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Travis Robert-Ritter

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INTRODUCTION

In an era of globalization fueled by the driving force of capitalism, corporations have been pushing for the unrestricted move-

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ment of capital and goods throughout the world.[1] Although this policy has made some countries and their domestic corporations wealthy, global promulgation of this agenda has tolled an immense human cost.[2] With the signing of free trade agreements, corporations can more easily move factories to nations offering the lowest cost of production.[3] Such ability has created an environment where corporations operating in nations with effective avenues to remedy workers' rights violations are incentivized to move production to countries that lack such protections.[4] Underdeveloped nations looking to attract these corporations are thusly encouraged not to enforce their labor and environmental laws.[5] Lax enforcement affords underdeveloped nations one of their few opportunities to economically compete with developed nations and creates intense competition amongst nations also willing to degrade labor and environmental standards.[6] Many scholars have named this latter competition the race to the bottom and has been highlighted as a major cause of environmental abuse as well as abhorrent human rights violations in factories around the world.[7]

The race to the bottom has attracted the attention and criticism of many scholars, politicians, and labor activists who have become aware of this global economic reality as well as one of the major methods by which it is created: free trade agreements.[8] This recognition has become especially noticeable in developed countries like the United States where politicians have attempted to appease their constituency by including provisions in free trade agreements that allegedly prevent signatories from lowering envi-

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1. *See* LYDIA MIHELIC PULSIPHER, WORLD REGIONAL GEOGRAPHY: GLOBAL PATTERNS, LOCAL LIVES 32 (4th ed. 2008).

2. *See* Morton E. Winston, Book Note, 21 HUM. RTS. Q. 824 (1999) (reviewing WILLIAM H. MEYER, HUMAN RIGHTS AND INTERNATIONAL POLITICAL ECONOMY IN THIRD WORLD NATIONS: MULTINATIONAL CORPORATIONS, FOREIGN AID, AND REPRESSION (1998)).

3. *See generally* Lance Compa, *Labor Rights and Labor Standards in International Trade,* 25 LAW & POL'Y INT'L BUS. 165 (1993).

4. *See generally* Sherri M. Durand, *American Maquiladoras: Are They Exploiting Mexico's Working Poor?,* 3 KAN. J.L. & PUB. POL'Y 128 (1994).

5. Bradley S. Fiorito, *Calling A Lemon a Lemon: Regulating Electronic Gambling Machines to Contain Pathological Gambling,* 100 NW. U. L. REV. 1325, 1332 (2006); Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements,* 28 ST. LOUIS U. PUB. L. REV. 201, 223 (2008).

6. *See generally* Gareth Porter, *Trade Competition and Pollution Standards: "Race to the Bottom" or "Stuck at the Bottom,"* 8 J. ENV'T. & DEV. 133 (1999).

7. Daniel W. Drezner, *Globalization and Policy Convergence,* 3 INT'L STUDIES REV. 53 (2001).

8. *See infra* Part II.

ronmental and labor standards (which US voters assert result in a loss of American jobs).[9] Despite inclusion of these provisions, the constraints tend to be purposefully ineffective and a race to the bottom is not avoided.[10] This undoubtedly occurs because of the incentive structure of the sovereigns entering into free trade agreements, which is frequently between economically developed and underdeveloped countries.[11] Under free trade, underdeveloped countries have an incentive to create a comparative advantage by exploiting their country's labor force, while the developed country and their corporations have an incentive to allow such exploitation.[12] As a result, provisions in free trade agreements meant to protect labor and the environment often have a negligible impact and permit governments to degrade or ignore labor and environmental laws.[13] Such a transnational trade structure permits North American corporations unfettered discretion as to the extent they wish to impose abhorrent labor conditions or destroy a country's environment for economic gain.[14]

In Mexico, surrendering the choice to corporations as to the extent they respect human rights and the environment has resulted in an unfortunate reality. Mexican workers are allowed to labor in 19th century sweatshop like conditions, and at times, children accompany their parents to work.[15] Women in particular are faced with horrid conditions.[16] Many have been forced to work late in their pregnancy resulting in miscarriages due to stressful work environments.[17] As unfortunate as these realities may be,

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9. Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 1019 (1997).

10. *See infra* Part II.

11. *See* Sayim Yorgun, *Illegal Mobilization of Labour: The Effects of Illegal Migration and Unauthorized Foreign Workers on the Turkish Labour Market* (1998), http://www.sayimyorgun.com/article3.html. This paper was presented at the IIRA 5th Asian Regional Congress, "Dynamics and Diversity: Employment Relations in the Asian-Pacific Region," which took place in Seoul on June 23-26, 2004.

12. Anwar Shaikh, *Globalization and the Myth of Free Trade*, NEW SCH. U., 10 (Apr. 5, 2003), http://causaestudiantil.com.ar/bibliotecavirtual/BIBLIOTECA%20DEL%20PENSAMIENTO/SHAIKH%20ANWAR%20-%20GLOBALIZATION%20AND%20THE%20MYTH%20OF%20FREE%20TRADE.pdf. Developed nations have an incentive to allow the country with whom they are entering into a free agreement to participate in the race to the bottom because it allows the developed country's corporations to increase their profits and provide cheaper products to domestic consumers.

13. *See infra* Part II.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

they are just a few of the human rights violations that have been perpetuated in Mexico.[18] These workers' inadequate compensation forces many to live below the poverty line while simultaneously being exposed to dangerous toxins.[19] Exposure to toxins not only occurs in factories using dangerous solvents and chemicals, but also around the factories where the workers live.[20] Because there are few constraints on how corporations dispense of pollution, toxic waste is often discarded in residential areas around the factories.[21] Such dumping areas become cesspools for communicable disease, and the rates of cancer in communities around the factories are much greater than others.[22] These are the realities of corporate factories unhindered by governmental regulations, and they are immensely harmful to Mexicans. Such dreadful conditions are the very reality this article attempts to combat. The attempt at this lofty goal is undertaken by analyzing how these conditions are created under free trade, and then analyzing the complex legal landscape of the Alien Tort Statue in attempt to discover a potential disincentive against corporate abuses in such economic paradigm.

NAFTA is one of the first and most prominent examples of a free trade agreement that was draped with toothless labor and environmental constraints in addition to perpetuating a race to the bottom. Part I of this article focuses on the effect the North American Free Trade Agreement (NAFTA) has had on Mexico's labor force, as well as how the NAFTA side agreements on labor and the environment have failed to prevent Mexico from degrading its laws.[23] The article will show that the race to the bottom under NAFTA has resulted in a decay of living conditions and workers' rights in and around foreign owned Mexican factories. These conditions are explored in an effort to show how free trade agreements with no constraining labor and environmental provisions allow corporations to abuse a nation's populace.

After illuminating these realities, a question of immeasurable import arises: is there a solution to these human rights failings?

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18. *See infra* Part II.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. John H. Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 LOY. L.A. INT'L & COMP. L. REV. 359, 378 (2004); Monica Schurtman, *Los "Jonkeados" and the NAALC: the Autotrim / Customtrim Case and its Implications for Submissions under the NAFTA Side Agreement*, 22 ARIZ. J. INT'L & COMP. L. 291, 378 (2005).

The difficulty in answering such question is intensified by the effects of the global competition to the race to the bottom. Any solution, absent overthrowing governments, must take into consideration that governments do not want to create a disincentive for corporations to do business in their country.[24] As a result, economic impediments to corporations (such as enforcement of labor laws) may be ill-perceived by underdeveloped nations and therefore are not realistic solutions.[25] A solution must therefore be applicable not only to the particular nation racing to the bottom, but to all nations in such competition. Fortunately, a complex yet realistic answer may lie in the Alien Tort Statute.

Part III of this article offers the Alien Tort Statute (ATS) as a solution to abate human rights abuses in Mexican factories. If navigated correctly, the statute may allow Mexican workers to bring claims against US corporations for violations of their human rights. This remedy is particularly suitable to combat corporate abuse because it is immune from the opposing pressure to allow human rights violations under the race to the bottom. The statute is applicable to all aliens of the United States, and therefore its application will put no nation in the race to the bottom at a disadvantage. Examination of the ATS as applied to Mexican workers is especially relevant in light of outdated and inaccurate aspects of current scholarship that suggest a claim would not succeed.[26] With the revaluation of scholarship and the potential of the statute fully understood, this article will offer the ATS not only as a tool to make free trade agreements and therefore market capitalism in Mexico more responsive to workers' rights, but as a solution to remedy abuses around the globe.

PART I: ANALYSIS OF NAFTA AND ITS SIDE AGREEMENTS

An Overview of NAFTA

With the fall of the Soviet Union and the resulting prominence of market capitalism on the world stage, the United States was poised to expand its capitalistic agenda throughout the Americas.[27] The United States has carried out this goal by signing free

24. Laura Spitz, *The Gift of Enron: An Opportunity to Talk about Capitalism, Equality, Globalization, and the Promise of a North-American Charter of Fundamental Rights*, 66 OHIO ST. L.J. 315, 396 (2005).

