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Judicial Activism in Transnational Business and Human Rights Litigation

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Abstract: This article explores a more expansive adjudicative role for domestic judiciaries in the U.S., U.K., and Canada in private law disputes that concern personal and environmental harm by multinational corporations that operate in the Global South. This expansive role may confront—although not necessarily upend—existing understandings around the separation of powers in common law jurisdictions. I canvass existing literature on judicial activism. Then, I detail legality gaps in the selected common law home states, which can be broken down into four categories: i) failed legislation; ii) deficient legislation; iii) judicial restraint; and iv) judicial deference.

I suggest three ways to actualize judicial activism in transnational business and human rights litigation. First, judges can heed Thomas Franck's recognition that there is a distinction between judicial and foreign policy. That distinction becomes rather acute here since transnational business and human rights litigation does not directly involve governments as parties to the litigation. Second, judges can prioritize the need to fill transnational access to justice gaps. I examine two potential ways that judicial gap-filling can take place: expanding the list of violations deemed as part of the Alien Tort Statute's 'law of nations' requirement and a better alignment of the *ex ante / ex post* flip in instances of FNC dismissals and foreign judgment enforcement. Third, transnational business and human rights litigation may be an apt area to employ judicial morality in deciding 'hard cases.' Judges can utilize a natural law framework that prioritizes corporate accountability over formalistic doctrinal conceptions.

Key words: Courts, transnational law, litigation, human rights, corporations

Introduction

Recent trends in the courts and legislatures of common law "home state" jurisdictions where western multinational corporations (MNCs) are headquartered portend a crystallizing path if victims of corporate-related human rights and environmental abuses in Global South "host states" are going to have viable avenues to recover compensatory tort remedies through home state legal systems.[1] In the past few decades, home state legislatures in nearly all western common law home states have refused to pass statutes that include provisions around the private law liability of MNCs for personal and environmental harms abroad. As such, existing statutory frameworks in common law home states—the United States (U.S.), United Kingdom (U.K.) and Canada being the focus here—do not provide a means for home state courts to systemically impute private law liability upon MNCs for harm they allegedly commit against Global South workers and third party community members. In addition, home state judiciaries have tended to take restrained or deferential approaches. As a result, corporate revenues that could be used as a means to compensate harmed Global South victims have been sheltered by domestic home state laws.

Scholars have memorialized the above scenario as part of a "governance gap" or a "missing forum" to suggest a number of solutions that, in one way or another, expect leadership from the political branches of government.[2] This circular reasoning places faith in the very institutions that have consistently shirked their responsibilities to create systemic avenues for Global South host state victims to seek redress from MNCs that commit egregious violations in the course of transnational commerce. What has received relatively less attention in this literature is the role that domestic judiciaries could, in theory, play in the midst of existing legislative gaps and a previous policy of judicial restraint and deference. Distinct from the political branches of government that require a level of consensus to pass legislation, judiciaries are able to reverse past adjudicative approaches relatively easily in a way that could result in the more consistent transfer of corporate revenues to Global South host state victims pursuant to host state human rights and environmental violations.

Previous scholarship from the common law world has assessed the place of domestic judiciaries vis-à-vis the political branches of government in light of constitutional constraints or established practices as they relate to foreign affairs with other nations. It is problematic to transpose that discourse into the realm of transnational business and human rights litigation. Whereas constitutional or foreign relations concerns often involve interactions that state governments have with actors abroad, the potential domestic law liability of MNCs in transnational scenarios is one degree removed from prevailing understandings of foreign affairs. MNCs function within "disembedded markets" and are not legally connected to governments in the territories where they

[1] Sara Seck, "Corporate Social and Human Rights Responsibilities: Global, Legal and Management Perspectives" in CORPORATE SOCIAL AND HUMAN RIGHTS RESPONSIBILITIES: GLOBAL, LEGAL AND MANAGEMENT PERSPECTIVES, 29 (K. Buhmann, L. Roseberry, & M. Morsing eds., 2010) (host state as "where the impact of the human rights violations is felt.").

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

are headquartered.[3] Although they may originate out of general incorporation statutes passed by legislatures, MNCs are not *per se* the state or agents thereof. This reality is unmitigated by the fact that many of the largest MNCs that operate in host states in the Global South (predominantly in extractive and manufacturing industries) retain close economic and political ties with those states' governments.

In light of prevailing legislative and judicial gaps in western home states where transnational business and human rights litigation is often commenced, detailed below, I argue for a more expansive adjudicative role for domestic judiciaries in disputes that concern personal and environmental harm in the Global South. This expansive role may confront—although not necessarily upend—existing understandings around the separation of powers, particularly in common law jurisdictions. Even so, it prioritizes the necessity of affording private law remedies to those who have experienced violations of their personal dignity and security and serves as a method to fill transnational access to justice gaps. Judicial lawmaking in this area can, in turn, effect corporate accountability with the prospect of curtailing MNC behaviour in the Global South in the future.

To advocate for a more expansive role of domestic common law home state courts that are increasingly called upon to adjudicate transnational business and human rights litigation pursuant to personal or environmental harms in the Global South, I canvass existing literature on judicial activism and then suggest ways that it can appropriately be expressed in an area of litigation where there continue to be gaps in legality. More activist judiciaries can prioritize the need to afford Global South host state victims viable paths to compensatory redress where very few, if any, currently exist.

Part I of this article presents some literature on judicial activism from both its proponents and opponents. I outline how the concept has been understood when it comes to both domestic and transnational disputes. Part II outlines existing legislative and judicial gaps when it comes to transnational business and human rights litigation. Although there have been failures and deficiencies in other home states, I focus particularly on the U.S., U.K., and Canadian legal systems where a large proportion of transnational business and human rights litigation has been commenced.

Part III suggests three methods by which judicial activism can be actualized in common law home state courts in transnational business and human rights litigation. First, judges can heed Franck's recognition that there is a distinction between judicial and foreign policy. That distinction becomes rather acute in transnational business and human rights litigation since it does not specifically include domestic or foreign governments as parties to the litigation. Second, judges can prioritize the need to fill transnational access to justice gaps given the lack of remedial avenues open to Global South host state victims. And third, this type of litigation may be a prime example of where judicial morality plays an appropriate role in deciding 'hard cases.' Judges can utilize a natural law framework that prioritizes accountability and remedies for international human rights

[3] *See generally* Peer Zumbansen, *Corporate governance, capital market regulation and the challenge of disembedded markets* in CORPORATE GOVERNANCE AND THE GLOBAL FINANCIAL CRISIS: INTERNATIONAL PERSPECTIVES, (William Sun, Jim Stewart, & David Pollard eds., 2012).

violations over formalistic doctrinal conceptions, reviewed in Part II(c) and (d), that have hindered corporate accountability in the past.

Before proceeding, two clarifications are required. First, although the need for expansive adjudication can be argued for a number of western home states in common and civil law countries (including Germany and the Netherlands for the latter) where transnational business and human rights litigation has been commenced, I focus predominantly here on the common law world as, to date, the vast majority of transnational corporate liability claims, largely couched in tort law principles, have been commenced in those jurisdictions. At times though, I do mention particular cases and legislation in civil law jurisdictions.

Second, the transnational judicialization I discuss here is distinct from concepts of judicial globalization or global judicial dialogue put forth by Anne-Marie Slaughter and others. In that discourse, judges at the national, supranational, and/or international level are in a position to communicate with one another through their judicial decisions in order to elicit a shared notion of human rights or other fundamental concepts that transcend state boundaries. Here, the expansive transnational judicial role in light of legislative gaps recognizes that Global South host state plaintiffs are to be afforded private law cause of action and a viable pathway to compensatory remedies when their own judicial systems are incapable or unwilling to do the same.

I. Academic Conceptions of Judicial Activism

As Keenan Kmiec noted in his 2004 article *The Origin and Current Meanings of Judicial Activism*, as a concept judicial activism is often used by judges and academics without a presentation of what it actually means. In his article, Kmiec construed the concept of judicial activism as having five 'core meanings' or, in other words, five instances in which we can say that a judge has exhibited activism. These instances are when i) the political branches of government have taken arguably constitutional actions that are then nullified or overturned by courts; ii) courts fail to adhere to their own precedent or that of higher courts; iii) courts legislate from the bench; iv) courts employ novel interpretations of past laws; and v) courts make law with the results in mind (result-oriented judging). In a similar vein, Sterling Harwood interprets judges as being activist when they refuse to defer to the other branches of government, relax requirements around justiciability (*i.e.* take an expansive view of jurisdiction), break with precedent, and loosely or creatively interpret constitutions, statutes, or judicial precedents.[4]

From these definitions and characterizations, judicial activism as a concept is intricately connected to the separations of power. The above authors, in understanding the term, were concerned with the extent to which judicial power seeps into the normative purviews of the legislative and executive branches of government.[5] That concern alone makes judicial activism relevant in

[4] *Also see* Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236–247 (1982) (six dimensions of judicial activism).

[5] Judicial activism is distinct from judicial discretion, which is about the ability for judges to make more than one right choice. See Kent Greenwalt, *Discretion and Judicial Decision: The Elusive Question for the Fetters that Bind Judges*, *Legislation*, 43 Harv L. Rev. 1302; Roscoe Pound, *Spurious Interpretation*, 7 Colum L. Rev. 379 (1907).

transnational disputes because it is the executive branch, which either through constitutional decree (as in the U.S.) or by the practice of Crown prerogative (as in Canada and the U.K.), tasked with building relations with other nations' governments. Separation of powers concerns are likewise present in transnational business and human rights litigation. MNCs often contract with or align closely with host state governments and/or their militaries throughout the course of manufacturing and extractive activities and increasingly public works projects around infrastructure and transportation. Those public-private interactions can and, in fact, do have profound influences on foreign relations.

Judicial activism is often viewed in contradistinction to judicial restraint—whether it be to the legislative process or the executive's ability to engage in foreign relations. However, Edward McWhinney, in the second of his two seminal articles on the topic concerning the U.S. Supreme Court, argued that rather than dichotomous classifications, these two categories are better viewed as "different points on a continuum."[6] McWhinney surmised a judge's decision to exhibit activism or restraint to be contingent on questions of timing and technique. He asks, "[a]re there particular time periods appropriate for the exercise of strict (restrictive) judicial interpretation of a constitution or statute, and other periods in which more ample conceptions of the judicial office are desirable or necessary?"[7] He asserts that the initial periods after a statute is passed warrant a more restrictive interpretation.

As for technique, McWhinney takes the views that the level of judicial activism (which he relegates to expansive statutory interpretations[8]) depends largely on a nation's constitutional structure. A "simple and unitary" constitution that places significant power in the legislative and executive branches, in his view, requires little, if any, judicial activism. On the contrary, a "complex constitutional structure", in McWhinney's words, based on a separation of powers and "amending machinery which works only with extreme difficulty and slowness" necessitates a greater responsibility—and even a primary one—of constitutional and statutory interpretation to the judiciary. For the judicial role in statutory interpretation, he takes the example of the U.S. with its bouts of war and recurring and evolving issues of race relations. Conceivably, with the complexity of American society and in light of its constitutional structure marked by checks and balances, McWhinney surmises that courts ought to establish a list of priorities that dictate when (and to what extent) they will exhibit activist tendencies.[9]

Finally, while most authors have approached the topic of judicial activism in relation to domestic disputes, little has been written on the concept in relation to transnational and international disputes. In his 2012 study, Fuad Zarbiyev proposed a conceptual framework for judicial activism in international law. Perhaps in line with the ambiguity with which some international legal scholars write, Zarbiyev views judicial activism as dependent on prevailing social conventions. He

[6] Edward McWhinney, *The Great Debate: Activism and Self-Restraint and Current Dilemmas in Judicial Policy-Making*, 33 N.Y.U. L. REV. 775, 790 (1958).
[7] *Id.* at 791.
[8] For this type of approach to judicial activism, *also see* Wallace Mendelson, *The Politics of Judicial Activism*, 24 EMORY L. J. 43–66 (1975).
[9] McWhinney, *supra* note 6, at 792–793.

comes upon a number of variables to determine whether activism for judges who interpret international legal mechanisms is justified. These factors are:

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

As may be gleaned from Zarbiyev's above-noted variables, there is a range of possibilities as to whether and how a particular judiciary will be activist, as he views the concept. However, in all, given the large quantity of factors to which he attributes the potential for activism, it becomes difficult to ascertain when activism is, in his view, properly employed within the confines of the judicial role.

In the next two subsections, I review a spectrum of opinions on judicial activism, from more progressive takes to more conservative ones. By and large, these two camps fall within what Hugh Thirlway dichotomizes as formal versus substantive judicial activism. Formalists, much like positivists in legal philosophy, discussed later, view the law as being complete with the provision of an answer to every possible scenario (and, as such, no law when there is no answer).[10] From this perspective, there is no room for judicial discretion. Therefore, when judges depart from the accepted apparatus of the law, they are, in fact, acting *ultra vires* their powers.

On the other hand, substantivists, again like their counterparts in legal philosophy, accept that there can be lacunae in existing laws. In light of that, judges can supplement those laws or even create law by themselves without explicit authority from the other branches of government.[11] Of course, there are intermediary positions, such as H.L.A. Hart's notion that judicial discretion is permissible in areas of 'penumbra', where there remains ambiguity. However, Hart would rightfully be classified as being closer to the formalists because, for him, the 'heart of law' leaves no room for judicial discretion.[12]

As a point of caution, most, if not all, of the views presented below are from American authors or those who have opined on judicial activism within the American legal system. However, their analysis can be analogized to other common law systems, particularly the U.K. and Canada where

[10] *Cf* RONALD DWORKIN, LAW'S EMPIRE **XX** (1988) (a lacuna in the law may require an answer).
[11] Hugh Thirlway, *Judicial Activism and the International Court of Justice* in LIBER AMICORUM JUDGE SHIGERU ODA (2 VOLS), 75–76 (Nisuke Ando et al. eds., 2002).
[12] H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARVARD LAW REVIEW 593, 614–615 (1958).

transnational business and human rights litigation has also been commenced. The primary thrust of the literature on judicial activism in the U.S.—again, comparable to other common law systems—is the extent to which judges can weigh in on a dispute when it abuts the political branches of their own governments or other governments around the world. Therefore, in a Montesquian tripartite system, that discourse can rightfully be transplanted within the discourse of other common law systems.

a. Some supportive views

The view that domestic judges, as arms-length actors largely insulated from political pressures once in their posts, are the cornerstone of common law system is a long-held understanding. Brian Bix notes that Blackstone favoured 'judicial legislation as the strongest characteristic of the common law.[13]

Kmiec, in the article noted above, traced the first modern usage of the term 'judicial activism' to Arthur Schlesinger Jr. In a 1947 *Fortune* article, Schlesinger wrote that a wise judge "knows that political choice is inevitable; he makes no false pretense of objectivity and consciously exercises the judicial power with an eye to social results."[14] Despite his seeming approval of activist judges, Schlesinger thought it best for judges to be activist only in cases that concern civil liberties. He characterized the Black-Douglas 'progressive' wing of the U.S. Supreme Court, in effect, to have adopted the posture that "the Court cannot escape politics: therefore, let it use its political power for wholesome social purposes."[15] Seemingly, for Schlesinger, it would be a wholesome purpose for judges to thwart precedent, legislate from the bench, or judge with the result in mind when it comes to matter than affect people's civil liberties. In contemporary terms, his stance would arguably encompass transnational human rights violations by U.S.-domiciled MNCs.[16]

In his 1964 article, *The Role of Domestic Courts in the International Legal Order*, Richard Falk took a partisan position that supported judicial lawmaking independent of the political branches. He sought to push back against "[t]he paternalistic claim that the government can protect its citizens better if they are denied a judicial remedy in an international law case."[17] He confronted this parochial stance on judicial lawmaking as something that "undermines the effort to transform the law of nations into a law of mankind."[18] Falk had begun to develop a participatory theory of domestic courts in the international legal order in another article published three years prior. There, he argued that deference on the part of domestic judiciaries to national policy in international

[13] Brian Bix, Positively Positivism, 85 VA. L. REV. 889, 907 n.108 (1999) (book review), cited in Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIFORNIA LAW REVIEW 1441, 1444, n. 15 (2004) [internal citations omitted].
[14] Arthur M. Schlesinger, Jr., The Supreme Court: 1947, FORTUNE, Jan. 1947
[15] *Id.*
[16] Despite his dissent in *Lochner* in which he promoted 'judicial self-restraint', Holmes, like Schlesinger, was supportive of some degree of judicial activism when it came to cases around civil liberties. *See Lochner v. New York*, 198 U.S. 45, 76 (1905).
[17] Richard A Falk, *The Role of Domestic Courts in the International Legal Order*, 39 INDIANA LAW JOURNAL 429, 430 (1964).
[18] Falk, *id.*

affairs, in fact, results in less objective legal results.[19] He did not see a conflict between domestic courts being constituent institutions of specific states and simultaneously being agents of an emerging international order.

