BEYOND GOOD AND EVIL[1]: TOWARD A SOLUTION OF THE CONFLICT BETWEEN CORPORATE PROFITS AND HUMAN RIGHTS

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I. Introduction

In May 2008, Iranian President Ahmadinejad catches wind of an imminent military coup to be launched with the assistance of a radical student movement—Persian Intellectuals and Students for Social and Environmental Democracy ("PISSED"). PISSED, frustrated with religious repression and with the perception that foreign companies were "stealing the wealth of the Iranian people" and "leaving behind nothing but desolation and despoilment," has already occupied Teheran University and several government buildings, and its most radical members have begun to sabotage the property of foreign oil lessees in an effort to deprive the Ahmadinejad government of royalties. Foreign petroleum corporations publicly appeal to the Iranian government for assistance.

In early June, Amhadinejad orders PISSED crushed and the coup plotters arrested. Thousands of members of PISSED are killed by police and loyal military forces of the Iranian government in street battles, and many more (suspected) protesters and disloyal officers are arbitrarily spirited from their homes and away to military prisons where they are subjected to torture. By July, with Iranian oilfields now under military occupation, Western oil companies are able to increase production dramatically, and by September, gas prices in the U.S. have fallen by more than forty percent to an average of $1.75/gallon, providing an economic boost to Americans. Moreover, flush with new oil revenues, Iran has managed to raise its domestic standard of living appreciably.

However, in October, a class of nearly two thousand Iranian nationals—some of whom have fled Iran and sought asylum in the U.S., others of whom remain imprisoned or in hiding but appear by next friend, and still others of whom are captioned as "John and Jane Does" for fear of retribution against their relatives still located in Iran, is permitted to file suit against Texaco, BP, Marathon, ExxonMobil, Shell, and ConocoPhillips, as well as named individual executives of those corporations, in the Federal District Court for the Southern District of Texas in

1 "What is done out of love is always beyond good and evil." FRIEDERICH NIETZSCHE, BEYOND GOOD AND EVIL § 153 (Walter Kaufmann trans. 1966) (1888).

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Houston—headquarters for many of the defendants.[2] *These PISSED plaintiffs, led by an army of lawyers employed in turn by a consortium of human rights non-government organizations, including Amnesty International, Human Rights First, and the American Civil Liberties Union, sue under the Alien Tort Claims Act,*[3] *alleging that the corporate defendants were either directly complicit or, through their connections with the Iranian government, knowingly aided and abetted the commission of extrajudicial killing, torture, and other serious violations of international human rights law. The plaintiffs demand $14 billion—an amount that represents approximately one percent of the gross revenues earned in 2006 by the defendants collectively.*

Outraged petroleum executives disclaim any knowledge of or responsibility for the acts of the Iranian government[4] *and express shock and sadness at the brutality of the Ahmadinejad regime. Organizations such as the National Foreign Trade Council, USA Engage, the Chamber of Commerce of the United States of America, the United States Council for International Business, and the American Petroleum Institute*[5] *echo the argument that responsibility for the injuries suffered by plaintiffs rests with the Iranian government, an entity that, they are quick to note, is not under the control of private corporations or their executive leadership and which has not been sued.*[6] *Furthermore, the oil majors warn that if they, as private corporations, are to be exposed to an "onslaught" of liability for violations of rights committed abroad by foreign governments simply because they possess "deep pockets"*[7] *and are subject to the personal*

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

3 The Alien Tort Claims Act ["ATCA"], which stands as the contemporary codification of a provision of the Judiciary Act of 1789, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (codifying Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77). Thus, for subject matter jurisdiction to vest, three elements must exist: (1) the plaintiffs must be aliens, (2) the claim must be for a tort, and (3) the tort must violate the law of nations or treaties of the United States. Id.

4 See John D. Bishop, The Moral Responsibility of Corporate Executives for Disasters, in BUSINESS ETHICS (Norman Bowie ed. 2002), 261, 263 ("When things go horribly wrong, executives sometimes deny responsibility on the grounds that they did not know, and could not be expected to know, the information . . . needed to prevent the disaster.").

5 These pro-business and anti-ATCA organizations were among a number who joined in submitting a brief amici curiae to the Supreme Court in a 2004 ATCA case that urged the Court to restrict the jurisdictional reach of the ATCA in order to prevent American business from bearing the burdens of the failures of foreign governments to protect human rights. See Brief for the Nat'l Foreign Trade Council et al. as Amici Curiae Supporting Petitioner, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) (N0. 03-339).

6 See Bishop, supra note 4, at 261, 262 ("It is commonplace in discussing morality that people [and corporations] should not be held responsible for events over which they have no influence or control[.]").

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

jurisdiction of federal courts, future foreign investment, particularly in countries with poor human rights records, will be curtailed sharply. As a result of decreased foreign investment, warn the oil majors and business associations, foreign economic development, democratization, and the protection of human rights—all dependent on the foreign capital that only major multinational corporations can provide—will be curtailed.[8] *In a news conference, petroleum executives and the heads of major business associations, joined by a deputy White House press secretary, call publicly for the dismissal of what they brand "politically motivated" lawsuits.*[9] *Bill Reinsch, the President of the National Foreign Trade Council, is even more blunt:*

> *We think the Founding Fathers didn't intend all this . . . What you got is trial lawyers who have seized on [the ATCA] as the new asbestos, filing these hoping to hit the jackpot . . . The oil in all the nice countries has been found already.*[10]

In their own news conference announcing the ATCA suits, attorneys for the PISSED plaintiffs charge that multinational corporations "wield more power than many of the world's nations" and use their "immense wealth and political capital"[11] *to neutralize or coopt governments in developing countries, minimize the costs of doing business, and generate tremendous profits. By virtue of their wealth and power, the PISSED attorneys contend, corporations come to be impressed with social responsibilities—quite independent of the obligations of the host states in which they operate—to protect and promote human rights. These defendant corporations and their executives, according to counsel for the plaintiffs, "ha[d] a moral duty to structure the[ir affairs] to ensure that the risks of disaster[s such as befell the plaintiffs] are discovered and made known to themselves . . . and then . . . to act on the information."*[12] *When a corporation breaches its responsibilities to protect the human rights of the populations in the local communities in which it does business, "it, like all other persons,*

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

9 See Brief for the United States as Amicus Curiae in Support of Reversal of the Judgment against Defendant-Appellant Jose Francisco Sosa at 13-14, Alvarez-Machain v. Sosa, 331 F.3d 604 (9th Cir. 2003) (No. 99-56880) (contending that the use of the ATCA to allow aliens to seek remedies in U.S. courts for torts committed abroad where there is no other connection to the U.S. creates a legal and political climate hostile to the interests of American business and to the United States).

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

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

12 Bishop, supra note 4, at 266.

must be forced at times to look at the very personal tragedies it causes."[13] *Moreover, as the lead attorney pronounced, perhaps in response to the defendants' objections,*

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

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The preceding hypothetical scenario is intended not as a prediction but rather as an illustration of the ongoing social battle for the power to determine the legal, ethical, and economic substance of the regime that will govern corporations and specify their powers and duties with regard to the protection of human rights.[15] Whereas for much of the history of the modern corporation its object and purpose, as well as its powers and duties, were widely considered to be settled by domestic law, custom, and social contract, in the past two decades a series of events—revelations of massive corporate fraud at Enron *et al*., environmental disasters at Bhopal and in Alaska, allegations of corporate complicity in widespread violations of human rights in the developing world,[16] and the gathering transnational strength of the human rights movement—have unraveled this common understanding to form two contending camps with ideologically opposed visions of how corporations should be structured and held responsible for harms connected, however directly or remotely, to their conduct.[17] Both contend upon the terrain mapped out by a new social movement, entitled "corporate social responsibility" ["CSR"], which engages a variety of state and non-state actors in contestation over a host of

13 See Peter French, The Corporation as Moral Person, in Business Ethics (Michal Boylan ed. 2001), at 59, 59 (quoting the lead attorney for the plaintiffs in the lawsuit against Ford for negligent design of the Ford Pinto).

14 THOMAS A. WHITE, BUSINESS ETHICS 186 (1993).

15 While not a prediction, the notion that petroleum corporations in particular are especially well-placed to influence human rights practices in the developing world in which they have operations, and that their acts and omissions have real human consequences, is an empirical fact. See, e.g., Jody Williams & Mia Farrow, Sudan's Enablers, WSJ, May 22, 2007, a A12 (alleging that the contract between China National Petroleum Company ["CNPC"] and the government of Sudan funds the latter's purchase of military hardware used to commit genocide against the population of Darfur and that CNPC refuses to use its leverage to halt the practice).

16 See infra at Part II (3).

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

political and legal projects designed by their architects to restrain corporations in their pursuit of self-interest and to hold them accountable to constituencies other than shareholders for their performance as measured along dimensions other than financial performance, including environmental protection, philanthropic commitment, and protection of human rights.

The "shareholders" camp, grounded in a theory of the firm which regards a corporation as a legal creation designed and managed solely to generate profits for its stockholders, rejects all claims other than the economic self-interest of the stockholders or the contractual obligations voluntarily entered into by parties as subjects appropriately within the ambit of corporate governance.[18] CSR means nothing more to adherents of shareholder theory than assuring that the corporation is run in such a manner as to maximize profit lawfully;[19] moreover, should managers consider the "public or social interest" in the discharge of their duties, they would not only be derelict in their duties to the shareholders but would risk surrendering their firms to public control.[20] If indeed a compelling social interest is claimed that would require the firm to abstain from acts or omissions otherwise in its own interest, this interest ought to be subjected to proof in the democratic political process and, if validated, vindicated by government through legislation.[21] Shareholder theory and its followers accept only fiduciary responsibility to owners and legal compliance as fundamental principles of corporate governance. In the United States at present, shareholder theory has maintained its legal primacy, animating corporate law and specifying the powers and duties of corporations and their employees in such a manner as to facilitate efficiency and profitability.[22] Thus, so long as a firm remains within the "rules of the game, which is to say, engages in open and free competition, without deception or fraud[,]"[23] it is legally free to ignore all other objectives save maximization of shareholder wealth.

18 See, e.g., Milton Friedman, The Social Responsibility of Business is to Increase its Profits 126 (1970).

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

20 F.A. HAYEK, LAW, LEGISLATION, LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE 3 (1982).

21 See Friedman, supra note 18, at 126 (rejecting the devolution of governmental responsibility to act in the social interest onto business as undemocratic).

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

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

In marked contrast, the "stakeholders" camp is committed to a vision of the firm as not merely a legal fiction but rather as a moral organism with social and ethical responsibilities[24] that extend far beyond the interests of shareholders to include other constituent groups such as employees, customers, suppliers, nongovernmental organizations, local communities, and even, in conjunction with issue-areas such as the environment, disease and corruption prevention, and human rights, the community of nations.[25] Legitimate objects of the corporation include not merely profitability but sustainable growth, equitable employment practices, and long-term social and environmental accountability.[26] Whether because of an implied social contract[27] or because of moral imperatives,[28] where the drive for profit butts up against its non-pecuniary responsibilities, a corporation, according to stakeholder theory, must balance these obligations in a manner that safeguards the welfare of society.[29] Although stakeholder theorists distribute along a continuum ranging from those who envision CSR to require little more than engaged philanthropy and legal compliance to those who believe firms should actively aim to contribute to global welfare even at the expense of shareholders, all agree that corporations are obligated to add social, in addition to financial, value, and that they are, or should be, held accountable—

24 See, e.g.,YADONG LUO, GLOBAL DIMENSIONS OF CORPORATE GOVERNANCE 199 (2005) (identifying economic, legal, ethical, moral, and philanthropic dimensions of stakeholder theory); Pope John Paul II, Cenesimus Annus (1992) ("[T]he purpose of a business firm is not simply to make a profit, but it is to be found in its very existence as a community of persons who in various ways are endeavoring to satisfy their basic needs . . . Profit is a regulator of the life of a business, but . . . other human and moral factors must also be considered[.]"); WHITE,, supra note 14, at 201 (arguing that firms must consider the moral dimensions of their actions).

25 Thomas M. Jones, Andrew C. Wicks, & R. Edward Freeman, Stakeholder Theory: The State of the Art, in Bowie, supra note 4, at 19, 21. For an in-depth presentation of the stakeholder theory and its expression through the CSR movement, see Ruth V. Aguilera et al., Putting the S Back in Corporate Social Responsibility: A Multi-Level Theory of Social Change in Organizations, 31 ACAD. MGMT. REV. 1 (2006).

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

27 WHITE, supra note 14, at 92 (presenting the social contractual basis for stakeholder theory, which maintains that because firms are permitted by society to aggregate great wealth and power and to become social giants that affect the lives of millions, they are bound by an implied agreement to exercise such power for stakeholders as beneficiaries).

28 See, e.g., John Boatright, Ethics and Corporate Governance, in Bowie, supra note 4, at 38, 53 (contending that "all individuals have some rights that they should not have to bargain [with corporations] for.").

29 LUO, supra note 24, at 198. Stakeholder theorists contend that, in most instances, such balancing is in fact possible. See, e.g., THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS 12 (1989) (contending that stakeholder theory can simultaneously "stand the tests of rational consistency and compatibility with fundamental moral precepts in complex factual surroundings"); Norman Bowie,Introduction, in Bowie, supra note 4, at 2 (holding that the "obligation of business is to consider, weigh, and balance the needs of the firm's stakeholders").

whether economically, politically, and/or legally—for the faithful discharge of their social, ethical, and moral responsibilities.[30]

Shareholder theorists brand stakeholder theory as an "amorphous and ill-defined construct, born of good intentions, but doomed to fail for its breadth, its emphasis on people rather than profits, and its inability to direct the day-to-day behavior of managers."[31] Stakeholder theory does not assign relative weights to the interests of the various constituencies that claim a stake in the firm, nor does it provide a mechanism for ascertaining precisely what individuals and groups are entitled to stakeholder status, nor does it provide a detailed ethical argument for its normative claims.[32] Moreover, stakeholder theory has not explained why, if the lawful pursuit of profit by a firm generates externalities or "social costs" that offend various would-be constituencies, the appropriate response is not to turn to the political process wherein to seek to amend the law and create a legal obligation for the firm to internalize the purported harms it creates,[33] rather than to claim a "stake" in the firm as the basis for standing to charge a breach of some ill-defined moral or ethical responsibility.[34]

For their part, stakeholder theorists claim that shareholder theory is afflicted by an "ethical tunnel vision"[35] that leads ineluctably to "corporate Neanderthalism[36] of the sort that triggered the implosion of corporations such as Enron, WorldCom, Tyco, and Arthur Andersen. Moreover, CSR is neither static nor one-size-fits-all: rather, the social responsibility of firms increases as a function of their increasing social power and in correlation with the "evolution of international moral expectations."[37] Accordingly, shareholder theory is a morally repugnant mode of governance, particularly for powerful firms.[38] What is more, according to proponents of stakeholder theory, shareholder theory is less economically profitable than the latter paradigm.

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30 See CRANE & MATTEN, supra note 19, at 43-63 (developing a typology and continuum of stakeholder theorists' views on CSR and corporate citizenship).

31 Jones et al, supra note 25, at 25.

32 See DONALDSON, supra note 29, at 45-47 ("No serious attempt has been made by defenders of the [stakeholder] model to devise a principle for making trade-offs between the interests of shareholders, suppliers, employees, consumers, members of the general public, or anyone else who might qualify as a stakeholder . . . Furthermore, the stakeholder model lacks any explicit theoretical moral grounding . . .").

33 Boatright, supra note 28, at 50, 55.

34 See Kent Greenfield, Saving the World With Corporate Law (available at http://ssrn.com/abstract+978242) (suggesting that the tendency to "create benefits for itself by pushing external costs onto others" merits describing the corporation as an "externality machine.").

35 WHITE, supra note 14, at 196-97.

36 DONALDSON, supra note 29, at 45.

37 THOMAS DONALDSON & THOMAS W. DUNFEE, TIES THAT BIND 15 (1999).

38 Boatright, supra note 28, at 38.

Because the environment in which firms operate is far more complex than the simplified reality assumed by shareholder theory, a managerial focus exclusively on duties to shareholders diverts attention and energy away from other groups—employees, customers, suppliers, communities, etc.—whose participation with the firm in the creation of value and satisfaction with their treatment by the firm are both vital to the firm's success or failure. In other words, to be profitable, firms cannot merely serve the short-term ends of shareholders but must satisfy the longer-term needs of a wide array of stakeholders.[39]

Although at least one commentator has suggested that it is possible to harmonize shareholder and stakeholder theories to create a "convergent stakeholder theory," the fundamental normative distance between these two schools of thought can be difficult, in practice, to bridge. At the same time, neither theory offers specific and detailed guidance to managers facing complex legal, ethical, and moral challenges and charged with the duty to make decisions under conditions of multidimensional uncertainty. For much of the first two decades the struggle between the two paradigms of corporate governance, and in turn the evolution of the CSR movement, was fought within the academy. However, the wave of corporate scandals in the first few years of the third millennium and the increasing sophistication of the international human rights movement combined, within the past five years, to draw the battle out of the academy and into new arenas, both judicial and legislative; to energize those who would displace the shareholder model in favor of a stakeholder approach to corporate governance; and, as a consequence of the terrain on which the battle is being fought and the substance of the demands being levied, to heighten the stakes.

In this new phase of ideological and political contestation, the champions of shareholder theory and a rather narrowly construed understanding of CSR are, naturally, many (and perhaps most) corporations and their shareholders. On the other side of the equation, a broad spectrum of nongovernmental organizations ["NGOs"]—"pressure groups," charities, religious groups, interested individuals, and other entities organized around specific themes such as the promotion and protection of human rights, labor rights, indigenous rights, women's rights, and the

39 Jones et al., supra note 25, at 19.

environment—are the major proponents of stakeholder theory and of a much more expansive view of the obligations owed by corporations to constituencies under the rubric of CSR.[40]

The vastly divergent interests, normative commitments, and worldviews of corporations on the one hand and human rights NGOs on the other—illustrated by the hypothetical scenario *supra*—might seem to compel the conclusion that conflict is inevitable and cooperation is impossible, especially in the emotion-laden and politically sensitive issue-area of human rights. This conclusion might appear all the more logical in light of the salience of CSR to the international human rights movement—it has moved to the forefront of its agenda[41]—and in view of the dominant strategies chosen by NGOs—litigation, application of political pressure within the United Nations and domestic governance spheres, and legislative attempts to reform corporations as quasi-public entities with human rights obligations akin to those of states.[42] Yet despite the seeming intractability of and disparity between these two diametrically opposed normative visions of corporate responsibility for the protection and promotion of human rights, an analysis of the strategies available to corporations and to NGOs, augmented by the use of game theory, reveals that not only is cooperation possible but that a mode of governance dependent upon self-interested cooperation can yield the simultaneous outcomes of corporate profitability and protection of human rights universally—by NGOs as well as by the most-self interested of corporations—deemed desirable.[43]

Accordingly, Part II will identify and analyze the strategies employed by NGOs and corporations in the battle over whether and to what extent corporations should bear responsibility

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40 See CRANE & MATTEN, supra note 19, at 345 (describing the civil society groups that have organized to advance stakeholder governance and a broad conception of CSR). The contemporary CSR "community" consists of a wide variety of entities, including "CSR professionals within for-profit companies; another new class of outsiders who consult with companies and audit their nonfinancial reports; executives at pension funds, insurance companies, and other institutional investment organizations who believe in socially responsible investing; like-minded independent investment managers to whom institutional portfolios may be entrusted; those who work for and on behalf of NGOs; and government officials worldwide whose mandate covers social and environmental issues." Conley & Williams, Engage, supra note 26, at 5. Although some corporations have embraced CSR as their preferred model of governance, they are in the minority, and few still of these have implemented strategies consistent with the core principles of the CSR movement. Moreoever, because they are the exception, this Article simplifies reality for the sake of theory generation and assumes a dichotomization between corporations on the one hand and NGOs on the other only to relax that assumption in order to game the strategic interaction between corporations truly committed to CSR and NGOs in Part III.

41 Scott Greathead, The Multinational and the "New Stakeholder": Examining the Business Case for Human Rights, 35 VAND. J. TRANSNAT'L L. 719, 724 (2006).

42 See infra at Part II (discussing NGO strategy).

43 See Amnesty International USA, Human Rights Principles for Companies (1998) (noting that the proposition that human rights form the "bedrock principles" of civilized society and must be protected is not objectionable to any state or corporation in principle).

for violations of human rights. Part III will, with the assistance of game theoretic modeling, present the strategic interactions between these two parties, determine optimal strategies for each party, identify any strategic equilibria, and analyze the findings. A Conclusion will propose integrative solutions that might be adopted either independently or in conjunction with third-parties to facilitate the coexistence of corporate profitability and human rights and advance the theoretical debate beyond simple characterizations of NGOs as good and corporations as evil.

II. The Battle over Corporate Responsibility for Violations of Human Rights: A Strategic Analysis

A. The NGOs Movement to Formalize CSR for Human Rights

NGOs have devised and implemented four primary strategies to formalize a broad conception of CSR for human rights: (1) protestation and negotiation, (2) litigation, (3) transnational regulation, (4) legislation, and (5)

1. Negotiate: Corporate Codes of Conduct ["CCCs"]

In the early 1990s, human rights organizations and other NGOs, despite no legal rights to ownership of the firms they targeted and no popular mandates, began nonetheless to assert a claim to stakeholder status solely by virtue of their capacity to mobilize public opinion and influence government.[44] As self-styled stakeholders, defined broadly as "group[s] or individual[s] who can affect or [are] affected by the achievement of an organization's objectives[,]"[45] NGOs defined their mission as the achievement of *de facto* influence upon corporate conduct for the purpose of transforming corporate practice along a series of relevant dimensions. Because no explicit criteria existed to determine whether NGOs were entitled to stakeholder status or what considerations that status accorded them, in practice, the NGOs that made the most "noise" through the orchestration of successful media campaigns (or "assaults," depending upon point-of-view) and consumer boycotts[46] were eventually called out of the picket lines and into partnerships by targeted corporations[47] interested in staving off further injuries to

44 Boatright, supra note 28, at 43.

45 R. FREEMAN, STAKEHOLDER THEORY (1984).

46 See CRANE & MATTEN, supra note 19, at 345 (discussing successful consumer boycotts of the Shell Corporation's Brent Spar oil platform led by Greenpeace)..

