# Judicial Activism in Transnational Business and Human Rights Litigation

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ABSTRACT

*This Article explores a more expansive adjudicative role for domestic judiciaries in the United States, United Kingdom, and Canada in private law disputes that concern personal and environmental harm by multinational corporations that operate in the Global South. This expansive role may confront, but not upend, existing understandings around the separation of powers in common law jurisdictions. After canvassing existing literature on judicial activism and detailing legality gaps in the select common law home States that may warrant a more activist judicial role, this Article suggests three ways to actualize activism. First, judges can heed Thomas Franck's recognition that there is a distinction between judicial policy and foreign policy. That distinction encompasses transnational business and human rights litigation, which does not directly involve governments as parties to the litigation. Second, home State judges can prioritize the need to fill transnational access to justice gaps in two ways: expanding the list of violations in the Alien Tort Statute's "law of nations" requirement and better aligning the ex-ante/ex-post flip in "boomerang litigation." Third, transnational business and human rights litigation may be an apt area to employ judicial morality in deciding "hard cases." Judges can utilize a natural law framework that prioritizes corporate accountability over formalistic doctrinal conceptions.*

DOI: https://doi.org/10.15779/Z38M03XZ5P

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## INTRODUCTION

Recent trends in Western common law home State jurisdictions portend a path for Global South host State victims to pursue compensatory tort remedies against multinational corporations (MNCs) for human rights and environmental abuses.[1] Over the past few decades, home state legislatures have failed to enact statutes that include provisions around the liability of MNCs for personal and environmental harms abroad. As such, existing statutory frameworks in salient home States—the United States, United Kingdom, and Canada being the focus here—do not provide a means for home State courts to systemically impute liability upon MNCs. Moreover, home State judiciaries have tended to take restrained or deferential approaches. Consequently, corporate revenues that could be used to compensate harmed Global South victims have been effectively sheltered by home State laws.

Scholars have memorialized the above scenario as part of a "governance gap" or a "missing forum" to suggest a number of solutions that, in one way or another, expect leadership from the political branches of government.[2] This circular reasoning places faith in the very institutions that have consistently failed to create systemic avenues for Global South host State victims to seek redress from MNCs in the course of transnational commerce. Even if it also evinces some circularity, what has received relatively less attention in the literature is the role that domestic judiciaries can, in theory, play in the midst of existing legislative gaps and a previous policy of judicial restraint and deference. Distinct from the political branches of government that require a level of consensus to pass legislation, judiciaries are better situated to reverse past adjudicative approaches in a manner that results in a more consistent transfer of corporate revenues to Global South host State victims who have suffered human rights and environmental violations.

Previous scholarship from the common law world has assessed the place of domestic judiciaries vis-à-vis the political branches of government in light of constitutional constraints or established practices related to foreign affairs with other nations.[3] It is problematic to import that discourse into the realm of transnational business and human rights litigation. Whereas constitutional or foreign relations concerns often involve interactions that State governments have with actors abroad, the potential domestic law liability of MNCs in transnational

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1. Sara Seck, *Conceptualizing the Home State Duty to Protect Human Rights, in* CORPORATE SOCIAL AND HUMAN RIGHTS RESPONSIBILITIES: GLOBAL, LEGAL AND MANAGEMENT PERSPECTIVES, 25, 29 (Karin Buhmann, Lynn M. Roseberry & Mette Morsing eds., 2011) (host State as "where the impact of the human rights violations is felt").

2. PENELOPE SIMONS & AUDREY MACKLIN, THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS AND THE HOME STATE ADVANTAGE (2014); MAYA STEINITZ, THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE (2018).

3. *See, e.g.* Richard A. Falk, *The Role of Domestic Courts in the International Legal Order*, 39 IND. L.J. 429 (1964); Jules Lobel, *The Limits of Constitutional Power: Conflicts between Foreign Power and International Law*, 71 VA. L. REV. 1071 (1985).

scenarios is one degree removed from prevailing understandings of foreign affairs. MNCs function within "disembedded markets," operating at an arm's-length from Western home State governments.[4] They are not per se the state or agents thereof.

In light of prevailing legislative and judicial gaps in Western home States where transnational business and human rights litigation is often commenced, I argue for a more expansive adjudicative role for home State judiciaries. This expansive role may confront—although not necessarily upend—existing understandings around the separation of powers, particularly in common law jurisdictions. However, it prioritizes the necessity of affording private law remedies to those who have experienced violations of their personal dignity and security. And it serves as a method to fill transnational access to justice gaps. In turn, judicial lawmaking can potentially curtail MNC wrongdoing in the Global South.

Part I of this Article presents literature on judicial activism from both its proponents and opponents. I outline how the concept has been understood in both domestic and transnational disputes. Part II details existing legislative and judicial gaps when it comes to transnational business and human rights litigation. Although there have been failures and deficiencies in other home States, I focus particularly on the United States, the United Kingdom, and Canada, where a large proportion of transnational business and human rights litigation has been commenced. Part III suggests three methods by which judicial activism can be actualized in common law home State courts. First, judges can heed Thomas Franck's distinction between judicial and foreign policy, which becomes acute in transnational business and human rights litigation that does not specifically include domestic or foreign governments as parties to the litigation. Second, judges can prioritize the need to fill transnational access to justice gaps given the lack of remedial avenues open to Global South host State victims. And third, this area of litigation may be a prime example to elicit judicial morality in "hard cases." Judges can utilize a natural law framework that prioritizes accountability and remedies for international human rights violations over formalistic doctrinal conceptions that have previously hindered corporate accountability.

## I. ACADEMIC CONCEPTIONS OF JUDICIAL ACTIVISM

As Keenan Kmiec notes in his 2004 article *The Origin and Current Meanings of Judicial Activism*, judicial activism is often used as a concept by judges and academics without a presentation of what it actually means.[5] In his article, Kmiec construes judicial activism as consisting of five "core meanings"

4. *See generally* Peer Zumbansen, *Corporate Governance, Capital Market Regulation and the Challenge of Disembedded Markets* in CORPORATE GOVERNANCE AND THE GLOBAL FINANCIAL CRISIS: INTERNATIONAL PERSPECTIVES, 248 (William Sun, Jim Stewart, & David Pollard eds., 2011).

5. *See* Keenan Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 CAL. L. REV 1441, 1443 (2004).

or, in other words, five instances in which it can be said that a judge has exhibited activism. These instances are when: i) the political branches of government have taken arguably constitutional actions that are then nullified or overturned by courts; ii) courts fail to adhere to their own precedent or that of higher courts; iii) courts legislate from the bench; iv) courts employ novel interpretations of past laws; and v) courts make law with the results in mind.[6] In a similar vein, Sterling Harwood interprets judges as being activists when they refuse to defer to the other branches of government, relax requirements around justiciability (i.e., take an expansive view of jurisdiction), break with precedent, and loosely or creatively interpret constitutions, statutes, or judicial precedents.[7]

From these definitions and characterizations, judicial activism as a concept is intricately connected to the separation of powers. The above authors were concerned with the extent to which judicial power seeps into the normative purviews of the legislative and executive branches of government.[8] That concern alone makes judicial activism relevant in transnational disputes because it is the executive branch, through constitutional decree (in the United States) or by the practice of Crown prerogative (in Canada and the United Kingdom), that is tasked with building relations with other nations' governments. As such, separation of powers concerns are present in transnational business and human rights litigation. MNCs often contract with or align closely with host State governments and/or their militaries in the course of manufacturing and extractive activities and, increasingly, public works projects around infrastructure and transportation. Those public-private interactions can affect foreign relations.

Judicial activism is often viewed in contradistinction to judicial restraint—whether that restraint be practiced vis-à-vis the legislative process or the executive's ability to engage in foreign relations. Edward McWhinney, in the second of his two seminal articles on the US Supreme Court, argued that rather than dichotomous classifications, these two categories are better viewed as points on a continuum.[9] McWhinney surmised that a judge's decision to exhibit activism or restraint is contingent on questions of timing and technique. He asks, "[a]re there particular time periods appropriate for the exercise of strict (restrictive) judicial interpretation of a constitution or statute, and other periods in which more ample conceptions of the judicial office are desirable or necessary?"[10] He asserts

6. *See id.* at 1444.

7. *See* STERLING HARWOOD, JUDICIAL ACTIVISM: A RESTRAINED DEFENSE (1996); see *also* Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE, 236, 236–247 (1982) (six dimensions of judicial activism).

8. *See e.g.* Kmiec, *supra* note 5, at 1447; HARWOOD, *supra* note 7, at 23. Judicial activism is distinct from judicial discretion, which is about the ability for judges to make more than one right choice. *See* Kent Greenwalt, *Discretion and Judicial Decision: The Elusive Question for the Fetters that Bind Judges, Legislation*, 75 COLUM L. REV. 359 (1975); Roscoe Pound, *Spurious Interpretation*, 7 COLUM L. REV. 379 (1907).

9. Edward McWhinney, *The Great Debate: Activism and Self-Restraint and Current Dilemmas in Judicial Policy-Making*, 33 N.Y.U. L. REV. 775, 790 (1958).

10. *Id.* at 791.

that the initial periods after a statute is passed warrant more restrictive interpretations.[11]

As for technique, McWhinney takes the position that the level of judicial activism (which he relegates to expansive statutory interpretations[12]) depends largely on a nation's constitutional structure. A "simple and unitary" constitution that places significant power in the legislative and executive branches requires little, if any, judicial activism. On the contrary, a "complex constitutional structure" based on a separation of powers and "amending machinery which works only with extreme difficulty and slowness" necessitates greater responsibility—and even a primary one—upon the judiciary in matters of constitutional and statutory interpretation.[13]

While most authors have approached judicial activism in relation to domestic disputes, little has been written on the concept in relation to transnational and international disputes. In his 2012 study, Fuad Zarbiyev proposes a conceptual framework for judicial activism in international law.[14] He views activism as dependent on prevailing social conventions. He comes upon a number of variables to determine whether activism is justified for judges who interpret international legal mechanisms. These factors are:

- the conception of the judicial function (are judges pursuing "a grand design"?);
- the degree of determinacy in the system (how is the law defined and interpreted?);
- the existence of a hierarchically structured judicial system (is there an appeals structure?);
- prudential doctrines (are there times when judges ought not interfere with political branches?);
- the mechanisms of political control (are there exit routes from judicial decisions?);
- the legitimating function of legal academics (are singular judicial decisions viewed more broadly in light of neutral principles?);
- the nature of proceedings (ad hoc, advisory, or permanent tribunals);
- discursive constraints (what, if any, disciplinary rules must judges adhere to?); and

11. *Id.*

12. For this type of approach to judicial activism, *see* Wallace Mendelson, *The Politics of Judicial Activism*, 24 EMORY L. J. 43 (1975).

13. McWhinney, *supra* note 9, at 792.

14. Fuad Zarbiyev, *Judicial Activism in International Law - A Conceptual Framework for Analysis*, 3 J. INT'L DISPUTE SETTLEMENT 247 (2012).

- social legitimacy considerations (do judges have to justify their decisions to the wider public?).[15]

In the next two subsections, I review a spectrum of opinions on judicial activism, which range from more progressive takes to more conservative ones. By and large, these two camps fall within what Hugh Thirlway dichotomizes as formal versus substantive judicial activism. Formalists, much like positivists in legal philosophy, discussed later, view the law as complete with the provision of an answer to every possible scenario.[16] From this perspective, there is no room for activism (or at least very little). Therefore, when judges depart from the accepted apparatus of the law, they are, in fact, acting *ultra vires* their powers.

On the other hand, substantivists, again like their counterparts in legal philosophy, accept that there can be lacunae in existing laws. Judges can accordingly supplement or even create law by themselves without explicit authority from the other branches of government.[17] There are also intermediary positions, such as H.L.A. Hart's notion that judicial discretion is permissible in areas of "penumbra."[18] However, Hart would rightfully be classified as being closer to the formalists because, for him, the "heart of law" leaves no room for activism.[19]

As a point of caution, most of the views presented below are from American authors or those who have opined on judicial activism within the American legal system.[20] Their analyses can be analogized to other common law systems, particularly the United Kingdom and Canada, where transnational business and human rights litigation has also commenced. The general thrust of the US-centric literature concerns the extent to which judges can weigh in on a dispute when it abuts the political branches of their own government or other governments around the world.

#### *a. Some supportive views*

There is a long-held understanding that domestic judges, as arms-length actors largely insulated from political pressures once in their posts, are the

15. *Id.* at 254–57.

16. Hugh Thirlway, *Judicial Activism and the International Court of Justice* in 1 LIBER AMICORUM JUDGE SHIGERU ODA, 75–76 (Nise Ando et al. eds., 2002).

17. *Id.*

18. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

19. *Id*. at 614–15.

20. *But see* Kent Roach, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE (2016); Bruce Feldthusen, *Unique Public Duties of Care: Judicial Activism in the Supreme Court of Canada*, 53 ALTA. L. REV 955 (2016) (judicial activism in Canada). *See also* Brice Dickson, *Activism and Restraint within the UK Supreme Court*, 21 E.J.O.C.L.I. 1 (2015) (judicial activism in the United Kingdom).

cornerstone of common law systems. Brian Bix notes that Blackstone favored "judicial legislation as the strongest characteristic of the common law."[21]

Kmiec traces the first modern usage of the term "judicial activism" to Arthur Schlesinger Jr.[22] In a 1947 *Fortune* article, Schlesinger wrote that a wise judge "knows that political choice is inevitable; he makes no false pretense of objectivity and consciously exercises the judicial power with an eye to social results."[23] Despite his apparent approval of activist judges, Schlesinger thought it best for judges only to be activists in cases that concern civil liberties. He characterized the Black-Douglas "progressive" wing of the US Supreme Court, in effect, to have adopted the posture that "the Court cannot escape politics: therefore, let it use its political power for wholesome social purposes."[24] Seemingly, for Schlesinger, it would be a wholesome purpose for judges to thwart precedent, legislate from the bench, or judge with the result in mind when it affects people's civil liberties.[25] In contemporary terms, his stance would arguably encompass transnational corporate human rights violations.[26]

In his 1964 article, *The Role of Domestic Courts in the International Legal Order*, Richard Falk took a partisan position that supported judicial lawmaking independent of the political branches. He sought to push back against "[t]he paternalistic claim that the government can protect its citizens better if they are denied a judicial remedy in an international law case."[27] He confronted this parochial stance on judicial lawmaking as something that "undermines the effort to transform the law of nations into a law of mankind."[28] In another article he published three years prior, Falk had begun to develop a participatory theory of domestic courts in the international legal order. There, he argued that deference on the part of domestic judiciaries to national policy in international affairs actually results in less objective legal results.[29] He did not see a conflict between domestic courts being constituent institutions of specific States and simultaneously being agents of an emerging international order.

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21. Brian Bix, *Positively Positivism*, 85 VA. L. REV. 889, 907 (1999) (reviewing ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998)), cited in Kmiec, *supra* note 5, at 1444 (internal citations omitted).

22. *See* Kmiec, *supra* note 5, at 1444.

23. Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE MAG. (Jan. 1947).

24. *Id.*

25. *Id.*

26. Despite his dissent in *Lochner* in which he promoted "judicial self-restraint," Holmes, like Schlesinger, was supportive of some degree of judicial activism when it came to cases around civil liberties. *See Lochner v. New York*, 198 U.S. 45, 76 (1905).

27. Falk, *supra* note 3, at 430.

28. *Id.* at 430.

