its structure over time to adopt better and more competitive business environments. There have been many attempts to understand basic operative and managerial structures of the MNEs. This has created a special area of studies in economic and managerial fields.

This complex structure gives grounds for more sophisticated problems in the area of MNEs, which is still mostly regulated by the rigid principles of company law settled in the 19th century. Thus there is always a claim that MNEs are primarily governed by the national legislation of the countries in which they operate. However, national legislations in developing countries are weak or they do not have the political will or technical know-how to enforce liability. Moreover, corporations’ headquarters are increasingly located in one country, where they are registered, with sourcing or production networks linking them to subsidiaries in another country or countries, while they have share listing on several stock exchanges. They can move money around and within the enterprise, relocate their headquarters and subsidiaries in response to changing legal and social environments, and play one government off against another to obtain more favorable tax and regulatory treatment. Under these conditions, being regulated by host states does not increase the level of liability of MNEs but gives them power to manipulate the countries’ fragile legal systems. As a result this complicated structure of the international economy puts MNEs in positions of extraordinary power and equally extraordinary lack of accountability to anyone or any authority except their shareholders. Accordingly the directors can always legitimate their decisions by claiming they have a duty to produce the best for the shareholders. Under these conditions, the only aim would be to maximize profit whatever it costs to outsiders of the company.
MULTINATIONAL ENTERPRISE TORTS

While aiming at profit maximization, MNEs are not reluctant to use any possible incentives offered to them or any gap in the law. Current structures of company law offer many gaps in this sense; the businesses might use shell companies in order to escape from liability. Moreover, at the international level, the corporation might divide up its assets to many locally operating subsidiaries while escaping overall group liability. Not surprisingly, these problems of company laws’ ability to regulate MNEs are not unknown at governmental and international organization levels.

One particular problem MNEs create is of the utmost importance and thus will be the centre of discussion in this book. With developments in the global economy and MNEs’ transformation, other global common characteristics of the international economy have emerged, the globalization of corporate victims. In recent decades, the world witnessed the global phenomenon of corporate torts. MNEs have been involved in mass tort actions in various parts of the world and mostly escaped justice easily. With the campaigns of non-governmental organizations (NGOs), the dark side of the global economic order has been revealed. It has become usual to witness a new example of corporate torts on a daily basis. These torts were more severe and common in less-developed countries. But it is also common to see the same level of corporate tort in developed countries. Some incidents have attracted worldwide publicity while many others were simply forgotten thanks to the difficulty in bringing a tort action against MNEs.

The cases for corporate torts vary from country to country according to their economic and social characteristics; in less-developed countries there is usually collusion between the state and MNEs. In severe cases MNEs are ignoring safety and environmental regulations causing many injuries and deaths. In developed countries, since the law is more developed, MNEs use the legal incentives given by company law statutes by dividing their entity into many sub-units to escape possible lawsuits. Yet despite this surge in interest in corporate tort responsibilities, there remain certain important countervailing factors. The most important among these is the disagreement between the objects and practice of globalization of tort victims, and that of economic globalization on the other. Certainly international trade law essentially grants numerous rights to MNEs and very few enforceable duties, and few if any significant rights in respect of tort victims.

What is interesting in this sense is the lack of action taken by states to create improvements in this situation. It is somehow understandable for less-developed countries to ignore most of the allegations in order not to lose investments but developed countries also take no action. There is hardly any effort by parliaments to change the current situation and courts do not try hard enough to create
better regulations. Instead, with the efforts of NGOs, the existing laws, such as the Alien Tort Claims Act (ATCA), are usually stretched in an attempt to impose tort liability on MNEs.

Accordingly there are a number of obstacles that prevent justifiable solutions to MNEs’ torts; from current legal systems to negative campaigns run by MNEs. There is a political unwillingness in less-developed countries not to scare MNEs. Moreover there might be collusion between MNEs and governments in less-developed countries so states are not willing to enforce existing laws and often pass laws which actively exempt MNEs from their national legal systems, often under pressure from their own economic needs. In developing countries the laws and models of the legal system, originating from the developed countries, where the companies have their centres, are weighting the system towards the already powerful. Thus both home and host countries’ legal systems are not efficient enough to solve the problems.

