ARTICLES

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A Green New Foreign Practices Act: How to Enforce Corporate Environmental Responsibility

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INTRODUCTION

One of the biggest challenges facing international environmental protection is enforcement. States are called upon by agreements such as the Rio Declaration and the U.N. Framework Convention on Climate Change to develop laws establishing liability for environmental damage by their private actors. Even when states have strong domestic emissions standards, companies often outsource their pollution to those with lax standards or little enforcement capacity—often in the Global South.[1]

We tend to think of carbon emissions by country. For instance, according to a 2021 report by a Swiss-based air monitoring company, Bangladesh, India, and Pakistan have some of the highest levels of air pollution in the world.[2] Countries such as Sweden, Iceland, and Finland have some of the lowest.[3] While many in the Global North tend to condemn the coal-reliant, smoke-choked countries in the South, recent evidence suggests foreign affiliates of large multinational enterprises (MNEs), headquartered in the Global North, are the major contributors of carbon emissions.[4] Not only has the North historically produced the most pollution, but its multinationals also make up a large percentage of carbon emissions in other countries.

Although corporate social responsibility has been thrust into the spotlight with an increased public demand for "green" or "clean" products, many companies have beguiled consumers with "greenwashing," largely performative actions, while others in the manufacturing and refining sectors operate out of the public eye. While countries construct domestic environmental regulations and standards, many multinational companies have grown so large they are effectively outside the jurisdiction of any one country.[5]

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1 *See infra* Part I.

2 IQAIR, 2021 WORLD AIR QUALITY REPORT: REGION & CITY PM2.5 RANKING 9 (2021).

3 *Id.*

4 Zengkai Zhang et al., *Embodied Carbon Emissions in the Supply Chains of Multinational Enterprises*, 10 NATURE CLIMATE CHANGE 1096 (2020), https://www.nature.com/articles/s41558-020-0895-9 [https://perma.cc/M9VB-CADG].

5 For example, despite recent renewed attempts to regulate numerous antitrust lawsuits, Amazon has so far enjoyed relative freedom from regulation. The company has even flouted the bipartisan-supported Uyghur Forced Labor Prevention Act. *See, e.g.*, *Amazon Suppliers Tied to Forced Labor in Xinjiang*, TECH TRANSPARENCY PROJECT (Mar. 7, 2022), https://

Because global warming is a global problem, pollution abroad will not leave the United States untouched. The Intergovernmental Panel on Climate Change (IPCC) has cautioned against a rise in global temperatures 1.5 degrees Celsius above preindustrial levels.[6] This is not just some distant event. The World Meteorological Organization has recently predicted that there is a fifty percent chance of the average global temperature reaching this level in at least one of the next five years, and a ninety-three percent chance that one of those years will be the hottest on record.[7] We are already seeing historic weather events, including floods, droughts, and wildfires, all over the world.

As a result, companies are spending fortunes on climate-related damages to physical plants and supply chains. A 2020 International Institute for Sustainable Development (IISD) global supply chain report has predicted that companies will have to bear up to USD 100 billion in expenses from environmental risks, such as flooding, wildfires, deforestation, and water insecurity, by the year 2026.[8] At the same time, many companies are failing to take serious steps to cut emissions and make sustainable adaptations. While some companies are genuinely trying to incorporate more sustainable development and long-term thinking, they face the risk of being outperformed by others who are not above "outsourcing" pollution to other countries and delaying the inevitable.

Although customary international law draws a hard line against human rights violations, the law has yet to create actionable environmental obligations for states and private actors, such as MNEs. In Part I, this Article examines state responsibility to create a specialized extraterritorial cause of action. Part II assesses the current gaps in U.S. extraterritorial tools to prevent environmental degradation abroad. This includes the Alien Tort Statute, which a series of recent

www.techtransparencyproject.org/articles/amazon-suppliers-tied-forced-labor-xinjiang [https://perma.cc/9MCL-CZPW].

6 *Global Warming of 1.5°C*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, https://www.ipcc.ch/sr15/ [https://perma.cc/86NE-J78G] (last visited Nov. 28, 2023).

7 Press Release, World Meteorological Organization, WMO Update: 50:50 Chance of Global Temperature Temporarily Reaching 1.5°C Threshold in Next Five Years (May 9, 2022), https://public-old.wmo.int/en/media/press-release/wmo-update-5050-chance-of-global-temperature-temporarily-reaching-15%C2%B0c-threshold [https://perma.cc/A5SK-YVWV].

8 Gabriel Gordon-Harper, *CDP Estimates Environmental Supply Chain Risks to Cost Companies USD 120 Billion by 2026*, IISD (Mar. 1, 2021), https://sdg.iisd.org/news/cdp-estimates-environmental-supply-chain-risks-to-cost-companies-usd-120-billion-by-2026/ [https://perma.cc/8WEQ-MAGZ].

U.S. Supreme Court decisions has largely defanged; bilateral investment treaties (BITs); and cross-border agreements. Parts III and IV examine a particularly successful and bipartisan piece of legislation—the Foreign Corrupt Practices Act—and propose a similar framework for a Foreign Environmental Practices Act. Such an act would help level the playing field between the countries producing the most carbon emissions and those countries most affected by it. This Article focuses primarily on greenhouse gases (GHGs), or carbon emissions, although it also contemplates a broader liability for all kinds of environmental degradation. Finally, the Article looks at both international and domestic climate initiatives that both necessitate and support an extraterritorial environmental cause of action.

I
WHILE STATES HAVE A RESPONSIBILITY TO CONTROL THE EMISSIONS OF PRIVATE ACTORS, MANY COMPANIES OUTSOURCE THEIR POLLUTION

Before exploring whether the United States can regulate the overseas emissions of greenhouse gases, we must establish why states have an internationally recognized responsibility, albeit aspirational, to control emissions from private actors. Several international conventions and standards lay the framework for a duty to control emissions, including the Organization for Economic Cooperation and Development (OECD) 2011 Guidelines, the UN Convention on Climate Change, and the Rio Declaration.[9] However, these conventions are soft law, encompassing voluntary commitments. While many developed countries have enacted "cleaner" production at home, this is often an indicator of increased reliance on "dirty" supply chains abroad.[10] States should hold themselves accountable for all emissions produced or consumed domestically, even if those emissions came from foreign affiliates.

The Pollution Haven Hypothesis contends that strengthening domestic environmental policies causes "dirty" industries, particularly those involved in the exploitation and processing of natural resources,

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9 *OECD Guidelines for Multinational Enterprises*, OECD PUBL'G (2011), http://dx.doi.org/10.1787/9789264115415-en [https://perma.cc/8N82-GBPL]; United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107; U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992).

10 Zhang et al., *supra* note 4.

to relocate to countries with less stringent policies.[11] On the other hand, the Pollution Halo Hypothesis argues that industries engage in a "race to the top" when consumer demand for "clean" products leads to more sustainable technology and industry management.[12] One problem with the Pollution Halo Hypothesis is that it would not affect companies operating outside the public eye, such as manufacturers and refiners. The average consumer does not usually have information about how a plant or extraction company operates. And even if they did, it is more difficult to boycott oil than sneakers. For the most part, companies operating abroad can escape close scrutiny by the American public.

While many multinationals operate ethically abroad, some succumb to the temptation of these "foreign pollution havens"—countries with less strict standards and legal loopholes that allow them to emit higher levels of CO_2 than in their home state.[13] And it takes only a few large companies to reduce competition for those companies who rely on ethically sourced, low-emission supply chains. The United States, particularly California, has some of the strictest laws for controlling carbon dioxide emissions.[14] Arguably, the dawn of U.S. environmental regulations in the 1970s led to "industrial flight."[15] The general understanding during this time was that the developing world had a higher tolerance for pollution and an overwhelming desire to attract foreign money.[16] Many MNEs have found it convenient to outsource their pollution to countries with laxer regulations, often in developing

11 Tomasz Koźluck & Christina Timiliotis, *Do Environmental Policies Affect Global Value Chains? A New Perspective on the Pollution Haven Hypothesis* (OECD Econ. Dep't, Working Paper No. 1282, 2016), https://www.oecd-ilibrary.org/docserver/5jm2hh7nf3wd-en.pdf?expires=1553373843&id=id&accname=guest&checksum=D18492E9AA800E1A0F80D809D499267E [https://perma.cc/V67V-RDYD].

12 Jean-Marie Grether & Jaime de Melo, *Globalization and Dirty Industries: Do Pollution Havens Matter?* 7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 9776, 2003), https://www.nber.org/papers/w9776.pdf [https://perma.cc/TB8B-9CDB].

13 One recent study found evidence of "pollution offshoring" by U.S. companies whose domestic pollution and costs of compliance decreased as its imports from low-wage countries in "pollution-intensive industries" increased. Xiaoyang Li & Yue Maggie Zhou, *Offshoring Pollution While Offshoring Production?* 19–20 (Strategic Mgmt. J., Working Paper No. 1253, 2019), https://ssrn.com/abstract=2506164 [https://perma.cc/5JZT-9E9A].

14 *See Assembly Bill 32 Overview*, CAL. AIR RES. BD. (Sept. 28, 2018), https://www.arb.ca.gov/cc/ab32/ab32.htm [https://perma.cc/5JGW-PWVH].

