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## Some Legal Considerations for E.U. Based MNEs Contemplating High-Risk Foreign Direct Investments in the Energy Sector After *Kiobel v. Royal Dutch Petroleum* and *Chevron Corporation v. Naranjo*

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SOME LEGAL CONSIDERATIONS FOR E.U.-  
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THE ENERGY SECTOR AFTER *KIOBEL v.*  
*ROYAL DUTCH PETROLEUM AND*  
*CHEVRON CORPORATION v. NARANJO*

*Jeffrey A. Van Detta\**

INTRODUCTION

In a two-year span, two major multinational enterprises (MNEs) in the energy-sector—Chevron and Royal Dutch Petroleum—have experienced the opposite ends of a similar problem: The impact of civil litigation risks on foreign direct investments.<sup>1</sup>

For Chevron, it was the denouement of a two-decade effort to defeat a corporate campaign that Ecuadorian residents of a polluted oil-exploration region waged against it since 1993 and its predecessor, Texaco, first in the U.S. federal courts, then in the Ecuadorian courts.<sup>2</sup> After putting all of its litigation resources into ousting the jurisdiction of U.S. courts through a forum non

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<sup>1</sup> See, e.g., Christopher A. Whytock, *The Chevron-Ecuador Case: Three Dimensions of Complexity in Transnational Dispute Resolution*, 106 *AM. SOC'Y INT'L L.* 425 (2012).

<sup>2</sup> Judith Kimberling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevron-Texaco, and Aguinda v. Texaco*, 38 *N.Y.U. J. INT'L L. & POL.* 413 (2006).

conveniens dismissal conditioned on Chevron submitting to litigation in Ecuador,<sup>3</sup> Chevron's odyssey through the Ecuadorian court system resulted in a \$19 billion judgment,<sup>4</sup> which Chevron has fought as hard against in the Southern District of New York as it once did in that same court to get into Ecuador<sup>5</sup>—only to have the Second Circuit rebuff Chevron's effort to use New York's enactment of the Uniform Foreign Money Judgment Recognition Act (UFMJRA)<sup>6</sup> as a sword rather than a shield and the U.S. Supreme Court decline to take up the case.<sup>7</sup>

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<sup>3</sup> Jeffrey A. Van Datta, *Justice Restored: Using a Preservation-of-Court-Access Approach to Replace Forum Non Conveniens in Five International Product-Injury Cases*, 24 NW. J. INT'L L. & BUS. 53, 96–98 (2003); Jennifer K. Rankin, Note, *U.S. Laws in the Rainforest: Can a U.S. Court Find Liability for Extraterritorial Pollution Caused by a U.S. Corporation? An Analysis of Aguinda v. Texaco, Inc.*, 18 B.C. INT'L & COMP. L. REV. 221, 223–24 (1995). As another commentator described the impact of oil exploration and exploitation:

The boom of the petroleum industry was also not without environmental and human costs, which have led to the instant lawsuit. Estimates place pipeline spills at 16.8 million gallons of crude oil emptying into the Amazon River Basin. Additionally, almost 30 billion gallons of toxic by-products of the petroleum extraction were released into the environment.

Lisa Lambert, Case Note, *At the Crossroads of Environmental and Human Rights Standards: Aguinda v. Texaco, Inc. Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in U.S. Courts*, 10 J. TRANSNAT'L L. & POL'Y 109, 113 (2000) (footnotes omitted) (noting that “an unpublished study's preliminary findings state the overall rate of cancer in the Oriente [where oil exploration and exploitation occurred] is 2.3 times higher than residents of Ecuador's capital, Quito”).

<sup>4</sup> Charles N. Brower & Diane Brown, *From Pinochet in The House of Lords to the Chevron/Ecuador Lago Agrio Dispute: The Hottest Topics in International Dispute Resolution*, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 1, 27–31 (2013).

<sup>5</sup> Compare *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998), and *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994), with *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011), *rev'd sub nom.*, and *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

<sup>6</sup> N.Y. C.P.L.R. §§ 5301–5309. While New York's law is an enactment of the Uniform Foreign Money Judgment Recognition Act (UFMJRA), promulgated by the Uniform Law Commissioners in 1962, the

For Royal Dutch Petroleum, a litigation odyssey started after victims and families of victims of torture, extrajudicial—and even judicially-sanctioned—killing in the Niger delta filed lawsuits in the U.S. federal courts. It all but came to an end—simply awaiting transmission of the appellate mandate—after the U.S. Supreme Court ruled that 28 U.S.C. § 1350 (the Alien Tort Statute) did not apply extraterritorially to alleged torts “in violation of the law of nations” that are alleged to have transpired “outside the United States.”<sup>8</sup>

These cases hold lessons for both outside and in-house corporate counsel, yet they also deserve further scrutiny and integration into the business decision-making process that underlies foreign direct investments. This is particularly true for companies located in the euro zone today, which are challenged truly to “think outside of the box”<sup>9</sup>—and outside of the European Union<sup>10</sup>—in structuring

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New York Legislature in 1970 denominated the law as the “Uniform Foreign Country Money-Judgment Recognition Act,” which is in fact the title of a new 2005 uniform law that New York has yet to adopt. *Compare* Uniform Law Commission, Foreign-Country Money Judgments Recognition Act, *available at* <http://www.uniformlaws.org/ActSummary.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act>, *with* *Naranjo*, 667 F.3d at 234, 239–40 and N.Y. C.P.L.R. § 5301 (captioned “Recognition of Foreign Country Money Judgments”), § 5309 (“This article may be cited as the “Uniform Foreign Country Money-Judgments Recognition Act.”). Unfortunately, the usually astute Professor David Siegel did not comment upon this anomaly in his PRACTICE COMMENTARIES, N.Y. C.P.L.R. § 5301, C53101:1 (2013), and even the astute Chief Judge of the New York Court of Appeals has not picked up on the anomaly. *See* *Galliano, S.A. v. Stallion, Inc.*, 15 N.Y.3d 75, 79–80, 904 N.Y.S.2d 683, 930 N.E.2d 756 (2010).

<sup>7</sup> *Chevron Corp. v. Naranjo*, 133 S. Ct. 423 (2012).

<sup>8</sup> *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1660 (2013).

<sup>9</sup> *See* Patrick R. Hugg, *Redefining the European Union's Position in the Emerging Multipolar World: Strong Global Leadership Potential, Restrained by Asymmetry of Power and Dissonant Voices*, 20 TUL. J. INT'L & COMP. L. 145 (2011); Inese Vaidere, *The Impact of Regional and Cohesion Policy on the Economic Development of the EU*, ISSN 1822–8402 European Integration Studies, No. 5 (2011), *available at* <http://www.eis.ktu.lt/index.php/EIS/article/view/1092/1168>; Daniel Daianu, *Euro Zone Crisis and EU Governance: Tackling a Flawed Design and Inadequate Policy*

international growth from a now suddenly unstable home base.<sup>11</sup> Thus, the time is ripe to re-consider how E.U.-based multinationals might modify their decision-making templates for identifying and undertaking opportunities for foreign direct investment (FDI),<sup>12</sup> while tempering that perspective with an analysis of the potential for litigation over certain kinds of FDI—whether in the courts of the United States or in tribunals elsewhere.

Effective evaluation of FDI requires more than the application of business modeling and economic theory.<sup>13</sup> It requires critical evaluation of legal issues raised not only under the regulatory environment of the host state, but also under the legal system of the FDI investor's home state, and third-states to which the FDI investor has substantial connections. This inquiry is both inductive and

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*Arrangements*, CASE Network Studies and Analyses No. 433 (2012), available at <http://ssrn.com/abstract=1991162>; Stefano Micossi, *Misguided Policies Risk Breaking up the Eurozone and the EU* (Centre for European Policy Working Paper No. 260, 2011), available at <http://ssrn.com/abstract=1996457>.

<sup>10</sup> See Hugg, *supra* note 9; see also Vaidere, *supra* note 9; Daianu, *supra* note 9; Micossi, *supra* note 9.

<sup>11</sup> See, e.g., Alfredo Jimenez & Juan Bautista Delgado-Garcia, *Proactive Management of Political Risk and Corporate Performance: The Case of Spanish Multinational Enterprises*, 21 INT'L BUS. REV. 1029 (2012), available at <http://dx.doi.org/10.1016/j.ibusrev.2011.11.008> (noting that Spanish MNEs have displayed “a proactive use of political risk in the internationalization strategy . . . by taking advantage of their political capabilities in certain locations”).

<sup>12</sup> For examples of how the EU has benefitted from foreign trade even in the face of the Euro Zone crisis, see Rajnish Tiwari, *Bilateral Business Defies Financial Crisis and Economic Slowdown*, INDO-GERMAN ECON., May 2012, at 19–21, available at <http://ssrn.com/abstract=2083082>; Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment—How Will the New EU Competence on FDI Affect the Emerging Global Regime?*, 15 J. INT'L ECON. L. 51, 52 (footnotes omitted), available at <http://jiel.oxfordjournals.org/content/15/1/51>.

<sup>13</sup> See JOHN W. HEAD, GLOBAL BUSINESS LAW: THE BUSINESS AND PRACTICE OF INTERNATIONAL COMMERCE AND INVESTMENT 384 (Carolina Academic Press 2d ed. 2007). For an examination of the importance of FDI within a broader legal environment, see Kenneth C. Randall & John E. Norris, *A New Paradigm For International Business Transactions*, 71 WASH. U. L.Q. 599 (1993).

deductive.<sup>14</sup> It must also encompass the vantage points that the divergent experiences of the Chevron-Ecuador and Royal Dutch Shell-United States litigations—each having arisen from FDI projects—embrace.

To demonstrate critical evaluation of FDI-generated legal issues, we hypothesize for study in that one of the world's largest MNEs, France's Alstom, S.A., is considering an FDI in Israel's Golan Heights for one of Alstom's leading businesses: the manufacture, installation, and operation of wind-powered generation of electricity.<sup>15</sup> In Part I, this article explores some of the legal risks MNEs face from FDI-related issues, particularly litigation under municipal human rights-related laws of various jurisdictions, as related laws in France and the United States illustrate.<sup>16</sup> Political risks of Alstom's hypothesized Golan Heights wind project, and the availability of insurance against those risks, are also discussed in Part I. In Parts II and III, we examine the divergent experiences of the fourth and second largest energy companies in the world—Royal Dutch Shell and Chevron—as defendants in precedent-changing litigation under America's Alien Tort Statute (Shell's Nigerian FDI) and under the civil-law legal tradition in Ecuador (Texaco's FDI in Ecuador before its Chevron merger). In that discussion, we will examine two of the most recent developments in attempted FDI litigation-risk management. We will contrast Royal Dutch Shell's (surprisingly) *successful* defense of ATS litigation that has resulted in a landmark Supreme Court precedent that will effectuate a major

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<sup>14</sup> There are, of course, even more detailed ways to express this paradigm. See, e.g., *Conceptual Outline And Checklist Of Foreign Direct Investment Issues*, in DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES & MATERIALS, 446–47 (Aspen 2d ed. 2010).

<sup>15</sup> This hypothetical, and the business reasoning behind it, are fully discussed in Jeffrey A. Van Detta, *Politics And Legal Regulation in the International Business Environment: An FDI Case Study of Alstom, S.A.*, in *Israel*, 21 MIAMI BUS. L. REV. 1, 11–36 (2013).

<sup>16</sup> One of the most notable expressions of business community angst is GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 (Policy Analysis No. 70, Inst. for Int'l Econ., 2003) (note especially Ch. 1, entitled “Nightmare Scenario”).

curtailment of ATS suits against MNEs in the U.S. courts, with Chevron's unsuccessful initial effort to defeat enforcement of the huge environmental tort judgment rendered against it by Ecuador's Lago Agrio court—and Chevron's current efforts to defeat enforcement of that judgment by U.S. federal court litigation against the Ecuadorian plaintiff's American lawyer.<sup>17</sup>

## I. CRITICAL EVALUATION OF LEGAL ISSUES

### A. *THE ROLE OF LITIGATION RISK IN FDI DECISIONS—WITH A PARTICULAR EMPHASIS ON MUNICIPAL COURTS AND CORPORATE SOCIAL RESPONSIBILITY IMPLICATIONS*

Litigation is a tool of strategic business management, capable of deployment as a tool by which private parties or organizations use the municipal courts of various countries to control the activities of MNEs, including hobbling or even stopping particular FDI projects. This has certainly proven to be the case with FDIs in the Occupied Territories of Israel.<sup>18</sup> Such litigation is often viewed as a peculiarly American phenomenon; but other nations and their court systems are now among the forums hosting such disputes.<sup>19</sup>

In the following subsections, litigation in municipal courts of France and the United States arising from MNE activity, including

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<sup>17</sup> See, e.g., Patrick Radden Keefe, *Reversal Of Fortune: A Crusading Lawyer Helped Ecuadorians Secure A Huge Environmental Judgment Against Chevron. But Did He Go Too Far?*, THE NEW YORKER, Jan. 9, 2012, available at [http://www.newyorker.com/reporting/2012/01/09/120109fa\\_fact\\_keefe](http://www.newyorker.com/reporting/2012/01/09/120109fa_fact_keefe).

<sup>18</sup> See, e.g., Yishai Blank, *Legalizing The Barrier: The Legality and Materiality of the Israel/Palestine Separation Barrier*, 46 TEX. INT'L L.J. 309, 311 & n.8 (2011) (analyzing the "legal campaign against" the wall erected in the Occupied Territories).

<sup>19</sup> Indeed, a court in the Netherlands recently exercised what amounts to universal jurisdiction of the kind sought by foreign plaintiffs in American court cases. See *Dutch Courts Compensate Palestinian For Libya Jail*, BBC NEWS, Mar. 28, 2012, <http://www.bbc.co.uk/news/world-middle-east-17537597>.

FDIs, in other nations is examined, and the impact of such lawsuits on Alstom's hypothesized FDI in the Golan Heights is assessed.<sup>20</sup>

1. ALSTOM'S VULNERABILITY TO SUITS AT HOME OVER ITS FDI IN ISRAEL

An FDI factor that may not immediately come to mind is lawsuits in the home state(s) of an MNE. For an MNE that has the span of Alstom, this translates into legal entanglements in countries other than the host state. These entanglements portend both prolixity and costliness. The costs include not only the potential litigation, but also the difficulties that such lawsuits create for the MNE with investors and the public at-large, not to mention politicians in the home states who may seek to use the stage created by litigation against the MNE to pursue legislative or regulatory investigations.

Alstom's exposure to such suits is worth considering, particularly in light of a case brought in France against Alstom for alleged violations in Alstom's participation in the Jerusalem Light Rail Project.<sup>21</sup> The *Association France Palestine Solidarité* (AFPS) and the Palestinian Liberation Organization (PLO) sued Alstom and Veolia Transport, another contractor working on the Jerusalem Light Rail Project, in the French Courts, contending that they were collaborating, in violation of international law, through their work on building a tramway through the occupied territories in Israel.<sup>22</sup> The papers initiating the legal action in the French Court of Grand

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<sup>20</sup> For an examination of this hypothesized MNE from the perspective of possible litigation in Québec Province, Canada, see Van Detta, *supra* note 15.

<sup>21</sup> See, e.g., Wolfgang Kaleck, *From Pinochet To Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT'L L. 927, 972 & n.307 (2009). The railway opened in August 2011. See Harriet Sherwood, *Jerusalem's Long-Awaited Light Railway Splits Opinion*, THE GUARDIAN, Aug. 17, 2011, <http://www.guardian.co.uk/world/2011/aug/17/jerusalem-light-railway-opinion?INTCMP=SRCH>.

<sup>22</sup> Kaleck, *supra* note 21, at 972 n.307; see also Aurine Crémieu, Rubrique "En Mouvement" *Israel et Territoires Occupés*, LA CHRONIQUE, Mar. 1, 2006, [http://www.amnesty.fr/index.php/amnesty/s\\_informer/la\\_chronique/mars\\_2006\\_sommaire/israel\\_et\\_territoires\\_occup](http://www.amnesty.fr/index.php/amnesty/s_informer/la_chronique/mars_2006_sommaire/israel_et_territoires_occup).



Instance at Nanterre sought “to cancel the Israeli contract given to Alstom, which will provide the train carriages, and to Veolia Transport, the public transport operator.”<sup>23</sup> The French appeals court (*cour d’appel*) affirmed an interlocutory decision of the Nanterre court that the courts of France had subject matter jurisdiction over the claims asserting violation of international law, as well as over the claims asserted under France’s Civil Code;<sup>24</sup> that in and of itself is quite an important ruling, for it opens the French courts to future cases filed against Alstom and other MNEs alleging violations (or complicity in violating) international legal norms.

The litigation before the Nanterre court went on for four years, and while the court ultimately ruled that “neither the signature of the concession agreement by these companies and their subsidiaries, nor the route and operating conditions of the light rail system constituted a fault under Article 1382 of the French Civil Code,”<sup>25</sup> the significant fact is that the court viewed that it had jurisdiction over the case.<sup>26</sup>

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<sup>23</sup> Rory McCarthy & Angelique Chrisafis, *PLO Disputes Jerusalem Rail Plan*, THE GUARDIAN, Oct. 23, 2007, <http://www.guardian.co.uk/world/2007/oct/26/france.israel?INTCMP=SRCH>.

<sup>24</sup> See *French Appeals Court Confirms Jurisdiction over Alstom Case*, BDS MOVEMENT (Dec. 29, 2009), <http://www.bdsmovement.net/2009/fr-ench-appeals-court-confirms-jurisdiction-over-alstom-case-617>.

<sup>25</sup> *August & Debouzy Advise Veolia Transport on the Lawsuit Between Veolia, Alstom and the Palestine Liberation Organisation*, AUGUST & DEBOUZY AVOCATES, <http://www.august-debouzy.com/en/495/august-debouzy-advise-veolia-transport-lawsuit-between-veolia-alstom-and-palestine-liberation-or> (last visited Feb. 22, 2013).

