MULTINATIONAL ENTERPRISES' LIABILITY FOR THE ACTS OF THEIR OFFSHORE SUBSIDIARIES: THE AFTERMATH OF *KIOBEL* AND *DAIMLER*

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Multinational enterprises (MNEs) play a significant role with worldwide subsidiaries in the global economy. MNEs generally dominate agreements with their offshore subsidiaries in promoting their global operations. How to hold MNEs liable for the tortious acts of their offshore subsidiaries is a pressing issue. National courts, international norms and MNEs' internal codes of conduct cannot legally and effectively hold MNEs liable for their offshore subsidiaries' tortious acts.

After the Supreme Court case Filartiga v. Pena-Irala in 1980, the U.S. Alien Tort Statue (ATS) rose to provide a mechanism to hold MNEs liable for offshore tortious acts. Suits filed under the ATS have caused conflict in United States courts in the past, including those related to the issue of corporate ATS liability. The Supreme Court in Kiobel v. Royal Dutch Petroleum Co. in 2013 asserted that the ATS could only apply to violations occurring within the territory of the United States. Half a year later, with facts similar to those in Kiobel, the Supreme Court in Daimler AG v. Bauman in January 2014 asserted that ATS litigation should also satisfy the strict general jurisdiction requirement. Thus, many cases are filtered out of United States courts due to the ATS's territorial limitation and jurisdictional limitation. Barriers to post-Daimler litigating under the ATS to hold MNEs liable for the tortious acts of offshore subsidiaries are difficult to pass through. These barriers could include the principle

of presumption against extraterritorial application, the limitation of personal jurisdiction, and international comity, among other barriers. The United States seems to have closed the door for transnational litigation to hold MNEs liable for the tortious acts of offshore subsidiaries.

Even though United States courts are returning to their original position prior to the rise of ATS litigation, several strategies to impose liability on MNEs for the acts of offshore subsidiaries after Kiobel and Daimler might achieve success, including the correct application of the ATS, litigation in state courts or under state law, the expansion of the piercing the corporate veil doctrine and obtainment of consent from parties.

INTRODUCTION

Multinational enterprises (MNEs), usually comprised of companies which are located in different countries, exert significant influence over and share knowledge and resources with each other.[1] MNEs are supported by a complex and opaque web that extends across the globe. Its global network of subsidiaries and affiliate companies plays a significant role in the MNEs' global operations.

Traditionally, United States courts could not hold MNEs liable for the acts of their offshore subsidiaries due to territorial and sovereign limitations.[2] However, the Alien Tort Statute (ATS) has provided a mechanism for aliens to bring claims against individuals and corporations for tortious conduct committed abroad. The statute expressly grants subject matter jurisdiction to United States courts and provides the opportunity for victims to be awarded "domestic remedies."[3] After *Filartiga v. Pena-Irala*[4] in 1980, ATS litigation was on the rise after being ignored for 170 years. ATS became a tool to bring claims against MNEs for their offshore acts, and provided a possible

1. Org. for Econ. Cooperation and Dev. [OECD], *OECD Guidelines for Multinational Enterprises*, 15 I.L.M. 9 at 2 (1976) [hereinafter OECD Guidelines].

2. Pennoyer v. Neff, 95 U.S. 714, 720, 736 (1877) (holding that a tribunal's jurisdiction over persons reaches no father than the geographic bounds of the forum).

3. Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 61 (2008).

4. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir 1980).

mechanism to hold MNEs liable for their offshore subsidiaries' acts. However, in the milestone case *Kiobel v. Royal Dutch Petroleum Co.* in June 2013, the Supreme Court asserted that the ATS could only apply to violations of the law of nations occurring within the United States.[5] Half a year later, with facts similar to those in *Kiobel*, the Supreme Court in *Daimler AG v. Bauman* in January 2014, asserted that ATS litigation should also satisfy the strict general jurisdiction requirement.[6] Even though United States courts are returning to their original position prior to the rise of ATS litigation, several strategies are emerging to hold MNEs liable for their offshore subsidiaries' acts after *Daimler*.

This paper inquires as to how to assert MNEs' responsibility regarding their offshore subsidiaries' acts. This paper will explore and explain possible strategies to hold MNEs liable for its offshore subsidiaries' acts after the cases *Kiobel* and *Daimler*, even with difficult barriers to these strategies to cross.

The structure of this paper is as follows. The paper begins with the operation of MNEs in Part I with the case of Apple Inc. Part II explains that national courts, international norms, and MNEs' internal codes of conduct cannot legally and effectively hold MNEs liable for their offshore subsidiaries' acts. Part III examines the ATS as a mechanism to hold MNEs liable for subsidiaries' tortious acts, with a focus on the issue of corporate ATS liability by analyzing a series of cases in U.S. courts. Part IV explains that holding MNEs liable for offshore subsidiaries' acts would still meet difficult barriers, including the due process doctrine, the principle against the application of extraterritorial statues, the requirement of personal jurisdiction and the principal of international comity. Part V discusses the possible alternatives to hold MNEs liable for offshore subsidiaries acts, including the correct application of the ATS, litigation in state courts or state law, the expansion of the doctrine of piercing the corporate veil, the obtainment of consent from parties, and the newly arising principal-agent theory for piercing the corporate veil set forth in *Daimler*. This paper concludes that even though the attitude of United States courts seems to be retracting from the earlier rise of the use of the ATS, there are still alternatives to impose liability on MNEs for their offshore subsidiaries' acts. It is suggested that new

5. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665 (2013).
6. Daimler AG v. Bauman, 134 S. Ct. 746, 760-61 (2014).

thinking, such as improving the principal-agent theory to pierce the corporate veil, should be utilized to hold MNEs liable for offshore subsidiaries acts after *Kiobel* and *Daimler*. This paper asserts that these new strategies would achieve success, even though they face difficult substantive and procedural obstacles.

I. MULTINATIONAL ENTERPRISES' GLOBAL OPERATIONS

The operations of MNEs across state borders are an increasingly important part of global economic activity. MNEs are involved in 80 percent of global trade.[7] Of more than 100,000 MNEs, the overwhelming majority are based in the advanced economies of developed countries with many developing countries playing host to their 900,000 subsidiaries.[8]

MNEs play an important role in the world economy and are the driving forces of economic globalization.[9] The global network of production is primarily based upon the transnational activities of such companies. "About 60 percent of global trade, which today amounts to more than $20 trillion, consists of trade in intermediate goods and services that are incorporated at various stages in the production process of goods and services for final consumption."[10]

For example, Apple Inc. operates numerous manufacturing facilities and distribution centers, and their business activities are conducted in distant and inconsistently regulated environments, often with little or irregular monitoring.[11] Apple has 63,000 employees located in different

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7. United Nations Conference on Trade and Dev. (UNCTAD), World Investment Report 2013: Global Value Chains: Investment and Trade for Development 134 (2013).

8. Robert D. Hormats, *The Continuing Importance of Investment in the Global Economy* (April 20-23, 2012), http://webplus.nankai.edu.cn/picture/article/33/61/08/b3d1d25f4786a98063814141b26e/74a64f0b-d603-4298-97dc-b0479578569f.pdf.

9. *See* Peter Malanczuk, *Globalization and the Future Role of Sovereign States, in* INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE (Friedl Weiss et al. eds., 1998).

10. UNCTAD, *supra* note 7, at 122.

11. Kriss Deiglmeier, *Transparency in Supply Chains: A Convergence of Possibilities*, STANFORD GRADUATE SCHOOL OF BUSINESS (Feb. 4, 2013, 12:50 PM), http://csi.gsb.stanford.edu/transparency-supply-chains-convergence-possibilities.

subsidiaries worldwide.[12] Around ninety percent of all of the components for its iPhones, for example, are engineered, manufactured, and assembled in Asia, Europe, and Africa.[13] Apple's "[a]dvanced semiconductors have come from Germany and Taiwan, memory from Korea and Japan, display panels and circuitry from Korea and Taiwan, chipsets from Europe and rare metals from Africa and Asia. And all of it is put together in China."[14]

MNEs play a leading and active role with offshore subsidiaries located around the world. MNEs with a multitude of potential sources are in a strong position to dictate contractual terms with subsidiaries.[15] The agreements between MNEs and their subsidiaries usually contain the price, the pattern, the materials, the quality and quantity. The subsidiaries have to follow the strict requirements from MNEs to support the MNEs' global operations. The subsidiaries are in a relatively weak position when facing MNEs. For instance, the General Distributor Agreement between DaimlerChrysler Aktiengesellschaft (DCAG) with headquarters in Germany and the United States subsidiary Mercedes-Benz USA (MBUSA) contains fully detailed information about standards, price, management personal, service, MBUSA's authority and ownership, trademark, and so on.[16]

II. THE ROLE OF NATIONAL COURTS, INTERNATIONAL NORMS AND INTERNAL CODES OF CONDUCT IN HOLDING MNES LIABLE FOR THE ACTS OF OFFSHORE SUBSIDIARIES

A. The Role of the National Court in Holding a MNE Liable for its Offshore Subsidiary's Acts: In China

If there are means to hold MNEs liable for offshore subsidiaries' acts, one is that they should go through national law or national courts where

12. Charles Duhigg & Keith Bradsher, *How the U.S. Lost Out on iPhone Work*, N.Y. TIMES, Jan. 22, 2012, http://www.nytimes.com/2012/01/22/business/apple-america-and-a-squeezed-middle-class.html?pagewanted=all&_r=0.