25. *Id.*

26. *See infra* Part III.

27. *See generally* Ricardo Grinspun & Robert Kreklewich, *Consolidating*

trade agreements with other nations.[28] NAFTA is one of the first and most historic of these regional trade agreements.[29] The agreement was passed in an effort to facilitate the unhindered movement of capital and goods among the three countries, creating a new economic model in North America.[30]

The negotiators of NAFTA accomplished a variety of economic goals meant to benefit its signatories. The agreement required each country to phase out many types of tariffs and subsidies, economic impediments that are harmful to the signatories' corporations.[31] Impediments such as import licenses that had previously excluded American goods from Canadian and Mexican markets were accordingly lifted.[32] In addition to facilitating the movement of corporate products, the countries also attempted to incentivize transnational investment by strengthening corporate rights.[33] NAFTA ensures that corporations can carry out transnational investment among the three countries with less risk of expropriation or governmental measures meant to protect domestic corporations.[34] It accomplishes this latter goal by affording corporations in any of the three signatories the ability to do business without signatories providing domestic corporations with an unfair advantage.[35] To ensure these rights are upheld, corporations who assert a violation of NAFTA are provided with a neutral arbitral tribunal holding the power to award damages against the accused government.[36] It was believed this trade model would fundamentally

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Neoliberal Reforms: "Free Trade" as a Conditioning Framework, 43 STUD. POL. ECON. 34 (1994).

28. *Id.*

29. *See generally* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 102 (2000).

30. *See supra* Part I.

31. Tariffs artificially increase the price of products produced by a foreign company, putting them at a disadvantage with respect to domestic non-tariffed companies. Subsidies from the government to domestic businesses decrease the final cost of a product and artificially make such product less expensive than foreign produced non-subsidized goods.

32. Kent S. Foster & Dean C. Alexander, *The North American Free Trade Agreement and the Agricultural Sector*, 27 CREIGHTON L. REV. 985, 994 (1994).

33. As Article 1102 of NAFTA states, "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." While Article 1110 asserts, "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment."

34. *Id.*

35. *Id.*

36. As Article 1115 of NAFTA states, ". . . this Section establishes a mechanism for

change the way North America did business, and to some extent, it would.[37] Many pontificated that the changes would create a more efficient market among the three countries from which North America would benefit.[38] However, the fundamental way the new model would alter trade and change the way North America did business went far beyond transnational investment or efficiency. Despite resulting economic gains, the greatest changes would come in the form of human rights violations.[39]

The reality of such cost was foreseeable, and the US attempted to address the concern about Mexico's potential race to the bottom.[40] It was predicted that after the ratification of NAFTA Mexico would not enforce its labor and environmental laws permitting corporations to exploit its environment and labor force.[41] Clearly such an act would give Mexico a competitive advantage under NAFTA, and absent a race to the bottom, would benefit substantially less from the agreement.[42] As a result, two side agreements addressing labor and the environment were passed: the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC).[43] These side agreements were meant to prevent Mexico from lowering environmental and labor rights protections in an effort to become more competitive.[44] Unfortunately, the hope that these agreements would create positive change quickly faded to the realization that the two agreements proved ineffective, and that Mexico had every intention of allowing corporations to perpetrate human rights violations for a greater profit.[45]

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the settlement of investment disputes that assures [] equal treatment among investors of the Parties . . . ."

37. *See* David M. Gould, *Has NAFTA Changed North American Trade?*, ECON. REV. 12 (1998), http://www.dallasfed.com/research / er /1998/er9801b.pdf.

38. *See* Dr. Joseph McKinney, *NAFTA Turns Ten,* BAYLOR BUS. REV. (2004), http://www.baylor.edu/bbr/index.php?id=16167.

39. *See infra* Part II.

40. Cody Jacobs, *Trade We Can Believe In: Renegotiating NAFTA's Labor Provisions to Create More Equitable Growth in North America,* 17 GEO. J. POVERTY L. & POL'Y 127, 129 (2010).

41. John P. Isa, *Testing the NAALC's Dispute Resolution System: A Case Study*, 7 AM. U. J. GENDER SOC. POL'Y & L. 179, 184 (1999).

42. *Id.*

43. Knox, *supra* note 24, at 363-64.

44. *Id.*

45. Isa, *supra* note 42, at 213; Schurtman, *supra* note 24, at 295; Knox, *supra* note 24, at 378.

North American Agreement on Labor Cooperation

The North American Agreement on Labor Cooperation (NAALC) was meant to prevent Mexico from its anticipated race to the bottom, but it failed to accomplish this purpose.[46] In large part, the reason the United States asserted an interest in preventing the degradation of labor standards in Mexico was to appease labor organizations such as the AFL-CIO, whose placation was assumedly needed to pass NAFTA in the United States Congress.[47] Indeed, both Mexico and the United States would benefit economically from the weak enforcement of Mexican labor laws. Whereas the United States economy benefits by allowing corporations to receive a greater return on investments because of lower labor costs, the Mexican government benefits from greater foreign direct investment and proportionally higher taxes. As a result, due to the agreement being a ploy to appease political constituencies and the overall incentive structure of NAFTA, the NAALC is ineffective at protecting worker's rights.[48]

The side agreement on labor establishes an ineffective mechanism where both public and private actors can air grievances with respect to a certain defined class of labor abuses.[49] The agreement requires a country to enforce its current labor laws.[50] However, most cases brought under the side agreement create soft law, which means the violating government or corporation is not legally obligated to abide by a ruling made pursuant to the agreement.[51] Worse yet, the parties charged with the ability to determine whether claims will have a hard law effect are NAFTA's signatories.[52] This is much like the fox guarding the henhouse, as each country has an incentive to ignore labor abuses in order to collectively reap greater economic gains. According to Human

46. Vivian H.W. Wang, *Investor Protection or Environmental Protection? "Green" Development under CAFTA*, 32 COLUM. J. ENVTL. L. 251, 256 (2007); As stated in the extensive agreement, the three nations commit to "improve working conditions and living standards in each Party's territory." *See* NAALC, at 2.

47. Kristi Schaeffer, *Mercosur and Labor Rights: The Comparative Strengths of Sub-Regional Trade Agreements in Developing and Enforcing Labor Standards in Latin American States*, 45 COLUM. J. TRANSNAT'L L. 829, 853 (2007).

48. Ruth Buchanan & Rusby Chaparro, *International Institutions and Transnational Advocacy: The Case of the North American Agreement on Labor Cooperation*, 13 UCLA J. INT'L L. & FOREIGN AFF. 129, 135, 137 (2008); Frank H. Bieszczat, *Labor Provisions in Trade Agreements: From the NAALC to Now*, 83 CHI.-KENT L. REV. 1387, 1406 (2008).

49. Buchanan & Chaparro, *supra* note 49, at 129, 135, 137.

50. Knox, *supra* note 24, at 377.

51. Buchanan & Chaparro, *supra* note 49, at 139.

52. Knox, *supra* note 24, at 386.

Rights Watch, the side agreements signatories have worked together to minimize the effectiveness of the agreement.[53] Due to the structure of the labor side agreement, wherein soft and hard law administered by biased governmental officials is expected to overpower the incentive of greater taxes and corporate profits, the agreement has expectedly proven ineffective. Thus, the ineffective side agreement on labor has generated little incentive for Mexico to improve or enforce its labor laws, and has been unable to prevent a race to the bottom.

Representative of this failure is the agreement's enforcement history. During the twelve years following the agreement's passage, roughly thirty-four complaints were filed, of which, a majority were dismissed or withdrawn.[54] Among the claims that were not dismissed, none survived long enough to reach an arbitral tribunal with enforcement powers.[55] Beside its abysmal enforcement history, many fundamental rights are unable to even reach the enforcement phase of the agreement.[56] Under the NAALC, if an employee's right to organize or collectively bargain is violated, the agreement cannot require an employer to rehire illegally fired workers and is unable to impose damages against a government that fails to enforce the worker's rights.[57] This creates an environment where the employees have no leverage to bargain or organize and the government is incentivized to support corporate interests that are contrary to the spirit of the agreement. In light of these realities, critics of the mechanism have dubbed it "dead letter," and it has garnered scholarly recognition for its lack of effectiveness.[58]

The creation of a free-market system in the Americas allows Mexico to abandon recognized rights for its labor sector and permits the country to leverage one of its few comparative advantages, an exploitable labor force.[59] Mexico surely believed this was

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53. Human Rights Watch, *Future Trade Pacts Must Avoid Pitfalls* (Apr. 15, 2001), http://www.hrw.org/en/news/2001/04/15/nafta-labor-accord-ineffective.

