New Concern for Transnational Corporations: Potential Liability for Tortious Acts Committed by Foreign Partners*

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I. INTRODUCTION

On March 25, 1997, United States District Court Judge Richard A. Paez announced a ruling that could have serious impacts on U.S. companies transacting business overseas. In the case of Doe v. Unocal, Judge Paez allowed Burmese plaintiffs to carry forward their claims against Unocal Corp. (“Unocal”) for alleged human right violations committed in connection with Unocal’s construction of a pipeline in Burma/Myanmar.

The plaintiffs, comprised mainly of Burmese farmers, sued Unocal under 28 U.S.C. § 1350 of the Alien Tort Claims Act (“ATCA”) which allows alien plaintiffs to sue in United States courts for torts committed in violation of the law of nations or a treaty of the United States. Unocal had entered into alleged joint ventures with several project members including the State Law and Order Restoration Council.

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3. See Unocal, 963 F. Supp. at 883. The plaintiffs named are villagers from the Tenasserim region of Burma. The plaintiffs seek injunctive, declaratory and compensatory relief for alleged international human rights violations committed by the defendants in furtherance of the Yadana gas pipeline project. Id. at 883-84.

The project, named the Yadana Natural Gas Project, involved building a 250 mile pipeline costing over one billion dollars. The plaintiffs alleged that SLORC committed human rights abuses, including torture and forced labor, in connection with building the pipeline. Although SLORC was entitled to sovereign immunity, the federal court in California had jurisdiction over Unocal for the abuses that SLORC committed.

In light of Unocal's potential liability for the abusive acts committed by SLORC, U.S. companies operating overseas have great cause for concern. Even though Unocal involves human rights violations in particular, Unocal's liability pursuant to the ATCA may have broader

5. See Unocal, 963 F. Supp. at 883. The project members include: Total S.A. ("Total"), a French oil company; the Myanma Oil and Gas Enterprise ("MOGE"), a Burmese oil company wholly owned and operated by SLORC; and the Petroleum Authority of Thailand Exploration & Production Public Co. Ltd. ("PTTEP"). National Coalition Gov't of the Union of Burma (NCGUB) v. Unocal Inc., 176 F.R.D. 329, 336 (C.D. Cal. 1997). The NCGUB case involves another action brought against Unocal for the same tortious acts committed by SLORC in connection with building the pipeline.

6. See Unocal, 963 F. Supp. at 883; Cox, supra note 1, at 1. The oil companies (Unocal, Total and MOGE) commenced negotiations for the construction of the pipeline in 1991. See Pizzuro & Delaney, supra note 1, at S5. Unocal has invested $20 million in the project as of November 1995. See Cox, supra note 1, at 2. The project plans indicate that the pipeline will run through Burma into Thailand and will cost approximately $1.2 billion. See Bencivenga, supra note 1, at 5.

7. See Doe v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997). Plaintiffs contend that SLORC used violence and intimidation to relocate and enslave farmers in order to build the pipeline. See id.; NCGUB, 176 F.R.D. at 336. Allegedly, the government police committed acts of torture, violence, rape and forced labor to further the building of the pipeline. See Pizzuro & Delaney, supra note 1, at S5.

8. See Unocal, 963 F. Supp. at 885-88 (noting that SLORC and MOGE are entitled to sovereign immunity pursuant to The Foreign Sovereign Immunities Act ("FSIA")). Generally, the FSIA limits a plaintiff's ability to sue a sovereign, but an exception applies when the sovereign has engaged in a commercial activity. See 28 U.S.C. §§ 1330, 1602 (1994). Judge Paez rejected Unocal's argument that the Unocal case fell under this commercial activity exception. Unocal, 963 F. Supp. at 887-89.

9. In response to Unocal's motion to dismiss, Judge Paez held, among other things, that the Burmese government was not a necessary and indispensable party; the court had jurisdiction over claims against Unocal under the ATCA; allegations of torture and slavery by the Burmese government in connection with the pipeline project stated a claim against Unocal; and consideration of these claims were not precluded by the act of state doctrine. A separate case brought by the NCGUB confirmed that the act of state doctrine did not bar consideration of claims of torture and forced labor. NCGUB, 176 F.R.D. 329, 354 (C.D. Cal. 1997). In this November 5, 1997 ruling, Judge Paez dismissed one plaintiff party, the NCGUB, because it lacked standing to bring the action in a United States Court. See id. at 360.
implications. Corporations may in the future be held accountable for all
types of tortious conduct committed by business partners, including
potential liability due to unfair labor practices and even simple
negligence. This potential liability is problematic considering that,
although certain tortious conduct may be illegal by U.S. standards, those
same acts may be legal in the country in which they are performed. The
issue then arises of whether U.S. courts should hear such cases,
necessarily imposing U.S. legal standards on conduct occurring in
foreign territory.

Critics have argued that the problem of foreign sovereigns committing
abusive acts in their own countries is a matter of foreign affairs that is
best left to Congress and the President. They contend that U.S. courts
have no authority to hear such matters. This Comment examines
whether U.S. companies conducting business overseas with foreign
partners should be held accountable in U.S. courts for human rights
abuses and other tortious acts committed by those partners.

Prior to Unocal, several organizations took measures to mitigate the
gross human rights violations occurring in countries where U.S.-based
corporations were operating. Recently, more specific measures have
been taken to counter human rights abuses in Burma. Unfortunately,
these attempts have been unsuccessful, and companies like Unocal are
left with no clear guidelines for investing overseas.

In the absence of effective mandates from the United States
government or from any world organization, this Comment proposes
that transnational corporations ("TNCs") should develop their own
private codes of conduct to ensure the protection of human rights abroad.
Specifically, it will address the legal and moral importance of TNCs
withholding investment from, or divesting from, projects that are
connected with human rights abuses. Furthermore, when TNCs fail to
uphold human rights in connection with their business dealings, the
United States court system might be an appropriate means for affording

10. The groups include the United Nations, the United States Congress, the United
States President, local governments and private groups. See infra Part II.
11. See infra Part II.
12. Currently, corporate and governmental policies provide limited guidance on
how corporations operating overseas should respond to human rights violations. The
existing policies are too vague to serve as a guide for the proper corporate response to
specific human rights violations. See Barbara A. Frey, The Legal and Ethical
Responsibilities of Transnational Corporations in the Protection of International Human
Rights, 6 MINN. J. GLOBAL TRADE 153, 154 (1997).
13. The term 'transnational corporation' refers to a corporation with affiliated
business establishments in more than one country. See Jonathan I. Charney,
Transnational Corporations and Developing Public International Law, 1983 DUKE L.J.
748, 749 n.1 (1983) (citing WEINER FELD, NONGOVERNMENTAL FORCES AND WORLD
POLITICS, A STUDY OF BUSINESS, LABOR, AND POLITICAL GROUPS 22-23 (1972)).
plaintiffs a remedy.

This Comment addresses these broad issues in three parts. First, it discusses past initiatives by various governing bodies and private groups to handle the problem of TNCs investing in countries that commit grave human rights violations. More specifically, the efforts discussed are those of the United Nations, the U.S. Congress and the President, state and city governments, and private groups. Because of the U.S. government's desire to promote free trade, none of these efforts has proved effective in regulating investment activity overseas.

This Comment then discusses whether, in the absence of clear mandates from the United States government, TNCs should be held accountable for human rights abuses committed by foreign partners. Specifically, three issues will be addressed. First, is this a matter of foreign affairs that should be left to the United States executive and legislative branches instead of the judiciary? Second, does TNC activity that furthers human rights abuses violate international customary law? Third, do TNCs have a moral duty to uphold human rights overseas? Because the answer to each of these questions requires an examination of the particular facts of a given case, this Comment will discuss the opposing arguments in the context of the *Unocal* case.

Finally, this Comment proposes the solution that TNCs should develop and follow private codes of conduct until the legislature intervenes. Increasingly, TNCs are developing these codes, but no real mechanism exists to enforce the codes. Absent any legislative directive and when codes of conduct fail, allowing plaintiffs to sue TNCs in U.S. courts may deter TNCs from engaging in overseas activities that contribute to human rights violations.

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14. See infra Part II.
15. See infra Part II.
16. See infra Part III.
17. See infra Part III(A).
18. See infra Part III(B).
19. See infra Part III(C).
20. See infra Part IV.
21. See infra Part IV(B).
22. This Comment discusses possible regulation of U.S.-based TNCs only, as opposed to regulation of TNCs that are not based in the U.S.
II. EFFORTS TO REGULATE TNC ACTIVITY

A. The United Nations

In 1974, the forty-eight member states of the United Nations Economic and Social Council ("ECOSOC") formed the United Nations Commission on TNCs. Their main purpose was to formulate a code of conduct for TNCs. In 1990, the Commission completed the final draft of the United Nations Code of Conduct on Transnational Corporations ("the Code") which attempted to balance the competing interests of regulating corporate conduct and setting forth fundamental standards for nondiscriminatory government host behavior towards TNCs. The final draft of the Code explicitly stated that TNCs must respect human rights, requiring that human rights take precedence over cultural norms. Western governments and TNCs opposed the adoption of the Code on the grounds that it would impose significant duties on TNCs, without imposing equally significant duties on host governments. Consequently, negotiations concerning adoption of the Code ceased in 1992. Therefore the Code serves merely as a moral standard until it is formally adopted.

Even though the United Nations has not yet adopted a formal standard for regulating TNC activity overseas, it has made clear efforts to combat

23. See Frey, supra note 12, at 166.
24. See id. The code was inspired by allegations of improper TNC behavior overseas. See Multinational Corporations and United States Foreign Policy: Hearings before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, 94th Cong., 381-86 (1975).
26. See Frey, supra note 12, at 167.
27. See id.
28. See Compa & Hinchliffe-Darricarrere, supra note 25, at 670. In 1994, the Commission on TNCs was moved from ECOSOC, and became a commission under the Trade and Development Board. See Frey, supra note 12, at 167. This move was a result of the Secretary-General's decision to consolidate all activities related to TNCs within the U.N. Conference on Trade and Development ("UNCTAD"). See id. UNCTAD promotes foreign direct investment, especially investment in developing countries. The Commission's name change to the "Commission on International Investment and Transnational Corporations" showed a slight commitment on the part of the United Nations to focus regulatory efforts on corporations conducting business overseas. See id.