15 H. JEFFREY LEONARD, POLLUTION AND THE STRUGGLE FOR THE WORLD PRODUCT: MULTINATIONAL CORPORATIONS, ENVIRONMENT, AND INTERNATIONAL COMPARATIVE ADVANTAGE 1–3 (1988).

16 *Id.* at 68–70.

areas, while complying with U.S. environmental regulations at home.[17] If they build factories or other manufacturing plants overseas, they are considered foreign direct investors. The idea, however, that developing countries would make themselves into pollution havens to attract foreign direct investment (FDI) rests on "the assumption that their social tolerance for pollution would remain quite high."[18] However, as these countries are increasingly affected by the devastating effects of global warming, the level of social tolerance is shifting. A growing number of citizens in the Global South are accusing some polluting MNEs of environmental racism and neoimperialism.[19]

If MNEs do not effectively adopt stricter emissions standards more closely aligned with those of their home country, or even environmental regulations in developing countries overseas, they become complicit in the rising levels of greenhouse gases. Ultimately, the CO_2 emissions generated abroad will affect the home countries of foreign investors. For example, at least sixty-five percent of the heavy smog that affects the western United States originates from countries

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17 *See* Nick Mabey & Richard McNally, *Foreign Direct Investment and the Environment: from Pollution Havens to Sustainable Development*, WWF-UK (Aug. 1999), http://www.oecd.org/investment/mne/2089912.pdf [https://perma.cc/2MHG-HGHX]; Bill Chappell, *Smog in Western US Starts Out as Pollution in Asia, Researchers Say*, NPR (Mar. 3, 2017, 10:21 AM), https://www.npr.org/sections/thetwo-way/2017/03/03/518323094/rise-in-smog-in-western-u-s-is-blamed-on-asias-air-pollution [https://perma.cc/T3VA-B2J7]; Yue Maggie Zhou, *When Some US Firms Move Production Overseas, They Also Offshore Their Pollution*, THE CONVERSATION (May 18, 2017, 9:01 PM), http://theconversation.com/when-some-us-firms-move-production-overseas-they-also-offshore-their-pollution-75371 [https://perma.cc/HK2A-75N6].

18 LEONARD, *supra* note 15, at 68.

19 For example, a social media campaign was launched in 2015, targeting Hindustan Unilever's reluctance to clean up toxic mercury contamination from a thermometer plant in Kodaikanal, India. The plant had been moved from New York to Kodaikanal because of environmental safety concerns in the 1980s but was closed in 2001 when authorities found that the company had been illegally dumping mercury. The company was ultimately forced to clean up the toxic waste after a settlement more than a decade later. *See* Jhatkaa Org, *Kodaikanal Won't*, YOUTUBE (July 30, 2015), https://www.youtube.com/watch?v=nSal-ms0vcI [https://perma.cc/23LD-N9UE]; Jhatkaa Org, *Kodaikanal Still Won't*, YOUTUBE (June 29, 2018), https://www.youtube.com/watch?v=UhZz5vKi01c [https://www.youtube.com/watch?v=UhZz5vKi01c]; *Unilever Settles Dispute over Mercury Poisoning in India*, THE GUARDIAN (Mar. 9, 2016, 11:57 AM), https://www.theguardian.com/environment/2016/mar/09/unilever-settles-dispute-over-mercury-poisoning-in-india [https://perma.cc/5FPP-S2NX]. The clean-up process is currently being monitored by local Pollution Control Boards and India's National Green Tribunal (NGT), which handles matters of environmental justice. T.K. Rohit, *No Violations by HUL in Remediation at Kodaikanal Factory Site: NGT*, THE HINDU (Apr. 22, 2022), https://www.thehindu.com/news/national/tamil-nadu/no-violations-by-kodaikanal-hul-unit-in-remediation-process-ngt/article65345469.ece [https://perma.cc/Z5UX-ULMG].

such as China and India.[20] Given the duty of states to limit anthropogenic emissions and the growing consequences to domestic air quality, the United States must ensure that their MNEs are held liable for environmental degradation abroad.

The duty of corporate social—particularly environmental—responsibility has become more widely accepted, especially given the power international firms wield over the society and economy of a host state, often a developing country.[21] This duty has become even more important considering new data on emissions. In 2008, as much as twenty-two percent of global carbon emissions were produced by the foreign affiliates of MNEs.[22] While that percentage has gradually declined in the past few years, it is still a staggering proportion of emissions.[23] Carbon emissions from the foreign affiliates of a single large MNE are often greater than an entire domestic industry. For example, the foreign affiliates of the U.S. MNE Coca-Cola emit almost as much carbon as the entire food sector of mainland China.[24]

International guidelines caution MNEs to subscribe to environmentally conscious behavior. Although the OECD Guidelines for Multinational Enterprises are primarily aspirational, the recent 2023 amendments argue more strongly for corporate environmental responsibility.[25] The Guidelines encourage MNEs, in relevant part, to "[c]ontribute to economic, environmental and social progress with a view to achieving sustainable development" and to "[r]efrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health,

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20 Chappell, *supra* note 17.

21 *See* Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 101 (2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=695641 [https://perma.cc/GGE2-BEL5].

22 Zhang et al., *supra* note 4.

23 *See id.*

24 *See* Thin Lei Win, *Multinational Companies Account for Nearly a Fifth of Global CO2 Emissions, Researchers Say*, REUTERS (Sept. 8, 2020, 5:10 AM), https://www.reuters.com/article/us-climatechange-companies-emissions-trf/multinational-companies-account-for-nearly-a-fifth-of-global-co2-emissions-researchers-say-idUSKBN25Z1W6 [https://perma.cc/E2AQ-XETH]; Zhang et al., *supra* note 4, at 1099.

25 *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, OECD PUBL'G (June 8, 2023), https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en [hereinafter *OECD Guidelines*] [https://perma.cc/54Y2-E23J].

safety, . . . or other issues."[26] Most notably, the OECD Guidelines provide that MNEs have a responsibility to promote sustainable development through responsible corporate governance that includes internal plans to mitigate the environmental effect of each company's operations.[27] The Guidelines urge the use of the precautionary principle when conducting environmental impact assessments to judge the risk of harm.[28]

MNEs engaged in responsible business practices, according to the Guidelines, would institute "a system of environmental management" to assess risk, mitigate harm, and "establish[] and implement[] measurable objectives, targets and strategies for addressing adverse environmental impacts associated with their operations, products and services and for improving environmental performance."[29] Most importantly, the Guidelines suggest a "whole of society approach" and encourage communication and consultation with relevant stakeholders, including local communities, indigenous peoples, and employees about potential environmental and health impacts.[30] Not only do states have a duty to create regulations to prevent environmental harms, but corporations also have a duty to reduce their environmental footprint.

Even if corporations themselves are not duty bound to practice corporate environmental responsibility, the UN Framework Convention on Climate Change urges participating states, including the United States, to enact policies and regulations to promote sustainable growth and limit "anthropogenic emissions" of greenhouse gases.[31] This provision implies that states have a duty to regulate the conduct of private actors to limit the effects of climate change.

The Rio Declaration on Environment and Development directs states to take on issues of global pollution. Principle 13 states, in relevant part, that "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. [They] shall also cooperate . . . to develop further international law regarding liability and compensation for adverse effects of environmental damage . . . to areas beyond their jurisdiction."[32] While the Declaration cautions against unilateral measures to address

26 *Id.* at 14.

27 *See id.* at 33–38.

28 *See id.* at 37.

29 *Id.* at 33.

30 *Id.* at 34–36.

31 United Nations Framework Convention on Climate Change, *supra* note 9, art. 4(1)(b).

32 U.N. Conference on Environment and Development, *supra* note 9, at Principle 13.

transboundary or international environmental problems beyond a state's jurisdiction, it also urges states to "prevent the relocation of and transfer to other [s]tates of any activities . . . that cause severe environmental degradation."[33] MNEs that outsource their pollution abroad so they can lower emissions at home transfer harmful activities to other states. Creating a domestic environmental statute that provides for extraterritorial jurisdiction would arguably follow the precepts of the Rio Declaration.

While the United States has fairly strict emissions standards, it is still the second largest producer of greenhouse gases, behind China, and has not always participated in international environmental efforts.[34] The U.S. economy cannot afford to be left behind in a "race to zero emissions."[35] Controlling its global carbon footprint is a good first step. The United States has some options to exercise extraterritorial jurisdiction over its companies, but there is currently no effective liability for U.S. MNEs that exceed legal greenhouse gas emissions abroad.

II
GAPS IN MULTINATIONAL ENTERPRISE LIABILITY IN THE UNITED STATES

The United States has a limited ability to enforce corporate environmental responsibility among its MNEs. While a new generation of bilateral investment treaties (BITs) has incorporated language protecting environmental policymaking initiatives, old BITs that are still in effect primarily protect investor rights.[36] One solution to protect environmental policy efforts is to extend the United States' jurisdiction over these investors. Currently, the Alien Tort Statute (ATS)[37] and

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33 *Id.* at Principles 12 & 14.

34 *See Where Carbon Is Taxed (Overview)*, CARBON TAX CTR., https://www.carbontax.org/where-carbon-is-taxed-overview/ [https://perma.cc/ZM4B-VH5F] (last visited Nov 28, 2023).

