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The Cost of Progress: Enduring the Tax Deductibility of International Corporate Social Responsibility Initiatives

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THE COST OF PROGRESS: ENSURING THE TAX DEDUCTIBILITY OF INTERNATIONAL CORPORATE SOCIAL RESPONSIBILITY INITIATIVES

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I. INTRODUCTION

American multinational corporations (MNCs) are immensely wealthy, powerful, and influential entities. Despite their stereotypical image as greedy and uncaring, if not outright villainous, American MNCs have become increasingly generous at home and abroad. Early corporations were strictly limited to pursue only those purposes for which the corporation was expressly created. Charitable relief, as one can imagine, was not a common purpose for which corporations were formed in early America. Toward the end of the nineteenth-century, corporations began to lobby state legislatures to ease the application of the ultra vires doctrine with respect to incidental activities that were not diametrically contrary to the entity’s stated purpose.

Two landmark twentieth-century cases have had an enduring impact on American jurisprudence regarding the role and purpose of corporations. In Dodge v. Ford Motor Co., the Michigan Supreme Court ruled that although incidental humanitarian expenditures are permissible, the ultimate purpose of a corporation is to increase the wealth of its shareholders. Three decades later in A.P Smith Mfg. Co. v. Barlow, a New Jersey appellate court ruled against a group of shareholders who challenged their board of directors’ decision to make a charitable contribution to Princeton University. The two cases highlight the fine-line corporation directors

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1 See Beth Stephens, The Amorality of Profit: Transnational Corporations and Human Rights, 20 BERKELY J. INT’L. L. 45, 46 (2002) (“Multiple layers of control and ownership insulate individuals from a sense of responsibility for corporate actions. The enormous power of multinational corporations enables them to inflict greater harms, while their economic and political clout renders them difficult to regulate.”).


3 LEE HARRIS, MASTERING CORPORATIONS AND OTHER BUSINESS ENTITIES 100 (2009). An activity beyond the established power of the corporation would be deemed ultra vires and thus void.

4 Id. at 101 (discussing the emergence of general incorporation statues).

5 Dodge v. Ford Motor Co., 204 Mich. 459 (1919) (“A business corporation is organized and carried on primary for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes”). The court deferred to the business judgment rule in approving Ford’s decision to vertically integrate the company’s operations. The court ruled, however, that withholding a special dividend in order to advanced Ford’s philanthropic goals was antithetical to the business judgment rule and the shareholder primacy norm.

6 A.P. Smith Mfg. Co. v. Barlow, 13 N.J. 145 (1953). The court allowed the charitable donation because the company’s president argued that it was made with the intent to increase the firm’s future profitability. Most states have since enacted statutes authorizing corporate charitable donations, although there is variation regarding whether and to what extent the donation can be linked to a deemed future benefit to the corporation. For a comparison of the
must walk when structuring charitable initiatives. Reading them and similar cases together produces the general rule that, a corporation is permitted to donate a portion of its profits to charity, but not in a manner or amount that would violate its directors’ fiduciary duties to investors.

Along with making donations to eligible charities, American MNCs have begun to embrace the concept of corporate social responsibility (CSR). Just what is CSR? That question cannot be answered definitively since CSR is an amorphous concept. Generally CSR is a form of corporate self-regulation through which corporations consider the ethical and environmental effects of a given choice of action. Despite good-faith efforts by many American MNCs to implement CSR policies, labor and human rights violations persist in the global supply chain of many sectors of the U.S. economy. From hi-tech to mining, apparel to agriculture, many commercial products sold by American MNCs have been tarnished by abusive production methods in developing nations. Historically, the American government has paid scant attention to the problem while foreign host nations and foreign business entities eagerly exploit cheap and even slave labor sources. Even when the U.S.

pertinent provisions from Delaware, California, New York and Pennsylvania see William Klein et al., Business Associations, Cases and Materials on Agency, Partnerships, and Corporations 268-69 (7th ed. 2009). Specifically Delaware’s version of the statute states the following: “Every corporation created under this chapter shall have power to: (9) Make donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof;” Del. Code Ann. tit. 8, § 122(9) (West 2012).


8 See generally Cynthia A. Williams, Corporate Social Responsibility in an Era of Economic Globalization, 35 U.C. Davis L. Rev. 705 (2002) (advocating the conception of corporations as both economic and social entities).

9 See id. at 721 (“The general corporate social responsibility concern tend to be a seemingly pessimistic preoccupation with the potential negative social and environmental effects that may be created by economic entities in their pursuit of economic returns.”).


11 See Maria Ellinikos, American MNCs Continue to Profit from the Use of Forced and Slave Labor Begging the Question: Should America Take a Cue from Germany?, 35 Colum. J.L. & Soc. Probs. 1, 10-11 (2001) (contrasting the willingness of post-WWII German courts to hold German businesses accountable for exploiting slave labor under the Nazi regime with the reluctance of their American judicial counterparts to hold American MNCs liable for using slave or forced labor without concrete supporting evidence that the American MNC directly participated or cooperated in the abusive practice).

12 Id. at 1; see also E. Christopher Johnson Jr., Michigan Lawyers in the Fight Against Slavery, 91-Jun Mich. B. J. 22-24 (2012) (discussing Ambassador-at-Large to Monitor and Combat Trafficking in Persons Luis CdeBaca’s recent testimony before Congress on the use of forced labor in the production of rubber, cotton, chocolate, coffee, tin, and steel). While not the focus of conservatively estimated to be at least 10,000 according to Kevin Bales et al., Hidden Slaves Forced Labor in the United States, 23 Berkeley J. Int’l L. 47-48 (2005). The article lists, Chinese, Mexicans, and Vietnamese as the top three ethnic groups of forced laborers inside the U.S. The article apportions forced laborers in the U.S. into the following sectors: prostitution and sex services (46%), domestic service (27%), agriculture (10%), sweatshop/factory (5%), and restaurant and hotel work (4%). But see The Foreign Corrupt
ratifies international human and/or labor rights treaties, it routinely attaches “reservations, understandings, and declarations” (referred to as RUDs) which effectively limit the domestic application of the treaty.\textsuperscript{13}

Non-governmental organizations have long championed the cause, however, the utility of international treaties and pledges (such as the U.N.’s “Global Compact”)\textsuperscript{14} in protecting human and labor rights are marred by their unenforceability and voluntariness.\textsuperscript{15} Their unenforceability stems from the lack of an enforcement mechanism in the various initiatives. But for the U.S. Supreme Court’s decision in \textit{Sosa v. Alvarez-Machain}, limiting the potential labor and human rights claims litigants may pursue in American courts under the Alien Tort Statute (ATS),\textsuperscript{16} the ATS would serve as a deterrent to corporations that would otherwise be willing to profit irresponsibly. The global recession and accompanying fiscal cliff debt crises increase the general apathy of corporate shareholders who continue to seek profits in a time of financial uncertainty.\textsuperscript{17} Some developing nations, further pressed by weak demand for their exports, have shown a willingness to forgo strengthening human and labor rights policies in order to continue the flow of foreign direct investment.\textsuperscript{18}

\textsuperscript{13} Amy C. Harfeld, \textit{Oh Righteous Delinquent One: The United States’ International Human Rights Double Standard—Explanation, Examples, and Avenues for Change}, 4 N.Y. CITY L. REV. 59, 75-76 (2001) (“There are many explanations for these RUDs, some of which point towards America’s sense of international political and legal superiority; all of which serve to keep the United States free from the grasp of international law.”).