B. The United States Legislature

The U.S. legislature’s primary method of restricting trade and investment in certain countries is by imposing economic sanctions. In early years of governing TNCs, the legislature was only slightly concerned with human rights abuses. More recently, several proposals have been set forth in Congress, but none have been implemented.

The most thorough attempt to regulate TNCs was the 1986 Anti-Apartheid Act in South Africa, which contained a code of conduct for human rights protection. Any United States national employing over


30. See id. The United Nations has taken other measures to address international concerns. On June 15, 1998, United Nations delegates from more than 120 countries agreed to establish a permanent international criminal court, in spite of much skepticism concerning whether these individuals would be able to reach a consensus. The court will try individuals suspected of war crimes, genocide, and crimes against humanity. See The U.N. and War Criminals: How Strong a Court?, THE ECONOMIST, June 13, 1998, at 46.


32. Although the U.S. government is often willing to regulate business activities in foreign countries, the government has had little success in regulating TNCs on human rights issues. See Frey, supra note 12, at 169. One of the earliest initiatives against human rights abuses was the Hawley-Taft Act that Congress passed in 1930 which prohibited importation of products made by convict labor. Tariff Act of 1930, Pub. L. No. 71-361 § 307, 46 Stat. 590, 689-90 (1930).

twenty-five people in South Africa was required to follow this code.34 Also, in 1989, Senators John Heinz and Dennis DeConcini introduced a bill which attempted to formulate codes of conduct for business transactions with the Soviet Union.35 It required U.S.-based TNCs to promote human rights and democratic reform.36

In 1991, Congressman John Miller introduced a similar bill which created a code of conduct for U.S. companies conducting business in China and was to be adopted on a voluntary basis only.37 Like previous bills presented before Congress, this bill was not enacted into law. However, it was one of the first Congressional initiatives which provided for a human rights code to be adhered to by TNCs.38 Several other Congressmen planned to sponsor new bills similar to the Miller legislation but refrained once President Clinton vowed to propose his own code of conduct for companies transacting business overseas. President Clinton proposed the Model Business Principles to address human rights conditions in China.39 Critics argue that the principles were virtually ineffective because they were voluntary only.40 However, the Model Business Principles at least serve as an example of a broad human rights policy that TNCs can choose to adopt privately.41

With respect to Burma in particular, Senator Mitch McConnell proposed a 1995 bill which would ban U.S. investment and trade with Burma through The Burma Freedom and Democracy Act, which was modeled after the Anti-Apartheid Act.42 The Burma Act sought to prohibit any investment supporting SLORC, even investment in which TNCs unknowingly supported SLORC.43 The bill mandated that the U.S. government: (1) withhold support for loans to Burma from international financial institutions; (2) prevent direct assistance to SLORC; and (3) exclude members of SLORC from the United States.44 The Clinton Administration did not adopt this bill because of its desire to promote free trade and investment in Burma. In an April 5, 1995 letter to AFL-CIO President Lane Kirkland, U.S. Secretary of State

34. See Frey, supra note 12, at 188 n.86.
36. See id.
38. See id. at § 401(b).
39. See Frey, supra note 12, at 171. President Clinton's code of conduct promise stemmed from his decision to uphold China's most favored nation status. See id.
40. See infra notes 51-52 and accompanying text.
41. See infra Part IV.A (discussing formal adoption of codes of conduct by TNCs).
42. See Frey, supra note 12, at 169. Senator McConnell had previously been an advocate of legislative sanctions against South Africa in 1986. See Danitz, supra note 2, at 4.
43. See Frey, supra note 12, at 169.
44. See id.
Warren Christopher acknowledged concern for the human rights situation in Burma, but refused to support the full trade and investment embargo proposed by Kirkland (and captured in the McConnell bill). According to the Secretary of State,

"To be effective such an embargo would need international backing. . . We have found no interest in an U.N. embargo. Indeed, many of Burma's largest trading and investment partners argue for more trade and investment and profess to believe that more interaction with the world economy and with states where political diversity is respected will encourage change for the better in Burma."

Warren Christopher’s letter highlights one of the major dilemmas concerning U.S. investment overseas: whether such investment actually promotes democracy in corrupt countries or whether it encourages corruption by providing foreign governments with financial assistance. Because of this dilemma, the U.S. government has been reluctant to adopt a policy that would prohibit investment in Burma.

Recently, United States Senator Jesse Helms has attempted to address human rights problems in Burma by suggesting that the U.S. impose unilateral sanctions on Burma. Senators Dianne Feinstein and John McCain have made other, less drastic attempts; they have advocated allowing the President, in conjunction with other nations, to develop a multilateral strategy against Burma before imposing sanctions. The President has not expressly adopted either of these proposals.

C. The United States Executive

The President and the Executive branch have the power “to enforce U.S. policy through economic sanctions such as the revocation of most favored nation status, the suspension of economic and security assistance, and the vetoing of assistance from international financial institutions.” President Clinton has been reluctant to use his authority to limit foreign commercial activities of U.S. companies, as demonstrated by his resistance to forming a strong policy against human rights in Burma.

45. Id. at 170 (quoting letter from Warren Christopher, former U.S. Secretary of State, to Lane Kirkland, President, AFL-CIO (Apr. 5, 1995) (ellipsis in original)).
46. See infra Part III.C.2.
47. See Doe v. Unocal Corp., 963 F. Supp. 880, 894 n.17 (C.D. Cal. 1997). In support of his position, Senator Helms stated that “[w]e know there is forced labor in Burma.” Id. (citations omitted).
48. See id.
49. See infra Part II.C.
50. Frey, supra note 12, at 171.
In response to the criticism he received for upholding China's Most Favored Nation ("MFN") status, President Clinton set forth the Model Business Principles. The Principles were established not just for China, but for all nations, and they are voluntary, with no provisions for government monitoring or enforcement. Although the Clinton Code has been highly criticized, some companies have in fact adopted the rules as minimum guidelines for transacting business abroad.

With respect to Burma specifically, President Clinton refused to impose economic sanctions against SLORC despite strong pressures from legislators and activists. Congress has recently granted the President conditional authority to prohibit only "new investment" in Burma. Thus Congress and the President have only made cautious


52. See Douglass Cassel, Corporate Initiatives: A Second Human Rights Revolution?, 19 FORDHAM INT'L L.J. 1963, 1974 (1996). In order for China's MFN status to be renewed, China was required to show significant progress in adhering to the Universal Declaration of Human Rights. See Turack, supra note 51, at 7-8; see also Universal Declaration of Human Rights, G.A. Res. 217 A, U.N. Doc. A/810, at 71 (1948). President Clinton admitted in a May 26, 1994 news conference that China did not make "overall significant progress" with respect to human rights, but he chose to renew China's MFN trading status anyway. He chose to "delink" human rights from the process, and considered a stringent human rights policy as no longer necessary. Turack, supra note 51, at 48. President Clinton has been highly criticized for this decision because "widespread and well-documented" human rights abuses have continued in China. Id. at 49-50.


55. See Frey, supra note 12, at 173.

56. See supra Part II.B; see also Ken Silverstein, Beyond Rangoon: Local Lobbyists and Unocal Shill for Burma's Military Junta, VILLAGE VOICE, Apr. 22, 1997, at 38. The strong lobbying efforts by groups funded by Unocal may have affected the President's decision not to impose sanctions on Burma. See id. Unocal has hired New York's premiere lobbying firm, Davidoff & Malito, to help deter legislative efforts that would hinder investment in Burma. See id. As of April 1997, Unocal is the largest investor in Burma. See id. Amnesty International's report that 1996 was the worst year for human rights in Burma since 1988, when the military seized and slaughtered 3000 people, evidences the atrocious acts occurring in Burma. See id.

attempts to limit human rights abuses in Burma. Again, such caution seems to stem from their reluctance to hinder free trade.

D. Private Groups

In past years several private groups have set forth initiatives to mitigate human rights abuses in countries where such abuses consistently occur. Two of the most noteworthy, the Sullivan Principles and the MacBride Principles, have strongly impacted TNCs by forcing them to realize their influential roles with respect to human rights abroad.

1. The Sullivan Principles Concerning South Africa

The Sullivan Principles, which were written by a General Motors board member, required TNCs to uphold non-discrimination in the workplace and to participate in community investment in South Africa. The purpose of community investment was to increase employment opportunities for oppressed racial groups. By 1986, two hundred of the two hundred sixty corporations doing business in South Africa had adopted the Sullivan Principles.

The desegregation efforts were actually regulated by an individual, D. Reid Weedon, a senior vice president of Massachusetts-based consulting firm Arthur D. Little. These efforts resulted in desegregation of

58. See Frey, supra note 12, at 174. Private initiatives against human rights abuses include: the Sullivan Principles (regulating TNC activity in South Africa), the MacBride Principles (regulating TNC activity in Ireland), the Slepak Principles (creating codes of conduct for TNCs in Russia), the Miller Code (suggesting conduct for TNCs in China), the Maquiladora Code (issuing a code of conduct for U.S. companies with operations along the border of Mexico), and the “Rugmark” campaign (creating a foundation which monitors companies against using child labor). See Compa & Hinchliffe-Darricarrere, supra note 25, at 671-73.

59. See Cassel, supra note 52, at 1971.

60. See id. at 1970-71; see also Elizabeth Glass Geltman & Andrew E. Skroback, Environmental Activism and the Ethical Investor, 22 J. CORP. L. 465 (1997).