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

Falk acknowledged that a judiciary interpreting international law in accordance with executive will would mean there would be a single national voice in international law disputes. However, in what he characterized as 'non-criminal and non-primitive' international law cases brought before domestic courts, he devised ten reasons that support a rationale for judicial independence:

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

Specific to the U.S., Falk viewed judicial independence in foreign relations-adjacent matters to suspend the *Bernstein* doctrine.[20] He thought it best that domestic judges retain discretion on when to opine on transnational disputes that abut foreign relations. Naturally, this opens the door to more activist lawmaking on the part of judges, including in transnational business and human rights

[19] Richard A. Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino*, 16 RUTGERS L. REV. 1, 7 (1961).
[20] *Id.* at 21. *Also see Bernstein v. Van Heyghen Frres, 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947)* (the doctrine allows the executive branch to intercede in Act of State cases when adjudication would not impinge upon foreign relations).

litigation. For Falk, a proper use of judicial discretion would be determined by whether there was legitimate or illegitimate diversity between the sovereigns at issue. I discuss this important point below as it implicitly concerns an infusion of judicial morality in transnational disputes. To foreshadow though, I see Falk's distinction between legitimate and illegitimate diversity in two legal systems as a method by which domestic courts can weaponize activism in transnational business and human rights litigation.

Thomas Franck is another salient author who has advocated for a more expansive judicial role in transnational disputes. His 1992 book *Political Questions / Judicial Answers* is dedicated to addressing the fact that judicial restraint in the U.S. vis-à-vis the other branches of government in cases that implicate foreign relations actually stems back to British common law doctrine from the colonial period.[21] He traces prudential doctrines around foreign relations all the way back to the a British Crown Court's decision in *Nabob of Arcot*, a case which concerned a treaty between the Nabob and the East India Company.[22] Franck wrote:

> The tradition of [judicial] abdication has been built, bit by bit, on the straw foundations of dicta imported from the British monarchial system, deployed in cases where it was irrelevant to the matters being litigated, and thus was introduced into American law essentially without benefit of genuine adversary process, let alone profound jurisprudential reflection.[23]

Franck's argument can be summarized when he states that "there are no valid reasons—constitutional, prudential, technical, or policy-driven—for treating foreign-relations cases differently than others."[24] For him, the only relevant criteria for courts to assert jurisdiction is a "ripe dispute between parties with standing."[25] He takes pains to review all the decisions around foreign relations in the earliest years of the U.S. Supreme Court. He outlines that when it has been in the interests of the U.S. government's political branches, they have actually intervened in private litigation to ensure the judiciary would not abdicate its adjudicative role.[26]

Addressing Justice Marshall's opinion in *Marbury*, one of the first decisions that began to construct a political question doctrine in the U.S., he found that "no effort is made [in *Marbury*] to explain *why* foreign affairs should be placed beyond the reach of judicial review."[27] As Franck's blocked quote above pronounces, the political question doctrine and other similar deferential and prudential doctrines that are now not infrequently employed in transnational business and human rights litigation crept into U.S. case law through British precedents that were largely addressed in early

[21] THOMAS M. FRANCK, POLITICAL QUESTIONS JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? Ch. 1 (1992).
[22] 3 Bro. C. C. 292; 29 Eng. Rep. 544 (Ch. 1791).
[23] FRANCK, *supra* note 21 at 21.
[24] *Id.* at 7.
[25] *Id.*
[26] *Id.* at 6.
[27] *Id.* at 4 [emphasis in original].

U.S. Supreme Court cases in *obiter* rather than being doctrinal analyses necessary to resolve those disputes.[28]

Franck suggests U.S. courts have implicitly made a Faustian Pact with the other branches of government as they have widened their jurisdiction with regard to domestic matters in exchange for restraint when it comes to transnational matters that abut foreign relations.[29] Like his predecessors, Franck criticizes the notion professed by some lawyers and judges that "the nation must operate with a single voice—by which they mean the president's—and that only the executive branch has the information and expert experience necessary to make informed choices in matters crucial to national security."[30]

He makes the crucial point—and one that applies to transnational business and human rights litigation in common law home states: "[w]hen courts speak in cases and thereby incidentally affect some aspect of foreign relations, they do not make foreign policy. They make judicial policy."[31] By this, he means that there is a distinction between, on the one hand, the ongoing and entrenched relationships of one government with one or more other governments around the world and, on the other hand, how individual rights are interpreted in a specific dispute that crosses state boundaries.

Finally, a lively debate took place in the 2006-2007 volumes of the Yale Law Journal about the U.S. Supreme Court's 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[32] an administrative law case about principles around judicial reference for domestic disputes. Pursuant to that decision, a logical question in the minds of some was whether there should be a substantial degree of deference on the part of the U.S. federal judiciary when they are tasked with adjudicating legal disputes that have foreign relations elements attached.

Derek Jinks and Neal Katyal (the latter ironically retained by the defendants in *Doe v. Nestle*, discussed below, to argue against ATS jurisdiction) were not convinced that there should be substantial deference to the executive in disputes touching on foreign relations.[33] Rather, they saw a swath of cases that operate within what they call the "executive-constraining zone", being matters related to international law **i)** that occupies supreme federal law within the U.S. (*i.e.* ratified treaties such as the Geneva Conventions, **ii)** made at least in part outside the executive (*i.e.* Article II treaties made with the "Advice and Consent" of the Senate); and **iii)** that conditions the exercise of executive power.[34] Pushing back on Posner and Sunstein's view that the costs and benefits of disputes that impinge on foreign relations are best dealt with by the executive, Jinks and Katyal asserted that Chevronizing foreign relations would put too much power in the hands of the executive and even invite lawbreaking authority when it comes to international law within the

[28] Also see *id.* at 8. (referring to this phenomenon as "doctrinal cacophony").
[29] *Id.* at 10–20 for an elaboration on this Faustian Pact.
[30] *Id.* at 5.
[31] *Id.* [emphasis added].
[32] 467 U.S. 837 (1984).
[33] Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 THE YALE LAW JOURNAL 1230 (2007).
[34] *Id.* at 1236–1245 [detailing the three categories].

"executive-constraining zone." To them, Chevronizing foreign relations—while it may bolster foreign relations interests—would undermine the rule of law.[35]

Of greatest relevance to this study, Jinks and Katyal indicate that the Posner/Sunstein approach would "encourage courts to defer to self-interested positions taken by the executive…".[36] Whereas Posner and Sunstein note that judiciaries are not politically accountable when they weigh in on disputes related to foreign relations, Jinks and Katyal see that lack of political accountability (and relatedly self-interested behaviour) as a seminal reason for courts to eschew deference.[37] Given the contours of this study that has laid out how transnational MNC liability manifests in accordance with governmental interests, I agree that an appointed judiciary ostensibly devoid of political motivations is a rightful check on the power of elected branches of government. In fact, without saying more about the topic, Jinks and Katyal specifically note that the self-interested nature of the executive branch (that Posner and Sunstein couch in 'accountability' language) "often restrict[s] only the liberty of foreigners—who cannot vote."[38] It is striking that Jinks and Katyal intuitively single out foreign plaintiffs as I have done here.

Jinks and Katyal do not discount the possibility for judges to have motivations that are less than objective, but they rightly state "that there is no particular case to be made for political bias of the courts today."[39] Even the U.S. federal judiciary, which has become increasingly polarized in recent years, does not always neatly make decisions in 'hard cases' along party lines, as empirical evidence has indicated.[40] And if Posner and Sunstein are correct that "judges do not lack biases of their own,"[41] those biases are not bolstered by economic benefits and the concern with re-election as it is for the political branches of government. Moreover, for judicial decisions there are appeals mechanism built into domestic adjudicative processes that are absent for the legislative and executive branches.

b. Some restrained views

Like more progressive views on the topic, restrictive views of the judicial branch's ability to make or fill gaps in the law (in both domestic and transnational disputes) also go back centuries to proponents of legal positivism. Jeremy Bentham (who Dworkin identifies as the father of the positivist movement) characterized judicial lawmaking as 'miserable sophistry'.[42] David Dyzenhaus attributes Bentham's contempt of judicial lawmaking to two things. First, Bentham was concerned that appointed judges who often come from elite social classes would be reticent to progressive legislative reform. Second, common law judiciaries would be apt to see themselves as safeguarding and controlling law's meaning through what they saw as their place as "exclusive

[35] *Id.* at 1234.
[36] *Id.* at 1235.
[37] *Id.* at 1246.
[38] *Id.*
[39] *Id.* at 1269.
[40] *See e.g.* Gregory C Sisk, Michael Heise & Andrew P Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N. Y. UNIV. LAW REV. 1377, 1388.
[41] Eric A Posner & Cass R Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE LAW JOURNAL 1170, 1212 (2006).
[42]

exponents of [artificial] reason."[43] In both instances, Bentham's contempt of common law judges stemmed from a perception that they viewed themselves as vanguards of social order.

More recently, in *Proper Judicial Activism*, Greg Jones argues that the American constitutional structure stresses restraint such that judges only intervene when a decision is required to maintain the separation of powers among the co-equal branches of government. He asserts, "[t]he overarching practical principle guiding the Founders was a fear of the concentration of political power in government."[44] For Jones, only that fear of concentrated power in the hands of the political branches (particularly the executive branch) is what would warrant judicial intervention.

Contrary to the structural approach for which Jones argues, 'improper' judicial activism' for him is when judges construe that "law is only policy and that the judge should concentrate on building the good society according to the judge's own vision."[45] At odds with more expansive takes on activism forwarded by, for instance, Schlesinger and Holmes, Jones does not see a place for activism in cases that concern civil liberties or human rights. He decries this type of activism as "judging in the service of conscience," a characterization he makes of the progressive wing of the Warren court.[46]

Jones's 'structural judicial activism' promotes a majoritarian respect for the elected branches. In his view, activism to overturn instances of the political branches acting *ultra vires* their powers demonstrates fidelity to the constitution. Quoting another author, Jones takes the position that "judges should *always* be hesitant to declare statues [*sic*] or governmental actions unconstitutional [because it] … encourages the separation of powers, protects our democratic processes, and preserves our fundamental rights."[47] In essence, Jones gives the political branches a *carte blanche* to legislate and engage in foreign relations as they see fit as long as they do not impinge on the powers of the co-equal branches of government.

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

Posner and Abebe view FAL as appearing in three distinct guises: i) the Benvenisti competitive or zero-sum model *i.e.* more activist courts translates into a tightening sphere for the executive branch to define international legal rules; ii) the Koh balanced institutional participation model *i.e.* courts play a role in constructing shared norms and practices that are internalized into domestic laws and politics; and iii) the 'Slaughter' transnational governance networks model *i.e.* inter-state judicial

[43] David Dyzenhaus, *The Very Idea of a Judge*, 60 THE UNIVERSITY OF TORONTO LAW JOURNAL 61, 63 (2010).
[44] Greg Jones, *Proper Judicial Activism*, 14 REGENT UNIVERSITY LAW REVIEW 141, 146 (2001).
[45] Jones, *id.*
[46] *Id.* at 144 [internal citation omitted].
[47] *Id.* at 166–167.

dialogue to craft a global rule of law without centralized global institutions. To Posner and Abebe, these models all share some themes. First, they capture judiciaries as having the capacity as well as an interest in restraining the executive branch. Second, judicial intervention promotes international law. And third, rather than bolstering the global rule of law, executive pre-eminence interferes with it as, to FAL proponents, executive branches often prioritize national self-interest over multilateral efforts.

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

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

It should be noted that the very characteristics that Posner and Abebe see as crutches to courts weighing in on foreign affairs-related matters are what proponents of judicial activism see, in fact, as strengths. When Posner and Abebe say courts are too decentralized, they are essentially characterizing courts as structurally incapable of building a coherent foreign policy. Franck would likely agree with that sentiment as, rather that delineating relations among state governments, judiciaries are making one-off decisions in light of claims around individual rights and private law remedies. Similarly, when Posner and Abebe say that courts have 'little feel' for international politics, Falk would respond by noting the conflict of interest between the executive and judicial branches, introduced above. Executives branches have conciliatory or settlement objectives whereas judicial branches have rights-based objectives.

In the Yale Law Journal article to which Jinks and Katyal responded in 2007, Posner, along with Cass Sunstein, argued that there should be a "Chevronizing" of foreign relations law in which legislative vacuums—like the ones that will shortly be detailed around transnational business and human rights litigation—remain the sole interpretive sphere of the executive branch.[48] In instances of penumbra, judiciaries should defer adjudication. In their view, a migration of administrative law principles to 'international relations doctrines' (extraterritoriality, act of state, comity, and others) is warranted as the executive branch is best placed to weigh the subsequent foreign relations

[48] Posner and Sunstein, *supra* note 41.

costs and benefits.[49] Chevronizing foreign relations would mean that courts would be left only to determine the reasonableness of executive interpretations, which in the U.S. context at least has rarely led to courts overruling executive conduct.[50]

Relatedly, the authors argued that the executive branch is in a better position to determine if a particular course of action would result in retaliation by foreign states. To them, "courts should generally defer to the executive on the ground that resolving ambiguities requires judgments of policy and principle, and the foreign policy expertise of the executive places it in the best position to make those judgments."[51] Finally, in instances when the executive branch intervenes in private litigation, it would be afforded an even greater level of deference than the basic *Chevron* reasonableness deference.[52]

One concern with Posner and Sunstein's position on Chevronizing foreign relations is that it can be read to prioritize the interests of the U.S. government to the ambivalence of remedial rights on the part of foreign victims—another nod to the distinction of judicial policy and foreign policy to which Franck pointed. In other words, Posner and Sunstein's approach to the judicial role in foreign relations law erases the plaintiffs seeking a private law remedy. Moreover, it erases the fact that judges who adjudicate a specific dispute are not making foreign policy, but rather opining on a single fact pattern—a dynamic, as mentioned, to which Franck was attuned. In short, Posner and Sunstein take a 'national interests' approach rather than a victim-centric approach, an approach which would translate into judiciaries taking deferential stances in transnational business and human rights litigation.

II. Home State Legality Gaps in Transnational Business and Human Rights Litigation

Before making a case for expansive judicial activism in transnational business and human rights litigation in common law home states, it is first necessary to establish why domestic judges ought to assume that role. In short, the past few decades have witnessed a consistent stream of legislative and judicial legality gaps in common law home state legal systems. As a consequence, Global South host state victims have been hindered from pursuing private law remedies pursuant to corporate human rights violations. Contemporary gaps can be broken into four categories: failed legislation, deficient legislation, judicial restraint, and judicial deference.

Home state statutory provisions that, in theory, could ground transnational corporate human rights litigation in a home state's jurisdiction and allow for a duty of care on the part of an MNC's parent and/or subsidiary / contracting companies remain conspicuously absent. Home state legislatures have previously exhibited ambivalence or outright opposition to statutes that would include

[49] Posner and Sunstein, *id.* at 1186.
[50] Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy?: An Empirical Investigation of Chevron*, 73 UNIV. CHIC. LAW REV. 823 (2006).
[51] Posner and Sunstein, *supra* note 41 at 1176.
[52] *Id.* at 1177.

provisions around a private right of action for corporate-related harms committed in host states, predominantly in the Global South.

