just and humane society a reality. Thus, let not this dream fade solely on the ground that a certain sector of the citizenry desires otherwise and allows stagnation in the government by tolerating the rise of political monopolies. Even the greatest of the political leaders may have something to learn from the people they have led for a long time.

The Implications of the Principles of Corporate Governance on the Doctrine of Piercing the Veil of Corporate Fiction: Rethinking *MR Holdings v. Bajar*

*Allan Verman Y. Ong**

INTRODUCTION

In the corporate family which includes the corporation, its shareholders, its board of directors and its officers, the creditor is considered an outsider. The creditor, usually a bank or other financing institution, lends capital to the

* '04 J.D., cand., Ateneo de Manila University School of Law. Executive Editor, *Ateneo Law Journal*.

The author thanks Associate Dean Cesar L. Villanueva for his valuable insights which contributed greatly to this work, Atty. Cirilo P. Noel for his patient explanation of the concepts in the taxation of offshore transactions, and Ms. Karla Ng for her editing and research assistance.

Cite as 48 ATENEO L.J. 209 (2003).

payment of interest and by property against which the transaction is secured. The corporation's only obligations to the creditor are those which arise from the contract of loan.[1]

Creditors who deal with corporations are faced with unique constraints. By virtue of the separate juridical personalities of the corporation and its directors and stockholders, creditors cannot satisfy their claims against the directors or stockholders when the corporation becomes insolvent. The board of directors may decide to pay themselves large salaries that will siphon corporate funds, or enter into risky ventures that will lead the corporate business into ruin. Thereafter, the creditors may be left with no means to obtain the principal, much less, the interest payments. These are the risks that the creditor takes when he lends funds to the corporation: in exchange for the right to demand the payment of the placement of its funds at its maturity, he has no say in the management of the corporation.[2] By virtue of this contractual obligation of the corporation towards its stockholders, which is enforced by the principles of the trust fund doctrine and the power of creditors to petition for the corporation's involuntary insolvency when the corporate business enterprise begins to disintegrate, the relationship between the corporation and its creditors appears to be contentious.

Adam Smith, however, gives an alternate perspective from which to view the creditor's contribution to the corporation. Although the unsavory concepts of usury law, insolvency, foreclosure of mortgages, concurrence and preference of credits come to mind immediately when there are contentious issues between the corporation and the creditor, creditors are more important than mere outside sources of capital. Smith writes that the stock, which is lent at interest, can be considered as capital by the creditor. But what the corporate borrower really wants, and what the creditor really supplies him with, is *not the money, but the money's worth, or the goods which it can purchase.*[3] As it were, "[b]y means of the loan, the lender...assigns to the borrower his right to a certain portion of the annual produce of the land and labor of the country, to be employed as the borrower pleases."[4]

---

1. CESAR L. VILLANUEVA, PHILIPPINE CORPORATE LAW 349 (2001). In addition to this, certain obligations arise in the dissolution of a corporation where, by virtue of the trust fund doctrine, subscriptions to the capital of a corporation constitute a fund to which the creditors have a right to look for satisfaction of their claims; and in the issuance of watered stocks, where any director who consents or does not manifest his objection in writing to the issuance of watered stocks is personally liable to the creditor for the difference between the fair value received and the par value of the same.
2. *Id.* at 532-34.
3. ADAM SMITH, THE WEALTH OF NATIONS 381-82 (Edwin Cannan ed. 2001).
4. *Id.* at 382.

Thus, although the creditor is theoretically a mere alternative source of capital for the corporation, the capital which the creditor furnishes is not any lesser in utility than that supplied by the shareholders. The loan is but the "deed of assignment" which conveys from one hand to another the capital which its owners, the creditors, do not care to employ themselves. Understood in this sense, what the creditors assign to the borrower is not merely funds or capital, but the power to make purchases, or more generally, the power to run the corporate business enterprise.[5] In assigning the capital to the corporation, the creditor forfeits his own right to acquire a share in the annual produce: "A capital lent at interest may, in this manner, be considered as an assignment from the lender to the borrower of a certain considerable portion of the annual produce."[6]

Corporate Law recognizes the value of creditors. In cases where the corporation uses the fiction of corporate personality as a means of perpetrating a fraud or an illegal act, or as a vehicle for the evasion of an existing obligation, the circumvention of statutes, the achievement or perfection of a monopoly or generally the perpetration of knavery or crime, then the "veil with which the law covers and isolates the corporation from the members of stockholders who compose it will be lifted to allow for its consideration merely as an aggregation of individuals."[7]

This doctrine of piercing the veil of corporate fiction has been applied by the Supreme Court in three areas:

1. When the corporate entity is used to commit fraud or to justify a wrong, or to defend a crime;
2. When the corporate entity is used to defeat public convenience, or a mere farce, since the corporation is merely the alter ego, business conduit or instrumentality of a person or another entity; and
3. When the piercing of the corporate fiction is necessary to achieve justice or equity.[8]

Therefore, the doctrine of piercing the veil of corporate fiction has been observed to act as a regulating valve by which to preserve the powerful engine that is the main doctrine of separate juridical personality.[9] Corporations are still free, in the effort to maximize shareholder value and obtain profit, to use corporate structures to limit their liability, or to engage

---

5. *Id.* at 382-84.
6. *Id.* at 383.
7. San Juan Structural and Steel Fabricators, Inc. v. Court of Appeals, 296 SCRA 631, 645 (1998).
8. VILLANUEVA, *supra* note 1, at 86.
9. *Id.* at 75.

engine that is the main doctrine of separate juridical personality.[9] Corporations are still free, in the effort to maximize shareholder value and obtain profit, to use corporate structures to limit their liability, or to engage in legitimate tax avoidance schemes. Only when such structures constitute any of the three above-mentioned instances may the court disregard corporate fiction. Only then will the corporation be prevented from undertaking such schemes.

One such scheme by which corporate structures have been availed of in order to limit liability to certain levels is the formation of parent corporations and subsidiary corporations.

A subsidiary corporation is one in which control, usually in the form of ownership of majority of its shares, is vested in another corporation, called the parent corporation.[10] Subsidiaries may be used to subdivide or to expand a business enterprise or to accomplish a great variety of purposes. Some of the purposes for which subsidiary corporations are used may be summarized as follows:

1. To escape or lessen franchise taxes upon the privilege of doing business as a foreign corporation in other States, by the creation of local selling companies or branches.
2. Local subsidiaries may be used by a foreign manufacturing corporation to avoid service of process of the parent corporation and escape litigation in the courts of other States, by having a selling subsidiary carry on business there for the benefit of the parent, but not as its agent.
3. Subsidiaries may be employed for risky branches or departments of a business in order to limit liability to the property of the subsidiary corporations and render the parent and its other subsidiaries immune to the risk of that segment of the business.
4. A corporation, control of which has been acquired by purchase, may be operated as a subsidiary to retain the benefit of its well-advertised corporate name and goodwill and separate merchandising policies, the identity of which might otherwise be lost.
5. Subsidiaries have been frequently used to combine various operating companies, such as public utilities, into a large system under the control of a top holding company and obtain advantages in the merchandising of securities, in service contracts with subsidiaries and otherwise, control of operating companies at the base of a corporate pyramid may be held indirectly by a series of intermediate holding and operating companies, with a top superholding company at the apex of the system in which maximum control may be exercised on the basis of a minimum amount of investment.[11]
6. Subsidiary and affiliated corporations are sometimes used for various illegitimate purposes such as that of speculation, of taking refuge behind a "cleverly erected screen of corporate dummies" with inadequate capital, or to evade statutory regulations and restrictions on business not operate to certain class of corporations like banks and public utilities, or to evade trust laws.[12]

Because of the tendency for the set-up of the parent-subsidiary corporation to be utilized iniquitously, Dean Aguedo Agbayani has commented that the three theories of piercing the veil of corporate fiction have also been applied to parent or holding corporations, subsidiaries and affiliates, so as to hold the parent corporation liable for the contract or tortuous obligations of the subsidiary or affiliate.[13] Thus, where the corporation's directors become overzealous in their mandate to maximize the profit of the corporation[14] and perform illegal acts or acts which constitute bad faith, the piercing doctrine has served to check such indiscretions.

But legal developments in the Philippines have changed the paradigm of permitting corporations to engage in profit maximization by all means available. The latest development is the passage of the Code of Corporate Governance[15] passed by the Securities and Exchange Commission (SEC). The Code has raised the stakes of the corporation's accountability to the public and its aims are awe-inspiring: to raise investor confidence, to develop capital market, and to help achieve high sustained growth for the corporate sector and the economy.[16] Thus, although the board of directors is mandated to maximize the profit of the corporation, it likewise assumes certain responsibilities to different constituencies or stakeholders, who have the right

9. *Id.* at 75.

10. JOSE C. CAMPOS JR., THE CORPORATION CODE: COMMENTS, NOTES AND SELECTED CASES 48-49 (1990) (citing International Order of Twelve Knights and Daughter of Tabor v. Fridia, 91 SW 2d 404 193 1 6).

11. Salonga observes that in the U.S., the abuses of large public utility holding company systems led to the adoption of the Public Utility Holding Company Act of 1935, applicable to electric and gas holding companies and their subsidiaries engaged in interstate commerce.

12. JOVITO R. SALONGA, PHILIPPINE LAW ON PRIVATE CORPORATIONS 26-27 (1968).

13. AGUEDO F. AGBAYANI, COMMENTARIES AND JURISPRUDENCE ON THE COMMERCIAL LAWS OF THE PHILIPPINES 38-39 (1998). Here, Agbayani refers to the three theories of agency, instrumentality, and alter ego.

14. Prime White Cement v. Intermediate Appellate Court, 220 SCRA 103 (1993).

15. SEC Memorandum Circular No. 2, series of 2002.

16. Code of Corporate Governance, pmbl.

to expect that the institution is being run in a prudent and sound manner.[17] Among these stakeholders to whom the directors are accountable to are the creditors. Under this new paradigm, it appears that the instances where the veil of corporate fiction may be disregarded has been expanded and are no longer limited to fraud instances, alter ego scenario, or equity considerations.