61. See Frey, supra note 12, at 175.


63. See Stratford P. Sherman, Scoring Corporate Conduct in South Africa, FORTUNE, July 9, 1984, at 168, 168. Companies were required to turn over performance information to the consulting firm, and the firm would compile and release a public report comparing the performance of companies who had agreed to adhere to the
hundreds of enterprises, improvements in education and job training for workers, and increased investment in the infrastructure of black and desegregated education in South Africa. However, some commentators argue that the Sullivan Principles ultimately were a failure, and that apartheid fell because of other factors such as corporate divestment from South Africa, as well as government sanctions against South Africa.

2. The MacBride Principles Concerning Northern Ireland

The MacBride Principles, modeled after the Sullivan Principles, were intended to secure equal treatment for Catholic workers in Protestant-majority Northern Ireland. The principles set forth a series of non-discrimination standards, which promoted hiring and training on a

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See Geltman & Skroback, supra note 60, at 471.

64. See Geltman & Skroback, supra note 60, at 472. The Sullivan Principles helped black South Africans gain rights in the workplace, while raising awareness of the injustices in the South African labor system. The principles also helped educate investors, by allowing them to make investment decisions according to moral determinations. See id. at 471. Several corporations adopted the Principles because of social and moral pressures such as: (1) increased media reporting; (2) rising public interest concerning the role of business in South Africa; (3) the need to improve corporate image with domestic groups; (4) the growing number of shareholder resolutions calling for adoption of the Sullivan Principles; and (5) the growing use of the Sullivan Principles by investors in making moral determinations regarding their investments. See id. at 472. Economic pressure seemed to have had the most significant impact on U.S. corporations. See id. at 472 n.49. See also Richard T. DeGeorge, "Sullivan-Type" Principles for U.S. Multinationals in Emerging Economies, 18 U. PA. J. INT'L ECON. L. 1193, 1201 (1997) (discussing the corruption and bribery that confront TNCs when investing overseas, and proposing that TNCs adopt codes similar to the Sullivan Principles).

65. See Cassel, supra note 52, at 1971.

66. See id.; Compa & Hinchcliffe-Darricarrere, supra note 25, at 671-72. The MacBride Principles set forth initiatives for: (1) increasing the representation of individuals from under-represented religious groups in the work force, including managerial, supervisory, administrative, clerical and technical jobs; (2) providing adequate security for the protection of minority employees both at the work place and while traveling to and from work; (3) banning provocative religious or political emblems from the work place; (4) publicly advertising all job openings, and making special recruitment efforts to attract applicants from under-represented religious groups; (5) refraining from favoring particular religious groups in layoff, recall and termination procedures; (6) abolishing job reservations, apprenticeship restrictions and differential employment criteria which discriminate on the basis of religion or ethnic origin; (7) developing training programs that prepare current minority employees for skilled jobs, including the expansion of existing programs and the creation of new programs to train, upgrade and improve the skills of minority employees; (8) establishing procedures to assess, identify and actively recruit minority employees with potential for further advancement; (9) appointing a senior management staff to oversee the company's affirmative action efforts; and (10) setting up time tables to carry out affirmative action principles. See Kevin A. Burke, Fair Employment in Northern Ireland: The Role of Affirmative Action, 28 COLUM. J.L. & SOC. PROBS. 1, 10 n.42 (1994). Sean MacBride amplified these principles in 1986. See id.
nonsectarian basis. They also mandated adequate employee security and protection from sectarian violence. Currently, most corporations do not follow the MacBride Principles, mainly due to lack of public pressure. Unlike the strong public rallying against apartheid in South Africa, public support of human rights reform in Northern Ireland has not seemed to influence TNC behavior. Nevertheless, several states have adopted the MacBride principles to govern TNC investment.

E. Local Governments

Several cities and one state, Massachusetts, have enacted laws to address the human rights situation in Burma. In 1996, Massachusetts amended its general laws, prohibiting the state or state agencies from transacting business with entities on a “restricted purchase list.” The list contains the names of all persons and entities currently involved in

67. See Burke, supra note 66, at 10 n.42; Dermot O’Callaghan, From Belfast to Brixton: Could New Monitoring Measures Cross the Irish Sea?, PERSONNEL MGMT., Aug. 1988, at 44, 45.

68. Although some shareholders have requested that corporations follow the MacBride Principles, only approximately 24 U.S. firms conducting business in Ireland have agreed to make efforts toward implementing the standards. See Burke supra note 66, at 11-12. These firms include: Alexander and Alexander, AM International, American Home Products, Avery Dennison, AT&T, Data General, Digital Equipment Co., Dupont, Federal Express, Fruit of the Loom, GATX Inc., Honeywell, Hyster (NACC Industries), IBM, NYNEX, Oneida, Pitney Bowes, Proctor and Gamble, Sara Lee, Sonoco, Teleflex, Texaco, Unysis and VP Inc. See id. at 12 n.47. Although corporations are reluctant to adopt the principles, several states have in fact adopted them. See id. at 12. The states are: Connecticut, Florida, Illinois, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania and Rhode Island. See id. at 12 n.49. States seem more inclined than corporations to adopt the principles, perhaps due to the strong public pressure to pass such legislation. See also infra Part II.E (discussing whether state and local government enactments that prohibit or control investment overseas are constitutional).

69. See Frey, supra note 12, at 176. The British government has opposed the adoption of the principles because it does not want TNCs to divest from Ireland. See Burke, supra note 66, at 13. However, several U.S. politicians support the adoption of the principles, including New York State Governor Mario Cuomo, New York City Mayor Rudolph Giuliani, and President Bill Clinton. See id. at 13 n.51.

70. See supra note 68 for a list of states that have adopted the principles.

business dealings with Burma. In response to this legislation, several companies, including Apple Computers, Eastman Kodak and Hewlett-Packard, divested holdings in Burma.

The City of Berkeley, California, passed a resolution in February 1995 prohibiting contracts with entities conducting business in Burma. The prohibition is to remain effective "until the City Council determines that the people of Burma have become self-governing.

The City of San Francisco passed a similar measure, prohibiting the city from entering into contracts with businesses operating in Burma. The city disqualified Ericsson GE ("Ericsson") from entering into a $40 million contract to rebuild the city's emergency radio system. The city disqualified Ericsson because of the business ties that Ericsson's parent company maintained with Burma. Other local governments that have passed similar measures include: Madison, Wisconsin; Santa Monica, California; Oakland, California; Carborro, North Carolina; Takoma Park, Maryland; and Ann Arbor, Michigan.

Even though these efforts show an active part of local governments to rectify the situation in Burma, much debate has occurred over whether local governments have the authority to pass these laws and whether these laws are constitutional. Some critics argue that allowing state and local governments to affect international dealings through economic sanctions threatens the authority of the federal government and its ability to effectively conduct foreign affairs.

The European Union and Japan have complained about the Massachusetts law specifically, claiming it violates the U.S. Constitution and an international government

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73. See Danitz, supra note 2, at 45.


75. See Asamoah, supra note 29, at 562.

76. See id. The City of San Francisco also rejected a $123 million contract with Mitsubishi Heavy Industries for the building of an airport transportation system. See Ted Bardacke, American Burma Boycotts Start to Bite, FIN. TIMES, Feb. 6, 1997, at 6.

77. See Schmahmann & Finch, supra note 71, at 180 n.14.

78. See, e.g., Schmahmann & Finch, supra note 71. Serious questions exist as to the constitutionality of imposing state or local government laws to regulate international behavior through trade restrictions. See Howard N. Fenton III, The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions, 13 NW. J. INT'L L. & BUS. 563, 565 (1993). State and local restrictions may seriously disrupt U.S. foreign policy and international trade. See id. at 566. See also Steven R. Salbu, True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities, 15 U. PA. J. INT'L BUS. L. 327 (1994).

79. See Fenton, supra note 78, at 563.
procurement agreement.\textsuperscript{83} Also, several private organizations have initiated actions to challenge the constitutionality of state and local selective purchasing laws.\textsuperscript{81} Some of these groups believe that selective purchasing laws violate "the foreign commerce clause, the preemption clause, the supremacy clause, and the due process clause of the Fifth and Fourteenth Amendments to the U.S. Constitution."\textsuperscript{82} However, these selective purchasing laws have become increasingly popular, and their constitutional validity may remain unchallenged.\textsuperscript{83}

III. TNC ACCOUNTABILITY FOR ACTS OF FOREIGN PARTNERS

A. Matter of Foreign Affairs

Judges and scholars have acknowledged that human rights abuses committed solely by foreign partners in connection with TNC investment overseas may constitute a matter of foreign affairs to be handled by Congress and the President, and not by the judiciary.\textsuperscript{84} Because \textit{Unocal} directly addresses the acts of SLORC (and the United States currently considers SLORC to be the government of Burma/Myanmar),\textsuperscript{85} the case may infringe upon the foreign policy efforts

\begin{itemize}
    \item \textsuperscript{80} See Danitz, \textit{supra} note 2, at 4-5. The European Union and Japan have asserted that these measures are "inconsistent with obligations under the World Trade Organization (WTO) Agreement on Government Procurement that state and local governments will remove public procurement market barriers." Asamoah, \textit{supra} note 29, at 562. While the European Union and the United States have initiated dispute settlement consultations concerning this issue, the European Union may choose to initiate arbitration procedures if these consultations do not resolve the issue. \textit{See id.}
    \item \textsuperscript{81} See Asamoah, \textit{supra} note 29, at 562.
    \item \textsuperscript{82} \textit{Id.} at 562-63. \textit{See also}, Schmahann & Finch, \textit{supra} note 70.
    \item \textsuperscript{83} See Fenton, \textit{supra} note 78, at 565.
    \item \textsuperscript{84} See Doe v. Unocal Corp., 963 F. Supp. 880, 894 n.17 (C.D. Cal. 1997) (regarding Unocal's contention that adjudication of this case will interfere with Congressional and Executive efforts to exert pressure on SLORC to reform its human rights record). \textit{See also} Walker, \textit{supra} note 4, at 560 (discussing whether a suit for human rights abuses committed overseas raises legitimate foreign policy concerns that would warrant a stay of proceedings or even dismissal of an entire action in United States courts).
    \item \textsuperscript{85} National Coalition Gov't of Burma (NCGUB) v. Unocal, Inc., 176 F.R.D. 329, 352 (C.D. Cal. 1997). The court took judicial notice of the fact that the United States considers SLORC to be the current government of Burma when conducting foreign affairs. It also noted that "SLORC is properly deemed a foreign sovereign for purposes of the act of state doctrine," \textit{See id.} Unocal presented evidence to encourage the court to
of the United States government.