54. Jacobs, *supra* note 41, at 136.

55. *Id.*

56. Laura Okin Pomeroy, *The Labor Side Agreement Under the NAFTA: Analysis of its Failure to Include Strong Enforcement Provisions and Recommendations for Future Labor Agreements Negotiated with Developing Countries*, 29 GEO. WASH. J. INT'L L. & ECON. 769, 792 (1996).

57. *Id.*

58. Knox, *supra* note 24, at 377.

59. Raúl Delgado Wise & James M. Cypher, *The Strategic Role of Mexican Labor under NAFTA: Critical Perspectives on Current Economic Integration*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 120, 138 (2007).

a needed advantage under NAFTA and is why the labor agreement accomplishes little.[60] Without such low utility, there would be less of an incentive for Mexico to sign NAFTA.[61] As such, Mexico's current labor scheme allows employers to establish economically beneficial and dismal working conditions. Those willing to stand up to their employers are often faced with draconian consequences.[62] The brave willing to organize are fired and have permanent difficulty finding another job.[63] Workers who submit complaints to labor oversight bodies quickly discover the futility of their attempts.[64] As a result, they have little to no bargaining power, and their employers, cognizant of the fact that there is no mechanism to enforce labor abuses, are incentivized to take advantage of Mexicans through economically advantageous and inhumane working conditions.[65] This was a foreseeable and intended result of the NAALC, a result that aligned with the economic interests of the sovereigns' corporations and thus the political will. The same outcome arose out of the side agreement on the environment.

North American Agreement on Environmental Cooperation

Just as the supplemental labor agreement panders to corporate interests, so does the supplemental environmental agreement.[66] The side agreement on the environment, the North American Agreement on Environmental Cooperation (NAAEC), was passed with the asserted purpose of preventing signatories of NAFTA from lowering environmental standards in an effort to attract business.[67] There was voiced concern that if Mexico began its anticipated race to the bottom America and Canada would fol-

60. Betty Southard Murphy, *NAFTA's North American Agreement On Labor Cooperation: The Present and the Future*, 10 CONN. J. INT'L L. 403, 417 (1995).

61. Isa, *supra* note 42, at 199.

62. *See* A. Maria Plumtree, *Maquiladoras and Women Workers: The Marginalization of Women in Mexico as a Means to Economic Development*, 6 SW. J.L. & TRADE AMS. 177, 189 (1999).

63. *Id.*

64. As already indicated, this mechanism is inherently ineffective. *See generally* DAVID BACON, CHILDREN OF NAFTA: LABOR WARS ON THE U.S.-MEXICO BORDER 76 (2004).

65. *See infra* Part II, which highlights the conditions workers are forced to endure in order to create higher profits for companies.

66. Kevin Scott Prussia, *NAFTA & the Alien Tort Claims Act: Making a Case for Actionable Offenses Based on Environmental Harms and Injuries to the Public Health*, 32 AM. J.L. & MED. 381, 385 (2006).

67. Bradley N. Lewis, *Biting Without Teeth: The Citizen Submission Process and Environmental Protection*, 155 U. PA. L. REV. 1229, 1231 (2007).

low suit in an effort to prevent businesses from relocating.[68] Many environmental groups in America and Canada banded together to create political opposition to the passage of NAFTA if it excluded environmental constraints.[69] This political movement gained such momentum that significant political pressure was placed on American presidential candidates during the 1992 election.[70] As a result, President Clinton promised voters he would require environmental constraints with the passage of NAFTA and kept his promise once elected to office by mandating the drafting of the NAAEC.[71] However these regulations, as one scholar put it, amounted to nothing more than a paper tiger.[72] Much like the passage of the side agreement on labor, this political pandering amounted to nothing more than a superficial way to appease his constituency.

The eventual provisions in the NAAEC would create a mechanism that was meant to prevent corporations from exploiting the environment, but unfortunately, the mechanism designed to accomplish this is inherently ineffective. There are three major problems with the effectiveness of the side agreement. First, the agreement only requires countries to enforce their current environmental laws.[73] Thus, a country can change its environmental laws to allow corporations to abuse the environment and the agreement is unable to prevent such legislative changes.[74] If a private citizen submits a claim under the agreement that Mexico has rewritten its laws to allow immense environmental destruction, the people responsible for the submission process must dismiss the claim.[75] This allows Mexico's legislature to pander to corporate interests by ignoring environmental standards.[76] Nevertheless, despite this immense loophole, there has been no need for the rewriting of Mexican laws. In addition to having existing environmental laws that are inadequate by developed nations' standards,

68. Lauren A. Hopkins, *Protecting Costa Rica's Osa Peninsula: CAFTA's Citizen Submission Process and Beyond*, 31 VT. L. REV. 381, 388 (2007).

69. Paul Stanton Kibel, *The Paper Tiger Awakens: North American Environmental Law after the Cozumel Reef Case*, 39 COLUM. J. TRANSNAT'L L. 395, 406-07 (2001).

70. *Id.*

71. *Id.*

72. Chris Dove, *Can Voluntary Compliance Protect the Environment?: The North American Agreement on Environmental Cooperation*, 50 U. KAN. L. REV. 867, 880 (2002).

73. *Id.* at 881.

74. *Id.*

75. *Id.*

76. *Id.* at 883.

Mexico fails to mandate compliance with its substandard regulatory scheme.[77] Thus, despite the side agreement's greatest failure, Mexico has had no need to take advantage as the country allows its environmental laws to decay through a lack of enforcement.[78]

The second way the environmental agreement fails to accomplish its purpose is through its submission and enforcement procedures. Although any of the three countries' governments, citizens, or corporations can submit a claim that a government has not followed its environmental laws, the only way a violator can be punished with monetary damages is if one of the three governments brings a claim.[79] Moreover to impose damages, the other two signatories must agree by vote to convene an arbitral panel vested with punitive power.[80] This design, again, is akin to the fox guarding the hen house. Each country has an incentive to overlook one another's environmental failings out of fear that reporting its neighbors' abuses will eventually bring its own failings into the spotlight.[81] As one scholar aptly described the status quo, ". . . the three governments are not willing politically to treat the NAAEC as a legally binding agreement, preferring instead to view it simply as an expression of aspirational principles."[82] The enforcement history of the governmental submission process clearly supports this view, as there has never been a submission by a governmental actor.[83] The fact that such an avenue is the only one that allows for damages, and has never been used, in and of itself, suggests the NAAEC is dead letter and merely an "expression of aspirational principles."[84] Nevertheless, in addition to these two major flaws, there is a third deficiency that makes the NAAEC inherently ineffective.

Beyond the governmental submission mechanism, corporations and private citizens in any of the three countries are also able to submit grievances. However, these submissions cannot result in any substantive change to the practice that triggered the submission.[85] The only achievable outcome under such process is

77. Matthew L. Lopez, *The Effects of Free Trade on the Environment: Conserving the Environment while Maintaining Increased Levels of Economic Prosperity for Developing Countries*, 3 PHOENIX L. REV. 701, 710 (2010).
78. *Id.*
79. Kibel, *supra* note 70, at 414-16.
80. *Id.*
81. Dove, *supra* note 73, at 878.
82. Kibel, *supra* note 70, at 417.
83. *Id.*
84. *Id.*
85. *Id.* at 414-16.

the publication of a record detailing what environmental failings the citizen or corporation claims a government carried out.[86] Accordingly, minimal incentive exists for people to bring a claim if they want to achieve substantive change. Moreover agents of the governments are partly responsible for determining what issues are reviewed under the current process, and over the years, have worked to narrow the factual scope of submissions and treated the process as adversarial.[87] The governments' participation in the system has thusly stymied the mechanism's overall effectiveness. Governments faced with possible public criticism for failing to follow their environmental laws under the agreement are afforded the power to appoint those partly responsible for guaranteeing its success, creating pressure on the governmental appointee to reduce the effectiveness of the system.[88] As a result, due to the general design of the environmental side agreement, it is inherently ineffective.

Even still, proponents of environmental rights under NAFTA face even greater challenges than the inevitable failing of the environmental side agreement. NAFTA not only overrides the side agreement to protect corporate investment, but it also allows corporations to override domestic laws and bring large claims against governments who are not willing to allow corporations to abuse their environment. This is due to corporations' ability under NAFTA to sue a signatory when it passes environmental laws that have a negative effect on a corporation's investment.[89] This potential creates situations where the government would rather settle a case with a corporation and overturn an environmental regulation than pay exorbitant damages to the corporation.[90]

NAFTA overrides the side agreement as follows: if a business builds a manufacturing plant that operates in a particular fashion which is legal at the time of creation but deleterious to environ-

86. *Id.*

87. Sandra Le Priol-Vrejan, *The NAFTA Environmental Side Agreement and the Power to Investigate Violations of Environmental Laws*, 23 HOFSTRA L. REV. 483, 495 (1994); Chris Wold, Lucus Ritchie, Deborah Scott & Matthew Clark, *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT'L & COMP. L. REV. 415, 418, 442 (2004).

