

I. INTRODUCTION

Between 1989 and 2004, Chiquita Brands International ("Chiquita") helped finance a brutal campaign of torture, murder, and imprisonment.¹ Chiquita, the second largest banana producer in the world,² had paid over one million dollars to three violent terrorist groups.³ Characterized as "security payments," and concealed from shareholders, these payments were made to suppress union activity and provide security against guerrilla fighters in the Colombian banana fields.⁴ In reality, Chiquita's payments facilitated drug trafficking, financed terrorism, and perpetuated a civil war.⁵

In March of 2007, Chiquita agreed to five years of corporate probation and a criminal fine of twenty-five million dollars.⁶ Shortly after Chiquita's sentencing, its shareholders filed a derivative action, alleging the directors breached their fiduciary duties by continuing to make the payments to the terrorist groups.⁷ By 2011, more than four thousand Colombian citizens also brought action against Chiquita seeking to hold the corporation liable for its involvement with the terrorist groups.⁸ The plaintiffs claimed subject matter jurisdiction under the Alien Tort Statute

¹*In re Chiquita Brands Int'l, Inc. Alien Tort Statute and Shareholder Derivative Litig.*, 792 F. Supp. 2d 1301, 1309-10 (S.D. Fla. 2011); Verified Consol. S'holder Derivative Complaint at 1, *In re Chiquita Brands Int'l, Inc. Alien Tort Statute and Shareholder Derivative Litig.*, 792 F. Supp. 2d 1301 (S.D. Fla. 2011) (No. 08-01916) [hereinafter *Chiquita Shareholder Derivative Complaint*]; see also *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1187-88 (11th Cir. 2014). Chiquita Brands International is an Ohio corporation. *Id.* at 1185. Also named as a defendant in the litigation is Chiquita Fresh North America, LLC, a Delaware company. *Id.*

²*Chiquita Shareholder Derivative Complaint*, *supra* note 1, at 2.

³See Gov't Sentencing Memorandum at 2-3, *United States v. Chiquita Brands Int'l, Inc.*, No. 07-055 (D.D.C. Sept. 17, 2007) [hereinafter *Chiquita Sentencing Memorandum*]. Chiquita made payments to the United Self-Defense Forces of Colombia ("AUC"), the Revolutionary Armed Forces of Colombia ("FARC"), and the National Liberation Army ("ENL"). *Id.*

⁴*In re Chiquita*, 792 F. Supp. 2d at 1310.

⁵See *id.*

⁶*Id.*; see also *Chiquita Sentencing Memorandum*, *supra* note 3, at 20.

⁷*Chiquita Shareholder Derivative Complaint*, *supra* note 1, at 1.

⁸*In re Chiquita*, 792 F. Supp. 2d at 1310.

("ATS"), a long standing U.S. statute which confers jurisdiction in federal court for claims brought by aliens for violations of international law.⁹

The Chiquita litigation provides the most illustrative example of an emerging nexus between the efforts of foreign victims to hold corporations liable under the ATS, and the claims of shareholders alleging directors breached their fiduciary duties by engaging in such violations.¹⁰ In *Cardona v. Chiquita*, the Eleventh Circuit's holding, that ATS jurisdiction does not reach Chiquita, highlights the current disagreement among the circuits as to whether the statute applies to corporations.¹¹ In addition, the derivative suit brought by shareholders against Chiquita's board demonstrates the threat to corporate directors whose business decisions perhaps involve the corporation in violations of international law.¹²

This Note will therefore focus on issues of corporate liability through jurisdiction granted by the ATS and the concurrent claims by shareholders alleging a breach of fiduciary duty. Part II outlines the existing duties owed by corporate directors pursuant to Delaware law.¹³ Part II also traces the early development of ATS jurisprudence.¹⁴ Part III then analyzes the current uncertainty regarding the extent to which the ATS reaches corporations.¹⁵ Part IV evaluates the Chiquita litigation to illustrate how shareholders' claims of breach of fiduciary duty, coupled with the threat of ATS liability, necessitate further consideration of corporate policies regarding international law.¹⁶ Finally, in an attempt to consider those threats prospectively, Part V recommends that

⁹28 U.S.C. § 1350 (2006). *See also infra* Part II.D.

¹⁰*See* Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 87 (2005).

¹¹*Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1192 (11th Cir. 2014).

¹²Chiquita Shareholder Derivative Complaint, *supra* note 1, at 1; *see also* Williams, *supra* note 10, at 87.

¹³*See infra* Part II.A-C.

¹⁴*See infra* Part II.D.

¹⁵*See infra* Part III.

¹⁶*See infra* Part IV.

corporate boards adopt more stringent governance policies that explicitly mandate both compliance with international law and structural mechanisms to ensure such compliance.¹⁷

II. BACKGROUND: EXISTING FIDUCIARY DUTIES AND THE REDISCOVERY OF THE ALIEN TORT STATUTE

Chiquita's directors characterized the payments to the terrorist groups as the "cost of doing business" to protect their interests in Colombia.¹⁸ The payments, fraudulently recorded in corporate books as "security payment[s]," were meant to suppress union activity among the banana growers, thus ensuring the production of more bananas and secure profits for the corporation.¹⁹ Chiquita's directors may have argued that their decision is supported by a conception of corporate purpose that prioritizes the interests of shareholders over those of other constituencies.²⁰ Were it true such a conception exists exclusively, Chiquita's directors could have sought protection under the business judgment rule, and shielded themselves from claims of breach of fiduciary duty.²¹ However, the business judgment rule does not exist without limitations.²² In Delaware, from

¹⁷See *infra* Part V.

¹⁸See Chiquita Sentencing Memorandum, *supra* note 3, at 5 ("[O]ne officer of defendant Chiquita remarked about the payments: 'Cost of doing business in Colombia—maybe the question is not why are we [Chiquita] doing this but rather we [Chiquita] are in Colombia [*sic*]'"); *but see* CHIQUITA CORP. RESPONSIBILITY REPORT 25 (Nov. 17, 2006) available at <http://www.chiquita.com/getattachment/a09f6fd5-2c11-4475-86c6-af5320d00a81/2006AR-CRsection.pdf.aspx> (maintaining that the payments were made "to protect the lives and safety of its employees" and were always "motivated by [its] good faith concern for the safety of [its] employees").

¹⁹See Chiquita Shareholder Derivative Complaint, *supra* note 1, at 1. It was alleged that, in addition to preventing unionization and protecting the banana fields, the payments directly funded the terrorist groups' shipment of arms and narcotics. *Id.* Chiquita's executives also facilitated the procurement of weapons and ammunition for the groups in 2001. *Id.* at 5.

²⁰See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 671 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders.").

²¹See David Millon, *Human Rights and Delaware Corporate Law*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 173, 174-75. (2012).

²²See *id.*; see William M. Lafferty et al., *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law*, 166 PENN ST. L. REV. 837, 842 (2012) ("[The business judgment rule] does not give a director free reign to act without due care."); see also Virginia Harper Ho, *Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 COLUM. J. TRANSNAT'L L. 113, 147 (2013) ("Delaware corporations' stakeholders arguably include not only their own stakeholders, but also those of foreign affiliates who contribute to the success of the corporate group as a whole.").

which much of corporate law has emanated,²³ statute and case law have established and implemented not only strict fiduciary duties but also, at the very least, created a space within which corporate governance may consider other interests.²⁴

Certainly directors who harm the corporation through its involvement with violations of international law may be exposed to derivative suits alleging a breach of fiduciary duty.²⁵ Such harm to the corporation may come as a result of criminal prosecution,²⁶ as well as civil liability sought under the ATS by victims alleging that the corporation aided and abetted violators of international law.²⁷ The corporate decision to knowingly engage in international law violations thus implicates both the potential for ATS litigation and a breach of fiduciary duty.²⁸

A. *The Fiduciary Duties of Care and Loyalty*

The decision to conduct business abroad is made by corporate directors.²⁹ In this context, corporate law governs and vests in the directors the authority to manage the business decisions of the corporation.³⁰ In fulfilling this managerial authority, corporate directors are charged with the fiduciary duties of care and loyalty to both the corporation and its shareholders.³¹ When a business decision is challenged as not made in the best interest of the corporation or shareholders, courts do

²³See Hon. Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 771-72 (2009) (discussing Delaware's leadership in corporate law). In a practical context, Delaware law would apply when financial harm to a Delaware corporation is caused by violations of international law that were connected to conduct in Delaware. See Ho, *supra* note 22, at 142. For further discussion of Delaware's relevance to the issue of corporate liability for violations of international law, see *id.* at 140-43.