35 *See* Press Release, U.N. Climate Change, Commitments to Net Zero Double in Less Than a Year (Sept. 21, 2020), https://unfccc.int/news/commitments-to-net-zero-double-in-less-than-a-year [https://perma.cc/AV3G-K3K5].

36 *See* Kathryn Gordon & Jachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey* (OECD, Working Paper No. 2011/01, 2011), http://www.oecd.org/daf/inv/internationalinvestmentagreements/WP-2011_1.pdf [https://perma.cc/2ZHE-4FJY]; Jackson Shaw Kern, *Investor Responsibility as Familiar Frontier*, 113 AJIL UNBOUND 28, 31 (2018).

37 Alien Tort Statute, 28 U.S.C. § 1350 (1948).

the Foreign Corrupt Practices Act (FCPA)[38] are two relevant statutes that allow for U.S. extraterritorial jurisdiction, albeit in limited circumstances. While the FCPA allows federal courts broad jurisdiction over the conduct of domestic companies and foreign nationals abroad, it covers only a narrow subject matter: bribery of a foreign government official or an official of a political party.[39] On the other hand, the ATS covers a broad range of actions, but its jurisdictional reach is almost prohibitively narrow thanks to a series of recent Supreme Court cases.[40]

The U.S. court system has also been grappling with the extraterritorial application of domestic environmental law.[41] This is particularly relevant to courts hearing cross-border pollution cases between the United States, Mexico, and Canada.[42] Cross-border pollution presents a unique jurisdictional challenge. To address this issue, countries can create a partnership, such as the U.S.-Mexico Border Partnership.[43] Carbon emissions are one such environmental hazard that can affect more than one country. However, a partnership, consisting more of guidelines than actionable obligations, would not elicit the same enforceable commitments as that of a ratified treaty.[44]

This approach is also not entirely effective in reaching the conduct of domestic companies abroad. Courts generally adopt a narrow interpretation, cautioning that extraterritorial jurisdiction may not be read into a statute unless specifically addressed in the language.[45] And any alternative dispute systems for filing complaints, such as the National Contact Point,[46] are so voluntary as to be rendered largely ineffective.

A. Green BITs and the Lack of Investor Liability

Inclusion of environmental protections and concerns has become increasingly common in international investment agreements, such as

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38 Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 (1977).

39 *See infra* Part III.

40 *See infra* Section II.B.

41 *See* ROGER R. MARTELLA JR. & JAMES W. COLEMAN, INTERNATIONAL ENVIRONMENTAL LAW: A GUIDE FOR JUDGES (Federal Judicial Center 2015), https://www.fjc.gov/content/309707/international-environmental-law-guide-judges [https://perma.cc/Y4K8-VX9P] [hereinafter *International Environmental Law Guide*].

42 *See id.*

43 *Id.* at 5–6.

44 *Id.* at 6.

45 *Id.* at 7.

46 *See infra* Section II.D.

BITs.[47] It has also been incorporated into the North American Free Trade Agreement (NAFTA) and carried over into its successor, the United States-Mexico-Canada Agreement (USMCA), through Chapters 14 and 24.[48] Article 14.16 of the USMCA provides: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives."[49] Similar to Section 1114 of NAFTA, this provision replaces "environmental concerns" with "environmental, health, safety, or other . . . objectives."[50] This gives some "policy space" for enacting regulations designed to protect the environment.[51] However, in an investor-state dispute, this policy space may not be sufficient to overcome an argument of expropriation. Further, any measures adopted by a party would still have to be "otherwise consistent with this Chapter,"[52] limiting policy discretion, even for environmental and health issues. Such a claim would depend on the interpretation of the arbitrators, who do not have to follow precedent.[53] While it is a good start, the lack of specificity in many of these environmental provisions means that they are more aspirational than binding.

The USMCA does make some important additions, however. One can be found in the investment chapter and is dedicated to "Corporate Social Responsibility."[54] This provision urges parties to the agreement to encourage foreign investors within their jurisdictions to voluntarily adopt "internationally recognized standards," such as the 2011 OECD Guidelines, into their operations.[55] The USMCA also adds an entire

47 *See* Gordon & Pohl, *supra* note 36.

48 *See North American Free Trade Agreement (NAFTA)*, DEP'T OF COM., INT'L TRADE ADMIN. (2020), https://www.trade.gov/north-american-free-trade-agreement-nafta [https://perma.cc/WA8C-T87B]; U.S.-Mex.-Can. Agreement, Ch. 14 & 24, Nov. 30, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [https://perma.cc/7SAR-JPA3] [hereinafter USMCA].

49 USMCA, *supra* note 48, art. 14.16.

50 *See id.*; North American Free Trade Agreement U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), https://www.italaw.com/sites/default/files/laws/italaw6187%2814%29.pdf [https://perma.cc/M45A-5WZ2].

51 *See* Gordon & Pohl, *supra* note 36, at 14–18.

52 USMCA, *supra* note 48, at art. 14.16.

53 *See* Kern, *supra* note 36, at 28.

54 USMCA, *supra* note 48, art. 14.17.

55 *Id.*

chapter dedicated to environmental issues, including Environmental Impact Assessments (EIAs), ozone protection, air quality, marine pollution, multilateral environmental agreements, and corporate social responsibility.[56] Most notably, Article 24.4 provides strong language about enforcement, stating that "[n]o Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties."[57] This discourages a host state from compromising environmental regulations to attract foreign investors. But while neglecting to enforce existing environmental laws is explicitly prohibited and states are obligated to enforce these laws under binding state-to-state dispute settlement, weakening such laws to promote investment is merely frowned upon.[58]

Traditionally, BITs have almost exclusively protected foreign investors from state action, leaving little room for host states to bring claims or even counterclaims against investors through an investor-state dispute mechanism.[59] Even if a state is committed to sustainable environmental development and protection, it is often difficult to enforce or create new regulations in this area without experiencing resistance from foreign investors protected under a BIT. The potential for "regulatory chill" is high in these cases because a foreign investor can bring a claim against a host state, sometimes blocking enforcement of domestic judgments, even if that state has sued the foreign investor for environmental degradation.[60] This is particularly troubling when foreign investors bring claims against the state for indirect expropriation after attempts by the state to enact environmental policy. Often, these policies are consistent with commitments to environmental sustainability found in the constitutions of other countries and international sustainable development goals. For example, Mexico's constitution contains such environmental language:

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56 *See id.* at art. 24.

57 *Id.* at art. 24.4.

58 *See id.*

59 Kern, *supra* note 36, at 30–31.

60 *See* Rosalien Diepeveen, et al., *Bridging the Gap Between International Investment Law and the Environment*, 30 UTRECHT J. INT'L & EUR. L. 145, 153–54 (2014), https://utrechtjournal.org/articles/76. A specific example of this issue is the Republic of Ecuador's case against Chevron. In 2011, an Ecuadorian court ordered Chevron to pay a substantial fine and perform an environmental cleanup. However, Chevron subsequently brought a claim against the Ecuadorian government under the BIT, claiming it did not receive sufficient due process from the domestic proceeding. As a result, arbitration postponed the government's ability to enforce the environmental cleanup. *Id.* at 153–54.

"Any person has the right to a healthy environment for his/her own development and well-being. The State will guarantee the respect to such right. Environmental damage and deterioration will generate a liability for whoever provokes them in terms of the provisions by the law."[61] Despite this provision, the Mexican government has little power to enforce its protective environmental laws, in part because of its efforts to encourage foreign direct investment.[62] The situation in Mexico is hardly unique. And the uneven obligations enumerated within the BITs give host states who sign little recourse to bring claims or counterclaims against foreign investors who engage in environmental degradation.[63] There are some recent cases of host countries bringing environmental degradation claims in investor-state disputes, but one tribunal held that to bring a successful environmental degradation counterclaim, there has to be an explicit obligation in the BIT.[64]

A 2011 survey from the OECD found that parties have started to incorporate environmental language into their BITs and, by 2008, eighty-nine percent of recent treaties mentioned environmental concerns.[65] Most notably, a new model "green investment treaty" has been proposed.[66] This model treaty would impose obligations on investors, including conducting an EIA, enacting an environmental management plan, and monitoring and publicly reporting results.[67] A model green treaty would also require that arbitrators who hear disputes

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61 CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, CPEUM, art. 4(5), Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 2015 (Mex.), https://www.constituteproject.org/constitution/Mexico_2015.pdf?lang=en [https://perma.cc/3TTX-24ZK] (last visited Nov. 21, 2023) (English translation).

62 *See* Diepeveen, *supra* note 60, at 156.

63 *See* James Gathi & Sergio Puig, *Introduction to the Symposium on Investor Responsibility: The Next Frontier in International Investment Law*, 112 AJIL UNBOUND 362 (2018); Jean Ho, *The Creation of Elusive Investor Responsibility*, 113 AJIL UNBOUND 10, 10–12, 14 (2018).

64 *See* Urbaser v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, https://www.italaw.com/cases/1144 [https://perma.cc/D8T5-SAYP]; Aven v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Final Award, https://www.italaw.com/cases/2959 [https://perma.cc/YF99-4LAL].

