

1-1-2013

Environments, Externalities and Ethics: Compulsory Multinational and Transnational Corporate Bonding to Promote Accountability for Externalization of Environmental Harm

Matthew A. Susson
Chapman University School of Law (Student)

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/belj>



Part of the [Environmental Law Commons](#), and the [Torts Commons](#)

Recommended Citation

Matthew A. Susson, *Environments, Externalities and Ethics: Compulsory Multinational and Transnational Corporate Bonding to Promote Accountability for Externalization of Environmental Harm*, 20 *Buff. Envtl. L.J.* 65 (2012-2013).

Available at: <https://digitalcommons.law.buffalo.edu/belj/vol20/iss1/3>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Environmental Law Journal by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

**ENVIRONMENTS, EXTERNALITIES AND
ETHICS: COMPULSORY MULTINATIONAL AND
TRANSNATIONAL CORPORATE BONDING TO
PROMOTE ACCOUNTABILITY FOR EXTERNALIZATION
OF ENVIRONMENTAL HARM**

Matthew A. Susson*

Developing nations often look to their bounty of natural resources or willing labor as a means of attracting international investors. While national and local governments frequently perceive the arrival of a multinational corporate presence as a boon to their economy, the potential for government instability, ineffectiveness or corruption may facilitate environmentally exploitive corporate practices. Furthermore, residents of the subject nation may be left without proper legal recourse. Legislators have made various efforts in both the United States and abroad to propound Corporate Codes of Conduct to address such concerns, but despite laudable intentions, features of the increasingly global economy “accentuate the difficulties of relying upon law as an external constraint to correctly structure the corporate relationship.” Furthermore, absent an international sovereign, national taxing authorities are often impotent to effectively tax corporations to raise money for social welfare or environmental protection efforts, and the law is often insufficient to provide redress once the damage is done.

Both American and alien litigants have sought to utilize the Alien Tort Statute (“ATS”) (or Alien Tort Claims Act (“ATCA”)) to address instances of corporate malfeasance, though the ATS has not yet proven an effective remedy capable of sanctioning multinational corporations for their illegal or unethical behavior. As voluntary codes of business ethics and United Nations guidelines have also proven ineffective, the United States must develop or support a legal regime capable of providing an effective civil or criminal remedy to the victims of illegal or unethical corporate activity.

*Chapman University School of Law, J.D., expected 2013. University of California–Los Angeles, B.A., Philosophy, 2007. Many thanks to Professor Donald J. Kochan for his invaluable assistance in developing my topic and proposal. I also owe a debt of gratitude to Professor Susanna Ripken for her thoughtful criticisms and continual encouragement to become a better student and writer. I am likewise exceptionally grateful for the love and support of the ever-patient Monica Francis, as well as my parents Mark and Dana Susson, and my sister Sarah Susson.

Under the current understanding of the shareholder primacy paradigm, companies will never fully internalize the environmental and social costs of their productive processes and labor relationships in a globalized economy, without an ultimate sovereign. Any practicable regime capable of coercing internalization of environmental costs must transcend mere optimistic reliance on the shareholder wealth maximization theory—as it is currently understood—within constraints of domestic law and private contractual arrangements. This Article suggests that exploitative corporate behavior stems largely from a fundamental misconception of the shareholder wealth maximization theory, and proposes that the United States create a bonding system under which a federal regulatory agency would compel multinational corporations doing business in America to contribute to an environmental remediation bond, administered by the United States.

Table of Contents

INTRODUCTION	67
I. THE SHORTCOMINGS OF CORPORATE SOCIAL RESPONSIBILITY LAW AND EXISTING LEGAL SCHEMES: ECUADOR AND THE ATS	72
A. Texaco, Chevron and the Ecuadorean Amazon: A Case Study in Inefficiency	72
B. The Alien Tort Statute and Kiobel	77
II. THE DIFFICULTIES OF IMPLEMENTING LIABILITY REGIMES IN AN INCREASINGLY GLOBAL ECONOMY	79
III. CORPORATE SOCIAL RESPONSIBILITY IN AN ERA OF SHAREHOLDER PRIMACY	81
A. The Role of the Corporation in the United States.....	82
B. The Tension Between Profit Maximization and Environmental Stewardship.....	83
IV. WHERE DO WE GO FROM HERE?.....	85
A. Reconceptualizing the Profit-Maximization Model.....	85
B. The Alien Tort Statute Is Not the Answer	88
C. Compulsory Multinational and Transnational Corporate Bonding.....	92
V. IMPOSING GREATER CORPORATE LIABILITY IS COSTLY, MAY OFFEND NOTIONS OF SOVEREIGNTY, AND COULD STIFLE INVESTMENT..	101
CONCLUSION	105

“There is no United States Supreme Court of the World.”¹

—Justice Stephen Breyer

INTRODUCTION

Developing nations often look to their bounty of natural resources or willing labor as a means of attracting international investors.² While national and local governments frequently perceive the arrival of a multinational corporate presence as a boon to their economy, the potential for government instability, ineffectiveness or corruption may facilitate environmentally exploitive corporate practices.³ Furthermore, residents of the subject nation may be left without proper legal recourse.⁴

¹ Transcript of Oral Argument at 23, *Kiobel v. Royal Dutch Petroleum Co.* (Feb. 28, 2012) (No. 10-1491).

² Nick Mabey & Richard McNally, *Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development* 3 (1999), <http://www.oecd.org/dataoecd/9/48/2089912.pdf>.

³ See Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT'L & COMP. L. REV. 429, 433 (2004) (“Faced with competition, developing countries may relax or fail to enforce domestic regulatory standards . . . to the detriment of the health and well-being of their citizens.”); Greg Hills, *Leigh Fiske & Adeb Mahmud, Anti-Corruption as Strategic CSR: A Call to Action for Corporations* 10 (2009), <http://www.ethics.org/files/u5/Anti-corruptionFINAL.pdf> (noting that corruption poses a real business threat to corporations operating in the developing world); JOHN R. BOAIRIGHT, *ETHICS AND THE CONDUCT OF BUSINESS* 417 (6th ed. 2008) (noting the lower environmental standards in less developed countries and that multinational corporations often exploit natural resources without making efforts to advance economic development). Many of the same criticisms can be made in the context of human rights violations, though such concerns lie beyond the scope of the current analysis.

⁴ Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 1 (2003) (“Although corporate environmental abuse abroad is common, successful litigation of the abuse is not.”); Denis G. Arnold, *Texaco in the Ecuadorean Amazon*, in *ETHICAL THEORY AND BUSINESS* 555, 557 (Tom L. Beauchamp et al. eds., 8th ed. 2009) (suggesting that Ecuador may be an unsuitable forum where a number of its aggrieved citizens sought recourse for alleged environmental destruction by Texaco, because Ecuador’s judicial system does not recognize class-action suits, has no history of environmental litigation, is notoriously corrupt, and lacks the infrastructure to try the case).

Legislators have made various efforts in both the United States and abroad to propound Corporate Codes of Conduct to address such concerns, though most such codes remain voluntary.⁵ Additionally, numerous international agreements—including the 1972 Stockholm Declaration on the Human Environment, to which the United States and 100 other countries are signatories⁶—identify the right to a clean and healthy environment as a fundamental human right⁷ and “prohibit both state and private actors from endangering the needs of present and future generations.”⁸ Despite laudable intentions, however, features of the increasingly global economy “accentuate the difficulties of relying upon law as an external constraint to correctly structure the corporate relationship.”⁹ Absent

⁵ See Meaghan Shaughnessy, *The United Nations Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct*, 2000 COLO. J. INT’L ENVTL. L. & POL’Y 159, 161 (noting that although member corporations to the 1999 Global Compact pledged to abide by its principles, executives resisted mandatory compliance or monitoring of their performances); Su-Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT’L L. 603, 614 (2000) (“The weakness of promoting voluntary codes as a primary human rights instrument is the lack of a legal mechanism to enforce compliance.”).

⁶ Becoming a signatory to an international declaration does not, in and of itself, necessarily create legally binding effect. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (noting that a declaration “creates an expectation of adherence”); Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. U. J. INT’L HUM. RTS. 5, available at <http://www.law.northwestern.edu/journals/JIHR/v2/5 ¶ 8> (2004) (noting that a declaration is not presumptively binding).

⁷ See, e.g., Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf. 48/14, 21st plen. mtg. at Principle 1 (Stockholm 1972), reprinted in 11 I.L.M. 1416 (1972) (Stockholm Declaration) (stating that man has a fundamental right to “freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”).

⁸ Arnold, *supra* note 4, at 557; see also *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (noting that Principle 2 of the 1992 Rio Declaration asserts that states have the “sovereign right to exploit their own resources pursuant to their own environmental and developmental policies,” but also “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment or other States or areas beyond the limits of national jurisdiction”).

⁹ Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 725 (2002) (stating that one of the defining

an international sovereign, national taxing authorities are often impotent to effectively tax corporations to raise money for social welfare or environmental protection efforts, and the law is often insufficient to provide redress once the damage has been done.¹⁰

Both American and alien litigants¹¹ have sought to utilize the Alien Tort Statute (“ATS”) (or Alien Tort Claims Act (“ATCA”))¹² to address instances of corporate malfeasance, though the ATS has yet to prove an effective remedy capable of sanctioning multinational corporations for their illegal or unethical behavior.¹³ Voluntary codes of business ethics and United Nations guidelines have also proven ineffective.¹⁴ The United States must develop or support a legal

features of globalization is that it undermines efforts by sovereign nations to impose substantive, proactive limits on economic actors like transnational corporations).

¹⁰ *Id.*; see also BOATRIGHT, *supra* note 3, at 417 (noting that multinational corporate exploitation of natural resources in developing nations is often exacerbated when companies “avoid paying their fair share of taxes”).

¹¹ Bradford Mank, *Can Plaintiffs Use Multinational Environmental Treaties as Customary International Law to Sue Under the Alien Tort Statute?*, 2007 UTAH L. REV. 1085, 1100 (noting that most environmental claims under the ATS assert that developing nations are unable to protect ethnic groups in their country from the environmental harms of multinational companies).

¹² 28 U.S.C. § 1350 (2010); see generally Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587 (2002).

¹³ Adam Liptak, *Supreme Court Seeks Clarification on Jurisdiction in a Human Rights Case*, N.Y. TIMES, Mar. 6, 2012, at A15, available at http://www.nytimes.com/2012/03/06/us/supreme-court-seeks-clarification-in-human-rights-case.html?_r=0 (reporting that the Supreme Court “wanted to know whether American courts might ever hear disputes under the law for human rights abuses abroad, whether the defendant was a corporation or not”). A likely reason for the uncertainty surrounding suits that may be brought in federal court under the ATS is the absence of a substantial judicial history of interpretation—from 1789 until 1980, only two plaintiffs successfully brought suit under the ATS. See Mank, *supra* note 11, at 1089; James Boevig, *Half Full...or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain*, 18 GEO. INT’L ENVTL. L. REV. 109, 110 & n.6 (2005).

¹⁴ See generally Rhys Jenkins, *Corporate Codes of Conduct: Self-Regulation in a Global Economy*, Technology, Business and Society, Programme Paper No. 2, United Nations Research Institute for Social Development: Geneva (2001), available at <http://digitalcommons.ilr.cornell.edu/codes/10>. The United Nations Conference on Trade and Development (UNCTAD) reported in 2011 that corporate social responsibility standards pose a number of systemic challenges, noting, “[a] funda-

regime capable of providing an effective civil or criminal remedy to the victims of illegal or unethical corporate activity.

