1

Nightmare Scenario

> 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.

This one-sentence law—the Alien Tort Statute (ATS) of 1789—could plausibly culminate in a nightmare, more than 200 years after it was enacted. Within the next decade, for example, 100,000 class action Chinese plaintiffs, organized by New York trial lawyers, could sue General Motors, Toyota, Volkswagen, General Electric, Mitsubishi, Siemens, Motorola, NTT, Nokia, and 20 other blue-chip corporations in a federal court for abetting China's denial of political rights, for observing China's restrictions on trade unions, and for impairing the Chinese environment. These plaintiffs might claim actual damages of $6 billion and punitive damages of $20 billion. To minimize their exposure to punitive damages, the corporations could settle for an intermediate amount, such as $10 billion.

Thereafter, corporate lawyers would advise the targeted multinational corporations (MNCs) and many other firms to curtail their investments, not only in China but also in other (mainly developing) countries with less than perfect observance of individual and labor rights and shortcomings in the realm of political and environmental norms. Corporate lawyers would also advise their clients to be wary of entering 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. Meanwhile, a powerful coalition would have been forged between American trial lawyers and antiglobalization

forces,[1] far more destructive to the liberalization agenda than protests mounted in Seattle, Prague, or Washington, DC.

To be sure, no *decided* ATS cases can be cited to confirm that the nightmare scenario we have just sketched will come to pass. Yet many in the US government believe it can: both the State and Treasury Departments have signaled their concern over the direction of ATS litigation. A very recent amicus brief filed by the Justice Department in the pending *Unocal* case argues for a sharply narrowed interpretation of the statute. In one decided case, the district court dismissed ATS claims on the recommendation of the State Department. But there is no guarantee that other judges will heed the concerns of the State, Treasury, and Justice Departments. Meanwhile, several blockbuster cases are working their way through federal and state court systems. If plaintiff lawyers prevail, today's imagined nightmare will become tomorrow's reality.

For almost 200 years the ATS slept.[2] It is now an awakening monster. Unless checked by Congress or the Supreme Court, trial lawyers will seek to expand the scope of ATS awards to such an extent that investment and trade in developing countries will be seriously threatened. The ultimate losers will be millions of impoverished people denied an opportunity to participate in global markets. Along the way, the United States will find itself at loggerheads with traditional allies, trading partners, and developing countries.

How did we get to the verge of this worrisome prospect?

1. Environmental groups, such as the Sierra Club, and human rights groups, such as Human Rights Watch, are generally sympathetic to the aims of ATS plaintiffs.

2. Some courts have referred to the statute as the Alien Tort Claims Act (ATCA) or the Alien Tort Act (ATA). Between 1789 and 1980, there were only 21 reported cases under the ATS, and in only two cases did the court uphold ATS jurisdiction. For an excellent overview of the ATS, see Carter, Trimble, and Bradley (2003, 229–51).

2

Ancient and Recent History

Enacted as part of the Judiciary Act of 1789, soon after the ratification of the US Constitution, the ATS was apparently intended to show European powers that the new nation would not tolerate flagrant violations of the "law of nations," especially when victims were foreign ambassadors or merchants. So far as the scant record reveals, the immediate events behind passage of the ATS were two incidents of assault against foreign ambassadors on US soil. Early in the history of the republic, Congress was evidently anxious to display American leadership in defending international standards of good behavior.

The ATS remained largely unnoticed and unused until 1980, when the Second Circuit Court of Appeals decided *Filartiga v. Pena-Irala* (630 F.2d 876, 879 [2d Cir. 1980]). Before *Filartiga*, the ATS was rarely invoked by plaintiffs. Even then, the general view was that the ATS was principally a jurisdictional statute. According to the pre-*Filartiga* view, the ATS confided the power in federal district courts to hear tort cases brought by foreigners, but it did not (with very limited exceptions) enumerate torts that could be the basis of a lawsuit. This is the interpretation urged by Judge Robert H. Bork in *Tel-Oren v. Libyan Arab Republic*, decided in 1984 by the DC Circuit. According to Bork, the ATS enables federal district courts to adjudicate violations of the law of nations as that term was understood in 1789,[1] plus wrongs committed abroad against foreigners

1. 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. Prohibitions on slave trading entered the law of nations in the late 1800s. See Rassam (1999).

to the extent Congress, *in subsequent legislation*, specifically creates additional causes of action.[2]

In *Filartiga*, the Second Circuit took a far more expansive view of the ATS. The court held that the ATS itself conferred jurisdiction over violations of international law *in light of evolving jurisprudence*. According to the Second Circuit, the ATS thus enables foreigners to sue in US courts for all torts committed in violation of international law, *as international law may be contemporaneously interpreted*. 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.

The Supreme Court has yet to determine whether the *Filartiga* court (which found broad subject matter jurisdiction) or Judge Bork (who found jurisdiction only for original torts and torts subsequently enumerated through legislation) has the better interpretation of the ATS. Meanwhile, the majority of circuit and lower court decisions since *Filartiga* have expanded the Second Circuit's broad reach. Latching on to the reading in *Filartiga*, other courts of appeal have held that the ATS not only confers jurisdiction but also authorizes courts to imply causes of action under international law. More recently, US courts have enlarged the target class to include private actors—notably MNCs—both for their own actions and for actions carried out by foreign states. So far, the courts have not required ATS plaintiffs to exhaust available judicial remedies in their own country before resorting to US courts.[3]

Thus, in the post-*Filartiga* era, federal courts have expanded the interpretation of the ATS in three major ways with far-reaching consequences. First, the courts have held that the ATS confers tort jurisdiction over *all* violations of international law as contemporaneously interpreted. Second, the courts have held that MNCs can be targeted as defendants when they act in concert with a foreign state. Third, the courts have *not* compelled foreign plaintiffs to bring their cases in their national courts whenever possible.

The two main categories of ATS cases that have developed over the last two decades are "state actor" cases and "private actor" cases. Cases

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2. In *Al Odah v. United States*, decided by the DC Circuit in 2003, Judge A. Raymond Randolph likewise argued that the ATS only confers jurisdiction on the district courts—it does not create causes of action beyond those recognized in 1789 and those subsequently enacted by Congress (notably the Torture Victim Protection Act, discussed later in this policy analysis).

3. Some courts (for example, *Aguinda v. Texaco*) have dismissed ATS cases on grounds of *forum non conveniens*, meaning that physical evidence and witnesses are more readily available in the foreign state where the alleged violations occurred. The *forum non conveniens* doctrine is related to, but distinct from, an exhaustion of remedies requirement. Under an exhaustion of remedies requirement, the case would first have to be pursued in the foreign state, even if all the physical evidence and witnesses were equally available in the United States.

within the private-actor category can be further divided between those where the defendant is sued for its own actions and those where the defendant (usually a corporation) is principally sued for acting in concert with a foreign state. Appendix A and table A.1 provide case summaries.

In the first category of cases, aliens have sued state actors such as foreign governments, government officials, or state entities. In these cases, a major jurisdictional barrier is the US Foreign Sovereign Immunities Act of 1976 (FSIA), which creates a blanket presumption of sovereign immunity from US lawsuits unless a specific exception applies (the most relevant exceptions are commercial activity and sponsorship of terrorism).[4] In addition, state actors may invoke prudential court doctrines, especially the "act of state" and "political question" doctrines, to bar suits against them. Because these barriers are formidable, plaintiffs have focused their ATS suits on private parties.

In the second strand of cases, aliens have sued private defendants—mainly individuals but also corporations—for their alleged violations of international law. In 1789, international law contemplated private liability for piracy; in the two centuries since then, the list of private international offenses has grown to include slave trading, war crimes, and genocide. In *Kadic v. Karadzic* (70 F.3d 232 [2d Cir. 1995]), the Second Circuit found that a private individual could also be held liable under the ATS for acts of rape, summary execution, and torture that were committed in pursuit of war crimes or genocide.

In the third and most troubling strand of cases, aliens sue MNCs for acts principally committed by a foreign state. In these cases, plaintiffs allege that the private firms (1) aided and abetted the foreign government or (2) were acting "under color of law," or were "joint actors" with the foreign government.[5] Under these theories, foreign state conduct is attributed to the private firm in order to impose liability.

For example, in *Wiwa v. Royal Dutch Petroleum Co*. (originally filed in 1996 in the Second Circuit, and still in litigation), four citizens of Nigeria alleged violations of international, federal, and state laws in connection with the Nigerian government's activities in the Ogoni region of Nigeria during the 1990s. The plaintiffs claim that Royal Dutch Shell conspired with the Nigerian military government to arrest and convict nine members of a Nigerian opposition movement in violation of international human rights law. After a series of court rulings, the case is currently in the discovery stage.

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4. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act that amended the FSIA to allow for suits against a foreign state designated by the secretary of state as a state sponsor of terrorism.

5. The domestic law standards for finding "under color of law" liability in federal civil rights suits are set forth in the line of cases interpreting the civil rights statute, 42 U.S.C. § 1983.

This brief tour hints at the real and potential legal exposure of MNCs (including those based in Europe, Japan, and other countries) when they do business in developing countries. Local firms based in developing countries are equally exposed if they ever do business in the United States.[6]

6. Business activity in the United States will confer personal jurisdiction over a corporation based elsewhere; if the corporation has US or foreign assets that can be seized to satisfy a judgment, it will make an attractive ATS target.

3

Evolving Jurisprudence

ATS litigation threatens to spin out of control. More than a dozen current cases cite corporate defendants for their operations in Asia, the Middle East, Africa, and Latin America; more than 50 MNCs are in the dock; and the damages claimed exceed $200 billion (see appendix A). In bringing these cases, foreign plaintiffs are free to shop among the 12 circuit courts for a favorable forum; they can bring class action "strike suits" that impose enormous discovery costs on corporate defendants;[1] they can tarnish corporate reputations through press releases that, in the midst of ongoing litigation, are shielded from libel suits; and they can ask for enormous punitive damages on top of actual damages. All these are inherent features of US tort law, whatever the substantive basis of the claim.

US Treaties and the Law of Nations

The ATS invokes tort liability for a violation of US treaties and the "law of nations." Only a few treaties are relevant for ATS suits. Some treaties cited by ATS plaintiffs (notably, the International Convention on Civil and Political Rights, the ICCPR) are not self-executing—in other words, before they can apply as domestic law, they require enabling legislation.

1. The purpose of a "strike suit" is to force a defendant to settle, even if it is confident of victory on the merits, in order to avoid huge legal fees and adverse publicity entailed by litigation.

But the fact that a treaty is not self-executing, and even the fact that the US Senate refused to ratify a treaty, does not dispose of an ATS case. Plaintiffs may still claim a violation of the law of nations. In *Sarei v. Rio Tinto* (221 F. Supp. 2d 1116 [C.D. Cal. 2002]), the federal district court held that the MNC could be held liable (by a foreigner, not a US citizen) for violating the United Nations Convention of the Law of the Sea, even though the United States has declined to ratify the treaty. Under that reasoning, US-based MNCs could be held liable under the ATS for violations of the Kyoto Protocol, the United Nations Convention on the Rights of the Child, and other treaties the United States has not ratified, on the theory that the treaty norms have become part of the law of nations. By the same theory, a firm could be held liable for violating a ratified treaty, such as the ICCPR, that was not self-executing because Congress has yet to pass enabling legislation.

Since the law of nations is not well defined, courts have elastically defined the concept to include norms drawn from multiple sources (including treaties neither ratified nor self-executing). The landmark *Filartiga* court defined the law of nations to mean international law "as it has evolved and exists among the nations of the world today."[2]

Subsequent courts have held that, to qualify as a law of nations, the rules must be "specific, universal, and *obligatory*."[3] The apparent limitations are cosmetic only.

Bringing suits in the Second and Ninth Circuits, ATS plaintiffs have alleged that the following acts violate the law of nations: summary execution; disappearance; torture; cruel, inhuman, or degrading treatment; arbitrary detention; violations of the rights to life, liberty, and security of person; violations of the 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; breach of a duty to treat with dignity.[4] No one disagrees that the enumerated offenses range from atrocities to injuries. But it is another matter for *aliens* to seek redress in US courthouses for

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2. Starting with the Second Circuit, federal courts have expanded the law of nations beyond the domain of "customary international law." The Restatement (Third) of the Foreign Relations Law of the United States, Sec. 101(2) gives this definition: "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Norms derived from treaties—especially treaties that have not been ratified by the United States—often fail the tests inherent in this definition. For an exposition of "customary international law," see Carter, Trimble, and Bradley (2003, chs. 2 and 3).

3. Emphasis added. *Doe v. Unocal Corp.*, 2002 US App. LEXIS 19263, *23 (9th Cir. 2002); see also F*orti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362 (E.D. La. 1997).

4. The last two asserted violations were raised in *Abdullahi v. Pfizer, Inc.*, 2002 US Dist. LEXIS 17436 (S.D.N.Y. 2002), in the context of drug tests undertaken in Nigeria.

events that occurred *outside US territory*. Unless checked, the ATS could lead US courts to become judicial instruments of imperial overstretch, with American judges and juries dispensing global justice.[5] This would be viewed abroad as blatant American imperialism.

Aiding and Abetting

One court has held that corporations can be liable for "aiding and abetting" violations alleged to have been committed by a foreign state. 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 perpetration of the crime" is sufficient to prove the corporation aided and abetted the state actor.[6] What is "knowledge" under this standard? According to the court, actual *or* constructive knowledge is sufficient.[7] The majority also suggested that "moral support" alone may establish private liability.

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. If the allegation was proven, the court ruled, Unocal could be held liable. Using the aiding and abetting theory, 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.

Under the aiding and abetting theory, plaintiffs seek money from private firms for foreign government acts in circumstances where sovereign immunity (through the FSIA and related judicial doctrines) bar 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.[8]

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5. In *The Rise and Fall of Great Powers* (1987), Paul Kennedy drew on the history of military and territorial expansion to warn against imperial overstretch. By analogy, American judicial expansion in the 21st century AD carries some of the same dangers inherent in the Athenian-led Delian League of the 5th century BC. At its height, in 454 BC, the Delian League had grown to 140 members, but subsequent imperial behavior by Athens sparked disaffection, and the League collapsed in 404 BC with the Peloponnesian War.

6. *Unocal*, 2002 US App. LEXIS 19263, at *35-36. Because of the far-reaching implications of the panel's opinion, the case is now being reheard *en banc* by all the judges sitting in the Ninth Circuit.

7. 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 employees were actually aware of events.

8. MNCs 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

Under Color of Law

District courts, drawing on US civil rights litigation, have imported the "under color of law" standard into the ATS.[9] The result is to hold private actors equally liable as state actors. In legal terminology, private firms are alleged to be "joint actors" with the state. 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 business activities. The requisite degree of involvement is easy to establish in oil and mining ventures, but with ingenuity, it can also be found in other business activities.

For example, in *Sarei v. Rio Tinto*, the district court held that a racial discrimination claim against Rio Tinto could be sustained because it was a joint actor with the government of Papua New Guinea, thanks to the fact that Rio Tinto's mining activities require both government permission and facilitation. Likewise, in *Wiwa v. Royal Dutch Petroleum,* the district court found a "substantial degree of cooperative action between" Nigeria and Royal Dutch Petroleum, which was sufficient to proceed against the company as a joint actor. Under both aiding and abetting and "under color of law" theories, these 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 with the state.

Choice of Law

Once a plaintiff has established subject matter jurisdiction under the ATS, the court must still determine which country's law applies to the case. For example, if a court holds that the ATS establishes subject matter jurisdiction over racial discrimination suits, the court must still determine which country's racial discrimination laws apply: the forum law (i.e., US law), the law of the foreign state where the tort occurred, or

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jurisdiction other than the United States. Increasingly US courts "look through" the corporate veil and attach liability to a US 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, *9 (6th Cir. 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.'").

9. The "under color of law" standard was developed in the civil rights caselaw interpreting 42 U.S.C. § 1983. The basic idea is that a private defendant deprived a plaintiff of his civil rights by enforcing, for example, a restrictive racial covenant in a deed.

international law. US courts have been creative, ignoring traditional conflict-of-law rules and instead mixing and matching standards. In *Tachiona v. Mugabe*, the district court adopted a "flexible course in the determination of the substantive law to be applied in adjudicating [ATS] cases."[10] The result was that US, international, and Zimbabwean laws all were applied to hold the defendant liable to the greatest extent.