29. Richard A. Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino*, 16 RUTGERS L. REV. 1, 7 (1961).

For Falk, international disputes brought before domestic courts called for two types of autonomy: institutional autonomy (i.e., the separation of the judicial branch from the political branches of government) and doctrinal autonomy (i.e., the independence of the rules of international law from the political sphere).[30] Falk viewed the executive and judicial branches as operating within distinct spheres of interest. Whereas the executive branch acts in the public interest with the goal of reaching settlements and agreements among States around collective action problems (with indirect consequences to individuals who have been affected in one way or another by such problems), the judicial branch has a private interest in determining whether there has been a specific infringement of individual rights.[31]

Falk acknowledges that a judiciary that interprets international law in accordance with the executive branch results in a single national voice in international law disputes. However, in what he characterizes as "non-criminal and non-punitive" international law cases brought before domestic courts, he devises ten reasons that support a rationale for judicial independence, which would be akin to a more activist stance for the purposes of this Article:

- The absence or unavailability of international tribunals;
- A loss of respect for international law as a legal system if it is subservient to diplomatic processes and goals;
- Domestic courts have an opportunity to advance international law rules;
- The domesticity of the forum is not essential to the dispute;
- Judicial independence shatters the notion that sovereignty permits a State to reconcile its national interests with its international law obligations;
- A general acceptance of judicial independence will lessen the burden (or surprise) experienced by executive branches;
- Judicial independence preserves a private sphere of international transactions that do not succumb to government control;
- The visibility of domestic courts makes them averse to political pressures;
- Via their opinions, domestic courts have an educational function to teach the public about the rules of international law; and
- Domestic judicial opinions can play a role in promoting a global legal order.[32]

30. *Id.* at 431.

31. *Id.* at 432.

32. *Id.* at 440–442.

Specific to the United States, Falk views judicial independence in foreign relations-adjacent matters as a suspension of the *Bernstein* doctrine.[33] He considers it best that domestic judges retain discretion on when to opine on transnational disputes about foreign relations. Naturally, this opens the door to more activist lawmaking on the part of judges, including in transnational business and human rights litigation.

Similarly, Franck has advocated for a more expansive judicial role in transnational disputes. His 1992 book, *Political Questions/Judicial Answers,* is dedicated to addressing the fact that judicial restraint in the United States vis-à-vis the other branches of government in cases that implicate foreign relations actually stems back to colonial British common law doctrine.[34] He traces prudential doctrines around foreign relations to a British Crown Court's decision in *Nabob of Arcot v. East India Company*, a case which concerned a treaty between the Nabob and the East India Company.[35] Franck writes:

> The tradition of [judicial] abdication has been built, bit by bit, on the straw foundations of dicta imported from the British monarchial system, deployed in cases where it was irrelevant to the matters being litigated, and thus was introduced into American law essentially without benefit of genuine adversary process, let alone profound jurisprudential reflection.[36]

Franck's argument can be summarized in his statement that "there are no valid reasons—constitutional, prudential, technical, or policy-driven—for treating foreign-relations cases differently than others."[37] For him, the only relevant criterion for courts to assert jurisdiction is a "ripe dispute between parties with standing."[38]

Addressing Justice Marshall's opinion in *Marbury v. Madison*, one of the first decisions that began to construct a political question doctrine in the United States, Franck writes that "no effort is made [in *Marbury*] to explain *why* foreign affairs should be placed beyond the reach of judicial review."[39] As Franck's blocked quote above pronounces, the political question doctrine and other similar deferential and prudential doctrines employed in transnational business and human rights litigation crept into early US Supreme Court decisions in *obiter* through British cases that applied those doctrines.[40]

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33. *Id.* at 21. Also, *see Bernstein v. Van Heyghen Freres*, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 US 772 (1947) (the doctrine allows the executive branch to intercede in Act of State cases when adjudication would not impinge upon foreign relations).

34. THOMAS M. FRANCK, POLITICAL QUESTIONS JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992).

35. Nabob of Arcot v. the East India Company, 3 Bro. C. C. 292; 29 Eng. Rep. 544 (Ch. 1791).

36. FRANCK, *supra* note 34, at 21.

37. *Id.* at 7.

38. *Id.*

39. *Id.* at 4 (emphasis in original).

40. Also, *see id.* at 8 (referring to this phenomenon as "doctrinal cacophony").

Franck suggests US courts have implicitly made a Faustian Pact (i.e., a deal to "sell their soul") with the other branches of government. They have widened their jurisdiction with regard to domestic matters in exchange for restraint in transnational matters that abut foreign relations.[41] Like his predecessors, Franck criticizes the notion professed by some lawyers and judges that the nation must operate with a single voice—the President's. He makes a crucial point—and one that applies today to transnational business and human rights litigation in common law home States: "[w]hen courts speak in cases and thereby incidentally affect some aspect of foreign relations, they do not make foreign policy. They make judicial policy."[42] By this, he means that there is a distinction between, on the one hand, the ongoing and entrenched relationships of one government with one or more other governments around the world and, on the other hand, how individual rights are interpreted in a specific dispute that crosses State boundaries. I will return to this notion later as one way in which home State courts can engage in activism.

### *b. Some restrained views*

Like more progressive views, restrictive views of the judicial branch's ability to make or fill gaps in the law (in both domestic and transnational disputes) also go back centuries to proponents of legal positivism. Jeremy Bentham (whom Dworkin identifies as the father of the positivist movement) characterized judicial lawmaking as "miserable sophistry."[43] David Dyzenhaus attributes Bentham's contempt of judicial lawmaking to two things.[44] First, Bentham was concerned that appointed judges who come from elite social classes would be reticent to progressive legislative reform. Second, common law judiciaries would be apt to see themselves as safeguarding and controlling law's meaning through their place as "exclusive exponents of [artificial] reason."[45] In both instances, Bentham's contempt of common law judges stems from a perception that they view themselves as vanguards of social order.

More recently, in *Proper Judicial Activism*, Greg Jones argues that the American constitutional structure stresses restraint: judges only intervene when a decision is required to maintain the separation of powers among the co-equal branches of government. He asserts, "[t]he overarching practical principle guiding the Founders was a fear of the concentration of political power in government."[46]

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41. *See id.* at 10–20 for an elaboration on this Faustian Pact.

42. *Id.* (emphasis added).

43. *See* RICHARD A. COSGROVE, SCHOLARS OF THE LAW: ENGLISH JURISPRUDENCE FROM BLACKSTONE TO HART 56–57 (1996); RONALD DWORKIN, HART'S POSTSCRIPT AND THE CHARACTER OF POLITICAL PHILOSOPHY, 24 OXF. J. LEG. STUD. 1, 27 (2004).

44. *See* David Dyzenhaus, *The Very Idea of a Judge*, 60 UNIV. TORONTO L. J. 61, 63 (2010).

45. *Id.*

46. Greg Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141, 146 (2001).

For Jones, only that fear of concentrated power in the hands of the political branches (particularly the executive branch) warrants judicial intervention.[47]

Contrary to the structural approach for which Jones argues, "improper judicial activism" is when judges construe that "law is only policy and that the judge should concentrate on building the good society according to the judge's own vision."[48] At odds with more expansive takes on activism forwarded by, for instance, Schlesinger and Holmes, Jones does not see a place for activism in cases that concern civil liberties or human rights.[49] He decries this type of activism as "judging in the service of conscience," a characterization he makes of the progressive wing of the Warren court.[50]

Jones' "structural judicial activism" promotes a majoritarian respect for the elected branches. In his view, activism to overturn instances of the political branches acting *ultra vires* their powers demonstrates fidelity to the constitution. Quoting Judge J. Clifford Wallace, Jones takes the position that "judges should *always* be hesitant to declare statues [*sic*] or governmental actions unconstitutional [because it] … encourages the separation of powers, protects our democratic processes, and preserves our fundamental rights."[51] In essence, Jones gives the political branches a carte blanche to legislate and engage in foreign relations as they see fit as long as they do not impinge on the powers of the co-equal branches of government.

Arguably one of the most prominent and consistent critics of judicial activism has been the University of Chicago Law School professor Eric Posner. In a 2011 article with Daniel Abebe, Posner takes the position that "Foreign Affairs Legalism" or FAL (where the judiciary weighs in on disputes that abut foreign affairs), in fact, degenerates rather than advances international law.[52] FAL critics persist with some of the arguments refuted by more progressive voices around judicial activism, namely that the fluidity of relations among States (Franck's "Too Much at Stake" category) warrants a sphere in which the executive branch has the freedom to act without being second-guessed by the judiciary.

Posner and Abebe view FAL as appearing in three distinct guises: i) the Benvenisti "competitive" or "zero-sum" model (i.e., more activist courts translate into a tightening sphere for the executive branch to define international legal rules); ii) the Koh "balanced institutional participation" model (i.e., courts play a

47. *See id.*

48. *Id.* at 144.

49. *See e.g.*, Schlesinger, *supra* note 23.

50. *Id.* (internal citation omitted).

51. *Id.* at 166–167 (emphasis added); J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 2 (1981).

52. *See* Daniel Abebe & Eric Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 509 (2011).

role in constructing shared norms and practices that are internalized into domestic laws and politics); and iii) the Slaughter 'transnational governance networks' model (i.e., inter-State judicial dialogue to craft a global rule of law without centralized global institutions).[53] To Posner and Abebe, these models all share three themes. First, they capture judiciaries as having the capacity as well as an interest in restraining the executive branch.[54] Second, judicial intervention promotes international law.[55] And third, rather than bolstering the global rule of law, executive pre-eminence interferes with it as, to FAL proponents, executive branches often prioritize national self-interest over multilateral efforts.[56]

Posner and Abebe do not doubt that, at times, courts promote international legal rules, including widely accepted norms of international human rights. However, they view judicial decisions as having minimal effect on international law, a reality that militates in favor of more restraint.[57] Writing prior to Posner and Abebe's critique of FAL, Franck sees this approach as one of the bulwarks of the restraint camp.[58] He remains unconvinced that the judiciary should forego its rightful jurisdiction to adjudicate a foreign relations-related matter simply because it may be limited in its capacity to compel the executive branch to follow judicial decisions.

Posner and Abebe also view courts as being too slow and decentralized to develop coherent policies that affect international law.[59] Furthermore, in their view, while judges may be impartial, they are not accountable for their decisions like members of the political branches of government who must survive the next poll or vote. That unaccountability gives them "little feel" for international politics and the public interest.[60] Overall, the authors argue that judiciaries are not best-placed to handle foreign affairs-related matters. For them, domestic doctrine has not developed to handle such disputes—what Franck views as an historical accident that seeped into the common law through *dicta* opinions.[61]

It should be noted that the very characteristics that Posner and Abebe see as crutches to courts weighing in on foreign affairs-related matters are what proponents of judicial activism, in fact, see as strengths.[62] When Posner and Abebe say that courts are too decentralized, they are essentially characterizing courts as structurally incapable of building a coherent foreign policy.[63] Franck

53. *See id.* at 512–517.
54. *See id.* at 518.
55. *See id.*
56. *See id.*
57. *See id.* at 531.
58. FRANCK, *supra* note 34.
59. *See* Abebe & Posner, *supra* note 52, at 509.
60. *Id.* at 544.
61. *See id.*; FRANCK, *supra* note 34, at 21.
62. *See* Abebe & Posner, *supra* note 52, at 519.
63. *See id.* at 542.

would likely agree with that sentiment as, rather than delineating relations among State governments, judiciaries make one-off decisions in light of claims around individual rights and private law remedies.[64] Similarly, when Posner and Abebe say that courts have "little feel" for international politics, Falk would respond by noting the aforementioned conflicts of interest between the executive and judicial branches.[65] Executive branches have conciliatory or settlement objectives, whereas judicial branches have rights-based objectives.

## II. HOME STATE LEGALITY GAPS

Before making a case for an expansive judicial role in transnational business and human rights litigation, it is first necessary to establish the circumstances that may lead domestic judges to assume that role. In short, there has been a consistent stream of legislative and judicial legality gaps in common law home State legal systems. As a consequence, Global South host State victims have been hindered from pursuing private law remedies pursuant to corporate human rights violations. These gaps can be broken into four categories: failed legislation, deficient legislation, judicial restraint, and judicial deference.

Statutory provisions that, in theory, could ground transnational corporate human rights litigation in a home State's jurisdiction and allow for a duty of care on the part of an MNC's parent and/or subsidiary/contracting companies remain conspicuously absent. Home State legislatures have previously exhibited ambivalence or outright opposition to statutes that would include provisions around a private right of action for corporate-related harms committed in host States, predominantly in the Global South.

Alongside legislative gaps, home State judiciaries have—although not fatalistically—practiced restraint or taken deferential stances with respect to the courts or governments of foreign host States. For instance, common law home State courts have restrictively interpreted corporate separateness as to be unwilling to pierce the corporate veil. For example, US courts have limited the Alien Tort Statute's application to State actors and for violations that take place within US territory.[66] And, at times, despite home State courts acknowledging that a host State's legal system is wholly deficient to adjudicate complex mass transnational tort claims against an MNC, they have still deemed that legal system as a more appropriate forum to hear such claims.

### *a. Failed Legislation*

Despite recent efforts in some States to pass human rights transparency and due diligence statutes, in States where transnational business and human rights

64. *See* FRANCK, *supra* note 34, at 21–22.

65. *See* Abebe & Posner, *supra* note 52, at 544; Falk, *supra* note 3, at 432.

66. Nestlé USA, Inc. v. Doe et al., 593 U.S. ____ (2021), at 5 [Nestlé].

litigation has commenced—the United States, United Kingdom, and Canada being most notable—there are no provisions to allow for MNC tort liability for host State human rights and/or environmental harms. On occasion, individual lawmakers have introduced draft legislation only to be turned away by their legislatures.

*i. Amendments to Alien Tort Statute*

In its first two centuries, the 1789 *Alien Tort Statute* (ATS) was seldom invoked—and certainly not for transnational corporate-related cases.[67] Since it has been called upon in corporate tort claims for human rights violations, the statute's ambiguity around the types of defendants to which it applies and its territorial reach have barred Global South host State plaintiffs from advancing claims in US courts. The stumbling block for Global South plaintiffs in, for instance, *Kiobel v. Royal Dutch Petroleum Co.*,[68] *Sarei v. Rio Tinto, PLC*,[69] and even the Supreme Court's 2021 decision in *Nestlé USA, Inc. v. Doe*[70] has been that, without legislative guidance, appeals courts see themselves as being handcuffed such that they are unable to expand the traditional scope of customary international law violations to non-State actors, including MNCs.[71]

In 2005, Diane Feinstein introduced the ATS Reform Act (ATSRA) to clarify the jurisdiction of the US federal courts in ATS claims.[72] Had it passed, the act would have replaced the ATS's provision with the following:

> The district courts shall have original and exclusive jurisdiction of any civil action brought by an alien asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort. The district courts shall not have jurisdiction over such civil suits brought by an alien if a foreign [S]tate is responsible for committing the tort in question within its sovereign territory.[73]

Additionally, the ATSRA would have replaced the term "law of nations" in the ATS's current iteration with a list of defined human rights violations. Directly relevant to transnational business and human rights disputes, the ATSRA's proposed defendants would have included "a partnership, corporation or other

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67. Stephens notes that the ATS was invoked in fewer than 25 cases between 1789 and 1989. In that time, it was only cited in two successful cases: Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) and Adra v. Drift 195 F. Supp. 857 (D. Md. 1961). *See* Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1472 (2014). See also Judiciary Act of 1789 § 9, 1 Stat 73, 76-77, codified as amended at 28 U.S.C. § 1350.

68. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) [Kiobel].

69. Sarei v. Rio Tinto, PLC, 671 F.3d 736 (2011).

70. Nestlé, *supra* note 66.

71. *But see e.g.* Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion Essay*, 51 VA. J. INT'L L. 977 (2010) (arguing that non-State actors have historically entered into treaties).

72. Alien Tort Statute Reform Act, S. 1874, 109th Cong. (2005), https://www.congress.gov/bill/109th-congress/senate-bill/1874/text [hereinafter ATSRA].

73. *Id.* at § 2(a).

legal entity organized under the laws of the United States or of a foreign [S]tate."[74] Consequently, US courts would no longer have been able to assert (even if in *obiter*) that corporate liability falls outside the ATS's scope.