Under the current shareholder primacy paradigm¹⁵—which characterizes the corporation as an economic entity whose purpose is to maximize shareholder wealth¹⁶—companies will never fully internalize the environmental and social costs of their productive processes and labor relationships in a globalized economy, without an ultimate sovereign.¹⁷ It is simply more profitable for a corporation to eschew costly environmental cleanup and externalize costs to third parties. Any practicable regime capable of coercing internalization of environmental costs must transcend mere optimistic reliance on the shareholder wealth maximization theory¹⁸—as it is currently

mental challenge affecting most CSR standards is ensuring that companies actually comply with their content,” and that “there are gaps, overlaps and inconsistencies between standards in terms of global reach, subjects covered, industry focus and uptake among companies.” See also U.N. CONFERENCE ON TRADE AND DEVELOPMENT [UNCTAD], WORLD INVESTMENT REPORT 2011, xxi (New York and Geneva 2011), available at <http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf>. It also stated that international CSR standards, at present, are almost uniformly voluntary in nature and exist as a unique dimension of “soft law.” *Id.* at 111, 114 (recognizing that where voluntary standards are promoted as a substitute for environmental protection legislation, or where such standards are not based on national or international rules, such voluntary standards “can potentially undermine, substitute or distract from governmental regulatory effort”).

¹⁵ David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 224 (1990) (“[T]he shareholder primacy principle has been the fundamental postulate of corporate law and is the standard response to arguments in favor of corporate social responsibility.”).

¹⁶ Kenneth B. Davis, Jr., *Discretion of Corporate Management to Do Good at the Expense of Shareholder Gain—A Survey of, and Commentary on, the U.S. Corporate Law*, 13 CAN.-U.S. L.J. 7, 8 (1998) (“The bedrock principle of U.S. corporate law remains that maximization of shareholder value is the polestar for managerial decisionmaking.”).

¹⁷ Williams, *supra* note 9, at 708; see also Amanda Perry-Kessaris, *Corporate Liability for Environmental Harm*, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 371 (Malgosia Fitzmaurice et al. eds., 2010) (“[C]losing the gargantuan gaps through which [multinational corporations] are able to evade liability for environmental harm requires some more holistic national and international action.”).

¹⁸ Though the terms possess slightly different meanings in a technical sense, this Article will use “profit maximization” and “wealth maximization” interchangeably.

understood—within constraints of domestic law and private contractual arrangements.¹⁹

Furthermore, corporate stakeholders—which may include the inhabitants of the communities and countries in which multinational corporations conduct business—will likely be unable to represent their own interests through participation in corporate governance under current law.²⁰ Rather, contractual arrangements and other (positive) bodies of law should protect the stakeholders' interests.²¹

This Article proposes that the United States create a bonding system under which multinational corporations doing business in America would be required to contribute to an environmental remediation bond, administered by the United States.

Part II of this Article will utilize the ongoing battle between Chevron and the people of the Ecuadorean Amazon, as well as the litigation against Royal Dutch Petroleum for its activities in Nigeria, to illustrate the inadequacy of current corporate law and existing legal regimes in the environmental responsibility context.²² Part III will discuss some of the difficulties of implementing liability regimes in a globalizing economy, including the risk of disincentivizing foreign investment in developing nations who seek to impose more robust environmental protections.²³ Part IV will explore the tension between the predominating shareholder primacy norm and the corporate managerial responsibility to maximize profits, on the one hand, and the goal of environmental stewardship, on the other.²⁴ Part V will assess, and ultimately dismiss, the ATS as a viable liability mechanism for environmental degradation abroad. It will also discuss the need to reconceptualize the wealth maximization model to account for greater reciprocal rights in our

¹⁹ Williams, *supra* note 9, at 708.

²⁰ *Id.* at 713.

²¹ See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 442 (2001) (rejecting the notion that corporate law itself should embody a multi-fiduciary or stakeholder model of accountability); Williams, *supra* note 9, at 718 (noting that the predominant model would find problematic any attempts to impose greater obligations on the corporation via corporate law).

²² See *infra* Part II.

²³ See *infra* Part III.

²⁴ See *infra* Part IV.

capitalistic system. Part V then proposes a mandatory corporate bonding regime, administered by the United States, that can be utilized to curb corporate environmental exploitation and provide a ready fund for remediation.²⁵ Finally, Part VI addresses important counter-arguments to the proposed corporate bonding system. In particular, it analyzes the possibility that imposing greater corporate liability may prove too costly, interfere with foreign relations and offend national sovereignty, and stifle investment in the developing world.²⁶

I. THE SHORTCOMINGS OF CORPORATE SOCIAL RESPONSIBILITY LAW AND EXISTING LEGAL SCHEMES: ECUADOR AND THE ATS

A. Texaco, Chevron and the Ecuadorean Amazon: A Case Study in Inefficiency

The Ecuadorean Amazon is one of the most biologically diverse forests in the world, home to an estimated five percent of the planet's species, many of which are extremely sensitive to disturbance.²⁷ Indigenous populations have coexisted harmoniously—sustainably fishing, hunting and raising crops—with these species for centuries.²⁸ Beneath the forest floor, however, lies one of the nation's most crucial resources: crude oil, the expropriation of which was unlike anything the indigenous had ever done.²⁹

In 1964, Texaco Petroleum Company (“Texaco”), an American company, commenced oil exploration and drilling in the Oriente region of the Ecuadorean jungle, near Lago Agrio.³⁰

²⁵ See *infra* Part V.

²⁶ See *infra* Part VI.

²⁷ Arnold, *supra* note 4, at 556.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *In re* Application of Chevron Corp., 709 F. Supp. 2d 283, 285 (S.D.N.Y. 2010), as corrected (May 10, 2010), *aff'd sub nom.* Chevron Corp. v. Berlinger, 629 F.3d 297 (2d Cir. 2011); see also The Americas, *Justice or extortion? Ecuador, Chevron and pollution: The hounding of an American oil company*, ECONOMIST, May 21, 2009, at 42 [hereinafter The Americas].

The next year, Texaco began operating a petroleum concession³¹ for a consortium owned in equal parts by Texaco and Gulf Oil Corporation.³² The government of Ecuador later obtained Gulf Oil's interest via Petroecuador, its state-owned oil company, and, in 1976, became the majority stakeholder in the consortium.³³ The consortium constructed 400 drill sites and hundreds of miles of roads and pipelines, including a primary, trans-Ecuadorean pipeline that extends for 280 miles across the Andes.³⁴ Texaco operated the primary pipeline and supervised drilling activities until 1990, at which time Petroecuador assumed control.³⁵ Two years later, Texaco surrendered its interests, and left Petroecuador the sole owner.³⁶

In 1993, a group of residents from the Oriente region brought a class action suit in federal court in New York against Texaco, alleging that “between 1964 and 1992 Texaco’s oil operation activities polluted the rain forests and rivers in Ecuador.”³⁷ Specifically, the plaintiffs claimed that Texaco failed to properly dispose of toxic byproducts of oil exploration, and instead dumped them into local rivers, and onto local landfills or local dirt roads.³⁸ Experts estimate the primary pipeline itself spilled more than 16.8 million gallons of oil into the Amazon over an 18-year period.³⁹ Rivers and lakes were contaminated by oil and petroleum, heavy metals, industrial solvents, and other highly toxic chemicals.⁴⁰

³¹ A “concession” is a “contract in which a country transfers some rights to a foreign enterprise which then engages in an activity (such as mining) contingent on state approval and subject to the terms of the contract.” BLACK’S LAW DICTIONARY 328 (9th ed. 2009).

³² *In re Application of Chevron Corp.*, 709 F. Supp. 2d at 285.

³³ *Id.*

³⁴ Arnold, *supra* note 4, at 556.

³⁵ *In re Application of Chevron Corp.*, 709 F. Supp. 2d at 285.

³⁶ *Id.*

³⁷ *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).

³⁸ Williams, *supra* note 9, at 752.

³⁹ Arnold, *supra* note 4, at 556 (“Spills from secondary pipelines have never been estimated or recorded; however, smaller tertiary pipelines dump 10,000 gallons of petroleum per week into the Amazon, and production pits dump approximately 4.3 million gallons of toxic production wastes and treatment chemicals into the forest’s rivers, streams, and groundwater each day.”).

⁴⁰ *Id.* While Texaco spent \$40 million on cleanup operations in Ecuador between

Community leaders and health professionals reported adults and children with deformities, rashes, abscesses, dysentery, respiratory ailments, disproportionately high rates of cancer, and other painful physical symptoms.⁴¹ The plaintiffs sought billions of dollars in damages, relying upon theories of “negligence, public and private nuisance, strict liability, medical monitoring, trespass, civil conspiracy, and violations of the Alien Tort Claims Act.”⁴² They also sought extensive equitable relief intended to “redress contamination of the water supplies and environment.”⁴³

Touting the ability of the Ecuadorian courts to provide a “fair and alternative forum” for the plaintiffs’ claims,⁴⁴ Texaco argued that the case properly belonged in Ecuador, where the evidence and witnesses were predominantly located.⁴⁵ The *Aguinda* court agreed and, in 2001, dismissed the case on *forum non conveniens* grounds after nine years of litigation.⁴⁶

1995 and 1998, independent estimates place the cost of cleanup of the production pits *alone* at \$600 million. *Id.* at 557. In return for Texaco’s cleanup efforts, the government of Ecuador agreed to waive future claims against the company. *Id.*

⁴¹ *Id.* at 556–57.

⁴² *Aguinda v. Texaco, Inc.*, 303 F.3d at 473.

⁴³ *Id.* at 473–74. The plaintiffs articulated the specific equitable relief sought, requesting “financing for environmental cleanup to create access to potable water and hunting and fishing grounds; renovating or closing the Trans Ecuadorian Pipeline; creation of an environmental monitoring fund; establishing standards to govern future Texaco oil development; creation of a medical monitoring fund; an injunction restraining Texaco from entering into activities that risk environmental or human injuries, and restitution.” *Id.*

⁴⁴ *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 286 (S.D.N.Y. 2010), *as corrected* (May 10, 2010), *aff’d sub nom. Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011).

⁴⁵ *Id.* at 285.

⁴⁶ *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001) *aff’d as modified*, 303 F.3d 470 (2d Cir. 2002). The Second Circuit affirmed the dismissal in 2002. *Id.* Studies show that few international cases dismissed on *forum non conveniens* grounds are ever re-litigated. Laurel E. Miller, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Action*, 58 U. CHI. L. REV. 1369, 1372 (1991) (“[F]ew international cases dismissed on *forum non conveniens* grounds are ever actually litigated.”); *see also* Chris Jochnick, ‘A Civil Action, Part 2,’ CHRISTIAN SCIENCE MONITOR, Mar. 17, 1999, at 9, available at <http://www.csmonitor.com/1999/0317/p9s1.html> (“Studies show that only 4 per-

Following the dismissal, a group of Ecuadorians—including many of the *Aguinda* plaintiffs⁴⁷—sued ChevronTexaco⁴⁸ in Lago Agrio, Ecuador, and asserted claims for, among other things, violations of a 1999 Ecuadorian environmental law.⁴⁹ On February 14, 2011, an Ecuadorian court levied upon Chevron, a California-based company, a \$9.47 billion fine—or up to nearly twice that amount if Chevron failed to publicly apologize for its actions.⁵⁰ Chevron has adamantly contested the verdict and hopes to persuade courts in New York and The Hague that it is “the innocent victim of an attempted shakedown based on a spectacular fraud by the plaintiffs’ lawyers and members of the Ecuadorean judiciary.”⁵¹ Though Chevron acknowledges that Texaco polluted streams and rivers,⁵² it disclaims any and all liability, citing the remedial agreement it signed with the Ecuadorean government, and contends the remaining pollution is Petroecuador’s fault.⁵³

In response, Chevron filed suit in New York against the plaintiffs’ lawyers—one of whom solicited a documentary film

cent of cases dismissed on grounds of forum non conveniens are ever re-litigated.”).