13. *Id.*

14. *Id.*

15. Frederick Mayer & William Milberg, Aid for Trade in a World of Global Value Chains: Chain Power, the Distribution of Rents and Implications for the Form of Aid 5 (The Univ. of Manchester, Working Paper No. 34, 2013).

16. Bauman v. DailmerChrysler Corp., 644 F.3d 909, 914-917 (9th Cir. 2011).

subsidiaries are located to hold the MNEs liable. As an example, we assume China to be where a MNE's subsidiary is located. The analysis is similar in most situations, no matter where a MNE's subsidiary is located.

1. Bringing Claims in Chinese Courts

Article 30 of the Criminal Law of the People's Republic of China states that "[a] company or enterprise which commits an act endangering society that is considered a crime under the law shall bear criminal responsibility."[17] As to how a company could assume criminal responsibility, Article 31 of the Criminal Law states that "[t]he person in charge and other personnel who are directly responsible shall also bear criminal responsibility."[18] In the General Principles of the Civil Law of the People's Republic of China,[19] there is corporate civil liability. A corporation is regarded as a legal person.[20] Article 106 states that "[c]itizens and legal persons who breach a contract or fail to fulfill other obligations shall bear civil liability."[21] "Citizens and legal persons, who through their fault encroach upon State or collective property or the property or person of other persons, shall bear civil liability."[22] Civil liability shall still be borne even in the absence of fault, if the law so stipulates.

As to how to bring suit in Chinese courts, Article 108 of the Civil Procedure Law of the People's Republic of China states:

> The following conditions must be met before a lawsuit is filed: (1) The plaintiff must be a citizen, legal person, or an organization having a

17. Zhonghua Renmin Gonghe Guo Xingfa (中华人民共和国刑法(1997修订)) [Criminal Law of the People's Republic of China (97 Revision)] (promulgated by the Nat'l People's Cong., Mar. 14, 1997, effective Dec. 25, 1999) [hereinafter Criminal Law].

18. *Id.* art. 31.

19. Zhonghua Renmin Gonghe Guo Mingfa Tongze (中华人民共和国民法通则) [General Principles of the Civil Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Aug. 27, 2009) art. 5. [hereinafter Civil Law].

20. *Id.* art. 41.

21. *Id.* art. 106.

22. *Id.*

> direct interest with the case; (2) There must be a specific defendant; (3) There must be concrete claim, a factual basis, and a cause for the lawsuit; and (4) The lawsuit must be within the scope of civil lawsuits to be accepted by the people's courts and within the jurisdiction of the people's court to which the lawsuit is filed.[23]

Article 29 of Civil Procedure Law states, a lawsuit brought on a tortious act shall be under the jurisdiction of the people's court of the place where the tort is committed or where the defendant has his domicile.[24] Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships is the main statute to determine how the law applies to foreign-related civil relations.[25] Article 8 states that the classification of foreign-related civil relations is governed by the law of the forum.[26] Based on this classification, tortious liability is governed by the law of the place whether the tortious act occurred. Where the parties have common habitual residence, the law of their common habitual residence shall be applied.[27] Where the parties have chosen by agreement an applicable law after the tortious act occurs, the agreement shall be followed.[28]

Chinese courts could deal with such disputes if the offshore subsidiaries' tortious acts occur in China. The fourth requirement—whether the national court has jurisdiction over a United States MNE—is

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23. Zhonghua Renmin Gonghe Guo Mingshi Susong Fa (中华人民共和国民事诉讼法(2007修正)) [Civil Procedure Law of the People's Republic of China (2007 Amendment)] (promulgated by the Nat'l People's Cong., Oct. 28, 2007) art. 108 [hereinafter Civil Procedure Law].

24. *Id.* art. 29.

25. Zhonghua Renmin Gonghe Guo Shewai Minshi Guanxi Falv Shiyong Fa (中华人民共和国涉外民事关系法律适用法) [Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective Apr. 1, 2011). art. 2 ("The laws applicable to foreign-related civil relations shall be determined in accordance with this law. Where other statutes have a special and different provision on the law applicable to a foreign-related civil relation, that provision shall be followed. Where no applicable law to a foreign-related civil relation has been specified in this law or other statutes, the law that is most closely connected with the foreign-related civil relation shall be applied.") [hereinafter Choice of Law for Foreign-related Civil Relationships].

26. *Id.* art. 8.

27. *Id*. art. 44.

28. *Id*.

critical here. As to the jurisdiction, there are four kinds of jurisdiction in China: territorial jurisdiction,[29] personal jurisdiction,[30] protection jurisdiction[31] and universal jurisdiction.[32] In general, Chinese courts cannot govern foreign MNEs for their Chinese subsidiaries' acts due to territorial limitations. China only recognizes universal jurisdiction in serious violations of the laws of nations, such as crimes against humanity. The only remaining probable way is to pierce the corporate veil to discover whether a Chinese court could govern United States MNEs in such a case.

2. Piercing the Corporate Veil Doctrine in China

As a general principle, upon incorporation, a company has an independent personality separate from its corporate members.[33] The limited liability principle as the basis of a corporation provides many benefits: it decreases the need to monitor agents; it reduces the costs of monitoring other shareholders; it gives managers incentives to act efficiently; and it allows for more efficient diversification and facilitates optimal investment decisions.[34]

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29. Criminal Law, *supra* note 17, art. 6 ("This law is applicable to all who commit crimes within the territory of the PRC except as specially stipulated by law.").

30. *Id.* art. 7 ("This Law shall be applicable to any citizen of the People's Republic of China who commits a crime prescribed in this Law outside the territory and territorial waters and space of the People's Republic of China; however, if the maximum punishment to be imposed is fixed-term imprisonment of not more than three years as stipulated in this Law, he may be exempted from the investigation for his criminal responsibility. This Law shall be applicable to any State functionary or serviceman who commits a crime prescribed in this Law outside the territory and territorial waters and space of the People's Republic of China.").

31. *Id.* art. 8 ("This law may be applicable to foreigners, who outside PRC territory, commit crimes against the PRC state or against its citizens, provided that this law stipulates a minimum sentence of not less than a three-year fixed term of imprisonment for such crimes; but an exception is to be made if a crime is not punishable according the law of the place where it was committed.").

32. *Id.* art. 9 ("This law is applicable to the crimes specified in international treaties to which the PRC is a signatory state or with which it is a member and the PRC exercises criminal jurisdiction over such crimes within its treaty obligations.").

33. Salomon v. Salomon & Co. Ltd., [1897] A.C. 22 at 40. (H.L.).

34. WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 97 (3d. ed 2012).

Under the limited liability principle, shareholders' responsibilities are limited within their investments in the company. However, the risk of operating an enterprise can be shifted to outside parties, such as creditors and tort victims. Hence, under specific circumstances, the corporate veil could be pierced and shareholders could be held liable for the obligations of the company beyond their investments in the company. The first case about veil piercing on behalf of involuntary creditors was *Walkovszky v. Carlton* in 1966.[35]

China formally introduced the doctrine of "piercing the corporate veil" in its Company Law in 2005,[36] attracting widespread public and academic attention at home and abroad.[37] The central provision of the Chinese veil piercing law is contained in Article 20(3) of the Company Law, which reads: "Where the shareholder of a company abuses the independent status of the company as a legal person or the limited liability of shareholders, evades debts and thus seriously damages the interests of the creditors of the company, he shall bear joint liability for the debts of the company."[38] There are three key elements that must be satisfied if the court is to pierce the corporate veil: (1) misconduct: it must be established that the principle of separate legal personality and limited liability were abused by the shareholder; (2) intent: the abusive behavior was intended to evade the debt payment; and (3) consequence: the abuse caused serious damage to the creditors' interests.[39]

Based on a narrow textual interpretation of Article 20(3) of the Company Law, it has been asserted that the doctrine of piercing the corporate veil applies only to debt situations, such as private contractual

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35. Walkovsky v. Carlton, 223 N.E.2d 6 (N.Y. 1966).

36. Zhonghua Renming Gongheguo Gongsifa (中华人民共和国公司法) [The Company Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective July 1, 1994) [hereinafter Company Law].