\textsuperscript{14} U.N. Secretary-General Ban Ki-moon: “The Global Compact asks companies to embrace universal principles and to partner with the United Nations. It has grown to become a critical platform for the UN to engage effectively with enlightened global business.” The Ten Principles of the Global Compact are available at http://www.unglobalcompact.org/AboutTheGC/index.html; see also Elisa Westfield, \textit{Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century}, 42 VA. J. Int’l L. 1075, 1091 (2002) (noting that the Global Compact lacks an enforcement mechanism. Thus limiting the U.N. to persuasion and media embarrassment to enforce the Compact).

\textsuperscript{15} \textit{But cf.}, Tim Baines, \textit{Integration of Corporate Social Responsibility through International Voluntary Initiatives}, 16 IND. J. GLOBAL LEGAL STUD. 223 (discussing options for increasing the effectiveness of voluntary initiatives including consolidating complementary initiatives, using an ombudsman to monitor grievances, and a narrow tailoring of existing initiatives).

\textsuperscript{16} Vanessa R. Waldref, \textit{The Alien Tort Statute after Sosa: A Viable Tool in the Campaign to End Child Labor?}, 31 BERKELEY J. EMP. & LAB. L. 160, 161 (2010). In Sosa, the Court held that ATS claims must involve violations of norms that are “universally accepted, specific, and concrete.” It is argued that that standard begs the question because of the divergent international acceptance of human rights norms.

\textsuperscript{17} See Robert Sprague & Aaron Lyttle, \textit{Shareholder Primacy and the Business Judgment Rule: Arguments for Expanded Corporate Democracy}, 16 STAN J.L. BUS. & FIN. 1, 27 (2010) (“Shareholder empowerment may force directors to focus on short-term returns at the expense of other constituencies, interfering with the goals of corporate social responsibility.”).

\textsuperscript{18} See, e.g., Ellinikos, \textit{supra} note 11, at 7 (discussing the numerous allegations of human and labor rights violations leveled against the ruling Burmese military junta in connection with oil & gas partnerships with the former American MNC Unocal).
Until the end of the twentieth century, the predominant view in America was that a corporation’s sole duty was to supply wealth to its shareholders. The idea that a corporation owes a broader duty to all of its stakeholders has gained ground based largely on the emerging international recognition of human rights norms.

Increasingly American MNCs have opted to voluntarily create and implement CSR policies for moral, economic, and political reasons. While charitable donations made to exempt organizations are expressly deductible under section 170 of the Internal Revenue Code, the same might not be true for a given CSR expenditure. In order to claim a tax deduction, a taxpayer must be able to point to a section of the Internal Revenue Code containing the magic words, “There shall be allowed as a deduction…” for the given outlay.

Therefore, many American MNCs may be reluctant to proceed with a meaningful CSR program without a corresponding tax subsidy; a subsidy in the sense that a tax deduction reduces the after tax cost of a given outlay by subtracting the cost of the outlay from the taxpayer’s gross income. For example, imagine that student “A” paid $1,000 in interest on her student loans during 2012. Also imagine that she was fortunate enough to secure employment placing her in the 25% marginal tax bracket. The interest payment would be fully deductible under section 221. The payment would reduce her tax bill by $1,000 x (25%) or $250. Her after tax cost of the interest payment is $750 and $250 of the payment has been effectively subsidized by the federal government.

This note, in Part II, explains the challenges in influencing and regulating the extra-territorial acts and omissions of American MNCs and their foreign suppliers. Part III. A. discusses some of the most pressing human and labor rights abuses that are someway connected to American MNCs. Part III. B. begins the conversation of a CSR tax deduction by describing the similarities and differences of tax credits and deductions. Next, Part III. C. offers arguments for a tax deduction for money spent by American MNCs on CSR initiatives to improve human and labor rights, and

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20 See id.

21 See Williams, supra note 8. For additional commentary on William’s note see CORPORATE GOVERNANCE: LAW, THEORY AND POLICY 30-38 (Thomas W. Joo eds., 2010).

22 I.R.C. § 170(a)(1).

23 See JOSEPH M. DODGE ET AL., FEDERAL INCOME TAX: DOCTRINE, STRUCTURE, AND POLICY 57 (3d ed. 2004) (“a core principal is that only deductions specifically granted by the Code are allowable. One often reads in judicial opinions that deduction provisions in the Code are a matter of legislative grace and thus are to be strictly construed against the taxpayer.”) (internal quotation marks omitted ).

24 I.R.C. § 221(a), (b).

environmental protection. Counter-arguments against such a deduction are considered in Part III. Finally Part IV concludes the Note.

II. BACKGROUND—REGULATING AMERICAN MULTINATIONAL CORPORATIONS’ FOREIGN ACTIVITIES

A. The Shareholder versus Stakeholder Corporate Governance Model Debate

Since corporations are people too (legally speaking), should corporations care if their operations harm other people or the environment in places where their wealth is generated? Should corporations feel obligated to take steps toward lowering their carbon footprint? Prevent labor and human rights abuses in their supply chain? Though the debate is ongoing, many MNCs now voluntarily allocate a portion of their corporate earnings to CSR programs to do just that.26

Traditionally MNCs have implemented CSR initiatives for a myriad of reasons, not the least of which is the continued economic success of their enterprise.27 Despite substantial research into expanding the regulations governing MNCs’ overseas activities, the current economic stagnation and political gridlock makes it doubtful that any perceived anti-business regulations (such as a law mandating CSR spending) could make it through Congress unscathed. Only recently has the discussion regarding the role of tax law in the CSR sphere started to coalesce, however the research to date is inadequate.28 Much of the research regarding taxation in the CSR context is focused on the question of whether tax avoidance strategies are socially responsible.29 I believe that a corporate tax deduction for CSR spending should be palatable to both sides of the aisle, if the deduction does not appreciably increase the national deficit.

A useful place to begin is a review of historical competing corporate governance theories regarding the duties and obligations of a corporation. In their famous long-running debate, Professors Adolph Berle and E. Merrick Dodd offered seemingly opposite views regarding the obligations of corporations. Berle’s viewpoint was that a corporation’s only duty was to increase shareholder wealth.30 Berle’s argument

26 See Nancy Hatch Woodward, Corporate Social Responsibility May Prove To Be Recession Proof and Smarter Than Ever, 28 No. 3 Emp. Alert 2 (citing Santiago Zorzopulos Reich, senior consultant with the Ethical Leadership Group, “Now that a recession has happened, we are no longer just theorizing that CSR supports business initiatives; we have to prove that it contributes to the success of the enterprise…We are seeing expansion and growth in these programs at a time we aren’t seeing it in most other corporate initiatives.”); see also Arthur Acevedo, Responsible Profitability? Not on My Balance Sheet!, 61 CATH. U. L. REV. 651, 652, 653 (2012).