88. *Id.*

89. William Greider, *The Right and US Trade Law: Invalidating the 20th Century*, THE NATION, Oct. 15, 2001, at 55.

90. Marina Medved, *Potential Environmental Impacts of Central America Free Trade Agreement-Dominican Republic*, 13 NEW ENG. J. INT'L & COMP. L. 74, 96-99 (2006).

mental health, a company can sue Mexico for subsequently passing environmental laws which affect the operation of the plant in such a way that the company's return on investment decreases.[91] The company can submit its dispute to an arbitral tribunal that creates a binding ruling on both the country and the corporation, which may result in the government paying millions of dollars in damages.[92] This creates a perverse incentive structure.[93] On the one hand it creates a condition where companies have an incentive to abuse the environment to realize greater returns on investment.[94] By doing so, companies are able to create precedent allowing them to sue the government when their returns are compromised due to increased environmental protections.[95] On the other hand, the government has a disincentive to act on environmental ills because of such "pollution precedent."[96] Moreover the government is disincentivized to regulate because it could create an economic discouragement to the building of factories in Mexico. Overall, the system creates a legal relationship where corporations are encouraged to harm the environment in order to increase their economic gains, while the government is incentivized to do nothing.[97]

The designs of the environmental and labor agreements seem to align with the overall corporate impetus behind free trade agreements, the allowance of labor and environmental degradation to provide for greater profits. Certainly, with a thorough understanding of the design and the inherent fatal flaws of these agreements, the assertion that they were meant to do anything other than allow for NAFTA's passage becomes understood as incredible. That is, once the agreements are fully analyzed, their ultimate purpose of allowing corporations unfettered discretion in order to reap greater profits becomes manifest. Nevertheless, it is important to note that once the race to the bottom is perpetuated, it is generally accompanied by domestic changes that similarly

91. John H. Knox, *The 2005 Activity of the NAFTA Tribunals*, 100 AM. J. INT'L L. 429, 432 (2006).

92. Madeline Stone, *NAFTA Article 1110: Environmental Friend or Foe?*, 15 GEO. INT'L ENVTL. L. REV. 763, 764 (2003).

93. Francisco S. Nogales, *The NAFTA Environmental Framework, Chapter 11 Investment Provisions, and the Environment*, 8 ANN. SURV. INT'L & COMP. L. 97, 134 (2002).

94. *Id.*

95. *Id.*

96. *Id.*

97. *See generally* Michael A. Fallek, *Trouble on the U.S.-Mexico Border: The Mysterious Anencephaly Outbreak*, 31 TEX. INT'L L.J. 288 (1996).

facilitate corporate pillaging and must be similarly understood to combat abuses.

PART II: COMBINED EFFECT OF NAFTA AND SIDE AGREEMENTS WITH MEXICAN DOMESTIC POLICY, THE RESULTING EXPLOITABLE POPULACE

Free trade agreements are not the only way countries facilitate the abuses of their citizens by multi-national corporations. Domestic policy is often changed in an effort to facilitate the race to the bottom, and Mexico is no exception.[98] To fully understand the present human rights problem in Mexico as well as in other countries that sign free trade agreements, in addition to understanding the effect of NAFTA and its side agreements, one must also take notice of frequent changes to domestic policy that aid the transformative effects of free trade.[99] Mexico provides a good case study for such an understanding.

Around the time of NAFTA's passage, Mexico was poised to develop a new free trade model.[100] But to do this, it decided certain impediments had to be lifted in order to create an unhindered shift to free trade in North America.[101] Under free trade in North American, Mexico knew its comparative advantage would be cheap labor due to its anticipated lax workplace standards and a large lower class. Not only did it want to leverage this labor force, but anything it could do to shift the movement of lower class Mexicans towards corporate demand would necessarily aid its envisioned transformation.[102] As such, it went about taking a series of steps that allowed corporations to exploit Mexico's lower class.[103] Its first step was to change the Mexican constitution.[104] Such change in conjunction with a second step, the removal of corn subsidies, pushed lower class Mexicans off their lands and towards corporations willing to exploit Mexico's labor force.[105]

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98. Jose E. Alvarez, *Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?*, 60 ALA. L. REV. 943, 961 (2009).

99. *Id.*

100. Jorge I. Euan-Avila, Manuel Chavez & Scott Whiteford, *The North American Free Trade Agreement (NAFTA) and the Mayan Indigenous People of the Yukitan, Peninsula FTA's within the Hemisphere and their Environmental and Investment Chapters: Impact on Indigenous People*, 14 MICH. ST. J. INT'L L. 291, 298 (2006).

101. *Id.*

102. *See generally* David Yetman, *Ejidos, Land Sales, and Free Trade in Northwest Mexico: Will Globalization Affect the Commons?*, 41 AM. STUD. 211 (2000).

103. *Id.*

104. Euan-Avila, Chavez & Whiteford, *supra* note 101, at 298.

105. *See* Rick Relinger, *NAFTA and U.S. Corn Subsidies: Explaining the*

For around seventy-five years, the Mexican constitution firmly established a land ownership system that allowed lower class Mexicans to live on, cultivate, and manage certain small to medium plots of land.[106] Mexicans lived on these lands and agriculturally developed much of the plots.[107] The sale or rental of this land had been prohibited under the constitution until 1992, when in preparation for NAFTA, the government changed the Mexican constitution.[108] In addition to allowing the lower class to sell their holdings, the government increased the landowners' holdings requirement.[109] For certain categories of land, the holdings requirement increased by roughly two hundred percent.[110] These new changes were the beginnings of a governmentally incentivized migration of lower class Mexicans towards corporate demand.[111] The next step was to lift corn subsidies.

By increasing land holding requirements and allowing poor farmers to legally sell their lands, the Mexican government set the stage for a lower class migration due to the expected influx of cheap American food under free trade.[112] America would not stop subsidizing a large part of their agricultural industry, including its multi-billion dollar corn industry.[113] As a result, because fifteen million Mexican farmers depended on the production of corn as a livelihood, a large percentage of Mexicans would be out of work and pushed off of their now sellable lands.[114] Thus, the altering of

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Displacement of Mexico's Corn Farmers, PROSPECT J. INT'L AFF. AT UCSD (Apr. 2010), http://prospectjournal.ucsd.edu / index.php / 2010 / 04 / nafta-and-u-s-corn-subsidies-explaining-the-displacement-of-mexicos-corn-farmers/.

106. Euan-Avila, Chavez & Whiteford, *supra* note 101, at 298.

107. *Id.*

108. *Id.*

109. A holding requirement in the context of land ownership is the amount of land one needs to hold in order to legally retain a property that falls within a particular governmental definition. For instance, if there is a five-acre holding requirement in Coral Gables, Florida one could not own land unless they owned five acres. This subjects such areas to forced migration by those not capable of meeting the governmentally imposed holding requirement. Specifically, those who are too poor to meet the holdings requirement are required to sell their lands. This is particularly troubling when considering the lack of bargaining power such an environment creates. Because they are required to sell their lands, predatory pricing resulting from buyer collusion leads to deflated prices being offered to poor land owners. *Id.*

110. *Id.*

111. *See* Yetman, *supra* note 103.

112. Bill Ong Hing, *NAFTA, Globalization, and Mexican Migrants*, 5 J.L. ECON. & POL'Y 87, 98-99 (2009).

113. *Id.*

114. Elizabeth Becker, *U.S. Corn Subsidies Said to Damage Mexico*, N.Y. TIMES (Aug. 27, 2003), http://www.nytimes.com/2003/08/27/business/us-corn-subsidies-said-to-damage-mexico.html.

land ownership and holding requirements coupled with the expected flood of cheap agricultural products purposefully resulted in lower class Mexicans being forced off their lands and to look for new jobs.[115] Unfortunately, the millions of people governmentally pushed into this economic model discovered that their working conditions were abysmal, because as they eventually learned, their human rights were afforded little protection.[116] This is the reality of the race to the bottom under free trade and a governmentally created aspect that is often overlooked.

Free trade in the Americas supported by a governmentally incentivized migration of Mexican workers has resulted in a perfect storm of sorts. Mexico has ignored its labor and environmental laws, and as a result, corporations have taken advantage of a large exploitable populace. This has foreseeably resulted in abhorrent working conditions in foreign owned Mexican factories and created environmental problems that plague the areas in which the intense pollution from the factories are emitted. Sorrowingly, all of this was expected; it is the foreseeable outcome when corporations are gifted unfettered discretion as to the extent they wish to respect human rights and environmental standards.