²⁴See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 966 (Del. 1985). In evaluating business decisions, corporations may consider "the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)" *Id.*

²⁵See, e.g., *Chiquita Shareholder Derivative Complaint*, *supra* note 1, at 1.

²⁶See *Chiquita Sentencing Memorandum*, *supra* note 3, at 20.

²⁷See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011) ("[A]iding and abetting liability is well established under the ATS.").

²⁸See *Williams*, *supra* note 10, at 87; Ho, *supra* note 22, at 147.

²⁹See *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1192 (11th Cir. 2014) (Martin, J., dissenting).

³⁰DEL. CODE. ANN. tit. 8, §141 (2014).

³¹See *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

not supplant their judgment for the judgment of corporate boards.³² Under this business judgment rule, corporate directors are presumed to have "acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company."³³ To rebut the business judgment rule, shareholders must show a breach of either care or loyalty.³⁴

Although the duty of care is not defined by statute in Delaware, it has been primarily characterized as the duty to avoid "gross negligence."³⁵ The Delaware Supreme Court has maintained that the duty of care requires directors to make informed decisions with a requisite amount of attention to detail and process.³⁶ In practice, the directors must slow the decision making process and act in "an informed and deliberate manner."³⁷ The duty of care is thus procedural, not substantive.³⁸ Directors must inform themselves of all material information before engaging in business decisions.³⁹ A grossly negligent failure to do so, even without fraud, violates the duty of care.⁴⁰

Corporate directors also owe the duty of loyalty to the corporation and its shareholders.⁴¹ A director must put the interests of the corporation and its shareholders ahead of the director's own personal interests.⁴² While often not directly implicated by the decision to conduct business in a

³²See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

³³*Id.*

³⁴Lafferty, *supra* note 22, at 842.

³⁵See *Aronson*, 473 A.2d at 812; *Van Gorkom*, 488 A.2d at 873; *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 192 (Del. Ch. 2005) (defining gross negligence as "reckless indifference to or a deliberate disregard of the whole body of stock holders") (internal citation omitted).

³⁶*Van Gorkom*, 488 A.2d at 872-73.

³⁷*Id.* at 873.

³⁸See *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000) ("Courts do not measure, weigh or quantify directors' judgments Due care in the decisionmaking context is *process* due care only.").

³⁹See *id.*

⁴⁰See Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 465 (2004).

⁴¹Lafferty, *supra* note 22, at 844.

⁴²See *Cede & Co. v. Technicolor Inc.*, 634 A.2d 345, 361 (Del. 1993).

foreign country with potential violators of international law,⁴³ the fiduciary duty of loyalty also encompasses a director's obligation to act in good faith.⁴⁴

B. *Good Faith and Disclosure*

Although often grouped with the duties of care and loyalty, "the obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty."⁴⁵ A director breaches the duty of good faith by intentionally acting with a purpose other than that of advancing the best interests of the corporation, by acting with the intent to violate applicable law, or by intentionally failing to act in the face of a known duty to act.⁴⁶ This obligation is most overtly breached by the business decision to engage in illegal activity.⁴⁷

Like the duty of good faith, the duty of disclosure is not an independent fiduciary duty, but rather is viewed as being derived from the duties of care and loyalty.⁴⁸ The duty of disclosure requires directors to act with "complete candor" in certain situations and to disclose "all of the facts and circumstances" relevant to the board's decision.⁴⁹ The Delaware Supreme Court characterized such facts as those that are "material" to the business decision.⁵⁰

⁴³*But see* Chiquita Shareholder Derivative Complaint, *supra* note 1, at 12-14 (arguing that the plea deal was made in return for a promise from the government not to prosecute individual Chiquita directors).

⁴⁴Lafferty, *supra* note 22, at 847.

⁴⁵Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

⁴⁶*In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006).

⁴⁷*See, e.g.*, Chiquita Shareholder Derivative Complaint, *supra* note 1, at 33; *see also* Williams, *supra* note 10, at 87.

⁴⁸*See* DEL. CODE. ANN. tit. 8, § 251 (2014) (requiring stockholder approval of a merger); *id.* § 271 (requiring stockholder approval of the sale of all or substantially all of a corporation's assets); *id.* § 275 (requiring stockholder approval of the dissolution of a corporation).

⁴⁹*See* Lafferty, *supra* note 22, at 848; Lynch v. Vickers Energy Corp., 383 A.2d 278, 279, 281 (Del. 1977).

⁵⁰*See* Smith v. Van Gorkom, 488 A.2d 858, 890 (Del. 1985) ("In reality, 'germane' means material facts."); *see Lynch*, 383 A.2d at 281 (defining germane as "information such as a reasonable shareholder would consider important in deciding whether to sell or retain stock").

C. Oversight and Compliance

Inherent in the fiduciary duties of care and loyalty and the obligation to act in good faith is the duty of oversight and compliance.⁵¹ The duty of oversight and compliance requires directors to act in compliance with the law and provide adequate mechanisms of oversight to ensure all business decisions and activities throughout the enterprise are within the law.⁵² The Delaware Chancery Court defined this duty when it held that "a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is necessary condition to liability."⁵³ While the standard to satisfy the duty of oversight and compliance may seem quite low—directors need only to "attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists"⁵⁴—in the context of international law violations, with such uncertainty as to whether corporations can be liable, this duty is paramount.⁵⁵

D. The Alien Tort Statute

The risk to directors of breaching a fiduciary duty is heightened by the emergence of claims brought against corporations under the ATS.⁵⁶ The ATS provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of

⁵¹Ho, *supra* note 22, at 156.

⁵²*Id.* at 157.

⁵³*In re Caremark Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

⁵⁴*Id.* at 970.

⁵⁵*See infra* Part IV.

⁵⁶*See Williams, supra* note 10, at 87; *see* Charles W. Brower, *Calling All NGOs: A Discussion of the Continuing Vitality of the Alien Tort Statute as a Tool in the Fight for International Human Rights in the Wake of Sosa v. Alvarez-Machain*, 26 WHITTIER L. REV. 929, 949 (2005) ("Litigation has been, by far, the most effective means of accomplishing long-term progress towards protecting individuals from egregious human rights abuses.").

the law of nations or a treaty of the United States."⁵⁷ Thus, this statute confers federal subject matter jurisdiction⁵⁸ when three conditions are met: (1) an alien sues (2) for a tort (3) committed "in violation of the law of nations or a treaty of the United States."⁵⁹ Enacted in the first Judiciary Act of 1789, the statute lay mostly dormant for almost two hundred years⁶⁰ until it was "discovered"⁶¹ in *Filártiga v. Peña-Irala* in 1980.⁶² In *Filártiga*, the Second Circuit held that a foreign state official could be liable for state-sanctioned torture against foreign citizens under the jurisdiction granted by the ATS.⁶³ After *Filártiga*, ATS jurisprudence would take another leap forward in *Kadic v. Karadzic* when the Second Circuit held that even private actors could be held

⁵⁷28 U.S.C. § 1350 (2006). The Alien Tort Statute [hereinafter "ATS"] was a provision of the first Judiciary Act of 1789. Ch. 20, § 9(b), 1 Stat. 73, 77 (1789). It has since been codified as the Alien Torts Claims Act in 28 U.S.C. § 1350 (2006). The language of the original provision has remained largely unchanged.

⁵⁸*Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004). While much about the ATS is debated, it is clear that the ATS is entirely jurisdictional; it does not create a separate cause of action. *Id.*

⁵⁹§ 1350. For claims to be successfully brought under ATS jurisdiction, they must allege violations of the "law of nations." *Id.* Courts have since interpreted that term to mean those laws that are fundamental norms of what is now called "customary international law." *See* *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1015-17 (7th Cir. 2011); *see also Sosa*, 542 U.S. at 715. To further elaborate on the term, courts recognize that what were violations of the "law of nations" in the eighteenth century can, and indeed have, evolved, albeit cautiously, to include new violations not specifically anticipated in 1789. *Id.* at 724-25. Early conceptions of the "law of nations" included primarily three offenses: the violation of safe conducts, the infringement of the rights of ambassadors, and piracy. *Id.*; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769). Customary international law currently includes prohibitions against torture, genocide, war crimes, and enslavement. *See Doe v. Unocal Corp.*, 395 F.3d 932, 945 (9th Cir. 2002).