<sup>26</sup> In March 2013, the *Cour d’appel de Versailles* affirmed this ruling of the Nanterre court. See Eugene Kontorovich, *Landmark French Ruling on West Bank Construction and International Law*, OPINIO JURIS (May 1, 2013, 10:30 AM), <http://opiniojuris.org/2013/05/01/guest-post-landmark-french-ruling-on-west-bank-construction-and-international-law/>. Some scholars have read the decision—currently available only in its original French—as holding “that construction of a light rail system in the Israeli-controlled West Bank by a French company does not violate international law” and “that only the Government of Israel, and not private parties, can violate the relevant provisions of the Geneva Convention.” *Id.* Other commentators read the decision more narrowly—“as international law orthodoxy *a la* Oppenheim—‘states only and exclusively are subjects of international law.’” *Id.* Among those commentators, some see the ruling as technical, as well as narrow:

[V]arious French and Israeli companies formed an Israeli corporation, which won a bid to build the light rail. There were thus two layers of contracts: the concession

contract between the State of Israel and the Israeli corporation (Citypass), and the agreements that existed between the Israeli corporation and the Israeli and French companies as shareholders in Citypass. The action in this case was brought against the French corporate shareholders. Very importantly, this was NOT a case of damages alleging the French shareholders' secondary liability for acts undertaken by Israel. Rather, this was a case to annul the contracts. Under French law, a contract can be annulled if its "cause" is illicit.

According to the French court, the primary prohibition of non-transfer applies to the occupying power. Thus, even assuming that the cause was illicit, it could only annul the concession contract between the State of Israel and the Israeli corporation. The Court refused to pierce the corporate veil and rule that the shareholders' agreements were invalid by "contamination."

Thus, this case is interesting for its refusal to pierce the corporate veil. It does not, however, have any relevance to the issue of whether natural or legal persons can be secondarily liable for acts of occupation. Given that the claim concerned the annulment of contract, the issue of secondary liability simply wasn't before the Court.

*Id.* In accord, another commentator has observed that the *Cour d'appel* "determined that because the State of Israel was not a party to the present litigation, the Court had to limit itself to the examination of contracts signed by Alstom itself (the construction contracts) and could not rule on the legality of the concession contract to which Israel was a party," and thus the *Cour d'appel* "refused to comment on the alleged illicit contractual purpose (the illegal occupation and 'colonization' of the West Bank), imputed to Israel by the plaintiffs." Milena Sterio, *French Companies May Build in the West Bank—An Assessment of the Versailles Court of Appeals Case*, OPINIO JURIS (May 8, 2013, 4:39 PM), <http://opiniojuris.org/2013/05/08/guest-post-french-companies-may-build-in-the-west-bank-an-assessment-of-the-versailles-court-of-appeals-case/>. That commentator also noted that the *Cour d'appel* "analyzed the plaintiffs' argument that, under customary law, multinational corporations should be held liable for violations of human rights," and "referred to American Alien Tort Claims Act litigation, and specified that these cases were not relevant for the purposes of the French case as they discuss the application of American, domestic law, and because some of

However, activists against Alstom still celebrated because the Jerusalem FDI recently claimed that the publicity and debate generated by their opposition were the cause of a failed Alstom bid to “build a high-speed railway on the Muslim pilgrim[age] route between Mecca and Medina in Saudi Arabia,” a project claimed to be worth \$10 billion.<sup>27</sup>

## 2. ALSTOM’S VULNERABILITY TO INTERNATIONAL CIVIL LITIGATION IN AMERICAN COURTS

Alstom’s greatest American litigation is an opaque and long-obscure law originating in the Judiciary Act of 1789 that established the federal court system. The law, now codified and known colloquially as the “Alien Tort Statute” (ATS), tersely provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>28</sup> The ATS has become a rallying point for anti-corporate activists seeking a forum for litigation against MNEs in U.S. federal courts,<sup>29</sup> and a bane of business organizations, who see the law being used as a stage upon which activists wage costly and protracted public relations campaigns against MNEs. These campaigns have created “a new

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them have ‘penal’ aspects.” *Id.* Obviously, more work remains for scholars seeking to understand the *Cour d’appel*’s decision within the context of the French civil-law tradition and present-day legal system.

<sup>27</sup> *BDS Claims Victory After Alstom Project Derails*, MA’AN NEWS AGENCY (Oct. 27, 2011), <http://www.maannews.net/eng/viewdetails.aspx?id=433036>. The activists also claim “Alstom suffered blows when a Swedish pension fund excluded it from its investment portfolio, as did the Dutch ASN Bank, due to involvement in Israel’s occupation of Palestinian land.” *Id.*

<sup>28</sup> 28 U.S.C. § 1350 (2006) (captioned “Alien’s Action for Tort). The U.S. Supreme Court has consistently appellated the statute “the Alien Tort Statute,” beginning with *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989), and continuing with *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). See *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 n.5 (9th Cir. 2007).

<sup>29</sup> *Part II: The ATS In The Modern Era—Corporate Accountability For Aiding And Abetting*, THE CENTER FOR JUSTICE & ACCOUNTABILITY, <http://www.cja.org/article.php?id=435> (last visited Feb. 24, 2013).

form of political risk”<sup>30</sup> to enterprises such as Alstom’s East Jerusalem Light-Rail Project, as well as our hypothetical Golan Heights wind farm project. “As a practical matter, plaintiffs choose to sue under the ATS to forum shop their way into a U.S. court in hopes of finding a more favorable forum in which to litigate their case,”<sup>31</sup> even if the litigation serves only to generate publicity.<sup>32</sup> For example, in *Corrie v. Caterpillar, Inc.*,<sup>33</sup> bulldozer sales to Israel were attacked under the ATS as allegedly aiding and abetting alleged human rights violations in the Occupied Territories when the bulldozers were used in constructing and expanding settlements.<sup>34</sup> While the courts ultimately dismissed the complaint against Caterpillar, they *did not find* (1) that corporations were inappropriate ATS defendants; (2) that the FDI of Caterpillar in Israel was outside of the ATS; or (3) that the ATS is inapplicable to extraterritorial conduct. Instead, solely because the U.S. government actually paid for Caterpillar’s sale of equipment to Israel, the federal court concluded that it could not “intrude into our government’s decision to grant military assistance to Israel, even indirectly by deciding this challenge to a defense contractor’s sales.”<sup>35</sup> *Corrie*, therefore, offers

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<sup>30</sup> Geoffrey Jones, *Multinational Strategies and Developing Countries in Historical Perspective* 34–35 (HARVARD BUS. SCHOOL, Working Paper No. 10-076, 2010), available at [www.hbs.edu/research/pdf/10-076.pdf](http://www.hbs.edu/research/pdf/10-076.pdf) (noting that “[t]he Act lay dormant for almost two hundred years, until in 1979 it was used against a Paraguayan police inspector living in the United States, who was accused of torturing and killing the son of a Paraguayan dissident in Paraguay,” to win “a \$10 million judgment, which was never paid”).

<sup>31</sup> Donald Earl Childress, III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 723 (2012).

<sup>32</sup> *Id.* at 725; see, e.g., *Bauman v. DaimlerChrysler*, 644 F.3d 909 (9th Cir. 2011), *reh’g en banc denied by a divided court*, 676 F.3d 774 (9th Cir. 2011) (O’Scannlain, J., dissenting from denial of rehearing en banc), *petition for cert. filed sub nom. DaimlerChrysler v. Bauman*, 80 U.S.L.W. 3461 (U.S. Feb. 06, 2012) (No. 11-965).

<sup>33</sup> 503 F.3d 974 (9th Cir. 2007).

<sup>34</sup> *Id.* at 1023–24.

<sup>35</sup> *Id.* at 983 (citations and footnotes omitted).

little comfort to Alstom.<sup>36</sup> A lawsuit challenging a Golan Heights wind farm project might well get more traction under the ATS, and subject Alstom to the considerable transactional costs attendant to American-style discovery and civil practice, the generation of negative public opinion and negative opinion among investors and analysts, and the costs of settlement—which corporate ATS defendants have incurred in more than a few cases—just to bring the legal proceedings to a definitive close.<sup>37</sup> Some U.S. courts have expressed concern that such use of ATS litigation “coerce[s] the payment of tens of millions of dollars in settlement, even where a plaintiff’s likelihood of success on the merits is zero,” and “[c]ourts should take care that they do not become instruments of abuse and extortion.”<sup>38</sup>

Indeed, the objective, it seems, of more than a few ATS suits filed against MNEs is to reset the context and terms of activism against the FDIs of those MNEs.<sup>39</sup> The effect of the ATS-litigation

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<sup>36</sup> Indeed, the Corrie family then unsuccessfully sued the state of Israel in the courts of that country. See, e.g., Harriet Sherwood, *Rachel Corrie’s Death Was An Accident, Israeli Judge Rules—Judge Finds No Fault In Military Investigation That Cleared Defence Force Of Responsibility For Protester Being Killed By Bulldozer*, THE GUARDIAN, Aug. 28, 2012, <http://www.guardian.co.uk/world/2012/aug/28/rachelcorrie-verdict-accident-judge>.

<sup>37</sup> And, as Professor Childress has noted recently, there have been ATS cases against corporations that have been tried to plaintiff’s verdicts. See Childress, *supra* note 31, at 713 n.25.

<sup>38</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 271 (2d Cir. 2011) (Jacobs, C.J., concurring in denial of rehearing); *accord*, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 116 (“Such civil lawsuits, alleging heinous crimes condemned by customary international law, often involve a variety of issues unique to ATS litigation, not least the fact that the events took place abroad and in troubled or chaotic circumstances. The resulting complexity and uncertainty—combined with the fact that juries hearing ATS claims are capable of awarding multibillion-dollar verdicts—has led many defendants to settle ATS claims prior to trial.”) Only a few ATS cases against corporations have been tried to plaintiff’s verdicts. Childress, *supra* note 31, at 713 n.25.

<sup>39</sup> Childress, *supra* note 31, at 725–26 (noting “the signaling value that is offered when bringing suit against a corporation for alleged violations of international law” because “no corporation wishes to be known as a human-rights abuser or violator of international law”); see also Julian Ku, *D’Amato Sues Hungarian Railways for Holocaust-Era Complicity*, OPINIO JURIS BLOG, (Feb. 17, 2010, 3:24 PM), <http://opiniojuris.org/2010/02/17/damato-sues->

risk on MNEs—whether U.S.-based<sup>40</sup> or foreign-based—is more than *de minimis*, and creates considerable problems for the United States, as well as for the MNEs.<sup>41</sup>

Thus, the *Corrie* case does not by any means preclude viable ATS lawsuits against other corporations, such as Alstom, which are working on projects sited in the Occupied Territories.<sup>42</sup> To the contrary, we need to place that case within a context that provides a perspective from which to assess the litany of claims that plaintiffs and their lawyers, along with persons and groups who advocate for human rights and environmental causes, and legal academics, have imagined in the thirty-three words of the ATS. Indeed, a commentator noted, “in the past [twenty] years, there have been 150 [ATS] lawsuits filed against corporations over their activities in about [sixty] countries.”<sup>43</sup> Examining just a small sampling of these suits shows just how attenuated they are, particularly in comparison to the increasingly scarce judicial resources available to handle those cases in either our federal or state courts, both systems overflowing with burgeoning civil, and constitutionally prioritized criminal, domestic dockets:

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hungarian-railways-for-holocaust-era-complicity/ (with link to the complaint); cf. *Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098, 1101 (S.D.N.Y. 1973).

<sup>40</sup> Jack L. Goldsmith & Alan O. Sykes, Commentary, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1137 (2007); see also *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 845 (7th Cir. 1999) (noting that the place of a foreign tort, not a U.S. courtroom, “is the place that has the greatest interest in striking a reasonable balance among safety, cost, and other factors pertinent to the design and administration of a system of tort law”).

<sup>41</sup> *Kiobel*, 642 F.3d at 270.

<sup>42</sup> See, e.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (en banc), *vacated and remanded on other grounds*, *Rio Tinto PLC v. Sarei*, No. 11-649, 2013 WL 1704704 (Apr. 22, 2013).

<sup>43</sup> Lawrence Hurley, *Supreme Court May Consider Whether Companies Can Be Sued Over Human Rights*, N.Y. TIMES, Aug. 11, 2011, <http://www.nytimes.com/gwire/2011/08/11/11greenwire-supreme-court-may-consider-whether-companies-c-23629.html>.

- (1) Burmese villagers sued over various human rights violations arising from the construction of the Yadana gas pipeline project in Myanmar;<sup>44</sup>
- (2) Nigerian domiciliaries sued over events that occurred on a Chevron offshore drilling platform in 1998, when Nigerian soldiers suppressed a protest against Chevron's environmental and business practices;<sup>45</sup>
- (3) Nigerian relatives of poet and activist Ken Wiwa sued Royal Dutch Petroleum over his arrest, prosecution, show trial, and execution in the wake of his opposition to Shell's oil exploration activities in the Niger Delta;<sup>46</sup>
- (4) Sudanese citizens' made allegations against a Canadian oil company concerning its purported assistance to the government in Sudan in the forced movement of civilians residing near oil facilities;<sup>47</sup>
- (5) Papua New Guinea residents sued an Anglo-Australian mining conglomerate over a 1988 revolt on the island of Bougainville in which Rio Tinto allegedly provided helicopters and vehicles to the

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<sup>44</sup> Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (denying motion to dismiss ATS claims against Unocal), *aff'd in part & rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed upon settlement*, 403 F.3d 708 (9th Cir. 2005), *vacating*, 110 F. Supp. 2d 1294 (C.D. Cal. 2004) (which had granted summary judgment to Unocal on plaintiffs' ATS and RICO claims).

<sup>45</sup> Bowoto v. Chevron Corp., 621 F.3d 1116 (9th Cir. 2010) (affirming defense judgment upon jury verdict finding no liability on ATS and other claims). *Bowoto* is the rare instance of an ATS case making it to trial.

<sup>46</sup> See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000). *Wiwa* is notable for almost making it to trial; the lawyers settled the case on the eve of a jury trial in the Southern District of New York. See Jad Mouawad, *Shell to Pay \$15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 1, 2009, at B1; Jad Mouawad, *Oil Industry Braces for Trial on Rights Abuses*, N.Y. TIMES, May 22, 2009, at B1.

<sup>47</sup> Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009).

Government, which is alleged to have killed 15,000 people;<sup>48</sup>

(6) Peruvian residents and representatives of deceased residents sued an American mining company alleging that pollution from mining company's Peruvian operations had caused severe lung disease;<sup>49</sup>

(7) Colombian citizens, the family members of trade unionists, banana-plantation workers, political organizers, social activists, and others tortured and killed by paramilitary organizations operating in Colombia, sued an American MNE for made-payments to Colombian terrorist organization in exchange for protection of workers, thereby providing the terrorist organization with weapons, ammunition, and other supplies;<sup>50</sup>

(8) Relatives of alleged victims of extrajudicial killings in Sri Lanka brought action against sitting President of Sri Lanka;<sup>51</sup>

(9) Victims and families of victims of terrorist attacks committed in Israel sued a Jordanian bank for allegedly providing financial services to terrorist organizations;<sup>52</sup>

(10) Mexican citizens sued MNEs over workplace safety violations arising from methane explosion at

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<sup>48</sup> *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (en banc), *vacated and remanded on other grounds*, *Rio Tinto PLC v. Sarei*, No. 11-649, 2013 WL 1704704 (Apr. 22, 2013).

<sup>49</sup> *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

<sup>50</sup> *In re Chiquita Brands Int'l, Inc. Alien Tort Statute and Shareholder Derivative Litigation*, 792 F. Supp. 2d 1301 (S.D. Fla. 2011).

<sup>51</sup> *Manoharan v. Rajapaksa*, 711 F.3d 178 (D.C. Cir. 2013). Although brought under TVPA, rather than ATS, the allegations here are like those brought in ATS cases involving sitting members of foreign governments.

<sup>52</sup> *Linde v. Arab Bank, PLC*, 706 F.3d 92 (2d Cir. 2013).



Pasta de Conchos mine in the State of Coahuila, Mexico;<sup>53</sup>

(11) Holocaust survivors and heirs of other Holocaust victims sued banks alleging that the banks participated in expropriating property from Hungarian Jews during the Holocaust;<sup>54</sup>

(12) Holocaust survivors and heirs of other Holocaust victims sued Hungarian National Railways alleging that Railways participated in expropriating property from Hungarian Jews during the Holocaust;<sup>55</sup>

(13) Widows of former Presidents of Rwanda and Burundi, who were killed during their presidencies when surface-to-air missiles brought down aircraft carrying them over Rwandan capital, sued the President of Rwanda, seeking to hold him liable;<sup>56</sup>

(14) Colombian citizens sued Coca-Cola Corporation alleging Coca-Cola bottlers in Colombia collaborated with Colombian paramilitary forces in "the systematic intimidation, kidnapping, detention, torture, and murder of Colombian trade unionists";<sup>57</sup>

(15) Allegations by family, formerly citizens of Egypt and now emigrated to Canada, that Coca-Cola had been making millions of dollars annually in profits by exploiting, through "Coca-Cola Egypt," property that Coca-Cola had, before 1965, leased from the Bigio family, at which time the property was confiscated by the Egyptian government in Nasser's anti-Jewish program of

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<sup>53</sup> Diaz v. Grupo Mexico Inc., 487 Fed. Appx. 366 (9th Cir. 2012); *see also* Brief of Appellants, Diaz v. Grupo Mexico Inc., 487 Fed. Appx. 366 (9th Cir. 2012) (No. 11-15848), 2011 WL 3019825.

<sup>54</sup> Abelesz v. OTP Bank, 692 F.3d 638 (7th Cir. 2012).

<sup>55</sup> Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012).

<sup>56</sup> Habyarimana v. Kagame, 696 F.3d 1029 (10th Cir. 2012).