47 Conley & Williams, supra note 26, at 12.

their reputations, relieving the market pressures on their bottom-lines,[48] and, in some cases, gaining a competitive advantage over rival firms that did not bring NGOs in from the cold.[49]

NGOs demanded, as a condition of these partnerships, that corporations embrace the notion that responsibility for promotion and protection of human rights is incumbent not only upon states and host country officials but upon corporations and their executives.[50] To demonstrate this commitment, NGOs demanded that corporations adopt voluntary "codes of conduct" ["CCCs"] that elaborated internal guidelines and standards for behavior putatively more protective of human rights and the environment than existing governmental laws and regulations.[51] Many CCCs contain voluntary reporting provisions under which a corporation pledges to report to the public, via a corporate website or its annual report, on the state of its human rights, environmental, and labor rights practices. Some NGOs hail the public reporting provisions of CCCs as creating greater transparency and thus enhanced opportunities for stakeholders to ensure that reporting corporations upholds their obligations.[52]

CCCs have spread like wildfire. Indeed, as of 2007,

> one would be hard-pressed to find any major corporation today that did not make some claim to abiding by a code of conduct that comprised, at least in part, adherence to human rights standards. Indeed, more often than not, such adherence to codes is trumpeted by major corporations.[53]

Perhaps predictably, the number of organizations devoted to assisting corporations in meeting their responsibilities under CCCs has mushroomed as well, resulting in a "sea of competing frameworks and guidelines"[54] from which corporations must select in attempting to secure an organizational "stamp of approval" at tolerable cost. Specific guidance and blueprints

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48 See Robert J. Liubicic, Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives, 39 L. & POL'Y INT'L Bus. 111, 114 (1998) ("MNCs submit to codes of conduct . . . as a result of pressure from consumers, investors, the media, and non-governmental organizations.").

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

50 DONALDSON, supra note 29, at 67.

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

52 "Transparency" is the degree to which corporate decisions, policies, actions, and effects are acknowledged and communicated to relevant stakeholders. CRANE & MATTEN, supra note 19, at 61.

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

54 Abdullah Simaika, The Value of Information: Alternatives to Liability in Influencing Corporate Behavior Overseas, 38 COLUM. J.L. & SOC. PROBS. 321, 345 (2005).

for CCC construction are available to industries ranging from coffee to hospitality, bananas, textiles, and mining, and documents such as the Global Sullivan Principles and the MacBride Principles serve as general templates that relieve firms from having to reinvent the compliance wheel.[55]

Still, despite the human rights critics of CCCs note that participation rates remain low: only a small fraction of the fifty thousand or more multinational corporations explicitly include respect for human rights in their codes of conduct, and among those that do, few scrupulously honor their commitment.[56] Advocates of CCCs had anticipated that the same techniques that moved corporations to adopt CCCS would induce them to comply, and that violations could be successfully minimized and addressed with the threat and use of shame-based punishment.[57] However, as others have noted, without a legal obligation to adopt CCCs it is perhaps difficult to understand why a corporation that has heretofore not been subjected to media assault or boycotts, whether by virtue of its size or its stealth, would feel compelled to create and implement a CCC.

Further criticisms have been leveled at CCCs and the firms that adopt them. Some commentators describe the human rights obligations in CCCs as underdeveloped and abstract, particularly in comparison to more robust conceptions under development in intergovernmental fora.[58] Others fault the lack of effective monitoring and enforcement mechanisms. While NGOs are actively engaged in monitoring, the entities best situated to gauge compliance are corporations themselves, and as a general rule corporations are biased and unlikely to report conditions accurately[59] and are subject to few if any effective sanctions for failing to do so.[60] NGO frustration with outcomes associated with CCCs has led some to conclude that voluntarism alone is inadequate and that legislation mandating corporate disclosure of compliance

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55 Id.

56 See Daniel Litvin, Needed: A Global Business Code of Conduct, FOREIGN POLICY, November/December 2003, at 69 (assessing firm compliance with CCC provisions on human rights).

57 See Peter A. French, The Hester Prynne Sanction, in Bowie, supra note 4, at 276, 297 (describing the mobilization of shame to alter corporate behavior the "Hester Prynne" sanction after the protagonist of Nathaniel Hawthorne's The Scarlet Letter).

58 Williams & Conley, supra note 15, at 86-87.

59 See Simaika, supra note 54, at 344 ("Although many MNCs routinely provide information through websites or other reports, . . . there are no requirements pertaining to the type or quantity of information supplied . . . [and] [a]ny information supplied . . . is also difficult to verify because . . . the corporations are single-handedly gathering and disseminating the data.").

60 Julia Fisher, Free Speech to Have Sweatshops? How Kasky v. Nike Might Provide a Useful Tool to Improve Sweatshop Conditions, 26 B.C. THIRD WORLD L.J. 267, 286 (2005).

information is necessary to mobilize shame as an instrument to steer corporations back into compliance.[61] Still others have lost faith in voluntarism entirely, opting in favor of litigation.

2. Litigate: The Alien Tort Claims Act

By the early 2000s, NGOs had lost hope that CCCs and monitoring efforts alone could bring social sanctions to bear upon corporations sufficient to compel them to behave in a manner more protective of human rights. Accordingly, NGOs, with the assistance of the plaintiffs' bar and the inspiration from legal scholars,[62] changed strategies and turned toward the imposition of judicially enforceable liability for violations of purported human rights as a means to buttress CCCs and reform corporate conduct. Resort to litigation, with the ATCA[63] as the basis for jurisdiction, to adjudicate claims brought by alien plaintiffs alleging the commission of human-rights based torts by or with the complicity of corporations subject to the personal jurisdiction of U.S. federal courts—a tactic never employed theretofore—became the primary instrumentality of this new strategy.[64] NGOs anticipated that such suits would yield significant monetary damages for plaintiffs, which would in turn create a deterrent effect that would cause corporations to alter their practices and provide a higher standard of care to potential victims of human rights violations.[65]

The ATCA, which invests federal courts with subject matter jurisdiction in tort provided an alien plaintiff can demonstrate a violation of the law of nations or a treaty of the United States, was used successfully only twice prior to the 1980 case of *Filartiga v. Pena-Irala* when two Paraguayan citizens successfully sued a former Paraguayan police inspector general for the torture and murder of a relative.[66] Between 1980 and 2002, various jurisdictions allowed suits alleging genocide, summary execution, torture, and other serious human rights violations to

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61 See Simaika, supra note 54, at 346-47 (discussing proposals for legislation that would create a central database and require corporations to submit compliance data electronically as a means of enhancing compliance and making the use of shame more effective).

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

63 See supra note 3.

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

65 See Igor Fuks, Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability, 106 COLUM. L. REV. 112, 116-18 (2007) (suggesting that post-litigation a corporation will be more risk-averse and more likely to pressure its host government to uphold human rights in order to prevent future liability).

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

proceed against state actors and some natural persons with the ATCA as the basis for jurisdiction.[67] However, not until 2002, when the Ninth Circuit Court of Appeals upheld subject matter jurisdiction in the case of *Doe I v. Unocal Corp*.[68] and held that corporations and other non-state actors could corporations, under existing international law, be held liable in tort for committing or for aiding and abetting breaches of international human rights standards, including forced labor, murder, rape, and torture,[69] committed by state agents with whom they were in conspiracy or from whom they had received significant aid or support.[70]

Encouraged by the *Doe I v. Unocal* decision they hailed as a "remarkable victory not just for the plaintiffs involved, but for the effort to hold corporations responsible for their participation in atrocities abroad and at home in the name of profits[,]"[71] NGOs turned to the ATCA as their "chief weapon in a 21st century battle over corporate responsibility"[72] and filed scores of suits against corporations for a host of alleged violations of international human rights law.[73] However, significant doctrinal uncertainty over precisely what torts were actionable under

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

68 Doe v. Unocal Corp., 395 F.3d 932, 962-64 (9th Cir. 2002). Plaintiffs—fourteen Burmese villagers—alleged that, in the course of constructing a pipeline the plaintiffs opposed through their village, Unocal induced the Burmese government to engage in a series of human rights violations, including forced labor, murder, rape, and torture, in order to facilitate the completion of the pipeline. Id.

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

70 Doe v. Unocal Corp., 395 F.3d at 962-64.

71 See Mark D. Kielgard, Unocal and the Demise of Corporate Neutrality, 36 CAL. W. INT'L L.J. 185, 188 (2005) (quoting attorneys from the Center for Constitutional Rights, a human rights NGO).

72 Patti Waldmeir, An Abuse of Power, FIN. TIMES, Mar. 14, 2003, at 12.

73 See, e.g., Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (genocide); Tachione v. Mugabe, 234 F. Supp. 2d 401 (S.D.N.Y. 2002) (summary execution); Wiwa v. Royal Dutch Shell Petroleum, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (arbitrary detention); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (same); Sinaltrainal, et al. v. Coca-Cola Co., 256 F. Supp. 2d 1435 (S.D. Fla. 2003) (torture); Presbyterian Church of the Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (crimes against humanity).. Additional suits have been filed against Abercrombie & Fitch, BP, Chevron, Coca-Cola, Del-Monte, Dole, Drummond Coal, DynCorp, ExxonMobil, Ford, Freeport-McMoran, Inc., The Gap, J.C. Penney Co., Levi Strauss, Newmont Mining Corp., Nike, Occidental Petroleum, Pfizer, Rio Tinto, Shell, Siemens, Southern Peru

the ATCA developed over the quarter-century following *Filartiga*. Courts and commentators divided, with some suggesting that only the most serious violations of human rights—murder, slavery, rape, torture, and forced labor—were within the jurisdiction of federal courts, while others took a much more expansive view, maintaining that new torts could be judicially discovered as international law evolves through custom,[74] a position that, if unchecked, could have led to a "veritable cornucopia of international law violations.[75]

Worse still from the NGO viewpoint, as of 2004 in not a single case of the more than thirty-eight filed, alleging violations ranging from environmental degradation, to forced labor conditions, collaboration with the Nazis, profiting from apartheid, production of dangerous drugs, and corporate collusion with brutal and repressive military and paramilitary forces, had plaintiffs prevailed in pre-trial arguments.[76] Twenty-three had been dismissed on jurisdictional or prudential grounds,[77] others had only uncertain futures, and not a single corporation had been found liable.[78] The only beacon of hope, a $20 million settlement in December 2004 in the case of Doe v. Unocal, was soon darkened by a case heard by the Supreme Court in 2004 that severely restricted the utility of the ATCA to human rights NGOs.

With *Sosa v. Alvarez-Machain*,[79] the United States Supreme Court, in its first-ever pronouncement on the ATCA, curtailed its scope to breaches of international law norms that are as definite and generally accepted as the 18th-century paradigm that Congress embraced and expressed in enacting the statute—specifically, piracy and violation of ambassadorial and diplomatic safe-conduct.[80] Although the Court did not suggest that human rights NGOs had yet twisted federal courts into "debating clubs for professors willing to argue over what is or what is

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Copper Co., Target, Texaco, TotalFinaElf, Union Carbide, Unocal, and several others. See Diskin, supra note , at 805-06 (listing cases and providing detailed citations).

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

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

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

77 Williams & Conley, supra note 15 , at 83 (surveying litigation histories of human rights ATCA cases and grounds for dismissal of such cases).

78 See Simaika, supra note 54, at 337 (updating the status of outstanding ATCA claims as of 2005). A search of databases indicates that as of this writing no corporation has yet been found liable under the ATCA.

79 542 U.S. 692 (2004).

80 Id.

not an accepted violation of the law of nations[,]"[81] the holding was immediately hailed by corporate counsels as a "sound rejection" of the way NGOs had been using the ATCA.[82]

However, the *Sosa* decision did not reduce the risk of litigation faced by corporations to zero. While the Court created a narrower basis for liability, and noted that Congress remains possessed of the power to withdraw subject matter jurisdiction over ATCA claims entirely by amending or eliminating the ATCA,[83] at the same time it rejected the still narrower proposition advanced by several business organizations and the Bush Administration that the underlying causes of action must be established by Congress before they are cognizable in federal courts.[84] Moreover, the Court also recognized that the causes of action that can be heard under the ATCA may well continue to be extended by "further independent judicial recognition" whenever a customary international law norm becomes sufficiently definite, clearly applicable to private actors, universal among civilized nations, and obligatory.[85]

In short, although corporations have been temporarily relieved of some degree of ATCA liability as a result of the *Sosa* decision, the *Sosa* Court expressly reserved to the federal judiciary the power to adjudicate international human rights claims against corporations and to re-extend the scope of potential corporate liability should NGOs be able to satisfy the conditions of definiteness, applicability, universality, and the obligatory nature of the tort(s) in question. Recognizing that *Sosa* did not effect the general limitation on corporate liability for which they had hoped and which they had initially believed to have been created, business organizations have already lobbied Congress seeking legislation that would limit the scope of the ATCA by statute—a fact that "heartens those activists who still harbor hope of enhanced remedies."[86]

At best, the future of ATCA legislation as a strategic approach to enhancing corporate accountability for human rights is and will remain uncertain. Accordingly, it is unsurprising that NGOs have turned outward to locate their efforts in transnational fora.

3. Regulate: "Soft Law"

81 Tel-Oren v. Libyan Arab Republic, 726 F.2d at 827 (Robb, J., concurring).

82 See Kochan, supra note 64, at 104 (quoting Daniel Petrocelli, counsel for Unocal).

83 Sosa, 542 U.S. at 731.

84 See Fuks, supra note 65, at 120-21 (outling the Bush Administration's position on the ATCA).

85 Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

86 Simaika, supra note 54, at 339.

Although ATCA litigation in U.S. courts presently insufficient to generate the level of corporate regulation sought by NGOs, the ATCA is a far more potent legal weapon than is available to human rights NGOs in the judicial systems of virtually every other nation, and Congress and the federal judiciary retain the power to expand corporate ATCA liability. For this reason, and because many MNCs are headquartered or do significant business in the U.S., the U.S. remains the litigation forum of choice for NGOs. However, with MNCs astute enough to shift resources and operations beyond the reach of U.S. jurisdiction, particularly if ATCA liability is expanded, MNCs might well relocate their citizenship to more abuse-tolerant jurisdictions where they are free to operate with much greater disregard for human rights. The threat that MNCs will slip into a legal "black hole"[87] to evade duties to protect human rights spurred NGOs to create a "new governance" regime designed to transcend the short-armed reach of domestic legal orders, overcome the regulatory vacuum created by the absence of a global sovereign, and propound declarations of universal norms protective of human rights whether through the political process, through market pressure, or through judicial enforcement.

The "new governance" paradigm recognizes that in the era of globalization the power to create regulation—once the sole province of states—is now fragmented, diffused, and contested.[88] Because state regulation and corporate self-regulation have failed to achieve NGO objectives regarding corporate human rights practice, advocates of more effective regulation have labored to weave together various social, cultural, and political movements—in particular well-funded and –organized NGOs, labor unions, civil society associations, etc.—that seek to affect both the "character and independence of [corporations] and the power of nation-states to regulate these entities[.]"[89] NGOs and a wide array of private entities have seized upon the relative weakening of nation-states to insert themselves into the regulatory process and draw that process out of the direct control of states into transnational fora where, by strategically deploying information, they "generate compilations of best practices, codes of conduct, and templates for everything[,]" including corporate responsibilities for the protection of human rights.[90] Although

87 Fuks, supra note 65, at 132-33.

88 See Williams & Conley, supra note 15, at 101 (describing the effect of globalization on state regulatory power vis-à-vis corporations).

89 Larry Cata Baker, Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law, 37 COLUM. HUM. RTS. L. REV. 287, 309-10 (2006).

90Anne-Marie Slaughter, Global Government Networks, Global Information Agencies, and Disaggregated Democracy, 24 MICH. J. INT'L L. 1041, 1057 (2003).

they lack the power that states enjoy to coerce corporations through binding law, NGOs have produced several important declarations of human rights norms with the character of "quasi-regulations" or "soft law" that may well transform the expectations of consumers, investors, states, and even corporations regarding corporate conduct in the issue-area of human rights. The most important of these declarations are the Global Compact,[91] the Norms, and the Voluntary Principles on Security and Human Rights.

a. Global Compact

In a 1999 address to the World Economic Forum in Davos, Switzerland, United Nations Secretary-General Kofi Annan launched a UN initiative designed to induce corporations to reject complicity in human rights violations.[92] The resulting Global Compact ["Compact"] created an informal alliance of corporations, UN agencies, NGOs, and other civil society organizations to "embrace, support and enact, within their sphere of influence," nine human rights, labor, environmental protection, and anti-corruption principles.[93] Human rights protection figures prominently in the Compact: Principle 1 states that "businesses should support and respect the protection of internationally proclaimed human rights" while Principle 2 requires that corporations "make sure that they are not complicit in human rights abuses.[94]

Although the Compact Principles lack detail, the Compact, launched in July 2000, stands as "the world's largest corporate citizenship initiative[,] with more than 4858 companies from over 100 countries," and 136 of the Financial Times Global 500, having declared their membership as of June 2007.[95] At the very least, corporate members that have self-imposed the Compact cannot in good faith claim to be acting consistent with Principles 1 and 2 if they enter into business relationships with states that systematically engage in massive human rights violations, and they may be encumbered with the duty to divest from such nations, at least until their human rights practices improve. What is more, although the Compact and its Principles do

91 The Global Compact, The Ten Principles of the Global Compact, at http://www.unglobalcompact.org.

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

93 See Compact, supra note 91 .

94 Id.

95 See Participants in the Global Compact, available at http://www.unglobalcompact.org/ParticipantsAndStakeholders/search_participant.html?submit_x=page. Prominent members include BP, Royal Dutch/Shell Group, Total, Allianz, Volkswagen, Siemens, Hewlett-Packard, Nissan Motors, Unilever, BMW, Toshiba, NEC, Nokia, Bayer, Indian Oil, Volvo, L'Oreal, Pfizer, Novartis, Coca-Cola, Cisco Systems, BHP Billiton, Lufthansa Group, Electrolux, Gap, Xerox, Hindustan Petroleum, Henkel, and Westpac Banking.

not possess the status of international law because they are not yet evidence of the custom of states nor are they the product of international treaty,[96] the Compact has induced corporations to voluntarily accede to a body of principles identified, disseminated, and promoted primarily by NGOs. By using their increasing powers of moral suasion and establishing information networks to guide corporations toward compliance with the Compact,[97] NGOs envision producing a "new kind of actor—the potentially 'socially responsible corporation'—that may adhere to these [principles] not because of the manipulation of incentives, but rather because of a new self-understanding."[98] In effect, NGOs hope to resocialize corporations and transform their characters so that compliance with the Compact is perceived to be within the corporate self-interest.

However, critics of the Compact fear that its reach and its influence have both been overstated. Seventy-four percent of the Financial Times 500 global corporations have not yet become members,[99] and several Compact participants—including Coca-Cola, BHP, Shell, L'Oreal, and Cisco—have been the subject of ATCA litigation or public boycotts over policies and actions alleged to violate the Principles. In view of practice subsequent to membership, some suspect that corporations have latched onto the Compact primarily as a marketing tool to "bluewash" their reputations or images and pacify stakeholders, as well as to shield continued bad conduct regarding human rights. Moreover, many corporations have declined to accept

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

97 Over 200 NGOs have advocated creation of an "International Right to Know" ["IRTK"] monitoring and transparency program that would require corporations headquartered or raising capital in the U.S. to disclose information about their overseas human rights practices and submit such information to a central database maintained by the U.S. Department of State. By making the process of monitoring and the deployment of shame in response to bad corporate practice more efficient, the IRTK project, according to NGOs, will enhance the success of other projects such as the Compact. See International Right to Know—What is IRTK?, available at http://www.irtk.org.

98 Williams & Conley, supra note 15, at 102-03.

99 Prominent nonmember corporations include Wal-Mart, Exxon Mobil, General Motors, Toyota Motor, Ford Motor, General Electric, Chevron Texaco, Citigroup, ING Group, Hitachi, Honda Motor, Sinopec, Samsung Electronics, Vodafone, Sony, Boeing, Procter & Gamble, Target, Dell, Johnson & Johnson, Hyundai Motor, Dow Chemicals, Microsoft, LG Electronics, Walt Disney, Canon, Mitsubishi, Motorola, PepsiCo, DuPont, Spirit, FedEx, China Life Insurance, British American Tobacco, Sharp, China Mobile Communications, Coles Myer, Hilton Group, Halliburton, Woolworths, National Australia Bank, McDonald's, Bank of China, Telstra, Chinese Petroleum, Reliance Industries, AMP, British Airways, Kingfisher, Whirlpool, and Chubb. See Compact, supra note 91 .

membership in the Compact out of a fear that alleged noncompliance with its Principles will result in litigation. UN officials responsible for administration of the Compact are nonplussed, stating that "the Global Compact is neither a regulatory mechanism nor a seal of approval for the performance of those participating in it" but noting also that a "study by the consulting firm McKinsey & Company . . . found that, in several important respects, the Global Compact has already been a significant force for positive change."[100] At the very least, all agree that the Compact has not generated the transformative effects its sponsors anticipated.

b. The Norms

In 1998, the UN Subcommission for the Protection of Human Rights ["Subcommission"]—a specialized agency of the United Nations system—established a working group to examine the conduct of MNCs.[101] After five years of debates, the Subcommission approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, known colloquially as Resolution 2003/16 and as the "Norms."[102]

Substantively, the Norms assert that corporations are charged with human rights obligations no matter where they operate, including duties to refrain from engaging in or "benefiting from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced . . . labour, [and] hostage-taking[.]"[103] Moreover, the Norms propound a far broader set of "obligations" than the duty to refrain from committing the most serious human rights violations; other provisions would require corporations, as part of their human rights practices, to act affirmatively to "contribute to [the] realization" of such rights as "the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights."[104]

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100 Kielgard, supra note 71, at 202.

101 U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Protection of Human Rights, Working Group, Draft Resolution: Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/L.8 (Aug. 7, 2003) (hereinafter "Norms").