Exhaustion of Local Remedies

International law generally requires a plaintiff to exhaust his local remedies before bringing a case in a foreign court. The Torture Victim Protection Act of 1992 (TVPA) contains a similar requirement.[11] However, at least one district court that addressed the exhaustion requirement under the ATS has rejected it (*Sarei v. Rio Tinto*). The absence of an exhaustion requirement clearly acts as a magnet, attracting litigation to sympathetic US courts for every violation that can be shoehorned into the ATS.

Statute of Limitations

The ATS itself contains no statute of limitations. The Ninth Circuit has borrowed a 10-year limitation from the TVPA.[12] But other federal courts may choose a longer limitation. While the case did not go to trial, recent Holocaust litigation against Swiss banks and insurers contemplated a far longer statute of limitations than 10 years. Massive apartheid-era cases have already been filed in the Second Circuit, even though South Africa ended apartheid in 1989. Future ATS cases could revive events in the old Soviet Union, China during the cultural revolution, and Chile during Pinochet's rule.

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10. 2002 U.S. Dist. LEXIS 23830 (S.D.N.Y. 2002), at *51.

11. 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 extrajudicial killings. See Torture Victim Protection Act, P.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 US 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."

12. The Ninth Circuit recently reaffirmed its choice of a 10-year statute of limitations for the ATS in *Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003).

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Scope of ATS Litigation

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 (see box 4.1) is instructive as to the possible breadth of claims; indicators of human rights, together with political and economic conditions, suggest country targets.

ATS lawsuits aimed at corporate defendants have so far targeted corporations doing business in the following countries (listed in chronological order):[1] Saudi Arabia, Abu Dhabi, Ecuador, Indonesia, Nigeria, Burma, Egypt, Germany, Papua New Guinea, Japan, Guatemala, Colombia, Peru, Sudan, and South Africa. The Japanese and German cases, now dismissed, were based on Second World War atrocities. The other cases cite more recent events and indicate the long list of possible targets in developing countries. What do the named countries have in common? Usually a low regard for human rights, measured against US standards, coupled with limited political and economic freedom. Nongovernmental organizations (NGOs) have compiled indexes to measure social conditions. Tables A4.1 and A4.2 present two sets of these indexes, and table A4.3 summarizes the results.

1. See the case summaries in appendix A. In some countries, such as Nigeria and Colombia, different corporate defendants have been the targets of distinct cases.

Box 4.1 Lessons from asbestos

Asbestos spawned the largest mass tort litigation in legal history. 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 to be 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 billion and $275 billion.[1] Appendix B tells the asbestos story. Without corrective legislation or a significantly limiting court decision, the history of asbestos litigation will turn out to be the harbinger of ATS litigation.

As with asbestos, 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 34 MNCs. ATS plaintiffs, like their asbestos predecessors, are adept at forum shopping, heading to the Second and Ninth Circuits.[2]

Finally, like the asbestos precedent, ATS trials could clog the courts and run up massive costs because they involve numerous prediscovery motions, overseas discovery, expert witnesses in foreign and international law, and near certainty of appeal. For example, the *Unocal* case, now in its seventh year, is taking its second trip to the Ninth Circuit, with proceedings pending in both the federal district court and the California state court. Recently launched South African cases (see appendix A) promise to occupy courts in the Second Circuit for the next decade. On its present course, the judicially magnified ATS will ultimately result in large compensatory and punitive damage awards against MNCs for the conduct of foreign states.

Asbestos litigation drew on legal innovations (described in appendix B) that worked to the advantage of plaintiffs and to the detriment of defendants. ATS litigation is following the same path.

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1. Two recent bills introduced in the US House of Representatives would limit the scope of asbestos litigation and, in particular, punitive damage awards. These are the Asbestos Compensation Act of 2003, H.R. 1114 (significantly limiting punitive damages) and the Asbestos Compensation Fairness Act of 2003, H.R. 1586 (eliminating punitive damages).
2. The Ninth Circuit Court of Appeals, based in San Francisco, has jurisdiction over the federal courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington. The Second Circuit Court of Appeals, based in New York, has jurisdiction over the federal courts in Connecticut, New York, and Vermont. Trial lawyers bring their ATS cases to district courts in these circuits because of favorable rulings by the Courts of Appeals in prior cases.

Table A4.1 lists six questions from the *World Human Rights Guide* (Humana 1992). The guide is somewhat out of date, but conditions in most countries are about the same as a decade ago.[2] The answers in table A4.1 are graded from 1 (best) to 4 (worst). The combined score totals the six questions.

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2. Moreover, as the South African litigation shows, ATS claims can re-cite events that occurred years back.

Table A4.2 lists four indexes from Freedom House, Heritage Foundation/Wall Street Journal, and Transparency International, all for 2000 and 2001. The Freedom House indexes (political rights and civil liberties) are graded from 1 (best) to 7 (worst); the Heritage Foundation/Wall Street Journal index (economic freedom) and Transparency International index (corruption) are graded from 1 (best) to 5 (worst). The combined score totals the individual grades.

Table A4.3 gives an overall score to each country, calculated by adding the scores from tables A4.1 and A4.2. Based on the overall score, countries are labeled red or amber. Countries labeled red are those with overall scores of 32 or higher, and countries labeled amber are those with overall scores of 20 to 31. Where data are missing, a red or amber label was assigned based on available information. Of the cases so far, five have targeted corporations in red countries and six have targeted corporations in amber countries. Within the long list of eligible countries, there is a telling explanation for actual country targets: money. Willy Sutton's logic applies with equal force to the ATS.[3] As honey attracts bees, major corporations attract ATS suits. Major corporations concentrate their activities in relatively few developing countries. Table A4.4 profiles US economic contacts with several countries clearly at risk from ATS litigation.

Economic Overview of ATS Targets

Table A4.3 summarizes economic statistics, grouped by region, for red and amber countries, collectively called target countries, while tables A4.5, A4.6, and A4.7 provide trade, investment, and debt statistics. Before sizing up the collateral damage of ATS litigation, a few overview observations are in order.

Country Overview

Target countries for ATS suits include both the most populous countries (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 US figure is about $34,900. Since human rights, political and economic freedoms, and absence of corruption are highly

3. Willy Sutton was the notorious bank robber who, when asked why he robbed banks, is known to have said, "That's where the money's at."

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.

Trade Overview

US merchandise imports in 2001 from target countries totaled $418 billion, and US merchandise exports totaled $208 billion (table A4.5). The respective world figures were imports of $1,632 billion and exports of $1,143 billion (table A4.6). 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. 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. Total US 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 (from table A4.3; government consumption excludes transfer payments). For example, in 2001, US exports to Argentina totaled $3.6 billion, and Argentine government consumption accounted for 13.6 percent of GDP. By implication, Argentine public bodies may have purchased $0.5 billion of US exports in that year. Applying the same arithmetic to all target countries, US exports that are vulnerable (because they are 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 US corporations; firms based elsewhere—including in Europe and Japan as well as in target countries—will also make inviting defendants, provided they have assets that can be attached by US courts.

Foreign Direct Investment and Debt Overview

Besides trade ties to target countries, two other economic connections render a firm liable to ATS litigation. One connection is foreign direct

investment (FDI) in the target country; another connection is lending money to government agencies. Table A4.7 summarizes FDI and public debt data. The US FDI stock in target countries now totals about $220 billion; world FDI stock in these same countries (including US FDI) is about $1,365 billion. Any MNC that operates a subsidiary in a target country necessarily has contacts with the government. These contacts can easily turn the firm into an ATS defendant.

Public and publicly guaranteed credit creates yet another class of potential ATS defendants. Many lenders, such as the World Bank, the International Monetary Fund, and official export credit agencies, are immune from ATS suits by virtue of the FSIA, kindred legislation, and judicial doctrines. But private lenders, particularly international banks, are surely at risk. The total public debt of target countries is now $1,229 billion; more than half represents credit extended by private creditors.[4] It is no exaggeration to say that every major international bank is exposed to ATS liability. Several insurance companies and investment trusts are also exposed through their bond holdings.

4. See Dobson and Hufbauer (2001, table A.8, 188).

Chapter 4 Appendix

Table A4.1 Basic Human Rights Index grades as of 1992[a]

Region/country	Q7: Slavery	Q8: Killing	Q9: Torture	Q19: Political opposition	Q28: Trade unions	Q35: Individual property rights	Combined score
Africa: South of Sahara							
Angola	3	4	4	4	4	3	22
Burkina Faso	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Cameroon	2	3	4	3	4	1	17
Central African Republic	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Congo, Democratic Republic of (formerly Zaire)	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Congo, Republic of	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Côte d'Ivoire	2	1	2	2	2	2	11
Ethiopia	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Ghana	2	2	3	4	2	2	15
Kenya	2	3	3	4	2	1	15
Madagascar	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Mozambique	3	4	4	3	2	3	19
Nigeria	3	4	3	3	2	1	16
Rwanda	2	4	4	2	2	2	16
Senegal	2	3	3	1	2	1	12
Sierra Leone	2	2	2	3	2	1	12
South Africa	3	3	3	3	2	2	16
Sudan	4	4	4	4	3	4	23
Tanzania	3	3	3	4	4	4	21
Uganda	2	4	3	4	1	4	18
Zambia	2	3	3	1	2	1	12
Zimbabwe	2	1	3	3	1	1	11
Africa: North of Sahara							
Afghanistan	3	4	4	4	4	4	23
Algeria	2	1	3	2	2	1	11
Egypt	2	4	3	2	2	3	16
Morocco	2	3	3	3	2	1	14
Tunisia	2	2	3	3	2	1	13
Central Asia/Former Soviet Union							
Armenia	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Azerbaijan	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Belarus	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

(table continues next page)

Table A4.1 *(continued)*

Region/country	Q7: Slavery	Q8: Killing	Q9: Torture	Q19: Political opposition	Q28: Trade unions	Q35: Individual property rights	Combined score
Central Asia/Former Soviet Union *(cont.)*							
Georgia	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Kazakhstan	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Kyrgyzstan	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Moldova	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Russian Federation	3	3	3	2	2	1	14
Tajikistan	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Turkey	2	3	4	2	2	1	14
Turkmenistan	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Ukraine	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Uzbekistan	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
East Asia							
China	3	4	4	4	4	2	21
North Korea	3	4	4	4	4	3	22
South Asia							
Bangladesh	4	3	3	2	3	3	18
India	3	4	4	2	2	2	17
Nepal	3	2	3	1	2	1	12
Pakistan	3	4	4	2	3	2	18
Sri Lanka	2	4	4	1	2	2	15
Southeast Asia							
Cambodia	3	4	4	4	4	3	22
Indonesia	3	4	4	4	3	2	20
Malaysia	2	2	2	1	2	2	11
Myanmar	4	4	4	4	4	4	24
Papua New Guinea	2	3	4	1	1	2	13
Philippines	2	4	3	1	2	2	14
Thailand	3	2	3	2	3	1	14
Vietnam	3	3	3	4	4	3	20
Latin America							
Argentina	2	3	3	1	1	1	11
Bolivia	3	3	3	1	2	1	13
Brazil	3	4	4	1	2	3	17
Colombia	4	4	4	2	2	3	19
Cuba	3	3	3	4	4	4	21
Dominican Republic	2	2	3	1	3	1	12
Ecuador	2	1	2	1	2	1	9

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Table A4.1 *(continued)*

Region/country	Q7: Slavery	Q8: Killing	Q9: Torture	Q19: Political opposition	Q28: Trade unions	Q35: Individual property rights	Combined score
Latin America *(cont.)*							
El Salvador	2	4	4	2	3	4	19
Guatemala	2	4	4	2	2	2	16
Guyana	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Haiti	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Honduras	2	4	4	1	2	2	15
Jamaica	2	3	3	1	1	1	11
Mexico	2	4	4	2	2	1	15
Nicaragua	2	4	3	2	1	3	15
Panama	2	2	2	2	2	2	12
Paraguay	2	2	3	2	2	1	12
Peru	2	4	4	3	2	3	18
Venezuela	2	4	4	1	1	2	14
Middle East							
Bahrain	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Iran	2	4	4	4	4	4	22
Iraq	4	4	4	4	4	3	23
Jordan	2	1	2	3	2	1	11
Kuwait	1	4	3	4	2	3	17
Lebanon	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Libya	1	4	4	4	4	3	20
Oman	3	1	2	4	4	1	15
Qatar	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Saudi Arabia	2	1	3	4	4	1	15
Syria	3	4	4	4	3	1	19
Yemen	2	3	3	2	3	3	16
Reference							
United States	1	1	2	1	1	1	7

n.a. = not available

Note: The grades for each question in the Basic Human Rights Index are scaled from 1 (best) to 4 (worst). The index lists 40 questions. This table gives results for 6 questions defined as follows:

Q7 Freedom from serfdom, slavery, forced or child labor
Q8 Freedom from extrajudicial killings or "disappearances"
Q9 Freedom from torture or coercion by the state
Q19 Freedom for or rights to peaceful political opposition
Q28 Freedom for or rights to independent trade unions
Q35 Legal rights from arbitrary seizure of personal property

Source: Latest published edition of the *World Human Rights Guide* (Humana 1992).

Table A4.2 Political and economic rights grades as of 2002

Region/country	Freedom House: Political rights	Freedom House: Civil liberties	Heritage Foundation/ WSJ: Economic freedom	Transparency International: Corruption[a]	Combined score
Africa: South of Sahara					
Angola	6	6	n.a.	4	n.a.
Burkina Faso	4	4	3	n.a.	n.a.
Cameroon	6	6	3	4	19
Central African Republic	5	5	3	n.a.	n.a.
Congo, Democratic Republic of (formerly Zaire)	6	6	n.a.	n.a.	n.a.
Congo, Republic of	5	4	4	n.a.	n.a.
Côte d'Ivoire	5	4	n.a.	3	12
Ethiopia	5	5	4	3	17
Ghana	2	3	3	2	10
Kenya	6	5	3	4	18
Madagascar	2	4	3	4	13
Mozambique	3	4	3	n.a.	n.a.
Nigeria	4	5	4	4	17
Rwanda	7	6	3	n.a.	n.a.
Senegal	3	4	3	3	13
Sierra Leone	4	5	n.a.	n.a.	n.a.
South Africa	1	2	3	1	7
Sudan	7	7	n.a.	n.a.	n.a.
Tanzania	4	4	3	3	14
Uganda	6	5	3	4	18
Zambia	5	4	3	3	15
Zimbabwe	6	6	4	3	19
Africa: North of Sahara					
Afghanistan	7	7	n.a.	n.a.	n.a.
Algeria	6	5	3	n.a.	n.a.
Egypt	6	6	4	3	19
Morocco	5	5	3	2	15
Tunisia	6	5	3	1	15
Central Asia/Former Soviet Union					
Armenia	4	4	3	n.a.	n.a.
Azerbaijan	6	5	4	4	19
Belarus	6	6	4	1	17
Georgia	4	4	3	4	15
Kazakhstan	6	5	4	4	19
Kyrgyzstan	6	5	4	n.a.	n.a.
Moldova	2	4	3	4	13
Russian Federation	5	5	4	3	17
Tajikistan	6	6	4	n.a.	n.a.

(table continues next page)

Table A4.2 *(continued)*

Region/country	Freedom House: Political rights	Freedom House: Civil liberties	Heritage Foundation/ WSJ: Economic freedom	Transparency International: Corruption[a]	Combined score
Central Asia/Former Soviet Union *(cont.)*					
Turkey	4	5	3	3	15
Turkmenistan	7	7	4	n.a.	n.a.
Ukraine	4	4	4	4	16
Uzbekistan	7	6	4	3	20
East Asia					
China	7	6	4	3	20
North Korea	7	7	5	n.a.	n.a.
South Asia					
Bangladesh	3	4	4	5	16
India	2	3	4	3	12
Nepal	3	4	3	n.a.	n.a.
Pakistan	6	5	3	3	17
Sri Lanka	3	4	3	2	12
Southeast Asia					
Cambodia	6	5	3	n.a.	n.a.
Indonesia	3	4	3	4	14
Malaysia	5	5	3	1	14
Myanmar	7	7	4	n.a.	n.a.
Papua New Guinea	2	3	3	n.a.	n.a.
Philippines	2	3	3	3	11
Thailand	2	3	2	3	10
Vietnam	7	6	4	4	21
Latin America					
Argentina	3	3	3	3	12
Bolivia	1	3	3	4	11
Brazil	3	3	3	2	11
Colombia	4	4	3	2	13
Cuba	7	7	5	n.a.	n.a.
Dominican Republic	1	1	3	3	8
Ecuador	3	3	3	4	13
El Salvador	2	3	2	3	10
Guatemala	3	4	3	4	14
Guyana	2	2	3	n.a.	n.a.
Haiti	6	6	4	4	20
Honduras	3	3	3	3	12
Jamaica	2	2	3	2	9
Mexico	2	3	3	2	10
Nicaragua	3	3	3	4	13
Panama	1	2	3	3	9

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Table A4.2 *(continued)*

Region/country	Freedom House: Political rights	Freedom House: Civil liberties	Heritage Foundation/ WSJ: Economic freedom	Transparency International: Corruption[a]	Combined score
Latin America *(cont.)*					
Paraguay	4	3	3	4	14
Peru	1	3	3	2	9
Venezuela	3	5	4	4	16
Middle East					
Bahrain	6	5	2	n.a.	n.a.
Iran	6	6	5	n.a.	n.a.
Iraq	7	7	5	n.a.	n.a.
Jordan	5	5	3	2	15
Kuwait	4	5	3	n.a.	n.a.
Lebanon	6	5	3	n.a.	n.a.
Libya	7	7	5	n.a.	n.a.
Oman	6	5	3	n.a.	n.a.
Qatar	6	6	3	n.a.	n.a.
Saudi Arabia	7	7	3	n.a.	n.a.
Syria	7	7	4	n.a.	n.a.
Yemen	6	6	4	n.a.	n.a.
Reference					
United States	1	1	2	2	6

n.a. = not available
WSJ = Wall Street Journal

a. By subtracting 6 from Transparency International indexes, the Corruption Perceptions Index was adjusted for proper comparison with other political and economic rights scores.