37. See Mark Wu, Piercing China's Corporate Veil: Open Questions from the New Company Law, 117 YALE L.J. 329 (2007).

38. Company Law, *supra* note 36, art. 20.

39. 朱慈蕴, 公司法人人格否认：从法条跃入实践，《清华法学》2007 (2). Ciyun Zhu, *Disregarding Corporate Personality: From Law to Practice 1(2)*, TSINGHUA L. J. 009, 012 (2007) ("Where any shareholder of a company evades the payment of debts by abusing the independent status of corporate legal person and the shareholders' limited liability, and thus seriously damages the interests of any creditors, it shall bear joint liability for the debts of the company.").

deals, thereby excluding tort claims.[40] However, other scholars advocate a more liberal interpretation of the term "creditor" to include business partners, tort victims and other types of creditors.[41] The Chinese courts seem to adopt an approach in the middle: creditors can include tort victims, but not others, such as governmental agencies. Even if "creditors" include tort victims, the next difficult issue is how to decide the meaning of the word "abuse" as set forth in the three elements. The most typical situation is where one or more of the investors has failed to pay in the subscribed registered capital, or pays but then immediately withdraws it. Courts may pierce the corporate veil: when the parent company mixes its assets with the assets of the newly established company; where the parent company treats the company's assets as its own; or where the parent company ignores the subsidiary's corporate structure and exercises direct control over the subsidiary. From January 1, 2006 to December 31, 2010, there were only six cases related to piercing the parent corporate veil, not to mention when the parent's subsidiary is offshore.[42] In sum, it is difficult to find that MNEs have abused their powers, and subsequently, to hold them responsible for their offshore subsidiaries' tortious acts under the doctrine of piercing the corporate veil.

Given this detailed analysis of the Chinese legal system, the national court is unlikely to be able to hold MNEs liable for their offshore subsidiaries' conduct both effectively and legally. We next examine whether international principles or internal code of conducts could hold MNEs liable for offshore subsidiaries' acts.

B. The Role of International Principles in Holding MNEs Liable for Offshore Subsidiaries' Acts

At the international level, there are several commonly recognized norms and guidelines of regulating MNEs' behavior, including their subsidaries' offshore acts.

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40. Wu, *supra* note 37, at 334-35.

41. Xinhu Lei & Bin Liu, Expanding the Scope of the Body Eligible to Bring Piercing Cases, 27(4) J. POL. SCI. & L. 5 (2010).

42. Hui Huang, Piercing the Corporate Veil in China: Where Is It Now and Where Is It Heading?, 60 AM. J. COMP. L. 743, 755 (2012).

The Norms on The Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights explicitly states that MNEs shall respect rights to equal opportunity and non-discrimination treatment, rights to security of persons, rights of workers and human rights.[43] The Norms provide for a three-step implementation mechanism. First, MNEs are expected to "adopt, disseminate and implement internal rules of operation in compliance with the Norms" and incorporate the Norms in their contracts with all business partners.[44] Second, the Norms require transparent and independent monitoring systems through the United Nations, and other national and international instruments which already exist or need to be created.[45] Third, national states should ensure implementations of the Norms through their legal and administrative framework.[46] Moreover, the Norms provide for reparations, restitution, compensation, and rehabilitation for any damage done or property taken from the victims of non-compliance with the Norms.[47]

However, the Norms have certain limitations. They rely on monitoring mechanisms without specifying exactly which agencies they are referring to and without formulating an obligation to establish any. It is unclear which tribunals are appropriate for determining the remedies,and whether both national and international tribunals can do so.[48] This issue is of significance where MNEs operate with subsidiaries in many different countries. Moreover, there are no clear and appropriate guidelines on procedures. What's more, the implementation of the Norms relies heavily on national states, which are reluctant to oppose MNEs.[49]

The UN Global Compact asks companies to embrace universal principles and to partner with the United Nations.[50] The UN Global

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43. U.N. ECON. & SOC. COUNCIL, U.N. COMM'N ON HUMAN RIGHTS, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), at 4-5 [hereinafter Norms].

44. *Id.* at 6.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Regina E. Rauxloh, *A Call for the End of Impunity for Multinational Corporations*, 14 TEX. WESLEYAN L. REV. 297, 305 (2008).

50. *Overview of the UN Global Impact*, UN GLOBAL COMPACT,

Compact affirms that "[b]usinesses should support and respect the protection of . . . human rights"[51] and to "not [be] complicit in human rights abuses."[52] In addition, businesses are required to eliminate "all forms of forced and compulsory labour."[53] Unlike the Norms, the UN Global Compact relies on MNEs' cooperation rather than monitoring or policing them.[54] Neither independent monitoring mechanisms nor any sanction or compensation for the victims are offered.

OECD Guidelines for Multinational Enterprises are recommendations jointly addressed by governments to MNEs.[55] They provide principles and standards of good practice consistent with applicable laws and internationally recognized standards.[56] Observance of OECD Guidelines is voluntary and not legally enforceable**.** OECD Guidelines provide for so-called National Contact Points (NCP).[57] As national offices, their task is to promote and to implement the Guidelines. They receive and assess complaints against MNEs who are alleged to have breached the Guidelines. If an NCP decides the issue deserves further consideration, they offer assistance to the parties in resolving the disagreement.[58] The defect of such a mechanism is that there are no sanctions against MNEs for not obeying the Guidelines.[59] In addition, the NCP has the discretion

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http://www.unglobalcompact.org/AboutTheGC/index.html (last visited Feb. 28, 2014) ("The UN Global Compact is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption." It is a critical platform for the UN to engage effectively with enlightened global business).

51. *Global Compact Principle One*, UN GLOBAL COMPACT, https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html (last visited Feb. 28, 2014).

52. *Global Compact Principle Two*, UN GLOBAL COMPACT, https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html (last visited Feb. 28, 2014).

53. *Global Compact Principle Four*, UN GLOBAL COMPACT, https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle4.html (last visited Feb. 28, 2014).

54. *Overview of the UN Global Impact*, *supra* note 50.

55. OECD Guidelines, Preface, para. 1.

56. *Id*.

57. OECD Guidelines, Foreword, para. 3.

58. Barnali Choudhury, Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses, 26 NW. J. INT'L L. & BUS. 43, 64 (2005).

59. *Id.*

to decide whether the complaint requires further action.[60] This role of gatekeeper to the system for national offices is problematic as it often does not lie in the state's best interest to act against MNEs.

The Rome Statute of the International Criminal Court is the treaty that established the International Criminal Court (ICC).[61] The Rome Statue established four core international crimes: genocide, crimes against humanity, war crimes and crimes of aggression.[62] Putting paragraphs (1), (2), and (3) of Article 25 of the Rome Statute together, there can be no doubt that by limiting criminal responsibility to individual natural persons, the Rome Statute implicitly negates the punishability of corporations and other legal entities. In the same line, it has already been stated by the International Military Tribunal that international crimes "are committed by men, not by abstract entities."[63] Importantly, the Security Council cannot, in a referral of a situation to the ICC under Article 13(b) of the Rome Statute, extend the jurisdiction to legal persons.[64] The confinement to natural persons is a fundamental characteristic of the ICC, and the ICC would not be bound or even have the right to extend its jurisdiction beyond natural persons. Nor can the Security Council instruct the ICC Prosecutor to target individuals involved in criminal corporate activities, as this would impinge on the prosecutorial discretion of the ICC Prosecutor.[65]

In sum, the Norms, the UN Global Compact, the OECD Guidelines and the Rome Statute do have an indirect relevance. They are useful in promoting respectful behavior in MNEs and preventing the activities a corporation should refrain from. Moreover, they make it nearly impossible for a corporation to claim ignorance that business activities are intertwined with gross violations of human rights. However, these

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60. Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Part I C, para. 2 (the NCP will "make an initial assessment of whether the issues raised merit further examination and respond to the parties involved.").

61. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

62. *Id.* art. 5.

63. Trial of the Major War Criminals, at 223 (Int'l Military Tribunal Nov. 14, 1945-Oct. 1, 1946), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

64. Rome Statute, *supra* note 61, art. 13(b).

65. Model Draft Statute for the International Criminal Court Based on the Preparatory Committee's Text to the Diplomatic Conference, Rome, June 15-July 17, 1998, at 42 (Leila Sadat Wexler & M. Cherif Bassiouni eds., 1998).

provisions are non-binding, unenforceable and, therefore, largely ineffective in holding MNEs liable, not to mention in holding MNEs liable for their offshore subsidiaries' acts. In addition, often the effectiveness of these provisions depends on national enforcement, which has its own limitations as governments are often either unwilling or unable to effectively regulate and control MNEs.