102 Draft Report of the Sub-Comm'n on the Promotion and Protection of Human Rights, 55th Sess., at 52, U.N. Doc. E/CN.4/Sub.2/2003/L.11 (Aug. 13, 2003).

103 Norms, supra note 101, at Para. .12.

104 Id. at Para. 4.

Procedurally, the Norms require the incorporation of their provisions into all MNC contracts and require disclosure of information regarding compliance.[105] They prohibit corporations from doing business with natural or legal persons who do not "follow these or substantially similar norms"[106] unless corporations electing to do business with such entities "[successfully] work with them to reform or decrease violations."[107] The Norms create a monitoring network consisting of states, NGOs, and UN specialized agencies and require corporations to be responsive to complaints about violations of the Norms lodged by "non-governmental organizations, unions, individuals and others[;]"[108] moreover, the Norms call upon states to "establish and reinforce the necessary legal and administrative framework for ensuring that the Norms . . . are implemented" by corporations within their jurisdiction.[109] In effect, the "entire population of the Earth"[110] can report violations in the event of which Paragraph 18 obligates corporations to provide "prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms."[111]

Conceptually, the Norms import the "stakeholder" theory of the corporation wholesale, dismissing the shareholder model of governance entirely and defining stakeholders to include "stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises."[112] So long as an individual or entity can claim to be "substantially affected by the activities [of a given corporation]"—a low threshold that excludes almost no claimants—he or it is a stakeholder. Accordingly, the set of potential stakeholders who are entitled to exert governance rights over corporations, by operation of the Norms, is extensively broadened to include "consumer groups, customers, [g]overnments, neighboring communities, indigenous peoples and communities, non-governmental organizations, public and private lending

105 Id. at Para. 15.

106 Id.

107 Id.

108 Id. at Para. 16.

109 Id. at Para. 17.

110 Backer, supra note 89, at 384.

111 Norms, supra note 101, at Para. 18.

112 Id. at Para. 22.

institutions, suppliers, trade associations and others."[113] The putative effect of the Norms in derogation from the shareholder model, which has long dominated the theory and practice of corporations, is profound and unprecedented.

Taken together, the procedural and conceptual effects of the Norms are difficult to overstate. Corporations are no longer regarded as primarily private economic entities subject to public regulation by states: on the contrary, the Norms cast them as quasi-public entities with social, cultural, and political objectives no less and perhaps even more important than their economic objectives. In effect, the Norms purport to transfer the source of authority to regulate corporations from states to NGO-led international civil society and then proclaim that the primary purpose of corporations is no longer to maximize profits but to function as important public agent co-equal to the state in terms of the power and the obligation to protect and promote human rights. Ironically, the great transformation of corporate regulation from the private to the public realm and the shift in purpose from private to public has been championed by private entities—NGOs—who are at least as lacking in democratic accountability and in public representation as the corporations they have targeted.[114]

Legally, the Norms' proposals to alter the source of authority for corporate regulation and the social purposes of corporations have important implications. The Norms, although farther afield from the voluntarism of the Compact,[115] are nonbinding,[116] and yet they challenge existing corporate theory and practice. While the Norms' prohibitions against the most serious violations

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113 Id.

114 See, e.g., Backer, supra note 89, at 384 (noting the irony of the Norms' monitoring scheme that "[u]s[es] one portion of a large community of transnational non-state actors to perform a critical role in the disciplining of another portion of that community, without subjecting the monitors themselves to the same sort of discipline[.]" For a detailed criticism of the procedural and conceptual effects of the Norms on corporate governance and on the publicization of corporate purpose, and an argument that the Norms "perver[t] . . . the corporation's function and lead to an "abdication of responsibility by the state" in favor of unaccountable, anti-democratic NGOs, see id. at 356-74.

115 Many commentators regard the Norms as occupying a middle ground between the voluntarism of the Compact and the hard law desired by NGOs. See Hessbruegge, supra note 96, at 37-38 (gauging commentators' assessments of the legal force of the Norms in relation to the Compact).

116 The U.N. Commission on Human Rights has determined that the Norms currently have "no legal standing," despite claims from proponents that the Norms simply codify existing international law. Tracy Schmidt, Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations' "Norms" Provide the Required Means?, 36 CAL. W. INT'L L.J. 271, 238 (2005). Very little international legal precedent exists for regulating corporations, and nearly all of what is asserted as international law is in fact hortatory or aspirational expressions. See generally Liability of Multinational Corporations under International Law (Menno T. Kamminga & Saman Zarifi eds. 2000). Presently, "most governments appear to remain somewhat ambivalent about accepting corporate duties . . . toward individuals in states where they operate." Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 YALE L.J. 443, 488 (2001).

of human rights, such as extrajudicial killing, torture, and forced labor, are almost universally held to be restatements of existing international law, the proclaimed affirmative corporate duties to promote development, health, education, and general welfare are generally regarded by states and commentators as having little or no legal effect.[117] In brief, with the exception of a narrow range of serious human rights offenses such as torture, extrajudicial killing, rape, slavery, and other violations colorable as "crimes against humanity," international human rights law is only binding on national governments—corporations and other private actors are not objects of international human rights obligations unless national governments adopt and implement international human rights law through domestic legislation.[118]

Still, many advocates of the Norms envision their use as "soft law" possessed, if not of legal force, of political significance sufficient to influence domestic and international courts as well as national legislatures in interpreting existing corporate regulations more expansively and in fashioning new and more restrictive regimes;[119] others, labeled as "maximalists," argue that because the Norms incorporate extensive implementation and reparations provisions they are more than simply voluntary undertakings and, accordingly, international law and institutions—including regional human rights courts and the International Criminal Court ["ICC"]—can and should be used to bind corporations to existing international legal obligations that are simply restated in the Norms.[120] A series of commentaries to Paragraphs 1-12 of the Norms proposes

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117 See, e.g., Backer, supra note 89, at 340 (discussing the legal effect of the Norms under international law). Recall that a detailed discussion of the process by which international legal obligations are created through custom is well beyond the scope of the present Article.

118 See Robert McCorquodale, Human Rights and Global Business, in COMMERCIAL LAW AND HUMAN RIGHTS 89, 94 (Stephen Bottomley & David Kinley eds., 2002) (discussing in depth the applicability of international human rights law to corporations). For a discussion of the history of international law with regard to corporate civil and criminal liability for human rights violations, see Kinley and Tadaki, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, (2004) 44 Virginia Journal of International Law 931, at 993-994

119 See, e.g., Schmidt, supra note 116, at 217, 240 (noting that the declaration of "soft law," particularly in the domain of human rights, is often the first step in the creation of customary international binding law as states gradually incorporate soft law within their practice out of a sense of legal obligation.); Kielgard, supra note 71, at 199-200 (noting that soft law "starts in the form of recommendations and over time may be viewed as interpreting treaties and helping to establish custom or may serve as the basis for the later drafting of treaties."); id. at 212 ("[The Norms] [are] soft law, but [they] provide[] for greater accountability and the promise of more binding norms in the future . . . Voluntarism needs to be encouraged as a resource for corporate leaders who evince a sincere wish to abide by human rights norms, but . . . a legal framework of binding norms is necessary to compliment voluntarism.").

120 See Schmidt, supra note 116, at 233 (noting that some commentators maintain that the Norms already represent the opinio juris of the international community and are either already customary international law or at the very least lex ferenda). Indeed, the Norms expressly claim "that transnational corporations and other business enterprises ... have, inter alia, human rights obligations and responsibilities and that these human rights norms will contribute to the making and development of international law as to those responsibilities and obligations." Norms,

that corporate violations of obligations listed therein *as well as violations of human rights provisions of the Rome Statute of the ICC constitute criminal offenses—corporate and individual*.[121] Although the maximalist position is a minority and arguably radical view, it is clear that proponents of the Norms have not proffered them in the spirit of voluntarism, nor have they evinced an interest in generating the corporate partnerships that occupy the core of CCCs as well as the Compact.[122] Rather, the Norms appear to be an instrument predicated upon the belief that voluntarism has failed and engineered largely to bolster a litigation strategy.[123]

Predictably, the Norms sparked a

> great divide between public sector-oriented participants—principally academics and NGOs—and private sector or market-oriented participants—businesses and developed states. The former primarily argued to the Sub-Commission that the Norms represent a clear and complete advance over existing voluntary standards for regulating business behavior. They also suggested that the Norms represent an advance over existing standards by providing a single comprehensive regime drawing an appropriate balance between the obligations of states and of companies with respect to human rights, and by providing useful tools for evaluating performance. More importantly, advocates of the Norms were fond of the Norms' utility in providing a template for State behavior—providing a framework of standards that states ought to impose—while providing a system of remedies for individuals, supervised by a supra-national organization that important elements of global civil society trust (or at least trust more than they trust states).[124]

In contrast, corporations concerned about the prospects of additional legal risk and states threatened in the loss of their power to define international law mounted strong resistance to the Norms.[125]

Politically, the Norms, by affirmation of the Commission on Human Rights ["CHR"] in April 2004, have no legal standing despite their radical attempt to extend existing international

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supra note , at Preamble. For a discussion of the expansiveness of the maximalist position with regard to the legal force of the Norms, see Backer, supra note 89, at 369-70.

121 See Commentary to the Norms, supra note 101, Para. 4 cmt. (a) (requiring corporations to observe international human rights norms set forth in the Rome Statute of the ICC and other international conventions). Although no case was ultimately prosecuted, prosecutorial interest in bringing a test case against corporations operating within the Democratic Republic of Congo suggests that the prospect of using international criminal tribunals to sanction corporations, as the Norms contemplate, is not an idle threat. See, e.g., Julia Graf, Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo, 11 HUM. RTS. BRIEF 23 (2004).

122 See Schmidt, supra note 116, at 238 ("Another major difference between the Norms and previous efforts is its terminology. When discussing compliance, the Norms substitute standard terms like 'should' with 'shall.' Therefore, the Norms are not merely a restatement of existing obligations, but rather an effort to fill the voids of previous agreements and mandate certain aspects of international [CSR.]").

123 See id. (conceding that the Norms "may signify [NGOs'] unstated conclusion: the voluntary compliance called for in previous documents is proving to be inadequate[.]"); Kielgard, supra note , at 200 (suggesting that the primary utility of the Norms is to enhance litigation prospects).

124 Backer, supra note 89, at 356.

125 Id. at 384. For specific comments by corporations, states, and other entities, see Office of the High Comm'r for Human Rights, Stakeholder Submissions to the Report of the High Commissioner for Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, available at <http://www.ohchr.org/english/issues/globalization/business/contributions.htm>.

law, and are not to be monitored by UN agencies—in other words, the Norms are simply voluntary and aspirational goals. In early 2005, the Office of the High Commissioner on Human Rights produced a report recommending that the CHR "maintain the draft Norms among existing initiatives and standards on business and human rights, with a view to their further consideration"—bureaucratic language indicating the effective abandonment of any pretensions to legal status or significant political support for the Norms.[126] The CHR, after considering the report, requested the Secretary General to appoint a Special Representative on Business and Human Rights with a broad and independent mandate to research, develop, and compile a report on the issue of corporation responsibility for human rights.[127] The Special Representative, Professor John Ruggie, released an interim report detailing his conclusions that the Norms are a "train wreck"[128] that has sown confusion and discord by virtue of their exaggerated legal claims and conceptual and procedural ambiguities.[129]

Presently, perhaps all that can be said about the Norms is that they have an uncertain future. While the Special Representative has declared them dead, their exponents counter that the issues that gave birth to them remain alive and well, that the Norms have "articulate[ed] a core set of standards for going forward[,]"[130] and that the Norms will form the basis for future dialogue regarding mechanisms designed to impose transnational regulatory frameworks upon corporation in the interest of the protection of human rights.[131] Moreover, having established in principle the possibility of involuntary transnational regulation of corporate conduct in regard to human rights, the Norms have opened the door, and the position of the international community may well soften. The Special Representative has acknowledged the desirability of some of the principles elaborated in the Norms, in particular the summary of human rights subject to

126 ECOSOC, Sub-Comm'n on the Promotion and Protection of Human Rights, Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises With Regards to Human Rights, Para. 52(d), U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005).

127 See ECOSOC, Comm' n on Human Rights, Promotion and Protection of Human Rights, at 2, U.N. Doc. E/CN.4/2005/L.87 (Apr. 15, 2005).

128 See <http://www.reports-and-materials.org/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf> (remarks delivered by John Ruggie at a forum on Corporate Social Responsibility Co-Sponsored by the Fair Labor Association and the German Network of Business Ethics (Bamburg, Germany, 14 June 2006)).

129 See United Nations, Interim Report of the Secretary-General's Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (22 February 2006, E/CN 4/2006/97) ("Interim Report").

130 David Kinely, Justine Nolan, & Natalie Zerial, The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations, available at http://ssrn.com/abstract=962981.

131 Backer, supra note 89, at 332.

infringement by corporate activities,[132] and although he has rejected the involuntarism that characterized their development he has suggested that much of their substance might be resurrected in another document.[133] Thus, defenders of the Norms are undaunted and remain optimistic that the principles that animate them may yet achieve the status of international legal obligation at some future date, and they are patient.[134] As Professor David Weissbrodt, one of the principal authors of the Norms, explains,

> No one can realistically expect business human rights standards to become the subject of treaty obligations immediately. The development of a treaty requires a high degree of consensus among nations. Although a few countries have already indicated their support for the Norms, as yet there does not appear to be an international consensus on the place of businesses and other non-state actors in the international legal order. The Norms, like numerous other UN recommendations and declarations, have started as "soft" law. As with the drafting of almost all human rights treaties, the United Nations begins with declarations, principles, or other soft-law instruments. Such steps are necessary to develop the consensus required for treaty drafting . . . Any treaty takes years of preliminary work and consensus building before it has a chance of receiving the approval necessary for adoption and entry into force. Even soft-law instruments may take years to develop.[135]

In sum, the conflict over the Norms is part of an ongoing and broader battle over the legitimate place of civil society in the promulgation of international legal standards not soon to be resolved.

c. Global Reporting Initiative

The Global Reporting Initiative ["GRI"],[136] launched in the aftermath of the collapse of the Norms, may well be on its way to becoming the gold standard in transnational regulation of corporate human rights practice. According to the GRI, and in distinction from the Norms, the principles it adopts "are the result of a transparent, consensus-driven global consultation process, involving hundreds of stakeholders from around the world, and [are] built on a foundation of support by leading corporations, non-governmental organizations, labor groups, governments, and others."[137] GRI is funded by "a mix of governments, companies, foundations, and

132 Interim Report, supra note 129, at 14.

133 Id..

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

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

136 See Global Reporting Initiative ["GRI", available at http://www.globalreporting.org.

137 Id.

multilateral organizations[,]" and as a consequence has a greater claim to voluntarism than did the Norms. To date, nearly seven hundred corporations have published reports with the GRI, including many of the firms identified by socially responsible investment funds as among the most committed to general principles of CSR.[138]

d. summary

NGOs now possess greater power to shape corporate conduct through regulation than they have ever heretofore, and even if their engagement of transnational civil society to enhance corporate accountability for human rights practices through voluntary and involuntary restrictions on corporate conduct has not been as productive as they had hoped, there appears to be little doubt that NGOs have raised the question of corporate responsibility for human rights to the front of international debates about CSR and created disincentives for corporations to tolerate violations of human rights. The shareholder model of governance has been challenged by NGO involvement in the transnational regulatory process, and new constituencies have emerged to levy claims against corporations to behave in a manner consistent with the spirit, if not the letter, of their proposals. As one commentator puts it, it is almost certainly as a direct result of human rights NGO efforts to participate in the "new governance" regime that "soccer moms [now] refuse to buy a famous line of soccer balls after reading reports that they are hand sewn in Pakistan by children; [t]alented African-American MBA . . . will not interview with a company because it has a poor record of promoting minorities; students . . . protest their university's licensing agreement with a sportswear manufacturer that uses a Guatemala factory that allegedly abuses workers; money managers [now have] clients who refuse to invest in companies with poor environmental ratings; assertive reporters . . . will call a CEO at home to ask him if he knows the paper clips sold in his national retail chain were made by prisoners in China; [and] indigenous groups . . . will no longer passively accept the presence in their ancestral lands of big oil and mining companies that exploit natural resources without coming to terms with local communities."[139]

In short, notwithstanding the failure of NGOs to impose hard law obligations through their participation in the transnational regulatory process, their labor has not been for naught, as corporations that fail to recognize the new social expectations that have emerged as a direct

138 Id.

139 Greathead, supra note 41, at 719-20.

consequence will be punished in the marketplace by unsatisfied constituencies claiming the status of stakeholders.

4. Legislate: Model Uniform Code & International Criminal Court

A fourth strategy to formalize a broad conception of CSR for human rights, developed in part out of frustrations with the limitations of other strategies and with voluntarism more generally,[140] is the exploitation of legislative opportunities, domestic as well as international, to crystallize soft law into hard law and create binding legal obligations that compel corporate legislative targets.[141] Corporations remain unbound by laws governing human rights save for those enacted by their states of incorporation or the states where they do business,[142] and it is the rare corporation that chooses to place itself at a potential competitive disadvantage by adhering to more onerous standards than are required by law when its competitors do not reciprocate. Proponents of a legislative strategy, convinced that only hard law of general applicability can generate the deterrent effect necessary to restrain corporate misconduct, have offered domestic and international legislative proposals designed to remedy this perceived defect.[143]

Domestically, legislative strategists note that, although corporations are subject to legal liability and punishment and to whatever legal duties States impose upon them,[144] the practical and political difficulties in enforcing sanctions upon non-natural entities specifically designed to

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140 See Miwa, supra note 23, at 1244 (assuming that CSR with regard to human rights imposes costs and noting that voluntarism cannot succeed in a competitive marketplace because it "disadvantage[s] those [corporations] who acted responsibly and confer[s] a significant market advantage on those who did not.").

141 As a former corporate attorney turned human rights activist indicates,

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

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

142 See generally McCorquodale, supra note 118. Although the Nuremburg Tribunals did adjudicate corporate guilt for complicity in the commission of war crimes and crimes against humanity during World War II, and although those cases are of precedential value, there is at present no international forum with jurisdiction, and no binding body of regulations, to address corporate human rights practices. Id. For a discussion of proposals to create a forum, invest it with jurisdiction, and create binding laws, see supra at pp. and infra at .

143 See, e.g., Ehrlich, supra note 22, at 83 (presenting the critique of voluntarism and the argument that the effectiveness of a legislative solution to perceptions of inadequate control of corporate conduct is superior on the grounds that the State has power to compel but "better institutional mechanism that aggregate information, achieve coordination, and minimize the sort of opportunism one might expect if business managers were to become guardians of the public good.").

144 See Dartmouth College, 17 U.S. (4 Wheat.) 636, (18) (Marshall, C.J.) (holding that a corporation is an artificial creation of the State, rather than a natural legal person, and thus subject to whatever duties the legislature imposes upon it).

limit liability often trumps the effectiveness of existing legislation. As one commentator discussing the current prospects for the legislative punishment of corporations laments,

> The corporation, I submit, is best defined as a liability-limiting mechanism. Given this definition, no wonder the courts have so much difficulty meting out just punishment to corporations when they engage in misconduct! Rarely can the courts legally pierce the corporate veil to prosecute individuals thought responsible for corporate wrong-doing. Even when they can, the courts tend to display a reluctance to do so—we may suspect that that reluctance is the result of confusion regarding the range of liability pertaining to corporations and the well-entrenched personification of the corporation as moral agent. When the courts attempt to place responsibility on the corporation itself, the appropriate punishment is deemed to be monetary. However, when a corporation engages in repeated instances of gross misconduct, the courts are reluctant to levy truly heavy fines . . . A truly ponderous find, the sort of fine necessary to act as a deterrent . . . might leave a community stranded without its major industry, or consumers might be deprived of a much-needed or much-wanted product.[145]

Proposed legislative solutions include stripping corporations that serially violate soft law human rights norms of the "degree of protection or of compassion or mercy that the courts accord to real persons when they break the law."[146] Accordingly, "incorrigible" corporations would be analogized to "criminal psychopath[s]," deemed by their states of incorporation to have forfeited the advantages of the doctrine of limited liability, and even "confined in the interests of public safety"—meaning, potentially, disincorporated and dissolved.[147] Along this vein, a series of other legislative modifications to corporate law designed to enhance CSR have been suggested, including, *inter alia*, requiring corporations to make human rights disclosures in addition to their financial disclosures[148] and imposing duties upon directors to act in the interest of stakeholders in addition to stockholders.[149]

Some States have acted on these proposals. More than thirty have adopted non-shareholder constituency statutes that permit, if not obligate, managers to consider the effects of any corporate action upon shareholders.[150] To build on this trend toward the legislated inclusion

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145 Robert J. Rafalko, Corporate Punishment: A Proposal, in Bowie, supra note 4 , at 307, 308-09.

146 Id. at 311.

147 Id. at 316-17; see also Marjorie Kelly, The Divine Right of Capital: Dethroning the Corporate Aristocracy 111 (2001) (arguing for granting States the power to revoke corporate charters on the basis of conduct deemed immoral or of significant negative impact upon the community). A Constitutional amendment might be necessary to achieve this objective. See Litowitz, supra note 141, at 830-31 (discussing legal implications of such a proposal).

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

149 Kelly, supra note , at 140.

150 See, e.g., FLA. STAT. ANN. Section 607.0830(3) (1993) (permitting a director, in the discharge of duty, to "consider such factors as the director deems relevant, including the long-term prospects and interests of the corporation and its shareholders, and the social, economic, legal, or

of stakeholder concerns, NGOs have proposed amending SEC mandatory disclosure regulations to require a "list of the countries where the corporation has facilities or operations; data on compliance with occupational health and safety, anti-bribery, labor rights, and anti-discrimination laws; and security arrangements with state or private police and military forces."[151]

By far the most significant domestic proposal for legislation that would impose binding legal duties upon corporations to conform to specified conduct in regard to the promotion and protection of human rights is the Model Uniform Code for Corporate Responsibility ["Uniform Code"].[152] The Uniform Code, under consideration in the legislatures of Minnesota, California, and Maine, would amend State corporate charter legislation by imposing a duty upon directors, enforceable under civil and criminal law, to ""manage the corporation in a manner that does not cause damage to the environment, violate human rights, adversely affect the public health or safety, damage the welfare of communities in which the corporation operations, or violate the dignity of the corporation's employees."[153] Critics of the Uniform Code, which has yet to make it out of committees, contend that compliance costs and increased risk of litigation will drive business out of States that adopt it.[154]

Less expansive proposals would simply extend the reach of State tort jurisdiction extraterritorially to reach corporate conduct abroad.[155] A quite creative proposal would divide each industry into two groups—"do-gooders" and "evildoers"—and impose differential regulations, tax consequences, and monitoring obligations on each in the expectation that corporations in the latter camp would alter their practices in order to escape the onerous restrictions. In so doing, some of the public benefits of transformed corporate behaviors could

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other effects of any action on the employees, suppliers, customers of the corporation or its subsidiaries, the communities and society in which the corporation or its subsidiaries operate, and the economy of the state and the nation." For an analysis of these statutes, see JESSE H. CHOPER ET AL, CASES AND MATERIALS ON CORPORATIONS 42, (5th ed. 2000).