One week after introducing the proposed act—and before it could be considered by the Judiciary Committee—Senator Feinstein withdrew the bill, citing backlash from human rights groups as a reason for the bill's withdrawal.[75] However, given subsequent research conducted by Jeffrey Davis on the concerted lobbying efforts that were undertaken by business-friendly groups that opposed the ATSRA, that justification appears suspect.[76] Davis found that from 2003 up to when the ATSRA was introduced in 2005, the Chamber of Commerce, alongside other corporate-friendly groups such as USA Engage and the Washington Legal Foundation, consistently lobbied the US State Department, the Justice Department, the National Security Council, and the US Trade Representative to eliminate the potential for systemic corporate liability under the ATS or any putative amendments.[77] Irrespective of the reason, the ATSRA never passed into law.[78]

In 2022, Senators Dick Durbin and Sherrod Brown introduced the *Alien Tort Statute Clarification Act* (ATSCA).[79] The Act was a response to the 2021 decision in *Nestlé,* where the Supreme Court rejected the ATS's extraterritorial application. In *Nestlé*, former laborers on cocoa farms in Côte d'Ivoire claimed Nestlé, a US-headquartered global food conglomerate, aided and abetted forced labor. Eight justices applied the "focus test" from *RJR Nabisco, Inc. v. European Community* to hold that child labor—the focus of the claim—occurred outside US territory.[80] Justice Thomas, who penned the majority's decision, explained that "mere corporate presence," i.e., generic operational, financial, and administrative decisions, on the part of a home State corporation or parent company does not draw "a sufficient connection between the cause of action … and domestic conduct."[81]

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74. *Id.* at § 2(b)(1).

75. *See* Amnesty International, *Protecting the Law that Protects the Victims of Corporate Abuses*, CORP. ACTION NETWORK MAG. (March 2006) at 8-9, https://web.archive.org/web/20060823172448/http://www.amnestyusa.org/business/CAN_March_06.pdf.

76. JEFFREY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN US COURTS 143–144 (2008) cited in TONYA L. PUTNAM, COURTS WITHOUT BORDERS: LAW, POLITICS, AND US EXTRATERRITORIALITY 247 (2016).

77. *Id.*

78. ATSRA, *supra* note 72..

79. Alien Tort Statute Clarification Act, § 4155 117th Congress, 2d Session (2022), https://www.govinfo.gov/content/pkg/BILLS-117s4155is/pdf/BILLS-117s4155is.pdf [hereinafter ATSCA].

80. RJR Nabisco, Inc. v. European Community, 579 U.S. 325 (2016); Nestlé, *supra* note 66, at 7.

81. Nestlé, *supra* note 66, at 5.

The ATSCA is designed to clarify the ATS's extraterritorial scope. It states that "the district courts of the United States have extraterritorial jurisdiction over any tort … if … an alleged defendant is a national of the United States or an alien lawfully admitted for permanent residence … or an alleged defendant is present in the United States, irrespective of the nationality of the alleged defendant."[82] This type of automatic jurisdiction when a defendant is resident on US territory would mirror Article 4(1) of the *Brussels I Regulation* that has made *forum non conveniens* and extraterritoriality dismissals virtually obsolete in the United Kingdom.

Like the ATSRA, the ATSCA is unlikely to pass into law. Unlike the *Torture Victim Protection Act* (TVPA)[83] and the *Trafficking Victims Protections Reauthorization Act* (TVPRA),[84] which cannot compel corporations to compensate foreign plaintiffs,[85] the ATSCA (like the ATSRA) would allow for foreign plaintiffs to access corporate revenues. Given that some of the largest US-headquartered MNCs that undertake extractive and manufacturing operations in the Global South have considerable lobbying power, and have previously opposed the imposition of liability for human rights violations abroad "until hell freezes over,"[86] it is unlikely they will let up now. Consequently, the ambiguity in the American legislative landscape for transnational corporate human rights claims will likely persist.

*ii. UK Corporate Liability Bills*

Introduced in June 2002 as a private member's bill by Labor Member of Parliament (MP) Linda Perham, the *Corporate Responsibility Bill* would have been applicable to UK-registered companies and their foreign subsidiaries.[87] It would have required UK corporations to prepare and publish annual reports assessing "policies and performance in regards to environmental, social and economic impacts" and to minimize the effects of those impacts.[88] The Bill specifically included provisions to ensure parent companies would not be shielded from liability for actions of a foreign subsidiary.[89]

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82. ATSCA, *supra* note 79.

83. Torture VictimProtection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

84. Trafficking Victims Protection Reauthorization Act of 2005 (TVPRA 2005), Pub. L. No. 109-164.

85. *But see* Mohamad v. Palestinian Authority, 132 S. Ct. 1702 (2012) (limiting defendants in TVPA claims to natural persons).

86. Aaron Marr Page, *Chevron's "Fight It Out On The Ice" Strategy For Ecuador Case Is Slipping, Fast*, HUFFINGTON POST (Mar. 27, 2015), at https://www.huffpost.com/entry/slip-sliding-whats-happen_b_6911916.

87. Corporate Responsibility Bill 2002-3 HC Bill [129], https://publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf.

88. *Id.* at § 3.

89. *Id.* at § 6(2).

Section 6(1)(c) of the Bill stated that a parent company would be liable for compensatory damages if it was responsible for "serious physical or mental injury to persons working in or affected by those activities; serious harm to the environment; or both."[90] Other provisions explicitly stated the company's corporate structure is not a barrier to a liability determination.[91] In other words, the corporate veil, discussed as part of the judicial restraint that British and other home State courts have exhibited, could no longer be a doctrinal barrier to MNC liability.

When first introduced, the Bill received widespread praise. Signaling support of the Bill, more than 300 MPs signed an Early Day Motion.[92] It was also praised by the Corporate Responsibility Coalition, comprised of Amnesty International UK, Christian Aid, and Friends of the Earth.[93] A poll conducted by the British Department for Environment, Food and Rural Affairs found that 71 percent of the public agreed that businesses should report their environmental impact to the government.[94] Despite its backing inside and outside the government, Ms. Perham withdrew the Bill before a vote could take place.[95] While there is no published or online information available as to why the Bill was withdrawn, the following Hansard record of 19 July 2002 implicitly says it all:

*Order for Second Reading read.*

***Hon. Members:*** *Object.*

***Mr. Deputy Speaker:*** *Second Reading what day? No day named.*

***Dr. Julian Lewis:*** *On a point of order, Mr. Deputy Speaker. I seek your guidance once again. Is there any way in which at least we can place on the record the fact that now, Labour Back Benchers' Bills are being killed by their own Government Whips?*

***Mr. Deputy Speaker:*** *I think the hon. Gentleman has just done so.*[96]

After the demise of her initial bill, in October 2002 Perham tabled the *Corporate Responsibility (Environmental, Social and Financial Report) Bill*.[97]

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90. *Id.* at § 6(1)(c).

91. *Id.* at § 6(2).

92. House of Commons, Corporate Social Responsibility EDM #113, Tabled 18 November 2002, https://edm.parliament.uk/early-day-motion/23893/corporate-social-responsibilty.

93. *See* Amnesty International UK, *UK: New Bill Would Inject Substance into Corporate Social Responsibility*, AMNESTY INTERNATIONAL: PRESS RELEASES (Jun. 19, 2003), https://www.amnesty.org.uk/press-releases/uk-new-bill-would-inject-substance-corporate-social-responsibility.

94. *Id.*

95. House of Commons, *Weekly Information Bulletin: 27th July 2002*, https://publications.parliament.uk/pa/cm200102/cmwib/wb020727/bus.htm. ("Corporate Responsibility Bill - Objected to - no day named for 2nd reading.").

96. House of Commons, Parliamentary Business, Corporate Responsibility Bill, https://publications.parliament.uk/pa/cm200102/cmhansrd/vo020719/debtext/20719-24.htm (emphasis added).

97. *Id.*

The new Bill was much like the first one—except for one key provision. The new Bill was stripped of any discussion of parent company liability included in the first Bill.[98] In their book *The Governance Gap*, Penelope Simons and Audrey Macklin have written that "there is no indication that the bill was debated."[99] Since these attempts, no legislation has been introduced in Parliament that would allow for the tort liability of parent and/or subsidiary corporations for human rights and environmental violations abroad.

*iii. Canadian Corporate Liability Bills*

Like the United States and United Kingdom, there is continued uncertainty in Canada with regard to the ability of host State plaintiffs to seek compensatory remedies for corporate human rights and environmental violations. Each titled *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, Bills C-323, C-354, and C-331 were introduced by New Democrat MP Peter Julian in 2009, 2011, and 2015.[100] As the title suggests, the Bills would have amended the *Federal Courts Act*[101] to expressly permit foreign claimants to initiate tort claims for international human rights matters. Similar to the failed ATSRA, the proposed bills listed specific human rights violations that would fall within the Federal Court's jurisdiction. These included, but were not limited to, genocide, slavery, extrajudicial killing, torture, and arbitrary detention.[102]

After a nearly decade-long wait, Bill C-331 reached the floor of the House of Commons in June 2019 and was rejected by a vote of 238-49.[103] Perhaps to not ostensibly promote MNC profits and jobs over international human rights, MPs cited procedural hurdles to the Bill's adoption.[104] Conservative MP Marilyn Gladu argued that it would be imprudent to give the Federal Court jurisdiction as she considered it to be in "tatters"[105]—a perplexing (and arguably disingenuous) sentiment about a long-standing judicial venue that spans all Canadian provinces and covers all matters within the federal government's jurisdiction. Liberal MP Greg Fergus cautioned against a procedure akin to the ATS, arguing the latter is

98. House of Commons, Select Committee on Environmental Audit Minutes of Evidence, Annex A: The Corporate Responsibility Bill, https://publications.parliament.uk/pa/cm200203/cmselect/cmenvaud/98/2120404.htm.

99. SIMONS & MACKLIN, *supra* note 2 at 267, n.584.

100. When Mr. Julian introduced the initial bill, he stated that it was meant to mirror the ATS. *See* Bill C-323, An Act to Amend the Federal Courts Act (international promotion and protection of human rights), 41st Parl., 2nd Sess. (2013), https://openparliament.ca/bills/41-2/C-323/.

101. R.S.C. 1985, c F-7.

102. *Id.* at § 25.1(2).

103. Bill C-331, An Act to amend the Federal Court Act, Vote #1376 on June 19th, 2019, 42nd Parl. 1st Sess., https://openparliament.ca/votes/42-1/1376/.

104. For debate transcript, *see* Bill C-331 (Historical), An Act to Amend the Federal Courts Act (international promotion and protection of human rights), 42nd Parl., 1st Sess., 2019, https://openparliament.ca/bills/42-1/C-331/.

105. *Id.*

a mere relic from America's first Congress.[106] He also argued that, rather than a statutory amendment, it is better for the common law to evolve gradually, "incrementally taking into account developments in other jurisdictions."[107] That last remark implicitly signals a tolerant view of Canadian judges taking a more activist stance to fill legislative gaps perpetuated by Canada's Parliament.

In March of 2022, Mr. Julian tabled another private member's bill, C-262, *The Corporate Responsibility to Protect Human Rights Act*. Similar to the other bills, Bill C-262 provides a private right of action for "[a] person who alleges that they have suffered loss or damage as a result of a failure by an entity to comply with its obligations to prevent adverse impacts."[108] It also allows for litigation when a corporate entity fails to develop and implement due diligence procedures to mitigate the potential for human rights-related harms in the course of business operations.[109] As of this Article's writing, Parliament has not voted on Bill C-262. However, given that Mr. Julian is part of the minority New Democrat Party and presented Bill C-262 as a private member's bill without widespread support from the governing Liberal Party, it is unlikely to pass into law.

### *b. Deficient Legislation*

Failed legislation, like the aforementioned examples of home State bills around transnational corporate tort liability that have not passed into law, has not been the only hurdle to victims from the Global South pursuing private law remedies for corporate human rights violations. Deficient legislation is another notable legislative gap. In home States, there continues to be existing legislation that considers corporate responsibility and measures that could improve corporate behavior abroad, but does not include mechanisms for host State victims to sue MNCs in a domestic court for personal and environmental harms.

#### *i. UK Companies Act*

With 1300 sections and sixteen schedules, the *Companies Act 2006* is the primary source of corporate law in the United Kingdom.[110] It updated the *Companies Act 1985* after recommendations made in July 2001 in the British Company Law Review Steering Group's final report.[111] Muchlinski has criticized

106. *Id.*

107. *Id.*

108. Bill C-262, An Act respecting the corporate responsibility to prevent, address and remedy adverse impacts on human rights occurring in relation to business activities conducted abroad, 44th Parl. 1st Sess., 2021 § 10(1), https://www.parl.ca/legisinfo/en/bill/44-1/c-262.

109. *Id.* at § 10(2).

110. The Companies Act 2006, c. 46 (UK), https://www.legislation.gov.uk/ukpga/2006/46/contents.

111. For commentary on the Steering Group's report, *see* Peter T. Muchlinski, *Holding Multinationals to account: recent developments in English litigation and the Company Law Review I*, 39 AMICUS CURIAE 3 (2002).

that report for omitting recommendations on the liability of corporate groups.[112] This was likely not an oversight. As Mwaura notes, "one of the key reasons why [the Steering Group] … shied away from making recommendations for attributing liability to United Kingdom holding companies for acts of their foreign subsidiaries was the fact that this was going to make the United Kingdom a less competitive legal environment for business."[113] Extensive lobbying efforts deterred the Steering Group from even including recommendations in its final report about directors' liability.[114] As such, MNC liability for transnational tort claims was even further from reach.

*ii. UK Modern Slavery Act*

In many circles, the *Modern Slavery Act* has been welcomed as a culminating success that seeks to weed out human trafficking in transnational supply chains.[115] Like the *Companies Act 2006* and other legislation discussed in this Section, the *Modern Slavery Act*, while it includes provisions on criminal liability and reparations orders against accused persons, does not provide for corporate tort liability in instances of slavery, servitude, and forced and compulsory labor. Moreover, while Section 54 provides for disclosure requirements of UK-domiciled corporations in their supply chains, it does not contemplate private law liability or compensation for victims when those supply chains concern human trafficking or related offenses.[116] To date, UK politicians have not attempted to expand the Act's scope such that it could allow for the tort liability of UK-domiciled corporations.

*iii. Foreign Corruption Acts*

In the three selected common law home States, there is legislation that prohibits corruption by corporate actors in their business operations abroad, but does not include provisions around corporate human rights violations or the potential to commence tort claims when corporations commit personal and/or environmental harms abroad. As an example, the US *Foreign Corrupt Practices Act* (FCPA), which has relatively the same scope as the UK *Bribery Act* and Canada's *Corruption of Foreign Public Officials Act* (CFPOA), mandates that MNCs that operate abroad adhere to strict accounting controls and mandatory

112. *Id.*

113. Kiarie Mwaura, *Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil*, 11 J. INT'L BUS & L. 85, 107 (2012).

114. Eilís Ferran, *Company Law Reform in the United Kingdom: A Progress Report*, 69 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT / RABEL J. COMP. AND INT'L PRIVATE L. 629 (2005).

115. Modern Slavery Act 2015, c. 30, § 54.

116. *Id.*

disclosure requirements. MNCs can be subject to criminal penalties for payments to foreign officials linked to securing or retaining contracts.[117]

The FCPA and related legislation in other common law home States exemplify that governments have the political will to pass legislation that enriches them through hefty fine amounts, but a lack of will when it comes to passing legislation that allows for corporate revenues to be siphoned to victims of corporate human rights and environmental harms abroad. In his book *Between Impunity and Imperialism: The Regulation of Transnational Bribery*, Kevin Davis corroborates that notion. He writes, "[i]n principle, the resulting funds [from FCPA prosecutions] could be channeled to victims of corruption … To date, however, the funds collected rarely have been used for the purpose of compensation. They typically are remitted to the Treasury of the United States."[118]

Aside from the FCPA and other legislation above, in October 2016 the UK parliament introduced the *Criminal Finances Bill*, which amended parts of the *Proceeds of Crime Act 2002*.[119] Like the FCPA, *Bribery Act*, and CFPOA, Part Five of the Act allows for the UK government—but not victims of corporate abuse—to recover civil damages for property that has been obtained through unlawful conduct, domestically or abroad.[120] Pursuant to the amendment, unlawful conduct includes gross human rights violations, specifically torture and cruel, inhuman, or degrading treatment.[121] Rather than victims who would have standing to be compensated, the UK government is able to pursue an individual or corporation that has benefited from human rights abuses committed abroad. In sum, the amendments to the Act fortified the government's ability to be compensated, leaving victims in a lurch.