Conventional wisdom has thus given way to a shift in the paradigm, and this is obvious in legislation. But statutory law is still subject to judicial interpretation, and it is necessary to speculate on how courts will observe this paradigm shift with regard to the doctrine of piercing the veil of corporate fiction, particularly to a parent-subsidiary corporate structure.

The recent case of *MR Holdings, Ltd. v. Sheriff Carlos P. Bajar*[18] is important because it shows how the Supreme Court will apply the SEC issuance, in ruling on issues involving Corporate Law. Although the transaction involved in the case is relatively recent, having occurred in 1992, the case traces its beginnings to a mining project, which was supposed to uplift the impoverished Marinduque community.[19] The ruling illustrates the Supreme Court's judicial policy towards permitting the setting up of corporate structures that will allow corporations to limit their liabilities. But does it likewise reflect the judicial policy towards corporate governance?

I. THE CASE OF *MR Holdings, Ltd. v. Sheriff Carlos P. Bajar*

A. *The Parties to the Transaction*

The creditor in this case is the Asian Development Bank (ADB), a multilateral development finance institution. The debtor is the Marcopper Mining Corporation (Marcopper), a domestic corporation, with 40% of its outstanding capital stock owned by Placer Dome, Inc. (Placer), a foreign corporation. Placer owns 100% of the outstanding capital stock of MR Holdings, Ltd. (MR Holdings), (petitioner), a non-resident foreign corporation not doing business in the Philippines.

B. *The Facts of the Case*

ADB extended a loan to Marcopper in the aggregate amount of US$40 million to finance the latter's mining project. This was done under a

16. *Id.* § II (6) (a).

17. G.R. No. 138104, Apr. 11, 2002.

18. Keith Damsell, *Philippines set to launch probe into Marcopper, Placer Dome*, FINANCIAL POST, May 19, 1999 *at* http://www.probeinternational.org/pi/mining/index.cfm?DSP=content&ContentID=4816 (last accessed Aug. 19, 2003).

"Principal Loan Agreement" and "Complementary Loan Agreement," with the principal loan of US$15 million sourced from ADB's ordinary capital resources, and the complementary loan of US$25 million funded by the Bank of Nova Scotia, a participating finance institution.

Placer and ADB executed a "Support and Standby Credit Agreement" whereby the latter agreed to provide Marcopper with cash flow support for the payment of its obligations to ADB. In addition, Marcopper executed in favor of ADB a Deed of Real Estate and Chattel Mortgage covering substantially all of Marcopper's properties and assets in Marinduque.

When Marcopper defaulted in the payment of its loan obligation, Placer Dome, in fulfillment of its undertaking under the "Support and Standby Credit Agreement," agreed to have its subsidiary corporation, MR Holding, assume Marcopper's remaining obligation to ADB in the amount of US$18,453,450.02. Thus, ADB assigned to MR Holdings all its rights, interests and obligations under the principal and complementary loan agreements, namely the Deed of Real Estate and Chattel Mortgage and the Support and Standby Credit Agreement. Marcopper likewise executed a Deed of Assignment in favor of MR Holdings. Under its provisions, Marcopper assigns, transfers, cedes and conveys to MR Holdings, its assigns and/or successors-in-interest all of its (Marcopper's) properties, mining equipment and facilities.

Meanwhile, Solidbank Corporation (Solidbank) obtained a judgment against Marcopper from the Regional Trial Court of Manila, in a civil case entitled *Solidbank Corp. v. Marcopper Mining Corp., John E. Loney, Jose E. Reyes and Teodulo C. Gabor, Jr.*[20] The decision ordered defendant Marcopper to pay plaintiff Solidbank the sum of PhP52,970,756.89. Upon Solidbank's motion, the RTC of Manila issued a writ of execution pending appeal directing the sheriff, Carlos P. Bajar, to require Marcopper to pay the sums of money to satisfy the judgment. Thereafter, Bajar issued two notices of levy on Marcopper's personal and real properties and thereafter issued two notices setting the public auction sale of the levied properties.

Having learned of the scheduled auction sale, MR Holdings served an Affidavit of Third-Party Claim upon Bajar, asserting its ownership over all Marcopper's mining properties, equipment, and facilities by virtue of the Deed of Assignment.

Upon the denial of its Third-Party Claim by the RTC of Manila, petitioner commenced with the RTC of Boac, Marinduque, a complaint for reivindication of properties, with a prayer for preliminary injunction and temporary restraining order against Solidbank, Marcopper, and Bajar.

19. Civil Case No. 96-80083, Regional Trial Court, Manila.

C. The Rulings of the Lower Courts

The RTC of Marinduque denied MR Holdings' application for a writ of preliminary injunction on the ground that it has no legal capacity to sue, it being a foreign corporation doing business in the Philippines without license, among others. On a petition for *certiorari* before the Court of Appeals, the latter court held that the RTC did not commit grave abuse of discretion in denying petitioner's prayer for a writ of preliminary injunction.

The Court of Appeals held that MR Holdings, being a non-resident foreign corporation not doing business in the Philippines, cannot sue and seek redress in Philippine courts. On the allegation of MR Holdings that it was suing on an isolated transaction, a recognized exception to the proscription against foreign corporations doing business without a license from suing in local courts, the Court of Appeals ratiocinated:

> [P]etitioner is not suing on an isolated transaction as it claims to be, as it is very obvious from the deed of assignment and its relationships with Marcopper and Placer Dome, Inc. that its unmistakable intention is to continue the operations of Marcopper and shield its properties/assets from the reach of legitimate creditors, even those holding valid and executory court judgments against it. There is no other way for petitioner to recover its huge financial investments which it poured into Marcopper's rehabilitation and the local situs where the Deeds of Assignment were executed, without petitioner continuing to do business in the country.
>
> x x x x x x
>
> While petitioner may just be an assignee to the Deeds of Assignment, it may still fall within the meaning of "doing business" in light of the Supreme Court ruling in the case of *Far East International Import and Export Corporation v. Nankai Kogyo Co.*, that:
>
> > Where a single act or transaction however is not merely incidental or casual but indicates the foreign corporation's intention to do other business in the Philippines, said single act or transaction constitutes doing or engaging in or transacting business in the Philippines.[21]

The court went further by declaring that even a single act may constitute doing business if it is intended to be the beginning of a series of transactions.[22]

21. Far East International Import and Export Corporation v. Nankai Kogyo Co., 6 SCRA 725 (1962).

22. *MR Holdings*, G.R. No. 138104 at 7.

D. The Issues Before the Supreme Court

Petitioner MR Holdings then brought a petition for review on *certiorari* citing the following errors:

> x x x
>
> F. The Honorable Court of Appeals committed a reversible error in holding that petitioner is without legal capacity to sue and seek redress from Philippine courts, it being the case that Section 133 of the Corporation Code is without application to petitioner, and it being the case that the said court merely relied on surmises and conjectures in opining that petitioner intends to do business in the Philippines.
>
> x x x
>
> G. The Honorable Court of Appeals committed a reversible error in holding that respondent Marcopper, Placer Dome Inc., and petitioner are one and the same entity, the same being without factual or legal basis.[23]

The Supreme Court formulated the issues for resolution, thus:

1. Does petitioner have the legal capacity to sue?
2. Are petitioners MR Holdings, Ltd., Placer Dome, and Marcopper one and the same entity?

E. The Ruling of the Court

The discussion of the Supreme Court's ruling will be divided into the issues as defined by the Court.

1. Legal Capacity to Sue

Here, the Court held that the principles governing a foreign corporation's right to sue in local courts have long been settled and may be condensed in three statements, to wit:

> a. if a foreign corporation does business in the Philippines without a license, it cannot sue before the Philippine courts;
>
> b. if a foreign corporation is not doing business in the Philippines, it needs no license to sue before Philippine courts on an isolated transaction or on a cause of action entirely independent of any business transaction; and
>
> c. if a foreign corporation does business in the Philippines with the required license, it can sue before Philippine courts on any transaction. [I]t is not the absence of the prescribed license but the "doing (of)

23. *Id.* at 8-10 (formatting supplied).

business" in the Philippines without such license which debars the foreign corporation from access to our courts.[24]

The Court recognized that the test of whether a foreign corporation is doing business in the Philippines, as stated in *Mentholatum Co. Inc., v. Mangaliman*,[25] is if the corporation is continuing the body or substance of the business or enterprise for which it was organized, or whether it has substantially retired from it and turned it over to another. It likewise cited the definition found in the Foreign Investment Act of 1991,[26] and the Foreign Business Regulation Act.[27] The Court held that the common denominator among them all is the concept of "continuity."[28]

24. *Id.* at 12.

26. 72 Phil. 524 (1941).

27. An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines, and for Other Purposes, Republic Act No. 7042 (1991). The said statute states:

> Sec. 3 (d) The phrase 'doing business' shall include soliciting orders, service contracts, opening offices, whether called 'liaison' offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totalling one hundred eight(y) (180) days or more; participating in the management, supervision or control of any domestic business, firm, entity, or corporation in the Philippines; and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works; or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization; *Provided, however,* That the phrase 'doing business' shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor, nor having a nominee director or officer to represent its interests in such corporation, nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account.

