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# Judging Corporate Accountability in the Global Economy

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*As foreign victims and human rights advocates increasingly turn to U.S. courts to hold multinational corporations accountable for violations of international law and related abuses arising from their global operations, an international clash of jurisdictions is intensifying. The growing role of U.S. courts in defining standards of corporate conduct in the global economy represents a direct challenge to U.S. foreign policy leadership. But legislative, judicial or even executive efforts to restrict access to relief in the United States are neither wise nor effective policy, this Essay argues. Rather, U.S. policy makers should recognize that U.S. national interests are advanced by corporate accountability in the global economy. They should seek to leverage what will be an inevitable litigation to advance these interests.*

*The Essay identifies three pillars on which a U.S. strategy to promote accountability should be based. First, the U.S. should encourage local accountability and promote resolution of disputes in the jurisdictions where alleges abuses have occurred. Second, U.S. policy should create soft law “safe harbors” to shield companies that take effective action to prevent abuses or correct them when they are discovered. Finally, the United States should support the development of multilateral efforts to create accountability, with the experience of the OECD Bribery Convention as a model.*

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## I. INTRODUCTION

U.S. courts are rewriting the rules of globalization. More and more companies—based in the United States and abroad—find themselves forced to defend their global business practices and investment decisions before American judges.

The range of cases is breathtaking; the list of high-profile and deep-pocketed defendants include IBM, ExxonMobil, ChevronTexaco, Citicorp, Coca-Cola, Gap, Ford, and Del Monte.<sup>1</sup> The plaintiffs seek to build on successful court-approved settlements against historical atrocities—e.g., the German companies that employed slave labor in World War II and Swiss banks that failed to restore assets to the families of Holocaust victims—to challenge the global operations of corporate giants. The victims target “cozy” relationships between multinationals and local governments and the exploitative practices that may result, including forced labor, repression of trade unions, extra-judicial executions, and other apparent violations of international law.

These court rulings do not just make law, but also make policy. They have a profound and direct impact on the pace of global trade and development as well as the quality of U.S. efforts to promote economic development and growth. This ongoing judicial intervention threatens to undermine the authority of the President to set U.S. foreign policy with the advice and consent of Congress.

To CEOs worldwide, the cases represent the globalization of “ambulance chasing” where lawyers threaten protracted litigation to redistribute wealth from the private sector.<sup>2</sup> To the plaintiffs’ bar and

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1. See Ken Dalecki, *U.S. Firms Battle Human Rights Lawsuits*, U.S.A. ENGAGE, Sept. 5, 2002, available at [http://www.usaengage.org/news/2002/20020905\\_kiplinger.html](http://www.usaengage.org/news/2002/20020905_kiplinger.html) (last visited Sept. 28, 2003); see also *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (alleging that defendant oil company caused personal injuries and damaged the environment by polluting rain forests and rivers in Peru and Ecuador); *Doe I v. Gap, Inc.*, No. CV-01-0031, 2001 U.S. Dist. LEXIS 25035 (D. N. Mar. I. Nov. 26, 2001) (alleging that defendants committed criminal acts, including kidnapping, theft, extortion and coercion); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003) (alleging that defendant hired paramilitary units to harass and murder union organizers at plants in Colombia). For a description of additional cases, see Dalecki, *supra*.

2. See John E. Howard, *The Alien Tort Claims Act: Is Our Litigation-Run-Amok Going Global?*, U.S. CHAMBER OF COMMERCE, Oct. 2002, available at <http://www.uschamber.com/press/opeds/0210howardlitigation.htm> (last visited Sept. 30, 2003).

For years, U.S. business has sought to halt the proliferation of litigation-run-amok in the courts by restoring fairness, balance, efficiency and consistency to the U.S. civil justice system. But as serious as this problem is, it has generally been viewed as a “domestic” problem—with a small number of avaricious class-action lawyers using U.S. plaintiffs to pursue

their new allies in the human rights, environment and labor rights communities, civil liability provides a credible cudgel to hammer corporate miscreants for their exploitive practices in the developing world or punish their support for repressive regimes.<sup>3</sup>

For the foreign policy community, however, judicial intervention represents a clear and present danger to the diplomatic status quo—a new phenomenon that has been labeled “plaintiff’s diplomacy.”<sup>4</sup> The cases inject the U.S. court system into disputes that hinge on fundamental policy decisions taken by foreign governments and risk putting the imprimatur of the United States on court rulings that criticize putative allies. This linkage threatens to undermine both executive and legislative prerogatives in global affairs. In terms of globalization and economic growth, these lawsuits risk placing U.S.-based firms at a competitive disadvantage in world markets. They invite relatively “unaccountable” plaintiffs or their attorneys to establish global priorities for enforcement of international standards. If plaintiff’s diplomacy is allowed to evolve without firm policy guidelines, it threatens to provoke a constitutional crisis in the conduct of foreign policy.<sup>5</sup>

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gargantuan remedies for domestic torts. Expansion of this problem into the international arena via ATCA promises nothing but trouble for U.S. economic and foreign policy interests worldwide.

*Id.*

3. Terry Collingsworth, *Separating Fact from Fiction in the Debate over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F. L. REV. 563, 586 (2003); Daphne Eviatar, *Profits at Gunpoint: Unocal’s Pipeline in Burma Becomes a Test Case in Corporate Accountability*, THE NATION, June 30, 2003, at 16; Joshua Kurlantzick, *Globalism in the Dock: Burmese Villagers Sue Unocal in an L.A. Courtroom*, AM. PROSPECT, Nov. 4, 2002, at 19; David Montgomery, *Pipeline to Justice: A Burmese Activist Has the Attention of the White House and, He Hopes, the World*, WASH. POST, Aug. 13, 2003, at C1; *A Needed Human Rights Law*, N.Y. TIMES, June 2, 2003, at A16.

4. For a discussion of this phenomenon, see Anne-Marie Slaughter & David Bosco, *Plaintiff’s Diplomacy*, 79 FOREIGN AFF. 102 (2000).

5. See Brief for the United States of America, as Amicus Curiae at 4, *Doe v. Unocal Corp.*, Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. 2003) [hereinafter *Unocal Brief*].

Wide-ranging claims the courts have entertained regarding the acts of aliens in foreign countries necessarily call upon our courts to render judgments over matters that implicate our Nation’s foreign affairs. In the view of the United States, the assumption of this role by the courts under the ATS not only has no historical basis, but, more important, raises significant potential for serious interference with the important foreign policy interests of the United States, and is contrary to our constitutional framework and democratic principles.

