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International Implications of the Alien Tort Statute

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INTERNATIONAL IMPLICATIONS OF THE ALIEN TORT STATUTE[1]

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The 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.[2]

I. INTRODUCTION

The Alien Tort Statute ("ATS"),[3] a one-sentence law penned in 1789, could devastate global trade and investment – more than two hundred years after it was enacted. Unless curbed by the Supreme Court or the Congress, the ATS could be invoked by thousands of Chinese citizens, organized by plaintiffs' attorneys and supported by international human rights groups. In a class action lawsuit filed in federal court, pursuant to the ATS, the Chinese plaintiffs might allege that multinational corporations ("MNCs") violated international law by abetting China's denial of political rights, observing China's restrictions on trade unions, and impairing the Chinese environment. The complaint might claim actual damages of $6 billion and punitive damages of $20 billion. To minimize their potential liability, the defendant corporations could settle for an intermediate amount, such as $10 billion.

Rather than fight lengthy battles in federal courts, as well as in the court of public opinion, targeted MNCs may curtail their investments in countries with less-than-perfect records in human and labor rights and respect for political and environmental norms. Corporate lawyers might

1. This Article is based on a 2003 study, Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789*, Policy Analyses in International Economics 70, INST. INT'L ECON. (July 2003).

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2. 28 U.S.C. § 1350 (2000); *see also* Act of Sept. 24, 1789, ch. 20, 9(b), 1 Stat. 73, 77. Some courts have referred to the statute as the Alien Tort Claims Act (ATCA) or the Alien Tort Act (ATA). For an excellent overview of the statute and its history, *see* CARTER ET AL., INTERNATIONAL LAW 229 & 251 (4th ed. 2003).

3. 28 U.S.C. § 1350 (2000).

also dissuade their clients from entering into trade contracts with government bodies in those nations. The chill to trade and investment could entirely offset whatever liberalization agreements are negotiated in the Doha Development Round. Although this scenario is only a forecast of what might result from recent ATS jurisprudence, corporate counsel has already begun to advise MNCs on avoiding such high-risk investments and operations.[4]

The ATS was enacted as part of the Judiciary Act of 1789,[5] the law which created the federal district courts and delineated their jurisdiction.[6] The statute lay dormant for over two-hundred years before it was awakened in the landmark decision *Filartiga v. Pena-Irala*.[7] Within the last two decades, federal courts, interpreting the ATS expansively,[8] have fostered uncertainty regarding the statute's reach, particularly in the area of corporate liability. Federal courts have read the ATS to hold corporations liable, even when acts were committed by another actor (such as a foreign state entity). More than a dozen current cases cite corporate defendants for their operations in Asia, the Middle East, Africa and Latin America; more than fifty multinationals are in the dock; and the damages claimed exceed $200 billion. For example, at least thirty of the world's largest corporations have been named as defendants in class action lawsuits alleging that these companies violated international law by extending high interest loans to the apartheid regime in South Africa, built armored vehicles for South African security forces, and profited from apartheid by exploiting the low-paid workforce of the apartheid regime.[9]

Executive branch officials have finally said enough is enough. In an *amicus* brief filed by the Department of Justice in the Ninth Circuit's *en banc* rehearing of the *Unocal* case, the U.S. government sharply states that it takes issue with "several fundamental analytical errors regarding the ATS" made by panels of the Ninth Circuit, and it asks the court to read the

4. *See, e.g.*, Elliot Schrage, *Emerging Threat: Human Rights Claims*, Aug. 2003 HARV. BUS. REV. 16.

5. Some scholars argue that because the law was enacted as part of the Judiciary Act, it almost certainly was intended to serve merely as a grant of jurisdiction. *See, e.g.* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 592-94 (2002).

6. Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 76-77 (codified as amended at 28 U.S.C. § 1350 (2000)). *See also* Bradley, *supra* note 5, at 587.

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

8. Whether one adheres to the theory that the ATS was a jurisdictional grant only, such as the Bush Administration argues, or joins those who claim that statute implicitly creates a cause of action, the statute's framers never contemplated that corporate entities would be liable for violations of "the law of nations."

9. Nicol Degli Innocenti & John Reed, *In New York Today the Holocaust Lawyer Ed Fagan Begins One of Two Class Actions Facing Global Companies*, FIN. TIMES, May 19, 2003, at 15.

ATS as a jurisdictional statute only.[10] Recognizing the far-reaching consequences of this problem, the *Washington Post* stated: "But Congress has never passed a law directly authorizing lawsuits such as the one against Unocal. And bringing such lawsuits instead under the Alien Tort Statute creates grave problems of democratic accountability and involves courts in foreign policy judgments, an area in which they have no expertise."[11]

The *ad hoc* development of ATS case law, coupled with trial lawyers seeking to expand its scope, could seriously threaten international investment and trade both in developing countries and in the United States. Unless the ATS is limited by the Supreme Court or Congress, millions of impoverished people may be denied an opportunity to participate in the global market. Along the way, the United States will find itself at loggerheads with traditional allies, trading partners, and developing countries. In this article, we briefly review the history and development of ATS case law, including the expansive reading courts have applied to the statute. Then we discuss potential ATS target countries and estimate the damage to foreign direct investment and trade with those countries. We conclude that unless the Supreme Court narrows the statute's scope, the Congress must amend the ATS to avert its potentially devastating effects on international trade and investment.

II. ATS JURISPRUDENCE: AWAKENED AND REINVENTED POST-*FILARTIGA*

The ATS was enacted soon after the ratification of the U.S. Constitution. From what its veiled history suggests, the law was apparently intended to show European powers that the new nation would not tolerate flagrant violations of the "law of nations," especially when the victims were foreign ambassadors or merchants.[12] Between 1789 and 1980, the law was used no more than twenty-one times,[13] and only two courts had upheld jurisdiction under the statute.[14] When the U.S. Court of Appeals for the

10. Brief of Amicus Curiae for the United States of America at 2, 5, Doe v. Unocal, 2002 WL 31063976 (9th Cir. 2002) (No. 00-56603).

11. *Policing Human Rights*, WASH. POST, Aug. 14, 2003, at A18.