65 Gordon & Pohl, *supra* note 36, at 8. This percentage, however, does not include more recent treaties, including those found in online databases.

66 Daniel Magraw et al., *Model Green Investment Treaty: International Investment and Climate Change*, 36 J. INT'L ARB. 95 (2019).

67 *Id.* at 3–5, 24, 26–29.

arising under these BITs are familiar with sustainable development and climate law and policy.[68]

However, this does not necessarily allow for the host state's unfettered right to enact environmental policy. Even the survey acknowledges that "[t]reaty provisions that preserve policy space to regulate environmental matters do not automatically preclude compensation claims based on changes of environmental regulations or similar measures."[69] Protection against expropriation claims can be found elsewhere, such as the USMCA. It provides, "non-discriminatory regulatory actions . . . that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances."[70]

But we rarely see BIT provisions that explicitly shield host states from investor claims of indirect expropriation.[71] Even if a BIT prevents claims of creeping expropriation for a host state's environmental regulations, it's possible an arbitral tribunal would allow a claim in certain circumstances, based on its own interpretation.

Moreover, new BITs that include provisions regarding the host state's right to regulate compose only a portion of existing BITs. Earlier BITs, which make up most of the BITs currently in effect, are primarily concerned with the protection of the investor.[72] Although many countries have adopted a more balanced approach to investor and host state interests in BITs, and the renegotiation of current BITs nearing expiration may allow for more environmental policy space, it is not guaranteed all parties will embrace this approach.[73] A state may find such policy provisions unnecessary. Alternatively, unequal bargaining power between states may still skew BITs in favor of the larger, wealthier capital-exporting states seeking to appease their industry lobby. Because MNEs can so easily escape environmental obligations in most current BITs, we must also assess existing statutory solutions.

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68 Daniel B. Magraw & Sergio Puig, *Greening Investor-State Dispute Settlement*, 59 B.C. L. REV. 2717, 2726, 2731 (2018); Magraw et al., *supra* note 66, at 31–32.

69 Gordon & Pohl, *supra* note 36, at 20.

70 USMCA, *supra* note 48, Annex 14-B, 3(b). Several U.S. free trade agreements also contain similar language.

71 *Id.*

72 Mary E. Footer, *Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment*, 18 MICH. STATE J. INT'L L. 33, 37 (2009).

73 *Id.* at 46.

B. The Alien Tort Statute and Corporate Responsibility

The Alien Tort Claims Act, commonly referred to as the Alien Tort Statute (ATS), is a short act that simply provides that "[t]he 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."[74] In the past, foreign claimants have successfully used the ATS to sue foreign nationals in U.S. federal court for actions committed abroad that violated international laws.[75] Recently, however, the Supreme Court and the Ninth Circuit have drastically changed the legal landscape of the ATS, defining its limited jurisdictional reach over corporations.

The Supreme Court, in a 2013 case involving Royal Dutch Petroleum, determined that foreign nationals suing a foreign corporation under the ATS for acts done abroad did not overcome a presumption against extraterritoriality.[76] The plaintiffs, Nigerian nationals, alleged that the Dutch, British, and Nigerian companies "aided and abetted the Nigerian government" in violence and other atrocities directed against protests by local citizens regarding environmental degradation caused by the companies.[77] However, the Court was concerned that a broad interpretation of the ATS would potentially interfere with U.S. foreign policy,[78] echoing concerns expressed by some lawmakers before the passage of the Foreign Corrupt Practices Act.[79] The Court in *Kiobel* ultimately concluded that claims brought under the ATS must "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[80] It held that merely having a "corporate presence" in the United States, such as being traded on the New York Stock Exchange, was not enough to rebut that presumption.[81]

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74 Alien Tort Statute, 28 U.S.C. § 1350 (1948).

75 *See* Alien Tort Claims Act, GLOB. POL'Y F., https://www.globalpolicy.org/international-justice/alien-tort-claims-act-6-30.html [https://perma.cc/5967-CN8P] (last visited Nov. 29, 2023).

76 Kiobel v. Royal Dutch Petro. Co., 569 U.S. 108, 109, 115 (2013) (citing Morrison v. National Austl. Bank Ltd., 561 U.S. 247, 255 (2010)).

77 *Id.* at 113–14.

78 *See id.* at 119–21.

79 *See infra* Section III.C.

80 *Kiobel*, 569 U.S. at 124–25.

81 *Id.* at 125.

A few years later, the Court declined to extend ATS jurisdiction to foreign multinational corporations operating outside the United States in *Jesner v. Arab Bank, PLC*.[82] Looking at the jurisdictional reach of various international bodies, the Court concluded that because the authority of international tribunals—such as the International Criminal Tribunal—are limited to "natural persons," there is no "specific, universal, and obligatory norm of corporate liability under currently prevailing international law."[83] Under this interpretation, although individuals can be held accountable for violations of international customary law, corporations would not have civil or criminal liability.

This is problematic considering the potential harm corporations can cause, directly or indirectly. Justice Sotomayor commented that the law should step in when the market does not force corporations to pay for all externalities.[84] If corporations do not have liability for environmental actions, then they will be less motivated to adopt internal mechanisms to promote corporate responsibility toward their host state or local community. The Court acknowledged that "the corporate form can be an instrument for inflicting grave harm and suffering [and] poses serious and complex questions" but left these questions for Congress and the international community to decide.[85]

Following these cases, the Ninth Circuit also weighed in on the interpretation of the ATS. *Nestle I* concerned a complaint against a U.S. corporation for supporting and financing child slavery, a human rights violation committed abroad.[86] The court held that the ATS did not extend to extraterritorial business actions.[87] It later held, in *Nestle II*, that *domestic* corporations could still be liable under the ATS—even though the Supreme Court had recently held that foreign corporations could not—provided the focus of the company's conduct took place in

82 *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018); Tomoko Ishikawa, *Counterclaims and the Rule of Law in Investment Arbitration*, 113 AJIL UNBOUND 35 (2019).

83 *Jesner*, 138 S. Ct. at 1401.

84 *Id.* at 1437.

85 *Id.* at 1406.

86 Doe I v. Nestle U.S., Inc. (Nestle I), 766 F.3d 1013 (9th Cir. 2014).

87 *Id.*; *Supreme Court Limits Extraterritorial Reach of the Alien Tort Statute*, GIBSON DUNN (June 17, 2021), https://www.gibsondunn.com/supreme-court-limits-extraterritorial-reach-of-the-alien-tort-statute/#:~:text=Ct.,international%20law%20under%20the%20ATS [https://perma.cc/A4G2-EJQF].

the United States.[88] This would be the case "even if other conduct occurred abroad."[89]

However, the Supreme Court put the final nail in the ATS coffin in its most recent *Nestle* decision in October 2021, ruling that an ATS lawsuit cannot be brought for any conduct occurring overseas.[90] Justice Thomas, writing for the majority, goes so far as endorsing a "foreign policy" idea previously dismissed by *Sosa v. Alvarez-Machain*, arguing that the ATS contemplates only the three international torts in existence at its writing: "[1] . . . safe conducts, [2] infringement of the rights of ambassadors, and [3] piracy."[91] Sotomayor, while concurring in part, mentioned that a focus on these "foreign policy concerns" ignores that "foreign nations may take (and, indeed, historically have taken) umbrage at the United States' refusal to provide redress to their citizens for international law torts committed by U.S. nationals within the United States."[92] While U.S. corporations may still be liable under the ATS, the standard of proof will be high. And there would be plenty of ways businesses could avoid this liability, such as offshoring certain decision-making board meetings. Unless the polluting activity actually took place in the United States, it is unlikely a claimant could sue an MNE under this statute.

C. The Reach of Domestic Environmental Regulations

Since there is a lack of international law imposing environmental obligations or liability on private actors, the onus is on states to enact regulations to control the environmental actions of their own private industry actors. The *2015 Judicial Guide for International Environmental Law* argued that the problem of enforcing environmental regulations lies in the nature of pollution: "Climate change, in particular, has placed strains on traditional conceptions of extraterritorial jurisdiction, because global greenhouse gas concentrations are the cumulative result of greenhouse gas emissions from all over the world and cannot be traced to any *particular* polluter

88 Doe v. Nestle, S.A. (Nestle II), 906 F.3d 1120, 1126 (9th Cir. 2018).

89 *Id.* at 1125–26 (quoting RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325, 337 (2016)).

90 Nestle USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

91 *Id.* at 1937 (citing Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)); *see also Nestle USA, Inc. v. Doe I*, OYEZ, https://www.oyez.org/cases/2020/19-416 [https://perma.cc/M55D-XBXR] (last visited Nov. 29, 2022).

92 Nestle USA, Inc v. Doe, 141 S. Ct. 1931, 1948 (2021).

or any *particular* nation."[93] Although pollution, particularly carbon emissions, has global effects, it is difficult to show with reasonable certainty that any one jurisdiction or polluter is responsible.

The Clean Air Act, at Section 115(a), gives federal courts jurisdiction to hear cases concerning international air pollution if the Environmental Protection Agency (EPA) has "reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country."[94]

This statute deals solely with domestic actions that have an international effect but does not address *international* actions that have a domestic effect. When the EPA put into place more restrictive domestic regulations in 2010 concerning the emissions of greenhouse gases, the Supreme Court later cautioned that the EPA could not exceed the scope of statutes passed by Congress, particularly the Clean Air Act.[95] To expand its reach, Congress would need to enact another statute that specifically provides for extraterritorial jurisdiction over nondomestic environmental violations.