*Id.* “Through an obscure loophole in U.S. law, the United States is being turned into the world’s catchall civil claims court to the detriment of the U.S. economy and U.S. interests abroad.” Daniel T. Griswold, *Abuse of 18th Century Law Threatens U.S. Economic and Security Interests*, U.S.A. ENGAGE, Jan. 25, 2003, para. 1, available at

With the strong encouragement of the business community, the Bush administration has moved more aggressively than its predecessors to bar the doors of U.S. courts to these foreign plaintiffs.<sup>6</sup> The Justice Department, State Department, and Congress are all taking steps to limit or prohibit these cases.<sup>7</sup> This approach has achieved short-term victories, including satisfying an important domestic political constituency.<sup>8</sup>

But, however successful these tactics may be, they do not constitute a strategy. For every door the Administration closes, creative plaintiffs' lawyers will find a window—or a garage—to open. Moreover, both the U.S. government and business community have a strong interest in preventing or punishing egregious corporate conduct in the global economy. In the new environment following September 11 and the Iraq War, the perceived link between U.S. business interests and U.S. global policy is particularly strong in the Muslim world and among other developing countries.

Simply slamming the door on those seeking relief in U.S. courts is bad foreign policy, bad economic policy, and bad legal practice. The failure of the United States to advance a strategy to rein in perceived excesses of corporate conduct in the global economy risks simply adding fuel to the fire of anti-American and anti-globalization hostility.

The United States needs a strategy that recognizes the inevitability of litigation to hold corporations accountable for their

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[http://usaengage.org/legislative/2003/alientort/cato\\_griswold.html](http://usaengage.org/legislative/2003/alientort/cato_griswold.html).

6. See Dan Eggen & Charles Lane, *White House Seeks to Curb Rights Cases from Abroad*, WASH. POST, May 30, 2003, at A1.

7. See, e.g., Unocal Brief, *supra* note 5; see also *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002). In two cases, the Office of the Legal Adviser of the Department of State has delivered letters to the courts opposing adjudication of the disputes in the United States. See Letter from William H. Taft, IV, Legal Adviser, U.S. Department of State, to Hon. Robert McCallum, Assistant Attorney General, Civil Division, U.S. Department of Justice 2 (Oct. 31, 2001) (on file with the Columbia Journal of Transnational Law) [hereinafter McCallum Letter] (stating “[I]n our judgement, continued adjudication of the claims identified [redacted] would risk a potentially serious adverse impact on [redacted] the conduct of our foreign relations.”); Letter from William H. Taft, IV, Legal Adviser, U.S. Department of State, to Hon. Louis F. Oberdorfer, U.S. District Court, District of Columbia 1 (July 29, 2002) (on file with the Columbia Journal of Transnational Law) [hereinafter Oberdorfer Letter] (stating “[T]he Department of State believes that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the ongoing struggle against international terrorism.”).

8. See, e.g., *Sarei*, 221 F. Supp. 2d at 1116. The case was dismissed, in part as a result of the submission by the Department of State’s Legal Adviser.

global actions while seeking to achieve broader foreign policy objectives. An effective policy would harness the power of private litigation in U.S. courts as a vehicle for encouraging other countries and the corporations that operate in them to promote respect for the rule of law and improve the administration of justice. Such a strategy would support the development of local institutions able to enforce international standards against violators who are not only multinational corporations but governments and other entities as well.<sup>9</sup>

The legal basis for many of the claims against multinational corporations is the Alien Tort Statute, originally passed as part of the Judiciary Act of 1789, the same legislation that established the U.S. court system.<sup>10</sup> The Alien Tort Statute<sup>11</sup> grants original jurisdiction to the United States federal courts for any civil action brought by an alien for a tort committed in violation of international law.<sup>12</sup>

For its first 200 years, the Alien Tort Statute generated little interest and few cases.<sup>13</sup> In a landmark ruling in 1980, the Second Circuit Court of Appeals permitted the family of a young Paraguayan who had been kidnapped, tortured, and murdered, to sue the alleged torturer, a Paraguayan police officer who had emigrated to the United States, in a U.S. court.<sup>14</sup>

The judges ruled that three basic requirements for bringing the case were satisfied. The plaintiffs (i) were aliens, (ii) were alleging a tort, and (iii) the damage resulted from a breach of international law.<sup>15</sup>

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9. For a discussion of the risk of litigation arising out of human rights abuses, see Elliot Schrage, *Emerging Threat: Human Rights Claims*, HARV. BUS. REV., Aug. 2003, at 16–18.

10. Judiciary Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350) [hereinafter Alien Tort Statute].

11. There is a robust debate regarding the purpose of the Alien Tort Statute, between those who believe the Statute provides a statutory cause of action ((hence referring to it as the “Alien Tort Claims Act”) and those who believe the Statute is jurisdictional only (preferring, for obvious reasons, to call it the “Alien Tort Statute”). See e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (finding the ATS to provide a statutory cause of action). But see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (finding the ATS to provide jurisdiction only for causes of action separately created by Congress). For a historical discussion of the debate, see William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT’L & COMP. L. REV. 221 (1996). The author’s use of the phrase “Alien Tort Statute” in this Essay does not suggest an endorsement of one view over the other.

12. 28 U.S.C. § 1350.

13. In almost 200 years, jurisdiction under the Act was upheld only twice. See *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961); *Bolchos v. Darrel* 3 F. Cas. 810 (D.S.C. 1795).

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

15. *Id.* at 887.

Following that ruling, lawyers brought dozens of cases against former government officials for violating human rights and against their superiors for authorizing such abuse.<sup>16</sup> The corridors of U.S. courts were flung open to victims of torture, arbitrary arrest and detention, rape, execution, and other violations of international law.

Perversely, Bosnian Serb leader Radovan Karadzic brought these cases closer to corporations.<sup>17</sup> Prior to 1995, courts had ruled that the Alien Tort Statute generally required the defendant to be a “state actor,” operating under color of law or charged with the authority of the state.<sup>18</sup> Karadzic, who headed an illegitimate government not recognized by the international community, argued that he was not a state actor.<sup>19</sup> In finding him liable under the Alien Tort Statute, the Second Circuit ruled that non-state actors could violate international law.<sup>20</sup> As a result, non-American plaintiffs were permitted to bring certain Alien Tort Statute suits in U.S. courts against private actors.<sup>21</sup>

The corporate Rubicon was crossed in September 2002, when the Ninth Circuit Court of Appeals refused to dismiss an Alien Tort Statute case against Unocal.<sup>22</sup> The court ruled that villagers from Myanmar (Burma) could sue Unocal, the oil giant, for violating their