<sup>57</sup> Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009), *abrogated on other grounds by* Mohamad v. Palestinian Auth., 132 S.Ct. 1702, 1706 & n.2 (2012).

religious persecution, used by a government-owned company called ENBC that purportedly leased it from a government-owned insurance company, and, in 1994, placed under Coca-Cola's control when Coca-Cola purchased a substantial interest in ENBC and promptly renamed it, "Coca-Cola Egypt",<sup>58</sup>

(16) Citizens of South Africa sued multinational corporations that purportedly collaborated with the government of South Africa in maintaining apartheid, including claims filed against the three automakers—Daimler, Ford, and GM—alleging that they aided the apartheid regime by selling armored military vehicles that the Apartheid government used to violently suppress and terrorize South Africa's black population. Furthermore, the citizens claim that the corporations collaborated with South African security forces, providing information that was used to facilitate arrests, harassment, and torture of employees who were active in the struggle against apartheid and claim that IBM provided the Apartheid government with the equipment to generate race-based identity documents that stripped black South Africans of their nationality and citizenship,<sup>59</sup>

(17) Former Ukrainian Prime Minister Yulia Tymoshenko and political allies sued a Swiss corporation which allegedly—as retribution for Tymoshenko's eliminating the corporation from the Ukrainian natural gas trade—paid illegal kickbacks to the Yanukovich government in Ukraine to file criminal charges against

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<sup>58</sup> *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000); *see also* *Bigio v. Coca-Cola Co.*, 448 F.3d 176 (2d Cir. 2006); *Bigio v. Coca-Cola Co.*, 675 F.3d 163 (2d Cir. 2012).

<sup>59</sup> *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007).

Tymoshenko and other former government officials, to subject her to a politically-motivated “show trial” in Ukraine, and to incarcerate her in Ukraine since August 2011;<sup>60</sup>

(18)A Chinese dissent sued the Communist Party of China, People's Republic of China, and individual Chinese officials, claiming injury “with regard to the Tiananmen Square massacre, Defendants' policies towards overseas dissidents, . . . the alleged repressions of Wang Bingzhang and Yang Gianli,” the “abridgement of his ‘free association’ right with Wang, who is imprisoned,” and “allegations of harassment, violation of his free-speech rights, and interference with his family relationships.”<sup>61</sup>

Commentators have expressed even more ambitious plans for using the ATS in ways that are even further afield—as the basis for internationalizing environmental law;<sup>62</sup> as a basis for transnational

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<sup>60</sup> *Tymoshenko v. Firtash*, No. 11–CV–2794 (KMW), 2013 WL 1234943 (S.D.N.Y. Mar. 27, 2013); *see also* *Tymoshenko v. Firtash*, No. 11–CV–2794 (KMW), 2013 WL 1234821 (S.D.N.Y. Mar. 26, 2013); *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008). In *Chowdhury*, the individual plaintiff and his corporate employer, and its corporate shareholder, all citizens of Bangladesh, allege that the defendants—a Mauritius corporation and an individual U.S. citizen “with a role in [the Mauritius corporation] that he has variously described as chairman of the board, owner, or representative”—“to gain an advantage in a business dispute between the parties, made a false complaint of criminal conduct by plaintiffs to the Bangladeshi police,” as a result of which the individual plaintiff was arrested, incarcerated, and tortured by Bangladeshi police authorities in Bangladesh. *Id.* at 377–78.

<sup>61</sup> *Yaodi Hu v. Communist Party of China*, No. 1:12–CV–1213, 2013 WL 634719 (W.D. Mich. Feb. 20, 2013), *adopting report & recommendation of magistrate judge reported at* 2012 WL 7160373 (W.D. Mich. Nov. 20, 2012).

<sup>62</sup> *See* Sarah M. Morris, *The Intersection of Equal and Environmental Protection: A New Direction for Environmental Alien Tort Claims after Sarei and Sosa*, 41 COLUM. HUM. RTS. L. REV. 275, 275 (2009); Xiuli Han, *ATCA As An Avenue Of Overseas Environmental Protection And Its Implication To China's Overseas Investors*, 6(2) FRONTIERS OF LAW IN CHINA 219 (June 2011).

product liability law;<sup>63</sup> as a means of creating a transnational civil cause of action that parallels the criminal sanction of the Foreign Corrupt Practice Act;<sup>64</sup> as a vehicle for bringing claims against religious institutions (such as the Roman Catholic Church by persons claiming to be aggrieved by sacerdotal sexual abuse allegedly tolerated by the Church)<sup>65</sup> or against secular institutions over religious issues<sup>66</sup> (such as claims by Guantanamo detainees that they have been subjected to religious harassment while in custody),<sup>67</sup> as a platform for child-soldiers in foreign conflicts to sue arms manufacturers,<sup>68</sup> for Korean and other Asian women forced into sexual slavery by the occupying Japanese Imperial Army during World War II,<sup>69</sup> for foreign workers in “sweatshops” located in foreign countries,<sup>70</sup> and for Iraqis to sue the U.S. government and private contractors in Iraq for denying “Iraqis the same freedom of

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<sup>63</sup> See Joel Slawotsky, *International Product Liability Claims under the Alien Tort Claims Act*, 16 TUL. J. INT’L & COMP. L. 157 (2007); Joel Slawotsky, *Liability For Defective Chinese Products Under The Alien Tort Claims Act*, 7 WASH. U. GLOBAL STUD. L. REV. 519 (2008).

<sup>64</sup> Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT’L L. 385 (2010).

<sup>65</sup> *Rodriguez v. Mahony*, No. CV 10-02902-JST (JEMx), 2012 WL 1057428 (C.D. Cal. Mar. 26, 2012).

<sup>66</sup> See, e.g., Chad G. Marzen, *Religion and the Alien Tort Statute*, 1 CREIGHTON INT’L & COMP. L.J. 55 (2011).

<sup>67</sup> See *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008).

<sup>68</sup> See Nancy Morisseau, Note, *Seen But Not Heard: Child Soldiers Suing Gun Manufacturers Under The Alien Tort Claims Act*, 89 CORNELL L. REV. 1263 (2004).

<sup>69</sup> See Susan Jenkins Vanderweert, Comment, *Seeking Justice For “Comfort” Women: Without An International Criminal Court, Suits Brought By World War II Sex Slaves Of The Japanese Army May Find Their Best Hope Of Success In U.S. Federal Courts*, 27 N.C. J. INT’L L. & COM. REG. 141 (2001).

<sup>70</sup> See Debra Cohen Maryanov, Note & Comment, *Sweatshop Liability: Corporate Codes Of Conduct And The Governance Of Labor Standards In The International Supply Chain*, 14 LEWIS & CLARK L. REV. 397 (2010).

the press that their American counterparts enjoy,”<sup>71</sup> as a tool for addressing “egregious international corporate fraud,”<sup>72</sup> “financial crime,”<sup>73</sup> and violations of “labor rights,”<sup>74</sup> as a vehicle for claims of harm from air pollution,<sup>75</sup> global warming,<sup>76</sup> and rising sea levels,<sup>77</sup> and as a platform to assert claims against the U.S. Navy and U.S. government for alleged sonar-caused harm to whales and other sea mammals.<sup>78</sup>

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<sup>71</sup> Brenner A. Allen, Comment, *A Cause Of Action Against Private Contractors And The U.S. Government For Freedom Of Speech Violations In Iraq*, 31 N.C. J. INT’L L. & COM. REG. 535, 536–37, 559–73 (2005).

<sup>72</sup> See Joel Slawotsky, *The New Global Financial Landscape: Why Egregious International Corporate Fraud Should Be Cognizable under the Alien Tort Claims Act*, 17 DUKE J. COMP. & INT’L L. 131 (2006); see also Joel Slawotsky, *Are Financial Institutions Liable For Financial Crime Under The Alien Tort Statute?* (2013), ExpressO, [hereinafter *Are Financial Institutions Liable?*], available at [http://works.bepress.com/joel\\_slawotsky/1](http://works.bepress.com/joel_slawotsky/1) (article currently unavailable for download).

<sup>73</sup> See *Are Financial Institutions Liable?*, *supra* note 72.

<sup>74</sup> See Wesley V. Carrington, Note, *Corporate Liability for Violations of Labor Rights under the Alien Tort Claims Act*, 94 IOWA L. REV. 1381 (2009); Grace C. Spencer, *Her Body Is a Battlefield: The Applicability of the Alien Tort Statute to Corporate Human Rights Abuses in Juarez, Mexico*, 40 GONZ. L. REV. 503 (2004–2005); Sarah J. Adams Lien, *Employer Beware? Enforcing Transnational Labor Standards In The United States Under The Alien Tort Claims Act*, 6 J. SMALL & EMERGING BUS. L. 311 (2002).

<sup>75</sup> See Ajmel Quereshi, *The Search For An Environmental Filartiga: Trans-Boundary Harm And The Future Of International Environmental Litigation*, 56 HOW. L.J. 131, 157–63 (2012).

<sup>76</sup> See Mini Kaur, *Global Warming Litigation Under The Alien Tort Claims Act: What Sosa v. Alvarez Machain And Its Progeny Mean For Indigenous Arctic Communities*, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 155 (2006).

<sup>77</sup> See RoseMary Reed, *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?*, 11 PAC. RIM L. & POL’Y J. 399, 427 (2002); Jon M. Van Dyke et al., *Whales, Submarines, and Active Sonar*, 18 OCEAN YEARBOOK 330, 359–63 (2004), available at [www.mmc.gov/sound/internationalwrkshp/pdf/vandykeetal.pdf](http://www.mmc.gov/sound/internationalwrkshp/pdf/vandykeetal.pdf) (suggesting the plausibility of Alien Tort Statute claims for harming marine mammals with active sonar).

<sup>78</sup> See Daniel Inkelas, *Security, Sound, And Cetaceans: Legal Challenges To Low Frequency Active Sonar Under U.S. and International Environmental Law*, 37 GEO. WASH. INT’L L. REV. 207, 247 n.254 (2005); Van Dyke et al., *supra* note 77.

In the face of such cases that do not come close even to satisfying “six degrees of Kevin Bacon,” it is no small irony that in cases where individual aliens within U.S. territory claimed that state-level officials committed torts against them by detaining them without being informed of the requirement of consular notification and access under Article 36(1)(b)(3) of the Vienna Convention on Consular Relations, the federal courts have rejected those claims—which would seem at the historic core of the ATS, on the grounds the norm at issue—one that prohibits the detention of a foreign national with informing them of rights to consular notice and access—was insufficiently universal to support a claim under the ATS.<sup>79</sup>

However, as discussed below, the U.S. Supreme Court in April 2013 issued its second major ATS decision, and one that will have a very substantial impact on the assessment of future litigation risks arising from ATS litigation. We examine that decision, and assess the new risk landscape in Part III, *infra*.

B. LEGAL ASPECTS OF THE POLITICAL RISK INHERENT IN ALSTOM’S  
CHOICE OF A GOLAN HEIGHTS FDI

1. SYRIA’S CLAIMS TO THE GOLAN HEIGHTS

The politics of the Golan Heights creates practical legal problems that Alstom cannot ignore. Israel wrestled the Golan Heights territory from Syria in the course of 1967’s Six-Day War.<sup>80</sup> After the subsequent, and brief, 1973 conflict between Syria and Israel and a 1974 “disengagement agreement,” or cease-fire, the Golan Heights (except 100 square kilometers ceded back in 1974) remained in a legal limbo but a practical stasis.<sup>81</sup> The Golan Heights Law, enacted by Israel’s Parliament in 1981, changed that status by applying Israeli law, jurisdiction and administration to the Golan

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<sup>79</sup> See, e.g., *Mora v. New York*, 524 F.3d 183 (2d Cir. 2008); *Karboau v. City of Portland*, 498 Fed. Appx. 747, (9th Cir. 2012).

<sup>80</sup> Preface to *On The Legal Status Of The Golan Heights: Application Of Israeli Law Or Annexation?*, 20 BROOK. J. INT’L L. 331 (1994).

<sup>81</sup> See Muhammad Muslih, *The Golan: Israel, Syria, and Strategic Calculations*, 47 MIDDLE EAST J. 611, 621, 625–27 (1993).

Heights, which Syria complained to the U.N. Security Council constituted annexation in violation of international law, and the U.N. Security Council and General Assembly rebuked.<sup>82</sup> However, the actions and reactions at that point were more symbolic than substantive, and a new stasis emerged.<sup>83</sup>

Since the early 1980s, the dispute over Israel's development of the Golan Heights has not been as "hot" as the disputes over the development of Jerusalem and the West Bank. Syria did not concede its claims, and remained concerned about the commanding vista the Heights have over Damascus; Israel did not budge on its insistence that the return of any portion of the Golan Heights must be met by Syrian recognition of Israel and accession to Israeli-security demands.<sup>84</sup> During stirrings of a possible land-for-peace-and-recognition deal in the early 1990s, the United States attempted to facilitate dialogue between Hafez al-Assad (Syria's President 1971–2000), and Yitzhak Rabin (Israel's Prime Minister 1992–1995).<sup>85</sup> However, now that the "Arab Spring," which swept from Libya to Egypt, created civil war in Syria,<sup>86</sup> the stasis that has remained in effect since 1973 is entering uncharted territory. It is difficult to predict whether—and if so, to what degree—the post-Assad Syria that emerges from the current civil war will be a military threat to Israel or to its occupation of the Golan Heights.<sup>87</sup>

While the Druze populace left behind in the Golan Heights under the authority of Israel largely continues to identify with both

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<sup>82</sup> *Id.* at 624; see also Asher Maoz, *The Application of Israeli Law to the Golan Heights is Annexation*, 20 BROOK. J. INT'L L. 355, 386–88 (1994); Leon Sheleff, *The Application of Israeli Law to the Golan Heights is not Annexation*, 20 BROOK. J. INT'L L. 333 (1994).

<sup>83</sup> See, e.g., Sheleff, *supra* note 82 at 337–38.

<sup>84</sup> See Muslih, *supra* note 81; Maoz, *supra* note 82; Sheleff, *supra* note 82.

<sup>85</sup> See Muslih, *supra* note 81; Maoz, *supra* note 82; Sheleff, *supra* note 82; see also Clyde Haberman, *Rabin Hints Peace Could Cost Golan*, N.Y. TIMES, Apr. 22, 1994, <http://www.nytimes.com/1994/04/22/world/rabin-hints-peace-could-cost-golan.html>.

<sup>86</sup> *Towards The Endgame: The World Should Start Preparing For What Comes After Syria's President Bashar Assad*, THE ECONOMIST, July 21, 2012, at 9.

<sup>87</sup> Isabel Kershner, *Buqata Journal: Echoes of Syria's War In The Golan Heights*, N.Y. TIMES, Aug. 8, 2012, at A6.

Syria and the Assad family,<sup>88</sup> how they will react to these changes in the long run is unclear, because pronounced divisions have arisen within the Druze community.<sup>89</sup> Viewing the situation more holistically, it remains equally unclear whether a breakdown in the Assad autocracy will result in problems of sabotage, terrorism, and other destabilization along the buffer that the Golan Heights provides between Syria and Israel.<sup>90</sup> These worries include the possibility of fleeing Syrian refugees trying to enter the Golan Heights, and Assad's missile and chemical weapons arsenal falling into the wrong hands.<sup>91</sup>

While Israel has made it plain that it does not want to ignite a regional war by unilateral intervention, and that it prefers coordinated international action, the Israeli government has not sought to secret the fact that it has contingency plans for military strikes against Syria's chemical weapons storehouses and military convoys suspected of transporting chemical weapons from those storehouses.<sup>92</sup> Though the Golan Heights is quiet today—and the blades of wind-turbines may turn unimpeded in the winds of the Heights—the situation in Syria grows more volatile with each passing day, and the risk to people and property in the Golan Heights, as in other border areas with Syria, grows proportionately.<sup>93</sup> Even if the conflict is contained and the fears of terrorist or

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<sup>88</sup> *Golan Druze start to turn against Syria's Assad*, FOX NEWS (Jul. 28, 2012), <http://www.foxnews.com/world/2012/07/28/golan-druze-start-to-turn-against-syria-assad/>.

<sup>89</sup> *Id.*; see also Kershner, *supra* note 87, at A6; David Greenfield, *Will Assad's Fall Secure Israel's Golan Heights?*, FRONTPAGE MAG, Oct. 6, 2012, <http://frontpagemag.com/2012/dgreenfield/will-assads-fall-secure-israels-golan-heights/>.

<sup>90</sup> Yolande Knell, *Syria crisis felt in Israel and occupied Golan Heights*, BBC NEWS—MIDDLE EAST, Aug. 2, 2012, <http://www.bbc.co.uk/news/world-middle-east-19017502>.

<sup>91</sup> *See id.* (describing Israeli concerns as of August 2012).

<sup>92</sup> *Id.* For an excellent, regularly updated summary on the events in Syria surrounding the end of the Assad regime and the escalation of an internal civil war, see *Times Topics: Bashar al-Assad*, [http://topics.nytimes.com/top/reference/timestopics/people/a/bashar\\_al\\_assad/index.html](http://topics.nytimes.com/top/reference/timestopics/people/a/bashar_al_assad/index.html).

<sup>93</sup> *See Times Topics, supra* note 92.



insurrectionist infiltration along with the nightmares of chemical and biological weapons falling into their hands are abated, MNEs with the kinds of FDIs in the Golan Heights as Alstom is considering in our hypothetical FDI problem still must worry about the status of the investment in the wake of a new government that may, once it is on its feet, take up the return of the Golan Heights as a central theme.<sup>94</sup>

If the Golan Heights were turned over to a future Syrian government, the question for Alstom might well become whether their FDIs in the Heights—such as the wind-turbine farm that is the hypothesis of this article—will remain in the MNEs' possession and control, or whether the entire investment would be expropriated.

In addition, Alstom's ties to the United States in our hypothetical FDI might prove to be disadvantageous if the Golan Heights were to revert to Syrian control, even in the absence of an expropriation. Because the U.S. government designated Syria as a state sponsor of terrorism, Syria has been subject to the U.S. Department of Commerce's Export Administration Regulations (EAR) for over thirty years.<sup>95</sup> U.S. businesses find that FDIs in Syria are impracticable, due to the EAR prohibitions on the export of almost all U.S. products to Syria, and due to other restrictions, such as the Grassley Amendment's prohibitions on taking tax credits for taxes paid in Syria and the Syria Accountability Act (SAA) of 2004's authorization of the President to prohibit, under authority of the SAA, all U.S. business and investment activity in Syria at any time.<sup>96</sup>

As serious as the risks from Syrian civil war and an unpredictable aftermath may be,<sup>97</sup> another shadow looms over a wind-power FDI in Israel: the palpable potential for an armed

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<sup>94</sup> See, e.g., Fred Kaplan, *The Syrian Endgame: There Are No Guarantees. But In Almost Every Scenario, The Violence Will Persist*, SLATE, July 20, 2012, [http://www.slate.com/articles/news\\_and\\_politics/war\\_stories/2012/07/whether\\_bashar\\_al\\_assad\\_falls\\_or\\_not\\_the\\_fighting\\_in\\_syria\\_is\\_likely\\_to\\_persist\\_for\\_a\\_long\\_time.html](http://www.slate.com/articles/news_and_politics/war_stories/2012/07/whether_bashar_al_assad_falls_or_not_the_fighting_in_syria_is_likely_to_persist_for_a_long_time.html).