⁶⁰*See* Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385, 391-92 (2010). ATS jurisdiction was recognized in two early opinions of the Attorney General and in several early judicial opinions. *Id.* The ATS was successfully used to extend jurisdiction in only two published cases prior to 1980. *Id.*

⁶¹Donald J. Kochan, *Corporate Social Responsibility in a Remedy-Seeking Society: A Public Choice Perspective*, 17 CHAP. L. REV. 413, 452 (2014); *see also IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (describing the ATS as an "old but little used section [that] is a kind of legal Lohengrin, although it has been with us since the first Judiciary Act, no one seems to know whence it came").

⁶²630 F.2d 876 (2d Cir. 1980).

⁶³*Id.* at 889. A Paraguayan state official had tortured and murdered the son of outspoken opponent of the Paraguayan government. *Id.* at 878. When the victim's sister, who was in the United States seeking political asylum, learned that Peña-Irala was also in the country on an expired visa, she brought suit in district court claiming ATS jurisdiction. *Id.* at 878-798.

liable under the ATS.⁶⁴ Extending jurisdiction to private violators expanded the scope of liability even further and created the necessary precedent to extend jurisdiction to corporations.⁶⁵

The Supreme Court's decision in *Sosa v. Alvarez-Machain*, further defined the contours of the ATS and set in motion the current debate over the statute's applicability to corporations.⁶⁶ In *Sosa*, the Court analyzed what types of claims could constitute violations of international law under the ATS.⁶⁷ The Court held that in analyzing claims "based on the present-day law of nations," courts must exercise "judicial caution" and require that only those violations that are "specific, universal, and obligatory" will be actionable.⁶⁸ While *Sosa* dealt with the alleged kidnapping of a Mexican citizen by the U.S. government, Justice Souter anticipated in a footnote the issue of whether ATS liability reached a "private actor such as a corporation."⁶⁹

III. THE UNCERTAINTY OF CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

A. *Extending Jurisdiction to Corporations: Unocal as an Example*

Since *Kadic* and *Sosa*, there have been many claims brought against corporations under ATS jurisdiction.⁷⁰ These cases have led to both minor disagreements over the correct parameters of the statute⁷¹ and a more fundamental conflict over whether ATS jurisdiction should be extended

⁶⁴70 F.3d 232, 245-46 (2d Cir. 1995); *see also* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 785 (D.C. Cir. 1984) (stating that there are a "handful of crimes to which the law of nations attributes *individual responsibility*") (emphasis added).

⁶⁵*See* Williams, *supra* note 10, at 82.

⁶⁶*See* 542 U.S. 692, 732 n.20 (2004).

⁶⁷*See id.* at 732.

⁶⁸*Id.* (quoting *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)). Specifically, human rights violations, such as torture, genocide, and enslavement, which are most often alleged in ATS claims, are all universally recognized as violations of customary international law. *See Doe v. Unocal Corp.*, 395 F.3d 932, 945 (9th Cir. 2002) (citing torture, murder, and slavery as violations of international law); *see also Filártiga*, 630 F.2d at 890 ("[F]or purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."); *see also supra* note 59 and accompanying text.

⁶⁹*Sosa*, 542 U.S. at 732 n.20.

⁷⁰Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions*, 29 BERKLEY J. INT'L L. 456, 460 (2011). There have been over 150 ATS claims against corporations in the past two decades. *Id.*

⁷¹*Compare Doe v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002) (applying a mens rea standard of knowledge for aiding and abetting liability under the ATS), *with Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 852 F.3d 244, 259 (2d Cir. 2009) (applying a purpose standard).

to corporations at all.⁷² Jurisdiction is often claimed under the ATS by victims alleging that a corporation "aided and abetted" a violation of international law, typically a human rights violation such as torture or forced labor.⁷³ One of the first cases in which victims sought jurisdiction against a corporation under the ATS, *Doe v. Unocal Corp.*, provides the best framework for understanding how plaintiffs seek to hold corporations liable.⁷⁴

While seemingly taking for the granted the issue of whether ATS jurisdiction would or would not in fact reach corporations,⁷⁵ the Ninth Circuit focused primarily on whether Unocal met the actus reus and mens rea requirements for aiding and abetting: "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."⁷⁶ First, the court held that Unocal knew that the Myanmar military had a long history of human rights abuses, that it was providing security and assistance for the oil project, and that it was committing gross violations of international law as a part of this project.⁷⁷ The court also found Unocal's support of the Myanmar military further perpetuated these violations.⁷⁸ This reasoning helped established a

⁷²See *Ntsebeza v. Ford Motor Co.*, 15 F. Supp. 3d 454, 456-62 (S.D.N.Y. 2014) (discussing the circuits' analysis of corporate liability under the ATS); see also *Sosa*, 542 U.S. at 732 n.20 (raising the question as to whether ATS jurisdiction applies to corporations).

⁷³See, e.g., *Unocal*, 395 F.3d at 947 (forced labor); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1015 (7th Cir. 2011) (child labor); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 259 (2d Cir. 2007) (torture); see also *supra* note 59 and accompanying text.

⁷⁴See *Unocal*, 395 F.3d at 947. Citizens of Myanmar alleged that, to facilitate the construction of a new oil pipeline, Unocal supported the Myanmar military, who enslaved, tortured, kidnapped, and murdered Myanmar villagers and workers. *Id.* at 936.

⁷⁵*Id.* at 945-46. Indeed, the opinion offers no discussion of *whether* ATS jurisdiction applies to corporations. See *id.* (describing the two "threshold question[s] in *any* [ATS] case" as whether the alleged tort is a violation of international law and whether, when the action is against a private party, such as a corporation, the alleged tort requires the private party to engage in state action).

⁷⁶*Unocal*, 395 F.3d at 947.

⁷⁷See *id.* at 940-42. Unocal was briefed extensively about the situation in Myanmar by human rights organizations, business consultants, and the U.S. State Department. *Id.*

⁷⁸*Id.* at 952. While Unocal did not directly participate in the human rights violations of the Myanmar military, its support of the military's use of forced labor to help build the roads and pipelines needed for the project further perpetuated the human rights abuses. *Id.* For example, one eyewitness account testified that the Myanmar military forced villagers to construct a helipad for Unocal executives. *Id.*

framework by which other courts extended jurisdiction under the ATS to corporations.⁷⁹ Cases would emerge involving similar theories of liability for violations of international law.⁸⁰

Courts in early corporate ATS cases seemed less concerned with whether a corporation, as a juridical person, could be held liable through the ATS.⁸¹ Instead, courts relied mostly on the logical progression of *Sosa*, *Kadic*, and then *Unocal*.⁸² By 2013, the Second,⁸³ Seventh,⁸⁴ Ninth,⁸⁵ Eleventh,⁸⁶ and D.C.⁸⁷ Circuits had each held that ATS jurisdiction reaches corporations.⁸⁸ While courts were mostly willing to extend ATS jurisdiction, other considerations, such as the extent to which ATS litigation in the United States interfered with the victims' domestic adjudicative

⁷⁹*See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011) ("[W]e conclude that aiding and abetting liability is well established under the ATS.").

⁸⁰*See, e.g., Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1015 (7th Cir. 2011) (hazardous child labor in connection with rubber plantation); *Romero v. Drummond Co.*, 552 F.3d 1303, 1309 (11th Cir. 2008) (torture of union leaders in connection with mining operation); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1197-98 (9th Cir. 2007) (crimes against humanity in connection with mining operation).

⁸¹*See, e.g., Unocal*, 395 F.3d at 947. *Unocal* never explicitly addressed the issue of whether the jurisdictional grant of the ATS applied to corporations; it focused primarily on whether the alleged conduct met the requirement of violations of international law for the ATS and whether *Unocal* met the requisite mens rea and actus reus for the alleged tort. *Id.* *See also* Millon, *supra* note 21, at 183.

⁸²*See Romero*, 552 F.3d at 1315; *Aldana v. Del Monte Fresh Produce, N. Am., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005).

⁸³*See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, (2d Cir. 2007). As discussed *infra* Part III.B, the Second Circuit would later disallow jurisdiction to corporations under the ATS in *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel I*), 621 F.3d 111, 149 (2d Cir. 2010), thus setting in motion the current debate over the statute's applicability to corporations. Most recently, the District Court for the Southern District of New York held that corporations may be liable under the ATS jurisdiction. *See Ntsebeza v. Ford Motor Co.*, 15 F. Supp. 3d 454, 461 (S.D.N.Y. 2014).