D. Alternative Dispute Options

The National Contact Point (NCP) of Responsible Business Conduct, which encourages implementation of the 2023 OECD Guidelines,[96] offers another possible recourse to foreign parties wishing to hold U.S.-based MNEs responsible for environmental degradation. There are currently fifty-one NCPs in OECD countries that handle complaints against companies in a nonjudicial setting.[97] The U.S. NCP works with other agencies, including the Office of the U.S. Trade Representative, Department of Labor, and the EPA.[98] However, while the NCP covers a wider scope of activity than the ATS, its dependence on the cooperation of both parties limits its effectiveness.

93 *International Environmental Law Guide*, *supra* note 41, at 8.

94 *Id.* at 23; Clean Air Act, 42 U.S.C. § 7415(a) (1990).

95 *International Environmental Law Guide*, *supra* note 41, at 8–9 (citing Utility Air Regul. Grp. v. EPA, 573 U.S. 302 (2014)).

96 *Responsible Business Conduct*, OECD, http://mneguidelines.oecd.org/ncps/ [https://perma.cc/FUD3-PBD9] (last visited Nov. 29, 2023).

97 *Id.*

98 *About the US National Contact Point*, U.S. DEP'T OF STATE, https://www.state.gov/u-s-national-contact-point-for-the-oecd-guidelines-for-multinational-enterprises/about-the-u-s-national-contact-point/ [https://perma.cc/5REX-G6VY] (last visited Nov. 29, 2023).

The U.S. NCP has a "Specific Instance" process, which allows complaints to be filed against MNEs usually "related to issues arising in the United States or regarding the activities of U.S. headquartered companies operating in countries which have not established an NCP."[99] Although this office also offers mediation services, there are no consequences for failing to cooperate in alternative dispute resolutions or investigations.[100] Further, parties are allowed to keep certain information they deem sensitive out of published reports, similar to investor-state dispute arbitrations, despite the U.S. NCP's dedication to transparency.[101] Even if the United States were to adopt this model to investigate environmental violations committed by U.S. MNEs, it does not provide an adequate catchall for serious environmental degradation abroad.

It is difficult, if not impossible, for foreign individuals and communities harmed by environmental degradation from U.S.-based companies to get relief. This should be concerning to the United States for a couple of reasons. Not adopting effective climate policy would hurt its global reputation, potentially damaging the economy and future trade deals. And pollution and environmental degradation by U.S. MNEs abroad is causing domestic harm in the form of air quality and extreme weather from increased greenhouse gas emissions. A lack of jurisdictional options for claimants seeking action against U.S. MNE affiliates leaves open the question of who has the authority to hold MNEs accountable for environmental degradation.

III
THE FOREIGN CORRUPT PRACTICES ACT MODEL

Given the inexorable progress of climate change and the adverse effect of air pollution on public health, the economy, and sustainable development, we cannot wait for a private industry-driven solution. Therefore, Congress should enact legislation extending liability for environmental torts committed by U.S. multinational companies abroad. In gauging the success of such legislation, this Article examines a statute regulating corporate activity abroad that has enjoyed

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99 *Specific Instance Process*, U.S. DEP'T OF STATE, https://www.state.gov/u-s-national-contact-point-for-the-oecd-guidelines-for-multinational-enterprises/specific-instance-process/ [https://perma.cc/EM9S-KMTW] (last visited Nov. 29, 2023).

100 *See id.*

101 *See id.*

wide support—the Foreign Corrupt Practices Act of 1977 (FCPA).[102] Not only did this Act provide a broad scope of extraterritorial jurisdiction to address a moral and anticompetitive problem, but it also achieved bipartisan popularity and international influence.

A. Origins

In the early 1970s, the Securities and Exchange Commission (SEC) published a report based in part on information regarding illegal corporate political contributions uncovered by the special prosecutor for the Watergate investigation.[103] The SEC was concerned about the lack of transparency to investors and the public about other questionable payments these companies had also made to foreign governments.[104] A series of congressional hearings revealed several U.S. multinational companies were involved in these types of foreign payments.[105] One notable example was the government contractor, Lockheed Martin, who bribed the Japanese prime minister and government officials in other foreign countries while receiving a substantial loan from the federal government.[106] Although many other U.S. companies still operated ethically abroad, all U.S. companies became globally maligned for corruption, despite bribery being a common practice in many other countries.[107] This reputational blow did not merely pose a threat to the international reputation of the United States, but was beginning to affect relations with its allies.[108] There was a general fear in Congress that bribes made by U.S. companies abroad would undermine the U.S. government's foreign policy.[109] Congress determined that the harm of bribery payments to U.S. foreign policy outweighed the benefits of U.S. companies using bribes to win contracts overseas.[110]

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102 Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 (1977).

103 Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO STATE L.J. 929, 932 (2012), https://ssrn.com/abstract=2185406 [https://perma.cc/38RH-2JTT].

104 *Id.* at 933.

105 *See id.*; U.S. DEP'T OF JUST., CRIM. DIV. & U.S. SEC. & EXCH. COMM'N, ENV'T DIV., FCPA: A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 3 (2d ed. 2020), https://www.justice.gov/criminal-fraud/fcpa-guidance [https://perma.cc/6QC9-EUVT] [hereinafter FCPA GUIDE].

106 Koehler, *supra* note 103, at 934–35.

107 *Id.* at 938.

108 *See id.* at 940–43.

109 *See id.* at 940.

110 *See id.* at 942; FCPA GUIDE, *supra* note 105, at 3.

Not surprisingly, the FCPA, which garnered widespread bipartisan support from lawmakers in the United States,[111] came on the heels of the Watergate scandal. The bill passed shortly after the election of President Carter.[112] As the country reeled from the national embarrassment caused by the Nixon administration, a "post-Watergate morality" would become the prevailing mindset, driving the United States' attempts to save its image on the international stage.[113]

B. FCPA Liability

The FCPA provides for both civil liability, overseen by the SEC, and criminal liability, overseen by the Department of Justice.[114] Subject to FCPA liability are issuers and "domestic concerns."[115] An issuer is a domestic or foreign company that trades on a U.S. securities exchange or an "over-the-counter" stock market and files reports with the SEC, as well as individuals—directors, officers, and employees—regardless of nationality.[116] A "domestic concern" is, in relevant part, a corporation organized or principally doing business in the United States, or a U.S. national or resident.[117] A foreign national or non-issuer can also be subject to FCPA jurisdiction if they perpetuate corrupt activity within the territory of the United States.[118] Most notably, however, after a 1998 amendment prompted by the OECD Convention, the FCPA covers conduct abroad as well as in the United States.[119] Therefore, under the FCPA, unlike the ATS, a foreign corporation may be sued in federal court for conduct wholly occurring outside the United States. However, that suit must be limited only to specific conduct involving bribery and corrupt practices. The "post-Watergate morality" has not yet extended to other harmful conduct committed abroad by U.S. companies, such as air pollution and other environmental impacts.

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111 *See* Koehler, *supra* note 103, at 961.
112 *Id.* at 996.
113 *See id.* at 943.
114 FCPA GUIDE, *supra* note 105, at 4–5.
115 *Id.*
116 *Id.* at 10–11; Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 (1977).
117 FCPA GUIDE, *supra* note 105, at 10–11.
118 *Id.* at 11.
119 *Id.* at 12.

C. Success and Criticism of the FCPA

Despite early fears and some contemporary criticism, the FCPA has been largely successful at reducing corruption. In a discussion during a 1975 House hearing of the proposed bill, the then-deputy legal advisor expressed the concern that passing the FCPA might encroach on the sovereignty of other countries.[120] He stated:

> I think it is not hard to understand that countries feel they have the right not only to enact the laws in their country but to enforce the laws in their country. We have reason to believe that there would be resentment . . . if the U.S. Government, as a function of its sovereign power, undertook to insure, in effect, that foreign officials lived up to the statutes which have been enacted in their countries.[121]

He argued that prosecuting the actions of U.S. companies abroad would constitute jurisdictional overreach.[122] Although the FCPA eventually gained widespread support, foreign companies and foreign nationals are more likely to be in the crosshairs of aggressive prosecution today. This overreach by the United States essentially confirms the fears of early critics, but the benefits of reduced corruption make it hard for countries and U.S. lawmakers to oppose it.[123] Further, industry leaders and politicians are likely reluctant to publicly oppose an anti-bribery initiative.[124]

Another factor of the FCPA's success is its international support, because corruption hinders economic development in any country.[125] Initiatives in other countries and international organizations followed, as they perceived the FCPA to be a "moderate and reasonable" solution to a worldwide problem of corruption.[126] In March 1996, the Inter-American Convention Against Corruption was adopted, which required the criminalization of foreign and domestic bribery.[127] Later, the U.S. government negotiated an international treaty to prohibit bribery and corruption in international business practices among members of the

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120 Koehler, *supra* note 103, at 944–45.

