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## Is There an Emerging Fiduciary Duty to Consider Human Rights?

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# IS THERE AN EMERGING FIDUCIARY DUTY TO CONSIDER HUMAN RIGHTS?

CYNTHIA A. WILLIAMS\*

JOHN M. CONLEY\*\*

## I. INTRODUCTION

According to the majority of corporate law professors in the United States, a corporation's primary, and possibly exclusive, goal is to maximize shareholder wealth within the confines of the law. This academic view of the corporation leads directly to the conclusion that corporate governance structures and boards' fiduciary duties should be arranged to provide direct accountability to shareholders and only to shareholders.<sup>1</sup> Given this understanding of the corporate purpose, much academic commentary and debate has focused on the extent to which boards of directors of public companies may make decisions that advance the interests of stakeholder groups other than shareholders, such as decisions that advance the interests of employees, communities, consumers, or the environment, perhaps even to the detriment of shareholders.<sup>2</sup> This Article focuses on one particularly compelling non-financial consideration, the effect of a corporation's activities on human rights, to illustrate a variation of the more general questions of when *must* the directors of a public corporation consider other constituents and why.

In many senses, the shareholder-stakeholder debate has always been "merely" academic, since the complex realities facing corporate decision makers will often necessitate making decisions that have potential impacts on many stakeholders including employees, consumers, suppliers, debt holders, option holders, governments, business partners, and local communities. As a matter of business necessity, thoughtful boards and managers consider that wide range of Stakeholder interests in order to make intelligent decisions to enhance the long-term value and success of the corporation.<sup>3</sup> Indeed, recent proxy statements by major U.S. companies describing

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<sup>1</sup> For one formulation of this view, see Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439 (2001).

<sup>2</sup> See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253-54 (1999) (arguing that, given the understanding of the corporation as an instance of economic "team production," the function of the board is to be a mediating hierarchy and not to prefer the interests of one input (shareholders) to the exclusion of the others in all instances).

<sup>3</sup> See *The Good Company* (special report casting a critical eye on corporate social responsibility movement), ECONOMIST, Jan. 22, 2005, at 11 ("[F]or strictly selfish reasons, well-run companies will strive for friendly long-term relations with employees, suppliers and customers. There is no need for selfless sacrifice when it comes to stakeholders. It goes with the territory.").

the qualities they look for in directors explicitly mention the ability to make decisions balancing the interests of various constituencies.<sup>4</sup>

As a matter of doctrine, the business judgment rule has always given boards wide discretion to make decisions that advance other stakeholders' interests, even at the expense of shareholders.<sup>5</sup> This rule applies even when it means leaving money on the table with respect to a takeover bid,<sup>6</sup> which is when target shareholders' short-term wealth-maximizing interests most diametrically conflict with a stakeholder-infused or longer-term perspective. Under rare circumstances, directors may have a legal duty under *Revlon v. MacAndrews* to maximize short-term shareholder value.<sup>7</sup> *Revlon* has been construed narrowly by later Delaware Supreme Court opinions,<sup>8</sup> however, and "Revlon claims" are almost never successful.<sup>9</sup>

Leaving those rather substantial practical realities and doctrinal powers aside, boards' current fiduciary duties *to their shareholders* require them to consider the rights and interests of stakeholder groups, including those rights and interests exemplified in the international law of human rights. This Article will concentrate on three reasons why boards' fiduciary duties require consideration of international human rights: (1) the growing importance of Alien Tort Claims Act litigation (discussed in Part III); (2) changing institutional investor behavior (Part IV); and (3) developing public-private governance regimes (Part V), as illustrated by the United Nations Global Compact. To appreciate the context of these developments, this Article will start in Part II by sketching the changes occurring today in the social expectations of global business.

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<sup>4</sup> For instance, General Electric Company states the following:

The board of directors is elected by the shareowners to oversee management and to assure that the long-term interests of the shareowners are being served. Both the board of directors and management recognize that the long-term interests of shareowners are advanced by responsibly addressing the concerns of other stakeholders and interested parties including employees, recruits, customers, suppliers, GE communities, government officials and the public at large.

Michael R. McAlevy, *General Electric Board of Directors and Audit Committee Practices*, 1455 P.L.I. 599 (2004). See also Citigroup, Inc., available at <http://www.sec.gov/Archives/edgar/data/831001/000119312505051100/ddef14a.htm> (seeking candidates that, among other qualities, "will effectively, consistently and appropriately take into account and balance the legitimate interests and concerns of all of Citigroup's stockholders and our other stakeholders in reaching decisions, rather than advancing the interests of a particular constituency").

<sup>5</sup> See *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968) (refusing to require corporate owner of Wrigley Field to install lights so the Chicago Cubs could play games at night, notwithstanding plaintiffs' argument, which defendants did not deny, that the reason the Cubs' owners would not upgrade to allow night games was because of their view of the deleterious effect on the surrounding community).

<sup>6</sup> See *Paramount Comm., Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1990).

<sup>7</sup> See *Revlon v. MacAndrews*, 506 A.2d 173 (Del. 1986) (holding that when the break-up of a company is inevitable, or the company is involved in a change of control transaction, then the duty of the board of directors is to get the highest price possible for the shareholders).

<sup>8</sup> See *Paramount Comm., Inc. v. Time, Inc.*, 571 A.2d at 1150 (upholding the chancellor's conclusion as a matter of law that when control is in a "fluid aggregation of unaffiliated shareholders" before a transaction, i.e., in the market, and will be in a "fluid aggregation of unaffiliated shareholders" after a transaction, that is not a change of control transaction implicating *Revlon*); *Paramount Comm., Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1993) (holding that a transaction shifting control unaffiliated shareholders to a majority shareholder is a change of control transaction implicating *Revlon* duties).

<sup>9</sup> See Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 195 tbl.15 (2004) (finding that in 1999 and 2000, 233 complaints in Delaware raised Revlon claims, and none was successful).

Before beginning, one further explanatory paragraph is in order. We have stated that boards are currently “required” to consider the rights and interests of other constituents, but, as will become clear below, in only one instance is this a requirement of law, and that is when examining the interaction of potential Alien Tort Claims Act litigation and corporate fiduciary duty law. The “requirements” to consider institutional investor activism on stakeholder issues are market requirements, and the “requirements” to meet the standards of developing public-private governance regimes are norms-based requirements. Certainly, there is a difference, then, in how we are using the word “requirement” in these three instances. The more interesting question is how far apart these “requirements” are. “Legal” requirements presume potential enforcement in court, while market- and norms-based requirements presume enforcement by other means (such as shareholder disinvestment, bad publicity, consumer boycotts, and the risk of regulatory interventions to create new legal requirements). Yet, legal and non-legal enforcement mechanisms interact. The extra-legal “enforcement” brought about by risks to companies’ reputations and therefore to the value of their brands from highly-publicized problems with stakeholders or human rights issues may, in many instances, be stronger and thus more effective mechanisms of enforcement than the risks of actual liability in a court proceeding.<sup>10</sup> Many of the reasons that businesses are changing their approaches to these issues are not liability driven, but are market- and norms-driven. The existence of potential legal claims may heighten the efficacy of non-legal enforcement mechanisms because it may be more stigmatizing for a company to be hauled into court for alleged human rights abuses than to be pilloried in the press as part of a non-governmental organization (NGO) campaign. Yet, the difference between the strength of each of these potential enforcement mechanisms is narrowing, given the developments discussed below, and so, by implication, is the difference between our various uses of the word “requirement.”

## II. SOCIETY’S CHANGING EXPECTATIONS OF BUSINESS

For a number of reasons, society’s expectations of business have become more demanding over the past decade.<sup>11</sup> One reason is the maturing of the environmental movement, including the current salience of “sustainability” as a management concept.<sup>12</sup> Given the proliferation of environmental laws in the last three decades,<sup>13</sup> particularly in the United States, companies have increasingly hired an environmentally knowledgeable workforce, who can then become “change agents” within the organization.<sup>14</sup> Another reason is the increasing power of NGOs to mobilize resources, to frame issues of corporate responsibility, and to collaborate as partners with companies in order to address difficult social and environmental issues.<sup>15</sup> A third reason is the

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<sup>10</sup> See *infra* notes 11-28, 97-117 and accompanying text.

<sup>11</sup> See, e.g., ECONOMIST, *supra* note 3, at 3 of Special Report (“Over the past ten years or so, corporate social responsibility (CSR) has blossomed as an idea, if not as a coherent practical programme. CSR commands the attention of executives everywhere . . .”).

<sup>12</sup> See Pratima Bansal, *Evolving Sustainably: A Longitudinal Study of Corporate Sustainable Development*, 26 STRATEGIC MGMT. J. 197, 210 (2005) (explaining “why firms commit to sustainable development and the reasons that commitment changes over time”).

<sup>13</sup> See Vernon M. Buehler & Y.K. Shetty, *Motivations for Corporate Social Action*, 17 ACAD. MGMT. J. 767, 769 (1974) (noting “increasingly numerous federal, state, and local regulations” as the second most-often identified reason for companies’ increased social involvement, the first being “enlightened self interest,” i.e., the importance to companies of healthy communities, well-educated citizens, and stable political systems).

<sup>14</sup> See Pratima Bansal & Kendall Roth, *Why Companies Go Green: A Model of Ecological Responsiveness*, 43 ACAD. MGMT. J. 717, 728 (2000) (“Firms motivated by environmental responsibility often pointed to a single individual who had championed their ecological responses.”).