12. Shortly before the law was passed, there were two high-profile incidents involving foreign officials in the United States, and some believe that these may have been the principal impetus for the statute. CARTER ET AL., *supra* note 2, at 252; *see* Respublica v. De Longchamps, 1 U.S. 111 (1784). *But see* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 637 (2002).

13. Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4 n.15 (1985).

14. *See* Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961); Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) (No. 1067).

Second Circuit decided *Filartiga v. Pena-Irala*,[15] the largely unnoticed ATS hit the radar screen of human rights activists in the United States.

Filartiga paved the way for a new conceptualization of the ATS. Prior to the decision, the ATS was generally viewed as a jurisdictional statute.[16] However, since 1980, some courts of appeals have explicitly held that the ATS not only confers jurisdiction, but creates a cause of action under federal common law.[17] Furthermore, the *Filartiga* court read the statutory language "law of nations" in light of evolving jurisprudence and as it is contemporaneously interpreted.[18] According to the Second Circuit, subject matter jurisdiction is established when (1) a foreigner (alien) sues (2) for any tort (3) committed in violation of international law.[19]

Federal courts interpreting the ATS since *Filartiga* have expanded its scope in ways with far-reaching consequences. The statutory term "law of nations" has been interpreted broadly.[20] Although federal courts generally

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15. *Filartiga*, 630 F.2d 876.

16. Three contextual factors argue that the ATS is essentially jurisdictional: the statute's explicit wording ("shall have original jurisdiction"); its passage in a jurisdictional act (the First Judiciary Act); and the two high-profile incidents that preceded the statute. *See supra* note 5. Some jurists contend that this is the case. In *Tel-Oren v. Lybian Arab Republic*, Judge Bork concluded that the ATS granted federal courts jurisdiction to hear suits alleging violations of the "law of nations," as the term was understood in 1789, and those later recognized by Congress in subsequent legislation. Tel-Oren v. Lybian Arab Republic, 726 F.2d 774, 806 (D.C. Cir. 1984) (Bork, J., concurring). According to Judge Bork, this interpretation would preclude ATS suits alleging violations of international human rights. *Id.* at 812-13 (Bork, J., concurring). Likewise, in *Al Odah v. United States*, decided by the U.S. Court of Appeals for the D.C. Circuit in 2003, Judge Randolph reasoned that the ATS only confers jurisdiction – it does not create causes of action beyond those recognized in 1789. Al Odah v. United States, 321 F.3d 1134, 1145-49 (D.C. Cir. 2003), *cert. granted*, 124 S.Ct. 534, 157 L. Ed. 2d 407 (U.S. Nov. 10, 2003) (No. 03-343). In 1789, the term "law of nations" was limited to a few fundamental and universally agreed principles, namely the rights of ambassadors, the right of safe conduct, issues of prize, and prohibitions on piracy. *See generally* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995) (discussing origins of ATS). Prohibitions on slave trading entered the law of nations in the late 1800s. *See* A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 330 (1999).

17. These are the Second, Ninth, and Eleventh Circuits. *See* Kadic v. Karadzic, 70 F.3d 232, 236, 241-44 (2d Cir. 1995); Hilao v. Estate of Marcos (In re Estate of Ferdinand E. Marcos, Human Rights Litigation), 25 F.3d 1467, 1475-76 (9th Cir. 1994); Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996).

18. *Filartiga*, 630 F.2d at 884-85.

19. *Kadic*, 70 F.3d at 238.

20. The Second Circuit has held that the term, "law of nations," is international law "as it has evolved and exists among the nations of the world today." *Kadic*, 70 F.3d at 238. Furthermore, courts discern norms of international law by "consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *Id. But see* United States v. Yousef, 327 F.3d 56, 93 (2d Cir. 2003), *cert. denied*, 72 U.S.L.W. 3245 (Oct. 3, 2003) (clarifying that courts should rely on

have required the violation of an international norm that is "specific, universal and obligatory,"[21] they have nonetheless found a valid ATS claim based on a norm contained in a treaty even when it is not self-executing,[22] and even a treaty that the United States has not ratified.[23] If non-self executing and non-ratified treaties reflect international norms actionable under the ATS, multinational firms could be held liable for violations of the Kyoto Protocol, the United Nations Convention on the Rights of the Child, and many other treaties on the theory that the treaty norms have become part of the law of nations.

ATS plaintiffs (and their attorneys), recognizing the elasticity of the term "law of nations," have brought suits alleging that the following acts violate the "law of nations": arbitrary detention; violations of rights to life, liberty, and security of person; violations of right to peaceful assembly; forced labor; racial discrimination; environmental harms; violations of cultural, social, and political rights; breach of a duty to provide the best proven diagnostic and therapeutic treatment; and breach of a duty to treat with dignity.[24] Although potentially meritless, these claims are not "frivolous" in the legal sense because of the expansive reading courts have given the ATS. The mere filing of ATS complaints alleging such claims hurts corporate defendants in the court of public opinion through press releases that, in the midst of on-going litigation, are shielded from libel suits. Even the unstated threat of future ATS suits might dissuade some corporations from doing business in ATS magnet countries.[25]

Such fears are not idle. Courts have broadened private liability for violations of international law under the ATS and have opened the door for massive damages awards.[26] Importing the domestic "under color of law"

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the writings of jurists only for evidence of "what the law *really* is").

21. *In re Estate of Ferdinand E. Marcos, Human Rights Litigation*, 25 F.3d at 1475; *see also* Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 370 (E.D. La. 1997); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987).

22. *Al Odah*, 321 F.3d at 1146-47 (Randolph, J., concurring). Some treaties cited by ATS plaintiffs, for example, the International Convention on Civil and Political Rights ("ICCPR"), are not self-executing – in other words, before they can apply as domestic law, they require enabling legislation. *Id.*

23. Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1161-62 (C.D. Cal. 2002) (holding that multinational firm could be held liable for violating United Nations Convention of the Law of the Sea, even though United States declined to ratify treaty).

24. The last two asserted violations were raised in *Abdullahi v. Pfizer, Inc.*, in the context of drug tests undertaken in Nigeria. Abdullahi v. Pfizer, Inc., 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y. 2002), *vacated and remanded by* Nos. 02-9223(L), 02-9303(XAP), 2003 WL 22317923 (2d Cir. Oct. 8, 2003).

