Corporate Social Responsibility in an Era of Economic Globalization

Cynthia A. Williams[*]

TABLE OF CONTENTS

[*] I would like to thank the participants in the Davis Symposium on Corporate Governance for their comments on an earlier draft of this paper, as well as members of the faculty at the University of Colorado and at Fordham University Law School, where an earlier draft was presented. I would particularly like to thank members of the faculty at Georgetown University Law Center for their comments on an earlier draft and for their hospitality during the academic year 2000-01. This Article was written while I was a Sloan Fellow at Georgetown in the Sloan-Georgetown Project on Business Institutions during 2000-01, and so I warmly acknowledge the financial support of the Sloan Foundation as well.

INTRODUCTION

It is with some trepidation that this author undertakes a rather extended venture into the contested arena of corporate social responsibility. As Professors Henry Butler and Fred McChesney have so aptly put the point, "[f]or centuries legal, political, social, and economic commentators have debated corporate social responsibility *ad nauseam*."[1] Quite true. And yet, to the extent that the debate has produced a predominant consensus among legal academics in the United States on the parameters of corporate social responsibility, that consensus is incomplete in light of globalization of the world's economy or so this Article concludes.

[1] Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1195 (1999).

In thinking about the corporate social responsibility debate, which is indeed rather protracted, it seems to me that one of the difficulties in advancing the discussion is that it has proceeded by writers attempting to determine the nature of the corporation with reference to various sets of oppositional descriptions. Thus, the modern corporate social responsibility debate began with an exchange of views between Professors Merrick Dodd and Adolf Berle on the extent to which the corporation should be thought of primarily as an economic entity, versus the extent to which it should be thought of primarily as a social entity.[2] Later writers have argued about whether we should emphasize the private nature of the corporation or its public nature,[3] while the current corporate social responsibility debate often involves a competition between shareholder versus stakeholder conceptions of the corporation.[4]

The true answer to each of these sets of oppositions, I suspect, is that the corporation is both: an economic and a social entity; a private actor and a public actor; an entity that depends upon and gives particular legal consideration to shareholders; and an entity that depends upon and is composed of the specific inputs and relationships with multiple stakeholders and which gives consistent, pragmatic consideration to those stakeholders. If my intuition is correct, then one reason the corporate social responsibility debate has proceeded *ad nauseum* is because by emphasizing one aspect or the other of these dualities, participants have attempted to prove one or another of a series of incomplete theories about the internal nature of the corporation. I am going to try to deliberately sidestep that problem by focusing (at least initially) on a specific set of questions about the corporate social relationship that do not first require defining the internal nature of the corporation to answer. In effect, my task is not directly to challenge currently predominant academic assumptions about the nature of the

[2] *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1162 (1932); Adolph A. Berle, Jr., *For Whom Are Corporate Managers Trustees: A Note*, 45 HARV. L. REV. 1365, 1368 (1932). Dodd and Berle developed different implications about the fiduciary duties of boards of directors from their differing concepts of the nature of the corporation. Thus, Dodd viewed the modern corporation as a quasi-public entity, and so argued that the board of directors had quasi-public responsibilities to multiple constituencies, while Berle thought that until the problems created by potential accountability to multiple constituencies could be solved, it was necessary for boards to exercise their fiduciary duties in the interests of shareholders only. *See* Dodd, *supra*, at 1157-58; Berle, *supra*, at 1367-68.

[3] *See* Lawrence E. Mitchell, *Private Law, Public Interest?: The ALI Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 871, 875-76 (1993).

[4] *See infra* text accompanying notes 24-30.

corporation (which, in the United States, is to construe the corporation as a private, economic entity, the purpose of which is to maximize shareholder wealth), but simply to ask whether we have answered some specific questions about the corporate social relationship correctly even given those assumptions.[5]

This Article is actually the first in a series of three Articles in which I will examine the relationship between society and the prototypical large, transnational public corporation that is typically of concern in the corporate social responsibility discussion. In this Article, I examine the predominant legal consensus on corporate responsibility in the United States in light of globalization of the world's economy. That consensus suggests that corporations have no specific social responsibilities beyond profit maximizing for the benefit of shareholders, but that such profit maximizing must occur within the confines of the law, without deception or collusion.[6] In other words, the constraints of law, buttressed in some specific instances by contractual obligations, will be sufficient to address any and all concerns about the exercise of corporate power and in particular will be sufficient to ensure that companies fully internalize all of the social and environmental costs of their productive processes and labor relationships. As this Article concludes, however, the predominant view at least requires an ultimate sovereign, a condition that does not exist in the increasingly global economy. Thus, the predominant academic solution to these problems is incomplete in the current economic context. Something more is needed than optimistic reliance on the theory of shareholder wealth maximizing within the constraints of domestic law and private contractual arrangements.

The second in this series of Articles begins to develop what that "something more" might be. It starts by developing a distinction between the concepts of "corporate accountability" and "corporate responsibility." The concept of corporate accountability asks what duties might exist for corporations to account to society for the implications of their actions; that is, what duties might require corporations to inform society about the social, political, economic, and environmental consequences of managers' and directors' exercise of their fiduciary responsibilities.[7] This concept of corporate accountability does not imply

---

[5] Throughout this Article I suggest some reasons to think these assumptions about the internal nature of the corporation may not be correct, but my underlying premise is that the arguments I examine about the corporate social relationship do not depend upon any one conception of the internal nature of the corporation.

[6] *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962).

[7] While the 14,000 public reporting companies in the United States are currently

that changes are required in how corporations operate, but it does suggest that companies might have a duty to provide society with more information about those operations. The concept of corporate responsibility implies more affirmative obligations concerning what constitutes proper corporate conduct and so necessarily suggests changes, in specified ways, in how companies operate.

The second Article examines corporate accountability from both a theoretical and pragmatic perspective. Specifically, it first evaluates what theoretical arguments might be made for a duty of corporate accountability, that is, what the basis might be for a duty by corporations to provide a more complete accounting to society about the social, political, economic, and environmental effects of their actions.[8] It then turns to a more pragmatic examination of expanded disclosure, and asks what we might expect to accomplish by such disclosure and what advantages and disadvantages might result from such a disclosure mandate. That Article draws upon research concerning a number of existing disclosure mandates in environmental law to evaluate the effectiveness of disclosure as a regulatory strategy, and it examines the implications for corporate accountability of a number of institutional fora where companies are starting to develop voluntary disclosure initiatives encompassing social, political, and environmental information.

The third Article takes up a more difficult question, to my mind. It examines whether there might be a theoretical basis for constructing affirmative corporate responsibility requirements. That is, is there any

---

required to provide extensive financial information to the markets on a quarterly and annual basis, there is other financial information one could envision being provided to the market and society under an expanded disclosure mandate. For instance, companies could be required to provide charts about the specific percentages of their products or services produced or sold in each different country; the minimum wages in those countries; the measures of economic inequality in those countries; and, to the extent the company generally pays wages that are higher than the required minimum wages for various employment categories (e.g., unskilled employee; semi-skilled employee; skilled employee; technical or professional employee; etc.), by what percentage, per category, the company exceeds the minimum wage. Companies could also be asked to provide more clearly-identifiable information on the distribution of gains between shareholders and employees within the United States.

[8] I have previously argued that the Securities and Exchange Commission ("SEC") should act to promote corporate social transparency by imposing requirements on public reporting companies of expanded social and environmental disclosure. *See* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999). The focus of that Article was on the language and history of the securities laws, the authority of the SEC to require such disclosure, and the informational requirements of investors. The focus of the Article under discussion is broader, encompassing the relationship between the corporation and society (not just shareholders), and evaluating the appropriate level of corporate accountability in that relationship.

basis for claiming that companies have affirmative obligations to change the way they approach certain issues in order to either mitigate any potential harm they might be causing or even in order to ensure that they are causing positive social and environmental consequences in their areas of operations? While there may be good business reasons for companies to undertake such responsibilities, and there are certainly good business reasons for companies to be seen as undertaking such responsibilities, is there any reason in law, in political theory, or in the nature of the corporation to argue that corporations must undertake these responsibilities? That is the question the third Article in the series will address.[9] Again, I will approach the question from both a theoretical and pragmatic perspective. For the theoretical perspective, I will be relying upon the pioneering "human capabilities" approach of economist Amyrtra Sen and philosopher Martha Nussbaum, in which Professors Sen and Nussbaum have identified a set of requirements every person needs in order to live a fully human life.[10] I will ask whether companies have a duty to ensure that their social relationships (including their labor relationships and all of their productive interactions) either do not impede the development of human capabilities or actually promote those capabilities. For the pragmatic perspective, I will again turn to a number of institutional fora in which companies are developing voluntary, industry-specific standards that define responsible conduct, and I will describe these efforts and develop the implications for constructing affirmative obligations of corporate social responsibility.

The structure of this Article is straightforward, and the grounding pragmatic. Part I introduces the corporate social responsibility literature and describes the predominant academic consensus within that literature. Because the major positions in the literature are so well established, this overview can be mercifully brief. Part II of the Article then examines the inadequacies of the predominant academic position in

---

[9] To disclose my bias in advance, I must say I am currently somewhat skeptical on whether such a duty can be constructed, although I am certainly sympathetic to the effort. *Cf.* Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 798 n.5 (2001) (discussing efforts to go beyond "shareholder-only" characterizations of corporate law and policy, Professor Langevoort states that "[m]y Article takes an agnostic view on whether a broader characterization is the better one, though I am sympathetic to the effort").

[10] *See* AMARTYA SEN & MARTHA CRAVEN NUSSBAUM, *Introduction* to THE QUALITY OF LIFE 2 (Amartya Sen & Martha Craven Nussbaum eds. 1993); AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT (1982). The human capabilities approach identifies a core set of specifically human functions and capabilities and then asserts that, at a minimum, a society can be judged by how well it provides individuals within it with the ability to choose to develop those capabilities.

the context of the rapidly globalizing economy. Part II further develops the implications of these inadequacies and suggests how those implications relate to the questions about corporate accountability and responsibility to be taken up in the series of Articles described above.

I recognize that the goal of this Article may seem insufficiently ambitious. After all, it seeks to do nothing more than criticize existing doctrine, without (yet) presenting an alternative. Given the dominance of the reigning academic views on the questions of corporate social responsibility, though, and given the extent to which these views are fueling intellectual exports,[11] if this Article can serve to initiate a re-examination of the assumptions underlying those academic views I, at least, would view it as a success.

I. THE CORPORATE SOCIAL RESPONSIBILITY LITERATURE

In the corporate social responsibility literature a continuum of views can be identified, clustering around three basic positions: the "irresponsible" position, the "predominant" position, and the "progressive" position. I will further define each and then turn to an examination of why the predominant position is incomplete as a solution to the corporate social responsibility dilemma, given the increasing globalization of the economy.

A. The Predominant View

The starting point for this examination of the predominant consensus on corporate social responsibility is Professor Henry Hansmann and Reinier Kraakman's provocative (and provocatively titled) essay, *The End of History for Corporate Law*.[12] Professors Hansmann and Kraakman are what can be called "strong convergence optimists,"[13] for they not

---

[11] One of the most active academic debates in corporate law concerns the extent to which corporate governance systems the world over are converging, that is, becoming similar to each other; and if they are converging, the extent to which they are converging on an Anglo-American system that emphasizes shareholder wealth maximizing. *See* infra note 13. This is not just an academic debate, however, as various institutional shareholders in the United States are applying pressure in Europe on European companies to adopt more American views on the corporate social relationship, even as they pressure such companies to show higher profits and adopt more American-style "flexibility" in their labor relationships. *See infra*, note 121.

[12] Henry Hansmann and Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439 (2001).

[13] The term "strong convergence optimists" is taken from Professor Jeffrey Gordon, who has distinguished between convergence optimists, such as Hansmann and Kraakman, who believe that corporate governance systems across developed economies will

only foresee the continued convergence of corporate governance structures across developed economies, but they suggest that the ultimate corporate governance structure on which all such economies will converge will be the Anglo-American approach, which they term the "standard shareholder-oriented model."[14] Under this model, as Hansmann and Kraakman describe it, ultimate control over the corporation is in the hands of the shareholders;[15] corporate managers are charged with managing the corporation exclusively in the shareholders'

---

ultimately converge upon one, more or less uniform system and "convergence skeptics," such as Professors Mark Roe and Lucian Bebchuck, who believe that the political, social, and regulatory constructs of different countries, and the path dependencies those constructs create, will continue to affect corporate governance structures and limit convergences. *See* Jeffrey N. Gordon, *Pathways to Corporate Convergence? Two Steps on the Road to Shareholder Capitalism in Germany*, 5 COLUM. J. EUR. L. 219 (1999). I add the adjective "strong" to Professor Gordon's useful typology in my description of Hansmann and Kraakman's views in order to capture their view that not only will there be convergence but that the Anglo-American corporate governance system will ultimately prevail (as opposed to a hybrid system incorporating various aspects of Anglo—American, German, and Japanese corporate governance structures ultimately prevailing).

[14] Hansmann and Kraakman, *supra* note 12, at 441.

[15] It is debatable whether Hansmann and Kraakman's statement about shareholders' control of the corporation is descriptively accurate in the United States, in fact. One of the striking features of American corporate law is how little real control shareholders have, given that they are the "owners" of the corporation. *See generally* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 128-40 (1968) (identifying separation of ownership from control in modern American corporation). The most direct power shareholders have in a publicly-held corporation is to elect the directors and to vote on some fundamental corporate changes. Yet, as Professors Blair and Stout have pointed out, where shareholders are widely dispersed, shareholders' voting rights are practically meaningless, given collective action problems, shareholders' rational apathy, and the power top managers exercise in nominating the candidates for the board and in otherwise shaping the voting agenda. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 310 (1999) (developing theory of economic role of board of directors in public corporation as "mediating hierarch" among different claimants to economic returns with fiduciary duties to corporation, in contrast to prevailing views about board as agent only for shareholders with fiduciary duties to shareholders). Even where institutional investors hold concentrated positions in a company — as is the case with many Fortune 500 companies — and thus are able to mitigate these collective action problems, such investors have typically not directly engaged in proxy contests to nominate and elect competing, non-management slates of directors but have rather put "corporate governance" shareholder proposals on companies' agendas for their annual meetings. Such proposals do not constitute direct shareholder control, though, because they must be framed as suggestions to management, not directives, in order to comport with state corporate law. *See, e.g.*, DEL. GEN. CORP. L. § 141(a) (2000) (requiring corporation to be managed under direction of board of directors unless corporation has elected otherwise in its certificate of incorporation); *cf.* Bernard Black, *Shareholder Activism and Corporate Governance in the United States*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 459, 463 (Peter Newman, ed. 1998) (asserting that one reason institutional investors' activism has had little or no effect on firm performance is because proposals must be precatory and not mandatory, given state corporate law).

economic interests; and the interests of other corporate stakeholders (such as creditors, suppliers, employees, and customers) ought to be protected by explicit contracts or by other bodies of law, rather than through participation in corporate governance.[16]

Ultimately, Hansmann and Kraakman's theory of corporate governance rests on a view of corporate accountability that posits corporate managers ought to have direct accountability under corporate law only to shareholders.[17] By limiting direct accountability to shareholders, they claim, aggregate social welfare will best be pursued.[18] In making this claim concerning accountability under corporate law, Hansmann and Kraakman are implicitly staking out a position on perennial questions in corporate law theory: what is the nature and purpose of the modern corporation and whose interests ought to "count" when decisions need to be made among competing interests? While Hansmann and Kraakman recognize corporate responsibilities to constituents other than shareholders, where those responsibilities are embodied in positive law (such as in antitrust, consumer protection, labor, or environmental laws) or in explicit contracts, and they recognize the importance of corporations serving the interests of society as a whole,[19] they reject the view that corporate law itself ought to embody a multi-fiduciary or stakeholder model of accountability.

In rejecting a multi-fiduciary or stakeholder model, Hansmann and Kraakman situate themselves firmly within the mainstream of corporate law theorists on issues of corporate social responsibility.[20] Thus, the

---

[16] Hansmann and Kraakman, *supra* note 12, at 442. In contrast to the shareholder-oriented model, another theory of the corporation is the stakeholder theory. The stakeholder theory, also called the other constituency theory, suggests that managers owe consideration (and perhaps even fiduciary obligation) to a wider range of constituents than the shareholders and that the content of this obligation is to consider the effects of managerial actions on other stakeholders or constituents in the corporate enterprise, such as employees, consumers, suppliers, the community and the environment. These are the predominant competing positions in the corporate social responsibility debate in the United States. *See infra* text accompanying notes 27-30.

[17] Hansmann and Kraakman, *supra* note 12, at 441.

[18] *See id.* at 441 (stating that "[t]he point is simply that now, as a consequence of both logic and experience, there is convergence on a consensus that the best means to this end (that is, the pursuit of aggregate social welfare) is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests.").

[19] *See id.* at 442.

[20] There is one way in which Professors Hansmann and Kraakman sharply diverge from the predominant position and that is in their suggestion that corporate shareholders ought to be subject to unlimited liability for the torts of the corporation. *See* Henry Hansmann and Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L. J. 1879 (1991). In this suggestion, Professors Hansmann and Kraakman show

predominant academic view in the United States about corporate social responsibility is directly derived from the shareholder theory of the corporation. This view suggests that corporations have no specific social responsibilities beyond profit-maximizing for the benefit of shareholders, but that such profit-maximizing must occur within the confines of the law, without deception or collusion. Under this view, corporations meet their proper social responsibilities by excelling in their economic activities, which then contributes to a well-functioning economy by employing people, by providing needed (and some unneeded) goods and services,[21] and by contributing to social welfare through paying taxes. The most widely quoted exemplar of this view is Professor Milton Freedman, who has stated that in a free economy "there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud."[22] Many, if not most, contemporary United States corporate law scholars adhere to this view of corporate social responsibility,[23] if they consider the matter at all.

---

what I interpret as greater concern than is typical among corporate law professors for the potential negative externalities imposed under a limited liability regime. Yet, I would assert that because the law has generally not developed in the direction they suggest, the underlying problem of potential negative externalities still exists without remedial doctrinal developments.

[21] *See* ROBERT FRANK, LUXURY FEVER 14-32 (1999) (discussing how social dynamics of people comparing themselves and their material well-being against that of their peer groups is producing "fever" for varied luxury goods at highest economic levels in the United States).

[22] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962); *see also* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N. Y. TIMES MAGAZINE., Sept. 13, 1970, at 32.

[23] *See, e.g.*, FRANK H. EASTERBROOK AND DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 12 (1991) (stating that shareholders, as residual claimants, have implicitly contracted for promise that firm will maximize profits in long run); HENRY G. MANNE & HENRY C. WALLICH, THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY (1972) (noting that social responsibility of corporations is shareholder wealth maximizing); Bernard Black and Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996) (arguing that principal goal of corporate law is to maximize shareholder wealth); *see also* Michael Bradley, Cindy A. Schipani, Anant K. Sundaram and James P. Walsh, *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 9 (1999); Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 113 (1987) (asserting that core goal of corporate law is to maximize equity share prices).

B. Competing Views on Corporate Social Responsibility

In contrast to the predominant academic view just described, at one extreme of the continuum of other views about corporations' social responsibilities is what I would call the "irresponsible" position. Adherents to the irresponsible position derive this view from the "nexus-of-contracts" conception of the corporation, although it is not by any means a necessary implication of the nexus-of-contracts view.[24] (The nexus-of-contracts view conceptualizes the corporation as a nexus of implicit and explicit contracts between shareholders, bondholders, managers, employees, suppliers, and customers.[25]) Adherents of the irresponsible position suggest that because the corporation is a legal fiction, useful only as a designator to refer to the nexus of any particular company's contracts, it "is incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations."[26] Taking the implications of the nexus-of-contracts metaphor seriously, and understanding the corporate purpose as maximizing shareholder wealth, advocates of the irresponsibility position suggest that corporate managers do not even have a social or moral obligation to follow the law when violations are profitable. So, for instance, Judge Frank Easterbrook and Professor Daniel Fischel, who are the primary academic advocates of this view, have written that "managers not only may but also should violate the rules when it is profitable to do so."[27] Because I have extensively criticized that view elsewhere, I will forego doing so here.[28]

---

[24] Thus, Professor Marleen O'Connor has utilized the nexus of contracts approach to the corporation to argue for a progressive position concerning expanded fiduciary duties on boards of directors–specifically, fiduciary duties to employees who are laid off in a corporate downsizing or restructuring or when production facilities are moved off-shore. *See* Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C.L. REV. 1189, 1203-07, 1252-53 (1991). Moreover, many corporate law scholars utilize a nexus of contracts view of the corporation as their underlying conception of the corporation, while not adopting the irresponsibility view of corporate law compliance. *See* Hansmann and Kraakman, *supra* note 12, at 441 (observing that profit-maximizing must be within confines of law).

[25] For a typical definition of the nexus of contracts view of the corporation, *see* EASTERBROOK AND FISCHEL, *supra* note 23 at 12.

[26] Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982).

[27] *See* Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982).

[28] *See* Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265 (1998).

