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Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights

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**BEYOND GOOD AND EVIL:¹
THE COMMENSURABILITY OF CORPORATE
PROFITS AND HUMAN RIGHTS**

WILLIAM BRADFORD*

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1. "Whatever is done from love always occurs beyond good and evil." FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* § 153 (Walter Kaufmann trans., Vintage Books 1966) (1886).

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I. INTRODUCTION

In May 2012, Iranian President Mahmoud Ahmadinejad catches wind of an imminent military coup to be launched with the assistance of a radical student movement—Iranians for Revolution Against Transnational Exploitation ("IRATE"). IRATE, frustrated with religious repression and with the perception that foreign companies were "stealing the wealth of the Iranian people" and "leaving behind nothing but cultural desolation and despoilment," occupy Tehran University and several government buildings and begin massive anti-regime protests that turn violent. The most radical members of IRATE sabotage the pipelines of foreign oil lessees in an effort to deprive the Ahmadinejad government of royalties. Foreign petroleum corporations publicly appeal to the Iranian government for assistance and deploy private military contractors amid fears of civil war. Iranian oil production ceases, oil spikes to \$350 per barrel, and Western economies collapse into stagflation and malaise.

In early June, Ahmadinejad orders IRATE crushed and the coup plotters arrested. Thousands of members of IRATE are killed by police

and loyal military forces of the Iranian government in street battles, and many more (suspected) protesters and disloyal officers are arbitrarily spirited from their homes and away to military prisons where they are subjected to torture and summary execution. Human rights organizations decry the Iranian regime's actions, as does the UN Security Council, but to no avail. By July, with Iranian oilfields now under military occupation and Ahmadinejad's hold on power secured, Western oil companies are able to increase production dramatically, and by September, oil prices have returned to pre-crisis levels.

However, in October, a class of nearly two thousand Iranian nationals—some of whom have fled Iran and sought asylum in the U.S., others of whom remain imprisoned or in hiding but appear by next friend, and still others of whom are captioned as “John and Jane Does” for fear of retribution against their relatives still located in Iran—file suit against Texaco, BP, Marathon, ExxonMobil, Shell, ConocoPhillips, DynCorp, and Xe, as well as named individual executives of those corporations, in the Federal District Court for the Southern District of Texas in Houston, headquarters for many of the defendants.² The IRATE plaintiffs, led by an army of lawyers employed, in turn, by a consortium of human rights non-government organizations, including Amnesty International, Human Rights First, and the American Civil Liberties Union, sue under the Alien Tort Claims Act (“ATCA”),³ allege that the corporate defendants were either directly complicit or, through their connections with the Iranian government, knowingly aided and abetted the commission of extrajudicial killing, torture, and other serious violations of international human rights law. The plaintiffs demand \$24 billion—an amount that represents approximately one percent of the gross revenues earned in 2006 by the defendants collectively.

Outraged petroleum executives disclaim any knowledge of or responsibility for the acts of the Iranian government⁴ and express shock and

2. This scenario is entirely fictional and is not intended to imply any unlawful, unethical, or immoral conduct on the part of any named or unnamed corporation or individual but merely to provide context for the building of a theory in the present Article.

3. The Alien Tort Claims Act (ATCA), which stands as the contemporary codification of a provision of the Judiciary Act of 1789, provides that “[t]he 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 (2006) (codifying Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77). Thus, for subject matter jurisdiction to vest, three elements must exist: (1) the plaintiffs must be aliens, (2) the claim must be for a tort, and (3) the tort must violate the law of nations or treaties of the United States. *Id.*

4. See John D. Bishop, *The Moral Responsibility of Corporate Executives for Disasters*, in *BUSINESS ETHICS: A PHILOSOPHICAL READER* 261, 263 (Thomas I. White ed., 1993) (“When things go horribly wrong, executives sometimes deny responsibility on the grounds that they did not know, and could not be expected to know, the information . . . needed to prevent the disaster.”).

sadness at the brutality of the Ahmadinejad regime. Organizations such as the National Foreign Trade Council, USA Engage, the United States Chamber of Commerce, the United States Council for International Business, and the American Petroleum Institute⁵ echo the argument that responsibility for the injuries suffered by plaintiffs rests with the Iranian government, an entity that, they are quick to note, is not under the control of private corporations or their executive leadership and which has not been sued.⁶ Furthermore, the oil majors warn that if they, as private corporations, are to be exposed to an “onslaught” of liability for violations of rights committed abroad by foreign governments simply because they possess “deep pockets”⁷ and are subject to the personal jurisdiction of federal courts, future foreign investment, particularly in countries with poor human rights records, will be curtailed sharply. As a result of decreased foreign investment, warn the oil majors and business associations, foreign economic development, democratization, and the protection of human rights—all dependent on the foreign capital that only major multinational corporations can provide—will be curtailed.⁸ In a news conference, petroleum executives and the heads of major business associations, joined by a deputy White House press secretary, call publicly for the dismissal of what they brand “politically motivated” lawsuits.⁹ Bill Reinsch, the President of the National Foreign Trade Council, is even

5. These pro-business and anti-ATCA organizations were among a number who joined in submitting an *amici curiae* brief to the Supreme Court in a 2004 ATCA case that urged the Court to restrict the jurisdictional reach of ATCA to prevent American business from bearing the burdens of the failures of foreign governments to protect human rights. See Brief for the Nat'l Foreign Trade Council et al. as Amici Curiae Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

6. See Bishop, *supra* note 4, at 262 (“It is commonplace in discussing morality that people [and corporations] should not be held responsible for events over which they have no influence or control.”).

7. See John Ladd, *Corporate Mythology and Individual Responsibility*, in BUSINESS ETHICS, *supra* note 4, at 236, 244 (“[I]n vicarious liability someone other than the causal agent is held responsible, often because he has more money!”).

8. See GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 1–2 (2003) (predicting economic and political outcomes of subjecting U.S. corporations operating abroad to increased liability under ATCA and stressing that a “nightmare scenario” of rapid divestment from and that the collapse of democratization in developing countries is probable unless the applicability of the statute is judicially or legislatively limited).

9. See Brief for the United States as Amicus Curiae in Support of Reversal of the Judgment against Defendant-Appellant Jose Francisco Sosa at 13–14, *Alvarez-Machain v. Sosa*, 331 F.3d 604 (9th Cir. 2003) (No. 99-56780) (contending that the use of ATCA to allow aliens to seek remedies in U.S. courts for torts committed abroad, where there is no other connection to the U.S., creates a legal and political climate hostile to the interests of American business and to the United States).

more blunt: “[w]e think the Founding Fathers didn’t intend all this . . . [w]hat you got is trial lawyers who have seized on [ATCA] as the new asbestos, filing these hoping to hit the jackpot . . . [t]he oil in all the nice countries has been found already.”¹⁰

In their own news conference announcing the Alien Tort Claims Act suits, attorneys for the IRATE plaintiffs charge that multinational corporations “wield more power than many of the world’s nations” and use their “immense wealth and political capital”¹¹ to neutralize or co-opt governments in developing countries, minimize the costs of doing business, and generate tremendous profits. By virtue of their wealth and power, the IRATE attorneys contend, corporations come to be impressed with social responsibilities—quite independent of the obligations of the host states in which they operate—to protect and promote human rights. These defendant corporations and their executives, according to counsel for the plaintiffs, “ha[d] a moral duty to structure the[ir affairs] to ensure that [the] risks of disaster[s] such as befell the plaintiffs] are discovered and made known to themselves . . . and then . . . to act on the information.”¹² When a corporation breaches its responsibilities to protect the human rights of the populations in the local communities in which it does business, it, “like all other persons, must be forced at times to look at the very personal tragedies it causes.”¹³ Moreover, as the lead attorney pronounced, perhaps in response to the defendants’ objections:

Productive organizations, whether U.S. corporations or not, are subject to moral evaluations which transcend the boundaries of the political systems that contain them. The underlying function of all such organizations from the standpoint of society is to enhance social welfare through satisfying consumer and worker interests, while at the same time remaining within the bounds of justice. When they fail to live up to these expectations, they are deserving of moral criticism. When an organization, in the United States or elsewhere, [violates its social responsibility], it deserves moral condemnation: the organization has failed to live up to a hypothetical contract—a contract between itself and society.¹⁴

* * *

10. Alan Gomez, *Foreign Workers Sue U.S. Companies Under Old Law*, USA TODAY, Apr. 2, 2007, at 2A.

11. Kevin Scott Prussia, *NAFTA & the Alien Tort Claims Act: Making a Case for Actionable Offenses Based on Environmental Harms and Injuries to the Public Health*, 32 AM. J.L. & MED. 381, 381 (2006).

12. Bishop, *supra* note 4, at 266.

13. See Peter French, *The Corporation as a Moral Person*, in BUSINESS ETHICS 59, 59 (Michael Boylan ed., 2001) (quoting the lead attorney for the plaintiffs in the lawsuit against Ford for negligent design of the Ford Pinto).

14. Thomas Donaldson, *Constructing a Social Contract for Business*, in BUSINESS ETHICS, *supra* note 4, at 167, 186–87.

The preceding hypothetical scenario is intended not as a prediction but rather as an illustration of the ongoing social battle for the power to determine the legal, ethical, and economic substance of the regime that will govern corporations and specify their powers and duties with regard to the protection of human rights.¹⁵ The notions that corporations are especially well-placed to influence human rights practices in the developing world in which they have operations, and that their acts and omissions have real human consequences, are empirical facts. By the same token, the notion that corporations are uniquely capable of elevating living standards, creating jobs, and expanding educational opportunities is also an empirical fact. Whether corporations have human rights obligations, and, if so, what, why, in respect to whom, and at what cost those obligations are to be discharged, are, however, contested matters. For much of the history of the modern corporation its object and purpose, as well as its powers and duties, were widely considered to be settled—except perhaps in the academy¹⁶—by domestic law, custom, and social contract. The past two decades have witnessed a series of events: Three Mile Island and Bhopal; revelations of massive corporate fraud at Enron *et al.*; ExxonMobil and British Petroleum and other environmental disasters;¹⁷ allegations of corporate complicity in

15. For a general discussion on the sources, nature, domain, subject matter, and justiciability of human rights obligations under international and domestic legal systems, see generally Jernej Letnar Èrniè, *Corporate Human Rights Obligations at the International Level*, 16 WILLAMETTE J. INT'L L. & DISP. RESOL. 130, 157–68 (2008).

16. The business and legal academies have been fruitful sites for debate on the object, purpose, powers, and duties of corporations since at least the early 1970s. See HENRY G. MANNE & HENRY C. WALLICH, *THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY* (1972) (presenting and debating two strongly opposed theories of the corporation). Arguably, the corporation has been a contested concept in the academy as far back as the mid-19th century, and possibly even in the late-18th century. See, e.g., KARL MARX, *DAS KAPITAL: A CRITIQUE OF POLITICAL ECONOMY* (Friedrich Engels ed., 1848); ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Edwin Cannan ed., 1937) (1776). For an excellent development of the intellectual history of the corporation, see Archie B. Carroll, *Corporate Social Responsibility: A Historical Perspective*, in 3 *THE ACCOUNTABLE CORPORATION: CORPORATE SOCIAL RESPONSIBILITY* 3 (Marc J. Epstein & Kirk O. Hanson eds., 2006). For a discussion of the intellectual history of Corporate Social Responsibility, see Archie B. Carroll, *A History of Corporate Social Responsibility: Concepts and Practices*, in *THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY* 19 (Andrew Crane et al. eds., 2008).

17. See NATALIA YAKOVLEVA, *CORPORATE SOCIAL RESPONSIBILITY IN THE MINING INDUSTRIES* 21 (2005) (listing over a dozen major environmental disasters over the last two decades and linking them to the breakdown of traditional understandings of the role and responsibilities of the corporation).

genocide, rape, and slave labor;¹⁸ the rise of the omnipresent social media; and the gathering transnational strength of the human rights movement. The episodes have unraveled settled understandings of corporations to form two contending theoretical camps with ideologically opposed visions of how corporations should be structured and held responsible for harms allegedly connected, however directly or remotely, to their conduct.¹⁹ Both contend upon the terrain mapped out by an emergent social movement, entitled “corporate social responsibility” (“CSR”). CSR has been described variously as a threat to capitalism, a fad, as the essence of the responsible modern corporation, and even as the key to human survival,²⁰ depending upon various theoretical commitments and normative judgments. The paradigm engages a variety of state and non-state actors in contestation over a host of political and legal projects designed by their architects to restrain corporations in their pursuit of self-interest and to hold them accountable to constituencies other than shareholders for their performance as measured along dimensions other than financial performance, including environmental protection, philanthropic commitment, and protection of human rights.²¹

A. *Shareholder Theory*

The “shareholders” camp, grounded in a theory of the firm which regards a corporation as a legal creation designed and managed solely to generate profits for its stockholders, rejects all claims other than the economic self-interest of the stockholders or the contractual obligations voluntarily entered into by parties as subjects appropriately within the ambit of corporate govern-

18. See *infra* Part II.A.3.

19. See Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 78–79 (2005) (identifying a wave of corporate fraud scandals, the increasing sophistication of the human rights movement, and high-profile, negative events, such as Bhopal, as catalysts for the CSR movement).

20. BRYAN HARRIGAN, *CORPORATE SOCIAL RESPONSIBILITY IN THE 21ST CENTURY: DEBATES, MODELS AND PRACTICES ACROSS GOVERNMENT, LAW AND BUSINESS* 3–4 (2010).

21. The modern CSR movement is generally traced to the mid-20th century, although its antecedents reach back to antiquity. See HOWARD R. BOWEN, *SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN* 14 (1953). For an introduction to the intellectual history and principles of the CSR movement, see generally I *CORPORATE SOCIAL RESPONSIBILITY: CONCEPTS, ACCOUNTABILITY AND REPORTING* (José Allouche, ed., 2006).

ance.²² CSR means nothing more to adherents of shareholder theory than assuring that the corporation is run in such a manner as to maximize profit lawfully;²³ moreover, should managers consider the “public or social interest” in the discharge of their duties, they would not only be derelict in their duties to (and even stealing from) the shareholders, but would risk surrendering their firms to public control.²⁴ If indeed a compelling social interest is claimed that would require the firm to abstain from acts or omissions otherwise in its own interest, this interest ought to be subjected to proof in the democratic political process and, if validated, vindicated by government through legislation.²⁵ Shareholder theory and its followers accept only fiduciary responsibility to owners and legal compliance as fundamental principles of corporate governance. In the United States at present, shareholder theory has maintained its legal primacy, animating corporate law and specifying the powers and duties of corporations and their employees in such a manner as to facilitate efficiency and profitability.²⁶ Thus, so long as a firm remains within the “rules of the game, which is to say, engages in open and free competition, without deception or fraud[,]”²⁷ it is legally free to ignore all other objectives save maximization of shareholder wealth.²⁸

B. Stakeholder Theory

In marked contrast, the “stakeholders” camp is committed to a vision of the firm as not merely a legal fiction but rather as a moral organism with social and ethical responsibilities²⁹ that

22. See, e.g., Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32, 126.

23. ANDREW CRANE & DIRK MATTEN, *BUSINESS ETHICS: A EUROPEAN PERSPECTIVE* 186 (2004).

24. 3 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* 82 (1979).

25. See Friedman, *supra* note 22, at 126 (rejecting the devolution of governmental responsibility to act in the social interest onto business as undemocratic).

26. Craig Ehrlich, *Is Business Ethics Necessary?*, 4 DEPAUL BUS. & COM. L.J. 55, 57 (2005).

27. Yoshiro Miwa, *Corporate Social Responsibility: Dangerous and Harmful, Though Maybe Not Irrelevant*, 84 CORNELL L. REV. 1227, 1227 (1999).

28. For a detailed elaboration of shareholder theory, see ROBERT HESSEN, *IN DEFENSE OF THE CORPORATION* (1979). For a thorough discussion of the intellectual history and the principles of shareholder, or “classical,” theory, see JAMES J. BRUMMER, *CORPORATE RESPONSIBILITY AND LEGITIMACY: AN INTERDISCIPLINARY ANALYSIS* 101–20 (1991).

29. See, e.g., YADONG LUO, *GLOBAL DIMENSIONS OF CORPORATE GOVERNANCE* 199 (2007) (identifying economic, legal, ethical, moral, and philanthropic

extend far beyond the interests of shareholders to include other constituent groups such as employees, customers, suppliers, non-governmental organizations, local communities, and even, in conjunction with issue-areas such as the environment, disease and corruption prevention, and human rights, the community of nations.³⁰ Legitimate objects of the corporation include not merely profitability but sustainable growth, equitable employment practices, and long-term social and environmental accountability.³¹ Whether because of an implied social contract³² or because of moral imperatives,³³ where the drive for profit butts up against its non-pecuniary responsibilities, a corporation, according to stakeholder theory, must balance these obligations in a manner that safeguards the welfare of society.³⁴ Stakeholder

dimensions of stakeholder theory); JOHN PAUL II, ENCYCLICAL LETTER, *Centesimus Annus* of the Supreme Pontiff on the Hundredth Anniversary of *Rerum Novarum* 50–51 (1992) (“[T]he purpose of a business firm is not simply to make a profit, but it is to be found in its very existence as a *community of persons* who in various ways are endeavoring to satisfy their basic needs Profit is a regulator of the life of a business, but . . . *other human and moral factors* must also be considered”); Fred D. Miller, Jr. & John Ahrens, *The Social Responsibility of Corporations*, in *BUSINESS ETHICS*, *supra* note 4, at 202 (arguing that firms must consider the moral dimensions of their actions).

30. Thomas M. Jones, Andrew C. Wicks & R. Edward Freeman, *Stakeholder Theory: The State of the Art*, in *THE BLACKWELL GUIDE TO BUSINESS ETHICS* 19, 21 (Norman E. Bowie ed., 2002). For an in-depth presentation of the stakeholder theory and its expression through the CSR movement, see Ruth V. Aguilera et al., *Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations*, 32 *ACAD. MGMT. REV.* 836 (2007).

31. See John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 *J. CORP. L.* 1, 1–2 (2005) (elaborating the theoretical underpinnings of stakeholder theory).

32. John Rawls, *A Theory of Justice*, in *BUSINESS ETHICS*, *supra* note 4, at 89, 92 (presenting the social contractual basis for stakeholder theory, which maintains that because firms are permitted by society to aggregate great wealth and power and to become social giants that affect the lives of millions, they are bound by an implied agreement to exercise such power for stakeholders as beneficiaries).

33. See, e.g., John R. Boatright, *Ethics and Corporate Governance: Justifying the Role of Shareholder*, in *THE BLACKWELL GUIDE TO BUSINESS ETHICS*, *supra* note 30, at 38, 53 (contending that “all individuals have some rights that they should not have to bargain [with corporations] for . . .”).

34. Stakeholder theorists contend that, in most instances, such balancing is in fact possible. See, e.g., THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 12 (1989) (contending that stakeholder theory can simultaneously “stand the tests of rational consistency and compatibility with fundamental moral precepts . . . in complex factual surroundings”); Norman E. Bowie, *Introduction to THE BLACKWELL GUIDE TO BUSINESS ETHICS*, *supra* note 30, at 2 (holding that the “obligation of business . . . is to consider, weigh, and balance the needs of the firm’s stakeholders”).

theorists are distributed along a continuum ranging from those who envision CSR to require little more than engaged philanthropy and legal compliance to those who believe firms should actively aim to contribute to global welfare even at the expense of shareholders. But they all agree that corporations are obligated to add social, in addition to financial, value, and that they are, or should be, held accountable—whether economically, politically, or legally—for the faithful discharge of their social, ethical, and moral responsibilities.³⁵

C. *Theoretical Debate in the Era of Corporate Social Responsibility*

Shareholder theorists brand stakeholder theory as an “amorphous and ill-defined construct, born of good intentions, but doomed to fail for its breadth, its emphasis on people rather than profits, and its inability to direct the day-to-day behavior of managers.”³⁶ They make similar claims about CSR.³⁷ Stakeholder theory does not assign relative weights to the interests of the various constituencies that claim a stake in the firm, nor does it provide a mechanism for ascertaining precisely which individuals and groups are entitled to stakeholder status or a detailed ethical argument for its normative claims.³⁸ Moreover, if the lawful pursuit of profit by a firm generates externalities or “social costs” that offend various would-be constituencies, stakeholder theory has not explained why the appropriate response is not to turn to the political process to amend the law and create a legal obligation for the firm to internalize the purported harms it creates,³⁹ rather than to claim a “stake” in the firm as the basis for

35. See CRANE & MATTEN, *supra* note 23, at 43–63 (developing a typology and continuum of stakeholder theorists’ views on CSR and corporate citizenship). For a thorough presentation of stakeholder theory, see generally PATRICIA H. WERHANE, *PERSONS, RIGHTS, AND CORPORATIONS* (1985). For an intellectual history and taxonomy of shareholder theories, see BRUMMER, *supra* note 28, at 144–64.

36. Jones et al., *supra* note 30, at 25.

37. In part because it is so wide-ranging and broadly encompassing a social movement, it has recently been criticized for a lack of definitional precision and an incapacity to be reliably measured. See J. (Hans) van Oosterhout & Pursey P.M.A.R. Heugens, *Much Ado About Nothing: A Conceptual Critique of CSR*, in *THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY*, *supra* note 16, at 197.

38. See DONALDSON, *supra* note 34, at 45–47 (“No serious attempt has been made by defenders of the [stakeholder] model to devise a principle for making trade-offs between the interests of shareholders, suppliers, employees, consumers, members of the general public, or anyone else who might qualify as a stakeholder. . . . Furthermore, the stakeholder model lacks any explicit theoretical moral grounding.”).

39. Boatright, *supra* note 33, at 50, 55.

standing to charge a breach of some ill-defined moral or ethical responsibility.⁴⁰

For their part, stakeholder theorists claim that shareholder theory is afflicted by an “ethical tunnel vision”⁴¹ that leads ineluctably to “corporate Neanderthalism”⁴² of the sort that triggered the implosion of corporations such as Enron, WorldCom, Tyco, and Arthur Andersen. Moreover, CSR is neither static nor one-size-fits-all: rather, the social responsibility of firms increases as a function of their increasing social power and in correlation with the evolution of international moral expectations.⁴³ Accordingly, shareholder theory is a morally repugnant mode of governance, particularly for powerful firms.⁴⁴ What is more, according to proponents of stakeholder theory, shareholder theory is less economically profitable than the latter paradigm. Because the environment in which firms operate is far more complex than the simplified reality assumed by shareholder theory, a managerial focus exclusively on duties to shareholders diverts attention and energy away from other groups—employees, customers, suppliers, communities, etc.—whose participation with the firm in the creation of value and satisfaction with their treatment by the firm are both vital to the firm’s success or failure. In other words, to be profitable, firms cannot merely serve the short-term ends of shareholders but must satisfy the longer-term needs of a wide array of stakeholders.⁴⁵

Although at least one commentator has suggested that it is possible to harmonize shareholder and stakeholder theories to create a “convergent stakeholder theory,” the fundamental normative distance between these two schools of thought can be difficult, in practice, to bridge.⁴⁶ At the same time, neither theory

40. See Kent Greenfield, *Saving the World With Corporate Law?*, B.C. L. SCH. LEGAL STUD. RES. PAPER SERIES NO. 130 at 1, 11 (2007) (suggesting that the tendency to “create benefits for itself by pushing external costs onto others” merits describing the corporation as an “externality machine”).

41. Miller & Ahrens, *supra* note 29, at 196–97.

42. DONALDSON, *supra* note 34, at 45.

43. THOMAS DONALDSON & THOMAS W. DUNFEE, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* 15 (1999).

44. Boatright, *supra* note 33, at 38.

45. Jones et al., *supra* note 30, at 19.

46. Theorizing in the field of CSR is almost exclusively descriptive and oriented toward the building, rather than the heuristic testing, of hypotheses. See, e.g., John L. Campbell, *Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility*, 32 ACAD. MGMT. REV. 946 (2007) (arguing that there is a causal relationship between regulation, NGOs, behavioral norms, and discursive patterns without modeling this relationship); Andreas Georg Scherer, Guido Palazzo, & Dorothee Baumann, *Global Rules and Private Actors: Toward a New Role of the Transnational Corporation in*

offers specific and detailed guidance to aid and indemnify managers facing complex legal, ethical, and moral challenges and charged with the duty to make decisions under conditions of multidimensional uncertainty. For much of the first two decades the struggle between the two paradigms of corporate governance, and, in turn, the evolution of the CSR movement, was fought within the academy. However, the wave of corporate scandals in the first few years of the third millennium and the increasing sophistication of the international human rights movement combined, within the past ten years, to: (1) draw the battle out of the academy and into new arenas, both judicial and legislative, (2) to energize those who would displace the shareholder model in favor of a stakeholder approach to corporate governance, and (3) as a consequence of the terrain on which the battle is being fought and the substance of the demands being levied, to heighten the stakes.

D. *The Conflict over the Question of Corporate Responsibility for the Protection of Human Rights*

In the recent phase of ideological and political contestation, the champions of shareholder theory and a rather narrowly construed understanding of CSR are, naturally, many (but emphatically not all) corporations and their shareholders. On the other side of the equation, a broad spectrum of nongovernmental organizations (“NGOs”)—“pressure groups,” charities, religious groups, interested individuals, and other entities organized around specific themes such as the promotion and protection of human rights, labor rights, indigenous rights, women’s rights, and the environment—are the major proponents of stakeholder theory and of a much more expansive view of the obligations owed by corporations to constituencies under the rubric of CSR.⁴⁷

Global Governance, 16 BUS. ETHICS Q. 505 (2006) (surveying varying theories of CSR and suggesting that a systems-level theory and analysis of the potential of global governance regimes is necessary to explain and predict the strategic interplay between profit motives and human rights).

47. See CRANE & MATTEN, *supra* note 23, at 345 (describing the civil society groups that have organized to advance stakeholder governance and a broad conception of CSR). The contemporary CSR “community” consists of a wide variety of entities, including

CSR professionals within for-profit companies; . . . another new class of outsiders who consult with companies and audit their nonfinancial reports; . . . executives at pension funds, insurance companies, and other institutional investment organizations who believe in socially responsible investing . . . like-minded independent investment managers to whom institutional portfolios may be entrusted; those who work

The vastly divergent interests, normative commitments, and worldviews of many corporations on the one hand and human rights NGOs on the other—illustrated and perhaps even caricatured by the hypothetical scenario *supra*—might seem to compel the conclusion that conflict is inevitable and cooperation is impossible, especially in the emotion-laden and politically sensitive issue-area of human rights. This conclusion might appear all the more logical in light of the salience of CSR to the international human rights movement—it has moved to the forefront of its agenda.⁴⁸ This conclusion is also logical in view of the primary strategies chosen by NGOs: litigation, application of political pressure upon regulators within the transnational and domestic governance spheres, and legislative attempts to either reform corporations as quasi-public entities with human rights obligations akin to those of states or to dissolve them altogether.⁴⁹ Indeed, the perspective that NGOs and corporations occupy such different normative universes and missions “that they will never be able to work together”⁵⁰ and that partnerships

for and on behalf of NGOs . . . and government officials worldwide whose mandate covers social and environmental issues.

Conley & Williams, *supra* note 31, at 5. Although some corporations have embraced CSR as their preferred model of governance, they are in the minority, and fewer still of these have implemented strategies consistent with the core principles of the CSR movement. Moreover, because they are the exception, this Article simplifies reality for the sake of theory generation and assumes a dichotomy between corporations and NGOs so as to relax that assumption in order to game the strategic interaction between corporations truly committed to CSR and NGOs in Part III. Finally, a fuller description of reality might posit a trilateral bargaining situation with corporations, NGOs, and the state arrayed against each other; again, the project of theory building requires some simplifying decisions, and future research might well treat the strategic actions as trilateral or even multilateral. Still, NGOs have discovered in recent years that “in many cases businesses are important tools that can be more effectively harnessed for social change than governments,” which has meant that the dyadic interaction often predominates. Jone L. Pearce, *Foreword* to GLOBALIZATION AND NGOS: TRANSFORMING BUSINESS, GOVERNMENT, AND SOCIETY xiii (Jonathan P. Doh & Hildy Teegen eds., 2003).

48. Scott Greathead, *The Multinational and the “New Stakeholder”*: Examining the Business Case for Human Rights, 35 VAND. J. TRANSNAT’L L. 719, 724 (2002).

49. See *infra* at Part II (discussing NGO strategy). Indeed, the behavior of NGOs toward corporations on the subject of CSR for much of the past decade has been described as an “attack.” Pearce, *supra* note 47, at xi.

50. A. Rani Parker, *Prospects for NGO Collaboration with Multinational Enterprises*, in GLOBALIZATION AND NGOS: TRANSFORMING BUSINESS, GOVERNMENT, AND SOCIETY, *supra* note 47, at 81, 91.

between the two are impossible has undernourished theory and practice.⁵¹

Despite the seeming intractability of and disparity between these diametrically opposed normative visions of corporate responsibility for the protection and promotion of human rights, an analysis of the strategies available to corporations and to NGOs, augmented by the use of game theory, reveals that not only is cooperation possible but that a process of self-regulation achieved through negotiation and dependent upon self-interested cooperation can yield the simultaneous outcomes of corporate profitability and protection of human rights⁵² almost

51. See, e.g., Frank Den Hond & Frank G.A. De Bakker, *Ideologically Motivated Activism: How Activist Groups Influence Corporate Social Change Activities*, 32 *ACAD. MGMT. REV.* 901, 901 (2007) (noting that the CSR strategies of NGOs and the potential for partnerships have been left “largely . . . unattended” by the academy due to the seeming incommensurability of the objectives of NGOs and corporations). Without an understanding of the strategic relationship between corporations and NGOs, it has been difficult to develop theories as to why corporations should choose to behave in a socially responsible fashion, and as a consequence research has remained largely descriptive and normative. See Campbell, *supra* note 46, at 946 (surveying research and concluding that “little theoretical attention has been paid to understanding why or why not corporations act in socially responsible ways” and that “much of the literature on [CSR] has been more descriptive or normative than positivist in tone” until as recently as perhaps the last two years). *Id.* Most studies have been limited to examinations of the effects of CSR on corporate financial performance and have neglected to investigate the antecedents of corporate CSR strategies until quite recently. *Id.*

52. The human rights canon consists of an expanding number of treaties, declarations, and principles protective of the rights of individuals and groups against deprivation by states and, in some instances, non-state actors. While the specific parameters of the “human rights” regime are contested, with human rights NGOs seeking ever to expand the canon to include affirmative obligations to provide social welfare, and other actors—such as states and corporations—seeking to confine it to negative obligations of non-interference, the Universal Declaration of Human Rights captures many principles that are universally regarded as an irreducible and nonderogable core of human rights to which all persons are entitled by natural law, including the rights to life, liberty, security of person, due process of law, freedom from torture and from arbitrary detention, and political participation. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

Many subsequent human rights treaties and declarations are elaborations and extensions of the Universal Declaration, while others seek to append new and often contested claims of rights. Among the rights most likely to be directly or indirectly violated by corporations are non-discrimination, life, liberty, physical integrity, civil freedom, and freedom from slavery and forced labor. See INT’L COUNCIL ON HUMAN RIGHTS, *BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES* 15 (2002). In light of this, and to maintain definitional neutrality and avoid unproductive debate over the distinction between political and civil rights on the one hand

universally deemed desirable —by both NGOs as well as the most-self interested of corporations.⁵³

Accordingly, Part II will identify and analyze the strategies employed by NGOs and corporations in the battle over whether and to what extent corporations should bear responsibility for violations of human rights. Part III will, with the assistance of game theoretic modeling, present the strategic interactions between these two parties, determine payoffs and optimal strategies for each party, and identify any strategic equilibria. Part IV, followed by a Conclusion, will explain and contextualize the findings, propose a pre-theory of the commensurability of corporate profitability and human rights, and suggest directions for future research that will advance the theoretical debate beyond simple characterizations of NGOs as good and corporations as evil.

II. THE BATTLE OVER CORPORATE RESPONSIBILITY FOR THE PROTECTION OF HUMAN RIGHTS: A STRATEGIC ANALYSIS

A. *The NGO's Movement to Formalize CSR for Human Rights Protection*

NGOs⁵⁴ have devised and implemented five primary strategies to formalize a broad conception of CSR for human rights: (1) Negotiate, (2) Litigate, (3) Regulate, (4) Legislate, and (5) Delegitimate.

and social, economic, and cultural rights on the other, the term “human rights” as used in this Article refers generally to the body of rights recognized in the Universal Declaration and subsequent treaties with broadly representative memberships that elaborate these rights, including the International Covenant on Civil and Political Rights, those articles of the International Covenant on Economic, Social, and Cultural Rights that recognizes rights to life, bodily integrity, and freedom from torture and arbitrary detention, and the Convention on the Prevention of Torture. For a discussion and analysis of the various debates surrounding recognition of and enforcement of what are asserted as human rights, see William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1 (2005).

53. See AMNESTY INT'L, HUMAN RIGHTS PRINCIPLES FOR COMPANIES (Jan. 1998), available at <http://www.amnesty.org/en/library/info/ACT70/001> (noting that the proposition that human rights form the “bedrock principles” of civilized society and must be protected is not objectionable to any state or corporation in principle).

54. Although the hundreds—and potentially thousands—of human rights NGOs are by no means a monolith, there is a common core of shared beliefs about the preferred state of the world and about desired outcomes regarding the protection of the human rights of individuals and groups that unifies them and channels their energies along a common vector. Den Hond & De Bakker, *supra* note 51, at 902. Thus, for sake of parsimonious theory building they shall be aggregated into a single “entity.”

1. Negotiate: Corporate Codes of Conduct

In the early 1990s, human rights organizations and other NGOs, despite no legal rights to ownership of the firms they targeted and no popular mandates, began nonetheless to assert a claim to stakeholder status solely by virtue of their capacity to mobilize public opinion and influence government.⁵⁵ As self-styled stakeholders, defined broadly as “group[s] or individual[s] who can affect or [are] affected by the achievement of the organization’s objectives[,]”⁵⁶ NGOs defined their mission as the achievement of *de facto* influence upon corporate conduct for the purpose of transforming corporate practice along a series of relevant dimensions. Because no explicit criteria existed to determine whether NGOs were entitled to stakeholder status or what considerations that status accorded them, in practice, the NGOs that made the most “noise” through the orchestration of successful media campaigns (or “assaults,” depending upon point-of-view) and consumer boycotts⁵⁷ were eventually called out of the picket lines and into partnerships by targeted corporations⁵⁸ interested in staving off further injury to their reputations, thereby relieving the market pressures on their bottom-lines.⁵⁹ Further, in some cases cooperating corporations gained a competitive advantage over rival firms that did not bring NGOs in from the cold.⁶⁰

NGOs demanded, as a condition of these partnerships, that corporations embrace the notion that responsibility for promotion and protection of human rights is incumbent not only upon states and host country officials but also upon corporations and their executives.⁶¹ To demonstrate and formalize this commitment, NGOs demanded that corporations adopt voluntary “cor-

55. Boatright, *supra* note 33, at 43.

56. R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* 46 (1984).

57. See CRANE & MATTEN, *supra* note 23, at 346–47 (discussing successful consumer boycotts of the Shell Corporation’s Brent Spar oil platform led by Greenpeace).

58. Conley & Williams, *supra* note 31, at 12.

59. See Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 *LAW & POL’Y INT’L BUS.* 111, 114 (1998) (“MNCs submit to codes of conduct . . . as a result of pressure from consumers, investors, the media, and non-governmental organizations.”).

60. See Su-Ping Lu, Note, *Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law*, 38 *COLUM. J. TRANSNAT’L L.* 603, 613 (2000) (contending that engagement with NGOs is an “asset in public relations with consumers, employees and investors/shareholders”).

61. See DONALDSON, *supra* note 34, at 67.

porate codes of conduct” (“CCCs”) that elaborated internal guidelines and standards for behavior putatively more protective of human rights and the environment than existing governmental laws and regulations.⁶² Many CCCs contain voluntary reporting provisions under which a corporation pledges to report to the public, via a corporate website or its annual report, on the state of its human rights, environmental, and labor rights practices.⁶³ Some NGOs hail the public reporting provisions of CCCs as creating greater transparency and thus enhanced opportunities for stakeholders to ensure that reporting corporations uphold their obligations.⁶⁴

CCCs have spread like wildfire. At present, “[o]ne would be hard-pressed to find any major corporation today that did not make some claim to abiding by a code of conduct that comprised, at least in part, adherence to human rights standards. Indeed, more often than not, such adherence to codes is trumpeted by major corporations.”⁶⁵

Perhaps predictably, the number of organizations devoted to assisting corporations in meeting their responsibilities under CCCs has mushroomed as well, resulting in a “sea of competing frameworks and guidelines”⁶⁶ from which corporations must select in attempting to secure an organizational “stamp of approval” at tolerable cost. Specific guidance and blueprints for CCC construction are available to industries ranging from coffee to hospitality, bananas, textiles, and mining. Documents such as the Global Sullivan Principles and the MacBride Principles serve

62. See Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347, 357–60 (1999) (discussing the negotiation and drafting of CCCs).

63. Another informal and voluntary mechanism, known as Certified Management Standards (“CMS”), operates in much the same way by committing corporations to codify and adhere to certain management practices, such as the ISO 14001 environmental management standard and the SA 8000 labor standard, that are deemed socially desirable. For purposes of this Article, CCCs and CMSs are treated as functional equivalents. For a discussion of CMSs as a voluntary approach to transforming corporate conduct, see generally Ann Terlaak, *Order Without Law? The Role of Certified Management Standards in Shaping Socially Desired Firm Behaviors*, 32 ACAD. MGMT. REV. 968 (2007).

64. CRANE & MATTEN, *supra* note 23, at 61 (“Transparency is the degree to which corporate decisions, policies, actions, and effects are acknowledged and [communicated] to relevant stakeholders.”).

65. David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 953 (2004).

66. Abdallah Simaika, Note, *The Value of Information: Alternatives to Liability in Influencing Corporate Behavior Overseas*, 38 COLUM. J.L. & SOC. PROBS. 321, 346 (2005).

as general templates that relieve firms from reinventing the compliance wheel.⁶⁷

Still, despite the human rights, critics of CCCs note that participation rates remain low: only a small fraction of the 50,000 or more multinational corporations explicitly include respect for human rights in their codes of conduct, and among those that do, few scrupulously honor their commitment.⁶⁸ Advocates of CCCs had anticipated that the same techniques that moved corporations to adopt CCCs would induce them to comply, and that violations could be successfully minimized and addressed with the threat and use of shame-based punishment.⁶⁹ However, as others have noted, without a legal obligation to adopt CCCs it is perhaps difficult to understand why a corporation that has not yet been subjected to media assault or boycotts, whether by virtue of its size or its stealth, would feel compelled to create and implement a CCC.

Further criticisms have been leveled at CCCs and the firms that adopt them. Some commentators describe the human rights obligations in CCCs as underdeveloped and abstract, particularly in comparison to more robust conceptions under development in intergovernmental fora.⁷⁰ Others fault the lack of effective monitoring and enforcement mechanisms. While NGOs are actively engaged in monitoring, the entities best situated to gauge compliance are corporations themselves. However, as a general rule corporations are biased and unlikely to report conditions accurately⁷¹ and are subject to few, if any, effective sanctions for failing to do so.⁷² Still others have questioned whether certification and compliance is redundant,

67. *Id.* at 345.