⁴⁷ See *supra* note 37.

⁴⁸ Chevron merged with Texaco in 2001. *In re Application of Chevron Corp.*, 709 F. Supp. 2d at 286 n.9.

⁴⁹ *Id.* at 286. It is important to note that the law postdates the overwhelming bulk of the environmental harm, and was not on the books while Texaco conducted its operations there. *Id.*; see also The Americas, *supra* note 30, at 42.

⁵⁰ Environmental litigation, *Monster or victim? A court in Ecuador controversially fines Chevron a whopping \$9 billion*, *ECONOMIST*, Feb. 19, 2011, at 70 [hereinafter Environmental Litigation], available at <http://www.economist.com/node/18182242>. If upheld, the fine would be the largest-ever damages award in an environmental case. *Id.*; see also Simon Romero & Clifford Krauss, *Ecuador Judge Orders Chevron to Pay \$9 Billion*, *N.Y. TIMES*, Feb. 15, 2011, at A4 [hereinafter Romero & Krauss], available at <http://www.nytimes.com/2011/02/15/world/americas/15ecuador.html>.

⁵¹ Environmental Litigation, *supra* note 50, at 70; see also Romero & Krauss, *supra* note 50, at A4 (quoting Ralph G. Steinhardt, professor of law and international affairs at George Washington University Law School as stating the fine “might as well be Monopoly money, given all the respect that Chevron will show it”).

⁵² Inhabitants estimate that Texaco dumped 15.8 billion gallons of toxic waste-water into streams and rivers that supply most of their drinking water. Environmental Litigation, *supra* note 50, at 70.

⁵³ *Id.* The Ecuadorean judge, Nicolás Zambrano, ruled that the agreement did not resolve its responsibilities towards third parties. *Id.*

while the litigation was ongoing⁵⁴—alleging fraud and attempted extortion.⁵⁵ It claims that plaintiffs’ lawyers and court officials illegally colluded and substantially overinflated damages figures in order to attempt to compel Chevron to settle for an artificially high sum, though no such settlement has yet taken place.⁵⁶ Chevron has since removed all assets from Ecuador, and recently secured injunctions from both the Permanent Court of Arbitration at The Hague, and a court in New York, preventing authorities in other countries from enforcing the Ecuadorean ruling.⁵⁷

While the litigation is still ongoing, the interjurisdictional difficulties highlight some of the inefficiencies of current liability regimes. Furthermore, it seems clear that the Ecuadorean legal system is ill-equipped to deal with environmental litigation of this size and scope, and is unlikely to inspire great confidence in future litigants any time soon.⁵⁸ In light of the inadequacies of the host country’s legal system to address these problems, the ATS may provide an alternative approach.

⁵⁴ Award-winning filmmaker Joe Berlinger directed the film, entitled *Crude*, which screened at the Sundance Film Festival before a brief theatrical run. A.O. Scott, *Big Oil’s Stain in the Amazon*, N.Y. TIMES, Sept. 8, 2009, at C1, available at <http://movies.nytimes.com/2009/09/09/movies/09crude.html>.

⁵⁵ Environmental Litigation, *supra* note 50, at 70.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Linda A. Newson, *Life and Death in Early Colonial Ecuador*, THE NATION, May 31, 1995, at 3 (“The system [in Ecuador] is notoriously corrupt; a poll by George Washington University found that only 16 percent of Ecuadorians have confidence in their judiciary, lower than in any other Latin American country except Guatemala.”); see also Williams, *supra* note 9, at 751 (suggesting that there are serious questions about the quality of justice possible in the plaintiffs’ home jurisdiction); U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: ECUADOR I, 9–10 (2000), available at <http://www.state.gov/documents/organization/160163.pdf> (noting deficiencies in Ecuador’s legal system). While many writers and activists tend to focus on Ecuador’s inadequate judiciary from the perspective of the aggrieved would-be plaintiff, there are also significant risks that plaintiffs can exploit the informality of the litigation process, for example, and generate substantial political support in order to unduly influence judges or judicial proceedings. See, e.g., Patrick Radden Keefe, *Reversal of Fortune: A crusading lawyer helped Ecuadorans secure a huge environmental judgment against Chevron. But did he go too far?*, THE NEW YORKER (Jan. 9, 2012), available at http://www.newyorker.com/reporting/2012/01/09/120109fa_fact_keefe.

B. The Alien Tort Statute and *Kiobel*

The ATS, enacted as part of the Judiciary Act of 1789, provides U.S. federal courts subject matter jurisdiction over cases wherein an alien sues for a tort committed in violation of the “law of nations,” regardless of where in the world the torts occurred.⁵⁹ It permits non-citizens to take advantage of the subject matter jurisdiction grant so long as the court obtains personal jurisdiction over the defendant.⁶⁰ The ATS has become the “principal mechanism in U.S. courts for attempting to hold nation-states, state actors, and even private individuals or corporations responsible for what are alleged to be actual, complicit, aided or abetted, or conspiratorial violations of international law.”⁶¹ In the United States, the ATS has rapidly become a “chief weapon” in plaintiffs’ attorneys’ efforts to hold multinational corporations responsible for their corporate activities throughout the world.⁶² The extent to which the ATS permits U.S. courts to hold corporations accountable for acts committed abroad, however, remains unsettled.⁶³

⁵⁹“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2010); *see also* Douglas M. Branson, *Holding Multinational Corporations Accountable? Achilles’ Heels in Alien Tort Claims Act Litigation*, 9 SANTA CLARA J. INT’L L. 227, 227 (2011).

⁶⁰Branson, *supra* note 59, at 227.

⁶¹Donald J. Kochan, *Legal Mechanization of Corporate Social Responsibility through Alien Tort Statute Litigation: A Response to Professor Branson with some Supplemental Thoughts*, 9 SANTA CLARA J. INT’L L. 251, 252–53 (2011) [hereinafter Kochan, *Legal Mechanization of Corporate Social Responsibility*].

⁶²Patti Waldmeir, *An Abuse of Power*, FIN. TIMES, Mar. 14, 2003, at 12, *available at* http://archives.usaengage.org/news/2003/20030313_ft_atp_waldmeir.html.

⁶³*See* *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) *reh’g denied*, 642 F.3d 268 (2d Cir. 2011) *and cert. granted*, 132 S. Ct. 472 (2011) *and cert. denied*, 132 S. Ct. 248 (2011); *cf.* *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“[T]here is no evidence that Congress was concerned about remedying aliens’ injuries that occurred in foreign lands. And there is no particular reason that Congress would have been concerned about aliens injured in foreign lands. Remedies for such injuries could be provided, after all, by foreign sovereigns under their countries’ laws. It would be very odd to think that the Congress of 1789 wanted to create a federal tort cause of action enforceable in U.S. court for, say, a Frenchman injured in London.”).

In *Kiobel v. Royal Dutch Petroleum Co.*,⁶⁴ a number of Nigerian residents filed a putative class action under the ATS, arguing that Dutch, British and Nigerian corporations engaged in oil exploration and production in conjunction with a Nigerian government that committed human rights abuses in violation of the law of nations.⁶⁵ The Second Circuit Court of Appeals held that the ATS does not confer jurisdiction over claims against corporations, and that corporations are not subject to liability under customary international law.⁶⁶ In October, 2011, the United States Supreme Court granted certiorari to the Nigerian petitioners.⁶⁷

On February 28, 2012, the Court heard oral argument in the case.⁶⁸ Six days later, however, the Supreme Court instructed the parties to file additional briefs addressing an even broader question, in anticipation of reargument to be held during the Court's next term.⁶⁹ The Court asked the parties to address "[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."⁷⁰

Though the plaintiffs in *Kiobel* allege international human rights violations, the Supreme Court's holding will bear directly upon the ability to seek a remedy in American courts for environmental degradation abroad under the ATS. The speculation regarding corporate civil liability for extraterritorial behavior, however, lingers for the time being.

⁶⁴ *Kiobel*, 621 F.3d 111.

⁶⁵ *Id.* at 117.

⁶⁶ *Id.* at 145.

⁶⁷ Adam Liptak, *Two Human Rights Cases on Supreme Court Docket*, N.Y. TIMES, Oct. 18, 2011, at B11 [hereinafter Liptak, *Two Human Rights Cases*], available at <http://www.nytimes.com/2011/10/18/business/supreme-court-to-hear-2-human-rights-cases.html>.

⁶⁸ Transcript of Oral Argument at 23, *Kiobel v. Royal Dutch Petroleum Co.* (Feb. 28, 2012) (No. 10-1491)

⁶⁹ *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2012 WL 687061 (U.S. Mar. 5, 2012); see also Liptak, *Two Human Rights Cases*, *supra* note 67, at A15.

⁷⁰ Order List: 565 U.S., Monday March 5, 2012, Order in Pending Case, 10-1491, *Kiobel v. Royal Dutch Petroleum*, available at <http://www.supremecourt.gov/orders/courtorders/030512zr.pdf>.

II. THE DIFFICULTIES OF IMPLEMENTING LIABILITY REGIMES IN AN INCREASINGLY GLOBAL ECONOMY

Though controlling for negative externalities⁷¹ is an exceedingly challenging task,⁷² corporate generation of harmful environmental externalities (e.g. pollution) is an unsurprising result of the wealth maximization model.⁷³ Although capitalism relies on marketplace sentries to establish and enforce certain “rules of the game,” the globalization of the economy provides nations fewer incentives and erodes their ability to perform regulatory functions.⁷⁴

Globalization, in particular, undermines nations’ abilities to regulate the activities of transnational companies in an objective manner, and restricts the degree to which they may exercise proactive, regulatory power to stave off environmental harms.⁷⁵ For

⁷¹ An “externality” is a “consequence or side effect of one’s economic activity, causing another to benefit without paying or to suffer without compensation.” BLACK’S LAW DICTIONARY 664 (9th ed. 2009); see also JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 61 (2005) (quoting economist Milton Friedman as stating, “An externality . . . is the effect of a transaction . . . on a third party who has not consented to or played any role in the carrying out of that transaction.”). A *negative* externality is “an externality that is detrimental to another, such as water pollution created by a nearby factory.” BLACK’S LAW DICTIONARY 664 (9th ed. 2009); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 636 (4th ed. 1992) (“If either the benefits or costs of an activity within a state accrue to nonresidents . . ., the incentives of the state government will be distorted.”).

⁷² See, e.g., Donald J. Kochan, *Runoff and Reality: Externalities, Economics, and Traceability Issues in Urban Runoff Regulation*, 9 *CHAP. L. REV.* 409, 410 (2006) (discussing the difficulties in regulating the imposition of negative externalities in the context of urban runoff).

⁷³ See JOHN R. BOATRIGHT, *ETHICS AND THE CONDUCT OF BUSINESS* 383 (5th ed. 2007) (noting that societal welfare is not promoted when corporations make a profit for shareholders by polluting).

⁷⁴ Jenkins, *supra* note 14, at 1.