Therefore MNEs escape from possible lawsuits with reverse forum-shopping, where the accused corporation fights to have a case refused in a country favourable to the complainants (usually the home country) and to get it returned to a location favourable to itself (usually the host country). This is the first strategy carried out by MNEs when faced with tort claims under home countries’ laws. They use a number of gaps in private international law to reverse cases back to their origin where they are likely to remain unsolved. The cases that have overcome forum problems will have to struggle with the corporate veil and hidden ambiguities in the nationality of MNEs and the separation of identities of the parent company and the subsidiaries, created by MNEs to enable them to escape legal responsibility in any country where they operate.

There are a number of other factors that prevent liability; any small achievement at international level in creating better liability will be blocked by poor implementation mechanisms in most international regulatory instruments, if they are not already weakened by commitment to the voluntary regulations under corporate social responsibility (CSR) initiatives. Moreover internal codes of conduct allow corporations to claim to be good while not imposing any legal obligations on them, and so do not address the claims of MNEs’ victims. Additionally the system of out of court settlement is giving rights to companies to avoid having an effective ruling on certain issues; in a number of recent cases even though MNEs argue that they are not liable, they settled cases so that substantial grounds for future claims have been prevented.\(^4\) These problems are

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\(^4\) According to the report in the *Guardian* (www.guardian.co.uk/burma, and the *Guardian*, 15 December 2004) there was an out of court settlement between the energy MNE Unocal and Burmese villagers. The villagers claimed the company’s Yadana pipeline has led to deaths, rapes and the disruption of their lives. The amount of compensation is not disclosed. The lawsuit was launched in 1996; the action was brought to California
Introduction

not independent from each other and some of them are basic law problems while some of them are related mostly to the political preference of the countries.

IDENTIFYING THE LEGAL PROBLEMS

In this book the discussion will concentrate on the core-law issues, mainly jurisdictional problems and company law problems. Leaving aside more social-political arguments, the focus of this book will be on the legal obstacles for creating MNEs’ tort liability as the legal structure of corporate groups makes it possible for them to easily evade liability. This situation has been praised by many business and economic commentators for its success in raising capital through granting immunity from liability. This aspect was reflected very dramatically in a newspaper report. An American MNE, Halliburton, has settled asbestos claims for $5 billion. The interesting and important remark in this report is this part: ‘Halliburton has won praise on Wall Street for the way it dealt with an issue that could have led to its demise. By separating the oil business from the other subsidiaries, it was able to protect itself from lawsuits and built up cash to pay a settlement.’

Accordingly MNEs’ gift of spreading power, their capacity to be present in several parts of the world and nowhere at the same time, allows them to avoid national jurisdictions. The unique characteristic of MNEs’ structures together with private international law and company law makes access to justice in MNEs’ tort situation very problematic. The treatment of foreign subsidiaries of MNEs as independent legal persons separate from a sophisticatedly structured group, results in a situation that victims of these subsidiaries might bring their legal actions only against torts committed by the subsidiary in its own jurisdiction.

Limited liability and separate legal personality, which first emerged as a capital-raising tool in the simple form of a company, is now used as a liability evading tool for corporate groups. Thus in a simple evaluation of limited liability, it will be seen that limited liability almost grants a company more rights than private property grants since private property owners are liable for the damage that is caused by the misuse of property. For example where a house or car causes damage to people, there is full liability of owners for compensation but if a company causes the same injury and goes bankrupt because of the

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consequences, shareholders are liable for not more than they invested in the company. While all these negative sides of corporate law and private international law were being misused by MNEs to escape from liability, responses by law-makers to corporate groups’ challenges were at a minimum level and in very specific circumstances. Both actors of law-making (courts and parliaments) have failed to give immediate and satisfactory responses to these unfair situations. Responses were mostly related to corporate groups’ laws without a comprehensive examination of MNEs, thus they failed to create significant change in the current situation related to MNEs’ tort liability.

Given the characteristics of MNEs, the expectations at international and national level of regulations are high but there have been different approaches to the issues. Regulators prefer to create CSR initiatives or guidelines, which do not have a clear enforcement mechanism. While at a regional level, the EU, even though it was expected to be creative, considered the issues in a narrow sphere of company and group of companies’ law.

Regulatory efforts have been concentrated on the issues mostly relevant to the practical operational environments of MNEs, rather than liability issues. Thus most of the efforts related to groups of companies were in favour of MNEs’ activities or related to public law issues, such as tax law. At a global level, ideally, an international legal framework or convention is needed to discuss the activities of MNEs and to help encourage legislation at national level, but none has been drafted. However, it would be unfair to claim there have been no regulatory efforts for corporate tort liability; there have been some efforts, which tried to hold corporate groups directly liable for their torts by a different model of laws to create some sort of liability regime in the corporate groups’ context. However, those efforts, either in statutory law or in case law, have been weak and inefficient.