<sup>15</sup> See Petra Christmann & Glenn Taylor, *Globalization and the Environment: Strategies for International*

growth of the socially responsible investor movement and activist pension fund investors. Many of these investors are calling on companies to address long-term risks such as climate change or international human rights.<sup>16</sup> Fourth, consumer pressures establish heightened expectations in certain industries, such as in the food industry in Europe, where consumers press toward higher safety and quality standards.<sup>17</sup> Fifth, the anti-globalization movement that burst forth in Seattle in 1999 caused corporate leaders to realize that they need to defend the underlying premises of globalization and corporate-driven economic development.<sup>18</sup> Finally, in some industries, high-profile, negative events triggered rapid shifts in industry norms, such as the explosion of a Union Carbide Corporation plant in Bhopal, India, which accelerated the chemical industry's establishment of the Responsible Care Initiative creating benchmarks for safety in that industry.<sup>19</sup>

An example of some of the effects of these changing social expectations can be seen in the Chiquita Company, one of Cincinnati's premier companies. In the early 1990s, Chiquita was battered by bad press in the United States about environmental practices on its banana farms in Latin America.<sup>20</sup> Socially responsible investors began asking questions about the issue, and Chiquita's environmental managers led internal efforts to convince the board to change the way the company was handling the issue. To respond to these pressures, Chiquita turned to an established NGO, the Rainforest Alliance, and together they developed the Better Banana "Seal of Approval" to certify improvements in workers' health and safety, reduce emissions into the water, and preserve the rainforest.<sup>21</sup> As the partnership developed, Chiquita's social goals became

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*Voluntary Environmental Initiatives*, 16 ACAD. MGMT. EXECUTIVE 121, 122 (2002) ("In the last ten years, the ability of NGOs to exert global influence on firm conduct has increased tremendously."); Stuart L. Hart & Mark B. Milstein, *Creating Sustainable Value*, 17 ACAD. MGMT. EXECUTIVE 56 (2003) (discussing development of partnerships between companies and NGOs).

<sup>16</sup> See Gordon L. Clark & Tessa Hebb, *Why Do They Care? The Market for Corporate Global Responsibility and the Role of Institutional Investors* (2004) (unpublished paper, on file with the University of Oxford School of Geography and the Environment) (providing theoretical model of why institutional investors have become concerned with human rights and global social responsibility issues); Sandra Waddock, *The Multiple Bottom Lines of Corporate Citizenship: Social Investing, Reputation, and Responsibility Audits*, 105 BUS. & SOC'Y REV. 323, 330-33 (2000) (describing various kinds of social investing, and California Public Employees' Retirement System leadership on corporate governance and social issues).

<sup>17</sup> See Rachel Schurman, *Fighting "Frankenfoods": Industry Opportunity Structures and the Efficacy of the Anti-Biotech Movement in Western Europe*, 51 SOC. PROBS. 243 (2004) (discussing how anti-genetically-modified (GMO) food activists used the increasing sensitivity of European consumers to food safety issues to advance the anti-GMO agenda).

<sup>18</sup> See Bennett Freeman et al., *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 423, 424 (2001) (discussing the impact of the anti-globalization movement on companies' views of the importance of responding to increased social expectations).

<sup>19</sup> See Thomas P. Lyon, *'Green' Firms Bearing Gifts*, 26 REGULATION 36 (2003) (discussing the relationship between Bhopal and the development of the Responsible Care Initiative).

<sup>20</sup> This skeletal recitation of facts is taken from interviews we have conducted with Chiquita managers as part of an empirical project on the corporate responsibility movement, and on a conference presentation by Chiquita Senior Director of Corporate Responsibility and Public Affairs George Jaksch in London, February 2005, discussing its partnership with the Rainforest Alliance. See John M. Conley & Cynthia A. Williams, *Engage, Embed & Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. (forthcoming 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=691521](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=691521). For a complete account of the transformation at Chiquita, see J. GARY TAYLOR & PATRICIA J. SCHARLIN, *SMART ALLIANCE: HOW A GLOBAL CORPORATION AND ENVIRONMENTAL ACTIVISTS TRANSFORMED A TARNISHED BRAND* (2004).

<sup>21</sup> See TAYLOR & SCHARLIN, *supra* note 20, at 25-26, 32-36.

more extensive (perhaps as cultural changes occurred within the company).<sup>22</sup> In 2001, Chiquita signed an agreement with the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF), and the Latin American Coordinating committee of Banana Workers' Unions (COLSIBA) guaranteeing freedom of association and minimum labor standards, including a recognition of Chiquita's responsibilities to provide safe and healthy work environments.<sup>23</sup> Chiquita also made an internal commitment to ensure that all of its farms met the social and environmental standards of S.A. 8000 by 2006 (which includes a commitment to paying living wages), a goal it is on target to meet.<sup>24</sup> These changes have come about as potential customers (grocery store chains) in Europe and the United Kingdom ask questions about Chiquita's methods of production, and many seek "sustainability" assurances or inspection of farms before entering into long-term contracts.<sup>25</sup> Grocery stores are themselves responding to pressure from European and British consumers, who are becoming increasingly active on food safety and environmental issues.<sup>26</sup>

As this example shows, the shifting social context has caused many global companies to pay closer attention today to their social "license to operate." One-half of Global 500 companies now discuss social and environmental issues in their annual reports, in marked contrast with the communication landscape ten years ago.<sup>27</sup> Most now have corporate social responsibility (CSR)

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<sup>22</sup> Indeed, the depth of the alliance today can be seen in the fact that Chiquita's Social Responsibility Report contains a certification from the executive director of the Rainforest Alliance. The 2002 Report contains the following statement about Chiquita's environmental practices:

**Holding Chiquita Accountable for Environmental Excellence**

The Rainforest Alliance and associated members of the Sustainable Agriculture Network have been auditing Chiquita farms for more than ten years. **We have seen remarkable progress toward more eco-friendly production and healthier working and living conditions.** During 2002, we once again assessed all of the farms against our rigorous standards. Many of the audits were done without warning the farm managers in advance. I am pleased to report that all of the 115 farms were once again recertified.

We have reviewed the presentation of our audit findings and agree that this summary accurately reflects the findings of our independent audit teams. On average, we gave Chiquita farms lower scores this year as we continue to raise the bar for these farms that have long ago met the requirements of the core standards. Our program demands continuous improvement. . . .

. . . .

. . . Chiquita and the company's farm managers have a record of compliance with our standards. **We are now challenging them to dig deeper into persistent and systemic environmental issues such as worker health and safety, water conservation, agrichemical use and biodiversity protection.**

Tensie Whelan, Executive Director, Rainforest Alliance, Holding Chiquita Accountable for Environmental Excellence (July 3, 2003), [http://www.chiquita.com/chiquitacr02/envirosocial\\_01a\\_1.htm](http://www.chiquita.com/chiquitacr02/envirosocial_01a_1.htm) (emphasis in original).

<sup>23</sup> See IUF, Colsiba and Chiquita Sign Historic Agreement on Trade Union Rights for Banana Workers (June 14, 2001), available at <http://www.iuf.org> (select Chiquita from "companies" pull-down menu, click "go").

<sup>24</sup> See Chiquita's 2002 Social Report, available at [http://www.chiquita.com/chiquitacr02/envirosocial\\_01c\\_1.htm](http://www.chiquita.com/chiquitacr02/envirosocial_01c_1.htm).

<sup>25</sup> See *id.*

<sup>26</sup> See Schurman, *supra* note 17, at 244 (stating that the cultural and political context in Western Europe includes a "powerful cultural sensibility around food and a recent history of several serious food scares").

<sup>27</sup> See Cynthia A. Williams & John M. Conley, *An Emerging Third Way?: The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L.J. 493, 544 (2005) (discussing statistics on social and environmental reporting by Global 500 companies).



officers and departments, and the CSR consultant industry is thriving.<sup>28</sup> Thus, as a response to changing market conditions, well-run companies are paying sharply increased attention to human rights and other social and environmental risks throughout their global value chain. And yet there are more pointed reasons why boards are required to attend to stakeholder concerns and their social relationships as a function of maximizing long-term shareholder value.

### III. ALIEN TORT CLAIMS ACT LITIGATION

The Alien Tort Claims Act (ATCA), enacted as part of the Federal Judiciary Act of 1789, provides subject matter jurisdiction to the federal courts to hear claims by “an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>29</sup> This statute thus allows claims by aliens (non-citizens) alleging violations of international law, even against non-U.S. defendants, if there is a basis for asserting personal jurisdiction. The statute was virtually ignored until 1980, when the U.S. Court of Appeals for the Second Circuit decided *Filártiga v. Peña-Irala*.<sup>30</sup> In *Filártiga*, the Second Circuit held that the ATCA provides federal subject matter jurisdiction against a torturer, regardless of the nationality of the parties (if a basis for personal jurisdiction exists). In so doing, the court permitted a case to go forward against a former Paraguayan police officer, Americo Peña-Irala, who was visiting the United States, for Peña-Irala’s torturing Joelito Filártiga to death in Paraguay, the plaintiffs’ son and brother.<sup>31</sup> The Second Circuit held that:

Congress provided, in the first Judiciary Act, § 9(b), 1 Stat. 73, 77 (1789), for federal jurisdiction over suits by aliens where principles of international law are in issue. The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law.<sup>32</sup>

The *Filártiga* line of cases did not concern companies until 1995, when the Second Circuit held in *Kadic v. Karadzic* that a private defendant could be held liable under the ATCA as well.<sup>33</sup> *Kadic* created a doctrinal basis for bringing ATCA claims against other private defendants, including corporations, for their alleged human rights violations abroad, and such claims have proliferated. Approximately thirty-eight ATCA cases have been brought since *Kadic*.<sup>34</sup> The claims at issue span a wide range of types of alleged violations including: environmental degradation,<sup>35</sup> sweatshop labor conditions,<sup>36</sup> collaborating with the Nazis,<sup>37</sup> profiting from

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<sup>28</sup> See ECONOMIST, *supra* note 3 (begrudgingly recognizing the CSR consultancy industry).

<sup>29</sup> Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

<sup>30</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>31</sup> *Id.* at 877.

<sup>32</sup> *Id.* at 885.

<sup>33</sup> *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

<sup>34</sup> See Beth Stephens, *Upsetting the Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004) (overview of ATCA litigation); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-13 (2004) (noting that the ATCA had been used only once until 1959).

<sup>35</sup> See *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (upholding dismissal of claims alleging environmental degradation since environmental claims are not part of ATCA cause of action).

<sup>36</sup> See *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000) (holding dismissal of claims that alleged sweatshop labor conditions in Saipan’s textile industry for plaintiffs’ failure to provide real names was an abuse of discretion given the plaintiffs’ objective fear of reprisals).