68. See Daniel Litvin, *A Strategy for Business and Human Rights: Raising Human Rights Standards in the Private Sector*, 139 FOREIGN POL'Y 68, 69 (2003) (assessing firm compliance with CCC provisions on human rights).

69. See Peter A. French, *The Hester Prynne Sanction*, in BUSINESS ETHICS, *supra* note 4, at 276, 281–84 (describing the mobilization of shame to alter corporate behavior as the “Hester Prynne Sanction” after the protagonist of Nathaniel Hawthorne’s *The Scarlet Letter*).

70. Williams & Conley, *supra* note 19, at 86–87.

71. See Simaika, *supra* note 66, at 344 (“Although many MNCs routinely provide information through websites or other reports . . . there are no requirements pertaining to the type or quantity of information supplied . . . [and] [a]ny information supplied . . . is also difficult to verify because . . . the corporations are single-handedly gathering and disseminating the data.”).

72. Julia Fisher, Note, *Free Speech to Have Sweatshops? How Kasky v. Nike Might Provide a Useful Tool to Improve Sweatshop Conditions*, 26 B.C. THIRD WORLD L.J. 267, 286 (2006). For a critical examination of the coherence and utility of CCCs and an analysis of their effects on corporate conduct, see JANET DINE, COMPANIES, INTERNATIONAL TRADE AND HUMAN RIGHTS 226–49 (2005).

expensive, and insufficiently rewarding of “superior” corporations genuinely committed to honoring CCCs yet inadequate and ineffective in the case of “laggard” corporations that are not so committed.⁷³ NGO frustration with outcomes associated with CCCs has led some to conclude that voluntarism alone is inadequate and that legislation mandating corporate disclosure of compliance information is necessary to mobilize shame as an instrument to steer corporations back into compliance.⁷⁴ Still others have lost faith in voluntarism entirely, opting in favor of litigation.

2. Litigate: The Alien Tort Claims Act

By the early 2000s, NGOs had lost hope that CCCs and monitoring efforts alone could bring social sanctions to bear upon corporations sufficient to compel them to behave in a manner more protective of human rights. Accordingly, NGOs, with the assistance of the U.S. plaintiffs’ bar and inspiration from legal scholars,⁷⁵ changed strategies and substituted the imposition of judicially enforceable liability for violations of purported human rights as a means to buttress CCCs and reform corporate conduct. With ATCA⁷⁶ as the basis for jurisdiction, resort to litigation to adjudicate claims brought by alien plaintiffs alleging the commission of human rights-based torts by or with the complicity of corporations subject to the personal jurisdiction of U.S. federal courts—a tactic never before employed—became the primary instrumentality of this new strategy.⁷⁷ NGOs anticipated that such suits would yield significant monetary damages for plaintiffs, which, in turn, would create a deterrent effect causing

73. See, e.g., Terlaak, *supra* note 63, at 978–80.

74. See Simaika, *supra* note 66, at 346–47 (discussing proposals for legislation that would create a central database and require corporations to submit compliance data electronically as a means of enhancing compliance and making the use of shame more effective).

75. See, e.g., Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 488 (2001) (“If states and international organizations can accept rights and duties of corporations in some areas, there is no theoretical bar to recognizing duties more broadly, including duties in the human rights area.”).

76. Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

77. See Donald J. Kochan, *No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 111 (2005) (noting that the first use of ATCA to gain jurisdiction over corporations for torts committed against aliens abroad was the product of “some lawyers th[inking] out of the box”).

corporations to alter their practices and provide a higher standard of care to potential victims of human rights violations.⁷⁸

ATCA, which grants federal courts subject matter jurisdiction in tort, provided an alien plaintiff can demonstrate a violation of the law of nations or a treaty of the United States, was used successfully only twice prior to the 1980 case of *Filartiga v. Pena-Irala*, when two Paraguayan citizens successfully sued a former Paraguayan police inspector general for the torture and murder of a relative.⁷⁹ Between 1980 and 2002, various jurisdictions allowed suits alleging genocide, summary execution, torture, and other serious human rights violations to proceed against state actors and some natural persons with ATCA as the basis for jurisdiction.⁸⁰ However, it was not until 2002, when the Ninth Circuit Court of Appeals upheld subject matter jurisdiction in the case of *Doe v. Unocal Corp.*,⁸¹ and held that under existing international law, corporations and other non-state actors could be found liable in tort for committing or for aiding and abetting breaches of international human rights standards, including forced labor, murder, rape, and torture,⁸² committed

78. See Igor Fuks, *Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability*, 106 COLUM. L. REV. 112, 116–18 (2006) (suggesting that post-litigation, a corporation will be more risk-averse and more likely to pressure its host government to uphold human rights in order to prevent future liability).

79. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

80. In *Kadic v. Karadzic*, the court concluded that ATCA dispensed with a state action requirement in limited circumstances, such as when the plaintiff alleged piracy, slavery, and war crimes. 70 F.3d 232, 236 (2d Cir. 1995). Although the case expanded the set of potential subjects of ATCA claims, it did not explicitly draw corporations into the jurisdictional ambit of ATCA, and it did not dispense with a state action requirement in regard to claims of “lesser” violations of human rights. *Id.*

81. In *Doe v. Unocal Corp.*, 395 F.3d 932, 939–42 (9th Cir. 2002), plaintiffs—fourteen Burmese villagers—alleged that, in the course of constructing a pipeline the plaintiffs opposed through their village, Unocal induced the Burmese government to engage in a series of human rights violations, including forced labor, murder, rape, and torture, in order to facilitate the completion of the pipeline. *Id.*

82. The distinction between direct commission of violations of human rights and aiding and abetting violations by third parties either in joint venture with the corporation or acting as agents on its behalf is a technical point of law that is beyond the scope of the present Article. It is sufficient to note that the language of ATCA does not expressly provide for aiding and abetting liability. For a discussion of this distinction, see generally Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805 (2005). The vast majority of claims allege corporate aiding and abetting rather than direct commission of harms. *Id.* Similarly, the legal issues of whether a parent corporation can be held liable for the acts of its subsidiaries, as well as what precisely constitutes “joint action” or “ratification”

by state agents with whom they were in conspiracy or from whom they had received significant aid or support.⁸³

Encouraged by the *Unocal* decision NGOs hailed as a “remarkable victory not just for the plaintiffs involved, but for the effort to hold corporations responsible for their participation in atrocities abroad and at home in the name of shareholder profits,”⁸⁴ NGOs turned to ATCA as their “chief weapon in a 21st-century battle over corporate responsibility”⁸⁵ and filed scores of suits against corporations for a host of alleged violations of international human rights law.⁸⁶ However, significant doctrinal uncertainty over precisely what torts were actionable under ATCA developed over the decades following *Filartiga*. Courts and commentators divided, with some suggesting that only the most serious violations of human rights—murder, slavery, rape, torture, and forced labor—were within the jurisdiction of federal courts, while others took a much more expansive view, maintaining that new torts could be judicially discovered as international law evolves through custom,⁸⁷ a position that, if unchecked, could have led to a “veritable cornucopia of international law violations.”⁸⁸

by a corporation of a state’s actions, while of great consequence in individual cases, are well beyond the scope of the present Article.

83. *Unocal*, 395 F.3d at 961.

84. See Mark D. Kielsgard, *Unocal and the Demise of Corporate Neutrality*, 36 CAL. W. INT’L L.J. 185, 189 (2005) (quoting attorneys from the Center for Constitutional Rights, a human rights NGO).

85. Patti Waldmeir, *An Abuse of Power: US Courts should not Punish Companies for Human Rights Violations Committed Overseas*, FIN. TIMES, Mar. 14, 2003, at 12.

86. See, e.g., *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995) (genocide); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003) (torture); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (crimes against humanity); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002) (summary execution); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (arbitrary detention); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (same). Additional suits have been filed against Abercrombie & Fitch, BP, Chevron, Coca-Cola, Del-Monte, Dole, Drummond Coal, DynCorp, ExxonMobil, Ford, Freeport-McMoran, Inc., The Gap, The J.C. Penney Co., Levi Strauss, Newmont Mining Corp., Nike, Occidental Petroleum, Pfizer, Rio Tinto, Shell, Siemens, Southern Peru Copper Co., Target, Texaco, TotalFinaElf, Union Carbide, Unocal, and several others. See, e.g., Diskin, *supra* note 82, at 807 (listing cases and providing detailed citations).

87. For a detailed discussion of the various doctrinal approaches to ATCA, see Prussia, *supra* note 11, at 396–98.

88. *In re South African Apartheid Legislation*, 346 F. Supp. 2d 538, 548 (S.D.N.Y. 2004).

Worse still from the NGO viewpoint: as of 2004 plaintiffs had not prevailed in pre-trial arguments in a single case of the more than thirty-eight filed, alleging violations ranging from environmental degradation, to forced labor conditions, collaboration with the Nazis, profiting from apartheid, production of dangerous drugs, and corporate collusion with brutal and repressive military and paramilitary forces.⁸⁹ Twenty-three had been dismissed on jurisdictional or prudential grounds,⁹⁰ others had only uncertain futures, and not a single corporation had been found liable.⁹¹ The only beacon of hope, a \$20,000,000 settlement in December 2004 in the *Unocal* case, was soon darkened by a case heard by the Supreme Court in 2004 that severely restricted the utility of ATCA to human rights NGOs.

With *Sosa v. Alvarez-Machain*,⁹² the United States Supreme Court, in its first-ever pronouncement on ATCA, curtailed its scope to breaches of international law norms that are as definite and generally accepted as the 18th-century paradigm that Congress embraced and expressed in enacting the statute—specifically, piracy and violation of ambassadorial and diplomatic safe-conduct.⁹³ Although the Court did not suggest that human rights NGOs had yet twisted federal courts into “debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations,”⁹⁴ the holding was immediately hailed by corporate counsels as a “sound rejection” of the way NGOs had been using ATCA.⁹⁵

However, the *Sosa* decision did not reduce the risk of litigation faced by corporations to zero. While the Court created a narrower basis for liability, and noted that Congress remains possessed of the power to withdraw subject matter jurisdiction over ATCA claims entirely by amending or eliminating ATCA,⁹⁶ at the

89. See Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L. L. REV. 169, 209–13 (2005) (examining and cataloguing cases); Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004) (same).

90. Williams & Conley, *supra* note 19, at 82–83 (surveying litigation histories of human rights ATCA cases and grounds for dismissal of such cases).

91. See Simaika, *supra* note 66, at 337–39 (updating the status of outstanding ATCA claims as of 2005).

92. 542 U.S. 692 (2004).

93. *Id.* at 724.

94. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 827 (Robb, J., concurring).

95. See Kochan, *supra* note 77, at 104 (quoting Daniel Petrocelli, counsel for Unocal).

96. *Sosa*, 542 U.S. at 731.

same time it rejected the still narrower proposition advanced by several business organizations and the Bush Administration that the underlying causes of action must be established by Congress before they are cognizable in federal courts.⁹⁷ Moreover, the Court also recognized that the causes of action that can be heard under ATCA may well continue to be extended by “further independent judicial recognition” whenever a customary international law norm becomes sufficiently definite, clearly applicable to private actors, universal among civilized nations, and obligatory.⁹⁸

In short, although corporations were relieved of some degree of ATCA liability as a result of the *Sosa* decision, the *Sosa* Court expressly reserved to the federal judiciary the power to adjudicate international human rights claims against corporations and to re-extend the scope of potential corporate liability should NGOs be able to satisfy the conditions of definiteness, applicability, universality, and the obligatory nature of the tort(s) in question. Recognizing that *Sosa* did not affect the general limitation on corporate liability for which they had hoped and which they had initially believed to have been created, business organizations rushed to lobby Congress, seeking legislation that would limit the scope of ATCA by statute—a fact that “hearten[ed] those activists who still harbor hope of enhanced remedies.”⁹⁹

Post-*Sosa* ATCA cases, however, have failed to generate more cogent and consistent standards for and sources of laws creating corporate liability for human rights violations. This is particularly true when the allegation is not that corporate defendants were directly liable but that they aided and abetted or conspired

97. See Fuks, *supra* note 78, at 120–21 (outlining the Bush Administration’s position on ATCA).

98. *Sosa*, 542 U.S. at 729.

99. Simaika, *supra* note 66, at 339. Some commentators read *Sosa* even more favorably for prospective plaintiffs and suggest that Congress could remedy residual deficiencies in ATCA by amending it or by enacting a new statute that would create a cause of action and impose specific substantive legal liability on corporations for human rights violations committed abroad either directly or indirectly by governments acting in concert with corporations. See, e.g., Anthony Bernard, Note, *Holding Corporations Liable in the United States for Aiding and Abetting Human Rights Violations Abroad: A Statutory Solution*, 78 GEO. WASH. L. REV. 615 (2010). An ATCA case recently filed by the American Civil Liberties Union with the help of the Yale Law School Human Rights Clinic alleging complicity by a subsidiary of the Boeing Corporation in the commission of kidnapping, arbitrary detention, and torture while rendering a terrorist suspect on behalf of the CIA in the War on Terror bears watching as one that might destabilize the current jurisprudential equilibrium. See Complaint, Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. C 07CV2798), 2007 WL 1623289.

with government tortfeasors.¹⁰⁰ Doctrinal confusion persists, and the prospect that federal courts may find that ATCA does not permit indirect liability looms large.¹⁰¹ To date, of over fifty corporate ATCA cases filed, only three have been tried, and the plaintiff has prevailed in but one,¹⁰² with verdicts for corporate defendants establishing restrictive substantive limits on indirect liability,¹⁰³ requiring plaintiffs to demonstrate exhaustion of domestic remedies as a precursor to subject matter jurisdiction,¹⁰⁴ and otherwise eroding the utility of ATCA litigation as a strategy. At best, the future of ATCA legislation and that of analogous legislation in foreign jurisdictions as a strategic approach to enhancing corporate accountability for human rights is and will remain uncertain.¹⁰⁵ Accordingly, it is unsurprising that

100. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247 (2d Cir. 2009). For an analysis of recent doctrinal developments in ATCA, see generally Bernard, *supra* note 99.

101. See Judith Chomsky, *Will the Real ATS Please Stand Up?*, 33 SUFFOLK TRANSNAT'L L. REV. 461, 474 (2010) (reviewing recent ATCA jurisprudence and concluding that judicial contraction of the cause of action created by ATCA is a real possibility).

102. In *Jama v. U.S. Immigration and Naturalization Service*, plaintiffs—aliens detained in an INS facility pending adjudication of their asylum status—prevailed at trial in a suit against the defendant corporation that operated the detention center for the INS alleging inadequate living conditions, torture, and other human rights violations. 343 F. Supp. 2d 338, 386 (D.N.J. 2004). For an examination of the procedural and substantive history of corporate ATCA cases, see Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK J. INT'L L. 773 (2008).

103. See *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1092–95 (N.D. Cal. 2008); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2007 WL 2349336, at *15–18 (N.D. Cal. Aug. 14, 2007) (finding Chevron Corporation not liable under aiding and abetting, conspiracy, or agency theories for torture committed by the Nigerian military).

104. See *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 824 (9th Cir. 2008) (holding that ATCA claims “are appropriately considered for exhaustion under both domestic prudential standards and core principles of international law.”).

105. See, e.g., Chimène I. Keitner, *The Politics of Corporate Alien Tort Cases*, PEPP. L. REV. ONLINE (forthcoming 2011), <http://ssrn.com/abstract=1876746> (suggesting that “advocates concerned with modifying future corporate behavior might achieve better overall outcomes by focusing on strategies beyond AT[CA] litigation.”). Although a handful of other states have implementing legislation similar to ATCA, results have been as poor from the NGO point of view in those jurisdictions. See, e.g., Peter Muchlinski, *Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Case*, 50 INT'L & COMP. L.Q. 1 (2001) (describing doctrinal and other obstacles to using international law to litigate human rights and environmental claims in the UK); see also PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* (2d ed. 2007) (same). For a detailed examination of the domestic incorporation of international legal norms in domestic courts to address alleged violations of international human rights by corporate defendants, see generally Robert

NGOs began to turn outward at the turn of the millennium in an attempt to transcend the limitations of state sovereignty and of domestic legal regimes.¹⁰⁶

3. Regulate: “Soft Law”

Although ATCA litigation in U.S. courts is presently insufficient to generate the level of corporate regulation sought by NGOs, ATCA is a far more potent legal weapon than is available to human rights NGOs in the judicial systems of virtually every other nation, and Congress and the federal judiciary retain the power to expand corporate ATCA liability. For this reason, and because many multinational corporation (“MNCs”) are headquartered or do significant business in the U.S., the U.S. remains the litigation forum of choice for NGOs. However, with MNCs astute enough to shift resources and operations beyond the reach of U.S. jurisdiction, particularly if ATCA liability is expanded, MNCs might well relocate their citizenship to more abuse-tolerant jurisdictions where they are free to operate with much greater disregard for human rights. The threat that MNCs will slip into a legal “black hole”¹⁰⁷ to evade duties to protect human rights spurred NGOs to create a “new governance” regime designed to transcend the short-armed reach of domestic legal orders, overcome the regulatory vacuum created by the absence of a global sovereign, and propound declarations of universal norms protective of human rights whether through the political process, market pressure, or judicial enforcement.

The “new governance” paradigm recognizes that in the era of globalization the power to regulate—once the sole province of states—is now fragmented, diffused, and contested.¹⁰⁸ Because state regulation and corporate self-regulation have failed to achieve NGO objectives regarding corporate human rights practice, advocates of more effective regulation have labored to weave together various social, cultural, and political movements—in

McCorquodale, *Towards More Effective Legal Implementation of Corporate Accountability for Violations of Human Rights*, 103 AM. SOC'Y INT'L L. PROC. 288 (2009). For a discussion of the doctrinal and political uncertainty surrounding the future of ATCA litigation, see Donald 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 (2011).

106. For an examination of the NGO shift from law toward regulation, see Christiana Ochoa, *Corporate Social Responsibility and Firm Compliance: Lessons from the International Law—International Relations Discourse*, 9 SANTA CLARA J. INT'L L. 169 (2011).

107. Fuks, *supra* note 78, at 132–33.

108. See Williams & Conley, *supra* note 19, at 101 (describing the effect of globalization on state regulatory power vis-à-vis corporations).

particular well-funded and well-organized NGOs, labor unions, civil society associations, etc.—that seek to affect both the “character and independence of [corporations] and the power of nation-states to regulate these entities.”¹⁰⁹ NGOs and a wide array of private entities have seized upon the relative weakening of nation-states to insert themselves into the regulatory process and draw that process out of the direct control of states into transnational fora where, by strategically deploying information, they “generate compilations of best practices, codes of conduct, and templates for everything,” including corporate responsibilities for the protection of human rights.¹¹⁰ Although they lack the power that states enjoy to coerce corporations through binding law, NGOs have produced several important declarations of human rights norms with the character of “quasi-regulations” or “soft law” that may well transform the expectations of consumers, investors, states, and even corporations regarding corporate conduct in the issue-area of human rights. The most important of these declarations are the Global Compact,¹¹¹ the Norms, the Global Reporting Initiative, and the Framework.

a. Global Compact

In a 1999 address to the World Economic Forum in Davos, Switzerland, United Nations Secretary-General Kofi Annan launched a UN initiative designed to induce corporations to reject complicity in human rights violations.¹¹² The resulting Global Compact (“Compact”) created an informal alliance of corporations, UN agencies, NGOs, and other civil society organizations to “embrace, support and enact, within their sphere of influence,” nine human rights, labor, environmental protection, and anti-corruption principles.¹¹³ Human rights protection figures prominently in the Compact: Principle 1 states that “[b]usinesses should support and respect the protection of internationally proclaimed human rights,” while Principle 2 requires

109. Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations’ Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 309–10 (2006).

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

111. United Nations, *The Ten Principles of the Global Compact*, THE GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Oct. 11, 2011).

112. Press Release, Security-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Press Release SG/SM/6881 (Feb. 1, 1999).

113. See *The Ten Principles of the Global Compact*, *supra* note 111.

that corporations “make sure that they are not complicit in human rights abuses.”¹¹⁴

Although the Compact principles lack detail, the Compact, launched in July 2000, stands as the world’s largest corporate citizenship initiative, with more than 4,858 companies from over 100 countries, and 136 of the Financial Times Global 500, having declared their membership as of March 2011.¹¹⁵ At the very least, corporate members that have acceded to the Compact cannot in good faith claim to be acting consistent with Principles 1 and 2 if they enter into business relationships with states that systematically engage in massive human rights violations. In fact, they may be encumbered with the duty to divest from such nations, at least until their human rights practices improve. What is more, although the Compact and its Principles do not possess the status of international law because they are not yet evidence of the custom of states nor are they the product of international treaty,¹¹⁶ the Compact has induced corporations to voluntarily accede to a body of principles identified, disseminated, and promoted primarily by NGOs. By using their increasing powers of moral suasion and establishing information networks to guide corporations toward compliance with the Compact,¹¹⁷ NGOs envision producing a “new kind of actor—the

114. *Id.*

115. See United Nations, *UN Global Compact Participants*, THE GLOBAL COMPACT, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last updated July 28, 2011) (providing a list of prominent members including BP, Royal Dutch/Shell Group, Total, Allianz, Volkswagen, Siemens, Hewlett-Packard, Nissan Motors, Unilever, BMW, Toshiba, NEC, Nokia, Bayer, Indian Oil, Volvo, L’Oreal, Pfizer, Novartis, Coca-Cola, Cisco Systems, BHP Billiton, Lufthansa Group, Electrolux, Gap, Xerox, Hindustan Petroleum, Henkel, and Westpac Banking); see also United Nations, *UN Global Compact Bulletin*, THE GLOBAL COMPACT, http://www.unglobalcompact.org/NewsAndEvents/UNGC_bulletin/june_2011.html (June 10, 2011) (stating that as of March 2012, the Global Compact has received 8,338 Communications on Progress from more than 5,000 members).

116. A discussion of the sources of international law and of the process whereby customary international law is formed and recognized is well beyond the scope of the present Article. It suffices to note simply that the principle of state consent forms the basis for the contemporary international legal order and that the voluntary acceptance of obligations by non-state actors such as corporations, while evidence of the development of custom, is not dispositive of the question even where such obligations are intended by the non-state actors to be legally binding. For a discussion on the effects of declarations by corporations such as the Compact on the formation of customary international human rights law, see Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 BUFF. HUM. RTS. L. REV. 21, 37–38 (2005).

117. Over 200 NGOs have advocated creation of an “International Right to Know” (“IRTK”) monitoring and transparency program that would require

potentially ‘socially responsible corporation’—that may adhere to these [principles] not because of the manipulation of incentives, but rather because of a new self-understanding.”¹¹⁸ In effect, NGOs hope to resocialize corporations and transform their characters so that compliance with the Compact is perceived to be within the corporate self-interest.

However, critics of the Compact fear that its reach and its influence have both been overstated. Seventy-four percent of the Financial Times 500 global corporations have not yet become members,¹¹⁹ and several Compact participants—including Coca-Cola, BHP, Shell, L’Oreal, and Cisco—have been the subject of ATCA litigation or public boycotts over policies and actions alleged to violate the Principles.¹²⁰ In view of practice subsequent to membership, some suspect that corporations have latched onto the Compact primarily as a marketing tool to “bluewash” their reputations or images and pacify stakeholders, as well as to shield continued bad conduct regarding human rights. Moreover, many corporations have declined to accept membership in the Compact out of a fear that alleged noncompliance with its Principles will result in litigation. UN officials

corporations headquartered or raising capital in the U.S. to disclose information about their overseas human rights practices and submit such information to a central database maintained by the U.S. Department of State. By making the process of monitoring and the deployment of shame in response to bad corporate practice more efficient, the IRTK project, according to NGOs, will enhance the success of other projects such as the Compact. See, e.g., IRTK CAMPAIGN, INTERNATIONAL RIGHT TO KNOW (2003), available at <http://www.earthrights.org/sites/default/files/publications/international-right-to-know.pdf>.

118. Williams & Conley, *supra* note 19, at 102–03 (quoting Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 INT’L. ORG. 39, 61 (2005)).

119. Prominent nonmember corporations as of March 2011 include AMP, Bank of China, Boeing, British Airways, British American Tobacco, Canon, Chevron Texaco, China China Mobile Communications, Chinese Petroleum, Chubb, Citigroup, Coles Myer, Dell, Dow Chemicals, DuPont, Exxon Mobil, FedEx, Ford Motor, General Electric, General Motors, Halliburton, Hilton Group, Hitachi, Honda Motor, Hyundai Motor, ING Group, Johnson & Johnson, Kingfisher, LG Electronics, Life Insurance, McDonald’s, Microsoft, Mitsubishi, Motorola, National Australia Bank, PepsiCo, Procter & Gamble, Reliance Industries, Samsung Electronics, Sharp, Sinopec, Sony, Spirit, Target, Telstra, Toyota Motor, Vodafone, Wal-Mart, Walt Disney, Whirlpool, and Woolworths. For a list of all participants, see THE GLOBAL COMPACT, *supra* note 111.

120. Several corporations, including Coca-Cola, that are non-members of the Compact are members of the Business Leaders Institute on Human Rights (“BLIHR”), an organization dedicated to “find[ing] practical ways of implementing the Universal Declaration of Human Rights in a business context” and “to implement[ing] these practices in our own organizations, sectors and value chains around the world.” See BUSINESS LEADERS INITIATIVE ON HUMAN RIGHTS, <http://www.blihr.org> (last visited Oct. 11, 2011).

responsible for administration of the Compact are nonplussed, stating that “the Global Compact is neither a regulatory mechanism nor a seal of approval for the performance of those participating in it” but noting also that a “study by the consulting firm McKinsey & Company . . . found that, in several important respects, the Global Compact has already been a significant force for positive change.”¹²¹ At the very least, all agree that the Compact has not generated the transformative effects its sponsors anticipated.

b. The Norms

In 1998, the UN Subcommission for the Protection of Human Rights (“Subcommission”), a specialized agency of the United Nations system, established a working group to examine the conduct of MNCs.¹²² After five years of debates, the Subcommission approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, known as the “Norms.”¹²³

Substantively, the Norms assert that corporations are charged with human rights obligations no matter where they operate, including duties to refrain from engaging in or “benefit[ing] from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced . . . labour, [and] hostage-taking.”¹²⁴ Moreover, the Norms propound a far broader set of “obligations” than the duty to refrain from committing the most serious human rights violations; other provisions would require corporations, as part of their human rights practices, to act affirmatively to “contribute to [the] realization” of such rights as “the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression,

121. Kielsgard, *supra* note 84, at 202 (quoting letter from John Ruggie, Special Advisor to the Sec’y Gen. and George Kell, Exec. Head of the Global Compact, Office of Sec’y Gen., to Michael Posner, Executive Dir. Of Human Rights First (June 22, 2004)).

122. United Nations, Econ. & Soc. Council, Sub-Comm’n on the Promotion & Prot. of Human Rights, Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter Norms].

123. United Nations, Comm’n on Human Rights, Sub-Comm’n on the Promotion and Protection of Human Rights, Draft Provisional Agenda and Adoption of the Report, 52, U.N. Doc. E/CN.4/Sub.2/2003/L.11 (Aug. 14, 2003).

124. Norms, *supra* note 122, ¶ 3.

and shall refrain from actions which obstruct or impede the realization of those rights.”¹²⁵

Procedurally, the Norms require the incorporation of their provisions into all MNC contracts and require disclosure of information regarding compliance.¹²⁶ They prohibit corporations from doing business with natural or legal persons who do not “follow these or substantially similar norms” unless corporations electing to do business with such entities “[successfully] work with them to reform or decrease violations.”¹²⁷ The Norms create a monitoring network consisting of states, NGOs, and UN specialized agencies, and require corporations to be responsive to complaints about violations of the Norms lodged by “non-governmental organizations, unions, individuals and others”;¹²⁸ moreover, the Norms call upon states to “establish and reinforce the necessary legal and administrative framework for ensuring that the Norms . . . are implemented” by corporations within their jurisdiction.¹²⁹ In effect, the “entire population of the globe”¹³⁰ can report violations in the event of which Paragraph 18 obligates corporations to “provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms.”¹³¹

Conceptually, the Norms import the “stakeholder” theory of the corporation wholesale, dismissing the shareholder model of governance entirely and defining stakeholders to include “stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises.”¹³² So long as an individual or entity can claim to be “substantially affected by the activities [of a given corporation]”—a low threshold that excludes almost no claimants—stakeholder status is established. Accordingly, the set of potential stakeholders who are entitled to exert governance rights over corporations, by operation of the Norms, is extensively broadened to include

125. *Id.* ¶ 12.

126. *Id.* ¶ 15.

127. United Nations, Econ. & Soc. Council, Sub-Comm’n on the Promotion of Human Rights, Economic, Social and Cultural Rights: Commentary on the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 ¶ 15(c) (Aug. 26, 2003) [hereinafter Commentary on Norms].

128. *Id.* ¶ 16(b).

129. *Id.* ¶ 17.

130. Backer, *supra* note 109, at 385 (citing Norms, *supra* note 122).

131. Commentary on Norms, *supra* note 127, ¶ 18.

132. *Id.* ¶ 22.

“consumer groups, customers, [g]overnments, neighbouring communities, indigenous peoples and communities, non-governmental organizations, public and private lending institutions, suppliers, trade associations and others.”¹³³ The putative effect of the Norms in derogation from the shareholder model, which has long dominated the theory and practice of corporations, is profound and unprecedented.

Taken together, the procedural and conceptual effects of the Norms are difficult to overstate. Corporations are no longer regarded as primarily private economic entities subject to public regulation by states: on the contrary, the Norms cast them as quasi-public entities with social, cultural, and political objectives no less and perhaps even more important than their economic objectives. In effect, the Norms purport to transfer the source of authority to regulate corporations from states to NGO-led international civil society and then proclaim that the primary purpose of corporations is no longer to maximize profits but to function as important public agents co-equal to the state in terms of the power and the obligation to protect and promote human rights. Ironically, the great transformation of corporate regulation from the private to the public realm and the shift in purpose from private to public has been championed by private entities—NGOs—who are at least as lacking in democratic accountability and in public representation as the corporations they have targeted.¹³⁴

Legally, the Norms’ proposals to alter the source of authority for corporate regulation and the social purposes of corporations have important implications. The Norms, although farther afield from the voluntarism of the Compact,¹³⁵ are nonbinding,¹³⁶ and yet they challenge existing corporate theory and prac-

133. *Id.*

134. *See, e.g.,* Backer, *supra* note 109, at 387 (noting the irony of the Norms’ monitoring scheme that “[u]s[es] one portion of a large community of transnational non-state actors to perform a critical role in the disciplining of another portion of that community, without subjecting the monitors themselves to the same sort of discipline”). For a detailed criticism of the procedural and conceptual effects of the Norms on corporate governance and on the publicization of corporate purpose, and an argument that the Norms “pervert[t] . . . the corporation’s function” and lead to an “abdication of responsibility by the state” in favor of unaccountable, anti-democratic NGOs, *see id.* at 356–74.

135. Many commentators regard the Norms as occupying a middle ground between the voluntarism of the Compact and the hard law desired by NGOs. *See* Hessbruegge, *supra* note 116, at 37–38 (gauging commentators’ assessments of the legal force of the Norms in relation to the Compact).

136. The U.N. Commission on Human Rights has determined that the Norms currently have no legal standing, despite claims from proponents that the Norms simply codify existing international law. Tracy M. Schmidt, Com-

tice. While the Norms' prohibitions against the most serious violations of human rights, such as extrajudicial killing, torture, and forced labor, are almost universally held to be restatements of existing international law, the proclaimed affirmative corporate duties to promote development, health, education, and general welfare are generally regarded by states and commentators as having little or no legal effect.¹³⁷ In brief, with the exception of a narrow range of serious human rights offenses such as torture, extrajudicial killing, rape, slavery, and other violations colorable as "crimes against humanity," international human rights law is only binding on national governments. In other words, corporations and other private actors are not objects of international human rights obligations unless national governments adopt and implement international human rights law through domestic legislation such as ATCA.¹³⁸

Still, many advocates of the Norms envision their use as "soft law" possessed, if not of legal force, of political significance sufficient to influence domestic and international courts as well as national legislatures in interpreting existing corporate regulations more expansively and in fashioning new and more restric-

ment, *Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations' "Norms" Provide the Required Means?*, 36 CAL. W. INT'L L.J. 217, 238 (2006). Very little international legal precedent exists for regulating corporations, and nearly all of what is asserted as international law is in fact hortatory or aspirational expressions. See generally LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000). Presently, "most governments appear to remain somewhat ambivalent about accepting corporate duties . . . toward individuals in states where they operate." Ratner, *supra* note 75, at 488.

137. See, e.g., Backer, *supra* note 109, at 340 (discussing the legal effect of the Norms under international law). Recall that a detailed discussion of the process by which international legal obligations are created through custom is well beyond the scope of the present Article.

138. See Robert McCorquodale, *Human Rights and Global Business*, in COMMERCIAL LAW AND HUMAN RIGHTS 89, 94 (Stephen Bottomley & David Kinley eds., 2002) (discussing in depth the applicability of international human rights law to corporations); see also JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW (2006). For a discussion of the history of international law with regard to corporate civil and criminal liability for human rights violations, see David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 993-94 (2004). For a critique of the existing international law of corporate responsibility and state practice regarding international legal incorporation as ineffective to protect human rights, see DINE, *supra* note 72, at 68-76. See also *id.* at 168 ("Perhaps the most obvious difficulty is that companies have no place in international law, including international human rights law, as the primacy of nation states is so important.").

tive regimes;¹³⁹ others, labeled as “maximalists,” argue that because the Norms incorporate extensive implementation and reparations provisions they are more than simply voluntary undertakings and, accordingly, international law and institutions—including regional human rights courts and the International Criminal Court (“ICC”)—can and should be used to bind corporations to existing international legal obligations that are simply restated in the Norms.¹⁴⁰ A series of commentaries to Paragraphs 1 through 12 of the Norms proposes that corporate violations of obligations listed therein *as well as violations of human rights provisions of the Rome Statute of the ICC constitute criminal offenses—corporate and individual*.¹⁴¹ Although the maximalist position is a minority and arguably radical view, it is clear that proponents of the Norms have not proffered them in the spirit of voluntarism, nor have they evinced an interest in generating the corporate partnerships that occupy the core of CCCs as well

139. See, e.g., Schmidt, *supra* note 136, at 240 (noting that the declaration of “soft law,” particularly in the domain of human rights, is often the first step in the creation of customary international binding law as states gradually incorporate soft law within their practice out of a sense of legal obligation); see also Kielgard, *supra* note 84, at 199–201 (noting that soft law “starts in the form of recommendations and over time may be viewed as interpreting treaties and helping to establish custom or may serve as the basis for the later drafting of treaties.”) (quoting David Weissbrodt & Maria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901, 914 (2003)). “[The Norms] [are] soft law, but [they] provide[] for greater accountability and the promise of more binding norms in the future . . . Voluntarism needs to be encouraged as a resource for corporate leaders who evince a sincere wish to abide by human rights norms, but . . . [a] legal framework of binding norms is necessary to complement voluntarism.” *Id.* at 212.

140. See Schmidt, *supra* note 136, at 233 (noting that some commentators maintain that the Norms already represent the *opinio juris* of the international community and are either already customary international law or at the very least *lex ferenda*). Indeed, the Norms expressly claim “that transnational corporations and other business enterprises. . . have, inter alia, human rights obligations and responsibilities and that these human rights norms will contribute to the making and development of international law as to those responsibilities and obligations” Commentary on Norms, *supra* note 127, at pmb1. For a discussion of the expansiveness of the maximalist position with regard to the legal force of the Norms, see Backer, *supra* note 109, at 369–70.

141. See Commentary on Norms, *supra* note 127, ¶ 4 (requiring corporations to observe international human rights norms set forth in the Rome Statute of the ICC and other international conventions). Although no case was ultimately prosecuted, prosecutorial interest in bringing a test case against corporations operating within the Democratic Republic of Congo suggests that the prospect of using international criminal tribunals to sanction corporations, as the Norms contemplate, is not an idle threat. See, e.g., Julia Graff, Note, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo*, HUM. RTS. BRIEF, Winter 2004, at 23.

as the Compact.¹⁴² Rather, the Norms appear to be an instrument predicated upon the belief that voluntarism has failed and engineered largely to bolster a litigation strategy.¹⁴³

Predictably, the Norms sparked a great divide between public sector-oriented participants—principally academics and NGOs—and private sector or market-oriented participants—businesses and developed states. The former primarily argued to the Sub-Commission that the Norms represent a clear and complete advance over existing voluntary standards for regulating business behavior. They also suggested that the *Norms* represent an advance over existing standards by providing a single comprehensive regime drawing an appropriate balance between the obligations of states and of companies with respect to human rights, and by providing useful tools for evaluating performance. More importantly, advocates of the *Norms* were fond of the *Norms*' utility in providing a template for State behavior—providing a framework of standards that states ought to impose—while providing a system of remedies for individuals, supervised by a supranational organization that important elements of global civil society trust (or at least trust more than they trust states).¹⁴⁴

In contrast, corporations concerned about the prospects of additional legal risk and states threatened in the loss of their power to define international law mounted strong resistance to the Norms.¹⁴⁵

Politically, the Norms, by affirmation of the Commission on Human Rights (“CHR”) in April 2004, have no legal standing

142. See Schmidt, *supra* note 136, at 239 (“Another major difference between the Norms and previous efforts is its terminology. When discussing compliance, the Norms substitute standard terms like ‘should’ with ‘shall.’ Therefore, the *Norms* are not merely a restatement of existing obligations, but rather an effort to fill the voids of previous agreements and mandate certain aspects of international [CSR].”).

143. See *id.* (“[The Norms] . . . may signify [NGOs’] unstated conclusion: the voluntary compliance called for in previous documents is proving to be inadequate . . .”); see also Kielsingard, *supra* note 84, at 203 (suggesting that the primary utility of the Norms is to enhance litigation prospects).

144. Backer, *supra* note 109, at 356.

145. *Id.* at 382–83. See United Nations, Comm’n on Human Rights, Sub-Comm’n on the Promotion & Prot. of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005) (providing specific comments by corporations, states, and other entities).

despite their radical attempt to extend existing international law, and are not to be monitored by UN agencies. In other words, the Norms are simply voluntary and aspirational goals. In early 2005, the Office of the High Commissioner on Human Rights produced a report recommending that the CHR “maintain the draft Norms among existing initiatives and standards on business and human rights, with a view to their further consideration”—bureaucratic language indicating the effective abandonment of any pretensions to legal status or significant political support for the Norms.¹⁴⁶ The CHR, after considering the report, requested the Secretary General to appoint a Special Representative on Business and Human Rights with a broad and independent mandate to research, develop, and compile a report on the issue of corporation responsibility for human rights.¹⁴⁷ The Special Representative, Professor John Ruggie, released an interim report detailing his conclusions that the Norms are a “train wreck”¹⁴⁸ that have sown confusion and discord by virtue of their exaggerated and absolutist legal claims and conceptual and procedural ambiguities.¹⁴⁹

While the Special Representative has declared the Norms dead, their exponents counter that the issues that gave birth to them remain alive and well, that the Norms have “articulat[ed] a core set of standards for going forward,”¹⁵⁰ and that the Norms have formed the basis for future dialogue regarding mechanisms designed to impose transnational regulatory frameworks upon corporations in the interest of the protection of human rights, such as the Framework.¹⁵¹ Moreover, having established in prin-

146. See Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises With Regards to Human Rights, *supra* note 145, ¶ 52(d).