25. *See* discussion *infra* Part III; *see also* Schrage, *supra* note 4.

26. *See e.g.* Kadic v. Karadzic, 70 F.3d at 238-39; Doe v. Unocal, No. 00-56603, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *reh'g en banc granted*, 2003 WL 359787 (9th Cir. Feb. 14,

standard, some district courts have held that a private individual may be held liable for *purely* state-actor violations of international law.[27] In legal terminology, private firms are liable for acts committed under color of law "within the meaning of section 1983 of Title 42 when [they] act ... together with state officials or with significant state aid."[28] Under this standard, corporations may be held liable for conduct that normally requires state action, provided that the state was sufficiently involved in the firm's allegedly unlawful conduct.[29] The requisite degree of involvement is easy to establish in oil and mining ventures, and with ingenuity, it can also be found in other business activities. For example, in *Sarei v. Rio Tinto*, a district court held that a racial discrimination claim against the multinational company, Rio Tinto, could be sustained because it was a "joint actor" with the government of Papua New Guinea, given that Rio Tinto's mining activities required both government permission and facilitation.[30]

Even more troubling is a recent decision by the Ninth Circuit Court of Appeals that would hold multinational corporations liable for the acts of foreign states and their entities under an "aiding and abetting" theory.[31] In *Doe v. Unocal*, a three-judge panel of the Ninth Circuit held that "knowing practical assistance or encouragement which has a substantial effect on the

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2003).

27. The "under color of law" standard was developed in the civil rights caselaw interpreting 42 U.S.C. § 1983, but has been adopted by some courts for finding private liability under the ATS. *Kadic*, 70 F.3d at 245.

28. *Id.*

29. *See Sarei*, 221 F. Supp. 2d at 1144.

30. *Id.* at 1153-55 ("[T]he court finds that the factual allegations supporting plaintiffs' claim that Rio Tinto and PNG operated the mine as joint venture partners sufficiently plead state action to confer jurisdiction over the ATCA racial discrimination claim."). Likewise, in *Wiwa v. Royal Dutch Petroleum Co.*, another district court found that a "substantial degree of cooperative action between" Nigeria and Royal Dutch Petroleum was sufficient to proceed against the company as a "joint actor." Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002), *rev'd and remanded*, 226 F.3d 88 (2d Cir. 2003).

31. Under an "aiding and abetting" theory, plaintiffs seek money damages from private firms for foreign government acts in circumstances where sovereign immunity bars recovery from the foreign state itself. If the corporation "should have known" that its conduct provided "encouragement" or even "moral support" to the foreign state, it can be held liable. *See Unocal*, 2002 WL 31063976, at 45. Multinational corporations might seek to insulate themselves from ATS liability by insisting that the offensive activity was undertaken by a distinct legal entity, a subsidiary incorporated in a jurisdiction other than the United States. Increasingly U.S. courts "look through" the corporate veil and attach liability to a U.S. parent corporation when it effectively controls the operations of a foreign subsidiary corporation. *See, e.g.*, Precision, Inc. v. Kenco/Williams, Inc., 2003 U.S. App. LEXIS 5740, *4 (6th Cir. Mar. 21, 2003) ("Delaware and Michigan courts will pierce the corporate veil and hold the parent company liable for acts of a subsidiary when there is such a complete identity between the defendant and the corporation as to suggest that one was simply the alter ego of the other.").

perpetration of the crime" is sufficient to prove the corporation aided and abetted the state actor.[32] What is "knowledge" under this standard? According to the court, actual *or* constructive knowledge is sufficient.[33] The majority also suggested that "moral support" alone may establish private liability.[34] In *Unocal*, the plaintiffs alleged that forced labor was employed by the Myanmar (Burmese) military to build helipads and roads and to haul materials for Unocal pipeline construction. The court ruled that Unocal could be held liable if the allegation was proven.[35] The court also found that Unocal could be held liable for murder and rape, since the Myanmar military allegedly committed those acts somewhere in Burma while providing security and building infrastructure for the Unocal pipeline project.[36]

ATS decisions following *Filartiga*, particularly *Kadic* and *Unocal*, may seriously damage United States relations with foreign states, obstruct Executive policymaking, and reverse the effects of international trade and investment liberalization.[37] Under both the aiding and abetting and "under color of law" theories, courts have expanded the ATS to hold private firms *directly* liable for state-sponsored racial discrimination, rape, environmental pollution, and many other types of prohibited state conduct—provided the private firm had a substantial business relationship

32. *Unocal*, 2002 WL 31063976, at *49-50. Because of the far-reaching implications of the panel's opinion, the case is now being reheard *en banc* by the Ninth Circuit. Doe v. Unocal, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

33. *Id.* at *54. Constructive knowledge can be found when the evidence suggests that the corporate defendant "should have known" about the violations, whether or not the evidence shows that corporate officers were *actually* aware of events. *See id.*

34. *See id.* at 50 n.28; *see also id.* at 84 (Reinhardt, J., concurring). Judge Reinhardt criticizing the majority, stated: "In my view . . . we look to traditional civil tort principles embodied in federal common law, rather than to evolving standards of international law, such as a nascent criminal law doctrine recently adopted by an ad hoc international criminal tribunal." *Id.* at 90.

35. The majority held that a jury could find Unocal liable for violating the international norm against forced labor because it gave practical assistance to the Myanmar military by "hiring [them] to provide security and build infrastructure along the pipeline route in exchange for money or food" and by "using photos, surveys, and maps in daily meetings to show the Myanmar Military where to provide security and build infrastructure" and because "Unocal knew or should reasonably have known that its conduct—including the payments and the instructions where to provide security and build infrastructure—would assist or encourage the Myanmar Military to subject Plaintiffs to forced labor." *Id.* at 52-55.

36. *Id.* at 58.

37. John E. Howard, Vice President, Int'l Pol'y & Prog., U.S. Chamber of Commerce, *The "Alien Tort Claims Act": Is Our Litigation-Run-Amok Going Global, at* http://www.usaengage.org/news/2002/20020923_jhoward_oped.html (last visited 12/15/2003); Daniel T. Griswold, CATO Inst., *Abuse of 18th Century Law Threatens U.S. Economic and Security Interests, at* http://www.usaengage.org/legislative/2003/alientort/cato_grisworld.html (last visited 12/15/2003).

with the state.[38] Furthermore, the ATS as written contains neither a statute of limitations,[39] nor an exhaustion of local remedies requirement.[40] In the next section, we discuss how corporate liability exposure under the ATS could wreak havoc on global development and trade.

