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CORPORATE FREE MARKET RESPONSIBILITY: ADDRESSING RIGHTS VIOLATIONS WITH A FIDUCIARY DUTY APPROACH TO NATURAL RESOURCE EXTRACTIONS IN WEAK GOVERNANCE ZONES

The deep irony is that it is the unfettered rise of corporate power that presents the biggest threat to free markets, and to the ability of free markets to promote individual freedom, equality before the law and equitable prosperity.[1]

I. INTRODUCTION

While the free market has been characterized by some as a conduit for individual freedom,[2] absent institutional prerequisites such as property protections and voluntary contracting, it risks transforming into just the opposite.[3] Nowhere is this dysfunctional transformation more apparent, yet largely unaccounted for, than in the context of corporate natural resource extractions in weak governance zones,[4] where many of these institutional prerequisites are lacking. In pursuing shareholder profit maximization, corporate conduct is premised on the same free market principles, the absence of which can impede the legitimacy of its contracts.[5] From Colombia to Burma, corporate contracts that are voluntary with respect to the contracting government are made at the expense of local communities whose property interests are either undermined or never accounted for. Often, for example, property is physically confiscated, communities are displaced without compensation, environmental effects of new industry create new hazards for local communities, project revenues are

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1. Stephanie Blankenburg & Dan Plesch, *Corporate Rights and Responsibilities: Restoring Legal Accountability* (2007), *available at* http://www.opendemocracy.net/globalization-institutions_government/corporate_responsibilities_4605.jsp.

2. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 8 (1962).

3. Report of the Special Representative of the Secretary-General on the issue of human rights and transitional corporations and other business enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, 3, A/HRC/4/035 (9 Feb. 2007) [hereinafter SRSG Report] ("Markets function efficiently and sustainably only when certain institutional parameters are in place. The preconditions for success generally are assumed to include the protection of property rights, the enforceability of contracts, competition, and the smooth flow of information.").

4. Weak governance zones can be "defined as those states, as well as regions or sub-regions within states, in which governments cannot or will not assume their roles in protecting rights—including human rights—providing basic public services and ensuring that public sector management is efficient and effective." INTERNATIONAL ORGANIZATION OF EMPLOYERS, BUSINESS AND HUMAN RIGHTS: THE ROLE OF BUSINESS IN WEAK GOVERNANCE ZONES 3 (2006).

5. *See* discussion *infra* Part IV.

misappropriated, or local stakeholders are excluded from local development.[6] The end result is often local protest followed by state repression accompanied by human rights abuses.[7]

Legal remedies such as the Alien Tort Claims Act[8] (ATCA) have generally been applied to address human rights abuses under an emerging doctrine of corporate social responsibility.[9] The validity of contracts from the perspective of the corporation's free market responsibilities, however, has frequently escaped scrutiny. This oversight results from a failure to account for the first half of a dual-tier pattern of abuses.[10] Extractive operations initially result in first-tier property violations, which entail displacement of local populations, interference with their use of property,[11]

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6. Tarek F. Maassarani, Margo Tatgenhorst Drakos & Joanna Pajkowska, *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT'L L. J. 135, 138–40 (2007).

7. For example, see Andrew Bosson, *Forced Migration/Internal Displacement in Burma* 53 (May 2007), *available at* http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/D057F0FCA432F4B5C12572D7002B147B/$file/Burma_report_mai07.pdf (noting that the energy sector, which is the largest recipient of foreign direct investment in Burma, is associated with forced labor, forced relocations, and widespread land confiscations); HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES (1999) [hereinafter HRW NIGERIA REPORT], *available at* http://www.hrw.org/reports/1999/nigeria/Nigew991-01.htm#P190_8265; AMNESTY INTERNATIONAL, COLOMBIA – A LABORATORY OF WAR: REPRESSION AND VIOLENCE IN ARAUCA (2004) [hereinafter AI COLOMBIA REPORT], *available at* http://www.amnesty.org/en/report/info/AMR23/004/2004; AMNESTY INTERNATIONAL, NIGERIA TEN YEARS ON: INJUSTICE AND VIOLENCE HAUNT THE OIL DELTA (2006) [hereinafter AI NIGERIA REPORT], *available at* http://www.amnesty.org/en/report/info/AFR44/022/2005; Robert Dufresne, *The Opacity of Oil: Oil Corporations, Internal Violence, and International Law*, 36 N.Y.U. J. INT'L L. & POL. 331, 336 (2004).

8. Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

9. While a strict definition of corporate social responsibility is elusive, Thomas McInerny characterizes it as:

> an umbrella term that refers to a variety of initiatives ranging from voluntary codes of conduct to programs whereby companies can undergo external audits to verify the adequacy of their practices in a variety of areas of social concern. Although generally lacking formal state power of sanction, these efforts look to international law for their normative authority, intending to apply sometimes-latent international legal prescriptions directly to corporations.

Thomas McInerny, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L.J. 171, 172 (2007). John Ruggie notes that:

> corporate responsibility is being shaped through the interplay of two developments: one is the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute; the other is the extension of responsibility for international crimes to corporations under domestic law. The complex interaction between the two is creating an expanding web of potential corporate liability for international crimes—imposed through national courts.

SRSG Report, *supra* note 3, at 8.

10. *See* discussion *infra* Part II.

11. *Id*.

or exclusion from profits earned from their displacement.[12] Corporate recruitment of abusive state forces to protect their operations from resulting unrest consequently generates second-tier human rights violations of protesting communities, including widespread detentions, extrajudicial killings, and forced disappearances.[13]

In highlighting free market questions implicated by first-tier property violations, it is argued here that in order to preserve the legitimacy of a corporate contract for natural resource extractions, a corporation must adapt its fiduciary duty to address, rather than exploit, distortions created by the accountability gaps present in weak governance zones. Two such distortions are (1) the politicization of corporate activity and (2) the creation of a new breed of investor: affected landowners as involuntary investors.[14] In this context, it is not enough that directors be given greater discretion to exercise business judgment[15] in accounting for broader stakeholder interests.[16] An expanded fiduciary duty should encompass a broader duty of due diligence to local communities. The fact that property interests of local community members are frequently invested in the corporate endeavor against their will is more, not less, reason to ensure that their interests are accounted for by a governance structure that prioritizes voluntary contracting.[17] In furtherance of this duty, corporations should be required to put in place a preventative compliance system, which includes impact assessments, community consultations, and reporting requirements.[18] Absent representative local governance in countries where the extractions are taking place, each of these measures serves to address the accountability gap, ensure property protections, and preserve corporate free market legitimacy.

Much of the existing scholarship proposes similar compliance schemes, but looks at corporate accountability from the perspective of its consistency with human rights principles.[19] This note aims to highlight ways in which

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12. *Id.*
13. *Id.*
14. *See* discussion *infra* Part IV.
15. The "business judgment rule" is a presumption that the directors are acting in the corporation's best interest. Gimbel v. Signal Companies, Inc., 316 A.2d 599, 609 (Del. Ch. 1974). This results in "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); *see also* Zapata Corp. v. Maldonado, 430 A.2d 779, 782 (Del. 1981); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).
16. *See* discussion *infra* Part V.
17. *Id.*
18. *Id.*
19. *See* ANITA RAMASASTRY & ROBERT C. THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW 5 (2006); John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819 (2007); Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CINN. L. REV. 75 (2005).

contemporary corporate governance in the United States has failed to appropriately account for its role in weak governance zones in a manner consistent with its own free market principles. In examining local responses to natural resource extraction in countries such as Colombia, Burma, and Nigeria, Part II of this note identifies the dual-tier rights violations that occur when corporate contracts with unrepresentative governments displace local communities and subject protesting populations to abuse. Part III highlights the limitations of existing legal remedies, which have been tailored to address second-tier human rights violations with little opportunity for addressing the root causes of these violations. Part IV explores the free market underpinnings of the shareholder primacy model and its role in generating distortions in weak governance zones. Recognizing these distortions, Part V argues for an expanded conception of corporate fiduciary duties to address first-tier violations. Finally, Part VI concludes the note by briefly evaluating the challenges and prospects for such an approach.