Sources: Political rights and civil liberties: Freedom House (2003); economic freedom: O'Driscoll, Feulner, and O'Grady (2003); and corruption: Transparency International (2002).

Table A4.3 Character of target countries and summary economic data, circa 2000

Region/country	Overall score	Country character[a]	Population (millions)	GDP (PPP billions of dollars)[b]	GDP per capita (PPP dollars)[b]	Government consumption (percent of GDP)[c]
Africa: South of Sahara						
Angola	n.a.	Red	13.9	25	1,866	n.a.
Burkina Faso	n.a.	Red	12.2	12	1,025	15.6
Cameroon	36	Red	15.5	27	1,772	11.2
Central African Republic	n.a.	Red	3.8	4	1,184	11.3
Congo, Democratic Republic of (formerly Zaire)	n.a.	Red	54.3	n.a.	n.a.	n.a.
Congo, Republic of	n.a.	Red	3.2	2	767	11.8
Côte d'Ivoire	23	Amber	16.7	26	1,568	9.1
Ethiopia	n.a.	Red	66.0	47	717	16.6
Ghana	25	Amber	20.2	40	2,054	15.6
Kenya	33	Red	31.9	32	1,032	10.6
Madagascar	n.a.	Amber	16.9	14	889	6.8
Mozambique	n.a.	Red	19.0	20	1,110	12.2
Nigeria	33	Red	120.0	117	898	13.4
Rwanda	n.a.	Red	8.1	9	1,007	13.6
Senegal	25	Amber	9.9	15	1,583	10.1
Sierra Leone	n.a.	Red	4.8	2	474	15.7
South Africa	23	Amber	44.2	414	9,565	19.0
Sudan	n.a.	Red	32.6	60	1,878	n.a.
Tanzania	35	Red	36.8	19	545	9.8
Uganda	36	Red	24.8	29	1,255	12.4
Zambia	27	Amber	10.9	8	820	11.8
Zimbabwe	30	Amber	13.1	31	2,406	19.3
Africa: North of Sahara						
Afghanistan	n.a.	Red	23.3	n.a.	n.a.	n.a.
Algeria	n.a.	Amber	31.4	164	5,319	15.2
Egypt	35	Red	70.3	244	3,750	10.3
Morocco	29	Amber	31.0	110	3,787	18.2
Tunisia	28	Amber	9.7	65	6,769	13.6
Central Asia/Former Soviet Union						
Armenia	n.a.	Amber	3.8	11	2,808	8.8
Azerbaijan	n.a.	Red	8.1	26	3,226	10.1
Belarus	n.a.	Red	10.1	81	8,076	13.8
Georgia	n.a.	Amber	5.2	14	2,839	8.6
Kazakhstan	n.a.	Red	16.0	100	6,727	14.1
Kyrgyzstan	n.a.	Red	5.0	14	2,823	19.7
Moldova	n.a.	Amber	4.3	10	2,351	15.4

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Table A4.3 *(continued)*

Region/country	Overall score	Country character[a]	Population (millions)	GDP (PPP billions of dollars)[b]	GDP per capita (PPP dollars)[b]	Government consumption (percent of GDP)[c]
Central Asia/Former Soviet Union *(cont.)*						
Russian Federation	31	Amber	143.8	1,296	8,948	14.3
Tajikistan	n.a.	Red	6.2	8	1,207	8.2
Turkey	29	Amber	68.6	445	6,716	13.3
Turkmenistan	n.a.	Red	4.9	24	4,584	16.3
Ukraine	n.a.	Amber	48.7	207	4,224	18.4
Uzbekistan	n.a.	Red	25.6	63	2,516	17.9
East Asia						
China	41	Red	1,294.4	5,506	4,329	12.4
North Korea	n.a.	Red	22.6	n.a.	n.a.	n.a.
South Asia						
Bangladesh	34	Red	143.4	219	1,644	4.5
India	29	Amber	1,041.1	2,546	2,464	n.a.
Nepal	n.a.	Amber	24.2	33	1,389	10.2
Pakistan	35	Red	148.7	281	1,990	11.4
Sri Lanka	27	Amber	19.3	71	3,634	9.7
Southeast Asia						
Cambodia	n.a.	Amber	13.8	19	1,521	6.3
Indonesia	34	Red	217.5	654	3,059	7.4
Malaysia	25	Amber	23.0	200	8,424	11.9
Myanmar	n.a.	Red	49.0	n.a.	n.a.	n.a.
Papua New Guinea	n.a.	Amber	5.0	12	2,257	13.9
Philippines	25	Amber	78.6	317	4,113	14.2
Thailand	24	Amber	64.3	406	6,630	9.4
Vietnam	41	Red	80.2	169	2,130	6.4
Latin America						
Argentina	23	Amber	37.9	453	12,098	13.8
Bolivia	24	Amber	8.7	21	2,439	15.7
Brazil	28	Amber	174.7	1,339	7,759	19.9
Colombia	32	Red	43.5	267	6,202	18.6
Cuba	n.a.	Red	11.3	n.a.	n.a.	23.1
Dominican Republic	20	Amber	8.6	53	6,198	8.2
Ecuador	22	Amber	13.1	42	3,295	10.0
El Salvador	29	Amber	6.5	29	4,603	10.2
Guatemala	30	Amber	12.0	45	3,879	5.2
Guyana	n.a.	Amber	0.8	3	4,105	25.4
Haiti	n.a.	Red	8.4	12	1,444	n.a.
Honduras	27	Amber	6.7	16	2,505	12.7

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Table A4.3 *(continued)*

Region/country	Overall score	Country character[a]	Population (millions)	GDP (PPP billions of dollars)[b]	GDP per capita (PPP dollars)[b]	Government consumption (percent of GDP)[c]
Latin America *(cont.)*						
Jamaica	20	Amber	2.6	10	3,890	15.8
Mexico	25	Amber	101.8	892	8,969	11.6
Nicaragua	28	Amber	5.3	n.a.	n.a.	n.a.
Panama	21	Amber	2.9	17	5,986	14.7
Paraguay	26	Amber	5.8	25	4,379	10.3
Peru	27	Amber	26.5	125	4,797	11.2
Venezuela	30	Amber	25.1	147	5,966	8.0
Middle East						
Bahrain	n.a.	Amber	0.7	10	15,084	17.6
Iran	n.a.	Red	72.4	396	6,128	15.2
Iraq	n.a.	Red	24.2	n.a.	n.a.	n.a.
Jordan	25	Amber	5.2	21	4,080	24.0
Kuwait	n.a.	Amber	2.0	31	15,799	22.1
Lebanon	n.a.	Red	3.6	19	4,391	18.4
Libya	n.a.	Red	5.5	n.a.	n.a.	n.a.
Oman	n.a.	Amber	2.7	n.a.	n.a.	n.a.
Qatar	n.a.	Amber	0.6	n.a.	n.a.	n.a.
Saudi Arabia	n.a.	Amber	21.7	236	11,367	27.0
Syria	n.a.	Red	17.0	60	3,626	12.9
Yemen	n.a.	Red	19.9	15	812	14.4
Reference						
United States	13		288.5	9,907	34,888	14.2
Total, excluding the United States			4,997.5	18,555		
Average, excluding the United States	29				3,713[d]	13.5

a. An overall score of 32 or higher (found by adding the scores from tables 1 and 2) qualifies as red; a score of 20 to 31 qualifies as amber.
b. Based on 2001 data expressed in purchasing power parity (PPP), international dollars, as defined by the World Bank.
c. Government consumption represents central, state, and local outlays, excluding transfer payments (e.g., social security), expressed as a percent of GDP.
d. The average GDP per capita is a weighted average, based on totals for population and GDP, excluding the United States.

Note: Individual indexes for some countries are not available (n.a.). The country character is estimated from partial data and the character of similar countries.

Sources: Latest published edition of the *World Human Rights Guide* (Humana 1992), Freedom House (2003), Heritage Foundation and Wall Street Journal Index of Economic Freedom (O'Driscoll, Feulner, and O'Grady 2003), Transparency International (2002), World Bank *World Development Indicators 2000* and *2001*, and United Nations Population Division (2002).

Table A4.4 Profiles of countries at risk from ATS

Region/ country	Basic Human Rights Index[a]			US exports at risk (millions of dollars)[b]	US FDI at risk (millions of dollars)[c]	External debt at risk (millions of dollars)[d]
	Killing	Torture	Property rights			
Africa						
Nigeria	4	3	1	127	367	3,274
Rwanda*	4	4	2	2	n.a.	115
South Africa	3	3	2	537	738	909
Latin America						
Colombia	4	4	3	629	1,211	2,095
Cuba*	3	3	4	2	n.a.	n.a.
Ecuador	1	2	1	132	104	1,137
Guatemala	4	4	2	93	119	315
Middle East						
Iran*	4	4	4	1	n.a.	381
Libya	4	4	3	n.a.	20	n.a.
Saudi Arabia	1	3	1	1,491	1,041	n.a.
South and East Asia						
China*	4	4	2	2,227	2,632	10,471
India	4	4	2	n.a.	435	8,629
Indonesia	4	4	2	181	2,202	6,916

Note: The countries listed in this table have either been subject to at least one ATS dispute or are obvious targets (the latter are indicated by an asterix).

n.a. = not available

a. The grades for each question in the Basic Human Rights Index are scaled from 1 (best) to 4 (worst).
b. Based on estimated government purchases of US exports, as explained in table A4.5. Exports at risk are calculated as 50 percent of estimated US exports to public bodies (2001 data).
c. US FDI stocks at risk are calculated as 25 percent of the US FDI stock in each country (2001 data).
d. External debt (including public debt and publicly guaranteed debt) at risk is calculated as 10 percent of total public external debt (2001 data).

Sources: World Human Rights Guide (Humana 1992); World Bank *World Development Indicators 2003*; BEA, US Department of Commerce (2003); and US International Trade Commission (2003).

Table A4.5 US imports and exports to target countries in 2001

Region/country	US imports (millions of dollars)[a] Total	Oil and minerals[b]	US exports (millions of dollars)[c] Total	Government purchases[d]
Africa: South of Sahara				
Angola	2,776	2,769	275	n.a.
Burkina Faso	5	0	4	1
Cameroon	102	83	184	21
Central African Republic	2	0	4	0
Congo, Democratic Republic of (formerly Zaire)	148	113	19	n.a.
Congo, Republic of	458	440	89	11
Côte d'Ivoire	320	72	93	8
Ethiopia	29	2	61	10
Ghana	185	83	179	28
Kenya	129	0	574	61
Madagascar	272	0	21	1
Mozambique	7	0	28	3
Nigeria	8,916	8,662	948	127
Rwanda	7	3	17	2
Senegal	102	0	78	8
Sierra Leone	5	0	28	4
South Africa	4,430	729	2,822	537
Sudan	3	n.a.	17	n.a.
Tanzania	27	0	64	6
Uganda	18	0	32	4
Zambia	16	0	15	2
Zimbabwe	91	21	31	6
Africa: North of Sahara				
Afghanistan	3	2	6	n.a.
Algeria	2,564	2,241	1,004	153
Egypt	852	156	3,755	385
Morocco	453	55	283	51
Tunisia	124	55	275	37
Central Asia/Former Soviet Union				
Armenia	33	0	49	4
Azerbaijan	20	11	62	6
Belarus	108	17	34	5
Georgia	37	29	106	9
Kazakhstan	352	210	161	23
Kyrgyzstan	3	0	28	5
Moldova	68	35	35	5
Russian Federation	6,178	2,047	2,567	368
Tajikistan	5	0	29	2
Turkey	3,040	307	3,061	408
Turkmenistan	45	8	248	40
Ukraine	655	238	195	36
Uzbekistan	54	1	147	26

(table continues next page)

Table A4.5 *(continued)*

Region/country	US imports (millions of dollars)[a] Total	Oil and minerals[b]	US exports (millions of dollars)[c] Total	Government purchases[d]
East Asia				
China	102,069	3,210	17,959	2,227
North Korea	0	0	1	n.a.
South Asia				
Bangladesh	2,353	7	302	14
India	9,708	632	3,475	n.a.
Nepal	200	0	14	1
Pakistan	2,228	3	536	61
Sri Lanka	1,975	1	173	17
Southeast Asia				
Cambodia	964	0	28	2
Indonesia	9,931	609	2,442	181
Malaysia	22,228	478	8,555	1,016
Myanmar	471	0	11	n.a.
Papua New Guinea	57	18	19	3
Philippines	11,307	36	7,421	1,052
Thailand	14,672	415	5,716	537
Vietnam	1,026	157	394	25
Latin America				
Argentina	2,963	1,295	3,599	498
Bolivia	165	41	202	32
Brazil	14,415	2,700	14,663	2,924
Colombia	5,623	2,941	3,392	629
Cuba	0	n.a.	7	2
Dominican Republic	4,187	59	4,290	353
Ecuador	1,975	877	1,319	132
El Salvador	1,882	6	1,690	172
Guatemala	2,589	119	1,801	93
Guyana	125	24	138	35
Haiti	263	2	542	n.a.
Honduras	3,131	6	2,405	306
Jamaica	442	56	1,352	214
Mexico	130,509	12,746	90,537	10,466
Nicaragua	603	3	428	n.a.
Panama	285	41	1,223	180
Paraguay	33	1	368	38
Peru	1,806	833	1,450	162
Venezuela	14,178	12,708	5,383	429
Middle East				
Bahrain	424	66	398	70
Iran	143	0	8	1

(table continues next page)

Table A4.5 *(continued)*

Region/country	US imports (millions of dollars)[a] Total	US imports (millions of dollars)[a] Oil and minerals[b]	US exports (millions of dollars)[c] Total	US exports (millions of dollars)[c] Government purchases[d]
Middle East *(cont.)*				
Iraq	4,073	3,840	46	n.a.
Jordan	229	0	339	82
Kuwait	1,907	1,654	759	168
Lebanon	92	0	358	66
Libya	0	n.a.	9	n.a.
Oman	431	220	299	n.a.
Qatar	501	99	320	n.a.
Saudi Arabia	12,359	10,913	5,514	1,491
Syria	143	55	225	29
Yemen	258	249	185	26
Totals	417,564	75,511	207,925	26,139
At risk[e]	41,756	37,755	20,793	13,070

n.a. = not available

a. Total US imports based on US imports for consumption, according to general customs value.
b. Oil and minerals include the following commodities by the Harmonized Tariff Schedule (HTS) code: ores, slag, and ash (HTS 26); mineral fuels, mineral oils and products of their distillation, bituminous substances, mineral waxes (HTS 27); iron and steel (HTS 72); articles of iron and steel (HTS 73); copper and articles thereof (HTS 74); nickel and articles thereof (HTS 75); aluminum and articles thereof (HTS 76); lead and articles thereof (HTS 78); zinc and articles thereof (HTS 79); and tin and articles thereof (HTS 80).
c. Total US exports represent the FAS (free alongside ship) value of domestic exports.
d. Estimated government purchases are calculated by multiplying government consumption as percent of GDP (from table A4.3) and total US exports (from this table).
e. We speculate that 50 percent of US imports of oil and minerals from target countries, and 50 percent of US exports purchased by target governments are at risk from ATS litigation. Alternatively, we speculate that 10 percent of total US imports from and exports to target countries are at risk.