The predominant position, as described above, can be seen as the middle of the continuum of views. The progressive alternative, which is derived from the stakeholder theory of the corporation, suggests that corporate managers' underlying social obligations are more extensive than maximizing shareholders' wealth within the confines of the law. Specifically, progressive scholars contend that directors ought to consider the impact of their decisions on a wider range of constituents than shareholders, and thus ought to consider the implications of their actions on employees, consumers, suppliers (in some cases), the community, and the environment.[29] This "stakeholder" view of corporate social responsibilities is not simply an academic construct but is evident in the structure of law and in the social democratic underpinnings of most European countries (with the exceptions of England, Switzerland, and Belgium) and is evident in part in the Japanese approach to corporate governance as well.[30] Moreover, in response to increasing numbers of mergers and acquisitions in the United States in the late 1980's, a majority of states passed "other constituency" statutes.[31] These statutes permit corporate boards of directors to consider the effects of their actions on other constituencies, particularly employees and local communities, and so protect a board from derivative litigation claiming breach of fiduciary duty if it decides

---

[29] *See* Steven M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163 (1991). *See generally* PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995) (including the writing of a large number of progressive corporate law scholars). Another perspective from which shareholder primacy is criticized is offered by Professor Frank Partnoy, who suggests that once one considers the effects of financial derivatives on managers' actions then "it no longer makes sense to speak of a fiduciary duty owed by managers and directors to shareholders" (because "[c]orporations are able to slice and dice cash flows in so many novel ways" and thus their fiduciary duties are similarly fractured). *See* Frank Partnoy, *Adding Derivatives to the Corporate Law Mix*, 34 GA. L. REV. 599, 610 (2000).

[30] *See* Peter Nobel, *Social Responsibility of Corporations*, 84 CORNELL L. REV. 1255, 1259 (1999); Mark Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 YALE L. J. 1927 (1993).

[31] The existence of other constituency statutes and their interpretation has been discussed in a number of law review articles. For overviews, *see* Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085 (2000) (suggesting that basic statutory corporate law model should include other constituencies and that companies should then be able to opt-out and adopt shareholder primacy norm in their Articles of Incorporation); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992) (discussing varying interpretations of corporate constituency statutes); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992) (suggesting that constituency statutes change how courts should construe directors' fiduciary duties).

to reject an acquisitive overture from another company.[32] Notwithstanding these examples of functioning stakeholder corporate governance systems in such developed economies as Germany, France, and Japan, the stakeholder conception of corporate social responsibilities remains relatively unpopular among American legal academics.

II. AN EXAMINATION OF THE PREDOMINANT POSITION

As articulated above, the predominant position on corporate social responsibility suggests that a corporation's social responsibility is to maximize shareholder wealth within the confines of the law, and that other constituents ought to be protected primarily through contract law (through labor union contracts to protect employees, primarily), and public regulatory law (environmental protection laws, anti-discrimination laws, consumer protection laws, or antitrust, for instance). The first point to be recognized is that by accepting the analytic structure of "shareholders v. 'other constituents,'" one is already, in effect, adopting a non-neutral position on the nature of the corporation which may be understood to suggest: (1) shareholders comprise the corporation, and (2) that all others — including, most importantly, employees – are outsiders.[33] This analytic structure is one that has recently been challenged by Professors Margaret Blair and Lynn Stout,

[32] Boards may not have actually needed such statutory authorization: given the business judgment rule, directors have quite broad discretion to consider other constituents in their decision making, so long as their decisions are not egregiously self-interested. *See Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140, 1145, 1155 (Del. 1990) (upholding decision of board to reject shareholder wealth-maximizing takeover offer, where board acted to advance interests of the corporation and to protect "the Time [journalistic] culture"); *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (decision not to play night games at Wrigley Field upheld, even though decision was made to protect the neighborhood around Wrigley Field and not to maximize shareholder wealth); *see also* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of the Corporation*, 85 VA. L. REV. 247, 288 (1999) (fiduciary duties of directors extend to corporation, not to shareholders *per se*); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 288-89 (1998)(noting practical difficulties of prevailing on "the rare claim that the directors violated the shareholder primacy norm" and noting that more than half of states have passed "other constituency" statutes permitting directors to consider effects of their actions on non-shareholder constituencies, such as employees, community, and consumers).

[33] Somewhat ironically, Hansmann and Kraakman do refer to employees, creditors, other suppliers, customers, or society at large as "other corporate contituencies." *See* Hansmann and Kraakman, *supra* note 12, at 441. This may be one implication they must draw from the nexus-of-contracts view of the firm, because firms make explicit and implicit contracts with many constituents; and it is not clear *a priori* why the contracts with constituents other than shareholders would be ignored in defining the nature of the firm. So stated, their overall argument is for the primacy of shareholders within a multi-constituent model of the firm.

who suggest that as an economic matter the fundamental nature of the public business corporation is as an instance of team production, requiring the firm-specific inputs of various constituents, including employees, middle managers, and perhaps the communities in which business operations are located.[34] Under the team production model of the public corporation, all constituents other than shareholders cannot fairly be treated as outsiders to the corporate enterprise, both because their inputs into the corporate enterprise are necessary to its success, and because many of these other constituents are also residual claimants to the wealth created in the corporate enterprise.[35] Yet, for purposes of the following discussion, I will utilize the more usual "shareholder v. 'other constituents'" construct, while recognizing that this construct may not fully capture the true nature of the public corporation.

The second point to be recognized is that there are three separate premises implicit in the traditional view. The first premise is that the purpose of the corporation is to maximize shareholder wealth. The second premise is that, given the purpose of shareholder wealth maximizing, the only direct, necessary accountability of the corporation is economic accountability to shareholders. The third premise is that the social responsibility of business is fully met by operating within the constraints of the law and private contractual obligations and that is as much social obligation as can be imposed on the corporation by law. While it may be that individual corporations should go beyond law compliance in individual instances, for example, to engage in conduct that is ethical,[36] and the predominant model would not preclude this, the predominant model would also suggest that any attempts to impose greater obligations on the corporation through the auspices of corporate law are problematic.

While for reasons discussed above I am not directly examining the shareholder wealth-maximizing premise, I would suggest that it

---

[34] *See* Blair and Stout, *supra* note 32, at 280.

[35] The theory of shareholder primacy usually derives from a view of shareholders as being the singular residual claimant in the corporate enterprise — that is, the claimant whose inputs (capital) are most at risk if the enterprise is unsuccessful. Blair and Stout's theory of the corporation as an instance of team production recognizes that other constituents' inputs, such as their human capital, in the case of employees, or their "government capital," in the case of state or local subsidies to businesses, are also at risk if the enterprise is unsuccessful. *See id.*

[36] *See, e.g.,* Melvin Aron Eisenberg, *Corporate Conduct That Does Not Maximize Shareholder Gain: Legal Conduct, Ethical Conduct, the Penumbra Effect, Reciprocity, The Prisoner's Dilemma, Sheep's Clothing, Social Conduct, and Disclosure,* 28 STETSON L. REV. 1, 6 (1998).

ultimately bears serious examination as well. In particular, as an empirical matter it is not at all clear that the purpose of the modern business corporation is simply to maximize shareholder wealth. Indeed, neither a majority of business managers in the United States or in the world,[37] nor a majority of citizens of the United States,[38] construe the corporate purpose so narrowly. One can reasonably expect that a majority of citizens in the European Union and Japan would reject such a narrow conception of the corporate purpose, because citizens in those societies have been educated within a political and social context that emphasizes a stakeholder view of the corporation.[39] While the views of those outside corporate law may not be determinative of the proper understanding of the corporation as a legal matter, those views ought to at least inform our understanding of the implications of the corporate social relationship. Moreover, if Professors Blair and Stout are correct as a theoretical matter about the team-production aspects of the corporation, it is then incorrect to assume that the purpose of the corporation is simply to maximize shareholder wealth. If the corporation is, in fact, better construed as an instance of team-production, then the purpose of the corporation is to maximize the joint output of the team; and there should be no particular pre-conception about how that joint output ought to be allocated among team members.[40]

But setting aside those important questions for the moment, the question to be addressed here is whether the constraints of public

---

[37] *See* Thomas W. Dunfee, *Corporate Governance in a Market with Morality*, 62 LAW & CONTEMP. PROBS., Summer 1999, at 129, 143-44 (discussing survey of 15,000 middle managers from 12 countries, finding that "in no country did a majority of managers agree" with statement that "the only real goal of a company is making profit," where alternative choice was statement that "a company, besides making profit, has a goal of attaining the well being of various stakeholders, such as employees, customers, etc."); Barry Z. Posner and Warren H. Schmidt, *Values and the American Manager: An Update Updated*, 1992 CAL. MNGMT. REV. 80, 85 (indicating, in survey conducted for American Management Association, that majority of U.S. managers were loyal to their customers first, to their employees, colleagues, and self-interest next, the public next, and then to shareholders).

[38] *Cf.* Richard S. Dunham, *Will Bashing Business Keep Paying off for Gore?*, BUSINESS WEEK, Sept. 4, 2000, at 42 (citing *Business Week/Harris Poll* survey in which 82% of Americans said that business "had gained too much power over too many aspects of American life," up from 71% in 1996); Keith H. Hammonds, *Writing a New Social Contract*, BUSINESS WEEK, March 11, 1996, at 60 (citing *Business Week/Harris Poll* survey in which 95% of Americans "rejected the view that corporations' only role is to make money").

[39] *Cf.* Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539, 566-68 (2000) (describing attitudes towards social responsibilities of firms among German and French public officials).

[40] *See* Blair & Stout, *supra* note 32, at 310.

regulatory law and private contract law are sufficient to meet the social and environmental challenges engendered by the exercise of corporate power. As developed below, I conclude that in the context of the increasingly global economy, these mechanisms are insufficient to meet the issues arising from the corporate social relationship, given the limits of both contract law and regulatory law to protect the interests of "other constituents" such as employees, consumers, and the environment in their relationships with corporate entities. First, though, I will briefly describe transnational corporate activity in the globalizing economy and then define some general parameters of the corporate responsibility complex of issues that arise from that activity.

A. *Brief Overview of Transnational Economic Activity in the Globalizing Economy*

According to the United Nations Commission on Trade and Development (UNCTAD), there are 53,000 companies with headquarters in more than three countries, which it defines as transnational corporations.[41] Transnational companies carry on two-thirds of world trade, nearly half of it within their own company networks.[42] The regional distribution of foreign direct investment (FDI), which is a measure of international production, is "heavily skewed towards developed countries, reflecting the fact that, in the past, most FDI [nearly three-fifths of world inflows] originated and stayed in developed countries."[43] Much of this FDI inflow and outflow in developed countries results from cross-border merger activities, which is estimated to account for more than 60% of FDI in Europe and the United Kingdom and 80% of FDI in the United States in 1998.[44] (Inward investment into OECD countries reached $465 billion in 1998, representing a 71% increase over 1997; outflows were $566 billion.)[45]

---

[41] UNCTAD, WORLD INVESTMENT REPORT 1999 (New York 1999). For a concise overview of the evolution of predominantly nation-based companies into the pattern of multinational corporations we now observe, *see* Linda A. Mabry, *Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 GEO. L.J. 563, 568-576 (1999).

[42] UNCTAD, WORLD INVESTMENT REPORT 1995 (New York 1995). In other words, fully one-third of world trade occurs between different offices of transnational companies, giving some indication of the enormous size of today's transnational companies.

[43] UNCTAD, WORLD INVESTMENT REPORT 1998 (New York 1999).

[44] Organization for Cooperation and Economic Development ("OECD"), *Recent Trends in Foreign Direct Investment 1998* 113 (1999).

[45] *See id.* at 109.

Although in absolute terms most FDI stays in developed countries, if relative indicators are used (such as FDI per $1,000 GDP), then the top 30 host countries for FDI are developing countries.[46] Thus, in 1997, developing countries received about two-fifths of world FDI inflows or $149 billion; this is twice the level they received in 1993.[47] In the early 1990s, half of this inflow to developing countries was official development finance, such as from the World Bank; by 1997 that share was down to 15%, which is a function of the growing importance of private capital inflows into developing countries.[48] Of this private capital inflow, one-half is foreign direct investment (i.e., investment in production); one-third is "portfolio investment," such as investment in currency trading or capital market investment; and the rest is commercial bank loans and private investment.[49]

These, and myriad other statistics, indicate the growing economic interdependence of the world's economies.[50] These statistics also suggest the growing importance of transnational companies' investments in developing countries, as private capital inflows begin to replace official development sources of money into developing countries. Given the growing financial significance of private investment, the social significance of private, corporate actors' conduct is concomitantly enhanced.

B. *The Corporate Social Responsibility Dilemma*

As a general matter, the field of corporate social responsibility asks what the social obligations of companies, as citizens, are to the societies in which they are embedded. The general corporate social responsibility concern tends to be a seemingly pessimistic preoccupation with the potential negative social and environmental effects that may be created by economic entities in their pursuit of economic returns. In particular, academics have sought to evaluate the conditions under which decisions presumed to be shareholder wealth-maximizing have had negative effects on employees, consumers, communities, or the environment.[51]

---

[46] WORLD INVESTMENT REPORT 1998, *supra* note 43, at 12.

[47] *Id.* at 16.

[48] *Id.* at 13-14.

[49] *Id.* at 14.

[50] For instance, the World Trade Organization reports that "[t]he average growth rate of foreign direct investment in recent decades has been 12.5 per cent a year, roughly twice as fast as growth in world merchandise trade and five times faster than growth in world GDP." WTO, TRADE AND ENVIRONMENT 35 (1999).

[51] The scholarship on this point is voluminous. A number of recent symposia provide

Clearly, the specifics of any given corporate social responsibility issue vary by industry. Thus the corporate social responsibility issues in the extractive industries (mining for oil, gas, coal, and various minerals), where there are very long time frames for investment, have primarily concerned two types of issues: (1) companies' "entanglement" with repressive governments in infrastructure development or security arrangements[52] and (2) the environmental consequences of particular extractive technologies.[53] The corporate social responsibility issues in the global textiles, clothing, and footware industries, as well as other light manufacturing (such as of rugs, toys, soccer balls, and other consumer goods) have concerned both the conditions of labor and the consequences attendant upon attempted labor organizing. The former issues include wages; child labor issues; the environmental, health, and safety aspects of work; and various concerns about the living conditions of people who live in company-sponsored housing.[54] The latter issues concern whether collective labor rights, such as the right to organize and freely associate with labor organizers and individual labor rights, such as freedom of expression, are protected.[55] The corporate social

---

a useful overview to this discussion. *See* Symposium, *Corporate Social Responsibility: Paradigm or Paradox?*, 84 CORNELL L. REV. 1133 (1999); Symposium, *Corporate Social Responsibility*, 62 LAW & CONTEMP. PROBS. 1 (1999). *See also* PROGRESSIVE CORPORATE LAW, *supra* note 29 (compiling views of many progressive corporate law scholars).

[52] *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92 (2d Cir. 2000) (involving allegations that "Shell Nigeria recruited the Nigerian police and military to attack local villages and suppress the organized opposition to its development activity"); Doe v. UNOCAL Corp., 248 F.3d 915, 920 (involving Burmese villagers' action against UNOCAL based on its alleged participation with Burmese/Myanmar government's use of force to construct an oil pipeline); Bennett Freeman, Deputy Assistant Secretary of State for Democracy, Human Rights, and Labor, Remarks to the Third Warwick Corporate Citizenship Conference (July 10, 2000), *available at* http://www.state.gov/www/policy_remarks/2000/00710_freeman_warwicku.html (visited Aug. 10, 2000) (discussing claims against American and British companies in extractive industries arising out of companies' involvement with national or local security forces). These cases will be discussed below. *See infra* notes 173-199 and accompanying text.

[53] *See, e.g.*, Jota v. Texaco, Inc., 157 F.3d 153, 163 (2d Cir. 1998) (vacating grant of motion to dismiss claim brought by Ecuadorian residents against Texaco alleging environmental and personal injuries from Texaco's particular techniques in extracting oil and remanding for further proceedings). This case will be discussed below. *See infra* notes 146-172 and accompanying text.

[54] *See, e.g.*, Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1073 (9th Cir. 2000) (reversing dismissal of case based on multiple allegations of violations of Fair Labor Standards Act in U.S. Commonwealth of Northern Mariana Islands). This case will be discussed below. *See infra* notes 190-210 and accompanying text.

[55] *See* Comments of Ron Blackwell, Director of Corporate Affairs, AFL-CIO, *in* BUSINESS AND HUMAN RIGHTS: AN INTERDISCIPLINARY DISCUSSION at 15 (Harvard Law School Human Rights Program 1999) (drawing distinction between labor standards and

responsibility issues in "heavier" manufacturing industries from tanning (leather-making), metal-plating, furniture, automobiles, steel, and others, primarily concern environmental issues but also labor issues to the extent that such manufacturing is located in countries without a robust tradition of labor protection. Other kinds of corporate social responsibility issues concern product safety, as with car and tire designs and the health consequences of some products such as cigarettes.[56] An emerging corporate responsibility issue concerns the responsibilities, if any, of pharmaceutical companies to make anti-AIDS drugs available at affordable costs in Africa and other countries where there is extensive HIV infection but where the costs of anti-AIDS drugs preclude treatment.[57] Although the specific issues may vary from industry to industry, the basic complex of issues concerns the relationships between corporate economic activity and the health and welfare of the people and environment with which the corporate actor interacts.[58] Obviously, this

---

labor rights).

[56] Another type of product safety concern is that concerning the quality of goods sold in developing countries. For instance, a study by the United Nations Food and Agriculture Organization and the World Health Organization found that approximately 30% of the pesticides sold in developing countries did not meet international quality standards. In particular, the study found that many of the pesticides contained hazardous or toxic substances that are either banned, or the sale of which is severely restricted, in developed countries. Press Release, Food and Agriculture Organization ("FAO"), Amount of Poor-Quality Pesticides Sold in Developing Countries Alarmingly High, (Feb. 1, 2001), *available at* http://www.fao.org/WAICENT/OIS/PRESS_NE/PRESSENG/2001/pren0105.htm (last visited Feb. 21, 2001).

[57] The response of pharmaceutical companies has been to agree to sell these drugs at cost in sub-Saharan Africa, where 25 million people are infected with HIV, the virus that causes AIDS. *See* Rachel Zimmerman & Michael Waldholz, *Abbott to Cut African AIDS-Drug Prices*, WALL ST. J., Mar. 27, 2001, at A3 (describing moves by many major pharmaceutical companies to sell their anti-AIDS drugs at cost in sub-Saharan Africa). In taking these actions, which seemingly recognize responsibilities well beyond shareholder wealth maximizing, company executives have expressed concerns about these actions making it "impossible [for pharmaceutical companies] to sustain the profit growth demanded by Wall Street." Gardiner Harris, *Adverse Reaction: AIDS Gaffes in Africa Come Back to Haunt Drug Industry at Home*, WALL ST. J., Apr. 23, 2001, at A1.

[58] I recognize, of course, that "the corporation" does not act but rather the people within it do. Yet, to this author speaking of "the corporate actor" or "the corporation" makes sense, because the corporation as an organization structures the actions of the individuals within it, such that the social implications of the whole are larger than the social implications of the sum of the parts or so I have argued. *See Corporate Compliance*, *supra* note 28, at 1377 n.414. This "reifying approach" is consistent with the approach of a number of prominent business ethicists, who construe corporations as unique communities capable of generating specific social norms. *See* THOMAS DONALDSON & THOMAS W. DUNFEE, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS (1999); Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252 (1994). For an introduction to

is not a narrow complex of issues.

One thing that may be immediately apparent, though, is that government entities regulate each of these areas of potential concern. Also, some areas of concern, such as labor relationships, may be affected by contractual relationships as well. The question then becomes why this author suggests that such constraints are insufficient fully to address the concerns of corporate social responsibility in the context of a globalizing economy.

C. *The Limits of Law*

Looking at the question as a matter of theory, there seems to be no reason that well-designed laws, that take account of all social costs from every type of industrial production and employment relationship and that correctly require companies to internalize all such costs, could not be sufficient constraints to solve the corporate responsibility problem. Certainly for these constraints to be sufficient, attention would need to be paid to organizational design within companies such that the requirements of law are effectively translated into actions at all levels of the organization. Moreover, the complex of liability regimes and enforcement would need to be well designed to motivate compliance by recalcitrant companies. Yet, none of these preconditions is theoretically impossible by any means, and indeed this seems to be the ideal state of law towards which much thinking and writing strives and towards which actual law stumbles, slouches, or slogs, depending on one's optimism. But, such well-designed laws, organizational designs, and liability and enforcement structures are the necessary theoretical precondition for the predominant view to be correct.

There have always been reasons to be concerned that, in reality, even in a purely domestic setting, laws will not be well designed in this ideal sense, and so they will not correctly structure all of the underlying relationships and reflect all of the negative externalities.[59] But there are

---

Donaldson and Dunfee's work, *see* Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L. J. 215 (2001). And yet, the reifying approach is sharply rejected by some proponents of the predominant position. *See, e.g.*, Milton Friedman, *A Freidman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N. Y. TIMES MAGAZINE, Sept. 13, 1970, at 32 (stating that "[o]nly people can have responsibilities.. A corporation is an artificial person and in this sense may have artificial responsibilities, but 'business' as a whole cannot be said to have responsibilities . . . .").