ORIGINS OF TORT LIABILITY PROBLEMS WITHIN CORPORATE GROUPS

Origins of the liability discussions lie within the main principles of company laws, which are based on the concept of separate legal personality of company and limited liability of shareholders. Under the theory of limited liability, shareholders have no obligations to the company or its creditors beyond their

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obligations on the par value of their shares, or under their guarantee in the case of a company limited by guarantee. It is assumed that a company is a distinct economic unit, which enjoys economic and managerial independence, and therefore must be considered as a legal person separate from its members. The separate legal personality theory is applied to all companies regardless of their shareholders. Thus the theory covers sole trader companies and wholly owned subsidiaries of MNEs. Under this traditional rule of corporation, a subsidiary corporation’s liability is also limited to the amount of its shareholders’ investment, and the parent or any other company under the group cannot be held liable for the subsidiary’s non-performed obligations.

In the beginning companies aimed to collect money from individuals since in early corporate history acquiring shares of another corporation was not approved by the courts. However, this rule changed dramatically after the acceptance of dropping all restrictions on acquiring shares in another company. The next stage then, with the emergence of corporate groups, was the discussion of whether limited liability protects the component companies of the new corporate groups in addition to the investors in the enterprise. Salomon v Salomon & Co Ltd brought about the situation that incorporators of a company could structure its capital so as to minimize their risk of the company’s failure. There is no requirement that the investment of the incorporators in a company must necessarily to a significant extent be in the form of equity. Hence separate legal personality meant just that, and it follows from this that a corporation is separate from its members and as such the latter not liable for its debts. This decision showed its effect for all corporations including corporate groups. Accordingly under traditional corporate law each component corporation of the group, whether parent, subsidiary or affiliate, for legal purposes was still separate and distinct from every other corporation in the group, and its rights and responsibilities were divorced from those of the other constituent companies of the group. For that reason, although the companies in the group, unlike its public shareholder-investors, were parts of the enterprise and engaged in the daily run of business, limited liability also insulated them from liability for the activities of its subsidiary companies because it was not discussed deeply and the simple logic determined the situation that limited liability protects shareholders, a corporation is a shareholder of the subsidiary, and therefore limited liability protects the shareholder corporation.

7 [1897] AC 22 HL.
8 Blumberg argues that limited liability of corporate groups, one of the most important legal rules in modern economic systems, appears to have emerged as a ‘historical accident’. See Blumberg, P.I., The Multinational Challenge to Corporation Law (OUP, Oxford 1993) p.57.
Accordingly, a typical group of companies constitutes an economic unit, which is divided into a great number of legal units, for purposes of exploiting any possible convenience and benefit. The limited liability company theory ignores contemporary economic realities because parent companies and their subsidiaries are collectively conducting a common enterprise. An MNE may have hundreds of subsidiaries around the world and each subsidiary may operate under its host country’s regulatory arrangement, but in practical terms they operate in accordance with the main economic and managerial policies of the group. Therefore there is a compound multinational enterprise structure under which, according to law, companies are independent from each other, but, on the other hand, according to economic realities, they are entirely interrelated.

The attraction of a subsidiary is that the combination of legal personality and limited liability enables its controller to separate an area of activity, or particular assets, and to control the subsidiary’s legal relationship with the wider organization because the law has given little recognition to the essential differences between subsidiaries and freestanding companies. There is an effective shifting of risk from the controllers and owners to the creditors of a subsidiary resulting from its separate legal personality. The control of shares by another company is not only control but also brings subsidiaries under common group management systems. Here the problems arise, as unlike the individual majority shareholders, the common management system may have a reason to direct the subsidiary to act contrary to its own interest and may even put its existence in danger. Thus there can be use of main corporate law theories to clearly further legitimate goals or possible abuse of corporate structure to avoid social conflict and corporate liability.

As a result of current case law, in order to make parent companies liable the plaintiffs would have to overcome the reluctance of the common law of tort to make one person responsible for the acts of another. English law offers virtually no prospect of success against parent companies on the basis of vicarious liability in the light of the Court of Appeal’s approach to corporate personality in the Adams v Cape Industries9 case by stating that ‘each company in a group of companies … is a separate legal entity possessed of separate rights and liabilities’. Therefore it is logical to claim that adherence to limited liability in corporate groups is a common characteristic of modern laws.