Sources: US International Trade Commission (2003) and World Bank *World Development Indicators 2000* and *2001*.

Table A4.6 World imports and exports to target countries in 2001

Region/country	World imports (millions of dollars) Total	Oil and minerals[a]	World exports (millions of dollars) Total	Government purchases[b]
Africa: South of Sahara				
Angola	6,837	n.a.	3,062	n.a.
Burkina Faso	145	n.a.	445	69
Cameroon	2,337	957	1,950	218
Central African Republic	189	n.a.	94	11
Congo, Democratic Republic of (formerly Zaire)	1,289	n.a.	696	n.a.
Congo, Republic of	2,463	n.a.	851	101
Côte d'Ivoire	4,115	851	2,523	229
Ethiopia	424	4	1,025	170
Ghana	1,541	409	2,695	419
Kenya	2,370	268	3,340	355
Madagascar	1,083	67	1,098	74
Mozambique	815	218	1,134	139
Nigeria	22,554	22,474	10,397	1,394
Rwanda	101	n.a.	207	28
Senegal	887	73	1,887	190
Sierra Leone	56	n.a.	376	59
South Africa	32,942	6,908	25,612	4,871
Sudan	1,934	n.a.	1,661	n.a.
Tanzania	824	9	1,454	142
Uganda	344	43	878	109
Zambia	709	n.a.	841	100
Zimbabwe	1,576	191	1,220	235
Africa: North of Sahara				
Afghanistan	88	n.a.	546	n.a.
Algeria	21,489	20,947	10,434	1,588
Egypt	5,776	2,385	17,654	1,810
Morocco	8,557	1,062	10,674	1,938
Tunisia	6,882	938	8,988	1,226
Central Asia/Former Soviet Union				
Armenia	249	82	532	47
Azerbaijan	1,427	1,238	1,213	123
Belarus	2,509	515	2,396	330
Georgia	628	n.a.	921	79
Kazakhstan	9,469	6,819	5,561	784
Kyrgyzstan	359	63	491	97
Moldova	832	13	1,084	167
Russian Federation	111,627	67,620	52,291	7,488
Tajikistan	490	n.a.	551	45
Turkey	32,787	1,191	37,835	5,043
Turkmenistan	2,089	1,700	1,347	219
Ukraine	16,161	n.a.	14,520	2,664
Uzbekistan	2,226	n.a.	2,128	381

(table continues next page)

Table A4.6 *(continued)*

Region/country	World imports (millions of dollars) Total	Oil and minerals[a]	World exports (millions of dollars) Total	Government purchases[b]
East Asia				
China	414,942	n.a.	222,119	27,543
North Korea	905	46	2,670	n.a.
Latin America				
Argentina	28,419	6,006	18,170	2,513
Bolivia	1,019	383	1,386	217
Brazil	66,496	7,613	57,820	11,529
Colombia	13,638	5,742	10,613	1,969
Cuba	1,687	n.a.	2,706	626
Dominican Republic	4,922	n.a.	7,449	614
Ecuador	5,960	2,958	5,083	508
El Salvador	3,054	225	4,330	440
Guatemala	4,698	371	5,507	286
Guyana	740	n.a.	594	151
Haiti	322	n.a.	983	n.a.
Honduras	4,196	181	3,853	491
Jamaica	1,619	71	2,850	452
Mexico	161,188	17,722	137,158	15,855
Nicaragua	1,320	26	1,677	n.a.
Panama	1,884	167	14,257	2,094
Paraguay	1,244	6	2,349	241
Peru	6,581	3,048	6,034	675
Venezuela	29,929	26,693	17,101	1,363
South Asia				
Bangladesh	6,561	n.a.	7,692	347
India	47,766	1,290	46,966	n.a.
Nepal	598	9	1,041	106
Pakistan	10,098	166	10,025	1,145
Sri Lanka	4,988	13	5,153	498
Southeast Asia				
Cambodia	1,719	521	1,960	123
Indonesia	63,165	n.a.	31,527	2,342
Malaysia	111,446	11,888	73,250	8,702
Myanmar	2,786	n.a.	2,442	n.a.
Papua New Guinea	1,782	1,427	1,009	140
Philippines	42,870	1,269	39,594	5,614
Thailand	72,637	3,124	55,674	5,228
Vietnam	14,854	n.a.	15,030	956
Middle East				
Bahrain	3,692	3,269	3,857	677
Iran	25,168	22,474	15,107	2,299

(table continues next page)

Table A4.6 *(continued)*

Region/country	World imports (millions of dollars) Total	Oil and minerals[a]	World exports (millions of dollars) Total	Government purchases[b]
Middle East *(cont.)*				
Iraq	12,196	n.a.	4,316	n.a.
Jordan	1,638	239	4,718	1,134
Kuwait	20,521	16,229	7,044	1,559
Lebanon	962	n.a.	5,683	1,043
Libya	12,355	n.a.	3,923	n.a.
Oman	11,141	9,292	5,246	n.a.
Qatar	12,560	11,335	3,652	n.a.
Saudi Arabia	76,589	70,633	32,896	8,892
Syria	5,906	4,552	4,733	609
Yemen	3,745	n.a.	2,763	396
Totals	1,631,686	366,034	1,142,621	142,318

n.a. = not available

a. Calculated based on the following data: each target country's fuel exports as a percent of its merchandise exports; each target country's ore and metas exports as a percent of merchandise exports; and total world imports from the target country.
b. Estimated government purchases are calculated by multiplying government consumption as percent of GDP (from table A4.3) and total world exports (from this table).

Sources: World Bank *World Development Indicators 2000* and *2001*, and IMF *Direction of Trade Statistics 2002.*

Table A4.7 US and world foreign direct investment (FDI) stock, and public external debt of target countries, 2000–01

Region/country	US FDI stock (millions of dollars)	World FDI stock[a] (millions of dollars)	Public external debt[b] (millions of dollars)
Africa: South of Sahara			
Angola	1,498	9,096	8,758
Burkina Faso	1	175	1,135
Cameroon	n.a.	1,338	7,357
Central African Republic	n.a.	118	810
Congo, Democratic Republic of (formerly Zaire)	76	649	7,842
Congo, Republic of	155	915	3,758
Côte d'Ivoire	141	3,685	9,063
Ethiopia	46	961	5,325
Ghana	224	1,347	5,529
Kenya	92	1,045	5,180
Madagascar	n.a.	446	4,295
Mozambique	8	1,350	4,599
Nigeria	1,467	21,289	32,735
Rwanda	n.a.	262	1,147
Senegal	44	977	2,958
Sierra Leone	8	–2	969
South Africa	2,950	50,115	9,088
Sudan	17	1,970	8,647
Tanzania	–12	1,404	6,325
Uganda	–1	1,484	2,997
Zambia	56	2,397	4,448
Zimbabwe	229	1,090	2,948
Africa: North of Sahara			
Afghanistan	n.a.	19	n.a.
Algeria	2,484	4,637	23,062
Egypt	3,068	21,355	24,279
Morocco	55	8,798	15,793
Tunisia	22	11,672	8,869
Central Asia/Former Soviet Union			
Armenia	n.a.	714	658
Azerbaijan	1,753	3,962	594
Belarus	–3	1,412	692
Georgia	n.a.	583	1,271
Kazakhstan	5,242	12,647	3,602
Kyrgyzstan	n.a.	459	1,224
Moldova	n.a.	609	854
Russian Federation	231	21,795	111,419
Tajikistan	n.a.	166	626
Turkey	1,207	12,601	55,293
Turkmenistan	64	1,063	n.a.
Ukraine	43	4,615	8,139
Uzbekistan	n.a.	768	3,578

(table continues next page)

Table A4.7 *(continued)*

Region/country	US FDI stock (millions of dollars)	World FDI stock[a] (millions of dollars)	Public external debt[b] (millions of dollars)
East Asia			
China	10,526	395,192	104,709
North Korea	n.a.	1,053	n.a.
South Asia			
Bangladesh	187	1,059	15,098
India	1,739	22,319	86,293
Nepal	n.a.	116	2,784
Pakistan	474	6,608	27,140
Sri Lanka	48	2,620	8,035
Southeast Asia			
Cambodia	0	1,664	2,180
Indonesia	8,807	57,361	69,161
Malaysia	6,820	53,302	19,090
Myanmar	n.a.	3,314	5,360
Papua New Guinea	17	2,219	1,502
Philippines	2,776	14,232	33,429
Thailand	7,337	28,227	29,418
Vietnam	–57	15,923	11,546
Latin America			
Argentina	14,234	76,269	86,599
Bolivia	332	5,699	4,120
Brazil	36,317	219,342	92,590
Colombia	4,844	14,777	20,951
Cuba	n.a.	79	n.a.
Dominican Republic	752	6,413	3,368
Ecuador	417	8,271	11,366
El Salvador	657	2,241	2,775
Guatemala	477	3,875	3,146
Guyana	98	720	1,209
Haiti	48	218	1,040
Honduras	49	1,684	4,337
Jamaica	2,280	4,040	3,373
Mexico	52,168	115,952	81,550
Nicaragua	206	1,505	5,602
Panama	25,296	7,257	5,723
Paraguay	415	1,389	2,061
Peru	3,591	11,000	19,205
Venezuela	10,680	30,352	27,628
Middle East			
Bahrain	–128	5,864	n.a.
Iran	n.a.	2,507	3,812
Iraq	n.a.	–24	n.a.

(table continues next page)

Table A4.7 *(continued)*

Region/country	US FDI stock (millions of dollars)	World FDI stock[a] (millions of dollars)	Public external debt[b] (millions of dollars)
Middle East *(cont.)*			
Jordan	14	1,679	7,055
Kuwait	764	487	n.a.
Lebanon	123	1,334	7,034
Libya	78	–5,997	n.a.
Oman	47	2,529	2,673
Qatar	1,977	2,158	n.a.
Saudi Arabia	4,162	25,983	n.a.
Syria	–30	1,904	15,930
Yemen	649	683	4,525
Totals	220,356	1,365,385	1,229,278
At risk[c]	55,089	273,077	122,928

n.a. = not available

a. World FDI stock is FDI from all home-base countries including the United States.
b. Public external debt includes public debt and publicly guaranteed debt.
c. We speculate that 25 percent of US FDI, 20 percent of world FDI, and 10 percent of public external debt are at risk through ATS litigation.

Sources: BEA, US Department of Commerce (2003); UNCTAD *World Investment Report 2002*; and World Bank *World Development Indicators 2003.*

5

Collateral Damage from ATS Suits

The collateral damage from ATS litigation could be severe. Innocent victims will be harmed both in the United States and in target countries. Our calculations separately examine potential US losses from diminished trade and FDI and potential target-country losses. The key results are summarized in boxes 5.1 and 5.2.

Damage to Trade

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[1] indicate that extensive economic sanctions depress US trade (merchandise imports and exports) with target countries by more than 95 percent.[2] ATS litigation would not depress trade to nearly the same extent,[3] but billion-dollar 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.

1. The cited parameter values are drawn from Hufbauer and Oegg (2003).

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

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

Box 5.1 Illustrative damage to the United States from ATS litigation

Impact on US jobs

- More than 180,000 export-related jobs are at risk[a]
- As many as 130,000 US jobs supported by inward FDI are at risk[b]
- Estimated loss of pay for dislocated workers could reach $4,000 per worker per year[c]

Impact on US trade and FDI

- Potential loss of $23 billion in US exports[d]
- A quarter of all US oil and minerals imports, valued at $37 billion could be disrupted[e]
- US FDI stocks in target countries could decline by $55 billion[f]

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a. Export-related job dislocation reflects the possible loss of both direct US exports to target countries and US exports linked to US FDI in target countries.
b. Assuming that $24 billion of inward FDI (i.e., foreign MNCs operating in the United States) is deterred by ATS litigation.
c. The figure of $4,000 reflects the premium associated with jobs in manufactures exports. The pay premium associated with inward FDI is even higher.
d. The direct effect is calculated at $13 billion (per table A4.4); the indirect effect, through lost FDI, is calculated at $10 billion (per text).
e. Based on the calculations in table A4.4.
f. US FDI stocks at risk are calculated as 25 percent of total US FDI stock in 2000 in target countries.

Sources: US Census Bureau (2002); Lewis and Richardson (2001); BEA, US Department of Commerce (2003); UNCTAD *World Investment Report 2002*; World Bank *World Development Indicators 2003*; and US International Trade Commission (2003).

We obtain one set of estimates by assuming that a wave of ATS litigation would depress overall US trade with target countries by 10 percent from current levels. The damages are a $42 billion loss in US imports and a $21 billion loss in US exports (table A4.4). We obtain a second set of estimates by assuming that the most vulnerable categories of commerce—US imports of oil and minerals and US exports to government agencies—would each be depressed by 50 percent. The "vulnerable commerce" calculation suggests a $37 billion loss in US imports and a $13 billion loss in US exports (table A4.4). Either way, ATS litigation could diminish US merchandise trade (imports plus exports) by $50 billion to $60 billion with the target countries. Of course, lost US trade with these countries would be largely replaced by commerce with other sources and destinations, both in the United States and abroad. But affected US firms would likely endure substantial "friction" costs, as they sought new markets and new suppliers.

Thus, between $13 billion and $21 billion of US exports to potential target countries are at risk. The bulk of these exports are manufactured goods. Approximately 8,300 US manufacturing employees are supported

Box 5.2 Illustrative damage to target countries from ATS litigation

Impact on trade, FDI, and external debt

- Merchandise trade with the United States could be reduced by $60 billion[a]
- Target countries could lose $270 billion of world FDI[b]
- Public external debt might be cut by more than $100 billion[c]

Impact on jobs and GDP

- Reduced world FDI in target countries could put 1.9 million jobs at risk
- Reduced US commerce could diminish target country GDP by $20 billion[d]
- Reduced world FDI stocks could diminish target country GDP by more than $50 billion[e]

a. Assuming 10 percent of merchandise trade with the United States is at risk (table A4.4).
b. World FDI stocks at risk are calculated as 20 percent of world FDI stocks in target countries (table A4.7).
c. External debt at risk is calculated as 10 percent of public external debt (table A4.7).
d. Assuming that a $10 billion decline in merchandise trade reduces GDP by roughly $3.3 billion annually.
e. Assuming that a $10 billion decline in FDI stock reduces GDP by $2 billion annually.

Sources: BEA, US Department of Commerce (2003); Frankel and Romer (1999), Brown, Deardorff, and Stern (2001); UNCTAD *World Investment Report* (2002); World Bank *World Development Indicators 2003*; and US International Trade Commission (2003).

by $1 billion of manufactured shipments.[4] ATS could thus put more than 100,000 US manufacturing jobs at risk. If these jobs were lost, others would be found. But since jobs in exporting plants pay 10 percent more than jobs in nonexporting plants (Lewis and Richardson 2001, 26), it seems likely that the displaced employees would take a significant pay cut, as much as $3,700 per worker.[5]

To the extent the United States imports less oil and minerals from target countries, it will become more dependent on other suppliers. For oil imports in particular, the United States benefits from diversified and competitive sources of supply. A wave of ATS litigation could affect

4. The figure of 8,300 employees is based on 2000 data, showing 16.7 million manufacturing employees and $2,002 billion manufacturing value added (US Census Bureau 2002). In this calculation, we assume that $1 billion of manufactured exports equates to $1 billion 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.

5. The average payroll per manufacturing employee was $37,000 in 2000; export plants paid about 10 percent above the average, or about $41,000 (US Census Bureau 2002). The calculation here assumes that manufacturing firms that supply inputs to exporting firms also pay higher than average wages.

approximately one-fourth of US imports of oil (total imports of oil and minerals were around $150 billion in 2002). The economic consequences—higher oil prices (owing to greater transactions costs) and less diverse sources—while hard to calculate, could be significant.

Damage to Outbound FDI

Adverse ATS decisions could prompt firms to disinvest en masse, as they did during the South African apartheid era. In that episode, the US FDI stock in South Africa dropped by two-thirds.[6] Conservatively, we think the ATS will be less devastating but that 25 percent of US and 20 percent of world FDI (including US FDI) in target countries will be at risk. FDI by foreign-based MNCs is at risk because most of them (but not all of them) have substantial investments in the United States, which 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 US FDI and $273 billion in world FDI. However, ATS claims could do the most damage by deterring *new* FDI over the next 20 years, an amount that should exceed existing FDI stocks. Burgeoning investment in China is particularly vulnerable.

Conservatively, we calculate that $55 billion of US FDI could be deterred by ATS suits (table A4.6). From a US 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 US 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 US FDI of $55 billion in target countries would thus jeopardize at least $10 billion of US exports.[7] Through the FDI channel, more than 80,000 additional US 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.