PANDORA'S BOX: POTENTIAL DAMAGE TO INTERNATIONAL COMMERCE

Asbestos spawned the largest mass tort litigation in legal history.[41] Following the same trajectory, ATS litigation is developing into a plaintiff's market, fueled by class action lawyers. The most recent example is Edward Fagan's massive South African apartheid class action, seeking $100 billion from thirty-four multi-national corporations.[42] ATS plaintiffs,

38. In fact, if the *Unocal* decision is upheld, a multinational corporation could be found liable for state conduct by providing moral support or practical encouragement to the state and merely "because [it] knew that acts of violence would probably be committed." *Unocal*, 2002 WL 31063976 at 63 (discussing *mens rea* requirement).

39. The ATS itself contains no statute of limitations. The Ninth Circuit has borrowed a 10-year limitation from the Torture Victim Protection Act (TVPA). *See* Deutsch v. Turner Corp, 317 F.3d 1005, 1028 (9th Cir. 2003). But other federal courts may choose a longer limitation. Massive class action lawsuits alleging apartheid-era claims have already been filed in the Southern District of New York, even though South Africa ended apartheid in 1989. Nicol degli Innocenti & John Reed, *Comment & Analysis: The Defendants are 34 of the World's Biggest Companies and Banks, Accused of Having Supported Apartheid*, FIN. TIMES, May 19, 2003, at 15. Future ATS cases could revive events in the old Soviet Union, China during the cultural revolution, and Chile during Pinochet's rule.

40. International law generally requires a plaintiff to exhaust his local remedies before bringing a case in a foreign court. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 703 cmt. d, 902 cmt. k. *But see* Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1161-62 (C.D. Cal. 2002). The Torture Victim Protection Act of 1992 (TVPA) contains a similar requirement. The TVPA was passed, as companion legislation to the ATS, after the *Filartiga* case to create a right of action against foreign states for torture and extra-judicial killings. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350). Unlike the ATS, the TVPA specifically creates a cause of action that can be litigated in U.S. courts. As to exhaustion of remedies, the TVPA provides: "A court shall decline to hear a claim under [the TVPA] if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992). The absence of an exhaustion requirement clearly acts as a magnet, attracting litigation to sympathetic U.S. courts for every violation that can be shoehorned into the ATS.

41. In 1982, legislators were shocked to learn that 21,000 plaintiffs had filed cases against 300 corporate defendants, and that total costs (awards and legal expenses) then amounted to about $1 billion. That was the proverbial tip of the iceberg. By 2002, the cumulative number of plaintiffs ballooned to more than 600,000, and total costs reached $54 billion. Unless checked the total costs of current and future asbestos cases could range between $200 and $275 billion. Stephen J. Carroll et al., *Asbestos Litigation Costs and Compensation: An Interim Report*, Rand Institute for Civil Justice (2002).

42. *In re* South African Apartheid Litig., No. 02-1499, 2003 U.S. Dist. LEXIS 13797, at *1 (S.D.N.Y May 21, 2003); *In re* South African Aparthied Litig., 238 F. Supp. 2d. 1379 (J.P.M.L. 2002). Originally, class actions were filed in various districts, but the Judicial Panel on

like their asbestos predecessors, are adept at forum shopping, heading to the Ninth and Second circuits. Finally, like the asbestos precedent, ATS trials could clog the courts and run up massive costs because they involve numerous pre-discovery motions, overseas discovery, expert witnesses in foreign and international law, and near certainty of appeal.[43]

But these are early days in ATS litigation against corporate defendants. Some cases have been dismissed, and so far no suit against a corporate defendant has been adjudicated in the plaintiffs' favor. Given the sparse record, an assessment of the potential scope of ATS litigation requires guesswork. Nevertheless, based on ATS cases already filed and precedents from asbestos litigation, informed guesses can be made. Asbestos litigation is instructive as to the possible breadth of claims; indicators of human rights, together with political and economic conditions, suggest country targets.

Target countries, where state conduct or acts have given rise to ATS lawsuits, usually have a low regard for human rights, measured against U.S. standards, coupled with limited political and economic freedoms. Non-governmental organizations ("NGOs") have compiled indexes to measure social conditions. Based on these indexes, we have identified likely or potential target countries of ATS lawsuits.[44] Our monograph provides economic statistics, grouped by region, for what we have labeled Red and Amber countries, collectively called target countries. Our monograph also provides relevant trade, investment, and debt statistics. In this article, we report summary statistics, and interested readers may

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Multidistrict Litigation allowed for the consolidation of the cases and their transfer to the United States District Court for the Southern District of New York; *see* Nicol Degli Innocenti & John Reed, *In New York today the Holocaust lawyer Ed Fagan begins one of two class actions facing global companies said to have profited from South Africa's apartheid* regime, FIN. TIMES (London), May 19, 2003, at 15. Originally, class actions were filed in various districts, but the judicial panel on Multidistrict Litigation allowed for the consolidation of the cases and their transfer to the United States District Court for the Southern District of New York. *In re* South African Apartheid Litig., 238 F. Supp. 2d at 1379.

43. For example, *Unocal* is now in its seventh year, is taking its second trip to the Ninth Circuit, with proceedings pending in federal district court and a trial commencing in California state court. Jim Carlton, *Unocal Trial on Slave-Labor Claims Is Set to Start Today*, WALL ST. J., Dec. 9, 2003, at A19.