⁸⁴*See Flomo*, 634 F.3d at 1021.

⁸⁵*See Sarei*, 487 F.3d at 1203. The Ninth Circuit also extended jurisdiction in *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014), even acknowledging the recently decided Supreme Court decision in *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel II*), 133 S. Ct. 1659 (2013), which many argue foreclosed the possibility of corporate liability under the ATS. *See Doe I v. Nestle USA, Inc.*, 738 F.3d 1048, 1049 (9th Cir. 2013). *See also infra* Part III.B.

⁸⁶*Romero*, 552 F.3d at 1315. The court in *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009) did not extend jurisdiction under the facts of the case but nonetheless acknowledged that corporate defendants can be liable under the ATS. *Id.* at 1263.

⁸⁷*Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011) (noting that corporate immunity from ATS jurisdiction would be inconsistent with the case law precedent, statutory text, and historical context of the statute).

⁸⁸Within the Third Circuit, the U.S. District Court for the District of New Jersey in *Jama v. U.S.I.N.S.*, 343 F. Supp. 2d 338, 360-61 (D.N.J. 2004) heard ATS claims against a private corporation contracted to operate an Immigration and Naturalization Service facility, but nonetheless held that the conduct alleged did not constitute a violation of international law.

system, would emerge.⁸⁹ These considerations would begin to curtail the extent to which ATS jurisdiction applied to corporations and create uncertainty among corporate directors.⁹⁰

B. *Kiobel Disrupts the Trend*

One such issue that restricted the scope of corporate liability under the ATS was the extent to which the statute applied extraterritorially.⁹¹ In *Kiobel v. Royal Dutch Petroleum Co.* ("*Kiobel I*"), the Supreme Court considered whether the ATS should apply when foreign plaintiffs were suing foreign corporations for conduct occurring in a foreign country.⁹² Ultimately, the Court held that ATS jurisdiction did not reach the corporations.⁹³

The Court first heard oral argument solely on the question of whether the ATS encompassed suits against corporations, as was the issue argued in the Second Circuit ("*Kiobel I*").⁹⁴ It was during this first oral argument that Justice Alito introduced his ultimate concern with the specific circumstances of the case.⁹⁵ He stated:

The first sentence in your brief and the statement of the case is really striking: "This case was filed by 12 Nigerian Plaintiffs who alleged that Respondents aided and abetted the human rights violations committed against them by the Abacha

⁸⁹See, e.g., *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 295-311 (2d Cir. 2007). In *Khulumani*, the Second Circuit faced a scenario in which the litigation of an ATS case in U.S. courts had potentially damaging implications on South Africa's own independent effort to deal with their past human rights violations. See *id.* (discussing the issue of deference to South Africa's adjudicative process regarding apartheid) (Korman, J., concurring in part and dissenting in part). Characterizing ATS litigation as "judicial imperialism," South Africa argued that the statute affords U.S. courts too much authority to pursue litigation that could have negative consequences within another country. *Id.* Subsequent cases were also sensitive to this concern. See *Kiobel II*, 133 S. Ct. 1659, 1664 (2013) (questioning the merits of adjudicating Nigerian atrocities in U.S. courts).

⁹⁰See Matteo M. Winkler, *What Remains of the Alien Tort Statute After Kiobel?*, 39 N.C. J. INT'L L. & COM. REG. 171, 173 (2013) (commenting on the uncertainty surround the reach of ATS).

⁹¹See *Kiobel II*, 133 S. Ct. at 1664. The extraterritoriality of the statute is the extent to which it applies to conduct occurring in a foreign sovereignty. In *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 248 (2010), the Court held that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."

⁹²133 S. Ct. at 1664. The case was brought under ATS jurisdiction by citizens of Nigeria against British, Dutch, and Nigerian corporations, claiming the corporations aided and abetted the Nigerian government in committing human rights abuses. *Id.* at 1660.

⁹³*Id.* at 1669.

⁹⁴*Kiobel I*, 621 F. 111 (2d Cir. 2010). The Second Circuit held that courts must look to international norms in determining whether the ATS applies to corporations. *Id.* at 126. Finding that corporate liability is not a norm of international law, the Second Circuit denied ATS jurisdiction. *Id.* at 149.

⁹⁵Transcript of Oral Argument I, *Kiobel v. Royal Dutch Petroleum Co.*, 2012 WL 628670, at *11 (Feb. 28, 2012).

dictatorship in Nigeria between 1992 and 1995." What does a case like that—what business does a case like that have in the courts of the United States?⁹⁶

The explicit questioning of such a configuration, referred to as "foreign-cubed" in the second oral argument,⁹⁷ prompted the Court to order argument on this new question.⁹⁸ The focus of the case thus shifted from the issue of whether ATS jurisdiction reaches corporations at all to the issue of adjudicating ATS claims involving conduct that occurred within another country.⁹⁹

This shift is fundamental to many commentators' criticism of *Kiobel II*'s effect on corporate liability under the ATS.¹⁰⁰ Indeed, the issue of corporate liability is rarely discussed throughout the Court's opinions.¹⁰¹ Instead, the justices focused on, as a threshold issue, whether foreign-cubed claims could be brought in U.S. courts under the ATS.¹⁰² Justice Roberts's opinion ultimately held a presumption against extraterritoriality applies to claims brought under the ATS, and that if claims "touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."¹⁰³

Although some commentators believe *Kiobel II* has ended ATS litigation for corporations, the issue is still very much undecided.¹⁰⁴ Commentators and courts seem divided on the correct

⁹⁶*Id.*

⁹⁷Transcript of Oral Argument II, *Kiobel v. Royal Dutch Petroleum Co.*, 2012 WL 4496095, at *13 (Oct. 1, 2012) (characterizing a case with foreign plaintiffs, foreign defendants, involving conduct that occurred in a foreign country).

⁹⁸*Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (Mem.).

⁹⁹*Id.* The parties were directed to argue the question: "[w]hether and under what circumstances the Alien Tort Statute . . . allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Id.*

¹⁰⁰Winkler, *supra* note 90, at 173 ("[T]he Court's focus on the issue of the statute's extraterritoriality, instead of corporate liability, limited the ruling's scope.").

¹⁰¹*See Kiobel II*, 133 S. Ct. 1659, 1664 (2013) ("The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign.").

¹⁰²*Id.*

¹⁰³*Id.* at 1660.

¹⁰⁴*See, e.g.,* Winkler, *supra* note 90, at 173 ("Even after [*Kiobel II*], the issue of corporate liability under the ATS remains unsettled.").

analytical interpretation of *Kiobel II*'s effect on corporate ATS liability.¹⁰⁵ Several scholars maintain that the *Kiobel* cases effectively ended ATS liability for corporations,¹⁰⁶ while others maintain that the nuanced opinion of *Kiobel II* never fully addressed the issue of ATS liability for U.S. corporations.¹⁰⁷ A trip back to the Supreme Court seems likely for corporate ATS liability.¹⁰⁸

IV. EVALUATING THE NEXUS BETWEEN CORPORATE ATS CLAIMS AND FIDUCIARY LAW: *CHIQUITA* AS AN EXAMPLE

Until the Supreme Court adequately addresses the issue of whether a U.S. corporation can be liable for violations of human rights law under ATS jurisdiction, and given the holdings of the circuit courts, directors must consider the possibility that their corporations could be liable under the ATS for engaging in violations of international law.¹⁰⁹ If courts hold that ATS jurisdiction does reach corporations, corporations that are involved in such violations are now exposed to possible lawsuits.¹¹⁰ And even if it is decided that U.S. corporations are ultimately free from ATS liability, the derivative suit against Chiquita demonstrates that directors may still face claims of breach of fiduciary duty.¹¹¹

¹⁰⁵See *id.* Compare *Ntsebeza v. Ford Motor Co.*, 15 F. Supp. 3d 454, 457 (S.D.N.Y. 2014) ("The Supreme Court did not reach the issue of corporate liability in *Kiobel II*."), with *Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013) ("[I]f all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel II*.").

¹⁰⁶See *Kochan*, *supra* note 61, at 470 ("[T]he 2013 Supreme Court decision in *Kiobel* severely limited ATS suits, including those against corporations"); see Douglas M. Branson, *Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation*, 9 SANTA CLARA J. INT'L L. 227, 234-35 (2011) (referring to *Kiobel I*).

