August, 2011

Legal Mechanization of Corporate Social Responsibility Through Alien Tort Statute Litigation: A Response to Professor Branson with Some Supplemental Thoughts

Donald J. Kochan

SANTA CLARA JOURNAL OF INTERNATIONAL LAW

Volume 9 2011 No. 1

LEGAL MECHANIZATION OF CORPORATE SOCIAL RESPONSIBILITY THROUGH ALIEN TORT STATUTE LITIGATION: A RESPONSE TO PROFESSOR BRANSON WITH SOME SUPPLEMENTAL THOUGHTS

Donald J. Kochan

Legal Mechanization of Corporate Social Responsibility Through Alien Tort Statute Litigation:

A Response to Professor Branson with Some Supplemental Thoughts[1]

Donald J. Kochan*

I. Introduction

The Alien Tort Statute ("ATS") (or Alien Tort Claims Act ("ATCA"))[2] has presented the doormen to the courthouse doors in the United States, responsible for checking the plaintiffs and defendants against the acceptable guest list, with ever-increasing problems—and once the litigants are inside, the judicial hosts seriously struggle deciding whether to entertain the claims and defenses brought to the party.[3] In Professor Doug Branson's article,

1. This Symposium was held in March 2010 and this Response was completed, except for minor style edits, at the end of July, 2010, prior to the September 17, 2010 decision in Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. Sept. 17, 2010), *petition for reh'g denied,* 2011 U.S. App. LEXIS2200 (2d Cir. Feb. 4, 2011), *petition for cert. filed*, No. 10-1491 (U.S. June 6, 2011). The publication process did not permit time to change this Response to reflect this and other subsequent developments. Although significant, the *Kiobel* decision has certainly not finally decided the issues of ATS corporate liability or the role of the ATS in corporate social responsibility, and the reflections contained herein have continuing relevance in what is still a live debate even in a post-*Kiobel* world.

* Associate Professor of Law, Chapman University School of Law. J.D., Cornell Law School, 1998; B.A. Western Michigan University, 1995. I thank the editors of the Santa Clara Journal of International Law for hosting and inviting me to participate in this 2010 Symposium on Corporations and International Law. This paper was presented as a response to the remarks of Professor Doug Branson at that symposium.

2. 28 U.S.C. § 1350 (2006). *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002) (explaining distinction between "Alien Tort Statute" as opposed to "Alien Tort Claims Act" to refer to section 1350).

3. Many of the thoughts herein are presented for the first time, although some have predicates in earlier work. As space provided for this response has been limited, the curious reader can find my more comprehensive analyses of ATS litigation elsewhere. *See, e.g.*, Donald J. Kochan, *Boyakasha, Fist to Fist:*

Holding Multinational Corporations Accountable? An Achilles Heel in Alien Tort Claims Act Litigation,[4] we are exposed to a new chapter in the doormen's dilemma in the ATS litigation saga and the development of international law.

Professor Branson's primary point of discussion involves the increasing struggle by the courts over whether to increase the scope of entities responsible under the ATS.[5] This response argues that as ATS jurisprudence matures or becomes more sophisticated,[6] the legitimate limits of the law regress.

The primary areas discussed in Branson's article are the developments in corporate ATS liability related to direct action or aiding and abetting theories, and the possibility of reaching up the tiers in a corporate hierarchy based on theories of veil piercing, enterprise liability, joint venture, and agency.[7] Most of his article deals with what I will call the "entity liability" issue resulting from the complex form of multinational corporations:

> [M]ost multinationals are great-great grandparent corporations, or great grandparents, of the entity (subsidiary) doing business and committing the acts of which the plaintiffs complain. Interleaved between the great grandchild corporation and the household name multinational may be two or three layers of subsidiaries, corporations which we might term a parent, a grandparent, and a great grandparent.[8]

Branson's article does a great service in analyzing this interesting and unsettled question of which entities can be sued and held liable under the ATS. The developments have broad implications for the future development of corporate law, as well as for the meaning of international law itself.