⁷⁵ Williams, *supra* note 9, at 725; see also A. Claire Cutler et al., *Private Authority and International Affairs*, in *PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS* 3, 15–19 (A. Claire Cutler et al., eds.); HANS-PETER MARTIN & HARALD SCHUMANN, *THE GLOBAL TRAP* 185 (1999) (citing Boutros Boutros-Ghali, former secretary-general of the United Nations, stating that as a result of globalization “individual states have less and less capacity to influence things, while the powers of global players—in the realm of finance, for example—grow and grow without being controlled by

one, companies can more easily relocate production or outsource tasks to other countries to exploit more favorable regulatory conditions.⁷⁶ While there is less risk of such relocation in the extractive industries—as the resources can be mined only where the deposits exist—the problem is not insignificant in more mobile industries.⁷⁷

Furthermore, countries imposing more rigorous environmental regulations may risk a competitive disadvantage in terms of attracting foreign capital investments, due to the perception that conforming to environmental regulations is an expensive proposition.⁷⁸ In fact, proposed environmental legislation in even the United States, European Union, Australia and Japan have been defeated on the basis of such concerns.⁷⁹ Globalization and the competition amongst nations for capital investment “has led to what the WTO terms ‘regulatory chill’ with respect to countries enacting protecting laws, with the effect that global environmental regulation may not cause companies to fully internalize the costs of negative environmental externalities.”⁸⁰

Before we can explore proposals to compel corporations to internalize such costs, however, we must first briefly address the current characterization of the corporate entity.

anyone.”); WTO, TRADE AND ENVIRONMENT 1 (1999), available at http://www.wto.org/english/tratop_e/envir_e/environment.pdf (acknowledging that “economic integration has, or at least is perceived to have, diminished the regulatory power of individual nations.”).

⁷⁶ Williams, *supra* note 9, at 726.

⁷⁷ *But see* Weiler, *supra* note 3, at 433 (asking whether foreign direct investment, once it has been committed to a particular country, is as highly mobile as some suggest).

⁷⁸ WTO, *supra* note 75, at 5–6, 35.

⁷⁹ Daniel C. Esty & Damien Geradin, *Environmental Protection and International Competitiveness: A Conceptual Framework*, J. WORLD TRADE 5, 19–20 (1998).

⁸⁰ Williams, *supra* note 9, at 730.

III. CORPORATE SOCIAL RESPONSIBILITY IN AN ERA OF SHAREHOLDER PRIMACY

The field of corporate social responsibility, generally, seeks to question and define the social obligations of companies, as citizens, to the societies in which they are embedded.⁸¹ Proponents of the “profit maximizing view” believe the sole social responsibility of business is to “use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.”⁸² Others contend that corporations should bear “affirmative perceived-moral obligations that can be compelled by coercive force.”⁸³ In essence, the debate largely depends upon dueling—yet opposed—conceptions of the corporation as either primarily an economic entity or a social entity.⁸⁴

While a particularly substantial risk of environmental damage exists in the extractive industries (e.g. mining for oil, gas, coal, and various materials), most global textiles and manufacturing operations raise similar concerns (e.g. runoff, spillage, etc.).⁸⁵ The specific issues vary by industry, yet the operative corporate social responsibility concerns all inhere in the relationships between the corporate activity and the health and welfare of the people and environment with which the corporate actor interrelates.⁸⁶

⁸¹ *Id.* at 721; see also WTO, *supra* note 75, at 35; ROBERT CHARLES CLARK, *CORPORATE LAW* § 16.2 (1986) (characterizing the “corporation’s role” as “the affirmative, open-ended goals that a particular corporation’s ultimate decision making group should try to pursue.”).

⁸² MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (1962); see also Kochan, *Legal Mechanization of Corporate Social Responsibility*, *supra* note 61, at 253–54 (characterizing Friedman’s conceptualization of corporate responsibility as essentially nonexistent “unless it happens to be an accidental and spontaneous outcome of otherwise self-interest financial motives of a profit-maximizing corporation.”).

⁸³ Kochan, *Legal Mechanization of Corporate Social Responsibility*, *supra* note 61, at 254.

⁸⁴ Williams, *supra* note 9, at 707 (characterizing the corporation as both an economic and social entity); see also E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); Adolph A. Berle, Jr., *For Whom Are Corporate Managers Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

⁸⁵ Williams, *supra* note 9, at 722–23.

⁸⁶ *Id.* at 723.

A. The Role of the Corporation in the United States

In the United States, corporations are predominantly viewed as private, economic entities whose purpose is to maximize shareholder wealth.⁸⁷ The consensus suggests that corporations bear no particular social responsibilities beyond profit maximization for the benefit of shareholders.⁸⁸ Under this view, “the constraints of law, buttressed in some specific instances by contractual obligations . . . will be sufficient to ensure that companies fully internalize all of the social and environmental costs of their productive processes and labor relationships.”⁸⁹ While employees, creditors, suppliers, customers, and others may possess contractually defined rights against the corporation, shareholders “claim the corporation’s heart.”⁹⁰ Commensurate with the shareholder-centric focus, corporate directors possess fiduciary duties to act in accordance with the best interests of the shareholders.⁹¹ This is often called the shareholder primacy norm.⁹²

⁸⁷ D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 277–78 (1998).

⁸⁸ See Milton Friedman, *A Friedman Doctrine: The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 32, available at <http://www.umich.edu/~thecore/doc/Friedman.pdf>.

⁸⁹ Williams, *supra* note 9, at 708; see also CLARK, *supra* note 81, at § 16.2 (“[T]he profit-maximizing norm does *not* imply that corporations and their managers have only minimal legal obligations to persons other than shareholders. Quite the contrary is true. Every major relationship between the corporation and persons or groups it affects is subject to vast and intricate bodies of legal doctrine and to legal enforcement mechanisms”); Kochan, *Legal Mechanization of Corporate Social Responsibility*, *supra* note 61, at 255 (“It is often ignored that the profit maximization theory is conditioned on companies operating within legal constraints.”).

⁹⁰ Smith, *supra* note 87, at 278.

⁹¹ *Id.*

⁹² The most well-known exposition of the shareholder primacy norm comes from *Dodge v. Ford Motor Co.*: “A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.” 170 N.W. 668, 684 (Mich. 1919); see also Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21

B. The Tension Between Profit Maximization and Environmental Stewardship

While the law provides corporations with many of the same rights as humans, it cannot rely upon corporations to be constrained by internal moral and social checks and balances natural to most humans.⁹³ Rather, corporations are “*singularly* self-interested and unable to feel genuine concern for others in any context.”⁹⁴ The corporation’s tendency to pursue profit maximization steadfastly, to the exclusion of all else, poses a particular risk to the natural environment, “a resource which only the most selfless and charitable of human beings tend to be prone to preserving.”⁹⁵ A corporation would thus seem to owe a *de facto* duty to its shareholders to behave callously when profitable. With this understanding, Chevron has behaved both predictably and appropriately by disclaiming any additional liability for the toxic production pits and tainted water in Ecuador, and staunchly contesting any suggestions it acted illegally.⁹⁶ In its “mind,” any obligation it once had ceased to exist when it executed an agreement with Ecuador to waive future claims against Chevron as part of its environmental remediation efforts.

Concededly, purely self-interested profit-maximizing behavior may occasionally induce socially responsible corporate action, particularly in response to consumer demand.⁹⁷ Increasingly,

J. CORP. L. 657, 717 (1996) (asserting that “the shareholder wealth maximization norm . . . has been fully internalized by American managers.”).

⁹³ Perry-Kessaris, *supra* note 17, at 361; *see also* BAKAN, *supra* note 71, at 60 (noting that the corporation is “compelled to cause harm when the benefits of doing so outweigh the costs”).

⁹⁴ BAKAN, *supra* note 71, at 56.

⁹⁵ Perry-Kessaris, *supra* note 17, at 362.

⁹⁶ *See* Environmental Litigation, *supra* note 50, at 70 (“Chevron argues calmly that it is not a monster but the victim of a monstrous injustice.”); *see also* BAKAN, *supra* note 71, at 60 (“Only pragmatic concern for its own interests and the laws of the land constrain the corporation’s predatory instincts . . .”).

⁹⁷ Kochan, *Legal Mechanization of Corporate Social Responsibility*, *supra* note 61, at 256 (classifying such external pressures as “non-coercive, pressure-induced/quasi voluntary”); *see also* Lu, *supra* note 5, at 607 (noting that investors seeking to invest in socially responsible companies now screen the companies they invest in for human rights violations).

consumers seek out socially and environmentally responsible goods, and voice their discontent with corporate environmental misconduct by adjusting their purchasing habits.⁹⁸ As the Chevron case seems to suggest, though, many shareholders remain concerned first and foremost with dividends, not contrition.⁹⁹

Current law tends to convert liability for environmental harm into regulatory fines or tort damages payable to aggrieved parties.¹⁰⁰ Because the corporation exists as a purely economic actor, environmental harm constitutes a mere numerical value—not unlike the price of raw materials, shipping, human resources, etc.—in the broader corporate calculus.¹⁰¹ In other words, existing environmental regulations generally constitute mere liability rules incapable of compelling behavioral modifications—rather, corporations need only pay to pollute.¹⁰²

⁹⁸ John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 472 (2000) (“[W]hen Shell Oil announced its plans to dump the Brent Spar oil platform into the sea, a consumer boycott caused sales to drop as much as fifty percent.”); see also Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT’L L. 41, 47 (2010) (“[A] company’s reputation has become one of its most valuable assets.”).

⁹⁹ Furthermore, some multinational and transnational companies are large enough to overcome significant fluctuations in consumer behavior. See Anderson, *supra* note 98, at 472 (noting that Exxon’s size helped it survive the Valdez oil spill).

¹⁰⁰ Perry-Kessaris, *supra* note 17, at 363.

¹⁰¹ *Id.*

¹⁰² See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). A state must often decide which of two conflicting interests to favor—for example, an oil company’s interest in externalizing the social and environmental costs of pollution as contrasted to the surrounding community’s right to breathe clean air—or it risks that access to goods, services, and life will depend upon a system in which “might makes right,” wherein the stronger or shrewder party prevails. *Id.* at 1090. Thus, the law decides which of the conflicting parties claims a superior “entitlement” to pursue its interests. *Id.* One manner in which the state or federal government may protect such entitlements is via liability rules, in which a party may destroy the initial entitlement if he is willing to pay an objectively determined value for it. *Id.* at 1092. Though the power to make a value determination resides outside the purview of the actor seeking to destroy the entitlement, so long as that party is willing to fulfill its payment obligation, it may not be prevented from trans-

IV. WHERE DO WE GO FROM HERE?

Generally speaking, the law seems incapable of providing sufficient constraints to address the corporate responsibility problem. Due, in part, to the complexities of international law, current regimes have failed both to account for every social cost from all industrial production and employment relationships, and to compel companies to internalize those costs.¹⁰³ Though scholars have put forth many interesting and creative proposals to address the issue,¹⁰⁴ the following modest discussion explores only one possible line of reasoning.

A. Reconceptualizing the Profit-Maximization Model

Some would argue that adopting a model more akin to the stakeholder theory¹⁰⁵ of the corporation would substantially broaden

ferring or destroying the entitlement. *Id.*

¹⁰³Williams, *supra* note 9, at 724.

¹⁰⁴One such measure includes imposing more rigorous information disclosure requirements on corporations pertaining to the environmental consequences of the company's activities. *See id.* at 709 n.7 (“[C]ompanies could be required to provide charts about the specific percentages of their products or services produced or sold in each different country; the minimum wages in those countries; the measures of economic inequality in those countries; and, to the extent the company generally pays wages that are higher than the required minimum wages for various employment categories . . . by what percentage, per category, the company exceeds the minimum wage.”). Another suggestion involves rethinking the notion of limited liability as applied to both corporations and their shareholders. Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 *YALE L. J.* 1879 (1991); *see also* UNCTAD, *supra* note 14, at xxi (suggesting that transnational corporations adjust their environmental practices based on their perception of and exposure to legal liability risks). Still others turn their attention to more effective remedies in environmental cases. *See* Bridgeman, *supra* note 4, at 37 n.214 (suggesting that, though courts have been reluctant to award them as a remedy, disgorgement of profits in the environmental context may deter corporations from externalizing the costs of environmental pollution by requiring them to surrender the profits earned as a result of violative conduct). This Article expresses no opinion in regards to the merit of the aforementioned proposals.