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9 [1990] 2 WLR 786.
EXISTING LAWS REGARDING LIABILITY OF CORPORATE GROUPS AND BRIEF EXPOSITION OF UNDERSTANDINGS OF THE THEORY OF CONTROL

It is apparent that the unfair effects of limited liability in a corporate group context have forced courts to search for alternative ways to reduce these unjust effects. For this purpose, plaintiffs will be able to base their argument on theories for the liability of parent corporations and search for existing liability under tort law, corporate law and the existing case law, which are mainly based on the piercing the corporate veil (veil lifting) doctrine. The real function of the doctrine is to fill the gap in common law doctrines that statutory rules cannot resolve effectively.

The application of the veil piercing principles by the courts showed different features during the past century and it differs from one jurisdiction to another. Sometimes courts forced the boundaries of established rigid principles of company law; but mostly the result of the cases in which disregarding of the corporate veil was demanded was simply a repetition of *Salomon* principles. The courts have never taken an evolutionary step in creating alternatives as they did when establishing the principle of separate corporate personality in *Salomon*.

The main problem of veil piercing theory is its dependency on the control theory which makes its application very weak and rare. In order to establish liability on a group basis for certain behaviours, one needs to prove the existence of control of the parent over the subsidiary and intent of misuse of the relationship between subsidiary and other companies in the group. In practice, control is applied by powers of decision-making. The most striking conclusion from the liability principles created by courts for groups of companies is that generally the corporate veil will not be pierced unless the corporate shareholder dominates the corporate subsidiary and the corporate shareholder has engaged in a fraudulent or illegal conduct or other improper conduct, which has resulted in an injustice.

Therefore liability applied or suggested was based on a simplified formula, which considered corporate groups as vertically organized institutions, thus the control theory was one-way control applied by parent companies over subsidiaries. In cases of a horizontally structured MNEs group, the control theory is inapplicable. Thus the control theory is much more suited to vertically organized corporate groups under which the divisions between subsidiaries and the parent is more apparent and the parent exercises some level of control over its subsidiaries. Plaintiffs are required to prove the excessive control of parents over their subsidiaries. This requires a very detailed fact specific inquiry and thus is almost impossible to prove in the modern structure of corporate groups.

This misunderstanding has caused another negative result in that there have never been real discussions or applications of group liability; rather parent-
subsidiary liability has been considered as the only possible way of establishing liability in corporate groups’ context. Accordingly, there is a starting presumption of separateness between the parent and subsidiaries, which flows from basic legal doctrines of corporate law. On the other side of the conflict, the plaintiff has to try to overturn this presumption by showing complete control of the parent over subsidiaries. In this stage, there are other assumptions about the nature of control in corporate groups; veil lifted only where there’s a clear single decision-making centre exercising complete control over subsidiaries, otherwise subsidiaries are held as a separate entity.

The reason for this failure could be found under the conception of MNEs in a legal world under which corporate groups have been traditionally considered as having one central decision-making body. Accordingly, in a group situation when one of the companies in the group has fallen under the control of the parent, the regulators incline to make the controller liable for the torts of the controlled company. Therefore the courts were never inventive beyond the theory of veil piercing, which has very strict conditions. Mostly theories related to veil piercing, developed for small companies, tried to be applied in the corporate group context. Eventually it was almost impossible to demonstrate and prove the strict requirements of veil piercing in corporate groups. Thus the efforts to extend veil piercing theory to corporate groups have failed.

In consideration of the piercing the corporate veil theory from a broader perspective, such an inadequately developed and complex structure of case law, even incapable of creating solutions for a private, one-man limited company, cannot be applied in modern times to corporate groups, particularly to MNEs with complex horizontal structure. Thus it is difficult to apply piercing the veil principles in subsidiaries’ torts since there is no easy proof of control of one particular entity over another. This lack of modern and comprehensive understandings of groups of companies, especially from the perspective of MNEs, prevents scholars, practitioners, courts and parliaments from developing satisfactory regulations. This leads to the ensuing examination of the business management structure of MNEs.