28. An Act to Require that the Making of Investments and the Doing of Business Within the Philippines by Foreigners or Business Organizations Owned in Whole or In Part by Foreigners Should Contribute to the Sound and Balanced Development of the National Economy on a Self-Sustaining Basis, and for Other Purposes, Republic Act No. 5455 (1968). The Act provides:

> SECTION. 1. *Definition and scope of this Act.* - (1) x x x the phrase 'doing business' shall include soliciting orders, purchases, service contracts, opening offices, whether called 'liaison' offices or branches; appointing representatives or distributors who are

The Supreme Court held that the appellate court's ruling that MR Holdings' participation under the Assignment Agreement and the Deed of Assignment is untenable because the expression "doing business" should not be given a strict and literal construction as to make it apply to any corporate dealing:

> At this early stage and with petitioner's acts or transactions limited to the assignment contracts, it cannot be said that it had performed acts intended to continue the business for which it was organized. It may not be amiss to point out that the purpose or business for which petitioner was organized is not discernible in the records. No effort was exerted by the Court of Appeals to establish the nexus between petitioner's business and the acts supposed to constitute "doing business." Thus, whether the assignment contracts were incidental to petitioner's business or were continuation thereof is beyond determination.[29]

The case of *Far East Int'l. Import and Export Corp. v. Nankai Kogyo Co., Ltd.*,[30] cited by the Court of Appeals – which held that a single act may still constitute "doing business" if it is not merely incidental or casual, but is of such character as distinctly to indicate a purpose on the part of the foreign corporation to do other business in the state – was held to be inapplicable to the present case. In *Far East*, the act of sending the official to the Philippines revealed an intention to continue engaging in the business in the Philippines because there was an express admission from the official that he was sent to the Philippines to look into the operation of mines. In the present case, the payment of MR Holdings to ADB is not, as Solidbank alleges, an investment into Marcopper which would compel MR Holdings to participate in Marcopper's recovery. It was done merely in fulfillment of the existing Support and Standby Credit Agreement between ADB and Placer and cannot be construed as an investment.

> domiciled in the Philippines or who in any calendar year stay in the Philippines for a period or periods totaling one hundred eighty days or more; participating in the management, supervision or control of any domestic business firm, entity or corporation in the Philippines; and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization.

29. *MR Holdings*, G.R. No. 138104 at 16.

30. *Id.* at 16-17.

31. 6 SCRA 725 (1962).

The Court conceded that MR Holdings may very well decide to operate Marcopper's mining business. However, the Court held that this is mere speculation. There are several options available to MR Holdings, but to see through the present facts an intention on the part of petitioner to start a series of business transaction is to rest on assumptions or probabilities falling short of actual proof. The Supreme Court admonished that courts should never base their judgments on a state of facts so inadequately developed and stated that it cannot be determined where inference ends and conjecture begins.

Lastly, the Court noted that long before MR Holdings assumed Marcopper's debt to ADB, there already existed a Support and Standby Credit Agreement between ADB and Placer. MR Holdings' payment to ADB was done merely in fulfillment of an obligation and cannot be construed as an investment. MR Holdings was thus held to be engaged only in isolated acts or transactions. Since single or isolated acts are not regarded as a doing or carrying on of business, MR Holdings had the personality to sue in local courts.

2. Piercing the Veil of Corporate Fiction

Solidbank seemed to argue that assuming MR Holdings has the standing to sue, it still cannot obtain an injunction to the attachment of the properties covered in the Deed of Assignment. This was because MR Holdings, Placer, and Marcopper are one and the same entity. Thus, even if MR Holdings had executed a Deed of Assignment to Placer which was subsequently assigned to MR Holdings, all these assignments are ineffectual because all the corporations are one and the same. It was as if no transfer had been effected and the property remained in Marcopper.

But the Supreme Court held that the record is lacking in circumstances that would suggest that MR Holdings, Placer, and Marcopper are one and the same entity. While petitioner is a wholly-owned subsidiary of Placer Dome, which, in turn, was then a minority stockholder of Marcopper, the mere fact that a corporation owns all of the stocks of another corporation, taken alone is not sufficient to justify their being treated as one entity.[31] The Court held that if the parent-subsidiary structure is used to perform legitimate functions, a subsidiary's separate existence shall be respected, and the liability of the parent corporation as well as the subsidiary will be confined to those arising from their respective businesses.

The Supreme Court cited the case of *Philippine National Bank v. Ritratto Group Inc.*,[32] which enumerates a list of factors which are useful in the

32. *MR Holdings*, G.R. No. 138104 at 24.

33. 362 SCRA 216 (2001).

determination of whether a subsidiary is but a mere instrumentality of the parent-corporation.[33] The only circumstance that would lead to the conclusion that MR Holdings is a mere instrument of its parent is if MR Holdings is wholly-owned by Placer Dome. Apart from this, there are no other factors indicative that MR Holdings is a mere instrumentality of Marcopper or Placer Dome. The mere fact that Placer Dome agreed, under the terms of the "Support and Standby Credit Agreement" to provide Marcopper with cash flow support in paying its obligations to ADB, does not mean that its personality has merged with that of Marcopper. The Supreme Court thus held that in the absence of fraud in the transaction of the three foreign corporations, it would be improper to pierce the veil of corporate fiction: "[t]hat equitable doctrine developed to address situations where the corporate personality of a corporation is abused or used for wrongful purposes."[34]

34. *Id.* The case provides:

a. The parent corporation owns all or most of the capital stock of the subsidiary.

b. The parent and subsidiary corporations have common directors or officers.

c. The parent corporation finances the subsidiary.

d. The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.

e. The subsidiary has grossly inadequate capital.

f. The parent corporation pays the salaries and other expenses or losses of the subsidiary.

g. The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to or by the parent corporation.

h. In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.

i. The parent corporation uses the property of the subsidiary as its own.

j. The directors or executives of the subsidiary do not act independently in the interest of the subsidiary, but take their orders from the parent corporation.

k. The formal legal requirements of the subsidiary are not observed.

35. *MR Holdings*, G.R. No. 138104 at 26.

II. THE TRANSACTION EXPLAINED

In order to fully appreciate the doctrines enunciated by the Court, it is first important to put the transaction into context, that is, to understand the investment structure utilized in the corporation. To do so, concepts in the National Internal Revenue Code[35] as well as the Philippine Canadian Tax Convention[36] will be used to aid in the analysis.

A. Placer's Investment as a Foreign Corporation

Marcopper is engaged in the mining industry. Mining is considered a means of exploring, developing and utilizing the natural resources of the State. Therefore, this can be undertaken only by Filipino citizens, or corporations, at least 60% of whose capital is owned by Filipinos.[37] This is why Placer could not have owned more than 40% of the outstanding capital stock of Marcopper.

By making a direct investment in Marcopper rather than coursing the investment through a Philippine branch or subsidiary, Placer envisioned the tax consequences of investing through an entity that may have been considered doing business in the Philippines.

On one hand, if Placer had set up a branch in the Philippines and had invested in Marcopper through that branch, the dividends received by the branch, considered a resident foreign corporation, from Marcopper, a domestic corporation, would not be subject to income tax.[38] This income would, instead be taxed in the Philippines, at the rate of 32% of the net income[39] and then the remittance of the profits of the branch to the foreign Placer head office would be taxed at 15% of the amount actually remitted.[40]

On the other hand, if Placer had invested by setting up a Philippine subsidiary, the subsidiary, considered a domestic corporation, having been incorporated in the Philippines, would be taxed at the rate of 32% of net income.[41] The dividends received by the subsidiary would be remitted to the

35. NATIONAL INTERNAL REVENUE CODE, Republic Act No. 8424 (1997).

36. Convention Between the Philippines and Canada For The Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, *available at* http://www.fin.gc.ca/treaties/Philip_e.html (last accessed August 19, 2003) [hereinafter RP-Canada Tax Convention].

38. PHIL. CONST. art. XII, § 2.

39. NIRC, § 28 (A) (7d).

40. *Id.* § 28 A.

41. *Id.* § 28 (A) (5).

42. *Id.* § 27 A.

foreign Placer parent. Such remittance would be subject to a tax of 15% of the amount actually remitted, provided that the county in which the foreign corporation is domiciled allows a credit against the tax due from the nonresident foreign corporation taxes deemed to have been paid in the Philippines.[42]

By investing in Marcopper directly as a foreign corporation without doing business in the Philippines, Placer would be taxed on its Philippine sourced income at the rate of 32%, but using the gross income as its tax base,[43] rather than the net income, which would be the case if Placer had invested through a branch or a subsidiary. The remittance of dividends to Placer from Marcopper would likewise be taxed at 15% of the amount actually remitted provided that the foreign corporation is in a country that allows a credit against the tax due from the non-resident foreign corporation taxes deemed to have been paid in the Philippines.[44]

An initial look at the situation reveals that Placer made a foolish decision in investing directly in Marcopper instead of coursing it through a branch or a subsidiary. But there are consequences to setting up both a branch and a subsidiary that Placer may have wanted to avoid.

A branch is considered in Corporate Law as a mere adjunct or department of another corporation.[45] It is taxed under the Tax Code as a resident foreign corporation, being a department of a foreign corporation which does business in the Philippines with a license. But since it is a mere extension of the foreign corporation, the branch and the foreign home office is considered a single entity. Therefore, any suit filed against the branch necessarily impleads the foreign home office. A creditor who files a suit against the branch can therefore look to the assets not merely of the branch but also of the home office to satisfy the judgment which it may obtain in the case.

A subsidiary is a corporation in which a parent corporation has a controlling share.[46] The investment may have been coursed through a Philippine incorporated subsidiary, even if it were wholly-owned by a foreign corporation. By investing through a subsidiary, the foreign parent corporation can limit its liability to its capital investment in the subsidiary. Thus, the assets of the foreign parent need not be subject to risk. However, a

43. *Id.* § 28 (B) (5) (B). *See also* Commissioner v. Proctor & Gamble PMC, 160 SCRA 560 (1988).

44. NIRC, § 28 (B) (1).

45. NIRC, § 28 (B) (5) (B).

46. Yutivo Sons Hardware Co. v. Court of Tax Appeals, 1 SCRA 160 (1961).

47. BLACK'S LAW DICTIONARY 345 (7th. ed. 1999).

subsidiary, being a domestic corporation, is taxable on all income derived from sources within and without the Philippines.[47] This would not be the case in a branch, since being a mere extension of a foreign corporation, and therefore a foreign corporation itself, it is taxable only on income derived from sources within the Philippines.[48]

Thus, by investing directly in Marcopper, it avoids taxability of income derived from sources outside the Philippines if it had invested as a subsidiary. And since Placer had merely wished to invest in a venture, it need not have set up a branch, which would have allowed local suits to reach its foreign assets. But even the investment method that Placer chose has allowed it to avoid certain tax consequences.