<sup>95</sup> U.S. & Foreign Commercial Service and U.S. Department of State, *Doing business in Syria: 2010 country commercial guide for U.S. companies*, Chapter 6, § 1, Investment Climate—Openness To Foreign Investment, p. 26., available at [http://photos.state.gov/libraries/syria/328666/trade\\_commerce/ccg-syria-2010.pdf](http://photos.state.gov/libraries/syria/328666/trade_commerce/ccg-syria-2010.pdf).

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., David D. Kilpatrick, *Egyptian President Warns Assad That "Your Time Won't Be Long"*, N.Y. TIMES, Sept. 6, 2012, at A1.

conflict involving Israel and Iran. This set of risks is discussed in the next section, along with the ameliorative impact of political-risk insurance.

2. THE IMPACT OF AN ISRAEL–IRAN ARMED CONFLICT ON FDI IN  
ISRAEL—AND THE ROLE OF POLITICAL RISK INSURANCE

Any FDI in Israel—not just in the volatile Occupied Territories—carries with it a particular set of risks created by an arms race between Israel and Iran in the midst of what has been called “an Arab Cold War.”<sup>98</sup> While Iran was the second Middle-Eastern nation to recognize Israel in the 1950s and maintained cooperative relations during the reign of Reza Pahlavi<sup>99</sup> since 1979, Iran has been in a state of total hostility toward an Israel that Iran no longer recognizes and Iranian leaders have repeatedly vowed to destroy.<sup>100</sup> Such threats assumed a new urgency when it became clear that the production of nuclear fuel in Iran had proceeded to the point where uranium could be enriched to “weapons-grade” levels,<sup>101</sup> and, concomitantly, that

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<sup>98</sup> Curtis Ryan, *The New Arab Cold War And The Struggle For Syria*, 42 MIDDLE E. REP. (Spring 2012), available at <http://www.merip.org/mer/mer262>.

<sup>99</sup> See SOHRAB SOBHANI, *THE PRAGMATIC ENTENTE: ISRAELI–IRANIAN RELATIONS, 1948–1988*, at 4–8 (Praeger Publishers 1989).

<sup>100</sup> Quinton Cannon Farrar, *U.S. Energy Sanctions And The Race To Prevent Iran From Acquiring Weapons Of Mass Destruction*, 79 FORDHAM L. REV. 2347, 2350–51 & n.18–23 (2011).

<sup>101</sup> *Id.*; see, e.g., David E. Sanger, *Harder Push To Stop Iran from Making Nuclear Fuel*, N.Y. TIMES, Dec. 11, 2010, at A6; Cody Coombs, *Blue Morning-Glories In The Sky: Correcting Sanctions To Enforce Nuclear Nonproliferation In Iran*, 19 IND. INT’L & COMP. L. REV. 419 (2009); Press Release, *IAEA Statement After Iran Meeting* (June 8, 2012), available at <http://www.iaea.org/newscenter/pressreleases/2012/prn201216.html> (statement by IAEA Deputy Director General Herman Nackaerts); Mehrzad Boroujerdi & Todd Fine, *Symposium, A Nuclear Iran: The Legal Implications of a Preemptive National Security Strategy*, 57 SYRACUSE L. REV. 619, 628 (2007) (arguing that “the course of the nuclear crisis does not necessarily indicate that Iran is inherently untrustworthy” but rather “is

the Iranian military had successfully tested missiles that might be used to deliver a nuclear payload to Israel and other nations. Most alarming to an MNE considering any new FDI in Israel—previous suggestions<sup>102</sup> of a “pre-emptive” military strike of some sort have resurfaced<sup>103</sup>—includes public statements by Israel’s Prime Minister and Defense Minister that Israel is prepared to take unilateral military action to thwart Iran’s ability to develop nuclear weapons.<sup>104</sup>

The implications of armed conflict for FDIs in a conflict zone are obviously not propitious. Perhaps that is why there appears to be no studies published in English exploring the impact of an Israel–Iran conflict on FDI in Israel.<sup>105</sup> However, recent studies have focused on the negative impact the present conflicts and regional instability are having on foreign FDI in Middle Eastern nations.<sup>106</sup> The impact of

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attempting to achieve what it can within the rules of a game that is stacked against it”).

<sup>102</sup> See, e.g., Gregory Koblentz, *Coercive Nonproliferation: Israel's Use of Coercive Diplomacy to Prevent the Proliferation of Weapons of Mass Destruction*, AM. POLITICAL SCI. ASS'N (2011), available at <http://ssrn.com/abstract=1900518>.

<sup>103</sup> See David Isenberg, *Israeli Attack on Iran's Nuclear Facilities Easier Said than Done*, ASIA TIMES, Feb. 15, 2012, available at [http://www.atimes.com/atimes/Middle\\_East/NB16Ak01.html](http://www.atimes.com/atimes/Middle_East/NB16Ak01.html).

<sup>104</sup> See, e.g., Matthew Kroenig, Essay, *Time to Attack Iran: Why a Strike is the Least Bad Option*, 91 FOREIGN AFF. 78 (2012). But see Colin H. Kahl, Essay, *Not Time to Attack Iran: Why War Should Be a Last Resort*, 91 FOREIGN AFF. 16 (2012).

<sup>105</sup> There have been recent studies, however, of the economic consequences of the “cold war” between Iran, Israel, and other Middle Eastern nations. See Mohammed Nuruzzaman, *Conflicts Between Iran and the Gulf Arab States: An Economic Evaluation*, 36 STRATEGIC AFF. 542 (2012); Ariel Cohen & Kevin DeCorla-Souza, *Eurasian Energy and Israel's Choices*, 88 BAR-ILAN U.: MIDEAST SECURITY AND POLICY STUD. 1, 32–34 (2011) (observing that “[s]urrounded by unfriendly and unreliable neighbors, Israel is an energy island,” and suggesting strategy for maintaining viability of energy infrastructures “to help Israel navigate . . . constantly shifting politics and security” issues). The general media have only recently started to run features considering the impact of an Israel–Iran armed conflict on the economy of Israel. See, e.g., Jean-Luc Renaudie, *Is Israeli Economy Under Threat in Case of Iran War?*, MIDDLE E. ONLINE (Israel), Aug. 16, 2012, available at <http://www.middle-east-online.com/english/?id=53931>.

<sup>106</sup> Wesam Sedik & Hussien Seoudy, *The Impact of Country Risk and New Institutional Economics on Foreign Direct Investment: A Panel Data*

open warfare would be almost unimaginably devastating, especially to energy infrastructure targets such as windmill farms, solar energy arrays, and conventional power plants.<sup>107</sup> Various armed conflicts in the Middle East, Asia, and Africa over the last fifty years have demonstrated the extent of devastation to populations, as well as FDIs, that can occur when armed conflict destroys energy infrastructures.<sup>108</sup>

Some investment advisors have warned investors to “probably think twice before investing in the Israeli economy until the rhetoric between Israel and Iran cools.”<sup>109</sup> Israeli press coverage has included socio-economists who warn that the cost of war would be massive and that the damage from an Iranian counterstrike inestimable, versus those who contend that “credit default swaps on Israeli bonds—‘a classic measurement of the risk the market assigns to a state’—have not risen,” that “the possibility of Israel attacking Iran does not affect

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*Analysis for Middle East and North Africa Region (1999–2010)*, 16 INT’L SOC’Y FOR NEW INSTITUTIONAL ECON. 1 (2012).

<sup>107</sup> Alexander E. Farrell et al., *Energy Infrastructure And Security*, 29 ANN. REV. ENV’T & RESOURCES 421 (2004); Karen Smith Stegen et al., *Terrorists Versus the Sun: Desertec in North Africa as a Case Study for Assessing Risks to Energy Infrastructure*, 14 RISK MGMT. 3 (2012); Ali Khajavi, Op-Ed., *A Realistic Outlook for Iraq’s Oil Production in 2030*, MIDDLE E. ECON. SURV. (July 3, 2012), available at <http://www.mees.com/en/articles/1874-a-realistic-outlok-for-iraqs-oil-production-in-2030> (detailing damage to Iraq’s energy infrastructure in the wake of Desert Storm II); see also Brett van Niekerk & Manoj S. Maharaj, *Relevance Of Information Warfare Models To Critical Infrastructure Protection*, [39 No. 2] SCIENTIA MILITARIA: S. AFR. J. MILITARY STUD. 99 (2012); Jennifer Giroux & Caroline Hilpert, *The Relationship Between Energy Infrastructure Attacks and Crude Oil Prices*, J. ENERGY SECURITY, Oct. 2009, available at [http://www.ensec.org/index.php?option=com\\_content&view=article&id=216:the-relationship-between-energy-infrastructure-attacks-and-crude-oil-prices&catid=100:issuecontent&Itemid=352](http://www.ensec.org/index.php?option=com_content&view=article&id=216:the-relationship-between-energy-infrastructure-attacks-and-crude-oil-prices&catid=100:issuecontent&Itemid=352).

<sup>108</sup> Jenny Sin-hang Ngai, *Energy as a Human Right in Armed Conflict: A Question or Universal Need, Survival, and Human Dignity*, 37 BROOK. J. INT’L L. 579 (2011–2012).

<sup>109</sup> Sean Geary, *How Conflict with Iran Would Affect the Israeli Economy*, EMERGING MONEY (Aug. 16, 2012, 8:00 AM), <http://emergingmoney.com/technology/iran-israeli-economy-eis-teva-mlnx/>.

whether foreigners invest in the country,” and that “a brief, successful Israeli strike could benefit the local economy.”<sup>110</sup> Whether Alstom would—or should—share such a sanguine view is a difficult question to answer without a good deal more *reliable* data.<sup>111</sup>

However, part of any answer that involves an Alstom FDI in Israel needs to include the availability of insurance protection against the risk of losses on a wind-energy FDI in the event of an Israeli–Iranian armed conflict.<sup>112</sup> Indeed, it has aptly been observed that “[a] company's ability to procure PRI is often crucial to its continuing investment in developing countries.”<sup>113</sup> Private-market insurance for war and other force majeure kinds of investment risks exist, but may be prohibitively expensive.<sup>114</sup> As one commentator observed when surveying the availability of private sector political risk insurance in 1996, “[t]he private insurance industry has been called a boutique provider of specialized political risk products as opposed to the more substantial and uniform government programs” because, for

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<sup>110</sup> Moti Bassok & Hagai Amit, *Lengthy Iran Conflict Likely to Cost Israeli Economy Billions of Shekels: Former Finance Ministry Director General Says Nuclear Iran Involves Considerable Economic Cost to Israel, Adds that War with Iran Would Be Much More Expensive than Second Lebanon War*, HAARETZ (Aug. 14, 2012, 4:59 AM), <http://www.haaretz.com/business/lengthy-iran-conflict-likely-to-cost-israeli-economy-billions-of-shekels-1.458060>.

<sup>111</sup> Despite persistent tensions, there have been some hopeful signs for peace rather than war. See David E. Sanger & Eric Schmitt, *To Calm Israel, U.S. Offers Ways To Restrain Iran*, N.Y. TIMES, Sept. 3, 2012, at A1. However, the volatility of the region keeps predictions on day-to-day tenterhooks. See, e.g., Anne Barnard, Michael R. Gordon & Jodi Rudoren, *Israel Targeted Iranian Missiles in Syria Attack*, N.Y. TIMES, May 4, 2013, at A1; David E. Sanger & William J. Broad, *Iran Is Seen Advancing Nuclear Bid*, N.Y. TIMES, May 23, 2013, at A10.

<sup>112</sup> See Erik J. Woodhouse, *The Obsolescing Bargain Redux? Foreign Investment in the Electric Power Sector in Developing Countries*, 38 N.Y.U. J. INT'L L. & POL. 121 (2006) (discussing the kinds of risks inherent to energy FDIs and strategies that have been developed to address those risks).

<sup>113</sup> Jennifer M. DeLeonardo, Note, *Are Public And Private Political Risk Insurance Two Of A Kind? Suggestions for a New Direction for Government Coverage*, 45 VA. J. INT'L L. 737, 739 (2005).

<sup>114</sup> See Maura B. Perry, *A Model for Efficient Foreign Aid: The Case for the Political Risk Insurance Activities of the Overseas Private Investment Corporation*, 36 VA. J. INT'L L. 511, 545–46 (1996) (discussing the daunting challenges facing private-market FDI insurers).

example, they “individually apprais[e] risks on a commercial basis, which is subject to supply and demand considerations as well as particular risk characteristics” instead of using “standardized rating schedules”; thus, the private sector “has never been a particularly robust or stable source of political insurance.”<sup>115</sup> That is not to say, however, that there is any shortage of insurers and insurance syndicates who offer some form of political risk coverage; but it is not always easy to estimate what kinds of coverage limits and premiums will attend to a political risk insurance issued in the private sector.<sup>116</sup> Indeed, when the “Arab Spring” came to Egypt in 2011, premiums for political risk insurance for projects in Egypt quickly rose 12%–15%.<sup>117</sup>

For American businesses, the Overseas Private Investment Corporation (OPIC) has provided insurance of FDI in countries specifically listed by Congress in the acts authorizing OPIC as “an insurer ‘of last resort’” rather than a competitor of private finance and political risk insurance.<sup>118</sup> While OPIC insurance has

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<sup>115</sup> *Id.* at 536.

<sup>116</sup> See, e.g., Lijana Baublyte et al., *Risk Selection in the London Political Risk Insurance Market: The Role of Tacit Knowledge, Trust and Heuristics*, [15 No. 9] J. RISK RES. 1101, 1101 (2012) (demonstrating that “the basis of decision-making and risk selection in the London Political Risk Insurance (PRI) market is a combination of *Art* and *Science* with such factors as trust and reputation playing an important role . . . . and examining different methods and strategies of political risk underwriting employed in the insurance market, which does not rely on statistical tools as seen in more traditional insurance types”); *Lloyd’s Risk Locator: Political Risks Insurance*, LLOYD’S, [http://www.lloyds.com/Redirect-pages/Risk\\_locator/Political\\_risks\\_insurance](http://www.lloyds.com/Redirect-pages/Risk_locator/Political_risks_insurance) (last visited Mar. 31, 2013) (discussing differences in location of risk, and thus ranges of premiums, for “political risks insurance,” including “trade-related cover”; “other asset cover”; “insurance of assets against political violence”; and “global contract”).

<sup>117</sup> Cyril Tuohy, *Egypt Causes Price Spike for Political Risk Insurance: Expert Sees a “Pause” in the Marketplace for Political Risk Insurance as Carriers Scramble to Reassess Middle East Exposures*, RISK & INS. (Feb. 7, 2011), <http://www.riskandinsurance.com/story.jsp?storyId=533329908>.

<sup>118</sup> Perry, *supra* note 114, at 514; see Pablo M. Zylberglait, Note, *OPIC’s Investment Insurance: The Platypus of Governmental Programs and Its Jurisprudence*, 25 LAW & POL’Y INT’L BUS. 359 (1993).

traditionally provided ten times the coverage limits for nearly seven times the policy duration limits for a wider range of risks than political risk insurance offered in the private insurance markets,<sup>119</sup> eligibility is limited to insureds having a substantial nexus to the United States and essentially under American control.<sup>120</sup> Since neither Alstom nor its American subsidiary meets these definitions,<sup>121</sup> OPIC cannot insure a Golan Heights FDI, despite the substantial involvement of Alstom's Texas-based nacelle production facility in such an undertaking. However, Alstom has at least two other sources of government-backed FDI political risk insurance programs offered through the World Bank and its home state, France.

Indeed, it is precisely because many "national insurance programs"—such as OPIC—"due to their respective national objectives, often contain strict eligibility requirements that exclude many investors and investments"<sup>122</sup> that the World Bank Group

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<sup>119</sup> Perry, *supra* note 114, at 534–36; Ashton B. Inniss, Note, *Rethinking Political Risk Insurance: Incentives for Investor Risk Mitigation*, 16 SW. J. INT'L L. 477, 488–90 (2010).

<sup>120</sup> Paul E. Comeaux & N. Stephen Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 1, 36 (1994).

<sup>121</sup> See, e.g., Kathryn Gordon, *Investment Guarantees and Political Risk Insurance: Institutions, Incentives, and Development* 8 (Org. Econ. Cooperation & Dev.: Investment Division, Working Paper No. 1, 2009) (noting that only "[s]even PRI providers offer coverage for foreign corporations with domestic presence (Australia, Austria, Belgium, France, Netherlands, Turkey and the United Kingdom)"), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1718484](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718484). The Amarillo, Texas Alstom facility is owned by an entity loosely referred to as "Alstom Wind, North America" (AWNA) (<http://www.ryancompanies.com/projects/Alstom-Wind-North-America/>), but which appears to in fact be a limited-liability corporation called Alstom Wind Texas LLC, which is a Delaware corporation headquartered in Connecticut. Alstom's Amarillo facility is one of thirty-seven it maintains in the U.S., divided among Grid, Transport, Power, and Corporate Headquarters segments of Alstom's businesses, which employ "10,000 employees in locations that span 47 states and the District of Columbia." *U.S. Locations*, ALSTOM, <http://www.alstom.com/us/locations/> (last visited Mar. 31, 2013).