### *c. Judicial Restraint*

In transnational business and human rights litigation, common law home State courts have routinely taken conservative stances on doctrines that would otherwise allow them to assert jurisdiction or impute liability on MNCs for human rights or environmental harms abroad. Here, I review restrained stances taken with respect to applying customary international law to corporate actors, expansive notions of the corporate veil, and the extraterritorial reach of home State statutes.

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117. *See* 15 USC. §§ 78dd-1, et seq. *See also* Restatement (Third) of the Foreign Relations Law of the United States § 14 cmt. D, 115 cmt. E (1987) at § 414.

118. KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 9 (2019).

119. Criminal Finances Bill, 2016-7, HC Bill [75] (UK).

120. Proceeds of Crime Act 2002, c. 29 (UK), § 243 https://www.legislation.gov.uk/ukpga/2002/29/contents.

121. *Id.*, § 241, §241A.

*i. Corporate Customary International Law*

Home State courts have struggled to reconcile traditional "State-centric" interpretations of international law with the reality that the contemporary corporate form increasingly performs government-like functions and asserts power and authority over individuals in a way akin to governments.[122] By and large, US courts have rejected the possibility that MNCs can be subject to customary international law norms;[123] and the Supreme Court of Canada has tepidly endorsed a "human-centric" turn in international law, even though it has not explicitly allowed for MNCs to fall within international law's ambit.[124]

Despite Harold Koh's insistence that it is a myth that US courts cannot hold private corporations civilly liable under ATS claims,[125] ATS jurisprudence since the D.C. Circuit's decision in *Tel-Oren v. Libyan Arab Republic* has developed in a fashion that distinguishes State and corporate liability.[126] In *Kiobel v. Shell Petroleum Development Company of Nigeria Ltd*, a case that involved allegations of arbitrary arrest and detention, torture, and extrajudicial killings on the part of a multinational oil company operating in Nigeria, the Second Circuit in a 2-1 split departed from its previous decision in *Flores v. Southern Peru Copper Corp*.[127] It stated:

> [c]ustomary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern. The marked characteristic of the whole system is a commonality of interest aligned against the enemies of all mankind. The idea of corporate liability does not withstand scrutiny in that light.[128]

In a related *Kiobel v. Shell Petroleum* decision, the court of appeals concluded there was no customary norm of corporate liability to ground an ATS claim.[129] As previous courts had "*never* extended the scope of [customary international law] liability to a corporation,"[130] the Second Circuit was unwilling to depart with established international law interpretations in order to apply the ATS to the defendant MNC.[131]

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122. *See e.g.* Jay Butler, *Corporations as Semi-States*, 57 COLUMBIA J. TRANSNAT'L. L. 221 (2019).

123. *See e.g.* Banco Nacional de Cuba v. Sabbatino 376 U.S. 398 (1964) [hereinafter Sabbatino]; Samantar v. Yousuf, 560 U.S. 305 (2010)

124. *See* Nevsun Resources Ltd. v. Araya 2020 SCC 5 (Can.), at ¶ 108 [hereinafter Nevsun].

125. Harold Hongju Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 265 (2004).

126. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir., 1984).

127. Flores v. Southern Peru Copper Corp., 414 F.3d 233 (2d. Cir. 2003).

128. Kiobel v. Shell Petroleum Development Company of Nigeria Ltd. et al., 642 F.3d 268, 270 (2d. Cir., 2011) (internal citation omitted).

129. Kiobel v. Shell Petroleum Development Company of Nigeria Ltd. et al., 621 F.3d 111, 137 (2d. Cir. 2010).

130. *Id.* at 120 (emphasis added).

131. *Also see* the following cases in which US courts have interpreted the ATS in a way that limits liability to instances of State involvement: Jama v. INS, 22 F. Supp. 2d 353 (1998); Salim v.

In 2018, the Supreme Court released its decision in *Jesner v. Arab Bank PLC*,[132] an ATS case against a Jordanian bank with a US branch. The dispute, at last, called for a ruling as to whether the ATS applies to non-State actors. Justice Kennedy, along with the Court's four conservative justices, held that allowing foreign corporations to fall within the ATS's ambit would impinge on US foreign relations—a matter in the majority's view that is beyond the judiciary's powers.[133] Joined by Chief Justice Roberts and Justice Thomas, Kennedy tackled the separate issue of private corporate liability for customary international law violations. He followed the Second Circuit's approach in *Kiobel* that the ATS applies to States and individuals who act under the color of law since that was how custom developed post-World War II.[134] However, absent express legislation, the ATS does not apply to juridical persons such as corporations.[135] Kennedy also agreed with the Court in *Kiobel* that, to date, there is no "specific, universal, and obligatory" norm of corporate liability under international law.[136]

Unlike their US counterparts, Canadian courts have not completely shut the door on corporate liability under customary international law—although their jurisprudence is practically no further ahead. Without legislative guidance, Canadian courts have been left to reach for doctrinal interpretations that are well outside traditional understandings of international law. In the Supreme Court of Canada's 2020 decision in *Nevsun*, a transnational human rights claim on behalf of Eritrean plaintiffs against a Canadian mining company, the majority held that it was not plain and obvious that a tort characterized as a violation of customary international law was bound to fail.[137] Passing that low bar only meant that the plaintiffs who alleged acts of torture, forced labor, and arbitrary detention were allowed to proceed with their case, but not necessarily that customary international law norms apply to corporations.[138] In *Nevsun*, the Supreme Court held that "a compelling argument *can* … be made that since customary international law is part of Canadian common law, a breach by a Canadian company can *theoretically* be directly remedied."[139]

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Mitchell, No. CV-15-0286-JLQ, Memorandum Opinion re Motion for Summary Judgment (August 7, 2017) (unreported); Saleh v. Titan Corp., 580 F.3d 1 (2009); Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (2005); Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702 (2010).

132. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

133. *See id.* at 12.

134. *Id.*, at Parts II-A, II-B-2, II-B-3, and III.

135. *Id at 3*.

136. *Id.* at 1390.

137. *See* Nevsun, *supra* note 124, at ¶ 113.

138. *See id.* at ¶¶ 146-148. After the Supreme Court's decision, the parties entered into a confidential settlement in October 2020. *See* Yvette Brend, *Landmark settlement is a message to Canadian companies extracting resources overseas: Amnesty International*, CBC NEWS (Oct. 23, 2020), https://www.cbc.ca/news/canada/british-columbia/settlement-amnesty-scc-africa-mine-nevsun-1.5774910.

139. Nevsun, *supra* note 124, at ¶ 127 (emphasis added).

It is up for debate whether the *Nevsun* majority actually moved the common law forward with respect to corporate liability for human rights violations in the Global South. Realistically, the plaintiffs overcame a low-threshold dismissal motion on a set of theoretical bases that may not have been adopted had the matter proceeded to the High Court on its merits. Future Canadian courts can ignore *Nevsun* and revert back to traditional State-centric notions of international law that have developed over the past decades and centuries—and were endorsed by a minority of the justices. Moreover, without legislative guidance, Canadian courts are left without systemic principles that govern when and how to apply international law to corporations.

*ii. The Corporate Veil*

Corporate separateness is the law's recognition that each corporate entity is subject to limited liability. A subset of corporate separateness is referred to as the "corporate veil," a term that applies when one corporation owns some or all of the shares of another corporation.[140] Absent fraud, a determination that one corporation is an alter ego of another corporation, or a determination that a foreign corporation is "so continuous and systematic" with a domestic corporation so as to be at home,[141] courts have been bound by a legal formalism that dictates centuries-old precepts of limited liability be respected. MNCs have successfully invoked the veil to dismiss transnational tort-based claims. Otherwise, as in recent British transnational corporate tort cases, discussed below, the threshold to impute the actions of one corporate entity onto another has been crafted such that a home State corporation must exercise a significant degree of control over a host State corporation—a relationship that can potentially be tweaked to ensure that home State corporations routinely avoid liability for the tortious conduct of a host State subsidiary.

US courts have upheld corporate separateness to curtail transnational tort claims for human rights violations in the Global South. In *Doe v. Unocal Corp. (2001)*, Burmese citizens alleged that a number of oil and gas MNCs were complicit in the use of forced labor to construct a pipeline.[142] After refusing to assert personal jurisdiction over the host State subsidiaries under the test for specific *in personam* jurisdiction,[143] the court turned to the "minimum contacts" test for general jurisdiction.[144] In a case that involves domestic and foreign

140. *See generally* Kurt A. Strasser, *Piercing the Veil in Corporate Groups Symposium*, 37 CONN. L. REV. 637–666 (2004).

141. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

142. Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001) [hereinafter *Doe*].

143. *See* Gordy v. The Daily News, L.P., 95 F.3d 829, 831–32 (9th Cir. 1996): i) did the foreign defendant purposefully avail itself of the forum State; ii) did the claim arise out of or result from the defendant's forum-related activities? and iii) is the exercise of jurisdiction reasonable?

144. Doe, *supra* note 142, at 923. General jurisdiction is typically understood as a foreign defendant's systematic and continuous business contacts with the forum State. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

corporations, that test calls for a court to "engage in a preliminary inquiry to determine whether the subsidiaries contacts are properly attributed to the [parent company] defendant."[145]

The court affirmed the general rule that a parent and subsidiary are separate legal entities such that the subsidiary's host State conduct cannot (in most circumstances) form the basis for the parent's liability.[146] It applied Supreme Court and Ninth Circuit precedents to conclude that the parent company was not an alter ego of the foreign subsidiary and that the foreign subsidiary was not the parent company's agent.[147] Evidence adduced on appeal about an intertwined relationship between the US parent and host State subsidiaries around, for instance, capital expenditures, investments, general business policies, and even shared directors and officers did not convince the court to pierce the veil.[148] Rather, like the current state of UK law, discussed below, the court required day-to-day control or significant managerial intervention on the part of the parent company over a foreign subsidiary.[149]

In the United Kingdom, the *Brussels I Regulation* (B1R) turns a personal jurisdiction inquiry into one that concerns a British parent company's duty of care to foreign plaintiffs. Explicitly, Article 4(1) of the B1R reads that "persons domiciled in a [EU] Member State shall, whatever their nationality, be sued in the courts of that Member State."[150] That provision encompasses corporate persons. Previously, the entity theory—as it manifests through tort law principles—was a hallmark of UK corporate veil dismissals.[151]

Recently, the UK Supreme Court has heard two veil-related transnational cases against British MNCs.[152] From those cases, both of which survived their respective dismissal motions, British common law around parent company liability has evolved in a way that requires a significant degree of control over a host State subsidiary. In effect, the two Supreme Court decisions have empowered

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145. Doe, *supra* note 142, at 925.

146. *Id.* at 924.

147. *Id*. at 926. *See, e.g.*, United States v. Bestfoods, 524 U.S. 51 (1998); El Fadl v. Central Bank of Jordan, 316 U.S. App. D.C. 86 (D.C. Cir. 1996); American Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586 (9th Cir. 1996); Slottow v. American Cas. Co. of Reading, Pennsylvania, 10 F.3d 1355 (9th Cir. 1993); Laborers Clean-Up Contract Administration Trust Fund v. Uriarte Clean-Up Service, Inc., 736 F.2d 516 (9th Cir. 1984); Chan v. Society Expeditions, Inc., 39 F.3d 1398 (9th Cir. 1994).

148. Doe, *supra* note 142, at 926 (citing Bestfoods, *supra* note 147, at 69).

149. *See also* Alomang v. Freeport-McMoran, Inc., 811 So.2d 98, 101 (2002).

150. Regulation (EU) No. 1215/2012, of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L 351) Art. 4(1) [hereinafter B1R].

151. *E.g.*, AAA & Ors v. Unilever PLC, [2018] EWCA (Civ) 1532; Vava & Ors v. Anglo American South Africa Ltd, [2014] EWCA (Civ) 1130; Young v. Anglo American South Africa Limited & Ors [2014] EWCA (Civ) 1130.

152. *See* Vedanta Resources PLC v. Lungowe [2019] UKSC 20 [hereinafter Vedanta]; Okpabi v. Royal Dutch Shell Plc (Respondents), [2021] UKSC 3 [hereinafter Okpabi].

British MNCs to alter their transnational corporate relationships to ensure that it is very difficult for host State plaintiffs to meet the control threshold.

*Vedanta Resources v. Lungowe* was a transnational claim commenced in a British court on behalf of 1,826 Zambian villagers who alleged that the UK-based Vedanta Resources Plc (Vedanta) and its Zambian subsidiary, Konkola Copper Mines Plc (KCM), polluted local waterways resulting in personal and financial injury to local residents.[153] In its 2019 decision, the Supreme Court held there was an arguable case that Vedanta sufficiently intervened in KCM's day-to-day management.[154] Among other things, the court relied on evidence that Vedanta provided health, safety, and environmental training to KCM and vowed in public statements to address environmental and technical shortcomings in KCM's mining infrastructure.[155]

In 2021, the Supreme Court released its decision in *Okpabi v. Royal Dutch Shell* overturning High Court and Court of Appeal decisions that held Royal Dutch Shell Plc (RDS), as an anchor defendant under the B1R, did not owe a duty of care to the Nigerian plaintiffs.[156] Like *Vedanta*, *Okpabi* reached the Supreme Court in the context of a dismissal motion where the threshold for the claim to proceed was whether there was a real issue to be tried.[157] The *Okpabi* court relied heavily on *Vedanta* to conclude that RDS could, in theory, owe the plaintiffs a duty of care. Like the parent company in *Vedanta*, in *Okpabi* there was evidence adduced that RDS exercised a high level of control, direction, and oversight over the Nigerian subsidiary's operation of its oil infrastructure.[158] The court was left to grapple with whether a parent company owes a duty of care to host State plaintiffs when it i) exercises day-to-day control over a subsidiary's material operations; and ii) issues mandatory policies and standards meant to apply throughout a group of companies.[159]

The Supreme Court forwarded three principles that diverged from the Court of Appeal's ruling. First, the court had already determined in *Vedanta* that group-wide policies and standards can give rise to a duty of care—a principle overlooked by the Court of Appeal.[160] Second, the Supreme Court distinguished between de jure financial control and de facto managerial control, holding that a duty of care may arise in either circumstance. Again, it relied on its decision in *Vedanta* where Lord Briggs stated that "the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of

153. Vedanta, *supra* note 152.

154. *Id.* at ¶ 44.

155. *Id.* at ¶¶ 42–62.

156. Okpabi, *supra* note 152. The facts of Okpabi are substantially similar to Vedanta.

157. *Id.* at ¶¶ 153–159.

158. *Id.* at ¶ 29.

159. *Id.* at ¶ 76.

160. Vedanta, *supra* note 152, at ¶ 52.

supervision and control of its subsidiaries, *even if it does not in fact do so*."[161] And third, the Supreme Court found that the Court of Appeal erred by surmising parent company liability as a distinct category of negligence that must satisfy the three-part *Caparo* test.[162] Based on these reasons, the Court held that the plaintiffs' claim stood a real prospect of success.

A number of issues arise from the UK Supreme Court's decisions in *Vedanta* and *Okpabi*. Like the Supreme Court of Canada's decision in *Nevsun*, the UK decisions are not, in fact, merits determinations that move the law around transnational MNC liability forward in any substantial or systematic way. Rather, they were rendered in the context of early-stage dismissal motions that allow a claim to move forward, but do not necessarily mean it will be successful on the merits of the case.

Additionally, the Supreme Court decisions have opened a relatively easy pathway for parent companies to alter their relationships with host State subsidiaries and affiliates in order to evade transnational liability. After the decisions in *Vedanta* and *Okpabi*, corporations domiciled in the United Kingdom can continue to profit off the operations of host State corporations yet distance themselves in day-to-day control and oversight. Moreover, parent companies can decide to eliminate group-wide mandatory policies and standards and replace them with policies and standards devised and implemented by each separate corporate entity, with the ultimate result being the same as group-wide policies and standards. According to the principles laid out in *Vedanta* and *Okpabi*, those steps should nullify a parent company's duty of care to host State plaintiffs.