[59] *See, e.g.*, David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 50-65 (1979) (discussing how corporate political involvement may affect structure of law).

particular features of globalization of the economy that accentuate the difficulties of relying upon law as an external constraint to correctly structure the corporate social relationship. One of the defining features (and perhaps the defining feature) of globalization, as it is now understood, is that it undermines the ability of sovereign nations to impose substantive, proactive limits on economic actors such as transnational corporations and capital market participants.[60] Moreover, because of the structure of globalization and because there is no international sovereign, the power of nations to tax corporate enterprises and spend money on social welfare benefits in order to address distributive concerns arising from globalization is waning, although it is far from fully diminished. Finally, in the increasingly common international context, when there are instances that can be understood as a breakdown in corporate social responsibility, law is often insufficient to provide redress. Each of these points, clearly, needs elaboration.

1. The Undermining of Sovereignty: Problems in the Proactive Application of State Power

As stated above, one distinctive feature of globalization of the economy is the effect it has on the ability of nations to exercise proactive, regulatory power on transnational companies. That is, globalization of the economy as an economic process undermines the practical ability of nation-states to regulate the totality of activities of transnational companies in a dispassionate, objective fashion.[61] This process is

---

[60] *See* Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age,* 18 PENN. J. INT'L ECON. LAW 745, 749 (1997) (discussing how competition for foreign investment affects nations exercise of sovereignty and even concept of "sovereignty"). One interesting strand of sociological and political argument concerns the extent to which one can say that domestic governments' effective power is being undermined by globalization, versus an argument that domestic governments having chosen to enact deregulatory policies (such as with respect to currency exchange rates, direct foreign investment, stock and other financial markets) that have allowed globalization to flourish. For one introduction to this argument, with references to the sociological literature, see Saskia Sassen, *The Spatial Organization of Information Industries: Implications for the Role of the State, in* GLOBALIZATION: CRITICAL REFLECTIONS 33, 46 (James H. Mittelman ed., 1996) (discussing role of state in implementing new economic architecture by enacting policies "furthering deregulation, strengthening markets, and pushing for privatization"). For a legal argument that developed nations have chosen deregulatory policies, and so it is not quite correct to say that globalization has "undermined" sovereignty, but rather that globalization is the logical implication of how countries' have chosen to exercise their sovereignty, see Daniel K. Tarullo, *International Economic Low and Democratic Accountability, in* DEMOCRACY AND THE RULE OF LAW 308(Norman Dorsen & Prosser Gifford eds., 2001).

[61] *See, e.g.,* A. Claire Cutler, et al., *Private Authority and International Affairs, in* PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 3, 15-19 (A. Claire Cutler, et al., eds.) (evaluating

occurring in a number of different ways, so I will focus on two of the more important ways it is occurring: through companies' ability to relocate production processes to countries whose regulatory structure is perceived to be most favorable and through companies' influence on the kinds of laws and regulations countries promulgate and enforce in the first instance.

a. Relocation as a Method of Choosing the Applicable Regulatory Structure

One of the major reasons that globalization undermines sovereigns' power to regulate corporate activity is that companies can, and do, move their productive processes to different countries or "outsource" to independent producers in other countries to take advantage of competitive opportunities, including favorable regulatory climates. This process has been responsible for raising the standard of living in some developing nations,[62] and countries compete to encourage such foreign

ways in which private entities are taking on some aspects of quasi-governmental authority, even as governments divest themselves of monopoly on such authority); HANS-PETER MARTIN AND HARALD SCHUMANN, THE GLOBAL TRAP, 130, 204, 216 (1999) (describing "removal of economic power form the state" and competition among governments to offer financial incentives to corporations to locate their facilities in their country, including by infrastructure investments, negotiating labor concessions, etc.); *see id.* at 185 (citing Boutros Boutros-Ghali, former secretary-general of United Nations, who stated that as result of globalization "individual states have less and less capacity to influence things, while the powers of global players — in the realm of finance, for example — grow and grow without being controlled by anyone"); SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS 92 (1998) (stating that "the major dynamics at work in the global economy have the capacity to undo the intersection of sovereignty and territory embedded in the modern state"). Prof. Sassen argues against a simple national/global duality; however, because she recognizes that some aspects of a company's operations are "place-bounded," such as fixed infrastructure investment, natural resources, and specialized workforces, while others are "electronic space outputs," which are hypermobile. *Id.* at p. 199; *see also* WTO, *supra* note 50, at 1 (1999) (recognizing that "economic integration has, or at least is perceived to have, diminished the regulatory power of individual nations"); Jessica T. Mathews, *Power Shift*, 76 FOREIGN AFFAIRS 50 (1997) (national governments are increasingly sharing sovereign powers with businesses, international organizations, and non—governmental organizations). For a thoughtful analysis of the various ways in which globalization is affecting the relationships between nations and between nations and private actors, *see* Alfred C. Aman, Jr., *Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest*, 6 IND. J. GLOBAL LEGAL STUD. 397 (1999).

[62] In particular, the East Asia and Pacific regoins have shown a dramatic decrease in the percentage of the population living on less than $2 per day (from 67.0% of the population in 1987 to 49.1% in 1998). *See* WTO,TRADE, INCOME DISPARITY AND POVERTY 2 (2000). This region includes four of the most successful newly industrialized nations: Hong Kong, Taiwan, South Korea and Singapore. *See* Gary Gereffi, *The Elusive Last Lap in the Quest for Developed-Country Status in* GLOBALIZATION: CRITICAL REFLECTIONS 59-61

investment, indicating that it is perceived as a positive influence on economic development. The process "shrinks" sovereignty, however. I will elaborate upon that point with respect to two substantive areas of particular concern in discussions of globalization of the economy: environmental and labor law.

(1) Environmental Law

The Environmental Protection Agency in the United States recently promulgated integrated regulations about the disposal of toxic and conventional pollutants in the pulp and paper industry, one of the most pollution-intensive industries in the United States,[63] covering both air and water emissions.[64] The technology standards in the regulations will "cut toxic air pollutant emissions by almost 60 percent. . . and virtually eliminate all dioxin discharged from pulp, paper and paperboard mills into rivers and other surface waters."[65] If U.S. companies move their paper production facilities to other countries with less stringent environmental laws; however, such as Mexico,[66] then the environmental impact of these regulations will be substantially undermined. While the paper and pulp industry may be less "mobile" than many (given the economics of transporting the raw materials such as wood to the production facilities), other industries, such as the furniture-making, automobile manufacturing, electronics, and semiconductor industries, have made just such moves.

(James H. Mittelman, ed. 1996) (discussing patterns of industrialization and success of Hong Kong, Taiwan, South Korea and Singapore).

[63] *See* TRADE AND ENVIRONMENT, *supra* note 50, at 31 (1999) (identifying paper and pulp, non-ferrous metals, industrial and agricultural chemicals, iron and steel, and petroleum refining as U.S. industries incurring highest level of pollution abatement and control expenditures).

[64] EPA Cluster Rule for Pulp, Paper, and Paperboard Category, 40 C.F.R. 430 (2001). *See generally* Robert Repetto and Duncan Austin, PURE PROFIT: THE FINANCIAL IMPLICATIONS OF ENVIRONMENTAL PERFORMANCE 7-11 (Robert Livernash ed., 2000) (discussing cluster rule).

[65] *See* EPA, *EPA's Final Pulp, Paper, and Paperboard Cluster Rule*, DOC. EPA-821-F-97-010 (Nov. 1997), *available at* http://www.epa.gov/waterscience/pulppaper/jd/fs1.pdf (last visited 11/13/2001).

[66] *See* Keith Pezzoli, *Environmental Management Systems and Regulatory Innovation*, 36 CAL. L. REV. 335, 338-39 (2000) (asserting that as of June 1, 1999, Mexico ranks thirtieth in world in number of manufacturing plants certified as having highest standards of environmental management ("ISO 14001 compliant"), with forty-eight such plants after Japan (first in the world with 2,124 certifications); Germany (second with 1,400); the United Kingdom (third with 947); the United States (seventh with 460); and twenty-five other countries).

Avoiding environmental regulations by moving production abroad may not actually be a typical decision, however. First, some kinds of production likely to have serious environmental impacts — particularly electrical power generation and transportation — cannot be moved.[67] Likewise, while mining and the extractive industries generally are of serious environmental concern, oil, gas, coal, and other minerals can only be extracted where there are such deposits.[68] Second, studies by the World Trade Organization ("WTO") indicate that complying with environmental regulations in the United States accounts for 0.6% of production costs for most industries, rising to between 1.5% and 2% of the costs of production for the most pollution-intensive industries (petroleum and coal products, chemicals and allied products, metal industries, and paper and allied products).[69] Companies seem unlikely to move production facilities to save 1-2 percent of their costs of production (unless it is an industry subject to extreme international competition), particularly because any actual cost savings would be offset by increased shipping costs. Indeed, the data do not show migration of polluting industries from developed countries to developing countries (perhaps because most polluting industries also tend to be capital intensive and so tend to move to other developed countries),[70] while the data do show migration of labor-intensive

---

[67] For instance, carbon dioxide (CO_2), which is a by-product of the process of producing electricity, is a primary contributor to global warming. *See* Klaus Toepfer, United Nations Environment Programme Executive Director, Statement on Climate Change (Mar. 15, 2001), *available at* http://www.unep.org/Documents/Default.asp?DocumentID=193&Article ID=2793.

[68] One countervailing argument here is that when decisions are made about where to locate new facilities among countries with similar natural resources to extract (for instance in mining or oil and gas extraction) or where to locate new sites for chemical-intensive agriculture, the stringency of the environmental regulations may well be a factor that is taken into account.

[69] *See* TRADE AND ENVIRNONMENT, *supra* note 50 at 36. As the WTO notes, however, studies about the global costs of compliance with environmental regulations are hampered by a lack of available data, because only the United States publishes such data, based on an annual survey of industry participants. *See id.* The Organization for Economic Cooperation and Development ("OECD") in Europe did a study of the costs of compliance in the iron and steel industries and found a larger range of compliance costs, concluding that "direct environmental costs are believed to account for 1-5 percent of production costs." OECD, THE EFFECTS OF GOVERNMENT ENVIRONMENTAL POLICY ON COSTS AND COMPETITIVENESS: IRON AND STEEL SECTOR, DSTI/SI/SC(97) 46 (1997), *cited in* TRADE AND ENVIRONMENT, *supra* note 50, at 38 (1999).

[70] *See* TRADE AND ENVIRONMENT, *supra* note 50, at 31 (discussing studies finding that "developed countries' share of world trade in 'environmentally sensitive sectors'... remained essentially unchanged (81.1 per cent in 1990, compared to 81.3 per cent in 1970)"); *see also* Robert Repetto, *Jobs, Competitiveness and Environmental Regulation: What Are the Real*

industries to developing countries.[71]

Moreover, not every company that moves production facilities abroad takes advantage of the host country's laws. A number of studies have shown that transnational companies tend to use standardized technologies throughout their productive facilities.[72] Indeed, this makes good economic sense. Where companies have developed stringent environmental management systems, they are financially better off using those systems in all of their production facilities, notwithstanding the local laws and indeed have higher firm values than firms without stringent environmental management systems.[73] Presumably many companies are aware of this, and thus the synchronicity between doing good and doing well promotes compliance with stricter environmental regulation than would be required in the international context.

This is not to suggest that there are no adverse environmental impacts from globalization, of course. Once production facilities are moved offshore to take advantage of lower labor costs, the lower environmental standards of host countries may become quite relevant within factories, as they have in the apparel and footwear industries.[74] In addition, part of the impetus for increasing global economic integration is a reduction on tariffs and liberalization of the rules concerning foreign investment, both of which fuel economic development, which itself entails environmental consequences.[75] There have also been concerns expressed that some

---

Issues?" WORLD RESOURCES INST. REP., Mar. 1995, at 8 (concluding that "To the extent that developed countries are exporting their dirty industries, they seem to be exporting them to each other, not to the less developed economies.").

[71] *See* TRADE AND ENVIRONMENT, *supra* note 50, at 38-40.

[72] According to the 1995 U.S. International Trade Commission, "much research indicates that multinational firms tend to replicate the technologies employed in their home markets when operating in developing countries. Indeed, the ability to duplicate technology in a number of countries is deemed central to the competitive strategies of most multinationals."

[73] *See* Glen Dowell, et al., *Do Corporate Global Environmental Standards Create or Destroy Market Value?* 46 MGMT. SCI. 1059, 1060 (Aug. 2000) (finding that multinational enterprises that adopt stringent global environmental standards, notwithstanding variations in local regulations, have higher firm values (as measured by Tobin's) than firms without stringent environmental standards).

[74] *See* Steven Greenhouse, *Report Says Global Accounting Firm Overlooks Factory Abuses*, N.Y. TIMES, Sept. 28, 2000, at A12 (discussing environmental, health, and safety issues in overseas apparel factories); Bill Richards, *Nike to Increase Minimum Age in Asia for New Hirings, Improve Air Quality*, WALL ST. J., May 13, 1998, at B10 (discussing efforts Nike was making to refurbish reputation, including by improving air quality in its overseas plants to match requirements in United States).

[75] The United Nations Environment Programme (UNEP) cites a number of examples of this relationship in country reports issued in conjunction with a recent meeting of trade and environment ministers in Berlin. For instance, "[i]n India, trade liberalization in the

domestic environmental regulations may be undermined in the process of complying with international trade regulations under the auspices of the World Trade Organization (WTO) or international trade regimes such as the North American Free Trade Agreement (NAFTA).

Moreover, even the World Trade Organization (WTO), which obviously supports expanding the processes of globalization, recognizes that there is a perception that environmental regulations are expensive and thus that countries which adopt stringent environmental requirements will be at a competitive disadvantage in attracting foreign investment.[76] Companies have used this perception to lobby against new environmental laws, with some success.[77] Thus, the process of globalization, and the competition by countries for capital investments, has led to what the WTO terms a "regulatory chill" with respect to countries enacting protective environmental laws, with the effect that global environmental regulation may not cause companies to fully internalize the costs of negative environmental externalities. While the effects of globalization on environmental regulation cannot necessarily be accurately described simply by using the familiar rubric of an environmental "race to the bottom;" therefore, it is at the same time clear that domestic regulators are not able effectively to address all of the environmental problems industrial production entails, given the mobility of capital and of production and given the "intellectual leverage" such mobility creates.

---

form of tariff reduction and liberalization of foreign investment in the automotive sector helped increase automobile production by 136%. This contributed to a doubling of urban air pollution levels between 1991 and 1997." *See* News Release, UNEP, Trade Agreements Must Consider Environmental Issues (March 21, 2001), *available at* http://www.unep.org/Documents/Default.asp?DocumentID=196&Article ID=2803 (last visited 3/22/01). Other examples included overfishing in Uganda and Argentina linked to reductions in tariffs on fishing exports. *See id.* This point is clearly not intended to suggest that economic development should somehow be stopped to promote environmental values; but rather, as UNEP suggested, both countries and companies ought more aggressively to promote and implement policies of environmentally sustainable development in both developed and developing economies. *See id.*

[76] *See* TRADE AND ENVIRONMENT, *supra* note 50, at 5-6, 35 (1999) (discussing "regulatory chill"); *see also* Daniel C. Esty & Damien Geradin, *Environmental Protection and International Competitiveness: A Conceptual Framework*, J. WORLD TRADE, June 1998, at 5, 19-20 (discussing examples of proposed environmental legislation in the United States, European Union, Australia, and Japan that were defeated on the basis of international competitiveness concerns).

[77] *See id* at 20.

(2) Labor Law

The potential effect of globalization on the labor relationships between transnational corporations and people throughout the world is another area of growing corporate social responsibility concern. Here, as in the environmental area, globalization has undermined the ability of any one country to regulate the full panoply of activities of transnational companies, casting doubt on the assumption that corporate social responsibility concerns can be fully addressed by reliance upon existing law. American, Japanese, and European companies do move production offshore to take advantage of lower wages,[78] and the generally less stringent labor, health, and safety regulations associated with those lower wages.[79] Part of the phenomenon of globalization is the increasing irrelevance of geography to the means of production, given new technologies for the global shipment of goods, the advent of the computer, and in particular the Internet.[80] So, of course, it is possible for U.S. and European banks, credit card companies, or insurance companies to have their "back office" operations located in India, Thailand, or Indonesia.[81] Some industries, such as the textiles, apparel, and footwear industries, have moved almost all of their production away from the United States and the European Union to developing nations to take advantage of lower wages.[82]

---

[78] *See, e.g.*, TRADE AND ENVIRONMENT, *supra* note 50, at 5 (1999) (finding that foreign direct investment into developing countries tends to be in labor intensive industries, such as light manufacturing); *Business this Week*, THE ECONOMIST, Mar. 31, 2001, at 5 (stating that "Aiwa, Japanese electronics maker just over half-owned by Sony, said it would cut its workforce by half and close eight of its nine factories in Japan, Malaysia, Indonesia and Wales," and further stating that "[i]nstead it will outsource most of its production to contract manufacturers in low-cost countries.")

[79] *See* Charles Sable, et al., *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace* (Draft May 2, 2000), *available at* http://web.mit.edu/dorourke/www/PDF/RLS21.pdf (describing globalization and concluding that as "The very transformations making possible higher quality, cheaper products often lead to unacceptable conditions of work: brutal use of child labor, dangerous environments, punishingly long days, starvation wages, discrimination, suppression of expression and association.").

[80] *See* THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 117 (1999) (discussing how the Internet is fueling the increasing mobility of where work is performed).

[81] *See* Mark Landler, *Hi, I'm in Bangalore (But I Can't Say So)*, N.Y. TIMES, Mar. 21, 2001, at A1 (describing call centers in India, which are a "booming business . . . as companies like General Electric and British Airways set up supermarket-size phone banks to handle . . . customer inquiries. The companies value India for its widespread use of English and low-cost labor.").

[82] In October of 2000, the International Labor Organization ("ILO") issued a report on global employment in the textile, clothing, and footwear ("TCF") industries. It found that while the total number of people employed in these industries remained stable during the

And yet this mobility implicates serious corporate social responsibility issues, primarily about wages and the conditions of labor. With respect to the conditions of labor, as Harvard economics Professor Dani Rodrik has pointed out, U.S. law prevents U.S. manufacturers from competing with each other by requiring workers to agree to work twelve hour days, without overtime, by paying workers below the minimum wage, or by requiring workers to agree to be fired if they join a union.[83] And yet globalization facilitates exactly that sort of competition, undermining the effective power of domestic governments to regulate labor conditions and what constitutes "fair" competition within its borders[84] and affecting the range of social policy choices perceived to be available to governments domestically.[85]

With respect to wages, some evidence suggests that globalization may be leading to downward pressures on wages in *developed* countries, at least among people who are "unskilled" and "semi-skilled" according to traditional labor definitions, because their labor can be substituted by trade with or outsourcing to countries with lower wages.[86] Indeed, although the comparative advantage used by many developing countries in their efforts to attract foreign investment has been lower wages,[87] there

---

1990s (30 million people), there has been a dramatic shift in the distribution of those jobs towards Asia, such that Asia now has 72% of total world employment in the TCF industries (of which China alone accounts for 20% of global TCF employment). Press Release, ILO, Global Employment Levels in Textile, Clothing and Footwear Industries Holding Stable as Industries Relocate (Oct. 16, 2000), *available at* http://www.ilo.org/public/english/bureau/inf/pr/2000/38.htm. The summary indicated that clothing employment in the United States and Europe fell steadily throughout 1990-1998. The ILO stated that these trends are hardly surprising given the "high labour content in clothing production." *Id.* The report noted that average hourly wage rates in the textile industry are approximately $10/hour in Europe; $9.40/hour in Japan; and $7.64 in the United States, as compared to average hourly wage rates of under $0.45/hour in China, Indonesia, Pakistan and Vietnam. *Id.*

[83] *See* DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 36 (1999).

[84] The phrase "effective power of governments" is based on the distinction between "legal or formal sovereignty" and "effective sovereignty" that has been developed in the globalization literature. Legal or formal sovereignty refers to "exclusive legal authority within a given territory and to mutual recognition of that authority by other sovereigns." Tarullo, *supra* note 60, at 310. Effective sovereignty refers to the ability of domestic regulators actually to control events within their territories, or at their borders, given the competitive pressures of globalization, the effects of currency exchange deregulation, and the importance of events in the world capital markets on domestic policies. *Id.*

[85] *See infra* notes 110-118 and accompanying text.

[86] *See* Rodrik, *supra* note 83, at 18-23 (discussing fact that liberalized world trade and increased mobility of capital mean that costs of improved working conditions in developed nations cannot be shared as easily between employers and employees and concluding that employees have borne brunt of these structural changes with lost jobs and lower wages).