Economic and Working Conditions in Foreign Owned Factories, a Forced Exodus into an Abhorrent Reality

The combination of the variables described above resulted in a mass exodus from the farmland to both foreign owned factories in Mexico and illegal employment in the United States.[117] According to one study, illegal immigration into the United States has increased over the last twelve years by sixty-six percent.[118] And from just 1987 to 1997, the number of Mexicans working in foreign owned factories increased from three hundred thirty thousand employed in 1,120 factories to around a million working in around 3,700 factories.[119] Unfortunately, the jobs found by lower class

115. Carmen G. Gonzalez, *Deconstructing the Mythology of Free Trade: Critical Reflections on Comparative Advantage*, 17 BERKELEY LA RAZA L.J. 65, 84-86 (2006).

116. *See infra* Part II.

117. Louis Uchitelle, *NAFTA Should Have Stopped Illegal Immigration, Right?*, N.Y. TIMES (Feb. 18, 2007), http://www.nytimes.com/2007/02/18/weekinreview/18uchitelle.html.

118. Dr. William Gibson, *Winners and Losers: The Cost and Effects of Agriculture Subsidies and Dumping on the United States and Mexico*, http://www.tjadventures.com/powerpoints/PolSci-Powerpoint1.ppt.

119. Anne-Marie O'Conner, Sam Dillon & Sidney Weintraub, *Mexico: Wages, Maquiladoras, NAFTA*, MIGRATION NEWS (Vol. 5 No. 2, 1998), http://migration.ucdavis.edu/mn/more.php?id=1451_0_2_0.

Mexicans in these factories garnered reputations as paying below the poverty line, requiring employment under abhorrent working conditions, and creating little chance for economic or social advancement.[120] Employment was found in the Maquiladoras, a term used to describe foreign owned factories predominantly located on the border of the US and Mexico.[121] These factories have garnered an extremely poor reputation in the Americas for their conditions of employment.[122] But this was expected. It was the foreseeable result of market capitalism in Mexico without governmentally imposed conditions for workers' rights.[123] The purpose of having weak labor and environmental enforcement was to allow for multi-national corporations to take advantage of lower class Mexican workers.[124] And as a result of this created economic environment, two questions necessarily arise. First, do the factories reputations accurately depict reality within their walls? And second, is there a solution to the negative effect unfettered capitalism has had on human rights?

Maquiladoras and the Unprotected Rights of Workers

Ultimately, the poor reputation of Maquiladoras is as accurate as it is unfortunate. As one empirical study noted, these men and women face serious health effects, which the workers assert are due to their employment with the Maquiladoras.[125] Reportedly, there is a significant percentage increase in health problems among Maquiladora workers, the most common complaint in one empirical study being respiratory problems.[126] As another empirical study notes, the factories are much like 19th century sweatshops.[127] Often workers are forced to carry out repetitive tasks in abusive working conditions.[128] For example, the workers' necks

120. *See infra* Part II.

121. Nicole L. Grimm, *The North American Agreement on Labor Cooperation and its Effects on Women Working in Mexican Maquiladoras*, 48 AM. U. L. REV. 179, 184 (1998).

122. *Id.*

123. Jeff Faux, *Without Consent: Global Capital Mobility and Democracy*, DISSENT, Winter 2004, at 48.

124. *Id.*

125. Kurt Alan Ver Beek, *Maquiladoras: Exploitation or Emancipation? An Overview of the Situation of Maquiladora Workers in Honduras*, *in* 29 WORLD DEVELOPMENT 1553, 1560-61 (O. Coomes ed., 2001).

126. *Id.* at 1560.

127. *See generally* Rafael Moure-Eraso et al., *Back to the Future: Sweatshop Conditions on the Mexico-U.S. Border. II. Occupational Health Impact of Maquiladora Industrial Activity*, 31 AM. J. INDUS. MED. 587 (1997).

128. *Id.*

and wrists are frequently injured due to the "repetitive movement and forceful manual work."[129] Many workers experience "fatigue, chest pressure, and pins-and-needles sensations in [] [their] extremities" due to exposure to chemicals and solvents.[130] Although Mexican laws are in place to combat such abuses and harmful work environments, they are rarely enforced and thusly allow multi-national corporations to carry out human rights violations under inhumane working conditions.

The effect on workers with medical conditions is equally pronounced. A study by the Mexican Institute of Public Health indicated that women working in Maquiladoras are more likely to have problems associated with giving birth due to the "arduous working conditions and lack of [] [maternity] leave . . . ."[131] Some pregnant women are forced to continue working while late into their pregnancies because they were not permitted to take leave or because leave was permitted but unpaid.[132] In light of the realities associated with making no money for an extended period, some women have chosen to continue working, and had miscarriages as a result.[133] But others are also adversely affected. If a worker who is injured at a factory takes a day off to receive medical attention, the manager sometimes forces the individual to work a number of days without pay as punishment, or in the alternative, terminates their employment.[134] This like other violations, occurs without legitimate legal recourse under the law.[135] As one worker put it: the problem is not the law; the problem is enforcement.[136] Sadly, such lax enforcement also adversely affects children's rights.[137]

Because many parents are unable to support a family with their meager Maquiladora salary, their children sometimes join them in the factories.[138] As a consequence, children laboring in the

129. *Id.* at 592-93.

130. *Id.* at 591.

131. Prudencia Cerón-Mireles, Siobán D. Harlow & Constanza I. Sánchez-Carrillo, *The Risk of Prematurity and Small-for-Gestational-Age Birth in Mexico City: The Effects of Working Conditions and Antenatal Leave*, 86 AM. J. PUB. HEALTH 825, 827 (1996).

132. *Id.* at 829.

133. *Id.*

134. BACON, *supra* note 65, at 62.

135. *Id.*

136. *Id.* at 76.

137. *Id.* at 39.

138. *Id.* at 35.

Maquiladoras have become commonplace.[139] One source in the Mexican government stated that roughly 800,000 children under the age of fourteen are employed in Mexico.[140] Some of these children reportedly work fifteen-hour days.[141] Although Mexican law makes child labor illegal, the reality is that the law is rarely enforced and children are sometimes employed in the horrible conditions of Maquiladora factories.[142] As one scholar notes, "Maquiladoras lay waste to entire communities, both the people and the environment."[143]

As a result of this truth, due to the Maquiladoras' adverse effect on the environment, living nearby possess a significant risk to workers.[144] As previously discussed, the combination of Mexico's lax environmental protections and the ineffectiveness of NAFTA's parallel environmental agreement allow companies to carry out activities that are very harmful to the Mexican environment.[145] The effect of this pollution is significant for the workers employed in Maquiladoras, as many live near the facilities.[146] As one critic noted, the hazardous waste of much of these factories is "simply washed down the drain" and each "year[ ] seven million tons of toxic waste are, without controls, illegally dumped in drains and marine waters. Only 1 percent [of factories] are [monitored] . . . ."[147] As a result, the towns in which the Maquiladoras are located, as one scholar highlighted, are "virtual cesspool and breeding ground for [ ] disease." In some communities, "the pollution is visible to the naked eye—orange and purple slime pours out of discharge pipes and flows down open canals . . . ."[148] And the rate of "communicable and infectious diseases are significantly

139. Joshua M. Kagan, *Workers' Rights in the Mexican Maqulidora Sector: Collective Bargaining, Women's Rights, and General Human Rights: Law, Norms, and Practice*, 15 J. TRANSNAT'L L. & POL'Y 153, 165 (2005).

140. *Id.*

141. *Id.*

142. BACON, *supra* note 65, at 39.

143. *Id.* at 49.

144. Sara E. Grineski & Timothy W. Collins, *Exploring Patterns of Environmental Injustice in the Global South: Maquiladoras in Cuidad Juárez, Mexico*, 29 POPULATION & ENV'T 247, 253 (2008).

145. *Id.*

146. Grimm, *supra* note 122, at 277.

147. C. Gerald Fraser, *NAFTA's Environmental Problems*, EARTH TIMES, Jan. 22, 1996, at 4.

148. Kevin Scott Prussia, *NAFTA & the Alien Tort Claims Act: Making a Case for Actionable Offenses Based on Environmental Harms and Injuries to the Public Health*, 32 AM. J.L. & MED. 381, 400-01 (2006).

higher."[149] Indeed, exposure to these environmental harms may cause cancer and birth defects within the Maquiladora communities.[150] One study indicated that the Mexican pollution may be increasing the rate of babies born "with incomplete or missing brains and/or skulls."[151] Thus, the Maquiladoras not only create abysmal working conditions, they pollute the towns in which the workers live.