Finally, the corporate veil as a judicial gap for Global South host State plaintiffs to pursue compensatory remedies has also manifested in transnational claims brought to Canadian courts. *Das v. George Weston Limited* concerned transnational claims brought by Bengali plaintiffs after the Rana Plaza collapse that killed thousands of workers employed by local companies that supplied garments to Canadian MNC Loblaws.[163] The plaintiffs brought tort claims against Loblaws and Bureau Veritas, a French-incorporated consulting company that conducted "social audits" to ensure that Loblaws's Corporate Social Responsibility (CSR) policies were being implemented at the Rana Plaza and other manufacturing facilities. Unlike the US and UK cases, discussed above, the corporate entities in *Das* were not related through a traditional parent-subsidiary relationship. Rather, Loblaws entered into a contract with Bureau Veritas's Bengali subsidiary to undertake the social audits.

In a lengthy 2017 decision, Justice Paul Perell of the Ontario Superior Court of Justice dismissed the matter.[164] Even though the primary basis for dismissing

161. *Id.* at ¶ 53, cited in Okpabi, *supra* note 152, at ¶ 148 (emphasis added).

162. Okpabi, *supra* note 152, at ¶¶ 149–151.

163. Das v. George Weston Ltd, 2017 ONSC 4129 [hereinafter Das]; Das v. George Weston Ltd, 2018 ONCA 1053.

164. Das, *supra* note 163.

the transnational claim was that the plaintiffs' allegations were limitations-barred under Bengali law,[165] he proceeded to analyze the jurisdictional and liability issues as if the limitations bar did not apply.[166] He utilized the three-part test from *Caparo Industries PLC v. Dickman* to determine whether Loblaws would have owed the plaintiffs a duty of care under Bengali law.[167] And like the British cases, he concluded that Loblaws did not have sufficient control over the Bengali manufacturing companies most proximate to the plaintiffs. Therefore, it did not owe the plaintiffs a duty of care.[168]

Relying on Bengali (British) law, Perell distinguished *Das* from the English Court of Appeal's decision in *Chandler v. Cape PLC* that found direct parent company liability against the British corporation.[169] Unlike *Das*, in *Chandler* the British parent corporation owned the host State subsidiary.[170] More importantly, the parent company exerted significant control over the subsidiary and had detailed knowledge about the dangerous working conditions (and what to do about them) that eventually caused the foreign plaintiffs harm. In *Das*, Perell noted that Loblaws was not an operating parent company, but simply entered into contracts with Bengali companies to supply it with garments as well as ensure adherence to its CSR strategy.[171] In other words, Loblaws did not exercise day-to-day control over the Bengali companies and possessed little, if any, knowledge of the danger in which the foreign plaintiffs found themselves by working at the Rana Plaza.

Perell also analyzed the plaintiffs' ability to sue Loblaws under Ontario law. He held there was no basis to ignore corporate separateness to construe the (in)actions of the Bengali companies that led to the building collapse to that of Loblaws.[172] He distinguished *Das* from the Superior Court's decision in *Choc v. Hudbay Minerals, Inc.* in which the court found direct parent company liability on the part of the Canadian-domiciled corporation *without piercing the veil*—a first for a transnational human rights claim in Canada.[173] Rather than assessing proximity between the parent company and the foreign plaintiffs like the court in *Choc*, Perell considered the level of control the Canadian company possessed over

165. *Id.* at ¶ 5.

166. *Id.*

167. *See id.* at ¶ 412 ("The test from *Caparo* is that a duty of care exists when: (1) it is foreseeable that if the defendant failed to take reasonable care, the plaintiff would be injured by the acts or omissions of the defendant (the foreseeability factor); (2) there is a relationship between the plaintiff the defendant characterized by the law as one of "proximity" or of being "neighbours" one to another (the proximity factor); and (3) as a matter of legal policy it would be fair and just to impose a duty of care on the defendant (the policy factor)").

168. *Id.* at ¶ 412(d).

169. Cape v. Chandler PLC, [2012] EWCA (Civ) 525 [Chandler].

170. *Id.*

171. Das, *supra* note 163, at ¶ 46.

172. *Id.* at ¶ 540.

173. *See* Choc v. Hudbay Minerals Inc. et al, 2013 ONSC 1414. In Choc, the court allowed the claims to proceed on a theory of direct parent company liability.

the host State companies most proximate to the foreign plaintiffs.[174] This approach is a more traditional veil piercing analysis. Perell again concluded that the lack of day-to-day oversight on the part of the Canadian parent company meant there was an insufficient degree of control that would otherwise permit him to ignore corporate separateness.[175]

*iii. Extraterritoriality*

In US jurisprudence, the presumption against extraterritoriality provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[176] To assert jurisdiction, US courts have required express congressional intent of extraterritorial statutory application.[177] Underlying this deferential approach to Congress is the concern that "the Judiciary . . . not erroneously adopt an interpretation of US law that carries foreign policy consequences not clearly intended by the political branches."[178] The presumption has evolved over time and as the Supreme Court has interpreted different statutes. After the Court's 2016 decision in *RJR Nabisco, Inc. v. The European Community*, there appears to be a three-step determination of a statute's extraterritorial application: i) express congressional intent; ii) focus (whether the provision in question involves domestic application); and iii) injuries on US territory.[179]

With the doctrine well-established, the Supreme Court in *Kiobel* rejected the ATS's extraterritorial application in transnational human rights claims against British, Dutch, and US oil companies. The Court affirmed the rule that where parties and actions are strictly outside US territory, the matter remains beyond the ATS's scope.[180] The Court's ruling in *Kiobel* fell in line with how the presumption developed over the preceding decades. Applying the presumption to the ATS, the Court's majority wrote in *Kiobel* that "[n]othing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach."[181] Finding authority in *Morrison*, Justice Breyer's concurring opinion in *Kiobel* left the door open for matters that touch and concern US territory with sufficient force.[182] However, absent congressional action to enact a statute more specific than the ATS—something Congress has refused to

174. Das, *supra* note 163, at ¶ 435.

175. *Id.* at ¶ 450.

176. *See, e.g,.* Kiobel, *supra* note 68, citing Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010).

177. *See* United States v. Bowman, 260 U.S. 94, 98.

178. *See* Kiobel, *supra* note 68,, citing EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991).

179. RJR Nabisco v. European Cmty., 136 S. Ct. 2090, 2101 (2016).

180. Kiobel, *supra* note 68.

181. *Id.* at 7.

182. *See* Al-Shimari v. CACI Premier Technology, Inc., 758 F.3d 516 (2014) where the "touch and concern" principle has been applied to allow for the ATS's extraterritorial application.

do—the presumption against extraterritoriality remains a barrier to transnational claims against corporations for alleged conduct abroad.[183]

In *Nestlé*, an eight-judge majority of the Supreme Court ruled that the "focus" of the host State plaintiffs' claims—child labor in the Ivory Coast—occurred outside US territory. The majority affirmed *Kiobel* and dismissed the plaintiffs' claims, finding that the ATS does not have extraterritorial reach except in rare instances. Justice Thomas, who penned the majority's decision, explained that "mere corporate presence," as in generic operational, financial, and administrative decisions, on the part of a home State corporation or parent company does not draw "a sufficient connection between the cause of action . . . and domestic conduct."[184]

### *d. Judicial Deference*

Other than home State decisions in which courts have taken restrained approaches to dismiss transnational business and human rights litigation or failed to advance doctrine in a substantial way, there is a set of doctrines that have been invoked to dismiss transnational business and human rights litigation out of deference to host State governments and courts. Here, I briefly review *forum non conveniens* and act of State reasons advanced by US and Canadian courts.

#### *i. Forum Non Conveniens*[185]

*Forum non conveniens* (FNC) sits at the intersection of judicial and political considerations in transnational disputes that often lead home State courts to adopt deferential approaches.[186] Over the past few decades, the doctrine's development has been propelled by transnational litigation involving MNC defendants that seek FNC dismissals, "not necessarily because they prefer the alternative forum, but because this will often represent the last they will see of the litigation."[187] In FNC analyses, US courts tend to prioritize deference to a host State's sovereignty over US national interest in a matter that implicates an American MNC. In other words, FNC considerations have routinely been undergirded by notions of comity.[188]

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183. Kiobel, *supra* note 68, at 14.

184. Nestlé, *supra* note 66, at 5.

185. FNC has been expunged in the United Kingdom. *See* Owusu v. Jackson [2005] E.C.R. I-1383.

186. This interplay between adjudication and politics is alluded to in Philippa Webb, *Forum non conveniens: Recent Developments at the Intersection of Public and Private International Law, in* RESOLVING CONFLICTS IN THE LAW: ESSAYS IN HONOUR OF LEA BRILMAYER, 79 (Chiara Giorgetti & Natalie Klein, eds. 2019).

187. Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 672 (1992).

188. The Supreme Court offered the following definition of comity in *Hilton v. Guyot*, 159 U.S. 113, 164 (1895): "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nations."

Gardner argues this focus on comity is misplaced because the Supreme Court in *Gulf Oil Co. v. Gilbert* was not necessarily concerned about the integrity of another State's sovereignty. Rather, *Gilbert* was about the administration of justice in the federal court system *among US states*.[189] Despite Gardner's opposition to comity-centric approaches to FNC, US courts have dismissed transnational human rights cases involving MNCs on such grounds. *In Re Union Carbide Corp. Gas Plant Disaster* [*Bhopal*], a transnational claim involving an explosion at a gas plant in India owned by a subsidiary of the US corporation Union Carbide, is an oft-cited example.[190]

The Indian government, recognizing myriad deficiencies in its own legal system, chose to commence a transnational claim in New York where both the district court and court of appeals dismissed the case on FNC grounds.[191] Indicating comity concerns, both courts took the position that adjudicating the claims in the parent company's home State would impinge on India's sovereignty and deprive it of the opportunity to develop its own tort laws.[192] However, evidence submitted in the course of the FNC dismissal motion painted a picture of the Indian legal system as far from an "independent and legitimate judiciary" able "to mete out fair and equal justice." Rather, the evidence overwhelmingly suggested that India was ill-equipped to handle the complex factual and legal issues related to the matter. The Indian government submitted evidence substantiating that its legal system lacked sufficient tort precedents relating to personal injury.[193] It also submitted evidence of widespread corruption, endemic delays, and the absence of class actions and contingency fee regimes.[194] Yet, those assertions were of "no moment with respect to the adequacy of the Indian courts."[195]

The courts also recognized that were there to be a liability finding in the Indian system, the case would, in essence, have to be re-litigated in US courts in the course of enforcement proceedings. To square the circle such that re-litigation would not be required, one of the conditions the district court imposed as part of the FNC dismissal was that the MNC defendant would have to abide by an Indian court's judgment. As that condition was waived on appeal,[196] it is a wonder how the matter was dismissed to a legal system implicitly recognized by a US court as

189. Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 405–406 (2017).

190. *See* Lydia Polgreen & Hari Kumar, *8 Former Executives Guilty in '84 Bhopal Chemical Leak*, N.Y. TIMES (Jun. 7, 2010); Dinesh C. Sharma, *Bhopal: 20 Years On*, LANCET (Jan. 8, 2005), cited in STEINITZ, *supra* note 2, at 48.

191. In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 847 (S.D.N.Y. 1986) [hereinafter Bhopal]; In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d. 195 (2d. Cir., 1987) [hereinafter Bhopal Appeal].

192. Bhopal, *supra* note 191, at 867.

193. *Id.* at 849.

194. *Id.* at 851.

195. *Id.*

196. Bhopal Appeal, *supra* note 191.

being inadequate to adjudicate the novel and complex issues related to the transnational claim. After the court of appeals' decision, the case proceeded in the Indian courts with the difficulties noted in the FNC adequacy analysis. The claims were never adjudicated on the merits. Two years after the US dismissal and five years after the explosion, the parent company settled with the plaintiffs for an arguably paltry sum of $470 million USD in return for a full waiver of all legal claims.[197]

Another FNC example where home State courts deferred to host State judiciaries involves transnational claims against Del Monte when Guatemalan banana farm workers accused the American MNC of arbitrarily detaining and threatening to kill them after failed labor negotiations.[198] Although the Eleventh Circuit initially allowed the claims to proceed, finding it had subject matter jurisdiction under the ATS and TVPA, it eventually dismissed the transnational claims on FNC grounds.[199]

In *Aldana v. Del Monte Fresh Produce Inc.*, the court of appeals upheld the district court's FNC dismissal. It respected the distinction spearheaded in *Piper Aircraft Co. v. Reyno* that a foreign plaintiff is afforded less deference in forum choice.[200] In the adequacy analysis, rather than delve into whether Guatemalan courts had substantive laws and procedural rules sufficient to adjudicate the claims, the US courts concluded the Guatemalan legal system was adequate by the fact that the host State had jurisdiction over all the parties and that the plaintiffs had no reason to fear for their safety because they would not have to physically appear in a Guatemalan court.[201] This result again evidences the focus US courts place upon a host State's sovereignty.

The public interest factors discussed in *Aldana* illustrate the courts' repeated deferential approach. The court of appeals affirmed the district court's assertion that the dispute was "quintessentially Guatemalan" since it involved one of the country's largest employers; even though the MNC was headquartered in the United States, comity considerations were also at the forefront when the Appeals Court asserted that were it to retain jurisdiction, it would send the tacit message that the "Guatemalan judicial system is too corrupt to justly resolve the dispute."[202] And even though the *Aldana* Appeals Court decision upheld the FNC dismissal, it accepted that corruption and other deficiencies in the Guatemalan

197. One comparative study found that had Bhopal victims been compensated according to the same principles as those in asbestos cases against US corporations litigated in US courts, the settlement amount would be in excess of $10 billion USD. *See* Edward Broughton, *The Bhopal Disaster and Its Aftermath: A Review*, ENVIRONMENTAL HEALTH: A GLOBAL ACCESS SCIENCE SOURCE, www.ncbi.nlm.nih.gov/pmc/articles/PMC1142333/, cited in STEINITZ, *supra* note 2, at 49.

198. Aldana v. Del Monte Fresh Produce NA, Inc., 578 F.3d 1283 (11th Cir. 2009) [Aldana], *en banc reh'g denied*, 452 F.3d 1284 (11th Cir.2006), cert. denied, 549 U.S. 1032.

199. Aldana, *supra* note 198.

200. *Id.* at 1303.

201. *Id.* at 1290–1292.

202. *Id.* at 1299.

system were facts "at war with the [lower court's] undisputed finding that Guatemalan courts constitute an adequate alternative forum."[203]

In Canada, the FNC doctrine has also been used to bring an effective end to litigation—at least for the purposes of a liability determination against Canadian MNCs. One such example is the Quebec Superior Court's decision in *Recherches Internationales Quebec v. Cambior Inc.*, a claim brought on behalf of Guyanese citizens against a Canadian mining company following a cyanide spill that resulted in water contamination.[204] Like its American counterparts, the court in *Cambior* ignored what it characterized as "scathing" evidence that Guyana's judicial system "was nothing more than an appendage of the repressive administrative dictatorship it served."[205]

Similar to the US approach that prioritizes comity considerations over the home State's national interest in adjudicating a transnational dispute, the court in *Cambior* deferred to the Guyanese legal system by accepting evidence that it was adequate even though "there is room for substantial improvement."[206] Soon after a Guyanese claim was commenced, it was dismissed on procedural grounds with the only available information online being a press release on Cambior's website saying the claim was struck for "repeated failure to file an affidavit by the plaintiffs."[207]

*ii. Act of State*

In transnational disputes, act of State is one out of a number of prudential common law doctrines whereby a court decides that overseas conduct is so closely tied to a foreign government that a defendant—public or private—cannot be liable for an alleged wrong.[208] Although its application overlaps among States, in US jurisprudence the doctrine is a defense on the merits whereas in the United Kingdom it is one of abstention in which British courts deny jurisdiction.[209]

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203. *Id.*

204. Recherches Internationales Québec v. Cambior Inc., 1998 CanLII 9780 [*Cambior*]. Even though Quebec is the sole civil law jurisdiction in Canada, I include the discussion on *Cambior* as the Court in its FNC analysis found the common law precedents, particularly the Supreme Court of Canada's decision in Anchem Products Inc. v. B.C. (W.C.B.), [1993] 1 S.C.R. 897, to be a useful guide in interpreting Article 3135 of the Quebec Civil Code. *See id.* ¶ 25.