**THE CENTRAL DISCUSSION OF THE BOOK**

The book makes two major points. The first is that key elements of the existing law on MNE group structures are based upon a particular understanding of the nature of those structures. Particularly, the way in which central control is exercised is based on the system of vertical structures. This understanding is increasingly at odds with their real nature under which control is increasingly being exercised in a different, decentralized way. Hence there is a need for the law to take account of management literature which tracks changing nature and
management of MNEs. In other words central authority and control in MNEs is not exercised in the way that the law implicitly assumes it is. Legal understandings of the nature of control based on the idea of a central command centre are simplistic and outdated.

The second point is a wider point about the disagreement there has always been between the legal structures of MNEs and their real nature. In legal theory, there is the idea of groups as made up of lots of formally separate entities. However, the economic business structure of MNEs reflects a different and more single enterprise structure for MNEs. In short the idea of separate corporate personality was not developed with either one-man companies or groups of companies in mind. Therefore this point reveals a wider problem which goes to the heart of company law, theory of separate corporate personality.

Accordingly these problems should be examined in detail and solutions should be suggested by considering the findings. The solution to the problem of misconception of control, from this perspective, is simply for the law to adopt a new and more appropriate conception of control. The second point seems to imply a much more fundamental legal reform, involving the questioning of the whole idea of a separate corporate personality as it applies to groups.

Interestingly academic discussions in the area of corporate groups’ liability were somehow successful in pointing out the problems of the application of limited liability in corporate groups’ context and thus evasion of liability against involuntary creditors. However, the solutions suggested were mostly short and unconvincing due to misinterpretation of economic and managerial characteristics of MNEs. Suggestions offered by academia have never been adequately creative to be considered as alternatives. The failure was due to lack of interdisciplinary examination in the area of MNEs’ activities and thus misinterpretation of the way control by one entity over another in MNEs is used. There has always been a belief in the simple top to bottom control since they have never gone beyond the theory of a firm to develop a theory of a multinational enterprise.

Accordingly there is a requirement that MNEs must be examined from interdisciplinary perspectives in order to create better regimes of liability for MNEs’ tort; there must be extensive efforts to discover what the basic theories behind the structure of MNEs are. This examination should cover economic, social, organizational and legal areas. When applying these requirements into the current book, the future of MNEs tort liability must be discussed from two perspectives, first there must be an examination of basic economic, managerial, social and legal characteristics of MNEs and, secondly, the existing regulations must be tested to see if they are efficient enough to meet the challenges. As a result, suggestions on MNEs’ liability must be built on the results of extensive interdisciplinary and comparative methods.

This book aims to indicate the social, economic and organizational characteristics of MNEs. The purpose is to evaluate how different MNEs are conceived
in other disciplines and how this perception of MNEs in legal discipline and practice has been absorbed. While doing this there will be indication of theories developed by legal practice in order to solve liability problems in the context of groups of companies. The concentration will be on the perception of MNEs’ structure in legal theory and the liability theories developed on this perception, namely the theory of control in MNEs’ management structure.

The idea of removal of separate legal personality in the corporate groups’ context goes beyond the discussion of tort liability because it covers liabilities that arise from any activities of MNEs. Thus even though much of the analysis in this book can be interpreted as evidence to support the abolishment of separate legal personalities in the corporate groups’ context, the central discussion is built on the quest to demonstrate problems regarding the tort liability of MNEs and to focus on the efficiency of existing law and principles.

STRUCTURE OF THE BOOK

In order to bring modern interdisciplinary understandings of MNEs together with legal disciplines and to create modern proposals for MNEs’ tort liability, the book is divided into three parts and eight chapters.

The first part of the book will be devoted to the examination of the basic social, economic, managerial and legal characteristics of MNEs under the title of ‘Concept of Multinational Enterprise’. The aim of the part is to designate the basic feature of MNEs as unique institutions. The weakness of legal theory and regulations applied to MNEs will be better understood and this interdisciplinary examination will identify the basic theoretical problems in the area of tort liability of MNEs.

I wish to give some conceptual characteristics of MNEs in order to explain why they need special examination and draw conceptual limits of the MNEs for the present book. In a short explanation, the origin of contemporary conceptions of the MNEs lies in the belief that this modern, large-scale capitalist enterprise is a unique phenomenon, different in class from earlier business organizations such as the partnership and the small firm. Therefore this new phenomenon needs special examination in order to designate the differences from the patterns of small firms’ limited models. These differences occur in economic, social, organizational and legal characteristics of MNEs. Economic, organizational and social differences, to the necessary extent, will be examined in order to create a better understanding of the legal regulations and proposed solutions to the liability problems of MNEs.