¹⁰⁷See Louise Weinberg, *What We Don't Talk About When We Talk About Extraterritoriality: Kiobel and the Conflicts of Laws*, 99 CORNELL L. REV. 1471, 1496 (2014) ("[*Kiobel II*], unanimous as it was, seems plainly wrong."); Ho, *supra* note 22, at 122 ("Although the Supreme Court tightly curtailed the availability of the [ATS] in its recent decision in the *Kiobel* case, the Court did not bar its application to corporate entities").

¹⁰⁸The Supreme Court decided another corporate ATS claim in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). However, *Daimler* again presented to the court a "foreign-cubed" case, and the Court dispensed of the ATS claim in one sentence. *Id.* at 762-63.

¹⁰⁹Millon, *supra* note 21, at 184.

¹¹⁰See, e.g. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Ntsebeza*, 15 F. Supp. 3d at 465; see also *Williams*, *supra* note 10, at 87.

¹¹¹See *Chiquita Shareholder Derivative Complaint*, *supra* note 1, at 1.

Shortly after Chiquita pleaded guilty and was sentenced to criminal probation and a fine of twenty-five million dollars for its conduct in Colombia, shareholders brought a derivative suit against the board, claiming breach of care, loyalty, and good faith.¹¹² The suit offers a practical example of how the corporate decision to engage with violators of international law implicates a breach of fiduciary duty.¹¹³ Shareholders alleged that the directors had, among other duties, the duty to "[m]anage, conduct, supervise and direct the business and internal affairs of Chiquita in accordance with the laws and regulations of the United States and every country in which Chiquita conducts business" and to "[e]stablish and maintain systematic and adequate records and reports of the business."¹¹⁴ The complaint further alleged that directors breached the duty of compliance and oversight by continually making payments despite both internal and external warnings as to the criminal nature of such payments.¹¹⁵

Although the suit eventually settled,¹¹⁶ it is clear that Chiquita's directors breached their fiduciary duties by making the illegal payments to the terrorist groups.¹¹⁷ The decision to authorize the payments, which the directors knew were financing the terrorists' atrocities, is precisely the kind of reckless disregard that is to be avoided in fulfilling the fiduciary duty of care.¹¹⁸ Supporting the terrorist groups, even after warnings from internal counsel, external counsel, and

¹¹²*Id.*

¹¹³*See id.*

¹¹⁴*See id.* at 34.

¹¹⁵*See* Chiquita Shareholder Derivative Complaint, *supra* note 1, at 57-61. The complaint also emphasized the consistency with which directors misled shareholders as to Chiquita's "corporate values." *Id.* at 37-46. Shareholders further claimed that the directors breached their fiduciary duty to put the corporation's interests ahead of their own by agreeing to the plea deal to avoid criminal charges. *Id.* at 61-62. Not surprisingly, the shareholders argued a breach of nearly all imaginable duties and obligations. For a more thorough description of the shareholders' claims, see *id.* at 33-63.

¹¹⁶Stipulation and Agreement of Settlement at 5, *In re Chiquita Brands Int'l, Inc. Alien Tort Statute and Shareholder Derivative Litig.*, 792 F. Supp. 2d 1301 (S.D. Fla. 2011) (No. 08-01916) [hereinafter Chiquita Settlement Agreement].

¹¹⁷*See* Chiquita Shareholder Derivative Complaint, *supra* note 1, at 34.

¹¹⁸*See id.* at 33-63; *see also* Lafferty, *supra* note 22, at 843.

the Department of Justice, further demonstrates a clear lack of good faith.¹¹⁹ The decision to make these payments, which both violated U.S. law and supported the violation of international law, also breaches a duty of oversight and compliance.¹²⁰ Furthermore, the fraudulent misrepresentations and concealment of the payments from the shareholders constituted a breach of the duty to disclose.¹²¹ Pursuant to the settlement agreement, Chiquita paid the shareholders' four million dollar legal fees and, more importantly, was required to implement new corporate oversight and compliance policies.¹²²

V. RECOMMENDATION

ATS litigation against U.S. corporations remains a significant threat.¹²³ The threat of liability broadens the potential for corporate harm as a result of the business decision to engage in violations of human rights and international law.¹²⁴ To avoid both corporate liability through the ATS and a breach of fiduciary duty, corporate boards conducting business abroad must adopt stricter governance policies with a keen awareness toward compliance and oversight

¹¹⁹See Chiquita Sentencing Memorandum, *supra* note 3, at 3-12. Chiquita's directors continued to make the payments even after warnings from outside counsel. *Id.* Throughout 2003, outside counsel repeatedly warned:

Must stop payments

....

Bottom Line: CANNOT MAKE THE PAYMENT

....

You voluntarily put yourself in this position. Duress defense can wear out through repetition. Buz [business] decision to stay in harm's way. Chiquita should leave Colombia.

....

[T]he company should not make the payment.

Id. In light of these warnings, the decision to continue making the payments can be best characterized as reckless indifference to the corporation. *See also* Benihana of Tokyo, Inc. v. Benihana, Inc., 891 A.2d 150, 192 (Del. Ch. 2005) (discussing the fiduciary duty of care).

¹²⁰See Chiquita Shareholder Derivative Complaint, *supra* note 1, at 4-12.

¹²¹See *id.* at 4, 54.

¹²²See Chiquita Settlement Agreement, *supra* note 116, at 4.

¹²³See *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 520 (4th Cir. 2014); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1016 (9th Cir. 2014).

¹²⁴See *Williams*, *supra* note 10, at 87; *see also* Brief for the Nat'l Foreign Trade Council et al. as Amici Curiae Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 162760, at *4 (arguing that the "very existence of [ATS] lawsuits creates risk").

mechanisms.¹²⁵ Corporate boards should do this prospectively, through their own procedures. Business decisions are, after all, best left to directors, not the judiciary.¹²⁶ Such policies should not come, as in the case of Chiquita, as mandated by a settlement agreement in the wake of personal tragedy and corporate injury.¹²⁷

A. *Kiobel's Weakness*

Kiobel II did not fully decide the issue of whether U.S. corporations can be liable under the ATS.¹²⁸ While some courts and commentators have argued that the *Kiobel* litigation effectively ended ATS liability for corporations,¹²⁹ others have maintained that the Supreme Court's decision leaves the issue unanswered.¹³⁰ Despite the Court's unanimous holding, the justices' separate opinions further suggest the issue is unsettled.¹³¹ In particular, Justice Kennedy, who is perhaps most aware of the global business environment,¹³² recognized in his one-paragraph concurrence that "the opinion of the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."¹³³ Indeed, one such question left open by *Kiobel II* is the extent to which the presumption against extraterritoriality can be displaced by

¹²⁵See Williams, *supra* note 10, at 86 ("As a practical matter, *Sosa* and subsequent human rights cases may be less important than the self-regulatory regimes . . . in raising standards of corporate behavior, although the two may reinforce each other.").

¹²⁶See *id.*

¹²⁷See Chiquita Settlement Agreement, *supra* note 116, at Exhibit C: Governance and Compliance Changes.

¹²⁸Winkler, *supra* note 90, at 172 ("Even after [*Kiobel II*], the issue of corporate liability under the ATS remains unsettled.").

¹²⁹See *Daimler AG v. Bauman*, 134 S. Ct. 746, 762-63 (2014); Branson, *supra* note 106, at 234-35.

¹³⁰See Winkler, *supra* note 90, at 172-73 ("Kiobel did not sign a death sentence for the ATS . . ."); Ho, *supra* note 22, at 122 ("Although the Supreme Court tightly curtailed the availability of the [ATS] in its recent decision in the *Kiobel* case, the Court did not bar its application to corporate entities . . ."); see also Susan Farbstein & Tyler Giannini, Anthony Clark Arend, Debate, *The Alien Tort Statute and Corporate Liability*, 160 U. PA. L. REV. PENNUMBRA 99 (2011), <http://www.pennumbra.com/responses/11-2011/ATS.pdf> (debating the effect of *Kiobel I*).

¹³¹Ralph G. Steinhardt, *Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink*, 107 AM. J. INT'L L. 841, 841 (2013) ("All four of the opinions in *Kiobel* confirm that multiple significant issues remain for future resolution . . .").

¹³²For an example of Justice Kennedy's international perspective, see *Roper v. Simmons*, 543 U.S. 551 (2005) in which Kennedy referenced foreign law in his opinion. See also Jeffery Toobin, *Swing Shift*, NEW YORKER, Sept. 12, 2005, at 42 (discussing Kennedy's internationalism).