205. *Id.* ¶ 73.

206. *Id.* ¶ 80.

207. *See Press Release, Cambior, Dismissal of OMAI-Related Class-Action Suit in Guyana* (Feb. 22, 2002), https://web.archive.org/web/20130523223956/https://www.thefreelibrary.com/Cambior%3A+Dismissal+of+OMAI-Related+Class-Action+Suit+in+Guyana.-a083149306.

208. Other prudential doctrines include foreign sovereign immunity and the political question doctrine. *See* Michael J. O'Donnell, *A Turn for the Worse: Foreign Relations, Corporate Human Rights Abuse, and the Courts Symposium: Healing the Wounds of Slavery: Can Present Legal Remedies Cure Past Wrongs: Note*, 24 B.C. THIRD WORLD L.J. 223, 223–266 (2004).

209. On the distinction between the doctrine in the United States and United Kingdom, *see* John Harrison, *The American Act of State Doctrine*, 47 GEO. J. INT'L L. 507, 556–561 (2016).

Irrespective of that distinction, the doctrine has been an obstacle for Global South plaintiffs when they try to procure compensatory remedies from MNCs alleged to have committed human rights abuses.

In the United States, the doctrine has been successfully invoked to dismiss transnational human rights cases against MNCs. District and appeals courts in California applied the *Banco Nacional de Cuba v. Sabbatino* factors in a series of decisions concerning alleged acts of torture, forced labor, and confiscation of property by the sitting Burmese government (State Law and Order Restoration Council or SLORC) against local villagers in the course of oil extraction activities by Unocal Corporation.[210] The prospect for an act of State defense arose due to the fact that Unocal entered into a joint venture with the Burmese military to construct an oil pipeline. In one decision, *Roe v. Unocal Corp.*, the defendant MNC brought a motion to dismiss on the basis that adjudicating the plaintiff's claims would require the district court to "pass judgment on the validity of SLORC's official military acts."[211]

Proceeding through the *Sabbatino* test, the court in *Roe v. Unocal Corp.* determined that SLORC was, in fact, the legitimate Burmese government and thus a foreign sovereign. It also concluded that an order to undertake public works (such as those related to building a pipeline for oil extraction) constitutes an official military act. Concerning the balancing factors, the court held that requiring the plaintiff, a Burmese military officer, to work on a civil construction project without pay does not constitute a violation of international law.[212] Therefore, there was insufficient codification or consensus to set aside the doctrine's application. In addition, the plaintiff's claims would "most likely touch national nerves"[213] indicating a high degree of deference to the host State. Lastly, there was nothing to suggest that SLORC was no longer in existence.[214] The act of State doctrine thus served as a merits-based rule of decision to dismiss the transnational case, leaving the foreign plaintiff with no further avenue in the United States to seek compensatory remedies.

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210. *See* Sabbatino, *supra* note 123 at 423, 428 (court must assess whether i) there was an official act of a foreign sovereign performed within its own territory; and ii) the relief sought or the defense interposed would require a court to declare the official act invalid). *Also see* W.S. Kirkpatrick Co., Inc. v. Environmental Tectonics Corp. International, 493 U.S. 400, 406 (1990) ("Act of State issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign.").

211. *See* Roe v. Unocal Corp., 70 F. Supp. 2d 1073, 1076 (C.D. Cal., 1999).

212. *Id.* at 1082.

213. *Id.* at 1081.

214. *Id.*

## III. WEAPONIZING ACTIVISM: THREE PRINCIPLED BASES IN TRANSNATIONAL BUSINESS AND HUMAN RIGHTS LITIGATION

In light of the legislative and judicial gaps presented in the previous Part, Global South host State plaintiffs are left with a stark reality. In theory, they can approach their own courts, but would be confronted with political pressure and judicial systems that have rarely, if ever, adjudicated transnational corporate tort claims against MNCs headquartered in Western States.[215] Furthermore, the vast majority of MNC assets that could satisfy a judgment are held outside host States where human rights and environmental harms take place and where a private law claim would be commenced in a domestic court.[216] Without the ability to lobby the political branches of government in home States to ameliorate statutory laws in their favor, Global South victims have persisted in their attempts to advance novel theories of jurisdiction and liability in Western common law courts.

If the law around transnational corporate liability for human rights harms is going to allow host State victims from the Global South a consistent avenue to hold MNCs accountable, home State judiciaries may likely have to act *sua sponte* to forge a restitutionary pathway. This Part provides three bases by which home State judiciaries can turn course from the restrained and deferential approach taken in the past. First, common law judges can heed Franck's argument that foreign relations concerns are, in fact, a relic of the colonial past and that there is a marked distinction between foreign policy and judicial policy. Second, judges can view themselves as appropriate conduits to fill prevailing transnational access to justice gaps. And third, judges may choose to regard transnational business and human rights litigation as an appropriate area to incorporate what some legal philosophers have characterized as "permissible judicial morality."

It is arguably easier for a handful of judges to veer in a different doctrinal direction than it is for a majority faction of legislatures from various political parties to pass legislation that would allow foreign plaintiffs with no voting power to sue Western-headquartered MNCs in home State courts. As Alexander Hamilton wrote in *The Federalist No. 78*, courts, compared to the other branches of government, are "the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws."[217] In his 18th treatise, Blackstone wrote that judges are "depositary of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land."[218] Perhaps in no area can that quote be

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215. *See generally* Craig Forcese, *Deterring Militarized Commerce: The Prospect of Liability for Privatized Human Rights Abuses*, 31 OTTAWA L. REV. 171 (1999). *See also* Araya v. Nevsun Resources Ltd., 2016 BCSC 1856 ¶¶ 71–126, for various deficiencies in Eritrea's judicial system.

216. *See* Surya Deva, *Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations Against Overseas Corporate Hands of Local Corporations*, 8 NEWCASTLE L. REV. 87, 97–98 (2004).

217. *See* THE FEDERALIST NO. 28 (Alexander Hamilton).

218. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

more applicable today than in transnational business and human rights litigation that is marred by legality gaps that beckon for judges to fulfill their roles as "living oracles."

The political branches of government function with relatively short electoral timelines and are subject to the whims of corporate lobbying power. Judiciaries exist at an arm's-length from the litigants that appear in court. Therefore, there are ostensibly little, if any, political or economic interests at play for home State judiciaries when it comes to transnational corporate human rights disputes. In all, judge-made law appears to be the "low hanging fruit" in the pursuit of MNC accountability for human rights and environmental harms in the Global South.

Once in their posts, common law judges are politically independent and not beholden to corporate lobbying power like the elected branches of government. Judiciaries, particularly in common law jurisdictions, are able to advance the law incrementally—especially in light of the dearth of legal principles that apply to transnational corporate tort claims today for human rights and environmental violations in the Global South. Simply because judiciaries have been reticent in the past in asserting jurisdiction or advancing principles around transnational corporate tort liability does not mean they necessarily need to take the same tack in the future.

The three methods to judicialize transnational business and human rights litigation, noted above, are not mutually exclusive. Rather, they overlap with one another in some respects. For instance, judges may view their ability to fill transnational access to justice gaps or the ability to adjudicate matters related to foreign relations as part of judicial morality. The overall point is that there are doctrinal and philosophical bases, detailed below, to expand the judicial role such that transnational business and human rights litigation can overcome long-standing hurdles and potentially allow for Global South host State victims to more frequently recover compensatory remedies from powerful MNCs.

#### *a. Heeding Franck: Judicial Policy vs. Foreign Policy*

Both lawyers representing MNCs in home State transnational business and human rights claims as well as home State governments that have intervened in select cases have asserted a peculiar argument: the adjudication of such claims by home State courts interferes with foreign relations. Above, I outlined arguments made in the context of the act of State doctrine. In addition to that example, there have been instances in transnational business and human rights disputes in which defendants or intervenors have argued that litigation impinges on foreign policy. For instance, interventions by the Department of State during George W. Bush's tenure as President regularly raised foreign relations concerns.[219]

219. Interventions during the Obama and Trump administrations did not per se make foreign policy arguments but did oppose transnational business and human rights claims on other grounds. *See e.g.* Brief of the United States as Amicus Curiae Supporting Neither Party at 5, Jesner, *supra* note 132.

In *Sarei*, the Department of State submitted a letter to the Central District of California stating that "continued adjudication of the claims … would risk a potentially serious impact … on the conduct of our foreign relations."[220] Similarly, in *Doe v. Unocal Corp.* (2003),[221] the Department of Justice argued "the ATS … raises significant potential for serious interference with the important foreign policy interests of the United States."[222] There, the Bush administration not only opposed ATS arguments in that particular case, but opposed the entire line of ATS human rights cases up to that point. The government argued that "the ATS has been wrongly interpreted to permit suits requiring the courts to pass factual, moral and legal judgment on … foreign acts."[223] In *In Re South African Apartheid Litigation*, the US government as well as the governments of the United Kingdom, Canada, South Africa, Germany, and Switzerland submitted briefs arguing against the ability of US courts to assert ATS jurisdiction over MNCs for transnational human rights violations.[224] In its brief, the Bush administration argued that the suit would harm its economic interests abroad in addition to jeopardizing its relations with foreign governments.[225]

Should home State judiciaries treat transnational business and human rights cases as non-justiciable because host State commerce overlaps with concerns about a nation's foreign policy? A logical place to start in answering this question is to understand how foreign relations and the law around it have been characterized. Definitions of foreign relations law emphasize that it sits at the intersection of domestic laws and international law or international affairs. Curtis Bradley defines it as the "[d]omestic law of each nation that governs how that nation interacts with the rest of the world."[226] For him, foreign relations law concerns a domestic judiciary's authority in cases that relate to international affairs. Similarly, Helmut Philipp Aust and Thomas Kleinlein view foreign relations law as bridging domestic and international laws or, otherwise, setting boundaries between the two.[227]

The above definitions are crafted in a broad enough manner such that *any* relation or overlap of domestic law with international affairs can fall within the realm of foreign relations law and, at one time or another, can be the basis for a

220. Letter from William H. Taft IV, Legal Adviser of the Dep't of State, to J. Robert D. McCallum, October 3, 2001; *Sarei*, *supra* note 69, at 1181.

221. Doe v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003).

222. Brief for the United States of America as Amici Curiae at 4, 11.

223. *Id.*

224. In re S. Afr. Apartheid Litig., 617 F. Supp. 2d 228, 276 (S.D.N.Y. 2009).

225. Brief for the United States as Amicus Curiae in Support of Petitioners, American Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (No. 07-919).

226. THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 3 (Curtis A. Bradley ed., 2019).

227. *See generally*, Helmut Philipp Aust & Thomas Kleinlein, *Introduction*, *in* ENCOUNTERS BETWEEN FOREIGN RELATIONS LAW AND INTERNATIONAL LAW: BRIDGES AND BOUNDARIES 1–20 (Helmut Philipp Aust & Thomas Kleinlein eds., 2021).

domestic court to take a restrained approach to jurisdiction in a given case. However, there are justifiable bases in transnational business and human rights cases to keep the two realms (i.e., domestic and international) separate. The primary basis may be what Franck has suggested—that judicial policy does not constitute foreign policy. The idea that a judge adjudicating the private law rights of former employees or third-party community members affected by an MNC's conduct in a host State in the course of extractive or manufacturing activities impinges on a country's foreign relations seemingly aggrandizes a domestic court's role.

Individual judges or judicial panels are tasked with applying the law to a set of facts *in a single case*. One jurisdictional or merits-based judicial decision does not constitute a country's foreign policy. However, it constitutes a precedential doctrine that persists within a judicial system over time. Moreover, as Derek Jinks and Neal Katyal have noted, we need not be so naïve as to think judges play such a seminal role in foreign relations that their opinions in one case will attenuate relations between States.[228] Judicial decisions are subject to legislative and executive overhauls across the common law world. Yet, to date, in the common law home States analyzed in the previous Part, there is no explicit indication of legislative intent that would serve as a basis to bar home State courts from adjudicating transnational business and human rights litigation.

Richard Falk noted decades ago the apparent conflict of interest between the judiciary and the executive in matters of international politics. As he remarked, the executive is focused on conciliatory settlement to maintain good relations among States. The judiciary is rights-focused, interested in resolving particular claims before a court.[229] In other words, common law judiciaries ought to be concerned primarily with the litigants before them that have an interest in resolving a private law dispute in accordance with established or potential doctrine.

Adjudication by domestic judiciaries may have a broader public interest role, including (likely tangential) consequences on how an MNC or home State government interacts with a host State government and/or its population. However, as opponents of judicial activism note, judiciaries are neither tasked with nor have expertise in broader public policy or international affairs. That a decision on a singular dispute based on a specific fact pattern will have ripple effects on a country's foreign relations is presumptuous. It elicits unwarranted anxieties that a decision to assert jurisdiction or impute liability on an MNC for extraterritorial conduct will attenuate interstate relations and weaken political and/or economic fortunes.

Anxieties around foreign relations becomes even more unwarranted if we factor in that the home States routinely involved in transnational business and

228. Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L. J. 1230, 1253 (2007).

229. Falk, *supra* note 3, at 432.

human rights litigation (i.e., the United States, the United Kingdom, Canada, the Netherlands, and France) are relatively powerful countries with long-standing and entrenched relations with Global South host States where MNCs operate. A domestic judiciary adjudicating a case around the private rights of a single or group of host State plaintiffs will not, and likely cannot, upend those established realities. Rather, as has recently been the case, it is *government* action that tends to weaken foreign relations. Iran's nuclear program, Russia's invasion of Ukraine, China's human rights violations against its Uighur minority, and Saudi Arabia's role in the killing of journalist Jamal Khashoggi have been the source of recent foreign relations tensions. None of these scenarios per se involve MNCs engaged in transnational commerce.

Moreover, instances of MNC-related litigation that overlap with foreign relations have concerned an MNC headquartered in a *different* country from the adjudicating court, not in the same sovereign State. One example is the arrest and extradition hearings of Huawei executive Meng Wanghou in Canada.[230] There is greater normative authority for a court to adjudicate a claim that involves a corporate party headquartered within the same sovereign territory. Arguably, a foreign State—particularly one like China with significant extraterritorial commercial interests—would be perturbed by another country's courts adjudicating a claim against one of its largest corporate actors. However, a home State court in the United States or Canada, for instance, that hears a private law claim around the conduct of an MNC headquartered on its territory is well within its adjudicative jurisdiction.

On a different note, opponents of judicial activism argue that a nation is no longer speaking with one voice (i.e., the president's or the executive's) when a court decides to assert jurisdiction or impute liability on an MNC headquartered on its territory. That claim is unfounded. For one, although judges may be able to curtail corporate behavior (and even this caveat is suspect), they are not positioned to alter government behavior with respect to relations with foreign governments. A liability finding against an MNC does not bar the executive branches of home and host State governments from freely interacting with each other in much the same way as prior to a court case. In short, the separation of powers not only renders the judiciary independent of the executive, but likewise renders the executive independent of the judiciary.

Furthermore, MNC liability does not bar a host State government from encouraging and facilitating foreign investment. It may require MNCs to pay host State employees better wages with fewer hours and with safer working conditions; or it may require MNCs to remediate a plot of land or to maintain better oversight of contracted officials or militias, so they no longer harm or even kill host State inhabitants. In these instances, private law affects corporate behavior and, as such, should not be scapegoated for attenuating foreign relations when there is no (or only equivocal) indication that it has such far-reaching influence.