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16. See, e.g., *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002), *aff’d* *Ford v. Garcia*, No. 99-08359 (S.D. Fla. 1999) (charging a former El Salvadorian Minister of Defense and Director General of the National Guard with the torture and murder of six U.S. nuns); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115 (D.D.C. 2003) (charging extremist Islamic group with crimes against humanity, war crimes and other violations of international and domestic law); *Tachiona v. Mugabe*, 234 F. Supp. 401 (S.D.N.Y. 2002) (charging Zimbabwe’s President Robert Mugabe and Foreign Minister Stan Mudenge with the intimidation and suppression of peaceful political opposition); *Doe v. Lumintang*, No. 00-674 (D.D.C. 2001) (charging former Indonesian Vice Chief of Staff Johny Lumintang with systematic human rights violations in East Timor), available at <http://www.dcd.uscourts.gov/00-674.pdf> (last visited Sept. 30, 2003); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001) (charging a member of the Chilean military with murder of Chilean government official in the immediate aftermath of that nation’s 1973 coup); *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000) (charging former Chinese Premier Li Peng with human rights abuses in the Chinese prison system); *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994) (charging former Serbian leader Radovan Karadzic with genocide, war crimes, crimes against humanity and other human rights violations against Bosnian Muslims).

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

18. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823 (D.C. Cir. 1984) (Edwards, J. concurring).

19. *Kadic*, 70 F.3d at 239.

20. *Id.* at 236.

21. *Id.* at 239.

22. *Doe I v. Unocal Corp.*, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976 (9th Cir. 2002), *vacated by Doe v. Unocal Corp.*, Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. 2003).

human rights.<sup>23</sup> The plaintiffs claimed that the company should be liable for torture, rape, slave labor, and executions committed by the Myanmar military in connection with the construction of a pipeline.<sup>24</sup> The majority agreed, concluding that Unocal could be held liable for “aiding and abetting” the military in its violations by offering “knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration” of the abuse.<sup>25</sup> A jury would have to decide whether the relationships between Unocal, its Myanmar government partner, and the military were sufficient to meet this standard of liability.<sup>26</sup>

Moreover, the court also acknowledged, in an expansive footnote, that other theories of third-party liability—not simply “aiding and abetting”—could also be used to link the violations of a state actor to a private corporation.<sup>27</sup> This interpretation would dramatically increase the business community’s exposure to Alien Tort Statute liability. These theories of joint venture, agency, negligence, and recklessness<sup>28</sup> could be used to link all sorts of relationships that a corporation may have with government officials, government agencies, and state enterprises.

Although most of the cases cited have targeted companies in the extractive industries such as mining and petroleum, the emerging reality is that all companies whose supply chains or distribution markets reach into developing countries are suspect. Consumer products (Coca-Cola,<sup>29</sup> Gap,<sup>30</sup> Levi Strauss<sup>31</sup>), pharmaceuticals (Pfizer<sup>32</sup>), agricultural products (Del Monte<sup>33</sup>), financial services (Barclays, Citigroup, JPMorgan Chase<sup>34</sup>), technology (IBM,

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23. *Id.*

24. *Id.* at \*3–\*4.

25. *Id.* at \*13.

26. *Id.* at \*33.

27. *Id.* at \*10 n.20.

28. *Id.*

29. *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2001).

30. *Doe I v. Gap, Inc.*, No. CV-01-0031, 2001 U.S. Dist. LEXIS 25035 (D. N. Mar. I. Nov. 26, 2001).

31. *Id.*

32. *Abdullahi v. Pfizer, Inc.*, No. 01 CIV. 8118, 2002 WL 31082956 (S.D.N.Y. 2002) (denying motion to dismiss the complaint for failure to state a claim, where complaint was brought pursuant to Alien Tort Statute, but dismissing complaint for *forum non conveniens*).

33. *See* INT’L LABOR RIGHTS FUND, LEGAL INITIATIVES FOR CORPORATE ACCOUNTABILITY, available at [www.laborrights.org](http://www.laborrights.org) (last visited Oct. 3, 2003).

34. CHARLES ABRAHAMS, THE APARTHEID LAWSUIT, available at <http://users.skynet.be/cadtm/pages/english/abrahamslawsuitapartheid.htm> (last visited Oct. 3,

Fujitsu<sup>35</sup>), and automotive (Daimler Benz, Ford, General Motors<sup>36</sup>) all face Alien Tort Statute claims.

Globalization has made every multinational corporation more vulnerable. Cases have been filed against companies for their ongoing operations in China,<sup>37</sup> Colombia,<sup>38</sup> Ecuador,<sup>39</sup> Guatemala,<sup>40</sup> Indonesia,<sup>41</sup> Kenya,<sup>42</sup> Myanmar,<sup>43</sup> Nigeria,<sup>44</sup> Papua New Guinea,<sup>45</sup> Peru,<sup>46</sup> South Africa,<sup>47</sup> Sudan,<sup>48</sup> and Claims have also been made against companies that did business with South Africa during the apartheid era,<sup>49</sup> and in Germany,<sup>50</sup> Japan,<sup>51</sup> and the countries they occupied during World War II.<sup>52</sup>

If the Ninth Circuit decision stands, a successful Alien Tort Statute claim must show a company sanctioning or turning a blind eye to profound violations of international law, including genocide, war crimes, slavery, rape, torture, arbitrary arrest, and extra-judicial

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35. Allison Raphael, *Apartheid Victims Sue Global Corporations*, ONEWORLD US, Nov. 13, 2002, available at <http://www.globalpolicy.org/soecon/tncs/2002/1113apartheid.htm> (last visited Oct. 3, 2003).

36. ABRAHAMS, *supra* note 34.

37. Bao Ge v. Li Peng, 201 F. Supp. 2d 14 (D.D.C. 2000).

38. Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

39. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

40. See Collingsworth, *supra* note 3, at 584.

41. See *id.* at 580.

42. Abdullahi v. Pfizer, Inc., No. 01 CIV. 8118, 2002 WL 31082956 (S.D.N.Y. Sept. 17, 2002).

43. Doe I v. Unocal Corp., Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976 (9th Cir. Dec. 3, 2002), vacated by Doe v. Unocal Corp., Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

44. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).

45. Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

46. Flores v. S. Peru Copper Corp., No. 02-9008, 2003 U.S. App. LEXIS 18098 (2d Cir. Aug. 29, 2003).

47. *Id.* at 585.

48. Presbyterian Church of Sudan v. Talisman Energy, Inc., 44 F. Supp. 2d 289 (S.D.N.Y. 2001).

49. See Dalecki, *supra* note 1.

50. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999); Burger-Fischer v. Degussa A.G., 65 F. Supp. 2d 248 (D.N.J. 1999).

51. *In re World War II Era Japanese Forced Labor Litig.*, 64 F. Supp. 2d 1160 (N.D. Cal. 2001); Deutsch v. Turner Corp., 17 F.3d 1005 (9th Cir. 2003).