<sup>37</sup> See *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 127-28 (E.D.N.Y. 2000) (denying motions to dismiss for lack of subject matter jurisdiction claims alleging Nazi collaboration against Jewish customers).

apartheid,<sup>38</sup> and corporate “entanglement” with repressive military or police.<sup>39</sup> Notwithstanding this wide range of allegations, the international human rights causes of action recognized as valid when brought against private defendants are much narrower: genocide, slave trading, war crimes, and other such crimes against humanity.<sup>40</sup> To date, of thirty-eight cases brought against corporate defendants, twenty-three have been dismissed, either because the underlying causes of action do not meet the stringent requirements of the ATCA or because of the discretionary doctrine of forum non conveniens.<sup>41</sup> Seven cases with corporate defendants have survived motions to dismiss,<sup>42</sup> and the rest are in development (a number of which are pending decisions on motions to dismiss).<sup>43</sup>

The relatively modest success in withstanding motions to dismiss in these cases may not seem to pose a significant enough litigation risk for boards of directors to pay attention. That view does not give due regard to the trajectory of these cases since that developing jurisprudence began fewer than ten years ago. Moreover, a decision of the United States Supreme Court last term has heightened the litigation risk. In *Sosa v. Alvarez-Machain*, the U.S. Supreme Court ruled 6-3 that the ATCA gives the federal courts subject matter jurisdiction to hear claims arising out of “violations of the law of nations” and establishes a cause of action for torts in violation of international law.<sup>44</sup> This decision rejected the narrower view of the ATCA that the underlying causes of action must be established by federal statute before they are cognizable. The Court also

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of French banks).

<sup>38</sup> See *In re South African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (dismissing claims alleging violations of the ATCA for doing business in South African during the apartheid regime as not violations of international law).

<sup>39</sup> See *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal.2004) (holding that sufficient evidence precluded summary judgment and permitted plaintiffs to proceed against a U.S. corporate defendant on the theory that its Nigerian subsidiary was acting as defendants’ agent or that the defendant corporation aided and abetted in the human rights abuses).

<sup>40</sup> See Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT’L L. 153, 161-63 (2003); see also Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 750-71 (2002) (analyzing the procedural difficulties facing ATCA claims, but discussing a number of cases that withstood motions to dismiss and the causes of action that survived).

<sup>41</sup> See Stephens, *supra* note 34, at 177.

<sup>42</sup> *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (holding that allegations that mining company acted in conjunction with Columbian paramilitary units to violate laws of war by paying units to murder trade union leaders were sufficient to state a claim against company under ATCA; and, on issue of first impression, that denial of fundamental rights to associate and organize may be actionable tort under ATCA); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (ruling that campaign of ethnic cleansing against non-Muslim population of Sudan constituted genocide under the ATCA); *Sinaltrainal v. Coca-Cola Co., Inc.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003) (dismissing ATCA claim against Coca-Cola Company and its Columbian subsidiary, but allowing claim to go forward against Columbian bottler and owner alleging claims of conspiracy to commit murder); *Bowoto*, 312 F. Supp. 2d at 1247 (allowing plaintiffs to proceed on their claims against an oil company for aiding and abetting military killings in Nigeria); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (reversing dismissal on forum non conveniens grounds for alleged participation with the Nigerian government in extrajudicial killing of an environmental activist), *on remand*, No. 96 Civ. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (denying motion to dismiss amended complaint on the basis that private corporations could be held liable for “joint action” with state actors); *Bodner*, 114 F. Supp. 2d at 127-28 (holding that subject matter jurisdiction existed under the ATCA, where plaintiffs alleged a French bank had been complicit with the Nazi regime); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (denying motion to dismiss for alleged participation in government’s forced labor and torture).

<sup>43</sup> See Stephens, *supra* note 34, at 177.

<sup>44</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 719-20 (2004).

recognized that the causes of action that can be heard under the ATCA will continue to be extended (albeit with caution) whenever an international law norm becomes sufficiently definite, universal among civilized nations, and obligatory.<sup>45</sup> This opinion clearly leaves open further development of the ATCA jurisprudence, and so is worth considering in somewhat greater depth.

#### A. THE SOSA V. ALVAREZ-MACHAIN LITIGATION

The plaintiff in *Sosa* was a Mexican doctor, Humberto Alvarez-Machain, who was kidnapped in Mexico by people hired by the U.S. government and brought to the United States to be tried for his alleged participation in the torture and death of an American Drug Enforcement Administration (DEA) agent, Enrique Camarena-Salazar.<sup>46</sup> Camarena-Salazar had been captured in Mexico, taken to a private home, and tortured over a two-day period in 1985. Based on eyewitness testimony, the DEA believed that Alvarez-Machain was present during the torture and participated in it. In 1990, Alvarez-Machain was indicted by a federal grand jury in the U.S. District Court for the Central District of California and a warrant was issued for his arrest. The DEA unsuccessfully sought the cooperation of the Mexican government in bringing Alvarez-Machain to the United States for trial, and so it ultimately approved a plan to hire people in Mexico to “seize” Alvarez-Machain and bring him to the United States.<sup>47</sup> One of the people who participated in the “seizing” was the petitioner, Jose Francisco Sosa. Once seized, Alvarez-Machain was held in a motel overnight in Mexico, then flown to El Paso, Texas, and arrested. After unsuccessfully litigating the legality of the United States’ asserting jurisdiction to the Supreme Court, based on “outrageous governmental conduct” and violations of the extradition treaty with Mexico, Alvarez-Machain was tried in the United States for the underlying conduct, and won an acquittal at the end of the government’s case.<sup>48</sup>

Alvarez-Machain then initiated an action against Sosa, other DEA agents in Mexico and the United States, and unnamed citizens of Mexico under the ATCA, and against the United States government under the Federal Torts Claims Act (FTCA).<sup>49</sup> Eventually, the Ninth Circuit, sitting en banc, held for Alvarez-Machain on both counts, finding that the ATCA both gives the federal courts subject matter jurisdiction and provides a cause of action for violations of the law of nations, and that the “clear and universally recognized norm prohibiting arbitrary arrest and detention” meant that Alvarez-Machain’s arrest was a tort under international law.<sup>50</sup> As for the FTCA, the Ninth Circuit held that since the DEA had no jurisdiction to hold Alvarez-Machain in Mexico overnight, the U.S. government was liable to him for false arrest based on California law.<sup>51</sup>

The Supreme Court reversed on both counts, so *Sosa* can hardly be regarded as an unalloyed victory for human rights and the rule of law. While the Court recognized that the ATCA establishes a cause of action, and defined its present and future scope, it found no claim in this case. On the ATCA claim, the Court held that the norm prohibiting arbitrary arrest and detention had not yet reached the level of a *jus cogens* norm: one that is specific, universal, and

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<sup>45</sup> See *id.* at 731.

<sup>46</sup> See *id.* at 697 (reciting these facts). Unless otherwise indicated, all of the facts described here are taken from *Sosa*, 542 U.S. at 697-99.

<sup>47</sup> See *id.* at 698.

<sup>48</sup> See *id.* (quoting *United States v. Alvarez-Machain*, 504 U.S. 655, 658 (1992)). *Sosa* is thus Alvarez-Machain’s second litigation in the Supreme Court.

<sup>49</sup> Federal Torts Claims Act, 28 U.S.C. § 1346(b)(1), §§ 2671-2680 (2000).

<sup>50</sup> *Sosa*, 542 U.S. at 699 (quoting en banc decision of the Ninth Circuit, 331 F.3d 604, 620 (9th Cir. 2003)).

<sup>51</sup> *Id.*

obligatory.<sup>52</sup> On the FTCA claim, the Court held that the language of the FTCA excepted claims arising in a foreign country; therefore, Alvarez-Machain had no cause of action against the U.S. government for its torts committed in Mexico.<sup>53</sup>

The holding of *Sosa* is troubling from a human rights perspective, since there was no dispute that agents of the U.S. government participated in a plan to kidnap Alvarez-Machain because their efforts at lawful extradition were blocked, hired Mexican citizens to force him into the United States, and imprisoned him for almost two years on charges for which he was acquitted at the close of the government's case.<sup>54</sup> Still, it may be of some comfort to Alvarez-Machain that his case will ultimately be remembered as clarifying the scope of the ATCA and providing an important foundation for litigating claims against the United States and foreign companies in U.S. courts for their alleged human rights abuses abroad.<sup>55</sup> By recognizing that the ATCA establishes a federal cause of action based on evolving, international law norms of obligatory behavior, *Sosa* allowed the continuing development of case law to inform thinking about companies' human rights obligations. Ultimately, though, *Sosa*'s most important contribution may be the Court's embrace of international law as a source of U.S. legal obligation, as against the "nationalist" challenge epitomized by Justice Scalia's dissent.<sup>56</sup>

As a practical matter, *Sosa* and subsequent human rights cases may be less important than the self-regulatory regimes discussed later in this Article in raising standards of corporate behavior, although the two may reinforce each other.<sup>57</sup> The kinds of *jus cogens* claims that are cognizable against private actors under the ATCA target only the most egregious behavior, such as genocide, piracy, hijacking, summary execution, slavery, or war crimes,<sup>58</sup> while a slightly broader group of claims can be brought against a company acting in concert with a state, if sovereign immunity issues can be resolved.<sup>59</sup> Many companies have codes of conduct setting internal standards of

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<sup>52</sup> *Id.* at 732-33.

<sup>53</sup> *Id.* at 712. The Ninth Circuit had concluded that the foreign-country exception did not bar Alvarez-Machain's claim because the decision to proceed by kidnapping was made by officers in DEA headquarters in the United States. 331 F.3d at 638).

<sup>54</sup> One wonders if perhaps, on viewing the evidence against Alvarez-Machain when being asked to extradite him, the Mexican government reached the same conclusion that the federal court trying the case in the United States eventually did, that there was not enough evidence to extradite (or convict).

<sup>55</sup> When cases are brought against foreign companies for their alleged human rights violations abroad, there will also need to be a basis for finding personal jurisdiction in the U.S. courts.