¹⁰⁵Williams, *supra* note 9, at 713 n.16 (“The stakeholder theory, also called the other constituency theory, suggests that managers owe consideration (and perhaps even

the universe of potential constituents with cognizable rights, and compel managerial consideration of the environment. Corporate managers would thus possess social obligations beyond merely maximizing shareholders' wealth within the confines of the law.¹⁰⁶ The call to abandon the wealth maximization model for a more "progressive" model, however, results from the widespread and fundamental mischaracterization of the wealth maximization model itself.

Conventional discussions of the profit-maximization model tend to accept that exploitation—in this case, environmental—is not only permissible, but obliged.¹⁰⁷ At its essence, though, the profit-maximization model in capitalistic systems does not intend for parties to exploit one another.¹⁰⁸ It contemplates not only the

fiduciary obligations) to a wider range of constituents than the shareholders and that the content of this obligation is to consider the effects of managerial actions on other stakeholders or constituents in the corporate enterprise, such as employees, consumers, suppliers, the community and the environment.”).

¹⁰⁶ *Id.* at 716.

¹⁰⁷ *But see* CLARK, *supra* note 81, at § 16.2 (“Corporations owe many contractual, common law, and statutory duties to . . . the environment.”).

¹⁰⁸ *Id.* (“[N]o one need be made worse off by the corporation’s having a single goal of profit maximization.”). Adam Smith famously wrote of the motivating force of self-interest, stating, “It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity, but to their self-love.” ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 14 (1937). He also, however, recognized the importance of virtue, writing effusively, “By the wise contrivance of the Author of nature, virtue is upon all ordinary occasions, even with regard to this life, real wisdom and the surest and readiest means of obtaining both safety and advantage.” ADAM SMITH, *THEORY OF MORAL SENTIMENTS* 263 (2011); *see also* PATRICIA H. WERHANE, *ADAM SMITH AND HIS LEGACY FOR MODERN CAPITALISM* 180 (1991) (“[Adam] Smith’s ideal economic actor is a person of goodwill, prudence and self-restraint who operates both co-operatively and competitively in a social and economic milieu based on . . . morality, law, and justice.”); . D.P. O’Brien, *The Longevity of Adam Smith’s Vision: Paradigms, Research Programmes and Falsifiability in the History of Economic Thought*, in *ADAM SMITH: CRITICAL ASSESSMENTS*, vol. 3, at 377–78 (John Cunningham Wood ed., 1984) (“[Smith’s concept] was of an economic system . . . within a framework of law, justice and security of property Within the framework, individuals pursued their self-interest—but it was self-interest shot through with social values.”).

need for autonomy, but also the need for reciprocal obligations amongst individuals to permit each the opportunity to maximize their respective profits.¹⁰⁹ At its roots, then, a wealth maximization model requires something far less exploitative than the corporate behavior to which we are accustomed.¹¹⁰

Economists and legal scholars, including Friedman, discuss the profit maximization paradigm as operating ‘*within the bounds of the law*’.¹¹¹ But something more than the technically codified law should control.¹¹² Economic actors who fail to internalize the effects of their activities are using their property in a manner that harms another, whether or not domestic law prohibits the infringement. Fundamentally, in order to protect any one individual’s ability to maximize his profits, the system presupposes that *each individual* is entitled to the same right.¹¹³ As such, when one individual exploits a resource to the detriment of others, he has unlawfully disadvantaged the others and unlawfully interfered with their rights. Manipulating legal regimes to facilitate self-inurement by exploitation is thus entirely contrary to the foundations of the profit-maximization model, wherein the guarantees of equality and reciprocity allow

¹⁰⁹In the absence of such reciprocity, and given individuals’ freedom to pursue their own interests, a society risks a “Hobbesian war of all against all.” See JERRY EVENSKY, ADAM SMITH’S MORAL PHILOSOPHY: A HISTORICAL AND CONTEMPORARY PERSPECTIVE ON MARKETS, LAW, ETHICS, AND CULTURE 9 (2005).

¹¹⁰ATHOL FITZGIBBONS, ADAM SMITH’S SYSTEM OF LIBERTY, WEALTH, AND VIRTUE: THE MORAL AND POLITICAL FOUNDATIONS OF *THE WEALTH OF NATIONS* 9 (1995) (noting that Smith, though a strong advocate of self-interest and free trade, made statements indicating that economics needed to make moral distinctions).

¹¹¹See CLARK, *supra* note 81, at § 16.2 (noting that negative externalities like pollution can be corrected by tort or pollution laws either prohibiting pollution or taxing violative behavior).

¹¹²O’Brien, *supra* note 108, at 378 (noting that any interpretation of the view of self-interest set forth in the *Wealth of Nations* that does not account for Smith’s “sympathy” theory propounded in *The Theory of Moral Sentiments* will be seriously misleading).

¹¹³In fact, to emerge from the Hobbesian jungle in the first place requires the development of rules of obligations that delineate property rights, as well as an accompanying manifold of institutions of governance to secure those rights. Bruce L. Benson, *Emerging from the Hobbesian Jungle: Might Takes and Makes Rights*, in *THE ECONOMICS OF PROPERTY RIGHTS*, vol. 1 110–11 (Svetozar Pejovich ed., 2001).

economic actors to profit without interference. Though the capability to profit need not be uniform, externalizing the costs of conducting business in a capitalistic system interferes with the property rights of others. In short, the *profit-maximization* model was never meant to be an *exploitation* model.

Under this formulation of the wealth maximization model, “within the bounds of the law” should not be construed so hyper-technically as to mean the law of the jurisdiction in which the actor operates.¹¹⁴ Though a domestic regime may not incorporate certain basic capitalistic rights, there still exist inherent limitations on behavior that, from an ethical standpoint, should attach and be enforced. As noted, much of the opportunistic exploitation of lax environmental regulations takes place in developing nations.¹¹⁵ If such nations were, in fact, mature capitalistic systems with a rule of law and foundational protections for property rights, these types of exploitative behaviors would not be authorized.¹¹⁶ Perhaps, then, operating “within the bounds of the law” ought to mean something more than simply refraining from that which results in jail or fines.

If we ever hope for developing nations—in particular, those with attractive natural resources—to become mature capitalistic states, it is imperative they control for externalities and punish opportunistic exploitation.¹¹⁷ The law should not condone cunning manipulation of underdeveloped or developing nations. Ethical conduct means more than mere compliance.

B. The Alien Tort Statute Is Not the Answer

Under the ATS, plaintiffs must allege a tort in violation of the law of nations—in other words, in violation of well-established,

¹¹⁴ See BOATRIGHT, *supra* note 3, at 418 (“The mere fact that a country permits bribery, unsafe working conditions, exploitive wages, and violations of human rights does not mean that these practices are morally acceptable, even in that country.”).

¹¹⁵ See *supra* Part I.

¹¹⁶ See BOATRIGHT, *supra* note 3, at 421 (questioning whether lower national standards truly represent the considered judgment of its people).

¹¹⁷ *Id.* at 417 (“[Multinational corporations] have an opportunity to play a constructive role in countries making the transition from a socialist, planned economy to a free market.”).

universally recognized norms of international law.¹¹⁸ Courts have permitted causes of action against private actors—as opposed to state officials—under the ATS for crimes such as genocide,¹¹⁹ piracy, hijacking and slavery.¹²⁰ The ATS is used, however, almost exclusively in the human rights context, “with non-human rights suits filed under the ATS few and far between and almost always unsuccessful.”¹²¹ Courts’ tendencies to narrowly construe conduct that violates the law of nations substantially limit the type of corporate responsibility issues that American courts can address under the ATS.¹²²

Even if federal jurisdiction in a United States court is proper under the ATS, a federal judge may still dismiss a suit on grounds of *forum non conveniens*.¹²³ Unsurprisingly, many defendants—

¹¹⁸ *Filartiga v. Pena-Irala*, 630 F.2d 876, 887–88 (2d Cir. 1980) (“It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [ATS].”).

¹¹⁹ *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995).

¹²⁰ *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 371 (E.D. La. 1997) *aff’d*, 197 F.3d 161 (5th Cir. 1999).

¹²¹ Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT’L L. & POL. 1001, 1002 n.5 (2001); see, e.g., *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995) (holding that claims of fraud, breach of fiduciary duty, and misappropriation of funds in connection with allegedly fraudulent bank activities did not trigger jurisdiction under the ATS); *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (ruling that state lottery’s decision to pay lottery winnings partly through an annuity and not in one lump sum was not actionable under the ATS as a “shockingly egregious violation[] of universally recognized principles of international law”).

¹²² *Williams*, *supra* note 9, at 765 (noting that most corporate social responsibility issues “cannot be squeezed into the rubric of piracy, slavery, hijacking, genocide, or war crimes”); see also *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (dismissing claims of environmental despoliation in Indonesia where jurisdiction lied under the ATS and finding that plaintiffs failed to show that environmental “treaties and agreements enjoy [the] universal acceptance in the international community” required to constitute the law of nations); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732–33 (2004) (urging courts to be exercise caution in recognizing ATS claims based on evolving norms of modern international law).

¹²³ Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Con-*

particularly in the human rights context—invoke the doctrine as a basis for dismissal.¹²⁴ The doctrine, which focuses on the location of the evidence and parties, poses a significant hurdle for plaintiffs.¹²⁵ Certainly, judges have been reticent to dismiss a case where the judicial system in the country where the wrongs occurred is corrupt and inadequate as a viable forum for the plaintiffs.¹²⁶ Courts, however, have deemed most alternative fora adequate in the absence of rare circumstances.¹²⁷ Generally, only where a “remedy provided by the

veniens in U.S. Human Rights Litigation, 39 VA. J. INT’L L. 41, 46 (1998) (noting that federal courts largely apply the same common law *forum non conveniens* doctrine to international human rights cases); *see also* Williams, *supra* note 9, at 768 (noting that the premise of ATS litigation is in conceptual tension with *forum non conveniens*).

¹²⁴Most states have adopted the federal common law doctrine of *forum non conveniens*. David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 950–53 (1990). The chance that a judgment rendered in a non-United States court would be less than a judgment rendered in the States provides sufficient incentive for defendants to argue vigorously for dismissal on grounds of *forum non conveniens*. Boyd, *supra* note 123, at 47; *see also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 (1981) (noting that American courts are “extremely attractive to foreign plaintiffs”). Not all potential defendants, however, have been successful in seeking such a dismissal. *See* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Sarei v. Rio Tinto PLC., 221 F. Supp. 2d 1116, 1175 (C.D. Cal. 2002) *aff’d in part, vacated in part, rev’d in part*, 456 F.3d 1069 (9th Cir. 2006) *opinion withdrawn and superseded on reh’g in part*, 487 F.3d 1193 (9th Cir. 2007) *on reh’g en banc*, 550 F.3d 822 (9th Cir. 2008) *and aff’d in part, vacated in part, rev’d in part*, 487 F.3d 1193 (9th Cir. 2007) *on reh’g en banc*, 550 F.3d 822 (9th Cir. 2008) *and aff’d in part, rev’d in part*, 671 F.3d 736 (9th Cir. 2011) (declining to dismiss on grounds of *forum non conveniens* because plaintiffs presented sufficient evidence that they would have trouble finding adequate representation and encouraging crucial witnesses to testify).