II. The Role of the ATS

The ATS grants the federal courts subject-matter jurisdiction over cases in which an alien sues for a tort committed in violation of the law of nations.[9] It has become the principal

Respect and the Philosophical Link with Reciprocity in International Law and Human Rights, 38 GEO.WASH. INT'L L. REV. 349 (2006); Donald J. Kochan, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153 (1998); Donald J. Kochan, *No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103 (2005); Donald J. Kochan, *The Political Economy of the Production of Customary International Law: The Role of NGOs and United States Courts*, 21 BERKELEY J. INT'L L. 240 (2004); Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 FORDHAM INT'L L.J. 507 (2006).

4. Douglas M. Branson, *Holding Multinational Corporations Accountable? Achilles Heels in Alien Tort Claims Act Litigation*, 9 SANTA CLARA J. INT'L L. 227 (2011).
5. *Id.*
6. Branson recognizes that lawyers must be on the ready in ATS litigation, as the introduction of multinational corporations to the field of litigation presents a whole new game. *See, e.g.*, *id.* at 249 ("The number of ancillary issues which are likely to arise, and may be dispositive of a given [ATS] case, has grown exponentially since multinational corporations, and the large resourceful law firms likely to represent them, have arrived on the scene.").
7. *Id.* at 237–48.
8. *Id.* at 228. *See also* Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization,* 35 U.C. DAVIS L. REV. 705, 769 (2002) (discussing parent/subsidiary problems in ATS litigation).
9. The ATS provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006).

mechanism in U.S. courts for attempting to hold nation-states, state actors, and even private individuals or corporations responsible for what are alleged to be actual, complicit, aided or abetted, or conspiratorial violations of international law. Scores of ATS lawsuits against private actors—principally corporations—have been filed in the last fifteen years.[10] As a Financial Times columnist stated: "U.S. plaintiffs' lawyers have . . . made it their chief weapon in a twenty-first century battle over corporate responsibility in an age of globalisation."[11]

While once very sparse and unique, one writer claimed in a June 2009 article that "[t]hese lawsuits have become so routine . . . they've barely caused a ripple in the news cycle."[12] The frequency of lawsuits remains on the rise and the jurisprudential complexities compound with each new case.[13]

The early ATS cases were relatively easy and sympathetic—targeting ruthless regimes and atrocious governmental actors.[14] With easy facts and often default judgments, precedent under the ATS began to build. But as with many evolutionary trends on legal doctrines, early expansion bred further expansion, and ultimately the cases became more complicated.

That is the state of the ATS today, working through growing pains associated with corporations as defendants. And, the further expansion within the corporate defendant pool—attempting to pin liability on parent, grandparent, or great grandparent corporations and up to the top—raises the stakes and complexity of ATS litigation. Prospects of recovery under these ATS cases, according to Branson, are seen as a "bonanza" for human rights lawyers and environmental activists.[15]

III. The Corporate Social Responsibility Debate

It is important to explore how the trend Branson examines relates to the overall corporate social responsibility debate. That debate exists at and between two extremes.[16] One