<sup>122</sup> INTERNATIONAL AND COMPARATIVE MINERAL LAW AND POLICY: TRENDS AND PROSPECTS 325 (Elizabeth Bastida et al. eds., 2005).

created the Multilateral Investment Guarantee Agency (MIGA),<sup>123</sup> an international financial institution offering political risk insurance guarantees for FDIs in developing countries,<sup>124</sup> to “overcom[e] some of these shortcomings and hel[p] to fill the gaps.”<sup>125</sup> MIGA political risk insurance is structured and operated similarly to OPIC political risk insurance; however, MIGA operates with a number of broad policy objectives beyond those that animate OPIC’s activities.<sup>126</sup> MIGA is, however, somewhat of an enigma. Since its inception, 175 nations have acceded to the MIGA Treaty, and MIGA has insured some 600 projects in an aggregate amount exceeding “\$21 billion of guarantees.”<sup>127</sup> “To date, MIGA has only paid out three claims,” while negotiating a resolution in “fifty disputes over its guaranteed investments to prevent claims filings.”<sup>128</sup>

France also has its own national insurer of French firms seeking protection of their FDI, in an agency called *Compagnie Française d'Assurance Pour Le Commerce Extérieur* (COFACE).<sup>129</sup> Founded

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<sup>123</sup> See Malcolm D. Rowat, *Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases Of ICSID and MIGA*, 33 HARV. INT’L L.J. 103, 105 & n.9, 126–34 (1992) (describing how MIGA was actually the product of the World Bank-sponsored Convention Establishing the Multilateral Investment Guarantee Agency, which opened for states’ signatures in October 1985 and entered into force April 1988).

<sup>124</sup> Miriam Mafessanti, *Corporate Misbehavior & International Law: Are There Alternatives to “Complicity”?*, 6 S.C. J. INT’L L. & BUS. 167, 222–24 & nn.382–87, 229, n.427 (2010) (footnotes omitted) (providing that MIGA “has developed Environmental and Social Review Procedures and Safeguard Policies, modeled on the Performance Standards of the [International Finance Corporation], which bind its private sector clients”).

<sup>125</sup> Comeaux & Kinsella, *supra* note 120 at 40–45.

<sup>126</sup> Inniss, *supra* note 119, at 490–92; see also Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 78–79 & nn.50–55 (2008).

<sup>127</sup> Sam Foster Halabi, *Efficient Contracting Between Foreign Investors and Host States: Evidence from Stabilization Clauses*, 31 NW. J. INT’L L. & BUS. 261, 275 (2011).

<sup>128</sup> *Id.* at 274–75.

<sup>129</sup> *Who We Are*, COFACE, [http://www.coface.com/CofacePortal/CO\\_M\\_en\\_EN/pages/home/Who\\_we\\_are](http://www.coface.com/CofacePortal/CO_M_en_EN/pages/home/Who_we_are) (last visited Mar. 31, 2013).



in 1946 as a French governmental agency and privatized in 1990, COFACE is an example of an export credit agency (ECA), which many countries have created<sup>130</sup> in the last sixty years to insure foreign sales transactions and longer-term FDI projects undertaken by home-state businesses.<sup>131</sup> COFACE offers political risk insurance along the general outlines of OPIC's program, but for which Alstom qualifies.<sup>132</sup> Political risk can be insured for periods of five to fifteen years, at premiums ranging from 0.7% to 1% of the total value of the investment.<sup>133</sup> How COFACE might go about assessing the risks posed by Alstom's hypothesized Golan Heights FDI is unknown; COFACE "has a proprietary risk evaluation system."<sup>134</sup>

Similarly to COFACE, but in contrast to OPIC, Lloyd's of London, the world's most famous private insurance market, provides little transparency into premiums of the political risk insurance it offers, the methodology for calculating premiums, the limits of financial exposure Lloyd's syndicates are willing to assume, or how those limits are determined.<sup>135</sup> In 2012, one of the Lloyd's brokers,

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<sup>130</sup> See Janet Koven Levit, *The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits*, 45 HARV. INT'L L.J. 65, 142–50 & nn.345–78 (2004) (describing the listings and details for numerous ECAs).

<sup>131</sup> See *id.*; see also *About Political Risk Insurance*, MULTILATERAL INVESTMENT GUARANTEE AGENCY, <http://www.miga.org/resources/index.cfm?stid=1870#nav> (last visited May 21, 2013) ("Most public providers are national export credit agencies (ECAs), which may cover both export credit/trade transactions, as well as longer-term investments. ECAs usually support investors and lenders from their home country going into developing countries, and may also have mandates to support development and be self-sustaining.").

<sup>132</sup> Sidney Posel, *Factoring Accounts Receivable in France: Some Legal Aspects and American Comparisons*, 57 TUL. L. REV. 292, 326 n.124 (1982) (noting that COFACE offers credit insurance against "political risks" for foreign investors).

<sup>133</sup> Perry, *supra* note 114, at app. M.

<sup>134</sup> Gordon, *supra* note 121, at app. tbl.8.

<sup>135</sup> LLOYD'S, *supra* note 116. Sagicor, one of the Lloyd's syndicates, states that its "program line" limit for political risk insurance is \$7.5 million. *Political Risk, Credit, Surety and Terrorism*, SAGICOR, <http://www.sagicatoratlloyds.com/sagicor-lloyds/pecuniary-lines> (last visited Mar. 31, 2013); see also Nathan Jensen, *Political Risk, Democratic Institutions, and Foreign Direct Investment*, 70 J. POL. 1040, 1043 & n.36 (2008) (noting that "much of the political risk insurance coverage is essentially the same product used

RFIB Group, noted that the private market for political risk insurance is centered in London, where ten corporate entities—of which Chartis, Sovereign, and Zurich are dubbed “the ‘big three’”—and twenty-five syndicates on Lloyd’s market are involved in negotiating and issuing political risk insurance.<sup>136</sup> Fifteen London-based brokers interact with these insurers to create the bulk of the private pool of insurance contracts to cover credit and political risks.<sup>137</sup> The private-market political risk policies are limited in duration as well as in coverage limits: most fall within the range of two to three years, and as the tenor is lengthened, the number of insurers with the capacity to insure decreases.<sup>138</sup> The outermost private-market limits are fifteen years, which are available from only a few of the private-market insurers.<sup>139</sup>

From this general information about political risk insurance and insurance markets, several observations can be made in the case of Alstom and a hypothesized Golan Heights investment. First, it is likely that Alstom can find political risk insurance coverage for its Golan Heights FDI from a number of different sources, both public and private. Second, Alstom must scrupulously avoid bribery of any government official, or even the arguable appearance of bribery; not only because of anti-bribery laws such as the Foreign Corrupt Practices Act<sup>140</sup> and the OECD Anti-Bribery Convention,<sup>141</sup> but also

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50 years ago and . . . doesn’t appropriately cover a number of important risks faced by multinationals”).

<sup>136</sup> TOBY HEPPPEL, RFIB GRP. LTD., *THE PRIVATE INSURANCE MARKET FOR CREDIT AND POLITICAL RISKS* 4 (Apr. 2012), available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Toby%20Hepppel%20Presentation.pdf> (last visited Mar. 31, 2013).

<sup>137</sup> *Id.* at 5. Chubb Insurance Group withdrew from the credit and political risks market in May 2010. *Id.* at 8.

<sup>138</sup> *Id.* at 9; Jensen, *supra* note 135, at 1042–43 & nn.32–36.

<sup>139</sup> Jensen, *supra* note 135, at 1042–43 & nn.32–36.

<sup>140</sup> 15 U.S.C. §§ 78dd-1 (2006). Recent U.S. enforcement efforts have focused on foreign MNEs. See Leslie Wayne, *Foreign Firms Most Affected by a U.S. Law Barring Bribes*, N.Y. TIMES, Sept. 4, 2012, at B1; Claudio Gatti, *Alstom at Center of Web of Bribery Inquiries*, N.Y. TIMES, Mar. 29, 2010, <http://www.nytimes.com/2010/03/30/business/global/30alstom.html>. However, Alstom, S.A., may no longer be directly subject to the Act because, *inter alia*, its shares are no longer traded on U.S. stock exchanges,

because an allegation of bribery in connection with the FDI typically is itself grounds for retroactive cancellation of the political risk insurance policy and denial of any coverage for an occurrence.<sup>142</sup> Third, Alstom must take heed of the moral-hazard clauses in FDI insurance that “exclude coverage of events that the insured entity might reasonably have been expected to avoid”<sup>143</sup>—such as undertaking an investment in areas during a time when armed conflict may, from a *post hoc* perspective, have seemed imminent. Fourth, finding political risk insurance meeting the extent of coverage needed should war break out between Israel and one of its neighbors may be difficult, given the relatively modest coverage limits available in private markets. Even the higher limits available through an export credit agency such as COFACE (or OPIC, if an Alstom subsidiary were to qualify) may be taxed to compensate

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one of the bases for jurisdiction, and are now exclusively traded on the Paris Stock Exchange. See 15 U.S.C. § 78dd-1(a); see also *News Releases*, NYSE Euronext (Aug. 13, 2004), <http://www.nyse.com/press/1092392705795.html> (announcing suspension of Alstom shares from trading on the NYSE).

<sup>141</sup> See *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, ORG. ECON. CO-OPERATION & DEV. (2011) (hereinafter *OECD Convention*), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/38028044.pdf>. Both France and the United States have ratified the Convention and enacted implementing legislation. *Id.* Prior to implementing the OECD Convention, France seemed to treat bribery of foreign officials as cost of doing business. See, e.g., Scott D. Syfert, *Capitalism or Corruption? Corporate Structure, Western Investment and Commercial Crime in the Russian Federation*, 18 N.Y.L. SCH. J. INT’L & COMP. L. 357, 403 (1999) (observing that at the time, “payments in most of the world [we]re considered a routine cost of business,” and citing the example of COFACE, which at the time “over[ed] foreign bribery as export risk”); Christopher F. Dugan & Vladimir Lechtman, *The FCPA in Russia and Other Former Communist Countries*, 91 AM. J. INT’L L. 378, 379 (1997).

<sup>142</sup> See Gordon, *supra* note 121, at 9 (noting presence of such clauses in COFACE insurance contracts). The World Bank recently debarred two Alstom subsidiaries because their employees allegedly offered bribes to Zambian government officials in the early 2000s to win a contract for power plant construction. See Dionne Searcey & David Crawford, *World Bank Punishes Units of Alstom SA for Bribery*, WALL ST. J., Feb. 23, 2012, <http://online.wsj.com/article/SB10001424052970203918304577238943984834040.html>.

<sup>143</sup> Gordon, *supra* note 121, at 3.

Alstom in the event war or terrorism destroys the hypothesized Golan Heights wind farm. Alstom's comparable wind-farm projects in other areas of the world are valued at least ten times greater than even the most generous coverage limit (\$20 million) provided by OPIC.<sup>144</sup> Like many FDI projects, this one risks being

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<sup>144</sup> Multimatrix aspires to build 160 wind turbines on the eighteen-acre area, and generate 450 MW of power. Ari Rabinovitch, *Israel Uses Golan to Build Wind Energy Industry*, REUTERS, Apr. 29, 2010, <http://uk.reuters.com/article/2010/04/29/us-israel-energy-wind-idUKTRE63S37320100429>. Comparable, recent Alstom projects provide a good gauge by which to measure the magnitude of the FDI value for comparison to political risk coverage limits. See, e.g., Press Release, *Whitelee Onshore Wind Farm*, ALSTOM (Sept. 2010), <http://www.alstom.com/uk/projects/power/whitelee/> (describing \$250 million (€200 million) project for "Scottish Power Renewables . . . to build a 217 MW extension to the Whitelee wind farm in Scotland" of some seventy-five wind turbines under a contract including "supply, transportation, installation, commissioning, and operation [and] maintenance"); Press Release, *Alstom Will Supply Equipment to Four Wind Farms in Brazil*, ALSTOM (Apr. 19, 2012), <http://www.alstom.com/press-centre/2012/4/85822/> (describing the contract valued at \$165 million (€130 million) in which, "[i]n addition to the [supply and installation of 40] wind turbines, Alstom will be responsible for the supply and installation of electrical systems and substations throughout the complex" located in the Brazilian State of Rio Grande do Sul). Even very modest wind-farm projects, such as Alstom's in Ethiopia, would appear to exceed even OPIC coverage limits. See Press Release, *Alstom Grid Wins Subcontract with CYMI For Around €17 Million Project to Supply Equipment for Ethiopian Electric Power Corporation*, ALSTOM (June 12, 2012), <http://www.alstom.com/press-centre/2012/6/alstom-grid-wins-subcontract-with-cymi-for-around-17-million-project-to-supply-equipment-for-ethiopian-electric-power-corporation/> ("Alstom has signed a subcontract with Spanish company CYMI (ACS Group), to supply and manufacture equipment for the Ethiopian Utility (EEPSCO) as part of the Electricity Transmission System Improvement Project (ETSIP) in Ethiopia."); see also *Following a Planning Hitch, Ethiopia's First Wind Farm Is Back on Track*, RENEWABLES INT'L: THE MAG. (Oct. 5, 2011), <http://www.renewablesinternational.net/following-a-planning-hitch-ethiopias-first-wind-farm-is-back-on-track/150/505/30897/> (noting Alstom's supply of fifty-four turbines as part of a €283 million project).

underinsured.<sup>145</sup> This presents a challenge for Alstom in protecting its FDI.<sup>146</sup> Of course, Alstom might seek to deal with these limits by taking out multiple policies<sup>147</sup> of political risk insurance,<sup>148</sup> and by seeking a definition of insurable “occurrence” or “loss” that would cover to policy limits the sub-units of the project, such as each wind turbine, rather than merely the project in its entirety.<sup>149</sup>

Thus, Alstom will have to make, as it and other MNEs that work in politically volatile regions must do before each FDI, a careful cost-benefit analysis.<sup>150</sup> What makes Alstom’s hypothesized FDI in Israel more complex and challenging is that it is not the host country’s actions toward Alstom that pose the significant risks. Rather, the

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<sup>145</sup> Alex Khachaturian, “*Are We in Good Hands?*” *The Adequacy of American and Multilateral Political Risk Insurance Programs in Fostering International Development*, 38 CONN. L. REV. 1041, 1044, 1054–55, 1057–58, 1059–62 (2006) (noting gaps in political risk insurance coverage policies).

<sup>146</sup> Scott G. Johnson, *Ten Years After 9/11: Property Insurance Lessons Learned*, 46 TORT TRIAL & INS. PRAC. L.J. 685, 687 (2011) (“[W]here the per occurrence limit of insurance does not fully compensate the insured for its loss, whether a loss constitutes one occurrence or multiple occurrences can be a significant issue.”).

<sup>147</sup> Given Alstom’s resources and ability to obtain the attention of government officials, it might be in a position to persuade public political risk insurers (such as OPIC and MIGA) to partner with private political risk insurers *as co-insurers* to increase coverage amounts, encourage more insurers to have confidence in insuring a particular risk, and to put their “real informational advantage” to work in “act[ing] as a superior sorter of risk.” DeLeonardo, *supra* note 113, at 781–89.

<sup>148</sup> Insurance against terrorism risks will be required as well, and the insurability of those risks in the wake of highly organized terror-attacks against public infrastructure targets has tightened the market. See Andrew Gerrish, Note, *Terror CATs: TRIA’s Failure to Encourage a Private Market for Terrorism Insurance and How Federal Securitization of Terrorism Risk May Be a Viable Alternative*, 68 WASH. & LEE L. REV. 1825 (2011).

<sup>149</sup> An analogous issue was presented concerning property insurance on the World Trade Center towers, which were destroyed on September 11, 2001. See Michael Murray, Note, *The Law of Describing Accidents: A New Proposal for Determining the Number of Occurrences in Insurance*, 118 YALE L.J. 1484 (2009).

<sup>150</sup> Randel R. Young & Richard Devine, *Managing Risk in Emerging Market Hydrocarbon Development Projects*, 55 ROCKY MTN. MIN. L. INST. 30-1, § 30.07[5] (2009).

risks emanate from actions that Israel and the neighboring states of Syria and Iran may take against each other.

At the time this article went to print, those risks have been significantly heightened by the continuing escalation of the Syrian conflict, and the very real potential for that conflict to become a proxy conflict between Israel and Iran. As the *New York Times* recently reported, “[e]lite infantry and reconnaissance units have been moved into the long-quiet Golan Heights this spring” as “the concern in Israel runs deeper along what was for decades one border it did not have to worry much about” and “Israel’s military leadership now views southern Syria as an ‘ungoverned area’ that poses imminent danger.”<sup>151</sup> The situation has escalated even further, demonstrating the ways in which Syria may become the focal point of a proxy conflict between Iran and Israel. The front-page news on May 6, 2013, proclaimed that “[t]he Syrian government publicly condemned Israel for a powerful air assault on military targets near Damascus early Sunday, saying it ‘opened the door to all possibilities,’ as fear spread throughout the region that the country’s civil war could expand beyond its borders,” and prompted “[s]ome analysts” to observe that “Israel may have been sending a message to its main rival, Iran, that despite recent gains by Mr. Assad’s forces, the alliance between Iran, Syria and Hezbollah has waning power to check Israeli action.”<sup>152</sup>

These events are going to have an immediate—and quite palpable—impact on the availability and cost of PRI<sup>153</sup> for projects, like that hypothesized for Alstom, in the region. Two months before

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<sup>151</sup> Jodi Rudoren, *Israel Tightens Border Defense As Syria Erupts*, N.Y. TIMES, May 4, 2013, at A1.

<sup>152</sup> Anne Barnard, *Syria Condemns Israeli Assault Near Damascus*, N.Y. TIMES, May 6, 2013, at A1; see Jodi Rudoren & Isabel Kershner, *Airstrikes Into Syria A Message To Iranians*, N.Y. TIMES, May 6, 2013, at A8 (“The twin airstrikes in Damascus on Friday and Sunday attributed to Israel appear to be more about Jerusalem’s broad, mostly covert battle with Iran and Hezbollah than about the bloody civil war raging in Syria.”).