¹²⁵Boyd, *supra* note 123, at 46, 62 (noting that defendants in human rights cases have a reasonably good chance to demonstrate an adequate alternative forum exists, even where the country where the alleged abuses occurred has a corrupt legal system or the presence of violence may pose a threat to the plaintiff).

¹²⁶. Thus far, this largely applies in human rights contexts. *See, e.g.*, Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996) (holding that proposed alternative forum was inadequate because the plaintiff was “unlikely to obtain justice in Ghanaian courts” and would face danger if forced to return to Ghana).

¹²⁷*Piper*, 454 U.S. at 254–55 (stating that the capability of legal system is the focus

alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all” does a court weigh the less favorable laws of the fora for the plaintiff.¹²⁸ Furthermore, multinational defendants—including corporations, if the ATS confers jurisdiction—may propose additional fora in addition to the country where the wrongs occurred, which affords substantial leverage and power.¹²⁹ If defendants are successful in seeking dismissal, plaintiffs are unlikely to ever litigate the case.¹³⁰

Even those environmental cases under the ATS that survive the jurisdictional stage are unlikely to survive summary judgment or reach the trial stage, because claims based on environmental degradation do not yet sufficiently implicate customary international law.¹³¹ Thus, even plaintiffs capable of demonstrating degradation by the defendant may fail to successfully prove the existence of an obligatory, universal international norm sufficient to allow the party to proceed on the claim.¹³² As such, potential litigation is highly susceptible to motions to dismiss for failure to state a claim under FED. R. CIV. PROC. 12(b)(6), and will remain so until courts

rather than benefits to plaintiff).

¹²⁸ *Id.* at 254.

¹²⁹ Boyd, *supra* note 123, at 47.

¹³⁰ See *supra* note 46.

¹³¹ See Bridgeman, *supra* note 4, at 40 (noting that until environmental principles are recognized as part of the “law of nations” for ATS purposes, advocates must seek further development of international environmental law).

¹³² See *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (noting that the plaintiff failed to show that the international law it cited enjoyed universal acceptance in the international community, and that those sources referred only to “state abstract rights and liberties devoid of articulable or discernible standards and regulations to identify practices that constitute international environmental abuses or torts”); see also Mank, *supra* note 11, at 1100 (“Purely environmental ATS claims have sometimes encountered difficulties because of questions about whether there are universally recognized norms against such pollution.”). Plaintiffs have sought to circumvent the issue by bringing environmental claims based on degradation in conjunction with claims for “cultural genocide,” or other human rights violations, but courts have been reluctant to permit such claims to proceed. *Id.* Courts ultimately dismiss virtually all purely environmental suits under the ATS. *Id.* at 1100–01 (noting that courts have generally rejected environmental ATS claims based on a right to live in a clean and healthy environment).

no longer see fit to dismiss a claim of environmental harm for lack of universality.

For the above reasons, among others,¹³³ the ATS is an insufficient mechanism to compel multinational corporations to internalize the environmental costs of doing business.¹³⁴ While it may serve as a constraint on certain corporate malfeasance that falls within the ambit of the “law of nations,” the ATS—as it is currently understood—possesses very limited power to substantially impact corporate behavior, and should not be the centerpiece of a comprehensive environmental liability regime.

B. Compulsory Multinational and Transnational Corporate Bonding

This Article suggests that an effective way to influence corporate behavior under a wealth maximization model is to require all multinational and transnational corporations doing business in the United States to post a reclamation bond as a precondition to conducting environmentally invasive activities abroad. The United States would require that companies engaging in particular business activities contribute to a fund administered by a federal regulatory agency of Congress’ creation, with the goal of ensuring adequate funding for environmental cleanup efforts. As payouts to aggrieved parties are made, the cost of the bond would necessarily increase, leading to self-policing amongst bonding corporations. As the nuances and complexities of such a bonding scheme abound, this Article purports only to sketch some rudimentary contours around which such a system may be more fully realized.

¹³³ Issues of sovereign immunity and the nuances of the Foreign Sovereign Immunities Act (“FSIA”), for example, pose additional and substantial problems to the effective use of the ATS as a liability regime for environmental degradation, but any discussion thereof lies beyond the scope of this paper. *See also* Branson, *supra* note 59, at 228 (suggesting that plaintiffs and their counsel are “quickly brought back to earth, back to law school fundamentals” because of the many challenges encountered in trying to successfully bring suit against a multinational corporation).

¹³⁴ *See also* Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003) (involving unsuccessful claims by Peruvian residents for lung damage and environmental degradation caused by pollution resulting from copper mining operations).

The bonding system is not without precedent in the United States. In 1977, Congress passed the Surface Mining Control and Reclamation Act (SMCRA),¹³⁵ which requires companies seeking a permit to engage in coal mining to pay into a bond system operated by the U.S. government.¹³⁶ SMCRA requires that land affected by surface mining must be restored to a condition equal to or greater than the condition prior to mining,¹³⁷ and mandates reclamation bonding to assure restoration.¹³⁸ To guarantee compliance, SMCRA requires a permittee to submit a reclamation plan to the appropriate regulatory authority indicating how the mining operator plans to comply with SMCRA's reclamation standards,¹³⁹ as well as post a reclamation bond after the permit approval process, but prior to commencing mining operations.¹⁴⁰ Such bonding is particularly crucial for the regulatory authority where a permittee fails to complete the reclamation plan approved in the permit.¹⁴¹

Like its domestic model, the compulsory bonding regime this Article proposes would require companies to develop a reclamation plan as part of a permitting process.¹⁴² The reclamation plan would identify the lands subject to the corporation's activities, the pre-existing condition of the land and its uses prior to commencement of the permittee's operations, the proposed use of the land post-

¹³⁵ Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201–1328 (2010)). Congress passed the Act in response to the existence of a substantial number of unreclaimed or under reclaimed mining sites. 30 U.S.C. § 1201(h) (2010); *see also* Craig B. Giffin, *West Virginia's Seemingly Eternal Struggle for a Fiscally and Environmentally Adequate Coal Mining Reclamation Bonding Program*, 107 W. VA. L. REV. 105, 111 (2004).

¹³⁶ 30 U.S.C. § 1259; *see also* 30 C.F.R. § 800.11 (2012).

¹³⁷ *See* 30 U.S.C. § 1265(b)(2).

¹³⁸ *See* 30 U.S.C. § 1259; *see also* 30 C.F.R. § 800.

¹³⁹ 30 U.S.C. § 1257(d).

¹⁴⁰ 30 U.S.C. § 1259(a).

¹⁴¹ Performance Bonds, OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT (last visited Apr. 3, 2012), *available at* <http://www.osmre.gov/topic/bonds/BondsOverview.shtm>.

¹⁴² The proposed compulsory bonding scheme borrows heavily from the domestic model, itself a reasoned program developed over several decades. As such, in articulating the instant bonding scheme, this Article will cite frequently to analogous state and federal requirements.

reclamation, a detailed estimated timetable for the accomplishment of each major step in the reclamation plan, and the steps to be taken to comply with air and water quality regulations propounded by the responsible federal regulatory agency.¹⁴³

Once a corporation submits an adequate reclamation plan, it would post a corresponding bond. In the United States, the Office of Surface Mining Reclamation and Enforcement recognizes three types of reclamation bonds: corporate surety bonds,¹⁴⁴ collateral bonds,¹⁴⁵ and self bonds,¹⁴⁶ the last of which are available only to permittees who meet certain financial tests. While surety and self bonds may suffice in a domestic setting, an effective extraterritorial

¹⁴³ See 30 U.S.C. § 1258(a). The requirements for corporate reclamation plans may substantially mirror the existing requirements for surface mining control and reclamation under Title 30, though Congress or an empowered regulatory authority may tinker with such requirements to account for certain jurisdictional complexities.

¹⁴⁴ A corporate surety reclamation bond consists in a guarantee that a third party surety will undertake to perform a defaulting permittee's reclamation obligations or satisfy any financial obligation or payment owed to the regulatory authority in the event the permittee fails to perform reclamation as required by the bond agreement. See 30 C.F.R. § 800.5(a) (2012).

¹⁴⁵ A collateral bond is an indemnity agreement in a sum certain executed by the permittee, supported by a collateral deposit with the regulatory authority. See 30 C.F.R. § 800.5(b). The deposit may consist in cash, negotiable bonds, certificates of deposit, letters of credit, or certified checks for the amount of the bond. See *id.* (listing first-lien interests in real estate; federal, state, or municipal bonds; and investment-grade securities as sufficient collateral bonds). Collateral posted as bond must be owned solely by the permittee, be free of all liens, and be valued at current market value. Performance Bonds, OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT (last visited Apr. 3, 2012), available at <http://www.osmre.gov/topic/bonds/BondsOverview.shtm> [hereinafter Performance Bonds] ("The regulatory authority reduces the market value of collateral by a margin sufficient to cover the regulatory authority's cost to liquidate the collateral in the event funds are needed for reclamation.").

¹⁴⁶ A self bond is, like a collateral bond, an indemnity agreement in a sum certain typically executed by the permittee or its parent company. See 30 C.F.R. § 800.5(c); . . . see also Performance Bonds, *supra* note 141 (characterizing self bonds as legally binding promises without separate surety or collateral). Self-bonded permittees in the U.S. coal mining industry must maintain a tangible net worth of at least \$10 million, possess fixed assets in the U.S. of at least \$20 million, and either meet certain financial ratios or have an "A" or higher bond rating. *Id.*

bonding system requires the existence of a ready fund from which to draw. As such, corporate surety and self bonds are less preferable than collateral bonds in the context of an international bonding system in which impediments to effective reclamation—such as jurisdictional difficulties—must be minimized.

The federal regulatory agency may adopt either a single or incremental bonding scheme. Under a single reclamation bonding scheme, the permittee would post an initial bond covering all areas subject to the permit, even though the initial operations may not disturb portions of the bonded area until a future date.¹⁴⁷ Under an incremental bonding scheme, however, the bonded area would be segregated into discrete sections, each bonded separately.¹⁴⁸ The regulatory agency should determine the appropriate scheme on a case-by-case basis.

The federal regulatory authority must calculate the reclamation bond required to complete reclamation activities according to its discretion, though federal law should specify both a minimum and maximum bond amount to provide permittee corporations with greater certainty and stability.¹⁴⁹ Ensuring that the government collects adequate funds to guarantee reclamation, however, remains the primary concern.¹⁵⁰ The federal authority should determine the amount of the bond according to a rubric it develops for the industry in question, with adjustments made to reflect factors such as the fragility of the ecosystem in which the corporation proposes to operate. The regulatory agency must calculate the bond to reflect the cost of completing the permit's reclamation plan according to environmental performance standards developed by the agency.¹⁵¹ Furthermore, bond calculations should

¹⁴⁷ See 30 C.F.R. § 800.11(b), (d); see also W. VA. CODE § 22-3-11(a) (2011).

¹⁴⁸ See 30 C.F.R. § 800.11(b), (d); see also W. VA. CODE § 22-3-11(a).

¹⁴⁹ See W. VA. CODE § 22-3-11(a), -12(b)(1).

¹⁵⁰ See Giffin, *supra* note 135, at 113 (noting that prior to SMCRA, reclamation bonds in the U.S. coal mining industry were often so low that it cost the mining permittee more to reclaim its environmental damage than to simply leave the site unreclaimed, forgo the return of the bond, and repeat the process whenever it moved on to another site).