147. See United Nations, Econ. & Soc. Council, Comm’n on Human Rights, Promotion and Protection of Human Rights, ¶ 2, U.N. Doc. E/CN.4/2005/L.87 (Apr. 15, 2005).

148. John G. Ruggie, Remarks at the Forum on Corporate Social Responsibility (June 14, 2006), available at <http://www.reports-and-materials.org/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf>.

149. See United Nations, Econ. & Soc. Council, Comm’n on Human Rights, Sub-Comm’n on the Promotion & Prot. of Human Rights, *Interim Report of the Secretary-General’s Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 59, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter Interim Report].

150. David Kinley, Justine Nolan & Natalie Zerial, *The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations*, 25 COMPANY & SEC. L.J. 30, 31 (2007).

151. Backer, *supra* note 109, at 332; see *infra* notes 160–66 (discussing the Framework).

ciple the possibility of involuntary transnational regulation of corporate conduct in regard to human rights, the Norms have opened the door, and the position of the international community may well soften. The Special Representative has acknowledged the desirability of some of the principles elaborated in the Norms, in particular the summary of human rights subject to infringement by corporate activities,¹⁵² and although he has rejected the involuntarism that characterized their development he has restated much of their substance in the Framework.¹⁵³ Thus, defenders of the Norms are undaunted and remain optimistic that the principles that animated them may yet achieve the status of international legal obligation at some future date, and they are patient.¹⁵⁴ As Professor David Weissbrodt, one of the principal authors of the Norms, explains,

[n]o one can realistically expect business human rights standards to become the subject of treaty obligations immediately. The development of a treaty requires a high degree of consensus among nations. Although a few countries . . . indicated their support for the Norms, as yet there does not appear to be an international consensus on the place of businesses and other nonstate actors in the international legal order. The Norms, like numerous other UN recommendations and declarations . . . started as “soft” law. As with the drafting of almost all human rights treaties, the United Nations begins with declarations, principles, or other soft-law instruments. Such steps are necessary to develop the consensus required for treaty drafting Any treaty takes years of preliminary work and consensus building before it has a chance of receiving the approval necessary for adoption and entry into force. Even soft-law instruments may take years to develop.¹⁵⁵

In sum, the conflict over the Norms is part of an ongoing and broader battle over the legitimate place of civil society in the

152. See Interim Report, *supra* note 149, ¶ 14.

153. *Id.* ¶ 15.

154. See, e.g., Troy Rule, *Using “Norms” to Change International Law: UN Human Rights Law Sneaking in through the Back Door?*, 5 CHI. J. INT’L L. 325, 326 (2004) (describing the Norms as the “first major stepping stone towards the adoption of an international, enforceable set of legal obligations binding” on corporations).

155. David Weissbrodt & Muria Kruger, *Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901, 914 (2003).

promulgation of international legal standards not soon to be resolved.¹⁵⁶

c. Global Reporting Initiative

The Global Reporting Initiative (“GRI”),¹⁵⁷ launched in the aftermath of the collapse of the Norms, may well be on its way to becoming the gold standard in transnational regulation of corporate human rights practice. According to the GRI, and in distinction from the Norms, the principles it adopts was “developed through a systematic, consensus-seeking dialogue with a large network of . . . stakeholder groups including business, civil society, academia, labor and other professional institutions.”¹⁵⁸ GRI is funded by “a large international community of Organizational Stakeholders; [i]nstitutional grants from governments, [and] foundations; [and] [c]orporate and governmental sponsorships,” and as a consequence has a greater claim to voluntarism than did the Norms. To date, over seven hundred corporations have published reports with the GRI, including many of the firms identified by socially responsible investment funds as among the most committed to general principles of CSR.¹⁵⁹

d. The Framework

In April 2005, UN Secretary-General Kofi Annan designated John Ruggie as his Special Representative with a mandate to “identify and clarify standards of corporate responsibility and accountability” and to “elaborate on the role of States” in the development of transnational regulation.¹⁶⁰ With his initial report, Ruggie dismissed the Norms, drew attention to a governance gap caused by a “misalignment between economic forces and governance capacity,”¹⁶¹ and pronounced that, despite pro-

156. For a discussion of the history of the Norms and of the future directions of international “soft law” regulation, see David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUMAN RIGHTS. L. REV. 447 (2006).

157. See GLOBAL REPORTING INITIATIVE, <http://www.globalreporting.org> (last visited Oct. 11, 2011).

158. *Id.* (then follow “Reporting Framework” hyperlink, then “Document Process” hyperlink).

159. *Id.* (then follow “Funding” hyperlink).

160. See Promotion and Protection of Human Rights, *supra* note 147, ¶ 1(a), (b).

161. See United Nations, Human Rights Council, John Ruggie, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”*; *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 82, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) [hereinafter *2007 Report*].

gress, it was premature to argue that “the broad array of international human rights attach direct legal obligations to corporations.”¹⁶² In 2008, Ruggie submitted a proposed Framework to the U.N. Human Rights Council consisting of views and recommendations in three parts: (1) state duties to protect against third party human rights violations through enforcement of trade practices, investment agreements, and lending arrangements; (2) corporate responsibility to respect human rights through the exercise of formal due diligence, to include human rights impact assessments, tracking and monitoring, and other measures; and (3) access by victims of human rights abuses to effective remedies, both judicial and nonjudicial.¹⁶³ Many commentators view the three principles constituting the Framework as largely a more realistic and better articulated restatement and development of the Norms.

On the strength of the favorable reception of the Framework, which advocates the construction of shared legal and political responsibility for CSR as between states, corporations, domestic constituencies, and NGOs, the Council extended the mandate until 2011.¹⁶⁴ In subsequent reports Ruggie has further elaborated the three pillars, crafted more concrete standards of corporate accountability, and advanced the process of normative development.¹⁶⁵ However, although the Ruggie Framework is the most comprehensive set of transnational rules, norms, and implementation mechanisms in the CSR issue-area, it remains a solely voluntaristic system without the power to compel, and many states lack the technical capacity necessary to implement its mechanisms. Increasing the effectiveness of and reducing gaps in the regulatory regime remains, in Ruggie’s own words, a “long-term project” that will require its proponents to build broad coalitions and to ground the regime not merely on legal enforcement but upon all the “moral, social, and economic rationales that can affect the behavior of corporations.”¹⁶⁶ At the same

162. *Interim Report*, *supra* note 149, ¶ 64.

163. *Id.*

164. Human Rights Council Res. 8/7, ¶ 4, U.N. Doc. A/HRC/RES/8/7 (June 18, 2008).

165. See Human Rights Council, Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009); see also Human Rights Council, John Ruggie, *Business and Human Rights: Further Steps toward the Operationalization of the “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010).

166. John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 838–39 (2007). In March 2011, Ruggie completed his work as Special Representative of the Secretary-General on the Issue

time, the Framework raises concerns with corporations that disfavor transnational regulation in the issue-area of CSR and oppose the interposition of NGOs between corporations and states. Thus, although the Framework is the brightest hope for NGOs, the optimal governance regime has as yet evaded them.

e. Summary

NGOs now possess greater power to shape corporate conduct through regulation than at any time before. Even if their engagement of transnational civil society to enhance corporate accountability for human rights practices through voluntary and involuntary restrictions on corporate conduct has not been as productive as they had hoped, there appears to be little doubt that NGOs have raised the question of corporate responsibility for human rights to the front of international debates about CSR and created disincentives for corporations to tolerate violations of human rights. The shareholder model of governance has been challenged by NGO involvement in the transnational regulatory process, and new constituencies have emerged to levy claims against corporations to behave in a manner consistent with the spirit, if not the letter, of their proposals. As one commentator puts it, it is almost certainly as a direct result of human rights NGO efforts to participate in the “new governance” regime that

soccer moms [now] refuse to buy a famous line of soccer balls after reading reports that they are hand sewn in Pakistan by children; [t]alented African-American MBA[] [students] . . . will not interview with a company because it has a poor record of promoting minorities; students . . . protest their university’s licensing agreement with a sportswear manufacturer that uses a Guatemala factory that allegedly abuses workers; money managers [now have] clients who refuse to invest in companies with poor environmental ratings; assertive reporters . . . will call a CEO at home to ask him if he knows the paper clips sold in his national retail chain were made by prisoners in China; [and] indigenous groups . . . will no longer passively accept the presence in their ancestral lands of big oil and mining companies that

of Human Rights and Transnational Corporations and Other Business Enterprises with the release of Human Rights Council, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc. A/HRC/17/31 (Mar. 21, 2011) (advance edited edition).

exploit natural resources without coming to terms with local communities.¹⁶⁷

However, as Ruggie noted in dismissing the Norms, NGOs may well be guilty of “regulatory overstretch” in their pursuit of involuntary transnational administrative restrictions on corporate conduct. By extending their proposals beyond measures that would afford increased human rights protection and demanding, in effect, that corporations submit to an NGO fiat that would convert them from private to public actors with expansive (and expensive) positive duties as guarantors of the economic and physical welfare of the world, NGOs may well have forfeited some of their credibility along with any real chance at achieving lesser-order but attainable objectives.¹⁶⁸ Recognition of this tactical error has given some NGOs pause, and some have redirected regulatory efforts out of transnational civil society and back into domestic legislative processes.

4. Legislate: Model Uniform Code & International Criminal Court

A fourth strategy to formalize a broad conception of CSR for human rights, developed in part out of frustrations with the limitations of other strategies and with voluntarism more generally,¹⁶⁹ is the exploitation of legislative opportunities, domestic as

167. Greathead, *supra* note 48, at 719–20. For a deeper discussion of the concept of “new governance” in the fields of CSR specifically and transnational regulation generally, see David M. Trubek & Louise G. Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation*, LEGAL STUD. RES. PAPER SERIES NO. 1047, 1 (May 2007). For an argument in support of the continuing utility of soft law and the regulatory approach, see Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT’L L. 41 (2010).

168. A literature on the phenomenon of “regulatory unreasonableness” and the deleterious effects that asking for too much may have upon the ultimate effectiveness of any resulting regulatory agreements has grown up in the past quarter century. Although beyond the scope of the present Article, it bears noting that NGOs, by demanding the impossible of corporations and states in the Norms, may have given up the possible and thus became their own worst enemies. For a discussion of “regulatory unreasonableness,” see generally EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982). For a discussion of more effective approaches to regulation that include analyses of the political and economic constraints on parties, see, e.g., JULIA BLACK, *RULES AND REGULATORS* (1997). See also NEIL GUNNINGHAM ET AL., *SHADES OF GREEN: BUSINESS, REGULATION AND ENVIRONMENT* (2003); MALCOLM K. SPARROW, *THE REGULATORY CRAFT* (2000).

169. See Miwa, *supra* note 27, at 1244 (assuming that CSR with regard to human rights imposes costs and noting that voluntarism cannot succeed in a competitive marketplace because it “disadvantage[s] those [corporations] who acted responsibly and confer[s] a significant market advantage on those who

well as international, to crystallize soft law into hard law and create binding legal obligations that compel corporate legislative targets.¹⁷⁰ Corporations remain unbound by laws governing human rights except for those enacted by their states of incorporation or the states where they do business,¹⁷¹ and it is the rare corporation that chooses to place itself at a potential competitive disadvantage by adhering to more onerous standards than are required by law when its competitors do not reciprocate. Proponents of a legislative strategy, convinced that only hard law of general applicability can generate the deterrent effect necessary to restrain corporate misconduct, have offered domestic and international legislative proposals designed to remedy this perceived defect.¹⁷²

Domestically, legislative strategists note that, although corporations are subject to legal liability and punishment and to whatever legal duties states impose upon them,¹⁷³ the practical

did not"); see also Beate Sjøfjell, *Why Law Matters: Corporate Social Irresponsibility and the Futility of Voluntary Climate Change Mitigation*, 8 EUR. COMPANY L. 56, 57 (2011) (rejecting voluntarism entirely as a CSR strategy in favor of enforceable legislation on the ground that voluntarism is "detrimental to the development of a sustainably and socially responsible business and has contributed to giving CSR a bad name").

170. As a former corporate attorney turned human rights activist indicates:

After more than a decade of advocating corporate social responsibility and seeing its promise often thwarted, I've come to ask myself, What is blocking change? The answer is now obvious to me. It's the mandate to maximize returns for shareholders, which means serving the interests of wealth before all other interests. It is a systemwide mandate that cannot be overcome by individual companies. It is a legal mandate with which voluntary change cannot compete.

Douglas Litowitz, *Are Corporations Evil?*, 58 U. MIAMI L. REV. 811, 825 (2004).

171. See generally McCorquodale, *supra* note 138. Although the Nuremberg Tribunals did adjudicate corporate guilt for complicity in the commission of war crimes and crimes against humanity during World War II, and although those cases are of precedential value, there is at present no international forum with jurisdiction, and no binding body of regulations, to address corporate human rights practices. *Id.* For a discussion of proposals to create a forum, invest it with jurisdiction, and create binding laws, see *supra* notes 75–106 and 172–193 and accompanying text.

172. See, e.g., Ehrlich, *supra* note 26, at 83 (presenting the critique of voluntarism and the argument that the effectiveness of a legislative solution to perceptions of inadequate control of corporate conduct is superior on the grounds that the State has "access to better institutional mechanisms that aggregate information, achieve coordination, and minimize the sort of opportunism one might expect if business managers were to become guardians of the public good"). For one such proposal, see Bernard, *supra* note 99.

173. See *Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636–38 (1819) (holding that a corporation is an artificial creation of the State, rather than a natural

and political difficulties in enforcing sanctions upon non-natural entities specifically designed to limit liability often trumps the effectiveness of existing legislation. As one commentator discussing the current prospects for the legislative punishment of corporations laments,

[t]he corporation, I submit, is best defined as a liability-limiting mechanism. Given this definition, no wonder the courts have so much difficulty meting out just punishment to corporations when they engage in misconduct! Rarely can the courts legally pierce the corporate veil to prosecute individuals thought responsible for corporate wrongdoing. Even when they can, the courts tend to display a reluctance to do so—we may suspect that that reluctance is the result of confusion regarding the range of liability pertaining to corporations and the well-entrenched personification of the corporation as [a] moral agent. When the courts attempt to place responsibility on the corporation itself, the appropriate punishment is deemed to be monetary. However, when a corporation engages in repeated instances of gross misconduct, the courts are reluctant to levy truly heavy fines A truly ponderous fine, the sort of fine necessary to act as a deterrent . . . [might leave a community] stranded without its major industry, or consumers might be deprived of a much-needed or much-wanted product.¹⁷⁴

Given the political and practical difficulties in creating and enforcing law, it is not surprising, then, that many corporations express a preference for legislation over other potential forms of restraint on the conduct of their business.¹⁷⁵

Nevertheless, some proposed legislation is beyond the pale of what any corporation might be inclined to contemplate, including stripping corporations that serially violate soft law human rights norms of the “degree of protection or of compassion or mercy that the courts accord to real persons when they break the law.”¹⁷⁶ Accordingly, “incorrigible” corporations would be analogized to “criminal psychopath[s],” deemed by

legal person, and thus subject to whatever duties the legislature imposes upon it).

174. Robert J. Rafalko, *Corporate Punishment: A Proposal*, in BUSINESS ETHICS, *supra* note 4, at 307, 308–09.

175. See, e.g., NESTLÉ, NESTLÉ’S CORPORATE BUSINESS PRINCIPLES 5 (2004), available at http://www.nestle.pl/download/Corporate_Busines_GB.pdf (stating that “Nestle believes that, as a general rule, legislation is the most effective safeguard of responsible conduct . . .”).

176. Rafalko, *supra* note 174, at 311.

their states of incorporation to have forfeited the advantages of the doctrine of limited liability, and even “confined in the interests of public safety”—meaning, potentially, disincorporated and dissolved.¹⁷⁷ Along this vein, a series of other legislative modifications to corporate law designed to enhance CSR have been suggested, including, *inter alia*, requiring corporations to make human rights disclosures in addition to their financial disclosures¹⁷⁸ and imposing duties upon directors to act in the interest of stakeholders in addition to stockholders.¹⁷⁹

Some States have acted on these proposals. More than thirty have adopted non-shareholder constituency statutes that permit, if not obligate, managers to consider the effects of any corporate action upon shareholders.¹⁸⁰ To build on this trend toward the legislated inclusion of stakeholder concerns, NGOs have proposed amending SEC mandatory disclosure regulations to require a “list of the countries where the corporation has facilities or operations; data on compliance with occupational health and safety, anti-bribery, labor rights, and anti-discrimination laws; and security arrangements with state or private police and military forces.”¹⁸¹

By far the most significant domestic proposal for legislation that would impose binding legal duties upon corporations to conform to specified conduct in regard to the promotion and protection of human rights is the Model Uniform Code for Cor-

177. *Id.* at 316–17; see also MARJORIE KELLY, *THE DIVINE RIGHT OF CAPITAL: DETHRONING THE CORPORATE ARISTOCRACY* 175 (2001) (arguing for granting States the power to revoke corporate charters on the basis of conduct deemed immoral or of significant negative impact upon the community). A Constitutional amendment might be necessary to achieve this objective. See Litowitz, *supra* note 170, at 821–22 (discussing legal implications of such a proposal).

178. See RALPH ESTES, *TYRANNY OF THE BOTTOM LINE: WHY CORPORATIONS MAKE GOOD PEOPLE DO BAD THINGS* 210 (1996).

179. KELLY, *supra* note 177, at 140.

180. See, e.g., FLA. STAT. ANN. § 607.0830(3) (West 1993) (permitting a director, in the discharge of duty, to “consider such factors as the director deems relevant, including the long-term prospects and interests of the corporation and its shareholders, and the social, economic, legal, or other effects of any action on the employees, suppliers, customers of the corporation or its subsidiaries, the communities and society in which the corporation or its subsidiaries operate, and the economy of the state and the nation”). For an analysis of these statutes, see JESSE H. CHOPER ET AL., *CASES AND MATERIALS ON CORPORATIONS* 42 (5th ed. 2000).

181. See, e.g., *Hard Issues, Innovative Approaches: Improving NGO-Industry Dialogue on Corporate Responsibility and Accountability*, CALIFORNIA GLOBAL CORPORATE ACCOUNTABILITY PROJECT (Nov. 9, 1999), <http://oldsite.nautilus.org/archives/cap/reports/RoundtableReport.pdf>.

porate Responsibility (“Uniform Code”).¹⁸² The Uniform Code would amend State corporate charter legislation by imposing a duty upon directors, enforceable under civil and criminal law, to “manage the corporation in a manner that does not cause damage to the environment, violate human rights, adversely affect the public health or safety, damage the welfare of communities in which the corporation operate, or violate the dignity of the corporation’s employees.”¹⁸³ However, critics of the Uniform Code, which has yet to make it out of committees, contend that compliance costs and increased risk of litigation will drive business out of states that adopt it,¹⁸⁴ and there is at present simply no bloc of political support that would suggest that the remaking of corporate law is a viable project.

Less expansive proposals would simply extend the reach of state tort jurisdiction extraterritorially to reach corporate conduct abroad.¹⁸⁵ A quite creative proposal would divide each industry into two groups—“do-gooders” and “evildoers”—and impose differential regulations, tax consequences, and monitoring obligations on each in the expectation that corporations in the latter camp would alter their practices in order to escape the onerous restrictions. In so doing, some of the public benefits of transformed corporate behaviors could be privatized and transferred to corporate good citizens, enhancing the likelihood of compliance.¹⁸⁶ Other “green finance” proposals would require

182. MODEL UNIF. CODE FOR CORP. RESPONSIBILITY (2004) [hereinafter UNIF. CODE], available at http://www.citizenworks.org/enron/corp_code-text.php. For a comprehensive discussion of the UNIF. CODE., see Robert Hinkley, *28 Words to Redefine Corporate Duties: The Proposal for a Code for Corporate Citizenship*, 23 MULTINAT’L MONITOR (July/Aug. 2002), <http://multinationalmonitor.org/mm2002/02july-aug/july-aug02corp4.html>.

183. UNIF. CODE, *supra* note 182, § 1 (being considered in the legislatures of Minnesota, California, and Maine).

184. See Elisa Scalise, Note, *The Code for Corporate Citizenship: States Should Amend Statutes Governing Corporations and Enable Corporations to be Good Citizens*, 29 SEATTLE U. L. REV. 275, 292 (2006) (summarizing criticisms of the Uniform Code).

185. See, e.g., Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses*, 26 NW. J. INT’L L. & BUS. 43, 45 (2005) (describing the proposal).

186. Corporations considered “do-gooders” would be included on lists of corporations with which it would be deemed by the markets to be “politically correct” to do business, whereas “evildoers” would feel the sting of that status. This proposal would avoid the standard criticism of legislation as overinclusive for imposing costs on corporations that are already adhering to the behavioral prescriptions and proscriptions imposed by the new legal obligations. See, e.g., Diderik Lund, *Petroleum Tax Reform Proposals in Norway and Denmark*, 23 ENERGY J. 37 (2002) (rejecting a tax on all petroleum corporations for the purpose of alternative energy research as inefficient and punitive as it would impose addi-

financial entities that accept investments from public pension funds to incorporate legally enforceable and specific domestic CSR norms within the fiduciary responsibilities of investment managers.¹⁸⁷

Internationally, advocates of new legislation contend that every nation should incorporate the principles in the Framework in binding universal treaties in order to create a universal approach and deny to corporations the opportunity to “forum shop” for jurisdictions where they can violate human rights with relative impunity.¹⁸⁸ If national regulation remains unresponsive to CSR out of a fear of creating overly burdensome requirements that drive away foreign investment,¹⁸⁹ a universal and enforceable treaty has the potential to equalize national laws and remove incentives to transnational relocation.¹⁹⁰ Accordingly, legislative

tional costs on petroleum corporations already investing heavily in research and development of alternative energy).

187. See, e.g., Oren Perez, *The New Universe of Green Finance: From Self-Regulation to Multi-Polar Governance*, Bar-Ilan Univ. Pub. Law and Legal Theory, Working Paper No. 7-03, 2007, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=962633; Frank Jan de Graaf & Alfred Slager, *Guidelines for Integrating Socially Responsible Investment in the Investment Process* (Jan. 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929067.

188. See, e.g., Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENV. U. L. REV. 183, 184 (2010) (advocating for a “new global human rights regime” complete with a “Global Law Commission” as a quasi-executive body with the power to create binding international laws regulations on corporate conduct and with universal civil jurisdiction to enforce these provisions). The argument is that MNCs strategically allocate their business units in foreign jurisdictions that present the least legal risk in regard to their human rights practices and that in so doing they unfairly impose burdens on stakeholders—customers, employees, members of local communities, and others unable to protect their rights in private markets subject to weak state regulation. If state laws governing corporate human rights practices were harmonized, MNCs would not be able to “shop” for low-risk jurisdictions and would be obliged to provide certain minimum standards of human rights protection. See Backer, *supra* note 109, at 309. A counterargument is that each jurisdiction should be permitted to devise that set of regulations it deems necessary to protect its interests and that the market—with whatever economic and ethical pressures survive competition—will determine which regimes and which corporations are successful and which fail. See Boatright, *supra* note 33, at 46 (“Governance structures that are not efficient will disappear, along with the firms that adopted them, in a Darwinian struggle for the ‘survival of the fittest.’”).

189. See Simaika, *supra* note 66, at 340 (contending that countries that refuse to create domestic legislation incorporating the principles that underlie the Norms are often motivated by the fear of losing foreign investment to less restrictive jurisdictions).

190. See, e.g., Adefolake Adeyeye, *Corporate Responsibility in International Law: Which Way to Go?*, 11 SINGAPORE Y.B. OF INT’L L. 141, 143 (2007) (contending that effective implementation of the CSR agenda requires a universal treaty

strategists call for new international tribunals to address the phenomenon of corporate violations of human rights by internationalizing the field of corporate regulation and preempting conflicting national laws.¹⁹¹ One legislative “solution” to the perceived inadequacies of domestic corporate law would extend the jurisdiction of the International Criminal Court to reach legal persons, which does not presently have personal jurisdiction over corporations.¹⁹² This proposal has attracted serious attention: the International Commission of Jurists has begun work on defining the legal obligations of corporations with regard to human rights with direct reference to the Norms and subsequent debate, and Special Representative Ruggie is monitoring this work with a view toward the future of the Norms as a source of customary international law binding in international tribunals, whether the ICC or a specialized forum staffed with experts in business and human rights law.¹⁹³

that “clearly maps out what corporations should be responsible for and the methods by which such responsibility can be enforced”).

191. See Backer, *supra* note 109, at 319 (describing such proposals). A proposed “International Corporate Criminal Court” created by the UN Security Council would have original jurisdiction to impose liability on a corporation found to have committed such human rights violations as child labor use, environmental damage, forced relocation, cooperation with repressive regimes, and corruption, even if the state of incorporation objects. See Adrienne Barnhard, Response, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUM. RTS. & DEV. L.J. 207, 212–15 (2008) (elaborating on this proposal).

192. A French proposal to include a provision in the Rome Statute was defeated in 2001. It would have extended criminal liability beyond natural persons to include legal persons. See Comment, *Developments—International Criminal Law*, 114 HARV. L. REV. 1943, 2031–32 (2001). During the mandatory review in 2009, proposals to extend ICC jurisdiction to legal persons—i.e., corporations—will be heard and potentially decided. Choudhury, *supra* note 185, at 58.

193. See also Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises With Regards to Human Rights, *supra* note 149, ¶ 65 (noting that Special Representative Ruggie agrees that “there are no inherent conceptual barriers to States deciding to hold corporations directly responsible [for human rights violations] by establishing some form of international jurisdiction”); Choudhury, *supra* note 185, at 57 (discussing proposals for a specialized international tribunal charged with adjudicating claims of corporate violations of human rights); Michael J. Kelly, *Grafting the Command Responsibility Doctrine onto Corporate Criminal Liability for Atrocities*, 24 EMORY INT’L L. REV. 671 (2010) (advocating the use of the command responsibility doctrine to create criminal liability for corporations and natural persons on the standard that responsible individuals either knew or should have known about ongoing corporate wrongdoing). See generally Kinley & Chambers, *supra* note 156 (discussing the current status of the Norms in the context of proposals to grant them international legal status in international tribunals).

5. Delegitimate: Corporate Legitimacy Theory

In the past decade a consortium of observers described by at least one commentator as the “anti-corporation movement”¹⁹⁴ have concluded, based on the striking contrast between the declining power of many developing and failed states and the growing wealth and power of many contemporary MNCs,¹⁹⁵ that if human rights are to be promoted and protected, MNCs are the sole actors capable of exercising the authority to do so.¹⁹⁶ In response, an emerging theory woven from interrelated strands offered by a number of scholars and offered to support and inform other strategies, contends that the legitimacy of the contemporary MNC—often described as its “social license to operate”—hinges on the degree to which it shoulders the burden not merely of strict compliance with existing laws but of the broader functions and duties of democratically accountable public institutions, including the protection of human rights, the conservation and management of public resources, and the promotion of general welfare.¹⁹⁷ Specifically, those corporations that do not uphold, at a minimum, obligations to protect and promote human rights are deemed illegitimate and regarded as having forfeited their socially-granted license to operate¹⁹⁸ and even

194. Litowitz, *supra* note 170, at 820.

195. See, e.g., Adam McBeth, *Privatising Human Rights: What Happens to the State's Human Rights Duties When Services Are Privatized?*, 5 MELB. J. INT'L L. 133 (2004).

196. See CRANE & MATTEN, *supra* note 23, at 67; DONALDSON, *supra* note 34, at 31 (arguing that “enhanced power confers enhanced responsibilities” as the basis for asserting corporate obligations to assume erstwhile public functions protect and promote human rights); Hessbruegge, *supra* note 116, at 88 (noting that states are “no [longer] strong enough to . . . fulfill all their protective duties” and that the “obvious answer [to this problem] would be to supplement the existing framework of . . . human rights obligations with horizontal obligations for [MNCs]”).

197. See, e.g., Backer, *supra* note 109, at 301–02 (“Corporate privilege can only be legitimate if the corporation serves the community from which the factors of production of its wealth are derived . . . [by undertaking] active obligation[s] . . . to positively better the environment, to increase the wealth of the inhabitants in places where corporations operate, to develop economically depressed neighborhoods, or to pressure other institutions (like banks or government) to change their social or regulatory practices.”); Cary Coglianese, *Legitimacy and Corporate Governance*, 32 DEL. J. CORP. L. 159, 160 (2007) (stating that “[l]egitimacy is what is needed to justify, in moral terms, the wielding of such enormous, monopolistic power” by corporations and that “[j]ust as with governmental power, corporate power . . . can be abused”). For an intellectual history and taxonomy of the various corporate legitimacy theories, see generally BRUMMER, *supra* note 28.

198. See George Balabanis, Hugh C. Phillips & Jonathan Lyall, *Corporate Social Responsibility and Economic Performance in the Top British Companies: Are They*

their rights to exist.¹⁹⁹ Put slightly differently, legitimacy theory contends that in order for a corporation to be permitted to do business it must demonstrate that it is not merely in compliance with its legal obligations but that it contributes positively and proactively to the welfare of all those who might have occasion to describe themselves as its stakeholders.

Corporate legitimacy theorists and anti-corporation activists²⁰⁰ are aware that the major philosophical reconstruction of the corporation as a public, rather than as a private entity, for which legitimacy theory calls, is a profound move. Although not all proponents of corporate legitimacy theory view the modern MNC as “essentially sociopathic—something akin to a super-rich and well-connected human being who is motivated solely by return on investment and totally unmoved by attachments to . . . community,”²⁰¹ most would agree that corporations are inherently anti-social entities that “have no conscience, morals, nor sense of right and wrong[,] . . . no sense of living in a community[,] [and] have none of the human traits and characteristics that restrain people in ways that laws cannot and make living in a community possible.”²⁰² Moreover, most do not shy from

Linked?, 98 EUR. BUS. REV. 25, 25–26 (1998) (arguing that a corporation that does not meet the terms of its social license to operate should be denied the right to do so); Dennis M. Patten, *Exposure, Legitimacy, and Social Disclosure*, 10 J. ACCTG. & PUB. POL'Y 297 (1991) (same).

199. DONALDSON, *supra* note 34, at 55 (arguing that an MNC must “honor [human] rights as a condition of its justified existence”); *see id.* at 81 (enumerating the fundamental human rights MNCs are obligated, at a minimum to protect, including freedom from arbitrary detention, ownership of property, freedom from torture, the right to a fair trial, the right to nondiscriminatory treatment, freedom of speech and association, the right to a minimal education, the right to political participation, and the right to subsistence). Some scholars describe the minimal moral obligations of corporations to society as the product of a social contract, yet maintain that only those corporations that fulfill the contract possess sufficient legitimacy to be permitted to continue to operate. *See, e.g., id.* at 54 (contending that a corporation must “enhance the long-term welfare of employees and consumers in any society in which it operates” and “refrain from violating minimum standards of justice and of human rights in any society in which it operates” in order to be considered legitimate); *see also* Patricia H. Werhane, *Accountability and Employee Rights*, 1 INT'L J. APPLIED PHIL. 15 (1983) (same).

200. *See* Den Hond & De Bakker, *supra* note 51, at 906–07 (describing NGO strategies and tactics designed to delegitimize corporations).

201. Litowitz, *supra* note 170, at 819; *see* Thomas Donaldson & Mike Waler, *Ethics and Organization*, 17 J. Mgmt Stud. 34 (1980).

202. Robert C. Hinkley, *Neither Enron Nor Deregulation*, COMMON DREAMS. ORG. (May 19, 2002), <http://www.commondreams.org/views02/0519-07.htm> (quoting an anti-corporate NGO activist who formerly worked as a securities lawyer at the renowned law firm of Skadden, Arps, Slate, Meagher & Flom).

describing their argument for enhancing corporate accountability for human rights as a “complete rethinking of [corporate] ethics and ethical theory,”²⁰³ and all understand that their theory provides vastly different answers than does traditional corporate legal theory as to what corporations are, who owns them, and what can properly be demanded of them by non-owners.

Consequently, corporate legitimacy theorists contend that, because corporations, like states, are not natural creatures endowed with natural rights but in fact are artificial social constructions that owe their existence entirely to positive acts of legislation, society possesses the power to remake or even abolish them by the same legislative process if they cannot be justified morally.²⁰⁴ Corporate law and the corporations it creates and regulates are not *terra sancta* but rather are legitimate terrain for social intervention. If under existing law corporations do not function to benefit society in an equitable fashion, or if corporations impose too many externalities upon stakeholders, then the law must yield in the interest of social welfare, and new laws must be instituted to attenuate corporate pathologies.²⁰⁵ In other words, if corporations will not become socially responsible of their own volition, they must be made so. If they cannot be made so, they must be destroyed.²⁰⁶

Thus, a primary recommendation of corporate legitimacy theorists is the formal replacement of the shareholder model of corporate governance with a stakeholder model that advocates maintain will “constrain[] corporate misbehavior” and distribute wealth more equitably.²⁰⁷ State corporate law codes would

203. Jones et. al., *supra* note 30, at 34.

204. See, e.g., Donaldson, *supra* note 14, at 167–68 (distinguishing the powers granted by society and possessed by corporations from the rights inherent in natural persons); see also Thomas Donaldson, *Personalizing Corporate Ontology: The French Way*, in BUSINESS ETHICS, *supra* note 13, at 69, 71 (locating the source of corporate powers in legislation and differentiating powers from rights).

205. See generally Greenfield, *supra* note 40 (stating that the ultimate goal of corporate law must be to create social welfare and that failures to achieve the goal must be remedied through regulatory modifications).

206. The most radical corporate legitimacy theorists call for the elimination of corporations, and with them capitalism. See, e.g., HARRY GLASBEEK, WEALTH BY STEALTH: CORPORATE CRIME, CORPORATE LAW, AND THE PERVERSION OF DEMOCRACY (2002); JOHN GRAY, FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM (1998); DAVID C. KORTEN, THE POST-CORPORATE WORLD: LIFE AFTER CAPITALISM (1999).

207. Greenfield, *supra* note 40, at 13; see also Surya Deva, *Sustainable Good Governance and Corporations: An Analysis of Asymmetries*, 18 GEO. INT’L ENVTL. L. REV. 707, 748–49 (2006) (“[Because] the structure of [existing] corporate law does not allow corporations to look beyond shareholders or allow them to bal-

require much more dramatic wholesale revision than that contemplated by the Uniform Code; moreover, implied in the theory of corporate legitimacy is that corporations that resist attempts to convert them from private to quasi-public entities would face sanctions up to and including a corporate “death penalty.”²⁰⁸ More internationalist-oriented legitimacy theorists would discard the state-centric paradigm of corporate law in favor of an international corporate legal regime complete with protective provisions enforceable in domestic courts as well as international tribunals and an array of sanctions similarly sufficient to compel corporate compliance.²⁰⁹ Anti-corporation activists drawn from the memberships of NGOs apply corporate legitimacy theory directly to their subjects, employing tactics such as sabotage, “hacktivism,” boycotts, seizure and destruction of corporate property, and other hostile activities designed to inflict material damage on their targets.²¹⁰

Critics of corporate legitimacy theory dismiss it as a “Marxist” ideology advanced by “high-status Western academics” unable or unwilling to see the corporation as anything other than the “great example, symptom, or cause of some or all of the great maladies affecting the world.”²¹¹ They argue against the basic premise of corporate legitimacy theory—that corporations have eclipsed states in terms of their capacity to protect human rights—by noting that corporations, unlike states, “ha[ve] no power of fiat, no authority, no disciplinary action any different in

ance the interests of stockholders with stakeholders . . . the next step should be to remove this obstacle . . . through reforms of corporate law . . .”).

208. The following anecdote is exemplary of the “Delegitimate” strategy in action. In 1998 thirty NGOs, led by law professor Robert Benson, filed a petition urging the California Attorney General to revoke the charter of the Unocal Corporation on the ground that it was a “repeat offender” in its human rights conduct. See Mary Hood & Nick Penniman, *Environmental, Human Rights, Women’s, and Pro-Democracy Groups Petition Attorney General of California to Revoke UNOCAL’s Corporate Charter*, COMMONDREAMS.ORG (Sept. 10, 1998, 6:32 PM), http://www.commondreams.org/archive_newswire/0998releases.htm. According to Benson, “there has to be a point at which “some corporations should be permanently prevented from doing [further] harm.” *Id.* The California Attorney General denied the petition without comment. *Id.*

209. See Backer, *supra* note 109, at 307–08; see also Deva, *supra* note 207, at 749 (“[B]ecause some gap between expectations from and actions of corporations toward [protection of human rights] is inevitable, efforts should be made to develop a coherent, obligatory international regulatory regime that could make deviant corporations accountable in an efficient manner.”).

210. See Den Hond & De Bakker, *supra* note 51, at 909–11.

211. See Backer, *supra* note 109, at 314–316. For a detailed criticism of corporate legitimacy theory and stakeholder theory as vestiges of Marxist infiltration of Japanese economic culture, see generally Miwa, *supra* note 27.

the slightest degree from ordinary marketing contracting between any two people.”²¹² In other words, corporations are simply larger and wealthier—and more artificial—than most natural persons, and thus no more responsible for the protection of human rights. Moreover, corporate power is in fact diffused: when corporations act, they do so on behalf of thousands and even millions of individual owners—their shareholders. Furthermore, critics point out that under the law as it has existed for centuries the “mere act of chartering [a corporation] does not turn a firm into a public entity any more than the act of issuing a birth certificate or a marriage license obligates the individual(s) to serve the public interest.”²¹³

Ultimately, although critics are quick to note that public support of Marxist theory has eroded since the fall of the Berlin Wall, they are less quick to recognize the influence of corporate legitimacy theory—in particular its claims that corporations owe normative duties to stakeholders that society can and should enforce—in ATCA litigation, in the Framework and the Compact, and in the Uniform Code.

6. Summary

NGOs have pursued five basic strategies. The first, “Negotiate,” is the only strategy predicated upon the principle of voluntarism and enforced by the market, while the other four rest upon the power of state political intervention and enforcement. By way of the first strategy, NGOs have demonstrated and negotiated, with some success, to induce corporations to adopt voluntary codes of conduct specifying responsibilities to protect and promote human rights in all aspects and places of their operations. Second, they have turned to litigation, primarily in the U.S. under ATCA, in a largely unsuccessful attempt to impose legal liability for breaches of duties to protect human rights violations in foreign jurisdictions where multinational corporations do business. Third, they have lobbied in the United Nations system, with mixed but largely poor results, to pass declarations and statements of corporate responsibility for the protection of human rights in the hope that these pronouncements will acquire legal force. Fourth, they have rather unsuccessfully urged the States of incorporation for many firms to create State

212. Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777 (1971).