II. UNACCOUNTABLE EXTRACTIONS AND THE DUAL-TIER STRUCTURE OF PRIVATE AND PUBLIC RIGHTS VIOLATIONS

Corporate contracts for natural resource extractions in weak governance zones, which will be referred to here as unaccountable extractions,[20] frequently result in a hierarchy of abuses. An unaccountable extraction that results in dual-tier public and private rights violations generally is embodied by three elements: (1) an agreement between a corporation and an unrepresentative regime[21] that (2) licenses the corporation to extract natural resources[22] (3) either from property on which local communities live[23] or in a way that substantially affects the surrounding population's use of the land.[24] Such extractions typically result in second-tier human rights violations,[25] which commonly occur when state military forces are recruited to protect oil operations or installations in response to local protest.[26] Recent attention to human rights violations, although long-awaited, has in some ways served to overshadow corporate involvement in first-tier property rights violations, which occur when local property interests are negatively affected in the course of the extraction.[27] Oil operations initiated

20. The term "unaccountable extractions" refers to extractions carried out pursuant to an agreement with a corporation and a governing regime in a weak governance zone that generally does not take into account local interests and needs in decision-making.

21. *See* discussion *infra* Part II.A.

22. *Id.*

23. *See* discussion *infra* Part II.B.

24. *Id.*

25. *See* discussion *infra* Part II.A.

26. *Id.*

27. *See* discussion *infra* Part II.B.

by Occidental Petroleum in Colombia, Unocal in Burma, and Shell in Nigeria serve as three illustrations of this inverse dynamic, in which the international community, strapped for adequate market remedies, has been forced to target the result rather than the cause. Working backwards from second-tier violations, which have been the focus of recent scrutiny,[28] helps reveal the severe effects and importance of accounting for first-tier property rights violations.

A. SECOND-TIER HUMAN RIGHTS VIOLATIONS

The dynamics of second-tier human rights violations are exemplified by corporate involvement in the oil-rich north-eastern region of Arauca in Colombia.[29] The region has experienced protracted instability, militarization, and abuse of civilian populations, due in part to competing oil interests between government forces, paramilitary auxiliaries, and guerilla insurgents.[30] The U.S. company Occidental Petroleum (Occidental) intervened in this complex set of relationships in affiliation with the Colombian government. Occidental began pumping oil in Colombia in 1985 based on an "association contract" with Ecopetrol, a state oil company that owned fifty percent of the pipeline.[31] After more than 900 attacks on

28. In *Doe v. Unocal Corp.*, for example, a district court examined allegations of murder, assault, rape, torture, forced labor, and destruction of homes and property brought by local farmers who challenged Unocal's extractive operations in the Burma. Doe v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997).

29. Colombia constitutes a weak governance zone by virtue of its ongoing internal conflict. As Amnesty International noted in 2004, "Colombia has spent most of the last 50 years under various states of emergency through which constitutional guarantees have been side-stepped, governments have ruled by executive decree, and the military have been granted broad powers to deal with public order issues. This has led to widespread, flagrant human rights violations." AI COLOMBIA REPORT, *supra* note 7, at 3.

30. The emergence of guerilla groups during La Violencia in the 1950's resulted in the consolidation of the Fuerzas Armadas Revolucionares de Colombia (FARC) in 1966, which is now the largest guerilla group in Colombia established to protect the pro-liberal sectors within the country. AI COLOMBIA REPORT, *supra* note 7, at 4–5. The second largest guerilla group is the Ejército de Liberación Nacional. *Id.* These groups have secured control over various local governments, establishing strongholds, extorting rural estates, and launching increasing attacks on civilian populations. *Id.* During its counter-insurgency operations, the Colombian army has depended on private armed paramilitary groups, which have been implicated in the majority of civilian killings and disappearances. *Id.* To circumvent liability, the armed forces have used these paramilitary auxiliaries to outsource the pursuit of their aims through illegal conduct. *Id.* As a result all three groups—the guerillas, the government armed forces, and the paramilitary groups—have abused civilians, often in pursuit of profits linked to the oil-rich north-eastern department of Arauca. *Id.* Because of its strategic importance, Arauca has become a highly militarized zone. *Id.* The government has experimented with various security policies in the region, paramilitaries have likewise clamped down to secure domestic and international interests in conjunction with government armed forces, and FARC has responded by heightening intimidation of the civilian population.

31. Occidental owns the second half along with Repson-YPF, a Spanish company. *Id*. at 6–7.

the pipeline following its drilling operations,[32] Occidental began funding the Eighteenth Brigade, the local army unit, providing helicopters, fuel, uniforms, vehicles, and approximately $750,000 a year for "logistical support."[33] The Eighteenth Brigade has since been accused of various abuses including cooperation with paramilitary groups in the abduction and killing of alleged guerilla supporters.[34]

The oil-rich Niger Delta region of southern Nigeria has similarly been plagued by escalating conflict surrounding oil production.[35] In the 1990's, the Movement for the Survival of the Ogoni People (MOSOP) mobilized the Ogonis to challenge federal distribution of oil revenues and the activities of Shell in the region. Following protests at its facilities, Shell closed production.[36] Members of the Ogoni tribe were detained, beaten, and summarily executed by the Rivers State Internal Security Task Force, which, like the Eighteenth Brigade, was created to suppress protests.[37]

In Burma,[38] Unocal Corporation entered into an agreement with the government to initiate the Yadana gas pipeline project, which was worth an estimated $1.2 billion.[39] Unocal and one of its subsidiaries are believed to have hired the State Law and Restoration Council (SLORC)[40] to help build its offshore drilling stations for the purpose of extracting natural gas from the Andaman Sea to transport gas from Burma to Thailand.[41] Affected farmers in the Tenasserim region of Burma subsequently brought suit

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32. T. Christian Miller, *A Colombian Village Caught in a Cross-Fire*, L.A. TIMES, Mar. 17, 2002, at A-1, *available at* http://www.commondreams.org/headlines02/0317-01.htm.

33. *Id*. U.S. funds have gone towards the creation of the Fifth Mobile Brigade, which was created specifically to protect the pipeline. AI COLOMBIA REPORT, *supra* note 7, at 7.

34. While Occidental denied paying for arms, it is unclear how the corporation controlled or channeled the use of its funds by the Eighteenth Brigade. Miller, *supra* note 32. British Petroleum similarly contracted with the Colombian army for a three-year period, paying a sum of $60 million. Dufresne, *supra* note 7, at 344–45. In 1998, a U.S.-funded Colombian air force helicopter bombed the village of Santo Domingo, killing seventeen civilians with U.S. munitions. AI COLOMBIA REPORT, *supra* note 7, at 5–6.

35. AI NIGERIA REPORT, *supra* note 7, at 2.

36. HRW NIGERIA REPORT, supra note 7, at 9.

37. Ken Saro-Wiwa, the leader of the MOSOP, and eight additional Ogonis were arrested for murder of tribal leaders and executed following a military trial. *Id*.

38. Following a military coup in 1962, Burma remained under military rule characterized by widespread political oppression and economic mismanagement, with Burma's key industries controlled by military-run enterprises. BBC News Country Profile: Burma, http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/1300003.stm.

39. *Unocal Pays Out on Burma Abuses*, BBC NEWS, Mar. 22, 2005, http://news.bbc.co.uk/2/hi/asia-pacific/4371995.stm (last visited Mar. 10, 2008).

40. In 1990, following multi-party elections, the military junta, the State Law and Order Restoration Council (SLORC) refused to recognize the National League for Democracy's electoral victory, preventing the party from taking political office. BBC News Country Profile: Burma, http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/1300003.stm; SLORC Coup in Burma, GlobalSecurity.org, http://www.globalsecurity.org/military/world/war/slorc.htm.

41. Doe v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997).

alleging murder, assault, rape, torture, forced labor, and destruction of homes and property.[42]

In each of these cases, the focus on corporate complicity in second-tier human rights violations[43] has often overshadowed the root causes of such violations and corporate involvement in creating the environment for such abuses by initiating first-tier property rights violations.