¹⁵¹ See 30 U.S.C. § 1259(a) (2010). Unlike the coal mining bonding system, where environmental performance standards are based on existing domestic law, the regu-

reflect the “worst case scenario,” in which the permittee forfeits the bond at the point of maximum reclamation cost liability.¹⁵² As such, the bond calculation will reflect how much it will cost a third party, as opposed to the corporate entity, to complete reclamation.¹⁵³ Payments would be apportioned according to projected corporate liabilities, derived from the inherent risk of the particular activity and the likelihood of cleanup efforts or environmental remediation. Tethering contribution to projected liability would incentivize corporations to minimize their externalities, and thus reduce their contribution payment(s).

Determining the scope of activities to which the bonding regime would apply is a sizable task, and likely to engender significant corporate lobbying efforts intent on securing exemptions for various industries. At the very least, any pilot bonding program with teeth must compel bonding from corporations engaged in highly invasive extractive activities, including (but not limited to) oil and gas exploration and extraction, as well as mining of minerals and metals.¹⁵⁴ In essence, the bonding program would initially target

latory agency must develop performance standards for reclamation efforts conducted abroad.

¹⁵² See OFFICE OF SURFACE MINING, U.S. DEP'T OF THE INTERIOR, HANDBOOK FOR CALCULATION OF RECLAMATION BOND AMOUNTS 6 (2000), available at <http://www.techtransfer.osmre.gov/NTTMainSite/Library/hbmanual/bondcal/bondcal.pdf>.

¹⁵³ See Giffin, *supra* note 135, at 114 (noting that it often costs mining companies in the United States more money to complete reclamation of an unreclaimed site than it would have cost the mining entity to perform reclamation of that site because, among other reasons, public agencies must often pay laborers and contractors on a government financed reclamation project higher wages than would a private mining entity).

¹⁵⁴ See ANDRES LIEBENTHAL, ROLAND MICHELITSCH & ETHEL TARAZONA, EXTRACTIVE INDUSTRIES AND SUSTAINABLE DEVELOPMENT: AN EVALUATION OF WORLD BANK GROUP EXPERIENCE x, 7 (2003), available at [http://lnweb90.worldbank.org/oed/oeddoelib.nsf/24cc3bb1f94ae11c85256808006a0046/fb2a79b1eb4b9a4d85256d7a00750357/\\$FILE/Extractive_Industries_Evaluation_Overview.pdf](http://lnweb90.worldbank.org/oed/oeddoelib.nsf/24cc3bb1f94ae11c85256808006a0046/fb2a79b1eb4b9a4d85256d7a00750357/$FILE/Extractive_Industries_Evaluation_Overview.pdf) (noting that “[e]xtractive industries tend to have a heavy ‘footprint’ [or] large, wide-ranging, and long term environmental and social impacts”). Due to the possibility of continued harvesting and regeneration, corporations engaged in forestry, fishing, agriculture, and animal husbandry, for example, may not fall within the scope of the current bonding proposal.

corporations whose operations, by definition, cannot constitute part of a pattern of sustainable development.

Identifying the condition that triggers the permitting process—and thus the bonding obligation—is another open question. One possibility is to compel contribution to the remediation bond whenever any corporation conducts environmentally-invasive or extractive operations abroad, so long as that company maintains a U.S. presence. A system with such far-reaching effect, however, seems untenable and likely to implicate substantial constitutional concerns. Another option would require that companies conducting extractive activities domestically disclose their mining operations abroad. The federal regulatory authority would then simply impose additional bonding obligations—pertaining to the corporation's extraterritorial activities—as a condition to conducting its similar business domestically.¹⁵⁵ Finally, a third possibility is to marry the compulsory bonding scheme to the state incorporation process in some manner.¹⁵⁶ Regardless of the permitting mechanism, the United States must devise a bonding system broad enough to impact corporate behavior, yet sufficiently narrow to skirt allegations of overreaching and illegitimacy.

The proposed bonding system disincentivizes permittees from shirking their reclamation responsibilities. If a company is unable to demonstrate that its operations will not continue to generate post-activity effects (beyond the scope of the bond and the reclamation plan), the federal regulatory authority may deny that corporation a permit.¹⁵⁷ Similarly, if a permittee simply fails to complete its

¹⁵⁵Attaching an obligation to participate in a compulsory bonding regime for extractive activities abroad, when that corporation conducts similar activities domestically, may be the most politically tenable and equitable of the options mentioned.

¹⁵⁶The possibilities addressed here do not exhaust all the possible triggering events and conditions to permitting that Congress may wish to explore. Surely, in contemplating the proper and practicable scope of such a bonding regime, Congress would need to stay mindful of prevailing political and foreign relations considerations beyond the scope of the current discussion.

¹⁵⁷See Giffin, *supra* note 135, at 120 (noting that, in the context of the West Virginia coal mining reclamation bonding program, denial of a permit which forecasts a future pollution discharge is the simplest way to ensure the public will not have to bear the costs of treating the post-mining pollution).

reclamation responsibilities—after it has successfully procured a permit and conducted its operations abroad—and the regulatory authority either revokes the permit or forfeits the reclamation bond associated therewith, the defaulting permittee will not receive future permits from the United States.¹⁵⁸ In the event the bond is insufficient to finance reclamation, the regulatory authority may collect from the permittee the difference between the cost of reclaiming the permit and the amount of the posted bond.¹⁵⁹ Additionally, as noted above, the regulatory body—not the permittee—determines the cost of reclamation.¹⁶⁰ Finally, the reclamation bond is calculated such that it will pay for all projected costs of reclamation in the event the permittee is unwilling or unable.¹⁶¹

Once the corporation completes the operation(s) for which it sought a permit, it may initiate the bond release process.¹⁶² Similar to domestic requirements, the company would first need to notify local government bodies (in the forum country) and the surrounding community via available, practicable means, before demonstrating adequate remediation, as determined by the regulatory agency.¹⁶³ The regulatory authority would release the bond according to a schedule of its own determination, commensurate with the company's reclamation progress.¹⁶⁴

¹⁵⁸ See 30 U.S.C. § 1260(c) (2010).

¹⁵⁹ See 30 C.F.R. § 800.50(d)(1) (2012); Giffin, *supra* note 135, at 113 n.42 (noting that while this option is available in theory in the American coal mining industry, in practice the permittee in such circumstances often possesses inadequate assets, which thus precludes the collection of excess reclamation costs).

¹⁶⁰ See 30 U.S.C. § 1259(a); see also 30 C.F.R. 800.14(a)(i).

¹⁶¹ See 30 U.S.C. § 1259(a); 30 C.F.R. 800.50(b)(2).

¹⁶² See 30 U.S.C. § 1269. Once again, the mechanics of the bond release protocol will require a substantial quantum of fact-finding and development by the regulatory authority.

¹⁶³ See *id.* Unlike the domestic scheme, mandating inspection and evaluation by a U.S. regulatory authority may prove cost-ineffective and expensive, among other things. As such, the regulatory authority would need to develop a protocol by which companies may demonstrate conformity with its reclamation plan. Such a protocol may, for example, require that companies commission independent environmental evaluations by accredited bodies, or submit water and/or soil samples to the federal authority.

¹⁶⁴ See 30 U.S.C. § 1269(c).

To further ensure remediation, the bonding scheme must include a statutory authorization for citizen suits to compel compliance.¹⁶⁵ Granting federal jurisdiction to entertain suits by non-citizen aliens of the host country, however, may implicate the same issues raised by the ATS, some of which will remain unresolved until (at least) the conclusion of the *Kiobel* litigation. Due to the lingering jurisdictional concerns, this Article expresses no opinion regarding the viability or wisdom of compelling corporate contribution to a compensation fund—in addition to the proposed reclamation fund—to satisfy citizen suits for, among other things, related tort damages.

In addition to enacting legislation to create the bonding system itself, Congress must create an advisory council or board to monitor the fiscal health of the reclamation funds.¹⁶⁶ The council would generate reports for Congress, and make recommendations—based on fact-findings—regarding the adequacy of the mandated reclamation bonds.¹⁶⁷ In addition to legislators, the council must include members of the scientific community familiar with the

¹⁶⁵ See 30 U.S.C. § 1270.

¹⁶⁶ West Virginia created a similar coal mining reclamation fund advisory council. See W. VA. CODE § 22-1-17(f) (2011) (“The council shall, at a minimum: (1) Study the effectiveness, efficiency and financial stability of the special reclamation fund with an emphasis on development of a financial process that ensures long-term stability of the special reclamation program; (2) Identify and define problems associated with the special reclamation fund, including, but not limited to, the enforcement of federal and state law, regulation and rules pertaining to contemporaneous reclamation; (3) Evaluate bond forfeiture collection, reclamation efforts at bond forfeiture sites and compliance with approved reclamation plans as well as any modifications; (4) Provide a forum for a full and fair discussion of issues relating to the special reclamation fund; (5) Contract with a qualified actuary who shall make a determination as to the special reclamation fund’s fiscal soundness. This determination shall be completed on the thirty-first day of December, two thousand four, and every four years thereafter. The review is to include an evaluation of the present and prospective assets and liabilities of the special reclamation fund; and (6) Study and recommend to the Legislature alternative approaches to the current funding scheme of the special reclamation fund, considering revisions which will assure future proper reclamation of all mine sites and continued financial viability of the state’s coal industry.”).

¹⁶⁷ *Id.*

pertinent industries.¹⁶⁸ Furthermore, it must include a member who represents environmental advocacy organizations, a representative of the industry in which the corporation conducts its business, an economist or actuary, a member familiar with the government and industry of the foreign sovereign, and a member who represents the general public.¹⁶⁹

The result of the bonding system is that the entire industry self-regulates to minimize bond contribution. If catastrophic damage occurs, though, the bond constitutes available funding for remediation. Furthermore, if a party is able to determine fault, contribution is adjusted accordingly. An effective corporate bonding system with extraterritorial reach must thus accomplish at least two goals: assure that sufficient funds remain available to carry out the reclamation plan, and adequately incentivize permittees to comply with its reclamation plan.¹⁷⁰ An appropriately calculated bonding system will signal that the United States is serious about corporate accountability for externalization of environmental harm.

¹⁶⁸ See W. VA. CODE § 22-1-17(a), (b) (describing a similar special reclamation fund advisory council created to ensure the “effective, efficient and financially stable operation” of West Virginia’s special coal mining reclamation fund).

¹⁶⁹ *Id.*

¹⁷⁰ The author acknowledges that a practicable bonding scheme may permit a relevant federal regulatory authority to develop an alternate bonding scheme so long as it, too, effectuates the two primary goals. See W. VA. CODE § 22-3-11(c)(2); see also 30 C.F.R. § 800.11(e) (2012) (allowing the Office of Surface Mining to approve an alternative bonding system so long as it assures the regulatory authority will have available sufficient money to complete the reclamation plan for areas that may be in default at any time, and provides a substantial economic incentive for the permittee to comply with all reclamation provisions). For example, the federal authority may permit corporations to demonstrate that the host country has implemented an adequate legal regime capable of sufficiently regulating corporate activity and compelling internalization of any environmental damage resulting from its operations.