27 See Woodward, supra note 26, at 1 (listing cost saving, efficiency, and access to socially responsible investors as elements of the business case for CSR).


30 Backer, supra note 19, at 298.
held sway for the better portion of the last century. Berle’s argument was championed by Professor Milton Friedman, who argued that since corporations are not state actors, their regulation ought to focus on monetary policy rather than a corporation’s purported social policy functions. As a result of the dominance of the profit maximization (shareholder primacy) model, globalization in the late twentieth century triggered what has been referred to as the race to the bottom. On the other hand, according to Amir Licht, the debate between Dodd and Berle was not as simple as described above. In his reading of the debate, Berle did not dispute Dodd’s assertion that non-shareholders and shareholders could be beneficiaries of corporate fiduciary duties. The disagreement, however, centered on whether and how corporate directors could take their concerns for non-shareholders into account while still fulfilling their ultimate fiduciary duties to investors.

B. Applying U.S. Domestic Laws Abroad

1. American Banana Fruit Co. v. Dole Fruit Co.

Attempts to control the extraterritorial activities of American MNCs through U.S. domestic legislation have proven daunting ever since the U.S. Supreme Court’s decision in American Banana Co. v. United Fruit Co. In American Banana, the Court ruled that the Sherman Antitrust Act did not apply to acts outside of the U.S.: “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is

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31 Id.

32 Id. at 299 (“As such, corporations might be made to serve other constituencies, or might seek to serve such constituencies within a broader context than that of mere shareholder profit maximization.”).

33 Id. at 299, 300.

34 See Acevedo, supra note 26, at 656 (explaining that MNCs competed fiercely to establish their brands in the global marketplace by expanding operations to developing nations with lax human and labor rights standards).

35 See Amir N. Licht, The Maximands of Corporate Governance: A Theory of Values and Cognitive Style, 29 Del. J. Corp. L. 649, 652 (2004) (questioning the entire debate between the shareholder primacy and stakeholder views of corporate governance. Licht attacks the nearly universally accepted notion that corporations only have to identify its residual claimants to determine which interest the directors should seek to maximize, “[a] more sensible analysis reflected in modern economic theory of the firm-acknowledges that the corporate enterprise comprises several constituencies whose interests are both interdependent and intermediate.”).

36 Id. at 652.

37 Id.

done.” The result of *American Banana* has been a strong legislative and judicial presumption against the extraterritorial application of U.S. law.

2. The Comprehensive Anti-Apartheid Act of 1986

Despite the effect of the *American Banana* decision, the U.S. has passed domestic legislation to combat perceived moral ills in foreign nations, notably in the form of embargoes and sanctions. It is fair to say that in many instances, sanctions and embargoes have only been directed at the U.S.’ political foes; for example nations aligned with the former Soviet Union during the cold war. An exception to the paradigm was Congress’ enactment of the Comprehensive Anti-Apartheid Act of 1986. The Act was passed with strong bipartisan support overriding President Reagan’s veto. The act placed severe trade restrictions on American MNCs conducting business with the racist South African regime during the reign of apartheid. The anti-apartheid movement did not begin on Capitol Hill though. Congress only became involved after substantial grass roots activism by university students, NGOs, and religious leaders. Apartheid was able to galvanize the condemnation of the American electorate in ways that current human and labor rights abuses have not. Resultantly, American politicians have not been pressured by voters to take a tougher stance on current human and labor rights violations.

3. The Alien Tort Statute

Another check on MNCs’ seemingly unfettered power in developing nations is to allow foreign nationals to bring claims against MNCs in U.S. courts under the Alien

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39 Id. at 355 (the Court was worried that applying U.S. domestic laws extraterritorially would violate the sovereignty norm of international law).

40 See Westfield, supra note 14, at 1087.


42 The bulk of the current sanctions and embargoes are directed at deemed state sponsors of terrorism (Cuba, Iran, Sudan, and Syria) and nations that have used their military on their own populations, including China, Burma, and North Korea. The list of current state sponsors of terrorism is available at http://www.state.gov/j/ct/list/c14151.htm. A list of current defense related embargoes is available at http://www.pmddtc.state.gov/embargoed_countries/index.html.


45 See Joseph L. Miljak, *Forcing Sovereign Conformity: The Comprehensive Anti-Apartheid Act of 1986*, 36 CLEV. ST. L. REV. 261 (1988) (concluding, shortly after the passage of the act, that while legitimate under international law, the act would not be able to pressure the apartheid regime to reverse its segregationist policies. Thankfully that prediction turned out to be erroneous).
Tort Statute (ATS). The ATS was enacted as part of the historical Judiciary Act of 1789. The purported goal of the ATS was to assure European nations that American courts were willing and able to prosecute crimes at sea, thus protecting commerce between the new nation and the old world. The ATS was largely unused until a wave of plaintiffs brought claims under the doctrine in the 1980s against “war criminals, dictators, and terrorists for torture, slavery, genocide, and other egregious acts.” The cases were allowed to proceed under the auspices of “customary international law.” The Supreme Court did not hear a case brought under the ATS until it decided Sosa v. Alvarez-Machain in 2004. In Sosa, the Court ruled that the ATS was jurisdictional in nature and did not give rise to a new cause of action. After Sosa, all new claims brought under the ATS must be premised on international legal norms that are universal, specific, and concrete. Potential plaintiffs face an uphill battle bringing claims under ATS unless and until there is greater international consensus regarding, environmental, human and labor rights.

C. International Treaties and Compacts

International treaties and agreements have helped propel the debate for international recognition of human and labor rights, however, both are marred by their voluntariness and unenforceability. Further, Congress is under constant pressure from MNCs and their lobbyists not to ratify treaties or pledges that could negatively impact corporate profits. For example, the U.S. is the only industrialized nation that has not recognized the United Nation’s Convention on the Rights of the Child. The International Labour Organization (ILO) is the U.N.’s agency tasked with improving international working standards. Despite having over 180 members

46 28 U.S.C. §1350. See Waldref, supra note 16, at 166, 167 (The ATS states the following: “The district courts shall have 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.”).

47 Id. at 163.

48 Id.

49 Id.; see also JEFFREY DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 81-87 (3d ed. 2010) (discussing The Paquete Habana, 175 U.S. 677 (1900), where the Supreme Court held that by the general consent of civilized nations, independent of any express treaty, it is a violation of international law to seize coastal fishing vessels as prizes of war.).

50 Waldref, supra note 16, at 165, 166.

51 Id. The Court ruled that federal courts should not recognize claims under the ATS that were not understood as violations of the laws of nations by the “First Congress.”