B. First-Tier Property Rights Violations

In Colombia, Nigeria, and Burma, second-tier human rights violations such as detentions, killings, beatings, and summary executions have often been a product of first-tier property violations. Local property rights are adversely affected by unaccountable extractions in several ways. Violations include interference with ancestral land,[44] taking of property without compensation,[45] lack of adequate profit-sharing,[46] failure to follow through in development agreements,[47] and failure to account evenly for competing tribal property interests during the negotiation process.[48]

The use of ancestral lands for natural resource explorations has posed particular problems for indigenous groups.[49] As the Inter-American Commission on Human Rights has noted: "[T]he problems encountered by an Indian population as a result of relocation can affect that population seriously, considering the special ties they have with their original lands. In the Indian's complex scheme of values, what gives meaning to life is its intrinsic connection with their land . . . ."[50]

For indigenous groups, communal land rights are frequently crucial to cultural preservation.[51] Thus, self-determination struggles have been perceived as encompassing "the principle of permanent sovereignty over natural resources."[52] The principle serves as a means for newly independent

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42. *Id.* at 883.

43. *See* discussion *infra* Part III.

44. *See* Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 136 (2007) (highlighting indigenous rights to ancestral lands).

45. *See Unocal Corp.*, 963 F. Supp. at 885.

46. *See* AI NIGERIA REPORT, *supra* note 7, at 2.

47. *Id*. at 3.

48. *Id.* at 4; *see also* Maassarani, *supra* note 6, at 138–40.

49. Miranda, *supra* note 44, at 136.

50. Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, 27 (Nov. 29, 1983).

51. *Id*.

52. This principle is characterized as follows: "Peoples and nations must have the authority to manage and control their natural resources and in doing so to enjoy the benefits of their development and conservation." U.N. Econ. & Soc. Council [ECOSOC], Sub-Commission on the Promotion & Protection of Human Rights, Final Report of the Special Rapporteur, Erica Irene A. Daes, Indigenous Peoples' Permanent Sovereignty Over Natural Resources 5, U.N. Doc. E/CN.4/Sub.2/2004/30 (July 13, 2004) [hereinafter ECOSOC Report on Indigenous Peoples].

states to preserve economic sovereignty against inequitable contracts between external states and companies.[53] For example, in 1995, Colombia granted an oil exploration license to Occidental of Colombia, a subsidiary of Occidental.[54] The government's license authorized Occidental to drill on the ancestral lands of the indigenous U'wa people.[55] While the exploration proved futile, the license disregarded the specialized rights of the U'wa people to their ancestral lands and exposed them to future susceptibility to similar explorations.[56]

Even where ancestral land rights are not at issue, corporations such as Unocal are frequently accused of failing to compensate communities for land taken.[57] As a result of the agreement between Unocal and the SLORC, individuals in the Tenasserim region were either forced to relocate from their place of residence, forced to contribute labor and property, or subjected to various forms of violence.[58] Local populations, such as the Tenasserim farmers, often lose twofold: first, when their property is taken by foreign industries, and second, when profits earned from the extractive operations are not reinvested in the affected community.[59] In Nigeria, for example, while ninety-eight percent of the country's foreign exchange earnings are derived from oil revenues, constituting nearly eighty percent of the country's budget, the people of the Niger Delta see little of this revenue.[60] Despite high profit earnings, local communities often continue to live at the poverty level without adequate infrastructure: electricity supplies are erratic, water quality is poor, and the ongoing burning of gas continues to contaminate the local environment.[61]

Corporations that do agree to provide some form of compensation often refuse to follow through on development agreements,[62] or fail to take into

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53. *Id*. This right is derived from common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights: "All peoples may, for their own ends, freely dispose of their natural wealth and resources. . . . In no case may a people be deprived of its own means of subsistence." *Id*; *see also* International Covenant on Civil and Political Rights art. 1(2), Dec. 16, 1966, S. Exec. Doc. E, 95–2 (1978), 999 U.N.T.S. 171.

54. Miranda, *supra* note 44, at 136.

55. *Id*.

56. *Id*. at 137.

57. *See* Doe v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997).

58. It was believed that joint venturists, "through the SLORC military, intelligence and/or police forces, have used and continue to use violence and intimidation to relocate whole villages, enslave farmers living in the area of the proposed pipeline, and steal farmers' property for the benefit of the pipeline." *Id*. In *Doe v. Unocal Corp.*, plaintiffs challenged the corporation's contract with the SLORC, arguing that, as a function of this contract, "SLORC soldiers forced farmers to relocate their villages, confiscated property and forced inhabitants to clear forest, level the pipeline route, build headquarters for pipeline employees, prepare military outposts and carry supplies and equipment." *Id*. at 885.

59. *See* AI NIGERIA REPORT, *supra* note 7, at 2.

60. *Id*.

61. *Id*. at 2–3.

62. *Id*.

account the complex tribal distribution of property interests and consequently exclude interested communities from negotiations for oil exploration.[63] Protesters in the Niger Delta, for example, have challenged Chevron Nigeria's failure to provide jobs and development projects in exchange for a "non-disruptive operating environment" agreed to under a Memorandum of Understanding between the protestors and the company.[64] Communities that protest or obstruct oil production have been targeted by security forces, which have razed communities and killed civilians.[65] In the village of Odioma in Nigeria, seventeen individuals were reportedly killed by government forces in retaliation for the killing of local councilors.[66] Eighty percent of homes were subsequently razed.[67] The violence can be linked to a dispute between neighboring communities over control of land sought for oil exploration.[68] Shell Nigeria's compensation of one constituency at the expense of others exacerbated local tensions.[69]

Looking at the various ways in which unaccountable extractions adversely affect local property interests, it is clear that a key underlying element of the ensuing human rights violations is the initial first-tier property violations.[70] Corporations that have used shareholder assets to initiate such extractions implicate not only the ownership rights of the shareholders but also the ownership rights of the local communities.[71] An emerging contemporary corporate social responsibility regime is now encouraging accountability in these various contexts.[72] Because the discourse has focused on second-tier human rights violations, it has been framed largely as an issue of corporate *social* responsibility, focusing on human rights principles. As a result, emerging legal remedies have provided little opportunity to address first-tier property violations, the root cause of the problem.

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63. *Id.* at 4–5

64. *Id*. at 4.

65. AI NIGERIA REPORT, *supra* note 7, at 19.

66. *Id*. at 4.

67. *Id*.

68. *Id*. Violence erupted in the village of Odioma in Nigeria when a Joint Task Force raided the community in search of a vigilante group suspected of killing local counselors. Amnesty International noted that the violence was a result of conflict between communities within the same ethnic group over control of the land designated for oil exploration. After identifying two specific communities as the landowners, Shell Nigeria had to withdraw from the area when it learned that ownership of the land was in dispute. *Id*. at 4–5.

69. *Id*.

70. In 2005, the Joint Task Force, which was also a government security force created to protect major oil installations, fired on protesters at an oil terminal operated by Chevron Nigeria. *Id*. at 3. As Robert Dufresne explains, "In response to the expression of despair and social outrage, and to the voicing of socio-political claims, military or police interventions are undertaken to defend the disturbed concessions and to uphold concretely the conditions for the exercise of exploitation of prerogatives." Dufresne, *supra* note 7, at 336.

71. Miranda, *supra* note 44, at 136.

72. *See* SRSG Report, *supra* note 3, at 7–8.

III. PROTECTION GAPS IN THE EMERGING ACCOUNTABILITY REGIME: THE LIMITED JURISDICTIONAL GRANT OF THE ALIEN TORT CLAIMS ACT

The emerging legal architecture that is being erected under the umbrella of a corporate social responsibility regime represents a crucial step forward in addressing the egregious violations that have occurred at the hands of extractive industries.[73] In the United States, the ATCA provides a civil human rights remedy, giving federal courts original jurisdiction over civil actions brought by aliens for torts that qualify as a violation of the law of nations.[74] Similarly, the Torture Victim Protection Act of 1991 (TVPA) establishes civil liability, irrespective of citizenship, for any individual who, under the authority of a foreign nation, subjects another to torture or extrajudicial killings.[75] While statutory instruments such as the ATCA and the TVPA have provided innovative legal remedies to address human rights violations in federal courts,[76] courts have narrowly construed their jurisdiction to extend to a limited set of abuses.[77] The end result is that courts can address a limited set of second-tier human rights abuses and are circumscribed, if not explicitly prohibited, from reaching first-tier property rights violations within this statutory framework.