[87] *See* ETHAN KAPSTEIN, SHARING THE WEALTH 110-11 (1999). This point is recognized by policy makers in developing nations. In October, 2000 the presidents and chief

is now some evidence suggesting that efforts to compete for investment on the basis of low wages is causing wages to remain depressed in some developing countries as well.[88] Because increasing globalization has occurred at the same time as increasing economic inequality in the world, both within nations and between the industrialized nations and the developing nations,[89] if wage stagnation or wage depression is affected by globalization, that is cause for a serious examination of what role, if any, transnational corporations might play in creating the underlying problems and what corporate accountability or even responsibility may be required under those circumstances to start to solve these problems.

The relationships between increased global trade, economic growth, and economic inequality are obviously complex, however; and I have no expertise to add in resolving the conundrum of growing economic inequality in the world, which has perplexed economists.[90] As a general matter, economic inequality (income divergence) in the world has been increasing in the period 1960 through 1985, a period also marked by increasing trade liberalization.[91] The reasons for growing inequality are not clear, however.[92] In part, this growing inequality may be due to

---

executive officers of 19 national employer's organizations from the Asia-Pacific region met for their fifth conference on regional development, and they issued a 19-point communication on economic development and labor issues. Among other points these employers' representatives made was that "there is a need to move from [manufacturing] competitiveness based on cost-reduction to one based on value to the customer. Competitiveness should be based on a human resources strategy that equips people with capabilities that provide them with a range of choices." *Conclusions of the 5th Asia-Pacific High-Level Employers Conference*, U.N.-U.S.A. NEWSWIRE, Nov. 16, 2000, on file with U.C. Davis Law Review.

[88] *See* KAPSTEIN, *supra* note 87, at 110-11 (providing evidence that wages remain depressed in developing nations as result of competition for foreign investment). Similarly, the ILO concluded that the ability of textile, clothing, and footwear manufacturers to quickly change where their goods are produced to take advantage of lower wages has "partly slowed down wage increases in these industries and kept wage levels below those of other industrial sectors." Press Release, *supra* note 82.

[89] *See infra* note 134.

[90] *See* RODRIK, *supra* note 83, at 16 (discussing the fact that economists have been unable to identify major reasons for rising economic inequality, both within developed countries and between developed countries and rest of the world).

[91] *See* WORLD TRADE ORGANIZATION, TRADE, INCOME DISPARITY AND POVERTY 14 (1999).

[92] As Professor Dani Rodrik has described the issue, neither trade liberalization nor skill-based technological changes explain all of the rising wage inequality in the world or even a substantial portion of it. *See* RODRIK, *supra* note 83, at 16. Yet, there are few other theories being put forth to explain this trend. As Rodrik puts the point, "[E]conomics is notoriously bad at quantifying forces that most people believe are quite important. For example, no widely accepted model attributes to postwar trade liberalization more than a

higher economic growth rates in richer countries, on average, than poorer counties.[93] In part, it is because some of the world's poorest countries have experienced negative growth and have become even poorer, often due to civil wars and ethnic conflicts.[94] During the same years (1960 to 1985), the evidence shows that both developed and developing countries that are more open to trade have higher growth rates than those that are not open to trade,[95] which (according to most studies) will ultimately help to alleviate poverty[96] and, one presumes, economic inequality. Yet, there is a question of how long "ultimately" is under current conditions. That is, how long will it be necessary for the world's economy to grow in order to substantially affect the poverty that plagues most of the world? Today, 1.3 billion people in the world live on an income equivalent to one dollar per day,[97] and 3.0 billion people, or half the world's population, live on the equivalent of two dollars per day.[98] Even under the most optimistic assumptions about economic growth, it is expected that by 2015 there are likely still to be 2.3 billion people living on $2 a day or less.[99] So if wages in many developing countries are remaining depressed as a result of the global competition for capital, that, I submit, is part of the complex of corporate social

very tiny fraction of the increased prosperity of the advanced industrial countries. Yet most economists do believe that expanding trade was very important in this progress." *See id.*

[93] See TRADE, INCOME DISPARITY AND POVERTY, *supra* note 91, at 3.

[94] *See id.* at 3 & n.5.

[95] *See id.* at 36.

[96] *See, e.g., id.* at 43; DAVID DOLLAR & ALART KRAAY, GROWTH IS GOOD FOR THE POOR 19 (2000) (finding that the relationship between growth of income of the poor and overall economic growth within a country is one-to-one, implying that the poor participate equally with wealthier people in growth in income as an economy grows).

[97] UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 24 (1999).

[98] *See id.* While Southeast Asia is one of the success stories of economic progress from global trade, even there 49% of the population lives on the income equivalent of $2 per day, as of 1998 (although down from 67% in 1987). *See* TRADE, INCOME DISPARITY AND POVERTY, *supra* note 91, at 14.

[99] In September, 2000, 149 countries committed themselves to international development goals supported by the United Nations Development Program, the World Bank, the International Monetary Fund, and the Organisation for Economic Co-operation and Development. *See* THE WORLD BANK, WORLD DEVELOPMENT INDICATORS 2001, at 4. According to the World Bank, "[e]ven under the most optimistic assumptions [about world economic growth], in 2015 there are likely to be 2.3 billion people living on $2 a day or less, a limit that represents extreme poverty in many middle-income economies." *See id.* The optimistic assumption is that developing countries can maintain average GDP per capita growth of 3.7% per year, which is well above the average of their economic growth in the 1990s, which was 1.7 percent a year.

responsibility issues. Indeed, world business leaders have recognized as much.[100]

By the above brief discussion, I am not meaning to imply that companies relocating production in response to comparative regulatory advantage can be quickly and confidently labeled a "bad thing," or irresponsible, however. The corporate social responsibility area of inquiry does not admit of simple solutions.[101] Globalization is obviously a structural phenomenon, and it is creating competitive wage and price pressures in many industries that managers of transnational companies are not free to ignore. I doubt that any divisional manager of any transnational company wakes up in the morning with a zeal to figure out which workers in which country she can squeeze that day, but probably many a divisional manager of many a transnational company wakes up with the anxious certainty that she needs to cut costs or her division or her job will be in jeopardy, given the brutal reality of global competition. Producers are under pressure from retailers to cut costs, and retailers are under pressure from the global competition with other retailers to cut costs; and all of them are under pressure from the capital markets to show continuing profit improvement.[102] What I do suggest, though, is

[100] Thus, for instance, world economic inequality was the major focus at a recent meeting of the World Economic Forum, in Davos, Switzerland. *See* William Drozdiak, *Well-Guarded Elite Ponders World's Division*, WASH. POST, Jan. 31, 2001, at E3. The World Economic Forum is an organization comprised of the world's top business and political leaders that sponsors annual meetings to discuss important economic and political trends facing business. *See id.*

[101] I was reminded of this recently by Professor Lan Cao of William and Mary Law School. Professor Cao grew up in Vietnam, and as she put it, "I'm like the economists who wish they had more than two hands. While on the one hand I don't like the wages and working conditions in the Nike factories in Viet Nam, on the other hand my relatives in Viet Nam tell me these are the best jobs around, and that they'd far prefer to work for Nike or other multinationals than to work in the locally-owned factories." Professor Lan Cao, Comments at Hastings University Conference on Multinational Accountability under International Law (Feb. 16, 2001). Professor Deborah Spar of the Harvard Business School made a related point, arguing that given the greater visibility of large, global companies and their interests in protecting their reputations in the global marketplace, these companies' foreign direct investments can improve human rights and labor relations in some instances. *See* Debora L. Spar, *The Spotlight and the Bottom Line: How Multinationals Export Human Rights*, FOREIGN AFF., May 1998, at 11. While recognizing some of the serious human rights problems of working standards and wages, Professor Spar also states that U.S. multinationals bring with them "the glare of public scrutiny and the changes it can induce in an increasingly global marketplace. When local producers in Vietnam, Pakistan, or Honduras exploit their work force, few in the West hear of it, especially if the products are not exported to Western markets. But when those same producers become suppliers to Reebok, Levi Strauss, or Walt Disney, their actions make headlines in the United States." *Id.* at 12.

[102] The competitive cycle doesn't end there, of course. With over 9,000 mutual funds

that given these competitive dynamics, the constraints of domestic law will be necessary but not sufficient to address the social implications of globalizing production. Rather, the structural pressures brought about by globalization demand structural solutions, or at least demand the development of structural counter-pressures.[103]

b. The Efects of Globalization on Countries' Motivation to Pass Protective Laws

One response to the phenomenon of companies relocating to countries with lower wages and less protective labor, health, safety, and environmental regulations is to disagree that there is a corporate social responsibility concern where a host country chooses not to protect its people with better laws.[104] Indeed, this argument is a necessary premise of the traditional view on corporate social responsibility, because that view emphasizes that maximizing economic returns in compliance with the law fully satisfies a corporation's responsibilities to society and by implication this must include foreign, as well as, domestic law.

The first point to recognize is that this academic construct does not reflect the views of many citizens in the industrialized nations. Surveys show that a majority of Americans and Europeans do not agree that companies' social responsibilities are fully actuated simply by maximizing shareholder wealth in compliance with the law, both domestically and globally (although all would presumably agree that law compliance is an important starting point).[105] The survey data is corroborated by nascent social trends in the United States and Europe, such as the anti-sweatshop movement or the sustainable development movement.[106] Witness the reaction of the American public to publicity

---

for investors to choose from just in the United States, mutual fund managers are also under competitive pressures to "beat the market," that is, to show constant improvement in the returns to investors from their fund. Thus, while many companies feel that the capital markets are a significant source of pressure and control, many participants in the capital markets feel pressured and out-of-control by the competition within their industry. *See* Martin & Shumann, *supra* note 61, at 189 (quoting a number of money market managers to effect that "it is not us [in charge,] it is the marketplace").

[103] As is probably apparent from the introduction to this Article, I will be discussing the use of expanded social, political and environmental disclosure as a mechanism to develop structural counter-pressures in Article Two of this series.

[104] Indeed, even in the United States, people working full time at the minimum wage are not always earning incomes that put them above the federally-defined poverty level.

[105] *See supra* notes 37-38.

[106] "Sustainable development" is a term that refers to economic development and growth which incorporates a commitment to environmental protection and social equity. *See* World Business Council for Sustainable Development, *at* http://www.wbcsd.org (last

about Nike's relationships with its contractors in Asia, as one instance among many. Nike has become a symbol of the corporate social responsibility concerns engendered by globalization. As publicity has plagued Nike about the wages, hours, safety, and environmental conditions in the factories from which it buys its products, it has had to increasingly respond by raising wages above country-specific minimum wages and implement other safety and environmental improvements.[107] Many other participants in the textiles and retail clothing industries have joined partnerships with unions, consumers, and NGOs, in which companies agree to workplace standards that are more stringent than local standards in Asia or Latin America where these industries are predominantly located, with independent verification of compliance with the standards.[108] These actions have been forced upon industry participants by consumers and NGOs, based upon public disapproval of existing workplace conditions and wages, even if legal, in developing economies.[109]

---

visited Nov. 7, 2001).

[107] *See, e.g.*, Bill Richards, *Nike to Increase Minimum Age in Asia for New Hirings, Improve Air Quality*, WALL ST. J., May 13, 1998, at B10 (reporting that Nike was instituting plans to increase the minimum age of workers at its plants in Asia and that it was implementing engineering changes to bring air quality in its Asian plants up to United States standards).

[108] *See* Joseph Pereira, *Apparel Makers Back New Labor Inspection Group*, WALL ST. J., Apr. 10, 2001, at B1 (describing Fair Labor Association as partnership of companies and NGOs that will be inspecting labor conditions in garment factories worldwide and certifying compliance with set of identified human rights and labor standards). Another such partnership is Social Accountability International ("SAI"), which is a partnership of companies, accounting firms, trade unions, government, and NGOs. SAI promulgated a manufacturing standard for ethical workplace practices in 1998 called Social Accountability 8000 that was specifically designed to permit independent monitoring (social accounting) to evaluate compliance with the standard. *See* http://www.CEPAA.org for further information. (SAI was formerly known as the Council on Economic Priorities Accreditation Agency ("CEPAA")).

[109] One argument often made is that these factory conditions mimic those in the United States and Europe when they were newly industrializing during the late 1800s. So, it is argued, it is somehow elitist or hypocritical to deny to developing countries the same processes of industrialization that have produced vibrant economies in the already industrialized nations. While recognizing that it takes a certain level of wealth in order for countries to invest in human capital and clean technology, I would hope that we might be able to avoid the mistakes of the past while still permitting and encouraging economic development in the many countries in the world that desperately need it. Do factories in China, Indonesia, Pakistan, and Vietnam (or Mexico, El Salvador, Honduras, Bolivia, and Nicaragua) really need their own Shirtwaist Triangle fire in order to recognize the importance of industrial safety, for instance? I doubt it. Clearly we have much more knowledge of the pitfalls to avoid now than did industrialists in the late 1800s, in both the environmental and social arenas. What may still be missing is a serious political commitment, in both the industrialized and developing nations, to take actions in partnership to address the numerous, complex issues of just and sustainable economic

And yet, public opinion is not the only aspect of this issue that the predominant position fails to capture. Rather, it does not come to terms with the dynamics of globalization and how those dynamics affect nations' motivations to pass or enforce protective laws in the first instance. It is well known that companies in the United States are actively involved in lobbying both Congress and administrative agencies in the United States to protect and advance their regulatory interests.[110] Indeed, such lobbying often offers an extremely good "return on investment"[111] and so is entirely consistent with companies' economic goals. An analogous process occurs internationally as well, with companies negotiating with host countries about taxes, subsidies, rule of law issues, wages, and other parameters prior to investing[112]— including negotiations to forestall enhanced labor protection as a condition of

---

development.

[110] *See* John M. De Figueiredo & Emerson Tiller, The Structure and Conduct of Corporate Lobbying: How Firms Lobby the Federal Communications Commission, National Bureau of Economic Research Draft 2 (2002) (on file with author) (defining non-market strategies firms use in order to increase shareholder value as "actions taken by the firm in its political, regulatory, and social environments for the purpose of increasing firm value," such as "lobbying a legislator or regulator, litigating a case in court, and making campaign contributions."). De Figuiredo and Tiller have done an empirical examination of one type of lobbying at one agency, the FCC, and noted that in a two-month period of time there were 823 reported contacts by corporate lobbyists concerning 101 issues on the FCC's docket. *See id.* at 15-16; *see also* David P. Baron, *Integrated Market and Nonmarket Strategies in Client and Interest Group Politics*, 1 BUS. & POL. 7 (1999) (discussing market strategies, such as product development, pricing, and marketing, and non-market strategies, such as lobbying, used to increase firm values).

[111] *See* JIM SHULTZ, THE INITIATIVE COOKBOOK 8 (1996) (describing alcohol producers' $27 million lobbying efforts against proposed increase in tax rate on alcohol as "28:1 return on investment," because proposed tax was expected to cost producers $760 million in first year alone).

[112] The *New York Times* recently had a front-page article on apparel manufacturing in El Salvador. *See* Leslie Kaufman and David Gonzalez, *Labor Standards Clash with Global Reality*, N.Y. TIMES, Apr. 24, 2001, at A1 (discussing improvement of working conditions within some factories over past six years, given influence of consumer concerns with sweatshops, student anti-sweatshop movements, and resulting use of independent monitors of factory conditions by some companies (featuring The Gap)). During the same period of time, however, the wages of the workers featured in the article had only risen from 55 cents per hour to 60 cents per hour. *See id.* The government of El Salvador acknowledges that the minimum wage is not enough to live on (by some estimates it covers less than half of the basic needs of a family of four), but El Salvador competes for foreign investment with neighboring countries such as Honduras and Nicaragua, where minimum wages are lower. As the President of El Salvador, Francisco Flores, stated, attracting foreign investment and jobs is critical to El Salvador's economic growth, yet "[t]he difficulty in this region is that there is labor that is more competitively priced than El Salvador." *See id.* at A10. In such a climate, neither El Salvador, nor Honduras, nor Nicaragua (nor probably Mexico, nor Bolivia, nor Costa Rica, etc.) is going to act to raise their minimum wage in such a way that it is out of line with neighboring countries.

investment.[113] Moreover, some important economic intermediaries such as the World Bank also engage in similar discussions, with a goal of protecting investors from enhanced host-country labor protections as part of a complex of conditions for lending.[114] For their part, countries recognize that they are competing for foreign investment; and this competition can shape and constrain domestic regulation.[115] The major implication of these international discussions for corporate social responsibility issues is that the "rules of the game" are not always neutral arbiters of the public good, according to which corporate enterprise can confidently act. Rather, in significant instances those rules have been shaped by transnational enterprises' interests or even presumed interests.[116] So, to suggest that there are no corporate social

---

[113] *See* Martin & Schumann, *supra* note 61, at 205. Professor Phil McConnaughay has suggested that international contracts by developing nations with foreign investors can be used to "increase rather than reduce a nation's regulatory and adjudicatory capacities," by binding nations to commitments to protect property, including intellectual property; to facilitate exchange; and to adjudicate disputes in ways that may be in advance of the commitments that would otherwise exist in that country's legal infrastructure. *See* Phil McConnaughay, *The Scope of Autonomy in International Contracts and its Relation to Economic Regulation and Development*, UNIVERSITY OF ILLINOIS COLLEGE OF LAW, LAW AND ECONOMICS WORKING PAPERS SERIES, WORKING PAPER NO. 00-10 at 38-39, *available at* http://papers.ssrn.com/paper.tar?abstract-id=252832 (last visited Nov. 12, 2001). In other words, Professor McConnaughay asserts that one may import some greater semblance of the rule of law into developing nations through contracts between developing nations' governments and foreign investors. Moreover, in conversations with this author, Professor McConnaughay has suggested that it may be possible for developing nations to require foreign investors to agree to contractual commitments with respect to labor or environmental requirements that are more protective of a nation's people and environment than that nation's current laws. This is an intriguing suggestion, and as a matter of theory there is no reason why it couldn't be correct; but to date the competitive quest for comparative advantage has not worked to increase labor, health, safety and environmental protections, thus some mechanism for coordinating parallel governmental action among developing nations may be necessary to actuate Professor McConnaughay's important suggestion.

[114] *See* WORLD BANK REPORT, 2001: MAJORITY VIEWS (denying that rights of freedom of association and collective bargaining are core human rights).

[115] *See* UNITED NATIONS ESCOR, DIVISION FOR SOCIAL POLICY AND DEVELOPMENT, REPORT ON THE WORLD SOCIAL SITUATION: 1997 (1999), *available at* http://www.un.org/esa/socdev/rwss97c0.htm (stating that "Transnational forces that propel global changes, in particular mobile investment and finance, are weakening the ability of national governments to influence economic and social outcomes, often putting fulfillment of even the national political commitments, not to mention the ability to influence global trends, beyond the reach of elected national representatives."); *see also infra* text accompanying notes 132-136 concerning this competitive dynamic and the constraints it poses for countries' ability to raise taxes and increase social spending.

[116] *See* TRADE AND THE ENVIRONMENT, *supra* note 50, at 38-40 (1999) (discussing "regulatory chill," that is, the impact of companies' perceived interests in keeping environmental compliance costs low on enacting new environmental law).

responsibility issues so long as companies follow the law is not correct, because in many instances the structure of those laws and the patterns of enforcement of the law, as written,[117] will be affected by transnational companies' involvement and perceived interests.[118] Given that influence, it is not clear that the theoretical conditions necessary to support the predominant position obtain; that is, all social costs from every type of industrial production and employment relationship have been accurately identified and addressed in the structure of law.

2. The Insufficiency of Taxation and Redistribution to Remedy Fully Concerns of Corporate Social Responsibility

One response to the corporate social responsibility complex of issues, and in particular the response to patterns of economic inequality that

---

[117] For instance, the Women's Rights Division of Human Rights Watch has reported that women workers for large companies such as the General Motors ("GM") company in Mexico are given pregnancy exams as a condition of being hired, are tested regularly for pregnancy throughout their employment, and that pregnant workers are fired. HUMAN RIGHTS WATCH, NO GUARANTEES: SEX DISCRIMINATION IN MEXICO'S MAQUILADORA (1999). While these actions are illegal under both Mexican law and International Labor Organization standards, the government of Mexico has not taken action to enforce its laws in this and many other instances because of the government's concerns about repercussions on foreign direct investment if it were to adopt a policy of strict enforcement. Presumably, transnational companies do not need to advocate to the Mexican government for policies of non-enforcement; rather the perceived economic interests of transnational companies are presumed by the Mexican government.