C. The Role of MNEs' Internal Codes of Conduct in Holding MNEs Liable for Offshore Subsidiaries' Acts

Internal codes of conduct are commitments voluntarily made by companies, which set forth standards and principles for the conduct of business activities in the marketplace. These voluntary codes are designed to demonstrate a notion of corporate responsibility to consumers. These codes can be used for subsidiaries, affiliates or at any other level of corporate involvement that is appropriate. The Corporate Social Responsibility (CSR) code of conduct is such an example of MNEs' internal codes of conduct.[66]

It is not common for MNEs to set codes of conduct detailing the social and environmental performance standards for their global operations.[67] Companies are beginning to apply their CSR codes to members of MNEs.[68]

Codes of conduct, however, cannot hold MNEs liable for offshore subsidiaries' acts. For example, in *Doe v. Wal-Mart Stores, Inc.*, the plaintiffs in Wal-Mart's contractors' foreign factories brought suit against Wal-Mart for suffering substandard, grueling work-conditions in each of their employer's factories.[69] The plaintiffs asserted that Wal-Mart was liable to them because it had promised that it would monitor the suppliers' compliance through a code of conduct in its supplier

66. Lance Compa, *Corporate Social Responsibility and Workers' Rights*, 30 COMP. LAB. L. & POL' Y J. 1, 3-4 (2008).

67. UNCTAD, World Investment Report 2012: Toward a New Generation of Investment Policies 93.

68. UNCTAD, Corporate Social Responsibility in Global Value Chains: Evaluation and monitoring challenges for small and medium sized suppliers in developing countries 3 (2012) (noting 82% of MNEs applying CSR codes to their first-tier supplier, 23% apply to the 2nd tier or beyond).

69. Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 679-80 (9th Cir. 2009).

agreements.[70] The plaintiffs asserted that they were third party beneficiaries of that contract because "Wal-Mart necessarily intended to benefit Plaintiffs by incorporating its code of conduct in its supplier agreements, and making a binding commitment to enforce the code for Plaintiffs' benefit."[71] However, the court held there was no duty to inspect the contractor.[72] The court found that the contract was between the corporation and the contractor and that "no such promise flows to Plaintiffs as third-party beneficiaries."[73] Even though this case is about MNEs and its contractors, the court would not hold the MNE liable for its offshore subsidiaries' acts according to the internal code of conduct under the third party beneficiary doctrine, except by piercing the corporate veil, which will be discussed below.

An internal code of conduct could develop some legal consequences, but it is still far-reaching to hold MNEs liable for offshore subsidiaries' tortious acts.

In all, national courts cannot hold MNEs liable for offshore subsidiaries' conduct directly. Various international norms are non-binding, unenforceable and, therefore, largely ineffective to hold MNEs liable. An internal code of conduct could develop some legal consequences, but is too far-reaching to hold MNEs liable for offshore subsidiaries' tortious acts. In all, national courts, international norms, and the MNEs' internal codes of conduct cannot legally and effectively hold MNEs liable for offshore subsidiaries' tortious acts.

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70. *Id.* at 680-81.

71. Appellants' Reply Brief at III.B.3, *Doe I*, 572 F.3d 677 (No. 08-55706) 2008 WL 6690743, at *7.

72. Doe I, 572 F.3d at 684, 685.

73. *Id.* at 682 (quoting Marina Tenants Ass'n v. Deauville Marina Dev. Co., 226 Cal. Rptr. 321, 327 (Cal. Ct. App. 1986)) ("A third party beneficiary cannot assert greater rights than those of the promisee under the contract.").

III. ATS AS A MECHANISM TO HOLD MNES LIABLE FOR OFFSHORE ACTS: CONFLICTING OPINIONS ABOUT CORPORATE LIABILITY UNDER THE ATS

A. ATS Litigation as a Mechanism to Hold Offshore Tortious Acts Liable

The ATS provides a mechanism for aliens to bring claims for tortious conduct committed abroad. As stated in the Judiciary Act of 1789, "[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] We could infer that there must be three elements to bring ATS litigation: tort actions, aliens and violations of the law of nations. Law of nations includes war crimes and crimes against humanity; in other words, crimes in which the perpetrator can be called *hostis humani generis*, an enemy of all mankind.[75]

The statute expressly grants subject matter jurisdiction to United States courts and provides the opportunity for victims to be awarded "domestic remedies."[76] The ATS was initially ignored by attorneys and was infrequently utilized for over 170 years.[77] It was not until the early 1980s, after *Filartiga v. Pena-Irala*,[78] that courts saw a rise in ATS litigation. ATS became a tool to bring claims against MNEs for MNEs' offshore acts and provides a possible solution for holding MNEs responsible for their offshore subsidiaries' acts.

In 2004, the Supreme Court held in *Sosa v. Alvarez-Machain* that the ATS is a jurisdictional statute only; it creates no cause of action.[79] Indeed, at the time of its adoption, the ATS "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."[80] These included three specific offenses:

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74. Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).
75. *Id.*
76. Keitner, *supra* note 3.
77. Sean Wajert, *Second Circuit Upholds Dismissal of Alien Tort Statute Claim Against Corporate Defendants*, MASS TORT DEFENSE (Sept. 27, 2010), http://www.masstortdefense.com/2010/09/articles/second-circuit-upholds-dismissal-of-alien-tort-statute-claim-against-corporate-defendants.
78. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir 1980).
79. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).
80. *Id.* at 712.

"violation of safe conducts, infringement of the rights of ambassadors, and piracy."[81]

The Supreme Court did not, however, limit the jurisdiction of the federal courts under the ATS to those three offenses. Instead, the Court observed that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[82] The court in *Sosa* concluded that international law governs the scope of liability for violations of customary international law under the ATS.

Thus, we could conclude that the issue of corporate ATS liability is governed by international law itself. Therefore we will next discuss the corporate ATS liability to examine whether MNEs could be held liable under ATS.

B. Conflicting Opinions over Corporate ATS Liability

The question becomes then whether corporations may be held liable at all under the ATS. The Second Circuit court in *Kiobel* answered "no."[83] In *Kiobel*, Nigerian nationals residing in the United States sued Dutch, British, and Nigerian corporations pursuant to the ATS, alleging that the corporations aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria. The Second Circuit Court did a two-step analysis. Step one analyzed whether international or domestic law governs the corporate liability inquiry. Step two evaluated corporate liability through the lens of international law by analyzing tribunals, international treaties, and scholarly works. The Second Circuit held that all concepts of liability, adjective as well as substantive, must originate in international law norms. Further, applying *Sosa*, *Kiobel* limited those norms only to those which are "specific, universal and obligatory." The Second Circuit Court found that no specific and universal norms provide that corporations may ever be held liable in any ATS context.

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81. *Id.* at 715.
82. *Id.* at 732 n.20.
83. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 145 (2d Cir. 2010).

Finding only a few aiding and abetting outliers here and there,[84] which fall far short of "specific, universal and obligatory," the court ended thirty years of ATS corporate and MNEs' liability.[85] Henceforth, at least in the Second Circuit, international law norms and ATS liability will apply only to individuals.

The first post-*Kiobel* appellate ruling was the District of Columbia Court of Appeals opinion in *Doe VIII v. Exxon Mobil Corp*.[86] In *Exxon,* the court held that corporations may indeed have liability in ATS suits and called the Second Circuit opinion internally inconsistent and illogical.[87] Several days after the Exxon ruling in *Flomo v. Firestone Natural Rubber*, the Seventh Circuit similarly held that corporations may have liability in ATS suits.[88] Describing *Kiobel* as a rebel opinion, the court stated that the opinion was plainly "incorrect."[89] In *Sarei v. Rio Tinto PLC*, the Ninth Circuit joined the D.C. and Seventh Circuit post-*Kiobel* rulings finding that corporations may have liability under the ATS.[90]

A clear U.S. federal circuit court split on the issue of corporate ATS liability thus exists. Although the Supreme Court initially granted certiorari in *Kiobel* to decide the issue of corporate civil tort liability

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84. The Convention Against Transnational Organized Crime and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions provide for corporate liability, but only in the contexts to which those multinational treatises address themselves.

85. Kiobel, 621 F. 3d at 141.

86. Doe v. Exxon Mobil, 654 F.3d 11 (D.C. Cir. 2011), *vacated by* Doe VIII v. Exxon Mobil Co., 527 F. App'x 7 (D.C. Cir. 2013).

87. Doe, 654 F.3d at 41 (finding that *Kiobel*'s "analysis conflates the norms of conduct at issue in *Sosa* and the rules for any remedy to be found in federal common law at issue here; even on its own terms, its analysis misinterprets the import of footnote 20 in *Sosa* and is unduly circumscribed in examining the sources of customary international law.").

88. Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1025 (7th Cir. 2011).

89. *Id.* at 1017 ("All but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable. The outlier is the split decision in *Kiobel v. Royal Dutch Petroleum Co*., 621 F. 3d 111 (2d Cir. 2010), which indeed held that because corporations have never been prosecuted, whether criminally or civilly, for violating customary international law, there can't be said to be a principle of customary international law that binds a corporation. The factual premise of the majority opinion in the *Kiobel* case is incorrect." (citations omitted)).

90. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 748 (9th Cir. 2011), *vacated by* Rio Tinto PLC v. Sarei, 133 S. Ct. 1995 (2013).

under the ATS, it subsequently ordered re-argument on the broader question of "[w]hether and under what circumstances the [ATS] 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."[91] The Supreme Court did not rule on the corporate liability issue under the ATS. While the Court affirmed the Second Circuit's *Kiobel* dismissal, it so ruled based upon the presumption against extraterritorial application of the ATS.[92] The Supreme Court held that principles of presumption against extraterritoriality constrain courts exercising their power under ATS, and the ATS did not apply to violations of the law of nations occurring within sovereign territories other than the United States.[93]

Thus, whether corporations are subjected to suit under the ATS is not clear. How MNEs can be held liable for their offshore subsidiaries' acts after *Kiobel* is deserving of discussion.