52. See Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in U.S. Courts*, 34 U. RICH. L. REV. 1 (2000); Michael J. Bazylar, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601 (1999).

execution. However, it is clear that plaintiffs and their allies seek to expand the universe of international law violations, which would give rise to even more Alien Tort Statute claims. For example, plaintiffs have successfully persuaded courts to expand the historic definition of slavery to include forced labor.<sup>53</sup> More ambitious lawyers are seeking to craft an Alien Tort Statute claim based on harmful environmental practices; no court has yet accepted this expansion.<sup>54</sup>

## II. TACTICS MASQUERADING AS A POLICY

Since the first court decisions resuscitating the Alien Tort Statute from oblivion, U.S. policymakers have been ambivalent about its use to enforce international law. Since 1982, Republican administrations have generally argued that the decision of what international law is and what violations of it ought to be recognized by federal courts is a political question to be determined by Congress. In the absence of any legislative action, according to this view, the courts should decline to act. In contrast, Democratic administrations have been more supportive of judicial intervention to enforce international law in U.S. courts. Not surprisingly, with such contradictory guidance, U.S. courts have split on the appropriateness of accepting these cases.

The Bush Administration has appeared to take the strongest position against the Alien Tort Statute, and, in particular, its application to private corporations.<sup>55</sup> The policy has proceeded on two tracks. In May 2003, the Department of Justice intervened on behalf of a corporate defendant for the first time in an Alien Tort Statute case.<sup>56</sup> In a brief filed with the Ninth Circuit Court of

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53. *Doe I v. Unocal Corp.*, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976, at \*9-\*10 (9th Cir. Dec. 3, 2002), *vacated by Doe v. Unocal Corp.*, Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003), *citing* Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), *available at* <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm> (last visited Oct. 1, 2003).

54. For examples of failed efforts to extend international customary law to punish environmental destruction and its impact on individuals and communities, see *Flores v. S. Peru Copper Corp.*, No. 02-9008, 2003 U.S. App. LEXIS 18098 (2d Cir. Aug. 29, 2003); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001); *see also* Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545 (2000).

55. *See* Eggen & Lane, *supra* note 6.

56. *See* Unocal Brief, *supra* note 5.

Appeals, the Department argued that Unocal cannot be held liable in a U.S. court based on its alleged complicity with military forces in forced labor and other human rights violations committed during the construction of a natural gas pipeline in Burma.<sup>57</sup> Ironically, the same court rejected similar arguments over a decade ago when they were advanced by the Reagan Administration to shield former Philippine President Ferdinand Marcos from liability for torture and abuse.<sup>58</sup>

Separately, the State Department in 2002 communicated to courts for the first time its belief that adjudicating claims challenging corporate conduct might damage U.S. foreign policy objectives.<sup>59</sup> The State Department's Legal Advisor issued two such letters, in each case arguing that the adjudication of the claims would "risk a potentially serious adverse impact" on significant interests of the United States.<sup>60</sup> In a case involving ExxonMobil's operations in Indonesia, these included "interests related directly to the on-going struggle against international terrorism" and "efforts to promote human rights in Indonesia."<sup>61</sup> In a case involving Rio Tinto's operations in Papua New Guinea, these interests threatened to impact the "peace process, and hence on the conduct of our foreign relations" in resolving the separatist dispute in Bougainville.<sup>62</sup> Though neither of these letters has yet resulted in a definitive dismissal of the claims, other corporate defendants have requested similar missives in their own cases.<sup>63</sup>

The message of these actions appears to be that the Bush Administration opposes enforcement of international law standards by U.S. courts against multinational corporations. Such an approach is unnecessarily arbitrary. By focusing so much of its efforts on having courts reject these cases, the Bush Administration is abandoning a valuable policy tool that, if properly applied, could in fact advance U.S. global interests.

Moreover, regardless of the outcome of efforts to curtail the application of the Alien Tort Statute, the trend towards expanding the duties and obligations of global corporations to the individuals and communities touched by their operations seems destined to accelerate. The Statute is only one vehicle by which U.S. courts have sought to

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57. *Id.*

58. *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992).

59. Oberdorfer Letter, *supra* note 7; McCallum Letter, *supra* note 7.

60. McCallum Letter, *supra* note 7.

61. Oberdorfer Letter, *supra* note 7.

62. McCallum Letter, *supra* note 7.

63. Personal communication with author.

enforce standards of corporate accountability in the global economy. Should the Unocal decision be overturned, or the Alien Tort Statute itself repealed, there seems little doubt that the common interest of plaintiffs' lawyers and human rights advocates will uncover new and more creative ways to bring cases before courts in the United States and Europe.

U.S. courts have demonstrated a growing willingness to accept jurisdiction over cases alleging abuses in emerging markets.<sup>64</sup> Historically, courts have been loath to accept cases where the subject of the dispute does not fall clearly within its jurisdiction. Under the doctrine of *forum non conveniens*, courts have refused to adjudicate if another forum is more convenient for the parties. This is done to discourage "forum shopping"—prohibiting plaintiffs from looking for a friendly judge—or, in international disputes, a sympathetic judicial system. It also serves the goal of efficiency by directing local resources expended for judicial services on disputes of local interest.

Globalization and the greater ease of global communication have led courts to reexamine the doctrine and, in several prominent recent cases, accept cases that previously might have been rejected as too remote to the interests of U.S. courts and the U.S. justice system. Cases challenging corporate conduct have been filed based on theories of negligence, product liability, and conspiracy.<sup>65</sup> In one case, a federal court agreed to hear claims against a tear gas manufacturer, claiming it should have known that its product would be used under improper conditions by Israel's military forces operating in Gaza and the West Bank.<sup>66</sup>

Moreover, other jurisdictions have already followed the lead of U.S. federal courts to open their doors to these cases. Unocal is also defending its conduct in Myanmar before a state court in California.<sup>67</sup> Similar cases have also been filed, and accepted by, courts in France, Belgium, and Canada.<sup>68</sup> Indeed, until it was revised

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64. Matthew R. Skolnik, *The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of Its Former Self after Wiwa*, 16 EMORY INT'L L. REV. 187 (2002).

65. For a good discussion of the different claims against multinational corporations, see Phillip I. Blumberg, *Asserting Human Rights against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 508-22 (2002).

66. *Abu-Zeineh v. Fed. Lab., Inc.*, 975 F. Supp. 774 (W.D. Pa. 1994).

67. *Doe v. Unocal Corp.*, No. BC-237-980 (Cal. Super. Ct. June 7, 2002), available at <http://www.earthrights.org/unocal/TortLiabilityMSARuling.doc> (last visited Oct. 1, 2003).