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6. The US FDI stock in South Africa dropped from $2.4 billion in 1980 to $0.8 billion in 1990.

7. 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. Edward M. Graham's estimated coefficients suggest that a 10 percent reduction in US FDI stock in middle-income countries could reduce exports to those nations by 6.3 percent (Graham 2000, table B.1, 212). 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 US exports to the target countries amounted to $208 billion in 2001, applying the Graham coefficient suggests that some $13 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.

Table 5.1 FDI stock controlled by non-US-based MNCs, 1990 and 2000 (billions of dollars)

Region	1990	2000	Increase, 1990 to 2000
Target countries[a]			
Africa	40.70	119.29	78.59
Central Asia	n.a.	41.70	41.70
Latin America	42.68	308.21	265.53
Middle East	24.73	38.24	13.51
South and East Asia	83.75	508.85	425.10
Subtotal of target countries	191.86	1,016.26	824.40
United States	394.91	1,214.25	819.34

n.a. = not available

a. Target countries are those identified in table A4.7.

Sources: BEA, US Department of Commerce (2003); and UNCTAD *World Investment Report 2002.*

Damage to FDI in the United States

If ATS awards begin to approach the size of asbestos awards, it seems likely that the European and other home-base countries for MNCs will enact blocking statutes that prevent judgments from being executed within their territory. However, blocking statutes will not insulate MNC assets located in the United States. Faced with the prospect of ATS judgments against their US assets, foreign-based MNCs thus have a choice: should they divest their operations in the United States, or should they divest their operations in target countries?

For now, the decision might seem easy: divest in target countries. After all, business operations in the United States are typically much larger and more secure than operations in any single target country. Some foreign-based MNCs, however, may see things differently. They may balance the tort liability hazards of their FDI in *all* potential target countries taken together, against the benefits of continued operations in the United States.

As table 5.1 shows, as of 2000, non-US-based MNCs had invested $1,016 billion in all potential target countries taken as a group, compared to $1,214 billion invested in the United States.[8] 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-US-based MNCs in potential target countries taken as a group was $866 billion versus $819 billion incremental FDI placed by the

8. Both figures are FDI at historical cost.

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 will deprive the US economy of the benefits that come from inward foreign investment.[9]

An important benefit of inward FDI is better-paying jobs. Based on 2000 data, approximately 5,300 US jobs are associated with each $1 billion of inward FDI. Average compensation was $51,300 per employee, against the overall US private industry average of $45,600 per employee.[10] If foreign-based MNCs collectively cut their FDI in the United States by just 2 percent ($24 billion) to avoid ATS litigation, that would jeopardize about 130,000 well-paid US jobs.

Damage to Target Countries

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.[11] Just considering US commerce, the combined import and export trade of target countries could be reduced by $60 billion annually from a wave of ATS litigation (table A4.4). 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 US FDI in target countries could thus dislocate 380,000 good jobs. If the ATS damage extends beyond US investment and hits world FDI at the rate of 20 percent, deterring $273 billion of FDI (table A4.6), some 1.9 million good jobs could be dislocated in target countries.[12]

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9. On these benefits, see Graham and Krugman (1995).

10. Data from Bureau of Economic Analysis, *Survey of Current Business*, US Department of Commerce, December 2002, table 10.2; and US Census Bureau, *Statistical Abstract of the United States 2002*, table 607.

11. 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 Frankel and Romer (1999) for the modest coefficient; and Brown, Deardorff, and Stern (2001) for the high coefficient.

12. US affiliates based in target countries, on average, pay wages about 80 percent higher than the local norm in manufacturing (see Graham 2000, 94). Affiliates of non-US MNCs likewise probably pay premium wages.

A strong correlation exists between the per capita density of FDI in a country and its per capita GDP.[13] 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 (a conservative estimate), the loss of $273 billion of world FDI would inflict GDP losses of more than $50 billion annually.[14]

The final damage inflicted by ATS litigation on developing countries is access denied to international capital markets. Countries on the losing side of ATS cases will find that bank credit and bond placements are more difficult. If 10 percent of public external debt is at risk, the denial of credit could exceed $100 billion (table A4.6).

13. 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).

14. See Borensztein, de Gregorio, and Lee (1998) and Soto (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 and Hufbauer (2001, 65–66). Carkovik and Levine (2002), however, question the independent contribution of FDI to economic growth.

6

Judicial Imperialism

In the aftermath of the Second World War, landmark legal innovations advanced the obligation of all states to respect human rights. International law thus became an instrument for protecting individuals. The Nuremberg trials and the UN Declaration of Human Rights established universally recognized standards of human decency as an obligation for all states. Following the precedents set at Nuremberg, international judicial tribunals continue to conduct war crimes trials.[1] The UN declaration and a range of international treaties helped establish norms for human rights beyond the prohibition of war crimes and genocide.

The Nuremberg precedent was very different from the sort of cases litigated under the ATS. Perpetrators were *criminally* tried. Likewise, the focus of the Holocaust and slave labor cases was on criminal liability of *individuals*. Former officials and individuals who ran corporations assisting the Nazis were tried as individuals. Recent claims paid by Swiss and German companies were not the outcome of court awards but rather the result of decisions by the companies—faced with extreme public and diplomatic pressure—to close the books on their behavior during the Second World War.[2] However, ATS precedents now emerging from

As this policy analysis was going to press, Robert H. Bork (former judge on the DC Circuit Court of Appeals) published an op-ed on the ATS with the same title ("judicial imperialism") and same message. See Wall Street Journal*, June 17, 2003, A16.*

1. The two recent genocide courts, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), are akin to the Nuremberg precedent.

2. See the account in Eizenstat (2003).

US courthouses reflect something very different: courts are imposing *civil* liability on *corporations*.[3]

International crimes, like those conducted during the Holocaust, must be punished. No one denies this. In appropriate cases, monetary compensation must be paid. What we question is the broad brush of corporate liability under the ATS. Carefully drawn legislation—following the model of the Torture Victim Protection Act (TVPA)—that enumerates specific foreign torts actionable in US federal courts should be commended. Sprawling common-law jurisdiction, applied case by case and court by court, is quite another.

Unlike the Nuremberg court and its successors, the ATS does not imprison defendants but rather awards damages. Along the way, the ATS rewards class action plaintiffs and their attorneys. ATS cases create enormous problems that, when added together, amount to unilateral justice bordering on imperialism.

- ATS decisions will conflict with the jurisdictional claims of other states, particularly when both parties are citizens of the same foreign state.
- ATS cases will inflame relations between the United States and foreign governments, especially when foreign-based MNCs are subjected to large, American-style damage awards.
- Because ATS cases are civil actions, they will develop into attorney-driven enrichment machines, given the unique features of American mass tort litigation.
- ATS cases will interfere with the separation of powers. Under the Constitution, the executive branch, not the judiciary, is responsible for the conduct of foreign relations.

No other country has a *civil* statute that remotely resembles the ATS. A Belgian statute enacted in 1993 asserts universal *criminal* jurisdiction over genocide and crimes against humanity. The law was used four times to prosecute those who committed crimes in Rwanda (once a Belgian colony). To Belgium's embarrassment, political activists also invoked the law to prosecute Ariel Sharon, Yasser Arafat, Fidel Castro, and other world leaders. Responding to intense foreign criticism, in 2003 the Belgian Parliament sharply narrowed the jurisdictional scope of its statute.[4] Thus, the one country with a universal *criminal* statute saw the wisdom of limiting its judicial reach in deference to the concerns of foreign nations.

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3. For a thorough discussion of significant differences between the Nuremberg trials and ATS precedent, see Betz (2001).

4. The 1993 Belgian law enables the prosecutor to refer cases to the International Criminal Court or the courts where the crimes were committed, when the crimes happened outside Belgium and the accused are not Belgians. See *The Economist*, April 17, 2003.

Conflict with Other Jurisdictions

In many ATS cases, both the plaintiff and defendant are citizens of the same foreign country, and their alleged acts violate the foreign state's law. For example, in *Tachiona v. Mugabe*, Zimbabwean citizens sued the ruling political party for torture; extrajudicial killings; political rights; and cruel, inhuman, and degrading treatment, among other claims. The court determined that almost all these claims were actionable under Zimbabwean law. However, because the torture and extrajudicial killings claims were filed under the ATS and not the TVPA, there was no requirement that the plaintiffs exhaust their local remedies before chasing a class action rainbow across the Atlantic.

Adjudication of purely foreign claims under the ATS will severely interfere with the foreign state's jurisdiction and, in turn, its sovereignty. Allowing these plaintiffs to sue in the US courts essentially results in the assertion of US jurisdiction and US law as the supreme law for the world. Confronted with the facts asserted in *Tachiona,* the US State Department may severely criticize Zimbabwe and even sanction the Zimbabwean government. But it is another matter for private Zimbabwean plaintiffs, without any say-so from the US executive branch, to bring a damage case in US courts and turn the sanctioning power over to the judiciary.

Conflict with Home Nations of Foreign MNCs

The ATS has the potential of disrupting foreign relations even more than the Iran-Libya Sanctions Act (ILSA) and the Helms-Burton Act. Responding to those statutes, European states challenged the US assertion of jurisdiction over European corporations for investing in "rogue" nations (Cuba, Iran, and Libya). The ATS has an even greater prospect of inflaming antagonism against the United States because foreign MNCs may be exposed to huge awards with punitive damages or strike suit settlements. As a preview, the French oil company Total, S.A. was initially named a defendant in the *Unocal* case before the district court dismissed the claims against Total. If that decision had gone the other way—it might in a future ATS case—the United States would have created a new friction point with France.

Unique American Litigation

Foreign grievances arising from the unilateral nature of ATS suits will be amplified by the American invention of mass tort lawsuits: class actions, punitive damages, unpredictable awards, and large contingent fees.

Unlike Nuremberg-style trials, ATS lawsuits are civil actions, and domestic awards reflect American-style justice. Punitive damages and class actions are an exception in the judicial systems of the world. So are huge contingency fees that create an incentive for lawyers to bring strike suits. These aspects of the American tort system are intensely disliked abroad. For example, in the *Loewen* case (Krauss 2000), a Mississippi jury granted a huge punitive damages award against a Canadian corporation, thus bankrupting it.[5] This could happen often in ATS litigation.

Courts Making Foreign Policy

In ATS cases, the decision essentially amounts to a judgment on the actions of a foreign state. Even when foreign citizens sue private actors, the judgments almost always question foreign state conduct. Such litigation interferes with the executive conduct of foreign affairs and may well jeopardize sensitive negotiations. For example, recently the US State Department expressed concern that a decision in *Doe v. Exxon Mobil* could hinder US cooperation with Indonesia to combat international terrorism.

5. The *Loewen* case is now subject to a North American Free Trade Agreement (NAFTA) Chapter 11 dispute between the United States and Canada on account of the huge damage award.

7

Patchwork Solutions

Ad hoc judicial decisions have created a dangerously broad statute. On their present course, ATS suits have every prospect of becoming the international analogue of asbestos litigation. Huge vested interests will quickly accumulate, with tens of millions of dollars to fight proposed reforms. Damage will be done both to the US economy and the economies of developing nations.

Amicus curiae briefs by the Department of Justice and letters of interest from the State Department will better assist courts in recognizing the adverse consequences of ATS litigation on US interests. Accordingly we urge the executive branch to take a more active stance toward narrowing the ATS. Particularly useful are executive branch letters and briefs urging a narrow reading of the ATS in light of its history, constitutional separation of powers, and severe consequences for US foreign policy.

Nevertheless, it may prove difficult for the federal courts to arrest the sprawling sweep of ATS litigation in a timely fashion. Hence our core recommendations are addressed to the Congress: legislation can most efficiently correct the unlimited sweep of ATS claims.

Court Solutions

At this writing, the prospect of judicial correction seems distant. Some circuits have yet to hear an ATS case and decide on the statute's scope. There are 12 circuits that may all hand down varied interpretations of

the ATS, leading to considerable forum shopping.[1] Within each of these circuits are numerous district courts, the stage at which most civil cases are decided, settled, or disposed. The usual length of litigation, from the filing of the complaint to the final disposition by the appellate court, takes years.[2] Finally, the Supreme Court grants review to and decides fewer than 100 cases a year, out of the approximately 7,000 writs of certiorari filed (Mecham 2001). Supreme Court cases are disposed of within two years. Statistics on civil cases suggest that an ATS case would take on average 32 months to be finally decided by a circuit court, and an additional 12 to 24 months for a decision—if certiorari is granted—from the Supreme Court. During all this time, different courts will continue to issue their varied interpretations of the ATS. Meanwhile, district court awards will create a powerful array of vested interests.

Moreover, prospects are slight for a sweeping Supreme Court decision that would narrowly define the contours of the ATS. The Supreme Court, like the lower courts, would be limited to the facts presented in the case. It would be rare for the Supreme Court to address all the issues fraught with multiple interpretations of the ATS by the lower courts, because certiorari petitions generally involve only one or two questions of law.

Further involvement by the executive branch can help promote a court-fashioned limit to the scope of the ATS. Because ATS suits generally involve private parties, the interests of the United States have seldom been invoked. However, the active involvement of the Department of Justice, by submitting amicus curiae briefs in ATS cases, will ensure that otherwise unrepresented national interests are properly considered. The recent amicus brief of the Department of Justice in the Ninth Circuit's en banc rehearing of the *Unocal* case sharply states that the US government takes issue with "several fundamental analytical errors regarding the ATS" made by panels of the Ninth Circuit and asks the court to read the ATS as a jurisdictional statute only.[3]

A March 2003 opinion by Judge Randolph of the DC Circuit may have cracked the door open to Supreme Court review. In *Al Odah v. United*

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1. There are 11 numbered circuits plus the DC circuit whose jurisdiction extends to all federal subject matter. The Federal Circuit, which has limited and specialized jurisdiction, is not included in this count.

2. A typical civil case takes 32 months from the filing of the complaint to disposition of the case by the appellate tribunal. According to the Administrative Office of the United States Courts, 176,960 cases are filed each year in the US district courts. The median disposition period is 8.1 months, but cases that reach trial may take, on average, 20.4 months for a judgment. See Administrative Office of the US Courts (2002). At the appellate level, the median interval between the filing of the notice of appeal and a decision by the circuit court takes 11.4 months in civil cases. See Mecham (2001).

3. In an en banc hearing (reserved for the most important cases), all judges on the circuit court sit on the case. Normally cases are heard in panels of three or five judges.

States, Judge Randolph's separate concurrence described the most troubling aspects of ATS jurisprudence applied in other circuit courts and reaffirmed the DC Circuit's holding in *Tel-Oren*, in which two judges on the DC Circuit panel rejected the *Filartiga* approach. Given the fact that extension of the *Filartiga* precedent by some other circuit courts has led to greater enforceable rights for aliens than US citizens,[4] Judge Randolph urged the DC Circuit to take the opportunity "in this case and decide what § 1350 [of the ATS] does mean." Since *Al Odah* was disposed on other grounds, Judge Randolph's concurrence may remain no more than a prediction of what the DC Circuit might do in another ATS case. The Supreme Court may await another day and another case to rule on the ATS. However, continued involvement of the executive branch, through letters and amicus submissions in future cases, should speed up the march to the Supreme Court.

The problem is not confined to federal courts. Unless Congress confers *exclusive* jurisdiction on federal courts to hear alien tort claims, *solely* as defined in federal statutes, state courts may get involved through their interpretation of both state and federal laws. Some of this has already happened in the *Unocal* case. The potential for confusion and mischief grows exponentially once 50 state jurisdictions, in addition to the 12 circuits, hear alien tort claims and expound on the "law of nations."

State Department Solutions

In the past three years, the State Department has gotten involved in two corporate ATS cases, recommending that the interests of the United States might be harmed by adjudication.[5] In *Doe v. Exxon Mobil* (D.D.C. No. 01-CV-1357, 2002) and *Sarei v. Rio Tinto*, district judges requested the State Department to submit its advice on whether the case adversely affected national interests. The State Department's answer was strongest in *Exxon Mobil*, where William H. Taft IV, legal adviser to the State Department, stated "that adjudication . . . could adversely affect United States interests" 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. The

4. Some courts have drawn on treaties that were not ratified and treaties that are not self-executing to find norms enforceable under the ATS. Other courts have said that federal common law incorporates customary international law. By both devices, alien plaintiffs acquire greater rights than US plaintiffs.

5. During the Clinton administration, the State Department submitted a letter stating that the *Unocal* suit did not adversely affect US foreign policy interests. The State Department has also submitted letters in ATS cases involving state actor defendants (e.g., foreign officials).