Indeed, Unocal argued that under the act of state doctrine, the court was interfering with the foreign policy efforts of Congress and the President by adjudicating plaintiffs' claims. The act of state doctrine requires sovereign states to respect the independence of other sovereign states; United States courts will not hear cases concerning the potentially illegal acts of a foreign sovereign committed within the sovereign's own territory. The requirements of the act of state doctrine seem to be satisfied in Unocal: the acts were sovereign in nature, committed by the Burmese government, and were against its own citizens and within its own territory.

However, the Unocal court admitted that the scope of the application of the act of state doctrine is unclear, and it rejected Unocal's argument mainly because the policy behind the act of state doctrine did not justify its application in this case. The court stated that the doctrine should not apply unless there exists a likelihood that "adjudication of the matter will bring the nation into hostile confrontation with a foreign state." The court reasoned that because SLORC already knew of the United States government's condemnation of its abusive practices with respect to human rights, no threat of "confrontation" existed in this case.

In addition to the act of state doctrine, courts have invoked the political question doctrine to dismiss cases that interfere with the foreign policy efforts of certain governments. Under the political question doctrine, courts should defer to the executive branch when foreign policy is involved. In Tel-Oren v. Libyan Arab Republic, a case consisting of a fragmented group of differing opinions, one judge

judicially notice this fact, including sections from: the Department of State, Burma Country Commercial Guide for 1995; the CIA World Fact Book for 1995; and Madeline Albright's testimony before the United States Senate in 1996 (when Albright was serving as the United States Ambassador to the United Nations). Albright stated that SLORC "is unfortunately the recognized government of Burma." Id. at 351-52.

86. The rationale behind the act of state doctrine involves a separation of powers concept, whereby sovereigns will not question the actions of other sovereigns. This doctrine also avoids potential judicial interference with the Executive and Congress in foreign affairs matters, especially matters that are potentially embarrassing for those branches of government. See Pizzuro & Delaney, supra note 1, at S5. See also Underhill v. Hernandez, 168 U.S. 250, 252-53 (1897) (providing classic policy issues surrounding the act of state doctrine).


88. Id.

89. See id. at 892-93 (discussing the two doctrines that reflect the judiciary's concerns regarding separation of powers: the political question doctrine and the act of state doctrine).

implemented the political question doctrine. Judge Robb reasoned that the dismissal of the plaintiff's claims against the Palestinian Liberation Organization was proper because the court was not in a position to handle claims involving foreign affairs. If courts heard such claims, they would jeopardize the flexibility of the executive branch to deal with international issues diplomatically.

Judge Paez, the presiding judge of the Unocal case, was able to avoid applying both the political question and the act of state doctrines. He addressed the issue of whether the Unocal case caused the judiciary to overstep its authority by inviting the Department of State "to express its views concerning the ramifications of this litigation on the foreign policy of the United States." In response, Michael J. Matheson, the Acting Legal Advisor of the U.S. Department of State, wrote that "at this time adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma." Judge Paez used this letter as a basis for rejecting Unocal's argument that the court was interfering with the foreign policy efforts of Congress and the President.

Although this letter constitutes merely one opinion from the U.S. government, it shows that the act of state doctrine does not automatically bar claims that involve foreign governments. Judges can use their discretion in applying the doctrine, and outcomes may depend on which foreign government is involved. In Unocal, because the U.S. had already expressed its condemnation of SLORC's abusive practices, adjudication of the matter does not interfere with U.S. foreign policy.

However, if the governments of Britain or France, for example, were engaging in activity the United States abhors, the outcome would be less clear. Most likely, U.S. courts would refuse to hear those cases, and would claim that such matters should be handled by the other branches of the U.S. government. The act of state doctrine does not provide predictability in this area; courts may or may not apply the doctrine.

91. 726 F.2d 774, 823 (D.C. Cir. 1984) (Robb, J. concurring).
92. See id. at 825-26.
93. See id. at 823-27.
94. National Coalition Gov't of Burma (NCGUB) v. Unocal, 176 F.R.D. 329, 335 (C.D. Cal. 1997). The letter from the Honorable Richard A. Paez to Michael J. Matheson Dated April 24, 1997 and the letter from Michael J. Matheson to Frank W. Hunger, Assistant Attorney General dated July 8, 1997 were included as Exhibit A in the opinion. Id. at 361-62.
95. Id.
depending on whether a country's government is on friendly or hostile terms with the United States.

B. Customary International Law

Filartiga v. Pena-Irala was the first time a court held that a plaintiff could litigate human rights claims in a United States federal court, even though the alleged acts occurred in another country.96 Prior to Filartiga, an alien could not bring an action against government officials, even if those officials had committed atrocious acts of violence. Since Filartiga, courts have increasingly expanded the use of customary international law toward upholding human rights.97

Scholars have argued that non-state actors, such as Unocal, cannot be held liable under customary international law. "Customary international law" (also referred to as "public international law" or "the law of nations") has been defined as the law regulating relations between states, or regulating the singular conduct of states in particular areas such as human rights.98 Taken literally, this definition only refers to states and not to private actors. In his Tel-Oren concurrence, Judge Edwards held that customary norms of international law addressed only acts committed by a "state".99 Therefore, in the context of the Unocal case, it

96. 630 F.2d 876, 887 (2nd Cir. 1980). Filartiga involved an action brought by citizens of Paraguay against a former state official who had caused the wrongful death of their son by torturing him. At trial, the defendant official successfully argued that the "law of nations" did not cover a government's acts of torture on its own citizens. Consequently, the district court dismissed the case for lack of subject matter jurisdiction. The Second Circuit reversed, stating that such acts violate international customary norms. The court noted that defendants can be sued in U.S. courts when they are served within the United States. See id. at 877-86. See also Pizzuro & Delaney, supra note 1, at S5.

97. See generally Walker, supra note 4 (providing a general overview of the use of international law in United States courts and discussing the Filartiga, Tel-Oren and Kadic cases in particular). See also Pizzaro & Delaney, supra note 1, at S5 (stating that the Unocal decision may provide the courts with another opportunity to expand the use of customary international law beyond Filartiga and Kadic). Since Tel-Oren, courts have increasingly held that tort violations are actionable under the ATCA. See Walker, supra note 4, at 548. See also, e.g., In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, 503 (9th Cir. 1992) (holding that a plaintiff mother stated a valid claim under the ATCA against the daughter of former Philippine President Ferdinand Marcos and against the head of the Philippine police for the torture and murder of her son); Abebe-Jira v. Negewo, 72 F.3d 844, 845 (11th Cir. 1996) (holding that an Ethiopian military official was liable for acts of torture under the ATCA).


would seem that only the state actor (SLORC),\textsuperscript{100} and not the private party (Unocal), would be liable under customary international law.

However, under current customary international law, plaintiffs can sue both government and non-government actors for the commission of tortious acts. In \textit{Kadic v. Karadžić},\textsuperscript{101} the court held that the “law of nations,” as understood in the modern era, is not confined in its reach to state action; in certain circumstances, private individuals as well as nations can violate international law.\textsuperscript{102} The \textit{Kadic} court noted that participation in slave trade violates the law of nations “whether undertaken by those acting under the auspices of a state or only as private individuals.”\textsuperscript{103} Furthermore, the \textit{Unocal} ruling emphasized that the alleged violations of non-state actors must occur in conjunction with activities of a state. If this nexus is satisfied, then non-state actors can violate customary international law.

A more recent opinion, issued in February of 1998,\textsuperscript{104} reaffirmed the...
Kadic holding that non-state actors can be liable for offenses that violate international law. The court rejected the defendant’s argument that, under customary international law, a non-state actor must act under actual or apparent authority, or color of law, of a foreign state to be sued under the ATCA. Applying Kadic, the court found that the ATCA does not require the private defendant to have acted under the auspices of the state. Therefore, plaintiffs can sue non-state actors under the ATCA.

Applying modern customary international law to the Unocal case, Unocal (even as a non-state actor) can be held liable for abuses committed in violation of the ATCA. However, even though Unocal can be sued under the statute, plaintiffs will have to show a nexus between Unocal’s participation in the project and the tortious acts committed by SLORC. The Unocal case may turn on whether Unocal is truly a partner of SLORC, and whether the tortious acts were in fact committed in furtherance of the business venture. In order to escape liability, Unocal may argue: (1) that it was not a joint venturer and (2) that the abuses were not in furtherance of building the pipeline.

First, Unocal might argue that it was not a joint venturer with SLORC. Indeed, the contracts executed for construction of the pipeline may not indicate joint venture status. The negotiations between the parties led to what has been described as a “production-sharing contract for a joint venture gas drilling project” along with “construction of [a] gas pipeline personal jurisdiction over Haddam, even as a private actor; it had subject matter jurisdiction under the ATCA; and the plaintiffs’ claims were justiciable. See id. 105. The FIS court declined to follow Tel-Oren because Kadic was more on point and more timely. See id. at 8. Both Kadic and FIS dealt with war crimes, but Unocal dealt with crimes against humanity. For this reason, the Unocal court may choose to distinguish Kadic, and hold that Unocal as a private actor cannot be liable unless Unocal had acted under the “color of law.” However, the plaintiffs in Unocal can argue that the Kadic holding is not limited to piracy, slave trade, war crimes and aircraft hijacking. The court was clear that these examples were not exclusive and that private actors can be liable for “offenses of ‘universal concern’.” Kadic, 70 F.3d at 240.