121 *Id.*

122 *Id.*

123 *See* Rebecca L. Perlman & Alan O. Sykes, *The Political Economy of the Foreign Corrupt Practices Act: An Exploratory Analysis*, 9 J. LEGAL ANALYSIS 153, 167–68 (2017).

124 *Id.* at 160.

125 *See* Lee C. Buchheit & Ralph Reisner, *Why Has the FCPA Prospered?*, 18 NW. J. INT'L L. & BUS. 263, 264–65 (1998).

126 *Id.* at 265.

127 FCPA GUIDE, *supra* note 105, at 8.

OECD.[128] While there was some initial pushback by their MNE lobbyists, these negotiations resulted in the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* in November 1997, commonly known as the Anti-Bribery Convention.[129] The Anti-Bribery Convention provided, in relevant part, that its members must make it a crime to intentionally

> offer, promise, or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[130]

The Anti-Bribery Convention, in turn, shaped later iterations of the FCPA.[131]

More recently, the UN General Assembly adopted the Convention Against Corruption (UNCAC) in October 2003.[132] The UNCAC required member countries to criminalize bribery and corruption.[133] It also provided guidelines for states to adequately address and prevent corruption.[134]

The FCPA benefits foreign direct investors as well by protecting their sunk costs. While industry leaders have criticized the FCPA for impeding their competitiveness with foreign companies, who may have fewer qualms about bribery, it ultimately protects good actors.[135] Similar FCPA-inspired laws against corruption in other countries, international conventions, and the broad enforcement capability of the FCPA counteract the disadvantages U.S. MNEs face by not paying bribes to secure business opportunities abroad, creating a more level playing field.[136]

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128 *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *adopted* Nov. 21, 1997, http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [https://perma.cc/35GA-9KYM] [hereinafter Anti-Bribery Convention].

129 *See id.*

130 *Id.* art. 1(1).

131 *See* FCPA GUIDE, *supra* note 105, at 4.

132 *Id.* at 8; G.A. Res. 58/4, U.N. Doc. Convention Against Corruption (Oct. 31, 2003), https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf [https://perma.cc/DD9Q-SBKT].

133 FCPA GUIDE, *supra* note 105, at 8.

134 *Id.*

135 *See* Perlman & Sykes, *supra* note 123, at 159.

136 *Id.* at 156, 174–75.

Despite the substantial cost of developing compliance programs to stave off the threat of prosecution under the FCPA, the statute benefits American businesses, especially since enforcement has extended to foreign companies and nationals with a tenuous nexus to the United States.[137] This benefit is particularly apparent when a company has invested time and money into an FDI. For long-term investments, the solicitation of bribes takes on a more extortive quality.[138] The FCPA gives businesses an excuse to resist paying these bribes.[139] Further, the broader the reach of anticorruption measures, the less the market is distorted by bribery and corruption.[140] The reduced participation in corruption by many MNEs allows for increased economic development in the host country. This, in turn, can lead to more business opportunities for MNEs.

The FCPA has enjoyed bipartisan success in creating extraterritorial jurisdiction over U.S. companies. Following this model, it may be possible to construct similar legislation to address polluting companies abroad in the form of a Foreign Environmental Practices Act.

IV
A FOREIGN ENVIRONMENTAL PRACTICES ACT

A statute addressing environmental degradation abroad from foreign investors, particularly regarding violations of allowable carbon emission levels, would unambiguously provide U.S. agencies, such as the EPA and DOJ, with extraterritorial jurisdiction over U.S. MNEs and their foreign affiliates. Although there would be the potential for jurisdictional overreach, many countries most affected by climate change do not have adequate enforcement capabilities to ensure that companies adhere to allowable emission levels. And companies that adopt "clean" technology and attempt to reduce their reliance on emissions are at a competitive disadvantage against companies who rely on outsourcing their pollution to foreign affiliates.

A. Benefits and Challenges of a Statutory Solution

With urgent calls for environmental sustainability and a growing patchwork of low-emission jurisdictions, the benefits of a new environmental extraterritorial statute would not be purely reputational.

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137 *Id.*

138 *Id.* at 166–67.

139 *See id.* at 158.

140 *See id.* at 154.

Between the publication of the IPCC's 2018 report and its 2022 report, the number of governments and companies on board with a net-zero emissions plan has increased dramatically.[141] Industrial lobbyists could likely argue that any environmental cause of action would force companies to institute expensive emissions reduction measures with little benefit except that of reputation. However, severe climate events due to anthropogenic emissions can cause interruptions to supply chains and operations. And stricter international climate regulations may affect all imports and exports in the near future. Consumers are also more concerned about "green" production.[142] Companies that do not adapt to lower emissions will likely end up paying more in the long term. Just as the FCPA gives companies the means to resist extortion efforts by corrupt foreign government officials, a Foreign Environmental Practices Act could level the playing field for companies investing in low-emission strategies.

Similar to the FCPA, companies would be able to mitigate or avoid prosecution if they establish and adhere to an internal environmental monitoring program as contemplated by the OECD Guidelines.[143] Alternatively, they could engage in environmental assessments and public reporting, encouraged in the Model Green Investment Treaty.[144] Such a statute could effectively require a transfer of "clean" technology between a U.S. parent company and its affiliates and require clean energy use certification provisions in MNE supplier contracts.[145] Arguably, an environmental version of the FCPA would also provide an opportunity for public enforcement of foreign environmental degradation. Similar to the FCPA, investigations would be initiated by tips or whistleblowers, self-reporting or public disclosure requirements, referrals from other agencies, and media reports.[146]

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141 *See* Press Release, U.N. Climate Change, Commitments to Net Zero Double in Less Than a Year (Sept. 21, 2020), https://unfccc.int/news/commitments-to-net-zero-double-in-less-than-a-year [https://perma.cc/N7JX-YYQC].

142 *See, e.g.*, Jordan Bar Am et al., *Consumers Care About Sustainability—and Back It Up with Their Wallets*, MCKINSEY & CO. (Feb. 6, 2023), https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/consumers-care-about-sustainability-and-back-it-up-with-their-wallets [https://perma.cc/BC9B-AHBE].

143 *See OECD Guidelines*, *supra* note 25, at 41–46.

144 *See* Magraw et al., *supra* note 66.

145 *See* Luis-Antonio López et al., *The Carbon Footprint of the U.S. Multinationals' Foreign Affiliates*, NATURE COMMC'NS, Apr. 11, 2019, at 1, 7–8, https://doi.org/10.1038/s41467-019-09473-7 [https://perma.cc/2YE6-WSA6].

146 *See* FCPA GUIDE, *supra* note 105.

Since environmental degradation and corruption often go hand in hand, particularly if a company bribes a public official to bypass environmental regulations, there may be some jurisdictional overlap with the FCPA. Perhaps agencies such as the EPA or SEC could levy additional fines and sanctions on actions that violate both the FCPA and a Foreign Environmental Practices Act. An additional fine would compensate for the negative environmental externalities not necessarily contemplated by the FCPA. But more analysis would need to be done to determine where the money from such fines should go.

Bribery and environmental degradation often occur side by side when a party purposely takes advantage of a host country's desire to attract FDI to avoid complying with existing regulations in that country. For example, in 2003, Walmart planned to build a store in Mexico near historic ruins, in the hopes of attracting business from tourists.[147] Walmart bribed local officials into redrawing the zoning map so that construction on the new store could go forward.[148] The *New York Times* stated, "Wal-Mart de Mexico was not the reluctant victim of a corrupt culture that insisted on bribes as the cost of doing business. . . . Rather, Wal-Mart de Mexico was an aggressive and creative corrupter."[149]

Following the *Times* article, the Department of Justice initiated an investigation into Walmart's other holdings, including those in Brazil, China, and India.[150] The investigation uncovered widespread misconduct related to construction permits, and Walmart ultimately settled with the SEC and DOJ for a total of $282 million.[151] In addition, the company allegedly spent over $900 million on its global compliance program and other FCPA-related inquiries and a $160 million settlement for an investor class action suit related to the handling of the investigation.[152] Although some host states may be tempted to relax their environmental regulations to attract more foreign investors, the Walmart de Mexico case illustrates an "aggressive

147 David Barstow & Alejandra Xanic von Bertrab, *How Wal-Mart Used Payoffs to Get Its Way in Mexico*, N.Y. TIMES (Dec. 17, 2012), https://www.nytimes.com/2012/12/18/business/walmart-bribes-teotihuacan.html [https://perma.cc/7KJ7-SRTJ].

148 *Id.*

149 *Id.*

150 Nandita Bose, *Walmart to Pay $282 Million to Settle Seven-Year Global Corruption Probe*, REUTERS (June 20, 2019), https://www.reuters.com/article/us-walmart-fcpa/walmart-to-pay-282-million-to-settle-seven-year-global-corruption-probe-idUSKCN1TL27J [https://perma.cc/68QA-YDTH].

151 *Id.*

152 *Id.*

corrupter" whose money and influence can foil the effective implementation of domestic environmental regulations. A Foreign Environmental Practices Act would work together with the FCPA to discourage bad actors from taking advantage of host countries, while also promoting fair competition.