As earlier discussed, by merely investing in Marcopper, Placer would be deemed a non-resident foreign corporation. This is because under the Tax Code provisions, residence is ascertained by determining if the foreign corporation does or does not do business in the Philippines. A foreign corporation which engages in trade or business within the Philippines is considered a resident[49] whereas a foreign corporation which does not engage in trade or business within the Philippines is considered a non-resident.[50] This distinction is crucial not only for the purposes of limiting liability and avoiding the taxation of income sourced outside the Philippines, but is also important for Placer, to take advantage of the Philippine-Canada Income Tax Convention, it being a corporation incorporated in Canada.[51]

The treaty provides that the profits of an enterprise of the Philippines or Canada shall be taxable only in the State where it is located, unless the enterprise carries on business in the other contracting State through a "permanent establishment" situated in the other contracting state. Only then shall the profits of the enterprise be taxed in the other State.[52] The term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on.[53] Therefore, Placer

48. NIRC, § 23 (E).

49. *Id.* § 23 (F).

50. *Id.* § 22 (H).

51. *Id.* § 22 (I).

52. Placer Dome, Company Profile, *at* http://www.placerdome.com/company/profile.html (last accessed Aug. 19, 2003).

53. *Id.* art. VII § 1.

54. *Id.* art. V § 1. The treaty, in Art. V § 2 & § 3, further provides:

2. The term "permanent establishment" shall include especially:

i. a place of management;

avoids the taxation of its business profits by limiting its participation in Marcopper to mere investment in its capital stock. It is only the remittance of the dividends from Marcopper to Placer which would be taxed, not even at the regular treaty rate of 25% of the gross amount of dividend paid, but at the reduced rate of 15%, since Placer owns more than 10% of the company paying the dividend.[54]

ii. a branch;

iii. an office;

iv. a factory;

v. a workshop;

vi. a mine, quarry or other place of extraction of natural resources;

vii. a building or construction site or supervisory activities in connection therewith, where such activities continue for a period more than six months;

viii. an assembly or installation project which exists for more than three months;

ix. premises used as a sales outlet;

x. a warehouse, in relation to a person providing storage facilities for others.

3. The term "permanent establishment" shall not be deemed to include:

i. the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

ii. the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

iii. the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

iv. the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information for the enterprise;

v. the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research, or for similar activities which have a preparatory or auxiliary character, for the enterprise.

55. *Id.* Art. X, § 2 provides:

B. The Support and Standby Credit Agreement

Because Placer is a mere stockholder of Marcopper, it cannot be made to assume the liability of Marcopper towards ADB if Marcopper defaults. Apart from the property mortgaged to ADB to secure the debt, ADB would still require an additional security in the form of a surety, another party which would be solidarily liable with the principal debtor. This was the reason for the execution of the Support and Standby Credit Agreement between ADB and Placer.

The agreement was in the nature of an undertake to guarantee the monetary obligation, whereby the obligor agrees to pay the obligee if the principal debtor defaults on his obligation.[55] Here, Placer sharply limited its activities to investing in a domestic mining company and maintaining standby financial support in a financial transaction. This allowed Placer not to be considered doing business in the Philippines because its Canadian business is in gold mining. Providing financial assistance is considered incidental and casual, and not of such a character to indicate a purpose to engage in business. Since continuity of the conduct of business and an intention to establish a continuous business are pre-requisites for a foreign corporation to be considered doing business in the Philippines,[56] Placer avoids further involvement and retains its status as a foreign corporation not doing business in the Philippines. The subject of the foreign corporation doing business in the Philippines will later on be given extended treatment based on the Court's decision.

C. Assumption of Credit Agreement by a Foreign Subsidiary

When Marcopper defaulted on its loan and Placer was compelled to comply with the Support and Standby Credit Agreement it entered into with ADB, Placer did not do so on its own but through a wholly owned subsidiary which was a foreign corporation, MR Holdings, Ltd., a Cayman Islands-

2. Dividends paid by a company which is a resident of the Philippines to a resident of Canada may be taxed in Canada. However, such dividends may also be taxed in the Philippines, but where the beneficial owner of the dividends is a resident of Canada the tax so charged shall not exceed: 15 percent of the gross amount of any dividend paid to a company which is a resident of Canada which controls at least 10 percent of the voting power of the company paying the dividend; or 25 percent of the gross amount of the dividends in all other cases.

56. BLACK'S LAW DICTIONARY 916 (7th. ed. 1999). This defines a "Standby Letter of Credit."

57. Pacific Micronisian Line, Inc. v. Del Rosario and Peligon, 96 Phil. 23 (1954).

based company created by Placer.[57] By having a subsidiary assume the liability, Placer was able, once again, to use the separate juridical personalities of corporations to its advantage.

A subsidiary, possessing a juridical personality separate from the parent, was made to assume the liabilities incurred by the parent. With this, Placer effectively shielded its own assets from further liability. Certainly, MR Holdings' role seems to be limited to the enforcement of the collection of the debt that was paid for by Placer. But by assigning the credit to MR Holdings, Placer effectively divested itself from any risks pertaining to the transaction.

Despite this analysis, which has merely proven that the structure has allowed for Placer to have a tax efficient investment vehicle in the Philippines and to limit its liabilities where it so desires, it leaves many gaps in the otherwise coherent story.

This case speaks only of the default to the principal loan agreement of US$15 million between Marcopper and ADB. What was the fate of the supplemental loan agreement between Marcopper and Bank of Nova Scotia? Furthermore, why had Placer assigned the debt to MR Holdings if the purpose was merely for collection purposes? If this was for purposes of divesting its whole interest in the transaction, could the loan not have been assigned to a third party, rather than a subsidiary, to whom another default of the transaction could be detrimental to the parent Placer?

III. A MINING OPERATION GONE WRONG

The controversy under analysis traces its beginnings to the 70's when Marinduque, the smallest province of Region IV of the Southern Tagalog region, with a population of around 230,000[58] and a land area of 959 square kilometers,[59] was one of the poorest provinces in the Philippines. Marinduque welcomed Marcopper and the promise of 1,000 jobs some 30 years ago, along with the additional inducement of power, since electricity

58. Keith Damsell, *Twisted Road leads to Marcopper ownership*, FINANCIAL POST, May 8, 1999 *at* http://www.probeinternational.org/pi/index.cfm?DSP=content&ContentID=4818 (last accessed Aug. 19, 2003) [hereinafter Damsell Marcopper Ownership].

59. This pertains to the 1995 statistic.

60. Third World Network, *The Marcopper Toxic Mine Disaster – Philippines' Biggest Industrial Accident*, *at* http://www.twnside.org.sg/title/toxic-ch.htm, 1996 (last accessed Aug. 19, 2003).

was essential for mining operations.[60] During its peak, Marcopper, produced 30,000 tons of copper ore each day.[61] Placer Dome, then a diversified metals miner, held a 39.9% interest in Marcopper.[62]

Marcopper first mined the Taipan site. Mining of Tapian's low-grade copper ore began in 1969. The mining process produced two by-products: a heavy silt of rocks and sand, and the more dangerous tailings, a fine, grey mix of heavy metals, including lead, zinc, and sulphur.[63] Waste from Tapian was dumped in the surrounding countryside, including the nearby Boac river. The river was diverted to supply water to the pit and a dam built to collect waste. By 1975, with the approval of the government, three separate pipelines were constructed to funnel waste from Tapian down to Calancan Bay. Rather than burying the fine tailings deep below the surface of the bay, the waste was pumped out at shore level.[64]

The waste damaged the environment. Calancan Bay villagers complained that the dumping was reducing fish stocks. Surveys[65] confirmed a reduction in plant and animal life in the bay.[66] A class action suit was filed in 1988 against the company demanding an immediate halt to dumping. Marcopper's dumping permit expired and due to petitions filed before the Pollution Adjudication Board, Marcopper was made to cease operations.[67] But this stoppage in operation cut the electric supply to the island. Thus, mining was allowed to resume as with the dumping. As a concession, Marcopper agreed to contribute to a fund to rehabilitate the bay.[68]

It was during this time when the loan agreement in the present case occurred. On 4 Nov. 1992, Marcopper borrowed US$15 million from the Asia Development Bank to finance operations. An additional US$ 25 million was borrowed from the ADB, funded by Toronto-based Nova Scotia bank. Marcopper's Philippine assets were used as security for the two loans while

61. Keith Damsell, *Island's Deadly Legacy*, FINANCIAL POST, May 8, 1999 *at* http://www.probeinternational.org/pi/mining/index.cfm?DSP=content&ContentID=4817 (last accessed Aug. 19, 2003) [hereinafter Damsell Legacy].

62. Third World Network, *supra* note 61.

63. Damsell Legacy, *supra* note 62.

64. *Id.*

65. *Id.*

66. A series of annual surveys in the late 1970s and early 1980s by Synergistics Consultants, Inc. of the University of Philippines.

67. Damsell Legacy, *supra* note 62.

68. *Id.*

69. *Id.*

partner Placer Dome, Inc. agreed to provide Marcopper with cash flow to repay the loans.[69]

But from 1975 until 1991, Marcopper had essentially filled the environment with its waste. A 16-kilometre stretch of metal pipe delivered a poisonous brew of waste from a copper mine high in the island's hills to the waters of the bay.[70] In 1992, the firm began mining a second pit, San Antonio. The bulk of the tailings was stored in the Tapian pit while heavy silt was dumped in the nearby Mogpog River.[71]

In 1995, mine waste was discovered seeping through the groundwater near the Boac river. The source of the leak was the 2.25 kilometer drainage tunnel running from the Tapian pit to the Boac River. To relieve pressure and monitor the problem, engineers drilled a hole down to the two-meter tunnel.[72] On 24 March 1996, the tunnel's plug gave way, releasing 1.6 million cubic meters of tailings into the Boac River.