213. Fred D. Miller, Jr. & John Ahrens, *The Social Responsibility of Corporations*, in BUSINESS ETHICS, *supra* note 4, at 190 (summarizing the position of critics of corporate legitimacy theory).

liability regimes for violations of specified human rights obligations. Finally, in conjunction with the academy, NGOs have highlighted the wealth and power of many contemporary corporations, in contrast to the declining power of many developing and failed states, as the basis for urging a major philosophical reconstruction of the corporation as a public, rather than a private, entity, and for contending that, to be judged legitimate and allowed to exercise its power and authority, the corporation must assume many of the functions and duties of public institutions, including, *inter alia*, the protection of human rights, stewardship of public resources, and promotion of the general welfare.

Unifying each of these strategies are two goals: (1) to concretize significantly heightened corporate duties to protect and promote human rights and (2) to either secure voluntary corporate compliance with these expanded duties or else render them enforceable in domestic and/or international courts.

B. *Multinational Corporations*

In theory, when interacting with NGOs, corporations are free to choose from a gamut of strategic options ranging from determined opposition at one end of the conflict spectrum to comprehensive alliance at the other, with detached philanthropic engagement, critical but constructive engagement, accommodation through adoption of some degree of mutually reinforcing objectives, and close strategic coordination occupying the domain between the two poles.²¹⁴ In practice, however, corporations recognize that their policies and actions produce political, economic, and social effects that determine corporate performance and yield consequences not only for the firm but for claimed “shareholders.”²¹⁵ Strategies for interaction with NGOs on the question of human rights must therefore answer not only the fundamental economic question of where and how the firm should compete to earn profits,²¹⁶ but must also ask and answer the following, equally important questions: (1) what are the political, environmental, and social consequences for the corporation and for relevant third-parties of any given strategic choice, and (2) how are these consequences to be accounted for and defended, both internally as well as externally, in economic

214. See John Elkington & Shelly Fennell, *Partners of Sustainability*, in *TERMS FOR ENDEARMENT: BUSINESS, NGOs, AND SUSTAINABLE DEVELOPMENT* 150, 150–62 (Jem Bendell ed. 2000).

215. See ROBERT H. MILES, *COFFIN NAILS AND CORPORATE STRATEGY* 49, 52, 92 (1982).

216. *Id.* at 52.

as well as non-economic terms? Corporations vary in the singularity with which they pursue profits, in their sensitivity to the economic consequences of their decisions, and in their appetite for risk; the neoclassical assumption that all corporations are pure profit maximizers²¹⁷ is inconsistent with empirical observation.

Thus, while the core rights within the human rights canon—freedom from arbitrary arrest, from torture, from rape, and from extra-judicial executions—are universally regarded as forming the bedrock of civilized life by NGOs, by the corporations they shadow, and by states,²¹⁸ great differences of opinion exist as to corporate responsibility—moral as well as legal—for the promotion and protection of these rights. In turn, great variance in the answers provided by various corporations to the questions posed above manifest in the adoption of four very different ideal-typic corporate strategies for interaction with human rights NGOs. The four primary corporate strategies, presented in order from most to least conflictual, are (1) Fight, (2) Engage, (3) Accommodate, and (4) Collaborate.²¹⁹

1. Fight

a. Theory

The first strategy, “Fight,” is predicated upon principles of orthodox shareholder theory that regard the sole social responsibility of a corporation to be the maximization of profit for its shareholders. So long as a corporation “does not transgress the rules of the game set by law, it has the legal right to shape its strategy without reference to anything but profits.”²²⁰ In fact, for managers to pursue other objectives, however noble they might be, is to, in effect, steal property from its owners.²²¹ At least in

217. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (6th ed. 2003) (elaborating a neoclassical theory of law and economics that takes as a given that corporations are rational actors that seek to maximize profits).

218. See Cernic, *supra* note 15 (defining the universal and nonderogable core of the human rights regime).

219. The four ideal-typic corporate strategies have been selected as the set that best reflects empirical observation, an approach with at least one precedent in the literature. See, e.g., Archie B. Carroll, *A Three-Dimensional Conceptual Model of Corporate Social Performance*, 4 *ACAD. MGMT. REV.* 497, 503 (1979) (coding the social responsiveness of corporations to various “social responsibility categories” as either a “reaction,” “defense,” “accommodation,” or “proaction.”).

220. Albert Z. Carr, *Is Business Bluffing Ethical?*, 46 *HARV. BUS. REV.* 143, 149 (1968).

221. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 38 (1991) (contending that under existing cor-

the U.S., the shareholder model “has remained durable as a matter of domestic policy,” and accordingly, “traditional American corporate law. . . does not speak the language of human rights.”²²² In short, because corporations are obligated to be efficient, self-centered, and politically and ethically neutral participants in the marketplace, and because social responsibility is invariably at odds with the obligation to seek profitability, corporations need only submit to the laws imposed through public regulation—narrowly interpreting their legal obligations if it is in their economic interest to do so—and must disregard the ethical or moral demands lodged by private entities with contrary objectives.²²³ If corporations produce outcomes deemed ethical or “socially responsible” by outsiders—for example, the Johnson & Johnson decision to withdraw Tylenol upon the first evidence of tampering—they do so not to earn those judgments or out of consideration of moral or ethical obligations, but because the actions were those most likely to yield future profits.²²⁴

porate law a manager cannot simultaneously promote shareholder wealth and stakeholder interests); Ehrlich, *supra* note 26, at 71–72 (concluding that existing corporate law does not permit managers to make “socially responsible decisions” where such decisions come at the expense of profits owed the shareholders).

222. Backer, *supra* note 109, at 305–07; *see also* Ehrlich, *supra* note 26, at 65 (“Shareholder wealth maximization may be controversial, reviled by some ethical theorists who prefer a social model that emphasizes some sort of community responsibility, but it reflects the basic commercial understanding, at least in the U.S.”); Ehrlich, *supra* note 26, at 65 (“The current reality . . . is that business leaders are almost exclusively bottom line oriented, and stakeholder theory . . . is not the current state of the law.”).

223. *See* Scalise, *supra* note 184, at 283–84 (analyzing shareholder theory and concluding that “[s]ince directors only owe a legal duty to shareholders, directors . . . regard external interests as irrelevant in their decision making . . . unless those [interests] result in profit.”) (alteration in original); *see also* Miwa, *supra* note 27, at 1245 (suggesting that “any requirement that corporate leaders bear ‘social responsibility’ would diminish society’s aggregate wealth in proportion to the intensity of enforcement” because social responsibility is invariably at odds with profitability). Human rights NGOs and other advocates of expansive theories of CSR rail at existing corporate law, contending that its fiduciary duty principle “actually [imposes] a legal obligation [upon the corporation] to be a monster, an ethical monster They’re not supposed to do nice things. If they are, it is probably illegal.” Noam Chomsky, Interhemispheric Res. Ctr.: 20th Anniversary, *Taking Control of Our Lives: Freedom, Sovereignty, and Other Endangered Species* (Feb. 26, 2000), available at <http://www.ratical.org/co-globalize/NC022600.html> (alteration in original).

224. *See* Ehrlich, *supra* note 26, at 67–68 (distinguishing actions motivated by concerns of social responsibility from actions motivated by profit and contending that, although an action may please “stakeholders” as the socially responsible choice, it requires no justification other than its relationship to profitability).

Although corporations deliberately seek competitive advantage by investing in developing countries where resources and labor are cheap and plentiful and host governments provide forced labor and commit other human rights violations to maximize returns,²²⁵ corporations, like states, are not moral agents and thus, have no duties to consider the rectitude of the acts of third parties so long as they themselves are in compliance with their legal obligations.²²⁶ While “Fight” would not condone the commission of human rights violations by corporations, it flatly denies responsibility for human rights violations committed by third-parties,²²⁷ and rejects the guilt-by-association argument at the core of ATCA “aiding and abetting” claims. Moreover, “Fight” finds no legal basis for rejecting any competitive advantages secured through investment in countries whose governments, without the knowledge and support of corporations, are the direct authors of human rights misconduct.²²⁸ “Zones of weak governance,” a designation that includes failing states, regions of conflict and war, and repressive regimes, may present risks but also create opportunities in the form of lower costs arising from more docile workforces and more facilitative regulatory authorities.²²⁹

In short, for “Fight,” law, and not some notion of social responsibility, defines the boundaries of permissible conduct,

225. DONALDSON, *supra* note 34, at 33 (stating that MNCs seek out foreign countries for investment to take advantage of favorable labor, regulatory, and legal environments). The competitive advantage gained, at least in the short run, by locating operations in such “business-friendly” environments is quantifiable and significant. *Id.* For a discussion of the association of legal deficiencies with economic underdevelopment, see AVINASH K. DIXIT, *LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE* 3–4, 7–9 (2004).

226. CRANE & MATTEN, *supra* note 23, at 134.

227. *Id.* at 48.

228. An example of a corporation that has chosen “Fight” as its strategy is Unocal. Despite a recent legal settlement with plaintiffs alleging its complicity in human rights violations committed by the Burmese Government, Unocal continues to assert political and ethical neutrality in its discussion papers and continues to select host nations on the sole basis of their capacity to create environments conducive to the furtherance of profits. See Kielsingard, *supra* note 84, at 195.

229. See Ruggie, *supra* note 166 (defining the phenomenon of weak governance). “Fight” treats as theoretically irrelevant all normative arguments, including the hypothesis that a lack of CSR increases the likelihood of political violence born from the resentment of those who have suffered relative losses during the process of globalization and thus increases risks and costs over the long term, as well as the likelihood that corporations will be obligated to “Fight.” For a discussion of the theory that socially responsible business yields peace, see TIMOTHY L. FORT, *BUSINESS, INTEGRITY, AND PEACE: BEYOND GEOPOLITICAL AND DISCIPLINARY BOUNDARIES* 1–129 (2007).

and the social contract in its current iteration supports this interpretation.²³⁰ Because this position is diametrically opposed to that espoused by human rights NGOs, “Fight” treats these entities as hostile, extra-legal actors that jeopardize corporate profitability and pose existential legitimacy threats.²³¹ Accordingly, in response to NGO pressure, “Fight” directs corporations to adapt to the environment by using those tactics necessary to mitigate the threat and overcome NGO opposition, including, if need be, the willingness to battle for survival in “zero-sum conditions.”²³² CSR, through the lens of “Fight,” is merely “Corporate Scandal Response.”²³³

b. Implementation

Several tactics follow. First, “Fight” directs corporate counsels to prosecute the criminal acts of NGOs²³⁴ and to bring civil actions to hold human rights NGOs accountable for the legally unsupportable aspersions they cast against their corporate targets.²³⁵ Second, corporations choosing “Fight” are lobbying

230. See Ehrlich, *supra* note 26, at 71 (“Law . . . will resolve most questions of business ethics in a way that most people will find appealing, without the need to resort to questions of social responsibility.”).

231. See Miwa, *supra* note 27, at 1229–30 (arguing that the notion that corporations have duties to entities other than shareholders is “dangerous and harmful” to the profitability and even survival of corporations).

232. PETER LORANGE, *CORPORATE PLANNING: AN EXECUTIVE VIEWPOINT* 119, 284 (1980).

233. Joe W. (Chip) Pitts III, *Business, Human Rights, & the Environment: The Role of the Lawyer in CSR & Ethical Globalization*, 26 *BERKELEY J. INT’L. L.* 479, 479 (2008).

234. NGOs have engaged in a host of allegedly illegal acts in support of their advocacy, including destruction of animal testing labs, occupation of oil platforms, sabotage, and illegal occupations of corporate property. See EDMUND M. BURKE, *MANAGING A COMPANY IN AN ACTIVIST WORLD* 3 (2005) (chronicling “violent” NGO protests, including the firebombing of gas stations in Germany, destruction of oil wells in Canada, transmission of threatening letters to pharmaceutical corporate employees, arson at research centers, and even murder). In 2003, ExxonMobil filed a civil action against Greenpeace seeking injunctive relief and damages for trespassing on ExxonMobil headquarters. *Greenpeace, Inc. v. Exxon Mobil Corp.*, 133 S.W.3d 804, 807 (Tex. App. 2004) (affirming grant of temporary injunction prohibiting Greenpeace protesters from entering Exxon property). In 2006, ExxonMobil, acting through an NGO entitled Public Interest Watch funded almost exclusively by ExxonMobil, filed an unsuccessful IRS complaint against Greenpeace, accusing it of abusing its tax-exempt status in its lobbying efforts against ExxonMobil and of money laundering and other financial crimes. See *IRS Audited Greenpeace at Request of ExxonMobil-Funded Group*, *DEMOCRACY NOW!* (Mar. 24, 2006), <http://www.democracynow.org/article.pl?sid=06/03/24/150203>.

235. Conley & Williams, *supra* note 31, at 16. For example, a New Zealand paper mill targeted with boycotts, trespassing, and intense negative media

Congress to severely restrict, or even eliminate, corporate liability under ATCA.²³⁶ Third, corporations that “Fight” are making good on their threats to disinvest in order to avoid the threat of litigation. For example, Chevron recently ceased operations in offshore oilfields in southern Nigeria and permanently eliminated jobs after militant attacks led to the abductions of six workers and reduced output by more than 200,000 barrels per day.²³⁷ While Chevron might have hired additional security personnel either from the private sector or from the ranks of the Nigerian military in order to continue operations—the “socially responsible” choice, perhaps—had it done so, and had these personnel in the discharge of their duties been accused of human rights violations, the effect on Chevron’s profitability might well have been more negative than to simply cease operating. Finally, corporations that “Fight” reject any responsibility for the actions of host governments: when Shell was asked in 1995 to comment on the detention, trial, and hanging of a group of Nigerian citizens who had campaigned against environmental damage inflicted by foreign petroleum corporations, the official response was that “Nigeria makes its rules and it is not for private companies like us to comment on such processes in the country.”²³⁸ In sum, corporations that elect to “Fight,” a committed group that may still have constituted a majority less than a decade ago,²³⁹ are actively demonstrating that they cannot be bent by NGO pressure to “join the parade” of socially responsible corporations. To maintain their resolve they remind themselves that “[w]e just don’t

campaigns by Greenpeace sought an injunction; according to the mill manager, “We decided to take the battle to Greenpeace, and our PR guy enjoyed the scrap. We decided we can win this war. We can visit the schools before they do, and build relationships with indigenous groups. It comes down to individuals and over time, to trust.” Robert A. Kagan et al., *Explaining Corporate Environmental Performance: How Does Regulation Matter?*, 37 *LAW & SOC’Y REV.* 51, 72 (2003).

236. See Borchien Lai, Note, *The Alien Tort Claims Act: Temporary Stopgap Measure or Permanent Remedy?*, 26 *Nw. J. INT’L L. & BUS.* 139, 161 (2005) (describing such efforts).

237. Spencer Swartz & Chip Cummins, *Chevron Move Hurts Oil Markets, Nigeria*, *WALL. ST. J.*, May 12, 2007, at A3.

238. CHRISTOPHER AVERY, *BUSINESS AND HUMAN RIGHTS IN A TIME OF CHANGE* 22 (2000), available at <http://198.170.85.29/Avery-Report.html>. (follow “2. Society Calls on business to act” link).

239. See *id.* (follow “4. A slow response to new realities” link) (stating that “the absentees [from the CSR movement] remain in the majority, treating human rights violations as external to their responsibilities, regarding any adverse impact as a public relations problem rather than one that lies in the heart of the boardroom”).

take a view that we should try to paint a picture of something other than what we are.”²⁴⁰

The “Fight” strategy rests on two main, and potentially weak, assumptions. First, it assumes that developing and maintaining positive relationships with constituencies other than shareholders—an objective central to all other strategies—is irrelevant to profitability. In other words, a reputation with certain constituencies as a “good corporate citizen” is less valuable than the profits to be had by refusing to perform those actions that would earn that reputation.²⁴¹ Second, it assumes that any legal liability suffered by a corporation employing the “Fight” strategy will be less than the additional profits earned by choosing to “Fight.”

With respect to the first assumption, there is reason to believe that positive relationships with at least some constituencies are necessary, if not sufficient, conditions for profitability, and that reputation matters. As one commentator reminds corporations planning to “Fight,”

[t]he marketplace sometimes punishes bad acts. Selling shoddy goods drives customers away; bad workplace conditions drive employees away; wasteful use of resources drives costs up. In the long run, these practices tend to fail. This is particularly true when there will be repeated transactions and enduring relationships, because the gain from future cooperation exceeds the immediate gain that cheating might bring. Hence, the importance of one’s reputation It is not that good ethics is good business. It is the other way around.²⁴²

240. Geoff Colvin, *The Defiant One*, FORTUNE, Apr. 30, 2007, at 86, 88. As evidence of their intransigence in the face of NGO pressure, note that although ExxonMobil has already spent \$3 billion cleaning up the Prince William Sound in Alaska after the spill in the Exxon Valdez case, the corporation continues to resist paying the \$2.5 billion in punitive damages awarded against it, contending that hundreds of peer-reviewed scientific studies conducted by researchers from major independent scientific laboratories and academic institutions have proven that “the ecosystem in Prince William Sound today is healthy, robust and thriving.” ExxonMobil, *The Valdez Oil Spill*, http://www.exxonmobil.com/Corporate/about_issues_valdez.aspx (last visited Oct. 11, 2011).

241. CRANE & MATTEN, *supra* note 23, at 175. There is reason to believe that the importance of reputation, and the impact of external events on corporate reputation, varies as between corporations, and that those that elect to “Fight” may be less sensitive to reputational effects. See generally BRENT FISSE & JOHN BRAITHWAITE, *THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS* (1983) (developing a theory of corporate reputational effects and suggesting variation in terms of sensitivity to reputational effects across corporations).

242. Ehrlich, *supra* note 26, at 66.

The perception that a corporation is irresponsible with respect to human rights protection may well earn it a bad reputation with at least some employees, customers, shareholders, institutional investors,²⁴³ concerned citizens, and even regulators. Whether and, if so, how much the reputational effects of the “Fight” strategy with regard to human rights depress profits are very difficult to determine and may depend at least in part on the validity of the second assumption.

Determining the legal liability suffered by a corporation employing the “Fight” strategy in situations involving interaction with human rights NGOs is a complex proposition. Only one corporation to date has been found liable under ATCA,²⁴⁴ and no existing international tribunal has yet asserted jurisdiction over corporations for violations of human rights.²⁴⁵ Yet just as Congress or the federal judiciary can narrow the applicability of ATCA to corporate human rights practices, these branches of the government can also extend it. Moreover, the cost of litigation in such cases is great even when corporations are successful in avoiding liability. Finally, many risk-averse boards of directors and managers are cautious about the prospect of future ATCA claims, not primarily because of the potential for liability or the cost of defense (although these are concerns)²⁴⁶ but because of the “far more significant risk of damage to [corporate] reputation[s] from credible allegations of human rights abuse.”²⁴⁷ In the words of various business organizations in their amicus brief to the Supreme Court in the *Sosa* case, ATCA “lawsuits almost invariably raise highly charged allegations of human rights abuses [and] generate considerable publicity The very existence of such lawsuits creates risk.”²⁴⁸ In short, it is not even the proof of human rights abuses, but the mere allegation thereof

243. See Williams & Conley, *supra* note 19, at 95 (noting that institutional investors are increasingly requiring that corporations in which they hold shares demonstrate “social responsibility”).

244. As of this writing, only one corporation has been found liable, and only two have settled cases. See *supra* notes 79–106 and accompanying notes.

245. See *supra* notes 81, 83–85 and accompanying text.

246. See Williams & Conley, *supra* note 19, at 88 (indicating that “human rights violations are part of the liability risks that directors need to consider” after *Sosa*).

247. Bernard S. Black, Brian R. Cheffins, & Michael Klausner, *Outside Director Liability*, 58 STAN. L. REV. 1055, 1092–94 (2006); see also Williams & Conley, *supra* note 19, at 93 (stating that the “risks to business reputation from credible allegations of human rights abuses create incentives for companies and directors to consider these issues seriously, irrespective of whether an ultimate finding of liability is likely.”).

248. See Brief for the Nat’l Foreign Trade Council et al. as Amici Curiae Supporting Commissioner, *supra* note 5, at 4.

and the resulting public hue and cry, that may most significantly injure the accused corporation's profitability.²⁴⁹

On the other hand, corporations truly committed to "Fight," even if they should be found liable under an invigorated ATCA, are able to calculate and then pass along, or threaten to pass along, the cost of any civil penalties imposed by courts to other entities, resulting in lost jobs, higher prices, and fewer products on the market.²⁵⁰ In some instances, "Fight" might even urge deliberate acceptance of liability as a profitable and rational strategy. The case of the Ford Pinto is an exemplar of this tactic:

The Ford Pinto was first introduced in 1971 and became the focus of a major scandal when it was discovered that its design allowed its fuel tank to be ruptured in the event of a rear end collision. Ford was aware of this design flaw and decided it would be cheaper to pay off possible lawsuits for resulting deaths than to redesign the car. A cost-benefit analysis prepared by Ford concluded that it would cost \$11 per car to correct the flaws. Benefits derived from spending this amount of money were estimated to be \$49.5 million. This assumed that each death which could be avoided would be worth \$200,000, that each major burn injury which could have been avoided would be worth \$67,000 and that an average repair cost of \$700 per car would also be avoided. It further assumed that there would be 2,100 burned vehicles, 180 serious burn injuries and 180 burn deaths during the lifetime of the car. When the unit cost was spread out over the number of cars and light trucks which would be affected by the design change, at a cost of \$11 per vehicle, the cost was calculated to be \$137 million, much greater than the \$49.5 million benefit. It was hence perfectly rational, according to this instrumental logic, to decide that 360 people should be burnt or die rather than Ford pay out an extra \$87 million.²⁵¹

Moreover, although Ford clearly absorbed some reputational damage for its manufacture of the Pinto, public outrage did not translate into formal or informal boycotts of other Ford vehicles or otherwise injure Ford's profitability. In other words, there is simply insufficient empirical evidence that, by electing to

249. See French, *supra* note 69, at 276 (discussing the utility of using public shame to punish corporate misdeeds).

250. See Rafalko, *supra* note 174, at 315–16 (describing the "ricochet" effects of civil punishment of corporations).

251. CAMPBELL, JONES, MARTIN PARKER, & RENÉ TEN BOS, FOR BUSINESS ETHICS 89 (2005).

“Fight,” a corporation will necessarily incur costs for legal liability and/or reputational damage that will exceed the additional profits to be earned by choosing that strategy.²⁵² Unless the costs of civil penalties and reduced consumer demand outweigh the gains of cleaving closely to the pursuit of profits for the benefit of shareholders—a calculation that may depend on the strategy chosen by NGOs—the corporation beset by human rights NGOs²⁵³ is, according to a “Fight” strategy, agnostic with regard to ethics or morals, best off simply giving battle on all fronts—legal, political, and economic.²⁵⁴

2. Engage

a. Theory

The second strategy, “Engage,” maintains that the “economic mission” of the corporation is to maximize strength while minimizing vulnerability in a world in which “steadily rising moral and ethical standards” and rapidly expanding and unregulated communications networks have sharpened the examination of corporate activities and injected “complexity” into corporate decision-making.²⁵⁵ “Engage,” also described as “strategic corporate citizenship,”²⁵⁶ recognizes that many external constituencies bring to bear additional demands upon the corporation and that prudent corporate decision-makers must, out of self-interest and necessity, be simultaneously prepared to exploit opportunities to benefit from, or to shrewdly counter the constraints and threats imposed by, these relationships.²⁵⁷ Corporations employing the “Engage” strategy must be acutely sensitive to opportunities and threats in the external environment and either learn from experience how properly to differentiate between and respond to vari-

252. See, e.g., DONALDSON, *supra* note 34, at 114 (conceding that corporate risk analysis relies on a combination of objective and subjective judgments and that many corporations elect options that entail the likelihood of harm out of the belief that the benefits outweigh that harm).

253. CRANE & MATTEN, *supra* note 23, at 363 (describing human rights NGOs as a mass of “unelected, unaccountable ideologues”).

254. One commentator describes corporations electing the “Fight” strategy as “Corporate Locusts” that “operate . . . everywhere destroying social and environmental value and undermining the foundations of future growth.” See John Elkington, *The Triple Bottom Line*, in 3 THE ACCOUNTABLE CORPORATION: CORPORATE SOCIAL RESPONSIBILITY, *supra* note 16, at 97, 104–05.

255. KENNETH R. ANDREWS, *THE CONCEPT OF CORPORATE STRATEGY* 89 (rev. ed. 1980).

256. Note, *Finding Strategic Corporate Citizenship: A New Game Theoretic View*, 117 HARV. L. REV. 1957, 1958–59 (2004).

257. DANIEL R. GILBERT, JR., *THE TWILIGHT OF CORPORATE STRATEGY: A COMPARATIVE ETHICAL CRITIQUE* 86–104 (1992).

ous “stakeholders” or else cease to exist in an increasingly competitive economy.²⁵⁸

“Engage” is not an overtly political strategy. Its objective is still the maximization of firm profits, and it acknowledges this by the very act of making business decisions: a corporation reallocates resources and impacts the interests of external constituents (some positively and others negatively) who can affect firm profitability through their responses.²⁵⁹ Accordingly, “Engage” embraces the principle that every corporate decision must be based, at least in some measure, on noneconomic calculations.²⁶⁰ Nor is “Engage” an expressly ethical strategy; it directs the corporation toward the maximization of profit by capitalizing upon opportunities and minimizing threats, treating the “generally accepted moral conventions current at the time” of each decision in purely instrumental terms.²⁶¹

Corporations electing to implement “Engage” must answer three fundamental questions to implement the strategy: (1) Who are the “stakeholders” and what is the relative importance of each?; (2) What opportunities does each stakeholder present?; and (3) What threats does each stakeholder make (implicitly or expressly)?

i. Who is a stakeholder?

The domain of potential claimants to stakeholder status is potentially vast, particularly for MNCs that operate around the globe. In the case of British Petroleum, for example, the list includes “hundreds, probably even thousands of [groups] . . . [f]rom Azerbaijan educational groups, to British transport organizations, to Saharan desert communities, or fishing community groups in Trinidad.”²⁶² Yet not all self-proclaimed stakeholders are legitimate “stakeholders” within the understanding of that word employed by “Engage” strategy, which maintains that a corporation is the ultimate arbiter of who is a stakeholder and that

258. See Luo, *supra* note 29, at 214 (warning that “[f]ailure to pay heed to [the demands of external constituencies]” can destroy a corporation’s economic value).

259. See, e.g., Williams & Conley, *supra* note 19, at 75–76 (describing the political dimension of corporate decision-making with regard to assessing and weighing the interests of various external constituencies and the impacts of corporate actions upon these constituencies).

260. See, e.g., J.J. Boddewyn, *International Political Strategy: A Fourth ‘Generic’ Strategy* (1986) (unpublished paper) (on file with author) (discussing a strategic concept not dissimilar from “Engage”).

261. Ehrlich, *supra* note 26, at 67.

262. CRANE & MATTEN, *supra* note 23, at 352.

the resolution of the question is both an objective and subjective inquiry. Objectively, any individual or group who can assist or hinder the corporation in the achievement of its overriding purpose—profitability—affects the corporation and is thus a stakeholder as that concept is employed within the “Engage” strategy. Subjectively, managers may exercise their judgment to determine that certain groups that are simply “affected by the corporation” at present but may in the future gather the capacity to check its organizational purposes, either through alliances with existing stakeholders or through resort to media or government intervention, may be regarded as stakeholders as well.²⁶³

Clearly, not all stakeholders are equally important. Those who possess the power to enhance or threaten firm profitability, make demands that are generally perceived as legitimate, and require immediate corporate action are the most salient; the “Engage” strategy instructs that it is toward them that corporate energies must be directed in order to address their interests and, thereby, to protect and promote the corporation.²⁶⁴

In the debate about CSR and human rights protection, various external constituencies—typically, NGOs, consumer groups, academics, and investors—claim that corporations must possess “regulatory, economic, and social licenses [to operate],” that the set of obligations to which corporations are bound is broader than simply the existing corporate legal regime, and that these constituencies—who self-identify as “shareholders”—are entitled to privately enforce corporate compliance to the level of these higher ethical and social standards by publicizing negative information about wayward corporations, bringing lawsuits, and using other means to injure corporate reputations.²⁶⁵ Each of these constituencies poses an immediate threat to the profitability and

263. See FREEMAN, *supra* note 56, at 52 (developing the strategic approach to the concept of “stakeholder”).

264. See Ronald K. Mitchell et al., *Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts*, 22 *ACAD. MGMT. REV.* 853, 853–55. (1997) (elaborating upon a shareholder salience theory); see also FORT, *supra* note 229, at 131–229 (discussing an Integrated Social Contracts Theory that aids corporations in determining which stakeholders should have influence). “Engage” often adopts a definition that assesses whether the proposed stakeholder can negatively influence the corporation; if so, the entity is a stakeholder. See, e.g., Robert A. Kagan et al., *Explaining Corporate Environmental Performance: How Does Regulation Matter?*, 37 *LAW & SOC’Y REV.* 51, 52–77 (2003) (describing as stakeholders any entities that can “enforce[] the terms of the social license [to operate]” by imposing adverse publicity, generating consumer boycotts, bringing citizen suits, or applying political pressure for regulatory initiatives).

265. See Kagan et al., *supra* note 264 at 77–78 (describing informal “enforcement” of “obligations” that exceed formal legal rules).

the continued existence of the corporations they target²⁶⁶ and thus qualifies as a stakeholder under the “Engage” strategy.

On the other side of the equation, various other constituencies in the debate over CSR and human rights may present opportunities for enhancement of firm profitability. Employees, customers, suppliers, and local communities may have preferences regarding corporate protection of human rights and the capacity, through labor unions, business-to-business decision-making, or consumer advocacy groups, to exercise choices with regard to those preferences. Any constituency that has the power to choose whether to do business with a corporation at any point along its value chain, and who predicates that choice (at least in part) upon its perception of that corporation’s actions with respect to the protection of human rights, is thus regarded by the “Engage” strategy as a stakeholder.²⁶⁷

ii. What are the Opportunities?

Advocates of the “business case for CSR”²⁶⁸ generally argue that, by pursuing a socially responsible agenda, corporations reap intangible resources from their stakeholders, such as reputational benefits, increased organizational legitimacy, and long-term relationships that translate into tangible benefits and confer long-term competitive advantage over corporations that are not committed to CSR.²⁶⁹ In effect, the socially responsible

266. See CRANE & MATTEN, *supra* note 23, at 353 (“As soon as a [group] starts to direct its attentions towards a corporation, the stakes begin to rise, and the potential impact on the corporation and its reputation becomes more hazardous.”) (alteration in original).

267. For a discussion on the various indicia that corporations have used to identify external stakeholders, see BURKE, *supra* note 234, at 79–89.

268. Williams & Conley, *supra* note 19, at 104. For a thorough presentation and critical examination of the “business case” for CSR, see SIMON ZADEK, *THE CIVIL CORPORATION* 65–76 (2001). For an examination of the business case for CSR using empirical data from European corporations, see generally Daniela Venanzi & Barbara Fidanza, *Corporate Social Responsibility and Value Creation: Determinants and Mutual Relationships in a Sample of European Listed Firms* (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=939710 (finding a slight but positive correlation between responsible corporate behavior and corporate value).

269. See, e.g., Shawn L. Berman et al., *Does Stakeholder Orientation Matter? The Relationship Between Stakeholder Management Models and Firm Financial Performance*, 42 *ACAD. MGMT. J.* 488 (1999); Thomas Donaldson, *Defining the Value of Doing Good Business*, *FIN. TIMES* (London), June 3, 2005, at 2–3. The argument is that a significant portion of the value of the socially responsible corporation is achieved in the reputation of its brand, leaving such a corporation simultaneously vulnerable to reputational damage and open to reputational benefit. For a detailed discussion of the concept of corporate reputation, see generally

corporation sells its responsibility as a “product” in the marketplace for which there is positive demand. Primary stakeholders value the protection of human rights independently of market transactions, and are willing to pay a premium to do business with a corporation that has earned its reputation by serving these ends.²⁷⁰ Corporations that protect human rights may increase consumer demand and decrease price sensitivity,²⁷¹ increase employee satisfaction, earn additional investment,²⁷² enjoy price

CHARLES J. FORBRUN, *REPUTATION: REALIZING VALUE FROM THE CORPORATE IMAGE* (1996).

270. Foremost among these primary stakeholders may well be consumers, who register strong preferences in favor of CSR in surveys. *See, e.g.*, Scalise, *supra* note 184, at 288–89 (citing a September 2000 Business Week Harris Poll in which U.S. respondents preferred, by a ratio of 19 to 1, socially responsible corporate behavior over purely self-interested corporate behavior); *see also* Greathead, *supra* note 48, at 725 (citing other studies). Socially responsible corporations may also attract and retain more capable employees, as employee preferences of where to work and loyalty once hired are correlated with perceptions of corporate ethics. Litowitz, *supra* note 170, at 813–14.

271. *See, e.g.*, Thomas W. Dunfee, *Marketing an Ethical Stance*, *FIN. TIMES* (London), Nov. 17, 1995, at 13 (noting that “[t]he Body Shop and ice cream producer Ben & Jerry’s receive substantial free media publicity as a result of their identification with popular social issues . . . [as well as] a premium over competing products.”); Bruce Horovitz, *Whole Foods Pledges To Be More Humane*, *USA TODAY*, Oct. 21, 2003, at 1B (citing Whole Foods’ adoption of price increases in order to introduce humanely-raised and -slaughtered meats) (alteration in original).

272. The contention is that certain socially responsible investment funds, that assess corporations on variables such as transparency, environmental sustainability, and protection of human rights, will purchase shares only of corporations that satisfy their guidelines. *See, e.g.*, AMNESTY INT’L, *supra* note 53 (stating that corporations which use their influence to promote human rights promote a better climate for investment). Research supports this assertion: investors have demonstrated a willingness to pay an 18% premium for shares of U.S. corporations perceived to exercise sound corporate governance. *See* Steven Lydenburg, *The Mainstreaming of Socially Responsible Investing: Current Developments and Future Trends*, in 3 *ACCOUNTABLE CORPORATION: CORPORATE SOCIAL RESPONSIBILITY*, *supra* note 16, at 175, 177 (describing the growth of the socially responsible investment movement and reporting that information about a corporation’s CSR record is, to socially responsible investors, the “financial equivalent of nutrition labels” on food). Teams at investment brokerages responding to investor demand for information about corporate performance assess how corporations are affected by variables ranging from environmental performance to governance records and human rights performance. *Id.* at 181. Paul Coombes & Mark Watson, *Three Surveys on Corporate Governance*, *McKINSEY Q.*, Dec. 2000, at 74, 76; Pete Engardio, *Beyond the Green Corporation*, *BUS. WK.*, Jan. 29, 2007, at 50, 54 (reporting that if Wal-Mart enjoyed the reputation that Target possesses it would be worth an additional \$16 billion); Roberto Newell & Gregory Wilson, *A Premium for Good Governance*, *McKINSEY Q.*, Aug. 2002, at 20, 20–23. The Calvert Group, a leader in socially responsible investment, “actively seek[s] out companies that are making serious efforts to promote human rights

premiums on their equity due to reduced litigation and regulatory risk,²⁷³ and thus deliver increased valuation to their shareholders.²⁷⁴ In short, if corporate attentiveness to human rights is a good for which stakeholders are willing to pay, providing that good serves corporate self-interest.²⁷⁵ As evidence of the opportunities available to the corporation electing the “Engage” strategy, it is significant to note that many—perhaps even most—senior executives accept the validity of the business case for CSR,²⁷⁶ and that their public relations departments spend significant organizational energy and resources to publicize their corporate good citizenship in the various media.

at home and abroad.” AVERY, *supra* note 238. For a thorough examination of the concept of socially responsible investment and the processes whereby it adds value to corporations, see generally Frank Jan de Graaf & Alfred Slager, *Guidelines for Integrating Socially Responsible Investment in the Investment Process* (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=919108.

273. Stocks with good CSR ratings, as determined by managers of socially responsible investment funds, may enjoy a small price premium because they are more attractive purchases to such funds, while those with poor ratings can carry a price discount. Moreover, socially responsible firms tend to enjoy lower stock price volatility and lower firm-specific risk than irresponsible firms due perhaps to decreased concerns about legal exposure. See Alison Maitland, *Profits from the Righteous Path*, FIN. TIMES (London), Apr. 3, 2003, at 13 (citing a study by the United Kingdom’s Institute for Business Ethics).

274. See LUO, *supra* note 29, at 206 (indicating that for many socially responsible corporations, “an increasing percentage of their corporate value today is made up of reputation, goodwill, or benevolence” earned through acting responsibly). See generally Alison Mackey et al., *Corporate Social Responsibility and Firm Performance: Investor Preferences and Corporate Strategies*, 32 ACAD. MGMT. REV. 817 (2007), for a thorough empirical examination and analysis of the “business case for CSR” and a conclusion that there is a positive correlation between CSR and firm value.

275. A number of studies affirm the positive financial effects of socially responsible corporate behavior. See, e.g., JOSHUA DANIEL MARGOLIS & JAMES PATRICK WALSH, *PEOPLE AND PROFITS?* (2001); Jeffrey S. Harrison & R. Edward Freeman, *Stakeholders, Social Responsibility, and Performance: Empirical Evidence and Theoretical Perspectives*, 42 ACAD. MGMT. J. 479 (1999); Richard A. Johnson & Daniel W. Greening, *The Effects of Corporate Governance and Institutional Ownership Types on Corporate Social Performance*, 42 ACAD. MGMT. J. 564 (1999); Marc Orlitzky et al., *Corporate Social and Financial Performance: A Meta-Analysis*, 24 ORG. STUD. 403, 424–25 (2003) (re-analyzing 52 empirical studies with a population of 33,878 observations).

276. See WORLD ECON. FORUM, *GLOBAL CORPORATE CITIZENSHIP: THE LEADERSHIP CHALLENGE FOR CEOs AND BOARDS* 10 (2002), available at http://www.weforum.org/pdf/GCCI/GCC_CEOstatement.pdf (reporting that 70% of U.S. CEOs and 78% of European CEOs surveyed in 2002 agree that CSR is essential to corporate profitability).

iii. *What are the Threats?*

Critics of the business case for CSR contend that the “jury is still out on the economic benefits to be derived from good corporate citizenship” and that “[w]ith the exception of those in the socially responsible investment business, [critics] have not heard anyone make a robust claim that CSR can be shown to boost the traditional bottom line.”²⁷⁷ Few NGOs or the corporations they monitor have attempted to quantify the costs or benefits of altering business practices to satisfy stakeholders concerned with corporate CSR performance,²⁷⁸ and some recent empirical research suggests that the cost of CSR is greater than its benefits, measured strictly in economic terms, to business.²⁷⁹ As one commentator noted before the oil spill in the Gulf of Mexico in 2010, “BP is spending \$200 million on reformulating their brand [as a more socially responsible product] Yes, they’re high on corporate reputation rankings. But what does it do for them?”²⁸⁰ Recent research suggests that CSR increases firm value only where the demand for it exceeds available supply, and that, under some conditions, a corporation that behaves “responsibly” will actually decrease its value.²⁸¹

277. Conley & Williams, *supra* note 31, at 14 (citing POULOMI MRINAL, WHAT CASE FOR THE BUSINESS CASE, ETHICAL CORP. (June 3, 2005), <http://www.ethicalcorporation.com/content.asp?ContentID=3718>; *see also* Deva, *supra* note 207, at 741–42 (rejecting the business case for CSR on the basis of disconfirming empirical data). A handful of authors claim that the question of whether CSR is beneficial to the profitability of a corporation has been decided in the affirmative and that the debate is over. *See* Aguilera et al., *supra* note 30, at 836. Others suggest that while CSR imposes costs it also serves to insure against incurring other costs, such as reputational harm, the expense of litigation, and so on. *See, e.g.*, Mackey et al., *supra* note 274; Venanzi & Fidanza, *supra* note 268. For a discussion on the merits of these claims and on the vitality of the debate, *see infra* notes 278–83 and accompanying text.