52 Id.

53 Id.


55 See Dunoff, supra note 49, at 204-222.

56 See Shima Baradaran & Stephanie Barclay, Fair Trade and Child Labor, 43 COLUM. HUM. RTS. L REV. 1, 8 (the only other U.N. member state not to ratify the convention is Somalia).
in the organization, ILO Convention No. 15, Convention Concerning the Occupational Safety and Health and the Working Environment, only had fifty-six signatories as of 2010.57 The U.N. Conference on Trade and Developed (UNCTAD) attempted to control MNCs offshore operations when it produced its Draft Code of Conduct on Transnational Corporations. Article 14 of the Draft Code would have required that MNCs respect the human rights and fundamental freedoms in countries where they operate.58 Ultimately the Draft Code was never adopted by the U.N. General Assembly. Though voluntary, the Organization for Economic Co-operation and Development’s (OCED) Guidelines for Multinational Enterprises have been given serious treatment in the international community.59

D. The Emergence of Voluntary Corporate Social Responsibility Initiatives

CSR has grown in the vacuum of scant domestic legislation and unenforceable international agreements in controlling the foreign activities of American MNCs.60 The growth in CSR acceptance was spearheaded by academics and activists in the fields of international law and human rights.61 CSR can be understood as voluntary codes of conduct pronounced by business entities to outline the entity’s standards and principles for conducting business.62 CSR has been noted to serve both “micro” and “macro” business purposes.63 On the “micro” level, CSR initiatives help individual business entities with “greater access to investment capital; managing risks and liabilities; employee recruitment, retention, and productivity/motivation; improved stakeholder relations; innovation; and increased business opportunities.”64

57 See Dunoff, supra note 49, at 207 (“Indeed, most of the ILO conventions have relatively few ratifications.”).

58 Id. at 208.

59 Id. at 209-10; the Guidelines are available at http://mneguidelines.oecd.org/.

60 See Colin Marks & Paul S. Miller, Plato, The Prince, and Corporate Virtue: Philosophical Approaches to Corporate Social Responsibility, 45 U.S.F. L. Rev. 1, 4 (2010) (the authors credit Professor Archie B. Carroll as having articulated the most often cited model of CSR. According to Carroll’s model, corporations owe a legal, ethical, economic, and discretionary and/or philanthropic responsibility to society).

61 See Backer, supra note 19, at 307, 308 (“for people in these fields of law and policy, the traditional forms of nation-centered normative corporate regulatory systems, centered on the economics of shareholder wealth maximization, hold no special magic. Instead of economics and private law, public law and public accountability provide a better model for corporate regulation, which can be articulated as policy, and eventually as law. At this level, the domestic law framing of the issue of corporate social responsibility – the extent to which the corporation may or must take into account the effects of its actions on others, and the fundamental limitation of ultimate corporate purpose to shareholders - is increasingly rejected. State governance and corporate governance theory conflate in norm-making outside the nation-state.”).

62 See, e.g., Dunoff, supra note 49, at 218 (discussing the CSR policies of Nike. and the U.S. Fair Labor Association).


64 Id. at 365. See also Bruce Rogers, Is CSR Dead Or Just Mismanaged?, FORBES (Dec. 11, 2012 9:05 AM), http://www.forbes.com/sites/forbesinsights/2012/12/11/is-csr-dead-or-
At the “macro” level, CSR helps legitimize the broader global marketplace under the banner of sustainable development.\(^{65}\)

Despite the growth in CSR, shareholder primacy remains as the foremost governing principle of American MNCs.\(^{66}\) The sub-prime mortgage debacle has shown that shareholder primacy does not always protect the best interest of a corporation’s shareholders or of the broader society.\(^{67}\) Therefore the current uptick in CSR consciousness does not supplant shareholder primacy. Rather it can be viewed as another tool of corporate directors to fulfill their essential profit producing role through improving their brand’s reputation.\(^{68}\)

Because of the delicate tightrope act MNCs have to perform, the general consensus of corporations and other business organizations is that CSR should remain voluntary rather than mandated by law.\(^{69}\) The American government can encourage voluntary CSR development by allowing tax deductions for CSR outlays just-mismanaged/ (In the piece, Rogers provides results from the 2012 Rep Trak™ 100 Study which indicate that MNCs are not doing an adequate job managing their CSR initiatives and communicating the results of those initiatives to consumers, “Companies are mismanaging their CSR investments. It’s that simple. They do not apply the same rigor on these investments as they do on other core business priorities. They do not link it to their business strategy. But treat it like a separate initiative and investment. Companies need to reassess how to spend their money if they want to improve their return on investment. You don’t do CSR for the sake of CSR. You do CSR as part of your reputation management strategy to drive business growth, customer loyalty, and employee alignment.”).\(^{65}\)

\(^{65}\) Id. at 366.

\(^{66}\) Sprague, supra note 17, at 5. Sprague and Lyttle trace the shareholder primacy norm back to the Dodge case as discussed previously.

\(^{67}\) See id. at 7 (discussing the disastrous consequences of Lehman Brothers Inc.’s and other Wall Street firms’ relentless pursuit of profits through investments in sub-prime mortgage instruments).

\(^{68}\) See Levine, infra note 82, at 1 (“Through adequate CSR standards and effective monitoring, a corporation can protect the workers who make a brand’s products, and in so doing, the brand protects itself. Moreover, effective monitoring may yield greater knowledge about production supply chains and production sites, thereby helping to reduce a corporation’s exposure to counterfeiting and illegal transshipping.”).

\(^{69}\) Ronen Shamir, Socially Responsible Private Regulation: World-Culture or World Capitalism?, 45 LAW & SOC’Y REV. 313, 322 (2011) (“A prescriptive or regulatory approach or framework-setting could undermine business commitment to CSR, while a voluntary approach will firmly embed sustainable good practice within a business. CSR must be developed from within the company; it is not a discipline that can be imposed.”). See also Radhika Mittal, India’s Law on Corporate Social Responsibility, CSR ASIA (Feb. 1, 2013), available at http://www.syntao.com/CSRNews/CSRNews_Show_EN.asp?ID=15866 (discussing India’s Companies Bill 2011 now pending before India’s House of the Parliament. If passed, the law would require business entities with profits above a certain threshold to spend two percent of their profits earned in India on CSR initiatives within the country). For a scholarly analysis of India’s Companies Bill 2011, see Caroline Van Zile, India’s Mandatory Corporate Responsibility Proposal: Creative Capitalism Meets Created Regulation in the Global Market, 13 ASIAN-PAC. L. & POL’y J. 270, 273 (2012) (concluding that while radical, the measure is a rational response to major tensions in the nation’s economy).
for specially needed charitable works.\textsuperscript{70} As such, a tax deduction for CSR dollars spent on eradicating the worst forms of human and labor rights abuses in an MNC’s global supply chain, and lowering a MNC’s global footprint, would maintain the status quo of shareholder primacy while achieving laudable goals.