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

a. Failed Legislation

Despite recent efforts in some states to pass human rights transparency and due diligence statutes, in the states where transnational business and human rights litigation has been commenced—the U.S., U.K., and Canada being most notable—there are no provisions to allow for MNC tort liability for host state human rights and/or environmental harms. On occasion, individual lawmakers have introduced draft legislation only to be turned away legislatures.

i. Amendments to Alien Tort Statute

In its first two centuries, the 1789 *Alien Tort Statute* ("ATS"), also known as the *Alien Tort Claims Act*, was seldom invoked; and certainly not for transnational corporate-related cases.[53] Since it has been called upon in corporate tort claims for human rights violations, its ambiguity around the types of defendants to which it applies and its territorial reach have barred Global South host state plaintiffs from advancing claims in U.S. courts. Putnam states that "the requirement that tortious conduct must be in violation of international law or a U.S. treaty – that creates the complication."[54] The stumbling block for Global South plaintiffs in, for instance, *Kiobel*, *Sarei*, and even in the Supreme Court's 2021 decision in *Doe v. Nestlé* has been that, without legislative guidance, appeals courts see themselves as handcuffed to expand the traditional scope of customary international law violations to non-state actors, including MNCs.[55]

In 2005, Diane Feinstein introduced the ATS Reform Act ("ATSRA") to "clarify the jurisdiction" of the U.S. federal courts in ATS claims.[56] If it had passed, the act would have replaced the ATS's provision with the following:

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[53] Stephens notes that the ATS was invoked in fewer than 25 cases between 1789 and 1989. In that time, it was only cited in two successful cases: *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795) and *Adra v. Drift* 195 F. Supp. 857 (D. Md. 1961). *See* Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME LAW REVIEW 1467, 1472 (2014).

[54] TONYA L. PUTNAM, COURTS WITHOUT BORDERS: LAW, POLITICS, AND U.S. EXTRATERRITORIALITY 210 (2016).

[55] *But see e.g.* Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion Essay*, 51 VA. J. INT'L L. 977–1004 (2010) (arguing that non-state actors have historically entered into treaties).

[56] S. 1874 – Alien Tort Statute Reform Act, 109th Congress (2005-2006), <https://www.congress.gov/bill/109th-congress/senate-bill/1874/text> [ATSRA].

> The district courts shall have original and exclusive jurisdiction of any civil action brought by an alien asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort. The district courts shall not have jurisdiction over such civil suits brought by an alien if a foreign state is responsible for committing the tort in question within its sovereign territory.[57]

Also, the ATSRA would have replaced the term 'law of nations' in the ATS's current iteration with a list of defined human rights violations. Directly relevant to transnational business and human rights disputes, the ATSRA's proposed defendants would have included "a partnership, corporation or other legal entity organized under the laws of the United States or of a foreign state."[58] Consequently, U.S. courts could no longer assert (even if in obiter) that corporate liability falls outside the ATS's scope.[59]

One week after introducing the proposed act—and before it could be considered by the Judiciary Committee—Senator Feinstein withdrew the bill, citing backlash from human rights groups as a reason for the bill's withdrawal.[60] However, that justification appears suspect given subsequent research conducted by Jeffrey Davis on the concerted lobbying efforts that were undertaken by business-friendly groups that opposed the ATSRA. Davis found that from 2003 up to when the ATSRA was introduced in 2005, the Chamber of Commerce alongside other corporate-friendly groups such as USA Engage and the Washington Legal Foundation consistently lobbied the U.S. State Department, the Justice Department, the National Security Council, and the U.S. Trade Representative to eliminate the potential for systemic corporate liability under the ATS and any potential amendments.[61] Irrespective of the reason, the ATSRA never passed into law.

In 2022, Senators Dick Durbin and Sherrod Brown introduced the *Alien Tort Statute Clarification Act* (ATSCA). That proposed Act was a response to the 2021 decision in *Doe v. Nestlé* where the Supreme Court rejected the ATS's extraterritorial application. In *Doe*, a claim against a U.S.-headquartered global food conglomerate for its part in aiding and abetting forced labour on cocoa plantations in the Ivory Coast, eight justices applied the 'focus test' from *RJR Nabisco* to hold that the child labour—the focus of the claim—occurred outside U.S. territory. Justice Thomas, who penned the majority's decision, explained that 'mere corporate presence' *i.e.* generic operational, financial, and administrative decisions, on the part of a home state corporation or parent company does not draw "a sufficient connection between the cause of action … and domestic conduct."[62]

The ATSCA would clarify the ATS's extraterritorial scope by stating that "the district courts of the United States have extraterritorial jurisdiction over any tort … if … an alleged defendant is a

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[57] *Id.* at s.2(a).
[58] *Id.* at s. 2(b)(1).
[59] See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) [*Kiobel*]; *Jesner et al. v. Arab Bank PLC*, 138 S. Ct. 1386 (2018).
[60] *See* Amnesty International, *Protecting the Law that Protects the Victims of Corporate Abuses*, Corp. Action Network Mag. March 2006 at 8, 9, http://www.amnestyusa.org/business/CANMarch_06.pdf.
[61] JEFFREY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS 143–144 (2008) cited in PUTNAM, *supra* note 54 at 247.
[62] *Id.* at 5.

national of the United States or an alien lawfully admitted for permanent residence … or an alleged defendant is present in the United States, irrespective of the nationality of the alleged defendant."[63] This types of automatic jurisdiction when a defendant is resident on U.S. territory would mirror Article 4(1) of the *Brussels I Regulation* that has virtually made *forum non conveniens* dismissals obsolete in the U.K.

Like Feinstein's proposed ATSRA, the ATSCA is unlikely to pass into law. Distinct from the *Torture Victim Protection Act* (TVPA) and the *Trafficking Victims Protections Reauthorization Act* which cannot compel corporations to compensate foreign plaintiffs,[64] the ATSCA (like the ATSRA) would allow for foreign plaintiffs to access corporate revenues. Given that some of the largest U.S.-headquartered MNCs that undertake extractive and manufacturing operations in the Global South have considerable lobbying power over Congress and have previously avowed to oppose attempts at finding them liable for human rights violations abroad "until hell freezes over",[65] it is improbable they will likely let up now. Consequently, the ambiguity in the American legislative landscape for transnational corporate human rights claims will likely persist.

ii. U.K. Corporate Liability Bills

The British parliament's concern about MNC litigation in its courts goes back at least two decades after the House of Lords ruled in 1998 that a transnational claim against the mining company Rio Tinto should proceed in British rather than Namibian courts.[66] Uncomfortable with that determination, the Lord Chancellor's Department, in a restricted consultation letter, argued that increased litigation against British-headquartered MNCs in British courts could spark an 'exit threat' in which MNCs would be inclined to move their headquarters to jurisdictions where they would be less likely to have to defend transnational claims in court.[67]

Introduced in June 2002 as a private member's bill by Labour MP Linda Perham, the *Corporate Responsibility Bill* would have been applicable to U.K.-registered companies and their foreign subsidiaries.[68] It would have required U.K. corporations to prepare and publish annual reports assessing "policies and performance in regards to environmental, social and economic impacts" and to minimize the effects of those impacts.[69] The Bill specifically included provisions that would ensure parent companies were not shielded from liability for actions of a foreign subsidiary.

Section 6(1)(c) of the Bill stated that a parent company would be liable for compensatory damages if it was responsible for "serious physical or mental injury to persons working in or affected by

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[63] S. 4155 – *Alien Tort Statute Clarification Act*, 117th Congress, 2d Session (2022), <https://www.govinfo.gov/content/pkg/BILLS-117s4155is/pdf/BILLS-117s4155is.pdf>.

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

[65] Chevron's "Fight It Out On The Ice" Strategy For Ecuador Case Is Slipping, Fast, *Huffington Post*, <https://www.huffpost.com/entry/slip-sliding-whats-happen_>.

[66] *Connelly v. RTZ*, [1998] AC 854.

[67] *See* FLORIAN WETTSTEIN, MULTINATIONAL CORPORATIONS AND GLOBAL JUSTICE: HUMAN RIGHTS OBLIGATIONS OF A QUASI-GOVERNMENTAL INSTITUTION 232 (2009).

[68] Bill 129, Corporate Responsibility Bill, <https://publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf>.

[69] *Id.* at s. 3.

those activities; serious harm to the environment; or both."[70] Other provisions explicitly stated the company's corporate structure is not a barrier to a liability determination.[71] In other words, the corporate veil, discussed as part of the judicial restraint that British and other home state courts have exhibited, could no longer be a doctrinal barrier to MNC liability.

When first introduced, the Bill received widespread praise. Signaling support of the Bill, more than 300 MPs signed an Early Day Motion.[72] It was also praised by the Corporate Responsibility Coalition, comprised of Amnesty International U.K., Christian Aid, and Friends of the Earth.[73] A poll conducted by the British Department for Environment, Food and Rural Affairs found that 71% of the public agreed that businesses should report their environmental impact to the government.[74] Despite its backing inside and outside the government, Ms. Perham withdrew the Bill before a vote could take place.[75] While there is no published or online information available as to why the Bill was withdrawn, the following Hansard record of 19 July 2002 implicitly says it all:[76]

> *Order for Second Reading read.*
>
> ***Hon. Members:*** *Object.*
>
> ***Mr. Deputy Speaker:*** *Second Reading what day? No day named.*
>
> ***Dr. Julian Lewis:*** *On a point of order, Mr. Deputy Speaker. I seek your guidance once again. Is there any way in which at least we can place on the record the fact that now, Labour Back Benchers' Bills are being killed by their own Government Whips?*
>
> ***Mr. Deputy Speaker:*** *I think the hon. Gentleman has just done so.*

After the demise of her initial bill, In October 2002 Perham tabled the *Corporate Responsibility (environmental, Social and Financial Report) Bill.* The new Bill was much like the first one—except for one key provision. The new Bill was stripped of any discussion of parent company liability included in the first Bill.[77] In their book *The Governance Gap*, Penelope Simons and Audrey Macklin have written that "there is no indication that the bill was debated."[78] Since these

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[70] *Id.* at s.6(1)(c).
[71] *Id.* at s.6(2).
[72] House of Commons, Corporate Social Responsibility EDM #113, Tabled 18 November 2002, <https://edm.parliament.uk/early-day-motion/23893/corporate-social-responsibilty>.
[73] See Amnesty International UK, Press Releases, UK: New bill would inject substance into corporate social responsibility, <https://www.amnesty.org.uk/press-releases/uk-new-bill-would-inject-substance-corporate-social-responsibility>.
[74] *Id.*
[75] House of Commons, Weekly Information Bulletin: 27th July 2002, <https://publications.parliament.uk/pa/cm200102/cmwib/wb020727/bus.htm>. ("Corporate Responsibility Bill - Objected to - no day named for 2nd reading.").
[76] House of Commons, Parliamentary Business, Corporate Responsibility Bill, <https://publications.parliament.uk/pa/cm200102/cmhansrd/vo020719/debtext/20719-24.htm> [emphasis added].
[77] House of Commons, Select Committee on Environmental Audit Minutes of Evidence, Annex A: The Corporate Responsibility Bill, <https://publications.parliament.uk/pa/cm200203/cmselect/cmenvaud/98/2120404.htm>.
[78] SIMONS AND MACKLIN, *supra* note 2 at 267, n. 584.

attempts, no legislation has been introduced in parliament that would allow for the tort liability of parent and/or subsidiary corporations for human rights and environmental violations abroad.

iii. Canadian Corporate Liability Bills

Like the U.S. and U.K, there is continued uncertainty in Canada with regard to the ability of host state plaintiffs to seek compensatory remedies for corporate human rights and environmental violations. Each entitled *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, Bills C-323, C-354, and C-331 were introduced by New Democrat MP Peter Julian in 2009, 2011, and 2015.[79] As the title suggests, the bills would have amended the *Federal Courts Act*[80] to expressly permit foreign claimants to initiate tort claims for international human rights matters. Similar to the failed ATSRA in the U.S., the proposed bills listed specific human rights violations that would fall within the Federal Court's jurisdiction. These included, but were not limited to, genocide, slavery, extrajudicial killing, torture, and arbitrary detention.[81]

After a nearly decade-long wait, the bill reached the floor of the House of Commons in June 2019 and was rejected by a vote of 238-49.[82] Perhaps to not present the apprehension of promoting MNC profits and jobs over international human rights, MPs cited procedural hurdles to the bill's adoption.[83] Conservative MP Marilyn Gladu argued that it would be imprudent to give the Federal Court jurisdiction as she considered it (*i.e.* the Court) to be in 'tatters'[84]—a perplexing (and arguably disingenuous) sentiment about a long-standing judicial venue that spans all Canadian provinces and covers all matters within the federal government's jurisdiction. Liberal MP Greg Fergus cautioned against a procedure akin to the ATS, arguing the latter is a mere relic from America's first Congress.[85] He also argued that, rather than a statutory amendment, it is better for the common law to evolve gradually, "incrementally taking into account developments in other jurisdictions."[86] That last remarks implicitly signals an accepting view toward Canadian judges taking a more activist stance to fill legislative gaps perpetuated by Parliament.

In March of 2022, Mr. Julian tabled another private member's bill, C-262, *The Corporate Responsibility to Protect Human Rights Act*. Similar to the other bills, noted above Bill C-262 provides a private right of action for "[a] person who alleges that they have suffered loss or damage as a result of a failure by an entity to comply with its obligations to prevent adverse impacts."[87] Bill C-262 also allows for litigation when a corporate entity fails to develop and implement due

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[79] When Mr. Julian introduced the initial bill, he stated that it was meant to mirror the ATS. *See* Bill C-323 (Historical), An Act to Amend the Federal Courts Act (international promotion and protection of human rights), 41st Parliament, 2nd Session, <https://openparliament.ca/bills/41-2/C-323/>.
[80] RSC 1985, c F-7.
[81] *Id.* at 25.1(2).
[82] Open Parliament: Vote #1376 on June 19th, 2019, < https://openparliament.ca/votes/42-1/1376/>.
[83] For debate transcript, *see* Bill C-331 (Historical), An Act to amend the Federal Courts Act (international promotion and protection of human rights), 42nd Parliament, 1st Session, <https://openparliament.ca/bills/42-1/C-331/>.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] Parliament of Canada, LEGISinfo, C-262, An Act respecting the corporate responsibility to prevent, address and remedy adverse impacts on human rights occurring in relation to business activities conducted abroad, 44th parliament, 1st session, <https://www.parl.ca/legisinfo/en/bill/44-1/c-262>, s. 10(1).

diligence procedures to mitigation the potential for human rights-related harms in the course of business operations.[88] As of this article's writing, Parliament has not voted on Bill C-262. However, given that Mr. Julian's is part of the minority New Democrat party and the fact that the bill, like the others above, was presented as a private member's bill without widespread support from the governing Liberals, there is very little chance that it will become law.

b. Deficient Legislation

Not only are there examples of home state bills around transnational corporate tort liability that have not passed into law, there is existing legislation that considers corporate responsibility and measures that may help to improve corporate behaviour abroad, but does not include mechanisms for host state victims to sue MNCs in a domestic court and be compensated for personal and environmental harms.

i. U.K. Companies Act

With 1300 sections and 16 schedules, the *Companies Act 2006* is the primary source of corporate law in the U.K. It updated the *Companies Act 1985* after recommendations made in July 2001 in the British Company Law Review Steering Group's final report.[89] Simons and Macklin have written that "continued lobbying led to the inclusion of a limited number of CSR obligations"[90] in the Act, which requires directors to supply "information about … social and community issues, including information about any policies of the company in relation to those matters and the effectiveness of these policies."[91] The obligations apply only to publicly-traded companies with the caveat that the information only need be provided "to the extent necessary for an understanding of the development, performance or positions of the company's business."[92]

Muchlinski criticized the Steering Group's final report for omitting recommendations on the liability of corporate groups.[93] This was likely not an oversight. As Mwaura noted, "one of the key reasons why [the Steering Group] … shied away from making recommendations for attributing liability to United Kingdom holding companies for act of their foreign subsidiaries was the fact that this was going to make the United Kingdom a less competitive legal environment for business."[94] Extensive lobbying efforts deterred the Steering Group from even including recommendations in its final report about directors' liability.[95] As such, MNC liability for transnational tort claims was even farther from reach.