<sup>153</sup> World Bank Group, Multilateral Investment Guarantee Agency, *Survey of Political Risk Insurance Providers*, PERSPECTIVES (Jan. 2008), available at [www.pri-center.com/documents/south\\_south/survey\\_provider.pdf](http://www.pri-center.com/documents/south_south/survey_provider.pdf).

these events transpired, analysts in the PRI market were already seeing an increase in demand for PRI and related coverages for Middle-Eastern FDI projects,<sup>154</sup> which will only drive up insurance

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<sup>154</sup> See, e.g., WILLIS, POLITICAL RISK INSURANCE: MIND THE GAP (April 2011), at 2, available at [http://www.willis.com/Documents/Publications/Services/Political\\_Risk/Willis\\_Political\\_Risk\\_Report\\_April\\_2011.pdf](http://www.willis.com/Documents/Publications/Services/Political_Risk/Willis_Political_Risk_Report_April_2011.pdf). As the authors observe, “[i]nsurers too will be looking at their own exposures and aggregations and as a result will be seeking to impose tighter wordings and rate increases and even, in some cases, withdrawing from certain areas and lines of business.” *Id.* The authors also explain that “[t]here are three main types of coverage that companies concerned with political unrest could consider: Strikes, Riots and Civil Commotions (SRCC) insurance, Terrorism cover (known as the Lloyd’s Sabotage & Terrorism Only Form) and full Political Violence cover.” *Id.* at 3; see also *Taking a Multi-Country Approach to Political Risk and Trade Credit Insurance*, MARSH (Mar. 1, 2013), <http://usa.marsh.com/NewsInsights/ThoughtLeadership/Articles/ID/29546/Taking-a-Multi-Country-Approach-to-Political-Risk-and-Trade-Credit-Insurance.aspx>. As Marsh notes,

[m]any multinationals have since discovered that this country-by-country approach may leave them vulnerable to unexpected events. In recent years, many businesses have recognized the unpredictability of global risk and have increasingly turned to a broader approach to political and trade credit risk management through the purchase of multi-country insurance policies.

A multi-country policy enables businesses to take a more holistic approach to managing risk. Instead of attempting to cover unpredictable risks through a patchwork of policies for individual nations, a multi-country policy typically covers 15 to 20 countries, but potentially more. These policies can be customized to cover a single region—for example, the Middle East and North Africa—or include countries worldwide.

Underwriters often prefer this multi-country approach as it allows them to spread their political and trade credit risks across several countries. Because of this, the terms available in such policies can often be more favorable than single-country policies. For example, policies may have higher limits available; provide coverage for countries that

premiums,<sup>155</sup> increase the overhead that MNEs will face with their Middle-Eastern FDIs,<sup>156</sup> and constrict the scope of the imminent risks that many insurers will be willing to underwrite.<sup>157</sup>

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are typically difficult to insure, such as Egypt; and/or offer more attractive pricing.

Companies purchasing political risk insurance on foreign investments and assets are also seeking to insure a broader range of risks, rather than focusing on what they perceive to be the most likely events to occur. Some of these risks include expropriation, forced divestiture, political violence (including forced abandonment), business interruption and contingent business interruption, contract frustration, and trade disruption.

*Id.*

<sup>155</sup> See, e.g., KIT BROWNLEES, GALLAGHER LONDON, *TURNING TIDES—THE GLOBALISATION OF POLITICAL RISK* (2012), available at <http://www.ajginternational.com/assets/Uploads/Publications/TurningTidesWhitePaperJuly2012.pdf>.

<sup>156</sup> See, e.g., Stuart Collins, *Political Risk Industry Grows As Threat Climbs Firms' Agenda*, COMMERCIAL RISK EUROPE (Apr. 8, 2013), available at <http://www.commercialriskafrica.com/cre/2153/134/Political-risk-industry-grows-as-threat-climbs-firms-agenda/>.

<sup>157</sup> See, e.g., Sarah Vesey, *Middle East Unrest Puts Political Risk Insurance In Spotlight: Marsh*, BUSINESS INSURANCE (Feb. 13, 2013, 9:31 AM), <http://www.businessinsurance.com/article/20130213/NEWS04/130219930> (citing and quoting from MARSH, *NAVIGATING CREEPING POLITICAL RISKS FOR INFRASTRUCTURE PROJECTS* (Dec. 2012), available at [http://uk.marsh.com/Portals/18/Documents/12-1171-MRMR%20Briefing%20-%20Infrastructure\\_v5.pdf](http://uk.marsh.com/Portals/18/Documents/12-1171-MRMR%20Briefing%20-%20Infrastructure_v5.pdf)); see also Kristen David, *A Political Risk Insurance Lesson from the Arab Spring: The Importance of Early Notice*, POLICYHOLDER INFORMER (May 3, 2013), <http://www.policyholderinformer.com/2013/05/03/a-political-risk-insurance-lesson-from-the-arab-spring-the-importance-of-early-notice/>; *Political Risks Rise In Middle East And North Africa*, BUSINESS INSURANCE (Apr. 11, 2013, 6:00 AM), <http://www.businessinsurance.com/article/20130411/NEWS09/130419963> (noting that “[s]everal of Lloyd’s syndicates and new entrants are expected to begin underwriting political risk in 2013”); *Political-Risk Insurance: Of Coups And Coverage—Political Turmoil Is Costly. Unless You Are Fully Insured.*, THE ECONOMIST, Apr. 4, 2007, available at <http://www>



II. TOWARD THE RESTORATION OF THE 1789 LEGISLATIVE  
BOUNDARIES OF THE ALIEN TORT STATUTE: THE U.S.  
SUPREME COURT'S 2013 DECISION IN *KIOBEL V. ROYAL DUTCH  
PETROLEUM CO.* AND WHAT *KIOBEL* AUGURS FOR THE  
FUTURE OF ATS SUITS AS FDI RISKS

The litany of other kinds of ATS cases—or proposals for cases to be asserted under the ATS—discussed in Part I.A, above are serious matters for any corporation planning an FDI that might find itself within a U.S. federal court's exercise of personal jurisdiction. The absurd consequences of embroiling the judicial branch of the U.S. government into many of the cases, examples of which are listed below, is apparent; some might yet find a hold in the U.S. courts under the Torture Victim Protection Act (TVPA),<sup>158</sup> but if so, that is a choice that Congress made in enacting the TVPA. Surely, however, neither the Congress of 1789, nor any other Congress since, would seek to extend its legislative jurisdiction (let alone common-law expansion of a 235-year-old statute) to produce the kind of result that Seventh Circuit U.S. Appeals Court Chief Judge Hamilton foresaw in soberly considering the effects of purported ATS litigation filed against the Hungarian State Railways:

[W]e cannot overlook the comity and reciprocity between sovereign nations that dominate international law. The plaintiffs suing the railway seek a judgment from a U.S. court ordering the national railway to pay plaintiffs as much as \$1.25 billion. *The plaintiffs suing the bank seek as much as \$75 billion. The sum of damages sought by plaintiffs would amount to nearly 40 percent of Hungary's annual gross domestic product in 2011.*

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.economist.com/node/8967224. For regular updates in the PRI area, see, e.g., *MIGA: Political Risks And Emerging Markets—Insuring Investments, Ensuring Opportunities*, BLOGS.WORLDBANK.ORG, <http://blogs.worldbank.org/miga/> (last visited May 17, 2013).

<sup>158</sup> Torture Victim Protection Act, 28 U.S.C. § 1350 (1994). For a discussion of the relationship between the TVPA and the ATS, out of which the TVPA grew, see, e.g., Philip Mariani, Note, *Assessing the Proper Relationship between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. PA. L. REV. 1383 (2008); Kathryn L. Pryor, *Does the Torture Victim Protection Act Signal the Imminent Demise of the Alien Tort Claims Act?*, 29 VA. J. INT'L L. 969 (1988–1989).

Divided among Hungary's current population of 10 million people, that is more than \$7500 per person. *We should consider how the United States would react if a foreign court ordered the U.S. Treasury or the Federal Reserve Bank to pay a group of plaintiffs 40 percent of U.S. annual gross domestic product, which would be roughly \$6 trillion, or \$20,000 for every resident in the United States.* And consider further the reaction if such an order were based on events that happened generations ago in the United States itself, without any effort to secure just compensation through U.S. courts. If U.S. courts are ready to exercise jurisdiction to right wrongs all over the world, including those of past generations, we should not complain if other countries' courts decide to do the same.<sup>159</sup>

It is for such cases—the vast bulk of contemporary ATS filings—that the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*<sup>160</sup> has brought to an end the strange internationalist career devised for the ATS since 1980. After granting certiorari in *Kiobel* to consider whether an ATS claim lay against a corporation<sup>161</sup>—a point on which, as almost every other aspect of the ATS, the federal circuits differ—concern quickly shifted in the February 28, 2012 oral argument<sup>162</sup> to whether the ATS should ever apply to conduct outside of the United States.<sup>163</sup> Subsequently, the Court ordered

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<sup>159</sup> *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 682 (7<sup>th</sup> Cir. 2012) (emphasis added) (dismissing on grounds that plaintiffs must first exhaust available remedies in Hungary's courts, before seeking remedies in American courts).

<sup>160</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), *aff'g on other grounds* 621 F.3d 111 (2d Cir. 2010).

<sup>161</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 472 (2011).

<sup>162</sup> *See generally* Transcript of Oral Argument, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (Feb. 28, 2012) (No. 10-1491).

<sup>163</sup> The conduct at issue in *Kiobel*—as well as in its celebrated predecessor, *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000)—is amply narrated in Larisa Wick, *Human Rights Violations In Nigeria: Corporate Malpractice And State Acquiescence In The Oil Producing Deltas*

supplemental briefing followed by a new oral argument on October 1, 2012,<sup>164</sup> in which the Court's desire to limit the ATS's extraterritorial reach was palpable.<sup>165</sup>

When Chief Justice Roberts began announcing the Court's opinion in *Kiobel* on April 17, 2013, few expected that the Court would find unanimity on anything.<sup>166</sup> Yet it did. The Court defied predictions, and defied the expectation of a splintering along the lines as seen in *Sosa v. Alvarez-Machain*.<sup>167</sup> Rather, the differences in

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*Of Nigeria*, 12 MICH. ST. J. INT'L L. 63 (2003). See generally James Donnelly-Saalfield, *Irreparable Harms: How the Devastating Effects of Oil Extraction in Nigeria Have Not Been Remedied by Nigerian Courts, the African Commission, or U.S. Courts*, 15 HASTINGS W.-NW. J. ENV'T L. & POL'Y 371 (2009); James Goodwin & Armin Rosencranz, *Holding Oil Companies Liable For Human Rights Violations In A Post-Sosa World*, 42 NEW ENG. L. REV. 701 (2008).

<sup>164</sup> See generally Transcript of Oral Argument, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (Oct. 1, 2012) (No. 10-1491).

<sup>165</sup> See, e.g., John W. Bellinger, *Oral Argument in Kiobel: Justices Seem Inclined to Shut ATS Door Further, But Will It Remain Ajar?*, LAWFARE BLOG (Oct. 2, 2012, 11:00 AM), <http://www.lawfareblog.com/2012/10/oral-argument-in-kiobel-justices-seem-inclined-to-shut-ats-door-further-but-will-it-remain-ajar/>.

<sup>166</sup> Typical of the expectations expressed by commentators is that of Julian Ku, *(More) Spiking the Football on Kiobel*, OPINIO JURIS (Apr. 23, 2013, 9:06 AM), <http://opiniojuris.org/2013/04/23/more-spiking-the-football-on-kiobel/> (“Nearly everyone anticipating the *Kiobel* decision (including myself) predicted a Supreme Court vote starkly divided on ideological lines.”) (quoting Eugene Kontorovich, Opinion, *A Supreme Rebuke To Global Forum-Shopping: The Justices Say No To Those Who Want To Make U.S. Courts The Venue For All The World's Torts*, WALL ST. J., Apr. 22, 2013, <http://online.wsj.com/article/SB10001424127887324493704578430592807923134.html>). Previously, commentators had perceived an interesting—and at face value, unexpected—differentiation of how administrations of the two dominant American political parties have viewed the ATS. See Jide Nzelibe, *Contesting Adjudication: The Partisan Divide over Alien Tort Statute Litigation* (Northwestern Public Law Research Paper No. 12-31, Nov. 30, 2012), available at <http://ssrn.com/abstract=2183943> (Article to be published in forthcoming issue of the NW. J. INT'L L. & BUS.).

<sup>167</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); Eugene Kontorovich, *Kiobel And Academic Fallability*, THE VOLOKH CONSPIRACY (Apr. 17, 2013, 12:54 PM), <http://www.volokh.com/2013/04/17/kiobel-and-academic-fallability/>. See generally Keith A. Petty, *Who Watches the Watchmen: Vigilant Doorkeeping, the Alien Tort Statute, and Possible Reform*, 31 LOY. L.A. INT'L & COMP. L. REV. 183 (2009); Pamela J.

viewpoint among the Court's opinions boil down as to the reasons why an ATS lawsuit will not lie for Nigerian plaintiffs to sue an Anglo-Dutch corporation over alleged torts in violation of the law of nations that transpired in Nigeria.

Chief Justice Roberts wrote the majority opinion, which grounded its ruling "on a canon of statutory interpretation known as the presumption against extraterritorial application," which, "provides that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none.'"<sup>168</sup> After discussing the international relations rationale for the presumption, Chief Justice Roberts observed:

Indeed, the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do. This Court in *Sosa* repeatedly stressed the need for judicial caution in considering which claims could be brought under the ATS, in light of foreign policy concerns. As the Court explained, "the potential [foreign policy] implications . . . of recognizing . . . causes [under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." These concerns, which are implicated in any case arising under the ATS, are all the more pressing when the question is whether a cause of action

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Stephens, *Spinning Sosa: Federal Common Law, the Alien Tort Statute and Judicial Restraint*, 25 B.U. INT'L L.J. 1 (2007); Tim Kline, *Door Ajar Or A Floodgate: Corporate Liability After Sosa v. Alvarez-Machain*, 94 KY. L.J. 691 (2005–2006); Gerald Weber, *The Long Road Ahead: Sosa v. Alvarez-Machain and Clearly Established International Tort Law*, 9 EMORY INT'L L. REV. 129 (2005).

<sup>168</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1661 (2013) (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010)).

under the ATS reaches conduct within the territory of another sovereign.<sup>169</sup>

Examining the historical setting of the ATS within the context of the early Republic (from the *Marbois* incident through the 1795 Attorney General Opinion discussing the British demand for redress against American citizens who had aided a French raid upon Freetown in the Sierra Leone Colony),<sup>170</sup> the Chief Justice saw no reasonable basis on which the presumption against extraterritoriality might be rebutted in the case of the ATS—indeed, quite the contrary:

Nothing about this historical context suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign.

Indeed, far from avoiding diplomatic strife, providing such a cause of action could have generated it. Recent experience bears this out. See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77–78 (C.A.D.C. 2011) (Kavanaugh, J., dissenting in part) (listing recent objections to extraterritorial applications of the ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom). Moreover, accepting petitioners' view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world. The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.

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<sup>169</sup> *Id.* at 1664 (citing and quoting *Sosa*, 542 U.S., at 727–28, 124 S. Ct., at 2739) (“Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution”; and “[t]he possible collateral consequences of making international rules privately actionable argue for judicial caution.”).

<sup>170</sup> *Id.* at 1666–68.

We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. “[T]here is no clear indication of extraterritoriality here,” and petitioners’ case seeking relief for violations of the law of nations occurring outside the United States is barred.<sup>171</sup>

The Chief Justice might also have made another point here, one that the author believes is obvious when one steps back from the thicket of ratiocinations about the ATS and instead looks intelligently at the historical setting of the 1789 Judiciary Act within the context of the early Republic. That point is that a comprehensive subject matter jurisdiction of the federal courts over matters involving aliens is neatly provided *between* Section 11<sup>172</sup> of the 1789 Judiciary Act (what we’ve come to know as “diversity of citizenship” subject matter jurisdiction) *and* Section 9 (what we’ve come to know as the

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<sup>171</sup> *Id.* at 1668–69 (citing Morrison, 130 S. Ct. at 2883). Chief Justice Roberts also invoked the hoary aura of Justice Joseph Story:

Finally, there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms. As Justice Story put it, ‘No nation has ever yet pretended to be the *custos morum* of the whole world. . . .’ It is implausible to suppose that the First Congress wanted their fledgling Republic—struggling to receive international recognition—to be the first. Indeed, the parties offer no evidence that any nation, meek or mighty, presumed to do such a thing.

*Id.* at 1668 (quoting *U.S. v. The La Jeune Eugenie*, 26 F. Cas. 832, 847 (No. 15,551) (C.C.Mass.1822) (Story, J.)).

<sup>172</sup>The importance of federal court alienage subject matter jurisdiction as seen both to the Founders and to modern scholars is apparent when one considers that even those seeking to curtail substantially or abolish outright diversity jurisdiction recognize the vital national interests in preserving undisturbed the alienage provisions thereof and even suggest expanding their reach by requiring only “minimal” diversity of citizenship. *See, e.g.*, Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 966-968 & n. 11 (1979).