<sup>56</sup> *Sosa* arose at a time when there was a growing academic criticism of internationalism from political conservatives such as Curtis Bradley, Jack Goldsmith, Paul Stephan, and John Bolton. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237 (2000); John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205 (2000). In his dissent, Justice Scalia relied on Professors Bradley and Goldsmith's *Harvard Law Review* article, stating that "[t]he notion that a law of nations, redefined to mean the consensus of states on any subject, can be used by a private citizen to control a sovereign's treatment of its own citizens within its own territory is a 20th-century invention of internationalist law professors and human-rights advocates." *Sosa*, 542 U.S. at 749-50 (Scalia, J., dissenting) (citation omitted) (emphasis in original).

In defense of internationalism, see Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004). For an excellent summary of the debate, see Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193 (2005).

<sup>57</sup> See *infra* notes 118-42 and accompanying text.

<sup>58</sup> See Williams, *supra* note 40, at 764-66 (analyzing the *jus cogens* claims that can be brought against companies).

<sup>59</sup> See Stephens, *supra* note 34, at 173-82 (providing overview of ATCA litigation and the types of

behavior that are more protective of human rights or the environment than the *jus cogens* norms underlying these ATCA actions.<sup>60</sup> The articulation of corporate human rights responsibilities that may develop from these cases, if any, is likely to be thin as compared with the more robust conceptions embodied in voluntary initiatives such as the Global Compact or the extractive industry's Voluntary Principles on Security and Human Rights, or even stronger conceptions as embodied in the U.N. Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights.<sup>61</sup>

The *Sosa* Court also emphasized that it left the door ajar to “further independent judicial recognition of actionable international norms . . . subject to vigilant doorkeeping.”<sup>62</sup> It articulated a number of principles in addition to the “clear definition” principle to limit its holding: that the international law norm be clearly applicable to private actors; that claimants have exhausted domestic remedies; and that claims do not undermine the Executive's power to identify its foreign relations interests in any given case as a reason to dismiss.<sup>63</sup> And, of course, Congress is free to “shut the door to the law of nations entirely,” by amending or eliminating the ATCA, by modifying or canceling any decision based on the law of nations, or by preemption.<sup>64</sup> As a result, the central importance of *Sosa* in the corporate realm may not be so much what the Court did, although that is clearly important, but what boards of directors may do in response. Still, in rejecting the arguments of business lobbying groups to narrow the ATCA, the Court refused to relinquish an important federal judicial power to hear international human rights claims against global companies, and that continuing judicial power will work in tandem with new governance regimes to keep human concerns salient for corporate decisionmakers.

## B. IMPLICATIONS OF SOSA FOR CORPORATE BOARDS

Given the continuing vitality of ATCA litigation, directors' fiduciary duties now include a duty to be aware of human rights risks and potential violations within a company's global operations and to develop policies and management procedures to reduce the risks of such violations. Corporate directors have a number of well-established fiduciary duties under state corporate law: the duties of care, loyalty and full disclosure, and the duty to act in good faith.<sup>65</sup> As set out in *In re Caremark Derivative Litigation*, part of the directors' fiduciary duty of care is a duty to provide oversight with respect to law compliance—a duty to have systems in place to reduce liability

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complicity claims that can be brought).

<sup>60</sup> There is a burgeoning literature on corporate codes of conduct as scholars have begun to understand the devolution of power in the globalizing economy, and the new forms that regulation takes, including the importance of self-regulation. See *infra* notes 116-28 and accompanying text. For some introductions to codes of conduct, see Claire Moore Dickerson, *Human Rights: The Emerging Norm of Corporate Social Responsibility*, 76 TUL. L. REV. 1431 (2002); Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347 (1999).

<sup>61</sup> See *infra* notes 130-39 and accompanying text (discussing the Global Compact and the Global Reporting Initiative).

<sup>62</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

<sup>63</sup> *Id.* at 733 n.21.

<sup>64</sup> *Id.* at 731.

<sup>65</sup> See, e.g., *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001) (describing the “triad of primary fiduciary duties: due care, loyalty, and good faith”); *Malone v. Brincat*, 722 A.2d 5, 12-13 (Del. 1998) (holding that general fiduciary principles requires honest disclosure under state as well as federal law). See also Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456 (2004) (providing an overview of directors' fiduciary duties, as articulated in leading cases in Delaware, and discussing the evolving, independent fiduciary duty of directors to act in good faith).

risks from illegal activities by employees.<sup>66</sup> After *Sosa*, human rights violations are part of the liability risks that directors need to consider, at least to the extent of ensuring that the company has established appropriate information and reporting systems to assess risks of human rights violations, as well as policies to address conditions that may give rise to such risks.

That the risk of ATCA litigation is significant was emphasized by representatives of the business community in the *Sosa* litigation. Organizations speaking for the corporate community used *Sosa* as an opportunity to ask the Court to narrow the reach of the ATCA, a goal that was seen as important for business given the number of cases that have been brought against corporate defendants since *Kadic* was decided in 1995.<sup>67</sup> Business lobbying groups representing “a substantial proportion of all entities doing business in the United States and internationally,” including the Business Roundtable, the United States Council for International Business, the Chamber of Commerce of the United States, and the International Chamber of Commerce, collaborated in an amicus brief that emphasized what they viewed as the competitive disadvantage of the ATCA for companies with a U.S. presence.<sup>68</sup> The brief identified ATCA litigation as a “unique but significant risk” arising from the geographic breadth of claims—“turn[ing] on conduct occurring in nations as diverse as Egypt, Nigeria, Papua New Guinea, and Sudan,” the time-span of claims, from World War II Nazi slave labor claims to claims of cooperating with the South African regime of apartheid to claims arising today, and the range of types of actions that have been alleged to have violated the ATCA, including forced resettlement of villages, cultural genocide, marketing unsafe products, or a failure to allow independent unions.<sup>69</sup> Given the view of business amici that ATCA litigation presents a “unique but significant risk,” it would be imprudent for directors to ignore the possibility of this risk as too remote to consider in the board’s approach to risk management as part of their duty of oversight.

One response to this is to suggest that the duty of care generally has been eliminated as an enforceable duty of corporate law as a result of the combination of: the business judgment rule, which precludes personal liability for officers and directors taking reasonable care in making business decisions; indemnification, which authorizes or requires the company to reimburse officers and directors for most forms of personal liability; exculpation clauses, which companies adopt in their articles of incorporation to eliminate a cause of action for breach of the duty of

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<sup>66</sup> See *In re Caremark Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996) (Allen, J.). *Caremark* was a decision of Chancellor Allen before his retirement, bringing up to date the Delaware Supreme Court’s previous decision on law compliance, *Graham v. Allis-Chalmers Manufacturing Co.*, 188 A.2d 125 (Del. 1963). Although *Caremark* is not a decision of the Delaware Supreme Court, and so *Allis-Chalmers* is still the authoritative precedent, Chancellor Allen reconciled the passive approach to law compliance that *Allis-Chalmers* seems to permit with the realities of global business and regulation forty years later, suggesting that *Allis-Chalmers* “can be . . . narrowly interpreted as standing for the proposition that, absent grounds to suspect deception, neither corporate boards nor senior officers can be charged with wrongdoing simply for assuming the integrity of employees and the honesty of their dealings on the company’s behalf. A broader interpretation of *Graham v. Allis-Chalmers*—that it means that a corporate board has no responsibility to assure that appropriate information and reporting systems are established by management—would not, in any event, be accepted by the Delaware Supreme Court in 1996, in my opinion.” *Id.* at 969 (citation omitted).

<sup>67</sup> See Stephens, *supra* note 34, at 178-80.

<sup>68</sup> See Brief for the National Foreign Trade Council, USA \*Engage, the Chamber of Commerce of the United States of America, the United States Council for International Business, the International Chamber of Commerce, the Organization for International Investment, the Business Roundtable, the American Petroleum Institute, and the US-ASEAN Business Council as Amici Curiae Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 162760, at \*\*10-12.

<sup>69</sup> *Id.* at \*\*5-10.

care; and directors and officers (D&O) insurance, which effectively shifts the financial risk of malfeasance to an insurance company. Professor Sale takes this position,<sup>70</sup> while emphasizing, with Professor Thompson, that federal securities law fills the void by requiring disclosure of an extensive amount of information relevant to corporate governance.<sup>71</sup> Professors Black, Cheffins, and Klausner have evaluated outside directors' actual liability risks for failing to meet their "vigilance duties" arising under a range of statutes, and found for actions taken in good faith such risks are negligible, either under corporate, securities, environmental, pension, or other laws.<sup>72</sup> This component of directors' and managers' fiduciary duties is important even though it portends no realistic possibility of personal liability.

First, a precondition for directors not to be personally liable is that they acted in good faith, since the protective shields of the business judgment rule, exculpation, and indemnification are only available for actions taken in good faith.<sup>73</sup> D&O insurance may be available to protect directors against personal liability for actions not in good faith, in theory, depending on a company's policy. It would be hard to construe most standard, current policies to cover bad faith, however, and explicit coverage for bad faith actions would be very hard to get.<sup>74</sup> The Delaware courts are increasingly scrutinizing boards' actions in the post-Enron era, particularly as the federal government and the New York Stock Exchange seem to be encroaching on Delaware's predominant role as the arbiter of proper corporate governance.<sup>75</sup> As Professor Sale has argued,

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<sup>70</sup> See Sale, *supra* note 65, at 42 ("Although Delaware officers and directors previously had an enforceable duty of care, the state legislature eliminated this duty—despite protestations to the contrary by the Delaware judiciary—when it adopted the exculpation statute, section 102(b)(7)."). Professor Sale is not suggesting that directors do not have a duty of care, only that it is unenforceable.

<sup>71</sup> See Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 872 (2003).

<sup>72</sup> See Bernard Black, Brian Cheffins & Michael Klausner, *Outside Director Liability*, at ii (Social Science Research Network, Working Paper No. 250) (extensively surveying cases and settlements, and finding that "outside directors of U.S. public companies who fail to meet what we call their 'vigilance duties' under corporate, securities, environmental, pension, and other laws almost never face actual out-of-pocket liability" so long as they act in good faith).