106. See FIS, 993 F. Supp. at 7-8.
107. See id. at 8. The court supported this contention with language from Kadic, which interpreted Common Article 3 of the Geneva Conventions to apply to all parties to a conflict, not just government officials. Common Article 3 also provides that civilians be treated humanely and it prohibits “cruel treatment and torture.” Id.
108. See id.
109. See Kadic, 70 F.3d at 239.
110. In a November 5, 1997 ruling, the NCGUB asserted that Unocal is liable for SLORC’s alleged violations because Unocal is a joint venturer or implied partner in the pipeline project. National Coalition Gov’t of the Union of Burma (NCGUB) v. Unocal Inc., 176 F.R.D. 329, 334 (C. D. Cal. 1997). Although the NCGUB case has not been consolidated with the Unocal case, Judge Paez is hearing both cases. Judge Paez noted that because the cases involve similar allegations, certain issues will be decided consistently. Id. at 334-35. Therefore, analyzing Judge Paez’ determinations in NCGUB (on whether Unocal is deemed a joint venturer) may help predict his rulings in Unocal.
in Burmese territory.” Depending on the language of the agreement, Unocal may not be considered a “joint venturer.” Therefore, Unocal may not be held liable for the abuses committed by SLORC.

Second, in proving that the abuses were not in furtherance of the project, Unocal can argue that the 250-mile pipeline inevitably would touch some portion of the country where abuses occur, simply because the entire country is in military upheaval. Because the pipeline is so long, it would probably intersect some military action occurring at some location. Unocal’s strongest argument is that the pipeline’s coexistence with military activity alone does not establish that the abuses occurred in furtherance of the pipeline project. The abuses may have occurred whether or not the pipeline was being built.

On the other hand, facts brought out in discovery may reveal that Unocal intended for SLORC to forcibly remove Burmese farmers from their land in order to build the pipeline. As part of the agreement, SLORC was to clear forests and provide labor for the building of the pipeline. If SLORC also agreed to forcibly remove the farmers to assist Unocal in building the pipeline, the plaintiffs may successfully argue that the abuses were committed in furtherance of the project. In the future, courts may be increasingly more willing to hold TNCs accountable under the ATCA for acts that violate customary international law, even if those acts were committed solely by foreign partners. Although TNCs can be sued under the statute, plaintiffs carry the burden of proving that a partnership existed and that the abuses occurred in furtherance of the project. Depending on the facts of the case, this burden may be strong or slight. In general, the burden seems reasonable, since the more closely TNCs are involved in the abuses, the more accountable TNCs should be.

Knowing that cases may hinge on basic partnership law, future TNCs may simply set up contracts that do not establish true partnerships. With

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111. Pizzuro & Delaney, supra note 1, at 55.

112. See id. The NCGUB plaintiffs asserted that “Unocal was put on notice that SLORC would use forced labor and commit other serious human rights abuses in connection with the Project.” NCGUB, 176 F.R.D. at 336. Plaintiffs alleged that the President of Unocal, John Imle stated: “What I’m saying is that if you threaten the pipeline, there’s gonna be more military. If forced labor goes hand in glove with the military, yes there will be more forced labor. For every threat to the pipeline, there will be a reaction.” Id. This statement seems to mirror the attitude taken by Royal Dutch Shell in Nigeria when it refused to cease its drilling operations in spite of protests against it. See infra Part III.C.4.

113. See Pizzuro & Delaney, supra note 1, at 55.
a carefully crafted contract, parties can escape liability by arguing that a true partnership did not exist between the TNC and the tortfeasor. For example, a TNC can contract with a foreign government and stipulate in the contract that the TNC will only provide the technology for the particular operation. The local government will perform every other aspect of the operation, such as building and implementing the technology. If sued, the TNC can argue that it had no connection with the project other than providing technology, and merely providing technology does not contribute to human rights abuses. By distancing itself from the abuses, TNCs can escape liability in this manner.

Applying this theory to the Unocal case, if Unocal contracted to perform only a limited number of tasks with respect to building the pipeline, it would have a stronger argument that its activities did not further human rights violations. Moreover, if SLORC was named an "independent contractor" in the contract, Unocal would probably not be liable for the torts committed by SLORC. SLORC alone would be liable, because it would have been responsible for all tasks related to the actual construction of the pipeline. However, as previously mentioned, government defendants are often entitled to sovereign immunity protection. Therefore, neither a government nor a TNC would be liable in this situation, and the ability of plaintiffs to successfully sue these defendants would be severely limited.

On the other hand, even if Unocal was given only a limited role in the project under the terms of the contract, it may still be liable if, in reality, it played a significant role in actually constructing the pipeline. Courts will treat TNCs as partners if they in fact acted like partners, regardless of their named status in the contract. Therefore, the extent of participation of TNCs should determine the extent of their liability.

C. Moral Duty

1. Moral Duty in General

Several commentators have argued that TNCs have a moral duty to withhold investment from or to divest from ventures with corrupt governments. One commentator states that because government

114. See supra note 8 and accompanying text.
115. However, the fact that courts treat TNCs that act like partners as partners, will not necessarily deter TNC behavior in this regard. Often, TNCs can hide the level of their own participation in their projects. Plaintiffs will have difficulty in showing the nature and extent of TNC participation in particular projects.
116. See THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS 81-85 (1989) (stating that although withholding investment can be harmful economically,
regulatory efforts are essentially ineffective, "[i]t is time to examine the roles of other relevant actors, including business, labor, the media, and the general public, in promoting and protecting human rights." She further maintains that TNCs in particular have not only legal, but ethical responsibilities to uphold human rights.

Another commentator explains that the expansion of international customary law constituted a first revolution in protecting human rights, and that the second revolution consists of the moral responsibilities of TNCs to uphold human rights. He emphasizes that corporations should have a conscience. Indeed, he is not alone in his thinking, as even corporate executives acknowledge the need for a "conscience" when investing abroad.

2. Promoting Democracy Abroad

In response to the argument for imposing moral duties on TNCs, others argue that continuous overseas investment may actually promote democracy in countries ruled by corrupt governments. Unocal itself argued that democracy is promoted by investing in Burma. The greater presence TNCs have overseas, the more likely it is that TNCs will positively influence governments toward democratic reform.

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TNCs should factor in moral consequences of their actions when deciding to invest abroad); Cassel, supra note 52, at 1978-79.
117. Frey, supra note 12, at 153.
118. See id.
119. See Cassel, supra note 52, at 1963.
120. See id.
121. In 1995, John Duerden, former President of Reebok, said:

As a public company, we have an ethical responsibility to build value for Reebok's shareholders—but not at all possible costs. What we seek is harmony between the profit-maximizing demands of our free market system and the legitimate needs of our shareholders, and the needs and aspirations of the larger world community in which we are all citizens.

John Duerden, 'Walking the Walk' on Global Ethics, DIRECTORS & BOARDS (INVESTMENT DEALERS' DIGEST INC.), Mar. 22, 1995, available at 1995 WL 12220270. See also Cassel, supra note 52, at 1979; Compa & Hinchliffe-Darricarrere, supra note 25.
122. See Doe v. Unocal Corp., 963 F. Supp. 880, 895 n.17 (C.D. Cal. 1997). Unocal claims to be promoting democracy through an elaborate development program in Burma that includes building schools and improving medical care. See Danitz, supra note 2, at 3. Unocal proposes that the best way to lessen human rights abuses in Burma is to increase investment there. See id.
123. Unocal claims that its pipeline project will help locals by improving the standard of living in the vicinity. See G. Pascal Zachary, U.S. Companies Back Out of
U.S. government seems to subscribe to this view because it has continued to allow companies to “assert positive pressure on SLORC through their investments in Burma.”

In August of 1998, Atlantic Richfield Co. (“Arco”) chose to withdraw its operations from Burma due to “changing investment priorities,” and supposedly not because of public pressure to withdraw from that country. Arco spokesman Al Greenstein stated that Arco still believes that “engagement is preferable to isolation and companies like Arco are a constructive force in poor countries like Myanmar.” Arco, and other companies conducting operations overseas, often argue that they are promoting democracy by exposing other countries to democratic ideals. However, Arco may in fact have been influenced by public pressure.

Arco was one of the last remaining U.S. TNCs to withdraw from Burma; Unocal is currently the only major U.S. firm still conducting business in Burma.

In the context of China, business leaders have asserted that democratic values are promoted as the U.S. and China form more and more business contacts. They assert that these contacts may influence the Chinese government’s thinking toward upholding human rights. Furthermore, overseas investors argue that investment in developing countries promotes economic growth, which thereby develops a stronger middle class. As this middle class becomes stronger, it is likely to assert demands for fundamental liberties and respect for human rights. In this manner, human rights will be promoted through overseas investment.

However, overseas investment by U.S. companies may or may not promote democratic reform depending on the particular circumstances of the investment and the countries involved. For example, as to China in particular, one author argues that the best way to promote human rights is by persuading the Chinese government to reform its practices, rather than by regulating private investment. Another states that greater involvement by the U.S. business community in promoting human rights


125. Evelyn Iritani, Arco to End Exploration in Myanmar, L.A. TIMES, Aug. 12, 1998, at D1. Arco spokesman Al Greenstein stated that the company’s decision not to renew one of its oil exploration leases in Burma was not influenced by “protests or events inside Myanmar.” Id. at D1.

126. Id. at D9.

127. See id.

128. See id. at D1, D9.

129. See Orentlicher & Gelatt, supra note 54, at 98-99.

130. See id.

131. See id.

132. See id.

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in China is not an adequate substitute for well planned government actions.\textsuperscript{133} Government persuasion would be more effective because of the relationship the U.S. has with China with respect to trade and investment.\textsuperscript{134}

In the particular situation of Burma, the efforts of the U.S. government discussed in Part II show that government efforts have failed, and that direct government persuasion is unlikely to induce any positive changes.\textsuperscript{135} Perhaps reform is best done through the private sector. Investment by corporations such as Unocal may encourage democratic reform, especially because large U.S. corporations can exert enormous influence over countries as small as Burma. On the other hand, no reform will occur if TNCs merely promote abuses by protecting their investments at any cost to human rights.