In all, after *Filartiga* in 1980, ATS litigation was on track to becoming a tool to bring claims against MNEs for offshore acts. The ATS provides the possible mechanism to hold MNEs liable for MNEs' offshore subsidiaries' acts. However, the *Sosa* court asserted that the ATS allowed federal courts to hear only limited claims defined by the law of nations and recognized at common law.[94] The court in *Sosa* concluded that international law governs the scope of liability for violations of customary international law under the ATS.[95] Whether there is corporate ATS liability is still not clear due to conflicting opinions in a series of recent federal circuit cases. Thus, imposing liability on MNEs for their offshore subsidiaries' tortious acts is uncertain.

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91. *Order in Pending Case* (Mar. 5, 2012), *available at* http://www.supremecourt.gov/orders/courtorders/030512zr.pdf.

92. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) ("On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.").

93. *Id.* at 1659-62.

94. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

95. *Id.* at 733.

IV. BARRIERS TO HOLD MNES LIABLE FOR OFFSHORE SUBSIDIARIES' ACTS AFTER *KIOBEL* AND *DAIMLER*

American case law has developed a number of doctrines making it difficult to bring claims involving foreign defendants. First, foreign defendants must possess "minimum contacts" with the forum state to satisfy the personal jurisdiction requirement.[96] Second, the *forum non conveniens* doctrine could preclude a case from coming to federal court when there is an alternative forum that is more closely linked with the case.[97] Third, the "non-justiciability" doctrine complicates the application of the ATS in practice.[98] A judge may dismiss a case involving a "political" question on the basis of this doctrine.

Imposing liability on MNEs for offshore subsidiaries' act will meet traditional substantive and procedural barriers, including the principle of the presumption against extraterritorial application, the personal jurisdiction requirement and the principle of international comity. These obstacles can make claims to hold MNEs liable for offshore subsidiaries' tortious acts much more difficult. Furthermore, the United States courts seem to have returned to the original territorial limitation, as illustrated in the recent *Daimler* case. These barriers have appeared recently and are stressed by the U.S. Supreme Court.

A. Presumption Against Extraterritorial Application

Historically, the exercise of prescriptive, judicial and enforcement jurisdiction has been limited territorially due to state sovereignty. In times when geographical space limited human activity, these rules were workable and legitimate. However, they were never absolute. With the advancement of the global economy, markets are no longer confined to

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96. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (stating that the minimum contacts doctrine was originally designed to address interstate activities, but it could easily apply to activities between nations).

97. Patrick J. Borchers, *Conflict-of-Laws Considerations in State Court Human Rights Actions*, 3 U.C. IRVINE L. REV. 45, 59-60 (2013) (discussing application of f*orum non conveniens* doctrine in state human rights litigation).

98. See Ugo Mattei & Jeffrey Lena, U.S. Jurisdiction over Conflicts Arising Outside of the United States: Some Hegemonic Implications, 24 HASTINGS INT'L & COMP. L. REV. 381, 385-86 (2001).

national borders and national interests are intertwined. Jurisdictional rules premised on the concept of territoriality no longer work well. Promoted by the need to adequately address these developments, changes did occur, such as the extension of domestic jurisdiction rules beyond state borders.[99] The U.S. antitrust laws[100] and federal securities laws[101] demonstrate the extraterritorial reach of U.S. statutes.

However, the principles of presumption against extraterritorial application controlling claims under the ATS is still in use, as shown in the Supreme Court's recent *Kiobel* case.[102] The Supreme Court affirmed that the ATS could only be applied under the presumption against extraterritorial application.[103] The Supreme Court explained this principle in detail in *Morrison v. National Australia Bank Ltd*.[104] Foreign investors brought putative class action against Australian banking corporation, alleging securities fraud as to foreign transactions.[105] The Supreme Court held that the presumption that federal law is not meant to have extraterritorial effect is applicable in all cases whenever a party seeks to give any federal legislation extraterritorial effect.[106] And the Supreme Court asserted that it is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[107] When a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to

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99. Hannah L. Buxbaum, Territory, Territoriality, and the Resolution of Jurisdictional Conflict, 57 AM. J. COMP. L. 631, 632-36 (2009).

100. 15 U.S.C. § 1 (2004) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

101. Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968), *abrogated by* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) ("Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities.").

102. *See generally* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

103. *Id.*

104. See Morrison v. Nat'l Austl. Bank Ltd., 130 S.Ct. 2869 (2010).

105. *Id*. at 2873.

106. *Id*. at 2869.

107. Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros. v. Filardo, 336 U.S. 281, 284-85 (1949)).

its terms. That the statutory language can possibly be interpreted to apply extraterritorially does not override the presumption against extraterritoriality. When a statute gives no clear indication of an extraterritorial application, it has none.

The Supreme Court in the recent *Daimler* case in January 2014 reaffirmed that the ATS can only apply within the territory of the United States.[108] Thus, in holding MNEs liable for their offshore subsidiaries' tortious acts under ATS, the principle of presumption against extraterritorial application is a difficult obstacle to cross.

B. Personal Jurisdiction Requirement

There are two personal jurisdiction categories: specific jurisdiction and general jurisdiction. The specific jurisdiction requirement encompasses cases in which the suit "arises out of [or relates to the] defendant's contacts with the forum."[109] "General jurisdiction" is exercisable when a foreign corporation's "continuous corporate operations within a state . . . [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[110]

To satisfy specific jurisdiction for MNEs, the criterion of "presence" or "continuous and systematic business" are considered. In *Doe I v. Unocal Corp.*, Burmese citizens brought a class action asserting various claims against the California-based MNE, Unocal; the French MNE, Total; and the gas company, MOGE, controlled by the Government of Myanmar.[111] Due to State immunity, the court dismissed the claims against the Government of Myanmar and the gas company MOGE.[112] Total listed its stock on a United States exchange, and promoted sale of its stock. The court said that the French corporation's contractual relations with the U.S. oil company did not constitute purposeful availment of the benefits and protections of California law, where the French corporation entered into those contracts either by fax and

108. Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014).
109. Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 (1984).
110. International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).
111. Doe I v. Unocal Corp., 27 F. Supp. 2d 1174, 1178 (C.D. Cal. 1998).
112. Doe v. Unocal Corp., 963 F.Supp. 888 (1997).

telephone or via meetings outside the United States.[113] Furthermore, American law did not govern contracts related to the oil pipeline in Burma, as the oil would not be used in the United States.[114] The court held that the corporation's direct contacts with California were insufficient to warrant exercise of personal jurisdiction. Thus, a claim against a subsidiary for complicity in human rights violations in Myanmar was declared inadmissible.[115] Therefore, imposing liability on MNEs for the acts of offshore subsidiaries under specific jurisdiction must meet the criterion of "presence" or "continuous and systematic business."[116]

To satisfy general jurisdiction for MNEs, the rules are not so clear. The Supreme Court in *Daimler* followed the traditional rule of general jurisdiction in its decision.[117] In *Daimler*, plaintiffs, twenty-three Argentine citizens, sought to establish personal jurisdiction in a California federal court based upon the presence in California of two Mercedes Benz marketing offices and the offices of Mercedes Benz USA (MB USA), a Delaware Limited Liability Company. They alleged that they, or their close relatives, had been brutalized, tortured, or murdered by the Argentine military, which had ruled the country from 1976 to 1983.[118] They further alleged that Mercedes Benz Argentina (MBA) had aided and abetted the military.[119] These were the links to Daimler Chrysler AG (DC AG), the German parent corporation: Argentina to California to Germany, with the lawsuit to be filed and tried in California.

The Supreme Court in *Daimler* said that a defendant is subject to "general jurisdiction" only if its extensive contacts with the forum render it "at home" there.[120] To satisfy the requirement of "at home," the courts will consider the places where it is incorporated and where it maintains its principal place of business. It did not "foreclose the possibility" that

113. Doe I, 27 F. Supp. 2d at 1185.
114. *Id.*
115. *Id.* at 1185-86.
116. International Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945).
117. Daimler AG v. Bauman, 134 S. Ct. 746 (2014).
118. *Id*. at 748.
119. *Id*.
120. *Id*. at 754. (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)).

there might exist an "exceptional case" in which a corporation's contacts with a third state were "so substantial and of such a nature as to render the corporation at home in that State."[121] Thus, the exact requirements of general jurisdiction is not clear; more specifically, exactly when a MNE can satisfy the general jurisdiction is not clear.

MNEs generally own various subsidiaries around the world. Thus, to hold MNEs liable for their offshore subsidiaries' tortious acts under ATS, the personal jurisdiction requirement, especially the strict general jurisdiction requirement, is a difficult obstacle to cross.