<sup>73</sup> See Delaware General Corporation Law (DGCL), DEL. CODE ANN. tit. 8, § 102(b)(7)(ii) (2004) (statutory power to exculpate directors not available "for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law"); DGCL § 145(b) (power to indemnify directors, officers, employees and agents if "the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation"); *Emerald Partners v. Berlin*, 787 A.2d 85, 91 (Del. 2001) ("To rebut the presumptive applicability of the business judgment rule, a shareholder plaintiff has the burden of proving that the board of directors, in reaching its challenged decision, violated any one of its triad of fiduciary duties: due care, loyalty, or good faith.").

<sup>74</sup> A company can insure its directors and officers "whether or not the corporation would have the power to indemnify such person against such liability," here, for actions not in good faith. See DGCL § 145(g) (2004). So whether a director would face actual, personal liability for a case of "utter failure" to consider human rights risks as part of the board's oversight duties would depend on the actual D&O policy of the individual company at issue. Since it is unlikely that an insurance policy would be clearly drafted to insure actions in bad faith, even this type of "unconsidered action as bad faith," the theoretical risk of personal liability remains.

<sup>75</sup> See Robert B. Thompson, *Delaware, the Feds, and the Stock Exchange: Challenges to the First State as First in Corporate Law*, 29 DEL. J. CORP. L. 779, 779-80 (2004); William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953 (2003) (views of the Chancellor and one Vice-Chancellor of the Delaware Chancery Court). A good example of this more searching inquiry is found in the Disney litigation over the golden handshake of \$140 million given to Michael Ovitz as he left the company after fourteen unsuccessful months as second-in-command to his former good friend Michael Eisner. *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342 (Del. Ch. 1998). Shareholders brought

the Delaware courts are giving new significance to the fiduciary duty of officers and directors to act in good faith.<sup>76</sup> Additionally, plaintiffs have incentives to bring claims alleging a lack of good faith in order to neutralize exculpatory clauses.<sup>77</sup>

Not only are the Delaware courts emphasizing directors' good faith, but it is precisely in those circumstances where directors have failed to act that the courts are suggesting the possibility of a finding of a lack of good faith. In *Caremark*, the Delaware Chancery Court evaluated directors' obligations to exercise care about law compliance within the company and held that "a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability."<sup>78</sup> In the *Disney Derivative Litigation*, the board's failure to be involved in any meaningful way in the decisions to hire Michael Ovitz and then to grant him a "no-fault" severance could constitute a lack of good faith, if proven at trial.<sup>79</sup> As the Chancery Court put it, "[b]ecause the facts alleged here, if true, portray directors consciously indifferent to a material issue facing the corporation,"<sup>80</sup> the directors' actions would not be protected by the business judgment rule: "plaintiffs' new complaint suggests that the Disney directors failed to exercise *any* business judgment and failed to make *any* good faith attempt to fulfill their fiduciary duties to Disney and its stockholders."<sup>81</sup> By extension, an utter failure to do anything to attempt to assure that reasonable information and reporting systems exist with respect to human rights compliance would risk a court finding that the board or the company's officers had not acted in good faith, according to the analyses in *Caremark* and *Disney*, and so could increase directors' risks of personal liability. While the risk of personal liability is still quite low,<sup>82</sup> an "ostrich-like approach" to known risks is one way to increase it.

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claims of breach of the fiduciary duty of care and waste against the board for its having agreed to the terms of Ovitz's contract, which gave him every incentive to leave as quickly as possible on a "no fault" basis, and for its decision to grant him a "no fault" resignation. *Id.* at 351-54. The chancery court granted defendants' motion to dismiss in its entirety in 1998. *Id.* at 365. In 2000, the Delaware Supreme Court affirmed in part and reversed in part. *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Its reversal was narrow: the reversal of plaintiffs' claims for breach of fiduciary duty and waste were reversed "only to the extent that the dismissal ordered by the Court of Chancery was with prejudice." *Id.* at 267. So the Delaware Supreme Court gave plaintiffs leave to amend, on the basis that plaintiffs might, theoretically, be able to set out a waste claim, but did so with enormous skepticism. By the time plaintiffs were back in court on a motion to dismiss their amended complaint, Enron had happened. Now the Chancery Court refused to dismiss, heaping scorn on the Disney board for its "ostrich-like approach" to its duties. *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 288 (Del. Ch. 2003). Plaintiffs had used the access to the company's books and records provided in Delaware law to develop a much fuller picture of the board's abdication of authority, so the change in outcome was not entirely due to Enron and Sarbanes-Oxley, but one also senses some competitive pressure on the Delaware courts to maintain their pre-eminent position with respect to corporate law.

<sup>76</sup> See Sale, *supra* note 65, at 484-88 (discussing the developing meaning of "good faith" as an independent fiduciary duty).

<sup>77</sup> See Leo E. Strine, Jr., *Derivative Impact? Some Early Reflections on the Corporation Law Implications of the Enron Debacle*, 57 BUS. LAW. 1371, 1385-86 (2002) (asserting that because of "exculpatory charter provisions that exonerate directors for due care breaches . . . in the absence of evidence that the outside directors had a financial interest in the underlying misconduct, they force plaintiffs' counsel to challenge the state of mind (i.e., the good faith) of the outside directors").

<sup>78</sup> See *In re Caremark Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

<sup>79</sup> See *Disney Derivative Litig.*, 825 A.2d at 291.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 278. At trial, the plaintiffs failed to substantiate their allegations, and the court ruled for the defendants. *In re Disney Derivative Litig.*, 2005 WL 2056651 (Del. Ch. Aug. 9 2005).

<sup>82</sup> See Black et al., *supra* note 72, at 9-10 (describing the "sliver" of duty of care liability risk that



Second, a director's fiduciary duty of care is not to act so as to avoid personal liability. Rather, directors are expected to exercise due care, in this case to attend to risk assessment over a wide range of issues, including "stakeholder" issues and global human rights, because it is in the best interests of the companies they are guiding. One of the reasons for the combination of the business judgment rule, indemnification, insurance, and exculpation, which together produce such a low risk of personal liability, is precisely so directors will not be considering their own liability risks when making decisions for the company,<sup>83</sup> as recognized by Professors Black, Cheffins, and Klausner.<sup>84</sup>

Third, boards are increasingly engaging in comprehensive, enterprise risk management as part of their strategic thinking, and in reaction to the heightened attention to corporate governance after Sarbanes-Oxley.<sup>85</sup> As a Conference Board report stated, "[r]ecent interviews with business managers indicate that enterprise risk management (ERM) is gaining ground as a comprehensive approach for evaluating activities and assessing the multitude of risks—including, among others, strategic, operational, financial hazard, and legal—associated with conducting business."<sup>86</sup> The "unique but significant" risk of ATCA/human rights litigation<sup>87</sup> includes not only potential liability,<sup>88</sup> but also the far more significant risk of damage to a company's reputation from credible allegations of human rights abuse.<sup>89</sup> As the business community's brief

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*Caremark* and its progeny gave rise to).

<sup>83</sup> See *Gagliardi v. Trifoods Int'l, Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996) ("Shareholders don't want (or shouldn't rationally want) directors to be risk averse.").

<sup>84</sup> See Black et al., *supra* note 72, at 63.

<sup>85</sup> See Ellen S. Hexter & Stephen Gates, The Conference Board, *Executive Action Beyond Compliance: The Future of Risk Management*, EXECUTIVE ACTION REPORTS (Jan. 2005) (reporting results of Conference Board/Marsh Inc. survey showing that 91% of respondents (271 business leaders in the United States and European Union) are positively disposed to or implementing ERM, and that Sarbanes-Oxley is one explanation for this interest).

<sup>86</sup> *Id.*

<sup>87</sup> See Business Brief in *Sosa*, *supra* note 68, at 10.

<sup>88</sup> One of the few cases to have led to an actual recovery to the plaintiffs was *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), brought against Unocal Corporation for its alleged complicity with the government in Burma/Myanmar for the use of forced labor, murder, and rape, and settled on April 2, 2005. Those claims of complicity the Ninth Circuit had held were sufficient to state a cause of action against the company under the ATCA, and on that basis the case was going forward. *Id.* at 946. The original complaint alleged that plaintiffs and their family members had suffered a variety of human rights abuses, including forced resettlement, forced labor, rape, torture, and murder at the hands of members of the Burmese Government, and that Unocal knew or should have known of those abuses. *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997) (denying motion to dismiss for alleged participation in government's forced labor and torture). It was the "knew or should have known" complicity that the Ninth Circuit found sufficient. *Doe*, 395 F.3d at 956. The terms of the settlement are confidential, but both the plaintiffs' attorneys and Unocal posted statements to their websites that described the settlement as compensating plaintiffs and providing funds to enable "plaintiffs and their representatives to develop programs to improve living conditions, health care and education, and protect the rights of people from the pipeline region." See Press Release, Unocal Corporation, Settlement Reached in Yadana Pipeline Lawsuit (Apr. 2, 2005), available at <http://www.unocal.com/ucnews/2005news/032105.htm> (last visited Apr. 10, 2005). See also Press Release, EarthRights International, Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers, Press (Apr. 10, 2005), available at <http://www.earthrights.org> (last visited Apr. 10, 2005).

<sup>89</sup> Professors Black, Cheffins and Klausner look at market-based incentives for directors to exercise care, even though they find vanishingly low liability risks for breach of "vigilance duties" under any body of law, and conclude that directors' concerns with their own reputation is an important market-based supplement to the incentives created by legal liability. See Black et al., *supra* note 72, at 39-41. Here, we are emphasizing

to the Supreme Court in *Sosa* indicated, ATCA “lawsuits almost invariably raise highly charged allegations of human rights abuses, generate considerable publicity, and involve enormous potential damages. The very existence of such lawsuits creates risk . . . .”<sup>90</sup>

The risks to business reputation from credible allegations of human rights abuses create incentives for companies and directors to consider these issues seriously, irrespective of whether an ultimate finding of liability is likely.<sup>91</sup> Professors Kagan, Gunningham, and Thornton have used both quantitative and qualitative research methods to investigate why firms comply with the law. Specifically, they researched why many paper and pulp mills in various countries (Australia, Canada, New Zealand, and the United States) met higher environmental standards than required by law. Their results show top management in most of these firms are aware of, and affected by, “regulatory, economic, and social licenses [to operate],” in which laws and possible enforcement and penalties matter, as do the “enforcement” of various social actors such as investors, NGOs, consumers, and community members reacting to information about companies and the companies’ reputations.<sup>92</sup> Since directors and companies can suffer important losses of reputation from social and environmental allegations, including allegations of human rights abuses, with negative economic consequences to shareholders even in the absence of an ultimate finding of legal liability, well-counseled board members are increasingly attending to the underlying conditions in efforts to assess and mitigate those risks.<sup>93</sup>

Conversely, social (including human rights) and environmental issues present opportunities to well-managed companies. Recent meta-analytic research has shown that firms with better social and environmental management practices outperform those with questionable commitments to such issues.<sup>94</sup> Firms with responsible environmental policies, for instance, have lower stock price

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directors’ concerns with the firm’s reputation, while recognizing that the two are related: Enron’s directors may not be sought after to be on new boards given how badly the company did.