¹³³*Kiobel II*, 133 S. Ct. 1659, 1669 (2013) (Kennedy, J., concurring).

corporate activity.¹³⁴ Accordingly, the applicability of *Kiobel II* for ATS claims against U.S. corporations is not far-reaching.¹³⁵ The foreign-cubed nature of the case, in which the alleged conduct occurred in Nigeria in connection with decisions made in the boardrooms of Dutch and British corporations, prodded the Supreme Court into imposing a presumption against extraterritoriality.¹³⁶ The issue of whether the ATS applies to U.S. corporations remains unsettled.¹³⁷

In a separate opinion, Justice Breyer implicitly recognized this distinction.¹³⁸ Rather than impose a presumption against extraterritoriality for the ATS,¹³⁹ Breyer would apply a three-pronged standard for determining whether the statute provides jurisdiction for the claims.¹⁴⁰ Breyer would allow ATS jurisdiction when the alleged tort occurred on American soil, when the defendant is an American national, or when the defendant's conduct substantially and adversely affects an important American national interest.¹⁴¹

Even after *Kiobel II*, the Fourth and Ninth Circuits extended ATS jurisdiction to corporations.¹⁴² Acknowledging the Supreme Court's decision in *Kiobel II*, the Ninth Circuit in *Doe I v. Nestle USA, Inc.* maintained that the Supreme Court did not sufficiently analyze the issue of whether corporations may be liable under the ATS.¹⁴³ The court thus allowed ATS jurisdiction

¹³⁴*See id.* ("Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.").

¹³⁵Winkler, *supra* note 90, at 173.

¹³⁶*See* Transcript of Oral Argument I, *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 95, at *11; *see also Kiobel II*, 133 S. Ct. at 1669.

¹³⁷*See* *Ntsebeza v. Ford*, 15 F. Supp. 3d 454, 457 (S.D.N.Y. 2014) (finding that *Kiobel II* did not address whether corporate defendants can be liable under ATS).

¹³⁸*Kiobel II*, 133 S. Ct. at 1670-74 (Breyer, J., concurring in the judgment).

¹³⁹*Id.* at 1671.

¹⁴⁰*Id.* at 1674.

¹⁴¹*Id.*

¹⁴²*See* *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1016 (9th Cir. 2014); *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014). The District Court for the Southern District of New York also held that corporations may be liable under the ATS after *Kiobel II*. *See* *Ntsebeza v. Ford Motor Co.*, 15 F. Supp. 3d 454, 457 (S.D.N.Y. 2014).

¹⁴³766 F.3d at 1021.

to reach Nestle.¹⁴⁴ In *Al Shimari v. CACI Premier Tech., Inc.*, the Fourth Circuit reasoned that "the Supreme Court's decision in *Kiobel II* does not foreclose the plaintiffs' claims under the [ATS]" and held that plaintiffs' claims "'touched and concerned' the territory of United States with sufficient force to displace the presumption against extraterritoriality."¹⁴⁵ As the Ninth and Fourth Circuits demonstrate, *Kiobel II*'s holding remains debatable, and, at the very least, encourages a fact-based analysis to determine whether the nature of a particular case displaces the presumption against extraterritoriality.¹⁴⁶

Should *Cardona v. Chiquita* reach the Supreme Court, plaintiffs will likely rebut the presumption against extraterritoriality. In relying on *Kiobel II* as precedent, the Eleventh Circuit held that, like in *Kiobel*, "all the relevant conduct took place outside the United States."¹⁴⁷ This assertion is false. The misconduct alleged by plaintiffs in *Chiquita* occurred within the United States.¹⁴⁸ As discussed above, plaintiffs often sue corporations under the ATS on a theory of liability for aiding and abetting violators of international law.¹⁴⁹ ATS claims against corporations are not so much about the actual misconduct in the victims' country as they are about the business decisions to support, participate in, and engage with such misconduct.¹⁵⁰ Those decisions are made

¹⁴⁴*Id.* Shortly after *Kiobel II* was decided, the Ninth Circuit issued an order maintaining that corporations can be liable under the ATS. *Doe I v. Nestle USA, Inc.* 738 F.3d 1048 (9th Cir. 2013), *order withdrawn by* 766 F.3d 1013. The court interpreted *Kiobel II* as suggesting in dicta that corporations may be liable under the ATS if the presumption against extraterritoriality is overcome. *Id.* at 1049.

¹⁴⁵*Al Shimari*, 758 F.3d at 530. Iraqi citizens sued a U.S. corporation under the ATS claiming the corporation helped facilitate their torture at Abu Ghraib prison in Iraq. *Id.* at 521-22.

¹⁴⁶*Id.* at 527.

¹⁴⁷*Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1189 (11th Cir. 2014) (quoting *Kiobel II*, 133 S. Ct. 1659, 1669 (2013)).

¹⁴⁸*See id.* at 1192 (Martin, J., dissenting) ("[Plaintiffs] allege that Chiquita participated in a campaign of torture and murder in Colombia by reviewing, approving, and concealing a scheme of payments and weapons shipments to Colombian organizations, *all from their corporate offices in the territory of the United States.*") (emphasis added).

¹⁴⁹*See, e.g., Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

¹⁵⁰*See supra* Part III.A (discussing an aiding and abetting theory of liability under the ATS).

within the corporate enterprise.¹⁵¹ In *Chiquita*, plaintiffs sued the corporation for its decision to approve and knowingly facilitate payments to terrorist groups who were perpetrating violations of international law for fifteen years.¹⁵² That decision was made in Chiquita's boardroom.¹⁵³

A more precise analysis of *Chiquita* would thus displace the presumption against extraterritoriality. It would also satisfy at least the first and second prongs of Justice Breyer's standard for imposing ATS jurisdiction: the alleged misconduct occurred on American soil and Chiquita is an Ohio corporation.¹⁵⁴ The third prong is likely satisfied as well.¹⁵⁵ Undergirding Justice Breyer's standard is his concern that, by not imposing ATS liability, the United States risks becoming a safe harbor for violators of international law.¹⁵⁶ In the case of Chiquita, that risk became a reality with the corporation's sustained support of violence in Colombia.¹⁵⁷ Chiquita, as Justice Breyer feared, was providing a safe harbor for terrorists.¹⁵⁸

B. *The Persistence of Fiduciary Law*

Even if courts follow the central holding of *Kiobel II* and reverse earlier precedent to disallow ATS claims against corporations,¹⁵⁹ a board's fiduciary duties are unlikely to be litigated away.¹⁶⁰ Directors who harm the corporation through decisions to engage in violations of

¹⁵¹The Fourth Circuit's opinion in *Al Shimari*, 758 F.3d at 528-29 recognized this nuance. The court held that plaintiffs' claims against the Virginia corporation involved significant activity in the United States. *Id.* The alleged torture of Iraqi citizens was committed by U.S. citizens, all of whom were hired, paid, and cleared for security in the United States. *Id.* Further, plaintiffs allege managers at the corporation's headquarters in Virginia attempted to "cover up" the torture. *Id.* at 529.

¹⁵²*Chiquita*, 760 F.3d at 1188; *see also* Chiquita Sentencing Memorandum, *supra* note 3, at 2.

¹⁵³*See* Ho, *supra* note 22, at 143 (explaining that state law would apply to acts or omissions within the state that caused tortious human rights effects abroad).

¹⁵⁴*See Kiobel II*, 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring).

¹⁵⁵*See id.*

¹⁵⁶*See id.*

¹⁵⁷Chiquita Sentencing Memorandum, *supra* note 3, at 13 ("Simply put, Chiquita funded terrorism.").

¹⁵⁸*See id.*

¹⁵⁹*See* Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1021 (9th Cir. 2014) and *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) (holding that corporations can be liable under the ATS).

¹⁶⁰*See* Holland, *supra* note 23, at 778-79 (noting the history, importance, and predictability of Delaware's corporate law).

international law cannot simply invoke the business judgment rule. Regardless of whether the corporation is held liable under the ATS, directors are still at risk of breaching fiduciary duties.¹⁶¹ Indeed, the uncertainty surrounding corporate liability under the ATS only intensifies the risk of claims against directors for breaching their duties.¹⁶² While the threats of ATS litigation and derivative suits are not interdependent, one does reinforce the other.¹⁶³ That corporate ATS liability has been recognized by several circuit courts, and will arguably be further imposed, raises another legal norm with which corporations must comply.¹⁶⁴ And while a corporate responsibility to respect human rights may not yet be a norm of international law,¹⁶⁵ compliance with the laws of the corporation's home jurisdiction certainly establishes a baseline for that responsibility.¹⁶⁶

To be sure, there are risks of corporate harm other than ATS liability that should prompt corporations to consider international law. First, corporations found to have been involved in violations of international law face significant financial injury.¹⁶⁷ Even without civil liability under the ATS, criminal penalties are often imposed on corporations.¹⁶⁸ These penalties are a substantial financial injury to the corporation.¹⁶⁹ Accordingly, most cases alleging a breach of fiduciary duty are often brought after regulatory enforcement.¹⁷⁰ And even when ATS liability is

¹⁶¹See, e.g., Chiquita Shareholder Derivative Complaint, *supra* note 1, at 1.