An MNE has two distinctive economic features. First it organizes and coordinates multiple value-adding activities across national boundaries and, secondly, it internalizes the cross-border markets for the intermediate products.
arising from these activities. Therefore it is different since no other institution engages in both cross-border production and transactions. Moreover MNEs are different from government and international organizations in that the management of MNEs is not concerned with the development targets of individual nation-states, regions or territories; in contrast, circumstances and country-specific economic policies of nations determine the outcome of relations with MNEs.

MNEs also distinguish themselves from other types of business enterprises by their main characteristic feature that, as parent companies, they exercise control over subsidiary firms that are scattered over several states. In other words although there are legally independent organizations under the group, the parent company exercises strict control over the subsidiaries. However, this excessive exercise of control and unique organization of MNEs have undergone changes in the last 30 years. The changes have taken place in the structure of MNEs towards less-hierarchically structured organizations under which the power of the parent companies has considerably reduced and the organizations have gone in the direction of decentralization. However, the fact of being a unique phenomenon under this new organizational structure still apparently exists, even making the phenomenon more interesting to conduct a study on.

The idea of what an MNE consists of is also a challenge for scholars so the limits of the study must be illustrated from this perspective. There is an overwhelming agreement in academia that minority joint ventures, co-operative alliances and networking relationships with other organizations should be considered as part of an MNE’s sphere of influence because these kinds of relationships may give them some degree of control under an organizational structure or influence over the foreign companies associated with these organizations. There will be limited examination of networked enterprises in order to grasp the current discussion, and to prepare the ground for future MNEs’ studies. However, leaving further research to another study, the present book covers the liability arising from the ownership relationships under groups of companies. In other words, the examination will be based on the legal bodies under the group that are tied to each other with ownership relationships (joint-stock MNEs); the ownership could be full, part or cross-ownership.

At this stage, I wish to draw attention to the fact that in the history of ideas, attempts have been made to conceptualize the phenomena that MNEs create. The phenomena were regarded as new without realizing that both the phenomena and their images themselves undergo changes in time. This applies evidently to the concept of the MNEs. Therefore one should bear in mind that MNEs are neither homogeneous in function nor consistent in character over time. This obliges researchers to undertake further studies over time considering new developments and adopting them into established theories in the area. Since it is
the contemporary MNEs’ organizations that are under critical examination, the present work claims to have special characteristics.

Chapter 1 will be an examination of social and economic characteristics of MNEs in parallel with the MNEs’ emergence and maturing process from social and economic perspectives. There will be a search for where MNEs stand in current social-economic orders and how they operate. This examination will contribute to understanding the reasons for cross-border investments in the historical order. The process will be examined together with FDI movements and there will be a quest to discover the rationale behind the investment theory by simply asking why MNEs invest. Moreover the better understanding of FDI movement and growing direction of MNE developments will help to understand why there are liability problems related to the activities of MNEs. More importantly, this part of the study will enable better examination of the efficiency arguments of limited liability theory as it is considered to be the primary trigger for investment for companies. This examination will contribute to the discussion of tort liability by pointing out the basic social-economic characteristics of MNEs; the aim is to indicate that different social-economic characteristics need different laws and regulations.

The second chapter will be an examination of the organizational structures of MNEs under which there will be a close look at MNEs from the inside. The structural differences in organization of MNEs will be under historical, critical and explanatory examination. The basic features of managerial organizational structure of MNEs will be examined and later concentration will be on contemporary corporate structures. This examination will be vital for illustrating the need to move from the classical understanding of MNEs’ structures in applicable law and proposed regulations. While doing this, some examples of structures of modern MNEs will be demonstrated. The main reason for examining the organizational structural developments lies behind the fact that as a social institution the regulation of liability of MNEs should be structured according to their organizational structure. MNEs shall be considered as an institution that has certain characteristics which define them and make them different from any other institution in society, such as company, trust or international economic organizations. In particular this book discusses the liability issues arising from MNEs’ activities; in reality there have been many studies in the examination of multinational corporate groups and liability arising from their tortious actions. The past studies, in legal approach, have not taken horizontally structured MNEs into their main discussion. Therefore, this book will take these new developments as its main focus of research. In short, this managerial organizational examination has key importance for two reasons: first, the complex structure of MNEs prevents any liability theories and laws to be applied in MNEs torts. Secondly, the future law and theories must be built by considering the current characteristics of the structure of MNEs.
The third chapter of the book will be an examination of the legal theory behind MNEs’ regulations and liabilities. This examination will be entirely devoted to understanding the legal evolution with the developments under the case and statutory law. Limited liability and corporate separate legal personality principles will be at the centre of the examination. The aim of this examination is to prove the inefficiency of current legal regulations, which are dependent on historical case and statutory law. Accordingly the efficiency of limited liability will be discussed under this chapter in order to indicate the conceptual differences between a limited liability company and a limited liability MNE. The examination will be historical; first the emergence of corporate groups and, secondly, an evaluation process of corporate personality and limited liability will be conducted. The difference between individual and corporate shareholders will be identified. The deficiencies in the legal structure will be identified in order to understand the origins of the legal problems and pave the way to offer efficient liability regimes.