151 See California Global Corporate Accountability Project, available at http://www.nautilus.org/.

152 See Model Uniform Code for Corporate Responsibility (2005) ["Uniform Code"], available at http://www.c4cr.org/modelcode.html. For a comprehensive discussion of the Uniform Code, see Robert Hinkley, 28 Words to Redefine Corporate Duties: The Proposal for a Code for Corporate Citizenship, MULTINAT'L MONITOR, Jul.-Aug. 2002, available at http://multinationalmonitor.org/mm2002/02july-aug/july-aug02corp4.html.

153 Uniform Code, supra note 152, at Section 1.

154 See Elise Scalise, The Code for Corporate Citizenship: States Should Amend Statutes Governing Corporations and Enable Corporations to be Good Citizens, 29 SEATTLE UNIV. L.R. 275, 292 (2006) (summarizing criticisms of the Uniform Code).

155 See Barnali Choudhury, Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses, 26 N.W. J. INT'L L. & BUS. 43, 45 (2005) (describing the proposal).

be privatized and transferred to corporate good citizens, enhancing the likelihood of compliance.[156]

Internationally, advocates of new legislation contend that every nation should incorporate as binding law the principles in the Norms in order to create a universal approach and deny to corporations the opportunity to "forum shop" for jurisdictions where they can violate human rights with relative impunity.[157] However, if national regulation remains unresponsive to CSR out of a fear of creating overly burdensome requirements that drive away foreign investment[158] legislative strategists call for new international tribunals to address the phenomenon of corporate violations of human rights by internationalizing the field of corporate regulation and preempting conflicting national laws.[159] One legislative "solution" to the perceived inadequacies of domestic corporate law would extend the jurisdiction of the International Criminal Court, which does not presently have personal jurisdiction over corporations, to reach legal in addition to natural persons.[160] This proposal has attracted serious attention: the International Commission of Jurists has begun work on defining the legal obligations of corporations with regard to human rights with direct reference to the Norms and subsequent debate, and Special Representative Ruggie is monitoring this work with a view toward the future of the Norms as a source of

156 Corporations considered "do-gooders" would be included on lists of corporations with which it would be deemed by the markets to be "politically correct" to do business, whereas "evildoers" would feel the sting of that status. See Note, supra note , at 1975-76. This proposal would avoid the standard criticism of legislation as overinclusive for imposing costs on corporations that are already adhering the behavioral prescriptions and proscriptions imposed by the new legal obligations. See, e.g., Diderik Lund, Petroleum Tax Reform Proposals in Norway and Denmark, 23 ENERGY J. 37 (2002) (rejecting a tax on all petroleum corporations for the purpose of alternative energy research as inefficient and punitive as it would impose additional costs on petroleum corporations already investing heavily in R&D in alternative energy).

157 The argument is that MNCs strategically allocate their business units in foreign jurisdictions that present the least legal risk in regard to their human rights practices and that in so doing they unfairly impose burdens on stakeholders—customers, employees, members of local communities, and others unable to protect their rights in private markets subject to weak state regulation. If state laws governing corporate human rights practices were harmonized, MNCs would not be able to "shop" for low-risk jurisdictions and would be obliged to provide certain minimum standards of human rights protection. Backer, supra note 89, at 309. A counterargument is that each jurisdiction should be permitted to devise that set of regulations it deems necessary to protect its interests and that the market—with whatever economic and ethical pressures survive competition —will determine which regimes and which corporations are successful and which fail. See Boatright, supra note 28, at 46-47 ("Governance structures that are not efficient will disappear, along with the firms that adopted them, in a Darwinian struggle for the 'survival of the fittest.'").

158 See Simaika, supra note 54, at 340 (contending that countries that refuse to create domestic legislation incorporating the principles the underlie the Norms are often motivated by the fear of losing foreign investment to less restrictive jurisdictions).

159 See Backer, supra note 89, at 319 (describing such proposals).

160 A French proposal to include a provision in the Rome Statute that would have extended criminal liability beyond natural persons to include legal persons was defeated in 2001. See Comment, Developments—International Criminal Law, 114 HARV. L. REV. 1943, 2031-2032 (2001). During the mandatory review in 2009, proposals to extend ICC jurisdiction to legal persons—i.e., corporations, will be heard and potentially decided. Choudhury, supra note 155, at 58.

customary international law binding in international tribunals, whether the ICC or a specialized forum staffed with experts in business and human rights law.[161]

5. Delegitimate: Corporate Legitimacy Theory

In the past decade a consortium of observers described by at least one commentator as the "anti-corporation movement"[162] have concluded, based on the striking contrast between the declining power of many developing and failed states and the growing wealth and power of many contemporary MNCs,[163] that if human rights are to be promoted and protected, MNCs are the sole actors capable of exercising the authority to do so.[164] In response, an emerging theory, offered to support and inform other strategies, contends that the legitimacy of the contemporary MNC hinges on the degree to which it shoulders the burden not merely of strict compliance with existing laws but of the broader functions and duties of democratically accountable public institutions, including the protection of human rights, the conservation and management of public resources, and the promotion of general welfare.[165] Specifically, those corporations that do not uphold, at a minimum, obligations to protect and promote human rights, including freedom from arbitrary detention, ownership of property, freedom from torture, the right to a fair trial, the right to nondiscriminatory treatment, freedom of speech and association, the right to a minimal education, the right to political participation, and the right to subsistence are deemed

161 See generally Kinley et al., supra note 130 (discussing the current status of the Norms in the context of proposals to grant them international legal status in international tribunals); id. (noting that Special Representative Ruggie aggress that "there are no inherent conceptual barriers to States deciding to hold corporations directly responsible [for human rights violations] by establishing some form of international jurisdiction[.]"); Choudhury, supra note 155, at 57 (discussing proposals for a specialized international tribunal charged with adjudicating claims of corporate violations of human rights).

162 Litowitz, supra note 141, at 820.

163 See, e.g., Adam McBeth, Privatising Human Rights: What Happens to the State's Human Rights Duties when Services are Privatised?, 5 MELB. J. INT'L L. 133 (2004).

164 CRANE & MATTEN, supra note ,19 at 67; DONALDSON, supra note 29, at 31 (arguing that "enhanced power confers enhanced responsibilities" as the basis for asserting corporate obligations to assume erstwhile public functions protect and promote human rights); Hessbruegge, supra note 96, at 90 (noting that states are "no [longer] strong enough to . . . fulfill all their protective duties" and that the "obvious answer [to this problem] would be to supplement the existing framework of . . . human rights obligations with horizontal obligations for [MNCs].").

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

illegitimate and regarded as having forfeited their socially-granted "license to operate"[166] and even their rights to exist.[167] Put slightly differently, legitimacy theory contends that in order for a corporation to be permitted to do business it must demonstrate that it is not merely in compliance with its legal obligations but that it contributes positively and proactively to the welfare of all those who might have occasion to describe themselves as its stakeholders.

Corporate legitimacy theorists are aware that the major philosophical reconstruction of the corporation as a public, rather than as a private, entity, for which legitimacy theory calls is a profound move. Although not all proponents of corporate legitimacy theory view the modern MNC as "essentially sociopathic—something akin to a super-rich and well-connected human being who is motivated solely by return on investment and totally unmoved by attachments to . . . community[,]"[168] most would agree that corporations are inherently anti-social entities that "have no conscience, morals, nor sense of right and wrong[,] . . . no sense of living in a community[,] [and] have none of the human traits and characteristics that restrain people in ways that laws cannot and make living in a community possible."[169] Moreover, most do not shy from describing their argument for enhancing corporate accountability for human rights as a "complete rethinking of [corporate] ethics and ethical theory[,]"[170] and all understand that their theory provides vastly different answers than does traditional corporate legal theory as to what corporations are, who owns them, and what can properly be demanded of them by nonowners.

Consequently, corporate legitimacy theorists contend that, because corporations, like states, are not natural creatures endowed with natural rights but in fact are artificial social constructions that owe their existence entirely to positive acts of legislation, society possesses the power to remake or even abolish them by the same legislative process if they cannot be justified

166 See LUO, supra note 24, at 206 (describing the legitimacy theory of CSR).

167 See DONALDSON, supra note 29, at 55 (arguing that an MNC must "honor [human] rights as a condition of its justified existence"); id. at 81 (enumerating the fundamental human rights MNCs are obligated, at a minimum, to protect and promote as a condition of their continued existence). Some scholars describe the minimal moral obligations of corporations to society as the product of a social contract, yet maintain that only those corporations that fulfill the contract possess sufficient legitimacy to be permitted to continue to operate . See, e.g., id. at 54 (contending that a corporation must "enhance the long-term welfare of employees and consumers in any society in which it operates" and "refrain from violating minimum standards of justice and of human rights in any society in which it operates" in order to be considered legitimate).

168 Litowitz, supra note 141, at 819.

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

170 Jones et al, supra note 25, at 34.

morally.[171] Corporate law and the corporations it creates and regulates are not *terra sancta* but rather are legitimate terrain for social intervention. If under existing law corporations do not function to benefit society in an equitable fashion, or if corporations impose too many externalities upon stakeholders, then the law must yield in the interest of social welfare, and new laws must be instituted to attenuate corporate pathologies.[172] In other words, if corporations will not become socially responsible of their own volition, they must be made so.

Thus, a primary recommendation of corporate legitimacy theorists is the formal replacement of the shareholder model of corporate governance with a stakeholder model that advocates maintain will "constrain[] corporate misbehavior" and distribute wealth more equitably.[173] State corporate law codes would require wholescale revision much more dramatic than that contemplated by the Uniform Code; moreover, implied in the theory of corporate legitimacy is that corporations that resist attempts to convert them from private to quasi-public entities would face sanctions up to and including a corporate "death penalty." More internationalist-oriented legitimacy theorists would discard the state-centric paradigm of corporate law in favor of an international corporate legal regime complete with protective provisions enforceable in domestic courts as well as international tribunals and an array of sanctions similarly sufficient to compel corporate compliance.[174]

Critics of corporate legitimacy theory dismiss it as a "Marxist" ideology advanced by "high-status Western academics" unable or unwilling to see the corporation as anything other than the "great example, symptom, or cause of some or all of the great maladies affecting the world.[175] They argue against the basic premise of corporate legitimacy theory—that

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171 See, e.g., WHITE, supra note 14, at 167, 168 (distinguishing the powers granted by society and possessed by corporations from the rights inherent in natural persons); see also Thomas Donaldson, Personalizing Corporate Ontology: The French Way, in BOYLAN, supra note 13, at 69, 71 (locating the source of corporate powers in legislation and differentiating powers from rights).

172 See generally Kent Greenfield, supra note 34 (stating that the ultimate goal of corporate law must be to create social welfare and that failures to achieve the goal must be remedied through regulatory modifications).

173 Id.; see also Surya Deva, Sustainable Good Governance and Corporations: An Analysis of Asymmetries, 18 GEO. INT'L ENVT'L L. REV. 707, 748 (2006) ("[Because] the structure of [existing] corporate law does not allow corporations to look beyond shareholders or allow them to balance the interests of stockholders with stakeholders . . . the next step should be to remove this obstacle . . . through reforms of corporate law[.]").

174 Backer, supra note 89, at 307-08; see also Deva, supra note 173, at 748 ("[B]ecause some gap between expectations from and actions of corporations toward [protection of human rights] is inevitable, efforts should be made to develop a coherent, obligatory international regulatory regime that could make deviant corporations accountable in an efficient manner[.]"); see also supra at notes and accompanying text.

175 Backer, supra note 89, at 314, 316. For a detailed criticism of corporate legitimacy theory and stakeholder theory as vestiges of Marxist infiltration of Japanese economic culture, see generally Miwa, supra note .

corporations have eclipsed states in terms of their capacity to protect human rights—by noting that corporations, unlike states, "ha[ve] no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary marketing contracting between any two people."[176] In other words, corporations are simply larger and wealthier—and more artificial—than most natural persons, and thus no more responsible for the protection of human rights. Moreover, corporate power is in fact diffused: when corporations act, they do so on behalf of thousands and even millions of individual owners—their shareholders. Furthermore, critics point out that under the law as it has existed for centuries the "mere act of chartering [a corporation] does not turn a firm into a public entity any more than the act of issuing a birth certificate or a marriage license obligates the individual(s) to serve the public interest."[177]

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

6. Summary

NGOs have pursued five basic strategies. First, they have demonstrated and negotiated, with some success, to induce corporations to adopt voluntary codes of conduct specifying responsibilities to protect and promote human rights in all aspects and places of their operations. Second, they have turned to litigation, primarily in the U.S. under the ATCA, in a largely unsuccessful attempt to impose legal liability for breaches of duties to protect human rights violations in foreign jurisdictions where multinational corporations do business. Third, they have lobbied in the United Nations system, with mixed results, to pass declarations and statements of corporate responsibility for the protection of human rights in the hope that these pronouncements will acquire legal force. Fourth, they have urged the States of incorporation for many firms to create State liability regimes for violations of specified human rights obligations. Finally, in conjunction with the academy and in support of their other strategies, NGOs have highlighted the wealth and power of many contemporary multinational corporations, in contrast to the declining power of many developing and failed states, as the basis for urging a major

176 Alchian & Demsetz, at 777 (1972).

177 WHITE, supra note 14, at 190 (summarizing position of critics of corporate legitimacy theory).

philosophical relegitimization of the corporation as a public, rather than a private, entity, and for contending that, to be judged legitimate and allowed to exercise its power and authority, the corporation must assume many of the functions and duties of public institutions, including, inter alia, the protection of human rights, stewardship of public resources, and promotion of the general welfare. Unifying each of these strategies are two goals: (1) to formalize significantly heightened corporate duties to protect and promote human rights and (2) to either secure voluntary corporate compliance with these expanded duties or else render them enforceable in domestic and/or international courts.

B. Multinational Corporations

In theory, when interacting with NGOs, corporations are free to choose from a gamut of strategic options ranging from determined opposition at one end of the conflict spectrum to comprehensive alliance at the other, with critical dialogue, philanthropic engagement, accommodation through adoption of mutually reinforcing objectives, and close strategic coordination occupying the domain between the two poles.[178] In practice, however, corporations recognize that their policies and actions produce political, economic, and social effects that determine corporate performance and yield consequences not only for the firm but for claimed "shareholders."[179] Strategies for interaction with NGOs on the question of human rights must therefore answer not only the fundamental economic question of where and how should the firm compete,[180] but must also ask and answer the following, equally important questions: What are the political, environmental, and social consequences for the corporation and for relevant third-parties of any given strategic choice, and how are these consequences to be accounted for and defended, both internally as well as externally, in economic as well as non-economic terms?

The core rights within the human rights canon—freedom from arbitrary arrest, from torture, from rape, and from extra-judicial executions—are universally regarded as forming the bedrock of civilized life by NGOs as well as the corporations they shadow. Yet great differences of opinion as to corporate responsibility—moral as well as legal—for the promotion and protection of these rights, as well as variance in the answers provided by various corporations to

178 See J. Elkington & S. Fennell, Partners of Sustainability, in Terms for Endearment: Business, NGOs and Sustainable Development (J. Bendell ed. 2000), at 150-62.)

179 R.H. MILES, COFFIN NAILS AND CORPORATE STRATEGY 49, 52, 92 (1982).

180 Id. at 52.

the questions posed above manifest in the adoption of four very different corporate strategies for interaction with human rights NGOs. The four primary corporate strategies, presented in order from most to least conflictual, are as follows: (1) Fight, (2) Engage, (3) Accommodate, and (4) Collaborate.

1. Fight

The first strategy, "Fight," is predicated upon principles of orthodox shareholder theory that regard the sole social responsibility of a corporation to be the maximization of profit for its shareholders. So long as a corporation "does not transgress the rules of the game set by law, it has the legal right to shape its strategy without reference to anything but profits."[181] In fact, for managers to pursue other objectives, however noble they might be, is to, in effect, steal from its owners.[182] At least in the U.S., the shareholder model "has remained durable as a matter of domestic policy[,]" and accordingly "traditional U.S. corporate law . . . does not speak the language of human rights."[183] In short, because corporations are obligated to be efficient, self-centered, and politically and ethically neutral participants in the marketplace, and because social responsibility is invariably at odds with the obligation to seek profitability, corporation need submit only to the laws imposed through public regulation and must disregard the ethical or moral demands lodged by private entities with contrary objectives.[184] If corporations take actions produce outcomes deemed ethical or "socially responsible" by outsiders—e.g., the Johnson & Johnson decision to withdraw Tylenol upon the first evidence of tampering—they do

181 Albert Z. Carr, Is Business Bluffing Ethical?, 2 HARV. BUS. REV. 143, 149 (1968).

182 See Ehrlich, supra note 22, at 71-72 (concluding that existing corporate law does not permit managers to make "socially responsible decisions" where such decisions come at the expense of profits owed the shareholders); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 38 (1991) (contending that under existing corporate law a manager cannot simultaneously promote shareholder wealth and stakeholder interests).

183 Backer, supra note 89, at 305-07; see also Ehrlich, supra note22 , at 64-65 ("Shareholder wealth maximization may be controversial, reviled by some ethical theorists who prefer a social model that emphasizes some sort of community responsibility, but it reflects the basic commercial understanding, at least in the U.S."); id. ("[T]he current reality . . . is that business leaders are almost exclusively bottom line oriented, and stakeholder theory . . . is not the current state of the law.")

184 See Scalise, supra note 154, at 283084 (analyzing shareholder theory and concluding that "[s]ince directors only owe a legal duty to shareholders, directors . . . regard external interests as irrelevant in their decision making . . . unless those [interests] result in profit."); see also Miwa, supra note 23, at 1245 (suggesting that "any requirement that corporate leaders bear 'social responsibility' would diminish society's aggregate wealth in proportion to the intensity of enforcement" because social responsibility is invariably at odds with profitability). Human rights NGOs and other advocates of expansive theories of CSR rail at existing corporate law, contending that its fiduciary duty principle "actually [imposes] a legal obligation [upon the corporation] to be a monster, an ethical monster . . . They're not supposed to do nice things. If they are, it is probably illegal." Noam Chomsky, Taking Control of Our Lives: Freedom, Sovereignty, and Other Endangered Species, Speech Delivered to the Interhemispheric Resource Center in Santa Fe, New Mexico (Feb. 26, 2000), available at http://www.ratical.org/co-globalize/NC022600.html.

so not to earn those judgments or out of consideration of moral or ethical obligations but because the actions were those most likely to yield future profits.[185]

Although corporations deliberately seek competitive advantage by investing in developing countries where resources and labor are cheap and plentiful and host governments provide forced labor and commit other human rights violations to maximize returns,[186] corporations, like states, are not moral agents and thus, have no duties to consider the rectitude of the acts of third parties so long as they themselves are in compliance with their legal obligations.[187] While "Fight" would not condone the commission of human rights violations by corporations, it flatly denies responsibility for human rights violations committed by third-parties,[188] and rejects the guilt-by-association argument at the core of ATCA "aiding and abetting" claims. Moreover, "Fight" finds no legal basis for rejecting any competitive advantages secured through investment in countries whose governments, without the knowledge and support of corporations, are the direct authors of human rights misconduct.[189] Law, and not some notion of social responsibility, defines the boundaries of permissible conduct, and the social contract in its current iteration supports this interpretation.[190] Because this position is diametrically opposed to that espoused by human rights NGOs, "Fight" treats these entities as hostile, extra-legal actors that jeopardize corporate profitability and pose existential legitimacy threats.[191] Accordingly, in response to NGO pressure, "Fight" directs corporations to adapt the environment by using those tactics necessary to mitigate the threat and overcome NGO

185 See Ehrlich, supra note 22, at 67-68 (distinguishing actions motivated by concerns of social responsibility from actions motivated by profit and contending that, although an action may please "stakeholders" as the socially responsible choice it requires no justification other than its relationship to profitability).

186 DONALDSON, supra note 29, at 33 (stating that MNCs seek out foreign countries for investment to take advantage of favorable labor, regulatory, and legal environments). The competitive advantage gained, at least in the short run, by locating operations in such "business-friendly" environments is quantifiable and significant. Id.

187 CRANE & MATTEN, supra note 19, at 134.

188 Id. at 48.

189 An example of a corporation that has chose "Fight" as its strategy is Unocal, which, despite a recent legal settlement with plaintiffs alleging its complicity in human rights violations committed by the Burmese Government, continues to assert political and ethical neutrality in its discussion papers and continues to select host nations on the sole basis of their capacity to create environments conducive to the furtherance of profits. See Kielgard, supra note 71, at 195.

190 See Ehrlich, supra note 22, at 71 ("Law . . . will resolve most questions of business ethics in a way that most people will find appealing without the need to resort to questions of social responsibility.").