68. See, e.g., THIERRY DESMAREST & HERVE MADEO, CIVIL ACTION FOR CRIMES AGAINST HUMANITY AND COMPLICITY IN CRIMES AGAINST HUMANITY COMMITTED IN BURMA (MYANMAR) LODGED ON THURSDAY APRIL 25, 2002 IN THE BRUSSELS MAGISTRATES COURT AGAINST X, THE COMPANY TOTALFINAELF S.A., available at

this past summer following a very public diplomatic spat with the United States, Belgium's law of universal jurisdiction, granting anyone the right to use that nation's courts to bring to justice human rights violators, including corporations, threatened to make that country as popular to human rights advocates as Mississippi has become to U.S. plaintiffs' lawyers.<sup>69</sup>

Barring the courthouse door is not a feasible strategy. Even if it were, the United States should resist the temptation. The United States has consistently advanced a global agenda to promote respect for the rule of law. Investors and policymakers increasingly recognize that judicial independence and effective administration of justice are essential building blocks to sustained economic growth and participation in the global economy. Strong judiciaries protect foreign investment and commercial interests from parochial favoritism, bias, and corruption.

But strong judicial systems do much more: They reduce risks of political instability by promoting confidence in the consistent application of rules. They foster civil society by creating a check on unbridled government authority, or those perceived as closely aligned with it. Advancing the rule of law has become a bedrock of U.S. foreign policy, reflected in U.S. concerns over China's accession to the WTO and our support for reestablishing the court system in Iraq. It is the basis of the Bush Administration's establishment of the Millennium Challenge Account, which will increase foreign assistance by 50% over the next three years and targets programs that support respect for rule of law and promote human rights.<sup>70</sup>

Along with these new foreign assistance initiatives, the Alien Tort Statute should be an effective tool to support the development of the rule of law. The threat of civil liability in the United States encourages improvements in the administration of justice and meaningful relief for victims of abuse in developing countries, since such relief would reduce the likelihood that U.S. courts will accept jurisdiction in the first place. By seeking to eviscerate the Alien Tort Statute, U.S. policy makers are abandoning a powerful weapon in their policy arsenal, one that can be used to help realize a critical goal.

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[http://www.birmanie.net/birma/ab112\\_ab290502.html](http://www.birmanie.net/birma/ab112_ab290502.html) (last visited Sept. 28, 2003); *TotalFinaElf Face Lawsuit by Myanmar Refugees over Govt. Human Rights Abuses*, AFX NEWS, May 8, 2002.

69. See, e.g., Paul Ames, *Belgian Government Parties Agree to Restrict Use of War Crimes Law*, ASSOCIATED PRESS, June 22, 2003.

70. Jennifer Windsor, *Democracy and Development: The Evolution of U.S. Foreign Assistance Policy*, 27 FLETCHER F. WORLD AFF. 141 (2003).

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Moreover, our country has a strong national interest in permitting such cases to be filed under certain circumstances. The United States has been a forceful advocate for international human rights standards; the development of an effective means of enforcement, even if indirect, is a natural complement. Corporate accountability in the United States, when relief elsewhere would be impossible, is an essential moral complement to our strong support for economic globalization.

### III. TOWARDS A NEW POLICY

An effective policy would recognize the value of these lawsuits in promoting the rule of law and the harmonization of minimum global standards of economic behavior. The policy would stand on three pillars.

The first pillar of U.S. policy should be to promote the effective resolution of these disputes in the countries where the violations occur. It is just as counterproductive to open the floodgates to foreign plaintiffs as it would be to bar the doors. If local justice is possible, or can be promoted, this is the solution U.S. policy should pursue actively.

Unfortunately, U.S. policymakers have missed the opportunity to use Alien Tort Statute cases to promote local justice. In an action against Rio Tinto, the global mining giant, plaintiffs claimed the company violated international law in connection with its operations in Papua New Guinea.<sup>71</sup> Their lawyers argued that it was unnecessary to seek justice in Papua New Guinea before bringing the case in the United States, regardless of whether the courts were independent.<sup>72</sup> The District Court in California agreed. Though the case is currently under appeal to the Ninth Circuit Court of Appeals, the U.S. government declined entreaties from Rio Tinto to intervene on this issue.<sup>73</sup> Regardless of the merits of the claims, the principle of exhaustion, well-established in international law, should govern the application of the Alien Tort Statute to corporate conduct by U.S. courts.<sup>74</sup>

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71. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1120 (C.D. Cal. 2002).

72. *Id.* at 1138.

73. Personal communication with author.

74. Restatement (Third) of the Foreign Relations Law of the United States § 713 cmt. d (1987) (“Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies.□□”).

Similarly, a series of cases using the Alien Tort Statute have been filed against numerous multinational corporations for doing business in South Africa during the apartheid regime.<sup>75</sup> Patterned after the successful Holocaust cases, these claims seek billions of dollars in damages. Ironically, virtually every company sued was a member in good standing of the Sullivan Principles, a program designed to define appropriate business practices for corporations that chose to “constructively engage” with the South African regime.<sup>76</sup>

Regardless of the merits of the claims, the United States should want these cases to be adjudicated in South Africa. More than most countries, South Africa has successfully implemented a program of national reconciliation designed to facilitate the transition from apartheid to majority rule. The “South African model,” as it has become known, includes a finely tuned set of laws and institutions to balance the desire to establish the truth of the apartheid era, punish those responsible, and move past its painful legacy. At least from the standpoint of prospective plaintiffs, there should be little question about the independence or legitimacy of the South African judiciary, particularly over its ability to administer justice in disputes against the former apartheid leaders and their allies in the business community.

This is precisely a situation where U.S. intervention based on the existence of local remedies would be important to advance its global interests. A court decision to hear an Alien Tort Statute claim over actions in South Africa reflects the worst sort of “judicial imperialism.” It would send the message that the United States does not respect the ability of South African society to administer justice by implying that U.S. courts are better placed to judge the pace and degree of South Africa’s national reconciliation. In contrast, U.S. intervention to block such a suit sends a different signal to South Africa and other countries struggling through difficult political transitions. It would communicate our recognition of the respected position that the justice system holds in South Africa and reinforce the importance of having these claims judged in that country.

But in the absence of any clear guidance from policymakers, U.S. judges have demonstrated a remarkable creativity in exercising their authority to strengthen the ability of foreign courts to enforce international law claims against corporate defendants. In several cases, U.S. courts have dismissed claims against multinational

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75. See Dalecki, *supra* note 1.