The effects of the disaster were described as follows:

> The onrush of tailings which resulted from the accident displaced river water downstream, which in turn flooded low-lying areas, destroying crop farms and vegetable gardens along the banks. This clogged irrigation waterways to rice fields, temporally isolating some villages and affecting trade and access to services. Thousands of farmers and fishers were seriously affected and their incomes drastically reduced. Bennagen estimated that such people lost about US$6 million at the time of the accident. Over the last three years this has increased to US$19.5 million. Other key economic losses included US$14.4 million due to a reduction in tourism and other recreation activities.[73]

The United Nations sent a mission team to the Philippines to survey the disaster. The United Nations Mission final report, 73 pages all told, contains an extensive ecotoxicological assessment, an evaluation of the impacts on

70. Damsell Marcopper Ownership, *supra* note 59.

71. Damsell Legacy, *supra* note 62.

72. Keith Damsell, *Philippines set to launch probe into Marcopper, Placer Dome*, FINANCIAL POST, May 19, 1999, *at* http://www.probeinternational.org/pi/mining/index.cfm?DSP=content&ContentID=4816 [hereinafter Damsell Probe].

73. Damsell Legacy, *supra* note 62.

74. Agus Hermawan & Hang T. Nguyen, *The Marcopper Disaster in the Philippines: Case Study No. 1 in Environmental Economics in Asia*, KOMPAS NEWSPAPER, INDONESIA, VIETNAM NEWS AGENCY, *at* http://www.ecanet.net/articles/marcopper.html (last accessed Aug. 19, 2003).

human health and well-being, general discussion on the causes, as well as recommendations to avoid future disasters.[74]

Based on the assessment, the United Nations Mission team concluded that:

- The Makulapnit and Boac River systems had been so significantly degraded as to be considered an environmental disaster;
- The aquatic life, productivity and beneficial use of the rivers for domestic and agricultural purposes are totally lost as a result of the physical process of sedimentation;
- The coastal bottom communities adjacent to the mouth of the Boac River are also significantly degraded as a direct result of smothering by the mine tailings;
- There is no evidence of acute poisoning in the exposed population due to the mine tailings.
- There is an increased health and safety risk due to immersion and flooding as a result of the very large volume and physical properties of the mine tailings, should they be mobilized during the wet season; and,
- Concentrations of trace metals in the mine tailings were not sufficiently high to represent an immediate toxicological threat.[75]

Marcopper and Placer Dome tried to sort out the disaster. The drainage tunnel was plugged and mining operations halted, never to resume again. The catastrophe was alleged to be a fortuitous event, which Placer claims, was triggered by a minor island earthquake.[76] Still, criminal charges were filed in the Philippines against three Marcopper employees, including the President of Marcopper.[77]

After the tailings spill, Marcopper defaulted on its loan. ADB and Placer agreed to transfer the bank's interest to MR Holdings, whereby the latter effectively became the banker to the mining firm.[78] What of the secondary loan agreement with Bank of Nova Scotia? Nova Scotia bank struggled to recover its loan to Marcopper. SolidBank, Scotia, 40%-owned Asian banking unit, won a partial judgment from the RTC of Manila for Php60 million, about US$1.5-million, in May, 1997.[79] The RTC held: "[A]ll three corporations (Placer Dome, MR Holdings and Marcopper) are actually one and the same person sporting a different collar."[80] MR Holdings appealed this ruling to the Court of Appeals, and the decision of the RTC was affirmed. Thus, the appeal before the Supreme Court.

A year later, Placer Dome transferred its 39.9% holding to MR Holdings. Subsequently, Placer Dome said all the shares of MR Holdings were then transferred to "a group of Philippines financial investors." But Placer Dome had not provided officials with any documentary evidence of such a transfer. Court documents filed by MR Holdings in 1998, one year after Placer Dome's former president said the company ceased to have "any ownership interest whatsoever in Marcopper," showed MR Holding's address as being the same as Placer Dome's in Vancouver.[81]

Although Placer Dome has spent nearly US$71 million in rehabilitating the damages, a study[82] reveals that the damages far exceeded the amount of money paid by the company in compensation.[83] As the United Nations assessment reports, the damages amounted to an environmental disaster. "Boac River [is] virtually dead. It will take ten years to clean it up."[84]

IV. Analysis of the Supreme Court's Ruling

The rulings of the Supreme Court pertinent to issues involving Corporate Law are those which say that MR Holdings is not a foreign corporation doing business in the Philippines, and that Marcopper, Placer, and MR Holdings are not one corporation. These rulings shall be analyzed in this section.

75. United Nations Department of Humanitarian Affairs-DHA-Online, Joint UNEP/DHA Environment Unit, *at* http://www.reliefweb.int/ocha_ol/programs/rcb/unep4.html. *Relief Co-ordination Branch* Joint UNEP/DHA Environment Unit, The Marinduque Island Mine Disaster, Philippines, Assessment mission conducted under the leadership of UNEP/Water Branch.

76. *Id.*

77. Damsell Legacy, *supra* note 62.

78. *Id.*

79. Damsell Marcopper Ownership, *supra* note 59.

80. *Id.*

81. Simon Cooper, *Placer Dome Gets Flood Warning*, GLOBE AND MAIL, Oct. 23, 2001, *at* http://www.probeinternational.org/pi/mining/index.cfm?DSP=content&ContentID=4815 (last accessed Aug. 19, 2003).

82. *Id.*

83. The study, conducted by Ma. Eugenia Bennagen of the Philippines, estimated the impact of the Marcopper mining accident which poisoned the Boac river in Marinduque Island in March 1996.

84. Hermawan & Nguyen, *supra* note 75.

85. *Id.*

A. Doing Business in the Philippines

The Corporation Code provides that no foreign corporation which transacts business in the Philippines without a license shall be permitted to maintain or intervene in any action in any Philippine court. But such foreign corporation may be proceeded against in Philippine courts on any valid cause of action.[85] Thus, the third party complaint filed by MR Holdings could very well have been resolved on the basis of this provision of law, upon a determination of whether MR Holdings does business in the Philippines. But the Supreme Court took pains to give a careful restatement of the principles of the foreign corporation's capacity to sue and its suability in local courts, as well as the concept of the "foreign corporation which does business," citing the important case law in support of these doctrines. Only after this did the Court, under the learned pen of Madam Justice Gutierrez, proceed to rule upon the case.

Here, the Court of Appeals construed the Assignment Agreement that ADB granted to MR Holdings after it assumed Marcopper's obligation, to be indicative of MR Holdings' intention to do business in the Philippines. To this, the Supreme Court did not mince words in its disagreement that, "this is simply untenable."[86] The Court reiterated both the general rule and the exception in determining whether a foreign corporation is doing business in the Philippines.

The general rule, found in *Metholatum* and the FIA, is that of continuity and the pursuit of business that is normally incident to the purpose of the business organization. The Court held that the court *a quo* exerted no effort to establish the nexus between MR Holdings business and the acts supposed to constitute doing business. Perhaps, since MR Holdings was a subsidiary of Placer which was a mining corporation, the assumption of debts was simply not part of the regular course of a mining corporation's business.

Solidbank cited an exception to the rule of continuity and the pursuit of business normally incident to the company's purpose, which is the doctrine of isolated transactions. The doctrine states that a single act may still constitute "doing business" if it is not merely incidental or casual but is of such character as distinctly to indicate a purpose on the part of the foreign corporation to do other business in the State.[87] But MR Holdings still does not fall within this exception. The court *a quo* held that there is no other way for MR Holdings to recover its huge financial investments which it poured into Marcopper's rehabilitation without continuing Marcopper's business in the country. The Court struck this down as a mere presumption.

86. CORPORATION CODE, Batas Pambansa Blg. 68, § 133 (1980).

87. *MR Holdings*, G.R. No. 138104 at 16.

88. 6 SCRA 725 (1962).

There were no overt acts of MR Holdings from which the intention to continue Marcopper's business may be inferred. MR Holdings was, therefore, not doing business in the Philippines. As such, it needed no license to sue before Philippine courts on an isolated transaction.[88]

Viewed in isolation to the surrounding facts, the ruling of the Court on this issue is faultless. But the facts upon which the controversy was based were not fully laid down for the Court. These facts have most probably been excluded by the courts on charges of irrelevance and immateriality. But these points are crucial in a full appreciation of case. Foremost is Placer's role in the controversy.

The earlier analysis on Placer's investment structure was done in order to avoid tax liabilities. By merely investing in Marcopper, Placer did not do business in the Philippines. Even if Placer had placed nominee directors or officers in such company to represent its interests, it would still not have been considered doing business.[89] But it appears that Placer went beyond mere representation of its interest. Placer supplied the top management for two Marcopper mines for 30 years.[90] In fact, two of Placer's top managers of the mine are still facing criminal charges.[91] A year after the tailings spill, Placer divested its 40% share in Marcopper.[92] In the facts reported in the Supreme Court ruling, Placer had all but disappeared from the picture. The debt to ADB was assumed by MR Holdings together with, under the Deed of Assignment, all the assets of Marcopper. But MR Holdings is a wholly-owned subsidiary of Placer. As the parent company of MR Holdings, Placer now owns, albeit indirectly, the whole of Marcopper, not merely the 40% stake which it had divested. Placer went to great lengths to disclose its divestment of Marcopper in press releases on their webpage and in speeches.[93] But the company went to even greater lengths not to disclose its renewed ownership of Marcopper's assets through MR Holdings.[94] Placer was the 40% shareholder of Marcopper who supplied the top management in Marcopper. If the issue of Placer's doing business were to arise, the courts

89. Facilities Management Corp. v. De la Osa, 89 SCRA 131 (1979), Sunio v. NLRC, 127 SCRA 390 (1984); Asionics Philippines, Inc. v. NLRC; 290 SCRA 164 (1998); Republic v. Sandiganbayan, 346 SCRA 760 (2000).