III. ANALYSIS—A TAX DEDUCTION FOR CSR INITIATIVES

A. Pressing Issues in Global Supply Chains and the Limited Remedies to Address Them

1. Apple’s Foxconn Woe’s

A first step in considering a tax deduction for overseas CSR spending is deciding whether current domestic laws and international treaties are adequate in preventing human and labor rights abuses. For the most part, one would have to argue they are since living and working conditions have advanced in many parts of developing world at least partially because of the efforts of the United Nations and other non-governmental organizations.\textsuperscript{71} There are, however, certain industries, business entities and nations that perform worse than others in labor and human rights protection.

For example, Foxconn, the Taiwanese based manufacturer of Apple’s iPhone, iPad, and other hi-tech devices, has come under increased scrutiny after scores of suicides by its young overworked factory workers at its facilities in mainland China.\textsuperscript{72} A Foxconn factory worker told a reporter in early 2012, that at Foxconn “women work like men, and men work like animals.”\textsuperscript{73} After much bad press, Apple announced that it would have Foxconn’s operations audited by a third party.

\textsuperscript{70} But cf. David M. Schizer, Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals, 62 T. L. Rev. 221, 254-255 (2009) (arguing that charitable subsidies should be limited to nonprofits because extending charitable subsidies to for-profits would necessarily require the government to intrude in the allocation process, resulting in less experimentation and competition. Dean Schizer posits the intrusion would be necessary to prevent for-profit MNCs from using charitable subsidies to “pad their profits” by taking advantage of the overly broad substantive scope of the current charitable subsidy). In a similar vein, see also Miriam A. Cherry & Judd F. Sneirson, Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster, 85 Tul. L. Rev. 983, 1025, 1026 (2011) (discussing the potential for “overstatement, inflation, or even outright deception” in CSR claims).

\textsuperscript{71} But cf. Richard M. Bird & Eric M. Zolt, Rethinking Redistribution: Tax Policy in an Era of Rising Inequality: Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries, 52 UCLA L. Rev. 1627 (discussing the growing gap between the rich and the poor in developing nations and arguing that progressive income tax regimes are not the optimal cure for the problem).


Foxconn has also announced that it has increased worker’s salaries. Yet despite these efforts, allegations of harsh working conditions to flourish seemingly unabated.  

2. Bitter Sweet Chocolate

Agriculture is another area where MNCs are indirectly connected to labor and human rights violations. Labor intensive crops such as tobacco are often produced by young teens, to the detriment of their health and education prospects. The vast majority of chocolate consumed by Americans (and the rest of the world) and sold by American MNCs is produced from cocoa grown in West Africa, particularly in the Cote d’Ivoire. Cocoa production is an extremely labor intensive effort, and reports indicate that over 600,000 children were involved in cocoa production in the Cote d’Ivoire alone in 2002, many of which are victims of human trafficking and forced employment.  

3. Freeport’s Troubles Grasberg Mine

The mineral extraction industry is not immune either. The Grasberg Mine, containing the world’s largest gold deposits and third largest copper reserves, has been the site of under reported environmental degradation and cyclical violence. The mine is located in West Papua, officially the Indonesian province of Irian Jaya. The mine is operated by the American MNC Freeport-McMoran Inc., with security unofficially supplied by local police and often the brutally efficient Indonesian army. West Papuans, who have a different language, religion, and culture from other islands in the sprawling archipelago have resented Indonesian rule ever since the former incorporated the province following Indonesia’s independence from Dutch colonial rule. Freeport and the Indonesian government have been accused of

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74 See Susan Adams, Apple’s New Foxconn Embarrassment, FORBES (Sep. 12, 2012, 2:38 PM), http://www.forbes.com/sites/susanadams/2012/09/12/apples-new-foxconn-embarrassment/ (discussing the deplorable working conditions at Foxconn plants throughout China and recent allegations that teachers forced vocational students to work on Foxconn assembly lines to make up for a labor shortage in the wake of orders for the iPhone5).  

75 See Armin Rosencranz et al., Farming and Food: How We Grow What We Eat: Doling Out Environmental Justice to Nicaraguan Banana Workers: The Jose Adolfo Tellez v. Dole Food Company Litigation in U.S. Courts, 3 GOLDEN GATE U. ENVT'L. L.J. 161 (2009); Baradaran, supra note 56, at 11 (“A study conducted by Human Rights Watch also discovered that agricultural laborers often must work without access to sanitary drinking water, hand washing, and toilet facilities, all of which contribute to pesticide poisoning, infection, dehydration, and other illnesses.”).  

76 Baradaran, supra note 56, at 11-12.  

77 Id. at 12-13.  

78 Id. at 13.  


80 For an up-to-date report of the violent clashes between security forces and the indigenous tribes affected by the Grasberg mine see Freeport-McMoRan, WEST P A U P A M E D R A ALERTS, http://www.westpapuamedia.info/tag/ freeport-mcmoran/.
murder, torture, and poisoning rivers in connection with the operations at the mine and quelling local (frequently violent) protest. 81

4. Limited Patience for Additional Regulation

Regulations could be put into place on a nation by nation or industry by industry specific basis to prevent human and/or labor abuses. A suitable rule to combat the Foxconns and Freeports of the world would be to place a tariff on digital products or mineral resources produced in inhumane working conditions, or in a manner that is environmentally destructive. In the face of such a tariff, American MNCs would surely take a more pro-active role in controlling the practices of foreign vendors to avoid the tariff. However, as stated previously, the current political climate and stiff competition from foreign competing firms effectively rule out further regulation in this area.

5. “Fair Trade” Labeling

The use of “Fair Trade” labeling in the agricultural sector has been shown to have an extremely powerful impact on coffee and tea producers in several sub-Saharan African nations including Malawi and Ghana. Consumers in Europe have shown a willingness to pay a moderate premium for agricultural products that have been produced in a socially responsible manner; studies indicate that American consumers would do likewise. 82 American MNCs in the agricultural sector should be encouraged to purchase a certain percentage of their crops from Fair Trade suppliers.

B. An Overview of Tax Credits and Deductions

Allowing MNCs to take a tax deduction for corporate profits spent on certain CSR initiatives would allow American MNCs to improve the working and living conditions in nations where they derive wealth. Tax deductions work by subtracting the amount allowable for the deduction from the gross income of the taxpayer. The taxpayer’s adjusted gross income (AGI) is then multiplied by the taxpayer’s marginal tax rate to determine the taxpayer’s tax liability. Tax deductions are similar to tax credits; however tax credits operate at the end of the calculation by offsetting the amount of the tax credit, dollar-for-dollar, against the amount of tax owed. 83

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81 Khokhryakova, supra note 79, at 472.