76. The (Sullivan) Statement of Principles (Fourth Amplification), Nov. 8, 1984, reprinted in 24 I.L.M. 1496 (1985).

corporations conditionally, with the understanding that the multinational corporations will accept jurisdiction of the local courts and agree to honor their judgments.<sup>77</sup>

Following one such conditional dismissal in May 2003, approximately 30,000 indigenous people filed a billion-dollar lawsuit against ChevronTexaco Corporation in Ecuador's Oriente region.<sup>78</sup> The case charges that twenty years of massive dumping of billions of gallons of highly toxic wastewater and crude oil systematically destroyed the environment and homeland of a number of rainforest peoples.<sup>79</sup> "On the face of it, this is a 'David versus Goliath' battle. However, the [U.S.] court has leveled the playing field by ruling that a small court in a remote town of Ecuador has the same power over a 99-billion-dollar multinational corporation as a federal court in Manhattan," the lead attorney, Cristobal Bonifaz told reporters.<sup>80</sup>

Regardless of the final disposition of the case, adjudication of such a claim in Ecuador would be a "trifecta" victory for U.S. policy if policymakers had pursued this outcome. First, local adjudication provides the plaintiffs with an opportunity to have their day in court, an important act of participation in the political and civil development of their society. Second, it promotes the development of an active and vibrant legal community, willing and able to represent the interests of all citizens and protect their rights. Finally, it grants local courts an important opportunity to demonstrate their independence and professionalism. It may even prove to be a victory for the defendants, since they too may someday find themselves in need of a strong, independent and respected court system.

U.S. policy should not simply bar our courts from offering justice in these cases—our national interests are advanced when justice is rendered in local fora. The first pillar of an effective U.S. policy to promote local justice should include three elements.

First, the United States should seek to have the courts recognize that the internationally accepted legal doctrine of exhaustion of local remedies should apply to claims under the Alien Tort Statute. In every proceeding, the United States should encourage the court to ask parties to explain why local remedies can or cannot provide effective relief for the challenge to corporate conduct. U.S.

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77. See, e.g., *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 539 (S.D.N.Y. 2001).

78. Jim Lobe, *Environment: Oil Giant Lawsuit Signals Power of Third World Courts*, INTER PRESS SERVICE, May 8, 2003, available at LEXIS, News Library, INPRES File.

79. For background on the circumstances leading to the litigation, see *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996).

80. Lobe, *supra* note 77.

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policy should explicitly promote the principle that human rights claims against multinational corporations should be brought in local courts when those courts can offer effective remedies.

Second, the United States should support effective analysis by U.S. courts in scrutinizing practices of foreign judiciaries to determine their independence and in examining whether local justice can be fairly and effectively administered. Particularly where the United States has worked to promote improvements in respect for the rule of law and the effective administration of justice, the United States should assist its courts in understanding U.S. foreign policy interests in achieving local resolution of these disputes.

Finally, rather than intervene simply to ask courts to throw out Alien Tort Statute claims, the State Department should seek conditional dismissals as a policy tool to encourage local resolution of disputes. The decision on whether to play such a role will inevitably reflect a complicated balance of factors, and perhaps require coordination between officials at the Department of State, the Department of Justice, and the Office of the Special Trade Representative. But it will be no more challenging than the analysis Administration officials currently take when deciding to ask a court to dismiss a case due to the foreign policy damage that would result if it is not. And, unlike such requests, this intervention would directly advance U.S. national interests by promoting local respect for the rule of law.

In pursuing this fundamental policy pillar, the United States will inevitably be drawn into a determination of the elements of effective administration of justice, including not only the substantive standards of conduct, but also the minimum procedural rules. (Is the administration of justice not effective if class action suits are not permitted? Is relief unavailable if contingency fees are not permitted?). In an era of globalization of trade, investment, and injury, these are intensely political questions. But they are not new. These issues are already the subjects of international negotiation, most prominently over the draft Vienna Convention on the Respect of Foreign Judgments.<sup>81</sup>

At a minimum, our policy should look to the existence of a plaintiff's bar or a public interest community capable of pursuing these cases. However much corporate defendants may abjure them, the existence of a public interest law community or a plaintiff's bar is a powerful indication of the emergence of a nascent civil society.

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81. After all, a U.S. court should not respect a judgment delivered by a foreign court if that judgment was not reached in a "fair" proceeding.

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When qualified advocates are able to take on and win cases that challenge private corporate conduct, a society is establishing the checks and balances that create stability and respect for human rights and the rule of law.

Ironically, but appropriately, multinational corporations may well conclude that it is in their financial interest to take steps to improve the effective administration of justice in the countries where they do business. This reasoning should hold true even if it increases the odds that they and their operations will face legal action. Local courts can be far better suited to adjudicating claims than U.S. courts. Local proceedings as well as potential judgments are generally far less costly. By contrast, U.S. courts and juries may have little appreciation of the challenges of doing business in developing countries or the important benefits of global trade and investment to local communities. Some companies have recognized these benefits and begun to invest in local justice. Statoil, for example, has joined with Amnesty International, the United Nations Development Program, and the local judiciary, to create a program to train Venezuelan judges in human rights.<sup>82</sup>

Of course, this policy pillar must also recognize that in many parts of the world and certainly in many of the jurisdictions where Alien Tort Statute claims are based, an independent, functioning judicial system is a futile pipe dream. It is hard to imagine any U.S. court recognizing the courts of Myanmar as capable of adjudicating claims against Unocal's alleged complicity with that country's military rulers, or concluding that the courts in Sudan are capable of evaluating claims against Canadian oil producer Talisman's role in supporting Sudan's government military actions in that country's civil war.

In such situations, U.S. policy promoting the rule of law cannot simply focus on improving local courts. U.S. policy must push global conduct of multinational corporations to guide the development of local practices. By demonstrating that they keep their own houses in order, the multinational corporations that are the engines of globalization can advance respect for international law standards. The United States should shield these corporations from liability in U.S. courts.

The second pillar of U.S. policy should be to promote soft law "safe harbors" to shield companies that take effective action to prevent abuses or correct them when they are discovered. If

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82. Sarah Murray, *When Exploration Rights Meet Human Rights*, FIN. TIMES, Mar. 15, 2002, at 12.

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corporations wish to avoid liability in U.S. courts, and local courts are not an available option, then they will need to participate in private programs that achieve these results.

As part of its support for advancing respect for international law in the global economy, the U.S. government has supported several soft-law initiatives designed to promote corporate accountability in the global economy. Two areas that have received particular attention were begun by the Clinton Administration and continued under President Bush. They offer a glimpse of how a “safe harbor” policy could develop.