191 See Miwa, supra note 23, at 1229-30 (arguing that the notion that corporations have duties to entities other than shareholders is "dangerous and harmful" to the profitability and even survival of corporations).

opposition, including, if need be, the willingness to battle for survival in "zero-sum conditions."[192]

Several tactics follow. First, "Fight" directs corporate counsels to prosecute the criminal acts of NGOs[193] and to bring libel complaints to hold human rights NGOs accountable for the legally unsupportable aspersions they cast against their corporate targets.[194] Second, corporations choosing "Fight" are lobbying Congress to severely restrict, or even eliminate, corporate liability under the ATCA.[195] Third, corporations that "Fight" are making good on their threats to disinvest in order to avoid the threat of litigation. To wit, Chevron recently ceased operations in offshore oilfields in southern Nigeria and permanently eliminated jobs after militant attacks led to the abductions of six workers and reduced output by more than two hundred thousand barrels per day.[196] While Chevron might have hired additional security personnel either from the private sector or from the ranks of the Nigerian military in order to continue operations—the "socially responsible" choice, perhaps—had it done so, and had these personnel in the discharge of their duties been accused of human rights violations, the effect on Chevron's profitability might well have been more negative than to simply cease operating. Finally, corporations that elect to "Fight," such as ExxonMobil, cannot be bent by NGO pressure to "join the parade" of socially responsible corporations, and to maintain their resolve they remind themselves that "[w]e just don't take a view that we should try to paint a picture of something other than what we are."[197]

The "Fight" strategy rests on two main, and potentially falsifiable, assumptions. First, it assumes that developing and maintaining positive relationships with constituencies other than shareholders—an objective central to all other strategies—is irrelevant to profitability. In other words, a reputation with certain constituencies as a "good corporate citizen" is less valuable than

192 P. LORANGE, CORPORATE PLANNING: AN EXECUTIVE VIEWPOINT 119, 284 (1980).

193 NGOs have engaged in a host of criminal acts in support of their advocacy, including destruction of animal testing labs, occupation of oil platforms, sabotage, and illegal occupations of corporate property. See CRANE & MATTEN, supra note 19, at 354.

194 Conley & Williams, supra note 26, at 16. Corporations choosing "Fight" thereby require NGOs to present their claims in the form of testable and falsifiable propositions, thereby allowing corporations to hold NGOs accountable under scientific theories of proof rather than allowing NGOs to fight a rhetorical war unwinnable by corporations in the court of public opinion. Id. at 19.

195 See Borchien Lai, The Alien Tort Claims Act: Temporary Stopgap Measure of Permanent Remedy, 26 N.W. J. INT'L L. & BUS. 139, 161 (describing such efforts).

196 Spencer Swartz & Chip Cummins, Chevron Move Hurts Oil Markets, Nigeria, WSJ, May 12, 2007.

197 Geoff Colvin, The Defiant One, FORTUNE (Apr. 30, 2007), at 86, 88.

the profits to be had by refusing to perform those actions that would earn that reputation.[198] Second, it assumes that any legal liability suffered by a corporation employing the "Fight" strategy will be less than the additional profits earned by choosing to "Fight."

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

> The marketplace sometimes punishes bad acts. Selling shoddy goods drives customers away; bad workplace conditions drive employees away; wasteful use of resources drives costs up. In the long run, these practices tend to fail. This is particularly true when there will be repeated transactions and enduring relationships, because the gain from future cooperation exceeds the immediate gain that cheating might bring. Hence, the importance of one's reputation . . . It is not that good ethics is good business. It is the other way around.[199]

The perception that a corporation is irresponsible in regard to human rights protection may well earn it a bad reputation with at least some employees, customers, shareholders, institutional investors,[200] concerned citizens, and even regulators. Whether and, if so, how much the reputational effects of the "Fight" strategy with regard to human rights depress profits are very difficult to determine and may depend at least in part on the validity of the second assumption.

Determining the legal liability suffered by a corporation employing the "Fight" strategy in regard to interaction with human rights NGOs is a complex proposition. No corporation has to date been found liable under the ATCA,[201] and no existing international tribunal has yet asserted jurisdiction over corporations for violations of human rights.[202] Yet just as Congress or the federal judiciary can contract the applicability of the ATCA to corporate human rights practices, these branches of the government can extend it. Moreover, the cost of litigation in such cases is great even when corporations are successful in avoiding liability. Finally, many risk-averse boards of directors and managers are chary about the prospect of future ATCA claims not primarily because of the potential for liability or the cost of defense, although these are

198 CRANE & MATTEN, supra note 19, at 175.

199 Ehrlich, supra note 22, at 66.

200 See Williams & Conley, supra note 15, at 95 (noting that institutional investors are increasingly requiring that corporations in which they hold shares demonstrate "social responsibility").

201 As of this writing, no corporation has yet been found liable, and only one—Unocal—has settled a case.

202 See supra at notes & and accompanying text.

concerns,[203] but because of the "far more significant risk of damage to [corporate] reputation[s] from credible allegations of human rights abuse."[204] In the words of various business organizations in their amicus brief to the Supreme Court in the Sosa case, ATCA "lawsuits almost invariably raise highly charged allegations of human rights abuses [and] generate considerable publicity . . . The very existence of such lawsuits creates risk[.]"[205] In short, it is not even the proof of human rights abuses but the mere allegation thereof and the resulting public hue and cry that may most significantly injure the accused corporation's profitability.[206]

On the other hand, corporations truly committed to "Fight," even if they should be found liable under an invigorated ATCA, are able to calculate and then pass along, or threaten to pass along, the cost of any civil penalties imposed by courts to other entities, resulting in lost jobs, higher prices, and fewer products on the market.[207] In some instances, "Fight" might even urge deliberate acceptance of liability as a profitable and rational strategy. The case of the Ford Pinto is an exemplar of this tactic:

> The Ford Pinto was first introduced in 1971 and became the focus of a major scandal when it was discovered that its design allowed its fuel tank to be ruptured in the event of a rear end collision. Ford was aware of this design flaw and decided it would be cheaper to pay off possible lawsuits for resulting deaths than to redesign the car. A cost-benefit analysis prepared by Ford concluded that it would cost $11 per car to correct the flaws. Benefits derived from spending this amount of money were estimated to be $49.5 million. This assumed that each death which could be avoided would be worth $200,000, that each major burn injury which could have been avoided would be worth $67,000 and that an average repair cost of $700 per car would also be avoided. It further assumed that there would be 2,100 burned vehicles, 180 serious burn injuries and 180 burn deaths during the lifetime of the car. When the unit cost was spread out over the number of cars and light trucks which would be affected by the design change, at a cost of $11 per vehicle, the cost was calculated to be $137 million, much greater than the $49.5 million benefit. It was hence perfectly rational, according to this instrumental logic, to decide that 360 people should be burnt or die rather than Ford pay out an extra $87 million[.][208]

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203 See Williams & Conley, supra note 15, at 93 (indicating that "human rights violations are part of the liability risks that directors need to consider" after Sosa).

204 Bernard Black, Brian Cheffins & Michael Klausner, Outside Director Liability, at 39-41, at http://ssrn.WorkingPaperNo.250; see also Williams & Conley, supra note 15, at 93 (stating that the "risks to business reputation from credible allegations of human rights abuses create incentives for companies and directors to consider these issues seriously, irrespective of whether an ultimate finding of liability is likely.").

205 See Amici, supra note 205, at 4.

206 See French, supra note 55, at 276 (discussing the utility of the use of public shame to punish corporate misdeeds).

207 See Rafalko, supra note 145, at 315-16 (describing the "ricochet" effects of civil punishment of corporations.

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

Moreover, although Ford clearly absorbed some reputational damage for its manufacture of the Pinto, public outrage did not translate into formal or informal boycotts of other Ford vehicles or otherwise injure Ford's profitability. In other words, there is simply insufficient empirical evidence that, by electing to "Fight," a corporation will necessarily incur costs for legal liability and/or reputational damage that will exceed the additional profits to be earned by choosing that strategy.[209] Unless the costs of civil penalties and reduced consumer demand outweigh the gains of cleaving closely to the pursuit of profits for the benefit of shareholders—a calculation that may well depend on the strategy chosen by NGOs—the corporation beset by human rights NGOs—a mass of "unelected, unaccountable ideologues"[210]—is, according to a "Fight" strategy agnostic with regard to ethics or morals, best off simply giving battle on all fronts—legal, political, and economic.

2. Engage

The second strategy, "Engage," maintains that the "economic mission" of the corporation is to maximize strength while minimizing vulnerability in a world in which "steadily rising moral and ethical standards" and rapidly expanding and unregulated communications networks have sharpened the examination of corporate activities and injected "complexity" into corporate decisionmaking.[211] "Engage," also described as "strategic corporate citizenship,"[212] recognizes that many external constituencies bring demands to bear upon the corporation and that prudent corporate decisionmakers must, out of self-interest and out of necessity, be simultaneously prepared to exploit opportunities to benefit from, or to shrewdly counter the constraints and threats imposed by, these relationships[213] Corporations employing the "Engage" strategy must be acutely sensitive to opportunities and threats in the external environment and either learn from experience how properly to differentiate between and respond to various "stakeholders" or else cease to exist in an increasingly competitive economy.[214]

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209 See, e.g., DONALDSON, supra note 29, at 114 (conceding that corporate risk analysis relies on a combination of objective and subjective judgments and that many corporations elect options that entail the likelihood of harm out of the belief that the benefits outweigh that harm).

210 CRANE & MATTEN, supra note 19, at 363.

211 K. ANDREWS, THE CONCEPT OF CORPORATE STRATEGY 89 (1980).

212 Note, Finding Strategic Corporate Citizenship: A New Game Theoretic View, 117 HARV. L. REV. 1957 (2004).

213 DANIEL GILBERT, JR., THE TWILIGHT OF CORPORATE STRATEGY: A COMPARATIVE ETHICAL CRITIQUE 86-104 (1992).

214 See LUO, supra note 24, at 214 (warning that "[f]ailure to pay heed to [the demands of external constituencies]" can destroy a corporation's economic value).

"Engage" is not an overtly political strategy—its objective is still the maximization of firm profits—yet it acknowledges that by the very act of making business decisions a corporation reallocates resources and impacts the interests of external constituents—some positively and others negatively—who can, in response, affect firm profitability through their responses.[215] Accordingly, "Engage" embraces the principle that every corporate decision must be based, at least in some measure, on noneconomic calculations.[216] Nor is "Engage" an expressly ethical strategy—it directs the corporation toward the maximization of profit by capitalizing upon opportunities and minimizing threats, treating the "generally accepted moral conventions current at the time" of each decision in purely instrumental terms.[217]

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

a. Who is a stakeholder?

The domain of potential claimants to stakeholder status is potentially vast, particularly for MNCs that operate around the globe. In the case of British Petroleum, for example, the list includes "hundreds, probably even thousands of [groups] . . . [f]rom Azerbaijan educational groups, to British transport organizations, to Saharan desert communities, or fishing community groups in Trinidad[.]"[218] Yet not all self-proclaimed stakeholders are legitimate "stakeholders" within the understanding of that word employed by "Engage" strategy, which maintains that a corporation is the ultimate arbiter of who is a stakeholder and that the resolution of the question is both an objective and subjective inquiry. Objectively, any individual or group who can assist or hinder the corporation in the achievement of its overriding purpose—profitability—affects the corporation and is thus a stakeholder as that concept is employed within the "Engage" strategy. Subjectively, managers may exercise their judgment to determine that certain groups that are simply "affected by the corporation" at present but may in the future gather the capacity to check

215 See, e.g., Williams and Conley, supra note 15, at 75-76 (describing the political dimension of corporate decisionmaking with regard to assessing and weighing the interests of various external constituencies and the impacts of corporate actions upon these constituencies).

216 See, e.g.. J.J. Boddewyn, International Political Strategy: A Fourth 'Generic' Strategy," Paper Presented at the Annual Meeting of the Academy of Management (1997) (discussing a strategic concept not dissimilar from "Engage").

217 Ehrlich, supra note 22, at 67.

218 CRANE & MATTEN, supra note 19, at 352.

its organizational purposes, either through alliances with existing stakeholders or through resort to media or government intervention, may be regarded as stakeholders as well.[219]

Clearly, not all stakeholders are equally important. Those who possess the power to enhance or threaten firm profitability, make demands generally perceived as legitimate, and require immediate corporate action are the most salient, and "Engage" instructs that it is toward them that corporate energies must be directed in order to address their interests and, thereby, to protect and promote the corporation.[220]

In the debate about CSR and human rights protection, various external constituencies—typically, NGOs, consumer groups, academics, and investors—claim that corporations must possess "regulatory, economic, and social licenses [to operate]," that the set of obligations to which corporations are bound is broader than simply the existing corporate legal regime, and that these constituencies—who self-identify as "shareholders"—are entitled to privately enforce corporate compliance to the level of these higher ethical and social standards by publicizing negative information about wayward corporations, bringing lawsuits, and using other means to injure corporate reputations.[221] Each of these constituencies poses an immediate threat to the profitability and the continued existence of the corporations they target[222] and thus qualifies as a stakeholder under the "Engage" strategy.

On the other side of the equation, various other constituencies in the debate over CSR and human rights may present opportunities for enhancement of firm profitability. Employees, customers, suppliers, and local communities may well have preferences regarding corporate protection of human rights and the capacity, through labor unions, business-to-business decisionmaking, or consumer advocacy groups, to exercise choices with regard to those preferences. Any constituency that has the power to choose whether to do business with a corporation at any point along its value chain and predicates that choice at least in part upon its

219 See FREEMAN, supra note 45, at 52 (developing the strategic approach to the concept of "stakeholder").

220 See R.K. Mitchell, B.R. Agle, & D.J. Wood, Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts, 22 ACAD. MGMT. REV. 853 (1997) (elaborating a shareholder salience theory); see also FORT, supra note , at 130 (referencing an Integrated Social Contracts Theory that aids corporations in determining which stakeholders should have infuence).

221 See Robert A. Kagan, Neil Gunningham & Dorothy Thornton, Explaining Corporate Environmental Performance: How Does Regulation Matter?, 37 L. & SOC'Y REV. 51, 77 (2003) (describing informal "enforcement" of "obligations" that exceed formal legal rules).

222 See CRANE & MATTEN, supra note 19, at 353 ("As soon as a [group] starts to direct its attentions towards a corporation, the stakes begin to rise, and the potential impact on the corporation and its reputation become more hazardous."

perception of that corporation's actions with regard to the protection of human rights is thus regarded by the "Engage" strategy as a stakeholder.

b. What are the opportunities?

Advocates of the "business case for CSR"[223] generally argue that, by pursuing a socially responsible agenda, corporations reap intangible resources from their stakeholders, such as reputational benefits, increased organizational legitimacy, and long-term relationships, that translate into tangible benefits and confer long-term competitive advantage over corporations are not committed to CSR.[224] Primary stakeholders value the protection of human rights independently of market transactions, and are willing to pay a premium to do business with a corporation that has earned it by serving these ends.[225] Corporations that protect human rights increase consumer demand and decrease price sensitivity,[226] increase employee satisfaction, earn additional investment,[227] enjoy price premiums on their equity due to reduced litigation and regulatory risk,[228] and thus deliver increased valuation to their shareholders.[229] In short, because

223 Williams & Conley, supra note 15, at 93-94.

224 See, e.g., S.L. Bermann, A.C. Wicks, S. Kotha, & T.M. Jones, Does Stakeholder Orientation Matter: The Relationship Between Stakeholder Models and Firm Financial Performance, 42 ACAD. MGMT. J. 488 (1999)); Thomas Donaldson, Defining the Value of Doing Good Business, FINANCIAL TIMES, June 3, 2005, at 2, 2-3.

225 Foremost among these primary stakeholders may well be consumers, who register strong preferences in favor of CSR in surveys. See, e.g., Scalise, supra note 154, at 288-89 (citing a September 2000 Business Week Harris Poll in which U.S. respondents preferred, by a ration of 19 to 1, socially responsible corporate behavior over purely self-interested corporate behavior); see also Greathead, supra note , at 725 (citing other studies). Socially responsible corporations may also attract and retain more capable employees, as employee preferences of where to work and loyalty once hired are correlated with perceptions of corporate ethics. Litowitz, supra note 141, at 813-14.

226 See, e.g., Thomas W. Dunfee, Marketing an Ethical Stance, FIN. TIMES, Nov. 17, 1995, at 13 (noting that "the Body Shop and ice cream producer Ben & Jerry's receive substantial free media publicity as a result of their identification with popular social issues . . . [as well as] a premium over competing products[.]"); Bruce Horovitz, Whole Foods Pledges to be More Humane, USA TODAY, Oct. 21, 2003, at B1 (citing Whole Foods' adoption of price increases in order to introduce humanely-raised and -slaughtered meats).

227 The contention is that certain socially responsible investment funds, who assess corporations on variables such as transparency, environmental sustainability, and protection of human rights, will purchase shares only of corporations that satisfy their guidelines. See, e.g., Amnesty International, supra note ("Corporations which use their influence to promote human rights . . . promote a better climate for investment."). Research supports this assertion: investors have demonstrated a willingness to pay an 18% premium for shares of U.S. corporations perceived to exercise sound corporate governance. See Paul Coombes & Mark Watson, Three Surveys on Corporate Governance, McKINSEY Q. (No. 4) 74, 76 (2000); see also Roberto Newell & Gregory Wilson, A Premium for Good Governance, McKINSEY Q. (No. 3) 20, 20-23 (2002).

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

corporate attentiveness to human rights is a good for which stakeholders are willing to pay, providing that good serves corporate self-interest.[230] As evidence of the opportunities available to the corporation electing the "Engage" strategy, it is significant to note that many—perhaps even most—senior executives accept the validity of the business case for CSR,[231] and that their public relations departments spend significant organizational energy and resources to publicize their corporate good citizenship in the various media.

c. What are the threats?

Critics of the business case for CSR contend that the "jury is still out on the economic benefits to be derived from good corporate citizenship" and that "[w]ith the exception of those in the socially responsible investment business, [critics] have not heard anyone make a robust claim that CSR can be shown to boost the traditional bottom line."[232] Few NGOs or the corporations they monitor have attempted to quantify the costs or benefits of altering business practices to satisfy stakeholders concerned with corporate CSR performance,[233] and some recent empirical research suggests that the cost of CSR is greater than its benefits, measured strictly in economic terms, to business.[234] Intuitively it would stand to reason that formulating new policies, taking different actions, and monitoring conduct would increase costs; it is less clear that potential benefits will follow as a result. Critics suggest that only the least price-sensitive and best informed of consumers will voluntarily pay a price premium for the goods or services offered by

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229 See YUO, supra note 24, at 206 (indicating that for many social responsible corporations "an increasing percentage of their corporate value today is made up of reputation, goodwill, or benevolence" earned through acting responsibly).

230 A number of studies affirm the positive financial effects of socially responsible corporate behavior. See, e.g., R.A. Johnson & D.W. Greening, The Effects of Corporate Governance and Institutional Ownership Types on Corporate Social Performance, 42 ACAD. MGMT. J. 564 (1999); Berman et al. 1999; J.S. Harrison & R.E. Freeman, Shareholder, Social Responsibility and Performance: Empirical Evidence and Theoretical Perspectives, 42 ACAD. MGMT. J. 479 (1999); J.D. MARGOLIS & J.P. WALSH, PEOPLE AND PROFITS (2001); Marc Orlitzky, Frank L. Schmidt & Sara L. Rynes, Corporate Social and Financial Performance: A Meta-Analysis, 24 Org. Stud. 403, 424-25 (2003) (re-analyzing 52 empirical studies with a population of 33,878 observations).

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

232 Conley & Williams, supra note 26, at 13-14 (citing Poulomi Mrinai, What Case for the Business Case, Ethical Corp., June 3, 2005, at http://www.ethicalcorp.com/content.asp?ContentID=3718; see also Deva, supra note 173, at 741-42 (rejecting the business case for CSR on the basis of disconfirming empirical data).

233 Conley & Williams, supra note 26, at 13-14..

234 Id. at 37.

a socially responsible corporation.[235] Moreover, many corporations have declined to represent themselves as socially responsible in the first instance by rejecting membership in organizations such as the Global Compact out of fear that the slightest perceived violation of the rights enumerated therein will trigger expensive litigation.[236]

d. Implementation

One of the most contested subjects within the field of corporate governance generally and CSR specifically is whether the corporate pursuit of a socially responsible agenda is a benefit or a cost.[237] The answer to this question in any specific case is dependent upon a host of variables that is very difficult to model in such a manner as to give constructive guidance to corporate decisionmakers. A casuistic approach to the implementation of "Engage" which identifies relevant variables, assigns them weights, and links them in a chain of causation is necessary.

Generically speaking, "Engage" counsels corporations to manage relationships with stakeholders in the non-market environment aggressively and proactively, and many corporations have formed CSR departments with mandates to do just this.[238] From a tactical perspective, "Engage" is amoral and self-interested: shaping and even manipulating public and media opinion,[239] lobbying, forming alliances with other corporations, (lawfully) purchasing influence with government and regulatory officials, signing on to NGO declarations such as the

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235 See id. at 13-14 ("[E]very person we have heard or interviewed has agreed with the proposition that they (except for an affluent niche) will not pay more for responsibly-produced products."); see also Deva, supra note 173, at 426 ("Stakeholders may not fully understand the complex ethical dimensions involved in a given product or service . . . [and] do[] not usually boycott each and every product or service."); id. ("[C]onsumers or investors make very much like to support [CSR] but for the price of doing so; the more the variance in price between the products and services of X [the responsible corporation] and Y [the irresponsible corporation], the less the chances that rewards and sanctions wil flow from consumers[.]").

236 See, e.g., Kielgard, supra note 71, at 203 ("The issuance of corporate human rights policies and acquiescence to international initiatives, like the Global Compact, . . . puts [corporations] on the record vis-a-vis their responsibility for human rights norms . . . . [and the] use of the company policy to impeach them, either in a public relations forum or in a lawsuit, can have a devastating impact.").

237 See Deva, supra note 173, at 745. (concluding that the "results coming from this research so far have not been conclusive or one-sided").

238 See Williams & Conley, supra note 15, at 81 (providing examples).

239 The use of the word "manipulating" is deliberate: NGO critics accuse a number of corporations, including BP, Bayer, Nike, Shell, Rio Tinto, and Nestle, of using proclamations of commitment to CSR as marketing tools to enhance their reputations and images and gain benefits from consumers and other stakeholders without actually transforming their practices. See generally Terry Collingsworth, "Corporate Social Responsibility," Unmasked, 16 ST. THOMAS L. REV. 669 (2004) (arguing that corporate voluntarism is a public relations ploy designed to gain corporations a positive image but which is bereft of any sincere commitment to human rights principles); see also Note, supra note 212, at 1969-70 (noting that "some firms use socially responsible behavior to shield themselves from interest group criticism and public sanctions" even as they carry on irresponsibly, while others simply strive to create the perception that they engage in socially responsible behavior to reap the benefits of this perception in the marketplace); Conley & Williams, supra note , at 16 ("[S]ome CSR insiders have expressed a concern that [corporations] may be 'gaming the system' . . . [by] "imposing a code of conduct . . . only to . . . revert[] to business as usual[.]").