44. The overall score for each country was calculated by adding together the "grades" from the World Human Rights Guide (1992), and from the 2000-2001 indexes of Freedom House (political rights and civil liberties), Heritage Foundation (economic freedom), and Transparency International (corruption). Based on the overall score, countries were labeled Red or Amber. Of the ATS cases so far, five have targeted Red countries, and six have targeted Amber countries. *See* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789*, Policy Analyses in International Economics 70, 18-36, INST. INT'L ECON. (July 2003).

consult our monograph to find the detailed calculations and data sources.[45]

Before sizing up the potential collateral damage from ATS litigation, a few overview observations are in order. Target countries for ATS suits include both the most populous countries on earth (India and China) and the most impoverished countries (numerous African states). The total population of Red and Amber countries is nearly $5 billion; their total GDP (measured in purchasing power parity terms) is about $18 trillion. These countries account for more than three-quarters of the working population and one-half of world GDP. Their average per capita GDP is about $3,700 (again in purchasing power parity terms); by comparison, the U.S. figure is about $34,900. Since human rights, political and economic freedoms, and absence of corruption are highly correlated with per capita income, it is not surprising that target countries are by and large poor countries. ATS suits, if unchecked, will erect another barrier to their participation in global trade and investment.

U.S. merchandise imports in 2001 from target countries totaled $418 billion, and U.S. merchandise exports totaled $208 billion. The respective world figures were imports of $1,632 billion and exports of $1,142 billion. Most of this trade has little connection with government bodies, beyond the payment of customs duties and the provision of port services. Such tangential links cannot be ruled out as the basis for ATS claims (as the expansive history of asbestos litigation demonstrates), but they may be too remote for "first wave" ATS cases. On the other hand, imports of oil and minerals entail deep connections to government authorities in the exporting countries.[46] The government typically owns subsurface deposits, and either extracts and sells the resources, or collects substantial royalties on private extraction. In addition, the government often provides civil amenities, including police protection.[47] Total U.S. oil and mineral imports from target countries amounted to about $75 billion in 2001, and total world imports from these countries amounted to about $366 billion. Firms that import oil and minerals from target countries make inviting ATS defendants, and this trade must be regarded as vulnerable.

Firms that export to target country government bodies also make inviting ATS defendants. Such exports can be roughly estimated by using the percentage of GDP accounted for by government consumption outlays (government consumption is defined to exclude transfer payments). For

45. *Id.*

46. *See generally* Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386, 2002 WL 319887 (S.D.N.Y. 2002) (oil); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (mining).

47. *See generally*, *Unocal Corp.*, No. 00-56603, 2002 WL 31063976 (police protection).

example, in 2001 U.S. exports to Argentina totaled $3.6 billion and Argentina's government consumption accounted for 13.6 percent of GDP. By implication, Argentine public bodies may have purchased $0.5 billion of U.S. exports in that year. Applying the same arithmetic to all target countries, U.S. exports that are vulnerable (because sold to target country governments) amounted to about $26 billion in 2001, while vulnerable world exports amounted to about $142 billion. In "second wave" ATS cases, additional firms could be hit with lawsuits, beyond those dealing in vulnerable imports and exports. Defendants need not be limited to U.S. corporations; firms based elsewhere – including firms based in Europe and Japan as well as firms based in target countries – will also make inviting defendants, provided they have assets that can be attached by U.S. courts.[48]

Beside trade ties to target countries, foreign direct investment and lending money to government agencies may render a firm an ATS defendant. The U.S. FDI stock in target countries now totals about $220 billion; world FDI stock in these same countries (including U.S. FDI) is about $1,365 billion. Any multi-national firm that operates a subsidiary in a target country necessarily has contacts with the government. These contacts can turn the firm into an ATS defendant. Further, private lenders, particularly international banks, are at risk due to their ties with target countries. The total public debt of target countries is now $1,229 billion; more than half represents credit extended by private creditors.[49] It is no exaggeration to say that every major international bank is exposed to ATS liability.

The collateral damage from litigation could be severe. We separately examine potential U.S. losses from diminished trade and FDI, and then potential target country losses. A parameter that can help size up the potential damage to trade flows can be drawn from the analysis of economic sanctions. Gravity model estimates indicate that extensive economic sanctions depress U.S. trade (merchandise imports and exports) with target countries by more than ninety-five percent.[50] ATS litigation would not depress trade nearly to the same extent,[51] but billion-dollar

48. A court may constitutionally exercise personal jurisdiction over a MNC pursuant to the well-known "minimum contacts" test. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

49. *See* WENDY DOBSON & GARY CLYDE HUFBAUER, WORLD CAPITAL MARKETS: CHALLENGE TO THE G-10, 188, table A.8 (2001).

50. Gravity model coefficients cannot distinguish between trade permanently lost and trade diverted to other sources and destinations.

51. The impact would not be as large because a single ATS suit will generally hit only *some* of the U.S.-based MNCs doing business in a target country; by contrast, extensive sanctions hit *all* the MNCs.

awards, predicated on corporate trade with the target country, would certainly dampen commerce. Trade tainted with links to the foreign government – oil and mineral imports, and exports to government agencies – would be most affected by the ATS.

We obtain one set of estimates by assuming that a wave of ATS litigation would depress overall U.S. trade with target countries by ten percent from current levels. The damages are a $42 billion loss in U.S. imports and a $21 billion loss in U.S. exports. We obtain a second set of estimates by assuming that the most vulnerable categories of commerce – U.S. imports of oil and minerals and U.S. exports to government agencies – would each be depressed by fifty percent. The "vulnerable commerce" calculation suggests a $37 billion loss in U.S. imports and a $13 billion loss in U.S. exports. Either way, ATS litigation could diminish U.S. merchandise trade (imports plus exports) by $50 to $60 billion with the target countries. Of course, lost U.S. trade with these countries would be largely replaced by commerce with other sources and destinations, both in the United States and abroad. But affected U.S. firms would likely endure substantial "friction" costs as they sought new markets and new suppliers.

Between $13 and $21 billion of U.S. exports to potential target countries are thus at risk. The bulk of these exports are manufactured goods. Approximately 8,300 U.S. manufacturing employees are supported by a billion dollars of manufactured shipments.[52] ATS could thus put more than 100,000 U.S. manufacturing jobs at risk. Because jobs in exporting plants pay ten percent more than jobs in non-exporting plants,[53] it seems likely that the displaced employees would take a significant pay cut, as much as $4,000 per worker.[54] To the extent the United States imports less oil and minerals from target countries, it will become more dependent on other suppliers, resulting in economic consequences from higher oil prices (owing to greater transactions costs) and less diverse sources.