Unfortunate as it may be, these are but a few of the human rights issues raised by the Maquiladoras. They are the offspring of free trade and inadequate protections of human rights and an example of the true human cost associated with allowing corporations and governments to collaboratively create a race to the bottom. No doubt this occurs because of the international competition under the race to the bottom, a global race that perpetuates concern that if Mexico protected human rights, Maquiladora jobs will move to China or into another free trade zone in which corporations can abuse their workers. Almost certainly because of this, the Mexican government sits idly by as corporations abuse its populace. They sit idly by for the very reason finding a solution to such abuses is extremely difficult, because it must not create fear that jobs will disappear. Thus, the question necessarily arises: is there a solution for the victims of unrestrained capitalism, one that could possibly apply equally to all countries? An answer, and partial solution, may lie in the Alien Tort Statute.

PART III: A SOLUTION?

Introduction: The Alien Tort Statute

The Alien Tort Statute (ATS) can be viewed not only as a partial solution to human rights violations in the Maquiladoras, but in factories around the globe.[152] The statute asserts that "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."[153] It grants subject matter jurisdic-

149. *Id.* at 401.

150. *Id.*

151. Roderick R. Williams, *Cardboard to Concrete: Reconstructing the Texas Colonias Threshold*, 53 HASTINGS L.J. 705, 711 (2002).

152. *See* Jill C. Maguire, *Rape Under the Alien Tort Statute in the Post-Sosa v. Alverez-Machain Era*, 13 GEO. MASON L. REV. 935 (2005) ("The ATS allows aliens to bring a claim for a tort committed in violation of the law of nations or a U.S. treaty before a federal district court.").

153. 28 U.S.C. § 1350.

tion to U.S. federal courts to hear torts brought by an alien.[154] The tort, however, must fit into a discrete class of torts the substance of which lower courts are in disagreement over.[155] Importantly, a small number of these torts recognized by lower courts, such as the encouragement and employment of child labor, may result in certain human rights abuses in the Maquiladoras becoming a cognizable cause of action against US corporations.[156] Moreover it would be applicable equally to all aliens, regardless of their country of origin, and therefore not create a fear that enforcing the claims would result in the movement of factories out of Mexico. It is therefore a solution that does not make Mexico a less attractive country to exploit by multi-national corporations and is thus a particularly attractive solution to a problem partially caused by the pressure of the race to the bottom.

Nevertheless, no problem of such magnitude is solved with ease, and the ATS is no exception. The statute is riddled with conflicting lower court rulings regarding both procedural questions as well as questions regarding which torts create causes of action. Thus although it is an especially apt solution to fix the human rights violations in the Maquiladoras, understanding its potential applicability to Maquiladora workers is as difficult as it is important. This is an especially needed task in light of current incorrect and outdated scholarship on the subject, which is no doubt due to both the statute's difficulty and the changing landscape of the ATS.

Current ATS Scholarship

There are a number of incorrect and outdated assertions in current scholarship regarding the potential for Maquiladora workers to bring a claim under the Alien Tort Statute. Indeed, not only does the lone law review article to broach the issue never discuss the doctrine of forum non conveniens (no doubt self-servingly due to the doctrine's difficulty when applied to the ATS) but its excuse for such omission is hidden in the 139th footnote.[157] Explaining

154. John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 2 (2009).

155. Ryan Lincoln, *The Alien Tort Statute: Comments on Current Issues*, 28 BERKELEY J. INT'L L. 604, 607 (2010).

156. Vanessa R. Waldref, *The Alien Tort Statute After Sosa: A Viable Tool in the Campaign to End Child Labor?*, 31 BERKELEY J. EMP. & LAB. L. 160, 190 (2010).

157. *See generally* Grace C. Spencer, *Her Body is a Battle Field: The Applicability of the Alien Tort Statute to Corporate Human Rights Abuses in Juarez, Mexico*, 40 GONZ. L. REV. 503 (2004-05).

why it did not address the doctrine, it asserts that "[s]ince this discussion deals exclusively with American based companies, I choose to not address this very real pitfall [forum non conveniens is] for plaintiffs in ATS litigation."[158] But this assertion that forum non conveniens is any less devastating to ATS claims when brought against a US corporation is wholly false.[159] Indeed, numerous companies in the United States have successfully filed forum non conveniens motions against alien plaintiffs.[160] Thus, current scholarship has incorrectly analyzed the procedural challenges to the ATS landscape.

But in addition to being incorrect, it is also outdated for two main reasons. First, the article asserts, "it is likely the Maquiladora workers would have to show that the American corporations are state actors in order to successfully invoke the ATS."[161] Under current case law, this assertion is false.[162] Second, without the advantage of six years of case law after the only Supreme Court decision addressing the ATS, the article asserts that "it [is] more than likely that the Maquiladora workers would not prevail in an ATS claim brought under a law of nations theory."[163] This is also false.[164] As a result, because of the inaccurate and outdated nature of current scholarship, a new map is needed to ascertain the true landscape of the ATS. A map that can hopefully provide a solution to human rights violations not only within the Maquiladoras, but around the globe.

A Framework: Sosa Analyzed

The legal maneuvering one must undertake to successfully bring an ATS claim is highly complex due to conflicting lower court holdings attempting to interpret the only Supreme Court case analyzing the ATS. Thus, to fully understand why the courts have come to such varying conclusions and to learn how to bring a valid claim despite the complex landscape, one must first analyze the only Supreme Court case that federal courts must use to inter-

158. *Id.*

159. Undoubtedly the falsity of this statement was the reason the assertion lacked a supporting footnote.

160. *See generally* Hari M. Osofsky, *Environmental Human Rights under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335 (1997).

161. Spencer, *supra* note 158, at 526.

162. *See supra* Part "Lower Courts Interpretation of *Sosa*."

163. Spencer, *supra* note 158, at 527.

164. *See infra* Part III.

pret ATS claims: *Sosa v. Alvarez-Machai.*[165]

In *Sosa*, the US government paid Mexican nationals to forcibly bring a Mexican citizen to the US who was suspected of involvement with the torture and killing of a DEA agent.[166] Forcibly removed from his home and made to stay in a hotel overnight, he was eventually flown to the US on a private plane where he was arrested.[167] He would be acquitted of all charges, and upon returning to Mexico sued the US under the ATS for his unlawful detention.[168] The Ninth Circuit recognized his right to sue under the statute and ruled in his favor, but the Supreme Court reversed the decision and ordered the case be dismissed.[169] The Court held that only violations of accepted international law can be brought under the statute and that Sosa's claim was not among these accepted violations.[170]

Sosa, our provided judicial road map on ATS claims, gives little guidance as to the exact route one needs to take for a court to hold that a plaintiff has a cause of action under the statute.[171] The starting point being a tort, and the ending point being which of those torts is considered violative of a norm of international law.[172] This route was purposeful left open to allow for the development of a federal common law governing claims in the area.[173] In doing so, the Court took two important steps in an attempt to simultaneously open and limit the potentially vast scope of the federal common law.

The Court's first step was to assert, "the door is still ajar . . . and thus open to a narrow class of international norms today."[174] Thus, the Court recognized that the types of claims cognizable under the statute were not limited to the causes of action availa-

165. 542 U.S. 692 (2004); Regina Waugh, *Exhaustion of Remedies and the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 555, 557 (2010).

166. Elliot C. Cook, *Internationalizing Copyright: How Claims of International, Extraterritorial Copyright Infringement May Be Brought in U.S. Courts*, 7 U.C. DAVIS BUS. L.J. 429, 435 (2007).

167. Sosa v. Alvarez-Machain, 542 U.S. 692, 698 (2004).

168. *Id.*

169. *Id.*

170. *Id.* at 738.

171. Anthony Bernard, *Holding Corporations Liable in the United States for Aiding and Abetting Human Rights Violations Abroad: A Statutory Solution*, 78 GEO. WASH. L. REV. 615, 625 (2010).

172. Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273, 286 (2005).

173. Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080, 1089 (N.D. Cal. 2008).

174. Sosa v. Alvarez-Machain, 542 U.S. 692, 729-30 (2004).

ble at the time of the statute's passage.[175] As a result more than just "offenses against ambassadors, violation of safe conducts, and piracy" are allowed as a private cause of action.[176] Thus, the Court gave lower courts the privilege of defining new causes of action that they deem to arise out of the framework provided by *Sosa*.

The Court's second step was to caution lower courts against frivolously recognizing new causes of action.[177] Indeed, although the Court noted that the door was still open to recognition of newly created causes of action, it asserted that any new causes of action should be subject to "vigilant door keeping."[178] The Court attempted to supply throughout the opinion the type of vigilance it expected from the lower courts, asserting that the "common law [at the time of the ATS's passage] would provide a cause of action for [only a] [] modest number of international law violations,"[179] and that ". . . there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind."[180] However, beyond brief interjections suggestive of the cautious approach Federal courts should take in creating new rights, the Court left open what "vigilant door keeping" actually meant.[181] Just as the Court would leave their cautionary advice open ended, it would do the same for the definition of what constitutes a cause of action under the statute.