C. International Comity

Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[122] No matter how MNEs are held liable for offshore subsidiaries' acts, the issue of international comity is always involved.

In *Daimler*, the Supreme Court asserted that we should pay attention to the risks to international comity posed by its expansive view of general jurisdiction.[123] The expansive view of general jurisdiction, if adopted, will conflict with the practice of the European Union, which limits the suit of MNEs to three places: "statutory seat," "central administration," or "principal place of business."[124] "[F]oreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments."[125] In *Doe v. ExxonMobil*, Indonesian peasants claimed damages from ExxonMobil for colluding in human rights violations committed by Indonesian army units.[126] The U.S. federal government has

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121. Daimler, 134 S. Ct. at 761 n.19.
122. Hilton v. Guyot, 159 U.S. 113, 164 (1895).
123. Daimler, 134 S. Ct. at 763.
124. Council Regulation 1215/2012, arts. 63(1), 2012 O.J. (L 351) 7, 18.
125. Brief for the United States as Amicus Curiae Supporting Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965) 2013 WL 3377321, at *2.
126. Doe v. Exxon Mobil, 654 F.3d 11 (D.C. Cir. 2011), *vacated by* Doe VIII v. Exxon Mobil Co., 527 F. App'x 7 (D.C. Cir. 2013).

attempted to block this case, because allowing damages would harm foreign relations with Indonesia, a major ally in the war against terrorism.[127] Dealing with this complaint would lead to an interference of foreign policy.

Imposing liability on MNEs for their offshore subsidiaries' tortious acts will potentially involve conflicts with foreign governments. International comity as a long practice exerts influence and can be a barrier in dealing with these offshore tortious acts.

In all, after *Kiobel* asserted the territorial limitation of ATS litigation to hold MNEs liable for offshore subsidiaries' acts, several barriers still exist to prevent holding MNEs liable for offshore subsidiaries' acts. These barriers include the principle of presumption against extraterritorial application, the personal jurisdiction requirement shown in *Daimler*, and the principle of international comity. These barriers are reappearing and rising to prevent the imposition of liability on MNEs for the tortious acts of their offshore subsidiaries.

V. NEW EMERGING STRATEGIES TO HOLD MULTINATIONAL ENTERPRISES LIABLE FOR OFFSHORE SUBSIDIARIES' ACTS AFTER *KIOBEL* AND *DAIMLER*

After giving a full and careful analysis of the milestone cases *Kiobel v. Royal Dutch Petroleum Co.* and *Daimler AG v. Bauman*, there are several ways to hold MNEs liable for their subsidiaries' acts, despite the aforementioned barriers. The first is to apply the ATS correctly to govern MNEs for subsidiaries' acts following the majority opinion in *Kiobel*. The second alternative is to litigate in state court or apply state law under due process requirements. The third choice is to expand the doctrine of piercing the corporate veil to the relationship between MNEs and subsidiaries, especially the principal-agent theory, to attribute jurisdiction to MNEs. The fourth option is to obtain consent from the parties to litigation. These strategies would be legal and effective ways to impose liability on MNEs for their offshore subsidiaries' tortious acts.

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127. *See* Jim Lobe, *USA: State Department Tries to Get ExxonMobil Suit Dropped*, CORP WATCH (Aug. 7, 2002), http://www.corpwatch.org/article.php?id=3469.

A. Applying the ATS Correctly

To impose liability on MNEs for their offshore subsidiaries' tortious act, one strategy is to continue the ATS litigation but under correct requirements. *Kiobel* limited the ATS litigation under the principle of extraterritoriality. Half a year later, *Daimler* limited the ATS litigation by the requirement of personal jurisdiction. Therefore, we should conduct the ATS litigation under the principle of presumption against extraterritoriality and the requirement of personal jurisdiction.

1. Applying the ATS under Presumption Against Extraterritoriality

The Supreme Court in *Kiobel* held that courts should exercise their power under the principle of presumption against extraterritoriality and that the ATS applies only to violations of the law of nations occurring within the territory of the United States.[128] If the tort occurs within U.S. territory, then the ATS can be applied. If we would like to hold MNEs liable for its offshore subsidiaries' tortious acts, there generally could be four scenarios.

One is to argue that the MNEs and their offshore subsidiaries are in complicity to commit the tortious acts that violate the law of nations. The complicit acts could cover "advice, counsel, encouragement, or back-up support."[129] Complicity is committed by large bodies of people acting in implicit cooperation, such as governments and corporations. Often, these ATS-related claims are based on alleged complicity in violations committed by the government of the State in which the MNE is active. The *Doe I v. Unocal* case offered to charge the MNE Unocal with complicity in human rights abuses under the ATS for the first time. The case concerned allegations that a subsidiary of Unocal was complicit with its security partner, the Myanmar military, in the assault, rape, torture, and murder of villagers in Burma.[130]

Another is to assert that the MNEs "aided and abetted" the offshore subsidiaries' tortious acts in the United States, and to, therefore, regard

128. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663-69 (2013).

129. GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 164 (2008).

130. Doe I v. Unocal Corp., 395 F.3d 932, 936-37 (9th Cir. 2002).

the violations of the law of nations to have occurred within the territory of the United States. To define "aiding and abetting," the test set forth in *Doe I v. Unocal*[131] could be applied here. "Practical assistance or encouragement which has a substantial effect on the perpetration of the crime" and "actual or constructive [] knowledge that the accomplice's actions will assist the perpetrator in the commission of the crime" would be regarded as "aiding and abetting."[132]

A third argument is that the MNEs directly and actively participated in the tortious acts with their offshore subsidiaries. MNEs and their offshore subsidiaries could both be major conductors of tortious acts in violations of laws of nations. Sometimes MNEs play a leading role in violations of laws of nations with offshore subsidiaries. For instance, a U.S. MNE and its Chinese subsidiary both could directly commit torture and murder of victims during a slavery transaction. In these cases, MNEs should be accountable for their direct participation of tortious acts with their offshore subsidiaries.

Finally, if MNEs are held to be in reckless disregard as to whether victims would be subject to the subsidiaries' violations of the law of nations, the MNEs could be liable. There must be three elements to impose liability on the MNEs: (1) the MNEs either knew, or consciously disregarded information which clearly indicated, that the subsidiaries were conducting or about to conduct such tortious acts; (2) the tortious act concerned was within the effective responsibility and control of the MNEs; and (3) the MNEs failed to take all necessary and reasonable measure to prevent these tortious acts.[133] If these elements are met, then the MNEs should be accountable for tortious acts conducted by their subsidiaries under the MNEs' effective authority and control, as a result of their failure to exercise proper control over such subsidiaries.[134]

In all, these four scenarios could make MNEs accountable for the tortious acts of their offshore subsidiaries.

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131. *Id.* at 951.
132. *Id.* at 947, 953.
133. Rome Statute, *supra* note 61 art. 28(b).
134. *Id.*

2. Applying the ATS under the Requirement of Personal Jurisdiction

ATS litigation should satisfy the personal jurisdiction requirement. The Supreme Court in *Daimler* reaffirmed this universal requirement. The Supreme Court followed the traditional rule of general jurisdiction in *Daimler*.

Specific jurisdiction is easier to assert than general jurisdiction to impose liability on MNEs. Unlike specific jurisdiction, the Supreme Court in *Daimler* only affirmed the general principle that general jurisdiction based on doing business is limited.[135] Since *International Shoe*, the "minimum contacts" became the standard to exercise personal jurisdiction over a defendant, including a MNE.[136] For specific jurisdiction, *International Shoe* recognized that "the commission of some single or occasional acts of the corporate agent in a state" may be enough to subject the corporation to jurisdiction in that State's tribunals with respect to suits relating to that in-state activity.[137] For general jurisdiction, a court may hear any and all claims against corporations when their contacts with the State are so "continuous and systematic" as to render them at home in the forum State.[138] And thus, asserting specific jurisdiction requires less extensive contacts with the forum state than asserting general jurisdiction. In addition, since *International Shoe*, "specific jurisdiction has become the centerpiece of modern jurisdiction theory."[139] As is evident from these post-*International Shoe* decisions, "[s]pecific jurisdiction has been cut loose from *Pennoyer*'s sway."[140] What's more, the requirements of general jurisdiction are not clear enough in the aforementioned part. Therefore specific jurisdiction,

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135. Daimler AG v. Bauman, 134 S. Ct. 746, 758 (2014) ("Plaintiffs have never attempted to fit this case into the *specific* jurisdiction category. Nor did plaintiffs challenge on appeal the District Court's holding that Daimler's own contacts with California were, by themselves, too sporadic to justify the exercise of general jurisdiction.").

136. International Shoe Co. v. Washington, 326 U.S. 310, 326 (1945).

137. *Id.* at 318.

138. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

139. Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 628 (1988).

140. Daimler, 134 S. Ct. at 757.

instead of general jurisdiction, could be asserted to cross the strict jurisdiction requirement.