ATS) – *and* Section 9 was necessary precisely to fill the hole that Section 11 would leave in cases like the *Marbois* incident, wherein the litigants were *both aliens*, the injury occurred in the United States, and thus the injured alien would have no access to the federal courts through diversity of citizenship.<sup>173</sup> That Congress further

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<sup>173</sup> See Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 VA. J. INT'L L. 649 (2002). Professor Bradley has challenged this point of view, asserting that “[i]t has long been established that suits between aliens do not fall within Article III alienage diversity jurisdiction” — and although “Article III contains specific clauses for certain cases likely to involve law of nations issues, such as cases involving ambassadors and admiralty cases”— “outside of those contexts, it is not clear what the Article III basis for jurisdiction would be in an ATS case between aliens.” Curtis A. Bradley, *The Alien Tort Statute and Attorney General Bradford’s Opinion*, 106 AM. J. INT’L L. 509, 522 (2011)(footnotes omitted). It appears to be Professor Bradley’s suggestion that taking the view espoused here by the author would result in an ATS that exceeded the judicial power in Article III to be implemented by the Congress, particularly if “the law of nations” as it was understood during the Founding Era was a creature of state, rather than federal, law. *Id.* at 522-523 & n. 23 (“Article III concerns therefore provide an additional reason for construing the ATS not to apply to conduct by foreign citizens,” since “numerous scholars have concluded ...[that]... the law of nations was treated as general common law in the nineteenth and early twentieth centuries, not federal law.”). However, given that the Judiciary Act of 1789 was the first attempt to reify the broad strokes of Article III, it would not be surprising that Oliver Ellsworth and his colleagues may have had no reason to limn the boundaries of the judicial power with either the fly-speaking of modern scholars or with complete success in keeping the statute within the ambit of Article III as those boundaries would be declared later by the U.S. Supreme Court. Indeed, other provisions of the 1789 Judiciary Act either were found unconstitutional, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) ( §13’s purported grant of power to the Supreme Court to issue writs of mandamus), or to be unconstitutional as commonly applied by the federal courts, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77-79 (1938)(overruling Justice Story’s construction of §34, “The Rules of Decision Act,” in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), to avoid declaring §34 unconstitutional). The 1789 Judiciary Act was hardly written on a Mosaic tablet, and the *sui generis* nature of what Congress was trying to do in writing on this *tabula rasa* of a federal system commands our attention rather than our veneration. *See, e.g.*, William J. Wiecek, *The Reconstruction Of Federal Judicial Power*, 13 J. AM. LEG. HIST. 333, 337 & n.11 (1969)(noting that “the Judiciary Act of 1789 was a compromise measure, trimmed down considerably from the original draft by Oliver Ellsworth to placate opponents

narrowed the ATS jurisdiction provision to [a] torts that are [b] committed in violation of the law of nations, simply serves to reaffirm how strongly the 1789 Senate Judiciary Committee had *Marbois* and similar incidents in mind when providing a federal forum for cases such as the one that grew out of *Marbois*,—*Respublica v. de Longchamps*<sup>174</sup>—cases that would otherwise hang

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of the lower federal courts”); Harold M. Bowman, *The Unconstitutionality Of The Rule In Swift v. Tyson*, 18 B.U. L. REV. 659, 674- 680 (1938). Similarly, other provisions of the 1789 Judiciary Act, particularly Section 25, have raised storms of controversy strongly flavored by innuendo of unconstitutionality. See, e.g., Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States — A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1 (1913); see also Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1518 (1989) (“When the origins of our federal court system are viewed in their context of social and economic history, many questions ... find answers. In particular, it becomes clear that the system was constructed neither in the abstract nor within a conviction that law was separated from politics, but rather the contrary. The framers of the system worked within a living and unquestioned understanding that law was politics, that they were solving immediate and great political problems the best way they could.”); see, generally WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* (Wythe Holt & L.H. LaRue, Eds. 1990)

<sup>174</sup> 1 U.S. (1 Dall.) 111 (Pa. Ct. Oyez and Terminer 1784). The best exegesis of the *Marbois* incident and the legal and political concerns it raised comes from a non-legal source, G.S. Rowe & Alexander Knott, *Power, Justice, and Foreign Relations in the Confederation Period: The Marbois-Longchamps Affair, 1784-1786*, 104 PA. MAG. HIST. & BIO. 275 (June 1980). See also John C. Massaro, *The Forgotten Jurisdiction*, 33 N. ILL. U. L. REV. 83, 90-91 (2012). While technically a criminal prosecution, *Respublica v. de Longchamps* has been a staple of American torts casebooks and hornbooks for generations, cited to illustrate the extended personality doctrine in the law of tortious battery. See, e.g., DAN D. DOBBS, PAUL T. HAYDEN, & ELLEN BUBLICK, *TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* 37 (7<sup>th</sup> ed. 2013). The rationale for finding battery although *de Longchamps* struck only *Marbois*’ cane with his own is significant, for it shows how much more seriously the Founders would have taken the need to deal with such affronts not only by criminal prosecution but also by civil suit: “As to the assault, this is, perhaps, one ...



in a legal limbo while leaving justice up to the vagaries of state benches in the parochial years of the early Republic.<sup>175</sup>

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in which the insult is more to be considered than the actual damage; for, though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the definition of assault and battery, and among gentlemen too often induce dueling and terminate in murder.” *Respublica v. de Longchamps*, 1 U.S. (1 Dall.) at 114 (Opinion of M’Kean, C.J.). And Chief Justice M’Kean’s expression of concern in those years about affronts to dignity inducing dueling and terminating in murder became all-too-well exemplified some twenty years later, when Founder and an architect of the federal judicial power through the celebrated *Federalist No. 78*, Alexander Hamilton, was felled by the duelist’s pistol. See Joanne B. Freeman, *Dueling as Politics: Reinterpreting the Burr-Hamilton Duel*, 53 WM. & MARY QTRLY 289, 294-297 (Apr. 1996). That Chief Justice M’Kean in *de Longchamps* hoped it would not become so is evidenced by the breadth with which he defined battery — i.e., “[a]s, therefore, anything attached to the person, partakes of its inviolability; De Longchamps’ striking Monsieur Marbois’ cane, is a sufficient justification of that gentleman’s subsequent conduct” in defending himself,” 1 U.S. (1 Dall.) at 114, — which quickly inured to encouraging the civil remedy for the offended, rather than the resort to organized violence. See, e.g., *Hyatt v. Wood*, 3 Johns. 239 (N.Y. Sup. Ct. 1808); James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1372-1375 (2000); see also *United States v. Little*, 26 F.Cas. 936, 2 Wash.C.C. 205, No. 15,598 (C.C.D. Pa. 1808); see generally PETER GAY, *THE CULTIVATION OF HATRED: THE BOURGEOIS EXPERIENCE, VICTORIA TO FREUD* 9-33 (1994)(discussing *die Mensur*, the culture of dueling among 19<sup>th</sup> and early 20<sup>th</sup> century German students).

<sup>175</sup>William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687, 692 (2001-2002); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT’L & COMP. L. REV. 221, 225-237 (1996). We do well here to remember what Professor Bador called the compromise embodied in the 1789 Judiciary Act, “the essence of” which “was an agreement that the question whether access to the lower federal courts was necessary to assure the effectiveness of federal law should not be answered as a matter of constitutional principle, but rather, should be left a matter of political and legislative judgment, to be made from time to time in the light of particular circumstances,” Paul M. Bador, *Congressional Power Over Jurisdiction Of The Federal Courts*, 27 VILL. L. REV. 1030, 1031 (1981-1982), as well as Professor Holt’s admonition that understanding of the 1789 Judiciary Act “can be reached only when one accepts the fact that the Constitution and the Judiciary Act of 1789 were products of political vision and political struggle, relatively temporary political solutions for immediate, pressing political problems.” Wythe Holt, *The Origins of*

In a particularly enigmatic concluding section of only three sentences, yet bearing its own Roman numeral “IV,” Chief Justice Roberts left *Kiobel’s* version of an analogous statement in *Sosa* that has continued to haunt the federal courts with uncertainty—however in this case, the statement did not concern the “recognition” of causes of action under the ATS, but rather, the applicability of the presumption against extraterritoriality in cases that were not as remote as the “f-cubed” paradigm presented by *Kiobel*:

On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.<sup>176</sup>

For his part, Justice Kennedy, whose questioning and expressions of concern about extraterritorial application of the ATS at the first oral argument of the case in February 2012 set the wheels of the present decision in motion, concurred that the presumption against extraterritoriality applied on the facts of this case, but did not appear to desire a broader ruling:

The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my

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*Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547, 548 (1989). Furthermore, we should bear in mind Professor Holt’s observation “that a national court system was thought necessary on all sides because state courts, or at least many state courts, were not doing their jobs.” Holt, *supra*, at 549; see also *id.* at 553-562 (explaining examples of state-court judicial xenophobia).

<sup>176</sup> *Id.* at 1669 (citing *Morrison*, 130 S. Ct., at 2883-88).

view that is a proper disposition. Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991 (TVPA) . . . and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted. Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.<sup>177</sup>

Justice Alito also concurred with the Chief Justice's majority opinion, but he and Justice Thomas, unlike Justice Kennedy, would prefer an even more restrictive holding:

I concur in the judgment and join the opinion of the Court as far as it goes. Specifically, I agree that when Alien Tort Statute (ATS) "claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." This formulation obviously leaves much unanswered, and perhaps there is wisdom in the Court's preference for this narrow approach. I write separately to set out the broader<sup>178</sup> standard that leads me to the conclusion that this case falls within the scope of the presumption.

In *Morrison* we explained that "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." We also reiterated that a

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<sup>177</sup> *Id.* (Kennedy, J., concurring).

<sup>178</sup> *Id.* at 1670 (Alito, J., concurring). Here, Justice Alito likely means "broader" in the sense of "more encompassing," for the standard he articulates narrows, rather than broadens in any way, the scope of the Chief Justice's proposed "touch and concern" criterion.

cause of action falls outside the scope of the presumption—and thus is not barred by the presumption—only if the event or relationship that was “the ‘focus’ of congressional concern” under the relevant statute takes place within the United States. . . .

The Court's decision in *Sosa* makes clear that when the ATS was enacted, “congressional concern” was “‘focus[ed],”” on the “three principal offenses against the law of nations” that had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy. The Court therefore held that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.” In other words, only conduct that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations can be said to have been “the ‘focus’ of congressional concern,” when Congress enacted the ATS. As a result, a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—*unless the domestic conduct is sufficient* to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations.<sup>179</sup>

Unlike the extraterritoriality-presumption based rationales of the Chief Justice and Justices Kennedy and Alito, Justice Breyer, writing for himself and Justices Ginsburg, Sotomayor, and Kagan, would not rely on the extraterritoriality presumption at all.<sup>180</sup> Rather, Justice

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<sup>179</sup> *Id.* (Alito, J., concurring) (internal citations omitted) (emphasis added).

<sup>180</sup> *Id.* at 1671–74 (Breyer, J., concurring in the judgment).

Breyer would focus on the context of the connections between a putative ATS claim and U.S. interests—a foreign relations law perspective:

Unlike the Court, I would not invoke the presumption against extraterritoriality. Rather, guided in part by principles and practices of foreign relations law, I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.<sup>181</sup>

Justice Breyer elaborated his rationale grounded in the foreign relations law perspective in the following terms:

In applying the ATS to acts “occurring within the territory of a[nother] sovereign,” I would assume that Congress intended the statute's jurisdictional reach to match the statute's underlying substantive grasp. That grasp, defined by the statute's purposes set forth in *Sosa*, includes compensation for those injured by piracy and its modern-day equivalents, at least where allowing such compensation avoids “serious” negative international “consequences” for the United States. And just as we have looked to established international substantive norms to help determine the statute's substantive reach, so we should look to international jurisdictional norms to help determine the statute's jurisdictional scope.

The Restatement (Third) of Foreign Relations Law is helpful. Section 402 recognizes that, subject to § 403's “reasonableness” requirement, a nation may apply its law (for example, federal common law) not only (1) to “conduct” that “takes

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<sup>181</sup> *Id.* at 1671

place [or to persons or things] within its territory” but also (2) to the “activities, interests, status, or relations of its nationals outside as well as within its territory,” (3) to “conduct outside its territory that has or is intended to have substantial effect within its territory,” and (4) to certain foreign “conduct outside its territory . . . that is directed against the security of the state or against a limited class of other state interests.” In addition, § 404 of the Restatement explains that a “state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade,” and analogous behavior.

Considering these jurisdictional norms in light of both the ATS’s basic purpose (to provide compensation for those injured by today’s pirates) and *Sosa*’s basic caution (to avoid international friction), I believe that the statute provides jurisdiction where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

I would interpret the statute as providing jurisdiction only where distinct American interests are at issue. Doing so reflects the fact that Congress adopted the present statute at a time when, as Justice Story put it, “No nation ha[d] ever yet pretended to be the *custos morum* of the whole world.” That restriction also should help to minimize international friction. Further limiting principles such as exhaustion, forum non conveniens, and comity would do the same. So

would a practice of courts giving weight to the views of the Executive Branch.<sup>182</sup>

Justice Breyer then turned to the application of his foreign relations law-based test to the case the *Kiobel* plaintiffs presented to the Court:

Applying these jurisdictional principles to this case, however, I agree with the Court that jurisdiction does not lie. The defendants are two foreign corporations. Their shares, like those of many foreign corporations, are traded on the New York Stock Exchange. Their only presence in the United States consists of an office in New York City (actually owned by a separate but affiliated company) that helps to explain their business to potential investors. The plaintiffs are not United States nationals but nationals of other nations. The conduct at issue took place abroad. And the plaintiffs allege, not that the defendants directly engaged in acts of torture, genocide, or the equivalent, but that they helped others (who are not American nationals) to do so.

Under these circumstances, even if the New York office were a sufficient basis for asserting general jurisdiction, it would be farfetched to believe, based solely upon the defendants' minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest, such as in not providing a safe harbor for an "enemy of all mankind." Thus I agree with the Court that here it would "reach too far to say" that such "mere corporate presence suffices."<sup>183</sup>

Five days later, the Court granted Rio Tinto PLC's petition for a writ of certiorari in the *Sarei* case, vacated the Ninth Circuit's en

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<sup>182</sup> *Id.* at 1674 (internal citations omitted).

<sup>183</sup> *Id.* at 1677–78 (internal citations omitted).

banc opinion, and remanded the case “for further consideration in light of *Kiobel*.”<sup>184</sup>

Having surveyed the four opinions and two principal rationales of the Justices unanimous in their judgment, we next turn to consider matters of great import to MNEs both foreign, such as Alstom, and domestic, such as Chevron, in considering the risks posed by their FDIs: What terrain lies ahead—both perceived and imperceptible—in the post-*Kiobel* ATS landscape?

#### A. FUTURE ATS LITIGATION

Taken together, the U.S. Supreme Court’s major pronouncements in *Sosa* and *Kiobel* on the scope of the ATS answer some questions clearly:

- (1) While the ATS has been held to be a subject matter jurisdictional statute,<sup>185</sup> the ATS was not “stillborn” because it also “interact[s]” with “the ambient law of [its] era” such that “federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time.”<sup>186</sup>
- (2) Causes of action that violate modern international law can be “recognized” (as opposed to created) by federal district courts, but only when they “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century

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<sup>184</sup> *Rio Tinto PLC v. Sarei*, No. 11–649, 2013 WL 1704704 (Apr. 22, 2013).

<sup>185</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004) (“The statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.”).

<sup>186</sup> *Id.* at 714.



paradigms we have recognized,” i.e., “Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.”<sup>187</sup>

- (3) Because the “presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption,” cases “seeking relief for violations of the law of nations occurring outside the United States” are “barred” when “all of the relevant conduct took place outside the United States.”<sup>188</sup>
- (4) However, “where the claims touch and concern the territory of the United States,” the ATS may apply provided that the claims “do so with sufficient force to displace the presumption against extraterritorial application.”<sup>189</sup>
- (5) “[M]ere corporate presence” by itself does not “suffic[e]” to displace the presumption against extraterritoriality, given that “[c]orporations are often present in many countries.”<sup>190</sup>

The combination of what these holdings said, what they didn’t say, and the many other issues on which the Supreme Court hasn’t spoken definitely—and, of course, on which Congress has enacted no legislation—leave a very vague litigation frontier that will have to be limned, case-by-case, through the common-law decision-making processes of the ninety-four federal district courts and the thirteen U.S. appellate courts. One commentator has suggested that there are at least three categories of ATS cases whose survival after *Kiobel* remains open to debate, particularly as one of “those that” some of the Justices see as remaining “‘unresolved’ by *Kiobel*:

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<sup>187</sup> *Id.* at 724–25.

<sup>188</sup> *Kiobel v. Royal Dutch Petroleum*, No. 10-491, slip op. at 13–14 (U.S. Apr. 17, 2013).

<sup>189</sup> *Id.* at 14.

<sup>190</sup> *Id.*

- (1) Cases alleging *Sosa*-sufficient torts committed overseas by U.S. defendants;
- (2) Cases such as *Filartiga*, where a foreign defendant uses the U.S. as an effective “safe harbor,” thereby preventing other states from bringing him to justice; and
- (3) Cases in which the defendant is alleged to have engaged in conduct *in* the United States that contributed materially to the violation of a *Sosa*-sufficient law of nations norm (such as providing active assistance to torture), but where that conduct in the U.S. was not itself *sufficient* to establish the violation. ([But excluding from] this category cases alleging aiding and abetting predicated *solely* on knowledge by a U.S. corporation of a foreign subsidiary’s bad acts. Although even that case is not technically resolved by *Kiobel*, . . . it’s safe to predict the Court would not recognize such a claim, most likely on the theory that such general knowledge, and failure to stop the tort, does not satisfy the *scienter* requirement for a *Sosa*-qualified claim.)<sup>191</sup>

Yet, that is not all that remains unresolved, as the following subsections explain in detail.

#### 1. EXTRATERRITORIALITY REDEFINED—APPLYING THE CHIEF JUSTICE’S “TOUCH AND CONCERN” PHRASEOLOGY

While the Court in *Kiobel* clarified that the ATS does not apply to conduct by a foreign corporation that transpires entirely in that foreign country, the majority’s opinion once again, as it did in *Sosa*, tantalizingly leaves “the door . . . still ajar subject to vigilant

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<sup>191</sup> Marty Lederman, *Kiobel Insta-Symposium: What Remains of the ATS?*, OPINIO JURIS (Apr. 18, 2013, 6:40 PM), <http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-what-remains-of-the-ats/>.

doorkeeping.”<sup>192</sup> That metaphorical door is represented by the Chief Justice’s very specific use of the “touch and concern” language to delineate a gray area where the ATS will not have extraterritorial application. However, that is merely a presumption, and it is subject to rebuttal by the plaintiffs’ showing that their claims do not merely “touch and concern the territory of the United States,” but rather, that they touch and concern the territory of the United States “with sufficient force to displace the presumption against extraterritorial application.” This leaves three major sets of unresolved issues, which likely will present numerous sub-issues. First, what does it mean to say that a claim a plaintiff seeks to assert pursuant to the ATS “touches and concerns the territory of the United States”? Second, how is it that a plaintiff can demonstrate that a claim touches and concerns the territory of the United States “with sufficient force” to rebut the presumption against extraterritorial application. Third, what kind of force is being referenced, and how shall we know when that force is “sufficient to rebut the presumption against extraterritoriality”?<sup>193</sup>

*Al Shimari v. CACI International, Inc.*<sup>194</sup> is a case that presents the kind of fact pattern that will immediately test the boundaries set by *Kiobel*. In that case, which “concerns the well-publicized Abu Ghraib prison abuse scandal[,] . . . four previously detained Iraqi citizens [brought] claims arising under common law and the . . . [ATS] against military defense contractor CACI [Premier Technology, Inc.] for alleged abuse and torture during their detention in Abu Ghraib, Iraq.”<sup>195</sup> The corporate defendant is headquartered in Virginia.<sup>196</sup> The extraterritoriality issue left open by *Kiobel* would have to be faced head-on here: Does the conduct by an American

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<sup>192</sup> *Sosa*, 542 U.S. at 729.