<sup>90</sup> See Business Brief in *Sosa*, *supra* note 68, at 4.

<sup>91</sup> See Clark & Hebb, *supra* note 16, at 17-24 (developing theoretical model of why global institutional investors are paying attention to corporate social responsibility issues that is based on the importance of corporate reputation).

<sup>92</sup> See Robert A. Kagan, Neil Gunningham & Dorothy Thornton, *Explaining Corporate Environmental Performance: How Does Regulation Matter?*, 37 LAW & SOC’Y REV. 51, 77 (2003). For one example of how these different licenses to operate interact to encourage companies to change their behavior, irrespective of the ultimate outcome of litigation, see J. George Frynas, *Global Monitor: Royal Dutch/Shell*, 8 NEW POL. ECON. 275 (2003) (case study of Royal Dutch Shell and its reactions to Brent Spar and litigation about its alleged actions in Nigeria, which is still on-going).

<sup>93</sup> An example of this is General Motors Corporation, which has not one but two Corporate Responsibility Boards for risk assessment and strategic thinking. As described in notes posted on the Internet of a Business for Social Responsibility conference in November 2004, “The first CSR board is called the ‘CSR Team’ and is comprised of directors from the functional areas for tax, audits, and communications. This group looks at the impact of decisions on a company’s reputation. The second board is the ‘Corporate Reputation Strategy Board,’ which conducts audits of all GM’s operating facilities to ensure that there are ‘no surprises.’” BSR 2004 Conference Session Notes, Corporate Boards and CSR, at 1 presentation of Tanya Hayes, Manager, Corporate Responsibility, General Motors Corporation, available at <http://www.bsr.org/BSRConferences/2004/materials.cfm>. It seems ironic that with two CSR boards, there wasn’t someone who recognized GM may have competitive risk from failing to develop energy-efficient alternatives, such as Toyota’s and Honda’s hybrids, which are doing quite well in the market. While GM has, as of 2002, devoted \$1 billion to developing fuel cell technology, it seems way behind the hybrid market leaders Toyota and Honda. See Hart & Milstein, *supra* note 15, at 56 (discussing Toyota’s and Honda’s hybrids, and the management process that led to them).

<sup>94</sup> See Marc Orlitzky, Frank L. Schmidt & Sara L. Rynes, *Corporate Social and Financial Performance: A Meta-Analysis*, 24 ORG. STUD. 403, 424-25 (2003). A meta-analysis re-analyzes all methodologically sound

volatility and lower firm-specific risk than those with irresponsible policies,<sup>95</sup> just as firms with a serious commitment to ethical behavior outperform those without such a commitment over the long term.<sup>96</sup> While successful duty of care litigation challenging a failure to take advantage of such opportunities to perform well over the long term is inconceivable, we assume that at least some boards are thinking in those terms today because of the competitive disadvantage from failing to do so.

#### IV. CHANGING INSTITUTIONAL INVESTOR BEHAVIOR

Another reason that directors' fiduciary duties to shareholders may require them to consider human rights issues and other stakeholder concerns is that institutional investors, a critical class of shareholders, are increasingly requiring such consideration. Since the authors of this Article have recently written at length on this topic,<sup>97</sup> findings from previous literature are summarized below in order to emphasize the shareholder-generated incentives for directors to pay increasing attention to long-term social and environmental issues.

In the United States, institutional investor social activism is generally confined to socially responsible investors (SRI) and to activist pension funds such as CalPERS and NYCERS.<sup>98</sup> Mutual funds, which own "a large fraction of corporate America" have been "relatively silent" on corporate governance and performance,<sup>99</sup> and absolutely mute on social and environmental issues (except where they were voting against shareholder proposals raising those issues).<sup>100</sup> Still, the SRI portion of the market is growing rapidly<sup>101</sup> and is making progress raising some social and environmental issues with companies. Public pension funds are taking the lead in identifying

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prior studies of a given subject, using highly sophisticated statistical techniques. This meta-analysis by Professor Orlitzky of the University of Australia and Professors Schmidt and Rynes of the University of Iowa re-analyzes 52 prior studies and a total sample size of 33,878 observations.

<sup>95</sup> See Pratima Bansal & Iain Clelland, *Talking Trash: Legitimacy, Impression Management, and Unsystematic Risk in the Context of the Natural Environment*, 47 ACAD. MGMT. J. 93, 100-01 (2004).

<sup>96</sup> See Alison Maitland, *Profits from the Righteous Path*, FIN. TIMES (London), Apr. 3, 2003, at 13 (citing study by UK Institute for Business Ethics).

<sup>97</sup> See Williams & Conley, *supra* note 27, passim (describing new social and environmental disclosure requirements in the European Union and the United Kingdom; discussing institutional investor engagement with companies and activism concerning long-term social and environmental risks, particularly in the United Kingdom; and arguing that the corporate governance systems of the United Kingdom and the United States are diverging as a result of greater institutional investor activism in the United Kingdom concerning social and environmental topics).

<sup>98</sup> See *id.* at 545.

<sup>99</sup> See Gerald F. Davis & E. Han Kim, *Would Mutual Funds Bite the Hand that Feeds Them? Business Ties and Proxy Voting* at 2 (unpublished paper, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=667625](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=667625)), (Feb. 15, 2005) (studying proxy votes of mutual funds, and finding a "positive relation between the volume of pension business a fund company does and its propensity to vote with management" on corporate governance issues).

<sup>100</sup> See Williams & Conley, *supra* note 27, at 546 (citing statistics from the Investor Responsibility Research Center showing that 55% of the largest mutual funds in America vote against all social and environmental shareholder proposals; 15% vote against nearly all such proposals; and 30% cast abstentions).

<sup>101</sup> See SOCIAL INVESTMENT FORUM, 2003 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES (2004) (money under management in socially screened portfolios in the United States is \$2.14 trillion as of December 2003, growing 7% since 2001, notwithstanding the market downturn), available at [http://www.socialinvest.org/areas/research/trends/sri\\_trends\\_report\\_2003.pdf](http://www.socialinvest.org/areas/research/trends/sri_trends_report_2003.pdf) (last visited April 14, 2005).

environmental issues, particularly climate change, as a long-term risk to portfolio companies and pressuring the Securities and Exchange Commission to require companies to be more specific about the precise risks climate change represents to individual companies.<sup>102</sup> Recently CalPERS, which is the nation's largest public pension fund with a \$183 billion portfolio, adopted a "Green Wave" initiative to both mitigate environmental risk in its portfolio, and to encourage companies to better assess climate-related risks in their strategic management, and to provide more specific disclosure of those risks.<sup>103</sup>

Moreover, shareholder pressure on social and environmental issues is likely to intensify as a result of proxy voting disclosure, newly required since August 2004.<sup>104</sup> Prior to 2004, mutual funds did not have to disclose how they voted on shareholder resolutions, so they could vote with management, even when it was not necessarily in their shareholders' best interests (i.e., voting against corporate governance reforms or casting votes with management against assessing or improving environmental or social performance in portfolio companies).<sup>105</sup> Since August 2004, mutual funds have been required to disclose their votes on shareholder resolutions,<sup>106</sup> which seems to be intensifying the conflicts—and progress engaging with management—these resolutions can engender. For example, in the 2005 proxy season, for the first time a coordinated effort existed to encourage individual investors to contact their mutual funds to ask the mutual funds to support climate change resolutions at ExxonMobil Corporation.<sup>107</sup> While such an effort could have occurred before, there would have been no way to know what the mutual fund did in casting votes, and so no way to hold funds accountable. Another unprecedented development in the 2004 proxy season was the public support of management for social resolutions at two different companies.<sup>108</sup>

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<sup>102</sup> See Williams & Conley, *supra* note 27, at 545, 545 n.291.

<sup>103</sup> See Press Release, California State Treasurer Phil Angelides, With Kyoto Protocol Set to Take Effect Wednesday, Former Vice President Gore, California Treasurer Angelides Laud CalPERS's Approval of New Corporate Environmental Accountability Initiative to Encourage Companies to Address Global Warming (Feb. 14, 2005), available at [http://www.treasurer.ca.gov/news/releases/2005/21405\\_calpersenv.pdf](http://www.treasurer.ca.gov/news/releases/2005/21405_calpersenv.pdf) (describing the launch of CalPERS new corporate environmental governance program, which will include recognizing "best practices" in corporate environmental disclosure); Press Release, California State Treasurer Phil Angelides, State Treasurer Phil Angelides Launches "Green Wave" Environmental Investment Initiative to Bolster Financial Returns, Create Jobs and Clean up the Environment (Feb. 3, 2004), available at [http://www.treasurer.ca.gov/greenwave/020304\\_enviro.pdf](http://www.treasurer.ca.gov/greenwave/020304_enviro.pdf) (describing four components of "Green Wave" environmental governance initiative as CalPERS and CalSTRS (California State Teachers' Retirement System) (1) seek better accounting for environmental risk and better disclosure of companies' environmental practices, risks, and potential liabilities; (2) invest \$500 million in new environmental technologies and research; (3) invest \$1 billion in environmentally screened portfolios; and, (4) audit their real estate holdings to maximize their opportunities to use clean energy, boost energy efficiency, and adopt "green" building standards, and adopting a goal of reducing energy usage by 20% throughout their real estate holdings).

<sup>104</sup> See Williams & Conley, *supra* note 27, at 526-27.