In sum, if applying the ATS correctly to hold MNEs liable for the acts of offshore subsidiaries, the ATS should be applied under the presumption against extraterritorial application shown in *Kiobel* and the requirement of personal jurisdiction shown in *Daimler*. Specific jurisdiction is an easier strategy rather than general jurisdiction, as demonstrated in *Daimler*.

B. Litigating in State Court or Under State Law

One alternative is to litigate in state court or apply state law. After *Kiobel* and *Daimler*, the United States federal courts seem to have closed the door for transnational litigation under ATS. If the litigation increasingly meets substantive and procedural barriers in U.S. federal courts, tort victims are more likely to consider filing in state courts or under state law. This may be part of the next wave of transnational litigation after *Kiobel* and *Daimler*.[141]

The major benefit to litigating under state law in federal courts is that it avoids many substantive questions associated with pleading international law violations under the ATS. *Sosa* limited the types of international law violations available by using the terms "specific, universal, and obligatory."[142] The issue of corporate ATS liability is not clear in *Kiobel*. Tort victims may avoid *Sosa*'s limitations, such as corporate ATS liability, over which the ATS provides jurisdiction, by pleading their claims under state or foreign law,[143] since "the same conduct that constitutes a violation of international human rights norms usually also violates the law of the place where it occurred and the law of the forum state."[144]

The benefit to using state law in state courts is that federal procedural doctrines, such as *forum non conveniens*, are only applicable in federal

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141. Donald Earl Childress III, The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation, 100 GEO L.J. 709, 757 (2012).

142. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (quoting In re Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994)).

143. Childress, *supra* note 141, at 740.

144. BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 120 (2d ed. 2008).

court. In state courts or under state law, tort victims may avoid application of the federal *forum non conveniens* doctrine and strict federal pleading standards, and in some cases they may find a more sympathetic judge or jury.[145]

For the strategy of litigating in state court or under state law to hold MNEs liable for their subsidiaries' acts, the requirement of due process could prevent claims in state court.[146] The application of U.S. remedies law to foreign facts also raises due process issues. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Supreme Court made clear that the Constitution prevents a U.S. state's law of damages from "punishing a defendant for conduct that may have been lawful where it occurred."[147] There are also difficult issues surrounding the application of international law in state courts.[148] Moreover, state choice-of-law rules might point toward the application of foreign rather than state law. Lastly, the limits on the extraterritorial application of state statutes and state common law are unsettled.[149]

Even though there are concerns with litigating in state court or under state law, these concerns are minor. The filing of ATS cases in state court or under state law may escape some of the federal procedural devices. Imposing liability on MNEs for the acts of offshore subsidiaries in state court or under state law would be the "next wave."[150]

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145. *See generally id.* at xxii (noting that the *Filártiga* case was "the first successful use of the . . . [ATS] to enable victims of international human rights violations to sue in U.S. courts.").

146. As a constitutional rule derived from the Due Process Clause, personal jurisdiction requirements govern all courts in the United States. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV. The Foreign Sovereign Immunities Act governs the immunity of foreign states in both U.S. state courts and federal courts. 28 U.S.C. § 1604 (2006). In *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court held that the common law act of state doctrine applied equally in state and federal courts, and the same would seem to be true of non-statutory immunity doctrines. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964).

147. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003).

148. See David Kaye, State Execution of the International Covenant on Civil and Political Rights, 3 U.C. IRVINE L. REV. 95, 121-25 (2013).

149. See generally Anthony J. Colangelo & Kristina A. Kiik, Spatial Legality, Due Process, and Choice of Law in Human Rights Litigation Under U.S. State Law, 3 U.C. IRVINE L. REV. 63 (2013); See also Chimène I. Keitner, State Courts and Transitory Torts in Transnational Human Rights Cases, 3 U.C. IRVINE L. REV. 81 (2013).

150. Childress, *supra* note 141, at 757.

C. Expanding the Piercing the Corporate Veil Doctrine

The third choice is to expand the doctrine of piercing the corporate veil to hold MNEs liable for their subsidiaries' acts. There are several theories or standards to support piercing the corporate veil, including the contract to control, the operation to control and the current agency theory.

1. Contract to Control for Piercing the Corporate Veil

In *Sinaltrainal v. Coca-Cola Co.*, plaintiff labor leaders had allegedly been held against their will, tortured, and some murdered in revenge for past labor activism in Columbia.[151] The bottlers, one of which was Bebidas y Alimentos do Urab, collaborated with paramilitary groups.[152] Four thousand Columbian trade unionists had been killed since 1986.[153] The plaintiffs tried to hold Coca-Cola Columbia and its parent, Coca-Cola Co. liable as a U.S. MNE.[154] Coca Cola Columbia had contracts with the bottlers.[155] The court held that the contracts gave Coca-Cola only an ability to protect the trademark, not the day-to-day control which could cause ATS liability to reach up the corporate chain.[156]

In a similar case *Mohamed v. Jeppesen Dataplan, Inc*., foreign nationals who were allegedly transferred in secret to other countries for detention and interrogation pursuant to Central Intelligence Agency's (CIA) extraordinary rendition program brought an action under the ATS against a company that purportedly assisted in the program.[157] The five plaintiffs had been suspected of terrorism, and subjected to rendition in countries such as Egypt in which security personnel subjected them to torture and long periods of confinement, bereft of judicial proceedings or other intervention.[158] Defendant Jeppesen, a subsidiary of MNE Boeing Co., had provided fueling and flight guidance to the aircraft and crews

151. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1258 (11th Cir. 2009).
152. *Id.* at 1257-58.
153. *Id.* at 1265.
154. *Id.* at 1257.
155. *Id.* at 1259.
156. *Id.* at 1259, 1270.
157. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010).
158. *Id.* at 1074.

that had transported the plaintiffs.[159] The case is worth noting because the alleged link to the corporate actor was a contract.

We could conclude from the dictum of the *Coca-Cola* and the *Jeppesen* cases that daily or weekly control obtained through contract is sufficient for ATS purposes. If the MNEs dominate the detailed contract with their subsidiaries, such as the contract between DCAG and MBUSA[160] and the MNEs control their subsidiaries through such detailed contract, the doctrine of piercing the corporate veil may apply to impose liability on MNEs for their offshore subsidiaries' tortious acts.

2. The Operation Standard to Control for Piercing the Corporate Veil

The court in *United States v. Bestfoods* held that other persons and corporations are responsible for Superfund cleanup costs if they were either an "owner" of the site or an "operator" of the person who committed the offending acts.[161] Determining who qualifies as an operator is a federal question with courts borrowing veil piercing law from state laws.[162]

CPC International Inc. (CPC), Bestfood's predecessor, owned Ott Chemical Co., of Muskegon, Michigan, from 1965 to 1972.[163] Ott's plant site was declared a Superfund site.[164] In 1989, the United States sued Bestfoods for tens of millions of dollars in cleanup costs.[165] Justice Souter applied the doctrine of piercing the corporate veil to find when a parent corporation may become an operator of a subsidiary.[166]

Justice Souter stated that "[t]he question is not whether the parent operates the subsidiary, but rather whether it operates the facility which the subsidiary owns."[167] The former is permissible. Many of the parent's

159. *Id.* at 1075.
160. *See supra* Part I.
161. United States v. Bestfoods, 524 U.S. 51 (1998).
162. *Id.* at 59.
163. *Id*. at 56.
164. *Id*. at 55.
165. *Id.*
166. See generally id. at 67-70.
167. Id. at 68 (quoting Lynda J. Oswald, Bifurcation of the Owner and Operator Analysis Under CERCLA: Finding Order in the Chaos of Pervasive Control, 72 WASH. U. L.Q. 223, 269 (1994)).

actions are merely an exercise of its democratic rights, such as electing directors, engaging in long run strategic planning, appointing principal officers, and having joint directors and officers.[168] Even some operation of the subsidiary's facility is permissible, such as "monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures."[169]

By contrast, when the parent sends its own employees to participate in the daily or weekly operating decisions, or otherwise attempts to influence those decisions, the parent may lose its limited liability. CPC, under its successor name, Bestfoods, could raise the issue of the lose of its limited liability due to the fact the director had "played a conspicuous part in dealing with the toxic risks emanating from the operation of the plant."[170]

Thus, parents may operate their subsidiaries but not the facilities of their subsidiaries. Such a test comes close to establishing a bright line test for what parent corporations can do and what they should avoid in corporate group contexts. By the same token, *Bestfoods* could instruct courts as to when to pierce the corporate veil under the ATS. If a MNE sends its own employees to directly participate in the daily or weekly operating decisions of its offshore subsidiary, the doctrine of piercing the corporate veil could apply.

3. Principal-Agent Theory for Piercing the Corporate Veil

Agencies come in many sizes and shapes, "[o]ne may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose."[171] A subsidiary, for example, might be its parent's agent for claims arising in the place where the subsidiary operates, yet not its agent regarding claims arising elsewhere. Many courts use principal-agent analogies to uphold veil piercing allegations. "When a court finds that a

168. United States v. Bestfoods, 524 U.S. 51, 69-70 (1998).

169. Lynda Oswald, Bifurcation of the Owner and Operator Analysis Under CERCLA: Finding Order in the Chaos of Pervasive Control, 72 WASH. U. L.Q. 223, 281 (1994).