82 Baradaran, supra note 56, at 39 citing Patrick De Pelsmacker et al., Do Consumers Care About Ethics? Willingness to Pay for Fair Trade Coffee, 39 J. CONSUMER AFF. 363-64 (2005); see also CAROLE BASRI, PRACTISING LAW INSTITUTE, INTERNATIONAL CORPORATE PRACTICE: A PRACTITIONER’S GUIDE TO GLOBAL SUCCESS 7-45 (2008) (discussing the work of TransFair USA, a certifier of fair trade products in the United States, “TransFair is a member of Fairtrade Labeling Organizations International (FLO). FLO is a consortium of fair trade groups in Japan, Canada, the United States, and seventeen European countries. TransFair audits transactions between U.S. companies and their suppliers in order to guarantee that the farmers and farm workers are paid a fair, above-market price. In addition, FLO conducts annual inspections to ensure that strict socioeconomic development criteria are being met using the increased fairtrade revenues. TransFair then permits those products to bear a Fair Trade Certified™ label. Moreover, TransFair maintains a list of producers of Fair Trade products. One example is Starbucks’ Fair Trade Blend coffee.”).

American MNCs, if offered, would prefer a tax credit over a tax deduction because tax credits are more valuable to high income taxpayers. However a tax deduction would allow more tax revenue to ultimately flow to the U.S. government, while achieving the intended goal of increasing spending on CSR. While allowing a tax deduction for CSR spending does not necessarily prove that MNCs that otherwise would have no intention of implementing CSR will suddenly decide to implement a policy, the available evidence shows that the percentage of MNCs voluntarily implementing CSR policies has increased steadily. Thus allowing a tax deduction for CSR spending is highly likely to influence MNCs to consider other constituencies as well shareholder profits.  

C. Why CSR Initiatives Deserve Favorable Tax Treatment

1. Substance over Form

The statutes authorizing tax exempt status to nonprofit entities are located in subchapter F of the I.R.C. In order for an entity to be entitled to the benefits of tax exempt status (and for the entity’s donors to be entitled to a tax deduction), the entity must be one of the types listed in section 501(c)(3). Entities entitled to tax exempt treatment under section 501(c)(3) are taxed, however, on business activities that are not “substantially related to an organization’s charitable purpose.” Anup Malani and Eric A. Posner made a compelling argument for the extension of tax

84 See Marks, supra note 60, at 1 (citing Robert Reich in 2007 discussing the increase in corporate acceptance of CSR, “over 80 percent of corporate recruiters say business school graduates should display an awareness and knowledge of CSR. Hundreds of corporate conferences are held on it annually. Tens of thousands of corporate executives listen attentively to consultants who specialize in it explain its importance. The world's top CEOs and officials, gathering annually at the World Economic Forum in Davos, Switzerland, solemnly discuss it and proclaim their commitment to it.”).


86 See Joseph M. Dodge et al., Federal Income Tax: Doctrine, Structure, and Policy 373 (4th ed. 2011) (for a discussion of whether the charitable deduction is justified. The authors posit that although the “ability-to-pay tax norm would indicate that a person’s charitable donations were available to finance the federal government, and therefore should not be deductible. However, the ability-to-pay norm is based on a political theory that can accommodate the charitable domain. The U.S. government and charities both serve to promote the public good, and both conform to the same triadic structure: (1) contributors, (2) a mediating institution administered by accountable agents, and (3) a class of beneficiaries.”).

87 See Boris Bittker & Lawrence Lokken, Exempt Organizations-In General, in Fed. Tax’N OF INCOME EST. & GIFTS, (Thompson/RIA 2012). The list includes charitable institutions, religious organizations, colleges and other entities whose principal purpose is to benefit others rather than the entity or an entity’s investors.

88 Kalle Condliffe, Balancing the Equities: Considering the “Flip-Side” of the UBIT and Forming a Workable Solution, 6 BROOK J. CORP. FIN. & COM. L. 211, 213 (2011). The Unrelated Business Income Tax (UBIT) is codified at 26 U.S.C. § 511. The UBIT taxes charitable organizations on income received that is unrelated to the charitable purpose of the entity.
exemptions to for-profit charities. Currently for-profit charities are not entitled to valuable tax exemptions, and donations made to for-profit charities are not deductible in the United States. The principal reason for the disparate treatment is a restriction referred to as the “non-distribution constraint.” The crux of the non-distribution constraint is that 501(c)(3) entities are prohibited from distributing excess profits (net revenue less expenses) to persons who exercise control over the entity; additionally employees’ must be paid a fixed salary and cannot share in the entity’s profits.

Malani and Posner argue against “coupling” the 501(c)(3) tax benefit to the form of the entity as nonprofit versus for-profit. The authors list and forcefully criticize three explanations for why nonprofits are given special tax treatment compared to for-profit firms, namely 1. the public goods theory; 2. the agency theory; and 3. the altruism theory. According to the public goods theory, people are encouraged to donate to charities because their donations are tax deductible. In turn, the charities use the donations to produce “public goods” (i.e. meals for the hungry or coats for disadvantage youths) or to perform services that are deemed socially desirable in a manner that is more efficient than if the government produced identical “public goods” or performed identical services with tax revenues. The agency theory suggests that limiting tax exempt status to nonprofit entities protects donors who otherwise could not adequately measure the quality of charitable services of an entity with a profit-motive. Lastly the altruism theory holds that more public goods are created by nonprofits; and because nonprofits attract employees and leaders who are altruistic, a higher percentage of donations are directly passed to the entity’s charitable beneficiaries in the form of “public goods.” Ultimately Malani and Posner conclude that “coupling” the tax break to the entity’s form distorts entrepreneur’s incentives and encourages inefficient production of “public goods.”

My argument is not as broad sweeping as Malani’s and Posner’s in that I am only advocating for a tax deduction for American MNCs that spend a portion of their profits on targeted CSR initiatives such as poverty eradication and other socially desirable outcomes. I posit that American MNCs can and do produce “public

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89 See Anup Malani & Eric A. Posner, The Case for For-Profit Charities, 93 VA. L. REV. 2017 (2007). Recall that 501(c)(3) entities are exempt from corporate income tax, and their donors are entitled to a tax deduction under section 170.

90 See id. at 2019.

91 Id. at 2018; see also Dana Brakman Reiser, Charity Law’s Essentials, 86 NOTRE DAME L. REV. 2 (2002) (explaining the tension between an entity’s charitable mission and the inability of donors to adequately police the quality of the entity’s performance. “Current charity law embodies this rule and the slightly more general idea that charities must use their assets to benefit some charitable class. This requirement…focuses charities…by declaring self-regarding behavior unacceptable.”).


93 Id.

94 Id.

95 Id.

96 Id. at 2066 (“The relevant consideration for the law is not whether the entrepreneur is altruistic but whether the effect of the entrepreneur’s action is socially beneficial.”).
goods” in developing nations at least as efficiently as nonprofit entities. For example, Google’s philanthropic activities are carried out through a division of the firm rather than through donations to nonprofits. American Microfinance Institutions (MFIs) have provided loans to many economically challenged entrepreneurs who otherwise would have been turned away by traditional banks because of the borrower’s lack of collateral. Currently most MFIs operate as nonprofits; resultanty they face crippling hurdles in their efforts to obtain capital to make loans. Michelle Scholastica Paul argued that American MFIs serve as a conduit for the redistribution of wealth from the haves to the have-nots, regardless of whether they operate as a nonprofit or for-profit entity. Thus, because the needy borrower still received a loan they would not have received from a traditional bank, for-profit MFIs should be entitled to similar tax exemptions as nonprofits.