Global Compact to enhance reputation, selectively developing relationships with certain NGOs to increase leverage over them, "and [taking] other forms of 'political action'"[240] are permissible and legitimate means of countering threats and seizing opportunities to enhance profitability. An interesting recent application of the "Engage" strategy is the "Members Project" by American Express, which urges card members to vote on a "project to do something good for our world" and promises to fund the winning project with a $5 million grant.[241] Through the "Members Project," American Express is simultaneously reinforcing its brand, demonstrating its commitment to CSR to its most important stakeholders, and inviting these stakeholders into full partnership, all for less than .2% of its gross profit.[242]

Thus, under the "Engage" strategy, the corporation may and indeed should vigorously protect human rights so long as it is profitable to do so; *e.g.*, as Royal Dutch Shell stated in its Principles (1997) it is formally committed to supporting "fundamental human rights in line with the legitimate role of business."[243] If it is not profitable to protect human rights, however, "Engage" directs the corporation to either (1) reshape the interests of stakeholders so that they come to disfavor corporate involvement in human rights protection, (2) reduce stakeholders' capacity to do harm by concerted lobbying and legal efforts to eliminate or reduce potential ATCA liability, or (3) pass along the costs of human rights protection, such as privately contracted and directly accountable security forces, foregone opportunity costs in states where governments cannot be constrained, and liability judgments or settlements in claims brought under the ATCA, to consumers and other external constituencies.

3. Accommodate

The third strategy, "Accommodate," is grounded in the belief that it is possible and desirable to produce a theory of the corporation that is "simultaneously morally sound in its behavioral prescriptions and instrumentally viable in its economic outcomes."[244] Thus, the selection of "Accommodate" as corporate strategy entails a commitment, as in the case of Altria—the parent corporation of the tobacco company Philip Morris—to a "responsibility

240 DONALDSON, supra note 29, at 40.

241 See American Express, The Members Project, at http://www.membersproject.com/intro.htm?offer=emailAmerican Express.

242 See American Express Financial Statement (2006), at http://moneycentral.msn.com/investor/invsub/results/statemnt.aspx?symbol=AXP.

243 See DONALDSON & DUNFEE, supra note 37, at 4 (citing Shell's Principles).

244 DONALDSON, supra note 29, at 39-40. Many corporate executives are philosophically committed to the tenet of the "Accommodate strategy that maintains that if a corporation embraces CSR and alters its business practices in keeping with the normative regimes CSR imports the net economic outcome will be positive. Conley & Williams, supra note 26, at 13-14.

effort" that pledges to all stakeholders that the corporation will make not only lawful business decisions but "responsible" ones, implying a standard of ethical care higher than that imposed by law.[245] Corporations that "Accommodate" reject an adversarial relationship with critics in favor of forming partnerships that can assist them in identifying and addressing specific CSR problems.[246]

The "Accommodate" strategy incorporates five basic principles: (1) corporations are responsible for all of the direct and indirect outcomes of their business operations;[247] (2) managers are moral as well as economic agents obliged to exercise discretion toward the achievement of socially responsible outcomes;[248] (3) the protection of human rights is decidedly within the sphere of the outcomes of corporate business operations; (4) conflicts between corporate ends and the ends of stakeholders, and in particular NGOs, are to be resolved through cooperation and relational negotiation rather than through litigation, with the object being the discovery of hidden value and the accommodation of all parties' interests;[249] and (5) profit and ethical practice are mutually reinforcing from both positive and normative perspectives: their intersection in the use of the "Accommodate" strategy—also known as "convergent stakeholder theory"[250]—adds value to corporations and produces morally just outcomes.

Implementation of "Accommodate" in the issue-area of human rights protection requires several concrete actions. A corporation must first survey its operations against the backdrop of its code of conduct, declarations such as the Global Compact and the Norms, and other statements of best practices to identify situations or circumstances where its conduct, even if lawful, falls short of delivering socially responsible human rights outcomes.[251] It must then bear

245 See Philip Morris: Responsibility Overview, available at http://www.altria.com/responsibility/04. In other words, under the "Accommodate" strategy, laws proscribing unethical conduct could "wither away" or be repealed and corporations would nonetheless refrain from engaging in such behavior no matter how profitable.

246 Conley & Williams, supra note 26, at 3.

247 See LUO, supra note 24, at 200 (labeling this as the "principle of public responsibility").

248 Id. at 202 (labeling this the "principle of managerial discretion").

249 See TIMOTHY L. FORT, ETHICS AND GOVERNANCE: BUSINESS AS MEDIATING INSTITUTION 11 (2001) (suggesting, from an "Accommodate" strategic point of reference, that whereas "law is framed in adversarial terms, . . . business focuses on cooperation and relational negotiation").

250 Jones et al., supra note 25, at 28-29.

251 A number of corporations employing the "Accommodate" strategy, including Barclays, Ericsson, GE, General Motors, Hewlett-Packard, and Novartis have formed the Business Leaders Initiative for Human Rights ["BLIHR"' to "break down some of the barriers and uncertainties that have kept many responsible companies from realising their role in supporting universal human rights. See Business Leaders Initiative for Human

the expenses associated with altering its practices if necessary, negotiating with injured parties and relevant stakeholders as to redress and measures to prevent future violations, and subscribing to initiatives such as the Global Compact and the Norms.

Further, it must defend its commitment to ethical conduct if challenged by shareholders. Under existing corporate law—even in jurisdictions that lack stakeholder statutes—the managers and directors of corporations are permitted to "take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business, and . . . devote a reasonable amount of resources" to CSR functions.[252] However, the corporation electing "Accommodate" as its strategy must anticipate and prepare arguments to defend its business judgment against shareholder derivative suits challenging its pursuit of particular human rights outcomes as an abandonment of shareholder interests and a violation of fiduciary duty.[253]

4. Collaborate

The fourth strategy, "Collaborate," is distinct in that it states the core mission of the corporation in virtually altruistic terms and rejects the argument that corporations are economically rational actors.[254] Although some managers go so far as to suggest that the pursuit of profit is "wicked and immoral and must be curbed and controlled by external forces[,]"[255] the "Collaborate" strategy does not demonize profit but rather seeks it out in order to place it voluntarily in the service of all conceivable stakeholders. As capitalist potentate Henry Ford II explained in embracing a "Collaborate" strategy before a Harvard Business School Office in 1969,

> For a long time people believed that the only purpose of industry is to make a profit. They were wrong. Its purpose is to serve the general welfare.[256]

Rights, available at http://www.blihr.org. BLIHR aims to "find 'practical ways of applying the aspirations of [international human rights instruments] within a business context and to inspire other businesses to do likewise." Id.

252 American Law Institute, Principles of Corporate Governance: Analysis and Recommendations, Tentative Draft No. 2 (April 13, 1984), Part II (b)-(c).

253 Well-settled caselaw does in fact support the "Accommodate" strategy and the proposition that the business judgment rule has always given managers and directors wide discretion to make decisions that advance stakeholders' interests even at the expense of shareholders See, e.g., Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968).

254 See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3-4 (5th ed. 1998) (arguing that corporations are economically rational entities that, by virtue of this rationality, ineluctably pursue economic self-interest)

255 WHITE, supra note 14, at 166.

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

This commitment to the social welfare, even at the expense of profit, allows corporations electing the "Collaborate" strategy to dispense with any concerns about the accountability or the agendas of stakeholder organizations[257] and to open their doors to admit these entities as full partners. Accordingly, NGOs have become "part of the system," and it is no longer a question of acceding to NGO demands; rather, corporations are falling into the ranks beside them, eagerly and even passionately embracing CSR as their lodestar.[258] Symbiotic partnerships thus formed create, in effect, joint ventures between corporations and NGOs in which both partners are able to decide corporate actions and policies.[259]

However, while "Collaborate" implies equality as between partners, NGOs have been quick to assert their influence, and corporations that choose to "Collaborate" may find that unless they participate in their power-sharing arrangements they may surrender decisional freedom to NGOs who will wind up "controlling the agenda and defining the choices that are available."[260] While this may be of concern to some corporations, it appears that others are so committed to "Collaborate" and so dependent upon NGO approval that they do not fret the loss of strategic control or the sacrifice of profitability that may accompany their pursuit of CSR. To wit, corporations such as The Body Shop, Ford, General Motors, Novartis, and Microsoft announce, unbidden, that they and their suppliers promote fair trade, oppose animal testing, defend human rights, protect the environment, and assist in disaster relief around the globe; in response, NGOs laud them with awards and praise them as "good corporate citizens."[261]

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

257 J. Bendell, Civil Regulation: A New Form of Democratic Governance for the Global Economy?, in Terms for Endearment: Business, NGOs and Sustainable Development (J. Bendell ed. 2000), at 239-54.

258 See Conley & Williams, supra note 26, at 11 (indicating that for some managers, embracing CSR is not simply an attitude toward corporate governance but is rather a "feel-good, therapeutic focus on process."). For some "true believers," CSR is less a mode of corporate governance or an ethical corporate strategy than it is a cult complete with behavioral and intellectual homogeneity and the promise of "continued self-improvement." Id. at 5.

259 CRANE & MATTEN, supra note 10, at 369 (citing Bendell, supra note 257).

260 Conley & Williams, supra note 26, at 18.

261 See Deva, supra note 173, at 715-16 (describing the symbiotic relationship between corporations and NGOs that characterizes the "Accommodate" strategy).

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

5. Summary

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

III. Modeling the Conflict and Prospective Solutions

A. Game Theory: An Introduction

When a corporation and the human rights NGO community interact, each party assesses its objectives and preferences and its limitations and constraints, each is aware that its actions will affect the outcome or set of outcomes available to the other, and each makes decisions in response to what the other will do (or what each thinks the other might do). Interdependency is critical: because each party can affect the outcome available to the other, corporations and human rights NGOs do not engage in independent decisionmaking but rather in the explicit calculation of each other's actions upon their own decisions and in the selection of actions based upon these cross-effects. The interaction between "strategies," or choices available to each

"player," are known as a "game."[262] Accordingly, it is useful to turn to game theory, a relatively young but important branch of the decision sciences that permits the generation of core strategic principles and provides a rigorous method for analyzing these principles and the decisions players make as they interact under conditions of strategic interdependence.[263]

In brief, game theory assigns the outcomes associated with a game, which correspond to each available combination of strategies, numerical values, or "payoffs," which are a function of the strategic interaction.[264] The rules of the game are simply the list of players, the strategies available to each player, the payoffs to each player of all possible strategy combinations, and the assumption of rationality.[265] Note that although game theory presumes rationality—meaning that players purposefully act to maximize their payoffs[266]—it does not presume the values players pursue, nor does it assume perfect information, perfect play, or perfect competition. Games range the spectrum in terms of the degree of opposition of player interests from pure cooperation games, in which players must coordinate strategies to maximize payoffs, to zero-sum games in which either player gains only at the expense of the other.

In determining the selection of strategies, each player seeks to play a "dominant strategy," defined as that strategy that outperforms all of that player's other strategies irrespective of the rival's strategy, and to avoid a "dominated strategy," defined as that strategy that is uniformly worse for the player playing it than any of his other strategies. When each player employs the strategy that is the best response to the strategies of the other player, an "equilibrium" with corresponding payoffs is achieved in which, given what the other player does, neither would alter his own move. If neither player has a dominant strategy, each chooses a strategy that maximizes his own payoff while correctly anticipating the payoff-maximizing strategy of his rival, and a "Nash equilibrium" of mutual "best responses" results.

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262 See AVINASH DIXIT & SUSAN SKEATH, GAMES OF STRATEGY 18-20 (2d ed. 2007) (differentiating mere "decisions" from "games" on the basis of a mutual capacity to affect the outcomes available to the other party).

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

264 DIXIT & SKEATH, supra note 262,. at 28-29.

265 Id. at 32.

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

2. The Prisoners' Dilemma

The Prisoners' Dilemma ["PD"] is a commonly used game useful in explaining and predicting interactions between players who wish to cooperate but are uncertain whether self-interest will permit it. In the standard PD game, two players each interested in maximizing his own payoff simultaneously choose strategies and receive payoffs determined by their combination of strategies. Although each player can gain by cooperating, the strategy of "defecting," or betraying the other player, is dominant for each player and cooperation fails. For example, two suspects, A and B, are arrested by the police, who have insufficient evidence to convict either. The police, having physically separated both prisoners, visit each to offer the same deal: if one testifies for the prosecution against the other while the other remains silent, the defector goes free and the silent accomplice receives the full 10-year sentence. If both remain silent, both are sentenced to only six months on a lesser charge. If each betrays the other, each receives a two-year sentence. Each prisoner must decide whether to defect or to "cooperate," defined here as remaining silent. However, neither prisoner can be certain what choice the other will make. The dilemma can be summarized as follows (the row player's payoff is listed first and the smaller the payoff the lower the sentence and the greater the value to the player):

Prisoners' Dilemma

		Prisoner B	
		Silent	**Confess**
Prisoner A	**Silent**	**.5, .5**	**10, 0**
	Confess	**0, 10**	**2, 2**

Each player desires for the other to remain silent while he confesses, yet both know that if each confess they will receive 2-year sentences—a worse outcome than the cooperative outcome of six month-sentences. The cooperative outcome is Pareto optimal—any other decision would be worse for the two prisoners considered together—but unstable, because neither can be sure that the other will not defect in the hope of escaping punishment entirely and forcing the other to serve ten years. Consequently, because defection is not punishable and the dominant strategy for each is to confess, a suboptimal Nash equilibrium results where each player confesses and serves two years and would not wish unilaterally to change his strategy. In

other words, a collectively irrational outcome obtains through individually rational actions. Each players would like to remain silent if he could be certain that the other player would remain silent as well; since neither can be sure, they cannot "escape from the dilemma and are stuck with a sentence four times longer than that which they might have received.

B. The "Corporation" v. The "NGOs"

The strategic interaction, or game, between any given corporation and the human rights NGOs can be modeled using a multi-strategic variation of the standard PD game.[267] In this game, as in the standard PD game, there are two players—the "corporation" and the "NGOs"[268]—yet instead of two strategies, "cooperate" and "defect," there are four and five discrete strategies available to the corporation and to NGOs respectively. Thus, rather than four, there are a total of 4 x 5, or 20, outcomes possible, each with a set of associated payoffs. Once these outcomes and their payoffs are determined they can be represented in a 4 x 5 matrix[269] and subjected to analysis.

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267 It is also possible to conceive of the provision of human rights protection as a public goods problem, where each corporation is effectively playing a game against other corporations and employing strategies with regard to human rights protection in consideration of what strategies it expects other corporations to choose. In such a game, a cooperative strategy is one that provides human rights protection, whereas a defection is one that does not. The payoff to the corporation that defects while others cooperate is greater than the payoff for cooperation because the defector does not incur the costs of providing protection, thus conferring upon the defector a competitive advantage relative to cooperating corporations. However, if too many corporations defect, increased government prosecution and generalized reductions in public perceptions of business make all corporations worse off than if they had all cooperated. Nonetheless, because of uncertainties as to what strategies other corporations will choose, in this game defection emerges, ironically, as the dominant strategy, even for corporations that would otherwise prefer to cooperate, unless players can communicate, unless the game is played repeatedly, or unless third-parties, such as the government or NGOs, can impose direct and meaningful sanctions upon defectors. See AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE 115 (1991) (modeling this game); see also Note, supra note 212, at 1965-69 (analyzing corporate conduct regarding CSR as a public goods game); Deva, supra note 173, at 742 (same). While the foregoing is an important application of game theoretic modeling to the study of CSR, the questions posed in the present Article—what are the optimal strategies for corporations and for NGOs in their strategic interaction over the issue-area of human rights protection, and are there outcomes that are either Pareto optimal or Nash equilibria that might be achieved through communication or third-party intervention and which are superior to those that pertain at present?—involve the assignment of the benefits of strategies directly to the players, thus dictating the treatment of the game as one involving private goods..

268 Although it is possible to apply game theory to interactions of more than two players, by representing each corporation as a discrete decisional entity and aggregating all the various human rights NGOs into a second and unitary decisional entity it becomes possible to generate testable explanations and predictions of corporate and NGO behavior without vastly expanding the complexity of the model and the calculations necessary to build it. This maneuver, while a simplification of reality, is perhaps not inappropos: each corporation is an independent decisional entity, even if it is influenced by internal and external constituencies, and the human rights community is made up of a "predictable variety of players – human rights and labour NGOs, trade unions, . . . national and international business organisations, lawyers, and academics from multiple disciplines"—whose preferences and normative understandings tend to be rather closely aligned. Kinley et al, supra note 130. For these reasons at the least, theoretical parsimony, so long as it does not seriously weaken explanatory and predictive power, is desirable.

269 See infra at Table 1.

1. General Assumptions

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

(1) protection of human rights is equally costly or beneficial as a proportion of revenue for all corporations;

(2) payoffs associated with the various strategies can be assigned within a reasonable margin of error;

(3) costs and benefits of strategies are objective and transparent;

(4) costs and benefits are private;[270]

(5) no other strategies are possible;

6) players elect "pure" strategies—that is, they do not play a mixed strategy of "Fight" and "Engage," or "Demonstrate" and "Regulate;"

(7) payoffs are a function of the degree to which each player accomplishes its objectives;

(8) NGOs objectives are fixed; the objectives of the corporation depend on and vary with the strategy it selects;

(9) players are playing a one-shot game and do not consider the effects of their play on the future; and

(10) each player has no reliable information about what strategy the other will play.

2. Assumptions Regarding Payoffs

a. NGOs

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

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

270 For an analysis of the game that relaxes or discards these assumptions, treats CSR as a public good, and allows corporations only two strategies--, see generally Note, supra note 212.

(xviii) disinvest to avoid threat of litigation, -5 points;
(xix) be sued by shareholders for practices subsequent to adopting stakeholder approach, 5 points.

b. The Corporation

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

For "Fight", the corporation earns points as follows:

(i) successfully prosecute NGOs either civilly or criminally, 10 points;
(ii) successfully lobby to eliminate or severely restrict ATCA, 10 points;
(iii) disinvest to avoid threat of litigation, 5 points
(iv) avoid accepting external constituencies as "stakeholders", 20 points;
(v) avoid economic sanction by the marketplace, 10 points;
(vi) absorb economic sanction by the marketplace, -10 points;
(vii) avoid being sued under ATCA, 20 points,
(viii) avoid liability in ATCA suit, 5 points;
(ix) maintain or increase profitability, 20 points.

For "Engage," the corporation earns points as follows:

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

For "Accommodate," the corporation earns points as follows:

(i) make public commitment to stakeholder theory of governance, 10 points;
(ii) earn reputational benefits for signing Corporate Code of Conduct (with express provisions for human rights protection) and Global Compact, 20 points;
(iii) agree to reporting provisions under the Corporate Code of Conduct, 10 points;
(iv) embrace and conform corporate practice to Norms, 10 points;
(v) provide resources to assist NGOs in monitoring, 10 points;
(vi) avoid violations of human rights in sphere of operations, 10 points;
(vii) avoid ATCA suit, 10 points

(viii) offer redress to human rights victims of corporate actions without being sued, 10 points;
(ix) avoid shareholder suit, 10 points.

For "Collaborate," the corporation earns points as follows:

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

3. Narrative Accounts of Game Outcomes

The following narratives assess the outcomes for each strategy pairing.

a. "Fight" v. "Negotiate"

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

b. "Fight" v. "Litigate"

When a corporation electing to "Fight" interacts with an NGO choosing to "Litigate," the legal strategy of the corporation will be focused on defending against the ATCA claim, and thus it will not successfully prosecute NGOs. At the same time, the corporation defending against an ATCA claim does not have the "clean hands" necessary to lobby for the restriction or

elimination of the statute. The corporation will likely disinvest from other states with bad human rights records to avoid other litigation, however. While the corporation will reject that it has stakeholders, it will nevertheless absorb some economic sanctions in the marketplace by virtue of the reputational harm it suffers from the ATCA lawsuit. Although the corporation will not likely be found liable, nor will it offer a settlement, it will incur costs in defending against the ATCA claim. It is difficult to assess the effects of the ATCA claim on profitability, as despite the market sanctions the corporation may well benefit from its strategy of investing in states with bad human rights records; it is probably safest to assume they are negligible.

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

c. "Fight v. "Regulate"

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

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

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

d. "Fight v. "Legislate"

When "Fight" interacts with "Legislate," the corporation focuses its efforts on lobbying to eliminate or severely restrict the ATCA, to undercut the Global Compact and the Norms as "soft law," to prevent the implementation of the Uniform Code and stakeholder statutes, to deny

the expansion of the jurisdiction of the ICC, and to reduce legal protections of human rights in domestic and international fora.. As with "Regulate," the "Legislate" strategy creates disincentives for corporations to invest in states with bad human rights records and may well cause them to disinvest in order to reduce risk.

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

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

e. "Fight v. "Delegitimate"

When a corporation electing to "Fight" interacts with NGOs choosing to "Delegitimate" through theoretical development and academic discourse, the corporation is likely to do little more than observe, maintain lobbying efforts to reduce the risk of greater legal exposure under the ATCA and potentially the Global Compact and the Norms, develop their own theoretical rebuttals, and be prepared to react if NGO efforts to "constrain corporate misbehavior" are translated into concrete proposals for major legislative reform—whether in the Uniform Code, the ICC, or some other model. The corporation that elects to "Fight" does not alter its investment strategy, does not absorb economic sanctions, and does not experience any negative effects on profitability.