Exxon Mobil court has yet to issue its decision, but the *Rio Tinto* court relied on the State Department's advice to dismiss the case.

The scope of ATS litigation has troubled the Treasury Department as well. In a letter dated March 17, 2003, to Ambassador Thomas Niles (president, US Council for International Business), Randal K. Quarles, assistant secretary for international affairs at the Treasury, wrote: "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."

However, this ad hoc approach puts the State and Treasury Departments in the difficult position of "justifying" violations against sympathetic plaintiffs. When State Department involvement results in dismissal of the case, critics will assert that the US government is supporting violations of international law and condoning the denial of justice. Furthermore, a firefighting approach can address only one case at a time, and then, only when concrete national interests can be cited. Finally, a court is not compelled to heed the department's advice. The judge could 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.

We urge the State, Treasury, and Justice Departments to issue a joint declaration calling on the courts to interpret the ATS essentially as a jurisdictional statute, limiting causes of action to those contemplated in 1789, until Congress enacts additional substantive standards for alien tort claims and enumerates further causes of action. This is the interpretation urged by Judges Bork and Randolph. This is the position advocated by the Justice Department in its *Unocal* brief, filed in May 2003.[6]

To deflect calls, such as ours, for bold action, the State Department and National Security Council have instead recommended a "code of conduct defense."[7] The United Nations Global Compact, the Global Sullivan Principles of Social Responsibility, and the Voluntary Principles on Security and Human Rights all establish guidelines for MNCs that do business in states with records of human rights violations. The State Department suggests that subscription to these codes, or even a new code, might provide a defense against ATS litigation.

The record is otherwise. Rather than establish a defense for MNCs, 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

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6. *Brief for the United States of America, as Amicus Curiae, en banc* hearing in US Court of Appeals for the Ninth Circuit, *Doe v. Unocal*, Nos. 00-56603, 00-56628.

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

knowingly doing business in a bad country, and that, by doing business there, it will be charged with lending moral support to the offensive regime.

Exhibit A for this train of logic is the recent South African apartheid litigation under the ATS. As of May 2003, many of the 49 companies that signed the Sullivan principles have been named defendants in the ATS suit, including Caterpillar, Inc., Colgate-Palmolive Co., DuPont, and Johnson & Johnson. Their commitment to supporting human rights is now being used against them as evidence of an earlier failure to abide by the Sullivan principles and their knowing conduct of business in a state that trampled on human rights.

We think an international code of corporate conduct can be useful if, at a minimum, it does three things: (1) sets out concrete obligations that, if breached, create US tort liability for signatory corporations; (2) serves as a complete defense against US tort liability for norms not enumerated; and (3) sets a reasonable cap on punitive damages. Such a code will take years to negotiate and ratify.[8] Unless faster remedies are put in place, ATS awards and settlements will begin to accumulate, damaging trade and investment.

8. An analogy can be drawn to a forward-looking code that would define odious debt—debt that can be repudiated by a successor government. In both cases, a code would be useful, but either one would be hard to negotiate. It took two decades before the United States succeeded in generalizing its own Foreign Corrupt Practices Act of 1977 (as amended in 1988 to authorize presidential negotiation of an international agreement) into an OECD Convention (Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, December 17, 1997).

8

Conclusion: Congress Must Act

Long ago, for reasons obscured in the mist of history, the first Congress passed the ATS. After more than two centuries of hibernation, the ATS now condemns behavior and parties the first Congress in 1789 would never have imagined. With the promulgation of international agreements on every subject—from labor rights and the environment to drug use in sports—and the rapid expansion of customary international law, the ATS has seemingly opened US courts to a long list of foreign plaintiffs represented by industrious lawyers. Elastic definitions of the "law of nations," flexible choices as to substantive law, and "aiding and abetting" and "color of law" liability all highlight the urgent need for congressional action.

Recent efforts by the executive branch to limit the expansive interpretation of the ATS are commendable and should continue to guide courts in reading the ATS. In particular, statements of interest by the State Department and amicus briefs by the Department of Justice can assist courts in deciding important interpretive questions in light of US foreign policy.

The Torture Victim Protection Act (TVPA), enacted in 1992, creates causes of action for torture and extrajudicial killings. The TVPA defines the basis of liability, creates a 10-year statute of limitations, and requires the claimant to exhaust remedies in the place where the conduct occurred before bringing a suit in US courts. Using the TVPA as a basic model, and reflecting on the past 20 years of ATS litigation, Congress should reform the ATS. With the goal of limiting the ATS to its proper domain, we propose the following revisions:

- ***Defined 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, extrajudicial killings, and forced labor.

- ***Federal courts, not state courts.*** Congress should give federal courts exclusive jurisdiction over all tort suits brought by aliens for wrongs that occurred abroad. State legislatures and state courts should not get into the business of adjudicating foreign tort claims. 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 nation with the most significant interest should be applied to fill gaps in the statute. Normally this will be the law of the place where the tort occurred.
- ***"Aiding and abetting" and "color of law" liability.*** Congress should state that *intent* and *substantial assistance* are prerequisites for aiding and abetting and color of law liability. If a private actor is going to be held liable, the required mental state should be higher than mere association.[1]
- ***Statute of limitations.*** Like the TVPA, the reformed ATS should have a 10-year statute of limitations. The statute should be "tolled" (i.e., extended for a period) only when the alleged violator knowingly tries to conceal its bad conduct.
- ***Exhaustion of local remedies.*** The TVPA provides that a US 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 US 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 ILSA foretell the backlash against the ATS. Meanwhile, US-based MNCs 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 industrialized world. The costs of procrastination will be significant, both in the United States and abroad.

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1. The requirement of intent would be consistent with the Model Penal Code, which requires a finding of intent to convict an accessory to a crime. 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.

Appendix A
ATS Case Summaries

Alien Tort Statute (ATS) cases can be divided into two main categories: those where the defendant is a "state actor"—a state official, former state official, or government agency—and those where the defendant is a "private actor," usually a multinational corporation (MNC). The private-actor cases can be further divided between those where the defendant is sued for its own actions and those where the defendant is sued for acting in concert with a sovereign state.

State-actor cases are limited by the US Foreign Sovereign Immunities Act (FSIA), which generally creates a presumption of sovereign immunity for foreign states and their entities and therefore prevents courts from exercising jurisdiction over legal claims (statutory exceptions are made when a foreign government or its entity engages in a commercial activity, supports terrorism, etc.). Because the FSIA serves as a barrier to lawsuits against foreign states, most ATS state-actor cases are brought against individual officials and not government agencies. Seldom do the defendant officials have substantial resources; hence, the prospect of large monetary awards in these cases is remote. In addition, ATS cases against state actors raise greater concerns with judicial doctrines such as political questions, acts of state, and international comity.

ATS cases against private actors have the potential for larger and more readily available damage awards. MNCs have large resources and therefore have been the targets of major cases initiated in the past few years. In addition to ATS claims, plaintiffs usually allege tort offenses under other US statutes and the domestic law of the foreign country. One statute often invoked is the Torture Victim Protection Act of 1992 (TVPA), which explicitly creates a cause of action for individuals "acting under

actual or apparent authority, or color of law, of any foreign nation" responsible for torture or extrajudicial killing. Apart from torture and extrajudicial killing, ATS claims are broadly based on violations of the "law of nations."

The case summaries in this appendix are abbreviated from NFTC (2002) and other sources and have been supplemented by the authors' primary research. Private-actor cases where the defendant is a corporation principally sued for acting in concert with a foreign state are identified with an asterisk (*). Nearly all the private-actor cases are pending (though some of them have been in litigation for several years). Each summary starts with the date the case was initiated and its legal citation; cases that are still in litigation conclude with a short status report.

State-Actor Cases

1. (1979). *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)

Summary. Plaintiff Dr. Joel Filartiga and his daughter, citizens of Paraguay, sued Pena-Irala, a Paraguayan citizen then residing in the United States, for torturing and killing Filartiga's son while Pena-Irala was inspector general of police in Asunción. The district court dismissed the case for lack of subject matter jurisdiction. The Second Circuit reversed, holding that the Paraguayan plaintiffs could bring their claim under the ATS. The Second Circuit further held that customary international law has the status of federal common law and that torture violated customary international law. On remand, the district court awarded punitive damages of $10 million to the plaintiffs. It is unlikely they collected anything substantial. Prior to *Filartiga*, between 1789 and 1980, there were only 21 reported ATS decisions, all of which were state-actor cases. See Randall (1985). (moved to refs)

2. (1981). *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)

Summary. The plaintiffs, mostly Israeli citizens, sued Libya, the Palestine Liberation Organization (PLO), and other groups for a PLO attack in March 1978 that murdered 34 persons and injured 85 others. The case was dismissed, but each of the three judges on the panel filed separate concurring opinions. Judge Edwards dismissed the claims, holding that the PLO was not a state actor and that, with very limited exceptions (piracy and slave trading), the ATS only gave standing to sue state actors. Concurring, Judge Bork argued that the ATS confers only a grant of

jurisdiction, not a cause of action, and that the statute was intended to cover only the three crimes against the law of nations, contemporaneously enumerated by William Blackstone, namely violations of the right of safe conduct, violations of the rights of ambassadors, and piracy. In subsequent court decisions, Bork's view has become a minority opinion. Judge Robb argued that the case presented a political question and therefore was not justiciable.

3. (1993). *Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001)

Summary. Plaintiff Alvarez-Machain, a Mexican doctor, was acquitted of the murder of a US Drug Enforcement Administration (DEA) agent after being abducted and transported to the United States to face prosecution. He then sued the United States, the DEA agents, a former Mexican policeman, and Mexican civilians under the ATS and other federal laws. The plaintiff claimed the Mexican nationals were liable under the ATS for kidnapping, arbitrary detention, torture, cruel and inhuman treatment, and related domestic torts. On summary judgment, the district court entered judgment against one of the Mexican nationals for kidnapping and arbitrary detention under the ATS.

Status. On September 11, 2001, a three-judge panel of the Ninth Circuit affirmed the district court's ruling against the Mexican defendant. Specifically, the court found that the defendant's actions violated the plaintiff's international rights to freedom of movement, to remain in his country, and to security of his person, all of which the court found to be part of the law of nations. Further, the court found that holding the plaintiff in Mexico pursuant to an American warrant, but without a valid Mexican warrant, constituted arbitrary detention, also a violation of the law of nations. On March 20, 2002, the Ninth Circuit ordered that the case be reheard en banc. See Alvarez-Machain v. Order United States, 284 F.3d 1039 (9th Cir. 2002).

4. (1994). *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995)

Summary. The plaintiffs, nine expatriate citizens of Guatemala, brought this action against Guatemala's former minister of defense for alleged violations of the ATS. Plaintiffs alleged that the minister directed his troops' actions and was therefore liable for torture, arbitrary detentions, summary executions, and disappearances. The court awarded plaintiffs compensatory and punitive damages in the amount of $42.5 million.

5. (2000). *Abrams v. Société Nationale des Chemins de Fer Français*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001)

Summary. Holocaust survivors brought this class action against French railroad company Société Nationale des Chemins de Fer (SNCF) for alleged violations of the law of nations under the ATS, arising from the deportation of Jews and others to Nazi death camps. SNCF moved to dismiss the case for lack of jurisdiction under the FSIA. On November 5, 2001, the district court dismissed the suit on sovereign immunity grounds.

Status. According to the *New York Times*, the plaintiffs appealed the lower court's ruling in December 2001. A similar suit is being litigated in French courts and has raised domestic controversy. (See Alan Riding, Nazi's Human Cargo Now Haunts French Railway, *New York Times*, March 20, 2003, 3.) However, neither Lexis nor Westlaw reports an appeal or a subsequent decision.

6. (2000). *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002)

Summary. Citizens of Zimbabwe brought suit against Zimbabwe's president and other government officials and the ruling party, Zimbabwe African National Union Patriotic Front (ZANU PF). Plaintiffs alleged violations of the ATS, TVPA, international law, and Zimbabwean law. The court dismissed the claims against President Robert Mugabe and other government officials on sovereign and diplomatic immunity grounds. The district court held that the defendant political party violated the plaintiffs' freedoms of political belief, opinion, and expression, entitling the plaintiffs compensatory and punitive damages totaling $71,250,453.

7. (2002). *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003)

Summary. "Next friends" of foreign detainees caught in Afghanistan and Pakistan and held in Guantanamo Bay filed a complaint and petitions for writs of habeas corpus against the United States and US officials. The detainees alleged, among other claims, that the United States violated international law. Although the DC Circuit dismissed the suit on other grounds, Judge Randolph addressed the plaintiffs' claims under the ATS and highlighted that three circuit courts have held the ATS to not only confer jurisdiction but also create a cause of action. Judge Randolph concurred that the *Filartiga* line of cases is problematic and that in *Tel-Oren* the DC Circuit rejected *Filartiga*'s approach.

Private-Actor Cases

1. (1986). *Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988)*

Summary. A British plaintiff sued United Technologies Corp., among others, based on his two-year imprisonment and torture in Saudi Arabia. The plaintiff had been imprisoned following an attempt to flee Saudi Arabia and leave behind several unpaid claims against his company. The plaintiff asserted claims under the ATS as well as for false imprisonment, assault, and battery. The district court dismissed the case. In 1988, the Fifth Circuit affirmed the lower court's decision, holding that service of process had been insufficient with respect to all but one of the corporate defendants. The plaintiff failed to demonstrate that the remaining defendant committed a violation of the law of nations, since there was no evidence that it was responsible, directly or indirectly, for the plaintiff's incarceration.

2. (1987). *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987)

Summary. Two Argentine citizens brought action under the ATS for actions allegedly committed by military and police personnel under Suarez-Mason's command authority during the "dirty war." The plaintiffs sued for alleged violations of international law, namely torture, murder, summary execution, causing disappearance, and arbitrary detention. The court held that the ATS not only provides subject matter jurisdiction but also a cause of action.

Status. Under an extradition treaty between the United States and Argentina, the court found that Suarez-Mason was extraditable.

3. (1991). *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995)*

Summary. The plaintiffs, depositors of a failed international bank, brought a class action suit against 77 individuals, firms, and Abu Dhabi. The ATS claims were based upon allegations of fraud, breach of fiduciary duty, and misappropriation of funds. The plaintiffs argued that these claims were violations of international banking standards and, therefore, of the law of nations. The district court dismissed the case, and the plaintiffs appealed. On April 7, 1995, the Ninth Circuit affirmed the lower court's ruling and held that claims of fraud, breach of fiduciary duty, and misappropriation of funds are not breaches of the law of nations for purposes of the ATS.

4. (1993). *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995)

Summary. The plaintiffs, Croat and Muslim citizens of Bosnia-Herzegovina, brought a class action suit alleging atrocities committed by Bosnia-Serbian military forces under the command authority of Radovan Karadzic. The alleged atrocities included genocide, rape, torture, murder, and summary execution. Karadzic claimed, among other defenses, that he was not an official when the alleged atrocities were committed and that the ATS applied only to state actors. The Second Circuit rejected this defense (and others); *Kadic* was thus the first case to apply the ATS to private actors. The Second Circuit held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." On September 25, 2000, a jury awarded the plaintiffs $4.5 billion in damages, but the plaintiffs have little prospect of recovering much money.

5. (1993). *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001)

Summary. In a class action suit, the plaintiffs alleged human rights violations and environmental damages in Ecuador. Plaintiffs allege that from 1964 to 1992, a subsidiary of Texaco improperly disposed of waste while extracting oil from the Ecuadorian Amazon and that the pipeline subsequently leaked, damaging the environment. The district court originally dismissed the lawsuit in 1996, holding that the case should be heard in Ecuador. In 1998, the Second Circuit reversed and remanded the case to the trial court. In 2001, the trial court again dismissed the lawsuit on the grounds of *forum non conveniens*. The plaintiffs once again appealed the district court decision. On August 16, 2002, the Second Circuit affirmed the lower court's dismissal of the suit. See *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

6. (1996). *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999)*

Summary. The plaintiff, an Indonesian citizen, alleged that defendants were liable under the ATS and the TVPA for environmental abuses, human rights violations, and genocide, in connection with the defendants' copper, gold, and silver mining activities in Indonesia. Among other allegations, the plaintiff claimed that the defendants' private security force had acted in concert with the Indonesian government to violate international human rights. In April 1997, the district court dismissed the complaint and subsequently dismissed the plaintiff's second and third amended complaints. The district court held that the alleged genocide and indi-

vidual human rights violations were not specifically pleaded (with names, dates, and crimes); that the TVPA applied to individuals, not corporations; and that the environmental agreements cited by the plaintiff were not sufficient sources of customary international law to support an ATS claim. On November 29, 1999, the Fifth Circuit affirmed the lower court's dismissal of the complaint.