**V. IMPOSING GREATER CORPORATE LIABILITY IS COSTLY,
MAY OFFEND NOTIONS OF SOVEREIGNTY, AND COULD STIFLE
INVESTMENT**

Even meritless federal suits against corporations may take years to resolve, and may cause substantial damage to the company's reputation in the interim.¹⁷¹ The costs associated with litigation and damage control may disincentivize corporations from doing business in the less-developed countries from which such suits often arise, to the detriment of the countries' citizens who stood to benefit from foreign investment.¹⁷² The foreign governments will also suffer economically,¹⁷³ and may react poorly when American courts render judgments on a sovereign foreign government's actions within its own borders.¹⁷⁴

Specifically, in the context of the bonding system, non-U.S. corporations may balk at maintaining an American presence for fear of becoming subject to personal jurisdiction in an American court for extraterritorial acts (with respect to the United States).¹⁷⁵ The bonding system may thus produce troubling and nonsensical results much like the ATS. In *Kiobel*, for example, a group of Nigerians sued a Dutch corporation in an American court for acts that took place exclusively within the territorial borders of Nigeria.¹⁷⁶ There may

¹⁷¹Brief for Respondents at 45, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Aug. 12, 2011).

¹⁷²*Id.* at 46.

¹⁷³Brief for the United States as Amici Curiae Supporting Petitioners at 6, *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919), 2008 WL 408389 (stating that ATS suits "undermine efforts to encourage foreign investment").

¹⁷⁴Brief for Respondents at 46, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Aug. 12, 2011). "These consequences for corporations may in turn offend foreign governments whose judicial authority over conduct within their territories is usurped by a U.S. court." *Id.*; see also President Thabo Mbeki, Response to 15 National Assembly Question Paper (Nov. 8, 2007) (characterizing the decision in *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 5 254 (2d Cir. 2007) as a form of "judicial imperialism").

¹⁷⁵Brief for Respondents at 46, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Aug. 12, 2011).

¹⁷⁶See *supra* Part II.B.

be reason to suspect the bonding system is susceptible to similarly problematic outcomes, which raise complex sovereignty concerns. Nations possess no general duty to adjudicate claims between aliens for acts committed extraterritorially, and must consider very real concerns about offending sovereignty and meddling in international relations.¹⁷⁷

Furthermore, the United States could not compel non-U.S. corporations without an American presence to post a bond. Such companies would, thus, possess a strategic advantage over U.S. corporations operating in less-developed countries.¹⁷⁸ Weak environmental law systems will invariably attract the attention and business of multinational corporations, and a nation or state may opt to implement such a regime precisely to increase foreign investment.¹⁷⁹ The risk, of course, is that multinational corporations may see lax environmental regulations as an advantage, and trigger the oft-feared “race to the bottom” in environmental standards.¹⁸⁰

¹⁷⁷ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 695 (2004) (warning of the “potential implications for the foreign relations of the United States of recognizing” causes of action in which a foreign plaintiff sues a foreign defendant for a tort committed in a foreign country); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 746 (9th Cir. 2011).

¹⁷⁸ Brief for Respondents at 46, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Aug. 12, 2011); see also Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. LEGAL STUD. 339, 372 (2008).

¹⁷⁹ Perry-Kessarlis, *supra* note 17, at 364; see generally JOHN DUNNING, *EXPLAINING INTERNATIONAL PRODUCTION* (1988) (positing that firms choose whether to trade, license, or invest and where to do it by looking to ownership, internalization and location advantages).

¹⁸⁰ Professor William Cary coined the phrase “race for the bottom.” William Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974). He derives it from Justice Brandeis’s dissenting opinion in *Louis K. Liggett Co. v. Lee*, wherein he described a competition among states for corporate chartering revenues as a race “not of diligence but of laxity.” 288 U.S. 517, 559 (1933); see also A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) (discussing the phenomenon of regulatory competition reducing overall standards). *But see* Weiler, *supra* note 3, at 433 (stating that whether proof exists to justify the perceived downward regulatory spiral or “race to the bottom” on a macroeconomic level remains an open question). Environmentalists are nonetheless concerned that the ability of multinational corporations to do business anywhere in the world may still result in a “race to the bottom.” *Shaughnessy*, *supra* note 5, at 161.

A study conducted within the last decade, however, found that of the 500 largest multinational corporations, 186 have United States domicile, 126 have homes in the European Union, and 108 are headquartered in Japan.¹⁸¹ Nearly all of the 500 have a presence in the United States sufficient to support United States territorial (personal) jurisdiction over them.¹⁸² As such, the United States can lawfully compel the majority of the most influential extractive corporations to participate in its bonding scheme, under domestic law alone. International bodies like the United Nations, or treaties or accords between sovereigns, may further buttress the effectiveness of this domestic solution, and compel similar action from additional corporations.

There is an additional risk that corporations—even those over whom the United States may exert personal jurisdiction—may contract directly with a foreign sovereign and choose to simply ignore the American bonding requirements (particularly where the corporation is unable to procure a permit for its activities).

The federal government may address both the sovereignty and intentional avoidance issues by seeking to enact the above-described bonding scheme in concert with international treaties with those nations about whom the United States expresses the most concern in terms of environmental exploitation. In buttressing a liability regime with bilateral treaties, the U.S. may demonstrate its respect for notions of sovereignty, while affording the forum or host nation the benefit of its regulatory regime and infrastructure. In the absence of such a treaty, though, the U.S. government may need to consider imposing regulatory fines upon, or seizing the assets of, companies who opt to dodge legally-mandated bonding requirements.

¹⁸¹MEDARD GABEL & HENRY BRUNER, *GLOBAL, INC.* 131 (2003).

¹⁸²Branson, *supra* note 59, at 228. Another difficulty in holding multinational corporations liable for environmental harm is the fact that their activities often cross international boundaries, and nations do not generally legislate over acts performed outside their territory, by those other than their citizens, due to sovereignty concerns. Perry-Kessaris, *supra* note 17, at 363. As discussed in this Article, it is still unclear whether U.S. courts are willing to entertain suits against foreign corporations for acts committed exclusively on foreign soil.

The bonding system is also designed to stave off potential litigation by forcing companies to consider the impact of their operations prospectively, which should lead to a net decrease in meritless litigation. If the government created the above-mentioned additional compensation fund,¹⁸³ however, opportunistic litigants may seek to exploit the system, knowing there exists a fund to satisfy their claims.¹⁸⁴ The regulatory agency may limit the ability to which civil plaintiffs benefit unduly from the system by providing for permissive government intervention in any civil suit it wishes to pursue. Ultimately, though, litigants must rely on the adjudicatory process, and mechanisms like discovery, to deter plaintiffs seeking to wheedle their way into an American court.

Finally, the prevalence of sophisticated corporate enterprises utilizing decentralized governance structures and subsidiaries to conduct business may add another wrinkle to the permitting and bonding scheme. To prevent companies from exploiting their intricate and strategic organizational structures, the bonding regime must require corporations to acknowledge and assume responsibility for the activities of all subsidiary, cousin or affiliate corporations for the limited purpose of posting a remediation bond.

The risk that corporations will bypass American regulatory requirements, or that businesses will reign in investments in American markets, are surely of great concern. Regulatory agencies must thus remain cognizant that multinational corporations are not malevolent entities comprised of evildoers, and should draft legally coercive measures no broader than required. Ultimately, though, the increased bureaucracy, risk of frivolous litigation, and danger of “regulatory chill” are in service of protecting our only biosphere. Simply put, forcing those who would degrade or permanently damage our *only* ecosystem to account for their behavior must trump all else.¹⁸⁵

¹⁸³ See *supra* Part V.C.

¹⁸⁴ See *supra* note 150.

¹⁸⁵ See, e.g., *Nemeth v. Abonmarche Dev., Inc.*, 576 N.W.2d 641, 650 (1998) (noting that one of the primary purposes of the Michigan Environmental Protection Act is to protect our natural resources before they become “scarce”).

CONCLUSION

In 2010, developing economies for the first time absorbed close to half of global foreign direct investment (FDI)¹⁸⁶ inflows.¹⁸⁷ International production is expanding, and foreign sales, employment and assets of transnational corporations are all increasing.¹⁸⁸ Given the increasing importance of corporate investments in developing countries—as private capital replaces official development funds—the social significance of corporate conduct is concomitantly enhanced.¹⁸⁹

While globalization has not yet precipitated an environmental “race to the bottom,” domestic regulations have not sufficiently addressed the manifold of environmental problems resulting from industrial activities in a time of greater capital mobility.¹⁹⁰ Certain environmental exigencies, most chiefly concerns over climate change, are likely to spur a more urgent push for multilateral and coordinated efforts to combat the results of such activities.¹⁹¹

¹⁸⁶ “Foreign direct investment . . . occurs when an investor based in one country (the home country) acquires an asset in another country (the host country) with the intent to manage that asset.” Richard Blackhurst & Adrian Otten, Press Release, World Trade Organization, *Trade and Foreign Direct Investment*, PRESS/57 (Oct. 9, 1996), available at http://www.wto.org/english/news_e/pres96_e/pr057_e.htm. As a measurement of international production, FDI is a driving force of the globalization process that characterizes the modern world economy. Scott S. Quillin, *The World Trade Organization and Its Protection of Foreign Direct Investment: The Efficacy of the Agreement on Trade-Related Investment Measures*, 28 OKLA. CITY U. L. REV. 875, 878 (2003); Kevin C. Kennedy, *Foreign Direct Investment and Competition Policy at the World Trade Organization*, 33 GEO. WASH. INT’L L. REV. 585, 596, 650 n.1 (2001).

¹⁸⁷ UNCTAD, *supra* note 14, at x.

¹⁸⁸ *Id.*

¹⁸⁹ Williams, *supra* note 9, at 721.

¹⁹⁰ *Id.* at 730; see also Weiler, *supra* note 3, at 433 (“While it may not be clear that transnational corporations (both large and small) wield the power alleged by some of their harshest critics, there is a considerable amount of evidence to suggest that foreign enterprises operating investments in the developing world have committed, or been complicit in, environmental . . . abuses.”).

¹⁹¹ WTO & UNEP, *TRADE AND CLIMATE CHANGE: A REPORT BY THE UNITED NATIONS ENVIRONMENT PROGRAMME AND THE WORLD TRADE ORGANIZATION* (2009) (emphasizing the need for multilateral and international cooperation in pursuing sustainable

As discussed, the ATS should not, in and of itself, be the keystone of a more effective environmental liability regime.¹⁹² A sophisticated corporate bonding scheme will more effectively incentivize corporate internalization of environmental harm by adjusting transaction costs in the extractive industries.

Any practicable and sophisticated bonding scheme will certainly require a substantial amount of fact-finding beyond the scope of this writing. Effective counter-argumentation, however, should not prove fatal to the general tenets of the proposal at this stage. While the difficulties of implementing such a regime are many, the burden of accounting for the costs of environmental harm must lie with the actors who generate the harm, not those who seek to clean up the mess. The United States ought to wield its still considerable economic and political power to demonstrate that corporations, like men, should be held to answer for acts “odious and punishable by all laws of God and man.”¹⁹³

trade policies in light of increasing greenhouse gas emissions, and highlighting the complex web of regulatory instruments, economic incentives and financial measures that nations have used to reduce greenhouse gas emissions); World Trade Organization, *Trade and Environment: WTO and UNEP launch a report explaining for the first time the connections between trade and climate change* (June 26, 2009), http://www.wto.org/english/news_e/pres09_e/pr559_e.htm.

¹⁹² See *supra* Part V.B.

¹⁹³ The Case of Thomas Skinner, Merchant v. The East India Company, (1666) 6 State Trials 710 (H.L.) 711; see also Susan Farbstein & Tyler Giannini, *Liability for Harms*, N.Y. TIMES (Mar. 6, 2012, 4:05 PM), www.nytimes.com/roomfordebate/2012/02/28/corporate-rights-and-human-rights/rights-come-with-responsibility (“In exchange for rights, corporations accept certain responsibilities, including liability for harms committed by their agents. . . . Relief from suffering, and accountability for human rights violations, should not depend on whether an individual or a corporation is responsible for the abuse.”).