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

f. "Engage" v. "Negotiate"

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

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

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

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

g. "Engage" v. "Litigate"

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

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

Further, the "Engage" strategy requires the corporation to be selective in its investment strategy and to consider carefully the human rights record of the states in which it considers investing, and when interacting with NGOs that "Litigate" divestment from states with bad human rights records is imperative. When a corporation that has elected to "Engage" interacts with NGOs that "Litigate," ATCA litigation is directly at issue, and it is not the appropriate time to seek to reduce its legal exposure under that statute by lobbying to eliminate or severely restrict its reach to corporate conduct associated with human rights; rather, it is imperative to either win or to settle the claim, with the determination based on profitability. If litigation that could otherwise be won would impose reputational sanctions in the marketplace, the corporation choosing to "Engage" will settle the claim but will also ensure that these and any additional costs incurred, such as the costs of altering its conduct to bring it into compliance with its Code of Conduct, will be passed along to stakeholders, satisfying shareholders and avoiding derivative litigation. The ultimate effects on profitability are uncertain: while reputational benefits incurred

by devising a Code of Conduct will provide some market benefits, the ATCA claim may erode those benefits and even impose additional costs, particularly if the suit reveals the corporation as having been insincere in its adoption of its Code. The outcome is case-specific; for purpose of theory-building the assumption will be that there is no effect on profitability but that the corporation will lose price- and equity-premiums as well as additional investment during the pendency of the litigation.

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

h. "Engage" v. "Regulate"

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

Further, the "Engage" strategy requires the corporation to be selective in its investment strategy and to consider carefully the human rights record of the states in which it considers investing. When interacting with NGOs that "Regulate," divestment from states with bad human rights records is not a high priority, although the increased transnational scrutiny counsels against undertaking additional investment in similar stares. When a corporation that has elected to "Engage" interacts with NGOs that "Regulate," ATCA litigation is not directly at issue, and it is thus the appropriate time to seek to reduce its legal exposure under that statute by lobbying to eliminate or severely restrict its reach to corporate conduct associated with human rights. The

corporation will settle legitimate claims of human rights violations without the need for suit in order to preserve its reputation. Should legitimate human rights violations occur in the sphere of influence of the corporation that "Engages," the injured party will receive a settlement from the corporation without the need for litigation.

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

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

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

i. "Engage" v. "Legislate"

The corporation that elects to "Engage" against NGOs that "Legislate" is determined to be selective about drawing stakeholders into relationships but will negotiate directly with NGOs if it perceives that to do so will allow it to increase its leverage by discovering mechanisms to induce NGOs to accept negotiated legislative settlements of their differences. The corporation that decides to "Engage" will seek the reputational benefits of signing the a Corporate Code of Conduct with express provisions for human rights protection, in the expectation that doing so will enhance its bargaining power in the legislative process, in addition to earning it a price and an equity premium, additional investment, and thus increased profitability. However, the corporation choosing to "Engage" will be chary of including reporting provisions in its Code and of embracing the Global Compact and the Norms out of concern that NGOs will seek to use violations of the Code or of the soft law provisions of the latter two documents as the basis for legislative amendments to domestic corporate law, as well as to expand corporate liability under

the ATCA and even in the ICC. Because the corporation electing to "Engage" is not scrupulously committed to compliance and is determined to limit legal exposure, it will not absorb any NGO reporting costs.

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

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

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

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

j. "Engage" v. "Delegitimate"

The corporation that elects to "Engage" against NGOs that "Delegitimate" is determined will not negotiate or form partnerships with NGOs. While the corporation will seek the reputational benefits of signing the a Corporate Code of Conduct with express provisions for human rights protection in the expectation that doing so will enhance its market reputation, earn it a price and an equity premium, attract additional investment, and thus increase profitability. However, the corporation choosing to "Engage" will not include reporting provisions in its Code

nor will it embrace the Global Compact or the Norms out of concern that NGOs will seek to use violations of the Code or of the soft law provisions of the latter two documents as the basis for legislative amendments to domestic corporate law, as well as to expand corporate liability under the ATCA and even in the ICC. Because the corporation electing to "Engage" is not scrupulously committed to compliance and is determined to limit legal exposure, it will not absorb any reporting costs of NGOs the "Delegitimate."

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

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

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

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

k. "Accommodate" v. "Negotiate"

The corporation choosing to "Accommodate" NGOs playing "Negotiate" will swiftly create a Corporate Code of Conduct with express provisions on human rights protection and monitoring provisions, and it will scrupulously honor these commitments and avoid violations of

human rights in its sphere of operations to the best of its ability. Moreover, the corporation that chooses to "Accommodate" will embrace and conform corporate practice to the Global Compact and the Norms, and will provide NGOs playing "Negotiate" with resources to assist them in monitoring corporate conduct. Against NGOs playing "Negotiate" the corporation that plays "Accommodate" will avoid an ATCA suit, if need be by offering redress to the rare victims of alleged corporate actions, and although it may dissatisfy some shareholders it will not likely face a shareholders' suit.

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

l. "Accommodate v. "Litigate"

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

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

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

m. "Accommodate" v. "Regulate"

The corporation choosing to "Accommodate" NGOs playing "Regulate" will swiftly create a Corporate Code of Conduct with express provisions on human rights protection and monitoring provisions, and it will scrupulously honor these commitments and avoid violations of human rights in its sphere of operations to the best of its ability. Moreover, the corporation that

chooses to "Accommodate" will embrace and conform corporate practice to the Global Compact and the Norms and any other substantive principles generated in transnational fora, and will provide NGOs playing "Accommodate" with resources to assist them in monitoring corporate conduct. Against NGOs playing "Regulate" the corporation that plays "Accommodate" will avoid an ATCA suit, if need be by offering redress to the rare victims of alleged corporate actions, and although it may dissatisfy some shareholders it will not likely face a successful shareholders' suit.

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

n. "Accommodate" v. "Legislate"

The corporation choosing to "Accommodate" NGOs playing "Legislate" will swiftly create a Corporate Code of Conduct with express provisions on human rights protection and monitoring provisions, and it will scrupulously honor these commitments and avoid violations of human rights in its sphere of operations to the best of its ability. Moreover, the corporation that chooses to "Accommodate" will embrace and conform corporate practice to the Global Compact and the Norms and any other substantive principles generated in transnational fora, and will provide NGOs playing "Accommodate" with resources to assist them in monitoring corporate conduct. Against NGOs playing "Legislate" the corporation that plays "Accommodate" will avoid an ATCA suit, if need be by offering redress to the rare victims of alleged corporate actions, yet it will resist legislative proposals, such as the Uniform Code or ICC jurisdiction over corporations, that would heighten legal requirements for the protection of human rights in favor of the voluntary approach laid out in the Code, the Compact, and the Norms. Given the strategy of "Legislate" chosen by NGOs, the corporation that plays "Accommodate" will become very risk-averse in their investment strategies and will divest from some states in order to reduce litigation risk. It will not likely face a shareholders' suit.

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

o. "Accommodate" v. "Delegitimate"

The corporation choosing to "Accommodate" NGOs playing "Delegitimate" will swiftly create a Corporate Code of Conduct with express provisions on human rights protection and monitoring provisions, and it will scrupulously honor these commitments and avoid violations of

human rights in its sphere of operations to the best of its ability. Moreover, the corporation that chooses to "Accommodate" will embrace and conform corporate practice to the Global Compact and the Norms and any other substantive principles generated in transnational fora. However, the corporation playing "Accommodate" will not provide NGOs playing "Delegitimate" with resources to assist them in monitoring corporate conduct, and it will lobby to reduce the risk of legal exposure faced by corporations, to include efforts against the Uniform Code, expansion of the ICC to reach corporate conduct, and other major corporate legal reforms. Furthermore, the corporation electing to "Accommodate" will divest from states with human rights records that might make them the subject of increased scrutiny and reputation harm.

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

Accordingly, the corporation electing to "Accommodate" NGOs playing "Regulate" will earn 70 points, while NGOs will earn 45 points.

p. "Collaborate" v. "Negotiate"

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

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

q. "Collaborate" v. "Litigate"

The corporation deciding to "Collaborate" with NGOs that "Litigate" quickly adopts a Code of Conduct that expressly respects human rights and includes reporting provisions, and the corporation provides resources to the NGOs to assist their monitoring efforts. The corporation that "Collaborates" in its interaction with NGOs that "Litigate" scrupulously observes its

commitments under the Code, signs the Global Combat, publicly embraces the Norms, lobbies for the Uniform Code and for heightened requirements for protection of human rights, is sued under the ATCA but offers a settlement to plaintiffs, divests from states without high standards for protecting human rights, and accepts membership in BLIHR.

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

r. "Collaborate" v. "Regulate"

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

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

s. "Collaborate" v. "Legislate"

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

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

t. "Collaborate" v. "Delegitimate"

The corporation deciding to "Collaborate" with NGOs that "Delegitimate" quickly adopts a Code of Conduct that expressly respects human rights and includes reporting provisions, and

the corporation provides resources to the NGOs to assist their monitoring efforts. The corporation that "Collaborates" in its interaction with NGOs that "Delegitimate" scrupulously observes its commitments under the Code, signs the Global Combat, publicly embraces the Norms, avoids suit under the ATCA, lobbies for the Uniform Code and for heightened requirements for protection of human rights, offers redress to the rare alleged human rights victims of its practices, and accepts membership in BLIHR.

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

Table 1, *Matrix of Outcomes and Associated Payoffs*, illustrates the interactions of corporate and NGO strategy in the issue-area of the protection of human rights:

TABLE 1: MATRIX OF OUTCOMES AND ASSOCIATED PAYOFFS

		NGOs				
		Negotiate	**Litigate**	**Regulate**	**Legislate**	**Delegitimate**
CORP.	**Fight**	-10 45	-10 50	-10 80	-10 20	-10 75
	Engage	30 90	25 20	20 80	15 50	10 50
	Accommodate	65 90	60 70	65 90	55 90	45 70

Collaborate	90 100	90 85	90 100	90 100	90 100

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

C. Analysis of The Game: Corporation v. NGOs

1. Equilibria

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

However, for the NGOs, whose preferences are fixed, "Negotiate" is weakly dominant over "Regulate," suggesting that no matter what strategy the corporation plays, the best strategy for NGOs is to "Negotiate." This will be discussed further *infra*; it is sufficient to note in the game as specified the corporation should anticipate that NGOs will always play "Negotiate."

Because the preferences vary by strategy for the corporation, it is first necessary to identify, for each of the strategies selected by the corporation, the optimal response to each.

2. Analysis of Corporate Strategies

a. "Fight"

"Fight" is almost certainly, in the words of Professor Donaldson, "corporate Neanderthalism," or unreconstructed neoclassical shareholder theory, and as such has a series of preferences different from each of the three other corporate strategies. Its payoffs range from 20

to 80, and it performs worst against "Legislate" and best against "Regulate." Interestingly, a corporation choosing to "Fight" imposes a uniformly bad payoff on NGOs of -10, suggesting that at least in the short run corporate power, if committed to "Fight," can overcome NGOs. At the same time, however, "Fight" performs not very well against "Negotiate." Because "Negotiate" is the dominant strategy for NGOs, if a corporation cannot or will not alter its preferences sufficiently to justify another strategy it will receive a payoff worse than what it would have received had it chosen any other strategy. Moreover, if NGOs know the corporation plans to "Fight," either by its reputation, its public communication, or by the use of competitive intelligence, it can, in effect, "punish" the corporation in the amount of 25 points by choosing "Legislate" at no cost to itself. Under these conditions, a corporation that plans to "Fight" must either attempt to manage its reputation or else be cautious about releasing actionable intelligence regarding strategy.

b. "Engage"

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

c. "Accommodate"

"Accommodate" is the strategy-of-choice for many contemporary corporations who have accepted the CSR movement as a fundamental fixture of modern business. "Accommodate" payoffs range from 90 to 70, with payoffs of 90 earned when NGOs play its dominant strategy of "Negotiate" as well as when NGOs play "Regulate." The "Accommodate"-"Demonstrate" subgame equilibrium should be stable: although NGOs cannot inflict serious punishment for violation of this equilibrium, the corporation that chooses "Accommodate" intends to keep its

bargain, and "Litigate" and "Delegitimate" would impose costs upon NGOs with little affect on the corporation.

d. "Collaborate"

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

3. Analysis of NGO Strategies

a. "Negotiate"

"Negotiate" is the dominant strategy for NGOs, and as a general rule should always be played unless another of the remaining three strategies can be used at low- or no-cost to punish violations of agreements implied by the selection of particular strategies by corporations.[271] It offers 175 points across the four corporate strategies and 500 points in total payoff to both parties.

b. "Litigate"

"Litigate" is dominated by "Negotiate" but dominates "Legislate" and "Delegitimate." It should only be played to punish the corporation playing "Engage" or "Accommodate" who cannot be trusted to honor the commitments they implicitly make by virtue of those strategy choices. In other words, if NGOs has reliable information that the corporation will play "Engage" but will violate its Code of Conduct, spin its human rights record in the media, lobby against existing legal protections of human rights, and pass along costs to consumers, the NGO might be willing to absorb 5 points of cost to punish the corporation playing "Engage" in the amount of 70 points. Similarly, if NGOs has reliable information that the corporation will play "Accommodate" only to fail to sign the Global Compact, embrace the Norms, redress violations of human rights in its sphere of influence, and maintain its commitment to human rights in the

271 See supra at pp. .

face of shareholder pressure, NGOs might choose to absorb 5 points of cost to play "Litigate" and punish the corporation playing "Accommodate" in the amount of 20 points.[272] Finally, if NGOs knew that the corporation would "Collaborate," it might choose to "Litigate" but only if it could be assured as well that the result of litigation would neither alter the future strategy of that corporation nor dissuade other corporations from choosing to "Collaborate."

"Litigate" offers 165 points across the four corporate strategies and 390 points in total payoff to both parties.

c. "Regulate"

"Regulate" is dominated by "Negotiate" and in turn dominates "Legislate" and "Delegitimate." It should only be played by NGOs who have reliable information that (1) the corporation will play "Accommodate" and that by playing "Regulate" NGOs can, at no cost, create deeper normative commitments to regulatory principles that may in the future crystallize from "soft law" into hard law and be reflected as such in Corporate Codes of Conduct; or (2) that the corporation will play "Collaborate" in which case "Regulate" offers the same payoffs to both parties while creating deeper and more transnational normative commitments.

"Regulate" offers 165 points across the four corporate strategies and 515 points in total payoff to both parties.

d. "Legislate"

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

"Legislate" offers 150 points across the four corporate strategies and 410 points in total payoff to both parties.

e. "Delegitimate"

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

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

"Delegitimate" offers 135 points across the four corporate strategies and 430 points in total payoff to both parties.

4. Discussion and Implications

a. NGO Strategies

i. "Negotiate": The Virtue of Voluntarism

The finding that the dominant strategy for NGOs is "Negotiate" is compelling. At the heart of the "Negotiate" strategy is the principle of voluntarism, which has been the subject of sharp debate in the academic literature and in the field.

Critics of voluntarism, as manifested in Codes of Corporate Conduct and other voluntary statements of principles, deride it as far too lacking in teeth and insufficient to overcome the profit motive and induce corporate protection of human rights.[273] One NGO, representative of the views of many, brands CSR and the Codes of Corporate Conduct as a sham foisted upon society by corporations concerned only with protecting their reputations against the "potential damage of public campaigns directed against them, and overwhelmingly, with the desire—and the imperative—to secure ever-greater profits."[274]

Proponents of voluntarism, on the other hand, view Codes of Conduct as a "genuine commitment to human rights" and a categorical "reject[ion] [of] antithetical arguments sounding in corporate neutrality" that will "eventually lead to binding corporate norms and accountability."[275]

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

273 See David P. Forsythe, The Political Economy of Human Rights: Transnational Corporations (Human Rights Working Papers, Paper No. 14, 2001), http:www.du.edu/humanrights/workingpapers/papers/14-forsythe-03-01.pdf.

274 Christian Aid Society, Behind the Mask: The Real Face of CSR (2004), available at www.christian-aid.org.uk/indepth/0401csr/csr_behindthemask.pdf.

275 Kielgard, supra note 71, at 216 (describing viewpoint of proponents of voluntarism).

values important to many firms—foremost among them profitability.[276] Joint payoffs—a proxy for the benefit to society if one considers that NGOs represent all conceivable stakeholders while corporations represent shareholders, and most citizens are either the former, the latter, or, increasingly, both—totaled 500 when NGOs played "Negotiate" —a greater payoff than for all strategies except for "Regulate"—reinforcing the proposition that the strategy is conducive to the achievement of mutual interests. Although "Negotiate" may not be an effective strategy in interacting with corporations that elect to "Fight," it is dominant over all other strategies available to NGOs, and the conflict with "Fight" may be rooted in a broad cultural and social gulf that divides corporations with preferences that cause them to choose to "Fight" and NGOs. Moreover, as NGOs and firms "move from a primarily confrontational engagement to a more complex, multifaceted relationship"[277] involving negotiation rather than demonstration, the effectiveness of "Negotiate" may well increase to the point where, even in their interactions with corporations that still elect to "Fight," NGOs may well claim some positive payoffs. At the very least, the success of "Negotiate" should cause opponents of voluntarism to reevaluate their position. At its best, "Negotiate" evinces potential to profoundly reshape the relationship between corporations and NGOs.

ii. "Litigate": A Stick, But Not (Yet) a Strategy

Many human rights NGOs have reposed great faith in litigation, particularly under the ATCA, as the strategy that would bring corporate malefactors to heel. Yet the promise of "Litigate" has not been borne out by the history of human rights litigation under the ATCA, and there is no reason to believe that this will change in the near future. That "Litigate" yields inferior payoffs for both NGOs and the corporation—and thus inferior societal benefits—no matter what strategy the latter plays suggests that NGOs cannot increase the payoffs they would otherwise obtain by choosing to "Negotiate" and that the corporation suffers when NGOs elect to "Litigate" due to the expense of litigation—and not due to the remedial potential of "Litigate." Commentators have suggested that significant corporate opposition to "Litigate" arises from a mere "paper" commitment to human rights on the part of corporations,[278] yet the dominance of

276 Previous research has developed the proposition that social partnerships between "CSOs"—civil society organizations—and corporations are the mechanisms most likely to develop solutions to CSR problems that satisfy the interests of both partners. See generally Bendell, supra note 257..

277 CRANE & MATTEN, supra note 19, at 382.

278 See, e.g., Kielgard, supra note 71, at 215.

"Negotiate"—a largely voluntary form of interaction—over "Litigate"—the resort to state judicial power—calls this notion into question and suggests that the costs of litigation may well represent no small part of corporate objections.

That said, "Litigate" retains its value in the case of corporations who play "Engage" or "Accommodate" and fail to deliver compliance with Codes of Conduct, the Global Compact, and the Norms, or who fail to afford redress to victims of violent regimes where they locate their business, or who wilt under shareholder pressure. The threat alone that NGOs will play "Litigate" may well be enough to steel the spines of the executives of corporations that "Engage" or "Accommodate" against the siren's call of profitability and in favor of implementing practices protective of human rights, selecting investment opportunities based in some measure on the risk posed by host governments to human rights, and otherwise balancing economic concerns with human rights concerns.

As such, "Litigate" in the hands of NGOs is as yet primarily a stick to be used to enforce corporate discipline and not a strategy for interaction with corporations in the issue-area of human rights protection.

iii. "Regulate": A Support Strategy

Although much of the energies of NGOs have been invested in the last decade in transnational fora attempting to generate normative regulatory principles that would be adopted by corporations and governments and then rapidly crystallize into binding international law, the results have been, at least for proponents of such regulation, disappointing. The Global Compact has secured some important members, and yet many large corporations have declined to join, while the Norms are, in the words of the Special Report, "a train wreck." While some counsel yet another push in the same direction,[279] international legal process has simply not yet developed to support the project of formalizing legal obligations that can bind corporations over the opposition of their states of incorporation.[280] Accordingly, NGOs find that "Regulate" is dominated by "Negotiate" and has value as a strategy in the foreseeable future only to the extent that (1) specific corporations likely to "Accommodate" and predisposed to accept additional

279 See, e.g., Kinley et al, supra note 130 (noting that "some human rights groups see the Norms as just a normative basis for creating even more detailed regulations").

280 Although there has been some evolution, there has been no major revolution in international law since 1989, when "the realm of what is called 'international law' [wa]s largely a realm of voluntary associations, with agreed-upon rules and few sanctions[,] . . . [and] the prospects for regulating business by international rules backed by sanction seem[ed] dim." DONALDSON, supra note 29, at 149.

normative guidance from NGOs will internalize deeper normative principles that emerge from transnational regulatory process, or (2) NGOs devise effective substrategies in the domestic legal and political frameworks of states of incorporation to urge governments to adopt the "soft law" of the Compact and the Norms as hard law binding on all corporations. With respect to #1, however, corporations that "Accommodate" are at least as likely to respond to a "Negotiate" strategy as they are to "Regulate" unless by virtue of its international institutional provenance a normative principle stands a greater chance of finding its way into a Code of Conduct and corporate practice than the same principle developed through other means. With regard to #2, the usefulness of an international legal incorporation substrategy is not limited to the "Regulate" strategy but would bolster the utility of "Negotiate," "Litigate," and "Legislate."

In sum, however, NGOs seeking to transform corporate practice in the issue-area of human rights protection and endowed with limited resources would be better advised, at least in the short run, to "Negotiate."

iv. "Legislate": Implementation and Enforcement of "Negotiate"

Stakeholder advocates of "Legislate" note that the state has a fiduciary duty to society as a whole, that the government has the power to impose additional legal restrictions in corporate conduct, and that the existing corporate legal regime does not offer adequate (dis)incentives to encourage corporations to protect human rights.[281] Advocates of shareholder theory contend as well that legislation is the only legitimate method of transforming corporate conduct,[282] for reasons of democratic accountability[283] and to create disincentives for noncompliance.[284] Even those who credit voluntarism with some success suggest that a "legal framework provides powerful tools and incentives for improvement" and "anchor[s] [voluntary principles] in a legal framework [that] is likely to enhance their effectiveness."[285]

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281 See, .e.g., Deva, supra note 173, at 741 (arguing for legislative inducements to enhance corporate protection of human rights).

282 See, e.g., Friedman, supra note 18, at 126..

283 In theory, by creating constraints through the democratic process, ethical questions are aired and then put to rest through a legitimate process rather than left open to constant and destructive argument. See Ehrlich, supra note 22, at 83-84 ("The language of ethics suggests that you are right and I am wrong; that you speak with moral authority and that you have the right to tell me how to live my life . . . Work to change the law, but do not demonize me as being greedy because I disagree with you.").