170. Bestfoods, 524 U.S. at 72.

171. 2A C.J.S. Agency § 43 (West, Westlaw through Sept. 2014).

subsidiary corporation exists solely to carry out the owner's agenda, having no independent reason for its own existence, then the corporation is found to have been the mere agent or instrumentality of the owner."[172] The corporation is disregarded and the human owner or parent corporation is held liable.[173] To invoke the theory, there must be "such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal."[174]

Bauman v. DaimlerChrysler Corp., a recent ATS opinion by the Ninth Circuit Court of Appeals, showed what kind of evidence may indicate an agency relationship.[175] It is appropriate for the parent to monitor the subsidiary's performance, supervise the subsidiary's financial decisions, and articulate general policies and procedures.[176] To determine whether a parent has strayed over this appropriate line, and the subsidiary has become the agent of the parent, the Ninth Circuit implemented a two-step test.[177] First, the agent-subsidiary must be sufficiently important to the parent corporation that if it did not have a representative, the parent corporation would undertake to perform substantially similar services.[178] Second, the parent must have the right to control the subsidiary, but does not need to exert control in fact.[179] Based on the detailed General Distributor Agreement and specific facts of that case, the court found that the wholly-owned United States subsidiary, which served as the general distributor of German manufacturer's automobiles in the United States, was the manufacturer's agent for general jurisdictional purposes.[180] Furthermore, exercising personal

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172. ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 39 (3d ed. 2009).

173. *Id*. at 49.

174. William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 43 (West, Westlaw through 2014).

175. *See generally* Bauman v. DaimlerChrysler Corp., 579 F.3d 1088 (9th Cir. 2009), *reh'g granted and vacated*, 603 F.3d 1141 (9th Cir. 2010).

176. Bauman, 579 F.3d at 1095.

177. *Id.* at 1094.

178. Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1135 (9th Cir. 2003).

179. Bauman, 579 F.3d at 1095.

180. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 914-17 (9th Cir. 2011), *rev'd*, Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

jurisdiction over German automobile manufacturer comported with fair play and substantial justice.[181]

The Supreme Court asserted, however, that the analysis of the agency theory which the Ninth Circuit relied on was wrong.[182] The primary first step is wrongful and pro jurisdiction.[183] "Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist."[184] The Ninth Circuit's agency theory could subject foreign MNEs to general jurisdiction as long as they have an in-state subsidiary, which would go beyond the "sprawling view of general jurisdiction" that was rejected in *Goodyear*.[185]

However, the Supreme Court has not yet addressed whether a foreign corporation may be subject to a court's general jurisdiction based on the contacts of its in-state subsidiary. It means that the Supreme Court did not deny the applicability of the principal-agent theory for the purpose of personal jurisdiction. The principal-agent theory could still be applied to supply personal jurisdiction as long as the analysis of agency is correct, even though it is unlikely. In fact, in a footnote in *Daimler*, the Supreme Court said that an "[a]gency relationship[] . . . may be relevant to the existence of *specific* jurisdiction."[186] Furthermore, "the commission of some single or occasional acts of the corporate agent in a state" may sometimes "be deemed sufficient to render the corporation liable to suit" on related claims.[187] Thus, it is possible to apply principle-agent theory to impose liability on MNEs for their offshore subsidiaries' acts.

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181. Bauman, 644 F.3d 909, 930.

182. Daimler, 134 S.Ct. at 759 (2014).

183. *Id.*

184. Bauman v. DaimlerChrysler Corp., 676 F.3d 774, 777 (9th Cir. 2011) (citing Bauman, 644 F.3d at 922).

185. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2848 2856 (2011) (Two minor North Carolina residents were killed in bus accident that occurred in France. Estates brought action in North Carolina state court against subsidiaries of United States tire manufacturer, including subsidiaries based in Luxembourg, Turkey and France. The Supreme Court held that subsidiaries were not subject to general jurisdiction in North Carolina.).

186. Daimler, 134 S. Ct. at 759 n.13 (2014).

187. International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

A great advantage of the agency theory is that it crosses many layers. The theory may make the great-grandparent household name corporation answer for acts done by the great-grandchild subsidiary. To determine whether we can use such agency, the court would look at the detailed agreement between them on a case-by-case basis.

In all, a contract to control, daily or weekly control, or the principal-agent theory could be possible ways to hold MNEs liable for offshore subsidiaries' acts. As for which theory to apply to pierce the corporate veil, we could work on a case-by-case basis.

D. Obtaining Consent from Parties

MNEs which have not been served in one jurisdiction can nevertheless voluntarily appear and submit themselves to jurisdiction. In such cases MNEs are said to have "consented" to jurisdiction. Under the consent theory, MNEs register in states as a condition of doing business there and therefore consent to be sued there. In addition, MNEs may consent to the court's exercise of personal jurisdiction by agreeing to a contract that includes a forum-selection clause.[188]

The most relevant case to impose liability on MNEs for the acts of offshore subsidiaries due to consent by the parties is *In re Union Carbide Corporation*.[189] A U.S. MNE Union Carbide Corporation (UCC) had a fifty and nine-tenths percent interest in the Indian company Union Carbide India Limited (UCIL) that ran the chemical plant that experienced a tragic accident killing and injuring thousands of people.[190] The plaintiffs sued under both state and Indian law for negligent supervision and bad design of the plant.[191] The injuries occurred in India, but the parent's contributions to the accident involved U.S. as well as Indian-based conduct. Some 145 class actions in federal district courts in the United States was commenced on behalf of the victims.[192] The Judicial Panel on Multidistrict Litigation assigned the actions to the Southern District of New York where they became the subject of a

188. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 113-15 (10th ed. 2009).

189. In re Union Carbide Corp., 809 F.2d 195 (2d Cir. 1987).

190. *Id*. at 197.

191. *Id.* at 197-98.

192. *Id*. at 197.

consolidated complaint. The parent MNE, UCC, "consented" to the sole jurisdiction of the Southern District of New York.[193] This was not an ATS litigation. Also *Daimler* was not a factor because UCC was sued in multiple jurisdictions. The cases were consolidated by consent in the Southern District of New York.

Therefore, obtaining consent from parties is a simple and effective strategy to impose liability on MNEs for offshore subsidiaries' acts. This strategy does not need to involve the ATS, and the requirement of personal jurisdiction is satisfied due to consent from the parties of the litigation.

CONCLUSION

MNEs play significant roles with their worldwide subsidiaries in the global economy. How to impose liability on large, complex MNEs for the tortious acts of offshore subsidiaries is a pressing issue. National courts, international norms and MNEs' internal codes of conduct cannot legally and effectively hold MNEs liable. The U.S. ATS rose to provide such a mechanism for the past several decades. ATS suits have caused some confusion, however, such as with respect to the corporate ATS liability issue.

Kiobel limited subject matter jurisdiction in transnational human rights cases under the ATS. Half a year later, with facts similar to those in *Kiobel*, the Supreme Court in *Daimler* asserted that ATS litigation should also satisfy the strict general jurisdiction requirement. Various barriers to post-*Kiobel* and post-*Damiler* strategies to hold MNEs liable for the acts of offshore subsidiaries are difficult to surpass. The United States seems to have closed the door for transnational litigation to hold MNEs liable for the tortious acts of offshore subsidiaries. The Supreme Court said that U.S. federal courts did not have a "strong interest in adjudicating and redressing international human rights abuses" in *Daimler*.[194] The United States appeared to be a haven for MNEs being charged with their offshore susidiaries' tortious acts.

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193. *Id.*

194. Daimler AG v. Bauman, 134 S. Ct. 746, 762 (2014) (quoting Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 927 (9th Cir. 2011), *rev'd*, Daimler AG v. Bauman, 134 S. Ct. 746 (2014)).

However, several alternatives to hold MNEs liable for the tortious acts of offshore subsidiaries after *Kiobel* and *Daimler* might achieve success, including correct application of the ATS, litigating in state court or under state law, expanding the corporate veil doctrine, and obtaining consent from parties. Among these four strategies, the simplest alternative is to obtain consent from parties to the litigation, since this strategy does not need involve the ATS and the requirements of personal jurisdiction could be easily satisfied due to consent. Also, applying the ATS correctly is effective as long as the ATS's requirements are satisfied. Applying the principal-agent theory to pierce the corporate veil is not so easy since the courts haven't provided the clear and correct standard of agency theory.

The combination of these strategies would produce wonderful results and lead the next wave of transnational litigation. Pleading specific jurisdiction under the principle of the presumption against extraterritorial application is easy to satisfy the ATS requirements. If there is a correct principal-agency standard in the future, then applying principal-agent theory to pierce the corporate veil to plead specific jurisdiction against MNE could be the next wave of transnational litigation.