While the ATCA opened the door for federal courts to adjudicate certain violations recognized under international law,[78] it remained unclear which acts constituted violations of the law of nations. Subsequent case law has played a central role in clarifying the breadth of applicable violations. In *Filártiga v. Peña-Irala*,[79] a physician in Paraguay brought suit under the ATCA against the former Inspector General of Police in Paraguay for torturing his son in retaliation for his political opposition to the government of President Alfredo Stroessner.[80] The Second Circuit found perpetration of torture in an official capacity sufficient to grant federal jurisdiction.[81] In granting jurisdiction, the court in *Filártiga* nonetheless read the ATCA as providing narrow jurisdiction to adjudicate only a margin of acceptable claims involving "well-established, universally recognized norms of international law."[82]

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73. *See* Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 188 (2002).
74. Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).
75. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).
76. *See* Collingsworth, *supra* note 73, at 188.
77. *See* Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV. 401 405–06 (2001).
78. *See* Filártiga v. Peña-Irala, 630 F. 2d 876, 887 (2d Cir. 1980).
79. *See generally id.*
80. *Id*.
81. *Id*. at 888.
82. *Id.*

In *Doe v. Unocal Corp.*,[83] where Burmese farmers in the Tenasserim region brought suit against Unocal challenging the Yadana gas pipeline project, the district court reiterated adherence to the high threshold set by the Second Circuit in *Filártiga*.[84] As discussed, farmers alleged that the conduct of Unocal and its local subsidiary had resulted in forced displacement, confiscation of property, forced labor and torture.[85] Rejecting the expropriation claims, the court found that claims of torture and forced labor constituted violations of the laws of nations, triggering federal jurisdiction under the ATCA.[86] Building upon the Second Circuit's important precedent, the court found that even absent state conduct, private enterprise could be held liable because the allegation of forced labor fell within the set of crimes "for which the law of nations attributes individual responsibility."[87] While the court's interpretation of the law of nations extended the ATCA's applicability to private enterprises, it stopped short of extending such applicability to private rights.[88]

This distinction between private and public rights was previously emphasized by the Second Circuit in *Dreyfus v. von Finck*.[89] In *Dreyfus*, the court dismissed a complaint brought by a Swiss citizen seeking recovery against citizens of West Germany on claims of "wrongful confiscation of property in Nazi Germany in 1938."[90] The court found that "[d]efendants' conduct, tortious though it may have been, was not a violation of the law of nations, which governs civilized states in their dealings with each other."[91] Here, the court suggested that violations of the law of nations did not encompass violations of private rights. Similarly, in *Bigio v. Coca-Cola*, the Second Circuit found that Canadian citizens had not established subject matter jurisdiction under the ATCA in alleging that a Delaware corporation had purchased or leased property knowing that it had been unlawfully seized by the Egyptian government based on religious discrimination.[92] The court found that a corporation could not be held responsible for a state's

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83. Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997).

84. *Id*. at 883, 891–92.

85. *Id*. at 883.

86. *Id*. at 884.

87. *Id.* at 891–92. The Second Circuit had previously held that "the ATCA reaches the conduct of private parties provided that their conduct is undertaken under the color of state authority or violates a norm of international law that is recognized as extending to the conduct of private parties." Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104 (2d Cir. 2000) (citing Kadic v. Karadzic, 70 F.3d 232, 239–40, 245 (2d Cir. 1995)).

88. *Unocal Corp.*, 963 F. Supp. at 884 (C.D. Cal. 1997).

89. Dreyfus v. von Finck, 534 F.2d 24 (2d Cir. 1976) (Plaintiff was forced to leave Germany and sold his interest in Dreyfus. He alleged that the transaction took place under duress with the price substantially lower than the actual value of the stock.).

90. *Id*.

91. *Id*. at 31.

92. Bigio v. Coca-Cola Co., 239 F.3d 440, 444, 447 (2d Cir. 2000).

"discriminatory expropriation of property," and that such conduct did not amount to an act "of universal concern."[93]

In *Sosa v. Alvarez-Machain*,[94] the Supreme Court confirmed this closed-door approach,[95] cautioning against "adapting the law of nations to private rights" in the absence of congressional action.[96] Because courts retain only a narrow margin of discretion in interpreting violations of international law, they often have limited or no jurisdiction over these initial first-tier violations.[97] As Beth Stephens notes, "human rights and humanitarian law violations such as genocide, summary execution, war crimes and crimes against humanity, disappearance, slavery and forced labor trigger jurisdiction under the ATCA," whereas other claims, such as those "based on expropriation of property," fall outside this jurisdiction.[98] Because this statutory scheme extends only to a small margin of violations that have achieved the level of international consensus, it falls short of addressing the wide range of property violations that often set the stage for second-tier human rights violations worthy of jurisdiction under the ATCA.

In addition to their narrow interpretation of acts constituting violations of the law of nations, courts have also inferred particular bars to adjudicating the validity of foreign conduct. The act of state doctrine, which suggests that "the acts of foreign sovereigns taken within their own jurisdiction . . . be deemed valid," is one basis on which to argue against judicial interference with respect to foreign conduct.[99] Although the scope of this doctrine remains unclear, some have found that judicial interference is valid up until the point where "adjudication of the matter will bring the nation into hostile confrontation with the foreign state."[100] In *Unocal*, the court did not find that this line had been crossed with regards to allegations of torture and forced labor because the U.S. government had already criticized Burma for its human rights abuses and it was therefore "hard to imagine how judicial consideration of the matter [would] so substantially exacerbate relations as to cause 'hostile confrontation.'"[101] Because

93. *Id*. at 448.

94. Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004) (Humberto Alvarez-Machain, who was indicted for the torture and murder of a Drug Enforcement Administration (DEA) official and later acquitted, challenged his abduction in Mexico under a plan authorized by the DEA using Mexican nationals to seize him and bring him to the United States).

95. *Id*. at 725. The court found that that prohibitions against arbitrary arrest also fell short of the ATCA's requirements.

96. *Id*.

97. *See* Khulumani v. Barclay Nat'l Bank Ltd., 509 F.3d 148, (2d Cir. 2007).

98. Stephens, *supra* note 77, at 405–06.

99. Doe v. Unocal Corp., 963 F. Supp. 880, 893 (C.D. Cal. 1997).

100. *Id*.

101. *Id*. The court additionally reasoned that:

> [B]ecause nations do not, and cannot under international law, claim a right to torture or enslave their own citizens, a finding that a nation has committed such acts, particularly where, as here, that finding comports with the prior conclusions of the coordinate

consideration of whether a state is acting in the public interest factors into this doctrine, considerably more deference is afforded to states expropriating land as opposed to committing torture.[102] It has been argued, for example, that "'instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources' would affront the sovereignty of a state."[103] Because state land expropriations can be justified, often pretextually, on public interest grounds in a way that torture cannot, such expropriations fall more easily within the deferential act of state doctrine,[104] further limiting judicial determinations of first-tier violations.

While the ATCA provides an important opportunity to hold corporations liable for violations of international law, its narrow jurisdictional grant coupled with limiting principles such as the act of state doctrine leaves substantial gaps, if not barriers, in terms of preventative remedies. In the case of Burma, property claims were expressly preempted and the local community had to rely on traditional human rights claims to assert their rights. Similarly in Nigeria, petitioners in *Wiwa v. Royal Dutch Petroleum Co*. alleged first-tier violations, claiming that Shell Nigeria "coercively appropriated land for oil development without adequate compensation, and caused substantial pollution of the air and water in the homeland of the Ogoni people."[105] Their claim, however, also hinged primarily on allegations that Shell Nigeria orchestrated attacks involving torture and extrajudicial killings to suppress local opposition to drilling in the region.[106] The Second Circuit's focus on petitioners' claims of torture and extrajudicial killings in rejecting the corporations' forum non conveniens claims[107] further suggests that under the ATCA, first tier property rights will only be addressed indirectly insofar as they result in second-tier human rights claims.

Given the private nature of property rights in the United States and the deference afforded to states in land appropriations, it seems improbable that courts will be able to address land expropriations under this framework, absent torture or extrajudicial killings. Despite the groundbreaking achievements of recent litigation under the ATCA, the statute's limitations in the context of underlying property violations suggest that while it has become a necessary remedy, it remains an insufficient one. The increasing

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> branches of government, should have no detrimental effect on the polices underlying the act of the state doctrine.

Id. at 884.