230. For facts, *see* United States v. Meng, 2020 BCSC 785.

*b. Filling Transnational Access to Justice Gaps*

Falk characterizes adjudication as a form of participation. Among other things, participation in the adjudicative process ought to afford parties the opportunity to present reasoned arguments before a neutral adjudicator pursuant to an alleged breach of a right.[231] Unfortunately, as a result of the legislative and judicial gaps discussed above, coupled with ongoing problems in host State legal systems, a transnational access to justice gap has been developed for plaintiffs who have experienced personal or environmental harms committed by MNCs headquartered in Western common law States.

Contrary to the requirements outlined in the Third Pillar of the *United Nations Guiding Principles on Business and Human Rights*, existing access to justice gaps in transnational business and human rights litigation mean there is no viable judicial avenue for host State victims, largely from the Global South, to pursue private law claims.[232] As discussed above, there has been some progress in the United Kingdom and Canada pursuant to the Supreme Courts of those home States rejecting early-stage dismissal motions based on corporate veil and customary international law grounds. Nevertheless, lawyers who represent host State plaintiffs in transnational business and human rights litigation are typically fighting an uphill battle in light of the existing vacuum of legality.

In *The Nature of the Judicial Process*, Benjamin Cardozo writes that "[t]he rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice."[233] He argued that one function of the courts was to fill gaps in the law "which are found in every positive law in greater or less measure."[234] That scenario now confronts common law judges in home States. For Wallace Mendelson, judicial activism is particularly warranted in a democratic society "when other political forces have abdicated their role of directing social change.[235] In the midst of legality gaps, then, judges not only have the ability but a duty to advance the common law in a way that allows for transnational corporate human rights claims to be heard on their merits.

A number of doctrines can be addressed when we speak about common law judiciaries filling transnational access to justice gaps. I focus on two areas here. First, given the failure of Congress to amend the ATS as well as the evolving nature of transnational violations, US federal courts may consider reading in additional customary international law violations into the ATS's singular

231. Falk, *supra* note 29.

232. UN Office of High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, (June 16, 2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf .

233. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 19 (1921).

234. *Id.* at 12.

235. Mendelson, *supra* note 12, abstract.

provision. In *Nestlé*, Justice Sotomayor argued for this approach only to be outvoted by the Court's conservative wing. Otherwise, at least when it comes to tort liability that can directly compensate host State victims, US-based MNCs will be given a carte blanche with respect to how they operate in Global South host States as there will be no basis for jurisdiction in the home State.[236] Second, related to FNC dismissals, common law courts can retain jurisdiction in transnational business and human rights litigation to a greater extent so host State plaintiffs no longer have to litigate a case from start to finish in a host State court only to learn that a host State court's judgment cannot be enforced in a home State. Also, home State courts can better align FNC and foreign judgment enforcement analyses at the enforcement stage.

As a preliminary remark on this Section, those who may critique the notion that a judiciary cannot *sua sponte* advance principles of corporate liability to fill access to justice gaps should consider the US Supreme Court's 1909 unanimous decision in *New York Central & Hudson River Railroad Co. v. United States*.[237] There, the Court acknowledged that the changing nature of society demanded that corporations, just like natural persons, be held criminally liable for illegal conduct.[238] By construing corporate criminal liability in the absence of legislative guidance, the Court rejected the notion that a corporate entity could not commit a crime. The Court's own words are worth reproducing as they constitute precisely the type of acknowledgement currently missing on the part of home State judiciaries in transnational business and human rights litigation:

> We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and *to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject matter and correcting the abuses aimed at.*[239]

#### *i. Expanding the "Law of Nations"*

Since the ATS's post-*Filártiga* revival, a debate has persisted around the requirement that a defendant must violate the "law of nations." Should that term be interpreted in a way that honors what the "law of nations" meant when the

236. Nestlé, *supra* note 66, slip op. at 5–11 (opinion of Thomas J.).

237. New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481 (1909).

238. *Id.*

239. *Id.* at 496 (emphasis added).

statute was enacted in 1789 or what the "law of nations" encompasses today? This debate arose recently in the Supreme Court's 2021 decision in *Nestlé*, a string of plurality opinions that, as a result, have frozen the "law of nations" to its 18th-century understanding.

The potential role for judicial activism comes out of a discussion in *Nestlé* around which branch of government can rightfully expand the violations that fall within the ATS's "law of nations" requirement. Justice Thomas (joined by Justices Gorsuch and Kavanagh) deemed that role to be almost uniquely a legislative task.[240] In contrast, Justice Sotomayor (joined by Justices Breyer and Kagan) did not see that role in ATS disputes to be beyond the judiciary's ability.[241] In his plurality opinion, Justice Thomas took a deferential stance, stating upfront that "[w]e cannot create a cause of action that would let them [the plaintiff and respondents] sue petitioners. That job belongs to Congress, not the Federal Judiciary."[242]

Justice Thomas's position may be considered reasonable in the post-*Erie* era in which there is no federal common law,[243] but the language he uses to support deference to Congress is jarring and something that Justice Sotomayor in her own plurality opinion likewise notices.[244] Justice Thomas asserts that the Court is prohibited from creating a new cause of action under the ATS and "must refrain from creating a cause of action [a new violation under the "law of nations"] whenever there is *even a single sound reason to defer to Congress*."[245] For that proposition, he cites the Court's 2020 decision in *Hernandez v. Mesa*, which did not resort to the "single sound reason" language, even in Justice Thomas's own concurring opinion.[246]

As Justice Thomas and other conservative justices had done before, in *Nestlé* he limits the ATS's ambit to the three international law tort violations the statute initially encompassed: violation of safe conduct, infringement of the rights of ambassadors, and piracy.[247] He asserts that "[a]liens harmed by a violation of international law must rely on legislative and executive remedies, not judicial remedies."[248] His primary concern with judicial remedies is something that Franck directly argued against—"[t]he Judiciary does not have the 'institutional capacity' to consider all factors relevant to creating a cause of action that will 'inherently' affect foreign policy."[249] What that "institutional capacity" looks like

240. Nestlé, *supra* note 66, slip op. at 5–11 (opinion of Thomas J.).
241. *See id.* slip op. at 1–12 (opinion of Sotomayor J.).
242. *Id.* at 5 (opinion of Thomas J.).
243. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
244. Nestlé, *supra* note 66, slip. op. at 4 (opinion of Sotomayor J.).
245. *Id.* at 6 (emphasis added).
246. *See* Hernandez v. Mesa, 140 S. Ct. 735 (2020).
247. Nestlé, *supra* note 66, slip. op. at 7 (opinion of Thomas J.).
248. *Id.* at 6.
249. *Id.* at 10.

(and why Congress, not the judiciary, possesses it) is unspecified in Thomas's opinion.

Thomas indicates, like the Court did in *Hernandez*, that the federal judiciary should avoid "upsetting the careful balance of interests struck by the lawmakers."[250] For him, a judicial expansion of the ATS would amount to second-guessing Congress, a point that Justice Sotomayor explains with historical evidence is, in fact, contrary to the intentions of the First Congress. Moreover, the concern with Justice Thomas's deferential stance is that the political branches of government in the United States and other common law home States have been unwilling to legislate private law remedies for transnational corporate human rights violations. With each branch—for one reason or another—shirking responsibilities, host State victims from the Global South who approach US courts for remedies are left without a viable basis to argue for jurisdiction.

To be fair, Justice Thomas's opinion does not completely rule out the prospect for judicial discretion to widen the ATS's scope, but places that discretion at such a high threshold that if it was not exercised in a well-documented case of child slavery, as *Nestlé* was, it is difficult to see where that discretion would apply. He views judicial discretion as "an extraordinary act that places great stress on the separation of powers."[251] Again, he does not explain that assertion. His approach is also markedly distinct from that of Cardozo and others who saw it well within the judiciary's purview to fill gaps in the law in the face of reticence by the political branches.[252]

In her plurality opinion, Justice Sotomayor argued that Justice Thomas's views on the role of the judiciary in creating new causes of action under the ATS are, in fact, unmoored from the ATS's history as well as from the world that surrounds us.[253] She begins her opinion with the critique that likely stands out to many who read Thomas's words: the world has changed in the last two centuries since the ATS was first interpreted. She writes, "[l]ike the pirates of the 18th century, today's torturers, slave traders, and perpetrators of genocide are *hostis humani generis*, an enemy of all mankind."[254] That understanding alone may be the most robust basis for judiciaries to *sua sponte* fill gaps in the law around transnational business and human rights litigation. Courts ought to update doctrine in accordance with the realities of the world around them, especially when the political branches have failed to enact new laws to align doctrine with the vicissitudes of globalization. Chilling doctrine of a bygone era that is unrecognizable in today's world threatens to delegitimize judiciaries by necessitating their reliance on the political winds of the day.

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250. *Id.* at 8 (internal citation omitted).

251. *Id.* at 7.

252. CARDOZO, *supra* note 233.

253. *See generally id.* (opinion of Sotomayor J).

254. *Id.* at 2 (internal citation omitted).

MNCs have skillfully used now-outdated doctrines to avoid the prospect of redistributing their revenues to Global South host State victims of human rights and environmental harms. What is required is not only the wisdom but the courage of the 1909 US Supreme Court, which did not view powerful corporate actors as beyond its adjudicative powers. Of course, with the current conservative super-majority on the US Supreme Court that increasingly appears to be curtailing rather than expanding rights (for US citizens as well as foreign plaintiffs), it is unlikely in the near future that any majority of the Court will be inclined to read in further violations into the ATS's "law of nations" requirement.

With that said, if there are enough justices who adopt Sotomayor's view in *Nestlé* that the ATS can be expanded without legislative intervention, it should be at the forefront of the Court's collective mind. Expanding the scope of the "law of nations"—extraterritoriality considerations aside—is one of the most expedient ways to effectuate transnational corporate tort liability. With Congress likely to be divided on any legislative action to overhaul a future judicial decision that expands the ATS's scope, it is a reasonable assumption that a judicially-motivated expansion of the ATS would remain in place for the foreseeable future and bind lower court judges in subsequent transnational claims commenced in the United States.

*ii. FNC / Foreign Judgment Enforcement*

The second doctrinal area that leaves a potential transnational access to justice gap for common law home State courts to fill is what Christopher Whytock and Cassandra Robertson characterize as an ex-ante/ex-post flip around FNC dismissals and foreign judgment enforcement, otherwise referred to as "boomerang litigation."[255] To elaborate, in the rare instance in which an FNC dismissal in a home State court subsequently results in a host State judgment against an MNC, foreign plaintiffs have had to return to the home State to enforce that judgment because MNC defendants have been unwilling to accept a host State court's decision. Moreover, MNCs retain assets primarily where they are headquartered. Common law home States courts, particularly in the United States, have applied the FNC doctrine in transnational corporate human rights claims leniently and then taken a stricter approach at the recognition and enforcement stage.

An example of this ex-ante/ex-post flip is the dibromochloropropane litigation against Dow, Shell, Dole Foods, and a number of other American MNCs on behalf of thousands of banana farm workers in Latin American host States who became sterile, despite the chemical previously being banned in the United

255. *See* Webb, *supra* note 186, at 92; Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COL. L. REV. 1444, 1451 (2011) (discussing "boomerang litigation").

States.[256] In *Delgado v. Shell Oil Co.*, a district court in Texas dismissed consolidated claims on FNC grounds holding the cases would be better litigated in Latin America, the Philippines, the Ivory Coast, and Burkina Faso.[257] As an indication that the court in *Delgado* prioritized the "convenience to the parties" and "local interest" elements of the FNC analysis devised by the Supreme Court in *Gilbert*, it presented an analysis of the adequacy of twelve different host States' legal systems in a mere eight pages.[258] As such, the court's adequacy analysis was woefully deficient. Moreover, the court only needed one paragraph to address whether a host State judgment would be enforceable in a US court. It surmised that judgment enforceability would not be a concern given that the MNC defendants expressed a willingness to satisfy a host State judgment.[259] Perhaps more in-depth analysis would have attuned the district court to what would happen after it dismissed the transnational claim on FNC grounds.

After the FNC dismissal, some of the plaintiffs were able to obtain a $489.4 million USD judgment against Shell in Nicaragua—one of the host States that received a superficial adequacy analysis in the FNC dismissal in *Delgado*.[260] After the Nicaraguan judgment, Shell filed a complaint in the Central District of California to request a declaration that the foreign judgment was unenforceable as it was "rendered under a system that does not provide impartial tribunals."[261] The plaintiffs, now the defendants in the enforcement action, argued that Shell had changed its position from the FNC motion in *Delgado*—a proposition the District Court in that case thought unlikely on the mere basis that the MNC stated it would fulfill a host State judgment.[262] They argued that if the court denied enforcement, there would be "no place on this earth where an individual poisoned by DBCP may have his or her day in court."[263] Rather than defer to the host State court's jurisdiction as the *Delgado* court did when it initially dismissed the claim on FNC grounds, the enforcing court accepted the MNC's argument that it was, in fact, not subject to a Nicaraguan court's personal jurisdiction, even though accepting host State jurisdiction was a condition of the FNC dismissal in the first place. Consequently, the foreign judgment was deemed unenforceable.[264]

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256. Shell and Dow manufactured DBCP and Dole used it in host States. *See* Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1337 (S.D. Tex. 1995) aff'd 231 F.3d 165 (5th Cir. 2000).

257. *See id.*

258. *See id.* at 1358–1365.

259. *Id.* at 1369.

260. See Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx), 2004 U.S. Dist. LEXIS 31125, at 13 (C.D. Cal. May 18, 2004).

261. *Id.* at 6.

262. *Id.* at 5.

263. Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment at 4, 12–13, Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx) 2005 WL 6187868 (C.D.Cal. Aug. 3, 2005), 2005 WL 6187868, [hereinafter Franco 2005] cited in Whytock and Robertson, *supra* note 255, at 1477.

264. Franco 2005, *supra* note 263.

Another instance of the ex-ante/ex-post flip revolved around Chevron/Texaco's environmental harms in Ecuador.[265] After FNC dismissals in the United States, the plaintiffs ultimately obtained a $9.5 billion judgment through the Ecuadorian courts against the parent company of Chevron's global conglomerate.[266] The plaintiffs first attempted to enforce the judgment in the United States where the parent company has assets.[267] In a full bench trial that resulted in an almost 400-page decision, Kaplan J. of the Southern District of New York ruled that the Ecuadorian judgment was procured through fraud and corruption—a conclusion that corroborates Tarek Hansen and Whytock's assertion that when FNC dismissals neglect the likelihood of enforcement, plaintiffs are left without a meaningful remedy.[268]

Rather than accepting the foreign judgment at face value and giving the Ecuadorian courts the same deference as in the FNC proceedings, the district court concluded that lawyers for the plaintiff had fabricated evidence, made bribes, and ghost-written documents.[269] Kaplan J. forcefully wrote, "[i]f ever there were a case warranting equitable relief with respect to a judgment procured by fraud, this is it."[270] That decision barred enforcement anywhere in the United States. Also, it was subsequently upheld on appeal with *certiorari* denied by the Supreme Court.[271]

Like the judicial reticence to expand the list of violations that fall within the ATS's "law of nations" requirement, common law home State courts can choose to take a different approach to the current ex-ante/ex-post flip in transnational business and human rights litigation to avoid systemic transnational access to justice gaps that have left Global South host State victims without a viable judicial avenue to seek and recover compensation from MNCs. There are at least two ways that home State judiciaries can become more activist in this regard to ensure that host State plaintiffs have viable pathways to compensatory remedies in the future.

First, home State courts can assume less deference to a host State's legal system, which elicits an unfounded paternalism that dictates to a host State that it ought to adjudicate the transnational claim in place of a home State court. That was the precise tack taken in *Bhopal* that ultimately sank any chance the Indian victims had of recovering a substantial sum of money from Union Carbide. Home

265. Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014), aff'd, 833 F.3d 74 (2d Cir. 2016).