One major difference between the FCPA and a proposed Foreign Environmental Practices Act would be the motivating factors behind the legislation. As well as deterring "aggressive corruptors" and bad actors, the FCPA provides companies with the means to resist the payment of bribes, protecting their "sunk investments" in long-term FDI.[153] Although offshoring carbon emissions is harmful to market competition as well, foreign investors are more likely to impose environmental degradation onto host countries than to be extorted. There is less of a clear financial benefit to companies in an environmental version of the FCPA. However, it would still help with long-term risks to sunk investments because smaller, developing countries are being affected by climate change first and foreign affiliates may have to move due to flooding, droughts, extreme heat, or other conditions.

A number of challenges would arise as well with this proposed environmental extraterritorial legislation. Similar to the FCPA, many could argue such a law would constitute a gross violation of sovereignty. Countries eager to host FDI may feel this law would discourage foreign investment altogether. Further, as suggested by the U.N. Framework Convention on Climate Change, a multilateral treaty would be the ideal solution for this problem because it is often difficult to trace emissions back to any one polluter. However, a multilateral emissions treaty, similar to the Anti-Bribery Convention and the UNCAC,[154] would only increase the effectiveness of a Foreign Environmental Practices Act. More likely, such a treaty would be initiated by the EU because it has already spent several years developing WTO-compliant emissions legislation. However, if the United States develops its own extraterritorial emissions legislation, it could take the credit in future climate negotiations. It is important that the United States contemplate such a multilateral solution even as it enacts domestic legislation.

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153 Perlman & Sykes, *supra* note 123, at 166–69.

154 Anti-Bribery Convention, *supra* note 128; Convention Against Corruption, *supra* note 132.

B. Necessity of Extraterritorial Jurisdiction and Potential Bipartisan Support

A new legislative tool that would help communities and individuals harmed by polluting practices from U.S. MNE affiliates abroad would be useful because of actions being taken both internationally and domestically. First, there is increasing international pressure to comply with UN sustainable development goals to reduce emissions. Some countries have engaged in multilateral treaties, while others have codified new avenues for climate litigation.[155] Other solutions to reduce emissions have already been initiated in places like the EU and Canada.[156] These measures will affect future trade, particularly for industries that produce high emissions. In addition, there is growing public and political support for climate protection and emissions reduction, particularly including Europe, small-island nations, and other climate-vulnerable countries in the Global South.[157] Finally, the public and political support for climate initiatives is also growing in the United States, despite losing its bipartisan focus for several decades.[158]

1. International Climate Initiatives

With rising levels of smog, public health problems, and more frequent extreme weather, developing countries most vulnerable to climate change are enthusiastically embracing the idea of environmental sustainability. Small, climate-vulnerable countries are already developing treaties and solutions to affect more sustainable trade, such as the Agreement on Climate Change, Trade and Sustainability, adopted by Norway, Iceland, Costa Rica, Fiji, and New

155 Netherlands and France have codified climate obligations, which has opened the door to climate litigation cases. *See* Vereniging Milieudefensie v. Royal Dutch Shell PLC, Hague District Court, Judgment of May 26, 2021, https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2021:5339 [https://perma.cc/Y6TC-LVJL] (English translation); Notre Affaire à Tous v. Total, Court of Appeal of Versailles, 14th Chamber, Nov. 18, 2021, http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/ [https://perma.cc/W62A-3HFZ] (English translation).

156 *See infra* Section IV.B.1.

157 In fact, the biggest successes in climate protection have been in developing countries. *See, e.g.*, Katy Gillett, *How These Eight Countries Have Already Achieved Net-Zero Emissions*, NAT'L NEWS (Apr. 22, 2023), https://www.thenationalnews.com/uae/2023/04/22/how-these-eight-countries-have-already-achieved-net-zero-emissions/ [https://perma.cc/UFC9-A82S].

158 *See, e.g.*, Ariel Cohen, *Bipartisan Carbon Border Adjustment Mechanism – a Political Unicorn?*, FORBES (Mar. 15, 2023), https://www.forbes.com/sites/arielcohen/2023/03/15/bipartisan-carbon-border-adjustment-mechanisma-political-unicorn/?sh=1092782168df [https://perma.cc/SVT8-8N8U].

Zealand.[159] This agreement plans to liberalize trade and phase out fossil fuel subsidies.[160]

Most recently, the EU has agreed on a Carbon Border Adjustment Mechanism (CBAM) in March 2022, as part of its European Green Deal.[161] This new initiative would put a carbon price on all imports to the EU and address the problem of "carbon leakage" in its supply chains.[162] Although the United States has been reluctant to adopt similar measures in the past, there is speculation that the United States may eventually adopt a version of a carbon tax, as it more seriously considers the economic impact of climate change.[163]

While market-based carbon tax solutions, such as cap-and-trade and emissions trading schemes, are generally successful in reducing overall carbon emissions, there are some drawbacks. The most significant issue is that many large companies are less incentivized to reduce overall emissions if they can afford to buy carbon credits. And while these schemes can eventually reduce emissions or increase the cost of carbon, this reduction is more gradual. As there is a possibility that we will reach an average global temperature of 1.5 degrees Celsius much sooner than expected, we do not have time for more gradual transitions.[164]

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159 Ronald Steenblik & Susanne Droege, *Time to ACCTS? Five Countries Announce New Initiative on Trade and Climate Change*, IISD (Sept. 25, 2019), https://www.iisd.org/articles/insight/time-accts-five-countries-announce-new-initiative-trade-and-climate-change [https://perma.cc/M6JN-TVY5].

160 *ACCTS Negotiating Rounds*, N.Z. FOREIGN AFFS. & TRADE, https://www.mfat.govt.nz/en/trade/free-trade-agreements/trade-and-climate/accts-negotiating-rounds/ [https://perma.cc/TNE5-GG99] (last visited Nov. 26, 2023).

161 Press Release, Eur. Council, Council Agrees on the Carbon Border Adjustment Mechanism (CBAM) (Mar. 15, 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/03/15/carbon-border-adjustment-mechanism-cbam-council-agrees-its-negotiating-mandate/ [https://perma.cc/L72G-3SNX]; *The European Green Deal*, EUR. COMM'N, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en [https://perma.cc/8SAX-QRZX] (last visited Nov. 26, 2023).

162 *Commission Launches Public Consultations on Energy Taxation and a Carbon Border Adjustment Mechanism*, EUR. COMM'N (July 23, 2020), https://ec.europa.eu/taxation_customs/news/commission-launches-public-consultations-energy-taxation-and-carbon-border-adjustment-mechanism_en [https://perma.cc/CRJ3-96T7].

163 *See* Ryan Costello, *Green New Deal Is an Opportunity for GOP to Retake Climate Debate*, THE HILL (Apr. 5, 2019, 2:15 PM), https://thehill.com/blogs/congress-blog/energy-environment/437605-green-new-deal-is-an-opportunity-for-gop-to-retake [https://perma.cc/8J6T-T3VG].

164 *See* Fiona Harvey, *World Likely to Breach 1.5C Climate Threshold by 2027, Scientists Warn*, THE GUARDIAN (May 17, 2023), https://www.theguardian.com/environment

It is also difficult to track down carbon usage throughout the supply chain. Although there are tools being developed,[165] it would be easier if the responsibility of tracking the carbon usage of subsidiaries and suppliers fell to the MNEs instead of the states. They are better poised to track, negotiate, and deter emissions. Such a requirement could support the efforts of the CBAM and similar programs.

In 2018, Canada created the Canadian Ombudsperson for Responsible Enterprise (CORE), whose function is to investigate human rights violations committed by Canadian companies abroad.[166] At the same time, it created a multistakeholder Advisory Body on Responsible Business Conduct, who would advise the ombudsperson.[167] The first CORE was appointed in April 2019.[168] Her mandated duties include reviewing human rights abuse cases alleged primarily against Canadian companies in the extraction industry—oil, gas, and mining operations—as well as the garment industry.[169] Currently, a bill has been proposed to give the federal court jurisdiction over civil cases that allege human rights violations by Canadian companies acting abroad.[170]

The CORE office has attempted to make filing complaints accessible to affected individuals or communities. Complaints may be made online, in writing, or over the phone, and must meet three criteria. The complaint must concern (1) an "internationally recognized human right;" (2) a Canadian company operating abroad in the mining, oil and gas, or garment sectors; and (3) conduct occurring after May 1, 2019,

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/2023/may/17/global-heating-climate-crisis-record-temperatures-wmo-research [https://perma.cc/CFS4-MSJ4].

165 For example, a climate activist group plans to launch a satellite in 2024 that will track methane emissions. This data will be available to the public. Liz Hampton, *Methane Hunters Tap New Technology to Reshape Policing of U.S. Greenhouse Emissions*, U.S. NEWS (May 23, 2023), https://www.usnews.com/news/top-news/articles/2023-05-23/methane-hunters-tap-new-technology-to-reshape-policing-of-u-s-greenhouse-emissions.

166 *The Government of Canada Brings Leadership to Responsible Business Conduct Abroad*, GLOB. AFFS. CAN. (Jan. 17, 2018), https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringsleadershiptoresponsiblebusinesscond.html.

167 *Id.*

168 Press Release, Global Affairs Canada, Minister Carr Announces Appointment of First Canadian Ombudsperson for Responsible Enterprise (Apr. 8, 2019), https://www.canada.ca/en/global-affairs/news/2019/04/minister-carr-announces-appointment-of-first-canadian-ombudsperson-for-responsible-enterprise.