10. *See* Branson, *supra* note 4, at 228 & n.5 (listing corporate ATS defendants); *see, e.g.*, MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE (2009).
11. Patti Waldmeir, *An Abuse of Power*, FIN. TIMES, Mar. 14, 2003, at 12.
12. Steven Dudley, *Lawsuits Against Multinationals for Abuses Abroad May Be Losing Steam*, MIAMI HERALD, June 15, 2009, at G12; *see also* Lee G. Dunst, *Courts Have Enforced Strict Gatekeeping Function in Dismissing Suits Under the Alien Tort Claims Act*, N.Y.L.J., Oct. 26, 2009, at S6 (stating that ATS suits are "now commonplace for companies with international operations").
13. Nathan Koppel, *Arcane Law Brings Conflicts From Overseas to U.S. Courts*, WALL ST. J., Aug. 27, 2009, at A11 ("Victims of human-rights abuses around the world increasingly are seeking justice American style—by filing lawsuits against deep-pocketed defendants . . . . Both sides agree on one thing: Courts increasingly are willing to consider alien-tort suits and to force companies to answer for their behavior overseas.").
14. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (involving allegations of kidnapping, torturing, and killing by police officials in Paraguay); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 518 U.S. 1005 (1996) (involving allegations of various atrocities including rape, torture, and summary executions by the Bosnian-Serb military forces).
15. Branson, *supra* note 4, at 228.
16. "Corporate social responsibility" is difficult to define. *See* Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1432 (2006). It means different things to different people and it has been the subject of extensive debate for centuries. *Id.* ("The debate over corporate social responsibility is often vague or unrealistic or both. The participants speak in terms of how corporations ought to be run, without specifying the legal changes that will produce these re-

views the concept of corporate social responsibility as essentially nonexistent, unless it happens to be an accidental and spontaneous outcome of otherwise self-interested financial motives of a profit-maximizing corporation.[17] The other believes that corporations should become governmental surrogates, conscripted philanthropists, or otherwise constrained with affirmative perceived-moral obligations that can be compelled by coercive force. For purposes of this discussion, I will characterize this extreme as the "expansionist" view.

The spectrum between these extremes[18] resembles the classic debate over the negative and positive rights of man as they relate to obligation and the justification for intervention by institutions of power. The corporate social responsibility discussion raises three principal issues about how a moral corporation lives its life: how a corporation chooses its self-interest versus the interests of others, when and how it should help others if control decisions may harm the shareholder owners, and how far the corporation must affirmatively go to help right the perceived wrongs in the world in which it operates.[19] Although these questions could be posed simply as ones of policy or morality, with the injection of the ATS into the discussion they become questions that must be answered by examining the dictates and limits of law.[20]

"Corporate social responsibility" is a term that sounds difficult to quibble with as a goal. It exudes a sense of "the good" or "the proper." The marketing of law or ideas is advanced by the terms used to define the goals of expanded limitations on corporate behavior: rights, responsibilities, duties, human rights, morality, ethics, virtue, equality, accountability, and the like. It is against the backdrop of stories of genocide, killings, abuse, oppression, despair, poverty, inequality, slavery, starvation, arms, unjust imprisonment, apartheid, the Holocaust, greed, selfishness, and the like. It is easy to "sell" the ideas and projects that seek to solve or remedy these problems.

The optics favor the expansionist view. Friedman described it as the "already too prevalent view that the pursuit of profits is wicked and immoral and must be curbed and controlled by external forces."[21]

When juxtaposed against these themes, the motives and actions of the big corporation sound just plain bad. The competing terms like profit, wealth, or economic development seem dirty, unclean, or at best sterile. They evoke passions only in their opposition, not in

sults.").

17. The primary proponent of this "profit-maximizing view" is Milton Friedman. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962). *See also* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 32 [hereinafter *NY Times article*].
18. Williams, *supra* note 8, at 711–24 (providing a good summary of the corporate social responsibility literature and the positions along the spectrum).
19. Writing generally on the obligations of man and his relation to the state, Fried's introduction to his exposition in *Right and Wrong* provides an apt set of analogous questions: "This is a book about how a moral man lives his life: how he approaches choices between his own interests and those of others, what he should do if helping one person means hurting another, how far he must take on himself the burdens of the world's suffering." CHARLES FRIED, RIGHT AND WRONG 1 (1978).
20. Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Consent Concept of Corporate Social Responsibility*, 38 LAW & SOC'Y REV. 635, 635–36 (2004) ("[T]he career of the ATCA cases . . . reflects and in turn shapes the contours of a broader struggle: . . . one that deals with the very meaning and scope of the notion of corporate social responsibility . . . .").
21. *NY Times article*, *supra* note 17, at 32.

their promotion. Expansion-inclined corporate social responsibility advocates rely on painting corporations as different—as the anti-good, too wealthy, and too large. The argument that a profit maximization model of corporate governance advances the broad societal goals even better than the expansionist view falls on deaf ears.[22] It is often ignored that the profit maximization theory is conditioned on companies operating within legal constraints.[23] And, even when recognized, the obvious retort is that existing conditions mean we must need more law.