[118] One of the most ironic arguments that is advanced against the notion of corporate social responsibility is that to require corporate directors to think about interests other than those of the shareholders is to require them to make essentially political decisions that they have not been elected to make. *See, e.g.*, Joseph F. Johnston, Jr., *The Corporate Governance Debate: Shareholders, Stakeholders, and the Corporate State*, 1 GEO. J. OF LAW & PUB. POL'Y 11, 23 (2000) (asserting that social responsibility issues are generally "political problems to be addressed by government under the rule of law, not passed on to company directors who have not been elected by and are not accountable to the voters at large"). Or, as one law professor so aptly put the point to this author in conversation, "no one from the public elected Jack Welch [CEO of General Electric] to make corporate social responsibility decisions." While it is true that no one from the public elected Jack Welch (except the shareholders of GE, who elected him to be a board member), and therefore there are none of the traditional hallmarks of public accountability, the decisions he and other members of GE management make in pursuit of their economic goals can have political and social ramifications. This is one reason to argue that corporations ought to be understood to have a duty to provide a "social accounting" of the social and environmental effects of their decisions as part of their duties of corporate accountability. The larger irony, though, is that the argument depends on a construction of corporations as simply economic entities and not political actors and from this construction derives the claim that it is illegitimate to saddle corporations with political responsibilities. And yet companies are vigorously involved in all aspects of political life in the United States, and, indeed, that involvement is constitutionally protected. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

may be exacerbated by corporate governance structures, is to suggest that economic inequality is an issue of taxation and social spending (redistribution) and is thus not of concern to corporate law. This is true as a matter of existing doctrinal boundaries, yet it is not much of a stretch to recognize that distributional issues within the corporation can have a direct impact on economic inequality in a society, at least in theory. Thus, there are at least two questions to be addressed here. The first question is whether corporate governance structures themselves are contributing to growing economic inequality within the United States.[119] In other words, is the increasing pressure on corporate managers in the United States to take actions consistent with a shareholder wealth-maximizing philosophy or to take actions Wall Street regards with favor contributing to growing economic inequality in this country?[120] If so, then I would suggest that questions about economic inequality are properly part of the complex of issues to be addressed under the rubric of corporate social responsibility, particularly given the pressures on European companies to adopt more of a shareholder wealth-maximizing

---

[119] A potential connection between the American corporate governance regime and economic inequality is implicit in the work of a number of legal academics. The most comprehensive analysis of which I am aware, which describes the economic liberalization of open markets in trade, capital and goods, domestically and globally, as a New Economic Order and recognizes that employees have not participated in the gains of that economic order nearly as much as have shareholders, is by Professor Jeffrey Gordon. *See* Jeffrey N. Gordon, *Employees, Pensions and the New Economic Order*, 97 COLUM. L. REV. 1519, 1534 (1997) (noting that corporate profits increased 250% in United States between 1980 and 1995, as did stock prices, while "wages declined in real terms [during the same period of time] for all quintiles of the income distribution except the highest."). For other discussions of the disparities between returns to shareholders versus returns to employees, and the possible connection between these disparities and worsening economic inequality, *see* Kent Greenfield, *There's a Forest in Those Trees: Teaching About the Role of Corporations in Society*, 34 GA. L. REV. 1011, 1014-15 (2000) (describing worsening income inequality in United States over last two decades and contrasting that income inequality to stock market increases over same period of time); Jennifer Hill, *Visions and Revisions of the Shareholder*, 48 AM. J. COMP. LAW 39, 63 (2000) (recognizing growing economic inequality, Professor Hill suggests that there are dangers in the collectivization of the interests of institutional shareholders and managers in a context where labor's interests are increasingly not collectively advanced); David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1029-30 (2000) (stating that while manufacturing productivity (output per hour) had more than doubled (since 1970), and value of the Dow Jones Industrial Index has quadrupled in value since 1990, family incomes have stagnated during same period of time).

[120] While even in the United States a majority of corporate managers do not agree with the shareholder — centric view of the corporation, we have the highest proportion of managers who do agree with it (40%); and the proportion has been increasing over the last decade, *see* Dunfee, *supra* note 37, at 144, presumably in part as a result of the market factors and competitive pressures discussed immediately above.

philosophy of corporate governance.[121] Indeed, this is a critical question ultimately to be addressed in examining Kraakman and Hansmann's major thesis that shareholder wealth maximizing is the best means to pursue aggregate social welfare,[122] because many people believe that a fair distribution of wealth is an important component of social welfare, assuming background conditions of political liberty and humanitarian concern. While I am not at all in a position to offer definitive conclusions about the impact of corporate governance structures on economic inequality, I will sketch out some data that suggest this is an area that deserves further research.

The second question, which is more central for this inquiry, is how, if at all, globalization is affecting the ability of countries to ameliorate growing economic inequality, whether or not corporate governance structures can be said to be contributing to these inequalities, and what effect, if any, transnational corporations are having on countries' powers in this regard. Again the critical inquiry for this work is whether we can confidently rely on constraints and structures outside of corporate law to meet the corporate social responsibility challenges of a globalizing economy.

a. The Impact of Corporate Governance on Economic Inequality

When thinking about corporate governance systems, it is logical to ask whether the shareholder versus stakeholder models of the corporation might have an impact on economic inequality within a country.[123]

---

[121] It is clear that "shareholder value maximizing" is a doctrine that various sectors of the American economy seek to export. For instance, CALPERS, which is the investment manager for California's public pensioners, has increased its foreign investment to about 20% of its portfolio, because "the inefficiencies are now greater on international markets than on the domestic market." *See* Martin & Shumann, *supra* note 61, at 129 (quoting CALPERS strategist Jose Arau from March 18, 1996 Bloomberg Business News article). CALPERS has been in the forefront of institutional fund managers putting pressure on "underperforming companies" in the United States, and they have defined "inefficient" companies as those with return on invested capital of less than 10% per year. *See id.* Yet, returns of less than 10% a year are typical in Germany, France and Japan, where stakeholder visions of the corporation are dominant. *Id.*

[122] *See* Hansmann and Kraakman, *supra* note 12, at 441 (asserting that consensus now exists that the best way to pursue aggregate social welfare is "to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests.").

[123] Economists debate why there is growing inequality, and why productivity and growth have been so strong in the United States in the past eight years, without (so far as I know) suggesting that corporate governance structures have a role to play, while law professors seemingly assume that these corporate governance structures cause either the good or the bad economic results on which they focus. For instance, while recognizing that

Clearly, many other social, political, and macroeconomic factors will have an impact on economic equality within each country, just as those same social and political factors presumably have an impact on the extent to which a country adopts a shareholder wealth-maximizing view of the corporation in the first place. Still, if there has been a shift in the distribution of the economic gains of a company in the last two decades, such that a greater percentage is being returned to shareholders than is being returned to employees through wages or to the community through taxes, that may ultimately have an impact on economic inequality. Moreover, in the United States, as corporate managers are increasingly pressured by Wall Street to show constant profit improvement, there is increased pressure on them to engage in actions that may be deleterious to employees and communities, such as laying off large numbers of employees, outsourcing production, or engaging in mergers and acquisitions, which also leads to layoffs,[124] and which may

no one has a full explanation for growing world inequality, Professor Dani Rodrik surveys the extant explanations, which are increased trade liberalization (globalization) and the resulting downward pressure on wages or technological changes that reduce the need for lower-skilled workers. *See* Rodrik, *supra* note 83, at 16. Economists trying to explain the increases in worker productivity and economic growth rates in the United States over the last eight years similarly argue about whether these trends are a fundamental economic change brought about by new technology (here, the introduction of the computer) or if they are primarily a function of the business cycle. *Compare* Dale W. Jorgenson & Kevin J. Stiroh, *Raising the Speed Limit: U.S. Economic Growth in the Information Age* (May 2000) (unpublished draft on file with the author) (providing extensive bibliography of papers concluding that increases in worker productivity are fundamental economic change wrought by computerization) *with* Robert J. Gordon, *Does the "New Economy" Measure up to the Great Inventions of the Past*, J. ECON. PERSP., Fall 2000, at 49 (asserting that part of increased economic growth is due to cyclical effects and rest is due to productivity growth confined solely to durable goods sector, and that Internet "fails the hurdle test as a Great Invention"). In contrast, Professors Henry Hansmann and Renier Kraakman assume that the excellent performance of the U.S. economy over the last eight years is due to a shift to a shareholder wealth-maximizing theory of corporate governance. *See* Hansmann and Kraakman, *supra* note 12, at 450 (asserting that superiority of shareholder model of corporate governance is demonstrated by American economy of last eight years, and its outperforming the German, Japanese, and French economies over that same period of time). And, of course, I am here suggesting that the question of a possible relationship between the shareholder wealth-maximizing ideology and growing economic inequality is worth further study. While I recognize this is a heretical thought, it may be that law professors, including this one, overstate the importance of corporate governance structures in affecting economic performance. *But see infra* note 126, (OECD study of effects of corporate governance structures on economic performance).

[124] *See* James A. Fanto, *Breaking the Merger Momentum: Reforming Corporate Law Governing Mega-Mergers*, 49 BUFF. L. REV. 249, 279 (2001) (observing that mergers and acquisitions often, if not always, lead to layoffs, and that ability to cut jobs is often part of rationale for cost savings that will allegedly be obtained in a merger); Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, *in* CORPORATE TAKEOVERS:

ultimately have an impact on the distribution of economic well being within communities and groups.[125]

And there are provocative hints that the American shareholder system may indeed be a factor in our greater economic inequality, although presumably there is no single causal factor responsible for the United States' economic inequality. Statistics from the Organization for Economic Cooperation and Development (OECD) from 1996 show that economic inequality in the United States is greater than that in Switzerland, Japan, Australia, France, the United Kingdom, Canada, the Netherlands, Italy, Germany, Finland, Norway, Sweden, Belgium, Denmark, and Austria (in order of descending economic inequality).[126] The United States is also the country where the shareholder view of the corporation has made the deepest inroads (although, as stated above, surveys show that even in the United States neither a majority of managers nor of the public have embraced the shareholder wealth-maximizing view of the corporation).[127] What is particularly intriguing about these statistics is that they almost perfectly line up with shareholder wealth-maximizing value systems; that is, the countries with more emphasis on shareholder wealth maximizing are also those with

---

CAUSES AND CONSEQUENCES 33, 34 (Alan J. Auerbach ed., 1988) (surveying empirical evidence from which they conclude that "hostile takeovers enable shareholders to transfer wealth from stakeholders to themselves more so than to create wealth .").

[125] That mergers and acquisitions could have a distributional impact seems intuitively correct. For instance, most studies find a negative impact on firm performance in the majority of mergers; and no efficiency gains in takeovers or at best small efficiency gains. *See* Maria Maher & Thomas Andersson, CORPORATE GOVERNANCE: EFFECTS ON FIRM PERFORMANCE AND ECONOMIC GROWTH, 38 (1999) (study of financial performance of shareholder versus stakeholder models of corporate governance undertaken for Organization for Economic Cooperation and Development OECD). And yet, target shareholders have generally enjoyed premia of between 30% to 40%. *See id.* at 39. *See also* Fanto, *supra* note 124, at 280-283 (presenting evidence showing negative performance impact of most mergers). As Maher and Andersson state, "[s]ince efficiency gains are small, the vast majority of studies find that target shareholders' gains come primarily at the expense of other stakeholders, labour in particular. . . . [and] most of the these studies find that employees' losses mainly come in the form of layoffs, reduced wages, or lower employment and wage growth . . . ." Although both friendly and hostile acquisitions generally produce layoffs, political resistance to mergers and acquisition activity in the 1990s is muted as compared to the 1980s. Professor Bernie Black suggests this is because of the low underlying unemployment rate in the United States and perhaps because many mergers and acquisitions are occurring in sectors such as telecommunications where labor unions are not very strong. *See* Bernard S. Black, *The First International Merger Wave (and the Fifth and Last U.S. Wave)*, 54 U. MIAMI L. REV. 799, 807 (2000).

[126] OECD ANALYSIS OF ECONOMIC INEQUALITY, *cited in* Mark Roe, *Political Preconditions to Separating Ownership from Corporate Control: The Incompatibility of the American Public Firm with Social Democracy*, 53 STAN. L. REV. 539, 577 (2000).

[127] *See supra* notes 37-38.

more economic inequality, in general.[128] These statistics measure economic inequality after all government taxes and transfers are taken into account, though; clearly the more relevant question would be how these countries line up before those transfers.

Also intriguing is the fact that economic inequality in the United States has been increasing since the early 1980s,[129] which is also a period when the shareholder wealth-maximizing view of the corporation has started to become more prominent in the United States.[130] As stated earlier, corporate profits increased 250% in the United States between 1980 and 1995, as did stock prices, while "wages declined in real terms during the same period of time for all quintiles of the income distribution except the highest."[131] Thus, it is worth studying the extent to which these trends may be related, particularly because a number of other trends in business that are fueled by Wall Street's profit expectations (not unrelated to the shareholder primacy theory) could have an impact on the distribution of income between top executives, shareholders, and employees as well.[132]

---

[128] The correlation might be perfect if the positions of France and the United Kingdom were switched. I don't consider Japan a true "stakeholder" system, because the pro-employee jobs for life system only covers 30% of the working population and those are higher-income professionals.

[129] *See* CLAUDE S. FISCHER ET AL., INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH 122 (1996) (describing growing economic inequality in the United States); MICHEL ALBERT, CAPITALISM V. CAPITALISM (199) (same). Of course, economic inequality could be increasing because of increases in wealth and income at the top of the economic scale, with the wealth and income of those at the bottom holding steady. This theory for the source of economic inequality in the United States is not consistent with the data, however: while poverty rates dropped in the United States between 1960 and 1973, they have been increasing since 1973. *See* KAPSTEIN, *supra* note 87, at 103. *See also* Merrill Goozner, *Income Study Confirms U.S. Trend Toward Nation of Haves, Have-Nots*, CHICAGO TRIB., Jan. 18, 2000, at 8 (discussing U.S. Census data showing that household income of highest fifth of Americans had increased by 34.6% since 1979 and 1997, while household income of lowest fifth of Americans had decreased by 4.3% during same period of time).

[130] *See* Alan S. Blinder, Life Imitates Art: How the Economy Came to Resemble the Model 9 (1999) (unpublished draft on file with author) (asserting that "The rise of institutional investors and, especially, the emergence of an active (if not vicious) market for corporate control in the early 1980s, held managerial feet to the value-maximization fire as never before.").

[131] *See* Gordon, *supra* note 119, at 1534.

[132] Some of the business trends that may have had an effect on economic inequality are increased numbers of mergers and acquisitions; downsizing; outsourcing; and escalating levels of executive compensation, which can each be expected either to exacerbate income inequalities (executive compensation) or to create job losses, increase income volatility, and increase job insecurity. *See* Susan J. Stabile, *My Executive Makes More Than Your Executive: Rationalizing Executive Pay in a Global Economy*, 14 N.Y. INT'L L. REV. 63, 64-65 (2001) (discussing evidence showing "The gap in pay between U.S. executives and rank and file workers is currently 419 times the pay of average employees, the corresponding pay gap in Germany is only eight to one, in Japan, in the range of 20 or 30 to one, in Sweden, seven to

I am clearly not in a position to make causal claims, and I not making a causal claim here, since the early 1980s is also when the Reagan policies of cutting taxes and social spending came into effect, and income inequality in the United States, which is greater than that of the rest of the developed world, is greatest after taking government redistribution into account.[133] Moreover, there has been an acceleration of the shift from manufacturing to service and technology sectors in the United States, which tends to exacerbate income inequality between unskilled, semi-skilled, and professional workers, even as globalization itself has proceeded apace, with its effects on inequality. I would simply suggest that the relationship between the shareholder wealth maximizing view of the firm and economic inequality bears further examination, particularly before Americans go about exporting "shareholder value" to the rest of the world along with Coca-Cola, Big Macs and thirty-seven brands (or thereabouts) of laundry detergent.

b. The Effects of Globalization on Countries' Redistributive Policies

The more relevant analysis for examining the predominant position on corporate social responsibility, though, is about the effects of economic

---

one, and in the U.K., eighteen to one."); Gordon, *supra* note 119, at 1523, 1528 (describing effects of mergers and acquisitions market on employees as "prioritizing" claims of shareholders, increasing pressure on managers to maximize shareholder wealth, and making it more likely that cash flows of firms will be distributed to shareholders and not employees). Not all of these trends are on the surface related to a theory of shareholder wealth maximizing. Spiraling executive compensation, for instance, seems more about shareholder expropriation than anything else, although compensation with generous stock options can certainly cause executives to manage companies in such a way that stock values increase over the short term. Yet the effect of spiraling executive compensation could well be to exacerbate economic inequalities. Note in this regard that it is only the incomes of those in the top quintile of the income distribution in the United States, which would include CEOs, that have experienced real wage increases in the period 1980 through 1995, although even in this quintile there is more volatility and risk because of increased layoffs. *See id.* at 1538. Downsizing has had deleterious effects on employees, including middle managers. Although there was more attention paid in the late 1980s to downsizing and the job losses it entailed, recent figures suggest that job losses have actually been greater in the 1990s. Studies by both the Council of Economic Advisers (1996) and the National Bureau of Economic Research (1996) indicate that job losses were higher in the early 1990s than during the severe recession of the early 1980s. *See* Rodrik, *supra* note 83, at 21-22. Other studies indicate that 300,000 people per week lost their jobs during the "boom times" of the 1990s, *see* KAPSTEIN, *supra* note 87, at 98 (indicating the enormous flexibility of the American labor market). Of those who lose their jobs, approximately one-third are reemployed at lower wages (lower by 20-25%, depending on how long the worker had been employed); and "25-30% of displaced workers are unemployed for a long period of time." *See* Gordon, *supra* note 119, at 1538.

[133] *See* FISCHER, *supra* note 129, at 123.

globalization on countries' abilities to ameliorate the effects of either corporate governance systems *per se* or economic inequalities more generally. That is, are societies better off if corporations are relatively unconstrained simply to maximize shareholder wealth, in conjunction with social policies to redistribute wealth if the distributional results are problematic? That is certainly one implication of the traditional position on corporate social responsibility. But do the facts of globalization support this approach?

The first point to be recognized is that while this approach might work to ameliorate economic inequality within countries, it is not going to work to address economic inequality between countries in the absence of a global sovereign, which few people anticipate as a global governance structure in the near term. (So far, globalization has increased economic inequality between industrialized nations and developing nations, so addressing these disparities would be important, in the abstract.)[134] The second point to be recognized is that the transnational aspect of commercial activity is itself undermining countries' effective ability to implement tax policies to address economic inequality. Just as countries compete to provide a labor climate and regulatory structures that will attract global capital, they may compete as well to provide tax policies and tax subsidies[135] that will be perceived as favorable to foreign investors.[136] The Organization for Economic Co-Operation and

---

[134] *See* UNITED NATIONS, 1997 REPORT ON THE WORLD SOCIAL SITUATION 77 of 180 (Chapter 6), *available at* http://www.un.org/esa/socdev/rwss97c6.htm (reporting that during past quarter century real gross world product has more than doubled, and that overall "The quality of life for much of the world's population has improved as per capita incomes, life expectancy and levels of education have risen, but the distribution of these gains has been unequal both across and within countries."); SHAHID YUSUF, GLOBALIZATION AND THE CHALLENGE FOR DEVELOPING COUNTRIES 7 (World Bank Group, DECRG, Working Paper No. 2618, 2001) (stating that "The income gap between [most developing countries] and the richest nations has continued widening. Forty years ago the per capita incomes of the twenty richest countries were fifteen times the level of the twenty poorest countries. This ratio has now doubled to thirty.").

[135] The question of tax and other subsidies (such as government-provided land, infrastructure development, water and power subsidies) to companies to attract investment is an entirely separate aspect of the corporate social responsibility discussion, which I leave aside for the moment. For an overview of subsidy issues see KENNETH THOMAS, COMPETING FOR CAPITAL (2000). Thomas estimates that total subsidies in the United States to business in 1995-96, including subsidies by state and local governments, were $131 billion (which does not include $15.6 billion of agriculture subsidies).

[136] *See* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 34 (1998) (stating that "[g]lobalization has also encouraged countries to assess continually their tax systems and public expenditures with a view to making adjustments where appropriate to improve the 'fiscal climate' for investment."). *See also* Martin & Shumann, *supra* note 61, at 200-202 (discussing tax

Development ("OECD") has recognized nations' competition for capital by changing tax structures and has begun an effort to address harmful tax competition; yet one of the problems it recognizes is that "governments may find themselves in a 'prisoners dilemma' where they collectively would be better off by not offering [tax] incentives but each feels compelled to offer the incentive to maintain a competitive business environment."[137] Thus, governments are constrained in what taxes they can impose, given the competition for capital. The International Monetary Fund has recognized this point as well: "Globalization may be expected increasingly to constrain governments' choice of tax structures because internationally mobile factors of production can more easily avoid taxes levied in particular countries."[138]

A second problem is that the dynamic of product competition acts as an additional constraint on countries' redistributive policies. One of the features of globalization is that products from various parts of the world can now more directly and effectively compete with each other, given intermodal transportation capabilities, computerized supply chain, inventory control systems, and computerized systems integration more generally. As a result, there is an effective political limit to nations' abilities to tax their productive enterprises, because various countries cannot set their tax rates so high that they result in significantly higher prices for their countries' products than those of competitors from other nations,[139] at least where a company cannot pass on higher entity-level taxes through some other combination of lower wages and lower returns to shareholders, rather than higher prices, and still remain competitive.[140]

---

competition).

137 *See* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 34 (1998) (report concerning tax havens and harmful tax competition approved by OECD Council, with exceptions from Luxembourg and Switzerland).

138 INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK: MAY 1997, 70 (1997). The Organization for Economic Co-Operation and Development also recognized this problem, stating that globalization has provided "new ways by which companies and individuals can minimize and avoid taxes and in which countries can exploit these new opportunities by developing tax policies aimed primarily at diverting financial and other geographically mobile capital," which may "alter the structure of taxation (by shifting part of the tax burden from mobile [capital] to relatively immobile factors [property and labor] and from income to consumption) and may hamper the application of progressive tax rates and the achievement of redistributive goals." *See* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 14 (1998.)