90. Implementing Rules and Regulations of the Foreign Investments Act, § 1 (f).

91. Catherine Coumans, *The Sore That Keeps Festering*, FINANCIAL POST, Apr. 8, 1999, *at* http://www.probeinternational.org/pi/mining/index.cfm?DSP=content&ContentID=4820, (last accessed Aug. 19, 2003).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

would surely consider it to be doing business in the Philippines. Now that the assets were wholly-owned by Placer through a subsidiary, so much more would the courts be inclined to rule that Placer was doing business in the Philippines.

Alas, Placer's gambit, that of alleging that it played no managerial role in Marcopper,[95] and having its assets transferred to a subsidiary who would file the third party claim in its stead, had paid off. The subsidiary, MR Holdings, was never stained with indicia of involvement in the operation of Marcopper. The Supreme Court simply had to respect the separate personalities of MR Holdings and Placer, on the issue of whether MR Holdings did business in the Philippines.

B. *Piercing the Veil of Corporate Fiction*

Logically, the piercing of the separate personalities of MR Holdings and Placer would be the second instrument of attack of Solidbank. If MR Holdings was not to be considered doing business in the Philippines, then Placer, the foreign parent corporation who had supplied the top management of Marcopper, would be considered doing business in the Philippines. A ruling which would disregard the separate personalities of MR Holdings and Placer would allow Solidbank to argue that MR Holdings was a mere instrumentality of Placer which had been doing business without a license in the Philippines. Thus, it would have no standing to file the third party claim. But this was not to be the case.

1. Dissent to the Supreme Court Ruling

The Supreme Court held that the record is lacking in circumstances that would suggest that Placer, Marcopper and MR Holdings are one and the same entity. Mere ownership of all the stocks of another corporation is not sufficient to justify being treated as one entity, if used to perform legitimate functions.[96] The Court concluded that there were no other factors, apart from ownership, which would indicate that MR Holdings is a mere instrumentality of Marcopper or Placer.

The Court here seems to have disregarded the tailings spill incident along with the claims of the community against Marcopper in the ecological disaster that ensued, as no mention was made of the incident in the exhaustive 31-page decision of the Supreme Court. But Placer clearly transferred its ownership in order to avoid any liability against itself or its officers. This is because the Corporation Code provides that "directors or

96. Damsell Probe, *supra* note 73.

97. *MR Holdings*, G.R. No. 138104 at 24.

trustees who willfully and knowingly vote for or assent to patently unlawful acts shall be liable jointly and severally for all damages suffered by the corporation, its stockholders or members *and other persons*."[97] But it simply could not let go of its huge investments in Marcopper without any means of recouping its losses. It transferred ownership to a wholly-owned subsidiary to which the assets of Marcopper were transferred under a Deed of Assignment. The intent of Placer to dissociate itself from Marcopper to avoid liability but retaining a means of holding on to its investments is unmistakable. This should have warranted a finding of the piercing of the separate personalities of the corporations, at least, on the part of MR Holdings and Placer.

Using the factors[98] cited by *MR Holdings*, the separate personality of the parent and subsidiary could have been disregarded. First, the subsidiary had no substantial business except with the parent corporation or no assets except those conveyed to or by the parent corporation. As stated in its corporate name, MR Holdings was a mere holdings company. Second, the parent corporation pays the salaries and other expenses or losses of the subsidiary. A report states, "[A]ccording to contracts obtained by The Globe and Mail, Placer Dome Technical Services entered into a contract in 1997 to pay the salaries of about 200 Marcopper staff."[99] There is also the fact that MR Holdings is a wholly-owned subsidiary of Placer. This was earlier disputed by Placer, claiming that it has sold MR Holdings to another company, but Placer refused to identify this buyer,[100] but this is not in issue in the Supreme Court ruling.

Is there an underlying policy consideration in the way that the Court refused to pierce the separate personalities of the parent and subsidiary in this case? A survey of cases decided by the Supreme Court reveals that the instances where the separate personalities of the parent and the subsidiary were disregarded are restricted to those cases where violations of labor and tax laws were found.

98. CORPORATION CODE, § 31 (emphasis supplied).

99. Here, referring to the ten factors in PNB v. Ritratto Group, Inc., 362 SCRA 216 (2001).

100. Mines and Communities Website, *Placer Dome in Trouble in the Philippines*, *at* http://www.minesandcommunities.org/Action/press11.htm (last accessed Aug. 19 2003).

101. Project Underground, *Drillbits & Tailings: Placer Dome's Dirty Sore Keeps Festering*, http://www.moles.org/ProjectUnderground/drillbits/990417/99041701.html (last accessed Aug. 19, 2003).

a. Survey of Piercing Cases in Labor Law

The foremost case in labor law disregarding the parent-subsidiary relationships is *Tomas Lao Construction v. NLRC.*[101] Here, respondents were employees who alternately worked for three companies, which comprised a business conglomerate exclusively controlled and managed by members of the Lao family. These three companies were engaged in the same line of business, would undertake their projects either simultaneously or successively, would lease tools and equipment to one another, and would also allow the utilization of employees from one company to another. The respondents were illegally dismissed, and the Court ruled that all three companies were jointly and severally liable for their backwages, disregarding the separate personalities of the three corporations.

The Supreme Court held that where it appears that the business enterprises are owned, conducted, and controlled by the same parties, law and equity will, when necessary to protect the rights of third persons, disregard the legal fiction that the corporations are distinct entities and treat them as identical.[102] The Court added: "It should always be borne in mind that the fiction of law that a corporation as a juridical entity has a distinct and separate personality was envisaged for convenience and to serve justice; therefore it should not be used as a subterfuge to commit injustice and circumvent labor laws."[103]

In *Bibiano Reynoso v. Court of Appeals,*[104] petitioner Reynoso was an employee who obtained a money judgment against his employer, a subsidiary of a parent corporation. Since the subsidiary had been dissolved, he filed his writ of execution against the parent corporation. The parent corporation alleged that the claim could not be maintained against it, since it was never the employer of the petitioner employee. The Supreme Court ruled for the piercing of the separate personalities, citing several factors, including the subsidiary's use of the same name as the principal, the fact that both were engaged in one and the same business, and that an exclusive management contract insured that the subsidiary would not deviate from the commands of the mother corporation. But it was not only the unity of interests which led the Supreme Court to decide to pierce the separate personalities. The Court observed that to circumvent a Central bank regulation prohibiting directors from borrowing money from their corporation, the parent corporation set up a subsidiary in order to allow its officers to borrow, albeit indirectly. For his unwillingness to satisfactorily

102. 278 SCRA 186 (1997).

103. *Id.* at 99.

104. *Id* (emphasis supplied).

105. 345 SCRA 335 (2000).

conform to these directives and his reluctance to resort to illegal practices, petitioner earned the ire of his employers. Eventually, his services were terminated, and criminal and civil cases were filed against him. Later on, the parent closed the subsidiary in fraud of its creditors. The Court thus deemed it proper to pierce the separate juridical personalities of the parent and the subsidiary.

Lastly, in the case of *Simeon De Leon v. NLRC,*[105] Fortune Tobacco Co. acquired security services from Fortune Services, Inc., which later sold out to Magnum Inc. Fortune Tobacco later terminated the contract for security services. The displaced security guards filed a case for illegal dismissal against all three corporations. Fortune Tobacco denied the existence of an employer-employee relationship between them, claiming that it obtained the services of the security guards from a wholly separate corporation. The Supreme Court pierced the separate personalities. It held that Fortune Services was a mere adjunct or alter ego of Fortune Tobacco. Both companies had the same owners and business address, and the purported sale of the shares of the former stockholders to a new set of stockholders, who changed the name of the corporation to Magnum Inc., appears to be part of a scheme to terminate the services of the security guards and to bust their newly-organized union.

To draw meaning from the rulings in the cases where the Court disregarded the separate juridical personalities of the parent and subsidiary, it is important to analyze the instances where the Supreme Court refused to disregard the separate personalities of separate corporations, which do not share a parent-subsidiary relationship.

In *Diatagon Labor Federation v. Ople,*[106] Diatagon was the exclusive bargaining unit of Lianga Bay Co. Before the expiration of its collective bargaining agreement with Lianga Bay, it was able to negotiate a CBA with Georgia Pacific Corp., another corporation, majority of whose employees were former employees of Lianga Bay. Despite the transfer, the employees continued to use the pay envelopes and identification cards of their former employer. A certification election was held among the employees in Lianga Bay and the results were sought to be nullified on the ground that the Lianga Bay employees who were transferred to Georgia Pacific were not allowed to vote. The petitioner claimed that the employees in both corporations should be treated as one bargaining unit because they have a common interest.

The Supreme Court viewed the two corporations as a single bargaining unit because they were indubitably distinct entities with separate jurisdictional personalities. The fact that their business are related and that

106. 358 SCRA 27 (2001).

107. 101 SCRA 534 (1980).

the 236 employees of Georgia Pacific were originally employees of Lianga Bay is not justification for disregarding their separate personalities.

In *Development Bank v. NLRC,*[107] the debtor corporation obtained a loan from Development Bank, mortgaging to it real properties with all the buildings and improvements thereon and chattels. By virtue of the said loan agreement, DBP became the majority stockholder of the debtor corporation. When it failed to pay its obligation with DBP, the latter foreclosed and acquired the mortgaged real estate and chattels. Employees of the debtor corporation filed for payment of salaries against both the debtor corporation and the bank. The Supreme Court held that the employees failed to prove the existence of employer-employee relationship based on the fact that DBP is the majority stockholder of the debtor corporation, and that majority of the members of the board of directors of the latter are from DBP. These circumstances are insufficient indicia of the existence of an employer-employee relationship in the light of the express declaration of the Labor Arbiter and the NLRC that DBP is being held liable as a foreclosing creditor.