IV. A Category-Based Framework for the Mechanization of Corporate Social Responsibility Objectives

Ultimately, implementing the corporate social responsibility movement's objective requires that we determine the ends or objectives of the enterprise—requiring that we understand the meaning of "responsibility"—and then ascertain the means for achieving such ends.[24] Does the mandate for corporate social responsibility set aspirational goals, provide metrics for evaluation, and fill information gaps, thereby encouraging or incentivizing behavioral change? Or, does it necessitate we *require* changes in behavior and provide institutional enforcement mechanisms with the imprimatur of some lawmaking body with coercive power?

Whatever the measure or the meaning of corporate social responsibility, the mechanisms for accomplishing corporate social responsibility can be loosely grouped into three broad categories:

A. Internally-Induced, Profit-Driven/Voluntary

This first category encompasses all corporate social responsibility measures that are generated purely out of an individual corporation's financial self-interest and the traditionally recognized role of the corporation to be managed to maximize shareholder wealth. There are no external pressures other than those traditional incidents of business affecting profit that motivate corporate behavior, yet nonetheless the corporation's profit maximizing motive may coincide with outcomes that can be defined as socially desirable. The change in behavior grows organically from a business model that seeks to maximize profits within the constraints of the law.

22. For more on this argument, see ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 397, 399 (Prometheus Books 1991) (1776); see also Jan Narveson, *The "Invisible Hand*," 46 J. BUS. ETHICS 201 (2003).
23. ROBERT CHARLES CLARK, CORPORATE LAW § 16.2 (1986) ("[T]he profit-maximizing norm does *not* imply that corporations and their managers have only minimal legal obligations to persons other than shareholders. Quite the contrary is true.").
24. Ribstein, *supra* note 16, at 1432–33.

> [T]he legal issue is not whether the corporation or any of the individuals who manage it should care about society . . . . The question addressed here is whether the law *should* mandate such governance, given lawmakers' inherent limitations, the potential costs of legal rules, and disagreements about appropriate social objectives.
>
> *Id.*

B. Non-Coercive, Pressure-Induced/Quasi-Voluntary

This category includes actions that can be labeled as achieving socially responsible corporate action outside of profit-based decisions to meet consumer demands or other results from purely self-interested profit-maximizing motives. It involves actions that are induced from external pressures short of coercive force. Actions that fall into this category are those not initiated out of a unilateral desire but instead out of necessity—situations where inaction or non-responsiveness would intrude on profits. Actions here are not about maximizing shareholder value but instead more appropriately characterized as about minimizing shareholder harm.

Efforts dedicated to the protection and maintenance of the brand or reputation in order not to lose customers, rather than enhancement of the brand or reputation in order to gain customers, fall within this category.[25] Responses to public campaigns, boycotts, shaming techniques, shakedowns, and other pressure tactics from individuals or interest groups that require financial outlays but provide no net financial gain also fall into this category.[26] In this category, appeasement and silencing of opposition motivates corporate behavior. Promises can be extracted in consideration for cessation of campaigns against corporation or agreements not to sue. Thus, the threat of litigation may be the type of pressure imposed, resulting in an alteration in corporate behavior as a result of pre-litigation or pre-filing settlements of differences.

The currency by which a corporation may satisfy the pressure imposed against it could involve alterations in behavior, expenditures on public relations campaigns, or contributions to funds or charities of allegedly affected groups. It could take the form of outright monetary payments, ceasing or altering operations to comply with demands or private codes or protocols, enacting codes of conduct, joining compacts, establishing corporate social responsibility departments, instituting training, committing to transparency initiatives like contracting for external audits, and other mechanisms that either alter behavior or otherwise satisfy those interests applying some form of pressure to the corporate operation.