102. *Id*.
103. *Id*. (quoting Lui v. Republic of China, 892 F.2d 1419, 1432 (9th Cir. 1989)).
104. *Unocal Corp*, 963 F. Supp. at 893.
105. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92 (2d Cir. 2000)
106. *Id*.
107. *Id*.

promotion of a social and economic rights approach will serve as one way of further incorporating property principles within the realm of public protections. However, the lack of substantial consensus in this area suggests that, in the short-run, the responsibility for protecting private rights may rest more appropriately in the private sphere.

IV. CONTEMPORARY CORPORATE GOVERNANCE AND SHAREHOLDER PRIMACY'S DIVORCE FROM TRADITIONAL FREE MARKET PRINCIPLES

In identifying private remedies for private rights violations, the key starting point is to determine whether corporations carry out their extractive operations in developing countries in a manner consistent with their key governance principles. In prioritizing principles of voluntary ownership and contracting, U.S. corporations adhere generally to a shareholder primacy model, under which the corporation serves primarily to maximize the shareholder's profits.[108] In assessing the use of this model in the context of natural resource extractions in weak governance zones, it becomes immediately evident that corporations have, to some extent, abandoned precisely the principles governing ownership and contracting that justified a shareholder primacy approach in the first place.

Corporate contracts with unrepresentative regimes violate three free market principles underlying shareholder primacy: (1) informed and voluntary contracting; (2) the separation of economic power and political authority; and (3) the centrality of private property protections.[109] This free market contradiction creates problematic distortions in the corporation's role, often turning the corporation into a political actor and the local community into an involuntary investor. Where such distortions emerge, corporations can no longer rely on shareholder primacy to justify their conduct until such conduct is reconciled with the free market principles that justified shareholder primacy to begin with.

A. THE SHAREHOLDER PRIMACY MODEL

Under the prevailing shareholder primacy model of corporate governance, shareholders are collectively perceived, by virtue of their

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108. Under a shareholder primacy model of corporate governance, the corporate entity serves first and foremost to promote the interests of shareholders. *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 277–78 (1998); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189–90 (2002).

109. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1990, *available at* http://select.nytimes.com/gst/abstract.html?res=F10F11FB3E5810718EDDAA0994D1405B808BF1D3&scp=1&sq=the%20social%20responsibility%20of%20business%20is%20to%20increase%20its%20profits&st=cse (subscription required) [hereinafter *The Social Responsibility of Business*].

investments, as the owners of the corporation,[110] while the corporation is often perceived as "a nexus of contracts" between managers, shareholders and other constituents.[111] Property protection and voluntary contracting are thus two central principles underlying corporate governance.[112] Because shareholders are the owners, the corporation must be "primarily run for [their] pecuniary benefit,"[113] serving to protect their investments and maximize shareholder wealth.[114] Under this scheme, managers are frequently prevented or discouraged from acting in the interest of non-shareholder constituencies unless doing so would be in the best interests of the shareholders themselves.[115]

Because equity owners give decision-making authority to corporate agents, their expectation of profit maximization is protected by a system of fiduciary duty. In what Antoine Rebérioux refers to as a "philosophy of dispossession," shareholders, who must vest control in corporate

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110. Antoine Rebérioux, *Shareholder Primacy and Managerial Accountability, Comparative Research in Law and Political Economy*, CLPE Research Paper 1/2007 Vol. 03, No. 01, 1 (2007), *available at* http://ssrn.com/abstract=961290. The dynamics of the shareholder primacy model are described by Milton Friedman as follows:

> In a free-enterprise, private property system, a corporate executive is an employee of the owners of the business. He has a direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in the law and those embodied in ethical custom.

The Social Responsibility of Business, *supra* note 109.

111. Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: a Proposed Corporate Regime that Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 587, 592 (1997).

112. *Id*. at 590–94.

113. Henry T.C. Hu, *New Financial Products, the Modern Process of Financial Innovation, and the Puzzle of Shareholder Welfare*, 69 TEX. L. REV. 1273, 1278–83 (1991).

114. Rebérioux, *supra* note 110, at 2; *see* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, http://papers.ssrn.com/abstract=94043 (for an analysis of the benefits of a shareholder profit maximization approach).

115. The extent of the doctrine's protections of shareholder interest at the cost of managerial discretion was illustrated in the Michigan Supreme Court's ruling in *Dodge v. Ford Motor Company.* Where shareholders sought to compel seventy-five percent of the company's cash surplus against the director's decision to reinvest profits into the company, the court found that refusal to pay special dividends did not fall within a director's discretion and thus constituted an arbitrary refusal. *See* Dodge v. Ford Motor Co., 204 Mich. 459, 510 (1919). The court reasoned that:

> [a] business corporation is organized and carried on primarily for the profit of stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end. . .it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others . . . .

Id. at 507.

executives, counter their dispossession by retaining some influence over managers' decision-making.[116] Managers are held to a "triad of primary fiduciary duties:"[117] duties of due care, loyalty, and good faith.[118] This triad essentially requires directors to act in the best interest of the corporation, refrain from self-dealing, and remain honest.[119] Where there is a conflict of interest with other constituencies of the corporation, shareholder interests generally prevail.[120]

As discussed, the shareholder primacy model is premised on the importance of protecting ownership rights of investors based on a matrix of contractual relationships.[121] Milton Friedman has identified the key set of free market principles underlying the corporate form as follows:

> In an ideal free market resting on private property, no individual can coerce any other, all cooperation is voluntary, all parties to such cooperation benefit or they need not participate. There are no values, no "social" responsibilities in any sense other than the shared values and responsibilities of individuals.[122]

Irrespective of broader social responsibilities, the principles underlying corporate governance implicate a political or legal regime, or what will be referred to here as corporate free market responsibility. As explained by Friedman, this regime provides a series of interconnected underlying assumptions and individual protections: (1) informed and voluntary contracting and on some voluntary exit;[123] (2) the separation of economic power and political authority, which if consolidated adds a coercive element that can delegitimize the voluntary nature of a transaction;[124] and (3) private property protections, which rest definition of property rights.[125] While the shareholder primacy model is premised on these three free market principles, the legitimacy of the model is called into question when corporations engage in unaccountable extractions that stray from these

116. Rebérioux, *supra* note 110, at 5.

117. Williams, *supra* note 19, at 88 (citing Malone v. Brincat, 772 A.2d 5, 12–13 (Del. 1998)).

118. A general duty of disclosure is encompassed in the triad requiring directors to "provide the stockholders with accurate and complete information material to a transaction or other corporate event that is being presented to them for action." Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998). *See generally* Lawrence A. Hamermesh, *Calling Off the Lynch Mob: A Corporate Director's Fiduciary Disclosure Duty*, 49 VAN. L. REV. 1087, 1100 (1996).

119. MODEL BUS. CORP. ACT ANN. § 8.30(a) (2002).

120. Smith, *supra* note 108, at 282 (citing David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, Progressive Corporate Law 35, 1 (Lawrence E. Mitchell ed., 1995)). In the context of corporate takeovers, states have adopted nonshareholder constituencies statutes that allow managers to take into account the interests of customers, suppliers and employees in determining the interest of the corporation. *Id.* at 289.

121. Leung, *supra* note 111, at 590–94.

122. *The Social Responsibility of Business*, *supra* note 109.

123. *Id*.

124. CAPITALISM AND FREEDOM, *supra* note 2, at 115–16.

125. *Id.* at 27.

underpinnings. In such a context, these principles, while maintained with regard to shareholders, do not extend to local communities, whose interests often go unprotected by both the government and the corporation. As a result, contracts between a corporation and a foreign government deny local landowners of their property absent voluntary contracting and under substantial coercion. This gap in protection calls into question the legitimacy of a contract that uses coercive means in the name of the free market. In order to better address this gap, it is necessary to explore each of these free market principles and the ways in which corporations have diverged from them by engaging in unaccountable extractions.

1. Not-So-Voluntary Contracting

Generally, transaction costs will be too high for a corporation to contract with individual communities,[126] so instead the corporation contracts with the government, which retains sovereignty over the country's natural resources.[127] Because government officials contract on behalf of their country's citizens, the voluntary nature of that contract does not depend solely on whether the officials entered into the contract voluntarily, but on whether they did so as a matter of public welfare as opposed to personal gain.[128] Certain public harms that result from government contracts may be justified as products of a representative political process that is meant to facilitate fair distribution of public costs and benefits.[129] In the case of unrepresentative regimes, however, a bilateral arrangement between a corporation and the government that is voluntary and informed

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126. *See* Richard A. Posner, ECONOMIC ANALYSIS OF LAW 54–56 (6th ed. 2002).