The two cases where the Supreme Court refused to pierce the separate personalities of the two corporations involve cases where the companies are not related as parent and subsidiary. In *Diatagon*, there was merely identity in the line of business and the fact that previous employees of one company worked in the other company. In *Development Bank*, it was a mortgage creditor acquiring the shares of the mortgagee debtor. In labor cases therefore, the Supreme Court closely adheres to the dictum that mere ownership of the majority of shares by one corporation in another is not the only test by which separate corporate personalities may be disregarded. There must be a showing that the corporate entity is used to defeat public convenience, since the corporation is merely the alter ego of another entity. This is clear in the cases of *Lao*, *Reynoso*, and *De Leon*, where the Court disregarded the separate personalities of the parent and the subsidiary.

b. Survey of Piercing Cases in Tax Law

An investigation into Tax Law brings to the fore the case of *Lidell & Co., Inc. v. Commissioner of Internal Revenue,*[108] where two corporations were owned by one person. The main corporation imported automobiles, then conveyed them to the second corporation, which in turn sold the vehicles to the public with a steep mark-up. Since then, the main corporation paid sales taxes on the basis of its sales to the second corporation, considering said sales as its original sales. For taxation purposes, the Supreme Court determined that the second corporation was but an alter ego of the main corporation and

108. 186 SCRA 841 (1990).

109. 2 SCRA 632 (1961).

held that those sales made by the second corporation to the public were the proper tax base for the sales tax. In the case of *Filipinas Life Assurance Co., v. Court of Tax Appeals,*[109] in ruling on the issue of whether domestic and resident foreign life insurance companies are entitled to return only 25% of their income from dividends under the 1957 amendment of the National Internal Revenue Code, the Court observed that, "[T]he decision to tax a part (e.g., 25 per cent) of such dividends reflects the policy of discouraging complicated corporate structures as well as corporate divisions in the form of parent-subsidiary arrangements adopted to achieve a lower effective corporate income tax rate."

The separate juridical personalities of the parent corporation and its subsidiary are disregarded usually when the subsidiary is used merely as an alter ego of the parent corporation. This, however, was not the consideration used by the Court in *Koppel (Phil.), Inc. v. Yatco.*[110] In that case, Koppel Phil. is a local corporation, 99.5% of whose stocks is owned by Koppel Industrial, an American corporation, and the remaining 0.5% was owned by officers of the plaintiff corporation. It conducted business by offering for sale to the public certain merchandise. When a local buyer is interested in the purchase thereof, a price quotation is cabled by Koppel Phils. to the foreign company. The merchandise are shipped from abroad, and the plaintiff charges the price quoted, plus a small percentage. The Bureau of Internal Revenue (BIR) demanded of the plaintiff merchants' sales tax representing the total gross value of the sales. The BIR claims that this must be so, since the share of stock of plaintiff corporation were and are all owned by Koppel Industrial of U.S.A., and that Koppel (Phil.) is a mere dummy or branch. The Supreme Court affirmed this, saying that no group of businessmen could be expected to organize a mercantile corporation — the ultimate end of which could only be profit — if the amount of the profit were to be subjected to such a unilateral control of another corporation, unless indeed the former had previously been designed by the incorporates to serve as a mere subsidiary, branch or agency of the latter. The Supreme Court thus disregarded the separate personalities of the parent and the subsidiary and imposed the tax based on sales of the American parent company.

In Tax Law cases therefore, while there is an allegation that the subsidiary is reduced to a mere instrumentality, the Court pierces the separate personalities of the parent and subsidiary, not so much because the subsidiary was reduced to a mere puppet, but more so because the corporate entity is used to commit fraud or justify a wrong, or to defend a crime. These instances are considered in Corporate Law as "fraud piercing cases."

110. 21 SCRA 622 (1967).

111. 77 Phil. 496 (1946).

c. Other Piercing Cases

There are few cases apart from those involving Tax and Labor Law where the Supreme Court would disregard the separate personalities of the parent and subsidiary corporation.

In the case of *Philippine Veterans Investment Development Corportion v. Court of Appeals*,[111] Violeta Borres, was injured in an accident which was held to be due to the negligence of Phividec Railways, Inc. (PRI), a corporation partially held by petitioner Philippine Veterans. Later, petitioner sold all its rights and interests in the PRI to the Philippine Sugar Commission (PHILSUCOM). Two days later, PHILSUCOM caused the creation of a wholly-owned subsidiary, the Panay Railways, Inc., to operate the railway assets acquired from PHIVIDEC. Borres filed a complaint for damages against PRI and Panay, and Panay, in turn, filed a third-party complaint against the PHIVIDEC. Panay disclaimed liability on the ground that in the Agreement concluded between PHIVIDEC and PHILSUCOM, it was provided that PHIVIDEC holds PHILSUCOM harmless from and against any action, claim or liability that may arise out of or result from acts or omissions, contracts or transactions prior to the turnover.

The Supreme Court held that PHIVIDEC's act of selling PRI to PHILSUCOM gave PHIVIDEC complete control of PRI's business. PHIVIDEC had therefore expressly assumed liability for any claim against PRI. Since the accident happened before that agreement and PRI ceased to exist after the turn-over, it should follow that PHIVIDEC cannot evade its liability for the injuries sustained by the private respondent.

2. Implications of the Narrow Application of the Piercing Doctrine in Parent-Subsidiary Relationships

A disturbing implication of the survey of jurisprudence is that there seems to be a reluctance on the part of the Court to disregard the separate personalities of the parent and the subsidiary, where the issue involved is private. Thus, the Supreme Court has disregarded the separate juridical personalities of the parent and subsidiary corporation only when there is a public interest involved, such as in the lifeblood of the proper functioning of the State in Tax Law, or the protection of security of tenure in Labor Law. Otherwise, the Court is slow in striking down corporate structures. In the *MR Holdings* case, the only interests involved were those of the creditor and the debtor. It did not involve any other parties who claimed to have been damaged by the tailings spill. Is this reluctance of the Court well-placed?

112. 181 SCRA 841 (1990).

V. The Stakeholder Theory in Corporate Governance

The reluctance of the Court to rule on the contractual relationships that exist between corporations may arise from the dictum that business is largely considered private enterprise. The functions of the government have traditionally been classified into constituent and ministrant functions. Constituent functions are those compulsory functions which the government must undertake since these constitute the very bonds of society. Examples of these functions are the keeping of order, the protection of persons and property from violence and robbery, the fixing of personal, family, property relationships, and the definition and punishment of crimes.[112] Ministrant functions are the optional functions of government intended for achieving a better life for the community.[113] The production of goods for the consumption of society does not fall under either category. Government is not in the business of doing business – and the reason for this is that it is better to entrust such function to private enterprises, in order for business competition to provide better goods and services. This may have led courts to hesitate in applying the doctrine of piercing the veil of corporate fiction on occasions where the parent-subsidiary relation has been erected in order to further business enterprise, and where there is no public policy consideration being violated.

The laws on business organizations, which include Corporate Law and Partnership Law, represent the barest minimum of government regulation as to the doing of business. For instance, the Corporation Code gives no limitations on what forms of activity may be entered into, save restrictions on corporate purposes which are unconstitutional, illegal, immoral or contrary to government rules and regulations.[114] Very few restrictions are found elsewhere.[115] Instead of restricting the activities that a corporation cannot enter into, certain activities are in fact restricted to the corporate form of doing business, such as banking. The absence of restrictions as to the activities that a corporation may engage in is logical. The law has created, in the corporation, a convenient means by which to do business and provides it with several advantages, in order to serve as a means to encourage

113. Bacani v. NACOCO, 100 Phil. 468 (1956).

114. *Id.*

115. Corporation Code, § 17.

116. The few limitations that exist pertain to the ownership of stocks. Special laws such as the Insurance Code, Presidential Decree No. 1460, or the General Banking Act of 2000, Republic Act No. 8791, provide minimum paid-up capitalization in recognition of the fact that undercapitalization can harm certain interests. The Constitution and other special laws provide for limitation on stocks that may be subscribed to by foreigners, such as in public utilities, the exploitation of natural resources, mass media, and the advertising industry.

investment and to develop industries. The modern world has seen the emergence of the corporation as the choice vehicle for the conduct of business. As a form of doing business, the maximization of profit is its main objective.

The profit maximization norm falls under the dualist thought, described by Dean Robert Clark as the traditionalist view, which regards the private and public spheres as having distinct functions that ought to be kept distinct.[116] Thus, from the traditional legal viewpoint, a corporation's directors and officers have a fiduciary duty to maximize shareholder wealth, subject to numerous duties to meet specific obligations to other groups affected by the corporation.[117]

The dualist thought certainly does not mean that corporations and their managers have only minimal legal obligations to persons other than shareholders. Corporations are bound to employees under labor law, to consumers under consumer protection law, to the government under tax law, and even to the environment under environmental law. However, profit is considered the company's objective function and its residual goal. The duties to all other groups need simply be satisfied. They are considered constraints, and profit is to be as large as possible, within these constraints. The profit maximization viewpoint is legally consistent with the view that the corporation exists as a vehicle to conduct business. Business, and profit maximization, is legally and logically inconsistent with the corporation pursuing or fulfilling other interests.

But the "real and obvious truth" about corporations is that once they do business in a community, they become at once members of that community, and acquire duties and obligations.[118] Professor Sulpicio Guevarra observes that these duties and obligations are "not far different from the duties and obligations ordinarily expected of members in an organized, progressive, and progressing society."[119] Thus, American law has expressly authorized corporations to make donations to charity, discarding the traditional defense of shareholders that any benefit to entities other than themselves are *ultra vires* and impermissible.[120]

Philippine Corporate Law, in reaction to the slew of corporate controversies involving director malfeasance, has further recognized the

117. ROBERT L. CLARK, CORPORATE LAW 677-79 (1986).

118. *Id.* at 678.

119. Sulpicio Guevarra, *The Social Function of Private Corporations*, 34 PHIL. L.J. 464, 466 (1959).

120. *Id.*

121. *Id.* at 470.

interest that the public has in the way corporate directors manage. The Preamble of the Securities and Exchange Reorganization Act[121] lays down several of the government's policy towards corporations. The government encourages more active public participation in the affairs of private corporations and enterprises through which desirable activities may be pursued for the promotion of economic development,[122] and also seeks to promote a wider and more meaningful equitable distribution of wealth.[123]

The Code of Corporate Governance (CGG) states that a director assumes certain responsibilities to different constituencies or stakeholders, who have the right to expect that the corporation be run in a prudent and sound manner.[124] When the CGG provides that the director has constituencies other than the shareholders, it recognizes that there are parties who can claim a fiduciary duty from the directors. It means that while the director may owe duties towards shareholders, they are not the only body towards which the director is accountable.