139 *See* KAPSTEIN *supra* note 87, at 52.

140 I appreciate the comments of my colleague Professor John Colombo in pointing out that it is not simply product competition, but rather global competition in product, labor,

Thus, given global competition for capital and global competition among products, countries are constrained in their abilities to adopt policies to address the distributive effects of economic activity within the global economy.

In addition, transnational companies can systematically and legally use differences between nations' tax rates to "optimize" their taxable income. One way this occurs (from a U.S. perspective) is by establishing operating subsidiaries in foreign countries; the current income is not taxed to the U.S. parent unless it is distributed as a dividend up to the parent. Another way this is done is by the skillful use of internal "transfer prices" for inter-company transactions in order to recognize expenses in high-tax jurisdictions and income in low-tax jurisdictions.[141] While transfer pricing abuses are strictly regulated in the United States, they are not so clearly regulated in other developed economies. These and other mechanisms allow transnational companies to pay the least amount of tax possible, which can undermine countries' abilities to ameliorate the effects of globalization on incomes through social spending.

Given these dynamics, it is unclear that domestic taxation and social spending will be sufficient to address the growing economic inequality in our globalizing economy. Again, structural solutions in addition to those emphasized by the predominant position on corporate social responsibility must be explored. Particularly, we must explore these structural solutions if economic inequality is exacerbated by either a

---

and capital markets, and the relative elasticity of demand in each of these markets, that constrains tax policies. As he put the point in an e-mail communication to this author, "If a corporation cannot remain competitive by passing on the tax costs imposed by a particular country through some combination of higher prices, lower wages and lower returns to shareholders, then the corporation will either go out of business or will move to a country with a more favorable tax climate." E-mail communication from Professor John Colombo, 11/7/01 (on file with the *U.C. Davis Law Review*).

[141] *See* MARTIN & SHUMANN, *supra* note 61, at 198. Transfer prices are the prices subsidiaries and branches within one transnational company charge each other for unfinished goods, services, or licences. Recall, in this regard, that transnational companies carry on two-thirds of world trade, nearly half of it within their own company networks. THE UNITED NATIONS COMMISSION ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT (1995). Martin and Shumann give some dramatic examples of German companies using this technique, including BMW, the country's most profitable auto company. As they describe the situation: "BMW . . . reported in 1988 profits of a good 545 million marks to the tax authorities. Four years later, they had fallen to a mere 6 per cent of that amount, just 31 million marks. The next year, despite rising total profits and unchanged dividends, BMW actually declared losses on its domestic operations and got a refund of 32 million marks from the tax office. 'We try to make spending originate where taxes are highest, and that is inside the country,' BMW finance director Volker Doppelfeld explained frankly." MARTIN & SHUMANN, *supra* note 61, at 198.

global competition to avoid taxes among transnational corporations or by corporate governance systems that increasingly emphasize shareholder wealth maximizing.[142]

3. Problems in the Retroactive Application of State Power

To this point, the analysis in this Article has concentrated on effective difficulties with domestic sovereigns' exercise of prospective regulatory power with respect to transnational corporations, given the underlying dynamics of globalization. Yet there are problems in the retroactive application of state power as well. Thus, as economic entities increasingly operate in a global context, there have been a number of well-publicized instances where transnational corporations with headquarters in one country have engaged in activities that are alleged to have had serious, negative implications for people or the environment in another country but where there are difficulties in adjudicating the claims, given the jurisdictional interstices engendered by globalization.

To be sure, there has been a remarkable expansion in adjudicating these types of claims in the United States in the last two decades, based upon the increasing use of the Alien Tort Claims Act ("ATCA"),[143] and that expansion is likely to continue and may ultimately ameliorate some of the difficulties described below. The ATCA, enacted as part of the Judiciary Act of 1789, provides subject matter jurisdiction in federal courts in the United States to hear claims by aliens alleging violations of international law, even claims against non-U.S. defendants (assuming there is a basis for asserting personal jurisdiction). And yet, difficulties in adjudication remain. These difficulties arise for a number of reasons: problems of the underlying narrowness of the international customary law causes of action that can be adjudicated in the United States against private defendants under the ATCA; problems created by doctrines of

---

[142] One part of the puzzle which is not specific to corporate taxation, but which would reach individuals as well, is the existence of tax havens, countries to which enormous amounts of corporate and individual money flow. The United Nations World Investment Report: 1998 shows that of five countries with the highest per capita "foreign direct investment," four were tax havens: Bermuda, the Cayman Islands, the U.S. Virgin Islands; and Belgium and Luxembourg (considered one country in the U.N. report). UNITED NATIONS WORLD INVESTMENT REPORT: 1998 11 (1999). One method of tax avoidance that *Der Spiegel* writers Martin and Schumann describe is the "Dutch sandwich," in which a subsidiary in the Netherlands is combined with a company location in a tax haven. Apparently, "the two sets of tax laws can be used in such a way that nine-tenths of the company's profits are taxed at a rate of just 5 per cent." *See* MARTIN & SHUMANN, *supra* note 61, at 199.

[143] Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

state sovereignty in the context of public and private partnerships, as in the extractive industries; problems under the discretionary doctrine of *forum non conveniens;* and problems created by parent/subsidiary relationships, particularly with respect to asserting personal jurisdiction. I will use four cases to illustrate the potential breadth of the ATCA and yet the continuing difficulties these interjurisdictional disputes present: claims brought against the Texaco company for alleged environmental degradation in Ecuador; claims brought against Royal Dutch Shell for its alleged entanglement with repressive securities forces in Nigeria; claims brought against the UNOCAL company for its alleged involvement with a repressive military regime and associated human rights violations in Myanmar (the country more typically known as Burma); and claims brought by garment workers in Saipan against contractors, manufacturers, and U.S. retailers for the alleged sweatshop conditions under which they work in Saipan, in the Northern Mariana Islands in the Western Pacific. To be fair, it must be recognized that these problems predominantly derive from efforts to have the claims heard in the United States. Presumably these efforts are motivated by the generally higher quality of justice and potential for higher monetary awards in the United States than in many other parts of the world. So if the garment workers in Saipan who filed a federal class action in the Central District of California challenging the sweatshop conditions under which they work were content to have their claims heard in Saipan, for instance, then the jurisdictional issues might be less severe.[144] Yet, in most of these cases there are serious questions about the quality of justice possible in the plaintiffs' home jurisdictions, according to the U.S. State Department country reports, and thus adjudication here may be the only effective route to redress.[145]

---

[144] This statement is qualified because it may be difficult to get personal jurisdiction over U.S. retailers in Saipan, where those retailers simply purchase goods from contractors and manufacturers in Saipan, and it may be difficult to get personal jurisdiction over parent companies in a foreign country, even when the parent establishes policies and makes major decisions, where the parent conducts business through a separate subsidiary incorporated in that foreign country.

[145] *See* U.S. Department of State, Country Reports on Human Rights Practices, 2000, *available at* http://www.state.gov/g/drl/rls/hrrpt/2000 (last visited Dec. 13, 2001) (describing problems with judicial systems in Burma, Ecuador, and Nigeria). Because the Northern Mariana Islands is a U.S. Commonwealth, the State Department does not survey its human rights practices for inclusion in the annual Country Reports on Human Rights Practices.

a. The Texaco Litigation

This litigation involved two actions filed in 1993 on behalf of two putative classes: indigenous tribe members of the Oriente region of Ecuador[146] and residents of Peru who live downstream from the Oriente.[147] Both putative class actions challenged Texaco's actions in extracting oil in Ecuador between 1964 and 1992, alleging that Texaco had failed to follow industry practice in disposing of the toxic by-products of drilling for oil (reinjecting them back into the oil well) but had instead dumped these by-products into local rivers, onto local landfills, and had spread them on dirt roads in the area.[148] Plaintiffs alleged that as a result of these actions there was extensive pollution of the contiguous forests and rivers in the surrounding rainforests; and that they had suffered personal injuries, such as poisoning and the development of pre-cancerous growths.[149] Plaintiffs brought numerous causes of action, including claims of negligence, nuisance, trespass, conspiracy, and violations of the Alien Tort Claims Act.[150] The plaintiffs also sought "equitable relief to remedy the contamination and spoliation of their properties, water supplies, and environment."[151]

Texaco moved to dismiss on three grounds: (1) failure to join the government of Ecuador, which was substantially involved in the challenged actions, and thus was a necessary and indispensable party in Texaco's view; (2) international comity; and (3) *forum non conveniens.*[152] The government of Ecuador joined Texaco's motion arguing that, if the courts of the United States asserted jurisdiction over this action, it would be an affront to the principles of international comity. The factual basis for both motions to dismiss was that the government of Ecuador, through its state-owned oil agency (PetroEcuador), had gradually taken over ownership interests in the oil concession, until by 1992 it was wholly owned by PetroEcuador, and that PetroEcuador had taken over management of the oil extraction process as well.[153]

---

[146] *See* Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994). For the most part, the facts and legal holdings discussed above are taken from the Second Circuit's opinion in *Jota. v. Texaco, Inc.*, 157 F. 3d 153, 155 (2d Cir. 1998).

[147] *See* Ashanga v. Texaco Inc., No. 93 Civ. 9266, 2000 WL 122143 (S.D.N.Y. Jan 31, 2000).

[148] *See Jota*, 157 F.3d at 155.

[149] *See id.* at 155-56.

[150] *See id.* at 156.

[151] *See id.*

[152] *See id.*

[153] *See id.*

In an order filed on April 11, 1994, the District Court (Judge Vincent L. Broderick, District Judge), reserved judgment on Texaco's motion.[154] The court recognized that discretionary dismissal under the doctrine of *forum non conveniens* might be appropriate, given that the evidence about the challenged actions would be in Ecuador.[155] Yet, the court stated that any dismissal on those grounds would be contingent on the parent company, Texaco, Inc., consenting to personal jurisdiction in Ecuador (given that the actual conduct at issue had been conducted by Texaco's fourth-level subsidiary, TexPet, and thus Texaco might, otherwise, successfully contest jurisdiction).[156] The court also reserved judgment concerning dismissing on grounds of international comity, noting that the laws of the United States and Ecuador did not seem to be in conflict and thus applying U.S. law would not offend principles of respect for another sovereign.[157] Finally, the court declined to consider dismissal for failure to join Ecuador as a necessary and indispensable party, finding the factual record insufficient on that issue.[158]

After substantial discovery, Texaco renewed its motion to dismiss, again supported by the government of Ecuador. The district court granted this motion (by Judge Rakoff, to whom the case had been assigned after Judge Broderick's death), finding the *forum non conveniens* and indispensable party arguments to be persuasive.[159] While the court recognized that Texaco, Inc., was headquartered in the jurisdiction and that plaintiffs alleged that decisions made by executives at Texaco's Connecticut headquarters were responsible for the allegedly unlawful activities, it held that the balance of *forum non conveniens* factors weighed in favor of dismissal, in that the affected land and people were all in Ecuador, as was the bulk of the evidence.[160] Moreover, plaintiffs sought equitable relief, which included cleaning up the environmental damage, changing how the Trans-Ecuador pipeline was managed, and monitoring the environmental conditions of the land in subsequent years, which relief the court recognized was primarily directed at the actions of PetroEcuador and Ecuador itself. Because PetroEcuador was not a party in the proceedings, the court dismissed for the

---

[154] *See* Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994), *cited in Jota*, 157 F.3d at 156-157.

[155] *See Jota*, 157 F.3d at 156-157.

[156] *See id.* at 157.

[157] *See id.*

[158] *See id.*

[159] *See* Aquinda v. Texaco, Inc., 945 F. Supp. 625, 627 (S.D.N.Y. 1996).

[160] *See id.* at 627.

independently-sufficient reason that plaintiffs had failed to join necessary and indispensable parties, to whit, PetroEcuador and the Republic of Ecuador.[161]

Subsequently, a new government was elected in Ecuador; and the new government joined the plaintiffs in a motion for reconsideration and moved to intervene[162] Now, the government of Ecuador said it was willing to intervene in the action, and that intervention would be appropriate to "protect the interests of the indigenous citizens of the Ecuadorian Amazon who were seriously affected by the environmental contamination attributed to the defendant company."[163] The district court held, however, that the Ecuadorian government's affidavit was not specific enough to waive sovereign immunity, because the government sought to intervene as a party plaintiff; and that it was untimely, so the court denied both the motion for reconsideration and for intervention.[164] Thus, the court entered judgment in August of 1997 dismissing the complaint for the reasons it had initially articulated: *forum non conveniens*, international comity, and a failure to join a necessary and indispensable party (the government of Ecuador).[165]

In October of 1998, the Second Circuit vacated and remanded for further reconsideration. First, it found a dismissal on *forum non conveniens* grounds inappropriate, at least absent a commitment by Texaco, Inc., to submit to the jurisdiction of the Ecuadoran courts.[166] As for international comity, the court held that an analysis similar to the *forum non conveniens* analysis should obtain; that is, whether the defendant is amenable to suit in the foreign jurisdiction or has consented to such jurisdiction is a central factor to be considered in dismissing on

---

[161] *Id.*

[162] *See Jota*, 157 F.3d at 158.

[163] *Id.*

[164] *See* Aguinda v. Texaco, Inc., 175 F.R.D. 50, 51-52 (S.D.N.Y. 1997).

[165] *See id.*

[166] *Jota*, 157 F.3d at 159. In so holding, the Second Circuit relied upon its ruling ten years earlier in the litigation concerning the Bhopal disaster, in which Union Carbide's motion to dismiss on *forum non conveniens* grounds was granted, conditioned upon Union Carbide's consent to jurisdiction in India. *See id., citing* In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 203-04 (2d Cir. 1987). In these conditional *forum non conveniens* rulings, the Second Circuit seems to recognize that U.S. parent companies may often play an important role in making decisions about foreign subsidiaries' actions, but that those decisions may be insulated from judicial review without companies' express consent to foreign jurisdiction (because the decisions may not be considered in U.S. courts based on *forum non conveniens* considerations and because the parent company can so often contest personal jurisdiction in the foreign jurisdiction).

the basis of a concern for international comity (respect).[167] Moreover, the court thought that the Ecuadoran government's change of view on the appropriateness of litigation in the United States should have been given more serious consideration.[168] Finally, the Second Circuit held that while certain equitable claims implicating future conduct of the Ecuadoran government were properly dismissed if that government was not a party to the litigation, claims for damages against Texaco could proceed irrespective of the presence of the Ecuadoran government in the litigation, as could some of the equitable claims.[169] Thus, it remanded the case for further proceedings.

Following remand, Texaco renewed its motion to dismiss on grounds of *forum non conveniens* and international comity for the third time, this time premised on Texaco's consent to jurisdiction in Ecuador and Peru.[170] The district court suggested it was inclined to grant that motion, because it still thought the events in question had "everything to do with Ecuador, and very little to do with the United States," *except* that on January 21, 2000 there had been a military coup; and it was, therefore, again questionable what quality of justice the plaintiffs would receive in the local courts. Thus, seven years after the complaint had been filed, the court reopened the record for additional submissions by either party concerning whether the courts in Ecuador or Peru "might reasonably be expected to exercise a modicum of independence and impartiality" if the cases were refiled there.[171] That impasse is where the case now languishes, at least as evidenced by the published record.[172]

b. The Royal Dutch Shell Litigation

Another litigation proceeding in the Second Circuit on the basis of ATCA subject matter jurisdiction is that brought on November 8, 1996 by Nigerian émigrés against the Royal Dutch Petroleum Company ("Royal Dutch"), a holding company incorporated and based in the Netherlands, and Shell Transport and Trading Co., P.L.C. ("Shell Transport"), a

---

[167] *Id.* at 160.

[168] *Id.*

[169] *Id.* at 162.

[170] *See* Aguinda v. Texaco, 2000 WL 122143 (S.D.N.Y. Jan. 31, 2000).

[171] *See id.*

[172] In a telephone interview with plaintiffs' counsel on November 6th, 2001 Mr. Joseph Kohn said that the District Court had granted defendant's motion to dismiss once again on the basis of *forum non conveniens*, and that the opinion, which is unpublished, was being appealed to the Second Circuit. Telephone Interview with Joseph Kohn, Partner, Kohn, Swift & Graf (Nov. 6, 2001).

holding company incorporated and based in England.[173] The case concerns general allegations that Royal Dutch's indirectly-owned Nigerian subsidiary ("Shell"), which was not named as a defendant,[174] violated plaintiffs Ken Saro-Wiwa and John Kpuinen and their next of kin's human rights by recruiting the Nigerian military to suppress political opposition to Shell's oil development activity in the Ogoni region of Nigeria. Plaintiffs assert that in order to suppress that political opposition, led by Saro-Wiwa and Kpuinen, the Nigerian military, at the behest of and under the direction of Shell, arrested Saro-Wiwa and Kpuinen and tortured them; tried them for murder in front of a special military tribunal; convicted them on fabricated evidence; and hung them; and that others of Sar-Wiwa's family were illegally detained and beaten.[175]

Defendants brought a motion to dismiss on a number of grounds, including failure to state a claim, lack of personal jurisdiction, and *forum non conveniens*.[176] The district court found that there was personal jurisdiction, and then dismissed the action on *forum non conveniens* grounds, finding that England, where Shell Transport is headquartered, was an adequate alternative forum.[177] Having dismissed the case, the court did not reach defendants' arguments of a failure to state a claim.[178] Plaintiffs appealed, claiming that the district court did not give adequate weight to the plaintiffs' choice of forum and to the interests of the United States in providing a forum for international human rights claims to be heard.[179] Defendants' cross-appealed, contending that the court should have dismissed for lack of personal jurisdiction, and that the *forum non conveniens* dismissal was proper.

On appeal, the Second Circuit rendered an opinion that may prove to be a high-water mark for general jurisdiction in a parent/subsidiary context (jurisdiction to hear any claims brought against the defendant, not just jurisdiction to hear claims arising in the jurisdiction). Thus, the

---

[173] *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).

[174] Presumably the Nigerian subsidiary was not named as a defendant because there wouldn't be personal jurisdiction in the United States over it.

[175] *See id.* at 92.

[176] These facts concerning the Royal Dutch Petroleum litigation, where unpublished, were gathered in an interview of Christopher Vergonis, a litigation associate at Cravath, Swaine & Moore, which is the law firm representing the defendants in this litigation. Telephone interview with Christopher Vergonis, Litigation Associate, Cravath, Swaine & Moore (Dec. 18, 2001).

[177] *See Wiwa*, 226 F.3d at 92.

[178] Vergonis Interview, *supra* note 176.

[179] *See id.*

court upheld the District Court's exercise of personal jurisdiction, finding that by maintaining an investor relations office in New York City, the Dutch and English holding companies subjected themselves to the general, personal jurisdiction of the federal district court in New York.[180] This holding was based on New York State's long-arm statute, which provides for general personal jurisdiction in New York whenever a company is "doing business" in New York, which in turn has been defined as "continuous, permanent, and substantial activity in New York."[181] While recognizing that a well-established body of caselaw allows foreign corporations to list their securities on stock exchanges in New York and to take the administrative and regulatory steps necessary to facilitate those listings without subjecting themselves to jurisdiction in New York courts, the Second Circuit found that the facts of Royal Dutch Shell's maintaining an investor relations office went beyond those types of securities-related actions that do not confer general jurisdiction.[182] Thus, Royal Dutch Shell maintained an office in New York and paid for personnel, at a cost of approximately $45,000 per month, in order to "facilitat[e] the relations of the parent holding companies ... with the investment community;" and this "continuous presence" of the Investor Relations program was sufficient, according to the Second Circuit.[183] The court also found that it would be fair to subject the defendants to the court's general jurisdiction, given the extensive contacts of the Royal Dutch enterprise with New York.[184]

Parting company with the District Court, however, the Second Circuit reversed the District Court's dismissal on *forum non conveniens* grounds. Thus, the court reasoned that, even though England might be an adequate, alternative forum, the District Court had given insufficient weight to the U.S. resident plaintiffs' choice of forum and the interests of the United States in providing a forum to litigate international human rights claims — an interest the court held was demonstrated by the ATCA and by Congress's passage of the Torture Victim Prevention Act in 1991.[185] Moreover, the court found that the factors favoring litigation

---

[180] *See Wiwa*, 226 F.3d at 95-98.

[181] *See id.* at 95, *citing* N.Y.C.P.L.R. § 301 and Landoil Resources Corp. v. Alexander & Alexander Servs., Inc., 918 F.2d 1039, 1043 (2d Cir. 1990).

[182] *See Wiwa*, 226 F.3d at 97-98.

[183] *See id.* at 99.

[184] *See id.*

[185] *See id.* at 101. The Torture Victim Prevention Act, 28 U.S.C. section 1350 (2000), provides a cause of action under United States law to any individual (including U.S. citizens) where, under color of law of any foreign nation an individual is subject to torture or extra-judicial killing.

in England (the costs to the corporate defendants of shipping documents and sending witnesses to the United States) were outweighed by the substantial burden to the much-poorer U.S. resident plaintiffs of litigating in England.[186] Thus, the court remanded to the District Court for further proceedings.