3. Moral Duty Established Through Codes of Conduct

Even assuming continued investment abroad promotes democracy, corporations may still have a moral duty to promote human rights. This duty can be imposed through codes of conduct. Because TNCs are gaining more power than governments themselves, TNCs should develop and follow codes of conduct to combat human rights abuses that occur in connection with their projects.\textsuperscript{136} Several companies have found a balance between maximizing profits and protecting human rights abroad by adhering to codes of conduct that respect the rights of locals while still making profits.

For example, in 1995, the Gap adopted human rights standards for all of its overseas contractors.\textsuperscript{137} In response to sweatshop conditions occurring in El Salvador, the Gap terminated its contracts and refused to do business with contractors until labor conditions were investigated and improved.\textsuperscript{138} Such actions taken on the part of TNCs may lead to reform.

Other TNCs have taken similar steps toward protecting human rights in China. In 1992, Sears, Roebuck and Co. adopted a policy against

\textsuperscript{133} See id. at 100.
\textsuperscript{134} See Orentlicher & Gelatt, supra note 54, at 101.
\textsuperscript{135} See supra Part II.
\textsuperscript{136} See Cassel, supra note 52, at 1964. See also Steven R. Salbu, True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities, 15 U. PA. INT'L BUS. L. 327, 330 (1994).
\textsuperscript{137} See Cassel, supra note 32, at 1968.
\textsuperscript{138} See id.
imports made by prison labor. The policy included a provision that Sears employees could make unannounced inspections of manufacturing firms in China to ensure compliance with U.S. law. In the same year, Levi Strauss and Co. developed a policy in which it would factor in human rights considerations when selecting its business partners in China. Similarly, Reebok International Ltd. adopted a human rights policy, first toward its operations in China, and then toward all of its overseas operations. The policy includes an explicit statement that Reebok deports the use of force against human rights. These private efforts show progress toward ensuring human rights abroad.

4. Poor Display of Corporate Responsibility: Royal Dutch Shell in Nigeria

In contrast, the case of Royal Dutch Shell in Nigeria involved a poor display of corporate responsibility with respect to human rights. Similar to Unocal’s agreement with SLORC, Royal Dutch Shell entered into a joint venture with Nigeria’s state oil company. The state oil company supplied significant revenue to the corrupt military regime of General Sani Abacha. Shell’s continuous drilling and construction of pipelines

139. See Orentlicher & Gelatt, supra note 54, at 107.
140. See id. One of the first applications of Levis Strauss’ elaborate code of conduct was in 1992, in response to working conditions in Saipan. A factory owner had allegedly imposed slave conditions on his workers. After inspecting the Saipan factories, Levis Strauss found the conditions to be unsatisfactory and subsequently terminated its contract. See Compa & Hinchliffe-Darricarrere, supra note 25, at 675-79. Levis Strauss’ labor rights code, entitled “Business Partner Terms of Engagement and Guidelines for Country Selection,” proposes conduct for upholding health and safety conditions and human rights. In the code, Levis Strauss established the authority to terminate contracts with suppliers, using an elaborate internal monitoring and enforcement system. See id. The company has utilized this monitoring system by performing surprise inspections in factories in several countries, including China. In response to its findings, Levis Strauss decided to withdraw its entire operations from China. See id.
141. See Orentlicher & Gelatt, supra note 54, at 108.
142. See Zachary, supra note 123, at A10. These private efforts are similar to those taken by corporate executives in their dealings with South Africa, and the anti-apartheid efforts by private groups seemed to have significant impacts on total reform in that country. See supra note 63 and accompanying text.
143. See Cassel, supra note 52, at 1965. In 1993, the Nigerian military, headed by General Sani Abacha, seized control of the Nigerian government. See John Cook, Welcome to the New and Improved Nigeria, MOTHER JONES, Jan/Feb. 1998, at 51, 51. Abacha has allegedly provided military support for Royal Dutch Shell’s environmentally destructive operations in Nigeria. See id. International groups and governments have been threatening to impose sanctions on Nigeria, which would eliminate the $12 billion in profits Nigeria receives from oil each year. See id.
polluted the water and destroyed the lands of the Ogoni people living in the Niger River Delta.\footnote{145}

Because Shell's operations caused such severe effects, including destroying the livelihood of the Ogoni people, a group of activists sabotaged Shell's equipment.\footnote{146} Shell allegedly retaliated by calling upon the Nigerian military to attack the Ogoni, leading to several murders and massacres.\footnote{147} Shell also helped transport troops through the use of its helicopters and boats to enable the military to attack the Ogoni villages.\footnote{148}

The case came to trial, and the verdict resulted in the sentencing to death of the leader of the Ogoni activist group.\footnote{149} Consequently, protests poured in from the U.N. Human Rights Commission, Amnesty International, the U.S. and British governments, South Africa's Nelson Mandela, and several others.\footnote{150} Allegations of bribery of the witnesses by the Nigerian government (with Shell's acquiescence) caused particular controversy with respect to the unfairness of the trial.\footnote{151}

The case of Royal Dutch Shell is an extreme example, but it

\footnotesize{\begin{itemize}
\item \footnote{146} See Cassel, \textit{supra} note 52, at 1964-65.
\item \footnote{147} See \textit{id}.
\item \footnote{148} See \textit{id} at 1966.
\item \footnote{149} See \textit{id}.
\item \footnote{150} See \textit{id}. An activist group, the Movement for the Survival of the Ogoni People (MOSOP), filed a lawsuit in U.S. federal court in New York against Shell. The hanging of the leader activist group, Ken Saro-Wiwa, and eight other activists was the impetus for the lawsuit. See \textit{id}; see generally \textit{Worldwide Protests Against Shell}, \textit{Africa Policy Information Center}, \textit{Africa News Serv.}, May 15, 1997, available at 1997 WL 11108399 [hereinafter \textit{Worldwide Protests}]. For a comprehensive discussion of Shell's operations in Nigeria, see (visited Mar. 30, 1999) <http://ww.shellnigeria.com/issues/ogoni/html>.
\end{itemize}}
demonstrates that TNCs have not been held responsible in the past for human rights abuses that occur in connection with their overseas projects. Unlike Royal Dutch Shell, other companies have in fact pulled their entire operations out of countries in which grave human rights abuses occur. These companies seem to be setting better examples for how such human rights situations should be addressed.

Unfortunately, companies that tend to divest are mostly retail clothing and goods manufacturers that usually have smaller amounts of money invested overseas than the amounts invested by large oil companies like Unocal and Royal Dutch Shell. Retail manufacturers are not as economically committed to overseas operations because they often invest only small amounts of money compared to the billions of dollars needed to start and maintain oil drilling operations. Oil companies are also more limited geographically, depending on whether oil is available in a certain region. In this respect, oil companies have much more at stake, and therefore less incentive to divest.

Furthermore, even though retail manufacturers are persuaded by public opinion, oil companies are only effectively persuaded by financial concerns. Unlike clothing or goods which consumers can easily replace with a new brand (a brand of a company not involved in human rights violations), oil and gas are not as replaceable. Therefore retail clothing and goods manufacturers will alter their conduct in response to


154. Apparently, the NCGUB has been attempting to persuade Unocal to divest since 1993. See Danitz, supra note 2, at 3. Sein Win, the exiled Burmese Prime Minister and Director of the NCGUB, said, “We explained the situation to Unocal officials—that the situation is not good and we need them to stop.” Id.

155. However, one oil company was probably affected by public opinion. According to Simon Billenness, a leading Myanmar critic, Atlantic Richfield Co. (“Arco”), which withdrew its operations from Myanmar in August of 1998, was “the only U.S. oil company still doing business in Myanmar that was vulnerable to a consumer boycott, because, unlike Unocal, it sells oil and gas products directly to the public.” Iritani, supra note 125, at D9. Even though Arco was subject to consumer boycott, Arco claimed that its withdrawal from Myanmar was not due to “international pressure to punish the increasingly belligerent military regime.” Id. at D1.

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public opinion because public opinion directly affects their sales.\textsuperscript{156} In contrast, oil companies will not change their conduct because public opinion does not necessarily affect them financially.\textsuperscript{157}

For these reasons, corporations conducting business in sectors of the economy other than retail perhaps should not be held to the higher standards that retail manufacturers have set. The only effective way to ensure that TNCs uphold human rights may be to establish economic incentives for such conduct. However, it is unclear what types of economic incentives should be implemented. For example, one method of providing economic incentives might be to hold directors personally liable for corporate acts that promote human rights abuses. The threat of personal liability may induce directors to refrain from corrupt behavior and try to actively prevent their employees from committing abusive acts.

However, this approach seems drastic. Even if personal liability were imposed, holding directors personally accountable may lack any deterrent effects. Corporations will often indemnify directors when directors are sued personally, as long as the directors were acting in their corporate capacities. Furthermore, from a policy standpoint, holding a particular director liable seems unjust because often a single director cannot control the decisions of an entire corporation. Holding directors personally liable is just one example demonstrating the complexity of attempting to create economic incentives for TNCs to uphold human rights.

\textsuperscript{156} Companies that tend to establish stringent codes of conduct are those whose business success is affected by brand name and corporate image. These companies do not want their names associated with child labor and abusive working conditions, mainly because of potential profit losses due to decreased sales and boycotts. \textit{See Remarks of Lance Compa, Transcript of Jan. 7, 1995 Meeting of the Section on International Law of the American Association of Schools,} 17 \textit{Comp. Lab. L.J.} 338 (1996).