169 *Id.*

170 Kathleen Harris, *Top Court Weighs Precedent-Setting Case of Human Rights Breaches at Canadian Mine in Eritrea*, CBC NEWS (Jan. 23, 2019), https://www.cbc.ca/news/politics/supreme-court-nevsun-eritrea-mine-human-rights-1.4990064 [https://perma.cc/8Q2S-7B9D].

or previous conduct that is still ongoing.[171] The definition of a Canadian company includes "any entity that it controls, directly or indirectly, in its operations," which prevents a company from attempting to eschew responsibility for its subsidiaries abroad under this system.[172]

The difference between Canada's proposed CORE and the problem of environmental degradation by foreign MNEs is that CORE focuses primarily on the allegations of human rights violations—of which individual obligation and liability are already recognized under international law. Further, CORE does not seem to create extraterritorial jurisdiction over its companies. Although it purports to address conduct involving social and environmental corporate responsibilities, it may receive more industry pushback because there is currently no international cause of action.

2. U.S.–Based Climate Initiatives

Meanwhile, in the United States, environmental protection has not always garnered widespread political support. The United States has a global reputation as an uncooperative player in the international movement toward sustainable economic development.[173] However, climate change and environmental protection in the United States were not always divided among party lines. In 1989, the Global Warming Prevention Act, calling for a reduction of carbon dioxide use and the formation of an international agreement on the atmosphere, was introduced by a Republican House representative.[174] And it was a Republican president, George H.W. Bush, who strengthened the Clean Air Act with the Amendments of 1990.[175] There is speculation that the

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171 CORE OCRE, THE CANADIAN OMBUDSPERSON FOR RESPONSIBLE ENTERPRISE: ANNUAL REPORT 2019-2021, at 16 (Oct. 2021), https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/assets/pdfs/annual-report-2019-2021-rapport-annuel-eng.pdf [https://perma.cc/73CM-KUC8].

172 *Id.* at 6.

173 For example, the United States was the only country to briefly pull out of the Paris Agreement. It calls into question whether the United States' promises last only as long as its current administration. *See* Rebecca Hersher, *U.S. Officially Leaving Paris Climate Agreement*, NPR (Nov. 3, 2020), https://www.npr.org/2020/11/03/930312701/u-s-officially-leaving-paris-climate-agreement [https://perma.cc/AJ3R-KW8E].

174 H.R. 1078, 101st Cong. (1989) (introduced by Representative Claudine Schneider), https://www.congress.gov/bill/101st-congress/house-bill/1078/text?s=1&r=36 [https://perma.cc/LG35-RTQ8].

175 *See* Hana Vizcarra & Joe Goffman, *What Environmental Protection Owes George H.W. Bush*, ENV'T & ENERGY L. PROGRAM, HARV. L. SCH. (Dec. 6, 2018), https://eelp.law.harvard.edu/2018/12/what-environmental-protection-owes-george-h-w-bush/ [https://perma.cc/Y6LD-88VL].

economic realities and costs of climate change may again foster a bipartisan effort to support more environmental initiatives.[176]

As more countries adopt low-carbon policies, more investors have realized climate change also affects the financial viability of a company. In March 2022, the SEC proposed a climate reporting rule, based on pressure from these investors, that would standardize and mandate the reporting of several types of emissions.[177] Most controversially, the proposed rule includes "scope 3 emissions," which include those from a company's supply chain and affiliates.[178] While this proposed rule generated a lot of pushback, particularly from the American Fuel Petrochemical Manufacturers, the SEC stated that mandatory climate disclosures would be necessary for capital formation, investor protection, and fair market conditions.[179] U.S. MNEs that impose a "single global environmental standard" across their subsidiaries tend to have higher market values than those that do not.[180] But without a standardized environmental reporting mechanism, it's almost impossible for an investor to identify firms with this advantage. And many firms engage in a "cheap talk equilibrium," advertising sweeping and often unsubstantiated environmental goals.[181] The proposed climate reporting rule would likely reduce "greenwashing" and other misinformation designed to mislead consumers and investors.

Because predictability is essential for business, these reporting requirements would only serve to facilitate economic growth. While the SEC rule would make offshoring pollution more difficult—or at least more transparent—a legislated, environmental cause of action similar to the FCPA would safeguard any climate reporting rule. If

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176 *See, e.g.*, Costello *supra* note 163.

177 Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46 [https://perma.cc/5Q45-8UQX].

178 *See* GREENHOUSE GAS PROTOCOL, CORPORATE VALUE CHAIN (SCOPE 3) ACCOUNTING AND REPORTING STANDARD, SUPPLEMENT TO THE GHG PROTOCOL CORPORATE ACCOUNTING AND REPORTING STANDARD (Sept. 2011), https://ghgprotocol.org/sites/default/files/standards/Corporate-Value-Chain-Accounting-Reporing-Standard_041613_2.pdf [https://perma.cc/A8AU-3CWV].

179 The Enhancement and Standardization of Climate-Related Disclosures for Investors, 17 C.F.R. pt. 210, 229, 232, 239, 249 (2022).

180 *See* Glen Dowell et al., *Do Corporate Global Environmental Standards Create or Destroy Market Value?*, 46 MGMT. SCI. 1059, 1068 (2000).

181 *See* 17 C.F.R. pt. 210, 229, 232, 239, 249, 341; *see also* Vincent P. Crawford & Joel Sobel, *Strategic Information Transformation*, 50 ECONOMETRICA 1431 (1982).

Congress contemplates statutory liability for the scope 3 emissions of U.S. MNEs, then it would be harder to challenge the SEC in court.[182]

There is also a growing public support for "green" initiatives. In fact, the rise of "greenwashing" advertisements and claims by companies are only symptoms of a change in consumer awareness.[183] The controversial Green New Deal was spurred, in large part, by the IPCC's October 2018 report.[184] The goal of this legislation was not necessarily to introduce any specific law, but to encourage Congress to acknowledge the serious economic and environmental threats posed by even a modest rise in global temperatures.[185]

More importantly, legislative initiatives such as the Green New Deal indicate a prevailing "post-climate morality." As Justice Sotomayor mentioned in *Jesner*, the market does not price all externalities, and this is particularly true of environmental externalities.[186] When businesses do not have to pay for environmental damage, the cost often falls to governments or vulnerable, low-income communities. This applies to both domestic companies and multinational companies operating abroad.

With international and domestic support for sustainable environmental initiatives, a legislative solution to enforce corporate liability of MNEs operating abroad, such as a Foreign Environmental Practices Act, would be both timely and essential.

182 For example, in 2022, the U.S. Supreme Court held that the EPA did not have "clear congressional authorization" for its widespread regulation of greenhouse gases. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022). If Congress passed a statute imposing liability on U.S. companies for the environmental degradation of their foreign affiliates, the SEC and other agencies could use that to argue "congressional authorization."

183 For example, while Coca-Cola is the biggest plastic polluter in the world, producing about 200,000 tons of plastic waste a year in six developing countries alone, it advertises itself as a sustainable company. Tanuvi Joe, *Earth Island Sues Coca-Cola Over Greenwashing Claims & False Advertisement*, GREEN QUEEN (June 11, 2021), https://www.greenqueen.com.hk/earth-island-sues-coca-cola-over-greenwashing-claims-false-advertising/. Despite this, Coca-Cola recently won two major greenwashing lawsuits in D.C. Superior Court. Clara Hudson, *Coca-Cola Wins in Greenwashing Suits Show Hazy Marketing Limits*, BLOOMBERG L. (Dec. 29, 2022, 2:00 AM), https://news.bloomberglaw.com/securities-law/coca-cola-wins-in-greenwashing-suits-show-hazy-marketing-limits [https://perma.cc/3RN3-7VJ3].

184 *See* Green New Deal, H.R. Res. 109, 116th Cong. (2019).

185 *Id.*

186 *See* Jesner v. Arab Bank, PLC, 138 S. Ct 1386 (2018).

CONCLUSION

In the wake of the IPCC's urgent call for a coordinated global effort to deal with climate change and reduce carbon emissions, the role of corporate social and environmental responsibility will be central to future climate initiatives. The U.N. Framework Convention on Climate Change particularly charged developed countries with taking the lead in these efforts because they have "the largest share of historical and current global emissions of greenhouse gases."[187] Although there are many private companies attempting to reduce their emissions, there is still a lot of lobbying against climate regulations. It's likely that states will have to play a bigger role in regulating the pollution of their supply chains abroad. Already, countries such as Canada are developing extraterritorial controls over their own investors.[188] And the number of initiatives within the United States, such as the SEC's proposed rule and the Green New Deal, indicate a growing public support for climate protection and adaptation.[189] It is therefore incumbent upon states, including the United States, to develop extraterritorial jurisdiction over their domestic companies acting abroad. Although only environmental soft law instruments are in place now, international organizations may soon develop more binding legal obligations, similar to international human rights law. In anticipation, the United States should develop a more comprehensive framework for determining extraterritorial environmental jurisdiction.

187 United Nations Framework Convention on Climate Change, *supra* note 9, at 1.

188 *See supra* Section IV.B.1.

189 *See supra* Section IV.B.2.