On remand, defendants have renewed their motion to dismiss for failure to state a claim, which motion is currently pending before Judge Wood.[187] This motion is based, primarily, on three arguments. The first argument is that in order to hold the Dutch and English holding companies liable for the torts of their indirectly-owned Nigerian subsidiary, plaintiffs need to allege with specificity that the subsidiary is the alter ego of the parent, in a "piercing the corporate veil" analysis and that plaintiffs had failed to make those specific allegations.[188] The second argument is that the plaintiffs are attempting to hold private defendants liable for the actions of the government of Nigeria, without adequately pleading a conspiracy between the government and the private defendants; and the third argument, related to the second, is that in any event plaintiffs challenge the use of military and police power, which is quintessentially state power and thus the act of state doctrine prevents the court from reviewing these actions.[189] As will be discussed below, these arguments highlight one of the major, substantive difficulties plaintiffs face generally in "entanglement" cases under the ATCA, when plaintiffs challenge the exercise of power in a public/private joint venture.

c. The UNOCAL Litigation

In this litigation, plaintiffs are farmers from the Tenasserim region of Burma, bringing suit in the Central District of California under the Alien Tort Claims Act against the UNOCAL oil company and a number of UNOCAL executives; the Union Oil Company of California; a French oil company, Total S. A.; the state-owned oil company in Burma, called the Myanmar Oil and Gas Enterprise ("MOGE"); and State Law and Order Restoration Council ("SLORC"), which is the military government of Burma that had come to power in a coup in 1988.[190] The case alleges

---

[186] *See id.* at 104.

[187] *See* Vergonis Interview, *supra* note 176.

[188] *See id.*

[189] *See id*

[190] *See* Doe v. UNOCAL Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997). Further proceedings include *Doe v. UNOCAL Corp.*, 27 F. Supp.2d 1174 (C.D. Cal. 1998) (granting

numerous human rights abuses arising out of off-shore natural gas drilling activities, and the development of a port and pipeline to transport natural gas through the Tenasserim region to Thailand.[191] Plaintiffs contended that defendants, operating through the Burmese military and police forces, "have used and continue to use violence and intimidation to relocate whole villages, enslave farmers living in the area of the proposed pipeline, and steal farmers' property for the benefit of the pipeline."[192] Specifically, plaintiffs alleged that the UNOCAL/ Total joint venture entered into an agreement with the Burmese government under which SLORC would "clear forests, level ground, and provide labor, materials, and security for the pipeline project;" and plaintiffs further alleged that in carrying out its obligations under the agreement, SLORC "carried out a program of violence and intimidation" against the people living near the pipeline, including forcing people to work on the project, forcibly resettling whole villages to clear land for the pipeline,[193] and imprisoning or executing people who protested against these actions.[194] These allegations, while seemingly extreme, are consistent with U.S. State Department reports on human rights abuses by SLORC; and in particular, are consistent with State Department reports about the use of government-imposed conditions of forced labor and forced resettlement.[195] Plaintiffs further alleged that UNOCAL and Total executives knew that SLORC had a history of these types of human rights abuses when they entered into the agreement with SLORC.[196]

Initially, the district court dismissed the government of Burma from the action, finding that both the state-run oil enterprise, MOGE, and the governing coalition, SLORC, were entitled to sovereign immunity pursuant to the Foreign Sovereign Immunities Act ("FSIA").[197] Although

---

motion to dismiss of French company, Total S.A., for lack of personal jurisdiction), *aff'd* 248 F.3d 915 (9th Cir. 2001) (affirming dismissal of Total S.A. for lack of personal jurisdiction); Doe v. UNOCAL Corp., 110 F. Supp.2d 1294 (C.D. Cal. 2000) (granting UNOCAL's motion for summary judgment). After coming to power in 1988, SLORC renamed the country "Myanmar," but the United States Government continues to refer to the country as Burma (as will this author). *See UNOCAL,* 110 F. Supp.2d at 1296 n.1.

[191] Doe v. UNOCAL Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997).

[192] *Id.* at 883.

[193] *Id.* at 885.

[194] Doe v. UNOCAL, 110 F. Supp.2d 1294, 1299 (C.D. Cal. 2000) (citing 1995 letter from consultant to UNOCAL).

[195] *See* U.S. DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: BURMA 2 (2000), http://www.state.gov/www/global/human_rights/1999_hrp_report/burma.html (Feb. 25 2000).

[196] *UNOCAL,* 963 F. Supp. at 885.

[197] *See id.* at 886.

the court recognized that there are exceptions to the FSIA for the purely commercial activities in which a government engages, in determining the applicability of those exceptions courts look primarily to the type of power being exercised; and the court reasoned that in *UNOCAL* plaintiffs were challenging the misuse of police power, which is a quintessentially sovereign power.[198] Yet, in an important ruling for plaintiffs, the court held that MOGE and SLORC were not necessary parties to the litigation, and so it declined to dismiss the case in its entirety for failing to join a necessary and indispensable party.[199]

The court then turned to UNOCAL's motion to dismiss under the Alien Tort Claims Act ("ATCA").[200] As stated above, the ATCA gives the district courts in the United States jurisdiction to hear claims by aliens (that is, people who are not citizens of the United States and who do not live in the United States) alleging a violation of international law by an entity (or entities) subject to U.S. jurisdiction. UNOCAL had argued that the plaintiffs could not assert claims based on violations of international law against UNOCAL and Total, the private defendants, precisely because they were private and not government entities. That argument was based upon the traditional understanding that international law obligates states and not private actors — an understanding that has only recently begun to be rejected by some courts.[201] The Central District of California, too, disagreed with this limited construction of international law, noting two bases of jurisdiction: either the private plaintiffs' actions were so interrelated with actions of the state that they were effectively state action; or the private actors could be liable under the ATCA for a narrow range of violations of international law (slavery or piracy) even without state action.[202] So the court allowed the case to go forward.

One and a half years later, the district court granted Total S.A.'s motion to dismiss, finding the French company's contacts with California to be insufficient as a basis for the court to exercise personal jurisdiction.[203] The court found that Total's listing of its stock on U.S.

---

[198] *See id.* at 889.

[199] *Id.*

[200] Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

[201] The most important of these cases is *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), in which the Second Circuit stated that "[w]e do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." *Id.* at 239.

[202] *See UNOCAL*, 963 F. Supp. at 890-92.

[203] Doe v. UNOCAL Corp., 27 F. Supp. 1174, 1179 (C.D. Cal. 1998), *aff'd* 248 F.3d 915 (9th Cir. 2001).

exchanges, and promoting sales of its stock throughout the United States, were insufficient contacts to establish the court's general, personal jurisdiction over Total.[204] Moreover, the court found that the fact that Total had a California subsidiary was not sufficient to establish general jurisdiction over the parent in California, essentially requiring facts that would have established that the subsidiary was the "alter ego" of the parent as under a piercing test in order to establish general jurisdiction.[205] On appeal, the Ninth Circuit affirmed, adopting the district court's opinion as its own rather than writing separately.[206]

Most recently, the district court granted UNOCAL'S motion for summary judgment.[207] The court extensively reviewed the evidence, finding that it established that UNOCAL knew that SLORC was using forced labor in the construction of the pipeline and benefitted from such forced labor.[208] Yet, the court found those facts insufficient to establish a violation of international law in order to prevail under the Alien Tort Claims Act.[209] In order to be liable, the court held, there must be participation or cooperation in the use of forced labor, not mere knowledge, even though the court recognized that the joint venture benefitted financially from the forced labor.[210] Thus, the court granted UNOCAL's motion for summary judgment. The case is currently pending on appeal.

d. The Saipan Garment Manufacturers' Litigation

Saipan is one of the Northern Mariana Islands in the Western Pacific, and it is a U.S. Commonwealth. As such, employers are subject to U.S. laws, including U.S. labor laws (although with a significantly lower minimum wage); and goods can be imported into the U.S. duty free and marked "made in America." As a result, Saipan has become home to a thriving garment making industry. Apparel worth an estimated $1 billion (wholesale) was shipped duty-free from the Northern Mariana

---

[204] *Id.* at 1181.

[205] *Id.* at 1188.

[206] *See* Doe v. UNOCAL Corp.,248 F.3d 915, 920 (9th Cir. 2001).

[207] *See* Doe v. UNOCAL Corp., 110 F. Supp.2d 1294 (C.D. Cal. 2000).

[208] *See id.* at 1302-03.

[209] In order to establish liability under the Alien Tort Claims Act, a plaintiff must show (1) a claim by an alien, (2) alleging a tort, and (3) a violation of international law. Where the defendant is a private party, and there is no showing that the private party participated in or controlled the state actor's violations of international law, the violations that will suffice for a ATCA claim are limited to participation in piracy and slavery. *See id.* at 1303.

[210] *See id.* at 1310.

Islands into the United States in 1998.[211]

In 1999, three lawsuits were filed challenging the conditions under which garments are manufactured in Saipan. The core factual allegations in each lawsuit derive from the alleged sweatshop conditions in which people work, and the alleged inhospitable conditions in which they live. In particular, the plaintiffs claim that young men and women (predominantly women) are recruited from China, the Philippines, and other Asian countries to work in garment factories with the promise of steady work, good wages, healthy food, and "American-style" living quarters. It is claimed that most of these workers pay recruitment fees of several thousand dollars for the opportunity to work in Saipan.[212] (Given minimum wages set in the United States of approximately $3.00 per hour, as compared to average garment wages of $0.45 per hour in mainland China, these jobs, as described, are highly desirable.) Upon arrival, it is claimed, the reality is that the work is only too steady (12 to 14-hour work days, seven days a week), with uncompensated and forced overtime; that the wages barely exceed a worker's debt, given the initial recruitment fee and mandatory deductions for food and shelter; that the working conditions are unsafe and in routine violation of Occupational Safety and Health Association standards; and that the living conditions are deplorable, including locked dormitory-style housing where up to 20 people sleep in one dorm-sized room.[213]

Based on these factual allegations, the plaintiffs brought three separate lawsuits. The first is a class action filed in federal district court in Los Angeles against Saipan-based contractors and manufacturers and U.S. retailers.[214] This action alleged that these conditions constitute slavery, in violation of the Alien Torts Claims Act, and that the defendants conspired to violate the ATCA, in violation of the Racketeering Influenced Corrupt Organizations Act ("RICO"). In May of 1999, the

---

[211] *See* U.S. Rep. George Miller, *Beneath the American Flag: Labor and Human Rights Abuses in the CNMI*, (Mar. 26, 1998), reporting on fact-finding trip to Saipan in January 1998, *available at* http://www.house.gov/resources/105cong./democrat/hot_iss.htm.

[212] *See* Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1063 (9th Cir. 2000).

[213] *See id.*

[214] American defendants included retailers such as Abercrombie & Fitch Co., Brooks Brothers, Inc., J. Crew, The Gap, Tommy Hilfiger, Calvin Klein, Inc., J.C. Penney, Sears Roebuck, Levi Strauss & Co., Talbots Inc., and Woolrich, Inc. These facts concerning the Saipan litigation, where unpublished, were gathered in interviews with Patrick Daniels and Elizabeth Arleo. Both Ms. Arleo and Mr. Daniels are attorneys at Milberg, Weiss, Bershad, Hynes, and Lerach, which is the law firm representing the plaintiffs in this litigation. Telephone interview with Patrick Daniels, Milberg, Weiss, Bershad, Hynes, and Lerach (Apr. 16, 2001); telephone interview with Elizabeth Arleo, Milberg, Weiss, Bershad, Hynes, and Lerach (Aug. 28, 2001).

District Court in Los Angeles transferred the case to the District Court in Hawaii, and then in June of 2000 the District Court in Hawaii transferred the case to the District Court in the Commonwealth of the Northern Mariana Islands ("C.N.M.I.") and consolidated it with the second federal class action, described immediately below.[215] That order to transfer to the C.N.M.I. was appealed to the Ninth Circuit, which upheld the transfer in June of 2001. Discovery has begun in that case, and on August 10, 2001, there was a hearing on defendants' motion to dismiss. A ruling has not yet been issued on that motion.

The second case is also a class action, filed in federal district court in the C.N.M.I..[216] This case is brought against manufacturers in Saipan, claiming violations of the Fair Labor Standards Act and of C.N.M.I. labor law. In particular, plaintiffs allege that the employers routinely fail to pay overtime as required under U.S. and C.N.M.I. law; that they deduct excessive sums for unsanitary food and housing which plaintiffs are required to purchase as a condition of employment; and that the employers routinely fail to keep adequate records.[217] Plaintiffs filed this action as "Does I-XXIII," claiming that if their true identity were revealed they would be subject to retaliation, including violence and threats of violence, immediate deportation to their countries of origin, and possible arrest in their countries of origin unless they could immediately repay the recruitment fee.[218] All but one of the defendants moved to dismiss the action for failure to include the plaintiffs' true names, which the district court granted with leave to re-file with the plaintiffs' true names.[219] The Ninth Circuit asserted jurisdiction under the collateral order doctrine and reversed, holding that the plaintiffs had shown that they reasonably feared severe retaliation for having filed a complaint if their identities became known.[220] That case is currently pending, with a case management conference scheduled for October of 2001.

The third case was brought on behalf of California consumers in California state court against U.S. manufacturers and retailers.[221] This lawsuit alleges violations of California's unfair business practices act and

---

[215] *Id.*

[216] *Advanced Textile Corp.*, 214 F.3d 1058, 1063 (9th Cir. 2000).

[217] *Id.*

[218] *Id.*

[219] *Id* at 1064.

[220] *Id.* at 1063.

[221] Telephone interview with Patrick Daniels, Milberg, Weiss, Bershad, Hynes, and Lerach (Apr. 16, 2001); telephone interview with Elizabeth Arleo, Milberg, Weiss, Bershad, Hynes, and Lerach (Aug. 28, 2001).

challenges alleged deceptive advertising, asserting that the retailers are engaged in unfair and deceptive business practices by claiming their goods are made in the U.S.A. and under "no sweatshop" conditions. Defendants' demurrer in this case was unsuccessful, and so the first phase of discovery was undertaken. That discovery ended and was limited to the issue of the defendants' knowledge of the working conditions in Saipan. In addition to the party discovery that has been permitted, the court has issued an order permitting non-party discovery in Saipan. To date, plaintiffs have deposed a number of non-parties, including Richard Pearce, head of the Saipan Garment Manufacturers' Association; James Lin, CEO of United International Corporation (a large contractor on Saipan); and Price Waterhouse, which has performed monitoring of the factory conditions in Saipan for various retail clients in the Untied States. Once discovery ended, the defendants brought a motion for summary judgment, which is still pending.

4. Analysis

Clearly, none of these cases are yet concluded, given plaintiffs' pending appeal to the Ninth Circuit in *UNOCAL;* the pending proceedings about where to litigate in *Texaco;* the pending motion to dismiss in *Royal Dutch* Shell; and pending proceedings in the three Saipan cases. Yet a number of the difficulties of using the courts to address these types of interjurisdictional claims can be seen in the decisions to date. In turn, these difficulties implicate the effectiveness of law — here litigation — fully to solve the problems of corporate social responsibility.

a. Difficulties in Courts' Construction of the Underlying Cause of Action

First, courts have construed the types of claims that can be heard under the ATCA against private parties narrowly — at least where there is no state action. Establishing a cause of action under the ATCA requires a tort in violation of the law of nations, that is, a violation of an international law norm that is specific, universal, and obligatory.[222] Until 1995, however, it was not clear that an ATCA cause of action would reach the conduct of private actors, because many violations (such as torture or summary execution) are proscribed by international law only

---

[222] *See* Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

when committed by state officials or under color of state law.[223] In 1995, the Second Circuit decided *Kadic v. Karadzic* and squarely held that private actors can be held liable for certain, narrowly defined violations of the law of nations, such as genocide or war crimes.[224] Other courts have held that private actors engaged in piracy, hijacking, or slavery also violate the law of nations.[225] Many courts recognize that the law of nations is not static and is certainly not defined today as it was in 1789 when the ATCA was enacted.[226] Yet, it can take a significant amount of time and doctrinal development for international law norms to reach the "specific, universal, and obligatory" point where such norms can define an actionable violation for purposes of the ATCA, and presumably it takes longer for a norm to reach the point where it obligates private as well as public actors.

These narrow constructions of conduct by private actors that violate the law of nations (genocide, war crimes, piracy, slavery, hijacking), while probably correct doctrinally, limit the types of corporate responsibility issues that can be addressed in U.S. courts under the ATCA. This is a significant limitation, because many, if not most, corporate social responsibility issues cannot be squeezed into the rubric of piracy, slavery, hijacking, genocide, or war crimes. At least one circuit, the Fifth, has dismissed claims of environmental despoliation in Indonesia where jurisdiction was premised on the ATCA, holding that the plaintiffs had failed to show that environmental "treaties and agreements enjoy [the] universal acceptance in the international community"[227] necessary to constitute the law of nations. Many international labor issues, such as those addressed in the Saipan litigation, seem similarly difficult to frame within the actionable category of private harms. While it is possible that creative lawyers will make progress in expanding the types of facts that constitute actionable

---

[223] *See* Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995). Of course, "private actor" torture or extrajudicial killings could lead to criminal prosecution in the country of origin but would not give rise to "universal" jurisdiction under the ATCA, absent state action.

[224] *See id.* at 243. Private liability under the ATCA had been suggested by Judge Harry Edwards in his concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), but his views there did not represent the holding of the court.

[225] See Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 370 (E.D. LA. 1997).

[226] *See Filartiga*, 630 F.2d at 887; *Beanal*, 969 F. Supp. at 371.

[227] *See* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999). Plaintiffs there had also unsuccessfully argued that the effect on indigenous tribes of defendant Freeport-McMoran's operation of open pit copper, gold, and silver mines constituted cultural genocide, seeking to bring the private defendant's actions into the "genocide" category of harms for which individuals can be held liable.

violations — arguing that debt bondage is the modern equivalent of slavery, for instance, in the Saipan litigation — the current state of the law is that private actors can only be held liable under the ATCA for a very narrow range of conduct.

b. Problems Created by State Sovereign Immunity and the Act of State Doctrine

One partial solution to the narrowness of the causes of action that are available against private actors under the ATCA is to allege state action or that the private actor is acting under color of state law. There, a broader array of factual circumstances can give rise to liability. So, "a state violates international law if, as a matter of policy, it practices, encourages or condones genocide; slavery or slave trading; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; or a consistent pattern of gross violations of internationally recognized human rights."[228]

This is admittedly only a partial solution, because the range of factual circumstances that will give rise to actionable violations still will not include many of the types of corporate social responsibility concerns engendered by problematic labor relationships and environmental practices around the world (as defined in section C.1, above.) Yet, if there is state action or action under color of state law, some egregious situations can be addressed that cannot be addressed without state action. So, for instance, the alleged murder and disappearance of union labor organizers in Colombia could be reached,[229] as could the forced resettlement of villages and forced labor of citizens of Burma.[230] Because a number of corporate social responsibility issues described in section C.1, particularly in the extractive industries, concern the actions of local governments in partnership with the oil, gas, or mineral companies, this potentially broader array of causes of action is at least theoretically important in interpreting the potential of ATCA litigation to act as a

[228] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 (1986).

[229] A lawsuit was recently filed against Coca-Cola and its Colombian bottlers alleging that labor organizers were killed or have disappeared in a number of Colombian towns and further alleging that this was pursuant to a government policy condoning such action. *See* United Steel Workers and International Labor Rights Fund, Press Release, Coca-Cola (COKE) to be Sued for Human Rights Abuses in Colombia, (Jul. 19, 2001), *available at* http://www.laborrights.org (last visited Nov. 20, 2001).

[230] See *supra* notes 192-198 and accompanying text.

constraint on corporate action.

And yet, the involvement of a state in the contested activities can create sovereign immunity problems for the plaintiffs, as seen in the Texaco, UNOCAL, and Royal Dutch Shell litigations, and can lead courts to deny review based on the Act of State doctrine as well, as has the district court in Texaco. Thus, under the Foreign Sovereign Immunities Act ("FSIA"), foreign states can be brought into court in the United States to litigate claims arising from their commercial activities but not to hear claims based upon their sovereign activities. So, if the government of Nigeria defaults on a contract to purchase an aircraft from Boeing, there would not be sovereign immunity in U.S. courts under the FSIA. If the government of Nigeria falsely accuses its citizens of crimes, and tries and executes them based on manufactured evidence, there would probably be sovereign immunity, because conducting trials and administering justice (or not) is a quintessentially sovereign activity. Judge Patricia Wald of the Court of Appeals for the District of Columbia Circuit has argued in dissent that states should lose their immunity for actions that violate international human rights norms,[231] and yet that position has not yet prevailed a court's majority opinion. Similarly, the Act of State doctrine, based on the principles of respect for the actions of foreign sovereign nations and non-interference by the courts with the conduct of foreign affairs by the executive department, limits review in U.S. courts.