¹⁶²See Williams, *supra* note 10, at 87-94.

¹⁶³See *id.*

¹⁶⁴See *In re Caremark Int'l, Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

¹⁶⁵See *Kiobel I*, 621 F. 111, 149 (2d Cir. 2010) (holding that corporate liability is not a norm of international law).

¹⁶⁶See *In re Caremark*, 698 A.2d at 971.

¹⁶⁷See Joe Stephens, *Pfizer Reaches Settlement Agreement in Notorious Nigerian Drug Trial*, WASH. POST, Apr. 4, 2009, at A4. In 2009, Pfizer paid seventy-five million dollars to settle an ATS suit filed by Nigerian citizens alleging that the pharmaceutical company tested an experimental drug on children during a meningitis outbreak, resulting in death, blindness, and brain damage. *Id.* See also *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

¹⁶⁸See Chiquita Sentencing Memorandum, *supra* note XX, at 10-11 (making illegal payments to federally-designated terrorist groups). Often the violation of international law may encompass a violation of U.S. criminal law, as was the case in *Chiquita*. See *id.*

¹⁶⁹Chiquita Sentencing Memorandum, *supra* note 3, at 18. Pursuant to the plea deal with the government, Chiquita paid a twenty-five million dollar criminal penalty. *Id.*

¹⁷⁰Ho, *supra* note 22, at 142-43.

pursued against the corporation, the cases often settle, with significant settlement agreements being paid to victims by the corporation.¹⁷¹

Second, involvement with violators of international law creates a harm to the reputation of the corporation.¹⁷² Chiquita was plagued with bad press after its payments to the terrorist groups were revealed, and its stock value declined sharply.¹⁷³ The increasing focus on corporate social responsibility also mandates consideration of policies regarding international law, specifically with respect to human rights.¹⁷⁴ Likewise, the expectations of socially-conscious investors pressure corporations into implementing minimum standards regarding such things as environmental stewardship, child labor prohibitions, and safe working conditions.¹⁷⁵ Such investors would consider violations of these standards, as well as more egregious violations of human rights law, as a significant harm to the corporation.¹⁷⁶

Finally, from an economic standpoint, studies have shown that corporations with better social policies outperform those with questionable commitments to such issues.¹⁷⁷ In an increasingly transparent global environment, it is becoming a business necessity to adopt socially responsible policies.¹⁷⁸

C. *Toward a Stricter Corporate Policy*

¹⁷¹See Weinberg, *supra* note 107, at 1483; *see also supra* note 167 and accompanying text.

¹⁷²See also Special Report on Corporate Social Responsibility: A Stitch in Time, *ECONOMIST*, Jan. 19, 2008 ("Even if [an ATS claim] does not get as far as trial, this can be embarrassing and costly for companies.").

¹⁷³See Matthew Kirdahy, *U.S. Goes Bananas on Chiquita*, *FORBES* (Mar. 18, 2007, 10:37 PM), http://www.forbes.com/2007/03/18/chiquita-terrorists-faces-markets-equity-cx_mk_0315autofacescan01.html. In 2007, after its plea deal with the government became public, Chiquita's stock fell approximately twenty percent. *Id.*; *see* Laurie P. Cohen, *Chiquita Under the Gun*, *WALL ST. J.*, Aug. 2, 2007, at A1. *See also* Millon, *supra* note 21, at 184-86 (discussing the reputational harm to Nike when it became known that the company relied on child labor).

¹⁷⁴See Kochan, *supra* note 61, at 454.

¹⁷⁵See Williams, *supra* note 10, at 94-95.

¹⁷⁶See *id.* at 98.

¹⁷⁷See Marc Orlitzky et al., *Corporate Social and Financial Performance: A Meta-Analysis*, 24 *ORG. STUD.* 403, 424-25 (2003).

¹⁷⁸See *id.*

As a practical matter, it is important to remember that corporate boards must initially not participate in conduct that violates international law.¹⁷⁹ What was so egregious about Chiquita's support of the terrorist groups was the consistency and pattern of involvement over fifteen years, with tragic effects on thousands of Colombian citizens, even after repeated internal and external warnings.¹⁸⁰ But with the decision to conduct business abroad, particularly in places known to be dangerous, comes an inherent risk of involving the corporation with potentially harmful partners.¹⁸¹ Acknowledging that the corporation may be liable for its business decision to operate in that environment, boards must proactively develop internal policies that not only aspire to avoid misconduct, but require strict compliance mechanisms to ensure such misconduct never occurs.

As a starting point, corporations should look to emerging international business standards with respect to human rights.¹⁸² Many corporations have already endorsed global initiatives, such as the United Nations Global Compact, which encourage corporate responsibility and promote human rights.¹⁸³ These initiatives provide corporations with a basis for implementing policies that comply with fundamental international norms, such as the prohibition against child labor and forced labor.¹⁸⁴ Many corporations understand that these initiatives, whether signed on to or not,

¹⁷⁹See Chiquita Sentencing Memorandum, *supra* note 3, at 12. In January, 2004, Fernando Aguirre became Chiquita's new CEO and quickly decided to stop the payments. *Id.* Aguirre stated: "At the end of the day, if extortion is the modus operandi in Colombia or any other country, we will withdraw from doing business in such a country." *Id.*

¹⁸⁰See *id.* at 4-12.

¹⁸¹See Chiquita Sentencing Memorandum, *supra* note 3, at 5 (discussing the boards' awareness of the dangers of doing business in Colombia). To highlight this point, the ATS cases discussed above have all involved business conduct in particularly dangerous countries. See, e.g., *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 521-22 (4th Cir. 2014) (Iraq War); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 259 (2d Cir. 2007) (South African apartheid); *Doe v. Unocal, Corp.*, 395 F.3d 932, 937-38 (9th Cir. 2002) (Myanmar civil war).

¹⁸²Williams, *supra* note 10, at 103.

¹⁸³ See U.N. Global Compact's Ten Principles (Jul. 26, 2000), <https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

¹⁸⁴ See *id.*; see also MICROSOFT GLOBAL HUMAN RIGHTS STATEMENT (2013), available at <http://www.microsoft.com/about/corporatecitizenship/en-us/working-responsibly/principled-business-practices/human-rights/>. While instruments such as the Global Compact are non-binding, they promote best practices, which many companies seek to implement. See Williams, *supra* note 10, at 103.

establish the "moral norms by which companies are increasingly being judged by consumers, communities, investors, and civil society."¹⁸⁵ A failure to recognize these broader standards may discourage socially-conscious investors and tarnish the corporation's image.¹⁸⁶

Many corporations, especially those with extensive international business, already provide policies regarding basic compliance with human rights and international law norms.¹⁸⁷ To effect real change and ensure more thoroughly that no such violations occur, the best solution is to further enhance already existing measures and impose stricter compliance and reporting mechanisms for those policies. Simply having a statement on human rights does little to incentivize the board to achieve what is increasingly necessary in the global business environment.¹⁸⁸ Not only should boards acknowledge and reference international business covenants, many of which are largely aspirational,¹⁸⁹ they should draft specific policies with an informed awareness of the nexus between potential ATS claims and fiduciary law.¹⁹⁰ For example, in the Chiquita settlement agreement the board was required to formalize a process of monitoring developments in U.S. law with specific respect to the ATS.¹⁹¹ The settlement agreement anticipated, as all corporate boards should, that changes in ATS litigation have implications for the board's business decisions.¹⁹²

¹⁸⁵Williams, *supra* note 10, at 103.

¹⁸⁶*See id.*

¹⁸⁷*See* Cynthia A. Williams & John M. Conley, *An Emerging Third Way?: The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L.J. 493, 544 (2005) (discussing statistics on social and environmental reporting). Half of Global 500 companies now include statements dedicated to social and environmental issues in their annual reports. *Id.*

¹⁸⁸*See* Williams, *supra* note 10, at 103 (suggesting that these broad "voluntary" standards of international business may in fact become "the new face of regulation").