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[88] *Id*. at s. 10(2)

[89] For commentary on the Steering Group's report, *see* P. T. Muchlinski, *Holding Multinationals to account: recent developments in English litigation and the Company Law Review I*, 2002 AC 3–8 (2012).

[90] SIMONS AND MACKLIN, *supra* note 2, at 268.

[91] *Companies Act 2006,* s 417(5)(b)(iii).

[92] *Id*. at s. 417(5).

[93] Muchlinski, *supra* note 89.

[94] Kiarie Mwaura, *Internalization of Costs to Corporate Groups: Part-Whole Relationships*, 11 J. INT'L BUS & L. 85, 107 (2014).

[95] Eilís Ferran, *Company Law Reform in the United Kingdom: A Progress Report*, 69 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT / THE RABEL JOURNAL OF COMPARATIVE AND INTERNATIONAL PRIVATE LAW 629–657 (2005).

ii. U.K. Modern Slavery Act

In many circles, the *Modern Slavery Act* has been welcomed as a culminated success that seeks to weed out human trafficking in transnational supply chains. Like the *Companies Act* and other legislation discussed in this section, the *Modern Slavery Act*, while including provisions around criminal liability and reparations order against accused persons, does not provide for corporate tort liability in instances of slavery, servitude and forced and compulsory labour. Moreover, Section 54 provides for disclosure requirement of U.K.-domiciled corporations in their supply chains, but does not contemplate private law liability or compensation to victims when those supply chains concern human trafficking or related offences.[96]

To date, there have not been attempts to expand the Act's scope such that it could allow for the tort liability of U.K.-domiciled corporations. In both *Vedanta* and *Okpabi*, detailed below, where the U.K. Supreme Court recently held that there is, in theory, a duty of care on the part of U.K parent companies that exert substantial control of overseas subsidiaries, the Act was neither argued nor invoked by the Court as a basis to ground corporate liability.

iii. Foreign Corruption Acts

There is legislation in all three common law home states discussed in this part that prohibits corruption by corporate actors in their business operations abroad, but does not include provisions around corporate human rights violations or the potential to commence tort claims when personal and/or environmental harms are committed. As an example, the U.S. *Foreign Corrupt Practices Act* (FCPA), which has the relatively the same scope as U.K. *Bribery Act* and Canada's *Corruption of Foreign Public Officials Act* (CFPOA), mandates that MNCs that operate abroad adhere to strict accounting controls and mandatory disclosure requirements. MNCs can be subject to criminal penalties for payments made to foreign officials linked to securing or retaining contracts.[97]

The FCPA and related legislation in other common law home states exemplify that governments have exhibited the political will to pass legislation that enriches them through hefty fine amounts, but will not pass legislation that allows for corporate revenues to be syphoned to victims of corporate human rights and environmental harms abroad. In his book *Between Impunity and Imperialism: The Regulation of Transnational Bribery*, Kevin Davis writes, "[i]n principle, the resulting funds [from FCPA prosecutions] could be channeled to victims of corruption … To date, however, the funds collected rarely have been used for the purpose of compensation. They typically are remitted to the Treasury of the United States…"[98]

Aside from the FCPA and other legislation above, in October 2016 the U.K. parliament introduced the *Criminal Finances Bill*, which amended parts of the *Proceeds of Crime Act 2002*. Like the FCPA, *Bribery Act*, and CFPOA, Part 5 of the Act allows for the U.K. government—but not victims of corporate abuse—to recover civil damages for property that has been obtained through unlawful conduct, domestically or abroad. Pursuant to the amendment, unlawful conduct includes

[96] *Modern Slavery Act*, 2015 c. 30, s. 54.
[97] 15 U.S.C. §§ 78dd-1, et seq. *Also see* Restatement (Third) of the Foreign Relations Law of the United States § 14 cmt. D, 115 cmt. E (1987) at s. 414.
[98] KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 9 (2019).

gross human rights violations, specifically torture and cruel, inhuman or degrading treatment.[99] Rather than victims themselves who would then stand to be compensated, the U.K. government is able to pursue an individual or corporation that has benefited from human rights abuses committed abroad. As such, the amendments to the Act fortified the government's ability to be compensated, leaving victims in a lurch.

c. Judicial Restraint

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

i. Corporate Customary International Law

Home state courts have struggled to reconcile traditional interpretations of international law with the reality that the contemporary corporate form increasingly performs government-like functions and asserts power and authority over individuals in a way akin to governments.[100] Home state courts have rejected progressive notions of international law that would bring private corporations within the realm of customary and peremptory norms traditionally applied to states[101] and international organizations constituted at the consent of states.[102] Through a formalistic approach that depicts a by-gone era, common law home state courts have impeded litigation against MNCs by differentiating the international law obligations of corporations from those of state actors.

By and large, U.S. courts have rejected any possibility that MNCs can be subject to customary international law norms; and the Supreme Court of Canada has tepidly endorsed a 'human-centric' turn in international law, even though it has not explicitly allowed for MNCs to fall within international law's ambit. These debates around the scope and application of international law harkens back more than a half century to Jessup's portrayal of a fictional debate between what he termed 'orthodox' and 'iconoclastic' positions.[103] That debate continues until today without clear answers and presents (at times insurmountable) difficulties for Global South host state plaintiffs seeking compensatory redress from MNCs.[104]

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[99] *Proceeds of Crime Act 2002*, 2002 c. 29, ss. 241 and 241A.
[100] *See e.g.* Jay Butler, *Corporations as Semi-States*, 57 COLUMBIA J. TRANSNATL. LAW 221–282 (2019).
[101] *See* Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green, and Company, 1905) at 18–19 ("[s]ince the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations.").
[102] See *Reparation of Injuries Suffered in Service of the U.N.,* Advisory Opinion, 1949 I.C.J. 174 (Apr. 11, 1949) [*Reparations Opinion*].
[103] PHILIP C. JESSUP, TRANSNATIONAL LAW 15–21 (2003).
[104] Paul B. Stephan, *Privatizing International Law*, 97 VA. LAW REV. 1573–1664 (2011) ("[t]he old understanding of international law as something created solely by and for sovereigns is defunct").

Despite Koh's assertion that it is a myth that U.S. courts cannot hold private corporations civilly liable under ATS claims,[105] since the D.C. Circuit's decision in *Tel-Oren*, U.S. jurisprudence has progressively developed in a fashion that distinguishes state and corporate liability.[106] For instance, *Jama* concerned domestic physical and mental abuse against asylum seekers held in a private correctional facility that had contracted with the U.S. government.[107] The detainees commenced an ATS suit alleging the facility violated 'the law of nations' (customary international law) by subjecting them to cruel treatment and punishment. The district court in New Jersey rejected the argument that the ATS did not apply to the facility's actions. It held the private defendants could be liable for a tort claim pursuant to a violation of the 'law of nations' as it had contracted with the government. Debevoise J. wrote, "by virtue of the contract with INS [Immigration and Naturalization Service] to perform governmental detention functions these defendants became state actors and were not acting simply as a private corporation or private individuals."[108]

Likewise, in the more recent case of *Salim*, two psychologists had contracted with the U.S. government to provide expertise on how to conduct 'enhanced interrogation techniques' in black sites abroad, resulting in ATS claims alleging tort and other human rights violations.[109] Before the individual defendants settled for a confidential amount, a district court judge denied their motion to dismiss, concluding that the contractors were sufficiently connected to the government and thus could be held liable under the ATS for violating the 'law of nations.'[110] The court implicitly accepted the plaintiffs' argument that the individual defendants "played a crucial role in developing, refining, and supporting" the abusive techniques.[111]

The decisions in *Jama* and *Salim* employed functional analyses looking at defendants' actions and responsibilities rather than their formal classification as private actors. Upon determining that private defendants had performed a government function on behalf of the state—the detention of asylum seekers or interrogation of perceived enemy combatants—the courts characterized them as state actors with international law obligations. Despite similar fact patterns and allegations to those in *Jama* and *Salim*, ATS claims against MNCs operating in the Global South—even when those MNCs have contracted with the state—have been dismissed due to excessively traditional interpretations of international law.

One set of examples in which ATS claims against a corporate actor for abuses in the Global South were dismissed stemmed from allegations of torture and cruel and unusual treatment in Abu Ghraib prison in Iraq. On the premise that the 'law of nations' does not apply to private corporations district courts in *Saleh* and *Ibrahim* dismissed ATS claims commenced on behalf of hundreds of

[105] Harold Hongju Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 J. INT. ECON. LAW 263–274, 265 (2004).
[106] Tel-Oren v. Libyan Arab Republic, 726 F. 2d 774 (D.C. Cir., 1984).
[107] Jama. v INS, 22 F. Supp. 2d 353 [*Jama*].
[108] *Jama, id.* at 372 [emphasis added].
[109] Sheri Fink, *Settlement Reached in C.I.A. Torture Case*, THE NEW YORK TIMES, <https://www.nytimes.com/2017/08/17/us/cia-torture-lawsuit-settlement.html>.
[110] *Salim et al. v. Mitchell et al.*, No. CV-15-0286-JLQ, Memorandum Opinion re Motions for Summary Judgment [unreported] [*Salim*].
[111] *Id.* at 34.

Iraqi citizens who alleged torture and other physical abuse by security forces employed by the corporate defendant.[112]

What is striking is that the defendants in the Abu Ghraib cases and *Jama* performed very similar functions. They were both responsible for housing inmates who were detained or captured by American government personnel. The distinguishing feature between the two was how courts characterized their relationship with the U.S. government. The *Jama* court characterized the institutional defendant as a government contractor. The *Saleh* and *Ibrahim* courts characterized the defendant as a corporate actor that acted at an arms-length from the government. Pursuant to their limited legal status under international law, corporations such as the defendant in the Abu Ghraib cases have evaded 'law of nations' obligations whereas domestic corporations and individuals that contract with the government are considered as extensions of home state governments and subject to customary and/or peremptory norms.

The arguably arbitrary result established by district courts has been upheld by appellate courts that have contributed to eroding (and perhaps obliterating) the potential for transnational MNC liability under the ATS. In *Kiobel*, a case involving allegations of arbitrary arrest and detention, torture, and extrajudicial killings on the part of a multinational oil company operating in Nigeria, the Second Circuit in a 2-1 split departed from its previous decision in *Flores*.[113] It stated, "[c]ustomary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern. The marked characteristic of the whole system is a commonality of interest aligned against the enemies of all mankind. The idea of corporate liability does not withstand scrutiny in that light."[114] In a related decision, the Court of Appeals concluded there was no customary norm of corporate liability to ground an ATS claim.[115] As previous courts had "*never* extended the scope of [customary international law] liability to a corporation"[116] the Second Circuit was not willing to depart with establish international law interpretations in order to apply the ATS to the defendant MNC.

In 2018, the Supreme Court released its decision in *Jesner v. Arab Bank plc*,[117] an ATS case against a Jordanian bank with a U.S. branch. The dispute, at last, called for a ruling as to whether the ATS applies to non-state actors. Justice Kennedy along with the Court's four conservative judges held that allowing foreign corporations to fall within the ATS's ambit would impinge on U.S. foreign relations—a matter beyond the judiciary's powers.[118] Joined by Chief Justice Roberts and Justice Thomas, Kennedy tackled the separate issue of private corporate liability for customary international law violations. He followed the Second Circuit's approach in *Kiobel* that the ATS applies to states and individuals who act under the colour of law since that is how custom developed post-World War II.[119] However, absent express legislation, the ATS does not apply to

[112] Saleh et al. v. Titan Corp 580 F.3d 1 (2009) [*Saleh*]; Ibrahim et al. v. Titan Corp., 391 F.Supp.2d 10 [*Ibrahim*]. See also Al-Quraishi v. Nakhla, 728 F.Supp.2d 702 (2010).
[113] Flores v. Southern Peru Copper Corp., 414 F. 3d 233 (2d Cir. 2003).
[114] Kiobel v. Shell Petroleum Development Company of Nigeria Ltd. et al., 642 F.3d 268, 270 (2d. Cir., 2011) [internal citation omitted].
[115] Kiobel v. Shell Petroleum Development Company of Nigeria Ltd. et al., 621 F. 3d 111, 137.
[116] *Id.* at 120 [emphasis added].
[117] 138 S. Ct. 1386 (2018)
[118] See *id.* at Parts I, II-B-1, and II-C.
[119] *Id*., at Parts II-A, II-B-2, II-B-3, and III.

juridical persons such as corporations.[120] He also agreed with *Kiobel* that, to date, there is no 'specific, universal, and obligatory' norm of corporate liability under international law.[121]

Unlike their U.S. counterparts, Canadian courts have not completely shut the door on corporate liability under customary international law—although their jurisprudence is practically no further ahead. Without legislative guidance, Canadian courts have been left to reach for doctrinal interpretations that are well outside traditional understandings. In the Supreme Court of Canada's 2020 decision in *Nevsun*, a transnational human rights claim on behalf of Eritrean plaintiffs against a Canadian mining company, the majority held that it was not plain and obvious that a tort characterized as a violation of customary international law was bound to fail. Passing that low bar only meant that the plaintiffs who alleged acts of torture, forced labour, and arbitrary detention were allowed to proceed with their case, but not necessarily that customary international law norms apply to corporations.[122] In *Nevsun*, the Supreme Court held that "a compelling argument *can* … be made that since customary international law is part of Canadian common law, a breach by a Canadian company can *theoretically* be directly remedied."[123]

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

ii. The Corporate Veil

Corporate separateness is the law's recognition that each corporate entity is subject to limited liability. A subset of corporate separateness is referred as the 'corporate veil', a term that applies when one corporation owns some or all of the shares of another corporation. [124] Absent fraud, a determination that one corporation is an alter ego of another corporation, or a determination that a foreign corporation is "so continuous and systematic" with a domestic corporation so as to be at home,[125] courts have been bound by a legal formalism that dictates centuries-old precepts of limited liability be respected.

Without legislation to override formalistic notions of corporate separateness in transnational business and human rights disputes, MNCs have successfully invoked the veil to dismiss tort-

[120] *Id*.
[121] *Id*, at 1390.
[122] After the Supreme Court's decision, the parties entered into a confidential settlement in October 2020. *See* CBC News, "Landmark settlement is a message to Canadian companies extracting resources overseas: Amnesty International" (23 October 2020), online: <https://www.cbc.ca/news/canada/british-columbia/settlement-amnesty-scc-africa-mine-nevsun-1.5774910.
[123] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 127 [emphasis added].
[124] *See generally* Kurt A. Strasser, *Piercing the Veil in Corporate Groups Symposium*, 37 CONN. L. REV. 637–666 (2004).
[125] Goodyear Dunlop Tires Operations, S.A. v Brown, 131 S Ct 2846, 2851 (2011) [*Goodyear*].

based claims. Otherwise, as in recent British transnational corporate tort cases discussed below, the threshold to impute the actions of one corporate entity onto another has been crafted such that a home state corporation must exercise a significant degree of control over a host state corporation—a relationship that can potentially be tweaked to ensure that home state corporations routinely avoid liability for the tortious conduct of a host state subsidiary.