Thus, when private corporations act in partnership with a state sovereign, as is alleged in the *Texaco, UNOCAL,* and *Royal Dutch* Shell cases, the plaintiffs can be faced with a number of doctrinal difficulties. The companies will use the involvement of the state sovereign as a reason to argue for dismissing the entire case, based on the idea that the case cannot be heard against the government because of sovereign immunity or the Act of State doctrine, but that the government is a necessary and indispensable party and so the entire case should be dismissed under Rule 19 of the Federal Rules of Civil Procedure.

This Rule 19 argument was ultimately unsuccessful in Texaco before the Second Circuit and was also unsuccessful in the UNOCAL litigation, but the involvement of the sovereign creates another risk that is also evident in the UNOCAL litigation. This additional risk is that the company will successfully argue that the challenged actions were those

---

[231] *See* Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994) (holding that Federal Republic of Germany was entitled to sovereign immunity for claims arising from Nazi atrocities).

of the government partner, which cannot be sued because of sovereign immunity or the act of state doctrine, and that the private companies cannot be held responsible for how their joint venture partners use their sovereign power. This argument was accepted by the district court in UNOCAL when it granted UNOCAL's motion for summary judgment and is on appeal to the Ninth Circuit. Note that there is an irony when the two arguments are juxtaposed: in arguing for a Rule 19 dismissal, the private company is embracing the participation of the government partner, while in the second argument the private company wants to distance itself from participation with the government in order to disclaim liability.[232] Both arguments show the difficulties plaintiffs face in challenging actions in the "entanglement" context often presented in the extractive industries, where governments and private corporations act together.

c. Problems Created by the Doctrine of *Forum Non Conveniens*

As is evident from the proceedings in the Texaco case, the discretionary doctrine of *forum non conveniens* can also create difficulties for plaintiffs, although these difficulties are not insurmountable, as evidenced by the Second Circuit's opinion in the *Royal Dutch* Shell case. (Given the Second Circuit's opinion, it may be that the District Court's most recent, unpublished dismissal on *forum non conveniens* grounds in *Texaco* will be reversed.) Clearly the premise of Alien Tort Claims Act litigation, which asserts universal jurisdiction over some types of harms, is in conceptual tension with *forum non conveniens*, which seeks to locate litigation in the locale most closely related to the specific facts giving rise to the claims. It may be that the doctrine will be narrowed over time as ATCA litigation expands and such narrowing will be necessary if the ATCA vehicle is to become a partial solution to the problem of a lack of international courts, given the types of interjurisdictional issues that are arising with the increasing scope of multinational corporate activity.

One basis to argue for such narrowing is to recognize that when implemented in a purely domestic context, as within the courts of the United States, the doctrine presupposes certain background conditions with respect to the quality of justice litigants will receive. As the number

---

[232] One basis for the appeal to the Ninth Circuit is that the district court failed to apply standard agency law principles correctly. In essence, plaintiffs argue that UNOCAL and the various Myanmar government entities were either partners or that the government was acting as UNOCAL's agent, and so that UNOCAL, as principal, can be held liable for the torts of its agent or partner.

of interjurisdictional claims proliferates, this presupposition of approximately equal conditions of justice weakens, given that the courts in the United States will often be asked to dismiss cases in favor of hearings in countries without as robust conditions of justice. While the quality of the judicial system in the alternative forum is a factor that courts will weigh in considering a *forum non* dismissal, there will be numerous instances "on the margins" (such as India in the Bhopal litigation) where the courts are not so bad that dismissal is proper but where doubts might still remain about the fairness of hearings against important economic actors (such as a hearing against Texaco in Ecuador). In such contexts, it might be argued that there should be a presumption against *forum non conveniens* dismissals in the international contexts presented under the ATCA, absent compelling reasons for such a dismissal. While this and other narrowing arguments may ultimately vitiate the power of the *forum non* doctrine in ATCA litigation, at this time the doctrine remains in substantial tension with the universal jurisdiction that the ATCA presupposes.

d. Problems in Asserting Personal Jurisdiction Created by Parent/Subsidiary Relationships

Further difficulties in addressing the consequences of multinational corporate activity arise from the use of parent/subsidiary relationships to conduct business in far-flung countries. These difficulties can arise for a number of reasons, but perhaps the paradigmatic scenario involves conducting business in many countries through operating subsidiaries which do not have sufficient assets against which to execute (theoretical) judgments for conduct in the country but where there isn't jurisdiction over the parent company which does have assets and which does exercise managerial control. This general problem has been extensively analyzed by Professor Phillip Blumberg, so I will merely summarize the problem here.[233] Professor Blumberg has argued for "enterprise liability" for all members of a corporate group, but the enterprise liability theory was substantially rejected by the U.S. Supreme Court in *Bestfoods*.[234]

The problems that are created by parent/subsidiary relationships for asserting jurisdiction over multinational enterprises are well illustrated in the UNOCAL litigation, where the court refused to exercise general,

---

[233] *See* PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW 133-41 (1993).

[234] *See* Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. Corp. L. 573, 577. *But see* United States v. Bestfoods, 524 U.S. 51 (1998).

personal jurisdiction over the French company, Total S.A., even though it had established an operating subsidiary in California.[235] In that case, the District Court held, based on Ninth Circuit precedent, that the existence of a subsidiary in the jurisdiction is not sufficient to establish personal jurisdiction over the parent; rather, plaintiffs must be able to show that the subsidiary is the alter ego of the parent or that the parent completely dominates and controls the subsidiary, as in the analysis of "piercing the corporate veil." As a theoretical matter, it is not clear why a plaintiff should have to show as much control and domination by the parent over the subsidiary as under a piercing test in order to establish jurisdiction. Thus, by establishing a subsidiary in California, Total S.A. certainly seems to have minimum contacts with the State of California such that asserting personal jurisdiction would not violate "traditional notions of fair play and substantial justice," as articulated by the U.S. Supreme Court in *International Shoe Co. v. Washington.*[236] *International Shoe* was a case of specific jurisdiction, though, that is, jurisdiction over a non-resident defendant with respect to a claim arising from the defendant's activities within the jurisdiction. Asserting jurisdiction over Total S.A. in *UNOCAL* would be an instance of general jurisdiction, that is, jurisdiction over a non-resident defendant with respect to a claim arising outside of the jurisdiction.

In evaluating general jurisdiction, it may be that a different analysis should apply to determine the constitutionality of asserting jurisdiction over a non-resident corporate defendant than to asserting such jurisdiction over a non-resident person. Indeed, the Supreme Court has suggested as much in *dicta*, stating that "[e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation."[237] More recently, the Supreme Court noted, without deciding, that such "continuous and systematic" contacts with a jurisdiction may be sufficient to assert general jurisdiction over a corporate defendant, given that broader jurisdictional principles should apply to corporate defendants than to persons, because corporations "have never fitted comfortable in a jurisdictional regime based primarily upon *de facto*

---

[235] *See supra* notes 205-208 and accompanying text.

[236] *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[237] *See* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984).

power over the defendant's person."[238] If a "continuous and systematic" contacts test is, in fact, the proper one, it would seem that personal jurisdiction should have been asserted over Total S. A. based on its having established an operating subsidiary in California. Absent a different analysis for general jurisdiction when the defendant is a corporation versus an individual; however, the use of parent/subsidiary relationships will preclude jurisdiction over parent companies in many cases, which creates difficulties for obtaining judicial redress in these types of interjurisdictional cases, even given subject matter jurisdiction based on the ATCA.

e. Summary

These jurisdictional and *forum non conveniens* issues will continue to limit the adjudication of these claims in U.S. courts (referring, in this instance, to personal jurisdiction). This is problematic because, all things being equal, hearing these claims in the United States is more likely to lead to judicial redress than hearing them in the country in which the problems arose. The government of Burma, for instance, imprisons people and kills them without trial for political activities directed against the government.[239] It is hardly likely that the government will dispassionately examine its own culpability in these matters, and equally unlikely that it will so examine UNOCAL's or Total's.

Moreover, as a corporate governance matter, it is useful for U.S. shareholders, bondholders, employees, and communities to be aware of significant risks that a company's approach to managing important social issues entails, both here and abroad. While some of the information necessary to evaluate such issues is available in the United States, there is not as much as there should be, given the significance (both economic and social) of the information and in particular there is not as much consistent, credible, comparable information as regards companies' conduct in other countries as there should be.[240] If these claims are not heard here, then these constituents lose one avenue for getting this information (which may make the counter-factual assumption that the press reports on the litigation).

---

[238] Burnham v. Superior Court, 495 U.S. 604 (1990).

[239] *See* Williams, *supra* note 28, at 1282-87 (asserting that the SEC should act to make more information available to investors on the social and environmental consequences of firms' activities, in part because that information is an indicator of management quality).

[240] *See* U.S. DEP'T OF STATE, BURMA REPORT ON HUMAN RIGHTS PRACTICES FOR 1999, 2 (2000), http://www.state.gov/www/global/human_rights/1999_hrp_report/burma.html (visited Nov. 30, 2000).

Conversely, not all claims get dismissed on jurisdictional grounds,[241] and one might see progress in that these types of cases are even being brought in court.[242] Indeed, these cases may be important almost irrespective of their outcome, because they represent a form of leverage and a forum for leverage being newly brought to bear on global corporate social responsibility issues. (Witness, as an analogy, the twenty-year efforts to hold the tobacco industry accountable for the health consequences of their product, which efforts produced few victories in court during the first eighteen years but which have ultimately produced changes in public awareness, important settlements of state and federal claims, and new regulations to reduce smoking among children and teenagers.)[243] Ultimately, it will take years before we can evaluate international litigation as a mechanism for advancing corporate social responsibility. The general point I would draw from these cases, at this point, is that while the potential for resort to the courts may act as a structural constraint on corporate activity with respect to global social responsibility issues, it is a weak constraint at the moment.

D. The Limits of Contract Law

The other major constraint on corporate activity posited by the traditional position on corporate social responsibility is contract law. I treat this argument in a cursory fashion, because it has been extensively refuted elsewhere.[244] Indeed, some categories of participants in the corporate enterprise are well positioned to protect themselves by contract. Both sophisticated creditors and suppliers will typically have negotiated (or used) extensive contracts with a business entity prior to providing capital or goods, for instance, and in many cases will have

---

[241] *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (reversing *forum non conveniens* dismissal of action against Royal Dutch Petroleum brought by plaintiffs and their next of kin, who claimed that they were imprisoned, tortured and/or killed by the Nigerian government for their political activities challenging Shell Nigeria's actions).

[242] *See* Does I Thru XXIII. v. Advanced Textile Corp., 214 F.3d 1058, 1062 (9th Cir. 1998) (reversing district court's stayed dismissal to amend employees' failure to include their true names). The claim was brought by garment workers in Saipan, the main island of the Commonwealth of the Northern Mariana Islands (a commonwealth of the United States), alleging that "employers have a pattern, practice, or policy of failing to pay overtime; deducting excessive sums for unsanitary housing and food which plaintiffs are required to purchase as a condition of employment; and failing to keep adequate records. *Id* at 1063.

[243] *See* Williams, *supra* note 28, at 1381 & nn. 426-28 (describing tobacco litigation).

[244] *See* Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. Davis L. Rev. 581 (2002).

negotiated for a secured position in the event of insolvency. Private lenders, such as banks, also protect themselves with very specific agreements and secured positions. Top executives within transnational companies typically negotiate enviable contracts (complete with a company-provided Mercedes, apparently the company car of choice).[245]

Yet, there are other groups of people or entities–employees, consumers, communities, and "the environment" who typically have not negotiated explicit contracts with the business entities of interest, who are not protected by contracts, or whose contracts are not very protective. Often these people are not in a position to negotiate a contract to protect their interests, either because of a lack of bargaining power or perhaps because they don't know they're about to be affected by an exercise of corporate power (such as the citizens of Bhopal, India, just before the Union Carbide plant exploded). The most obvious "other constituent" that one thinks about as protected by contracts are employees. Yet, today in the United States only about 12% of employees belong to labor unions, and so are protected by explicit contracts (setting aside top executives).[246] And the implicit employment contract in the United States applicable to most employees is employment at will, which certainly undermines job security and provides no other tangible employment benefits to employees.[247] Communities, through their political representatives, often enter contracts with business entities to memorialize the tax and other subsidies that are granted to companies to encourage them to locate in that community. Many communities are starting to negotiate "clawback" arrangements in those contracts, which require payments to the locality if the number of jobs that were promised don't materialize, for instance, or if the salaries for those jobs don't reach specified levels.[248] Clawbacks are a relatively new development, however, and the major dynamic is still competition among states and localities to provide the best package of incentives and subsidies to companies to encourage them to locate in that community.[249] So while contracts may offer partial protection to some entities, they are not a complete answer to the corporate social responsibility dilemma.

---

[245] *See* Stewart J. Schwab and Randall S. Thomas, *What Do CEO's Bargain For? An Empirical Study of Key Legal Components of CEO Contracts* (Nov. 10, 2000) (draft, on file with author).

[246] *See* KAPSTEIN, *supra* note 87, at 99.

[247] See David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA.. L. REV. 975, 992 (1998).

[248] *See* THOMAS, *supra* note 135, at 173.

[249] *See id.* at 181-83.

CONCLUSION

The primary implication of the above analysis is that the predominant academic position on corporate social responsibility must be amended in light of globalization. While the constraints of domestic law are clearly necessary and important to structure the relationship between the corporation and society, they are not sufficient fully to address the corporate social responsibility complex of issues as the economy becomes increasingly global; neither will purely contractual solutions fill the gap. Rather, the competitive pressures on countries to attract foreign investment are too severe, and the regulatory chill that competition creates is too pervasive. This is true not only for the American "hot button" sectors of law that have been implicated in human rights litigation, such as environmental protection and labor law but also for the bedrock issues of social structuring, such as taxation and social spending. As this Article asserted initially, something more is needed as a theory of corporate social responsibility than companies acting simply to maximize shareholder wealth within the constraints of various countries' domestic law.[250]

Admittedly, that conclusion can be seen as doing nothing more than posing the traditional corporate social responsibility question in perhaps starker relief: what exactly, then, is that "something more" and how should corporate board members and managers know that they should

[250] There is even debate about the extent to which corporations really do focus on shareholder wealth in decision making to the exclusion of other social considerations, such as the effects of their actions on other constituents such as employees, consumers, and the community. The law and economics "nexus-of-contracts" view of the corporation posits that the corporate purpose is to maximize shareholder wealth; that is, as residual claimants of corporate wealth, shareholders are the beneficiaries of an implicit contract with corporate managers to maximize their wealth. And shareholder wealth maximizing has been used as the rhetorical straw person against which many progressive corporate law scholars react. But the reality of corporate decision making is undoubtedly more complicated than that, and to date corporate law scholars have not had good access to empirical data about how corporate decisions are actually made and how various considerations and constituencies are balanced in such decisions. One glimpse into this decision making process is provided by the comments of Terrence Gallagher, Vice President for Government Relations at Pfizer, as part of a discussion of the shareholder/stakeholder debate at Cornell University Law School. While supporting shareholder primacy as the underlying philosophy of American business, Mr. Gallagher stated that "a company—a United States corporation generally—is aware of, and sensitive to, and takes account of, the interests of the stakeholders beyond the shareholders," such as "the employees, the suppliers, and the community." Comments of Terrence Gallagher, printed in *Transcript: Corporate Social Responsibility: Paradigm or Paradox,* 84 CORNELL. L. REV. 1282, 1299, (1999). Presumably this sort of balancing of constituencies' interests takes place all the time in business but is not well reflected in most academic theories.

do it if it is not legally required?[251] Over the past decades, as various corporate law scholars in the United States have sought to advance discussions of different theories of corporate social responsibility, they have been met with two, seemingly intractable problems. First, it has been difficult to define what one means, in any fully specified way, by the concept of corporate social responsibility, and thus it has been difficult to discuss except at a high level of generality. While many advocates of more corporate social responsibility share a concern that managing global corporations to maximize shareholder wealth has the potential to lead to harmful social effects, including exacerbating persistent income inequalities, there is much less agreement about how to suggest reforming corporate law to address that concern.

Second, to the extent that very general definitions of corporate social responsibility have been developed, they tend to be the multi-fiduciary or stakeholder models discussed above.[252] Thus, progressive corporate scholars have advanced a concept of the corporation under which corporate managers and directors can be understood to owe consideration (and perhaps even fiduciary obligation) to a wider range of constituents than to the shareholders, including obligations to employees, consumers, communities, suppliers, and other constituents of the corporate contract, broadly construed.[253]

And yet this notion of corporate managers and directors being responsible to multiple constituencies has been deeply problematic from the standpoint of traditional corporate theory in the United States, precisely because it undermines one of the key values of corporate law — accountability. Central aspects of corporate law doctrine, such as the concepts of fiduciary duties of loyalty and care, exist to ensure that managers and directors are ultimately accountable to the corporation and its shareholders.[254] Market mechanisms, such as the existence of a

---

[251] *See, e.g.*, Engel, *supra* note 59, at 29-30 (posing this question).

[252] Quite recently there has been a flourishing of progressive corporate law scholarship that cannot be confined within the rubric of "stakeholder theories" so this statement is probably less true as a prediction of future trends in progressive corporate law scholarship than as a statement about much of what has been written to date. *See, e.g.*, Claire Moore Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers* (draft on file with author); Fanto, *supra* note 124; James A. Fanto, *Psychological Factors in Merger Decision-Making* (draft on file with author); Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. Davis L. Rev. 581 (2002).

[253] *See generally* PROGRESSIVE CORPORATE LAW, *supra* note 29.

[254] At first blush one might think that accountability to the corporation is the same thing as accountability to the shareholders of the corporation, as do scholars holding a shareholder primacy view of the corporation. And yet the caselaw in Delaware, the most

highly developed stock market and a robust market for corporate control, are also understood to promote accountability to stockholders' interests.[255] If managers are accountable to various other constituents in theory, they are likely to be accountable to no one but themselves in fact or so the traditional corporate law response has suggested.[256] So, for instance, managers may profess concern with the effects of a takeover on employees and the communities in which they operate, while their actual motivations in resisting a takeover are self-interest and concerns about their own positions (entrenchment). Moreover, if corporate managers and the board are responsible to a broad range of constituents rather than being responsible solely to the shareholders and the corporation, we lose a seemingly clear metric by which to judge the efficacy and fidelity of management's actions. Under the shareholder view of the corporation, whether management has done a good job is evaluated by determining whether management has increased the value of the firm over the period in question. While it may be, in fact, difficult to determine whether management has increased the value of a firm over the period in question, the shareholder view of the corporation typically assumes that this question can be answered simply by looking to increases in share prices.[257] Under a multiple constituency model, an evaluation of a broader range of social and financial facts is necessary to judge how well managers and the board are doing and thus to hold them accountable to their multiple constituencies. Thus, ironically, in a number of ways calls for increased corporate social responsibility have

---

important jurisdiction for corporate law jurisprudence, distinguishes between these two notions of accountability. *See, e.g.*, Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1154 (Del. 1990) (noting that fiduciary duties of Board run to corporation and include determining its view of corporation's best interest, even where that best interest may conflict with shareholders' interests in maximizing their short-term returns in investment); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (holding that in considering defenses to takeover, Board may consider effects of its decision on corporate enterprise and on constituents other than shareholders, including creditors, customers, employees, and perhaps even community).

[255] *See, e.g.*, Roe, *supra* note 39, at 554-60 (arguing that it is more difficult to promote accountability to shareholders in Europe than in United States for number of reasons, including that there is no well developed market for corporate control).

[256] *See* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1436-38 (1993).

[257] *See* Lynn A. Stout, *Stock Prices and Social Wealth*, HARVARD DISCUSSION PAPER NO. 301, at 24-25 & nn.31, 53 (discussing ways that managers can increase stock prices of their company without necessarily increasing company's value, such as by engaging in stock repurchase programs or by transferring wealth from employees to shareholders through downsizing and restructuring), *available at* http://www.law/harvard.edu/programs/olin_center/papers/pdf/301.pdf (Nov.2000).

floundered on the shoals of corporate accountability.

It is for that reason that I am so intrigued by distinguishing the concept of "social accountability" from that of "social responsibility" in the next Article in this series and further intrigued by examining the arguments for an expanded duty of corporate social accountability as one solution to the corporate social responsibility dilemma. Such accountability, as described in the introduction to this Article, would derive from companies producing more information to be publicly disseminated about the social, political, economic, and environmental consequences of managers' and directors' exercise of their fiduciary responsibilities. As such, it would not require any changes in how directors or managers exercise their fiduciary responsibilities, and it would leave to managers and directors decisions about how, precisely, to balance the competing demands of various constituents, including shareholders, exactly as corporate law and practice do today. Yet, the production and dissemination of such information would produce greater corporate social transparency, actuating the goal of enhanced corporate social accountability without directly undermining the traditional corporate law goal of shareholder accountability. That social accountability may, in turn, help to produce structural pressures to inculcate humanistic concerns into otherwise brutal global competition. That, at least, is one premise worthy of serious examination.

Thus, I submit, expanded corporate social transparency is one important candidate for the "something more" that must be incorporated into the prevailing theory of corporate social responsibilities to make that theory sufficient in light of the challenges of globalization. At least that is the operating premise upon which the next phase of this investigation proceeds.

***