\textsuperscript{157} Unocal and Royal Dutch Shell had few economic incentives to pull out of Burma and Nigeria, because public opposition to human rights abuses would probably not affect their sales. Interestingly, the brother of Ken Saro-Wiwa, Dr. Owens Wiwa, has traveled to several countries to educate the public on the struggle the Ogoni people have faced due to Shell's operations. \textit{See Worldwide Protests, supra} note 150. He stated that boycotting Shell's products would be one method of changing Shell's behavior. He also advised cities and local governments to adopt selective purchasing laws, like those adopted against Burma. Another recommendation was to pressure Congress to impose sanctions against Nigeria. \textit{Id.} The Sierra Club environmental group has advocated placing an oil embargo on Nigeria to reform the practices of General Abacha's regime. Danielle Knight, \textit{Rights-Nigeria: New Accusations of Arrest and Torture,} \textit{Inter Press Serv.,} Jan. 15, 1998, \textit{available at} 1998 WL 5985345.
5. Conflict Between Economic and Social Goals

As indicated, the main problem in regulating TNCs overseas is the absence of existing economic incentives to uphold human rights. In fact, the sole reason some corporations invest overseas is to take advantage of foreign laws and foreign working conditions. Substantial profits can be made from under-the-counter-deals and cheap labor, giving corporations strong economic incentives to invest despite human rights abuses. Therefore, corporate profit incentives seem to be in direct conflict with social responsibility abroad.\(^{158}\)

Furthermore, once a corporation has invested overseas, it is often difficult to prove that the corporation, through its directors, possessed the requisite knowledge that the human rights abuses occurred in connection with its project. Consequently, corporations have even fewer incentives to act responsibly because they are unlikely to suffer any negative consequences. And even if they are “caught” and sued, often they are better off financially to risk being sued and to simply settle or pay the judgment costs.\(^{159}\) In the absence of strong incentives to uphold human rights abroad, perhaps the best way to regulate corporate activity is from within the corporation, through private codes of conduct.

IV. PROPOSED SOLUTION: CORPORATE CODES OF CONDUCT

A. Codes of Conduct Generally

Codes of conduct can be an excellent tool for mitigating human rights

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158. See Orentlicher & Gelatt, supra note 54, at 97; Cassel, supra note 52, at 1977. Milton Friedman of the University of Chicago published an article that described corporate social responsibility as a “fundamentally subversive doctrine” in a free society. He states that when executives commit corporate funds for social responsibility, they wrongfully usurp the funds of their shareholders, or possibly their customers, or even of their employees. Doing public good is the responsibility of the government. See Milton Friedman, The Social Responsibility of Business Is to Increase Profits, N.Y. TIMES MAGAZINE, Sept. 13, 1970, at 32. See generally Robert Corzine and Antony Goldman, Talks Sought Over Nigeria Sackings, FINANCIAL TIMES, June 6, 1997, available at 1997 WL 11033101 (addressing shareholder concerns over the Royal Dutch Shell operations in Nigeria).

159. TNCs may simply continue to invest in corrupt governments and plan on settling if sued. TNCs may even allocate money for this purpose if they foresee the likelihood of litigation. Unocal may have large incentives to settle, especially because of the nature of the relief that the plaintiffs are seeking. The plaintiffs have requested not only damages, but injunctive and declaratory relief to prevent Unocal from continuing its massive pipeline project. This threat of an injunction that would lose Unocal millions of dollars, may prompt Unocal to offer a large settlement. See Pizzuro & Delaney, supra note 1, at S5.
violations that occur in connection with TNC activities overseas. TNC codes of conduct have been defined as “devices for the protection of the economies of host countries (and of host country workers, customers, competitors, and creditors) from unilateral action by multinational enterprises headquarters.” An increasing number of TNCs are adopting codes of conduct, and existing codes have become increasingly more stringent. Although codes of conduct can be arbitrary, every corporation should at least have minimum standards. Most corporate representatives conducting business overseas would readily admit that human rights abuses are of at least minimal concern to their businesses.

Privately created codes have several benefits, including their ability to be tailored to specific projects and their ability to state explicitly when TNCs’ activities cross the line from legal to illegal. Through codes of conduct, TNCs can know whether their activities are violating statutes, treaties or international law.

A particular code of conduct might include provisions that follow

160. See Geltman & Skroback, supra note 60, at 465 (stating that the Sullivan Principles of South Africa demonstrate that voluntary codes of conduct that demand responsibility beyond what it legally required of them can be successful. See Valerie A. Zondorak, A New Face in Corporate Environmental Responsibility: The Valdez Principles, 18 B.C. ENVTL. AFF. L. REV. 457, 457-58 (1991) (discussing whether voluntary codes of conduct are effective); see also Compa & Hinchliffe-Darricarrere, supra note 25, at 663.


162. Orentlicher & Gelatt, supra note 54, at 96; see Compa & Hinchliffe-Darricarrere, supra note 25, at 675-79 (describing in detail the standards set forth by Levis Strauss and Reebok and how those companies make divestment choices). Royal Dutch Shell has supposedly drafted a set of codes for conducting its business practices and has established a “social accountability unit” to examine human rights and environmental concerns. Asamoah, supra note 29, at 566. Similarly, British Petroleum, having been accused of human rights violations in the Casanare region of Columbia, has drafted codes of conduct in response to strong public pressure against its abusive practices. See id.; William Raynor and Richard Halstead, Columbia’s “Dirty War” Embroils BP, THE INDEPENDENT, June 22, 1997, at 2.

163. See Compa & Hinchliffe-Darricarere, supra note 25, at 675-79; Frey, supra note 12, at 164.

164. See Compa & Hinchliffe-Darricarrere, supra note 25, at 689 (stating that “forward-looking” corporate leaders will recognize the value of establishing codes that protect human rights). Upholding human rights will not only avoid offending customers, but it may improve overall employee productivity. See id.

165. See Frey, supra note 12, at 154.
Admittedly, customary international law is often ambiguous, but the codes can at least reflect general and well-accepted principles of customary international law, such as refraining from torture, bribery and murder. Although such a code would merely provide minimum standards, TNCs can incorporate additional rules depending on the particulars of their businesses.

For example, Unocal could have adopted a code forbidding all business activity in Burma that promoted abusive acts by SLORC. Certainly, this type of code might not be well-received, because of Unocal's economic interests, and the possibility that Unocal had already entered into certain agreements with SLORC. Even if Unocal had chosen to adopt such a code, it may not be worth forfeiting large investments in Burma in order to adhere to a code that is voluntary and not legally enforceable.

Perhaps a distinction should be made between TNCs that actively contribute to human rights abuses (as in the Royal Dutch Shell case) and those that only passively know of the existence of the abuses (which may be the case for Unocal). The sentiment is that less punishment should be given to TNCs that are further removed from the abuses.

On the other hand, TNCs may have incentives to hide their active roles by delegating duties to other actors, such as foreign government officials, who are less likely to be held liable in United States courts. In such a situation, TNCs will escape accountability even though they planned and furthered the tortious acts. As this discussion indicates, the real problem is the absence of incentives for TNCs to adhere to their codes of conduct. Because the codes are privately created, no outside

166.See supra Part III(B) (for a discussion of modern customary international law).
See also Compa & Hinchliffe-Darricarrere, supra note 25, at 687 (stating that codes can be easily drafted by following the several models presented by the United Nations, the Internal Labor Organization, governments and private companies). Some of the features a code should include are: assigning responsibility to an on-site manager; ongoing auditing and reporting of labor conditions; supervisory visits to production facilities; and public reporting of labor conditions. See id. at 688.

167. Whether adhering to a code of conduct is "worth" forfeiting large investments is a matter of perspective. From a shareholder perspective, shareholders have the right to sell their shares if they are adamantly opposed to Unocal's maintaining its operations in Burma. Presumably, those shareholders who do hold onto their Unocal shares are mainly concerned with maximizing profits. Those shareholders are probably not inclined to support compliance with voluntary codes of conduct merely for the sake of promoting socially responsible behavior.

enforcement mechanism exists to ensure compliance, and therefore TNCs will not follow the codes.

B. The Problem of Enforceability

Indeed, most TNCs, including Unocal, have some existing set of codes that govern their overseas transactions, but the main problem is enforceability. The model codes are not binding—they only impose a moral duty. For example, the OECD “Guidelines for Multinational Enterprises” is voluntary only and not legally enforceable. Similarly, the United Nations Code does not contain any provision imposing legal liability. Obviously, privately developed codes of conduct are not binding because they are created by the corporations themselves, and there is no outside regulating body to ensure compliance.

One proposal for enforcement by an outside regulating body is for a national government to regulate TNCs’ overseas conduct using the values and standards of public international law. Another proposal is to develop international agencies with binding authority to ensure that codes of conduct are followed. Monitoring can also be done by the private sector through professional organizations. Yet another form of monitoring may simply be through public opposition to human rights violations. Furthermore, if TNCs publicly announce their human rights policies, they will be even more inclined to follow them.

Even though these proposals seem feasible in theory, they may create several problems of implementation. Although they may create temporary or even long term incentives, only government legislation is legally enforceable.

Absent any existing government regulation, the current means of enforcement is by TNCs themselves. Codes may be highly effective

169. See Claudia M. Pardinas, The Enigma of the Legal Liability of Transnational Corporations, 14 SUFFOLK TRANSNAT’L L. REV. 405, 435 (1991); Remarks of Lance Compa, supra note 156, at 362 (stating that multilateral government-inspired codes are mostly in the form of guidelines and are not enforceable).
170. Pardinas, supra note 169, at 441.
171. See Orentlicher & Gelatt, supra note 54, at 115.
172. See Pardinas, supra note 169, at 448-49.
173. See Orentlicher & Gelatt, supra note 54, at 119.
174. See Geltman & Skroback, supra note 60, at 473 (stating that media pressure and strong public interest can influence corporate divestment).
175. See Cassel, supra note 52, at 1964 (arguing that private multinational corporations are beginning to accept responsibility for human rights in the form of self-imposed codes of conduct and other private initiatives). Judges and politicians have
depending on the corporation and whether or not it mandates strict compliance with its codes. Existing standards reflect that the further removed TNCs are from human rights abuses, the less responsibility they impose upon themselves to mitigate abuses. Also, certain corporations will look for ways to circumvent the rules, especially if large investments are involved. Even if they ignore their codes completely, they will not be punished. Therefore, absent any effective regulation through legislation or privately created codes, U.S.-based TNCs should be held accountable in U.S. courts for human rights violations committed in connection with their overseas projects.