To begin with the U.S., courts there have upheld corporate separateness to curtail transnational tort claims for human rights violations in the Global South. In *Doe v. Unocal Corp.*, Burmese citizens alleged that a number of oil and gas MNCs were complicit in the use of forced labour to construct a pipeline.[126] After refusing to assert personal jurisdiction over the host state subsidiaries under the test for specific in personam jurisdiction,[127] the court turned to the 'minimum contacts' test for general jurisdiction.[128] In a case that involves domestic and foreign corporations, that test calls for a court to "engage in a preliminary inquiry to determine whether the subsidiaries' contacts are properly attributed to the [parent company] defendant."[129]

The court affirmed the general rule that a parent and subsidiary are separate legal entities such that the subsidiary's host state conduct cannot (in most circumstances) form the basis for the parent's liability. It applied Supreme Court and Ninth Circuit precedents to conclude that the parent company was not an alter ego of the foreign subsidiary and that the foreign subsidiary was not the parent company's agent.[130] Evidence adduced on appeal about an intertwined relationship between the U.S. parent and host state subsidiaries around, for instance, capital expenditures, investments, general business policies, and even shared directors and officers did not convince the court to pierce the veil.[131] Rather, like the current state of U.K. law, discussed below, the Court required day-to-day control or significant managerial intervention on the part of the parent company over a foreign subsidiary.[132]

In the U.K., the *Brussels I Regulation* (B1R) turns a personal jurisdiction inquiry into one that concerns a British parent company's duty of care to foreign plaintiffs. Explicitly, Article 4(1) of the B1R reads that "persons domiciled in a [E.U.] Member State shall, whatever their nationality, be sued in the courts of that Member State."[133] That provision encompasses corporate persons. Previously, the entity theory—as it manifests through tort law principles—was a hallmark of U.K.

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

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

[128] General jurisdiction is typically understood as a foreign defendant's systematic and continuous business contacts with the forum state. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

[129] *Doe*, *supra* note 126, at 925.

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

[131] *Id.* at 926 (citing United States v. Bestfoods, 524 U.S. 51, 69).

[132] *Also see* Alomang v. Freeport-McMoran, Inc., 811 So. 2d 98, 101 (2002).

[133] *Regulation (EU) No. 1215/2012 of the European Parliament and of the Council* of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art. 4(1) [B1R].

corporate veil dismissals. And although more recent transnational cases have surpassed low-threshold dismissal motions, there remains a relatively high bar for U.K. parent companies to owe a duty of care to host state plaintiffs. Moreover, from its recent judgments, the Supreme Court has opened a path for British MNCs to distance themselves from host state operations and consequently evade tort liability on a consistent basis.

In *AAA*, former employees of a British parent company's Kenyan subsidiary commenced a transnational claim in British courts against both companies alleging negligence on the MNC's part for harm incurred in the course of tribal violence that left seven dead and hundreds injured.[134] To determine whether there was sufficient proximity between the parties to ground a tort law duty of care, the Court of Appeal analyzed the relationship between the corporate parent and its overseas subsidiary. Although the Court acknowledged that the British parent, through a separate holding company, owned 88.2% of subsidiary's shares, it dismissed the claim on the basis that each company was a separate legal person.[135] The Court surmised that veil piercing would turn on the facts of a particular case when a parent company "having greater scope to intervene in the affairs of its subsidiary than another third party might have, has taken action of a kind which is capable of meeting the relevant test for imposition of a duty of care in respect of a parent."[136]

Previously, British courts also distinguished a domestic parent company from a foreign subsidiary under the entity theory on the basis that a subsidiary is domiciled outside the U.K. Examples of this type of dismissal can be seen in the Anglo American Group litigation in which South African employees of a British MNC contracted silicosis and silico-tuberculosis.[137] In *Vava* and *Young*, foreign plaintiffs were forced to bring claims in British courts against only the South African subsidiary as there was no viable claim against the U.K. parent company that had acquired the subsidiary after the alleged violations took place. The parties agreed that to establish domicile under the B1R, a corporation's central place of administration is determined by where, factually, "the important decisions are made; the entrepreneurial management takes place."[138]

In *Vava*, both the chambers judge and the Court of Appeal held that the corporation's important decisions were made in South Africa. The Court of Appeal held that central administration lies where the company makes essential operational decisions. It made a distinction between 'influencing' decisions and 'determining' decisions and concluded that the subsidiary's 'determining' decisions took place in South Africa.[139] As the subsidiary was deemed to be domiciled outside the U.K., there was no basis for the British courts to assert jurisdiction. In a related 2014 decision, the Court of Appeal dismissed the transnational claim in *Young* by again concluding that British courts did not have jurisdiction over a foreign subsidiary, which was domiciled elsewhere.[140]

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[134] *AAA & Ors v. Unilever plc*, [2018] EWCA Civ 1532.
[135] *Id.* at paras. 14-29.
[136] *Id.* at para. 37.
[137] *Vava v Anglo American South Africa Ltd*, [2012] EWHC 1969 (QB) [*Vava*]; *Vava v. Anglo American South Africa Ltd.*, [2013] EWHC 2131 (QB) [*Vava Appeal*]; *Young v Anglo American South Africa Limited & Ors*, [2014] EWCA Civ 1130 [*Young*].
[138] *Vava*, *id.*
[139] *Vava* Appeal, *id.*
[140] *Young*, *id.* at para 40.

As mentioned, two recent transnational cases against British MNCs that involved an interpretation of the corporate veil have survived dismissal motions that only require plaintiffs to demonstrate their claims have a 'real prospect of success.'[141] From those cases, British common law around parent company liability has evolved in a way that requires a significant degree of control over a host state subsidiary. In effect, these recent Supreme Court decisions have empowered British MNCs to alter their transnational corporate relationships to ensure that it is very difficult for host state plaintiffs to meet the 'control threshold'.

Vedanta was a transnational claim commenced in a British court on behalf of 1,826 Zambian villagers who alleged that the U.K.-based Vedanta Resources Plc (Vedanta) and its Zambian subsidiary, Konkola Copper Mines plc (KCM), polluted local waterways resulting in personal and financial injury to local residents. In its 2019 decision, the Supreme Court held there was an arguable case that Vedanta sufficiently intervened in KCM's day-to-day management. Among other things, the court relied on evidence that Vedanta provided health, safety, and environmental training to KCM and vowed in public statements to address environmental and technical shortcomings in KCM's mining infrastructure.[142]

In 2021, the Supreme Court released its decision in *Okpabi* overturning High Court and Court of Appeal decisions that held Royal Dutch Shell Plc (RDS), as an anchor defendant under the B1R, did not owe a duty of care to the Nigerian plaintiffs.[143] Like *Vedanta*, *Okpabi* reached the Supreme Court in the context of a dismissal motion where the threshold for the claim to proceed was whether there was a real issue to be tried.[144] The *Okpabi* Court relied heavily on *Vedanta* to conclude that RDS could, in theory, owe the plaintiffs a duty of care.

Like for the parent company in *Vedanta,* in *Okpabi* there was evidence adduced that RDS exercised a high level of control, direction, and oversight over the Nigerian subsidiary's operation of its oil infrastructure.[145] The Court was left to grapple with whether a parent company owes a duty of care to host state plaintiffs when it i) exercises day-to-day control over a subsidiary's material operations; and ii) issues mandatory policies and standards meant to apply throughout a group of companies.[146] The Court of Appeal distinguished between those two scenarios and concluded that a parent only owes a duty of care in the former.[147]

Along with its conclusion that mandatory policies and standards among a corporate group are not indicative of a parent company's duty of care to host state plaintiffs, the Court of Appeal in *Okpabi* held that RDS did not exercise the necessary degree of control over "practices or failures which are the subject of the claim."[148] The Supreme Court disagreed in both respects for at least a few

[141] See *Vedanta Resources PLC & Ors v. Lungowe & Ors*, [2019] UKSC 20 [*Vedanta*]; *Okpabi and other (Appellants) v Royal Dutch Shell Plc and another (Respondents)*, [2021] UKSC 3 [*Okpabi*]
[142] *Vedanta, id.* at paras. 42-62.
[143] *Okpabi*, *supra* note 141. The facts of *Okpabi* are substantially similar to *Vedanta*.
[144] *Id.* at paras. 153-159.
[145] *Id.* at para. 29.
[146] *Id.* at para. 76.
[147] *His Royal Highness Okpabi v. Royal Dutch Shell*, 2019 EWCA Civ. 191 at para. 89.
[148] *Id.* at para. 127.

reasons. First, the Court had already determined in *Vedanta* that group-wide policies and standards can give rise to a duty of care—a principle overlooked by the Court of Appeal.[149]

Second, the Supreme Court distinguished between *de jure* financial control and *de facto* managerial control, holding that a duty of care may arise in either circumstance. Again, it relied on its decision in *Vedanta* where Lord Briggs stated that "the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, *even if it does not in fact do so*."[150] And third, the Court of Appeal erred by surmising parent company liability as a distinct category of negligence that must satisfy the three-part *Caparo* test.[151] Based on these reasons, the Court held that the plaintiffs' claim, as crafted, stood a real prospect of success. As such, the transnational case was allowed to proceed.

A number of issues arise from the U.K. Supreme Court's decisions in *Vedanta* and *Okpabi*. Like the Supreme Court of Canada's decision in *Nevsun*, discussed below, the U.K. decisions are not, in fact, merits determinations that move the law around transnational MNC liability forward in any substantial or systematic way. Rather, they were rendered in the context of early-stage dismissal motions that allow a claim to move forward, but do not necessarily mean it will be successful on the merits. Moreover, it is arguable that the U.K. decisions (like *Nevsun*) only garnered the support of the majority of the judges *because* they reached the Court on a jurisdictional (rather than merits) issue. Given the low threshold the plaintiffs are asked to meet and the overall insignificance of the decisions given that the Court was not required to opine on the merits of the case, it is safe to say the veil remains a doctrinal limitation in U.K. courts.

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

Finally, the corporate veil as a judicial gap for Global South host state plaintiffs to pursue compensatory remedies has also manifested in transnational claims brought to Canadian courts. *Das* concerned transnational claims brought by Bengali plaintiffs after the Rana Plaza collapse that killed thousands of workers employs by local companies that supplied garments to Canadian MNC Loblaws.[152] The plaintiffs brought tort claims against Loblaws and Bureau Veritas, a French-incorporated consulting company that conducted 'social audits' to ensure that Loblaws's CSR policies were being implemented at the Rana Plaza and other manufacturing facilities. Unlike the U.S. and U.K. cases, discussed above, the corporate entities in *Das* were not related through a

[149] *Vedanta*, *supra* note 141, at para. 52.
[150] *Id.* at para. 53, cited in *Okpabi*, *supra* note 141, at para. 148 [emphasis added].
[151] *Okpabi*, *id.* at para. 149-151.
[152] *Das v. George Weston Limited*, 2017 ONSC 4129 [*Das* ONSC]; *Das v. George Weston Limited*, 2018 ONCA 1053 [*Das* ONCA].

traditional parent-subsidiary relationship. Rather, Loblaws entered into a contract with Bureau Veritas's Bengali subsidiary to undertake the social audits.

In a lengthy 2017 decision, Perell J. of the Ontario Superior Court of Justice dismissed the matter. Even though the primary basis for dismissing the transnational claim was that the plaintiffs' allegations were limitations-barred under Bengali law,[153] Perell J. proceeded to analyze the jurisdictional and liability issues as if the limitations bar did not apply. He utilized the three-part *Caparo* test to determine whether Loblaws would have owed the plaintiffs a duty of care under Bengali law. And like the British cases, he concluded that Loblaws did not have sufficient control over the Bengali manufacturing companies most proximate to the plaintiffs. Therefore, it did not owe the plaintiffs a duty of care.[154]

Under Bengali (British) law, Perell J. distinguished *Das* from the English Court of Appeal's decision in *Chandler v. Cape plc* that found direct parent company liability against the British corporation.[155] Unlike *Das*, in *Chandler* the British parent corporation owned the host state subsidiary. More importantly, the parent company exerted significant control over the subsidiary and had detailed knowledge about the dangerous working conditions (and what to do about them) that eventually caused the foreign plaintiffs harm. In *Das*, Perell J. noted that Loblaws was not an operating parent company, but simply entered into contracts with Bengali companies to supply it with garments as well as ensure adherence to its CSR strategy.[156] In other words, Loblaws did not exercise day-to-day control over the Bengali companies and possessed little (if any) knowledge of the danger in which the foreign plaintiffs found themselves by working at the Rana Plaza.

Perell J. also analyzed the plaintiffs' ability to sue Loblaws under Ontario law. He held there was no basis to ignore corporate separateness to construe the (in)actions of the Bengali companies that led to the building collapse to that of Loblaws. He distinguished *Das* from the Superior Court's decision in *Choc v. Hudbay Minerals, Inc.* in which the court found direct parent company liability on the part of the Canadian-domiciled corporation *without having to pierce the veil*—a first for a transnational human rights claim in Canada.[157] Rather than assess proximity between the parent company and the foreign plaintiffs like the court in *Choc*, in *Das* Perell J. considered the salient factor to be the level of control the Canadian company possessed over the host state companies that were most proximate to the foreign plaintiffs—a more traditional veil piercing analysis. He again concluded that the lack of day-to-day oversight on the part of the Canadian parent company meant there was an insufficient degree of control that would otherwise permit him to ignore corporate separateness.[158]

iii. Extraterritoriality

In U.S. jurisprudence, the canon of statutory interpretation known as the presumption against extraterritorial provides that "[w]hen a statute gives no clear indication of an extraterritorial

[153] *Das* ONSC, *id.* at para. 5.
[154] *Id.* at para. 412(d).
[155] *Cape v Chandler Plc*, [2012] EWCA (Civ) 525 [*Chandler*].
[156] *See e.g. Das* ONSC, *supra* note 152, at para. 46.
[157] *See Choc v. Hudbay Minerals Inc. et al*, 2013 ONSC 1414. In *Choc*, the court allowed the claims to proceed on a theory of direct parent company liability.
[158] *Das* ONSC, *supra* note 152, at paras. 539-540.

application, it has none."[159] To assert jurisdiction, U.S. courts have required express congressional intent of extraterritorial statutory application.[160] Underlying this deferential tone to congress is a concern expressed by the U.S. Supreme Court in *Aramco* that "the Judiciary … not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."[161] The presumption has evolved over time and as the Supreme Court has interpreted different statutes. After the Court's 2016 decision in *RJR Nabisco, Inc. v. European Cmty*, there appears to be a three-step determination of a statute's extraterritorial application: i) express congressional intent; ii) focus *i.e.* whether the provision in question involves domestic application; and iii) injuries on U.S. territory.[162]

With the doctrine well-established, the U.S. Supreme Court in *Kiobel* rejected the ATS's extraterritorial application in transnational human rights claims against British, Dutch, and U.S. oil companies. The Court affirmed the rule that where parties and actions are strictly outside U.S. territory, the matter remains beyond the ATS's scope.[163] The Court's ruling in *Kiobel* fell in line with how the presumption developed over the preceding decades. Applying the presumption to the ATS, the Court's majority wrote in *Kiobel* that "[n]othing in the text of the statute suggests that congress intended causes of action recognized under it to have extraterritorial reach."[164] Finding authority in *Morrison*, Justice Breyer's concurring opinion in *Kiobel* left the door open for matters that touch and concern U.S. territory with sufficient force.[165] However, absent congressional action to enact a statute more specific than the ATS—something congress has refused to do—the presumption against extraterritoriality remains a barrier to transnational claims against corporations for alleged conduct abroad.[166]

In *Doe v. Nestlé*, an eight-judge majority of the high court ruled that the 'focus' of the host state plaintiffs' claims—the child labour in the Ivory Coast—occurred outside U.S. territory. As the majority affirmed *Kiobel* that the ATS does not have extraterritorial reach except in rare instances, the plaintiffs' claims were dismissed. Justice Thomas, who penned the majority's decision, explained that 'mere corporate presence' *i.e.* generic operational, financial, and administrative decisions, on the part of a home state corporation or parent company does not draw "a sufficient connection between the cause of action … and domestic conduct."[167]

d. Judicial Deference

Other than home state decisions in which courts have taken restrained approaches to dismiss transnational business and human rights litigation or failed to advance doctrine in a substantial way, there are a set of doctrines that have been invoked to dismissal transnational business and