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52. The figure of 8,300 employees is based on 2000 data, showing 16.7 million manufacturing employees and $2,002 billion manufacturing value added. U.S. Census Bureau, *Annual Survey of Manufactures*, February 11, 2002. In this calculation, we assume that a billion dollars of manufactured exports equates to a billion dollars of manufacturing value added (taking into account shipments of components between manufacturing firms). The calculation ignores labor employed in other sectors (services and natural resources) that supply inputs to the manufacturing sector.

53. *See* HOWARD LEWIS, III & DAVID RICHARDSON, WHY GLOBAL COMMITMENT REALLY MATTERS, 26 (2001).

54. The average payroll per manufacturing employee was $37,000 in 2000; export plants paid about ten percent above the average, or about $41,000. U.S. Census Bureau, *Annual Survey of Manufactures*, February 11, 2002. The calculation here assumes that manufacturing firms that supply inputs to exporting firms also pay higher than average wages.

Adverse ATS decisions could also prompt firms to disinvest *en masse*, as they did during the South African apartheid era. In that episode, the U.S. FDI stock in South Africa dropped by two-thirds.[55] Conservatively, we think the ATS will be less devastating but that twenty-five percent of U.S. and twenty percent of world FDI (including U.S. FDI) in target countries will be at risk. FDI by foreign-based multinationals is at risk because most of them (but not all of them) have substantial investments in the United States that could be attached to satisfy ATS awards. For purposes of illustration, we apply the risk percentages to the existing FDI stocks – suggesting a reduction of $55 billion in U.S. FDI and $273 billion in world FDI. ATS claims could do most damage by deterring *new* FDI over the next twenty years, particularly the burgeoning investment in China.

Conservatively, we calculate that $55 billion of U.S. FDI could be deterred by ATS suits. From a U.S. perspective, the loss of FDI means more than the sacrifice of otherwise profitable investments. It means the loss of export jobs, since FDI is a proven attractor of U.S. exports. In 2000, for every $10 billion of FDI placed in developing countries, the United States *directly* exported $1.8 billion to those foreign subsidiaries. A reduction in U.S. FDI of $55 billion in target countries would thus jeopardize at least $10 billion of U.S. exports.[56] Through the FDI channel, more than 80,000 additional U.S. manufacturing jobs could be displaced (8,300 jobs per $1 billion of lost exports), costing each of these workers an annual pay premium in the range of $4,000.

ATS liability of foreign-based MNCs might decrease FDI in the United States. Some foreign-based MNCs, balancing the ATS liability hazards of their FDI in *all* potential target countries taken together against the benefits of continued operations in the United States, might choose to divest from the United States. As of 2000, non-U.S.-based MNCs had

55. The U.S. FDI stock in South Africa dropped from $2.4 billion in 1980 to $0.8 billion in 1990.

56. Econometric analysis of the trade and FDI relationship between the United States and middle-income countries suggests that the adverse impact could be larger than our calculations indicate. Graham's estimated coefficients suggest that a 10 percent reduction in U.S. FDI stock in middle-income countries could reduce exports to those nations by 6.3 percent. EDWARD M. GRAHAM, FIGHTING THE WRONG ENEMY: ANTIGLOBAL ACTIVISTS AND MULTINATIONAL ENTERPRISES, 212, tbl. B.1 (2000) [hereinafter GRAHAM]. The coefficient of 0.63 is found as the inverse of the reported coefficient of 1.59 - where log FDI stock is the dependent variable and log exports is the independent variable. Since U.S. exports to the target countries amounted to $208 billion in 2001, applying the Graham coefficient suggests that some $33 billion of export sales could be at risk (6.3 percent of $208 billion). However, given Graham's estimating technique, a simple inversion of the estimated coefficient may exaggerate the impact of FDI on exports.

invested $1,016 billion (at historical cost) in all potential target countries taken as a group, compared to $1,214 billion invested in the United States. Seen in this light, the balance does not so clearly favor divesting in target countries, since some foreign-based MNCs would have a larger presence in "all targets" than in the United States. Moreover, between 1990 and 2000, the incremental FDI placed by non-U.S.-based MNCs in potential target countries taken as a group was $866 billion, *versus* $819 billion incremental FDI placed by the same firms in the United States. If the trends of the 1990s continue, target countries will attract substantially more FDI from foreign-based MNCs than the United States in the next decade. At the margin, some of these MNCs may simply decide to avoid the United States, in order to avoid ATS liability. That decision would deprive the U.S. economy of the benefits from inward foreign investment,[57] such as better-paying jobs.[58] If foreign-based MNCs collectively cut their FDI in the United States by just two percent ($24 billion) to avoid ATS litigation, that would jeopardize about 130,000 well-paid U.S. jobs.[59]

Finally, ATS suits will damage target countries by curtailing trade, investment, and access to credit. Since the second World War, trade has been an engine of world growth. Conversely, the denial of trade opportunities can harm a country's prospects. At the modest end of econometric estimates, a $10 billion reduction in a country's merchandise trade (imports plus exports) may cut its GDP by $3.3 billion annually.[60] Just considering U.S. commerce, the combined import and export trade of target countries could be reduced by $60 billion annually from a wave of ATS litigation. A blow of this magnitude (if not compensated by other avenues of trade) could reduce the combined GDP of target countries by $20 billion annually. The loss of FDI would inflict the most damage on target countries. In rough terms, $145,000 of FDI supports an employee in those nations. The loss of $55 billion of U.S. FDI in target countries could thus spell the dislocation of 400,000 good jobs. If the ATS damage extends

57. On these benefits, *see* GRAHAM & KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES (3d ed. 1995).

58. Based on 2000 data, approximately 5,300 U.S. jobs are associated with each $1 billion of inward FDI. Average compensation was $51,300 per employee, against the overall U.S. private industry average of $45,600 per employee. *See* SURVEY OF CURRENT BUSINESS, Dec. 2002, at 127, tbl 10.2; STATISTICAL ABSTRACT OF THE UNITED STATES, 2002, at 400, tbl 607.