The Court provided a loose framework to lower courts to use in determining if a tort constitutes a cause of action under the ATS.[182] This would be based on what the court called, accepted norms of international law.[183] Torts that violate certain recognized norms, the court held, become a recognized cause of action under the statute.[184] The court would only provide two endpoints to help lower courts decide if a tort amounts to a cause of action. On one endpoint the Court expressed that the confinement the doctor was forced to endure did not amount to an actionable claim because it did not violate any accepted principles of international law.[185]

175. *Bowoto*, 557 F. Supp. 2d at 1089.
176. *Id.*
177. *Sosa*, 542 U.S. at 729-30.
178. *Id.*
179. *Id.* at 724.
180. *Id.* at 725.
181. Jill C. Maguire, *Rape Under the Alien Tort Statute in the Post-Sosa v. Alvarez-Machain Era*, 13 GEO. MASON L. REV. 935, 943-44 (2005).
182. *Id.*
183. *Id.*
184. *Id.*
185. *Sosa*, 542 U.S. at 738.

However the court couched the plaintiff's claim in very broad terms, stating that he "invokes a general prohibition of "arbitrary" detention defined as officially sanctioned action exceeding positive authorization to detain . . . regardless of the circumstances."[186] As a result, this endpoint provides little help due to its broad nature. The court would subsequently attempt to define the other endpoint of the law, the point at which a claim would be considered valid.

The point at which an alien can bring a valid claim under the ATS, the Court asserted, required that the claimed "international law norm [ ] [have no] less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."[187] The Court went on to endorse as valid and falling under this paradigm those acts which made a person an "enemy of all mankind" such as torture and the slave trade, and that any such claim must be a violation of an accepted principle of international law that is "specific, universal, and obligatory."[188] The Court continued, asserting that ". . . where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had [in order to determine what is and is not an accepted principle of international law] to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators."[189] This, and this alone, would be the bare bones framework the Court gifted lower courts attempting to interpret the ATS.

Because this framework is more akin to guiding principles than a strict set of rules, lower courts have interpreted the opinion in various ways, some of which are in conflict.[190] As a result, lower courts analysis of the area must be used to determine the viability of a claim brought under the statute. The most dispositive question when analyzing these decisions, as well as the most difficult to answer, is whether violations seen in the Maquiladoras are among the accepted international norms that allow for a viable claim. However, before even reaching a point where one could couch human rights failings as violations of accepted international law, there are three major legal impediments to ATS claims.

186. *Id.* at 737.
187. *Id.* at 733.
188. *Id.*
189. *Id.* at 734.
190. *See supra* Part "Legal Impediments to ATS Claims."

Legal Impediments to ATS Claims

The first problem that arises when attempting to bring an ATS claim is whether a court will recognize corporate liability under the statute. There is a conflict amongst the courts as to whether a corporation can be held liable under the ATS.[191] Recently, the Second Circuit decided that corporations cannot be held liable for tort violations under the ATS.[192] Moreover, a district court in California has also asserted that the ATS does not extend liability to corporations.[193] However as the California Court noted, "With a single exception . . . [courts have] uniformly rejected or ignored" the claim that corporations cannot be held liable under the ATS.[194] Indeed most courts have held that a corporation can be held liable under the ATS.[195] Thus a Mexican worker bringing a claim against a US corporation must be careful to file the complaint in a jurisdiction that recognizes corporate liability under the ATS.

The second issue the litigant might face is whether he or she must exhaust local remedies before bringing a claim.[196] The Ninth Circuit recently held that as matter of prudence, lower courts could require exhaustion of local remedies when an ATS claim has a weak nexus with the United States.[197] In such instances, the court held that it was within the lower court's discretion to decide that a claimant should exhaust all local remedies before bringing an ATS claim.[198] Nevertheless, district and circuit courts outside the Ninth Circuit generally hold that exhaustion is not required for ATS claims unless another statute used in conjunction with the ATS requires it.[199] Moreover, even in those instances where courts did require exhaustion, the requirement was generally irrelevant. As one scholar noted, ". . . [the] exhaustion requirement in the ATS may be a moot point . . . most [of the] ATS cases would not be dismissed for failure to exhaust."[200] As a result, the Mexican litigant would have to be cognizant of its potentially

191. Doe v. Nestle, S.A., 2010 U.S. Dist. LEXIS 98991, at *191-92 (C.D. Cal. Sept. 8, 2010).

192. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010).

193. *Doe*, 2010 U.S. Dist. LEXIS 98991, at *191-92.

194. *Id.*

195. *Id.*

196. Waugh, *supra* note 166, at 565.

197. Sarei v. Rio Tinto, PLC, 550 F.3d 822, 824-25 (9th Cir. Cal. 2008).

198. *Id.*

199. Waugh, *supra* note 166, at 570. Up till 2008, almost no court outside the Ninth Circuit required exhaustion when dealing solely with the Alien Tort Statute.

200. *Id.*

weak nexus with the United States and not file a claim in the Ninth Circuit if such nexus is questionable. Thus the exhaustion requirement would likely not act as a bar to ATS claims.[201] But this is not the last of the procedural hurdles the litigant would likely face. The third, and possibly most formidable hurdle that the claimant must address, is the potential for forum non conveniens to prevent the claim from staying in a US court.[202] A brief overview of the doctrine is warranted before analyzing its threat to the ATS.

The doctrine of forum non conveniens allows for defendants to request that a lawsuit be moved to a different forum that also possesses jurisdiction over the case.[203] When faced with such a motion, a federal court must first make sure the proposed alternate forum possesses jurisdiction over all parties.[204] It must subsequently weigh the private interests associated with adjudicating the claim in each proposed forum with a strong presumption in favor of plaintiff's preference.[205] If private interests in another forum are stronger despite such presumption, the case will be dismissed or transferred to allow such jurisdiction to hear the plaintiff's claim.[206] However, if the court finds that the private interests are roughly equal, it will then look to public interest factors to determine whether the case should be moved to a different forum.[207] With respect to ATS claims, the threat of dismissal in a US court due to a forum non conveniens motion is not to be taken lightly.[208] As one scholar recently noted, "The forum non conveniens doctrine is an attractive tool to use against plaintiffs in the ATS context."[209] In the past five years a number of courts have dismissed ATS claims due to the use of the forum non conveniens doctrine.[210] Plaintiffs bringing a claim under the ATS are especially susceptible to this attack, as evidenced by recent dismissals, because they frequently are litigating issues that occurred in a

201. *Id.*

202. Rosaleen T. O'Gara, *Procedural Dismissals under the Alien Tort Statute*, 52 ARIZ. L. REV. 797, 804 (2010).

203. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 242 (1981).

204. Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283, 1290 (11th Cir. 2009).

205. *Id.*

206. *Id.*

207. *Id.*

208. O'Gara, *supra* note 204, at 804.

209. *Id.*

210. *Id.*

foreign forum and are not US citizens.[211] This foreign element of the case lends itself to dismissal under the test.[212]

There are nevertheless two glimmers of light in this seemingly bleak outlook for ATS claimants. First, the application of the doctrine is factually intensive.[213] This allows plaintiffs to diminish the power of *stare decisis* by attempting to factually distinguish their claims from those that were previously dismissed.[214] This is especially relevant in light of the fact that there is a severe absence of ATS litigation from Mexican Maquiladora workers.[215] As a result, if chartered correctly, by factually distinguishing their case from precedent and avoiding inhospitable circuits, a claim would have a significant chance at surviving an attack from the forum non conveniens doctrine.[216] As stated by one commentator, "courts [] applying the forum non conveniens doctrine [] have placed tight restrictions on its application, deferring to a plaintiff's choice of forum wherever possible."[217] In fact at least one court has construed the public factors of the forum non conveniens test more heavily to allow an ATS claim to advance.[218] Thus, this legal hurdle is equally surpassable, albeit more difficultly, than other judicial impediments created by courts.

Lower Courts' Interpretation of Sosa

Such legal obstacles, discouragingly enough, are insignificant compared to the difficulty associated with determining whether a human rights violation in the Maquiladora would be considered a violation of an accepted norm of international law. This is because there is little in the way of Supreme Court case law to determine whether a tort amounts to such definition. But however nebulous this legal landscape may be, a good starting place is the Restatement of the Law of Foreign Relations.[219] Section 702 reads that

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211. *Id.*

212. Iragorri v. United Techs. Corp., 274 F.3d 65, 71-72 (2d Cir. 2001).

213. John S. Willems, *Shutting the U.S. Courthouse Door? Forum Non Conveniens in International Arbitration*, DISP. RESOL. J., Aug.-Oct. 2003, at 57, *available at* http://www.whitecase.com/publications/detail.aspx?publication=509

214. Greg Vanden-Eykel, Case Comment, *Convenience for Whom? When Does Appellate Discretion Supercede a Plaintiff's Choice of Forum?—Aldana v. Del Monte Fresh Produce N.A., Inc.*, 15 SUFFOLK J. TRIAL & APP. ADV. 307, 311 (2010).