[159] *See e.g. Kiobel*, *supra* note 59, citing Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010) [*Morrison*].
[160] *See* United States v. Bowman, 260 U.S. 94, 98.
[161] EEOC v. Arabian American Oil Co., 499 U. S. 244, 248 (1991) [*Aramco*].
[162] *RJR Nabisco v. European Cmty*., 136 S.Ct. 2090, 2101 (2016) [*RJR Nabisco*].
[163] Kiobel v. Royal Dutch Petroleum Co., 569 U. S. ____ (2013) [*Kiobel* slip op].
[164] *Kiobel* slip op, *id.* at 7.
[165] *See* Al-Shimari v. CACI Premier Technology, Inc. 758 F. 3d 516 (2014) where the 'touch and concern' principle has been applied to allow for the ATS's extraterritorial application.
[166] *Kiobel*, slip op., *supra* note 163, at 14.
[167] *Id.* at 5.

human rights litigation out of deference to host state governments and courts. Here, I briefly review *forum non conveniens* and act or state reasons forwarded by U.S. and Canadian courts.

i. *Forum Non Conveniens*[168]

Forum non conveniens (FNC) sits at the intersection of judicial and political considerations in transnational disputes that often leads home state courts to take deferential postures.[169] Over the past few decades, the doctrine's development has been propelled by transnational litigation involving MNC defendants that seek FNC dismissals, "not necessarily because they prefer the alternative forum, but because this will often represent the last they will see of the litigation."[170] In FNC analyses, U.S. courts tend to prioritize deference to a host state's sovereignty over its own national interest in adjudicating a transnational matter that implicates a U.S. MNC. In other words, FNC considerations have routinely been undergirded by notions of comity.[171]

Gardner argues this focus on comity is misplaced because the Supreme Court in *Gilbert* was not necessarily concerned about the integrity of another state's sovereignty. Rather, *Gilbert* was about the administration of justice in the federal court system among U.S. states.[172] Despite Gardner's opposition to comity-centric approaches to FNC, U.S. courts have dismissed transnational human rights cases involving MNCs on such grounds. *Bhopal*, a transnational claim involving an explosion at a gas plant in India owned by a subsidiary of the U.S. corporation Union Carbide, is an oft-cited example.[173]

The Indian government, recognizing myriad deficiencies in its own legal system, chose to commence a transnational claim in New York where both the district court and court of appeals dismissed the case on FNC grounds.[174] Indicating comity concerns, both courts took the position that adjudicating the claims in the parent company's home state would impinge on India's sovereignty and rob it of the opportunity to develop its own tort laws.[175] However, evidence submitted in the course of the FNC dismissal motion painted a picture of the Indian legal system as far from an "independent and legitimate judiciary" able "to mete out fair and equal justice." Rather, the evidence overwhelmingly suggested that India was ill-equipped to handle the complex factual and legal issues related to the matter. The Indian government submitted evidence substantiating that its legal system lacked sufficient tort precedents relating to personal injury.[176] It also submitted evidence of widespread corruption, endemic delays, and the absence of class

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[168] FNC has been expunged in the U.K. *See Owusu v. Jackson*, [2005] E.C.R. I-1383 [*Owusu*].

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

[170] Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL LAW REVIEW 650, 672 (1992).

[171] The Supreme Court offered the following definition of comity in *Hilton v. Guyot*, 159 U.S. 113, 165 (1895): "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nations".

[172] Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. LAW REVIEW 390, 405–406 (2017).

[173] *See* Lydia Polgreen & Hari Kumar, "8 Former Executives Guilty in '84 Bhopal Chemical Leak," New York Times (7 June 2010) and Dinesh C. Sharma, "Bhopal: 20 Years On," Lancet (8 Jan. 2005), cited in STEINITZ, *supra* note 2 at 48.

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

[175] *Bhopal*, *id.* at 867.

[176] *Id.* at 849.

actions and contingency fee regimes.[177] Yet, those assertions were of "no moment with respect to the adequacy of the Indian courts."[178]

The courts also recognized that were there to be a liability finding warranting damages in the Indian system, the case would, in essence, have to be re-litigated in U.S. courts in the course of enforcement proceedings. To square the circle such that re-litigation would not be required, one of the conditions the district court imposed as part of the FNC dismissal was that the MNC defendant would have to abide by an Indian court's judgment. As that condition was waived on appeal,[179] it is a wonder how the matter was dismissed to a legal system implicitly recognized by a U.S. court as being inadequate to adjudicate the novel and complex issues related to the transnational claim. After the court of appeals' decision, the case proceeded in the Indian courts with all the expected troubles noted in the FNC adequacy analysis. The claims were never adjudicated on the merits. Two years after the U.S. dismissal and five years after the explosion, the parent company settled with the plaintiffs for an arguably paltry sum of $470 million USD in return for a full waiver of all legal claims.[180]

To the extent that some redress resulted from the transnational claim—minimal as it was—it must be taken into account that *Bhopal*, in part, ended in a settlement rather than a jurisdictional or early-stage dismissal in Indian courts due to the public outcry over the explosion as well as the Indian government's decision to act as a representative plaintiff. Other U.S. FNC dismissals in transnational cases have not ended with even that modicum of success. One example is *Sequihua*, a transnational claim on behalf of Ecuadorian plaintiffs against Texaco for wastewater contamination in the course of oil extraction.[181]

In *Sequihua*, the district court formally separated out comity and FNC considerations but addressed sovereignty interests in both to ultimately dismiss the claim. Following *Piper*, the court reiterated that foreign plaintiffs are afforded less deference in forum choice.[182] The Court held that Ecuador was the sovereign state with the primary interest in the dispute and should be the site of adjudication, even though the defendant MNC was headquartered in Texas.[183] And like *Bhopal*, the court found Ecuador to be an adequate forum even though "it may not provide the same benefits as the American system."[184]

Another FNC example where home state courts deferred to host state judiciaries involves transnational claims against Del Monte when Guatemalan banana farm workers accused the American MNC of arbitrarily detaining and threatening to kill them after failed labor negotiations. Although the eleventh circuit initially allowed the claims to proceed finding it had subject matter

[177] *Id.* at 851.
[178] *Id*.
[179] *Bhopal* appeal, *supra* note 174.
[180] One comparative study found that had Bhopal victims been compensated according to the same principles as those in asbestos cases against U.S. corporations litigated in U.S. courts, the settlement amount would be in excess of $10 billion USD. *See* Edward Broughton, "The Bhopal Disaster and Its Aftermath: A Review," Environmental Health: A Global Access Science Source, <www.ncbi.nlm.nih.gov/pmc/articles/PMC1142333/>, cited in STEINITZ, *supra* note 2, at 49.
[181] Sequihua v. Texaco, 847 F. Supp. 61 (S.D. Tex. 1994) [*Sequihua*].
[182] *Sequihua*, *id.* at 64.
[183] *Id*. at 62.
[184] *Id.* at 64.

jurisdiction under the ATS and TVPA, it eventually dismissed the transnational claims on FNC grounds.

In *Aldana*, the court of appeals upheld the district court's FNC dismissal again making the distinction spearheaded in *Piper* that a foreign plaintiff is afforded less deference in forum choice.[185] In the adequacy analysis, rather than delve into whether Guatemalan courts had substantive laws and procedural rules sufficient to adjudicate the claims, the U.S. courts concluded adequacy by the fact that the host state had jurisdiction over all the parties and that the plaintiffs had no reason to fear for their safety as they would not have to appear in a Guatemalan court.[186] This result again evidences the focus U.S. courts place upon a host state's sovereignty.

The public interest factors discussed in *Aldana* illustrate the courts' repeated deferential tone. The appeals court affirmed the district court's assertion that the dispute was 'quintessentially Guatemalan' since it involved one of the country's largest employers, even though the MNC was headquartered in the U.S. Comity considerations were also forefront when the appeals court asserted that were it to retain jurisdiction it would send the tacit message that the "Guatemalan judicial system is too corrupt to justly resolve the dispute."[187] And even though the *Aldana* appeals court decision upheld the FNC dismissal, it accepted that corruption and other deficiencies in the Guatemalan system were facts "at war with the [lower court's] undisputed finding that Guatemalan courts constitute an adequate alternative forum."[188]

In Canada, the FNC doctrine has also been used to bring an effective end to litigation—at least for the purposes of a liability determination against Canadian MNCs. One such example is the Quebec Superior Court's decision in *Cambior*, a claim brought on behalf of Guyanese citizens against a Canadian mining company following a cyanide spill that resulted in water contamination.[189] Like its American counterparts, the court in *Cambior* ignored what it characterized as 'scathing' evidence that Guyana's judicial system "was nothing more than an appendage of the repressive administrative dictatorship it served."[190]

Similar to the U.S. approach that prioritizes comity considerations over the home state's national interest in adjudicating a transnational dispute, the Court in *Cambior* deferred to the Guyanese legal system by accepting evidence that it was adequate even though "there is room for substantial improvement."[191] Soon after a Guyanese claim was commenced, it was dismissed on 'procedural

[185] Aldana v. Del Monte Fresh Produce NA, Inc., 578 F.3d 1283 (11th Cir. 2009) en banc reh'g denied, 452 F.3d 1284 (11th Cir.2006), cert. denied, 549 U.S. 1032 [*Aldana*].
[186] *Id.* at 1290-1292.
[187] *Id.* at 1299.
[188] *Id.*
[189] *Recherches internationales Québec v. Cambior Inc.*, 1998 CanLII 9780 [*Cambior*]. Even though Quebec is the sole civil law jurisdiction in Canada, I include the discussion on *Cambior* as the Court in its FNC analysis found the common law precedents, particularly the Supreme Court of Canada's decision in *Anchem Products Inc. v. B.C. (W.C.B.),* [1993] 1 S.C.R. 897, to be a useful guide in interpreting Article 3135 of the Quebec Civil Code. See *Cambior*, *id.* at para. 25.
[190] *Cambior*, *id.* at para. 73.
[191] *Id.* at para. 80.

grounds' with the only available information online being a press release on Cambior's website saying the claim was struck for "repeated failure to file an affidavit by the plaintiffs."[192]

ii. Act of State

In transnational disputes, act of state is one out of a number of prudential common law doctrines whereby a court decides that overseas conduct is so closely tied to a foreign government that a defendant—public or private—cannot be liable for an alleged wrong.[193] Although its application overlaps among states, in U.S. jurisprudence the doctrine is a defence on the merits whereas in the U.K. it is one of abstention in which British courts deny jurisdiction.[194] Irrespective of that distinction, it has been an obstacle Global South plaintiffs face when they try to procure compensatory remedies from MNCs pursuant to human rights violations.

In *Sabbatino*, the Supreme Court laid out the test to dismiss a case on act of state grounds. A court must assess whether **i)** there was an official act of a foreign sovereign performed within its own territory; and **ii)** the relief sought or the defence interposed would require a court to declare the official act invalid. According to the Supreme Court in *Kirkpatrick*, "[a]ct of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign."[195] According to the *Sabbatino* Court, if those two elements are inconclusive on whether to dismiss a case on act of state grounds, courts are to undertake a three-factor balancing test to determine the doctrine's application. The three factors are whether: **i)** there is a high degree of codification or consensus concerning a particular area of international law; **ii)** the foreign relations implications are high; and **iii)** the government that perpetrated the challenged act of state is no longer in existence.[196]

In the U.S., the doctrine has been successfully invoked to dismiss transnational human rights cases against MNCs. District and appeals courts in California applied the *Sabbatino* factors in a series of decisions concerning alleged acts of torture, forced labour, and confiscation of property by the sitting Burmese government (State Law and Order Restoration Council or "SLORC") against local villagers in the course of oil extraction activities by Unocal Corporation. The prospect for an act of state defense arose due to the fact that Unocal entered into a joint venture with the Burmese military to construct an oil pipeline. In one of the decisions, *Roe v. Unocal Corp.*, the defendant MNC brought a motion to dismiss on the basis that adjudicating the plaintiff's claims would require the district court to "pass judgment on the validity of SLORC's official military acts."[197]

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[192] *See* Cambior, Press Release, 'Dismissal of OMAI-Related Class-Action Suit in Guyana', <https://www.thefreelibrary.com/Cambior%3A+Dismissal+of+OMAI-Related+Class-Action+Suit+in+Guyana.-a083149306>.

[193] Other prudential doctrines include foreign sovereign immunity and the political question doctrine. *See* Michael J. O'Donnell, *A Turn for the Worse: Foreign Relations, Corporate Human Rights Abuse, and the Courts Symposium: Healing the Wounds of Slavery: Can Present Legal Remedies Cure Past Wrongs: Note*, BOSTON COLL. THIRD WORLD L. J. 224, 223–266 (2004).

[194] On the distinction between the doctrine in the U.S. and U.K., *see* John Harrison, *The American Act of State Doctrine*, GEORGET. J. INT'L L. 507, 556–561 (2015).

[195] W.S. Kirkpatrick Co., Inc. v. Environmental Tectonics Corp. International, 493 U.S. 400, 406 (1990) [*Kirkpatrick*].

[196] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423, 428 (1964) [*Sabbatino*].

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

Proceeding through the *Sabbatino* test, the court in *Roe v. Unocal Corp.* determined that SLORC was, in fact, the legitimate Burmese government and thus constituted a foreign sovereign. It also concluded that an order to undertake public works (such as those related to building a pipeline for oil extraction) constitutes an official military act. Concerning the balancing factors, the court held that requiring the plaintiff, a Burmese military officer, to work on a civil construction project without pay does not constitute a violation of international law. Therefore, there was insufficient codification or consensus to set aside the doctrine's application. Also, the plaintiff's claims would "most likely touch national nerves"[198] indicating high implications for foreign relations. Lastly, there was nothing to suggest that SLORC was no longer in existence. The act of state doctrine thus served as a merits-based rule of decision to dismiss the transnational case, leaving the foreign plaintiff no further avenue in the U.S. to seek a compensatory remedy.

III. Weaponizing Activism: Three Principled Bases in Transnational Business and Human Rights Litigation

In light of the legislative and judicial gaps presented in the previous part, Global South host state plaintiffs are left with a stark reality. In theory, they can approach their own courts, but would be confronted with political pressure and judicial systems that have rarely, if ever, adjudicated transnational corporate tort claims against MNCs headquartered in western states.[199] Furthermore, the vast majority of MNC assets that could satisfy a judgment are held outside host states where human rights and environmental harms take place and where a private law claim would be commenced in a domestic court.[200] Without the ability to lobby the political branches of government in home states to ameliorate statutory laws in their favour, Global South victims have persisted in their attempts to advance novel theories of jurisdiction and liability in western common law courts.

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

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[198] *Id.*, at 1081.

[199] *See generally* Craig Forcese, *Deterring Militarized Commerce: The Prospect of Liability for Privatized Human Rights Abuses*, 31 OTTAWA L. REV. 171–212 (1999). *Also see Araya v. Nevsun Resources Ltd., 2016 BCSC 1856* at paras. 71-126, for various deficiencies in Eritrea's judicial system.

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

It is arguably easier for a handful of judges to veer in a different doctrinal direction than it is for a majority faction of legislatures from various political parties to pass legislation that would allow foreign plaintiffs with no voting power to sue western-headquartered MNCs in home state courts. As Alexander Hamilton wrote in *The Federalist No. 78*, courts, compared to the other branches of government, are "the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws."[201] In his 18th treatise, Blackstone wrote that judges are "depositary of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land."[202] Perhaps in no area can that quote be more applicable today than in transnational business and human rights litigation that is marred by legality gaps that beckon for judges to fulfill their roles as 'living oracles' once again.

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

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

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

a. Heeding Franck: Judicial Policy vs. Foreign Policy

Both lawyers representing MNCs in home state transnational business and human rights claims as well as home state governments that have intervened in select cases have asserted a peculiar argument—the adjudication of such claims by home state courts interferes with foreign relations.