Although this result may unfairly hold TNCs accountable for acts committed by other parties, this remedy seems just because TNCs will only be held liable if their projects are the underlying cause of the human rights abuses. If the project, such as the construction of a pipeline, is not directly furthering the abuses, the court will not hold the TNC accountable. Thus, TNCs will have the opportunity to refute any allegations that human rights abuses occurred in furtherance of their projects.

Furthermore, TNCs know the potential harmful consequences when they invest in risky or unstable governments. From an economic

addressed a related problem, the problem of corruption in the judicial systems of foreign countries. Most of the corruption stems from attorneys bribing judges. To address the issue, leaders have stressed the importance of corporate counsel establishing codes of conduct. The only effective way of ensuring that foreign judges will not be bribed is for attorneys to decide as a group that none of them will bribe officials. Honorable J. Clifford Wallace, Address to the Students of University of San Diego (Feb. 18, 1998). If just one attorney partakes in bribes, codes of conduct will not be effective. See id. Leaders believe that statutes will not properly address the problem, and are therefore encouraging corporate counsel to adopt and follow codes of conduct to reduce the problem of corruption in foreign judicial systems. See id. This policy is pertinent to the issue of whether corporations should adopt codes of conduct regarding investment overseas. Just as attorneys engage in corrupt practices by bribing foreign judges, some overseas investors engage in a similar corruption by providing corrupt governments with investment capital. The trend toward remedying corruption overseas seems not to be by statute or some outside enforcement agency, but by the parties themselves (usually corporations or corporate counsel). However, one major barrier to reform is the difficulty in arranging for corporate counsel to cooperate on this issue. Cooperation is a problem particularly if corporations are operating in countries where bribery is so pervasive that it is an accepted way of business. See id.

176. See Frey, supra note 12, at 154.

177. When U.S.-based companies commit tortious acts domestically, they are held accountable in U.S. courts. As a policy argument, just because U.S.-based companies commit tortious acts overseas, does not mean they should escape liability for those acts. However, domestic companies know the law beforehand, and can adjust their behavior accordingly, whereas the activities of TNCs overseas are sometimes legal in the territory in which they are operating, though illegal in the United States. Therefore, holding TNCs liable under foreign law seems just, but holding them to U.S. legal standards is more problematic.
standpoint, TNCs should bear the loss of a risky investment in a corrupt
government, just like any other business risk. Corporations can absorb
the costs of risky investments by factoring in potential lawsuits or
potential losses that may occur as a result of entering into ventures with
corrupt governments.\footnote{On the other hand, investors and executives should not necessarily have to make their businesses a tool for political reform.}

As previously mentioned, simply allowing plaintiffs to sue in U.S.
courts under the ATCA does not mean that judgment will be entered
against the defendants. Defendants are still afforded a fair trial. They
also have the option to settle. Even though settlement is costly,
corporate executives possess the foresight to factor in potential lawsuits
when deciding to invest. They also have the ability to craft their
contracts to attempt to prevent any sort of human rights abuses from
occurring in connection with their projects. They might include
provisions in their contracts that demand termination of projects if
abusive acts are committed by foreign governments.

Therefore, TNCs have several methods of protection to shield
themselves from liability. Hopefully, these options will allow TNCs to
continue active investment overseas and possibly promote democratic
reforms as they conduct their overseas operations. Until the legislature
adopts an affirmative position on corporate responsibility overseas,
holding TNCs liable in U.S. courts may be an effective means of
ensuring human rights protections in countries where U.S.-based TNCs
operate.

C. The Decision to Invest Initially

A related issue is whether TNCs should invest in the first place in
countries that do not respect internationally recognized human rights.
Circumstances exist where foreign investment in itself contributes to
violations. For example, Unocal’s joint venture with SLORC served to
bolster a highly repressive regime, and Royal Dutch Shell’s project
generated revenues for an oppressive military dictatorship. Do similarly
situated TNCs have a duty to avoid initial investment?

Although the legislature has not specifically addressed the issue, some
TNCs have taken it upon themselves to bar initial investment in certain
countries. Levi Strauss has adopted a policy barring investment in
China and Burma for human rights reasons. Liz Claiborne, Eddie Bauer, and Federated Department Stores have all refused to conduct operations in Burma for the same reasons.

As previously mentioned, local governments have passed laws barring investment in Burma, and President Clinton is currently barring “new” investment in Burma. However, it is unclear whether barring such investment actually reforms oppressive governments. Some argue that the measures taken by the United States government against Cuba in recent years, for example, has done little to democratize that country. Therefore, barring initial investment may be futile.

Nonetheless, TNCs have the power to promote human rights abroad by using potential investment as a bargaining tool. Because local governments (such as SLORC and General Abacha’s regime) reap great financial benefits from joint ventures with private entities, TNCs can use this leverage to demand human rights protections. However, if U.S. companies do decide to completely withhold investment in an effort to uphold human rights, foreign governments can simply obtain investments from other countries and from non-U.S.-based corporations. In this situation, human rights would not be upheld, and U.S.-based TNCs would forfeit valuable investment opportunities.

Regardless, U.S.-based TNCs can at least attempt to set a gradual trend of adhering to customary international law. If corporations generate greater public awareness on this issue, perhaps reforms toward upholding human rights will occur. As seen in the case of South African apartheid, public awareness has been an excellent method in generating support for upholding human rights abroad.

D. The U.S. Court System as an Appropriate Remedy

Although corporate compliance with codes of conduct is a lofty goal,
codes of conduct are worthless without enforceability. Without enforceability, and until the legislature passes laws addressing TNC liability, the only effective means of holding TNCs accountable is through section 1350 of the ATCA. This recourse may pose several problems, because plaintiffs still have several hurdles to overcome in proving the liability of a particular defendant. 184

First, courts may have difficulty obtaining jurisdiction over government defendants because of sovereign immunity protection, as demonstrated by the lack of jurisdiction over SLORC in the Unocal case. 185 Also, governments can shield themselves under the act of state doctrine which carries the notion that “[e]very sovereign is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.” 186

Plaintiffs face other barriers when defendants raise motions to dismiss on improper venue and forum-non-conveniens grounds. 187 Even if plaintiffs pass these initial hurdles, the suit may still be dismissed if it raises legitimate foreign policy concerns. 188

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184. See Walker, supra note 4, at 560 (stating that “[w]hile victims of terrible human rights violations may seek redress in federal courts against the individual who caused them such harm, they will face numerous hurdles”).

185. In the April 24, 1997 clarifying order in Unocal, Judge Paez held that SLORC could claim sovereign immunity protection, and therefore the court did not have jurisdiction over SLORC. Plaintiffs tried to argue that the abuses committed by SLORC fell within the commercial activity exception to the Foreign Sovereign Immunities Act. The exception applies when

1. the action is based upon a commercial activity carried on in the United States by a foreign state; or
2. upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or
3. upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.


186. Unocal, 963 F. Supp. at 892, A.12 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897))). The court rejected Unocal's argument that by adjudicating plaintiffs' claims, the court is interfering with the foreign policy efforts of Congress and the President under the act of state doctrine. Id. at 891-95.

187. See Walker, supra note 4, at 560.

188. See id. In several section 1350 cases, the executive branch has expressed its views to the courts on whether the suit raises foreign policy concerns, and in most cases, the executive branch has not limited plaintiffs' ability to sue. See id. This fact along with the fact that Congress can amend or repeal section 1350 as it chooses, but has not
Because plaintiffs will rarely be able to sue foreign governments, plaintiffs are left suing only private parties, such as TNCs. However, plaintiffs' chances for relief have been improved because of the expansion of customary international law to include non-state actors. While U.S. courts may assert jurisdiction over TNCs in this regard, plaintiffs must still show the existence of the requisite legal relationship between the TNC and the tortfeasor, and that the torts were committed in furtherance of that TNC's particular project. Therefore, in answering the question of whether Unocal should be liable for torts committed by SLORC, the answer hinges on the specific facts introduced in the case. Because of the need for a fact intensive inquiry in each case, the U.S. court system is an appropriate place to determine liability.

A potential long-term effect of holding TNCs liable for acts committed by foreign partners is that other TNCs may be reluctant to invest in developing countries or countries ruled by military regimes. This outcome may stifle open trade and adversely affect relationships between sovereigns. However, TNCs can thoroughly research all potential risks before investing in overseas operations. Thus, the profitability of TNC activities may not be hindered because TNCs can account for the risks. Ideally, TNCs will strike a balance between generating profits and upholding human rights abroad.

V. CONCLUSION

Because, as in most cases, the Unocal case will depend on the facts brought out in litigation, it is unclear whether Unocal will be accountable for the abuses committed by SLORC. If the case continues without settling, Unocal's strongest argument may be that SLORC's abusive activities were not committed in connection with the Yadana pipeline project. Therefore, even though this case seems to involve complex and groundbreaking issues of international law, the entire case may turn on traditional notions of partnership law.

Even though the outcomes of cases involving potential corporate liability for human rights abuses may seem unpredictable, this unpredictability will be reduced if the legislature chooses to address the issue. Absent any legislative directive, corporate codes of conduct may be an effective method for mitigating human rights abuses abroad. Although there has been a strong trend towards developing codes of conduct, the fact that codes are non-binding does little to cure the

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189. See supra Part III.B.
problem of human rights abuses. Therefore, when codes of conduct fail, holding U.S.-based corporations liable in U.S. courts is an appropriate remedy.

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