215. A search for cases using the query, "alien tort statute & summary (mexican or mexico)," only brings up Sosa v. Alvarez-Machain.

216. Vanden-Eykel, *supra* note 216, at 311.

217. *Id.* at 310.

218. O'Gara, *supra* note 204, at 806.

219. Russell G. Donaldson, Annotation, *Construction and Application of Alien Tort*

one can violate an international law if they "encourage[ ] or condone[ ] genocide; slavery or the slave trade . . . inhumane, or degrading treatment or punishment . . . or a consistent pattern of gross violation of internationally recognized human rights."[220] This provides an optimistic glimpse into the types of existent international norms, but it only acts as a starting point. Analysis of lower courts' interpretation of the *Sosa* president is required to discover which of these norms is currently accepted by courts.

Lower courts deciding whether a claim falls under an accepted international legal norm quote a passage from *Sosa*, which states courts should only recognize those norms that are "specific, universal, and obligatory," and that they should look to "the works of jurists and commentators" to aid judicial determination of whether a claim amounts to such a violation.[221] However, it must be noted that the assertion claims need to be violative of universally accepted international law in order to be recognized does not in fact mean they need to be truly universal.[222] Instead, "virtually" all countries must accede to the validity of the principles rather than all nations.[223] This is a particularly important point for labor and human rights claims, as some nations lack recognition and protection for violations such as child labor, which in certain courts is a recognized claim under the ATS.[224] Indeed, at some point the question of which claims are universal becomes a judgment call regarding the nature of the law and the sovereigns who recognize it. An example of this includes apartheid.[225] As a result, different circuits have interpreted causes of action under accepted international law in conflicting manners.[226] This is very important with respect to corporate violations of human rights claims, which

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Statute (28 U.S.C.A. § 1350), Providing for Federal Jurisdiction over Alien's Action for Tort Committed in Violation of Law of Nations or Treaty of the United States, 116 A.L.R. FED. 387 (1993).

220. *Id.*

221. *Id.*

222. Raechel Anglin, Note, *International Environmental Law Gets Its Sea Legs: Hazardous Waste Dumping Claims Under the ATCA*, 26 YALE L. & POL'Y REV. 231, 264 n.84 (2007).

223. *Id.*

224. John Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 991 (S.D. Ind. 2007).

225. In re S. Afr. Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

226. *See, e.g.*, Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009) (corporations can be held liable under the statute); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 118 (2d Cir. 2010) (corporations cannot be held liable); Flomo v. Firestone Natural Rubber Co., 2010 U.S. Dist. LEXIS 108068 (S.D. Ind. Oct. 5, 2010) (finding no cause of action for child labor); *Bridgestone Corp.*, 492 F. Supp. 2d at 1022 (finding a cause of action for child labor).

just like other aspects of aspects of the ATS, may turn out differently depending on the court in which the claim is brought.[227]

The fact that courts are vested with the power to look at scholarly works and non-binding treaties to determine what is specific, universal, and obligatory and therefore an accepted norm of international law, necessarily makes it difficult for ruling courts to draw bright lines.[228] Because of this, just like other areas of the ATS, the success of a claim often depends on alleging a strategically chosen set of facts.[229]

One bright area for Maquiladora workers that invokes this concept was issued by a court in the Southern District of Indiana, which held that certain types of child labor may violate a norm of accepted international law.[230] In *Roe v. Bridgestone Corp.*, the Court was forced to muddle through various legal standards regarding child labor with respect to what age and what sort of workplace conditions at various ages violate a norm of international law.[231] The court looked to both international as well as US domestic labor law, and determined that an employer who allowed and allegedly encouraged children "six, seven, or ten years old" to work at a US company's foreign factory may violate a norm of accepted international law.[232] The court held that the corporate encouragement and employment of children workers combined to create a potentially cognizable claim under the ATS.[233] Importantly, the court also hinted that severe violations involving children older than the age of ten could also potentially create a cognizable claim under the ATS.[234]

This is a significant development for Maquiladora workers. There are many reported incidents of child labor within foreign owned factories.[235] Therefore, it is a particularly attractive litigation strategy to attempt to broadly define what the court means by encouraging youth to work in factories. One could interpret this case to stand for the proposition that encouragement by creating an environment where children are welcome to be hired for cer-

227. *Id.*
228. *Id.*
229. *Id.*
230. *Bridgestone Corp.*, 492 F. Supp. 2d at 1022.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. Jennifer Bol, *Using International Law to Fight Child Labor: A Case Study of Guatemala and the Inter-American System*, 13 AM. U. INT'L L. REV. 1135, 1165-68 (1998).

tain jobs, by paying particularly low wages to their parents, creates a cause of action under the ATS. On the other hand, this case could be read narrowly, and the employer might need to explicitly encourage the employment of young children in harsh labor conditions. Either way, it creates a potential cause of action for child labor violations in the Maquiladoras, an avenue free from the threat and pressure of globalization.

Such a cause of action, however, is not the only one available. In fact, there is a circuit split regarding a much more amorphous category of tort that allows for greater latitude in pleading a cause of action.[236] This is the category of cruel, inhumane, or degrading treatment.[237] The Northern District of California held in 2008 that acts constituting this type of treatment are cognizable causes of action under the ATS.[238] They have ruled in the opposite direction of the Eleventh Circuit, which held that such actions are not violative of norms of accepted international law.[239] The California court held that Chevron Corporation may have violated this cruel, inhumane or degrading standard when it paid the Nigerian government to treat protesters in a physically harsh manner.[240] Although other courts have held this category of tort cognizable under the statute, they had all done so before the Supreme Court decided *Sosa*.[241] Therefore, this decision in ATS jurisprudence, particularly in light of the fact that the Eleventh Circuit decision was made after *Sosa*, is extremely important precedent.[242] This is especially true in light of the other cognizable claims under the ATS. Besides the relatively narrow category of child labor, other potential ATS claims such as torture, slavery, and genocide are thankfully not available to claimants working in the Maquiladoras. Thus, this flexible category of cruel, inhumane, or degrading treatment is the best avenue for claimants working in the Maquiladoras.

Thus, it is possible people working in the Maquiladoras can

236. *Compare* Estate of Amergi v. Palestinian Auth., 611 F.3d 1350, 1361 (11th Cir. 2010) (finding no cause of action for cruel, inhumane, or degrading treatment), *with* Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080, 1095 (N.D. Cal. 2008) (finding a cause of action for cruel, inhumane, or degrading treatment).

237. *Bowoto*, 557 F. Supp. 2d at 1095.

238. *Id.*

239. Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283, 1286 (11th Cir. 2009).

240. *Bowoto*, 557 F. Supp. 2d at 1095.

241. Doe v. Qi, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004); Chiminya Tachiona v. Mugabe, 216 F. Supp. 2d 262, 281 (S.D.N.Y. 2002); Jama v. U.S. I.N.S., 22 F. Supp. 2d 353, 363 (D. N.J. 1998); Xuncax v. Gramajo, 886 F. Supp. 162, 187 (D. Mass. 1995).

242. Aldana v. Del Monte Fresh Produce, N.A., Inc., 452 F.3d 1284 (11th Cir. 2006).

bring claims against United States corporations for human rights violations carried out in their factories. This is an exciting truth. By holding corporations liable for human rights violations perpetuated in their factories, they will be disincentivized from treating workers inhumanely. Indeed as stated, the ATS is an especially apt solution for the violations documented in the Maquiladoras because it would be equally applicable to all abusive factories, not just those Mexico. Thus, this protection would not fall prey to the threat of other free trade countries and corresponding prospects of losing employment to those that allow environmental and worker abuses.

CONCLUSION

The conditions found in the factories on the border of the United States and Mexico are a prime example of the wrongs market capitalism can create when unrestrained by law meant to inject the model with altruism and respect for human rights. When corporations are unfettered by such constraints, they abuse a country's workers and destroy its environment. Although this suggests a broader problem related to the effects of unfettered capitalism, simple global solutions are not practicable. Therefore, if true change is sought, scholars must come up with creative solutions to constrain the free rain and harm created by corporations. Solutions such as the ATS must be sought out in an effort to inject altruism into the model and curtail human abuses. Without such effort, globalism will continue to trample on the human rights of workers and unfettered corporations will continue to perpetuate substandard working and environmental conditions. For now though, the ATS is a viable solution, but others must be discovered. Otherwise, the effects of free trade and unrestrained capitalism will continue to wreak havoc in nations around the world.