A. The Stakeholders of a Corporation

Under the "theory of original power," the power of the board of directors stem not as delegated to them by the shareholders, but as originally impressed upon them by law.[125] The exercise of this power is free from shareholder control, first, because the power has never been theirs to begin with, and second, because the board exercises this power not only in their favor. Thus, by recognizing that the board of directors has constituencies apart from shareholders, directors can no longer hide behind the fiduciary obligations to the principal shareholders as a shield to avoid their fiduciary obligations to other individuals or groups who hold stakes in the corporation. Corporations therefore have accountabilities towards the following constituencies: its shareholders, employees, creditors, the local community where it operates, and even its management.

Shareholders are, undeniably, parties who hold great stake in the corporation. Shareholders put equity into the corporation. This is the capital with which the business of the corporation is run – assets are purchased with the initial investment, employees are paid from these funds, and creditors are

122. SEC Reorganization Act, Presidential Decree 902-A (1976).

123. *Id.* Pmbl.

124. *Id.*

125. CODE OF CORPORATE GOVERNANCE, II (6) (a).

126. Cesar L. Villanueva, Legal and Regulatory Issues for Bank Directors 11 (unpublished manuscript on file with author) (2002).

willing to lend money to the company because it knows that it can look to the shareholder's equity to satisfy their debts.

Employees provide the means by which corporations can provide products and services which can be sold or exchanged for profit. The corporation utilizes the expertise, talent, and efficiency of its employees in order to satisfy its consumer's needs and to meet the demand of business.

Creditors, like the shareholders, lend financial resources to the company as investors and they are confronted with the same risk of being expropriated by the insiders.[126] Creditors provide funds to the business, and the corporation takes advantage of this from the business truism that opportunity should be taken of making profits out of the money of others through leveraging.[127] In a sense, creditors can be viewed as investors in the corporation the way shareholders are. Having made their initial credit investigation into the corporation, they agree to lend money to the corporation, and their funds are tied to the corporation until they are paid. The creditor risks its liquidity in the transaction, wagering in the continued viability of the corporation as a business enterprise.

The local government unit where the corporation is located grants the corporation the right to build its facilities within its territory and permits it to operate therein.[128] The community provides other incentives to the corporation in order for it to operate in the territory – it operates public utilities such as the construction of roads and bridges, the operation of power plants to provide electricity, and provides tax incentives for the corporation. Also, a corporation aims to internalize all possible gains from the community, and to externalize all possible costs onto the community.[129] The physical presence of the corporation in the environment exerts pressure on the community which can never be quantified in financial terms.[130]

Lastly, management, which includes the directors and officers of the corporation, runs the corporate business enterprise. Although an officer's duty of loyalty prevents him from acquiring pecuniary interest that is adverse to his position, he has the power to manage corporate affairs, his reward being in the form of maximized shareholder value that will eventually accrue to him as a shareholder.

127. *Id.*

128. VILLANUEVA, CORPORATE LAW, *supra* note 1, at 554.

129. R. EDWARD FREEMAN, A STAKEHOLDER THEORY OF THE MODERN CORPORATION, ETHICAL THEORY AND BUSINESS 70-71 (1997).

130. MARJORIE KELLY, THE DIVINE RIGHT OF CAPITAL: DETHRONING THE CORPORATE ARISTOCRACY 26 (2001).

131. *Id.*

B. *Stakeholder Claims on the Corporate Business Enterprise*

Corporate governance deals with the corporation primarily as a business enterprise. The claims of the stakeholders are directed to the business enterprise of the corporation as a going concern. The demands of employees, management, creditors and the community are not satisfied when the corporation makes charitable donations, or builds corporate goodwill. It is satisfied when the corporation exists profitably, because the common interest of stakeholders is in the financial well-being of the corporation. Under this proper understanding of the claims of the various stakeholders, the corporation is mandated to satisfy their claims not merely out of a sense of altruism nor by considerations of selfish gain in terms of publicity or because to satisfy stakeholder claims is profitable for the business. The corporation has to satisfy the claims of stakeholders precisely because they hold stakes in the corporation.

In the *MR Holdings* case, the creditor had the right to expect that the business enterprise be run as a profitable business venture in order for its claims to be satisfied. The actions of the corporation, that of divesting itself of its investments in the venture and transplanting its stake to a subsidiary, may have been permissible under the conventionally accepted principles of Corporate Law, calling the directors to maximize profit at all costs apart from transgressing the law, raising the defense of the Business Judgment Rule to prevent liability from attaching to himself. But the principles of corporate governance runs counter to such acts, and the Business Judgment Rule can be observed to have been tempered in its application as well, to suit the emergent obligations of the directors.[131]

The mandate of the recent pieces of legislation to the courts, in deciding cases involving the increased constituencies of the corporation, is therefore clear. The reluctance of the Court in applying these principles is not well-placed. In doing so, it does not directly set economic policy, but merely applies legislation. Judicial economics would merely be an incidental result of such decisions.

132. But the SEC Code and the BSP Circular now considers the corporation as owing duties to increased constituencies called stakeholders. The test to prevent courts from interfering with corporate affairs, that "the corporation acted within its powers" is no longer valid, because the Board can act within its powers and yet violate its duties to stakeholders. When the corporation violates stakeholder interest, courts may now exert their will on corporations because the test is now no longer the fact that the act was within corporate powers.

C. Judicial Intervention in Previously Private Areas

Supreme Court decisions interpreting the law have delved into areas considered private. In *Ichong v. Hernandez*,[132] the Court enunciated a protectionist policy against alien retailers when it recognized the validity of the Retail Trade Nationalization Law. The Court reversed its position in *Tañada v. Angara*[133] when the Court recognized that participation in the World Trade Organization would be a viable structure for multilateral trading and a veritable forum for the development of international trade law. In *Garcia v. Board of Investments*,[134] the Court saw it fit to rule on the matter of the location of the plant of a foreign investor on the grounds of national interest. Lastly, in *Tatad v. Secretary of Energy*,[135] the Court acknowledged that it may face criticism, in view of the fact that policy-making demands technical expertise and skill which it has in scarce amount, and which functionally pertain to the executive and legislative branches.[136] To this, the Court held:

> Such criticism is charmless for the Court is annulling R.A. No. 8180 not because it disagrees with deregulation as an economic policy but because as cobbled by Congress in its present form, the law violates the Constitution. x x x Striking down R.A. No. 8180 may cost losses in quantifiable terms to the oil oligopolists. But the loss in tolerating the tampering of our Constitution is not quantifiable in pesos and centavos. More worthy of protection than the supra-normal profits of private corporations is the sanctity of the fundamental principles of the Constitution. Indeed when confronted by a law violating the Constitution, the Court has no option but to strike it down dead. Lest it is missed, the Constitution is a covenant that grants and guarantees both the political and economic rights of the people. The Constitution mandates this Court to be the guardian not only of the people's political rights but their economic rights as well.[137]

Thus, the Supreme Court acknowledges its duty to apply the full force of the law even in purely private business enterprise relationships, and that it has to make rulings that form policy, thus shaping the economy. But it is reluctant to provide the remedy of piercing to cases which do not involve some public policy consideration such as the lifeblood theory of taxation, the security of tenure and provision of living wages to labor. The transaction

133. 105 Phil. 1155 (1957).

134. 272 SCRA 18 (1997).

135. 177 SCRA 374 (1990).

136. 281 SCRA 330 (1997).

137. Frances T. Yuyucheng, *An Analysis of Supreme Court Decisions with Economic Impact*, 39 ATENEO L.J. 219 (Dec. 1994).

138. *Tatad*, 281 SCRA at 335.

involving the piercing of the personalities of the parent and the subsidiary which did not involve such policy considerations like the case of *Phividec v. Court of Appeals*,[138] still it involved a value protected by the law – the requirement that common carriers must use extraordinary diligence in the carriage of passengers.[139] In the *MR Holdings* case, it was a mere creditor, with interests considered purely financial therefore not involving public interests, who was asserting the doctrine of piercing the veil of corporate fiction. However, this should not prevent the Court from applying the clear provisions of the law.

CONCLUSION

MR Holdings v. Bajar pitted a corporate creditor against a corporate debtor. The ruling of the Court may very well be valued for its clear enunciation of the concepts of foreign corporations doing business and its adherence to earlier case law in the adjudication of the issue of piercing the veil of corporate fiction, as a means to consolidate case law on the matter.

But cases where corporate parties are involved must now be viewed in the context of the corporation's responsibilities to its increased constituencies. Although principles in Corporate Law and Tax Law allow corporations to minimize tax liabilities and to limit liabilities to its capital contribution by virtue of its strong juridical personality, the complementary doctrine of piercing the veil of corporation fiction should apply to cases involving iniquitous actions by corporations. The Court cannot shirk from its responsibility in applying the provisions of law even when purely private concerns are involved. The Philippine economy relies heavily in the continuous vigilance of the courts in the field of Commercial Law.

The Court's seeming hesitation in applying principles of piercing the veil of corporate fiction in view of avoiding interference with private enterprise must be re-examined in the face of the mandate of the Code of Corporate Governance. Where corporations err in their aim to maximize profit, the Code is an unmistakable reflection of the orientation that is taken by the Securities and Exchange Commission that the government has abandoned the *laissez-faire* treatment of business and has extended its hand into the affairs of private parties. Corporate strategy must incorporate this realization, and judicial policy must take this into strict account.

139. 181 SCRA 841 (1990).

140. An Act to Ordain and Institute the Civil Code of the Philippines, Republic Act. 386 [CIVIL CODE], art. 1755.