<sup>105</sup> See Davis & Kim, *supra* note 99, at 27-28 (finding a significant, positive relation between the volume of pension fund business a mutual fund company does and its propensity to vote with management).

<sup>106</sup> See Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, Rel. No. 33-8188, 34-47304 (Jan. 31, 2003). The new rules require mutual funds to disclose, as of August 2003, their policies on voting on proxy resolutions, and require mutual funds to disclose their actual votes as of August 2004.

<sup>107</sup> See Press Release, Social Investment Forum, Social Shareholder Resolutions Close to 2004 Record (Apr. 7, 2005), available at <http://www.socialinvest.org/areas/news/040705.htm> (last visited Apr. 15, 2005). The resolution seeks information on how the company plans to meet Kyoto greenhouse reduction targets, given that ExxonMobil derives one-third of its revenue from countries participating in Kyoto.

<sup>108</sup> It does happen fairly regularly (often after a number of years of dialogue between SRI investors and

At Tyco International, Ltd., the resolution sought disclosure of how the company would reduce its lead and dioxin emissions; the company supported the resolution, and it received a 92% vote.<sup>109</sup> At the Coca-Cola Company, the resolution asked the company to prepare a report on the economic impact of HIV/AIDS, tuberculosis, and malaria on Coke's operations; the company supported it, and it received a 98% vote.<sup>110</sup> In conjunction with growing percentages of votes cast for climate change disclosure resolutions—37% at Apache Corporation; 28% at Anadarko Petroleum Corporation; and 27% at Marathon Oil Corporation—these developments indicate that shareholder proxy disclosure is leading to interesting shifts in behavior and pressures on companies that are among the factors causing companies to pay more attention to social and environmental issues.

In contrast to the United States, where particular sectors of institutional investors (SRI investors and public pension funds) are driving these developments, in the United Kingdom there has been broader-based institutional investor concern for human rights and environmental issues. Mainstream institutional investor trade associations such as the Association of British Insurers and the Institutional Shareholders Committee have issued statements about the corporate social responsibility disclosure they expect from portfolio companies, and that management's failure to appreciate corporate social responsibilities would be one reason for investors to engage in discussions with companies or to intervene more dramatically by using voting.<sup>111</sup> Coalitions of engaged investors have been leading efforts with NGOs to reform company policies on such issues as labor conditions in companies' global supply chains, child labor, government corruption in the extractive industry, and climate change.<sup>112</sup> Britain was also an important center of discussion for a joint U.K.-U.S. initiative among oil companies, institutional investors, and NGOs, addressing the human rights issues that arise from security arrangements in the extractive industry.<sup>113</sup> Moreover, new reporting requirements are to be implemented in the United Kingdom,

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companies) that social or environmental proposals are withdrawn based on companies' agreements to meet SRI investors' concerns, either to disclose specific information about various social or environmental issues, or to adopt new policies to change the underlying substantive conduct. So, for instance, in 2005 a resolution at computer giant Dell Inc. was withdrawn when the company agreed to improve by 50% its recovery rate of used computer products over fiscal year 2004 (when 35 million pounds were collected). This withdrawal followed a three-year dialogue with SRI investors. See News Release, Social Investment Forum, Socially Responsible Investing Advanced on Multiple Fronts in 2004, Setting Stage for More Progress in 2005 (Feb. 9, 2005), available at <http://www.socialinvest.org/areas/news/020905.htm>.

<sup>109</sup> See *id.* at 1.

<sup>110</sup> See *id.* at 2.

<sup>111</sup> See Williams & Conley, *supra* note 27, at 541-43 (describing policy positions of the Association of British Insurers and the Institutional Shareholders Committee). The Association of British Insurers represents about 50% of institutional funds under management in the United Kingdom. The Institutional Shareholders Committee includes the major trade associations for insurers, pension funds, investment trusts, and investment managers, and represents more than 80% of funds under management in the United Kingdom. See *id.* at 542.

<sup>112</sup> *Id.* at 54-59 (describing a number of institutional investor initiatives to develop best practice in such areas as child labor and conditions of production; HIV/AIDS policies in the pharmaceutical industry; climate change; and corruption in the extractive industry, and describing engagement with portfolio companies as part of these processes).

<sup>113</sup> See Freeman et al., *supra* note 18, at 426-39 (describing the Voluntary Principles on Security and Human Rights in the extractive industry). The Department of State, Bureau of Democracy, Human Rights and Labor in the Clinton Administration, under the leadership of Assistant Secretary of State Harold Koh, provided important leadership in developing this initiative, and yet its continuing efficacy is based on the British companies (BP and Shell) and institutions (such as institutional investors and NGOs) that continue

requiring boards of directors of British companies listed on the London Stock Exchange, the New York Stock Exchange, or NASDAQ to produce an annual “Operating and Financial Review” that identifies specific long-term risks from social and environmental issues and how the company plans to address them.<sup>114</sup> (The European Union is implementing similar requirements in its Accounts Modernization directives.)<sup>115</sup> London’s corporate governance standards have historically been influential in other countries; and the London Stock Exchange is the world’s most important market for global, cross-border trading.<sup>116</sup> Whether these particular expectations about responsible corporate behavior will influence U.S. disclosure requirements and mainstream institutional investor thinking remains to be seen. Still, these important developments provide powerful reasons for directors to think more carefully, and broadly, about human rights and other social and environmental issues as they identify the long-term strategic issues facing their companies in the global capital markets today, particularly if British and European investors become concerned about a lack of disclosure or strategic thinking about these matters among American companies.<sup>117</sup>

## V. PUBLIC-PRIVATE PARTNERSHIPS AS INSTANCES OF “NEW GOVERNANCE”

A final factor that is causing companies and their directors to consider stakeholder issues more carefully, in order to advance their shareholders’ interests, is the growth of “new governance” regimes establishing norms of responsible corporate behavior that require such consideration. Clearly, government regulation is an important factor shaping companies’ actions with respect to a wide range of regulated behavior.<sup>118</sup> The recognized—and obvious—importance of regulation gives rise to a concern among many commentators about the global reach of companies’ actions in contrast to the domestic reach of legislation. This concern reaches its apex with respect to international human rights. Given the absence of global government, globalization is understood to have produced a regulatory vacuum, where no single state has the power to regulate the totality of any global company’s activities.<sup>119</sup> Moreover, globalization is understood by some theorists to

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to support it.

<sup>114</sup> See Williams & Conley, *supra* note 27, at 515-23 (describing the regulatory process that resulted in the OFR, and describing the OFR requirements).

<sup>115</sup> See *id.* at 503-10 (describing expanded social and environmental disclosure in the European Union and in various countries within the European Union).

<sup>116</sup> See Gordon L. Clark, *London in the European Financial Services Industry: Locational Advantage and Product Complementarities*, 2 J. ECON. GEOGRAPHY 433, 438 (2002).

<sup>117</sup> We doubt that a concern about a lack of disclosure or strategic thinking about social and environmental matters would be a driving force behind disinvestment in the U.S. capital markets, but it might be an additional factor in some cases where concerns about corporate governance issues, and the double deficits (trade and budget) coalesce to cause a disinclination to further invest in the United States. Balancing this, of course, is the general strength of U.S. capital market regulation, the commitment to “rule of law,” the dollar weakness on the currency markets that make our stocks cheap to buy for investors using pounds or euros, and the growth rates and innovation that characterize the U.S. market. These factors have allowed the United States to continue to attract the foreign investment necessary to keep our economy growing, and will presumably do so for some time into the future.

<sup>118</sup> See Bansal & Roth, *supra* note 14 (describing qualitative study of the motivations for companies to develop better environmental policies, including the importance of regulation); Kagan et al., *supra* note 92 (demonstrating interaction of government regulation and pressures from private actors in determining corporate environmental behavior).

<sup>119</sup> See Alfred C. Aman, Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477 (2001).

have undermined the capacity of governments to determine optimal law even in a purely domestic context because of the concern that mobile capital and production will flee onerous regulatory jurisdictions.<sup>120</sup> In either the “global regulatory vacuum” or the “domestic regulatory chill” perspective, globalization is understood to have created a deregulatory legal environment.

Further examination suggests that these perspectives fail to capture the full range of types of “regulation” found in the rapidly increasing integration of economics, technology, and communication. Rich scholarship at the intersection of law and sociology decenters the state as a locus of regulatory power in favor of a more nuanced view of various systems of control that have an impact on conduct, including law, norms, industry and professional practices, markets, and even architecture.<sup>121</sup> The “new governance” model of exercising power blurs traditional public-private and state-market boundaries and introduces new categories of actors into the regulatory process—collectivities of transnational civil society in partnership with intergovernmental organizations or transnational associations of government employees, all in partnership with private entities such as corporations, labor, and institutional investors. These “governance” regimes exercise power through collecting and distributing information. As described by Professor Ann Marie Slaughter, information can be power: by virtue of their ability to “generate compilations of best practices, codes of conduct, and templates for everything,” the governance networks’ “dissemination of information has played a far greater role in triggering policy convergence in various issues than more deliberate and coercive attempts.”<sup>122</sup>

Moreover, “new governance” theory emphasizes the importance of “simple” articulation of norms. Years ago, Jürgen Habermas put forth the idea of a public sphere comprised of multiple strands of civil society discourse that shape thinking and understanding of salient public issues.<sup>123</sup> Later conceptualizations of the public sphere have recognized that these civic discourses can articulate norms that are potentially transformative.<sup>124</sup> Global corporate social responsibility (CSR) or human rights discourses provide a good example of both the multiplicity of voices in the transnational public sphere and the potential transformative impact of simple articulations of norms.<sup>125</sup>

There are a number of points worth emphasizing in this regard. First, scholars of regulation have theorized that the category of regulation should be understood to include the norms and

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<sup>120</sup> See SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996).

<sup>121</sup> See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 28 (2000) (“The last two decades of the twentieth century saw the rise of a ‘new regulatory state,’ where states do not so much run things as regulate them or monitor self-regulation. Self-regulatory organizations frequently become more important than states in the epistemic communities where debates over regulatory design are framed.”); Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 *ADMIN. L. REV.* 813, 831-35 (2000).

<sup>122</sup> Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 *MICH. J. INT’L L.* 1041, 1057 (2003).