127. ECOSOC Report on Indigenous Peoples, *supra* note 52, at 5.

128. The Securities and Exchange Commission (SEC) has increasingly held corporations accountable for bribing state officials under the Foreign Corrupt Practices Act. In 2006, the SEC entered final judgment against corporate employees operating in Nigeria for paying approximately one million dollars in bribes to Nigerian government officials in pursuit of a contract for an oil drilling project. Margaret Ayres, John Davis, Nicole Healy & Alexandria Wrage, *Developments in U.S. and International Efforts to Prevent Corruption*, 41 INT'L LAW 597, 600–01 (Summer 2007). The parties were charged civil monetary penalties. *Id*. Additionally, the SEC also brought a civil action against a former employee of Willbros, a public oilfield services company, for bribery schemes in Nigeria and Ecuador. *Id*. at 602.

129. As Bruce Ackerman notes, "welfare gains can rarely be purchased without social cost—though many may gain, some will lose as a result of the new governmental initiative." BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 1 (1977). In the United States, the Constitution's Takings Clause has been designed particularly to address problems of equitable distribution and potential misuse of eminent domain, requiring that property be taken only for public use and with just compensation. While the legal interpretations of these two requirements are complex, their mere existence, indicates that the government does not retain complete discretion when it takes property. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"). As Abraham Bell and Gideon Parchomovsky note: "Assuming that democratic mechanisms make public officials accountable for budget management, compensation is important to create a budgetary effect that forces governments to internalize the costs that their decisions impose on private resource holders." Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 580 (2001).

with respect to the government is generally not voluntary and informed with respect to the people living on the land or in the surrounding area, as illustrated in both Colombia and Burma.[130] In each of these cases, the contract was made by the corporation in pursuit of investor interests, whereas the local populations, whose land was a crucial investment in the venture, had no opportunity for voluntary choice.[131] They were not contracted with directly, they were not represented or compensated by the contracting government, and their property interests were not accounted for by the corporation itself.[132]

Under contract law, "[f]reedom of will is essential to the validity of an agreement."[133] A contract will be invalidated in cases of duress or undue influence, where such free will is compromised.[134] The circumstances of unaccountable extractions are analogous given that the absence of free will is actually more exaggerated: certain groups are not only intimidated but completely excluded from the process.[135] A corporation should therefore seriously reconsider the legitimacy of its contracts with an unrepresentative regime when it has reasonable grounds to believe that state contractors were not acting within the best interests of affected communities.[136] Neglect of accountability gaps has led to costly malfunctions such as violent protests and repressive state activity, often in the form of human rights abuses, including torture, forced disappearances, arbitrary arrests, and extrajudicial killings.[137] These forms of state abuse are further exacerbated where corporate influence dictates further consolidation and concentration of political and economic power.

2. The Corporation as a Political Entity

The corporation's pursuit of shareholder interests becomes further divorced from free market principles where corporate activity is politicized,

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130. *See* discussion *supra* Part II.
131. *Id*.
132. *Id*.
133. 17A AM. JUR. 2D CONTRACTS § 218 (2008).
134. *Id*.
135. *See* discussion *supra* Part II on the exclusion of interested parties in Odioma, Nigeria.
136. In analyzing odious debt, for example, Thomas Palley has argued that:

> [an] important measure for guarding against looting via financial markets is the legal doctrine of odious debt. The core idea is that where: (1) loans are made to illegitimate regimes, such as those that come to power undemocratically; (2) loans are not secured for the benefit of the people; and (3) lenders could reasonably have known about [such] conditions . . . then such loans can be deemed illegitimate and unenforceable.

Thomas I. Palley, *Lifting the Natural Resource Curse*, FOREIGN SERVICE JOURNAL (Dec. 2003), *available at* http://www.globalpolicy.org/security/natres/generaldebate/2003/12curse.htm.

137. HRW NIGERIA REPORT, *supra* note 7, at 14, 164.

threatening a coercive consolidation of political and economic power.[138] As Friedman explains:

> [By] removing the organization of economic activity from the control of political authority, the market eliminates this source of coercive power. It enables economic strength to be a check to political power rather than a reinforcement * * * if economic power is kept in separate hands from political power, it can serve as a check and a counter to political power.[139]

This approach, while minimizing government involvement, is not meant to eliminate it.[140] Instead, it designates the government as an essential "umpire to interpret and enforce the rules decided on" and to accordingly "minimize the extent to which government need participate directly in the game."[141] In the United States, government protections come in various forms, from state and federal regulations to protections of private property under the Fifth Amendment of the United States Constitution.[142]

The separation of economic and political authority, crucial to Friedman's competitive capitalist regime, breaks down when corporations contract with non-representative governments to serve a security function. Both corporations and local governments have incentives to preempt the development of legal infrastructure that may inhibit the scope of their operations.[143] Government leaders, who are not required to distribute revenues, stand to gain substantial profits irrespective of whether the local communities sustain substantial losses.[144] Therefore, corporations frequently have incentives to bribe state actors in pursuit of their goals.[145] Corporations cease being purely economic entities where their profits depend, in part, on being able to operate in economies uninhibited by the rule of law and where they use their economic power to preempt the state from evolving into Friedman's regulating "umpire."[146]

Corporations further blur the line by interfering in local conflict dynamics when they recruit government security forces, which may already be in conflict with other local factions.[147] As financial contributors, they

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138. 1000 corporations produce eighty percent of the world industrial output. Blankenburg, *supra* note 1. According to the United Nations Educational, Scientific and Cultural Organization, fifty-one of the world's largest economies are no longer states but corporations. SARAH ANDERSON & JOHN CAVANAGH, TOP 200: THE RISE OF GLOBAL CORPORATE POWER (2000), *available at* http://s3.amazonaws.com/corpwatch.org/downloads/top200.pdf.

139. CAPITALISM AND FREEDOM, *supra* note 2, at 27.

140. *Id*. at 115.

141. *Id*.

142. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 54–56 (1998).

143. *See generally* Paul Collier & Anke Hoeffler, *Greed and Grievance in Civil War*, OXFORD ECONOMIC PAPERS 56 (2004).

144. *See supra* note 70 and accompanying text.

145. *See supra* note 128 and accompanying text.

146. *See generally* Collier & Hoeffler, *supra* note 143.

147. *See* discussion *supra* Part II.

may empower one side of a domestic conflict in pursuit of shareholder profits.[148] The corporation's purely commercial role is undermined when it contracts with one side of a party to an internal conflict for the protection of a pipeline in a way that alters the conflict dynamics. As Robert Dufresne notes:

> The involvement of oil companies in internal violence reaches a more significant level when rebels, in order to counter the empowerment of governments that have contracted with oil corporations, directly attack oil concessions or pipelines. Then, rather than being simply part of the working conditions of a larger system that—to a certain and not insignificant degree—oil companies can claim not to control, their activities become directly involved in the dynamics of internal violence. In a sense, the defense of pipelines and of oil concessions is the material threshold that defeats the oil companies' argument that they are uninvolved in conflicts and merely carrying out commercial interaction.[149]

In Sudan, for example, revenues earned by the government in Khartoum through contracts with companies such as Chevron contributed to the government's weapons stockpile.[150] As "participants in the web of local interactions," corporations become "a means for the pursuit of local political objectives."[151] Taking a place within the military web politicizes corporate activity.

In failing to take into account the social realities of extracting resources from countries with unrepresentative and unaccountable political infrastructure, corporate governance structures facilitate exactly the type of consolidation of political and economic power that the free market system seeks to avoid. The absence of voluntary contracting, coupled with the coercive nature of corporate conduct, severely undermines the legitimacy of the corporation's interference with local property interests.