278. *See* Conley & Williams, *supra* note 31, at 13–14. For example, without offering any evidence, Amnesty International insists that it is “difficult to put figures to the business costs and benefits associated with human rights, but the connections are undeniable.” AMNESTY INT’L, HUMAN RIGHTS: IS IT ANY OF YOUR BUSINESS? 25 (2000).

279. *See* Conley & Williams, *supra* note 31, at 37; *see also* Brad Brown & Susan Perry, *Removing the Financial Performance Halo from Fortune’s “Most Admired” Companies*, 37 ACAD. MGMT. J. 1347 (1994).

280. David J. Vogel, *Managing Corporate Social Responsibility*, WALL ST. J., Mar. 3, 2007, at R2 (“[The CSR field] is littered with lofty intentions that don’t pay off.”).

281. *See* Mackey et al., *supra* note 274, at 831–33 (noting, however, that ascertaining demand and supply for CSR is exceedingly difficult, especially as these variables are evolving, are subject to “shocks,” and can be artificially manipulated).

Intuitively, formulating new policies, taking different actions, and monitoring conduct will increase costs; it is less clear that potential benefits will follow as a result. Moreover, increasing supply of CSR “products” typically does not immediately increase demand; there is a time lag during which the firm absorbs costs.²⁸² Further, critics suggest that only the least price-sensitive and best informed of consumers will voluntarily pay a price premium for the goods or services offered by a socially responsible corporation.²⁸³ Finally, many corporations have declined to represent themselves as socially responsible in the first instance by rejecting membership in organizations such as the Global Compact out of fear that the slightest perceived violation of the rights enumerated therein will trigger expensive litigation.²⁸⁴

b. Implementation

One of the most contested subjects within the field of corporate governance generally, and CSR specifically, is whether the corporate pursuit of a socially responsible agenda is a benefit or a cost.²⁸⁵ The answer to this question in any specific case is dependent upon a host of variables that are very difficult to model in such a manner as to give constructive guidance to corporate decision makers. A casuistic approach to the implementa-

282. *Id.* at 833.

283. See Conley & Williams, *supra* note 31, at 14 (“[E]very person we have heard or interviewed has agreed with the proposition that they (except for an affluent niche) will not pay more for responsibly-produced products.”); see also Deva, *supra* note 207, at 746 (“Stakeholders may not fully understand the complex ethical dimensions involved in a given product or service . . . [and] do[] not usually boycott each and every product or service.”); *id.* (“[C]onsumers or investors may very much like to support [CSR] but for the price of doing so; the more the variance in price between the products and services of X [the responsible corporation] and Y [the irresponsible corporation], the less the chances that rewards and sanctions will flow from consumers”); Ezra Rosser, *Offsetting and the Consumption of Social Responsibility*, 89 WASH. U. L. REV. (forthcoming 2011) (conceding that only a very small percentage of consumers will pay a significant price premium to ensure CSR, and that the likelihood they will do so is proportional to their incomes and personal wealth).

284. See, e.g., Kielsingard, *supra* note 84, at 203 (“The issuance of corporate human rights policies and acquiescence to international initiatives, like the *Global Compact*, . . . puts [corporations] on the record vis-a-vis their responsibility for human rights norms . . . [and the] use of the company policy to impeach them, either in a public relations forum or in a lawsuit, can have a devastating impact.”).

285. See Deva, *supra* note 207, at 745 (“[R]esults coming from this research so far have not been conclusive or one-sided”).

tion of “Engage” that identifies relevant variables, assigns them weights, and links them in a chain of causation is necessary.

Generically speaking, “Engage” counsels corporations to manage relationships with stakeholders in the non-market environment aggressively and proactively, and many corporations have formed CSR departments with mandates to do just this.²⁸⁶ From a tactical perspective, “Engage” is amoral and self-interested: the theory seeks to shape and even manipulate public and media opinion through tactical demonstrations of support for *causes célèbres*,²⁸⁷ “lobbying, educational efforts, forming alliances with other corporations, (lawfully) purchasing influence with government and regulatory officials, signing on to NGO declarations such as the Global Compact to enhance reputation, selectively developing relationships with certain NGOs to increase leverage over them, and [taking] other forms of ‘political action’”²⁸⁸ that are permissible and legitimate means of countering threats and seizing opportunities to enhance profitability. Many mining corporations and financial services corporations with imperfect reputations have embraced “Engage” as the strategy most likely to minimize negative social pressures while preserving profitability;²⁸⁹ an interesting recent application is the

286. See Williams & Conley, *supra* note 19, at 81 (providing examples of corporations that have formed CSR departments).

287. The use of the word “manipulating” is deliberate: NGO critics accuse a number of corporations, including BP, Bayer, Nike, Shell, Rio Tinto, and Nestlé, of using proclamations of commitment to CSR as marketing tools to enhance their reputations and images and gain benefits from consumers and other stakeholders without actually transforming their practices. See generally Terry Collingsworth, “Corporate Social Responsibility,” *Unmasked*, 16 ST. THOMAS L. REV. 669 (2004) (arguing that corporate voluntarism is a public relations ploy designed to gain corporations a positive image but which is bereft of any sincere commitment to human rights principles); see also Conley & Williams, *supra* note 31, at 15 (“[S]ome CSR insiders have expressed a concern that [corporations] may be ‘gaming the system’ . . . [by] imposing a code of conduct . . . only to . . . revert [] to business as usual”); Note, *supra* note 256, at 1969–70 (“[S]ome firms use socially responsible behavior to shield themselves from interest group criticism and public sanctions” even as they carry on irresponsibly, while others simply strive to create the perception that they engage in socially responsible behavior to reap the benefits of this perception in the marketplace.). One commentator refers to this deliberate manipulation as the “ugly” face of CSR. See SUBHABRATA BOBBY BANERJEE, CORPORATE SOCIAL RESPONSIBILITY: THE GOOD, THE BAD, AND THE UGLY 2 (2007).

288. DONALDSON, *supra* note 34, at 40.

289. YAKOVLEVA, *supra* note 17, at 19. Interestingly, however, not all mining corporations have adopted the basic “Engage” strategy; at least some of the corporations with greater market capitalization, including Rio Tinto, Normandy Mining, and Placer Dome, have moved “beyond compliance” and adopted fairly rigorous and restrictive voluntary industry codes of conduct. *Id.* at 98. These

“Members Project” by American Express, which urges card members to vote on a “project to do something good for our world” and promises to fund the winning project with a \$5 million grant.²⁹⁰ Through the “Members Project,” American Express is simultaneously reinforcing its brand, demonstrating its commitment to CSR to its most important stakeholders, and seemingly inviting these stakeholders into full partnership, all for less than 0.2% of its gross profit.²⁹¹

Thus, under the “Engage” strategy, the corporation may, and indeed should, vigorously protect human rights so long as it is profitable to do so. For example, as Royal Dutch Shell stated in its Principles (1997) it is formally committed to supporting “fundamental human rights in line with the legitimate role of business.”²⁹² If it is not profitable to protect human rights, however, “Engage” directs the corporation to either (1) reshape the interests of stakeholders so that they come to disfavor corporate involvement in human rights protection, (2) reduce stakeholders’ capacity to do harm by concerted lobbying and legal efforts to eliminate or reduce potential ATCA liability, or (3) pass along the costs of human rights protection, such as privately contracted and directly accountable security forces, foregone opportunity costs in states where governments cannot be constrained, and liability judgments or settlements in claims brought under ATCA, to consumers and other external constituencies.²⁹³

corporations might be more properly classified as having chosen an “Engage Plus” strategy: although they have not elected to “Accommodate,” they have distinguished themselves from peers.

290. See AM. EXPRESS, *The Members Project*, FACEBOOK.COM, <http://www.facebook.com/membersproject> (last visited Oct. 11, 2011).

291. See AM. EXPRESS, *Financial Statement* (2006), available at <http://moneycentral.msn.com/investor/invsb/results/statemnt.aspx?symbol=exp>.

292. See DONALDSON & DUNFEE, *supra* note 43, at 4 (citing Shell’s Principles) (citation omitted).

293. An example of the successful implementation of “Engage,” albeit in strategic interaction with NGOs in the issue-area of health and environment rather than human rights, is the case of Pepsi. See Diane Brady, *Pepsi: Repairing a Poisoned Reputation in India*, BUS. WK., June 11, 2007, at 46–54. When hit with boycotts for allegedly introducing high levels of pesticides in its soft drinks in India and draining water from water-poor areas for its production, Pepsi recognized community groups as important stakeholders and funded construction of clean water delivery systems and environmental improvements in poor areas but refused to bend to pressure to withdraw its products or alter its manufacturing on the ground that Pepsi products were, according to its CEO, “the safest in the world, bar none,” and the tests suggesting impurities were faulty. *Id.* (quoting Pepsi CEO Indra K. Nooyi). Instead, the CEO traveled to India, met directly with influential news media, and appeared in public speaking about Pepsi initiatives to improve the environment. Sales of Pepsi resumed and rose to levels higher than before the boycotts. *Id.* Recognizing the value of Pepsi’s

3. Accommodate

a. *Theory*

The third strategy, “Accommodate,” is grounded in the belief that it is possible and desirable to produce a theory of the corporation that is “simultaneously morally sound in its behavioral prescriptions and instrumentally viable in its economic outcomes.”²⁹⁴ Thus, the selection of “Accommodate” as corporate strategy entails a commitment, as in the case of Altria—the parent corporation of the tobacco company Philip Morris—to a “responsibility effort” that pledges to all stakeholders that the corporation will make not only lawful business decisions but “responsible” ones, implying a standard of ethical care higher than that imposed by law²⁹⁵ and a commitment to “overcompliance” rather than to merely brushing over the legal bar. Corporations that “Accommodate” reject an adversarial relationship with critics in favor of forming partnerships that can assist them in identifying and addressing potential CSR problems even before they develop.²⁹⁶ In short, CSR is an important part of their business profile and their strategy.²⁹⁷

strategy, Coke is now planning to replicate it. See Andrew Batson, *Coke Aims to Improve Water Recycling*, WALL ST. J., June 6, 2007, at A10.

294. Jones et al., *supra* note 30, at 28. Many corporate executives are philosophically committed to the tenet of the “Accommodate” strategy that maintains that if a corporation embraces CSR and alters its business practices in keeping with the normative regimes, CSR imports the net economic outcome will be positive. Conley & Williams, *supra* note 31, at 13–14.

295. See ALTRIA, *Responsibility: Our Approach*, http://www.altria.com/en/cms/Responsibility/At_A_Glance/Our_Approach/default.aspx# (last visited Oct. 11, 2011). In other words, under the “Accommodate” strategy, laws proscribing unethical conduct could “wither away” or be repealed and corporations would nonetheless refrain from engaging in such behavior no matter how profitable.

296. Conley & Williams, *supra* note 31, at 5.

297. See Gary R. Weaver et al., *Integrated and Decoupled Corporate Social Performance: Management Commitments, External Pressures, and Corporate Ethics Practices*, 42 ACAD. MGMT. J. 539 (1999) (describing what is effectively the “Accommodate” strategy). Corporations that have made CSR an integral part of their business, although more in the environmental rather than the human rights arena, include Unilever, GE, GlaxoSmithKline, and Sony. See Engardio et al., *supra* note 272. Corporations that “Accommodate” have been termed “Corporate Honeybees” because of their capacities to create a “sustainable business model” with a “clear . . . set of ethics-based business principles” and for their “sociability and . . . powerful symbiotic relationships . . .” Elkington, *supra* note 254, at 107. Other commentators describe this strategy as a “New Economy” approach in which the corporation adapts, acts on stakeholder interests, and builds new CSR competencies voluntarily and without primary reference to profitability. ZADEK, *supra* note 268, at 67.

The “Accommodate” strategy incorporates five basic principles: (1) corporations are responsible for all of the direct and indirect outcomes of their business operations;²⁹⁸ (2) managers are moral as well as economic agents obliged to exercise discretion toward the achievement of socially responsible outcomes;²⁹⁹ (3) the protection of human rights is decidedly within the sphere of the outcomes of corporate business operations; (4) conflicts between corporate ends and the ends of stakeholders, and in particular NGOs, are to be resolved through cooperation and relational negotiation rather than through litigation, with the object being the discovery of hidden value and the accommodation of all parties’ interests;³⁰⁰ and (5) profit and ethical practice are mutually reinforcing from both positive and normative perspectives: their intersection in the use of the “Accommodate” strategy—also known as “convergent stakeholder theory”³⁰¹—adds value to corporations and produces morally just outcomes.

b. Implementation

Implementation of “Accommodate” in the issue-area of human rights protection requires several concrete actions. A corporation must first survey its operations against the backdrop of its code of conduct, declarations such as the Global Compact, the Norms, and the Framework, and other statements of best practices to identify situations or circumstances where its conduct, even if lawful, falls short of delivering socially responsible human rights outcomes.³⁰² It must then bear the expenses associated with altering its practices if necessary, negotiating with injured parties and relevant stakeholders as to redress and mea-

298. See LUO, *supra* note 29, at 200 (labeling this the “principle of public responsibility”).

299. *Id.* at 202 (labeling this the “principle of managerial discretion”).

300. See TIMOTHY L. FORT, *ETHICS AND GOVERNANCE: BUSINESS AS MEDIATING INSTITUTION* 11 (2001) (suggesting, from an “Accommodate” strategic point of reference, that whereas “law [is] framed in adversarial terms . . . business . . . focus[es] on cooperation” and relational negotiation).

301. Jones et al., *supra* note 30, at 28–29.

302. A number of corporations employing the “Accommodate” strategy, including Barclays, Ericsson, GE, General Motors, Hewlett-Packard, and Novartis have formed the Business Leaders Initiative for Human Rights (“BLIHR”) to “break down some of the barriers and uncertainties that have kept many responsible companies from realizing their role in supporting universal human rights.” BUSINESS LEADERS INITIATIVE FOR HUMAN RIGHTS (Sept. 14, 2011), <http://www.blihr.org>. BLIHR aims to “find practical ways of implementing the [international human rights instruments] in a business context” and to inspire other businesses to do likewise. *Id.*

tures to prevent future violations, and subscribing to initiatives such as the Global Compact, the Norms, and the Framework.

Furthermore, it must defend its commitment to ethical conduct if challenged by shareholders. Under existing corporate law—even in jurisdictions that lack stakeholder statutes—the managers and directors of corporations are permitted to “take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business, and . . . devote a reasonable amount of resources” to CSR functions.³⁰³ However, the corporation electing “Accommodate” as its strategy must anticipate and prepare arguments to defend its business judgment against shareholder derivative suits challenging its pursuit of particular human rights outcomes as an abandonment of shareholder interests and a violation of fiduciary duty.³⁰⁴

4. Collaborate

a. *Theory*

The fourth strategy, “Collaborate,” is distinct in that it states the core mission of the corporation in virtually altruistic terms and rejects the argument that corporations are economically rational actors.³⁰⁵ Although some managers go so far as to suggest that the pursuit of profit is “wicked and immoral and must be curbed and controlled by external forces,”³⁰⁶ the “Collabo-

303. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS Part II(a)–(b) (Tentative Draft No. 2, Apr. 13, 1984).

304. Well-settled case law supports the “Accommodate” strategy and the proposition that the business judgment rule has always given managers and directors wide discretion to make decisions that advance stakeholders’ interests even at the expense of shareholders. *See, e.g., Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968). The Australian and other common legal systems make similar allowances for directors and managers to consider the interests of stakeholders even at shareholders’ expense; many civil law systems specifically require such considerations. *See generally* Andrew Lumsden & Saul Fridman, *Corporate Social Responsibility: The Case for a Self-Regulatory Model*, (Sydney L. Sch. Legal Studies Research Paper No. 07/34, 2007), available at <http://ssrn.com/abstract=987960>, for a discussion of Australian corporate law as regards directors’ and managers’ duties, the consistency of the “Accommodate” strategy and self-regulation more generally with Australian law, and suggestions for how Australian law might be reformed to further protect directors and managers exercising a vision of CSR.

305. *See* POSNER, *supra* note 217, at 3–4 (arguing that corporations are economically rational entities that, by virtue of this rationality, ineluctably pursue economic self-interest).

306. Donaldson, *supra* note 14, at 166. Some scholars have noted that some corporations have undergone an “overreaction” to the felt necessity of adopting CSR programs and have, as a result, neglected to maintain a focus on profitability. *See, e.g., Vogel, supra* note 280.

rate” strategy generally does not demonize profit but rather seeks it out in order to place it voluntarily in the service of all conceivable stakeholders.³⁰⁷ As capitalist potentate Henry Ford II explained in embracing a “Collaborate” strategy before a Harvard Business School audience in 1969: “[f]or a long time people believed that the only purpose of industry is to make a profit. They were wrong. Its purpose is to serve the general welfare.”³⁰⁸

This normative commitment to the social welfare and to ethical objectives, even at the expense of profit, allows corporations electing the “Collaborate” strategy to dispense with any concerns about the accountability or the agendas of stakeholder organizations³⁰⁹ and to open their doors to admit these entities as full partners. Accordingly, NGOs have become “part of the system,” and it is no longer a question of acceding to NGO demands; rather, corporations are falling into the ranks beside them, eagerly and even passionately embracing CSR as their identity and their lodestar.³¹⁰ The social, economic, political, and cultural views of the corporation that elects to “Collaborate” and the NGO are shared, their preferences are identical, and they pub-

307. Under CEO Emeritus Bill Gates, the Microsoft Corporation, at least in the last decade, has gradually transitioned into what might best be described as a “Collaborate” strategy in regard to NGOs and the CSR agenda in general. Although Microsoft is still run profitably, profit has taken a back seat to charitable works: Gates, as of June 2008, has left his managerial role to focus completely on philanthropy at the head of his \$60 billion Bill and Melinda Gates Foundation. In his words, “‘Humanity’s greatest advances are not in its discoveries—but in how those discoveries are applied to reduce inequality.’” Robert A. Guth, *The Speechmaker: How Bill Gates Got Ready for Harvard*, WALL. ST. J., Jun. 8, 2007, at A1 (quoting Bill Gates).

308. DAVID W. EWING, *FREEDOM INSIDE THE ORGANIZATION* 65 (1977) (quoting Henry Ford II, grandson of Henry Ford, the founder of the Ford Motor Company).

309. See Jem Bendell, *Civil Regulation: A New Form of Democratic Governance for the Global Economy?*, in *TERMS FOR ENDEARMENT: BUSINESS, NGOs AND SUSTAINABLE DEVELOPMENT*, *supra* note 214, at 239, 239–54.

310. See Conley & Williams, *supra* note 31, at 11 (indicating that for some managers, embracing CSR is not simply an attitude toward corporate governance but is rather a “feel-good, therapeutic focus on process”). For some “true believers,” CSR is less a mode of corporate governance or an ethical corporate strategy than it is a cult complete with behavioral and intellectual homogeneity and the promise of “continued self-improvement.” *Id.* at 9; see also BURKE, *supra* note 234, at 8 (noting that Orin Smith, CEO of Starbucks, volunteers alongside employees to clean beaches as part of his commitment to an expansive notion of CSR). One former CEO describes CSR as a moral commitment and a “concern for justice,” as expressed in the corpus of international human rights law and environmental law, which permeates business decision-making. Pitts, *supra* note 233, at 491–92.

licly express their joint commitments.³¹¹ Symbiotic partnerships thus formed create, in effect, joint ventures between corporations and NGOs—in which both partners are able to decide corporate actions and policies,³¹² including investment decisions, divestment decisions, and operating policies.³¹³

However, while “Collaborate” implies equality as between partners, NGOs have been quick to assert their influence, and corporations that choose to “Collaborate” may find that unless they participate in their power-sharing arrangements they may surrender decisional freedom to NGOs who will wind up “controlling the agenda and defining the choices that are available.”³¹⁴ While this may be of concern to some corporations, it appears that others are so committed to “Collaborate” and so dependent upon NGO approval that they do not fret the loss of strategic control or the sacrifice of profitability that may accompany their pursuit of CSR. Examples of this strategy put into practice include corporations such as The Body Shop, Ford, General Motors, Novartis, and Microsoft announcing, unbidden, that they and their suppliers promote fair trade, oppose animal testing, defend human rights, protect the environment, and assist in disaster relief around the globe; in response, NGOs laud them with awards and praise them as “responsible corporate citizens.”³¹⁵

b. Implementation

Implementation of “Collaborate” in the protection of human rights is largely a matter of allowing human rights NGOs to set an agenda and dedicating the necessary financial resources to fund their work in transnational fora and in the field. Corporations that “Collaborate” lead in the adoption and adherence to the Global Compact and the Norms yet strive to meet the even higher standards demanded by their NGO partners, who are invited to closely monitor every stage and every locale of their operations.³¹⁶ If local governments complicate the attainment of

311. See BURKE, *supra* note 234, at 99 (describing the degree of symbiosis in the corporate-NGO relationship that emerges under these conditions).

312. CRANE & MATTEN, *supra* note 23, at 369.

313. See AMNESTY INT’L, *supra* note 278, at 11 (describing an ideal corporate strategy from the NGO perspective as ceding this power to NGOs).

314. Conley & Williams, *supra* note 31, at 18 (quoting SustainAbility’s research and advocacy director).

315. See Deva, *supra* note 207, at 715–16 (footnote omitted) (describing the symbiotic relationship between corporations and NGOs that characterizes the “Accommodate” strategy).

316. Collaborating corporations might also voluntarily adopt the “Human Rights Impact Assessment” approach that anticipates and mitigates

high standards of human rights protection, corporations that “Collaborate” divest and swiftly and quietly reach negotiated settlements should any parties allege violations of human rights as a result of corporate activity. Finally, the “Collaborate” strategy, recognizing the potential for competitive advantage, urges governments to adopt more expansive legislation, including the Uniform Code, to create jurisdiction and tribunals that can impose civil and even criminal liability on other corporations whose commitments to human rights protection in both theory and practice fall short of those who “Collaborate.” In short, with respect to human rights protection, corporations that “Collaborate” are effectively hosts, perhaps even proxies, for their NGO partners.

5. Summary

When interacting with NGOs in the domain of human rights protection, corporations choose from four primary strategic options that guide decisions such as where and how to do business and what considerations to give to the consequences of corporate decisions and actions. Although the millions of corporations across the globe are all but universally committed to the protection of human rights as a desirable end in theory, their conduct shows great variation in their acceptance of the argument that corporations, rather than states, bear moral and legal responsibility for human rights in practice. The four primary corporate strategies for interaction with human rights NGOs—Fight, Engage, Accommodate, and Collaborate—reflect this variation.

III. MODELING THE CONFLICT AND PROSPECTIVE SOLUTIONS

A. *Game Theory: An Introduction*

When a corporation and the human rights NGO community interact, each party (1) assesses its objectives and preferences and its limitations and constraints, (2) is aware that its actions will affect the outcome or set of outcomes available to the other, and (3) makes decisions in response to what the other will do (or what each thinks the other might do). Interdependency is critical. Because each party can affect the outcome available to the other, corporations and human rights NGOs do not engage in

impacts of firm activities on the human rights of a wide range of stakeholders. See Tarek F. Maassarani et al., *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT’L L.J. 135 (2007) (describing a collaborative and proactive corporate approach to preventing human rights violations similar to environmental impact assessments and labeled “Human Rights Impact Assessment”).

independent decision-making but rather in the explicit calculation of each other's actions upon their own decisions and in the selection of actions based upon these cross-effects. The interaction between "strategies," or choices available to each "player," is known as a "game."³¹⁷ Accordingly, it is useful to turn to game theory, a relatively young but important branch of the decision sciences that permits the generation of core strategic principles and provides a rigorous method for analyzing these principles and the decisions players make as they interact under conditions of strategic interdependence.³¹⁸

In brief, game theory assigns the outcomes associated with a game, which correspond to each available combination of strategies, numerical values, or "payoffs," which are a function of the strategic interaction.³¹⁹ The rules of the game are simply the list of players, the strategies available to each player, the payoffs to each player of all possible strategy combinations, and the assumption of rationality.³²⁰ Note that although game theory presumes rationality—meaning that players purposefully act to maximize their payoffs³²¹—it does not presume the values players pursue, nor does it assume perfect information, perfect play, or perfect competition. Games range the spectrum in terms of the degree of opposition of player interests from pure cooperation games, in which players must coordinate strategies to maximize payoffs, to zero-sum games in which either player gains only at the expense of the other.

In determining the selection of strategies, each player seeks to play a "dominant strategy," defined as that strategy that outperforms all of that player's other strategies irrespective of the rival's strategy, and to avoid a "dominated strategy," defined as that strategy that is uniformly worse for the player playing it than

317. See AVINASH DIXIT & SUSAN SKEATH, *GAMES OF STRATEGY* 18–20 (2d ed. 2004) (differentiating mere "decisions" from "games" on the basis of a mutual capacity to affect the outcomes available to the other party).

318. Game theory as a discipline dates back to World War II. See, e.g., JOHN VON NEUMANN & OSKAR MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1944). While a relative newcomer to the social sciences, game theory is robust in its explanatory and predictive capabilities as confirmed by experimental research and field observations across a wide range of disciplines. See Vernon L. Smith, *Game Theory and Experimental Economics: Beginnings and Early Influences*, in *TOWARD A HISTORY OF GAME THEORY* 241 (E. Roy Weintraub ed., 1992).

319. DIXIT & SKEATH, *supra* note 317, at 28–29.

320. *Id.* at 32.

321. "Payoffs" are simply numerical values for the units of the "good" achieved by a given outcome and can be defined in economic or noneconomic terms.

any of his other strategies. When each player employs the strategy that is the best response to the strategies of the other player, an “equilibrium” with corresponding payoffs is achieved in which, given what the other player does, neither would alter his own move. If neither player has a dominant strategy, each chooses a strategy that maximizes his own payoff while correctly anticipating the payoff-maximizing strategy of his rival, and a “Nash equilibrium” of mutual “best responses” results.

1. The Prisoners’ Dilemma

The Prisoners’ Dilemma (“PD”) is a commonly used game useful in explaining and predicting interactions between players who wish to cooperate but are uncertain whether self-interest will permit it. In the standard PD game, two players each interested in maximizing their own payoffs simultaneously choose strategies and receive payoffs determined by their combination of strategies. Although each player can gain by cooperating, the strategy of “defecting,” or betraying the other player, is dominant for each player and cooperation fails. For example, two suspects, A and B, are arrested by the police, who have insufficient evidence to convict either. The police, having physically separated both prisoners, visit each to offer the same deal: if one testifies for the prosecution against the other while the other remains silent, the defector goes free and the silent accomplice receives the full ten-year sentence. If both remain silent, both are sentenced to only six months on a lesser charge. If each betrays the other, each receives a two-year sentence. Each prisoner must decide whether to defect or to “cooperate,” defined here as remaining silent. However, neither prisoner can be certain what choice the other will make. The dilemma can be summarized as follows:

TABLE 1: THE PRISONERS’ DILEMMA

		<i>Prisoner B</i>	
		Silent	Confess
<i>Prisoner A</i>	Silent	.5, .5	10, 0
	Confess	0, 10	2, 2

Prisoner A’s payoff is listed first—the smaller the payoff the lower the sentence and the greater the value to the player.

Each player desires for the other to remain silent while he confesses, yet both know that if each confess they will receive two-year sentences—a worse outcome than the cooperative outcome of six-month sentences. The cooperative outcome is Pareto opti-

mal—any other decision would be worse for the two prisoners considered together—but unstable, because neither can be sure that the other will not defect in the hope of escaping punishment entirely and forcing the other to serve ten years. Consequently, because defection is not punishable and the dominant strategy for each is to confess, a suboptimal Nash equilibrium results where each player confesses and serves two years and would not wish unilaterally to change his strategy. In other words, a collectively irrational outcome is obtained through individually rational actions. Each player would like to remain silent if he could be certain that the other player would remain silent as well; since neither can be sure, they cannot escape from the dilemma and are stuck with a sentence four times longer than that which they might have received.

B. *The “Corporation” v. The “NGOs”*

The strategic interaction, or game, between any given corporation and the human rights NGOs can be modeled using a multi-strategic variation of the standard PD game.³²² In this

322. It is also possible to conceive of the provision of human rights protection as a public goods problem, where each corporation is effectively playing a game against other corporations and employing strategies with regard to human rights protection in consideration of what strategies it expects other corporations to choose. In such a game, a cooperative strategy is one that provides human rights protection, whereas a defection is one that does not. The payoff to the corporation that defects while others cooperate is greater than the payoff for cooperation because the defector does not incur the costs of providing protection, thus conferring upon the defector a competitive advantage relative to cooperating corporations. However, if too many corporations defect, increased government prosecution and generalized reductions in public perceptions of business make all corporations worse off than if they had all cooperated. Nonetheless, because of uncertainties as to what strategies other corporations will choose, in this game defection emerges, ironically, as the dominant strategy, even for corporations that would otherwise prefer to cooperate, unless: (1) players can communicate, (2) the game is played repeatedly, or (3) third-parties, such as the government or NGOs, can impose direct and meaningful sanctions upon defectors. See AVINASH K. DIXIT & BARRY J. NALEBUFF, *THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE* 115–18 (1991) (modeling this game); see also Deva, *supra* note 207, at 742–44 (analyzing corporate conduct regarding CSR as a public goods game); Note, *supra* note 256, at 1965–69 (analyzing corporate conduct regarding CSR as a public goods game). While the foregoing is an important application of game theoretic modeling to the study of CSR, the questions posed in the present Article involve the assignment of the benefits of strategies directly to the players, thus dictating the treatment of the game as one involving private goods. More specifically, this Article asks: (1) what are the optimal strategies for corporations and for NGOs in their strategic interaction over the issue-area of human rights protection, and (2) are there outcomes that are either Pareto optimal or Nash equilibria that might be achieved through com-

game, as in the standard PD game, there are two players—the “corporation” and the “NGOs”³²³—yet instead of two strategies, “cooperate” and “defect,” there are four and five discrete strategies available to the corporation and to NGOs respectively. Thus, rather than four, there are a total of 4-by- 5, or twenty, outcomes possible, each with a set of associated payoffs. Once these outcomes and their payoffs are determined, they can be represented in a 4-by- 5 matrix³²⁴ and subjected to analysis.

1. General Assumptions

In determining payoffs for each of the twenty possible outcomes, the present theory makes the following simplifying assumptions:

- (1) protection of human rights is equally costly or beneficial as a proportion of revenue for all corporations;³²⁵
- (2) payoffs associated with the various strategies can be assigned within a reasonable margin of error;

munication or third-party intervention and which are superior to those that pertain at present?

323. Although it is possible to apply game theory to interactions of more than two players, by representing each corporation as a discrete decisional entity and aggregating all the various human rights NGOs into a second and unitary decisional entity it becomes possible to generate testable explanations and predictions of corporate and NGO behavior without vastly expanding the complexity of the model and the calculations necessary to build it. This maneuver, while a simplification of reality, is perhaps not inappropos: each corporation is an independent decisional entity, even if it is influenced by internal and external constituencies, and the human rights community is made up of a predictable variety of players—human rights and labor NGOs, trade unions, national and international business organisations, lawyers, and academics from multiple disciplines—whose preferences and normative understandings tend to be rather closely aligned. See Kinley & Chambers, *supra* note 156. For these reasons at the least, theoretical parsimony, so long as it does not seriously weaken explanatory and predictive power, is desirable.

324. See *infra* Table 2.

325. There is reason to suspect that this assumption does not survive closer comparative analysis: different national political economies afford differing incentives and impose differing costs for corporations considering whether to engage in CSR generally and the protection of human rights more specifically. See Aguilera et al., *supra* note 30; see also Isabelle Maignan & David A. Ralston, *Corporate Social Responsibility in Europe and the U.S.: Insights from Businesses' Self-Presentations*, 33 J. INT'L BUS. STUD. 497 (2002) (reporting that the tendency toward socially responsible corporate behavior varies across countries). However, incorporating the assumption simplifies analysis and aids theory-building and thus it falls to future research to examine the role of national cultural and political-economic variables in determining CSR strategies and behaviors.

- (3) costs and benefits of strategies are objective and transparent;
- (4) costs and benefits are private;³²⁶
- (5) no other strategies are possible;
- (6) players elect “pure” strategies—that is, they do not play a mixed strategy of “Fight” and “Engage,” or “Demonstrate” and “Regulate;”
- (7) payoffs are a function of the degree to which each player accomplishes its objectives;
- (8) NGOs’ objectives are fixed; the objectives of the corporation depend on and vary with the strategy it selects;
- (9) players are playing a one-shot game and do not consider the effects of their play on the future; and
- (10) each player has no reliable information about what strategy the other will play.

The present pre-theory is very specific in *not* assuming that a corporation has a preference for maximizing profit simply by virtue of the fact that it is a corporation. Although “rationality [and thus profit maximization] is a strong assumption in the legal literature about how corporations . . . behave in market settings,” empirical observation suggests strongly that preferences vary between corporations, and for this reason corporations elect different strategies to satisfy different preferences.³²⁷

2. Assumptions Regarding Payoffs

a. NGOs

The “NGOs” player can earn a maximum payoff of “100” in interacting with a corporation. Points are earned by NGOs for the commission of each corporate act as follows:

- (i) negotiate directly with NGOs, 5 points;
- (ii) sue NGOs, -5 points;
- (iii) adopt voluntary Code of Conduct, 5 points;

326. For an analysis of the game that relaxes or discards these assumptions, treats CSR as a public good, and allows corporations only two strategies, see generally Note, *supra* note 256.

327. Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, in *BEHAVIORAL LAW AND ECONOMICS* 144, 144–45 (Cass R. Sunstein ed., 2000). Tracing the chain of causation—whereby preferences are formed and exert influence as independent variables upon the selection of strategies as dependent variables—is the focus of future research. See Cass R. Sunstein, *Introduction* to *BEHAVIORAL LAW AND ECONOMICS*, at 1 (noting that “preferences . . . are constructed rather than elicited by social situations.”). For a brief discussion on the origin of preferences as independent variables that determine strategy, see *infra* notes 434–35 and accompanying text.

- (iv) explicitly include respect for human rights in Code of Conduct, 5 points;
- (v) agree to reporting provisions on its human rights practices, 10 points;
- (vi) scrupulously honor commitments in Code of Conduct, 10 points;
- (vii) provide resources for active NGO monitoring and reporting, 10 points;
- (viii) grant settlement in ATCA case, 10 points;
- (ix) offer redress to human rights victims without being sued, 5 points;
- (x) sign the Global Compact, 5 points;
- (xi) publicly embrace the Norms and/or the Framework, 5 points;
- (xii) lobby for the Uniform Code, 10 points;
- (xiii) publicly commit to the stakeholder theory of governance, 5 points;
- (xiv) accept membership in BLIHR,³²⁸ 5 points;
- (xv) lobby for heightened legal requirements for protection of human rights, 10 points;
- (xvi) lobby for reduced legal requirements for protection of human rights, -5 points;
- (xvii) invest in state with bad human rights record, -5 points;
- (xviii) divest to avoid threat of litigation, -5 points;
- (xix) be sued by shareholders for practices subsequent to adopting stakeholder approach, 5 points.

b. The Corporation

Each corporation can earn a maximum payoff of “100” in interacting with the NGOs. The points earned by a corporation vary depending upon its preferences and its choice of strategy.

For “Fight”, the corporation earns points as follows:

- (i) successfully prosecute NGOs either civilly or criminally, 10 points;
- (ii) successfully lobby to eliminate or severely restrict ATCA, 10 points;
- (iii) divest to avoid threat of litigation, 5 points
- (iv) avoid accepting external constituencies as “stakeholders,” 20 points;
- (v) avoid economic sanction by the marketplace, 10 points;

328. See *supra* note 302 (discussing the BLIHR).

- (vi) absorb economic sanction by the marketplace, -10 points;
- (vii) avoid being sued under ATCA, 20 points,
- (viii) avoid liability in ATCA suit, 5 points;
- (ix) maintain or increase profitability, 20 points.

For “Engage,” the corporation earns points as follows:

- (i) maintain or increase profitability, 20 points;
- (ii) earn price premium through providing enhanced human rights protection, 10 points;
- (iii) earn equity premium through providing enhanced human rights protection, 10 points;
- (iv) earn additional investment through providing enhanced human rights protection, 10 points;
- (v) avoid ATCA suit, 10 points;
- (vi) earn reputational benefits for signing Corporate Code of Conduct (with express provisions for human rights protection) and Global Compact, 10 points
- (vii) successfully lobby to eliminate or severely restrict ATCA, 10 points;
- (viii) pass along costs of affording enhanced human rights protection to stakeholders, 10 points;
- (ix) form strategic partnership with NGO stakeholders to increase leverage, 10 points.

For “Accommodate,” the corporation earns points as follows:

- (i) make public commitment to stakeholder theory of governance, 10 points;
- (ii) earn reputational benefits for signing Corporate Code of Conduct (with express provisions for human rights protection) and Global Compact, 20 points;
- (iii) agree to reporting provisions under the Corporate Code of Conduct, 10 points;
- (iv) embrace and conform corporate practice to Norms/Framework, 10 points;
- (v) provide resources to assist NGOs in monitoring, 10 points;
- (vi) avoid violations of human rights in sphere of operations, 10 points;
- (vii) avoid ATCA suit, 10 points
- (viii) offer redress to human rights victims of corporate actions without being sued, 10 points;
- (ix) avoid shareholder suit, 10 points.

For “Collaborate,” the corporation earns points as follows:

- (i) negotiate directly with NGOs, 5 points;
- (ii) adopt voluntary Code of Conduct, 5 points;
- (iii) explicitly include respect for human rights in Code of Conduct, 5 points;
- (iv) agree to reporting provisions on its human rights practices, 10 points;
- (v) scrupulously honor commitments in Code of Conduct, 10 points;
- (vi) provide resources for active NGO monitoring and reporting, 10 points;
- (vii) avoid ATCA case, 10 points;
- (viii) offer redress to human rights victims without being sued, 5 points;
- (ix) sign the Global Compact, 5 points;
- (x) publicly embrace the Norms/Framework, 5 points;
- (xi) lobby for the Uniform Code, 10 points;
- (xii) publicly commit to the stakeholder theory of governance, 5 points;
- (xiii) accept membership in BLIHR, 5 points;
- (xiv) lobby for heightened legal requirements for protection of human rights, 10 points.