7. (1996). *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000)*

Summary. The plaintiffs, four former or current citizens of Nigeria, alleged violations of international, federal, and state laws in connection with the Nigerian government's activities in the Ogoni region of Nigeria during the 1990s. The plaintiffs claim that Royal Dutch Shell conspired with the Nigerian military government to arrest and convict nine members of a Nigerian opposition movement in violation of the international human rights law. In 1998, the district court dismissed the case on grounds of *forum non conveniens*. On appeal, the Second Circuit reversed the trial court's ruling.

Status. On February 28, 2002, the trial court dismissed two ATS claims by the plaintiff, Wiwa, for alleged violation of his right to life, liberty, and security of person, and for arbitrary arrest and detention. The trial court denied the motion to dismiss all the remaining claims. The court ruled that claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) could proceed against Shell and Royal Dutch Petroleum and that the former head of Shell's Nigerian subsidiary could be sued under the TVPA. The case now proceeds to discovery.

8. (1996). *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000)*

Summary. In a class action suit, Burmese plaintiffs alleged that Unocal was jointly and severally liable and/or vicariously liable for human rights abuses by the Burmese military in conjunction with the construction of a gas pipeline. The plaintiffs claimed that the defendants—through the Burmese military, intelligence, and/or police forces—engaged in forced relocation of villages and knowingly used forced labor in furtherance of the pipeline project. The plaintiffs argued that knowing participation in a commercial venture with an agency of a government with a record of human rights abuses is sufficient to establish liability for abuses by the military under either joint venture or vicarious liability theories. The plaintiffs alleged causes of action based on the ATS, TVPA, and various domestic torts. On August 31, 2000, the district court granted summary judgment

in favor of Unocal and ruled that the oil company could not be held liable under the ATS for the Burmese government's use of forced labor for the benefit of the pipeline construction. The plaintiffs appealed the district court's ruling to the Ninth Circuit on September 15, 2000. The plaintiffs refiled their state law claims in the state court in California, where the court denied the motion for summary judgment. A three-judge panel of the Ninth Circuit overturned the district court's ruling on September 18, 2002, establishing a lower standard for proving vicarious liability in "aiding and abetting" and sending the case back to the district court. See *Doe v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002).

Status. On February 14, 2003, the Ninth Circuit vacated the decision of the three-judge panel pending a rehearing of the case en banc. See *Doe v. Unocal Corp.*, 2003 U.S. App. LEXIS 2716 (9th Cir. 2003).

9. (1997). *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2001)*

Summary. Egyptian plaintiffs claimed that in 1962 their property was unlawfully seized by the Egyptian government because the plaintiffs were Jewish. The plaintiffs allege that in 1993, Coca-Cola purchased or leased the property knowing that it had been nationalized. The plaintiffs argued that because the Egyptian government seized their property as part of a national program of religious persecution, the seizure violated international law. The plaintiffs' sole allegation against Coca-Cola was that it acquired the property with the knowledge that it had been expropriated in violation of international law. The district court found that the complaint failed to plead a violation of international law by Coca-Cola and, therefore, the court did not have jurisdiction over the ATS claims.

Status. On December 7, 2000, the Second Circuit upheld the dismissal of ATS claims, but determined that the lower court had other bases for jurisdiction and remanded the case to the district court for further proceedings.

10. (1998). *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424 (D.N.J. 1999)*

Summary. The plaintiff sued Ford Motor Company and its German subsidiary, alleging use of slave labor in the subsidiary's factory during the Second World War. The district court dismissed the case, holding that (1) the ATS claims were time-barred because the TVPA 10-year statute of limitations had run out; (2) the ATS claims against the subsidiary were previously resolved in the course of post-war reparations agreements; and (3) the claims were barred by the political question doctrine. In September

1999, the plaintiffs appealed the lower court's decision but agreed in 2001 to dismiss their appeal.

11. (1999). *Bowoto v. Chevron* (N.D. Cal., No. C99-2506)*

Summary. Nigerian plaintiffs brought a class action lawsuit alleging that Chevron provided assistance to and participated in two Nigerian military raids in which alleged human rights abuses occurred: one on demonstrators at Chevron's oil rig and another against a village supporting the demonstrators.

Status. The defendants' motion to dismiss was denied on June 16, 2000, and the case is currently in discovery. The defendants filed a motion for summary judgment on February 28, 2003, and the summary judgment hearing will be held on May 23, 2003.

12. (1999). *Bano v. Union Carbide Corp.*, 273 F.3d 120 (2d Cir. 2001)

Summary. In this class action, plaintiffs are victims of a 1984 toxic gas disaster at a chemical plant in Bhopal, India, which resulted in thousands of deaths and over 200,000 injuries. Earlier, complaints filed in the Southern District of New York were dismissed in deference to the Indian government's efforts to reach a global resolution of claims. The litigation in India eventually resulted in a settlement agreement, approved by the Indian Supreme Court in 1991. The plaintiffs filed this action in 1999 to obtain further redress in US courts. The plaintiffs' ATS and environmental claims were dismissed on the grounds that they were fully litigated and settled in India.

Status. The Southern District of New York granted the defendants' motion to dismiss on August 28, 2000. On November 15, 2001, the Second Circuit vacated the district court's dismissal of the environmental claims but upheld dismissal of the ATS claims.

13. (2000). *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002)*

Summary. The plaintiffs filed a class action lawsuit against Rio Tinto, alleging that it acted in concert with the government of Papua New Guinea (PNG), forcefully evicted plaintiffs from their land, and destroyed the surrounding rainforest through its copper-mining activities in Bougainville, an island off the shore of PNG. The plaintiffs further allege that the

defendants provided support to PNG troops to suppress a civilian uprising and use force to reopen the copper mine, knowing that government troops were killing and abusing civilians. The plaintiffs further allege that Rio Tinto officials encouraged a blockade of food and essential medical supplies, resulting in deaths and injuries to the plaintiffs. They claim that Rio Tinto is liable under the ATS for violations of international norms pertaining to crimes against humanity, war crimes, racial discrimination, torture, cruel or inhuman and degrading treatment, and violations of environmental rights.

Status. On July 11, 2002, the court granted the defendants' motion to dismiss, invoking the political question doctrine. Along the way, the court noted, "the Ninth Circuit has stated that the ATS both confers federal subject matter jurisdiction and creates an independent cause of action for violation of treaties of the law of nations."

14. (2000). *Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003)*

Summary. In this consolidated appeal, the Ninth Circuit considered several Second World War era cases. The named plaintiff, Deutsch, was a Hungarian Jewish holocaust victim of the German Holocaust. Other plaintiffs were Chinese, Korean, and Filipino victims of Japanese war acts. Deutsch filed a claim against Turner Corp., a subsidiary of Hochtief AG, invoking a California statute allowing suits for Second World War slave labor victims. The Ninth Circuit held that the California statute was an unconstitutional intrusion on the foreign affairs powers of the United States. The Chinese, Korean, Filipino, and certain other plaintiffs from allied countries alleged that the Japanese corporate defendants forced them to work as prisoners of war without compensation during the Second World War. The plaintiffs alleged that the defendant corporations were liable under the ATS as well as under the cited (unconstitutional) California statute. The Ninth Circuit concurred with the district court, finding that forced labor violates the law of nations under the ATS. The court then applied the TVPA's 10-year statute of limitations to the ATS and held that the plaintiffs' ATS claims were time barred. The court further found that the Treaty of Peace between the Allies and Japan barred the claims of the Filipinos and other alliance citizens.

15. (2001). *Villeda v. Fresh Del Monte Produce, Inc.*, (S.D. Fla., No. 01-CIV-3399)*

Summary. The plaintiffs allege that Del Monte and its subsidiary, Bandegua, hired security forces in Guatemala to intimidate local union leaders in

order to influence an ongoing collective bargaining negotiation. The plaintiffs claim that the defendants are liable under the ATS for torture, kidnapping, unlawful detention, crimes against humanity, and denial of the right to associate and organize; and under the TVPA for torture, extrajudicial killing, and various domestic torts.

Status. The plaintiffs filed their complaint on August 2, 2001, in the US District Court for the Southern District of Florida. On March 19, 2003, the court denied the defendants' motions to dismiss for lack of subject matter jurisdiction, *forum non conveniens*, lack of personal jurisdiction, and failure to state claims upon which relief can be granted. The case is in discovery with jury trial scheduled for August 25, 2003.

16. (2001). *Arias v. DynCorp*, (D.D.C., No. 01-01908)*

Summary. In a class action, the plaintiffs claim that DynCorp sprayed toxic herbicides over the area in Ecuador where the plaintiffs live in order to kill cocaine and heroin crops. The plaintiffs allege that the spraying caused a variety of medical problems, some resulting in death, as well as destroyed crops and livestock. They claim that the defendants are directly responsible under the ATS for torture, crimes against humanity, and cultural genocide; and under the TVPA for extrajudicial killing, torture, and other domestic torts.

Status. The complaint was filed on September 11, 2001, in the US District Court for the District of Columbia. The defendants' motion to dismiss has been fully briefed and is awaiting a decision.

17. (2001). *Sinaltrainal v. Coca-Cola Co.*, (S.D. Fla., No. 01-CV-03208)*

Summary. Sinaltrainal, a Colombian trade union, and individual plaintiffs allege that Coca-Cola hired paramilitary units to terrorize and murder union organizers at bottling plants in Colombia. The plaintiffs allege that Coca-Cola and its affiliates are liable under the ATS, TVPA, RICO, and domestic tort law for human rights abuses including murder, kidnapping, unlawful detention, torture, denial of the right to organize, threats, and extortion. They further allege that Coca-Cola is vicariously liable for the acts of paramilitary units.

Status. The complaint was filed on July 20, 2001, in the US District Court for the Southern District of Florida. On March 5, 2002, the defendants filed a motion to dismiss the amended complaint.

18. (2001). *Flores v. Southern Peru Copper*, 2002 U.S. Dist. LEXIS 13013, CV-00-9812 (S.D.N.Y. July 16, 2002)*

Summary. Eight residents of Peru filed suit against Southern Peru Copper for alleged violations of rights to life, health, and sustainable development. The plaintiffs alleged that the defendant's environmental pollution from the mining and refinery in Peru caused them asthma and lung disease. The district court dismissed the suit because environmental pollution within a state's border is not prohibited under international law.

19. (2001). *Abdullahi v. Pfizer, Inc.*, 01 Civ. 8118, 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y., Sept. 17, 2002)*

Summary. The plaintiffs, Nigerian minors and their guardians, filed a class action lawsuit against Pfizer for alleged violations of international law resulting from Pfizer's administration of antibiotic products to treat bacterial meningitis, cholera, and measles. Pfizer moved to dismiss the complaint for failing to state a claim and *forum non conveniens*. The district court found that the plaintiffs have adequately stated a claim because, although the conduct alleged by the plaintiffs was not actionable under international law against private actors, Pfizer and Nigeria may be found to have acted as "joint actors" in administering the drug treatment. However, the district court dismissed the suit on *forum non conveniens* grounds because there was an adequate alternative forum for the lawsuit, Nigeria, and balancing the public and private interests also determined that the claims would be better litigated in Nigeria.

20. (2001). *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 01 Civ. 9882 (AGS), 2003 U.S. Dist. LEXIS 4085 (S.D.N.Y., Mar. 19, 2003)*

Summary. The plaintiffs, current and former residents of Sudan, filed a class action against Talisman Energy, a Canadian corporation, and the Republic of Sudan, alleging violations of international law. The plaintiffs alleged that the defendants collaborated in an oil exploration in Sudan and committed extrajudicial killings, war crimes, forcible displacement, rape, kidnapping, and enslavement. Talisman's motion to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, standing, *forum non conveniens*, comity, act of state, political question, and other reasons was denied. The court held that corporations may be held liable for violations of international law, and in particular, violations of *jus cogens*.

The court also found that the defendant corporation could be held liable under an "aiding and abetting" theory.

21. (2002). *Estate of Rodriguez v. Drummond Co., Inc.*, (N.D. Ala. 2002, No. CV-02-0665-W)*

Summary. The plaintiffs, legal representatives for the estates of three murdered Colombian trade union leaders, and the trade union Sintramienergetica allege that the trade union leaders were killed by agents or employees of the defendants who operate a coal mine and a supporting rail line and port in Colombia. The plaintiffs specifically allege that the defendant companies hired paramilitary security forces to silence the leaders of unions representing workers at the defendants' facilities by means of violence, murder, torture, and unlawful detention. The plaintiffs claim that the deaths of the trade union leaders are extrajudicial killings in violation of the ATS, TVPA, and international law.

Status. On May 30, 2002, the defendants filed a motion to dismiss. A hearing was held on September 17, 2002, and a decision is still pending.

22. (2002). *Doe v. Exxon Mobil Corp.*, (D.D.C., No. 01-CV-1357, 2002)*

Summary. The plaintiffs, 11 John and Jane Does, allege that Exxon Mobil is jointly and severally liable and/or vicariously liable for human rights abuses committed by the Indonesian military in the northern region of Aceh, Sumatra. The plaintiffs allege that the Indonesian military unit assigned to guard Exxon Mobil Oil Indonesia, Inc. facilities in Aceh committed human rights abuses in the course of fighting a civil war. Further, the plaintiffs allege that the corporation, knowing that the Indonesian military has a history of human rights abuses, hired the military to secure the area and provided logistical support. The plaintiffs advance ATS claims for murder, genocide, torture, kidnapping, and crimes against humanity; and TVPA claims for torture, extrajudicial killing, and various domestic torts.

Status. The defendants filed a motion to dismiss on October 1, 2001. On July 29, 2002, at the request of the court, the Legal Adviser to the Department of State, William H. Taft IV, submitted the government's view: "the Department of State believes that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism." The case is pending.

23. South Africa Apartheid Litigation*

Summary. In 2002, four cases were filed in the Southern and Eastern Districts of New York (S.D.N.Y. and E.D.N.Y.):

Ntsebeza v. Citigroup, Inc., no. 4712 (S.D.N.Y.)
Goniwe v. IBM Corporation, no. 5297 (S.D.N.Y.)
Digwamaje v. Bank of America, no. 6218 (S.D.N.Y.)
Khulumani v. Barclays National Bank Ltd., no. 02-5952 (E.D.N.Y.)

- The *Ntsebeza* plaintiffs have filed additional cases in other federal district courts, and more are on the horizon. The strategy of the attorneys is to use the multidistrict litigation (MDL) procedure to consolidate all the apartheid cases in a single district court, arguing that the *Ntsebeza* plaintiffs should control the litigation.
- With the exception of *Khulumani,* the cases are class actions. The plaintiffs are victims of apartheid-related race discrimination and other human rights abuses that occurred in South Africa between 1948 and 1993. The plaintiffs include (1) alleged victims of torture, forced relocation, forced labor, and other human rights abuses, and (2) surviving relatives of victims of torture and/or murder.
- The plaintiffs allege that the defendant corporations *supported* the system of apartheid (asserting conspiracy and "aiding and abetting" theories of liability; and joint action/symbiotic relationship theories of state action). They also assert that the defendant companies *benefited* from apartheid.
- The plaintiffs assert claims for compensatory and punitive damages under the ATS, TVPA, and federal common law. In most respects, damages are as yet unspecified, though one complaint asks $200 billion in compensatory damages in each of the two separate counts. The plaintiffs are represented by some combination of US and South African counsel. Most prominent among the plaintiffs' lawyers are Michael Hausfeld and Ed Fagan, who were involved in the Holocaust litigation in New York. Fagan's lawsuit against 34 MNCs asks for $100 billion (*Financial Times*, May 19, 2001, 11).
- Corporate signatories to the Sullivan principles feature prominently among named defendants. So far, named defendants cover more than 100 corporations and represent companies from all commercial sectors including:

Banking:	Citigroup, Bank of America, Barclays, UBS, and Deutsche Bank
Computers:	IBM and Unisys

Pharmaceuticals:	Bristol-Myers Squibb and Eli Lilly
Oil:	Exxon Mobil, British Petroleum, Royal Dutch/Shell, and Total
Automobiles:	Ford, General Motors, and Nissan
Mining:	Anglo-American, Newmont, and Rio Tinto
Consumer products:	Coca-Cola, Pepsico, Johnson & Johnson, and Procter & Gamble

Related Non-ATS Case

(1996). *United States v. Yousef*, 2003 U.S. App. LEXIS 6437 (2d Cir. 2003)

Summary. This case involved the criminal prosecution and conviction of three individuals tied to the 1993 World Trade Center bombing in New York City and a conspiracy to bomb US airliners in Southeast Asia. The defendants appealed their convictions. In discussing the relationship between customary international law and US law, the Second Circuit held that the practices of nations or treaties are the *primary evidence* of customary international law, and the work of scholars is merely further evidence of what customary international law *is*, not what it should be. The court concluded that "put simply, and despite protestations to the contrary by some scholars (or "publicists" or "jurists"), a statement by the most highly qualified scholars that international law is *x* cannot trump evidence that the treaty practice or customary practices of States is otherwise, much less trump a statute or constitutional provision of the United States at variance with *x*. . . . Accordingly, instead of relying primarily on the works of scholars for a statement of customary international law, we look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practice of States."