3. Private Property Protections and Dispossession of the Involuntary Investor

By sidestepping local property interests in pursuit of profit maximization, the shareholder primacy model of corporate governance prioritizes the protection of property interests linked to formal investments (shareholder interests) while blindly discounting the property interests linked to other corporate assets (local community interests). Shareholders may argue that where local property protections are lacking, it is the responsibility of the state and not the corporation to account for them. In this case, however, it is the corporation and not the foreign regime that

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148. Dufresne, *supra* note 7, at 344.
149. *Id.*
150. *Id.* at 341.
151. *Id.* at 346.

bases the legitimacy of its conduct on respect for ownership and voluntary contracting. Placing the burden on the state ultimately reduces free market principles to a principle of double standards.[152]

The shareholder primacy model, in placing a premium on investor interests, incorrectly presumes that the unaccountable state is a valid transactional partner and that the absence of formal property rights extinguishes the need to recognize such rights. However, property ownership, which is a basic foundation of the shareholder primacy model, has historically been "viewed as establishing the economic basis for freedom from governmental coercion and the enjoyment of liberty."[153] For example, in the United States, constitutional checks on self-interested governmental takings have been put in place under the Takings Clause of the Fifth Amendment, which requires that property be taken only for a public use and in exchange for just compensation.[154] The Fifth Amendment's Due Process clause places an additional check, which, as interpreted by the Supreme Court, prohibits arbitrary and unreasonable deprivations of property.[155] These protections of private property do not exist in a vacuum, but rather are grounded in a representative system of government.[156]

In the case of unaccountable extractions, such checks are lacking. The contract is frequently motivated by self-interest, excludes the interests of the local communities, and is particularly coercive in nature.[157] Government officials, acting on their own behalf, often pocket the profits from the contract.[158] The corporation's use of that property in these cases is no different than a coercive taking or an arbitrary deprivation of property on behalf of the corporation and the government. Thus, while the Second Circuit in *Bigio* may not have found that a U.S. corporation utilizing

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152. Mark Gibney and R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Hold Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L COMP. L.J. 123, 145 (1996) ("There is one set of standards—legal and moral—in domestic operations; but a completely different and much lower set of standards when these same entities are operating abroad, particularly in much poorer countries. This dichotomy is wrong, and the governments in the industrialized world have the means of preventing it; by applying extraterritorially many of the domestic and international standards that are adopted and enforced at home.").

153. Ely, *supra* note 142, at 3.

154. *See supra* note 129 and accompanying text.

155. U.S. CONST. amend. V; Village of Euclid, Ohio v. Amber Realty Co., 272 U.S. 365, 395 (1926) ("it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare").

156. U.S. CONST. art. I, § 2 (setting forth election standards and process for the House of Representatives, who are to be chosen "by the People of the several States"); U.S. CONST. amend. XVII (setting forth election standards and process for the Senate).

157. HRW NIGERIA REPORT, *supra* note 7, at 6, 8–9.

158. *See* Douglas Anele, *Nigeria: On Obasanjo and His Critics*, VANGUARD, Mar. 20, 2008, http://www.allafrica.com/stories/200803240161.html.

unlawfully expropriated land had violated the law of nations, the corporation had nonetheless violated its own free market principles.

Additionally, the shareholder primacy model fails to reconcile the role of involuntary investors. In the context of unaccountable extractions, the local community takes on the anomalous role of an involuntary investor. Antoine Rebérioux's "philosophy of dispossession," as applied to the shareholder, can be applied in an exaggerated form to the local community, which is dispossessed of its property without initial approval and without retaining control.[159] Ironically, the corporation accounts for this dispossession with regard to shareholders by prioritizing shareholder interests[160] in a way that simultaneously facilitates a corresponding and somewhat perverse form of dispossession of local communities. To reconcile this paradox, fiduciary duty must be reconceptualized to eliminate the anomaly of the involuntary investor and ensure free market responsibility. While this reconciliation is important on a conceptual level, it also serves to address the monetary, reputational, and legitimacy costs that tend to result when property violations lead to destabilizing and violent unrest.[161] Free market fairness principles are not simply a social construct or moral imperative but rather a practical recognition that unfairness often sparks violence, and violence can be costly.[162]

V. CORPORATE FREE MARKET RESPONSIBILITY: RECONCILING CORPORATE FIDUCIARY DUTIES TO ACCOUNT FOR THE INVOLUNTARY INVESTOR

A corporation's failure to take into account the costs and risks of doing business with unaccountable regimes can result in unaccounted and substantial costs to involuntary investors in the form of security costs, lower growth prospects, and changes to planned investments.[163] Recognition of this reality requires reconsideration of corporate fiduciary duty as applied in the context of unaccountable extractions. As John Ruggie has warned, "[h]istory demonstrates that without adequate institutional underpinnings markets will fail to deliver their full benefits and may even become socially unsustainable."[164] Corporations acting in weak governance zones must

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159. *See* discussion *supra* Part II.

160. *See* discussion *supra* Part IV.A.

161. Deborah Rhode, *Profits and Professionalism*, 33 FORDHAM URB. L.J. 49, 54–55 (2005).

162. In the Warri region, oil companies originally reached an agreement with the Itsekiri leader, ignoring ownership claims of the Ijaw and Urhobo. AI NIGERIA REPORT, *supra* note 7, at 9. Based on the ensuing violence surrounding the oil installations, Chevron has sustained substantial financial losses estimated at up to $500 million. *Id.* at 14.

163. *Id.*

164. SRSG Report, *supra* note 3, at 3 (citing John McMillan, REINVENTING THE BAZAAR: A NATURAL HISTORY OF MARKETS (2002)). John Ruggie is currently the U.N. Special Representative of the Secretary-General on the issue of human rights and transitional corporations and other business enterprises. *Id.* at 1.

account for the absence of the requisite free market institutional parameters, both for the purposes of securing the value of their investments, but also to secure the validity of the free market approach on which their conduct is premised. Where corporations choose to engage in natural resource extractions, they must balance against the risk of contracting with unaccountable regimes by broadening directors' fiduciary duties. Such a balancing must encompass a duty of due diligence with regard to the rights and interests of otherwise unrepresented local communities so as to eliminate the problematic phenomena of involuntary investments.[165]

It is worth noting that the complexity of local property interests may indeed be insurmountable and the suggested approach is not considered a catch-all solution. Under the current framework, however, problems ensue not simply due to the complexity of local interests, but rather from recklessness on behalf of corporations, which fail to perform due diligence to better understand the environment in which they are working. Classic mistakes include the failure to take into account communal conflict over landownership and to compensate the full range of property owners who have interests at stake.[166]

A. CURRENT APPROACHES AND THEIR SHORTCOMINGS

Courts have recognized the need for corporations to adapt to account for their changing role within society and various models have been proposed for considering broader corporate stakeholders.[167] Some courts have chosen to interpret managerial discretion as encompassing greater flexibility to incorporate the interests of other stakeholders.[168] Similarly, the "mediating hierarchy model" suggests that granting directors broader discretion to favor other constituencies actually benefits shareholders' long-term interests.[169] However, the interests served are still limited to "members

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165. While the primary duty may rest with the state, this burden shifts in part to the corporation where its actions help preempt the emergence of states capable of upholding this duty.

166. Violence in Odioma, for example, can be linked to a dispute between neighboring communities over control of land sought for oil exploration. Shell Nigeria's identification of only one constituency at the cost of others exacerbated local tensions. AI NIGERIA REPORT, *supra* note 7, at 4.

167. In *A.P. Smith Mfg. Co. v. Barlow*, the Supreme Court of New Jersey validated a corporation's power to make contributions to academic institutions, recognizing the changing corporate role:

> When the wealth of the nation was primarily in the hands of individuals they discharged their responsibilities as citizens . . . with the transfer of wealth to corporate hands and the imposition of heavy burdens of individual taxation, they have been unable to keep pace with increased philanthropic needs. They have therefore, with justification, turned to corporations to assume the modern obligations of good citizenship.

A.P. Smith Mfg. Co. v. Barlow, 13 N. J. 145, 153 (1953).

168. *See* Shlensky v. Wrigley, 95 Ill. App. 2d 173 (1968).

169. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 297 (1999).

of the corporate coalition" such as shareholders, employees, and creditors.[170]

Other constituency statutes authorize directors to exercise similar discretion. The Pennsylvania statute defining fiduciary duty, for example, allows directors "in considering the best interests of the corporation" to "consider the effects of any action . . . upon communities in which offices or other establishments of the corporation are located."[171] This has allowed certain states to account for interests of broader constituencies. These approaches, however, do not require corporations to take such interests into account, imposing no duties and no liability.[172]

A more compelling and relevant example is the extension of fiduciary duties to controlling shareholders. Analogizing their influence to the control exercised by directors, courts have extended fiduciary duties to controlling shareholders.[173] If we similarly analogize the involuntary investments of local communities to the voluntary investments of shareholders, it is unclear why a parallel extension of rights should not apply to involuntary investors.

Important steps have already been taken towards this end in reconceptualizing not only corporate stakeholders but also the extent of directors' fiduciary duties. Cynthia Williams and John Conley, for example, argue that "directors' fiduciary duties now include a duty to be aware of human rights risks and potential violations within a company's global operations, and to develop policies and management procedures to reduce the risks of such violations."[174] This expanded notion of fiduciary duty, however, remains a duty to traditional shareholders and a duty geared more strongly towards second-tier human rights violations instead of first-tier property rights violations. Friedman himself has emphasized that corporations that invest in communities in which they are working or improving local government in order to "lessen losses from pilferage and sabotage" are not acting under a social responsibility, but rather upholding community interests when they serve the best interests of the corporations.[175] Here, it is not argued that an expanded fiduciary duty is owed to shareholders, but that a parallel fiduciary duty is owed to local communities who, in the context of unaccountable extractions, retain a status analogous to shareholders.[176]

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170. *Id*. at 305.

171. 15 PA. CONS. STAT. ANN. § 1716 (2006).

172. 15 PA. CONS. STAT. ANN. § 1717 (2006).

173. *See* Kahn v. Lynch Communications Systems, Inc., 638 A.2d 1110, 1113 (Del. 1994) (The court has held that "a shareholder owes a fiduciary duty . . . if it owns a majority interest in or *exercises control* over the business affairs of the corporation.").

174. Williams, *supra* note 19, at 87.

175. *The Social Responsibility of Business*, *supra* note 109.

176. *See supra* Part IV.

B. A FIDUCIARY DUTY OF DUE DILIGENCE

The extension of a fiduciary duty of care stems from reasoning underlying the fiduciary duty of loyalty. Fiduciary principles of loyalty apply: "[W]here a person who is empowered to manage the property of others for their benefit uses such property for personal benefit. In modern corporation law, such self-dealing behavior, while not flatly forbidden, is subject to the most searching degree of judicial scrutiny."[177]

A corporation engaged in natural resource extractions frequently uses the property of local communities for the benefit of shareholders without paying adequate or any compensation.[178] In such cases, the interests of formal shareholders may conflict with those of the involuntary investors and the transaction should be subject to rigid scrutiny. The transaction, held to an entire fairness standard, should ensure fair dealing and a fair price for all investors.[179] A corporation that initiates a Memoranda of Understanding (MOU)[180] that promises local development to a local community should be bound by that contract based on a principled free market duty to act in good faith.

The remedy may be equally assessed within the framework of the duty of care. In *Francis v. United Jersey Bank*, the Supreme Court of New Jersey defined a director's duty of care as encompassing an obligation to maintain a rudimentary understanding of the business of the corporation, keep informed of corporate activities, and monitor corporate affairs and policies.[181] It reasoned that "[t]he sentinel asleep at his post contributes nothing to the enterprise he is charged to protect."[182] Accordingly, "[s]hareholders have the right to expect that directors will exercise reasonable supervision and control over the policies and practices of the corporation."[183] For example, directors are required to make reasonable attempts to prevent misappropriation of corporate funds.[184] Extending the scope of this duty to require corporations to obtain greater understanding of the community contexts and communal property interests in the areas in which they operate serves both corporate interests and local community interests. Corporations that seek oil exploration contracts and take into account competing tribal claims to land may circumvent some of the conflict that will later threaten the stability of their operations.

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177. Hamermesh, *supra* note 118, at 1100.
178. *See supra* Part II.
179. *See generally* Hamermesh, *supra* note 118.
180. AI NIGERIA REPORT, *supra* note 7, at 4.
181. Francis v. United Jersey Bank, 87 N.J. 15, 31–32 (1981).
182. *Id*.
183. *Id.* at 32.
184. *Id*.

While corporations often agree to adhere to voluntary principles that require them to take into account local conditions,[185] they nevertheless continue to fail to report human rights violations, scrutinize aggressive actions on behalf of security forces, and ensure adequate training of security forces.[186] Therefore, the parameters of corporate conduct in weak governance zones should be more strongly circumscribed within the framework of corporate fiduciary duty, drawing from existing approaches to fiduciary duty as well as existing soft law mechanisms.[187] In a recent article, Cynthia Williams and John Conley point to the Delaware Chancery Court's decision in *In re Caremark Derivative Litigation*, noting that courts have put "systems in place" to guard against certain risks.[188] Accordingly, corporations could require systematic use of certain processes. The MOU is an important starting point so long as corporations are held to a good faith standard.

Additionally, the performance standards established by the International Finance Corporation (IFC), which are required of corporations seeking IFC investment funds, provide a useful framework for such a concrete system.[189] These standards include impact assessments with human rights elements and community consultation with compliance subject to review by an ombudsman who may hear complaints from those adversely affected.[190] Using the IFC standards as a structure, corporations operating in weak governance zones should be required to put in place a system that applies impact assessments and community consultations. The purpose of such a system is to gauge the impact of their operations on local communities and to account for their needs so as to address first-tier property violations and circumvent second-tier rights violations and their associated costs. Finally, corporations should be held to certain monitoring requirements assessing the ongoing rights implications of their operations and reporting on any violations of such rights. The purpose of such reports would not simply be to highlight human rights abuses, but to indicate to what extent the corporation is accounting for local interests and maintaining its free market responsibilities.

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185. Corporations like Chevron Nigeria are often signatories of the Voluntary Principles for Security and Human Rights, which provide human rights guideposts for companies in their operations. AI NIGERIA REPORT, *supra* note 7, at 4.

186. *Id*. at 8.

187. Soft law mechanisms refer to normative guidelines for operational standard setting and accountability procedures—"global administrative rulemaking." SRSG Report, *supra* note 3, at 16.

188. Williams, *supra* note 19, at 88.

189. SRSG Report, *supra* note 3, at 15.

190. *Id*.

VI. CONCLUSION

Irrespective of broader social responsibilities, the principles underlying corporate governance implicate a certain type of political or legal regime with at least minimal regulatory protections of individual freedom. The absence of these underlying elements in unaccountable extractions calls into question the legitimacy of corporate contracts in these regions. While recent litigation under the ATCA is providing important opportunities for legal redress in response to the most egregious human rights violations, existing mechanisms fall short of reaching first-tier property violations. Thus, a corresponding solution is necessary to address these violations and reconcile shareholder primacy with free market principles. A cynical response to such an approach may be that seeking a greater degree of accountability in the contracting process would be prohibitively expensive and is outside the role of the corporation.[191] However, by avoiding responsibilities to local communities, corporations create additional settlement costs, reputational costs, and risks in terms of the security and stability of corporations' natural resource operations.[192]

Slowly, corporations are being forced to face their free market responsibilities. In 2002, a group of female protestors demanding employment opportunities and investment in local communities occupied an oil terminal owned by Chevron Nigeria.[193] The occupation halted production of an estimated 500,000 barrels of oil per day.[194] Exchanging such costs with a broadly conceptualized fiduciary duty may serve as a more legitimate alternative, which, far from invoking a new paradigm of social responsibility, simply reinstates traditional free market principles. While the practicalities of this approach are more complex than what has been laid out here, particularly given the need for country-specific approaches, the principle of consistency in adherence to free market norms is a critical starting point.

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191. DAVID HENDERSON, MISGUIDED VIRTUE: FALSE NOTIONS OF CORPORATE SOCIAL RESPONSIBILITY 29 (New Zealand Business Roundtable, 2001), *available at* http://www.nzbr.org.nz/documents/publications/publications-2001/misguided_virtue.pdf.

192. Rhode, *supra* note 161, at 54–55.

193. '*Deal Reached' in Nigeria Oil Protest*, BBC NEWS, July 16, 2002, http://news.bbc.co.uk/2/hi/africa/2129281.stm.

194. *Id.*

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