266. *Id.*

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

268. Tarik R. Hansen & Christopher A. Whytock, *The Judgment Enforceability Factor in Forum Non Conveniens Analysis*, 101 IOWA L. REV. 923, 926 (2016). ("The foreign enforceability factor is often neglected").

269. Chevron Corp. v. Donziger, 974 F. Supp. 2d 362.

270. *Id.* at 384.

271. The plaintiffs subsequently attempted to enforce the Ecuadorian judgment against Chevron's Canadian subsidiary. The Ontario Court of Appeal denied that attempt in Yaiguaje v. Chevron Corp., 2018 ONCA 472.

State courts in *Delgado*, *Bhopal*, and in other instances have been too superficial in their analyses around the adequacy of the host State court in question to adjudicate the complex transnational tort claim at hand.[272] Greater due diligence at the FNC dismissal stage would keep more transnational cases in home State courts, which could eventually lead to liability determinations against an MNC for extraterritorial human rights or environmental harms. At a minimum, keeping these types of claims in the home State would result in a greater likelihood of settling. These settlements could be obtained without the time and effort required to litigate lengthy claims in host State courts, only to re-litigate them in a home State at the enforcement stage.

The second way that home State courts can overcome the ex-ante/ex-post flip is to honor the decision of the FNC dismissing court that a host State court is sufficiently adequate to adjudicate the transnational claim *and* that any judgment rendered by a host State court—subject to glaring signs of corruption or other deficiencies in how host State proceedings took place—will be recognized and enforced by the home State. In line with academic conceptions of judicial activism, this view of foreign judgment enforcement may already have the result in mind. By being more lenient at the enforcement stage, home State judiciaries are acknowledging that host State plaintiffs ought to be afforded a remedy that they would not be otherwise able to secure from an MNC defendant.

As mentioned above, an MNC's retained assets are unlikely to be held by a host State subsidiary. Couple that reality with a home State court's unwillingness to enforce a host State judgment and host State plaintiffs are effectively barred from a private law remedy in home State courts. John Locke famously wrote that "he who hath received any damage has, besides the right of punishment common to him with other men, a particular right to seek reparation from him that has done it."[273] A right that cannot be enforced to render a remedy is arguably no right at all. Global South host State plaintiffs who can neither have their claims adequately adjudicated by their own courts nor enforced by a home State court are consequently subjected to a law-free zone of impunity in which MNCs can commit human rights and environmental harms without the possibility of compensatory redress.

### *c. A Contemporary Space for Judicial Morality*

Above, I presented two methods by which home State judiciaries may be inclined to take more activist stances in contemporary transnational business and human rights litigation. They can heed Franck's notion that judicial policy is distinct from foreign policy. Otherwise, they can fill transnational access to justice

272. Bhopal Appeal, *supra* note 191, at 867; Delgado, *supra* note 256, at 1358–65. *Also see*, *e.g.*, Sequihua v. Texaco Inc., 847 F. Supp. 61, 64 (S.D. Tex. 1994); Aldana, *supra* note 198; Cambior, *supra* note 204, ¶ 73.

273. JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 6 (Crawford B. Macpherson, ed., 1980) (emphasis added).

gaps by expanding the violations as part of the "law of nations" in the ATS or by mitigating what has become an ex-ante/ex-post flip with regards to FNC dismissals and foreign judgment enforcement. In this Section, I present a third potential basis for activism to take hold in home State courts: the implementation of judicial morality via a rights-based conception of the rule of law.

Legal philosophers have debated the place of extra-doctrinal judicial morality in resolving disputes in State-sanctioned courts. Inevitably, this debate touches on some fundamental concepts, including how we define law itself as well as what constitutes the rule of law. Generally, legal positivists lie on one end of that debate. Joseph Raz identifies two theses that encompass the positivist conception.[274] The "sources thesis" requires that all laws have an identifiable source. He defines it as the following: "[a] law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument."[275] In other words, a positive legal rule and a fact pattern suffice to decide a dispute before a neutral adjudicator. This is Raz's preferred thesis. He critiques the other two theses that he terms the "incorporation thesis" and the "coherence thesis."[276] The incorporation thesis, prominently supported by H.L.A. Hart, is that "[a]ll law is either sourced-based or entailed by source-based law."[277] In essence, the incorporation thesis, albeit slightly broader than the sources thesis, still falls within the realm of legal positivism.

Defended in recent times by Ronald Dworkin, the coherence thesis opposes positivistic views of the rule of law. It asserts that "law consists of source-based law together with the *morally soundest justification of source-based law*."[278] The coherence thesis illuminates the divide around how judges should decide "hard cases" like transnational business and human rights litigation that typically involve novel fact patterns, ambiguous statutory frameworks, or unstable doctrinal referents.[279] It argues for more reliance on extra-legal principles outside of established doctrine.

For Dworkin, the rule of law can manifest via either a "rule book conception" (akin to Raz's sources or incorporation theses) or a "rights-based conception."[280] Under the rule book conception, judges only interpret and apply legislation as intended and enacted by elected branches of government.[281] Relatedly, judges will be reticent to advance the common law and opt to await legislative guidance.

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274. *See e.g.* H. L. A. HART, THE CONCEPT OF LAW (3rd ed., 2012); JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS (rev. ed. 1988).

275. RAZ, *supra* note 274, at 211.

276. *Id.*

277. *Id.* at 210.

278. *Id.* at 211 (emphasis added).

279. Ronald Dworkin, *Political Judges and the Rule of Law* in A MATTER OF PRINCIPLE 264 (Ronald Dworkin ed., 1985).

280. *Id*. at 262–269.

281. *Id.* at 262.

In matters of statutory interpretation, the rule book conception manifests via i) semantic theories, ii) group-psychological theories that inquire into what legislators intended when they devised a particular rule, or iii) historical theories that suggest what legislators *would have* enacted if they were tasked with legislating the exact issue that appears before a judge in a hard case.[282] For Dworkin, the rule book conception seeks to rectify the rule book so that "the collection of sentences is improved so as more faithfully to record the will of the various institutions whose decisions put those sentences in the rule book."[283]

The primary justification for the rule book conception is "the argument from democracy," which asserts that elected branches of government (as opposed to an appointed judiciary) represent the will of the people. That will should not be overridden by a small group of legal elites who substitute their morality in place of the public's collective morality that translates into positive legislated rules.[284] Of course, this idea may be subject to challenge on the basis that electoral politics may, at times, render the will of the public somewhat distinct from how elected branches of government are actually constituted. As one example, in three of the last five US presidential elections, the nominee that has garnered fewer votes nationally has won the election on the basis that he won more electoral college seats.

On the other hand, pursuant to a rights-based conception that Dworkin supports, legal persons have moral rights and duties with respect to one another (as well as rights against the State) that may not be captured by the rule book.[285] Upon demand, moral rights can be enforced by judicial institutions erected by the State. Dyzenhaus writes that "[t]he role of judges in Dworkin's conception is reduced to that of transmitting the content of the moral law. … [T]hey have to decide what interpretation of the positive law relevant to the matter shows the law in its best moral light."[286] The ultimate question that the rights conception asks is whether the plaintiff has a moral right that ought to be enforced in court. As such, it takes Locke's foregoing principle seriously to oblige a legal remedy to a moral right irrespective of whether the rule book has anything explicit to say about either of them.[287]

The two distinct conceptions diverge on whether judges should make what Dworkin calls "political decisions" in hard cases, meaning whether they should elicit a principle other than what is explicitly allowed for or entailed by the rule book. For Dworkin, although the rule book is not the exclusive source of rights, a moral right must be consistent with the rule book. To substantiate that assertion, he gives a radical example he calls the Christian principle, which would not fall

282. *Id.* at 265–266.

283. *Id.* at 267.

284. *Id.* at 270–271.

285. For an overview of the rights conception, *see id.* at 267–269.

286. Dyzenhaus, *supra* note 44, at 65.

287. Dworkin, *supra* note 279, at 267.

within his rights-based conception of the rule of law. Under the Christian principle, a judge in a compensatory claim could deny a damages award against an indigent defendant on the basis that the relatively more solvent plaintiff in the dispute should forego the claim as a sort of alms-giving.[288] Although the Christian principle may adhere to a judge's underlying morality, for Dworkin it contravenes "the vast bulk of the rules in the rule book" and, as such, would not be a viable political decision by a judge under the rights-based conception.[289]

Debated on a relatively more philosophical level, there is little explication in the rights-based and rule book conceptions of any specific considerations around foreign plaintiffs who are central to transnational business and human rights litigation. With that said, Dworkin recognizes that the rights-based conception he supports favors what he calls "entrenched minorities." He writes, "since, all else equal, the rich have more power over the legislature than the poor, at least in the long run, transferring some decisions from the legislature [to the judiciary] may for that reason be more valuable to the poor."[290] Implicitly acknowledging the argument from democracy, Dworkin posits that the majoritarian bias of legislatures works against entrenched minorities whose rights are ignored by elected branches of government—an assertion that accords with the lack of legislatively-mandated tort remedies for foreign plaintiffs who allege harm on the part of MNCs that operate in the Global South.[291]

Foreign plaintiffs from the Global South neither have the power of the vote nor the power of the purse in home States where their private law claims have been and will likely continue to be adjudicated in the future. These plaintiffs are not practically capable of influencing the legislative process in the way that corporate lobbying groups, for instance, opposed the ATSRA (and will likely oppose the ATSCA). On that basis, home State judges may be inclined to insert a level of morality to conclude that host State plaintiffs ought to be afforded a viable judicial avenue to compensatory remedies.

Penned by now retired Justice Rosalie Abella, the Supreme Court of Canada's majority decision in *Nevsun* illustrates how judicial morality can take hold in transnational business and human rights litigation.[292] As discussed above, one of the issues in *Nevsun* was whether the Eritrean plaintiffs would be able to seek tort remedies pursuant to *jus cogens* human rights violations long recognized under international law.[293] Justice Abella affirmed the court's approach in a prior case, *Kazemi v. Islamic Republic of Iran*, that *a jus cogens* norm "is a fundamental tenet of international law that is non-derogable."[294] In *Nevsun*, the issue before

288. *Id.* at 268.
289. *Id.* at 268–269.
290. *Id*. at 281.
291. *Id.*
292. Nevsun, *supra* note 124.
293. *Id.* ¶¶ 83–85.
294. *Id.* ¶ 83 (internal citations omitted).

the court was not necessarily the absence of *any* tort cause of action but whether the court ought to, in effect, recognize the particularly egregious nature of the MNC defendant's acts in a novel tort couched in international human rights law.[295]

Abella first affirmed that the human rights violations alleged by the *Nevsun* plaintiffs fell within the sphere of *jus cogens* norms. She then wrote that the "[d]evelopment of the common law occurs where such developments are necessary to clarify a legal principle, to resolve an inconsistency, or to keep the law aligned with the evolution of society. … [T]he possibility of a remedy for the breach of norms already forming part of the common law is such a necessary development."[296] Only a few paragraphs later she explicitly cites the principle that "where there is a right, there must be a remedy for its violation."[297]

How is *Nevsun* an instance of permissible judicial morality? The majority opinion recognized that, at the time, there was no distinct cause of action that could lead to a remedy for violations of *jus cogens* human rights norms as they are understood under international law. Moreover, the Canadian parliament has not legislated a cause of action for violations of customary international law. There is nothing in Canada akin to the ATS that ties a potential tort claim to a violation of the law of nations. Within that gap, the *Nevsun* majority found it appropriate to advance the common law in a manner that could afford the foreign plaintiffs a potential remedy for the specific types of harm they alleged. Abella's initial remark in her opinion substantiates that notion:

> …[M]odern international human rights law [is] the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed [i.e., through legal remedies].[298]

Abella operationalized Dworkin's rights-based conception of the rule of law without going outside of the established rulebook. She first established that international law—specifically *jus cogens* norms—forms part of Canadian common law and can thus be developed in a way that allows for a private law remedy. Even in Abella's conception of judicial morality, it was necessary for there to be an established sourced-based and doctrinal framework within which she was working in order to expand the common law in favor of host State plaintiffs who were suing a Canadian-headquartered MNC. This accords with how Dworkin interprets, for instance, the Christian principle, outlined above. In other words, she first established that it was within her adjudicative capacity to advance the common law in line with international human rights rules and norms and then did just that.

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295. *Id.*

296. *Id.* ¶ 118.

297. *Id.* ¶ 120.

298. *Id.* ¶ 1 (blocked quotes added).

As a final point on judicial morality, Falk suggests a useful framework that can lead to home State courts taking less deferential stances in favor of developing common law principles in matters that concern grave human rights violations. He distinguishes between what he terms legitimate and illegitimate diversities. He writes:

> In general, municipal courts should avoid interference in the domestic affairs of other [S]tates when the subject matter of disputes illustrates a legitimate diversity of values on the part of two national societies. In contrast, if the diversity can be said to be illegitimate, as when it exhibits an abuse of universal human rights, then domestic courts fulfill their role by refusing to further the policy of the foreign legal system. In instances of illegitimate diversity, where a genuine universal sentiment exists, then domestic courts properly act as agents of international order only if they give maximum effect to such universality.[299]

To apply Falk's paradigm to transnational business and human rights litigation, consider that there will be instances in which two legal systems can reasonably differ on a procedural or substantive rule: the scope of discovery, the requirements to legally convey land, the rules of inheritance, the elements appropriate to make out a cause of action, and many others. Those instances—where courts can reasonably disagree—may warrant a lesser degree of activism or no activism at all such that one court decides to defer to another court. In the context of this Article, that may be a home State court deferring to the jurisdiction of a host State court. Practically, this can occur in the course of FNC determinations. However, cognizable universal harms, like the personal and environmental harms often at issue in transnational business and human rights litigation, necessitate a court to retain jurisdiction irrespective of a foreign court's interest in the matter because these are substantive rights that amount to more than just peripheral distinctions between two legal systems.

In transnational business and human rights litigation, a home State court that retains jurisdiction does not necessarily elicit a concern about the "policy of the foreign legal system" as Falk's quote states. Rather, it is an appreciation that there are particularly egregious harms at issue in a given claim and that a host State court may not be best placed to adjudicate a claim related to such harms. Home State courts ought to be willing to retain jurisdiction in light of established incapacities in host State legal systems and previous instances in which deference on the part of home State judiciaries has not afforded host State plaintiffs a viable avenue to compensatory remedies. This was seen above with FNC dismissals and the circumstances around "boomerang litigation." In short, the inability for a host State court to adequately adjudicate a transnational business and human rights claim is, as Falk characterized it, an example of illegitimate diversity.

Falk gives the example of the *Eichmann* trial in which an Israeli court asserted universal jurisdiction for Holocaust-related harms.[300] In his view, *Eichmann* illustrated an illegitimate diversity between Israel and a foreign

299. Falk, *supra* note 29, at 7–8.

300. *Id.* at 8–9.

State.[301] Again, in transnational business and human rights litigation, there is no explicit governmental or judicial policy that is contrary to universal human rights. Rather, the concern with deferring jurisdiction to a host State court is that fundamental human rights violations should not go unaddressed to the extent that a plaintiff is without a viable judicial avenue to recover compensation for egregious harm. Placing those fundamental rights above the jurisdictional requirements of host State in order to adjudicate a complex transnational claim (while not straying from the basic principles of the rulebook) would be an appropriate instantiation of judicial morality in future home State business and human rights litigation.

## CONCLUSION

In light of a vacuum in legality, this Article has explored an opportunity for judges in common law home States to fill the "governance gap" for transnational human rights and environmental violations on the part of MNCs headquartered in the Western world. Given consistent inaction on the part of elected branches of government to enact legislative reforms, judiciaries may be the only viable source of private law remedies for Global South host State victims who have suffered egregious harms. Judicial activism would not only fulfill the natural law maxim that "where there is a right there is a remedy," it would honor the third pillar of the *UN Guiding Principles*. Activism may not take hold immediately or even in the near future, particularly with entrenched conservative wings in the judiciaries of several common law home States. However, this Article has presented some potential pathways to actualize activism when individual judges or even a majority of judges on appellate panels are prepared to embrace a more expansive adjudicative role.

301. *Id.*