Table A.1 Summary of ATS cases

Region and actors involved	Types of abuse	US FDI in 2001 (billions of dollars)	US exports in 2001 (billions of dollars)	Number of cases		Status of cases		
				Class action	Individuals	Decided for plaintiff	Decided for defendant	Pending
Africa		12.6	10.9					
State Actor Defendants	Freedom of speech and political opinion			0	1	1	0	0
Private Actor Defendants	Arbitrary arrest and detention, human rights abuses, killing, war crimes, rape, kidnapping, enslavement, forcible displacement, torture, forced labor, murder, pharmaceutical			5	7	1	0	6
Asia		38.7	47.0					
State Actor Defendants	n.a.			0	0	0	0	0
Private Actor Defendants	Genocide, environmental pollution, forced labor and relocation, death, injury, killing, murder, kidnapping, torture, violation of habeas corpus			3	4	0	5	2

Europe		725.8[a]	150.2[a]					
State Actor Defendants	Deportation and death			1	0	0	1	0
Private Actor Defendants	Genocide, rape, torture, murder, execution, forced labor			2	1	1	2	0
Latin America		152.9	134.8					
State Actor Defendants	Torture, killing, kidnapping, execution, murder, arbitrary detention			0	3	2	0	1
Private Actor Defendants	Environmental pollution, extortion, torture, murder, arbitrary detention, kidnapping, death from toxic herbicides, killing			2	5	0	2	5
Middle East		7.7	8.5					
State Actor Defendants	Murder and injury			0	1	0	1	0
Private Actor Defendants	False imprisonment, assault, fraud, misappropriation of funds, religious persecution, expropriation, forced labor			1	2	0	2	1

n.a. = not available

a. FDI and trade with Europe is not at risk nearly to the same extent as FDI and trade with other regions.

Sources: Appendix A, US Department of Commerce BEA (2003), and US International Trade Commission Dataweb (2003).

Appendix B
Lessons from Asbestos

The history of mass asbestos litigation starkly illustrates the potential scope of unchecked ATS litigation. This appendix is based on the latest Rand Corporation report (Carroll et al. 2002) and a recent National Bureau of Economic Research study (White 2002).

The launch-pad for mass asbestos litigation—comparable to the 1980 *Filartiga* case for ATS litigation—was the 1973 *Borel* decision (*Borel v. Fibreboard*, Fifth Circuit Court of Appeals, 1973). In *Borel*, the court found asbestos manufacturers strictly liable for injury to workers on account of their exposure to asbestos.

By the early 1980s, some 21,000 plaintiffs had filed cases against 300 defendant corporations, and total costs (awards and legal expenses) then amounted to about $1 billion.

The cumulative number of plaintiffs has now ballooned to more than 600,000. Individual plaintiffs often sue multiple corporations, so total claims are much larger. Defendant corporations number in excess of 6,000, ranging across 73 (out of 83) US industries. As of 2002, total costs (awards and legal expenses) amounted to about $54 billion. Unless checked, total costs of current and future asbestos cases could range between $200 billion and $275 billion.

Unchecked Legal Innovations

Legal innovations are responsible for this explosive growth. Most of the innovations pre-dated asbestos litigation, but asbestos lawyers exploited them to the limit.

Strict Liability

Strict liability is an old tort doctrine. But it was the *Borel* decision that applied strict liability to asbestos. By the time *Borel* was decided, ample scientific evidence had demonstrated that asbestos fibers could cause death or serious injury. Some manufacturers continued to expose their workers to asbestos, even though they knew the health dangers. These firms would have been liable under a negligence theory. The doctrine of strict liability swept a far larger class of corporate defendants into the courtroom. Under this doctrine, it is no defense that the manufacturer took precautions against worker exposure or indeed was unaware that its workers might be exposed. To their regret, many firms far removed from asbestos manufacturing (such as food and beverage firms) are now learning that their machinery has asbestos parts and they are therefore liable for asbestos claims.

Longer Statute of Limitations

In the initial phase of litigation, state courts often barred claims because the asbestos exposure had occurred many years before, and courts held that the relevant statute of limitations required suits to be filed within two or three years of the exposure. Because asbestos injuries can have a long latency period, several state legislatures changed their statute of limitations to allow claims long after exposure, provided they were filed within two or three years after the worker had notice of injury.

Class Actions and Mass Screenings

By the mid-1980s, plaintiff law firms had perfected the use of class action suits on behalf of multiple individual plaintiffs against multiple corporate defendants. One key was mass X-ray screenings to determine whether past and present employees show evidence of asbestos exposure. The latest X-ray technology can detect very small amounts of asbestos fiber and tiny fibrosis scars, thereby enlarging the class of potential plaintiffs.

Broad Definition of Injury

Asbestos plaintiffs can be divided into three categories: those with malignant injuries, those with nonmalignant injuries, and those with traces of asbestos but no injury (in the commonsense meaning of "injury"). Many plaintiffs in the second and third categories lead lives that have not been and never will be impaired by asbestos exposure.

Malignant injuries. Asbestos exposure can cause mesothelioma (a fatal cancer of the lung and abdomen), and lung and other cancers. While asbestos is a unique cause of mesothelioma, factors besides asbestos also cause other cancers. In class action litigation, however, individualized judgments are seldom made as to the cause of other cancers.

Nonmalignant injuries. There are two main nonmalignant injuries associated with asbestos: asbestosis and pleural plaque. Asbestosis is a scarring of lung tissue resulting from high-level exposure to asbestos fibers. It has been relatively uncommon for decades; it may be asymptomatic or only mildly impairing. The most common asbestos injury, accounting for the vast majority of plaintiffs, is pleural plaque, a scarring of the membrane that covers the outside of the lungs. Mild cases of pleural plaque do not impair the activities of daily life. The plaque indicates the possibility of future malignancy but is not an inevitable precursor.

No injuries. In 1995, supervised by Federal Judge Jack Weinstein, the Manville Trust instituted an audit program of a random sample of claimants. Independent X-ray readers rejected 50 percent of the claimants for failing to show even subdiagnostic levels of fibrosis. In 2002, Federal Judge Charles Weiner dismissed without prejudice a large number of claims "brought on behalf of individuals who are asymptomatic as to an asbestos-related illness." Few state courts review class action claimants with the same rigor.

Claimants by degree of injury. Mesothelioma plaintiffs accounted for 10 percent of asbestos claims in the 1970s but now account for 3 to 4 percent of claims. Lung and other cancers accounted for 11 to 14 percent of claims in the 1970s and now account for 5 percent. Nonmalignant injury cases and no-injury cases accounted for 80 percent of claimants in the 1980s and 90 percent in the 1990s.

"Two disease" rule. In the early years, many asbestos plaintiffs with nonmalignant injuries were deterred from bringing suit because they feared a small award would bar a larger award at a later date in the event of a malignant cancer. Many state legislatures (e.g., Maryland, New York, and Texas) were persuaded to respond by permitting plaintiffs to bring a second lawsuit if and when a malignancy was diagnosed. Thousands of plaintiffs were then free to bring nonmalignant claims.

Wide Class of Defendants

Workers in "traditional" asbestos industries dominated the initial wave of claims: asbestos mining and manufacture, installation, shipyards, railroad

and automobile maintenance, construction, chemicals, and utilities. By 2001, however, trial lawyers invoked the strict liability doctrine to file more new claims against nontraditional industries (43,000 new claims) than traditional industries (40,000 new claims). Nontraditional industries include food and beverage, textiles, paper, glass, durable goods, etc. In these industries, lifetime employee exposure to asbestos is less severe, and since severity of injury is linked to cumulative exposure, average injury levels are lower. That does not mean that average monetary awards are less.

Joinder of Claims and Forum Shopping

Under the liberal jurisdictional statutes of some states (for example, Mississippi), numerous claims can be consolidated in a class action lawsuit, even though many plaintiffs and defendants have no connection with the state. All it takes is one Mississippi plaintiff suing the out-of-state defendant; other plaintiffs with claims against that defendant (but with no ties to Mississippi) can join the lawsuit. Using liberal joinder rules, trial lawyers have every incentive to consolidate their claims in friendly jurisdictions. The ten most attractive jurisdictions (accounting for 84 percent of recent cases filed in state courts) are Mississippi, Texas, Maryland, Pennsylvania, New York, Florida, Louisiana, Ohio, Virginia, and West Virginia. The choice of court can decisively affect the size of the average award. Mississippi plaintiffs, received on average, $1.64 million more in compensatory damages than plaintiffs in less friendly states; they also receive $570,000 more in punitive damages. For Texas plaintiffs, the extra payoffs are $467,000 in compensatory damages and $477,000 in punitive damages. Under the "full faith and credit" clause of the US Constitution, these awards are enforced by every state in the union.

Bifurcated Trials

In a bifurcated trial, the jury decides liability in phase one and damages in phase two (the order can be reversed). If the defendant corporations lose phase one (as usually happens), the judge uses his authority to encourage a settlement. Often the judge threatens to let the jury hear evidence on punitive damages—a prospect that forces defendants to the settlement table. The argument for bifurcated trials is judicial economy: overwhelmed by their caseload, judges have tried to shorten the litigation process. On average, however, a bifurcated trial increases the award by $628,000.

Bouquet Trials

To expedite class action cases, judges often permit bouquet trials of selected plaintiffs. For example, a jury may hear the facts concerning five or ten plaintiffs out of a class of 1,000. The cases heard may not be particularly representative. On average, the use of bouquet trials increases the award by $2.41 million.

The cumulative effect of these legal innovations—nearly all of them invented by judges, not legislatures—is to create a tort claims industry that feeds on its own success. Even though asbestos practically went out of use two decades ago when Johns-Manville was forced into bankruptcy, the number of claims and size of awards are projected to increase sharply. Unless checked by Congress, more than a million additional claims may be brought, and with rising average awards, the additional cost could reach $200 billion.

Uneven Justice

Legal innovations that have enticed 600,000 individual plaintiffs to the courthouse and awarded $54 billion of damages might be applauded if the outcome was even-handed compensation for injured individuals. The results are otherwise.

Few public verdicts, many secret awards. Out of hundreds of thousands of claims, only 527 trial verdicts have been reached, covering 1,598 plaintiffs. These few plaintiffs at least received individualized justice. In the rest of the cases, lawyers acting in secret determined individual awards. Given the vagaries of different courts and strategies of different law firms, huge discrepancies characterize awards for individuals with highly similar injuries.

Discrepancies defy rational explanation. An econometric study of some 5,500 awards found that the expected total damages for an individual plaintiff were $636,000, but the standard deviation was $1.78 million. Part of the variance is explained by differing degrees of injury, but individuals with the same injury often receive very different awards. For example, the mean award for successful asbestosis claims was $1 million in 1999 and $5 million in 2001.

Exceptionally large awards take the lion's share. Awards in excess of $1 million account for about 90 percent of the total dollar pot. Awards in excess of $10 million account for about 35 percent. In August 2001, a jury in El Paso, Texas, awarded $55.5 million to a mesothelioma victim

and his family. In October 2001, a Mississippi jury awarded $150 million to six workers with asbestosis claims. This is jackpot justice.

Most dollars are paid to "nonmalignant" claimants. Between 1991 and 2001, mesothelioma plaintiffs received 17 percent of total awards, other cancer plaintiffs received 18 percent, and "nonmalignant" plaintiffs received 65 percent. The legal dreadnought promises to skew payments even further against seriously injured plaintiffs. Based on the experience of the Manville Trust, created in bankruptcy to pay asbestos claims, future claimants with malignant disease may receive very small payments—simply because there is no money left.

Severe Collateral Damage

The number of firms dragged into bankruptcy through asbestos litigation is on the rise. The first three bankruptcies occurred in 1982. Throughout the 1980s, 16 bankruptcies resulted from asbestos claims. In the 1990s, the number was 19. Since January 2000, 22 more bankruptcies have occurred and 4 are pending. The loss to shareholders and disruption to communities are severe.

Payment of asbestos claims eats into retained earnings, depresses investment, and curtails job creation. According to Rand estimates, of the $54 billion of asbestos costs so far incurred, about $31 billion has come from insurance and $23 billion has come from corporate retained earnings (including the retained earnings of now bankrupt firms). A $1 reduction in retained earnings is associated with a 42-cent reduction in investment. Hence, corporate investment has been depressed by around $10 billion, and the associated noncreation of jobs is around 138,000. If the legal dreadnought runs its full course, unchecked by Congress, these figures could reach $33 billion of lost investment and 423,000 lost jobs.

With the spread of litigation to reach nontraditional industries, the costs are increasingly borne by firms with very little, if any, culpability. Being hit by an asbestos suit is like being hit by lightning. Not only is this fundamentally unfair but it also serves no deterrent purpose. When corporate leaders don't know that they are engaging in supposedly dangerous practices, there is little they can do to change course.

Formidable Lobby Against Reform

The worst part of the asbestos saga is that even though the abuses have been known for years, the enormous power of the trial bar has so far prevented the courts, state legislatures, and Congress from acting. However, there is a glimmer of hope in 2003 that Congress might cap future awards.

In the 1990s, defense expenses in asbestos litigation accounted for about 27 percent of total costs, plaintiff expenses (mainly attorney fees) accounted for about 30 percent, and individual plaintiffs received about 43 percent. In rough dollar terms, individual plaintiffs have so far netted about $23 billion, plaintiff attorneys and their experts have earned about $16 billion, and defense attorneys and their experts have earned about $15 billion.

All the lawyers—plaintiff and defense lawyers alike—have strong financial incentives to keep the mass tort game going. Defense lawyers are held in check by their clients. Plaintiff lawyers are not. Plaintiff lawyers have so far prevailed, defeating reform in the courts, state legislatures, and Congress.

Failure of pleural registries. In an effort to preserve the rights of plaintiffs who show signs of scarring yet delay the filing of claims until severe injury was diagnosed, some states established pleural registries. A plaintiff could satisfy the statute of limitations by filing with the registry but delay further legal action until the injury progressed. Registries threatened to delay or derail tens of thousands of cases and were resisted by plaintiff lawyers. They have fallen into disuse.

Failure of "global" settlements. Under the federal multidistrict litigation (MDL) procedure, mass tort litigation brought to the federal courts can be consolidated in a single court, which may try to reach a global settlement. The MDL procedure was applied to asbestos litigation in 1991, and all federal cases were consolidated in Judge Charles Weiner's court. Weiner's global settlement was, however, rejected by the US Supreme Court in 1997, and the effort at global resolution through the federal court system collapsed. Meanwhile, most new cases were filed in friendly state courts. Before 1998, 41 percent of asbestos cases were filed in federal courts; by 1998, the figure dropped to less than 20 percent.

State legislatures. State legislatures have, so far, only enacted laws that make it easier to bring asbestos claims. The two most noteworthy examples are longer statutes of limitations and the two-disease rule. State legislatures have not seriously addressed abuses. Indeed, if one state legislature enacted reforms, cases would simply migrate to other states.

US Congress. To quote the Rand report (Carroll et al. 2002, 90), "over the past several decades, numerous proposals to establish administrative schemes for asbestos victims have been introduced in Congress but none has garnered substantial support." To quote Robert J. Samuelson (Asbestos Fraud, *Washington Post,* November 20, 2002, A25): "Congress could end this lavish welfare program for lawyers. It could preempt state law on asbestos; it could set strict medical standards for damages; it could put a cap on lawyers' fees. It could channel more money to deserving

victims and reduce the total costs of asbestos settlements." Reform remains elusive because the trial bar is rich and powerful. Two recent bills introduced in the US House of Representatives would, however, limit the scope of asbestos litigation, and in particular, punitive damage awards. These are the Asbestos Compensation Act of 2003, H.R. 1114 (significantly limiting punitive damages), and the Asbestos Compensation Fairness Act of 2003, H.R. 1586 (eliminating punitive damages).