As a result the combination of economical, social, organizational and, finally, legal examination, in the first part of the book, will provide a broader understanding of the concept of MNEs and provide a genuine and efficient background for regulatory efforts. With this examination, I aim to show that MNEs are representatives of the global economic order; their operational and organizational features are almost the same all over the world. The laws of national states differ as the social, cultural and traditional features of national states are different. However, it will be seen that in terms of MNEs’ operations, the differences amongst national states are becoming increasingly insignificant.

In Part II of the book, I will examine the existing laws and principles that apply to tort liability of MNEs under the title of ‘Exploring the Tort Liability of MNEs’. There will be examination of how the modern structure of MNEs creates obstacles to solving tort liability. Principles created by courts or parliaments or suggestions made by academics will be examined by asking if they match the demands to bring interdisciplinary approaches to MNEs’ tort liability discussions or not.

Jurisdictional problems of imposing MNEs’ liabilities will be examined in Chapter 4. Multi-jurisdictional characteristics of MNEs cause certain difficulties in establishing liability on MNEs. The importance of jurisdictional obstacles to imposing tort liability will be the beginning of the discussion. The so-called forum non conveniens theory and further obstacles will be examined by giving examples from English and American jurisdictions. Next, suggested solutions to the jurisdictional problems will be discussed. As it is presented, in recent years, as an important development in creating liability, the Alien Torts Claims Act will be examined in detail. As in other parts of the book, the examination of jurisdictional problems and suggested solutions will be comparative and interdisciplinary by questioning how current laws meet the challenges.
In Chapter 5, tort liabilities of MNEs in case law will be under critical examination. The problems in case law will be indicated by centralizing the arguments under the theory of piercing the corporate veil. The aim of the chapter will be to test the efficiency of the regulations and principles by asking whether they offer justified meaning of tort liability or not. The efficiency of the theory in application to modern MNEs will be tested and suggested solutions will be made.

In Chapter 6, comparative statutory and examples laws and principles regarding corporate groups’ liability will be examined. Assessment will range from UK laws to some examples from the US, as well as approaches in EU law which will also be discussed. Moreover individual efforts from Germany and Turkey will be examined and further reference to laws from other jurisdictions will be made. The examination in this chapter will go beyond the tort liability discussions to groups’ liability discussions in various branches of law in order to evaluate and compare the findings to theories developed for tort liabilities. The aim of this chapter is to discover the approaches of law-makers to the problem of groups of companies and MNEs liability and compatibility of these examples with interdisciplinary features of MNEs. These examinations are important for two reasons. First, it will demonstrate the efficiency of existing laws to create tort liabilities. Secondly, it will create a ground for suggestions that will be made in the third part of the book.

In Chapter 7, liability solutions beyond the corporate group liability discussion will be examined. There will be a quest to specify options to solve the liability problems in other areas of commercial law. However, I will put the self-regulation and corporate social responsibility discussions at the centre of the discussion. Particularly, voluntary regulatory options will be looked at from efficiency perspectives by testing their enforcement mechanism by centralizing the discussion on the issue of ‘binding versus voluntary’ regulation.

Part III of the book, Chapter 8, will examine how and on which criteria the future of MNEs’ liability must be built. First, there will be a quest to find out what the obstacles to imposing better developed liability rules on MNEs are. The mistakes made during the history of regulations will be examined by comparing them to the findings of the previous parts of this book. Finally the book concludes by putting combined suggested solutions which are based on results of examinations made in the previous chapters.