3. Narrative Accounts of Game Outcomes

The following narratives assess the outcomes for each strategy pairing.

a. *“Fight” v. “Negotiate”*

When a corporation electing to “Fight” interacts with an NGO choosing to “Negotiate,” the NGO is unable to negotiate directly with the corporation, and, if it is too “noisy,” it faces the possibility of civil or criminal prosecution. The corporation will simply not adopt a Code of Conduct or accept the principle that it owes any duties to stakeholders, and thus it will reject any responsibility for violations of human rights committed by other parties, even in states with bad human rights records where it locates some of its investments. It is as likely that refusing to adopt a Code of Conduct will have negative economic effects as it is that a corporation will successfully sue NGOs. Accordingly, the corporation choosing to “Fight” against NGOs choosing to “Negotiate” will earn 45 points, while NGOs will earn -10 points.

b. *“Fight” v. “Litigate”*

When a corporation electing to “Fight” interacts with an NGO choosing to “Litigate,” the legal strategy of the corporation will be focused on defending against ATCA claims, and thus it will not successfully prosecute NGOs. At the same time, the corporation defending against an ATCA claim does not have the “clean hands” necessary to lobby for the restriction or elimination of the statute; however, the corporation will likely divest from other states with bad human rights records to avoid other litigation. While the corporation will reject that it has stakeholders, it will nevertheless absorb some economic sanctions in the marketplace by virtue of the reputational harm it suffers from the ATCA lawsuit. Although the corporation will not likely be found liable, nor will it offer a settlement, it will incur costs in defending against the ATCA claim. It is difficult to assess the effects of the ATCA claim on profitability, as despite the market sanctions the corporation may well benefit from its strategy of investing in states with bad human rights records; it is probably safest to assume they are negligible.

Accordingly, the corporation choosing to “Fight” against NGOs choosing to “Litigate” will earn 50 points, while NGOs will earn -10 points.

c. *“Fight” v. “Regulate”*

When a corporation electing to “Fight” interacts with an NGO choosing to “Regulate,” the corporation fixes its efforts on lobbying to undercut the Global Compact and the Norms as “soft law,” and generally to reduce legal protections of human rights in domestic and international fora. During this process the corporation electing to “Fight” is not likely to invest in states with bad human rights records, and may well seek to divest in order to reduce risk.

The outcome of the regulatory battle is unclear; the Norms are largely dormant or at least still voluntary in nature, and it is thus necessary to assume that the status quo will prevail at least in the short run. It is also probable that the effects of regulatory battles will not cause negative market effects for the corporation that decides to “Fight”—hearings in transnational fora are not as likely to generate public interest as is litigation in domestic courts. However, the application of regulatory pressure is unlikely to induce corporations choosing to “Fight” to accede to any NGO demands regarding the Code of Conduct or the Norms/Framework, and the likelihood that shareholders would

sue a corporation seeking to avoid the prospect of additional involuntary quasi-legal obligations is near zero.

Accordingly, the corporation electing to “Fight” against the NGO adopting the “Regulate” strategy will earn 80 points while the NGO will earn -10 points.

d. “Fight” v. “Legislate”

When “Fight” interacts with “Legislate,” the corporation focuses its efforts on lobbying to eliminate or severely restrict ATCA, to undercut the Global Compact and the Norms/Framework as “soft law,” to prevent the implementation of the Uniform Code and stakeholder statutes, to deny the expansion of the jurisdiction of the ICC, and to reduce legal protections of human rights in domestic and international fora. As with “Regulate,” the “Legislate” strategy creates disincentives for corporations to invest in states with bad human rights records and may well cause them to divest in order to reduce risk.

The outcome of the legislative struggle is dependent on the party affiliations of political incumbents and on the capacity of the players to spend on lobbying. Without additional information, uncertainty abounds, especially given the recent pronouncement of the Supreme Court in *Sosa* coupled with the headway the Uniform Code has made in several States. Yet the negative publicity that attends corporate intransigence on the subject of human rights in legislative hearings may yield some measurable economic sanctions from the market. Although the application of regulatory pressure is unlikely to induce corporations choosing to “Fight” to accede to any NGO demands regarding the Code of Conduct or the Norms/Framework, and although the likelihood that shareholders would sue a corporation seeking to avoid the prospect of additional and expensive legal obligations is near zero, the ultimate effects on corporate profitability of the “Legislate” strategy may well be negative.

Accordingly, the corporation choosing to “Fight” against the NGOs electing to “Legislate” earns 20 points, while the NGOs earn -10 points.

e. “Fight” v. “Delegitimate”

When a corporation electing to “Fight” interacts with NGOs choosing to “Delegitimate” through theoretical development and academic discourse, the corporation is likely to do little more than observe, maintain lobbying efforts to reduce the risk of greater legal exposure under ATCA and potentially the Global Compact and the Norms/Framework, develop their own theoret-

ical rebuttals, and be prepared to react if NGO efforts to “constrain corporate misbehavior” are translated into concrete proposals for major legislative reform—whether in the Uniform Code, the ICC, or some other model. The corporation that elects to “Fight” does not alter its investment strategy, does not absorb economic sanctions, and does not experience any negative effects on profitability.

Accordingly, the corporation that decides to “Fight” against NGOs that chooses to “Delegitimate” earns 75 points while the NGO earns -10 points.

f. “Engage” v. “Negotiate”

The corporation that elects to “Engage” against NGOs that “Negotiate” is determined to be selective about drawing stakeholders into relationships, but will negotiate directly with NGOs to increase its leverage through co-optation. The corporation that decides to “Engage” will seek the reputational benefits of signing a Code of Conduct, with express provisions for human rights protection, in the expectation that doing so will earn it a price and an equity premium as well as additional investment, and thereby increase profitability. However, the corporation will not agree to NGO reporting or absorb the reporting costs incurred by NGOs in monitoring its compliance, as the “Engaging” corporation reserves the power to package its own case for compliance and tailor it directly to the media. The “corporation” that decides to “Engage” is not scrupulously committed to compliance; rather, it is strategically committed to compliance, and if compliance contributes to its profitability, it will comply, whereas compliance that is more costly than the benefits derived will soon cease.

Furthermore, the “Engage” strategy requires the corporation to be selective in its investment strategy, and to consider carefully the human rights record of the states in which it considers investing, but when interacting with NGOs that “Negotiate” the strategy does not necessarily counsel divestment. When a corporation that has elected to “Engage” interacts with NGOs that “Negotiate,” ATCA litigation is not directly at issue; however, the corporation will seek to reduce its legal exposure under that statute by lobbying to eliminate or severely restrict its reach to corporate conduct associated with human rights, arguing that voluntarism, rather than litigation, is the most effective means to achieve results desired by both players. The corporation will settle legitimate claims of human rights violations without the need for suit to preserve its reputation.

Although unlikely to reduce legal exposure in the short run through lobbying, the corporation choosing to “Engage” will ensure that any additional costs incurred, such as settlement costs paid to victims of human rights violations to avoid litigation or the costs of altering its conduct to bring it into compliance with its Code of Conduct, will be passed along to stakeholders, thereby satisfying shareholders and avoiding derivative litigation.

Accordingly, the corporation playing “Engage” against the NGOs playing “Negotiate” will earn 90 points, while the NGOs will earn 30 points.

g. “Engage” v. “Litigate”

The corporation that elects to “Engage” against NGOs that “Litigate” is determined to be selective about drawing stakeholders into relationships, but will negotiate directly with NGOs if it perceives that to do so will allow it to increase its leverage. However, given NGOs’ choice of strategy, corporations that “Engage” will not likely achieve leverage through partnerships with NGOs.

Nonetheless, the corporation that decides to “Engage” will seek the reputational benefits of signing a Code of Conduct with express provisions for human rights protection, in the expectation that doing so will earn it a price and an equity premium as well as additional investment, and thereby increase profitability. However, it will not include a reporting provision in its Code of Conduct, nor will it embrace the Global Compact or the Norms/Framework, as it will anticipate that NGOs will seek to use violations of the Code as well as the “soft law” provisions of these documents in ATCA litigation to expand corporate liability. Nor will it absorb the reporting costs incurred by NGOs in monitoring its compliance, as “Engage” preserves to the corporation choosing it the power to package its own case for compliance and tailor it directly to the media. The “corporation” that decides to “Engage” is not scrupulously committed to compliance. Rather, it is strategically committed to compliance, and if compliance contributes to its profitability, it will comply. But compliance that is more costly than the benefits derived will soon cease.

Furthermore, the “Engage” strategy requires the corporation to be selective in its investment strategy and to consider carefully the human rights record of the states in which it considers investing, and when interacting with NGOs that “Litigate,” divestment from states with bad human rights records is imperative. When a corporation that has elected to “Engage” interacts with NGOs that “Litigate,” ATCA litigation is directly at issue, and it is not the appropriate time to seek to reduce its legal exposure

under that statute by lobbying to eliminate or severely restrict its reach to corporate conduct associated with human rights. Rather, it is imperative to either win or to settle the claim, with the determination based on profitability. If litigation that could otherwise be won would impose reputational sanctions in the marketplace, the corporation choosing to “Engage” will settle the claim but will also ensure that these and any additional costs incurred, such as the costs of altering its conduct to bring it into compliance with its Code of Conduct, will be passed along to stakeholders, satisfying shareholders and avoiding derivative litigation. The ultimate effects on profitability are uncertain: while reputational benefits incurred by devising a Code of Conduct will provide some market benefits, the ATCA claim may erode those benefits and even impose additional costs, particularly if the suit reveals the corporation as having been insincere in its adoption of its Code. The outcome is case-specific, but for the purpose of theory-building the assumption will be that there is no effect on profitability except that the corporation will lose price- and equity-premiums as well as additional investment during the pendency of the litigation.

Accordingly, the corporation that chooses to “Engage” against NGOs that “Litigate” will earn 20 points, while the NGOs will earn 25 points.

h. “Engage” v. “Regulate”

The corporation that elects to “Engage” against NGOs that “Regulate” is determined to be selective about drawing stakeholders into relationships but will negotiate directly with NGOs if it perceives that to do so will allow it to increase its leverage over the regulatory process. The corporation that decides to “Engage” will seek the reputational benefits of signing a Code of Conduct with express provisions for human rights protection and for reporting, in the expectation that doing so will earn it a price and an equity premium as well as additional investment, and thereby increase profitability. The corporation will seek to influence but will not, however, embrace the Global Compact and the Norms/Framework because it will anticipate that NGOs will seek to use the “soft law” provisions of those documents in future ATCA litigation to expand corporate liability. Also, the corporation will not absorb the reporting costs incurred by NGOs in monitoring its compliance, as “Engage” preserves to the corporation choosing it the power to package its own case for compliance and tailor it directly to the media. The “corporation” that decides to “Engage” is not scrupulously committed to compliance; rather, it is strategically committed to compliance.

Further, the “Engage” strategy requires the corporation to be selective in its investment strategy and to consider carefully the human rights record of the states in which it considers investing. When interacting with NGOs that “Regulate,” divestment from states with bad human rights records is not a high priority, although the increased transnational scrutiny counsels against undertaking additional investment in similar states. When a corporation that has elected to “Engage” interacts with NGOs that “Regulate,” ATCA litigation is not directly at issue, and it is thus the appropriate time to seek to reduce its legal exposure under that statute by lobbying to eliminate or severely restrict its reach to corporate conduct associated with human rights. The corporation will settle legitimate claims of human rights violations without the need for suit in order to preserve its reputation. Should legitimate human rights violations occur in the sphere of influence of the corporation that “Engages,” the injured party will receive a settlement from the corporation without the need for litigation.

To the extent that the transnational regulatory process is perceived domestically as too anti-corporate, the prospects for lobbying success increase, yet it is too difficult without case-specific information to make a determination as to their ultimate probability of success. Still, these lobbying efforts, along with any additional costs incurred, such as the costs of altering its conduct to bring it into compliance with its Code of Conduct, the Global Compact, and the Norms/Framework, will be passed along to stakeholders, satisfying shareholders and avoiding derivative litigation.

The ultimate effects on profitability may be neutral: reputational benefits incurred by devising a Code of Conduct will provide some market benefits, and the corporation choosing to “Engage” against NGOs electing to “Regulate” will earn price- and equity-premiums as well as additional investment, but some backlash in the market is expected for refusing to accept membership in the Compact and the Norms.

Accordingly, the corporation that chooses to “Engage” against NGOs that “Regulate” will earn 80 points, while the NGOs will earn 20 points.

i. “Engage” v. “Legislate”

The corporation that elects to “Engage” against NGOs that “Legislate” is determined to be selective about drawing stakeholders into relationships, but will negotiate directly with NGOs if it perceives that to do so will allow it to increase its leverage by

discovering mechanisms to induce NGOs to accept negotiated legislative settlements of their differences. The corporation that decides to “Engage” will seek the reputational benefits of signing a Code of Conduct with express provisions for human rights protection, in the expectation that doing so will enhance its bargaining power in the legislative process, in addition to earning it a price and an equity premium, additional investment, and thus increased profitability. However, the corporation choosing to “Engage” will be chary of including reporting provisions in its Code of Conduct and of embracing the Global Compact and the Norms/Framework out of concern that NGOs will seek to use violations of the Code of Conduct or of the “soft law” provisions of the latter two documents as the basis for legislative amendments to domestic corporate law, as well as to expand corporate liability under ATCA and even in the ICC. Because the corporation electing to “Engage” is not scrupulously committed to compliance and is determined to limit legal exposure, it will not absorb any NGO reporting costs.

A corporation playing “Engage” against NGOs playing “Legislate” must be very selective in its investment strategy and should divest from states with bad human rights records in order to deny their opponents legislative ammunition. Although ATCA litigation is not directly at issue, in the legislative context it is an opportune time for the corporation choosing to “Engage” to seek to reduce its legal exposure under the statute by lobbying to eliminate or severely restrict its reach to corporate conduct associated with human rights. To the extent that the legislative process is governed by bargaining, it is reasonable to assume that the corporation might well achieve some legislative limitation, or at the very least clarification, of ATCA that reduces its legal risk, even if the same process imposes other legal requirements. Because the scope of legal liability under ATCA is directly under debate, the corporation will not redress claims of human rights violations even at the risk of suit under ATCA.

Whatever the outcome, the cost of engagement in the legislative process, along with any additional costs incurred, such as the costs of altering its conduct to bring it into compliance with its Code of Conduct, will be passed along to stakeholders, satisfying shareholders and avoiding derivative litigation.

The ultimate effects on profitability are likely to be neutral: reputational benefits incurred by devising a Code of Conduct will provide some market benefits, yet the negative perception of its efforts in reducing its legal liability for the protection of human rights will likely cancel out any price- and equity-premiums as well as any additional investment.

Accordingly, the corporation that chooses to “Engage” against NGOs that “Legislate” will earn 50 points, while the NGOs will earn 15 points.

j. “Engage” v. “Delegitimate”

The corporation that elects to “Engage” against NGOs that “Delegitimate” is determined that it will not negotiate or form partnerships with NGOs. The corporation will seek the reputational benefits of signing a Code of Conduct with express provisions for human rights protection, in the expectation that doing so will enhance its market reputation, earn it price and equity premium, attract additional investment, and thus increase profitability. However, the corporation choosing to “Engage” will not include reporting provisions in its Code, nor will it embrace the Global Compact or the Norms/Framework, out of concern that NGOs will seek to use violations of the Code or of the “soft law” provisions of the latter two documents as the basis for legislative amendments to domestic corporate law, as well as to expand corporate liability under ATCA and perhaps even in the ICC. Because the corporation electing to “Engage” is not scrupulously committed to compliance and is determined to limit legal exposure, it will not absorb any reporting costs of NGOs that “Delegitimate.”

A corporation playing “Engage” against NGOs playing “Delegitimate” should continue the status quo in its investment strategy. Although ATCA litigation is not directly at issue, given the extreme position of NGOs playing “Delegitimate,” it is likely an opportune time for the corporation choosing to “Engage” to seek to reduce its legal exposure under the statute by lobbying to eliminate or severely restrict its reach to corporate conduct associated with human rights. To the extent that the legislative process is governed by bargaining, it is reasonable to assume that the corporation might well achieve some legislative limitation, or at the very least clarification, of ATCA that reduces its legal exposure, even if the same process imposes other legal requirements. Because the scope of legal liability under ATCA arises in this debate, the corporation will not redress claims of human rights violations even at the risk of suit under ATCA.

Whatever the outcome, the cost of engagement in the legislative process, along with any additional costs incurred, such as the costs of altering its conduct to bring it into compliance with its Code of Conduct, will be passed along to stakeholders, satisfying shareholders and avoiding derivative litigation.

The ultimate effects on profitability are likely to be neutral: reputational benefits incurred by devising a Code of Conduct will provide some market benefits, yet the negative perception of its efforts in reducing its legal liability for the protection of human rights will likely cancel out any price or equity premiums as well as any additional investment.

Accordingly, the corporation that chooses to “Engage” against NGOs that “Delegitimate” will earn 50 points, while the NGOs will earn 10 points.

k. “Accommodate” v. “Negotiate”

The corporation choosing to “Accommodate” NGOs playing “Negotiate” will swiftly create a Corporate Code of Conduct with express provisions on human rights protection and monitoring, and it will scrupulously honor these commitments and avoid violations of human rights in its sphere of operations to the best of its ability. Moreover, the corporation that chooses to “Accommodate” will embrace and conform corporate practice to the Global Compact and the Norms, and will provide NGOs playing “Negotiate” with resources to assist them in monitoring corporate conduct. Against NGOs playing “Negotiate” the corporation that plays “Accommodate” will avoid an ATCA suit, if need be, by offering redress to the rare victims of alleged corporate actions, and although it may dissatisfy some shareholders it will not likely face a shareholders’ suit.

Accordingly, the corporation electing to “Accommodate” NGOs playing “Negotiate” will earn 90 points, while NGOs will earn 65 points.

l. “Accommodate v. “Litigate”

The corporation choosing to “Accommodate” NGOs playing “Litigate” will swiftly create a Code of Conduct with express provisions on human rights protection and monitoring provisions, and it will scrupulously honor these commitments and avoid violations of human rights in its sphere of operations to the best of its ability. Moreover, the corporation that chooses to “Accommodate” will embrace and conform corporate practice to the Global Compact and the Norms/Framework, and will provide NGOs playing “Litigate” with resources to assist them in monitoring corporate conduct. Against NGOs playing “Litigate,” however, the corporation that plays “Accommodate” will not avoid an ATCA suit despite, or perhaps because of, its voluntary acceptance of heightened standards of human rights protection. The corporation will likely settle the suit to avoid reputational harm.

Consequently, the corporation that elects to “Accommodate” will lobby to limit the scope of corporate liability under ATCA, and it will divest from states with human rights records that pose the threat of future liability risk. Although the corporation playing “Accommodate” may dissatisfy some shareholders, it will not likely face a shareholders’ suit.

Accordingly, the corporation electing to “Accommodate” NGOs playing “Litigate” will earn 70 points, while NGOs will earn 60 points.

m. “Accommodate” v. “Regulate”

The corporation choosing to “Accommodate” NGOs playing “Regulate” will swiftly create a Code of Conduct with express provisions on human rights protection and monitoring provisions, and it will scrupulously honor these commitments and avoid violations of human rights in its sphere of operations to the best of its ability. Moreover, the corporation that chooses to “Accommodate” will embrace and conform corporate practice to the Global Compact and the Norms/Framework, and any other substantive principles generated in transnational fora, and will provide NGOs playing “Regulate” with resources to assist them in monitoring corporate conduct. Against NGOs playing “Regulate” the corporation that plays “Accommodate” will avoid an ATCA suit, if need be, by offering redress to the rare victims of alleged corporate actions. Although it may dissatisfy some shareholders by “Accommodating”, it will not likely face a successful shareholders’ suit.

Accordingly, the corporation electing to “Accommodate” NGOs playing “Regulate” will earn 90 points, while NGOs will earn 65 points.

n. “Accommodate” v. “Legislate”

The corporation choosing to “Accommodate” NGOs playing “Legislate” will swiftly create a Code of Conduct with express provisions on human rights protection and monitoring provisions, and it will scrupulously honor these commitments and avoid violations of human rights in its sphere of operations to the best of its ability. Moreover, the corporation that chooses to “Accommodate” will embrace and conform corporate practice to the Global Compact and the Norms/Framework, and any other substantive principles generated in transnational fora, and will provide NGOs playing “Legislate” with resources to assist them in monitoring corporate conduct. Against NGOs playing “Legislate” the corporation that plays “Accommodate” will avoid an ATCA suit, if

need be, by offering redress to the rare victims of alleged corporate actions, yet it will resist legislative proposals, such as the Uniform Code or ICC jurisdiction over corporations, that would heighten legal requirements for the protection of human rights in favor of the voluntary approach laid out in the Code, the Compact, and the Norms/Framework. Given the strategy of “Legislate” chosen by NGOs, the corporation that plays “Accommodate” will become very risk-averse in their investment strategies and will divest from some states in order to reduce litigation risk. It will not likely face a shareholders’ suit.

Accordingly, the corporation electing to “Accommodate” NGOs playing “Legislate” will earn 90 points, while NGOs will earn 55 points.

o. “Accommodate” v. “Delegitimate”

The corporation choosing to “Accommodate” NGOs playing “Delegitimate” will swiftly create a Code of Conduct with express provisions on human rights protection and monitoring provisions, and it will scrupulously honor these commitments and avoid violations of human rights in its sphere of operations to the best of its ability. Moreover, the corporation that chooses to “Accommodate” will embrace and conform corporate practice to the Global Compact and the Norms/Framework and any other substantive principles generated in transnational fora. However, the corporation playing “Accommodate” will not provide NGOs playing “Delegitimate” with resources to assist them in monitoring corporate conduct, and it will lobby to reduce the risk of legal exposure faced by corporations to include efforts against the Uniform Code, expansion of the ICC to reach corporate conduct, and other major corporate legal reforms. Furthermore, the corporation electing to “Accommodate” will divest from states with human rights records that might make them the subject of increased scrutiny and reputational harm.

Against NGOs playing “Delegitimate” the corporation that plays “Accommodate” will avoid an ATCA suit, if need be, by offering redress to the rare victims of alleged corporate actions, and although it may dissatisfy some shareholders it will not likely face a shareholders’ suit.

Accordingly, the corporation electing to “Accommodate” NGOs playing “Delegitimate” will earn 70 points, while NGOs will earn 45 points.

p. "Collaborate" v. "Negotiate"

The corporation deciding to "Collaborate" with NGOs that "Negotiate" quickly adopts a Code of Conduct that expressly respects human rights and includes reporting provisions, and the corporation provides resources to the NGOs to assist their monitoring efforts. The corporation that decides to "Collaborate" in its interaction with NGOs that "Negotiate" scrupulously observes its commitments under the Code, signs the Global Compact, publicly embraces the Norms/Framework, avoids suit under ATCA, lobbies for the Uniform Code and for heightened requirements for the protection of human rights, offers redress to the rare alleged human rights victims of its practices, and accepts membership in BLIHR.

Accordingly, the corporation playing "Collaborate" against NGOs that "Negotiate" will earn 100 points, while the NGOs playing "Negotiate" will earn 90 points.

q. "Collaborate" v. "Litigate"

The corporation deciding to "Collaborate" with NGOs that "Litigate" quickly adopts a Code of Conduct that expressly respects human rights and includes reporting provisions, and the corporation provides resources to the NGOs to assist with their monitoring efforts. The corporation that "Collaborates" in its interaction with NGOs that "Litigate" scrupulously observes its commitments under the Code, signs the Global Compact, publicly embraces the Norms/Framework, lobbies for the Uniform Code and for heightened requirements for protection of human rights, is sued under ATCA but offers a settlement to plaintiffs, divests from states without high standards for protecting human rights, and accepts membership in BLIHR.

Accordingly, the corporation playing "Collaborate" against NGOs that "Litigate" will earn 85 points, while the NGOs playing "Litigate" will earn 90 points.

r. "Collaborate" v. "Regulate"

The corporation deciding to "Collaborate" with NGOs that "Regulate" quickly adopts a Code of Conduct that expressly respects human rights and includes reporting provisions, and the corporation provides resources to the NGOs to assist with their monitoring efforts. The corporation that "Collaborates" in its interaction with NGOs that "Regulate" scrupulously observes its commitments under the Code, signs the Global Compact, publicly embraces the Norms/Framework, avoids suit under ATCA, lobbies for the Uniform Code and for heightened requirements

for protection of human rights, offers redress to the rare alleged human rights victims of its practices, and accepts membership in BLIHR.

Accordingly, the corporation that chooses to “Collaborate” with NGOs that “Regulate” earns 100 points, while NGOs earn 90 points.

s. *“Collaborate” v. “Legislate”*

The corporation deciding to “Collaborate” with NGOs that “Legislate” quickly adopts a Code of Conduct that expressly respects human rights and includes reporting provisions, and the corporation provides resources to the NGOs to assist with their monitoring efforts. The corporation that “Collaborates” in its interaction with NGOs that “Legislate” scrupulously observes its commitments under the Code, signs the Global Compact, publicly embraces the Norms/Framework, avoids suit under ATCA, lobbies for the Uniform Code and for heightened requirements for protection of human rights, offers redress to the rare alleged human rights victims of its practices, and accepts membership in BLIHR.

Accordingly, the corporation that “Collaborates” with NGOs that “Legislate” earns 100 points, while NGOs earn 90 points.

t. *“Collaborate” v. “Delegitimate”*

The corporation deciding to “Collaborate” with NGOs that “Delegitimate” quickly adopts a Code of Conduct that expressly respects human rights and includes reporting provisions, and the corporation provides resources to the NGOs to assist their monitoring efforts. The corporation that “Collaborates” in its interaction with NGOs that “Delegitimate” scrupulously observes its commitments under the Code, signs the Global Compact, publicly embraces the Norms, avoids suit under ATCA, lobbies for the Uniform Code and for heightened requirements for protection of human rights, offers redress to the rare alleged human rights victims of its practices, and accepts membership in BLIHR.

Accordingly, the corporation that chooses to “Collaborate” with NGOs that “Legislate” earns 100 points, while NGOs earn 90 points.

Table 2, illustrates the interactions of corporate and NGO strategies in the issue-area of the protection of human rights:

TABLE 2: MATRIX OF OUTCOMES AND ASSOCIATED PAYOFFS

	NGOs									
	Negotiate		Litigate		Regulate		Legislate		Delegitimate	
Corporation Fight	45	-10	50	-10	80	-10	20	-10	75	-10
Engage	90	30	20	25	80	20	50	15	50	10
Accommodate	90	65	70	60	90	65	90	55	70	45
Collaborate	100	90	85	90	100	90	100	90	100	90

The payoff to the corporation is the value in the lower left-hand corner of each cell and the payoff to the NGOs is the value in the upper right-hand corner of each cell.

C. Analysis of The Game: Corporations v. NGOs

1. Equilibria

Whereas the objectives and preferences of NGOs are fixed, the objectives and preferences of a corporation with which it interacts depend on and vary with the strategy it selects. Although it might appear that “Collaborate” is, for the corporation, a dominant strategy because it outperforms all of the corporation’s other strategies irrespective of the NGO’s choice of strategy, this is not in fact the case. Because the payoff structure for each corporation player is different depending on its choice of strategy—specifically, for the corporation playing “Fight”—the preference is heavily weighted toward profit maximization and obduracy, whereas for the corporation playing “Collaborate” profit is but an afterthought and performing “ethically” and cooperating with NGOs are the values that drive the organization. Thus, because the payoff structure varies by strategy for the corporation, it is not possible to “solve” the game by finding an equilibrium or a Nash equilibrium.

However, for the NGOs whose preferences are fixed, “Negotiate” is weakly dominant over “Regulate,” suggesting that no matter what strategy the corporation plays, the best strategy for NGOs is to “Negotiate.” This will be discussed further *infra*; it is sufficient to note that in the game as specified, the corporation should anticipate that NGOs will always play “Negotiate,” even if this does not in fact occur in practice.

2. NGO Strategies

a. "Negotiate": *The Virtue of Voluntarism*

"Negotiate" is the dominant strategy for NGOs, and as a general rule should always be played unless another of the remaining three strategies can be used at low- or no-cost to punish violations of agreements implied by the selection of particular strategies by corporations.³²⁹ It offers 175 points across the four corporate strategies and 500 points in total payoff to both parties.

The finding that the dominant strategy for NGOs is "Negotiate" is compelling. At the heart of the "Negotiate" strategy is the principle of voluntarism, which has been the subject of sharp debates in the academic literature and in the field. Critics of voluntarism, as manifested in Codes of Corporate Conduct and other voluntary statements of principles, deride it as far too lacking in teeth and insufficient to overcome the profit motive and induce corporate protection of human rights.³³⁰ One NGO, representative of the views of many, brands CSR and the Codes of Corporate Conduct as a sham foisted upon society by corporations concerned only with protecting their reputations against the "potential damage of public campaigns directed against them, and overwhelmingly, with the desire—and the imperative—to secure ever-greater profits."³³¹ Proponents of voluntarism, on the other hand, view Codes of Conduct as a "genuine commitment to human rights" and a categorical "reject[ion] [of] antithetical arguments sounding in corporate neutrality" that will "eventually lead to binding corporate norms and accountability."³³²

The present study supports the notion that voluntarism—the principle at the core of "Negotiate"—may well be the best approach to the formation of enduring social partnerships between NGOs and corporations that carry with them the potential for joint development of effective corporate policies for the protection of human rights without sacrificing other core values important to many firms, foremost among them profitability.³³³

329. See *supra* notes 55–74 and accompanying text.

330. See David P. Forsythe, *Transnational Corporations and Human Rights*, in *HUMAN RIGHTS IN INTERNATIONAL RELATIONS* 218–48 (2d ed. 2006).

331. ANDREW PENDLETON ET AL., *CHRISTIAN AID SOCIETY, BEHIND THE MASK: THE REAL FACE OF CORPORATE SOCIAL RESPONSIBILITY* 5 (2004), available at <http://baierle.files.wordpress.com/2007/11/behind-mask.pdf>.

332. Kielsgard, *supra* note 84, at 215 (describing viewpoint of proponents of voluntarism).

333. Previous research has developed the proposition that social partnerships between civil society organizations ("CSOs") and corporations are the mechanisms most likely to develop solutions to CSR problems that satisfy the

In practice, NGOs, despite a lack of any direct coercive power, are able to provide expertise and consultation regarding specific practices and actions that corporations can take to improve their performance and their reputations for status, a measure of control, and significant grants of resources from their corporate partners.³³⁴ Corporations lack knowledge about problems and solutions, while NGOs lack the capacity to impose solutions.³³⁵ Through negotiation, NGOs gain leverage over corporate policies and actions and corporations gain reputational benefits that translate into enhanced profits. Joint payoffs—a proxy for the benefit to society if one considers that NGOs represent all conceivable stakeholders while corporations represent shareholders, and most citizens are either the former, the latter, or, increasingly, both—totaled 500 when NGOs played “Negotiate”—a greater payoff than for all strategies except for “Regulate”—reinforcing the proposition that the strategy is conducive to the achievement of mutual interests.

Although “Negotiate” may not be an effective strategy in interacting with corporations that elect to “Fight,” it is dominant over all other strategies available to NGOs, and the conflict with “Fight” may be rooted in a broad cultural and social gulf that divides corporations with preferences that cause them to choose to “Fight” NGOs. Moreover, as NGOs and firms “move[] from a primarily confrontational engagement to a more complex, multifaceted relationship”³³⁶ involving negotiation rather than demonstration, the effectiveness of “Negotiate” may well increase to the point where, even in their interactions with corporations that still elect to “Fight,” NGOs may well claim some positive payoffs. At the very least, the success of “Negotiate” should cause opponents of voluntarism to reevaluate their position. At its best, “Negotiate” evinces potential to profoundly reshape the relationship between corporations and NGOs.

interests of both partners. See generally TERMS FOR ENDEARMENT: BUSINESS, NGOs AND SUSTAINABLE DEVELOPMENT, *supra* note 309.

334. See Wendy Schoener, Note, *Non-Governmental Organizations and Global Activism: Legal and Informal Approaches*, 4 IND. J. GLOBAL LEGAL STUD. 537 (1997) (describing the basis of exchange between NGOs and corporations negotiating over the protection of human rights); see also Cecelia Albin, *Can NGOs Enhance the Effectiveness of International Negotiation?*, 4 INT’L NEGOTIATIONS 371 (1999).

335. See Geoffrey D. Chandler, *Do the Right Things*, GREEN FUTURES Mar.–Apr. 1999, at 22, 23 (“Companies need the expertise of NGOs in tackling problems of which they have inadequate knowledge” while “NGOs need the huge and growing influence of companies if they are to maximise their impact.”).

336. CRANE & MATTEN, *supra* note 23, at 382.

b. *“Litigate”: A Stick, But Not (Yet) a Strategy*

“Litigate” is dominated by “Negotiate” but dominates “Legislate” and “Delegitimize.” It should only be played to punish the corporation playing “Engage” or “Accommodate” who cannot be trusted to honor the commitments they implicitly make by virtue of those strategy choices. In other words, if NGOs have reliable information that the corporation will play “Engage” but will violate its Code of Conduct, spin its human rights record in the media, lobby against existing legal protections of human rights, and pass along costs to consumers, the NGO might be willing to absorb 5 points of cost to punish the corporation playing “Engage” in the amount of 70 points. Similarly, if NGOs have reliable information that the corporation will play “Accommodate” only to fail to sign the Global Compact, embrace the Norms/Framework, redress violations of human rights in its sphere of influence, and maintain its commitment to human rights in the face of shareholder pressure, NGOs might choose to absorb 5 points of cost to play “Litigate,” and punish the corporation playing “Accommodate” in the amount of 20 points.³³⁷ Finally, if NGOs know that the corporation will “Collaborate,” it might choose to “Litigate,” but only if it could be assured as well that the result of litigation would neither alter the future strategy of that corporation nor dissuade other corporations from choosing to “Collaborate.” “Litigate” offers 165 points across the four corporate strategies and 390 points in total payoff to both parties.

Many human rights NGOs have reposed great faith in litigation, particularly under ATCA, as the strategy that would bring corporate malefactors to heel. Yet the promise of “Litigate” has not been borne out by the history of human rights litigation under ATCA, and there is no reason to believe that this will change in the near future. Resorting to the official legal machinery of the state is costly and uncertain, and insufficient political support exists to modify the available laws to shift the payoffs in favor of NGOs. That “Litigate” yields inferior payoffs for both NGOs and the corporation—and thus inferior societal benefits—no matter what strategy the latter plays suggests that NGOs cannot increase the payoffs they would otherwise obtain by choosing to “Negotiate” and that the corporation suffers when NGOs elect to “Litigate” due to the expense of litigation and not due to the remedial potential of “Litigate.” Commentators have suggested that significant corporate opposition to “Litigate” arises from a

337. Both of these potential strategies involve considerations of the “next round,” otherwise known as the future. While this is an important subject of research, it is beyond the scope of the present Article.

mere “paper” commitment to human rights on the part of corporations,³³⁸ yet the dominance of “Negotiate” (a largely voluntary form of interaction) over “Litigate” (the resort to state judicial power) calls this notion into question and suggests that the costs of litigation may well represent no small part of corporate objections.³³⁹

That said, “Litigate” retains its value in the case of corporations who play “Engage” or “Accommodate” and fail to deliver compliance with Codes of Conduct, the Global Compact, and the Norms/Framework, or who fail to afford redress to victims of violent regimes where they locate their business, or who wilt under shareholder pressure. The threat alone that NGOs will play “Litigate” may well be enough to steel the spines of the executives of corporations that “Engage” or “Accommodate” against the siren’s call of profitability, and in favor of implementing practices protective of human rights, selecting investment opportunities based in some measure on the risk posed by host governments to human rights, and otherwise balancing economic concerns with human rights concerns. “Litigate” is, in effect, a “backstop”³⁴⁰ that introduces sufficient uncertainty about the potential costs to a corporation playing “Engage” or “Accommodate” should it attempt to cheat on the private bargains it strikes with NGOs, such as Codes of Conduct, adherence to the Global Compact, and membership in the BLIHR. By having “Litigate” as a weapon in its arsenal, NGOs can enforce corporate discipline. However, *Sosa* rendered ATCA sufficiently toothless, and the probability of significant sanctions are so remote,³⁴¹ “Litigate” is just a stick and not truly a strategy for interaction with corporations in the issue-area of human rights protection.

c. “Regulate”: A Support Strategy

Although “Regulate” dominates “Legislate” and “Delegitimate” it is dominated by “Negotiate” and offers 165 points across the four corporate strategies and 515 points in total payoff to both parties. Thus, it should only be played by NGOs who have

338. See, e.g., Kielsingard, *supra* note 84, at 215.

339. The superiority of “Negotiate,” a strategy which draws both players into private ordering of their relationship, may well signify, at least in part, the costliness of invoking the formal machinery of the state. See DIXIT, *supra* note 225, at 10, 29–32.

340. See *id.* at 29–31 (modeling how the threat of litigation negatively transforms the payoffs for the potential defector and thereby encourages negotiation; litigation thus “backstops” negotiation against defection).

341. See *supra* notes 92–106 and accompanying text.

reliable information that (1) the corporation will play “Accommodate” and that by playing “Regulate” NGOs can, at no cost, create deeper normative commitments to regulatory principles that may in the future crystallize from “soft law” into hard law and be reflected as such in Corporate Codes of Conduct; or (2) that the corporation will play “Collaborate” in which case “Regulate” offers the same payoffs to both parties while creating deeper and more transnational normative commitments.

Although much of the energies of NGOs have been invested in the last decade in transnational fora attempting to generate normative regulatory principles that would be adopted by corporations and governments and then rapidly crystallize into binding international law, the results have been, at least for proponents of such regulation, disappointing. The Global Compact has secured some important members, and yet many large corporations have declined to join that organization and refused to adopt the Norms.³⁴² While some advise yet another push in the same direction,³⁴³ international legal process has simply not yet developed to support the project of formalizing legal obligations that can bind corporations over the opposition of their states of incorporation.³⁴⁴ The same limitations exist in the domestic arena: regulations that do not benefit from a widespread perception that they are legitimate restrictions necessary to bring corporate conduct into line with what the relevant political community deems its “social license to operate” are unlikely to secure the requisite political support for enactment and market support for compliance.³⁴⁵ Effective regulation requires the

342. *Id.*

343. *See, e.g.,* Kinley & Chambers, *supra* note 156 (noting that some human rights groups see the Norms as just a normative basis for creating even more detailed regulations).

344. Although there has been some evolution, there has been no major revolution in international law since 1989, when “the realm of what is called ‘international law’ [wa]s largely a realm of voluntary associations, with agreed-upon rules and few sanctions[,] . . . [and] the prospects for regulating business by international rules backed by sanction seem[ed] dim.” DONALDSON, *supra* note 34, at 149.