The Fair Labor Association, the result of an initiative started by the Clinton Administration in 1996, seeks to ensure that global supply chains in the apparel, footwear, and other low-wage sectors meet international labor standards.<sup>83</sup> The organization, a partnership of industry, non-governmental organizations (“NGOs”), colleges and universities, has established an independent monitoring system that holds participating companies publicly accountable for the conditions under which their products are produced. Nike, Liz Claiborne, Reebok, Adidas, Polo Ralph Lauren, and Phillips Van Heusen are the major brands that participate in the system.<sup>84</sup>

The Voluntary Principles on Security and Human Rights (“Voluntary Principles”), issued in the final days of the Clinton Administration, seek to ensure that security measures to protect operations in the extractive sector comply with international human rights standards.<sup>85</sup> Endorsed by the governments of the United States, Great Britain, seven major extractive companies,<sup>86</sup> and five prominent human rights NGO’s,<sup>87</sup> the Voluntary Principles require that participating companies take steps to ensure that their operations

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83. For further information on the initiative, see [www.fairlabor.org](http://www.fairlabor.org).

84. For a full list of participating companies, see <http://www.fairlabor.org/all/companies/index.html>.

85. Voluntary Principles on Security and Human Rights, *available at* <http://www.state.gov/g/drl/rls/2931.htm> [hereinafter Voluntary Principles].

86. Texaco, Chevron, BP, Conoco, Freeport McMoRan, Rio Tinto and Shell endorsed the Voluntary Principles. *See* Secretary of State Madeleine Albright, Remarks at the State Dept. Briefing on Voluntary Corporate Code (Dec. 20, 2000), *available at* [http://www.usembassy.it/file2000\\_12/alia/a0122003.htm](http://www.usembassy.it/file2000_12/alia/a0122003.htm).

87. Amnesty International, Human Rights Watch, Business for Social Responsibility, Fund for Peace, International Alert, Prince of Wales Business Leaders Forum, Council on Economic Priorities and the Lawyers Committee for Human Rights endorsed the Voluntary Principles. *Id.* Two labor organizations, the International Federation of Chemical, Energy, Mine Workers Union and the General Workers Union, also endorsed the Voluntary Principles. *Id.*

comply with fundamental human rights standards.<sup>88</sup> These steps include completing a study of human rights conditions as part of their project evaluations, monitoring human rights violations by the state security forces protecting their operations, and ensuring that the security measures taken to protect their operations comply with international law.<sup>89</sup>

These initiatives have the potential fundamentally to advance U.S. interests in respect for the rule of law. Each looks to international legal standards as the source of substantive responsibilities for the treatment of workers and communities affected by their business operations. Each seeks to establish transparent procedures to promote compliance with those standards. Each seeks to demonstrate that compliance is compatible with successful business operations. Each elevates the legitimacy of international standards in countries where respect for law is the exception, rather than the rule.

Currently, companies have only limited incentive to join these initiatives, and even less to work to make them robust. They offer little direct benefit in the commercial marketplace, though participation may burnish corporate reputations for social responsibility. On the other hand, simply joining these initiatives imposes risks; at the very least, it may signal to prospective critics that the company is sensitive to reputational threats.

With such limited attraction, it is no surprise that the programs suffer from either limited corporate participation, limited achievements, or both. Seven years passed after the Rose Garden ceremony announced the partnership before the Fair Labor Association published its first “annual” report on the performance of companies. Though it was launched amid concerns over apparel sweatshops, the program has yet to achieve meaningful penetration in that sector. In fact, several of the larger companies, including Levi Strauss & Co., L.L. Bean, Nicole Miller, and Kathie Lee Gifford (whose tearful public relations crisis helped launch the initiative) have pulled out.<sup>90</sup>

The achievements of the Voluntary Principles are similarly discouraging. Almost three years after its public launch, two more governments (Norway and the Netherlands) and three more companies (Newmont Mining, Occidental Petroleum, and ExxonMobil) joined the process.<sup>91</sup> Yet despite—or perhaps because

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88. Voluntary Principles, *supra* note 85.

89. *Id.*

90. For a membership listing, see [www.fairlabor.org/all/companies/index.html](http://www.fairlabor.org/all/companies/index.html).

91. See U.S. DEP'T OF STATE, FY 2004 PERFORMANCE PLAN (2003), *available at*

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of—such broad support these endorsements have yet to translate into any clear change in corporate practices or their public reporting.

If launching these initiatives advances U.S. foreign policy interests, helping them succeed should as well. Companies respond to incentives; it is up to policymakers to provide them. The United States should insist that such programs be more than window dressing and reward companies that agree to participate by agreeing to intervene on their behalf in—or to prohibit—court proceedings that challenge their compliance. This would be a way to seize the policy agenda from the plaintiff's bar and direct it toward advancing U.S. objectives of advancing respect for the rule of law and compliance with international legal standards in the global economy.

In the future, when plaintiffs seek to punish a corporation for its supply chain practices, as in China for example, or a company's allegedly improper relationship with the security forces of a host government, the company's good standing in such a program should be evidence that the company has acted in good faith to prevent the problems. At the same time, the company's participation in the program provides the government the opportunity to intervene on the grounds that such participation advances a foreign policy objective of the United States. To be sure, neither of these arguments would be dispositive, but the imprimatur of U.S. policy in support of corporate conduct would be of significance.

Such a policy would have three salutary benefits. First, it would provide new incentives for companies to join and strengthen existing initiatives or to create new programs to respond to emerging risks. Potential corporate defendants that are genuinely concerned about the risks presented by the Alien Tort Statute and its cousins would undoubtedly welcome the prospect of reducing the risk of litigation by such a "safe harbor." This approach will also call the bluff of companies' concerns over the Alien Tort Statute and its cousins. The more companies fear lawsuits under the statute, the greater their incentive to join programs that will protect them; the less they fear liability, the less interest they should have in amending or eviscerating the statute.

Second, U.S. intervention would connect more directly to U.S. policy objectives. The current approach leads the United States to

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<http://www.state.gov/m/rm/rls/perfplan/2004/20482.htm> (last visited Oct. 1, 2003); *see also* ELIZABETH DUGAN, PROMOTING CORPORATE SOCIAL RESPONSIBILITY: THE HUMAN RIGHTS PERSPECTIVE (2003), *available at* <http://www.andi.org.co/ftp/LIXAsamblea/4%20-%20Subsecretaria%20de%20Estado%20de%20EU%20-%20Elizabeth%20Dugan.doc> (last visited Sept. 29, 2003).

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intervene in a manner that benefits companies and explicitly ignores the corporate conduct that is the basis of the claim. In the current environment, the United States has sought to have cases dismissed because of jurisdictional concerns or based on the possible risks to the U.S. relationship with a foreign government. In the future, the intervention would target the foreign policy implications of the claim itself. The United States would, quite properly, be supporting those corporations whose programs satisfied government-endorsed standards of conduct.