<sup>123</sup> See JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., MIT Press 1989).

<sup>124</sup> See J. Guidry, M. Kennedy & M. Zald, *Globalizations and Social Movements*, in *GLOBALIZATIONS AND SOCIAL MOVEMENTS: CULTURE, POWER, AND THE TRANSNATIONAL PUBLIC SPHERE* 13 (J. Guidry et al. eds., 2000).

<sup>125</sup> See Archon Fung, *Deliberative Democracy and International Labor Standards*, 16 *GOVERNANCE: INT’L J. POL’Y ADMIN. & INSTITUTIONS* 51, 54-56 (2003) (describing “bottom-up” process of activists and NGO demands with respect to labor standards, and companies’ voluntary reactions, as a deliberative, democratic process leading to new standards of behavior by which companies are judged).

practices of society or communities, or the discourses of sub-sets of society.<sup>126</sup> Inherent in this understanding is the recognition that norms, practices, and discourses can and do structure behavior, much as regulation does.<sup>127</sup> With this understanding, the articulation of norms about CSR or human rights by disparate participants in the transnational public sphere is more than evidence of the changes occurring in society's expectations of business. Rather, it can also be understood as a type of quasi-regulation that can foster further changes in companies' social behavior, particularly if consumers, investors, or NGOs incorporate the norm as their expectation of responsible behavior, thereby punishing companies that fail to meet the norm-based expectation, just as they punish companies that fail to meet the expectations created by law.<sup>128</sup>

Second, multi-national corporations, while certainly powerful entities in the globalizing economy, are part of a larger discussion in the transnational public sphere about corporate responsibilities. The power to define acceptable CSR practices (including human rights practices) is fragmented, held in varying proportions by employees, unions, consumers, investors, top management, governments, and NGOs, in addition to companies.<sup>129</sup> Many of the globalization as deregulation theories assume that corporations alone fill the global regulatory lacunae, and industry self-regulation is, in fact, an important source of regulation.<sup>130</sup> Yet even a brief examination of the transnational public sphere suggests that the definition of responsible corporate conduct is contested, and shifting, and that the power to affect that shifting definition is diffusely shared.<sup>131</sup> Companies may have the most power in this discourse, but they do not have a monopoly on this definitional power.

Third, it behooves directors to recognize, as many do, that even "voluntary" standards of responsible corporate behavior are therefore taking on new meaning. Such voluntary standards include the United Nations Global Compact, which identifies standards for substantive corporate

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<sup>126</sup> See Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, in *THE POLITICS OF REGULATION* (J. Jordana & D. Levi-Faur eds., 2004).

<sup>127</sup> See *id.*

<sup>128</sup> See Kagan et al., *supra* note 92, at 76-80 (demonstrating interaction of government regulation and pressures from private actors in determining corporate environmental behavior, and citing interviews of corporate managers who recognize that if the company departs from the expected norms with respect to responsible environmental behavior, there can be powerful negative effects on a company's well-being from community pressures, investors, consumers, or NGOs' activities, whether or not there is ever liability).

<sup>129</sup> See Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 *LAW & SOC'Y REV.* 635, 644-49 (2004) (describing the development of a sociological "field" of CSR, and defining it as a struggle over both the meaning of the term and a struggle over what entities ought to have power to participate in defining the term).

<sup>130</sup> See A. Claire Cutler, Virginia Haufler & Tony Porter, *Private Authority and International Affairs*, in *PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS* 9-15 (A. Cutler et al. eds., 1999) (describing different types of self-regulatory and cooperative arrangements that structure corporate behavior without the involvement of the state, such as informal industry norms and practices; production alliances and complementary activities; business associations; and private regimes). The "private regimes" concept is especially illustrative of the way self-regulatory power is increasingly exercised. Cutler, Haufler, and Porter cite Stephen Krasner's "now classic" definition of a private regime as the "principles, norms, rules and decisionmaking procedures around which actor expectations converge in a given issue area." *Id.* at 13 (citing *INTERNATIONAL REGIMES* 2 (Stephen Krasner ed., 1982)).

<sup>131</sup> See Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 *INT'L. ORG.* 39, 60 (2005) (suggesting that international relations theorists must understand new sources of power in global governance, including the power of NGOs to use "rhetorical and symbolic tools, as well as shaming tactics, to get states, multinational corporations, and others to comply with the values and norms they advance"); Shamir, *supra* note 129, at 645-49 (describing various participants that are part of the "field" shaping the definition of responsible corporate conduct).



behavior derived from the Universal Declaration of Human Rights; the International Labor Organization's Declaration of Fundamental Principles and Rights at Work; the Rio Declaration on Environment and Development; and the United Nations Convention against Corruption;<sup>132</sup> or the Global Reporting Initiative, which identifies consistent, comparable standards for economic, environmental, and social disclosure.<sup>133</sup> In important ways these emerging "voluntary" substantive and disclosure standards are the new face of regulation in the absence of truly global government, by becoming the norms by which companies will be judged by NGOs, consumers, regulators, and communities.

These points have been amplified with specific reference to the Global Compact by Professors Michael Barnett and Raymond Duvall in their analysis of new types of power in international politics.<sup>134</sup> First, Professors Barnett and Duvall identify the Global Compact process as an example of global governance, since it "engages the private sector to work with the UN, in partnership with international labor and nongovernmental organizations (NGOs), to identify, disseminate, and promote good corporate practices based on . . . universal principles' that are found in various UN documents."<sup>135</sup> Second, by engaging in this process, a number of mechanisms of "productive power" emerge, as identified by Professors Barnett and Duvall.<sup>136</sup> One type of power is the production of a "discursive space" in which various non-corporate actors (such as unions and NGOs) are given legitimacy to comment on the right standards of corporate behavior with respect to the panoply of human rights issues at the center of the Global Compact.<sup>137</sup> These actors are invited into the discussion, which enhances their power to use moral persuasion and other "shaming" techniques that are the essence of NGO power.<sup>138</sup> Second, the Global Compact governance regime seeks to produce a "new kind of actor—the potentially 'socially responsible corporation'—that may adhere to these best practices not because of the manipulation of incentives, but rather because of a new self-understanding."<sup>139</sup> To produce this new social actor, the Global Compact has set up a learning network that will identify best practices on various issues and communicate these practices to companies, hoping in the process to change corporate cultures by the internalization of U.N. principles.<sup>140</sup> The Global Compact, therefore:

illuminates the workings of, and connections between, different forms of power: compulsory power because of the ability of nonstate actors to deploy shaming techniques to alter corporate practices; institutional power because of the role of the UN in establishing new rules that can constrain the behavior of corporations; and productive power because of the attempt to help produce a new social kind of corporate actor.<sup>141</sup>

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<sup>132</sup> For more information on the Global Compact, see <http://www.unglobalcompact.org>.

<sup>133</sup> For more information on the Global Reporting Initiative, see <http://www.globalreporting.org>. The Global Reporting Initiative is also associated with the United Nations, through the United National Environment Program.

<sup>134</sup> See Barnett & Duvall, *supra* note 131, at 60.

<sup>135</sup> Id. (quoting John Ruggie, Global Governance.net: The Global Compact as Learning Network, 7 GLOBAL GOVERNANCE 371 (2001)).

<sup>136</sup> See *id.* at 61.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> *Id.*

<sup>140</sup> See *id.*

<sup>141</sup> *Id.*

Many global companies recognize that the norms these governance regimes are creating are becoming the moral norms by which companies are increasingly being judged by consumers, communities, investors, and civil society, whether a particular company has signed onto them or not.<sup>142</sup> A narrow focus by a board of directors or its subsidiary's board or officers on the substantive standards of any one country's domestic law may fail to meet the norm-based expectations of a wider swath of important stakeholders, with serious consequences to the company and to its shareholders.

## VI. CONCLUSION

If there is a fiduciary duty to consider human rights, either present or emergent, its enforcement will depend on a mixture of laws and norms. In the post-regulatory world of the new governance, the question is less whether the relevant fiduciary standards are laws or norms but whether they become enforceable in some meaningful way. "Law" presumes enforcement by the state; a "norm" is separate from the state and its enforceability is less certain and more complex. In small-scale societies, things like shaming, fear of bad reputation, and the possibility of needed sustenance being withheld (as in a reciprocal economy) are all robust mechanisms for the enforcement of norms. If state-enforced laws are to play a diminished role, as new governance theory predicts, will global-scale analogs to these small-scale enforcement mechanisms be found?

This Article presents two possibilities. The first is investor enforcement or, more specifically, institutional investor enforcement. This is a tangible, or "hard," form of enforcement. Large shareholders have the ultimate threat of selling and driving down share value (although the largest find it difficult to sell without depressing the stock price before fully getting out). Falling share prices get executives fired. Consequently, when institutional investors voice opinions about corporate strategy, those same executives listen. If institutional investors choose to make strong statements about human rights, action may well follow. The dubious part of this proposition—at least in this country—is the "if": despite a few highly publicized initiatives, there is still limited evidence that mainstream American institutions are exerting significant CSR pressure on their portfolio companies.

The second possibility is enforcement by such stakeholders as consumers, labor, and NGOs. The first two groups wield "hard" enforcement power, at least in theory: consumers can refuse to buy and labor can strike. But the case in practice is far weaker. With respect to consumers, all of the CSR professionals interviewed have acknowledged that the "business case" for CSR—presumably including human rights issues—is very difficult to make; at best, consumers may factor CSR into their buying decisions as long as it does not cost any more. To take an extreme example, there is no reason to believe that the *Exxon Valdez* disaster had any material impact on the long-term profitability of Exxon or its successor, ExxonMobil. As for unions, strikes may be "hard," but in this country private-sector unions are withering, and a similar trend may be inevitable in Europe as well. In the end, stakeholder leverage remains soft, dependent on such traditional strategies as threats to reputation. Only time will tell whether these mechanisms of norm enforcement can be effective on the global corporate scale.

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<sup>142</sup> Cf. Kagan at al., *supra* note 92 (demonstrating interaction of government regulation and pressures from private actors in determining corporate environmental behavior, and citing interviews of corporate managers' recognition that departing from recognized norms can have powerfully negative effects on a company's well-being).