C. Coercion-Induced/Involuntary

The final category includes actions that advance corporate social responsibility not as a matter of choice but instead due to an enforceable legal obligation. This category includes true legal enforcement mechanisms, involving the creation of jurisdiction, enforceable rights, duties, causes of action, and remedies, along with the creation or recognition of institutions given the authority and coercive power to enforce the social responsibility dictates. Obviously, the corporate ATS lawsuit falls in this category.

Within this category, corporate behaviors must change to comply with law and to avoid the imposition of liability or penalties when laws govern their behavior. If they deviate

25. Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT'L L. 41, 47 (2010) ("[A] company's reputation has become one of its most valuable assets.").
26. Lauren A. Dellinger, *Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act Litigation While Simultaneously Building a Better Business Reputation*, 40 CAL. W. INT'L L.J. 55 (2009) (discussing harm to reputation and corporate responses).

from legal standards, corporations may be subject to civil liability, fines, criminal penalties or other coercive measures. The expansionist objectives get teeth through enforceability and move beyond mere hopes of change.

Proactive corporations will adjust their behavior at the fear of the imposed penalties or liability from these coercive measures or even at the mere initiation of litigation, as each can tarnish their reputations.[27] After an ATS suit is filed much of the damage is done, so preventative intervention is important.[28] The mere threat or risk of liability can induce settlement or litigants can extract promises of category two actions in exchange for dismissing a case.[29] Finally, to the extent that lawsuits create settled law, precedent brings the stamp of legitimacy and provides valuable leverage for expansionists in future campaigns.

V. Legal Mechanization Merges Expansionist Views with Accepted Constraints of the Profit-Maximizing View

The law can provide the strongest stamp of acceptance behind a social responsibility norm or objective.[30] The closer those advocating expansive corporate social responsibility can equate their calls for corporate behavioral change to *legal obligations*, the more they can cut away at the objections from those espousing a "profit maximization within the law"-only constraint on corporate decision making. First, settled legal rules can govern corporate conduct rather than mere goals. Second, if the enforceable law takes an expansionist view, then the strict view is forced to incorporate it through the accepted constraint on profit-maximization: Compliance with the law. The distinction between the profit maximization view and the expansionist view collapses.

VI. Impacts of the ATS on Corporate Conduct

The ATS is arguably the most important tool under the coercion-induced/involuntary category. It provides a means for reaching states, individuals, and corporations, and holding them to legally enforceable standards.[31] Thus, how the ATS develops is pivotal to the most powerful mechanization opportunity for corporate social responsibility ideals.[32]

Branson states in closing that, "[t]he ultimate objective should be to send a message to corporate boardrooms and to obtain a recovery for persons who have suffered very real harms" in the form of using lawsuits to extract promises and induce changes in behavior.[33] As a result, he claims, "ATS suits thus have already served one of the highest and best pur-

27. ATS litigation avoidance encourages companies to change behavior. *Id.* at 74–75.
28. *Id.* at 59 ("Even though cases regarding human rights violations often result in settlement or dismissal, the tarnish to a corporation's reputation remains.").
29. Williams, *supra* note 8, at 772 ("[T]hese cases may be important almost irrespective of their outcome, because they represent a form of leverage and a forum for leverage being newly brought to bear . . . .").
30. *Id.* at 724 ("[W]ell-designed laws, organizational designs, and liability and enforcement structures are the necessary theoretical precondition for the predominant view to be correct.").
31. Shamir, *supra* note 20, at 637 ("ATCA cases [are] one element in a wide spectrum of attempts to tame corporate behavior by inventing new global regulatory regimes.").
32. Williams, *supra* note 8, at 724–66 (discussing problems and possibilities of using the ATS).
33. Branson, *supra* note 4, at 249.

poses they possibly could have."[34] That should not be the purpose of law.