284 See id. at 83 (arguing that it is "unlikely that a firm will put itself at a competitive disadvantage by incurring a cost associated with ethical behavior when others in the field have not done so, unless bigger firms attempt to promulgate rules that will disadvantage smaller competitors by saddling them with costs that the larger firms can afford to bear . . . If society wants business to behave in a certain way that escapes the discipline of the market, . . . then it is better to regulate by law so that all competitors are burdened proportionally).

285 Kielgard, supra note 71, at 197.

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

In the short run, "Legislate" is less a strategy than one of several processes to implement and enforce the "Negotiate" strategy as it benefits NGOs in only two ways: (1) it punishes corporations that "Fight" and refuse to acknowledge the existence of any obligations to protect human rights with the spectre of bad publicity, diminished profits, and future sanctions if they continue as "evildoers;" and (2) it offers NGOs an additional forum wherein to press corporations to voluntarily adopt constraints lest more onerous restrictions are imposed by government. In the long run, "Legislate" offers NGOs the prospect, however far down the temporal road, that actionable law useful to the execution of all other strategies will emerge.

v. "Delegitimate": An Empty Threat

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

b. Corporate Strategies

i. "Fight": Corporate Neanderthal Model

"Fight" is another expression for neoclassical shareholder theory, the sole virtue of which, in the contemporary political economy, is its ability to frustrate NGOs. It achieves this, however, at great cost to the corporation that elects it: with NGOs playing the dominant strategy

of "Negotiate," the corporation that chooses to "Fight" draws the ire of all that claim stakeholder status and in so doing significantly harms its own economic bottom line. In short, stakeholder theory appears to have eclipsed the shareholder model of corporate governance, and the corporation that continues to deny this political and economic reality will pay a price.

ii. "Engage": Strategic Stakeholder Model

Critics of "Engage"—also known as the "strategic stakeholder" model[286]—contend that it "fails not because it is immoral but because it is nonmoral—it is not an ethical synthesis but simply strategic reasoning that considers the retaliatory potential of aggrieved parties only and not the morality of their claims."[287] Although this description is not entirely unfair, the conclusion is not supported by the present study. Because the dominant strategy for NGOs is to "Negotiate," a corporation choosing to "Engage" will enjoy a reputation as a good corporate citizen, enhance its profitability, and continue to prosper so long as it chooses its NGO partners wisely and upholds the agreement it reaches with these partners. If the cost of adhering to the agreement becomes onerous, the corporation electing to "Engage" can pass it along to consumers.

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

iii. "Accommodate": Good Citizenship Model

Given the dominant strategy of NGOs—"Negotiate"—"Accommodate" earns high payoffs; what is more, against any other NGOs strategy "Accommodate" scores no worse than 70 out of 100. For corporations that have internalized the values of CSR and of the human rights movement, "Accommodate" guarantees them high payoffs and virtually immunizes them from punishment in the form of litigation or regulation. Provided that such a firm can manage to remain profitable after taking on the broad responsibility to guarantee human rights protection

286 See White, supra note 14, at .

287 Id.

within its sphere of business well beyond that required by law, and after navigating the shoals of discontented shareholder groups for whom heightened protection of human rights represents profits otherwise owed to them, "Accommodate" is a strategy with few if any faults. It requires, however, significant managerial competence to implement in such a manner as to satisfy stakeholders who demand profitability as well as those who demand accountability.

iv. "Collaborate": Symbiotic Model

"Collaborate" is almost a non-strategy: it effectively hands the corporate reins to NGOs and allows them to implement their own strategy in the corporate stead. However, for corporations driven principally by the need to express support for human rights and whose payoff structures reflect this preference, and for NGOs as well, "Collaborate" works. For the corporation playing "Collaborate," payoffs are virtually perfect,[288] and for NGOs the payoff, regardless of its strategy, is 90 out of 100. "Collaborate" rewards NGOs with maximum decisional freedom to adhere to, or depart from, its dominant "Negotiate" strategy; it rewards the corporation with the opportunity to express its value-structure through its business activities and through the actions of the NGOs who are partnered with it. "Collaborate," in a real sense, is a symbiosis: NGOs receive the opportunity to closely guide the affairs of the corporation in service to their human rights protective agenda, while the corporation reaps the internal reward of being assured that it is behaving properly in accordance with best human rights practices as well as the external reward of being deemed by NGOs as a model of the ethical corporation. The only risk faced by the corporation that decides to "Collaborate" is the market: it is unclear that "Collaborate" as a strategy generates sufficient economic returns to allow a major corporation, let alone a small- or medium-sized enterprise, to remain in business, even if considerations of profitability factor very little, if at all, into the equation of preferences for such a firm.[289]

5. Caveats, Criticisms, and Responses

First, it is important to note that the game developed here is highly sensitive to the assumptions about the payoffs that determine its solution. A more robust theoretical basis for the

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

289 The Achilles' heel of "Collaborate" may be sufficiently threatening to the survival of the corporation that employs it that it renders "Collaborate" a dysfunctional strategy. See, e.g., Ben Casselman, "Why 'Social Enterprise' Rarely Works," WSJ, Jun. 3, 2007, at B12 (reporting that the socially responsible model of business has not proven the capacity to be profitable over the last decade and that corporations attempting to employ the model inevitably require external support). It is also worth noting at this juncture that it is likely, given the potential unprofitability of "Collaborate," that no durable corporation employs a pure version of the strategy. See infra at note and accompanying text.

proffered payoff structure requires more empirical research as well as the use of methods that will trace the chain of causation between preferences, corporate strategies, actions and tactics to implement the strategies, and the costs and benefits associated with each strategy. Different payoffs would lead to different solutions and to different selections of strategies. The payoffs assigned are the product of artful intuition and somewhat arbitrary determination; they are not cast in stone.

Moreover, the game simplifies reality in ways that are not all captured in the general assumptions. For some corporations, it may be less costly to protect human rights than it is for others—for example, petroleum corporations who do business in regions of the developing world where governance is weak and brutal regimes are the norm face greater costs and risks in protecting human rights than do financial services corporations based primarily in New York or London. Furthermore, some corporations derive disproportionate gains from touting their human rights records, while others, no matter how hard they attempt to promote themselves as responsible, find it difficult to convince consumers. Ben & Jerry's is known at least as much for its commitment to CSR as for its ice cream, while there is perhaps little ExxonMobil could do to earn such a reputation after the *Exxon Valdez* disaster, other major environmental incidents, and a longstanding tradition of intransigence in the face of pressure from environmental groups. Reputation—how it is acquired, how it adds value, and how it is lost—bears further examination.

The game also presumes that the costs and benefits of strategies are objective, transparent, and private. In practice, it is exceedingly difficult to determine the costs and benefits of particular actions, particularly at the moment they are taken, and thus they are subject to subjective determination. Moreover, the choice of strategy by a corporation produces industry-wide effects and is itself, at least in part, determined by expectations about the behavior of other corporations, other industries, governmental actors, and even the global political economy. Costs and benefits associated with the interplay between variables at different levels of analysis are very difficult to model.

Furthermore, in the "real world," corporations and NGOs are "repeat players," meaning that the shadow of the future looms over their interactions and has important effects on their choices of strategies which have been addressed *en passim* in the analysis but not modeled in the present study. A player might choose a strategy that is suboptimal in the present period in order to inflict "punishment" on the other player in the hope of conditioning the other player to behave

differently in the future, either by adhering to the implicit agreement that accompanies the playing of a particular strategy or to play a different strategy. By the same token, a player might acquire knowledge about how the other player intends to play—either through the public pronouncements of the other player or through the use of competitive intelligence[290] or corporate espionage[291] to gather information—and thus might choose a different strategy that leads to a higher payoff.

With regard to strategies, the game assumes that no other strategies are possible and that players must elect pure strategies rather than mixed or randomized strategies that would allow them, based on their assessments of the particular strategic interaction and the specific preferences in play, to draw from two or more strategies—simultaneously or in sequence—to achieve their highest possible payoff. In fact, there may well be any number of other possible strategies that are consistent with maximization of payoffs for corporations that embody different preferences than those that together constitute the basis for the four corporate strategies developed in the present study.

Furthermore, the model of the corporation developed in the present study makes presumptions about the various groupings of preferences that constitute and animate many contemporary corporations and in turn give rise to four particular strategies for interaction with human rights NGOs. There are certainly more typologies that can and should be assembled and tested. Even more importantly, it is exceedingly difficult to ascertain empirically what any given corporation holds as its preferences. Again, artful intuition, reliance on public statements and business practices, and other indicia are useful but imperfect indicators. The same is true for human rights NGOs, who are grouped together for purpose of theory building but in fact represent a broad range of opinion as to desirable ends and means in the protection of human rights and might well be disaggregated to much benefit. More sophisticated tools—content

290 "Competitive intelligence ["CI"] is the ethical and lawful application of industry and research expertise to analyze publicly available information on competitors and to produce actionable intelligence that allows firms to make informed and strategic business decisions. See Society for Competitive Intelligence Professionals, http://www.scip.org/2_faq.php.

291 Corporate espionage" ["CE"] is the illegal subspecies of CI whose methods include "finding" lost documents, interviewing disgruntled employees, eavesdropping in airports and trade shows, social engineering (misrepresenting identities to trick people into yielding information, bugging offices, hacking computers, and outright stealing proprietary information. See supra at note 1.

291 See IRA WINKLER, CORPORATE ESPIONAGE 66 (1997) (quoting Pierre Marion, former head of the Directorate Generale Securite d'Etat—the equivalent of the U.S. Central Intelligence Agency and FBI).

analysis, survey research, and other techniques—will increase the rigor of the assignment process in future research.

Finally, game theoretic models cannot represent the human dimensions that underlie decisionmaking and have been criticized for this shortcoming.[292] Humans, and not corporations or NGOs, are the ultimate decisionmakers as to strategy and as to courses of action, and a host of variables difficult to reduce and integrate into the model of the firm as a "rational" entity—beliefs, values, traits, norms, emotions, uncertainty, etc.—are important determinants and thus deserve significant research attention. The influence of CEOs in particular upon corporate decisionmaking must also be considered as an important determinant of corporate preferences and in turn corporate strategy. At the same time, variables from other levels of analysis—small groups of top executive strategists, boards of directors, major shareholders, regulatory agencies, communities, and even states—exert independent influence upon the preferences of CEOs, and this influence may well be an important determinant of the strategies they select for their corporations. In short, harnessing more explanatory and predictive power requires creating and testing more complex and detailed representations of the strategic interaction between corporations and NGOs in the human rights issue-area.

Nevertheless, the present study is merely an attempt to build a theory, and as such must rely on simplifying assumptions and working hypotheses to construct a model with enough explanatory and predictive power to serve as a guide for organizing existing knowledge and pointing out fruitful paths for future research that will test the assumptions upon which the model relies, render more detailed accounts of preferences, extend the model to include considerations of the future and of mixed strategies, and undertake other tasks the better to fully capture the complexity of the strategic interaction between corporations and NGOs in the issue-area of human rights protection.

IV. Conclusion

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

292 See, e.g., Robert C. Solomon, Game Theory as a Model for Business and Business Ethics, 9 BUS. ETHICS Q. 11, 12 (1999) ("To many, the use of game theoretic analysis seems dehumanizing and false; it assumes that human behavior can be generalized and predicted by a series of equations or matrices.").

in which they do business. Human rights NGOs can claim much of the credit for requiring corporations to assume protective responsibilities in their spheres of operations and insisting that corporations infuse the conduct of their business operations with considerations of social and ethical obligations—even if, in many instances, they have pursued these objectives by resort to demonstrations, litigation, application of political pressure within the United Nations and domestic governance spheres, and legislative attempts to reform corporations as quasi-public entities with human rights obligations akin to those of states.

However, conflict between corporations and NGOs over the scope of corporate responsibility for the protection of human rights is far from inevitable. Analysis of the strategies available to corporations and to NGOs, assisted by game theoretic modeling, reveals that for NGOs the dominant strategy is "Negotiate." In practical terms, this means that NGOs, contrary to orthodox understandings, can best accomplish their objective of protecting and promoting human rights against violations connected with corporations that seek out investment opportunities in countries with weak or brutal governance by negotiating directly with corporations as constructive critics, advisers, and even, depending on corporate preferences, as full social partners. By entering into constructive dialogues that educate, instruct, and transmit normative content in a manner that impresses upon corporations the mutual gains to be enjoyed through alteration of corporate practices and the adoption and implementation of Corporate Codes of Conduct, NGOs are more likely to achieve their objectives than through the use of any other strategy, including those that rely upon litigation, regulation, legislation, or corporate delegitimation.

However, the strategic success of their negotiations is dependent upon the use of certain tactics. NGOs must first enhance their credibility as negotiating partners in order to gain seats at the corporate table. To do this, they must narrow the cultural and social gulf between NGOs and corporations by increasing the professionalism of their membership and developing their own Codes of Conduct to demonstrate their own acceptance of the principle of accountability to the stakeholders on behalf of whom they propose to negotiate.[293] By professionalizing their memberships and holding themselves accountable to stakeholders, NGOs will show corporations

293 See Conley & Williams, supra note 26, at 18 (noting that corporations have been insisting that "NGO accountability . . . be 'embedded' in the NGO, from the top down[.]").

that they are prepared to break from their confrontationalism of the past[294] and commit to building social partnerships that will allow bargaining toward more integrative solutions.

Moreover, NGOs must remember that, save for those corporations whose strategy is to "Collaborate"—and possibly for some of these firms as well—profit is not a dirty word but is rather essential to their continued existence. In the pursuit of their mission to enhance human rights protection they must recognize that any proposal that threatens to eradicate profitability also threatens the continued existence of the corporation with whom they are negotiating and will thus be perceived as an existential threat. NGOs must live in the world of corporations as they negotiate, understanding that the only feasible solutions are those that are jointly acceptable because they deliver enhanced protection of human rights without sacrificing profitability. Better still, NGOs should work together with corporations to devise media and educational substrategies to bolster reputations and increase the demand for the goods and services, as well as the shares, of corporations that protect human rights. If NGOs can draw upon and market their organizational knowledge, expertise, and energies to make the responsible corporation more profitable, they will create a genuine synergy between human rights protection and profit that will be stable and, in all probability, self-policing. Moreover, they may well effect a more general transformation of social norms and the construction of a more human-rights protective global community that has the beneficial effect of altering most corporations' preferences and payoff structures in the direction of greater commitment to human rights protection. In turn, the costs of monitoring and enforcement will decline sharply.

This is not to suggest, however, that NGOs should not demand and verify compliance from their negotiating partners. On the contrary, NGOs must insist on building monitoring provisions into Codes of Conduct to provide the verification necessary to the maintenance of trust. Moreover, NGOs should extend the sphere of voluntary agreements to include partnerships with states and corporations that will further enmesh all parties in commitments to human rights protection. States, although leery of transnational regulation and calls for litigation, are quite responsive to this sort of voluntarism. For example, the U.S.-U.K. Voluntary Principles on Security and Human Rights ["Voluntary Principles], urged by NGOs, call upon corporate signatories to conduct risk assessment and to "consider the available human rights

294 See id. , at 37 (noting that NGOs have traditionally been "aggressive . . . and sometimes hyperbolic" in their attempts to alter corporate behavior).

records of public security forces, paramilitaries, [and] local and national law enforcement" in determining whether to do business in a given foreign jurisdiction; signatories further pledge to "have an interest in ensuring that the actions taken by governments, particularly the actions of public security providers, are consistent with the protection and promotion of human rights."[295] Many of the members of the Voluntary Principles are petroleum and mining corporations that have heretofore elected to "Fight" in their interactions with human rights NGOs:[296] if professional and accountable NGOs can accept the obligation for corporations, even as they accept responsibilities to human rights protection, to continue to be profitable, and agree to work together with such corporations to achieve these joint outcomes, it may well be possible to beguile corporations away from "Fight" and into more cooperative strategies such as "Engage" or "Accommodate" with outcomes preferable to corporations, NGOs, and society. As Special Reporter Ruggie has urged, NGOs should work with states and international organizations to eradicate the corrupt and brutal governments that lure and "facilitate" foreign investment with weak, nonexistent, or outright oppressive legal regimes.[297] Finally, NGOs should maintain the capacity, and hold it in reserve, to "Litigate" and "Regulate" in order to discipline corporations that pledge to "Engage" or "Accommodate" only to violate their agreements.

This present study also strongly suggests that, although corporate preferences vary, the modern corporation must accept that the political economy has changed and that corporate survival will not be assured by a slavish devotion to shareholders and a constant battle against the existence and interests of stakeholders but rather by engaging, and even accommodating, important stakeholders whose interests can be served in such a way as to enhance the corporate reputation and its profitability. Corporations in the CSR era must draw NGOs into a relationship—with the degree of closeness a function of strategy— to "enhance the sophistication of their decisionmaking" and "introduce alongside analyses of the bottom line"[298] analyses of ethical and moral responsibilities—including the protection of human rights—that

295 See U.S.-U.K. Voluntary Principles on Security and Human Rights, available at http://www.voluntaryprinciples.org/participants/companies.php.

296 Membership in the Voluntary Principles reads like a "Who's Who" of the petroleum and mining industries and of the targets of ATCA litigation. The following are the members: Amerada Hess, AngloGold Ashanti, Anglo American, BG Group, BHP Billiton, BP, Chevron, ConocoPhilips, ExxonMobil, Freeport McMoRan Copper and Gold, Marathon Oil, Newmont Mining Corporation, Norsk Hydo, Occidental Petroleum, Rio Tinto, Shell, and Statoil. Id.

297 Kinley et al., supra note 130 .

298 DONALDSON, supra note 29, at 108.

they must fulfill to protect and enhance their reputations with stakeholders—an increasingly important constituent of profitability.

However, corporations need not and should not rely exclusively on NGOs to perform this service. They will need to expand or create CSR departments staffed by executives—and perhaps even by former NGO leaders—to provide in-house counsel to managers and to boards of directors as to existing and evolving normative standards, draft best practices and Codes of Conduct, and assess whether corporate conduct reflects its commitments and its intended strategy.[299] Moreover, will benefit by expanding their capacity not only to make and modify agreements but to implement them, thereby reducing their litigation and reputational injury risks. Specific proposals might include the creation of or contracting with highly professional private security forces to provide site security against threats in areas of operations;[300] whatever the cost of such a measure, it is cheaper than reliance on the state security forces in regimes known to violate human rights, and the cost—at least in part—can be passed along to consumers. Another method of reducing risk and enhancing compliance with Codes of Conduct would entail the hiring and detailing of human rights risk managers and legal advisers at corporate headquarters and at major field operations, with mandates to provide detailed instructions to corporate personnel regarding compliance with Code provisions protecting human rights and the authority to make decisions, to include ceasing operations or taking any other measures reasonable and proper to ensure compliance, on behalf of the corporation. Finally, corporations should ensure that their CSR teams maintain a forward and proactive presence in every forum where their interests and obligations are at stake: in the field, in negotiations with NGOs, in the academic and legislative debates about the reform of the ATCA and corporate law more generally,[301] in transnational institutions debating proposals such as the Norms, and in the marketplace. The knowledge, experience, and empathetic understanding of the NGOs agenda that CSR teams will

299 See LUO, supra note 24, at 223 (describing a proposal to create "CSR auditors" with these functions).

300 Private corporations do in fact offer security consulting and security forces to other private corporations to protect them against a panoply of risks. Blackwater and DynCorp are two of the more prominent private military contractors. See Blackwater USA, available at <http://www.blackwaterusa.com/>.; see also DynCorp International, available at http://www.dyn-intl.com/.

301 The Global Compact specifically targets academics and universities in an effort to "increase knowledge and understanding of corporate citizenship." See Academic Participation in the Global Compact, available at http://www.unglobalcompact.org/HowToParticipate/academic_network/index.html. Corporations should devise ways to participate in this and other discursive arenas so that their interests are represented and considered as new normative frameworks are proposed and debated.

acquire will assist corporations in identifying options for mutual gain through integrative, rather than distributive, bargaining.

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By spring 2009—even before pretrial discovery is complete—the plaintiffs in the case of PISSED v. ExxonMobil et al. reach a settlement with all the defendants except ExxonMobil. The terms require each of the settling defendants to adopt a detailed Code of Conduct committing the corporation to a series of measures protective of the environment, labor, and human rights, as well as provisions consenting to NGO monitoring and reporting and to membership in the Global Reporting Initiative. The defendants also agree, under the terms of the settlement, to continue periodic discussions with NGOs in which their performance will be assessed and recommendations made for adaptations to enhance implementation. Finally, each settling defendant agrees to pay into a victims' fund, with each victim eligible for monetary damages up to $50,000; total liability for all the defendants thus does not exceed $100 million. Neither the NGOs nor the former defendants have any comments, but from their faces on the steps of the courthouse one might conclude, as does the lead story in the Houston Chronicle, that all save for ExxonMobil are satisfied with the result.

On the announcement of the settlement, the share prices of the settling defendant rise several percentage points, while the share price of ExxonMobil dips slightly as investors factor in the slight probability that the corporation may be found liable at trial, given amendments before Congress to strengthen the ATCA as well as in a new wave of lawsuits rumored to be filed by NGOs in connection with ExxonMobil operations in Asia.

* * *

The results of the present study, illustrated and given a concrete if somewhat fanciful form by way of a hypothetical scenario, offer evidence that corporate profitability and the protection of human rights are not mutually exclusive and may even each be a necessary condition for the attainment of the other. Through negotiation based on considerations of self-interest and anticipation of the best strategy available to the other, it may well be possible for corporations and NGOs can produce jointly satisfactory outcomes that protect human rights while increasing profitability. The relationship is, or should be, interdependent, rather than conflictual; a partnership, rather than a battle. To reach this state of interdependence, it is useful to advance the theoretical debate beyond simple characterizations of NGOs as good and

corporations as evil—a claim some academic literature has been fond of making since the mid-nineteenth century—and to recognize that the contemporary political economy requires profit to protect human rights, and human rights to protect profit. Ultimately, we can, and must, have both, or we shall have neither.