59. *Id.*

60. At the high end of coefficient estimates, the GDP penalty from the loss of $10 billion of commerce may be as much as $9.2 billion annually. *See* Jeffery Frankel & David Romer, *Does Trade Cause Growth?*, 98 AM. ECON. REV. 379-99 (1999) (modest coefficient); Drusilla K. Brown et al., *CGE Modeling and Analysis of Multilateral and Regional Negotiating Options, in* ISSUES AND OPTIONS FOR U.S.-JAPAN TRADE POLICIES (Robert M. Stern ed., 2002) (high coefficient).

beyond U.S. investment and hits world FDI at the rate of twenty percent, deterring $273 billion of FDI, some 1,900,000 good jobs could be dislocated in target countries.[61] A strong correlation exists between the per capita density of FDI in a country and its per capita GDP.[62] The correlation does not prove causation, but plausible econometric estimates indicate that FDI, like trade, spurs an economy. If the loss of $10 billion of world FDI in target countries decreases their GDP by just $2 billion annually (a conservative estimate), the loss of $273 billion of world FDI would inflict GDP losses of more than $50 billion annually.[63] The final damage inflicted by ATS litigation on developing countries is denied access to international capital markets. Countries on the losing side of ATS cases will find that bank credit and bond placements are considerably more difficult.

WHERE DO WE GO FROM HERE: CONGRESS OR THE COURT?

Unless the Supreme Court substantially narrows the scope of the ATS,[64] Congress must enact legislation to define the statute's contours and limits. Ad hoc judicial decisions have dangerously broadened the ATS. On its present course, ATS suits may become the international analogue of asbestos litigation, with damage both to the U.S. economy and the economies of developing nations. ATS decisions also threaten important Executive policy decisions, particularly in the area of foreign relations. Recently, the U.S. State Department, *sua sponte* or per request of the court, submitted letters describing the adverse implications of ATS litigation on national interests.[65] Only months ago, Judge Sprizzo, after receiving a

61. U.S. affiliates based in target countries on average pay wages about 80 percent higher than the local norm in manufacturing. *See* GRAHAM, *supra* note 56, at 94. Affiliates of non-U.S. MNCs likewise probably pay premium wages.

62. The simple correlation between per capita FDI stocks and per capita GDP for 169 countries in 2001 (excluding Hong Kong, which is an outlier) was 0.66. On a cross-country basis, a $1.00 increase in FDI stocks per capita is associated with a $0.29 increase in GDP per capita (again, excluding Hong Kong).

63. *See* Borensztein et al., *How Does Foreign Direct Investment Affect Economic Growth,* 45 J. INT'L ECON. 115, 115-35 (1998); Marcelo Soto, *Capital Flows and Growth in Developing Countries,* OECD DEV. CENT. TECHNICAL PAPER 160 (2000). Coefficients estimated by these authors suggest that a 10 percent loss in a country's FDI stock could cause a loss of GDP by as much as 6 percent. *See* DOBSON & HUFBAUER, *supra* note 49, at 65-66. *But see* MARIA CARKOVIK & ROSS LEVINE, DOES FOREIGN DIRECT INVESTMENT ACCELERATE ECONOMIC GROWTH? (2002) (questioning the independent contribution of FDI to economic growth).

64. The Court could do so by adopting the position of the U.S. Justice Department, which contends that the ATS is merely jurisdictional and does not create a cause of action. *See* Brief of Amicus Curiae United States of America, Doe v. Unocal, Nos. 00-56603, 00-56628.

65. *See, e.g.*, Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1161-62 (C.D. Cal. 2002); In *Doe v. Exxon Mobil* and *Sarei v. Rio Tinto*, district judges requested the State Department to submit its advice describing whether national interests might be adversely affected by the cases.

declaration from South Africa's Minister of Justice and Constitutional Development, requested that the U.S. State Department chime in on whether present ATS litigation against MNCs, citing their business dealings with South Africa during the apartheid-era, would interfere with U.S. interests.[66] The State Department responded that the litigation will be detrimental to "U.S. foreign policy interests in promoting sustained economic growth in South Africa," will cause tensions in U.S. relations with the other countries, such as Canada and the United Kingdom, whose corporations were named defendants, and to the extent the litigation deters foreign investment, "it will compromise a valuable foreign policy tool and adversely effect U.S. economic interests as well as economic development in poor countries."[67] Because the ATS on its present course has the potential for creating widespread economic harms and disrupting U.S. relations with foreign countries, a case-by-case approach towards limiting litigation is no way to set national policy.[68]

Some argue that some sort of corporate code of conduct, akin to the Sullivan Principles, may balance the interests of ATS plaintiffs and MNCs.[69] MNCs that subscribe to and follow the code would be able to

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In both cases, the State Department stated that important economic and political interests were at stake. In *Exxon Mobil*, William H. Taft IV, Legal Adviser to the State Department, stated that "adjudication ... would impact adversely interests of the United States" because the lawsuit "could disrupt the on-going and extensive United States efforts to secure Indonesia's cooperation in the fight against international terrorist activity," among other concerns. Letter from William H. Taft, IV, Legal Adviser of the U.S. Dept. of State, to the Honorable Louis F. Oberdorfer, U.S. District Court for the District of Columbia 1-3 (July 29, 2002), *available at* http://www.usaengage.org (last visited Apr. 13, 2004).

66. Letter from the Honorable John E. Sprizzo, U.S. District Court for the Southern District of New York, to the Honorable William H. Taft, IV, Legal Adviser of the U.S. Dept. of State 1 (Aug. 7, 2003), *available at* http://www.usaengage.org. (last visited Apr. 13, 2004).

67. Letter from William H. Taft, IV, Legal Adviser to the U.S. Dept. of State, to Shannen W. Coffin, Dep. Ass. Att'y Gen., U.S. Dept. of Justice 2-3 (Oct. 27, 2003), *available at* http://www.usaengage.org (last visited Apr. 13, 2004). The scope of ATS litigation has troubled the Treasury Department as well. Letter from Randal K. Quarles, Assistant Sec. for Int'l Aff., U.S. Treasury, to Ambassador Thomas Niles, President, U.S. Council for Int'l Bus. (March 17, 2003) (on file with authors) ("I agree with you that some of these [ATS] cases mark a disturbing trend in litigation. Treasury will monitor developments in these cases and, as appropriate, speak out against misuse of the statute.").