Third, this approach would reduce the excessive influence of plaintiffs' attorneys in shaping the nature of U.S. efforts to promote respect for the rule of law globally. The current policy is reactive, forcing the United States to evaluate its foreign policy interests in response to lawsuits filed in U.S. courts. While the threat of litigation will certainly lead corporations to clamor for new "safe harbors," U.S. national interests, not litigation concerns, should drive the priorities and substance of the resulting programs.

The third pillar of this new policy paradigm should respect the need for a balance between American aspirations for promoting human rights and similar initiatives undertaken by other countries. Just as multilateral agreements for collective security such as NATO affect investments in national security, American policymakers must respect multilateral efforts to help procure human rights and economic development. Successfully blocking cases from American courts will mean little if other foreign courts in Belgium or elsewhere readily agreed to hear plaintiffs' claims. Similarly, companies will not seek out "safe harbors" if other governments do not recognize them.

As a first step, the U.S. government should pursue agreements with other countries that exhaustion of local remedies is not simply a judicial doctrine but a foreign policy accepted by all nations. Whether by formal conventions or less formal arrangements, the United States must work with its economic partners to support consistently the realization of local solutions. Even a rough multilateral consensus to local rule of law will encourage local judiciaries to assert greater independence and executives to respect their decisions.

Globalizing support for "safe harbors" should be the next step. If unilateral support for such programs advances U.S. interests in promoting responsible globalization, multilateral support should be even more effective. Building consensus will require the United States to demonstrate leadership it has previously chosen not to exercise. Over the past twenty years, there has been an explosion in

the number of standard-setting initiatives created by elements of civil society, national governments, and at the Organisation for Economic Co-operation and Development (“OECD”) and the United Nations. While “codes of conduct” have proliferated, the United States has steadfastly resisted doing significantly more than voicing its support for private voluntary initiatives. The G-8 Foreign Ministers reiterated this passive support most recently following their May 2003 meeting in Deauville.<sup>92</sup>

While such a “hands off” approach may have made sense two decades ago, it has now become counterproductive. In the wake of plaintiffs’ diplomacy, the proliferation of initiatives has created “code paralysis.” While these programs generally include comparable standards, the absence of strong government guidance discourages companies from joining any code. Standards may have developed, but the mechanisms to encourage companies to respect them have not matured. Again, incentives matter.

U.S. leadership in addressing international bribery and corruption offers a model of how standards of business conduct can successfully become accepted worldwide. As Commerce Secretary Evans has noted:

Corruption by and of public officials is a serious threat to governments and it undermines the rule of law. Furthermore, corruption materially affects the environments in which companies operate and erodes the fabric of everyday economic life; it is the invisible tax that raises the cost of doing business and unfairly places it on those least able to pay.<sup>93</sup>

The United States launched its own campaign against international bribery and corruption more than twenty-five years ago with the passage of the Foreign Corrupt Practices Act (“FCPA”).<sup>94</sup> The FCPA had a major impact on how U.S. companies conduct

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92. 2003 G8 SUMMIT, FINANCE MINISTER’S STATEMENT, *available at* [http://www.g8.fr/evian/english/navigation/news/news\\_update/finance\\_ministers\\_\\_statement.html](http://www.g8.fr/evian/english/navigation/news/news_update/finance_ministers__statement.html) (last visited Sept. 29, 2003). The Ministers stated that they “also encourage voluntary private sector initiatives that foster and complement such international efforts to promote corporate social and environmental responsibility as the OECD guidelines for Multinational Enterprises and the UN Global Compact principles.” *Id.*

93. TRADE COMPLIANCE CENTER, ADDRESSING THE CHALLENGES OF INTERNATIONAL BRIBERY AND FAIR COMPETITION: THE THIRD ANNUAL REPORT UNDER SECTION 6 OF THE INTERNATIONAL ANTI-BRIBERY AND FAIR COMPETITION ACT OF 1998, Executive Summary (2001), *available at* <http://www.tcc.mac.doc.gov/cgi-bin/doi.cgi?204:71:920312681:1> (last visited Oct. 1, 2003).

94. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd, 78dd-1 to -2 (1994).

international business. In the absence of support for similar standards of conduct by key trading partners, however, corruption could still thrive in international commerce. In addition, U.S. businesses were put at a significant disadvantage: their foreign competitors continued to pay bribes without fear of penalties.

Recognizing that bribery and corruption in foreign commerce “could be effectively addressed only through strong international cooperation, the United States undertook a long-term effort to convince the leading industrial nations to join it in passing laws to criminalize the bribery of foreign public officials.”<sup>95</sup> The effort succeeded in November 1997 with the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>96</sup>

The agreement on global programs to encourage corporate practices to satisfy international law standards has achieved the same level of consensus as concerns over bribery had at the time the United States enacted the FCPA. The “rule of law” link between policies to root out corporate corruption and policies to promote corporate respect for human rights could not be more pronounced.

#### IV. CONCLUSION

Since the end of World War II, U.S. administrations have declared, “our nation’s greatest export is its democratic principles. It is when free men and women are able to conduct their business in free markets that the returns are greatest for all of us.”<sup>97</sup> The foreign plaintiffs in U.S. courts claiming that they are victims of egregious corporate conduct are likely to agree, as would their attorneys.

But exporting democratic principles and promoting the rule of law do not mean and should not mean importing foreign litigants into American courts. To the contrary, American foreign policy and its democratic principles are best aligned when they promote the

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95. TRADE COMPLIANCE CENTER, ADDRESSING THE CHALLENGES OF INTERNATIONAL BRIBERY AND FAIR COMPETITION: FIRST ANNUAL REPORT TO CONGRESS ON THE OECD ANTIBRIBERY CONVENTION 2 (1999), available at [http://www.mac.doc.gov/tcc/anti\\_b/oeed1999](http://www.mac.doc.gov/tcc/anti_b/oeed1999) (last visited Sept. 26, 2003).

96. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, OECD Doc. DAFFE/IME/BR(97)20, 37 I.L.M. 1 (1998).

97. Letter from Donald L. Evans to Hon. Richard Cheney, President of the Senate, and Hon. J. Dennis Hastert, Speaker of the House of Representatives (2001), available at [http://www.mac.doc.gov/tcc/anti\\_b/oeed2001/html/seclet.htm](http://www.mac.doc.gov/tcc/anti_b/oeed2001/html/seclet.htm) (last visited Sept. 27, 2003).

development of local institutions that are politically robust and respectful of individual rights. The Marshall Plan, the reconstruction of Japan, and the FCPA are just a few American foreign policy initiatives that effectively balance principles and practice. They avoid imperialism, promote self-sufficiency and improve the ability of local governments to participate in the global community.