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[201] *See* The Avalon Project: Yale Law School, "The Federalist Papers: No. 78", <https://avalon.law.yale.edu/18th_century/fed78.asp>.

[202] *See* The Avalon Project: Yale Law School, "Blackstone's Commentaries on the Laws of England, Section the Third: Of the Laws of England", <https://avalon.law.yale.edu/18th_century/blackstone_bk1ch18.asp> at 69.

Above, I outlined arguments made in the context of the act of state doctrine as well as Posner and Sunstein's position around 'Chevronizing' foreign relations. In addition to those examples, there have been instances in transnational business and human rights disputes in which defendants or intervenors have argued that litigation impinges on foreign policy. For instance, interventions by the Department of State during George W. Bush's tenure as president raised foreign relations concerns.[203]

In *Rio Tinto*, the department submitted a letter to the Central District of California stating that "continued adjudication of the claims … would risk a potentially serious impact … on the conduct of our foreign relations."[204] Similarly, in *Doe v. Unocal*, the Department of Justice argued "the ATS…raises significant potential for serious interference with the important foreign policy interest of the United States."[205] There, the Bush administration not only opposed ATS arguments in that particular case, but opposed the entire line of ATS human rights cases commenced until then. The government argued that "the ATS has been wrongly interpreted to permit suits requiring the courts to pass factual, moral and legal judgment on … foreign acts."[206] Otherwise, in *Re South African Apartheid Litigation*, the U.S. government as well the governments of the U.K., Canada, South Africa, Germany, and Switzerland submitted briefs arguing against the ability of U.S. courts to assert ATS jurisdiction over MNCs for transnational human rights violations. In its brief, the Bush administration argued that the suit would harm its economic interests abroad in addition to attenuating its relations with foreign governments.[207]

Should home state judiciaries treat transnational business and human rights cases as non-justiciable because host state commerce overlaps with concerns about a nation's foreign policy? A logical place to start in order to answer that question is to understand how foreign relations and the law around it have been characterized. Definitions of foreign relations law emphasize that it sits at the intersection of domestic laws and international law or international affairs. Bradley defines it as the "[d]omestic law of each nation that governs how that nation interacts with the rest of the world."[208] For him, the topic concerns a domestic judiciary's authority in cases that relate to international affairs. Similarly, Aust and Kleinlein view foreign relations law as bridging domestic and international laws or, otherwise, setting boundaries between the two.[209]

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

[203] Interventions during the Obama and Trump administrations did not *per se* make foreign policy arguments but did oppose transnational business and human rights claims on other grounds. *See e.g.* Brief of the United States as Amicus Curiae Supporting Neither Party in *Jesner v. Arab Bank, PLC* at 5.
[204] Letter from William H. Taft IV, Legal Adviser of the Department of State, to J. Robert D. McCallum (October 3, 2001) in *Sarei v. Rio Tinto*, No. 00-11695 (MMM) AIJx) (C.D. Cal. 2001).
[205] Brief for the United States of America as Amici Curiae, Doe. v. Unocal Corp., 473 F.3d 345 (No. 00-56603) at 4, 11.
[206] *Id.*
[207] Brief for the United States as Amicus Curiae in Support of Petitioners in *American Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919.
[208] THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 3 (Curtis A. Bradley ed., 2019).
[209] *See generally*, Helmut Philipp Aust & Thomas Kleinlein, "Introduction" in ENCOUNTERS BETWEEN FOREIGN RELATIONS LAW AND INTERNATIONAL LAW: BRIDGES AND BOUNDARIES, (Helmut Philipp Aust & Thomas Kleinlein eds., 2021).

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

Individual judges or judicial panels are tasked with applying the law to a set of a facts *in a single case*. One jurisdictional or merits-based judicial decision does not constitute a country's foreign policy. However, it constitutes precedential doctrine that persists within a judicial system over time. Moreover, as Jinks and Katyal have noted, we need not be so naïve as to think judges play such a seminal role in foreign relations that their opinions in one case will attenuate relations between a set of states.[210] Judicial decisions, lest we forget, are subject to legislative and executive overhauls across the common law world. Yet, to date, in the common law home states analyzed in the previous part there is no explicit indication of legislative intent that would serve as a basis to bar home state courts from adjudicating over transnational business and human rights litigation.

Richard Falk pointed out decades ago that there is an apparent conflict of interest between the judiciary and the executive in matters of international politics. The executive is focused on conciliatory settlement to maintain good relations among states. The judiciary is rights-focused, interested in the resolution of a particular claim before the court.[211] In other words, common law judiciaries ought to be primarily concerned with the litigants before them that have an interest in resolving a private law-based dispute in accordance with established or potential doctrine.

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

Anxiety around foreign relations becomes more presumptuous if we factor in that the home states routinely involved in transnational business and human rights litigation (*i.e.* the U.S., U.K., Canada, the Netherlands, France) are relatively powerful countries with long-standing and entrenched relations with Global South host states where MNCs headquartered on their territories operate. A domestic judiciary adjudicating a case around the private rights of a single or group of host state plaintiffs will not and likely cannot upend those established realities. Rather, as has

[210] Jinks and Katyal, *supra* note 33, at 1253.
[211] Falk, *supra* note 17, at 432.

recently been the case, it is *government* action that tends to weaken foreign relations. Iran's nuclear program, Russia's invasion of Ukraine, China's human rights violations against its Uighur minority, and Saudi Arabia's role in the killing of journalist Jamal Khashoggi have been the source of recent foreign relations anxieties.

Moreover, instances of MNC-related litigation that overlaps with foreign relations has been about an MNC headquartered in a *different* country from the adjudicating court rather being headquartered in the same territory. One example is the arrest and extradition hearings of Huawei executive Meng Wanghou in Canada. There is greater normative authority for a court to adjudicate a claim that concerns a corporate party headquartered within the same sovereign territory. Arguably, a foreign government—particularly one like China's with significant extraterritorial commercial interests—would be perturbed about another country's courts adjudicating a claim against one of its largest corporate actors. However, a home state court in the U.S. or Canada, for instance, that hears a private law claim around the conduct of an MNC headquartered on its territory is well within its adjudicative jurisdiction.

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

Furthermore, MNC liability does not bar a host state government from encouraging and facilitating foreign investment. It may require MNCs to pay host state employees better wages with fewer hours and with safer working conditions; or it may require MNCs to remediate a plot of land or to maintain better oversight of contracted officials or militias so they no longer harm or even kill host state inhabitants. In such instances, private law affects corporate behaviour and, as such, should not be scapegoated for attenuating foreign relations.

b. Filling Transnational Access to Justice Gaps

Falk characterized adjudication as a form of participation. Among other things, participation in the adjudicative process ought to afford parties with the opportunity to present reasoned arguments before a neutral adjudicator pursuant to an alleged breach of a right.[212] Unfortunately, pursuant to the legislative and judicial gaps, presented above, coupled with ongoing problems in host state legal systems, a transnational access to justice gap has developed for plaintiffs who have experienced personal or environmental harms on the part of MNCs headquartered in common law states.

[212] Falk, *supra* note 19.

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

In *The Nature of the Judicial Process*, Benjamin Cardozo wrote that "[t]he rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice."[213] He argued that one function of the courts was to fill gaps in the law "which are found in every positive law in greater or less measure."[214] That scenario now confronts common law judges in home states. For Mendelson, judicial activism was particularly warranted in a democratic society "when other political forces have abdicated their role of directing social change.[215] In the midst of legality gaps then, judges not only have the ability but a duty to advance the common law in a way that allows for transnational corporate human rights claims to be heard on their merits.

A number of doctrines can be addressed when we speak about common law judiciaries filling transnational access to justice gaps. I focus on two areas here. First, given the failure of Congress to amend the ATS as well as the evolving nature of transnational violations, U.S. federal courts may consider reading in additional violations into the ATS's singular provision. In *Doe v. Nestle*, Justice Sotomayor argued for this approach. Otherwise, at least when it comes to tort liability that can directly compensate host state victims, U.S.-based MNCs will be given a *carte blanche* with respect to how they operate in Global South host states. Second, related to FNC dismissals, common law courts can retain, to a greater extent, jurisdiction in transnational business and human rights litigation so host state plaintiffs no longer have to litigate a case from start to finish in a host state court only to learn that a host state court's judgment cannot be enforced in a home state. Also, home state courts can better align FNC and foreign judgment enforcement analyses

As a preliminary remark on this section, for those who may critique the notion that a judiciary cannot *sua sponte* advance principles of corporate liability to fill access to justice gaps should consider the U.S. Supreme Court's 1909 unanimous decision in *New York Central & Hudson River Railroad Co. v. United States*. There, the Court acknowledged that the changing nature of society demanded that corporations, just like natural persons, be held criminally liable for illegal conduct.[216] By construing corporate criminal liability in the absence of legislative guidance, the Court rejected the notion that a corporate entity could not commit a crime. The Court's own words are worth reproducing as they constitute precisely the type of acknowledgement missing on the part of home state judiciaries in transnational business and human rights litigation:

[213] *Id.* at 19.
[214] *Id.* at 12.
[215] Mendelson, *supra* note 8, abstract.
[216] 212 U.S. 481 (1909) [*New York Central*].

> We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and *to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject matter and correcting the abuses aimed at.*[217]

i. Expanding the 'Law of Nations'

Since the ATS's post-*Filartiga* invigoration, a debate has persisted around the requirement that a defendant must violate the 'Law of Nations'. Should that term be interpreted in a way that honours what the 'law of nations' meant when the statute was enacted in 1789 or what the law of nations encompasses today? Most recently, this debate arose in the 2021 decision of *Doe v. Nestle*, a string of plurality opinions that freezes the 'law of nations' to its 18th century understanding.

The potential role for judicial activism comes out of a discussion in *Nestle* around which branch of government rightfully can expand the violations that fall within the ATS's 'law of nations' requirement. Justice Thomas (joined by Justices Gorsuch and Kavanagh) deemed that role to be almost uniquely a legislative task. Conversely, Justice Sotomayor (joined by Justices Breyer and Kagan) did not see that role in ATS disputes to be beyond the judiciary's ability.[218] In his plurality opinion, Justice Thomas immediately took a deferential stance, stating upfront that "[w]e cannot create a cause of action that would let them [the plaintiffs / respondents] sue petitioners. That job belongs to Congress, not the Federal Judiciary."[219]

The language that Thomas uses to support deference to Congress is jarring and something that Justice Sotomayor in her own plurality opinion likewise notices. Thomas asserts that the Court is prohibited from creating a new cause of action under the ATS and "must refrain from creating a cause of action [*i.e.* a new violation under the 'law of nations'] whenever there is *even a single sound reason to defer to Congress*."[220] For that proposition, he cites the Court's 2020 decision in *Hernandez v. Mesa*, which actually did not resort to the "single sound reason" language, even in Justice Thomas's own concurring opinion in that case.[221]

As Thomas and other conservative justices had done before, in *Nestle* he limits the ATS's ambit to the three international law tort violations the statute initially encompassed: violation of safe

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[217] *New York Central*, *id.* at 496 [emphasis added].
[218] Nestle USA, Inc. v. Doe et al., 593 U. S. ____ (2021) [*Nestlé* slip op.]. *See id.*, Opinion of Thomas J. at 5-11; Opinion of Sotomayor J. at 1-12.
[219] *Id.*, Opinion of Thomas J. at 5.
[220] *Id.* at 6.
[221] See *Hernandez v. Mesa*, 140 S. Ct. 735 (2020).

conducts, infringement of the rights of ambassadors, and piracy.[222] He asserted that "[a]liens harmed by a violation of international law must rely on legislative and executive remedies, not judicial remedies."[223] His primary concern with judicial remedies seems to accord with Posner and Sunstein and something that Franck argued against—"[t]he Judiciary does not have the 'institutional capacity' to consider all factors relevant to creating a cause of action that will inherently affect foreign policy."[224]

Thomas indicates, like the Court did in *Hernandez*, that the federal judiciary should avoid "upsetting the careful balance of interests struck by the lawmakers."[225] For him, a judicial expansion of the ATS would amount to second-guessing Congress, a point Justice Sotomayor explains with historical evidence is, in fact, contrary to the intentions of the First Congress. Moreover, as discussed, the concern with Thomas's deferential stance is that the political branches of government in the U.S. and other common law home states have been unwilling to legislate private law remedies for transnational corporate human rights violations.

To be fair, Thomas's opinion does not completely rule out the prospect for judicial discretion to widen the ATS's scope, but places that discretion at such a high threshold that if it was not exercised in a well-documented case of child slavery, as *Nestlé* was, it is difficult to see where that discretion would apply. He views judicial discretion to be "an extraordinary act that places great stress on the separation of powers."[226] That approach is markedly distinct from that of Cardozo and others who saw it well within the judiciary's purview to fill gaps in the law in the face of reticence by the political branches.

In her plurality opinion, Justice Sotomayor argued that Justice Thomas's views around the role of the judiciary to create new causes of action under the ATS are, in fact, unmoored from the ATS's history as well as from the world that surrounds us.[227] She begins her opinion with the critique that likely stands out to many who read Justice Thomas's words: the world has changed in the last two centuries. She writes, "[l]ike the pirates of the 18th century, today's torturers, slave traders, and perpetrators of genocide are *hostis humani generis*, an enemy of all mankind."[228] That understanding alone may be the most robust basis for judiciaries to *sua sponte* fill gaps in the law around transnational business and human rights litigation. Courts ought to update doctrine in accordance with the realities of the world around them, and especially when the political branches have failed to enact new laws to align doctrine with the vicissitudes of globalization.

MNCs have skillfully used now outdated doctrines to avoid the prospect of redistributing their revenues to Global South host state victims pursuant to human rights and environmental harms. What is required is not only the wisdom, but the courage of the 1909 U.S. Supreme Court that did not view reining in powerful corporate actors as beyond its adjudicative powers. Of course, with the current conservative super-majority on the U.S. Supreme Court that increasingly appears to be

[222] *Nestlé* slip op., Opinion of Thomas J., *supra* note 218, at 7.
[223] *Id.* at 6.
[224] *Id.* at 10.
[225] *Nestlé* slip op., Opinion of Thomas J., *supra* note 218, at 8 [internal citation omitted].
[226] *Id.* at 7.
[227] *See generally id.*, Opinion of Sotomayor J.
[228] *Id.* at 2 [Internal citation omitted].

curtailing rather than expanding rights (for U.S. citizens let alone foreign plaintiffs), it is unlikely in the near future that any majority of the Court will be inclined to read in further violations into the ATS's 'law of nations' requirement.

With that said, when there are a sufficient number of justices who take Justice Sotoamyor's view in *Nestle* that the ATS can be expanded without legislative intervention, it should be at the forefront of the Court's collective mind that expanding the scope of the 'law of nations'—extraterritoriality considerations aside—is one of the easiest and most expedient ways to effect transnational corporate tort liability. With Congress likely to be divided on any legislative action to overhaul a future judicial decision that expands the ATS's scope, it is a reasonable assumption that a judicially-instigated expansion would remain in place for the foreseeable future and bind lower court judges in subsequent transnational claims commenced in the U.S.

ii. FNC / Foreign Judgment Enforcement

The second doctrinal area that elicits a potential for common law home state courts to fill transnational access to justice gaps is what Christopher Whytock and Cassandra Robertson characterize as an *ex ante / ex post* flip around FNC dismissals and foreign judgment enforcement, otherwise referred to as 'boomerang litigation.'[229] To elaborate, in the rare instance in which an FNC dismissal in a home state court subsequently results in a host state judgment against an MNC, foreign plaintiffs have had to return to the home state to enforce that judgment because MNC defendants have been unwilling to accept a host state court's decision. Moreover, MNCs retain assets primarily where they are headquartered.[230] Common law home states courts, particularly in the U.S., have applied the FNC doctrine in transnational corporate human rights claims leniently *ex ante* and then taken a stricter approach at the recognition and enforcement stage.