Although Google (and other huge conglomerates) and a small start-up for-profit MFI have drastically different economic resources, they both can help reduce human and labor rights violations through their charitable CSR initiatives in developing nations. Therefore I see no reason why American MNCs that voluntarily spend profits on socially desirable CSR initiatives should not receive some form of tax deduction. The tax deduction would incentivize American MNCs to behave responsibly, thus increasing the potential beneficiaries of the entity’s resources; while simultaneously relieving some of the burden placed on the shareholders with respect to foregone profits.

2. More CSR, Less USAID?

A review of the U.S. government’s foreign aid expenditures and policy lends further support for allowing a CSR tax deduction. In the Obama administration’s proposed budget for fiscal year 2013, $54.87 billion dollars were requested for State, Foreign Operations and Related Programs appropriations. Ultimately the Senate approved $52.1 billion in spending. The bill includes $1.45 billion dollars for the U.S. Agency for International Development’s (USAID) operations and administration. USAID was created under the leadership of President John F.

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97 Reiser, supra note 91, at 2.


99 See Paul, supra note 98, at 1392-1417.

100 SUSAN B. EPSTEIN ET AL., CONG. RESEARCH SERV., R4261, STATE, FOREIGN OPERATIONS, & RELATED PROGRAMS: FY2013 BUDGET & APPROPRIATIONS (2012). The figure is roughly 1.5% of the total federal budget. State, Foreign Operations, and Related Programs is a subcommittee of the House of Representatives Committee on Appropriations tasked with funding a broad range of overseas initiatives, including diplomatic missions, foreign military aid and United States Agency for International Development (USAID). The Senate has a complementary subcommittee which performs virtually identical functions.


102 Id.
Kennedy after the passage of the Foreign Assistance Act of 1961.\textsuperscript{103} As of 2012, USAID operated approximately 11,097 projects in the developing world.\textsuperscript{104} If an American MNC can facilitate a program that is being funded through USAID’s tax dollars\textsuperscript{105}, the MNC should be allowed to operate the program. The MNC should be given a tax deduction for the funds spent carrying out the project. As previously stated, it would cost U.S. taxpayer’s less to allow the MNC the deduction than it would be to pay for the government performing the same function.

D. Arguments against a CSR Tax Deduction

1. Deduction’s Deplete the Fisc

One of the strongest and newest arguments against allowing a tax deduction for CSR spending (and even current section deductions) is the sky-rocketing national debt and the impending fiscal cliff. As far back as 2009, the Obama administration began a push to reduce the amount deductible for charitable contributions as a means to raise revenues.\textsuperscript{106} Limited to the context of CSR spending in developing nations, I propose that rather than scaling back the charitable deduction, the U.S. government could reduce foreign aid in situations where American MNCs provide comparable charity.

For example, if Congress allotted $X of foreign aid for mosquito nets in an impoverished nation ridden with malaria, and an American MNC operating in the nation could provide the nets through a CSR initiative, Congress could reallocate the funds from U.S. Aid that were designated for the project or use the saved funds to pay down the debt.\textsuperscript{107} Allowing the MNC a tax deduction in this scenario would actually increase rather than deplete the treasury. The reason for this is that while foreign aid removes money from the treasury dollar for dollar, the tax deduction allowed to the MNC would only result in lowering the MNC’s tax burden by a certain percentage of the cost of the CSR outlay.\textsuperscript{108} It is common knowledge that vast sums of foreign aid do not reach the intended beneficiaries because of corrupt heads of state in developing nations. Therefore, instead of doling out American tax dollars to kleptocrats, American MNCs should be allowed a tax deduction if they can carry out the Congressional intent of the foreign aid expenditure at a net cost savings.


\textsuperscript{105} Assuming the MNC can meet the benchmarks set for the program by USAID.

\textsuperscript{106} Schizer, supra note 70, at 223.

\textsuperscript{107} Of course American MNCs could not replace U.S. governmental aid with respect to the defense industry.

\textsuperscript{108} Consider a foreign aid project that would cost the government $1 million to provide Polio vaccinations in Haiti. If an American MNC provided the vaccines, the government would initially save the entire $1 million. When the MNC is allowed a tax deduction, the MNC’s tax liability would only be decreased by a percentage of the $1 million spent ($350,000 if the MNC was in the 35% marginal rate bracket) rather than the whole amount. In the end, the same charitable goal has been accomplished at a discounted price to the American taxpayers and the MNC.
Kalle Condliffe argues against extending Malani’s and Posner’s proposed for-profit tax exemption policy to CSR initiatives. Condliffe’s argument is that exempting CSR activities would likely “severely erode the tax base.” Using the example of Starbucks’s “Coffee and Farmer Equity Practices,” which decrease labor and human rights abuses and combat poverty, Condliffe concludes that all of the income generated by the sale of Starbucks coffee would be tax exempt. I disagree with Condliffe’s expansive interpretation of Malani’s and Posner’s proposal. Rather than exempting all of Starbucks’ income from selling “Fairtrade” coffee, I merely propose allowing a tax deduction for the premium amount that Starbucks spent on the CSR effort to purchase “Fairtrade” coffee rather than irresponsibly grown coffee. As such the deduction I am proposing would offset the added cost shouldered by American MNCs (and their investors) to prevent human and labor rights violations, and environmental degradation from occurring in their supply chain.

Professor Nancy Knauer argued against viewing the section 170 corporate charitable deduction as a tax expenditure (forgone revenue). Professor Knauer reasoned that because corporate giving is the functional equivalent of advertising and public relations expenditures, the section 170 deduction acts as a normative adjustment rather than a tax expenditure. The thrust of Professor Knauer’s argument is that corporate charitable contributions are essentially disguised purchases of advertising or goodwill from section 501(c)(3) entities. Resultantly the receipt of the disguised purchase should trigger the UBIT because selling advertisement is not related to a charitable purpose.

My perspective (limited indeed) is that Professor Knauer’s hypothesis hinges on the belief that all corporate transfers to charity are made public thus allowing the corporation to enjoy the benefits of the “halo effect.” Though admittedly routine, it must be the case that many corporations make charitable donations without the expectation of a quid pro quo benefit in the form of enhanced brand image. A deduction for CSR initiatives is less likely to result in a disguised purchase of goodwill because the beneficiary will not be a well-known 501(c)(3) entity. It is doubtful that any potential investor or customer would know if Freeport McMoran implemented a CSR policy to build clinics in the rural villages of West Papua, or utilized “greener,” but more expensive extraction methods unless the company made an overt act to publicize the initiative. Thus a tax deduction for certain CSR initiatives is less susceptible to the sort of subterfuge singled out by Professor Knauer if the CSR initiative is implemented discreetly.