68. Individual judgments necessarily focus on the limited facts of the case and are mainly designed to remedy or address only the parties before the court. When State Department involvement results in dismissal of a case, critics will assert that the U.S. government is condoning the denial of justice, and for this reason the State Department will submit letters only in the most egregious cases. Moreover, courts are not compelled to heed the Department's advice. Judges can decide that national interests are insufficient, that their relationship with the lawsuit is tenuous, or that the injury is so serious that it outweighs any national interest.

69. In conversations with corporate representatives, Undersecretary of State Alan Larson has advocated the code of conduct approach.

raise it as an affirmative defense in any future ATS litigation. However, the record shows this method is flawed. Rather than establish a defense for multinationals, the Sullivan Principles adopted by corporations operating in South Africa during the apartheid era seem to have exposed those firms to even greater liability in ATS suits. The legal logic, according to ATS plaintiffs, is that by signing the Sullivan Principles, the firm admitted that it was knowingly doing business in a bad country, and that, by doing business there, it can now be charged with lending moral support to the offensive regime.[70]

The ATS promises to spin further out of control because the law is not confined to federal courts. Unless Congress confers *exclusive* jurisdiction on federal courts to hear ATS claims, state courts may get involved through their interpretation of both state and federal laws. Some of this has already happened in the *Unocal* case.[71] The potential for confusion and mischief grows exponentially once fifty state jurisdictions, in addition to the twelve circuits, hear ATS claims and expound on the "law of nations."

The Supreme Court now has its first opportunity to opine on the ATS in over a decade.[72] This term, the consolidated cases, *Alvarez-Machain v. Sosa* and *Alvarez-Machain v. United States*,[73] will serve as a litmus test for whether the Court will limit the scope of ATS litigation. The cases involve the U.S. Drug Enforcement Administration ("DEA") hiring Mexican nationals to kidnap Dr. Alvarez-Machain from his office in Mexico and bring him to the United States, where he spent over two years in federal prison. When a judge threw out his indictments, Alvarez-Machain sued the United States and a DEA informant (Sosa) involved in the kidnapping, seeking $20 million damages under the ATS. A sharply divided panel of the Ninth Circuit upheld a damages award against the DEA agents.[74] In its petition for *certiorari*, the United States argued that "the court of appeals' expansive construction of its own authority under the FTCA (and under the Alien Tort Statute at issue in *Sosa v. Alvarez-Machain*, No. 03-339), placed that court squarely where federal courts do not belong in the realm of international politics, adjudicating the propriety of Executive conduct

70. *See* Innocenti & Reed, *supra* note 42, at 15.

71. Jim Carlton, *Unocal Trial on Slave-Labor Claims Is Set to Start Today*, WALL ST. J., Dec. 9, 2003, at A19.

72. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

73. 331 F.3d 604 (2003), *cert. granted*, 72 U.S.L.W. 3248 (Dec. 1, 2003). This case is consolidated with Alvarez-Machain v. Sosa, 72 U.S.L.W. 3171 (Dec. 1, 2003).

74. *Alvarez-Machain*, 331 F.3d at 641.

abroad."[75] The Court's decision in this case could finally end debate amongst judges and scholars regarding the nature of the ATS and hold that the statute is solely jurisdictional, as the United States and some *amici* have argued.

Whatever result, only the creator of the beast may put it to proper purpose. Congress, using the Torture Victim Protection Act as a basic model, should enact legislation defining the scope of the ATS and creating limited causes of action. The TVPA, enacted in 1992, creates causes of action for torture and extrajudicial killings, defines the basis of liability, creates a ten-year statute of limitations for all claims, and requires the claimant to exhaust remedies in the place where the conduct occurred before bringing a suit in U.S. courts.[76] With the goal of limiting the ATS, but maintaining its original purpose, we propose the following revisions:

Define causes of action. *Congress should limit ATS jurisdiction to a short list of enumerated actions for violations of widely recognized international norms: piracy, slavery, war crimes, genocide, torture, extra-judicial killings, and forced labor.*

Exclusive federal jurisdiction. *Congress should give federal courts exclusive jurisdiction over all tort suits brought by aliens for wrongs that occurred abroad. Exclusive federal jurisdiction will minimize conflicting interpretations, limit forum shopping, and dampen excessive awards.*

Choice of substantive law. *Congress should specify that the law of the state with the most significant interest should be applied to fill gaps in the statute. Normally this will be law of the place where the tort occurred.*

"Aiding and abetting" and "under color of law" liability. *Congress should state that intent and substantial assistance are pre-requisites for aiding and abetting and under color of law liability. If a private actor is going to be held liable, the required mental state should be higher than mere association.*[77]

Statute of limitations. *Like the TVPA, the reformed ATS should have a ten-year statute of limitations for all claims. The statute should be tolled only when the alleged violator knowingly tries to conceal its bad conduct.*

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75. Reply Brief for Petitioner at 9-10, United States v. Alvarez-Machain, (No. 03-485).

76. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (1992)).

77. The requirement of intent would be consistent with the Model Penal Code, which requires that an accomplice act "with the purpose of promoting or facilitating the commission of the offense." *See* MODEL PENAL CODE § 2.06(3) (emphasis added). An intent standard will ensure that firms that merely invest in or contract with the offending state, without intentionally assisting in the violation, will not be held responsible.

Exhaustion of local remedies. *The TVPA provides that a U.S. court must decline to hear a claim until the claimant has exhausted its remedies in the place where the conduct occurred. Similarly, the reformed ATS should require that plaintiffs demonstrate they have exhausted adequate and available local remedies before suing in U.S. courts.*

What if Congress puts off remedial legislation, waiting for the Supreme Court to limit ATS awards, or the State Department to negotiate corporate codes of conduct with effective defenses for complying firms? Very likely, before these alternative remedies are in place, the United States will be widely castigated for imposing its brand of justice worldwide. European and Canadian objections in the 1990s to the Helms-Burton Act and Iran Libyan Sanctions Act foretell the backlash against the ATS. Meanwhile, U.S. multinationals will lose out to foreign competitors that can escape the reach of US trial lawyers. And some developing countries will find it that much harder to expand their trade and investment ties with the industrial world. The costs of procrastination will be significant, both here and abroad.