An example of this *ex ante* / *ex post* flip is the dibromochloropropane litigation against Dow, Shell, Dole Foods, and a number of other American MNCs on behalf of thousands of banana farm workers in Latin American host states who became sterile, despite the chemical previously being banned in the U.S.[231] In *Delgado*, a district court in Texas dismissed consolidated claims on FNC grounds holding the cases would be better litigated in Latin America, the Philippines, the Ivory Coast, and Burkino Faso. As an indication the court in *Delgado* prioritized the 'convenience to the parties' and 'local interest' elements of the FNC analysis devised by the Supreme Court in *Gilbert*, it presented an analysis of the adequacy of 12 different host state legal systems in a mere eight pages. Explicitly, the Court's adequacy analysis was woefully deficient.[232] Moreover, the Court only needed one paragraph to address whether a host state judgment would be enforceable in a

[229] *See* Webb, *supra* note 169, at 92; Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COL. L. REV. 1444, 1451 (2011) (discussing boomerang litigation).
[230] No home state with a significant number of domiciled MNC parent companies is a party to the *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, which boasts a single signatory as of 2019. *See* Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.
[231] Shell and Dow manufactured DBCP and Dole used it in host states. See Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1337 (S.D. Tex. 1995) aff'd 231 F.3d 165 (5th Cir. 2000).
[232] *Id.* at 1358-1365.

U.S. court. It surmised that judgment enforceability would not be a concern given that the MNC defendants expressed a willingness to satisfy a host state judgment.[233]

After the FNC dismissal in the U.S., some of the plaintiffs were able to obtain a $489.4 million USD judgment against Shell in Nicaragua—one of the host states that received a superficial adequacy analysis in the FNC dismissal in *Delgado*. After the Nicaraguan judgment, Shell filed a complaint in the Central District of California requesting a declaration that the foreign judgment was unenforceable as it was "rendered under a system that does not provide impartial tribunals."[234] The plaintiffs, now the defendants in the enforcement action, argued that Shell had changed its position from the FNC motion in *Delgado*. They argued that if the court denied enforcement, there would be "no place on this earth where an individual poisoned by DBCP may have his or her day in court."[235] Rather than defer to the host state court's jurisdiction as the court did in *Delgado*, the enforcing court accepted the MNC's argument that it was, in fact, not subject to a Nicaraguan court's personal jurisdiction—even though accepting host state jurisdiction was a condition of the FNC dismissal in the first place. Consequently, the foreign judgment was deemed unenforceable.[236]

Another instance of the *ex ante / ex post* flip revolved around Chevron / Texaco's environmental harms in Ecuador, mentioned above. After FNC dismissals in the U.S., the plaintiffs ultimately obtained a $9.5 billion USD judgment through the Ecuadorian courts against the parent company of Chevron's global conglomerate. The plaintiffs first attempted to enforce the judgment in the U.S. where the parent company has assets. In a full bench trial that resulted in an almost 400-page decision, Kaplan J. of the Southern District of New York ruled that the Ecuadorian judgment was procured through fraud and corruption—a conclusion that corroborates Tarek Hansen and Whytock's assertion that when FNC dismissals neglect the likelihood of enforcement, plaintiffs are left without a meaningful remedy.[237]

Rather than accept the foreign judgment at face value and, in effect, give the Ecuadorian courts the same deference it had in the FNC proceedings, the district court concluded that lawyers for the plaintiff had fabricated evidence, made bribes, and ghost-written documents. Kaplan J. forcefully wrote, "[i]f ever there were a case warranting equitable relief with respect to a judgment procured by fraud, this is it."[238] That decision barred enforcement anywhere in the U.S. and was upheld on appeal with certiorari denied by the Supreme Court.[239]

Like judicial reticence to expand the list of violations that fall within the ATS's 'law of nations' requirement, common law home state courts can choose to take a different approach to the current *ex ante / ex post* flip in transnational business and human rights litigation to avoid systemic transnational access to justice gaps that have left Global South host state victims without a viable

[233] *Id.* at 1369.
[234] Shell Oil Co. v. Franco, 2004 WL 5615656.
[235] Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment at 4, 12–13, Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx) (C.D.Cal. Aug. 3, 2005), 2005 WL 6187868, cited in Whytock and Robertson, *supra* note 229, at 1477.
[236] Shell Oil Co. v. Franco, 2005 WL 6184247.
[237] Tarik R Hansen & Christopher A Whytock, *The Judgment Enforceability Factor in Forum Non Conveniens Analysis*, 101 IOWA LAW REV. 923, 926. ("the foreign enforceability factor is often neglected").
[238] Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 384 (S.D.N.Y. 2014) [*Donziger*].
[239] The plaintiffs subsequently attempted to enforce the Ecuadorian judgment against Chevron's Canadian subsidiary. The Ontario Court of Appeal denied that attempt in *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472.

judicial avenue to seek and recover compensation from MNCs. There are two ways that home state judiciaries can become more activism in this regard.

First, home state courts can assume less deference to a host state's legal system, which elicits an unfounded paternalism that dictates to a host state that it ought to adjudicate the transnational claim in place of a home state court. That was the precise tack taken in *Bhopal* that ultimately sank any chance the Indian victims had of recovering a substantial sum of money from Union Carbide. Home state courts in *Delgado*, *Bhopal*, and in other instances have been too superficial in their analysis of the adequacy of the host state court in question to adjudicate the complex transnational tort claim at hand. Greater due diligence at the FNC dismissal stage would keep more transnational cases in home state courts, which could eventually lead to a liability finding against an MNC for extraterritorial human rights or environmental harms.

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

As mentioned above, an MNC's retained assets are unlikely to be held in a host state subsidiary. Couple that with a home state court's unwillingness to enforce a host state judgment and host state plaintiffs are effectively barred from a private law remedy. John Locke famously wrote that "he who hath received any damage has, besides the right of punishment common to him with other men, a particular right to seek reparation from him that has done it."[240] A right that cannot be enforced to render a remedy is arguably no right at all. Global South host state plaintiffs who can neither have their claims adequately adjudicated by their own courts nor enforced by a home state court are consequently subjected to a law-free zone of impunity in which MNCs can commit human rights and environmental harms without the possibility for compensatory redress.

c. A Contemporary Space for Judicial Morality

Above, I presented two methods by which home state judiciaries may be inclined to take more activist stances in contemporary transnational business and human rights litigation. They can heed Franck's notion that judicial policy is distinct from foreign policy. Otherwise, they can fill transnational access to justice gaps by expanding the 'law of lations' in the ATS or by mitigating what has become an *ex ante / ex post* flip with regards to FNC dismissals and foreign judgment enforcement. In this section, I present a third potential basis for activism to take hold in home state courts: the implementation of judicial morality via a rights-based conception of the rule of law.

[240] John Locke, Second Treatise of Civil Government (C.B. Macpherson, ed., 1980) [emphasis added].

Legal philosophers have previously debated the place of extra-doctrinal judicial morality in resolving disputes in state-sanctioned courts. Inevitably, this debate touches on some fundamental concepts, including how we define law itself as well as what constitutes the rule of law. Generally, legal positivists lie on one end of that debate. Joseph Raz identifies two theses that encompass the positivist conception.[241] The 'sources thesis' requires that all law have an identifiable source. He defines it as the following: "[a] law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument."[242] In other words, a positive legal rule and a fact pattern suffice to decide a dispute before a neutral adjudicator. This is Raz's preferred thesis. He critiques the other two theses that he calls the 'incorporation thesis' and the 'coherence thesis'. The incorporation thesis, prominently supported by H.L.A. Hart, is that "all law is either sourced-based or entailed by source-based law."[243] In essence, the incorporation thesis, albeit slightly broader than the sources thesis, still comes within the realm of legal positivism.

Defended in recent times by Ronald Dworkin, the coherence thesis opposes positivistic views of the rule of law. It asserts that "law consists of source-based law together with the *morally soundest justification of sourced-based law*."[244] The coherence thesis illuminates the divide around how judges should decide 'hard cases' like transnational business and human rights litigation cases that typically have novel fact patterns, ambiguous statutory frameworks, or unstable doctrinal referents.[245]

For Dworkin, the rule of law can manifest either via a 'rule book conception' (akin to Raz's sources or incorporation theses) or a 'rights-based conception.' Under the rule book conception, judges only interpret and apply legislation as intended and enacted by elected branches of government.[246] Relatedly, judges will be reticent to advance the common law and opt to await legislative guidance. In matters of statutory interpretation, the rule book conception manifests via **i)** semantic theories, **ii)** group-psychological theories that inquire into what legislators intended when they devised a particular rule, or **iii)** historical theories that suggest what legislators *would have* enacted if they were tasked with legislating the exact issue that appears before a judge in a hard case.[247] For Dworkin, the rule book conception seeks to rectify the rule book so that "the collection of sentences is improved so as more faithfully to record the will of the various institutions whose decisions put those sentences in the rule book."[248]

The primary justification for the rule book conception is 'the argument from democracy,' which asserts that elected branches of government (as opposed to an appointed judiciary) represent the will of the populous. That will should not be overridden by a small group of legal elites who

[241] *See e.g.* H. L. A. HART, THE CONCEPT OF LAW (3rd ed., 2012); JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS (revised ed., 1988).
[242] RAZ, *id.* at 211.
[243] *Id.* at 210.
[244] *Id.* at 211 [emphasis added].
[245] Ronald, Dworkin, *Political Judges and the Rule of Law* in RONALD DWORKIN, A MATTER OF PRINCIPLE 264 (reprinted ed., 1986).
[246] *Id.* at 262.
[247] DWORKIN, *supra* note 245, at 265–266.
[248] *Id.* at 267.

substitute their morality in place of the public's collective morality that translates into positive legislated rules.[249] Of course, this idea may be subject to challenge as of late on the basis that electoral politics may, at times, render the will of the public somewhat distinct from how elected branches of government are actually constituted. In three of the last five federal elections, the nominee that has garnered fewer votes nationally has won the election on the basis that he won more electoral college seats.

On the other hand, pursuant to a rights-based conception legal persons have moral rights and duties with respect to one another (as well as rights against the state) that may not be captured by the rule book.[250] Upon demand, moral rights can be enforced by judicial institutions erected by the state. Dyzenhaus writes that "[t]he role of judges in Dworkin's conception is reduced to that of transmitting the content of the moral law. … [T]hey have to decide what interpretation of the positive law relevant to the matter shows the law in its best moral light."[251] The ultimate question the rights conception asks is whether the plaintiff has a moral right that ought to be enforced in court. As such, it takes Locke's above principle seriously to oblige a legal remedy to a moral right irrespective of whether the rule book has anything explicit to say about either of them.[252]

The two distinct conceptions divide whether judges should make what Dworkin calls 'political decisions' in hard cases, meaning whether they should elicit a principle other than what is explicitly allowed for or entailed by the rule book. For Dworkin, although the rule book is not the exclusive source of rights, a moral right must be consistent with the rule book. To substantiate that assertion, he gives a radical example he calls the 'Christian principle', which would not fall within his rights conception of the rule of law. Under the Christian principle, a judge in a compensatory claim could deny a damages award against an indigent defendant on the basis that the relatively more solvent plaintiff in the dispute should forego the claim as a sort of alms-giving. Although the Christian principle may adhere to a judge's underlying morality, for Dworkin it contravenes "the vast bulk of the rules in the rulebook" and, as such, would not be a viable political decision by a judge under the rights conception.[253]

Debated at a relatively more philosophical level, there is little explication in the rights-based and rule book conceptions of any specific considerations around foreign plaintiffs. With that said, Dworkin recognizes that the rights conception he supports favours what he calls 'entrenched minorities.' He writes, "since, all else equal, the rich have more power over the legislature than the poor, at least in the long run, transferring some decision from the legislature [to the judiciary] may for that reason be more valuable to the poor."[254] Implicitly acknowledging the argument from democracy, Dworkin posits that the majoritarian bias of legislatures works against entrenched minorities whose rights are ignored by elected branches of government—an assertion that accords

[249] *Id.* at 270–271.
[250] For an overview of the rights conception, *see id.* at 267–269.
[251] Dyzenhaus, *supra* note 43, at 65.
[252] DWORKIN, *supra* note 245, at 267.
[253] *Id.* at 268–269.
[254] *Id.* at 281.

with the lack of legislatively-mandate tort remedies for foreign plaintiffs who allege harm on the part of MNCs that predominantly operate in Global South host states.[255]

Foreign plaintiffs from the Global South neither have the power of the vote nor the power of the purse in home states where their private law claims have been and will likely continue to be adjudicated in the future. These plaintiffs are not practically capable of influencing the legislative process in the way that corporate lobbying groups, for instance, opposed the ATSRA (and will likely oppose the ATSCA). On that basis, home state judges may be inclined to insert a level of morality to conclude that host state plaintiffs ought to be afforded a judicial avenue to compensatory remedies. Of course, a determination to implement judicial morality is intertwined with a recognition that there continue to exist transnational access to justice gaps, both within existing statutory regimes and common law doctrines, including doctrines that overlap with foreign policy considerations. Therefore, morality considerations are not divorced from the other two principled bases for judicial activism that have been presented here.

Penned by now retired justice Rosalie Abella, the Supreme Court of Canada's majority decision in *Nevsun* illustrates how judicial morality can take hold in transnational business and human rights litigation. As discussed above, one of the issues in *Nevsun* was whether the Eritrean plaintiffs would be able to seek tort remedies pursuant to *jus cogens* human rights violations long recognized under international law. Justice Abella affirmed the Court's approach in a prior case entitled *Kazemi* that a *jus cogens* norm "is a fundamental tenet of international law that is non-derogable."[256] In *Nevsun*, the issue before the Court was not necessarily the absence of *any* tort cause of action but whether the Court ought to, in effect, recognize the particularly egregious nature of the MNC defendant's acts.

Abella first affirmed that the human rights violations alleged by the *Nevsun* plaintiffs fell within the sphere of *jus cogens* norms. She then wrote that the "[d]evelopment of the common law occurs where such developments are necessary to clarify a legal principle, to resolve an inconsistency, or to keep the law aligned with the evolution of society. In my respectful view, recognizing the possibility of a remedy for the breach of norms already forming part of the common law is such a necessary development."[257] Only a few paragraphs later she explicitly cites the principle that a "where there is a right, there must be a remedy for its violation."[258]

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

[255] *Id.*
[256] *Nevsun*, *supra* note 123, at para. 83 [internal citations omitted].
[257] *Id.* at para. 118.
[258] *Id.* at para. 120.

for the specific types of harm they alleged. Abella's initial remark in her opinion substantiates that notion:

> …modern international human rights law [is] the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed [*i.e.* through legal remedies].[259]

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

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

> In general, municipal courts should avoid interference in the domestic affairs of other states when the subject matter of disputes illustrates a legitimate diversity of values on the part of two national societies. In contrast, if the diversity can be said to be illegitimate, as when it exhibits an abuse of universal human rights, then domestic courts fulfill their role by refusing to further the policy of the foreign legal system. In instances of illegitimate diversity, where a genuine universal sentiment exists, then domestic courts properly act as agents of international order only if they give maximum effect to such universality.[260]

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

[259] *Id.* at para. 1 [blocked quotes added].
[260] Falk, *supra* note 19, at 7–8.

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

Falk gives the example of the *Eichmann* trial in which an Israeli court asserted universal jurisdiction for Holocaust-related harms. In his view, *Eichmann* illustrated an illegitimate diversity between Israel and a foreign state. Again, in transnational business and human rights litigation, even if there is no explicit governmental or judicial policy that speaks contrary to universal human rights. Rather, the concern with deferring jurisdiction to a host state court is that fundamental human rights violations should not go unaddressed to the extent that a plaintiff cannot recover compensation for egregious harm. Placing those fundamental rights above a host state court's jurisdiction to adjudicate a complex transnational claim (while not straying from the basic principles of the rulebook) would be an appropriate instantiation of judicial morality in future home state business and human rights litigation.

Conclusion

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