345. *See generally* Kagan et al., *supra* note 264 (analyzing corporate regulatory compliance and finding convergence between corporate behavior and “social license[s] to operate” commonly accepted within the relevant political communities). Regulations that seek to impose duties beyond the social license to operate—the grant by a community of permission to do business contingent upon the provision of a certain level of corporate social responsibility to that community—encourage corporate resistance if they are enacted at all. Regulations that fall short of the requirements of the social license often produce behavior described as “beyond compliance” in which corporations adhere to the higher standards of the social license. *Id.* Moreover, and perhaps even

political and economic support of local communities, and NGOs have not dedicated as much effort to winning this support as they have to fashioning regulations. At the same time, it requires the support of its subjects: a growing literature, albeit directed at the subject of the U.S. administrative process, suggests that a static and inflexible “command and control” regulatory model such as the Norms will prove inferior in practice to a model that permits ongoing negotiation between the regulators and the regulated and allows for the achievement of reasonable regulatory goals at reduced enforcement costs through adaptive dialogue and decision making by all parties.³⁴⁶ Corporations that are not consulted and treated as partners in the regulatory process resort to resistance and disengagement, whereas those who are “Engaged” develop “social bonds” to regulators and to the beneficiaries of regulation that create a culture of compliance and managerial accommodation.³⁴⁷

In essence, corporations have been alienated by the standoffish and arrogant regulatory efforts of NGOs, and regulatory overstretch, coupled with a maladaptive approach, has, at least for the short term, likely doomed any meaningful transnational administrative restrictions on corporate conduct in the issue-area of human rights protection while setting traps for the credibility of NGOs who would attempt to play “Regulate” as a strategy. Accordingly, NGOs find that “Regulate” is dominated by “Negoti-

more importantly, regulations that do not comport with the social expectations of the relevant communities will not be entitled to enforcement in the marketplace by stakeholders. Consumers will choose to buy or not buy from regulated companies, not by virtue of corporate compliance with ill-suited regulations, but on the basis of criteria unrelated to the social purpose underlying the regulations.

346. See generally ARCHON FUNG & ERIK OLIN WRIGHT, *DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE* (2003); Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions: Installment Two*, 24 STAN. ENVTL. L.J. 269 (2005); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Daniel A. Farber, *Revitalizing Regulation*, 91 MICH. L. REV. 1278 (1993); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

347. See generally Valerie Braithwaite, *Games of Engagement: Postures Within the Regulatory Community*, 17 LAW & POL'Y Q. 225 (1995) (developing a taxonomy of regulatory approaches and suggesting the importance to compliance of developing corporate commitments to the goals of regulation and, even more importantly, of building social bonds in the regulator-regulatee relationship).

ate” and has value as a strategy in the foreseeable future only to the extent that (1) specific corporations likely to “Accommodate” and predisposed to accept additional normative guidance from NGOs can be convinced to internalize deeper normative principles that emerged from the transnational regulatory process but yet are the product of direct bargaining, or (2) NGOs devise effective substrategies in the domestic legal and political frameworks of states of incorporation to urge governments to adopt the “soft law” of the Compact and the Norms/Framework as hard law binding on all corporations. With respect to number one, however, corporations that “Accommodate” are at least as likely to respond to a “Negotiate” strategy as they are to “Regulate” unless by virtue of its international institutional provenance a normative principle stands a greater chance of finding its way into a Code of Conduct and corporate practice than the same principle developed through other means. Regarding the second point, the usefulness of an international legal incorporation sub-strategy is not limited to the “Regulate” strategy but would interact with and bolster the utility of “Negotiate,” “Litigate,” and “Legislate” by placing an additional source of normative pressure upon corporations, the judiciary, and politicians.

In sum, however, NGOs seeking to transform corporate practice in the issue-area of human rights protection and endowed with limited resources would be better advised, at least in the short run, to “Negotiate” while recalibrating their expectations for their regulatory campaigns.

d. “Legislate”: Implementation and Enforcement of Negotiate

“Legislate” is dominated (weakly) by “Negotiate” and “Litigate,” and its only utility to NGOs is in the case where (1) NGOs have reliable information that a corporation will play “Fight,” in which case NGOs can impose 25 units of punishment at no cost, (2) where NGOs are willing to absorb 15 points of cost to inflict 40 units of punishment on a corporation about which they have reliable information that it will play “Engage” only to violate its implied agreement, and (3) where NGOs have reliable information that the corporation will play “Collaborate,” in which case “Legislate” offers the same payoffs to both parties, while creating actionable law useful to the execution of all other strategies in interactions against this or other corporations. “Legislate” offers 150 points across the four corporate strategies and 410 points in total payoff to both parties.

Stakeholder advocates of “Legislate” note that the state has a fiduciary duty to society as a whole, that the government has the

power to impose additional legal restrictions in corporate conduct, and that the existing corporate legal regime does not offer adequate (dis)incentives to encourage corporations to protect human rights.³⁴⁸ Advocates of shareholder theory contend as well that legislation is the only legitimate method of transforming corporate conduct,³⁴⁹ for reasons of democratic accountability³⁵⁰ and to create disincentives for noncompliance.³⁵¹ Even those who credit voluntarism with some success suggest that a “legal framework provides powerful tools and incentives for improvement” and “anchor[s] [voluntary principles] in a legal framework [that] is likely to enhance their effectiveness.”³⁵²

However, the law is an imperfect institution that is subject to political inertia, and the basic canons of corporate law have not been fundamentally reordered since the 1930s. Legislative proposals have remained just that—proposals—and although calls to convert corporations into quasi-public entities responsible for most of the functions of government, while they may benefit politicians, are not good strategy for NGOs. That “Negotiate” and “Litigate” dominate “Legislate” is thus unsurprising.

In the short run, “Legislate” is less a strategy than one of several processes to implement and enforce the “Negotiate” strategy as it benefits NGOs in only two ways: (1) it punishes corporations that “Fight” and refuse to acknowledge the existence of any obligations to protect human rights with the specter of bad publicity, diminished profits, and future sanctions if they continue as “evildoers;” and (2) it offers NGOs an additional forum wherein

348. See, e.g., Deva, *supra* note 207, at 741 (arguing for legislative inducements to enhance corporate protection of human rights).

349. See, e.g., Friedman, *supra* note 22, at 126.

350. In theory, by creating constraints through the democratic process, ethical questions are aired and then put to rest through a legitimate process rather than left open to constant and destructive argument. See Ehrlich, *supra* note 26, at 83–84 (“The language of ethics suggests that you are right and I am wrong; that you speak with moral authority and that you have the right to tell me how to live my life. Work to change the law, but do not demonize me as being greedy because I disagree with you.”).

351. See *id.* at 83 (“[It is] unlikely that a firm will voluntarily place itself at a competitive disadvantage by incurring a cost associated with ethical behavior when others in the field do not do so, unless bigger firms attempt to promulgate rules that will disadvantage smaller competitors by saddling them with costs that the larger firms can afford to bear If society wants business to behave in a certain way that escapes the discipline of the market, . . . then it is better to regulate by law so that all competitors are burdened proportionately.”).

352. Kielsgard, *supra* note 84, at 197 (quoting INT’L COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM, HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES, SUMMARY (2002)).

to press corporations to voluntarily adopt constraints lest more onerous restrictions are imposed by government. In the long run, "Legislate" offers NGOs the prospect, however far down the temporal road, that actionable law useful to the execution of all other strategies will emerge.

e. "Delegitimate": An Empty Threat

"Delegitimate" is the worst of the five strategies available to NGOs as it is (weakly) dominated by the other four. There is no instance in which NGOs should play it, with the sole possible exception of the case of a corporation the NGOs are certain will play "Collaborate" now and in the future no matter what strategy NGOs chooses in the present. "Delegitimate" offers 135 points across the four corporate strategies and 430 points in total payoff to both parties.

"Delegitimate" is not a strategy for interaction with corporations; rather, it is a repudiation of the corporation and a battle cry for adherents to use their critique of the corporate form as a point-of-entry into the re-engineering of the political economy. Ultamata backed by the threat of the "corporate death penalty" are not politically popular and may even be irresponsible from the point of view of NGOs, as these proposals may have the effect of shielding corporations from constraints, whether incurred voluntarily or by other means, drawn from the realm of the politically possible. Furthermore, "Delegitimate" shuts off dialogue, heightens the stakes, and may well promote defensive synergies between corporations and business associations. In short, NGOs should avoid "Delegitimate," which is inferior to all other strategies, unless and until popular support for its radical propositions is sufficient to make its implementation a practical possibility and other strategies have failed.

3. Corporate Strategies

a. "Fight": Corporate Neanderthal Model

"Fight" is almost certainly, in the words of Professor Donaldson, "corporate Neanderthalism," or unreconstructed neoclassical shareholder theory, and as such has a series of preferences different from each of the three other corporate strategies. Its payoffs range from 20 to 80, and it performs worst against "Legislate" and best against "Regulate." Interestingly, a corporation choosing to "Fight" imposes a uniformly bad payoff on NGOs of -10, suggesting that at least in the short run corporate power, if committed to "Fight," can overcome NGOs. At the same time, however, "Fight" does not perform very well against "Negotiate."

Because “Negotiate” is the dominant strategy for NGOs, if a corporation cannot or will not alter its preferences sufficiently to justify another strategy it will receive a payoff worse than what it would have received had it chosen any other strategy. Moreover, if NGOs know that the corporation plans to “Fight,” either by its reputation, its public communication, or by the use of competitive intelligence, it can, in effect, “punish” the corporation in the amount of 25 points by choosing “Legislate” at no cost to itself. Under these conditions, a corporation that plans to “Fight” must either attempt to manage its reputation or else be cautious about releasing actionable intelligence regarding strategy.

The sole virtue of “Fight” in the contemporary political economy is thus its ability to frustrate NGOs. It achieves this, however, at great cost: with NGOs playing the dominant strategy of “Negotiate,” the corporation that chooses to “Fight” draws the ire of all that claim stakeholder status and in so doing significantly harms its own economic bottom line. In sum, stakeholder theory appears to have eclipsed the shareholder model of corporate governance, and the corporation that continues to deny this political and economic reality—deemed “Yesterday’s Company” by one commentator³⁵³—will pay a price.

b. “Engage”: Strategic Stakeholder Model

“Engage” is, in most respects, “strategic stakeholder theory,”³⁵⁴ which considers and responds to all threats and opportunities that might affect its objective: shareholder wealth maximization. “Engage” payoffs range from 90 to 20, with the highest payoff coinciding with NGOs’ dominant strategy, “Negotiate,” creating a subgame equilibrium. Accordingly, “Engage” should consistently perform well against NGOs unless NGOs decide, perhaps because the corporation has been violating its Code of Conduct and manipulating the media, to “punish” “Engage” by playing “Litigate.” “Litigate” yields a payoff of (20, 25), and thus by abandoning its dominant strategy and incurring only a 5 point penalty NGOs can “punish” the corporation that chooses to “Engage” in the amount of 70 points. In other words, the corporation that chooses to “Engage” can gain from honoring its agreements with NGOs that “Negotiate,” but failure to do so can lead to costly litigation.

353. AVERY, *supra* note 238 (follow “1. Changes in business thinking” link) (coining this term to describe the corporation that denies responsibility for human rights and environmental protection, and distinguishing such a corporation from “Tomorrow’s Company” which accepts these responsibilities).

354. Donaldson, *supra* note 14.

Critics of “Engage” contend that it fails not because it is immoral, but because it is nonmoral—it is not an ethical synthesis but simply strategic reasoning that considers the retaliatory potential of aggrieved parties only and not the morality of their claims.³⁵⁵ Although this description is not entirely unfair, the conclusion is not supported by the present study. Because the dominant strategy for NGOs is to “Negotiate,” a corporation choosing to “Engage” will enjoy a reputation as a good corporate citizen, enhance its profitability, and continue to prosper so long as it chooses its NGO partners wisely and upholds the agreement it reaches with these partners. If the cost of adhering to the agreement becomes onerous, the corporation electing to “Engage” can pass it along to consumers.

It is crucial, however, that in choosing to “Engage” the corporation is sincere in its commitment to accept stakeholders, negotiate protections of human rights within its business sphere, and implement its agreement. Failure to do so can be very costly: although the direct effects of NGOs switching to “Litigate,” which can be swiftly imposed at relatively low cost to NGOs, are not likely to be significant in terms of corporate profitability, the loss of reputational benefits, and with it the loss of premiums on stock price, demand, and investment, will have serious negative impacts. In short, a corporation choosing to “Engage” must keep its bargain.

c. *“Accommodate”: Good Citizenship Model*

“Accommodate” is the strategy-of-choice for many contemporary corporations who have accepted the CSR movement as a fundamental fixture of modern business. “Accommodate” payoffs range from 70 to 90, with payoffs of 90 earned when NGOs play their dominant strategy of “Negotiate” as well as when NGOs play “Regulate.” The “Accommodate”-“Regulate” subgame equilibrium should be stable: although NGOs cannot inflict serious punishment for violation of this equilibrium, the corporation that chooses “Accommodate” intends to keep its bargain, and “Litigate” and “Delegitimate” would impose costs upon NGOs with little effect on the corporation.

Given the dominant strategy of NGOs—“Negotiate”—“Accommodate” earns high payoffs; what is more, against any other NGO’s strategy “Accommodate” scores no worse than 70 out of 100. For corporations that have internalized the values of CSR and of the human rights movement, “Accommodate” guarantees them high payoffs and virtually immunizes them from

355. *Id.*

punishment in the form of litigation or regulation. Provided that such a firm can manage to remain profitable after taking on the broad responsibility to guarantee human rights protection within its sphere of business well beyond that required by law, and after navigating the shoals of discontented shareholder groups for whom heightened protection of human rights represents profits otherwise owed to them, "Accommodate" is a strategy with few, if any, faults. It requires, however, significant managerial competence to implement in such a manner as to satisfy stakeholders who demand profitability as well as those who demand accountability.

d. "Collaborate": Symbiotic Model

"Collaborate" is played only by the very most "progressive" corporations who, but for their corporate charters and the fact of their shareholders, might be mistaken for NGOs themselves. "Collaborate" payoffs range from 85 to 100, with only "Collaborate"—"Litigate" yielding anything less than a perfect payoff. Moreover, NGO payoffs, regardless of NGO strategy, are 90 whenever a corporation plays "Collaborate." Thus, although "Collaborate"—"Negotiate" is a subgame equilibrium, meaning that it is the best possible outcome for each party, there exists an incentive for NGOs to choose "Litigate" against the corporation that chooses "Collaborate" because doing so imposes no cost on NGOs while the resulting litigation may offer benefits against other corporations choosing different strategies.

Moreover, in practice "Collaborate" is almost a non-strategy: it effectively hands the corporate reins to NGOs and allows them to implement their own strategy in the corporate stead. Still, for corporations driven principally by the need to express support for human rights and whose payoff structures reflect this preference, and for NGOs as well, "Collaborate" works. For the corporation playing "Collaborate," payoffs are virtually perfect,³⁵⁶ and for NGOs the payoff, regardless of its strategy, is 90 out of 100. "Collaborate" rewards NGOs with maximum decisional freedom to adhere to, or depart from, its dominant "Negotiate" strategy; it rewards the corporation with the opportunity to express its value-structure through its business activities and through the actions of the NGOs who are partnered with it. "Collaborate," in a real sense, is a symbiosis: NGOs receive the opportunity to closely guide the affairs of the corporation in service to their human rights protective agenda, while the corporation reaps the internal

356. The sole exception is when NGOs play "Litigate," which practically speaking is extremely unlikely against a corporation that plays "Collaborate."

reward of being assured that it is behaving properly in accordance with best human rights practices, as well as the external reward of being deemed by NGOs as a model of the ethical corporation. The only risk faced by the corporation that decides to “Collaborate” is the market: it is unclear that “Collaborate” as a strategy generates sufficient economic returns to allow a major corporation, let alone a small- or medium-sized enterprise, to remain in business, even if considerations of profitability factor very little, if at all, into the equation of preferences for such a firm.³⁵⁷

IV. DISCUSSION AND IMPLICATIONS FOR THEORY BUILDING AND FUTURE RESEARCH

A. Findings

1. Stakeholder Theory Ascendant

At least in the issue-area of human rights, the shareholder model lies all but vanquished, and corporations can no longer profitably deny all responsibility for acts of torture, extrajudicial killing, rape, or forced labor undertaken by the governments or militias of the foreign countries in which they do business.

Human rights NGOs can claim much of the credit for requiring corporations to assume protective responsibilities in their spheres of operations and insisting that corporations infuse the conduct of their business operations with considerations of social and ethical obligations—strategies that may well be independently less effective than negotiation. This is true even if, in many instances, NGOs pursued these objectives by resort to demonstrations, litigation, application of political pressure within the United Nations and domestic governance spheres, and legislative attempts to reform corporations as quasi-public entities with human rights obligations akin to those of states. Although the precise mechanisms whereby NGOs have succeeded in transforming corporate preferences and behavior with regard to human rights protection requires further research, it is clear that NGOs have succeeded in painting corporations as untrustworthy

357. The Achilles’ heel of “Collaborate” may be sufficiently threatening to the survival of the corporation that employs it such that it renders “Collaborate” a dysfunctional strategy. See, e.g., Ben Casselman, *Why ‘Social Enterprise’ Rarely Works*, WALL ST. J., June 1, 2007, at B12 (reporting that the socially responsible model of business has not proven the capacity to be profitable over the last decade, and that corporations attempting to employ the model inevitably require external support). It is also worth noting at this juncture that it is likely, given the potential unprofitability of “Collaborate,” that no durable corporation employs a pure version of the strategy.

and in stripping away much of the business goodwill of the corporations they have targeted as CSR-unfriendly.³⁵⁸ Corporations seeking to regain credibility with their customers and with policy-makers must now “turn . . . to [NGOs] for ‘lent trust’” in order to achieve gains in their reputation,³⁵⁹ and those corporations who reject the need to appeal to stakeholders are left at a serious disadvantage in their strategic interactions with NGOs who, by virtue of their non-financial and even altruistic objectives,³⁶⁰ are trusted and admired by many members of the public who value NGO objectives over corporate profits, regard themselves as stakeholders, and, but for time and resource constraints, would join NGO campaigns.³⁶¹

In sum, “Fight”—the strategy closest in provenance to shareholder theory—fares so poorly because, at least in part through NGO efforts, stakeholders exist in the market and demand that corporations accept at least some threshold obligations to protect human rights.

2. Ineffectiveness of Involuntarism

The behavior of natural and legal persons can be regulated in three ways: (1) exclusively by law, (2) exclusively by social norms, and (3) by law and social norms.³⁶² The first rests on the political power of the state to impose rules; the second is the domain of private, negotiated ordering; the third is a hybrid of the previous two. A number of scholars and NGOs have contended that corporate misconduct is the result of a missing or failed market and that CSR can only be achieved through the “uniquely powerful” and coercive mechanisms available to states—specifically, laws.³⁶³ Others have commented that the

358. See Duane Windsor, *Corporate Social Responsibility: Cases For and Against*, in 3 THE ACCOUNTABLE CORPORATION: CORPORATE SOCIAL RESPONSIBILITY, *supra* note 16, at 31, 46 (noting that NGO activities have rendered “[p]ublic opinion in the United States . . . distinctly cool, if not hostile, to large corporations and their managers” and damaged public trust in corporations).

359. ZADEK, *supra* note 268, at 46.

360. See Aguilera et al., *supra* note 30, at 852 (reinforcing the intuitively obvious conclusion that most NGOs are motivated primarily by altruistic motives, whereas most corporations are motivated primarily by profit motives).

361. See ZADEK, *supra* note 268, at 47 (“NGOs are able to mobilize and sustain a sense of shared trust by resembling, in their active view and engagement in the world, that part of people’s visions of, or desire about, themselves about which they feel most proud” but cannot actualize due to time or financial considerations.).

362. See Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 AM. L. & ECON. REV. 227 (2002).

363. See Aguilera et al., *supra* note 30, at 848 (arguing that “[g]overnment action[s]—both enacting laws and enforcing them—[are] . . . uniquely power-

requisite standard for corporate transformation must be set so high that only binding and enforceable law can possibly induce it.³⁶⁴ Still others have suggested that NGO activism is so rooted in considerations of pure ethics or even a nascent secular religion that it cannot be reconciled with corporate or market preferences and thus, if CSR is to be achieved, it must be engineered through the instrumentalities of the central government.³⁶⁵ As a consequence, NGOs, demanding more laws and regulations, have lobbied legislative and transnational regulatory bodies in an attempt to increase the supply of laws obligating corporations to provide increased protections for human rights.

It is unsurprising that for much of the last two decades, law has been the primary avenue of approach for NGOs and others who seek transformations that would require corporations to provide greater protection for human rights.³⁶⁶ After all, “[t]he role of the legal system . . . is to provide a framework or process for conflict resolution and the development of legal rights,”³⁶⁷ and where interests conflict, rights are disputed, and a method for resolving the conflict authoritatively is desired, it falls to law to perform this function. Debates over public policy questions generally tend to revolve around the question, “What legal reforms are necessary to achieve the desired objective?”, and CSR is no exception. Consistent with the predictions of public choice theory, corporations and NGOs do indeed contest within the legal domain where decisions are made as to: whose interests are to be deemed “rights” defensible by the state, whose values are to

ful because they can achieve broader coverage than voluntary initiatives, such as the UN Global Compact”); Andrew King, *Cooperation Between Corporations and Environmental Groups: A Transaction Cost Perspective*, 32 ACAD. MGMT. REV. 889, 891 (2007) (“For many years [CSR] scholars followed the Pigouvian tradition that held that the problems caused by missing markets could only be resolved through the actions of central government.”).

364. See BRUMMER, *supra* note 28, at 185 (“[S]ocial activist theorists believe that the standard of responsible corporate conduct is [much higher than, as well as] independent of[,] the current expectations, demands and, often even the current interests of the various groups of individuals served or affected by management decision making.”).

365. *Id.* at 185–87.

366. See Den Hond & De Bakker, *supra* note 51, at 918 (stating that, as their primary strategy, NGOs have “traditionally acted politically in trying to influence the diffusion, interpretation, and implementation of laws and regulations, as well as in lobbying for the formulation of new laws and regulations” before national governments and supranational bodies).

367. Warren J. Samuels & Nicholas Mercuro, *The Role and Resolution of the Compensation Principle in Society: Part One—The Role*, 1 RES. L. & ECON. 157, 166 (1979).

dominate the decision-making process, and who is to make these decisions.³⁶⁸

However, the present study reinforces more general research in the fields of law and economics, compliance theory, regulatory theory, and organization theory that has found that the resort to state-centric strategies—litigation, regulation, and legislation—does not always respond “more effectively to the needs of public officials, politicians, and private citizens”³⁶⁹ than does private ordering of relations between parties in the marketplace.³⁷⁰ Without question, law has limitations relative to private ordering through negotiation: it is slower, less fine an instrument, and less likely to secure compliance.³⁷¹ Few would dispute that, in the case of the protection of human rights and ATCA, Congress and the courts have been “unable to produce law that is coherent, intelligible, or in a large sense, purposeful.”³⁷² Moreover, the suppliers of law and regulations, both domestic and transnational, have clearly proven uninterested in expanding the supply of effective legal restraints on corporate conduct in the issue-area of human rights, perhaps because powerful corporations have “captured” the regulatory state.³⁷³

Strategies should be judged not by their legal content but by the structure of the incentives they establish and the conse-

368. See, e.g., James M. Buchanan, *Toward Analysis of Closed Behavioral Systems*, in *Theory of Public Choice: Political Applications of Economics* 11, 12 (James M. Buchanan & Robert D. Tollison eds., 1972) (explaining and predicting strategic interactions between self-interested entities competing for scarce public goods).

369. SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA* 8 (1992).

370. See, e.g., Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960) (theorizing from a Law and Economics perspective that so long as corporations and their stakeholders can reduce transaction costs—locating each other and negotiating and enforcing agreements—they can reach agreements in the marketplace superior to those available through the state) (compliance theory); Harold Demsetz, *Why Regulate Utilities?* 11 *J.L. & ECON.* 55 (1968) (regulation); King, *supra* note 363, at 891 (management).

371. Lawrence Lessig, *The New Chicago School*, 27 *J. LEGAL STUD.* 661, 665 (1998) (“[L]aw is, relative to [private ordering], a less effective constraint: [i]ts regulations, crude; its response, slow; its interventions, clumsy; and its effect often self-defeating.”).

372. Louise A. Halper, *Parables of Exchange: Foundations of Public Choice Theory and the Market Formalism of James Buchanan*, 2 *CORNELL J.L. & PUB. POL’Y* 229, 231 (1993).

373. See George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3, 5 (1971) (proposing a regulatory capture theory that postulates that corporations have the “power to utilize the state . . . to control entry” and content of regulation and to see that it is operated primarily for its benefit).

quences of corporations and NGOs altering their behavior in response to those incentives. Clearly, insufficient public incentives exist to motivate the behavioral transformations demanded of corporations by NGOs,³⁷⁴ and thus the value to NGOs of state-centric strategies are simply too low to recommend them at present and for the foreseeable future. However, there is reason to believe that the importance of law and of the state has been overestimated, not only because of limitations inherent in the legal enterprise and a lack of political will to provide sufficient incentives, but because non-legal sources of normative influence are more important sources of preference formation, behavior, and enforcement.³⁷⁵ Indeed, an examination of voluntarism in the CSR context suggests strongly that the market for CSR is neither missing nor failed and that the objectives of NGOs can be attained without state intervention.

3. The Virtues of Voluntarism

Compliance theory, and in particular its normative branch, suggests that individuals and organizations will voluntarily comply with social norms and customs, even in the absence of any law compelling them to do so, in order to avoid ostracism, earn higher social status, or fulfill internal needs regarding beliefs and values about law and compliance.³⁷⁶ Moreover, normative theories of compliance suggest that preferences about law are exogenous to the law itself; thus, changes in the law alone are insufficient to alter these preferences. According to constructivist theories of compliance, the following hypotheses explain how and why corporations and their executives can be induced to comply with the privately ordered and negotiated agreements they reach with NGOs:

(1) Corporations are not solely material creatures but are also ideational entities continuously reconstituted by the socially generated values, morals, and ideas of the individuals and groups who participate in their formation and direction;³⁷⁷

374. See NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW* 261–62 (2d ed. 2006) (recognizing that “the institutional environment can only do so much” to create incentives to alter behaviors and that private arrangements are often necessary to create the desired exchange of value).

375. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 137–55 (1991).

376. For a presentation of the various theories of legal compliance, see William Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, 37 *ARIZ. ST. L.J.* 1243 (2005).

377. See Alexander Wendt, *Collective Identity Formation and the International State*, 88 *AM. POL. SCI. REV.* 384, 384–85 (1994).

(2) Normative scripts of key individuals and groups—CEOs, other top executives, and important stakeholders—are principally responsible for constructing corporations and investing them with preferences.³⁷⁸

(3) Normative scripts are flexible: individuals and groups outside the corporation (such as NGOs), through patterns of “persuasion, socialization, and pressure,” can influence the normative perceptions and business agendas of individuals and groups within the corporation, and vice versa;³⁷⁹ and

(4) Legal rules *qua* rules do not independently generate compliance pull: laws are, in effect, restatements of social values and norms, and corporations conform their conduct not to the formal content of rules, but to a set of internalized norms that may or may not be reflected in formal legal regimes.³⁸⁰

Although a detailed examination of the process whereby corporate preferences can be transformed is beyond the scope of the present work, in essence, constructivism suggests that the non-legal sources of behavioral prescription and proscription exert more direct influence upon corporations than do legal sources, and that compliance is the end result of a process of norm inculcation that over time reconstructs corporate identities to embrace and reflect specific normative content as they evolve. In turn, through the influence of such institutions as families, churches, schools and workplaces, corporations and their managers are “constructed” by, or conditioned to adhere to, philosophies of governance prescribing and proscribing certain behavior even in the absence of formal legal rules.³⁸¹

Thus, so long as the proper normative content is inculcated into corporate decisionmakers and expressed in negotiated, voluntary agreements with NGOs—a major undertaking to be sure—the behavior of a corporation thus reconstructed will be largely congruent with these agreements. In sum, corporate preferences regarding the protection of human rights are not a given, and corporate protection of human rights can be induced

378. See generally THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS (Peter J. Katzenstein ed., 1996).

379. MARGARET F. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS 214 (1998).

380. See generally H. L. A. HART, THE CONCEPT OF LAW (2d ed. 1994) (stressing that compliance with law requires an internal attitudinal commitment that in turn requires that rules be consistent with normative principles).

381. See Joseph Galaskiewicz, *Making Corporate Actors Accountable: Institution-Building in Minneapolis-St. Paul*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 293 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (finding that corporations and their executives act in socially responsible ways if normative institutions create incentives for such behavior).

by altering the normative structure, and thus the preferences, of corporations and the executives who manage them.³⁸² Under these conditions, constructivism predicts a high rate of compliance even where noncompliance in any given instance might be a *materially* rational business strategy, because compliance serves the enlightened (or boundedly rational) self-interest. Where noncompliance occurs, it is sanctioned through a decentralized enforcement process that swiftly and effectively imposes social and economic sanctions not through the instrumentalities of the state, but in the community and, above all, in the market.³⁸³

This is not to suggest that state-centric strategies are not useful to NGOs: in fact, these statist strategies may strengthen privately ordered voluntary agreements between NGOs and corporations,³⁸⁴ particularly if used to prevent defections from these agreements,³⁸⁵ and their content shapes the norms and preferences that guide private ordering.³⁸⁶ Moreover, the existence of law, however marginal in its effectiveness, may serve an important inducement in the first instance to goad corporations into negotiations over private ordering arrangements with NGOs.³⁸⁷ It would be unfair to claim that in the strategic interaction between corporations and NGOs over the issue of human rights protection “[I]aw should understand . . . its own insignifi-

382. See Charles Handy, *What's a Business For?*, in HARV. BUS. REV. 49, 54–55 (2002) (concluding that corporations can be reconstructed to view compliance with CSR as an ethical imperative and as an act that serves self-interest).

383. See Terlaak, *supra* note 63, at 968 (describing the enforcement of private agreements between NGOs and corporations that have expressed normative preferences for socially responsible behavior).

384. See Campbell, *supra* note 46, at 955 (“Corporations will be more likely to act in socially responsible ways if there are strong and well-enforced state regulations in place to ensure such behavior, particularly if the process by which these regulations and enforcement capacities were developed was based on negotiation and consensus building among corporations, government, and the other relevant stakeholders.”).

385. See Marc J. Epstein & Kirk O. Hanson, *Introduction to 3 THE ACCOUNTABLE CORPORATION: CORPORATE SOCIAL RESPONSIBILITY* *supra* note 16, at vii, xii (recognizing that privately ordered agreements can be bolstered by state-centric strategies, including regulation); see also W. RICHARD SCOTT, *ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS* 346 (5th ed. 2003) (contending that whatever market solutions are devised, state-centric institutions will remain necessary to ensure that corporations continue to be responsive to the interests of stakeholders).

386. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 354 (1997) (discussing the interdependence between law and the norms that govern private ordering).

387. See John L. Campbell, *Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility*, 32 ACAD. MGMT. REV. 946, 948 (2007).

cance [and] . . . should step out of the way.”³⁸⁸ Still, voluntarism, encouraged by normative evolution and enforced via the market, is, standing alone, superior to other strategies available to NGOs seeking to induce transformations in corporate protection of human rights.

4. “Civil Regulation”: Harnessing Consumer Activism to Increase the Market Power of NGOs

In brief, civil regulation theory (“CRT”), also described as “New Governance”³⁸⁹ in the literature, postulates that the rules, norms, and principles embodied by voluntary agreements between corporations and NGOs are “quasi-regulations”³⁹⁰ that will, if breached by corporations, trigger boycotts and other direct actions. The fall-out will sufficiently damage corporate reputations and financial performance so as to induce corporations to behave as if these rules, norms, and principles were binding and enforceable law imposed via the state.³⁹¹ CRT postulates further that these quasi-regulations create “civil partnerships” between corporations and NGOs that can be more legitimate and more effective in securing compliance than binding law to the extent that they reflect normative commitments, both substantive and procedural, that corporations seek to fulfill in their own material, as well as ethical self-interest.³⁹²

For a decade, NGOs have been gradually drifting away from involuntarist strategies and toward civil regulation as the phenomenon of “political consumerism”³⁹³ has matured. NGOs

388. Lessig, *supra* note 371, at 666.

389. See, e.g., Trubek & Trubek, *supra* note 167.

390. See generally Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, in *THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE* 145 (Jacint Jordana & David Levi-Faur eds., 2004) (employing the phrase “quasi-regulations” to describe the normative bases for voluntary agreements between corporations and NGOs).

391. ZADEK, *supra* note 268, at 56–57, 62–63.

392. See *id.* at 142–43 (describing the bases for corporate compliance with “civil partnerships”); *id.* at 79–80 (describing “civil partnerships as “mutually legitimizing”). The effectiveness of “New Governance” is the subject of a vigorous debate, but many commentators acknowledge that under certain conditions civil regulation may be more effective than state “command and control” regulation in fostering deliberation, flexibility, innovation, partnerships, norm development, and learning. See Trubek & Trubek, *supra* note 167, at 5–6.

393. See *POLITICS, PRODUCTS & MARKETS: EXPLORING POLITICAL CONSUMERISM PAST AND PRESENT* 3–19 (Michele Micheletti et al. eds., 2004) (defining “political consumerism” as the coordinated use of consumer tactics—boycotts, protests, and other market-based tactics—to bring irresponsible corporations to heel).

have improved in their attempts to harness constituents,³⁹⁴ and in particular those consumers who punish irresponsible corporations with boycotts and reward their responsible counterparts with “buycotts”—deliberately increasing demand by spreading positive information and urging members of consumer networks to increase purchases from such responsible corporations.³⁹⁵ In effect, NGOs and political consumers have exploited opportunities presented by the market to enter into private contracts, also described as “relational contracts” or “civil partnerships,” with responsible corporations.³⁹⁶ These civil partnerships accomplish a mutually beneficial exchange that confers one form of property (quasi)rights—improved reputations and increased profits—upon corporations in exchange for another form of property (quasi)rights—funding and, more importantly, performance of the desired socially responsible corporate behaviors presently and in the future—upon NGOs.³⁹⁷ Corporations—at least those that have not chosen to “Fight”—have responded with varying degrees of favor to entreaties to civil partnership, in part to interdict more onerous state regulatory intervention, but out of considerations of material and ethical self-interest as well.³⁹⁸

Accordingly, through civil partnerships formed in the market, the welfare of NGOs and their political consumer constituents, as well as responsible corporations, are enhanced: both are better off than before the private agreement, long-term cooperation is promoted through the “shadow of the future” interactions between parties, and the outcome is Pareto-efficient.³⁹⁹ In short, through market forces, CRT predicts that civil partnerships will

394. See Parker, *supra* note 50, at 81 (noting the magnification of NGO power through networking and organizing made possible through globalization).

395. See Den Hond & De Bakker, *supra* note 51, at 918 (discussing NGOs’ efforts to claim consumer activists as constituents in their strategic interaction with corporations).

396. See Stuart L. Hart et al., *Creating Sustainable Value*, 17 ACAD. MGMT. EXEC. 56 (2003) (describing the evolution of these relationships).

397. See Den Hond & De Bakker, *supra* note 51, at 909–11 (identifying the benefits to corporations from civil partnerships, including material gain from increased consumer purchases and reputation gains from positive publicity and cooperation).

398. See Campbell, *supra* note 46, at 955 (“Sometimes industry moves toward self-regulation out of a concern that to do otherwise would eventually result in state regulatory intervention.”).

399. See King, *supra* note 363, at 893 (explaining that civil partnerships structure relations as an ongoing process that encourages parties to deal honestly in the present in order to gain the benefits of future cooperation); *id.* at 899 (citing research findings that civil partnerships increase social welfare beyond that obtainable through state regulation).

form, increase the supply of responsible corporate behavior beyond what is possible through state intervention, and enhance social welfare.⁴⁰⁰ Indeed, civil partnerships are (as of 2011) the primary NGO strategy for interaction with corporations.⁴⁰¹

Despite its benefits, civil regulation cannot be mandated, however; it must be agreed upon by both parties. In practice, then, the boundaries of corporate social responsibility are established through negotiation.⁴⁰²

5. Negotiation: The Pathway to Civil Regulation

Conflict between corporations and NGOs over the scope of corporate responsibility for the protection of human rights is far from inevitable. Although the motives for corporations and NGOs in seeking out civil partnerships may differ—the former generally are driven by financial considerations, while the latter act primarily out of ideological commitments⁴⁰³—the formation of enduring and beneficial civil partnerships does not require ideological solidarity, and each party can pursue its own goals within jointly agreed-upon frameworks.⁴⁰⁴ Analysis of the strategies available to corporations and to NGOs, assisted by game theoretic modeling, reveals that for NGOs the dominant strategy is “Negotiate.” In practical terms, this means that NGOs, contrary to orthodox understandings, can best accomplish their objective of protecting and promoting human rights against violations connected with corporations that seek out investment opportunities in countries with weak or brutal governance by negotiating directly with corporations as constructive critics, advisers, and

400. See Gregory Adams, *Corporate Social Responsibility and NGOs: Observations from a Global Power Company*, in GLOBALIZATION AND NGOS, *supra* note 47, at 187, 200 (reinforcing CRT premises that the market itself is the source of socially responsible corporate behavior and that “[w]hile far from perfect, no other approach or system has proven to produce results that are ultimately as socially responsible . . .”).

401. Aguilera et al., *supra* note 30, at 851.

402. See ZADEK, *supra* note 268, at 162 (“The real boundaries of responsibility of any organization are . . . essentially set through negotiation with those stakeholders who can penalize a business for ‘getting it wrong’ and equally those that can reward it for getting it right.”).

403. Corporate motives, and to a lesser extent, NGO motives, vary. And this variance is reflected across the range of strategies. In general, however, corporations pursue financial self-interest while NGOs pursue ideological interests. See Aguilera et al., *supra* note 30, at 852 (“NGOs . . . are more likely to be driven by altruism—trying to make the world a better place—than by [financial] motives Conversely, . . . corporat[ions] . . . hav[e] a more complex mix of motives [Some] undoubtedly . . . care about underlying social issues . . .”).

404. Parker, *supra* note 50, at 102.

even, depending on corporate preferences, as full civil partners. By entering into constructive dialogues that educate, instruct, and transmit normative content in a manner that impresses upon corporations the mutual private gains to be enjoyed through alteration of corporate practices and the adoption and implementation of Corporate Codes of Conduct and other normative statements of best practices, NGOs are more likely to achieve their objectives than through the use of any other strategy, including those that rely upon litigation, regulation, legislation, or corporate delegitimation.

a. NGO Tactical Imperatives

i. Professionalization

The strategic success of negotiations toward civil partnerships, however, is dependent upon mutual tactical commitments from both NGOs and corporations. NGOs must first enhance their credibility as negotiating partners in order to gain seats at the negotiating table. To do this, they must abandon the extra-legal aspects of their direct action agenda and narrow the cultural and social gulf between NGOs and corporations by increasing the professionalism of their membership and developing their own Codes of Conduct to demonstrate their reciprocal acceptance of the principle of accountability to the stakeholders on behalf of whom they propose to negotiate.⁴⁰⁵ Violent direct actions and protests “may win battles, and [they are] indeed . . . weapon[s] that cannot be surrendered, but [they] will not win the war or the argument.”⁴⁰⁶ Nor will threats to introduce international criminal exposure for corporate executives, accused on what are essentially negligence theories of failing to protect human rights, advance the prospects for civil partnerships.⁴⁰⁷ Furthermore, delegitimization tactics, and in particular threats to revoke corporate charters, are similarly hostile acts that will only convince skeptical corporations that partnerships are not possible with entities committed to their humiliation and destruction. Dialogue requires each party to accept the right of the other to exist and to be heard.