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109 Condliffe, supra note 88, at 226.
110 Id.
111 Id.
112 See Knauer, supra note 25, at 88-94.
113 Id. at 88.
114 Id. at 96-97.
115 See Condliffe, supra note 88.
116 Knauer, supra note 25, at 97.
117 In this context the “halo effect” is the enhanced public image corporations obtain when consumers learn about a given charitable contribution made by the corporation.
2. The Problem of “Greenwashing"

Another hurdle would be to prevent entities from obtaining a CSR tax deduction for good works in one area, while simultaneously acting grossly irresponsible in another. An example would be an MNC that profited from sweatshop labor, but decided to help build a neighborhood playground for its workers children. In order to prevent MNCs from engaging in this sort of “Greenwashing,” the deduction should be limited to MNCs that are not currently connected to human or labor rights violations, or extreme environmental destruction. The restriction would require American MNCs to take a harder look at every aspect of their global supply chain if it wishes to receive the deduction. The guidelines for obtaining the deduction would need to be written into the statute authorizing the deduction, as is already the case for every tax deduction. The economic burden of establishing the entities adherence to human and labor rights norms and ecological principles should rest with the MNC. I suggest requiring the MNC to pay a fee to the appropriate government agency118 commensurate with the agency’s labor expenses to process the MNC’s CSR deduction request.

3. Waning Support for the Section 170 Corporate Deduction

Scholars who oppose the section 170 corporate charitable deduction are not likely to support extending favorable tax treatment to charitable CSR initiatives. The section 170 deduction, as applied to corporate donations, has been the subject of scorn since its enactment. Much of the criticism revolves around the revenue depleting effect of the deduction.119 Prior to the enactment of the section 170 corporate deduction, courts faced with shareholder challenges to corporate donations would limit the donations to gifts that were made to financially benefit the corporation.120 If corporate directors could show that a donation was an ordinary and necessary business expense, courts would refrain from second guessing their decision.121

Ultimately Professor Lashbrooke concluded that the section 170 deduction for corporations is misguided because it allows corporations to choose which social welfare policies to support, a decision which he preferred was left entirely to the federal government.122 I do not see a reason to believe that our politicians are any better off than corporate directors in deciding which social causes are more deserving of financial support. At this point it is common knowledge that politicians routinely inflate appropriations bills with pork barrel spending projects to benefit their own power base. Why should the government have a monopoly in this area?

118 As with other deductions, the discretion to approve or deny the deduction must be left with the Treasury Department, hence the IRS.

119 See E.C. Lashbrooke, Jr., Internal Revenue Code Section 170 & the Great Corporate Giveaway, 22 Pac. L. J. 221-22 (1991) (“Given the state of the federal budget and the now express need to raise taxes, we [cannot] afford to continue to let as much as $1.7 billion dollars annually leak out of the federal treasury through the section 170 corporate charitable deduction.”).

120 Id. at 223.

121 Id. at 224 (citing Corning Glass Works v. Lucas, 37 F.2d 798 (D.C. Cir. 1929)).

122 Id. at 248.
Corporations, and other persons, deserve the opportunity to replace costly public welfare with deductible charitable contributions irrespective of whether the contribution is made to a section 501(c) entity or directly to beneficiaries through an MNCs’ CSR initiative.

4. Potential Conflicts with Section 162

There has been a fair amount of academic debate regarding whether the section 170 deduction for corporate charitable contributions should be replaced with the section 162 deduction for ordinary and necessary business expense deduction.\(^\text{123}\) Professor Linda Sugin argued that the section 170 deduction is biased in favor of corporate charitable donations when compared with donations by individual shareholders following corporate distributions.\(^\text{124}\) According to Professor Sugin, switching to the section 162 deduction would reduce agency costs by requiring donations to serve a legitimate business-related purpose, and make charity law more consistent with public perception and system of corporate double taxation.\(^\text{125}\)

An additional problem with replacing the section 170 deduction with a deduction under section 162 highlighted by Professor Sugin is the issue of timing the deduction.\(^\text{126}\) Under section 170, charitable donations are deductible in the year that they are made. Section 162 deductions, however, may have to be capitalized under section 263.\(^\text{127}\) The section 170 deduction requires that the donation is made without seeking a quid pro quo benefit from the recipient. Section 162, however, is expressly designated for “ordinary and necessary business expenses.” Therefore I do not think it would be helpful to completely replace the section 170 deduction with section 162 in the absence of treasury regulations explaining when the corporation would be entitled to deduct a specific contribution. Even a CSR initiative would face trouble getting around the section 263 capitalization requirement if the section 170 corporate charitable contribution was discarded.

IV. CONCLUSION

A tax deduction for CSR spending initiatives by American MNCs is justifiable under the same rationale as the current charitable deduction. In both instances, needed funds or services are transferred by those better off to needy individuals. It is


\(^{124}\) Id. at 129 (“In a system with a separate corporate tax, a charitable contribution made by a corporation and deducted at the corporate level can generally be larger than a contribution that an individual shareholder can make out of a corporate distribution of the same available funds because the corporate tax burdens the funds distributed to shareholders, but not the funds contributed to charity.”).

\(^{125}\) Id. at 167.

\(^{126}\) See id. at 170-78.

\(^{127}\) Id. at 170. The capitalization requirement requires outlays known as “capital expenditures” to be capitalized rather than deductible if the taxpayer will enjoy an economic benefit from the expenditure that will last beyond the current taxable year. For instance, if Walmart purchases a fleet of new Freightliner tractors, Walmart would have to capitalize their cost pursuant to section 263 and take a section 1012 cost basis in the rigs. Each subsequent year Walmart will be allowed to take depreciation deductions under section 167, and its basis in the trucks will be reduced under section 1016.
easier to justify using American tax dollars to subsidize charitable contributions made within the U.S., as it can be argued that the donations fill a void that would otherwise have to be provided through costly governmental services. But the current charitable deduction is available for business entities and individuals who contribute to international charities as well, so long as the charitable organization receiving the donation falls under one of the provisions of section 501(c).

American MNCs provide considerable resources and perform charitable services in a multitude of developing nations where they operate through CSR initiatives. Extending favorable tax treatment to charitable CSR initiatives would assuredly increase further CSR programs in size and scope, while preserving the shareholder primacy norm of corporate governance. A principal roadblock for a new tax deduction is the sky rocketing federal deficit and the stagnate growth of the U.S. economy. The current charitable tax deduction has already been in President Obama’s sights prior to his victory in the 2012 election. Time will tell whether President Obama will actually push for a reduction in the charitable tax deduction in his second term, or whether his prior statements were merely political blustery.

Alternatively, in the spirit of fiscal restraint, a CSR tax deduction could be limited to instances where the MNC can expend its own funds in the place of official U.S. foreign aid. The ultimate goal is the furtherance of human and labor rights protections, and sustainable development in the supply chains of American MNCs. While the average American would presumably accept that as a laudable goal, the question remains as to how much we are collectively willing to pay to achieve it.