We should not praise the ATS as a success for accomplishing settlements by manipulating the law in a manner that opens the courthouse doors simply to provide leverage to bully corporations into social reform. But setting aside whether settlement "should" be an "ultimate objective" of ATS suits, Branson is correct to note that settlement is a primary objective of many litigants.

Early ATS plaintiffs were faced with incomplete and unsatisfactory victories against nation states or foreign leaders, the principal tortfeasors.[35] Sovereign immunity, personal jurisdiction, political question doctrine, act of state doctrine, and other prudential rules make many nations or governmental actors difficult to sue in United States courts, even with the existence of the ATS. Moreover, some state actors proved to be judgment-proof or otherwise sufficiently insulated from collection on judgments, making victories against them somewhat hollow, at least economically so.[36] Corporations do not pose as many problems. And, the quest to expand entity liability within the corporate ATS lawsuit is simply following a well-known course in the evolution of tort theories—the search for the deepest pockets.

The ATS—its threat of liability and brand-damaging effects—is a tool, a weapon, and an instrument to wield against corporations to induce change and achieve social reform. The current uncertainty in ATS law or existence of risk is a motivator for settlement or behavior alteration,[37] as are the extensive litigation costs, time consumed, and potential damage to brand and reputation from protracted litigation. Settlement also avoids discovery in many cases that may dredge up uncomfortable images that could damage the corporation regardless of whether any culpability is established in court. As stated in a special report in The Economist:

> Most of the rhetoric on CSR may be about doing the right thing and trumping competitors, but much of the reality is plain risk management. It involves limiting the damage to the brand and the bottom line that can be inflicted by a bad press and consumer boycotts, as well as dealing with the threat of legal action. In America, the legal instrument of choice . . . is the Alien Tort Claims Act.[38]

Settlement value can be quite high, ranging from agreements to changed behaviors to large payments like the recent $15 million settlement by Shell in 2009 to resolve ATS litigation regarding its operations in Nigeria.[39]

The expansion beyond subsidiaries and toward parent and grandparent corporations as

34. *Id.*
35. Koppel, *supra* note 13, at A11 ("[C]orporations are being used unfairly as a surrogate for foreign governments in these cases.").
36. Dellinger, *supra* note 26, at 91 ("[ATS] litigation has largely been unsuccessful in the sense that no solid judgments against these corporations have been entered . . . . In the past, individuals have used the ATS merely to obtain a sense of justice, realizing that the monetary award may never come.").
37. In a non-ATS context, the Supreme Court recognized that when there is "uncertainty of the governing rules, entities subject to secondary liability as aiders and abettors may find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, 511 U.S. 164, 189 (1994).
38. *A Special Report on Corporate Social Responsibility: A Stitch in Time*, ECONOMIST, Jan. 18, 2008, at 66. *See also* Dudley, *supra* note 12, at G12 ("It seems to be about minimizing legal risks").
39. Dunst, *supra* note 12, at S6.

liable entities is motivated by the fact that subsidiaries face some of the judgment infirmities faced by suits against state actors—their assets cannot be reached or are not large enough to obtain the full recovery that plaintiffs believe that they are due. Branson acknowledges the same when he says that "the goal is to reach the top," to reach a household name and overcome the problems of subsidiaries (or even immediate parents) that are corporations with few or no assets.[40]

VII. Expanding Entity Liability in the Search to Cure Every Ill

The developments Branson highlights are demonstrative of the ethos of the expansionist corporate social responsibility view that bad things happen in the world and someone must pay. Not every wrong, even moral wrong, can be righted by the law.[41] "While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world."[42] Neither domestic nor international law is intended to provide a legal remedy for every wrong, harm, injury, or unfortunate social condition. Arguments to the contrary in the ATS cases and elsewhere, although pulling at the heartstrings, misconstrue legal doctrines.[43]

VIII. Increasing Entity Liability Threatens the Vitality of the Corporate Form

The threat of corporate liability under the ATS should be taken seriously by corporations and the public at large. Large organizations, like corporations, "increase social welfare, because without them certain large-scale business ventures would be impossible or would be carried out in a wasteful way."[44] Every increase in liability, and every expansion of the definition of responsible parties for alleged wrongs, threatens to deter investment in many of the countries where ATS wrongs allegedly occur.