405. See Conley & Williams, *supra* note 31, at 19 (noting that corporations have been insisting that “NGO accountability . . . be ‘embedded’ in the NGO, from the top down . . .”).

406. Chandler, *supra* note 335, at 23.

407. See *supra* notes 182–84, 192–93 and accompanying text.

By professionalizing their memberships, circumscribing their more radical and violent elements,⁴⁰⁸ eschewing hyperbole,⁴⁰⁹ and otherwise holding themselves accountable to stakeholders, NGOs will show corporations that they are prepared to break from their confrontationalism of the past⁴¹⁰ and commit to building social partnerships that will allow bargaining toward more integrative solutions. In sum, professionalization will enhance the trust upon which successful negotiation depends.⁴¹¹

ii. Nurture Respect for Profit Motive

NGOs must remember that, save for those corporations whose strategy is to “Collaborate”—and possibly for some of these firms as well—profit is not a dirty word but is rather essential to their continued existence. NGOs and corporations generally use very different frames in understanding the complex interplay between corporate conduct and human rights protection and in identifying problems and solutions.⁴¹² For NGOs, protection of human rights is the paramount mission and purpose, and every negotiation is a simple question of how to increase protection; for most corporations, by contrast, profit is the metric against which all corporate decisions are assessed. Although their noble objective accords NGOs significant normative leverage,⁴¹³ NGOs would be wise to resist the temptation to

408. See Den Hond & De Bakker, *supra* note 51, at 917 (“The efficacy of joint efforts by radical and reformatory activist groups in [building civil partnerships] is enhanced if radical groups are constrained in applying tactics aimed at material damage.”).

409. See BURKE, *supra* note 234, at 43 (noting that “the temptation for [NGOs] to slant the news, embellish pronouncements, or even falsify information” in order to achieve their objectives has injured NGOs’ reputations and complicated relationships with corporations).

410. See *Id.* at 37 (noting that NGOs have traditionally been “aggressive . . . and sometimes hyperbolic” in their attempts to alter corporate behavior).

411. See Peter Smith Ring & Andrew H. Van de Ven, *Developmental Processes of Cooperative Interorganizational Relationships*, 19 ACAD. MGMT. REV. 90 (1994) (finding that as NGOs become more professional they gain credibility and status and are simultaneously more likely to trust corporations and to be trusted by them with the result that dialogue is facilitated).

412. See J. EDWARD RUSSO & PAUL J. H. SCHOEMAKER, WINNING DECISIONS 21–28 (2002) (defining negotiating “frames” as “mental structures that simplify and guide our understanding of reality” but noting that frames introduce bias and the possibility of error and undesirable negotiation outcomes).

413. See G. RICHARD SHELL, BARGAINING FOR ADVANTAGE 44 (2d ed. 2006) (describing “normative leverage” as the use of standards, norms, and moral arguments that “the other party views as legitimate and relevant” to maximize advantage in the resolution of a dispute).

moral arrogance⁴¹⁴ and to recognize that corporations also fulfill a noble purpose in providing goods, services, and productive employment to society and that continuing to do so is also an important dimension of corporate social responsibility.⁴¹⁵

Thus, in the pursuit of their mission to enhance human rights protection, NGOs must recognize that any take-it-or-leave-it proposal that threatens to eradicate profitability threatens the continued existence of the corporation with whom they are negotiating and will thus be perceived as an existential threat. Any alternative to such a “negotiated” agreement, including abandoning the relationship, will be preferable to corporations presented with socially irresponsible ultimatums.⁴¹⁶ Corporations will vigorously resist any efforts to convert them into *de facto* governments with the full panoply of social welfare responsibilities. They are profit centers, and not agencies or instrumentalities of the state.

Accordingly, NGOs must live in the world of corporations as they negotiate, understanding that, while they might wish for corporations to grant them everything they desire no matter the cost, the only feasible solutions are those that are jointly acceptable because they deliver enhanced protection of human rights without sacrificing profitability. Simply, if crassly, put, CSR, and the protection of human rights, must pay for itself, and a corporation that provides protection but cannot secure a profit is not only socially irresponsible but not likely to survive.⁴¹⁷ The bargain NGOs offer to corporations must be better than the alternatives available to corporations outside of negotiation and must include a mutual commitment to profitability and survivability. If NGO intransigence or unprofessionalism erodes the benefits

414. See Parker, *supra* note 50, at 92 (“NGOs are trapping themselves by claiming ‘rightness’ and moral authority” and this arrogance creates animosity in the relationship with corporations with whom they seek to partner). Some NGOs, out of moral disdain for corporations, simply refuse to talk to them whatsoever, precluding all possibility of cooperation. *Id.* at 101.

415. See Adams, *supra* note 400, at 200 (“[F]or corporations and NGOs to work together cooperatively there needs to be a respect and understanding of the role of corporations in society in providing basic goods and services, and an appreciation that this contribution can, in itself, be a socially responsible one . . .”).

416. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 97–106 (2d ed. 1991) (defining a “best alternative to a negotiated agreement” (“BATNA”) as the result obtainable from abandoning negotiating and theorizing; that the better the BATNA, the less a party is compelled to negotiate).

417. See Carroll, *supra* note 16, at 22 (reminding all concerned that if in behaving responsibly the corporation does not “strive to make a profit” it will fail and no longer be able to behave responsibly) (emphasis removed).

of negotiation such that corporations can accomplish what they perceive as superior outcomes by defending against litigation and lobbying against regulation and legislation, negotiation will fail, despite its promise. The objective for NGOs, and for the corporations that negotiate with them, must be not simply a “deal” but a commitment that is durable and will be performed reliably, even eagerly, by each party.⁴¹⁸ To achieve this, NGOs must come to recognize the corporate interest in profitability as equally as valid, or at least as equally worthy of respect, as their interest in human rights protection, and they must commit to engagement with corporations as moral equals.

iii. Expand and Capitalize Upon Social Marketing

To make the protection of human rights profitable, NGOs should work together with corporations to devise social marketing substrategies to bolster the reputations, and increase the demand for the goods, services, and shares, of corporations that protect human rights. Simply put, NGOs must undertake the arduous and long-term task of educating and training consumers, through a process known as “social cueing,”⁴¹⁹ to come to view themselves as persons who want and demand corporate protection of human rights, and thus place a greater value upon those corporations that provide it than upon those that do not.⁴²⁰ A detailed discussion of the specifics of this process is beyond the scope of the present Article. It suffices at this juncture to suggest simply that there is already “an increasingly mobilized social group of consumers, often referred to as the ‘ethical shopping movement,’ with the capacity to impact brand image and corporate reputation for the sake of the greater

418. SHELL, *supra* note 413, at 191. A more fully developed theory of NGO-corporate bargaining on the protection of human rights must await future research.

419. For a discussion of social marketing research and the technique of “social cueing” in the related CSR context of environmental protection, see generally Gert Cornelissen et al., *Positive Cueing: Promoting Sustainable Consumer Behavior by Cueing Common Environmental Behaviors as Environmental* (Catholic University of Leuven, Working Paper No. MO 0610, 2007), available at https://lirias.kuleuven.be/bitstream/123456789/121057/1/MO_0610.pdf.

420. For a discussion of the utility of direct education campaigns in inculcating norms in and transforming the preferences of the educated to align them with desired social outcomes, see generally Dorothee Schmidt, *Mitigating the Shadow of Conflict: The Role of Social and Human Capital for the Reduction of Conflicts* (Max Planck Inst. for Research on Collective Goods, Working Paper No. 5, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982343.

good.”⁴²¹ If NGOs can draw upon and market their organizational knowledge, expertise, and energies to (1) reshape the way consumers view themselves in relation to the protection of human rights and (2) make the responsible corporation more profitable, they can create a genuine synergy between human rights protection and profit around the core of these “ethical shoppers” that will likely be stable and self-policing.⁴²² Moreover, they may well effect a more general transformation of social and market norms and the construction of a more human rights-protective global community that has the beneficial effect of altering most corporations’ preferences and payoff structures in the direction of greater commitment to human rights protection. In turn, the costs of monitoring and enforcement will decline sharply as social accountability becomes encultured through dialogue, rewarded by the market, and “backstopped” by the fear of loss of reputation and the economic value that attends it. In other words, it is in the marketplace—for products and services but even more importantly for ideas—that human rights NGOs must devote their labors, working to win the hearts and minds of consumers whose demand for corporate protection of human rights has proven far more potent than any law, principle, or regulation. By educating their constituents and transforming consumer demand, NGOs will alter corporate preferences, narrow the zone of corporate alternatives, and improve the prospects for negotiated agreements.

iv. Retain Capacity to Shift to Other Strategies

The decision to enter into civil partnerships and to apply the aforementioned tactics, however, does not relieve NGOs of the need to demand and verify compliance of their negotiating partners. On the contrary, NGOs must insist on building monitoring provisions into Codes of Conduct and other relational contracts to provide the verification necessary to the maintenance of trust. Moreover, NGOs should extend the sphere of voluntary agreements to include partnerships with states and other corporations that will further enmesh all parties in publicized commitments to human rights protection. States, although leery of transnational

421. Aguilera et al., *supra* note 30, at 847.

422. This will not be easy, particularly if consumers associate the protection of human rights with behavioral costs like time, money, effort, and inconvenience. Cornelissen et al., *supra* note 419, at 3. Transforming consumer attitudes and behaviors toward human rights protection, however, is the key to convincing corporations to voluntarily transform their own attitudes and behaviors, and may well be necessary to achieve traction in terms of other potential strategies. In short, it is here that NGOs will likely win or lose their battle.

regulation and calls for litigation, are quite responsive to this sort of voluntarism. For example, the U.S.-U.K. Voluntary Principles on Security and Human Rights (“Voluntary Principles”), urged by NGOs, call upon corporate signatories to conduct risk assessment and to “consider the available human rights records of public security forces, paramilitaries, [and] local and national law enforcement” in determining whether to do business in a given foreign jurisdiction; signatories further pledge to “have an interest in ensuring that the actions taken by governments, particularly the actions of public security providers, are consistent with the protection and promotion of human rights.”⁴²³ Many of the members of the Voluntary Principles are petroleum and mining corporations that have, until their membership, elected to “Fight” in their interactions with human rights NGOs.⁴²⁴ If professional and accountable NGOs can accept the obligation for corporations, even as they accept responsibilities for human rights protection, to continue to be profitable, and agree to work together with such corporations to achieve these joint outcomes, it may well be possible to beguile corporations away from “Fight” and into more cooperative strategies such as “Engage” or “Accommodate” with outcomes preferable to corporations, NGOs, and society. As Special Representative Ruggie has urged, NGOs should work with states and international organizations to eradicate the corrupt and brutal governments that lure and “facilitate” foreign investment with weak, nonexistent, or outright oppressive legal regimes.⁴²⁵

Finally, NGOs should maintain the capacities, and hold them in reserve, to “Litigate” and “Regulate” in order to discipline corporations that pledge to “Engage” or “Accommodate” only to violate their agreements. Legal intervention can provide the discipline that encourages and rewards corporations to heed the call of social and market forces that condition their conduct

423. See *The Principles*, THE VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, http://www.voluntaryprinciples.org/principles/risk_assessment (last visited Oct. 11, 2011).

424. Membership in the Voluntary Principles reads like a “Who’s Who” of the petroleum and mining industries and of the targets of ATCA litigation. The following are the members: AngloGold Ashanti, Anglo American, Barrick Gold Corporation, BG Group, BHP Billiton, BP, Chevron, ConocoPhillips, ExxonMobil, Freeport McMoRan Copper and Gold, Hess Corporation, Marathon Oil, Newmont Mining Corporation, Occidental Petroleum Corporation, Rio Tinto, Shell, Statoil, and Talisman Energy. *The Participants*, THE VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, <http://www.voluntaryprinciples.org/participants/companies.php> (last visited Oct. 11, 2011).

425. See generally Kinley & Chambers, *supra* note 156.

in ways protective of human rights.⁴²⁶ State regulation can provide the gist of actionable law and litigation at present or in the future. However, NGOs must be far more savvy than they have been: state regulatory efforts that attempt to seize a “bridge too far” are more likely to be thrown back in defeat, and with them the prospects for less ambitious, but more politically attainable, civil partnerships.

b. Corporate Tactical Imperatives

The present study strongly suggests that, although corporate preferences vary, the modern corporation must accept that the political economy has changed and that corporate survival will not be assured by a slavish devotion to shareholders and a constant battle against the existence and interests of stakeholders, but rather by engaging, and even accommodating, important stakeholders whose interests can be served in such a way as to enhance the corporate reputation and its profitability. For some time, NGOs have urged corporations to initiate and implement Codes of Conduct, to conduct social impact studies and audits prior to making important business decisions, and to create and staff in-house CSR competence.⁴²⁷ Corporations should heed these calls and adopt all of these tactics as well as a fifth: they must develop a presence in the academy, in domestic legislative and regulatory fora, and in transnational bodies where their interests are at stake.

i. Initiate and Implement Codes of Conduct

Corporations without a Code of Conduct should consult with NGOs and implement a voluntary agreement that elaborates specific and measurable internal guidelines and standards for the protection of human rights, as well as voluntary reporting provisions.⁴²⁸

426. One group of commentators independently reaches the conclusion that negotiation, backed by efforts to shape social and market forces to reward corporations that commit to upholding obligations under a CSR framework, is presently more effective than legal interventions but that the role for legal intervention will increase. See generally THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (Doreen McBarnet et al. eds., 2007).

427. BRUMMER, *supra* note 28, at 188.

428. See CRANE & MATTEN, *supra* note 64; Hepple, *supra* note 62; Kinley & Tadaki, *supra* note 65; Litvin, *supra* note 68 (describing CCCs); Simaika, *supra* note 66; Terlaak, *supra* note 63.

ii. *Formalize Dialogue*

Over the last decade, formal and ongoing dialogues have developed wherein corporations, NGOs, government officials, academics, labor representatives, and community leaders meet to discuss issues of common concern, including monitoring of, and compliance with, CCCs governing the protection of human rights.⁴²⁹ Such dialogues afford corporations valuable and low-cost information as to the social expectations of important stakeholders in a setting that enables the ongoing (re)negotiation of the details of broadly-based norms and principles that constitute civil partnerships. In exchange, NGOs acquire additional social status, wealth, prestige, and access. Through dialogues, corporations can calibrate their practices, learn how best to uphold their agreements, and retain the material advantages of identification by NGOs as socially responsible. They can achieve these advantages, however, only if they are as committed to listening as they are to speaking.

iii. *Perform Social Impact Statements and Audits*

Corporations should independently perform a rigorous “social audit” to ascertain the current status of their human rights protective practices, the threats to human rights within their spheres of operation, and the internal procedures available to respond to change and rapidly emergent threats.⁴³⁰ Following this, corporations should translate the results of dialogues into action by drawing NGOs into a relationship, with the degree of closeness a function of the strategy chosen, to “enhance the sophistication of their decisionmaking” and “introduce alongside analyses of the bottom line”⁴³¹ analyses of ethical and moral responsibilities, including the protection of human rights, that they must fulfill to protect and enhance their reputations with stakeholders—an increasingly important constituent of profitability. With the inputs from NGOs, corporations will be able to further refine their practices and enhance their capacities for

429. See, e.g., Mark Wade, *A Commitment to Sustainable Development: The Long Journey Begins*, in 3 THE ACCOUNTABLE CORPORATION: CORPORATE SOCIAL RESPONSIBILITY, *supra* note 16, at 133, 143 (discussing the evolution of roundtable discussions hosted by Shell for the purpose of harmonizing interests and expectations regarding corporate performance in the protection of human rights).

430. See *Id.* at 144–45 (describing the rigorous and searching process whereby a corporation can determine its present practices and make authoritative determinations as to modifications for the future).

431. DONALDSON, *supra* note 34, at 108.

compliance while reducing the risks of litigation and injury to reputation.

iv. Create and Diffuse CSR Norms and Internal Capacity at Headquarters and in the Field

Corporations need not and should not rely exclusively on NGOs for expert guidance as to best practices in the realm of the protection of human rights. They will need to expand or create CSR departments staffed by executives—and perhaps even by former NGO leaders—to provide in-house counsel to managers and to boards of directors as to existing and evolving normative standards, draft best practices and Codes of Conduct, and assess whether corporate conduct reflects its commitments and its intended strategy.⁴³² Such professionals will also work to facilitate the diffusion of normative commitments within their organizations in order to increase compliance at all levels.

Specific proposals might include the creation of or contracting with highly professional private security forces to provide site security against threats in areas of operations;⁴³³ whatever the cost of such a measure, it is cheaper than reliance on the state security forces in regimes known to violate human rights, and the cost—at least in part—can be passed along to consumers. Another method of reducing risk and enhancing compliance with Codes of Conduct would entail the hiring and detailing of human rights risk managers and legal advisers at corporate headquarters and at major field operations, with mandates to provide detailed instructions to corporate personnel regarding compliance with Code provisions protecting human rights and the authority to make decisions, to include ceasing operations or taking any other measures reasonable and proper to ensure compliance, on behalf of the corporation.

v. Proactive Presence in the Academy, Legislatures, and International Agencies

Corporations should ensure that their CSR teams maintain a forward and proactive presence in every forum and site where their interests and obligations are debated and placed at stake: in

432. See LUO, *supra* note 29, at 223 (describing a proposal to create “CSR auditors” with these functions).

433. Private corporations do in fact offer security consulting and security forces to other private corporations in order to protect them against a panoply of risks. Xe (formerly Blackwater) and DynCorp are two of the more prominent private military contractors. See BLACKWATER USA, <http://www.blackwaterusa.com> (last visited Oct. 11, 2011); DYNCORP INTERNATIONAL, <http://www.dyn-intl.com> (last visited Oct. 11, 2011).

the field, in negotiations with NGOs, in the academic and legislative debates about the reform of ATCA and corporate law more generally,⁴³⁴ in transnational institutions debating proposals such as the Norms, and in the marketplace. The knowledge, experience, and empathetic understanding of the NGO agenda that CSR teams will acquire will assist corporations in identifying options for mutual gain through integrative, rather than distributive, bargaining. At the same time, CSR teams may well come to influence NGO preferences as well, at least in the sense that NGOs may learn to empathize with corporate preferences for profitability and become more willing to seek out integrative solutions that deliver profit and protection simultaneously. Moreover, corporations must be far more proactive in domestic and international political and legal fora to ensure that the policy agendas and state legislative or regulatory proposals that emerge despite the existence of civil regulations are consistent with corporate interests and will allow them to achieve profit while providing human rights protection. Finally, corporations should take active roles in urging business schools, law schools, and other relevant educational venues to assist in the institutionalization and inculcation of the norms, principles, and values that support CSR in the area of human rights and serve as the training ground for future corporate decisionmakers and role models.⁴³⁵

B. *The Commensurability of Corporate Profit and Human Rights Protection: A Pretheory*

The following narrative sketch of the relationship between the *explanandum*—corporate protection of human rights—and the explanatory variables, or *explanans*,⁴³⁶ is offered as a prethe-

434. The Global Compact specifically targets academics and universities in an effort to “increase knowledge and understanding of corporate citizenship.” See *Academic Participation*, UNITED NATIONS, http://www.unglobalcompact.org/HowToParticipate/academic_network/index.html (last updated July 14, 2010). Corporations should devise ways to participate in this and other discursive arenas so that their interests are represented and considered as new normative frameworks are proposed and debated.

435. Few business schools have yet mandated a course in CSR for their MBA students, in part because of low student demand and a lack of faculty expertise in the field, yet many corporations are demanding that business schools do so. See Ronald Alsop, *Talking B-School: Why Teaching of Ethics Continues to be Lacking*, WALL ST. J., June 19, 2007, at B7 (noting increasing corporate demand for managers trained in CSR and explaining the lack of supply from business schools).

436. POLITICAL PSYCHOLOGY AND FOREIGN POLICY 248–49 (Valerie Singer & Eric Hudson eds., 1992).

ory of the commensurability of corporate profit and human rights protection. It treats corporate protection of human rights as a dependent variable caused by the presence of independent variables in a chain of causation.

Corporations and human rights NGOs, although they tend to possess very different motivations and may commence as adversaries, can negotiate cooperative and even collaborative relationships that increase the demand and the supply of socially responsible corporate conduct in such a manner as to increase the protection of human rights while preserving, and possibly increasing, corporate profitability. To develop these civil partnerships, corporations and NGOs must eschew primary reliance on inefficient and costly state-centric regulatory and legislative contests and develop civil regulations buttressed by relational contracts—Corporate Codes of Conduct, the Global Compact, and other voluntary agreements that provide explicit standards and monitoring regimes—and by market forces such as consumer activism. Relational contracting will require negotiation, which is the optimal strategy for NGOs based on available payoffs in strategic interaction with corporations; by the same token, corporations are best rewarded when they employ strategies—“Engage” or “Accommodate”—that enhance their social capital while facilitating integrative bargaining toward a Pareto optimal solution set that includes both corporate protection of human rights and corporate profitability.

To succeed in negotiation, both parties must commit to an ongoing dialogue and to the concept of civil partnership, rather than courts, legislative bodies, or the media, as the proper framework for managing the relationship. NGOs must commit to nonviolence, become more pragmatic with regard to the necessity of corporate profits, assist in generating demand for the offerings of socially responsible corporations, and learn to trade their substantive expertise for corporate promises of good conduct and financial assistance. Corporations must openly commit to an appreciation for CSR as a business and ethical imperative, inculcate this norm throughout the organization, learn from their NGO partners, and develop internal CSR capacity to perform social audits and devise tactics to bring their practices in line with their commitments.

Both NGOs and corporations should view state regulatory regimes and law more generally as a backstop to their strategies: self-regulation has the potential to be much more effective at lower cost, and all that is required from law is the prospect of discipline if NGOs or corporations should breach their regulatory contracts and adopt strategies and tactics inconsistent with

their civil partnerships.⁴³⁷ Efforts to add teeth to ATCA or implement state regulations or other restrictive legislation will erode civil partnerships and produce suboptimal joint outcomes. To the extent that exogenous variables are important in the enforcement of relational contracts, they are to be found in the market: activist consumers, investors, and others who demand additional corporate protection of human rights will “consume” the increased protection supplied in the form of additional purchases of the goods, services, and investment opportunities produced by the corporations that protect human rights.⁴³⁸

In sum, through civil partnerships that manage disputes over the substance and procedures of relational contracts through negotiation rather than resort to costly and ineffective state-centric enforcement strategies that erode the basis for partnership, and which rely on market forces to generate a demand for human rights protection that corporations committed to CSR as a material and even ethical imperative can profitably supply, corporate protection of human rights and profitability can emerge and persist as a jointly beneficial outcome of strategic engagement between NGOs and corporations.

C. *Caveats, Criticisms, and Responses*

First, it is important to note that the game developed here and the findings that derive from the game are highly sensitive to the assumptions about the payoffs that determine its solution. A more robust theoretical basis for the proffered payoff structure requires more empirical research as well as the use of methods that will trace the chain of causation between preferences, corporate strategies, actions and tactics to implement the strategies, and the costs and benefits associated with each strategy. Different payoffs would lead to different solutions and to different selections of strategies. The payoffs assigned are the product of artful intuition and somewhat arbitrary determination; they are not cast in stone.

437. See Campbell, *supra* note 46, at 956 (hypothesizing that “[c]orporations will be more likely to act in socially responsible ways if there is a system of well-organized and effective industrial self-regulation in place to ensure such behavior, particularly if it is based on the perceived threat of state intervention or broader industrial crisis and if the state provides support for this form of industrial governance”).

438. See *id.* at 958 (“Corporations will be more likely to act in socially responsible ways if there are private, independent organizations, including NGOs, social movement organizations, institutional investors, and the press, in their environment who monitor their behavior and, when necessary, mobilize to change it.”).

Moreover, the game simplifies reality in ways that are not all captured in the general assumptions. For some corporations, it may be less costly to protect human rights than it is for others—for example, petroleum corporations who do business in regions of the developing world where governance is weak and brutal regimes are the norm face greater costs and risks in protecting human rights than do financial services corporations based primarily in New York or London. Furthermore, some corporations derive disproportionate gains from touting their human rights records, while others, no matter how hard they attempt to promote themselves as responsible, find it difficult to convince consumers. Ben & Jerry's is known at least as much for its commitment to CSR as for its ice cream, while there is perhaps little ExxonMobil could do to earn such a reputation after the *Exxon Valdez* disaster, other major environmental incidents, and a longstanding tradition of intransigence in the face of pressure from environmental groups. Moreover, CSR is only one dimension of the corporate reputation: other dimensions include innovation, human resource management, financial management, investment strategy, and quality of products and services.⁴³⁹ In the field of CSR, reputation—how it is acquired, how it adds value and how much value it adds, and how it is lost—bears further examination.

The game also presumes that the costs and benefits of strategies are objective, transparent, private, and fixed. In practice, it is exceedingly difficult to determine the costs and benefits of specific actions, particularly at the moment they are taken; thus, they are subject to subjective determination. Moreover, the choice of strategy by a corporation produces industry-wide effects and is itself, at least in part, determined by expectations about the behavior of other corporations, other industries, governmental actors, and even the global political economy. Finally, revolutions in legislative or regulatory affairs may rapidly and unexpectedly change the costs and benefits associated with given strategies. In short, costs and benefits associated with the interplay between variables at different levels of analysis are very difficult to model.

Furthermore, in the “real world,” corporations and NGOs are “repeat players,” meaning that the shadow of the future looms over their interactions and has important effects on their choices of strategies which have been addressed in some depth in the analysis but not yet modeled in the present study. A player

439. See Anne Fisher, *America's Most Admired Companies*, *FORTUNE*, Mar. 19, 2007, at 88, 94 (ranking corporations along dimensions of reputation).

might choose a strategy that is suboptimal in the present period in order to inflict “punishment” on the other player in the hope of conditioning the other player to behave differently in the future, either by adhering to the implicit agreement that accompanies the playing of a particular strategy or to play a different strategy. By the same token, a player might acquire knowledge about how the other player intends to play—either through the public pronouncements of the other player or through the use of competitive intelligence⁴⁴⁰ or corporate espionage⁴⁴¹ to gather information—and thus might choose a different strategy that leads to a higher payoff. Indeed, the recommendation that “Litigate” and “Regulate” be retained in the NGO arsenal, and “Fight” in the corporate arsenal, reflects the importance of deterrence and the need to be able to credibly inflict future punishment if discipline is to be maintained and agreements are to be honored in the present.⁴⁴²

With regard to strategies, the game assumes that no other strategies are possible and that players must elect pure strategies rather than mixed or randomized strategies that would allow them, based on their assessments of the particular strategic interaction and the specific preferences in play, to draw from two or more strategies—simultaneously or in sequence—to achieve their highest possible payoff. In fact, there may well be any number of other possible strategies that are consistent with maximization of payoffs for corporations that embody different preferences than those that together constitute the basis for the four corporate strategies developed in the present study.

Additionally, the model of the corporation developed in the present study makes presumptions about the various groupings of preferences that constitute and animate many contemporary

440. “Competitive intelligence” (“CI”) is the ethical and lawful application of industry and research expertise to analyze publicly available information on competitors and to produce actionable intelligence that allows firms to make informed and strategic business decisions. See *Frequently Asked Questions*, STRATEGIC AND COMPETITIVE INTELLIGENCE PROFESSIONALS, <http://scip.org/resources/content.cfm?itemnumber=601&navItemNumber=533> (last visited Oct. 11, 2011).

441. “Corporate espionage” (“CE”) is the illegal subspecies of CI whose methods include “finding” lost documents, interviewing disgruntled employees, eavesdropping in airports and trade shows, social engineering (misrepresenting identities to trick people into yielding information), bugging offices, hacking computers, and outright stealing proprietary information. See IRA WINKLER, *CORPORATE ESPIONAGE* 66 (1997) (quoting Pierre Marion, former head of the Directorate Generale Securite d’Etat—the French equivalent of the U.S. Central Intelligence Agency and FBI).

442. See CRANE & MATTEN, *supra* note 253; DONALDSON, *supra* note 252; Elkington, *supra* note 254; *supra* notes 96–98.

corporations and in turn give rise to four particular strategies for interaction with human rights NGOs. There are certainly more typologies that can and should be assembled and tested. Even more importantly, it is exceedingly difficult to ascertain empirically what any given corporation holds as its preferences. Again, artful intuition, reliance on public statements and business practices, and other indicia are useful but imperfect indicators. The same is true for human rights NGOs, who are grouped together for the purpose of theory building but in fact represent a broad range of opinion as to desirable ends and means in the protection of human rights and might well be disaggregated to much benefit. More sophisticated tools—content analysis, survey research, and other techniques—will increase the rigor of the assignment process in future research.

Finally, game theoretic models cannot represent the human dimensions that underlie decisionmaking and, accordingly, have been criticized for this shortcoming.⁴⁴³ Humans, and not corporations or NGOs, are the ultimate decisionmakers as to strategy and as to courses of action, and a host of variables difficult to reduce and integrate into the model of the firm as a “rational” entity—beliefs, values, traits, norms, emotions, uncertainty, etc.—are important determinants of strategy and thus deserve significant research attention. The influence of CEOs in particular upon corporate decisionmaking must also be considered as an important determinant of corporate preferences and, in turn, corporate strategy.⁴⁴⁴

Nevertheless, the present study is merely an attempt to build a theory. As such, it must rely on simplifying assumptions and working hypotheses to construct a model with enough power to organize existing knowledge and point out fruitful paths for future research that will test the assumptions upon which the model relies, render more detailed accounts of preferences, extend the model to include considerations of the future and of

443. See, e.g., Robert C. Solomon, *Game Theory as a Model for Business and Business Ethics*, 9 BUS. ETHICS Q. 11, 12 (1999); Note, *supra* note 256, at 1960 (“To many, the use of game theoretic analysis seems dehumanizing and false; it assumes that human behavior can be generalized and predicted by a series of equations or matrices.”).

444. See Aguilera et al., *supra* note 30, at 844, 846 (2007) (noting that CEOs and other senior executives have direct power to influence and select corporate strategy regarding CSR, and that the personality-level variables account for at least some of the strategic variation between corporations); Donald C. Hambrick & Sydney Finkelstein, *Managerial Discretion: A Bridge Between Polar Views of Organizational Outcomes*, 9 RES. ORG. BEHAV. 369 (1987) (finding that CEO personality-level variables play a critical role in influencing and determining corporate strategies and actions).

mixed strategies, and undertake other tasks the better to fully capture the complexity of the strategic interaction between corporations and NGOs in the issue-area of human rights protection. It is heuristic, designed to investigate whether corporate profits and human rights are commensurable, rather than in tension as many have previously presumed, and not yet a fully elaborated theory.⁴⁴⁵

D. *Directions for Future Research*

Interdisciplinary research that draws upon the theoretical insights of psychology, law, economics, sociology, and organizational studies is needed to challenge assumptions and to better understand the chain of causation postulated by the pretheory as linking various independent variables to the independent variable of simultaneous corporate protection of human rights and profitability.

First, it is essential to enhance the taxonomy of strategies by aggregating empirical data about corporate performance in the protection of human rights and developing a more sophisticated protocol for determining corporate strategies.⁴⁴⁶ Next, it would be useful to validate preferences against this data and to ensure that preferences and payoffs align with strategies.

Second, it would be beneficial to derive strong empirical support for the claim that CSR is rewarded by the market, particularly in the issue-area of human rights. Much of the work in this subfield has treated the phenomenon of CSR rather broadly, and environmental protection has received far more attention than has human rights. Do consumer activists value human rights protection enough to demand that corporations supply it? If so, how specifically can this preference be reinforced and magni-

445. The theorist attempting to build a theory involving the strategic interaction of entities against the backdrop of law must “accept the fact that arguments . . . are going to be well short of rigorous and try to do the best one can despite that.” DAVID D. FRIEDMAN, *LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 87 (2000). The first step in such an enterprise is to “think through the logic of the games we are likely to encounter to learn as much as we can about possible outcomes and how they depend on the details of the game.” *Id.* It falls to subsequent research to refine and add rigor to the emerging theory.

446. A number of scholars have contributed casuistic studies of CSR as applied in various geographical regions and industrial sectors to assay a universal set of best-practices. *See, e.g.*, *GLOBAL PRACTICES OF CORPORATE SOCIAL RESPONSIBILITY* (Samuel O. Idowo & Walther Leal Filho eds., 2009); *CORPORATE SOCIAL RESPONSIBILITY: A CASE STUDY APPROACH* (Christine A. Mallin ed., 2009). However, empirical scholarship remains primarily descriptive, with a handful of exceptions. *See* Orlitzky et al., *supra* note 275.

fied? If not, can it be created through social marketing, and will it provide benefits sufficient to offset the costs corporations will incur in delivering human rights protection? If it cannot be created, then are NGOs, in demanding that corporations provide greater human rights protection than is required by law, simply seeking to impose a *de facto* tax upon corporations without the benefit of the political process, and does it not stand to reason that corporations would be better served by playing “Fight” against such a gambit? The answers to these questions bear on whether voluntarism in the protection of human rights is indeed feasible.

Third, the importance of reputation must be investigated further. It would be valuable to determine whether in fact all corporations are equally susceptible to reputational effects, or whether some—especially in extractive resource industries—bear the burden of bad reputations no matter how much protection they provide to human rights while others already endowed with good reputations can do no wrong in the eyes of stakeholders even as their performance lags behind. If a corporation cannot achieve a benefit no matter how much additional protection for human rights it provides, then it does not stand to reason that it should ever choose a strategy that is dependent upon civil regulation. Rather, it should elect to “Fight” and to ensure that state regulations and laws are crafted in such a manner as to allow it to remain profitable.

Fourth, corporations and NGOs will learn from experience and adapt to each other’s strategies, and as each become more skilled in the strategic interaction, preferences, strategies, and tactics may change, as may answers to the following questions: Do corporations that choose to “Accommodate” achieve advantages over those that merely “Engage”? In other words, are there benefits to deepening civil partnerships with NGOs beyond the “Engage” strategy, or is “Engage” sufficient to yield simultaneous outcomes of profitability and human rights protection while doing so at a lower cost to corporations? Furthermore, can some corporations become more efficient than others in protecting human rights regardless of their choice of strategy, and can they thus acquire a competitive advantage? Is there a mixed strategy for either corporations or NGOs that yields better payoffs? Can NGOs improve upon “Negotiate” by crafting more sophisticated state-centric regulatory regimes? Can corporations improve upon “Engage” or “Accommodate” by leveraging their wealth and power to craft state-centric regulatory regimes more favorable to profitability than anything achievable through civil partnerships? As corporations become more knowledgeable

about market preferences and about how to provide human rights protection, will they need NGOs as partners any longer? Finally, can corporations that “Collaborate” truly be profitable in the long-run, or will they be selected against by the market?

Fifth, it will be necessary to disaggregate the corporation, and to examine inputs from levels of analysis including individual, small decision group, organizational, industry, markets, and communities (both local and transnational) to determine precisely how corporate preferences regarding the protection of human rights are formed and how these preferences are expressed through the selection of corporate strategies. Perhaps the most difficult task will be the examination of the role that the personality of the CEO plays in developing normative preferences, beliefs, values, and understandings about the social role of business, and in inculcating those constituents of personality within organizations. At the same time, variables from other levels of analysis—small groups of top executive strategists, boards of directors, major shareholders, regulatory agencies, communities, and even states—exert independent influence upon the preferences of CEOs, and this influence may well be an important determinant of the strategies they select for their corporations.⁴⁴⁷ In short, harnessing more explanatory and predictive power requires creating and testing more complex and detailed representations of the strategic and repeated interaction between corporations and NGOs in the human rights issue-area.

V. CONCLUSION

By spring 2013—even before pretrial discovery is complete—the plaintiffs in the case of IRATE v. ExxonMobil, et al., reach a settlement with all the defendants except ExxonMobil. The terms require each of the settling defendants to adopt a detailed Code of Conduct committing the corporation to a series of measures protective of the environment,

447. A multivariate approach to tracing the linkages between corporate preferences and strategies is necessary, and a powerful explanatory and predictive model will require inputs at levels of analysis including top executives, corporate culture, corporate financial resources, and community expectations. See Robert J. Bies et al., *Corporations as Social Change Agents: Individual, Interpersonal, Institutional, and Environmental Dynamics*, 32 *ACAD. MGMT. REV.* 788, 792 (2007) (suggesting that important future research in the field of CSR will center up the role of leadership in the emergence of social change activities and the relationship of corporate culture and values to corporate preferences regarding CSR as both ethical and strategic imperatives); Campbell, *supra* note 46, at 962 (contending that “economic conditions—specifically, the relative health of corporations and the economy and the level of competition to which corporations are exposed—affect the probability that corporations will act in socially responsible ways”).

labor, and human rights, as well as provisions consenting to NGO monitoring and reporting and to membership in the Global Reporting Initiative. The defendants also agree, under the terms of the settlement, to continue periodic discussions with NGOs in which their performance will be assessed and recommendations made for adaptations to enhance implementation. Finally, each settling defendant agrees to pay into a victims' fund, with each victim eligible for monetary damages up to \$50,000; total liability for all the defendants thus does not exceed \$100 million. Neither the NGOs nor the former defendants have any immediate comments, but from a review of their faces as they huddled together on the steps of the courthouse one might conclude, as does the lead story in the *Houston Chronicle*, that all save for ExxonMobil are satisfied with the result.

On the announcement of the settlement, the share prices of the settling defendants rise several percentage points, while the share price of ExxonMobil dips slightly as investors factor in the slight probability that ExxonMobil may be found liable at trial, given proposed legislation before Congress to strengthen ATCA as well as in a new wave of lawsuits rumored to be filed by NGOs in connection with ExxonMobil operations in Asia and Africa, where civil unrest in oil producing regions is ongoing.

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The results of the present study, illustrated and given a concrete if somewhat fanciful form by way of a hypothetical scenario, offer evidence that corporate profitability and the protection of human rights are not mutually exclusive and may even each be a necessary condition for the attainment of the other.⁴⁴⁸ Markets and morals can coexist; shareholders' and stakeholders' interests can be harmonized; public and private sectors can collaborate; and efficiency need not come at the expense of justice. Through negotiation based on considerations of self-interest and anticipation of the best strategy available to the other party, and through the use of tactics that support the optimal strategy combination, it may well be possible for corporations and NGOs to produce jointly satisfactory outcomes that protect human rights while increasing profitability and maximizing social welfare. The rela-

448. Research suggests that environmental protection and corporate profitability may well be mutually necessary conditions, at least in the case of developing economies. See, e.g., Giovanni Bella, *A Blueprint for Optimal Intertemporal Consumption Under Environmental Constraints: The Modified Green Golden Rule* (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=936879. The same relationship may well obtain in the case of human rights and corporate profitability—opening up the way for a blue golden rule (where blue is the color representative of the United Nations, font of much of the codification of the international human rights regime, and gold is the color of money).

tionship is, or should be, interdependent, rather than conflictual; a partnership, rather than a battle. To reach this state of interdependence, it is useful to advance the theoretical debate beyond simple characterizations of NGOs as good and corporations as evil—a claim some academic literature has been fond of making since the mid-nineteenth century—and to recognize that the contemporary political economy requires profit to protect human rights, and human rights to protect profit. Ultimately, we can, and must, have both, or we shall have neither.