¹⁸⁹*But see id.*

¹⁹⁰*See* Doe v. Unocal Corp., 395 F.3d 932, 947 (9th Cir. 2002). One such policy might anticipate *Unocal's* ATS standard for aiding and abetting and require that, as a baseline, the corporation will not knowingly support conduct that could have a substantial effect on perpetuating a violation of international law. *See id.*

¹⁹¹*See* Chiquita Settlement Agreement, *supra* note 116, at Exhibit C: Governance and Compliance Changes II.R.

¹⁹²*See id.* *See also* *In re* Caremark Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996) (discussing the duty to comply with the law).

Boards should also implement training programs, designed at educating and informing both the directors and corporate officers as to the corporation's policies on human rights and international law.¹⁹³ These programs should be regularly updated and evaluated.¹⁹⁴ Similarly, the board should implement a structure whereby at each managerial level is a system to report known or suspected misconduct and to raise questions regarding the code of conduct or ethics policies.¹⁹⁵ Separate compliance committees,¹⁹⁶ composed of entirely independent directors,¹⁹⁷ are needed to continually review reports, conduct training, and evaluate these policies.¹⁹⁸ To help ensure such

¹⁹³See, e.g., Chiquita Settlement Agreement, *supra* note 116, at Exhibit C: Governance and Compliance Changes II.A (requiring Chiquita to implement training programs on "Working with Agents and Intermediaries," "Chiquita's Code of Conduct," "Antitrust Policies," and "U.S. Trade Regulations").

¹⁹⁴See, e.g., *id.* at Exhibit C: Governance and Compliance Changes II.B.

¹⁹⁵ See ASTRAZENECA, CODE OF CONDUCT (2014), available at <http://www.astrazeneca.com/Responsibility/Code-policies-standards/Code-of-Conduct>. For example, AstraZeneca's Code of Conduct includes numerous ways to raise an issue or report a violation. *Id.* It provides, in part:

Anyone who raises a concern about a possible compliance breach in good faith will be supported by management, and will not be subject to retaliation

You may at some time come across a situation that appears to violate an AstraZeneca policy. Everyone has a duty to report any suspected violation promptly.

In general, you should first seek to address your concerns with your manager. If you believe this is not appropriate, you may also contact your Human Resources, Legal Department or Compliance representative.

Id. The policy further provides a website, email address, and postal address dedicated to receiving concerns from employees. *Id.* Chiquita's current Code of Conduct also provides a similar reporting system. See CHIQUITA, CODE OF CONDUCT 52 (2014), available at <http://www.chiquita.com/Code-of-Conduct-PDF/ChiquitaCode-FINAL-EN.aspx>.

¹⁹⁶See CHIQUITA, CODE OF CONDUCT, *supra* note 195, at 52. Chiquita's Code of Conduct includes information on the Compliance Department. *Id.*

¹⁹⁷See Chiquita Settlement Agreement, *supra* note 116, at Exhibit C: Governance and Compliance Changes I (requiring Chiquita to implement changes regarding the composition of its board). Implicit in having independent directors on a compliance committee is the assurance that any risk of disloyalty is further avoided. See *id.* at Exhibit C: Governance and Compliance Changes I.C ("[Chiquita's Governance Policies] shall be revised to make explicit the requirement that at least three-fourths of the members of the board shall be 'independent directors' . . ."). Furthermore, an independent compliance committee provides the board with the opportunity to elect members who may have a particular background in international law or business compliance with respect to human rights. See CHIQUITA INVESTOR RELATIONS, BIOGRAPHY, JAMES E. THOMPSON, <http://investors.chiquita.com/phoenix.zhtml?c=119836&p=irol-govBio&ID=150461> (last visited Nov. 23, 2014). Chiquita's current Chief Legal Officer has an extensive background in international law, including positions in multinational corporations and the European Court of Justice. *Id.*

¹⁹⁸See Chiquita Settlement Agreement, *supra* note 116, at Exhibit C: Governance and Compliance Changes II.F(2). Pursuant to the settlement agreement, Chiquita's Compliance Committee now meets quarterly. *Id.*

compliance, boards should update, as was required in Chiquita, their whistleblower protection procedures¹⁹⁹ and establish non-retaliation policies.²⁰⁰

Finally, corporations that conduct business abroad should hire independent organizations to screen third parties and potential partners.²⁰¹ Before engaging in business abroad, the board should, as required by fiduciary law, slow down its decision making process and thoroughly evaluate the nature of its potential business.²⁰² One of the many faults of Chiquita's directors was their continued decision to acquiesce to the culture of illegality in Colombia.²⁰³ The directors maintained that if Chiquita was going to produce bananas in Colombia, payments to those groups were a necessary cost of that production.²⁰⁴

Implicit in these, or any, corporate policies is a duty of disclosure.²⁰⁵ Had Chiquita's directors not concealed the payments to the terrorist groups, the payments undoubtedly would have ended much sooner.²⁰⁶ While directors need not disclose every detail in a business decision, boards are nonetheless charged with the responsibility to disclose all "material" facts.²⁰⁷ The

¹⁹⁹See *id.* at Exhibit C: Governance and Compliance Changes II.K. Chiquita was required to include in its whistleblower policy "that an illegal act can be considered material to Chiquita's financial reporting processes and that Chiquita requests that any suspected illegal act be promptly identified and addressed consistent with the whistleblower protocol/notice." *Id.* Its current Code of Conduct also requires written acknowledgement of the Code from Chiquita's employees. See CHIQUITA, CODE OF CONDUCT, *supra* note 195, at 54.

²⁰⁰ See, e.g., DUPONT, CODE OF CONDUCT 35 (2013), available at http://www.dupont.com/content/dam/assets/corporate-functions/our-company/core-values/code-of-conduct/DuPont_CoC_English.pdf ("DuPont will not tolerate retaliation against anyone who, in good faith, raises a concern, reports suspected misconduct, or provides information related to an inquiry of suspected misconduct.").

²⁰¹See, e.g., Chiquita Settlement Agreement, *supra* note 116, at Exhibit C: Governance and Compliance Changes II.H (requiring Chiquita to formalize its process for screening transactions with third parties).

²⁰²See *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del.1985).

²⁰³See Chiquita Sentencing Memorandum, *supra* note 3, at 5 (characterizing the payments as the "cost of doing business" and having "no alternative").

²⁰⁴See *id.* See also *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 192 (Del. Ch. 2005) (discussing "reckless indifference" as a breach of the fiduciary duty of care).

²⁰⁵See *supra* Part II.B.

²⁰⁶See Chiquita Sentencing Memorandum, *supra* note 3, at 7-12. As news of Chiquita's payments became public, and once it became apparent that Chiquita was committing a serious felony, a new CEO was hired and the payments were stopped. *Id.*

²⁰⁷See *Smith v. Van Gorkom*, 488 A.2d 858, 890 (De. 1985); *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977); see also *supra* Part II.B (discussing the duty to disclose).

illegality of a business decision, and the likelihood of its devastating effect on innocent citizens, clearly constitutes a "material" fact.

Directors of corporations have a duty to consider the interests of the corporation as a whole.²⁰⁸ Accordingly, directors must implement policies that not only provide a check on their internal systems, but also ensure legal compliance wherever they operate.²⁰⁹ Adopting such policies serves both to prevent egregious violations of international law and to fulfill the board's fiduciary duties.²¹⁰

VI. CONCLUSION

Clearly a board's decision to engage in violations of international law is not entirely protected by the business judgment rule. The resultant corporate harm implicates claims of breach of fiduciary duty. These claims are further buttressed by the threat of civil liability under the jurisdiction of the ATS. The decision to conduct business abroad thus necessitates corporate responsibility on two fronts. At this nexus between ATS liability and fiduciary law is an opportunity to advance international law commitments through corporate governance. Adopting strict policies with respect to international law not only fulfills corporate obligations but also recognizes a social responsibility to non-shareholder constituencies.

Matthew Baas Goeller

²⁰⁸See Millon, *supra* note 21, at 176.

²⁰⁹See Ho, *supra* note 22, at 154 ("[C]ompanies should not only comply with all applicable laws regarding human rights but should also 'treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.'") (quoting U.N. Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011)).

²¹⁰See Millon, *supra* note 21, at 193; Williams, *supra* note 10, at 104.