Furthermore, the corporate form itself and the use of subsidiaries is a long recognized, vital component to the proper and efficient functioning of the corporate system. This includes the separation of ownership, assets, control, and liabilities. The necessity of such separation is even more acute for multinational corporations with entities operating in geographically and geopolitically diverse markets and governance systems.[45]

It bears repeating that in discussing the importance of a strict adherence to a presumption against piercing the corporate veil, the U.S. Supreme Court explained in *United States v. Bestfoods* the following fundamentals: "It is a general principle of corporate law deeply 'in-

40. Branson, *supra* note 4, at 229.
41. *See, e.g.*, Bush v. Lucas, 462 U.S. 367, 373 (1983) (explaining that courts will not fashion a remedy without a right, and even then only when considering broader policy).
42. Tobin v. Grossman, 24 N.Y.2d 609, 619 (N.Y. 1969).
43. *See* Howard v. Lecher, 42 N.Y.2d 109, 113 (N.Y.1977) ("There can be no doubt that the plaintiffs have suffered and the temptation is great to offer them some form of relief. Ideally, there should be a remedy for every wrong. This is not the function of the law . . . .").
44. CLARK, *supra* note 23, at 679–80.
45. It is worth noting that there is nothing particularly distinct about entity liability with multinational corporations that calls for the application of different rules under the ATS than would traditionally be applied to the assessment of liability between layers of a corporate family.

grained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries."[46] This "bedrock principle"[47] applies unless a statute clearly rejects its operation. The ATS certainly does not do so.

Thus, we are left with the limitation that a parent may be held liable only if the wrongs were the result of direct action by the parent or if the corporate *form* is misused to accomplish wrongs that are analogous to fraud, thereby allowing for a piercing of the corporate veil.[48] That piercing exception is not intended to make the corporate parent liable generally for all wrongs that may be attributable to separate actions of its subsidiary. To do otherwise, as has been attempted in the cases Branson discusses, dismantles the separation of ownership and control in the parent/subsidiary relationship.

IX. Let Us Not Lose Sight of the Cart

Branson's focus on the scope of corporate entity defendants as the leading emerging issue in ATS litigation regarding corporations is instructive and valuable. In explaining this focus, Branson says that arguments focusing on other pieces of the ATS controversy related to the meaning and legitimacy of international law itself, "put the cart before the horse."[49] As my final comment, I hope that we do not lose sight of that cart. Entity liability issues should not deflect attention from additional concerns with the ATS regarding jurisdictional issues, substantive legitimacy of the laws claimed to exist and apply, foreign policy concerns, and the implications of increased liability for economic growth and development. To do so would be to grant those vital debates, and others that linger, a premature death.

X. Conclusion

As the courts continue to address the entity liability issues Branson describes, the traditional limits of the law will be tested. Every expansion of liability, whether it is in terms of the persons or entities who may be sued or the nature of claims recognized as creating legal obligations, should be viewed cautiously. As a *Washington Post* editorial noted, "[y]ou don't have to be indifferent to human rights abuses to have misgivings about" the expanding reading of the ATS.[50]

46. United States v. Bestfoods, 524 U.S. 51, 61 (1998) (citing William O. Douglas & Carroll M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193 (1929)). There is some merit to Branson's claim that *Bestfoods* gives plaintiffs some hope in piercing the corporate veil, Branson, *supra* note 4, at 242–43, but as a general matter, the Court reinforced a very strict presumption against piercing.
47. *Bestfoods*, 524 U.S. at 62.
48. *Id.*
49. Branson, *supra* note 4, at 230.
50. Editorial, *Old Law, New Questions*, WASH. POST, July 20, 2004, at A16.