<sup>193</sup> Roger Alford, *Kiobel Insta-Symposium: Interpreting “Touch and Concern”*, OPINIO JURIS (Apr. 19, 2013, 9:59 AM), <http://opiniojuris.org/2013/04/19/kiobel-insta-symposium-interpreting-touch-and-concern>.

<sup>194</sup> *Al Shimari v. CACI Int’l, Inc.*, No. 1:08-CV-00827-GBL, 2013 WL 1234177 (E.D. Va. Mar. 19, 2013); see Jonathan Kaufman, *Lower Courts Set to Address Questions Kiobel Left Unanswered*, EARTHRIGHTS INT’L (May 9, 2013), <http://www.earthrights.org/blog/lower-courts-set-address-questions-kiobel-left-unanswered> (noting that the “touch and concern” language will be at issue in upcoming motions in three pending cases: *Samantar*, the *South African Apartheid* Litigation, and the *Chiquita* Litigation).

<sup>195</sup> *Al Shimari*, 2013 WL 12334177, at \*1.

<sup>196</sup> *Al Shimari v. CACI Int’l Inc.*, 679 F.3d 205, 209 (4th Cir. 2012).

military contractor in running a prison in a foreign country, but under contract with U.S. armed forces, touch and concern the territory of the United States with sufficient force so as to “rebut the extraterritoriality presumption”? The answer is far from clear. Nor is the answer likely to come from this litigation, because the district court has now, after remand, dismissed *Al Shimari* on statute of limitations grounds.<sup>197</sup>

The phrase “touch and concern” has not previously appeared in reported ATS cases in the federal courts until recently.<sup>198</sup> Thus, the phrase is an entirely new judicially applied gloss on the thirty-three words that make up the ATS. What could touch and concern mean? The phrase itself comes from the law of real property, where it is a

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<sup>197</sup> *Al Shimari*, 2013 WL 1234177, *vacated* *Shimari v. CACI Int’l Inc.*, 2008 WL 7348184 (E.D. Va., Nov. 25, 2008). In its original decision, subsequently reversed, the District Court dismissed the “[p]laintiffs’ claims to the extent that they rely upon ATS jurisdiction because tort claims against government contractor interrogators are too modern and too novel to satisfy the *Sosa* requirements for ATS jurisdiction.” 657 F. Supp. 2d 700, 704 (E.D. Va. 2009). In a related case, the District Court in Maryland appeared to come to exactly the opposite conclusion, permitting the ATS claims against the contractors to go forward. *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 745–60 (D. Md. 2010).

<sup>198</sup> In recent years, the phrase has been used in opinions authored by Justice Ginsburg in a variety of contexts. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2565 n.7 (2011) (Ginsburg, J., dissenting) (citations omitted) (noting that wrongful conduct may sufficiently touch and concern a whole class of persons where there are “common questions of law or fact” between the claims of the lead plaintiff and the applicant class”); *Kucana v. Holder*, 558 U.S. 233, 248 (2010) (noting that a denial of a motion to reopen . . . touches and concerns only the question whether the alien’s claims have been accorded a reasonable hearing”); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 123 (2005) (Ginsburg, J., dissenting) (noting that cases in which tax assessments burden off-reservation land “do not touch and concern . . . taxes formally imposed on nonmembers that nonetheless burden *on-reservation* tribal activity”); *Porter v. Nussle*, 534 U.S. 516, 517–18 (2002) (noting that the proof requirements of a pending case “do not touch or concern . . . whether resort to a prison grievance process must precede resort to a court”); *Arizona v. Evans*, 514 U.S. 1, 30–31 (1995) (Ginsburg, J., dissenting) (noting that institutional constraints prohibit federalism from touching or concerning state law interpreted by state courts).

term of art derived from the common-law used to describe promises that limit the use of a particular parcel of land.<sup>199</sup> “At common law, real covenants and equitable servitudes do not run with the land unless they touch and concern the land.”<sup>200</sup> Perhaps the majority’s focus on territory—the real property aspect of legislative jurisdiction—provides a logical, if not compelling, connection to this concept of real property law.<sup>201</sup> To fully understand how ill-chosen and infelicitous a phrase the Chief Justice’s opinion in *Kiobel* chose, however, we need not go any further than examining a recent explanation of how the phrase has caused innumerable problems in the area of law that gave it its birth:

The touch and concern requirement has had a tumultuous history. The requirement has endured decades of scholars’ failed attempts at articulating a definitive definition, test, or rationale for the requirement, and it has weathered severe criticism. The touch and concern requirement was first conceived in the English courts in *Spencer’s Case* and later explained in *Congleton v. Pattison* as a requirement that the covenant must “directly affect the nature, quality, or value of the thing demised, [or] the mode of occupying it.” In 1914, Professor Harry Bigelow, in his article *The Content of Covenants in Leases*, rejected the *Congleton* test, declaring it “vague” and “question-begging,” and articulated the following test: a covenant touches and concerns the land if it “operate[s] either to make more valuable some of the rights, privileges, or powers possessed by the covenantee or to

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<sup>199</sup> See generally Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982).

<sup>200</sup> Note, *Touch and Concern, The Restatement (Third) of Property: Servitudes, and a Proposal*, 122 HARV. L. REV. 938, 938 (2009) (footnote omitted); see Jeffrey E. Stake, *Toward an Economic Understanding of Touch and Concern*, 1988 DUKE L.J. 925, 925–32 (1988).

<sup>201</sup> See, e.g., Molly Shaffer Van Houweling, *Touching And Concerning Copyright: Real Property Reasoning In MDY Industries, Inc. v. Blizzard Entertainment, Inc.*, 51 SANTA CLARA L. REV. 1063, 1065 (2011) (discussing an analogous example of how “the spirit—if not the exact terminology—generation of servitude-like restrictions imposed by intellectual property owners”).

relieve him in whole or in part of some of his duties.” Professor Bigelow’s test was later tweaked by Dean (later Judge) Charles Clark:

If the promisor’s legal relations in respect to the land in question are lessened—his legal interest as owner rendered less valuable by the promise—the burden of the covenant touches or concerns that land; if the promisee’s legal relations in respect to that land are increased—his legal interest as owner rendered more valuable by the promise—the benefit of the covenant touches and concerns that land.

Though the Bigelow–Clark test has been widely criticized as being circular, it remains an oft-quoted test because, despite many attempts, there has been no consensus on an alternative.<sup>202</sup>

The touch and concern phrase is so vapid, in fact, that Reporters eliminated it from the *Restatement (Third) of Property*.<sup>203</sup> It is a shame that touch and concern has been revived in a completely different setting, perhaps ringing dimly in the minds of judges or their law clerks from long ago property classes, than the

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<sup>202</sup> *Touch and Concern, The Restatement (Third) of Property: Servitudes, and a Proposal, supra*, note 200, at 939 (footnotes omitted) (quoting CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH “RUN WITH LAND” 97 (2d ed. 1947)).

<sup>203</sup> RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 (2000); see *Touch and Concern, The Restatement (Third) of Property: Servitudes, and a Proposal, supra* note 200, at 940–45. *But see* Van Houweling, *supra* note 201, at 1064–65 (arguing that applying the touch and concern concept in connection with the doctrine of exhaustion in transferring intellectual property rights “suggests that the reasoning underlying the touch and concern doctrine may be more useful in this new context than in the land context where it first arose”).

extraterritorial reach of the ATS—whether a dispute touches or concerns the territory of the United States—to sew anew analogous, and equally inefficient, seeds of confusion, opacity, and argumentation, thereby unwittingly creating a new set of transaction costs for ATS litigants.<sup>204</sup> Indeed, the new touch and concern test may well suffer from the same problems that the Reporter of the *Restatement (Third) of Real Property* identified when he set out “to reweave the ancient strands of servitude law into a new, and presumably smoother, fabric,” and homed in on touch and concern as “[o]ne of the knotty strands destined for elimination or replacement . . . [because] ‘it identifies neither the problems addressed nor the value choices that must be made in determining whether to apply it.’”<sup>205</sup>

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<sup>204</sup> One commentator has observed that “[t]he only thing that is truly clear is that today, the Supreme Court has provided fodder for another decade or more of litigation and created more business for litigators” because “[c]ompanies and victims’ advocates will battle over when claims touch and concern the U.S. with sufficient force.” Katie Redford, *Commentary: Door Still Open for Human Rights Claims After Kiobel*, SCOTUS BLOG (Apr. 17, 2013), <http://www.scotusblog.com/2013/04/commentary-door-still-open-for-human-rights-claims-after-kiobel/>.

<sup>205</sup> Stake, *supra* note 200, at 926 (quoting Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 931 (1988) (footnote omitted)). At least one commentator has suggested that *Kiobel* may be a Pyrrhic victory for corporations because of the changes it is likely to bring to discovery in corporate ATS suits:

*Kiobel* would be a Pyrrhic victory if, to dismiss ATS claims, corporate defendants must have their officers and directors sit for depositions to determine to what extent they contributed to human rights violations abroad. Some of these individuals might be located in the United States but also have formal or informal roles in the entities that are most connected to the alleged violations committed abroad. It is not uncommon for there to be a great deal of overlap among the boards and management teams of a multinational corporation’s subsidiaries.

Milan Markovic, *Kiobel Insta-Symposium: Settlement, Discovery and Kiobel*, OPINIO JURIS (Apr. 24, 2013, 4:45 PM), <http://opiniojuris.org/2013/04/24/kiobel-insta-symposium-settlement-discovery-and-kiobel>. Another commentator has asked, “if mere corporate presence is not enough, what kind and how much territorial activity within the United States is enough?”, and has provided a “non-exhaustive list” of

Thus, there are a number of paradigms that were not directly addressed by the Court in deciding *Kiobel* on its particular litigation facts, which are left for future ATS litigation:

- (1) Can a foreign plaintiff sue a U.S. defendant for acts or omissions occurring *wholly* outside of the United State[s] that allegedly violate the law of nations? [Does it make a difference whether the defendant is a: (a) citizen; (b) resident; (c) corporation headquartered in America; (d) corporation incorporated in America; or (e) a subsidiary of a foreign corporation in America?]

....

- (2) Can a foreign plaintiff sue a foreign defendant for acts or omissions occurring *in part in* the United States that lead to an injury in a foreign country that allegedly violates the law of nations? . . .

....

- (3) Can a foreign plaintiff sue a U.S. defendant for acts or omissions occurring *in part in* the United States that lead to injury in a foreign country?<sup>206</sup>

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“the types of activities that might be the subject of future litigation.” Roger Alford, *Kiobel Insta-Symposium: Degrees of Territoriality*, OPINIO JURIS, (Apr. 22, 2013, 9:56 AM), <http://opiniojuris.org/2013/04/22/kiobel-insta-symposium-degrees-of-territoriality>.

<sup>206</sup> Donald Childress, *Kiobel Commentary: An ATS Answer with Many Questions (And the Possibility of a Brave New World of Transnational Litigation)*, SCOTUS BLOG (Apr. 18, 2013, 5:03 PM), <http://www.scotusblog.com/2013/04/kiobel-commentary-an-ats-answer-with-many-questions-and-the-possibility-of-a-brave-new-world-of-transnational-litigation>.



Because of the opacity of the touch and concern test, Professor Burt Neuborne of NYU foresees as much post-*Kiobel* litigation as there was pre-*Kiobel*:

[T]he *Kiobel* majority says little or nothing about how to decide ATS cases where a significant link to the territorial United States exists, either because the injured plaintiff is a United States national, the defendant is a United States resident, and/or a significant proportion of the operative facts took place within the United States. The Breyer concurrence indicates that the ATS will apply in many such cases. The Roberts majority is silent on whether one or more of such links will rebut the presumption against extraterritoriality. The swing-vote Kennedy concurrence is purposefully vague on the issue. So, much ATS litigation will continue, albeit in a narrower set of cases involving allegations of significant links to the territorial United States. We can look forward to years of uncertainty, split decisions, and an eventual return trip to a reconstituted Court.<sup>207</sup>

Another commentator, however, sees opportunity in the way Chief Justice Roberts phrased the touch and concern test, reading into it the classic effects test<sup>208</sup> for determining the scope of extraterritorial application of a federal statute, articulated<sup>209</sup> by

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<sup>207</sup> Burt Neuborne, *Some Quick Thoughts on Transnational Human Rights Litigation in American Courts After Kiobel*, N.Y.U. J. INT'L L. & POL. ONLINE FORUM (Apr. 19, 2013), <http://nyujilp.org/some-quick-thoughts-on-transnational-human-rights-litigation-in-american-courts-after-kiobel>.

Professor Childress offers some specific predictions on hypotheticals similar to those posed by Professor Neuborne. See Childress, *supra* note 206.

<sup>208</sup> See Joseph Rome, *R.I.P. A.T.S.? How Much of the Alien Tort Statute Survives the Supreme Court's Kiobel Decision?*, N.Y.U. J. INT'L L. & POL. ONLINE FORUM (Apr. 17, 2013), <http://nyujilp.org/r-i-p-a-t-s-how-much-of-the-alien-tort-statute-survives-the-supreme-courts-kiobel-decision> (noting that the Court's decision that claims should "'touch and concern the territory of the United States'" sounds familiar to "the old 'effects' test").

<sup>209</sup> See *U.S. v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); see also Jordan A. Dresnick et al., *The United States as Global Cop: Defining the 'Substantial Effects' Test in U.S. Antitrust Enforcement in the Americas*

Learned Hand when he and a Second Circuit panel were “Justices for a Day” because they sat in the stead of a Supreme Court which, because of recusals, could not muster a quorum.<sup>210</sup> The effects test subjects companies carrying on business outside of the United States to federal law, such as antitrust law, if their business activity is intended to affect U.S. commerce, and if that activity is not *de minimis*.<sup>211</sup> If so, “this could be an opportunity to reconcile the majority opinion with Breyer’s concurrence; perhaps if a ‘distinct American interest’ were at stake in a particular case, the Court would be satisfied that the presumption has been rebutted in that particular case,” particularly since “only [Justices] Alito and Thomas supported the notion that the offending conduct must occur on U.S. soil.”<sup>212</sup>

It would seem unlikely that the touch and concern language chosen by Chief Justice Roberts would evoke the effects test. The Supreme Court extensively criticized and rejected it in *Morrison*,<sup>213</sup> although this securities law case provided the very analytic foundation on which Chief Justice Roberts built his analysis for the *Kiobel* majority. Furthermore, the effects test itself is just as murky, heavily criticized,<sup>214</sup> and poorly predictive of results<sup>215</sup> as the

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*and Abroad*, 40 U. MIAMI INTER-AM. L. REV. 453, 467–68 (2009) (footnotes omitted).

<sup>210</sup> REASON AND IMAGINATION: THE SELECTED CORRESPONDENCE OF LEARNED HAND 247–48 (Constance Jordan ed., 2013).

<sup>211</sup> *Nat’l Bank of Canada v. Interbank Card Ass’n*, 666 F.2d 6, 8–9 (2d Cir. 1981).

<sup>212</sup> *Rome*, *supra* note 208.

<sup>213</sup> *Morrison v. Nat’l Australia Bank, Ltd.*, 130 S. Ct. 2869, 2878–81 (2010).

<sup>214</sup> *See id.*; Donald J. Curotto, *Extraterritorial Application of the Antitrust Laws and Retaliatory Legislation by Foreign Countries*, 11 GOLDEN GATE U. L. REV. 577 (1981). In an often-cited opinion, the Ninth Circuit criticized the effects test as inadequate and proposed a soft, multi-factored balancing test that, while extensively applied in the lower courts, still functions on an intensely factual, case-by-case basis. *Id.* at 582–83 (discussing *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976)); *see also* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (following the *Timberlane* rejection of the effects test). *But see* Dresnick, *supra* note 209, at 467–68 & n.95 (characterizing *Timberlane* as a

property-law conception of touch and concern. Indeed, that test is notorious for its morphing into an array of tests as courts applied it,<sup>216</sup> so the invitation for courts to resort to it to interpret the touch and concern gloss on the ATS should be flatly declined.

To understand the touch and concern language, the best hope is to return to the first causes of the statute itself,<sup>217</sup> as Chief Justice Roberts did, in *Kiobel*. Recalling the historical backdrop of the ATS will be critical in doing so.<sup>218</sup> Although courts will be invited to find that the incorporation or headquartering of an MNE in America satisfies this standard, judges will need to be even more astute and vigilant than *Sosa* instructed them to be. In particular, they will need to focus on three main things. First, a court should ensure that it is not the defendant, but rather, the defendant's *improper conduct* that

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modification of the effects test by “adding the element of international comity to the ‘effects test,’ thus creating a tripartite analysis”).

<sup>215</sup> See *Morrison*, 130 S. Ct. at 2878–81; Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455 (2008); Austen L. Parrish, *Morrison, the Effects Test, and the Presumption Against Extraterritoriality: A Reply to Professor Dodge*, 105 AM. SOC'Y INT'L L. PROC. 399 (2011). But see William S. Dodge, *Morrison's Effects Test*, 40 SW. L. REV. 687 (2011); William S. Dodge, *The Presumption Against Extraterritoriality After Morrison*, 105 AM. SOC'Y INT'L L. PROC. 396 (2011).

<sup>216</sup> For a classic description of the problem, see Judge Becker's opinion in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1187 (E.D. Pa. 1980) (describing the many variations of the effects test across jurisdictions).

<sup>217</sup> For an example of this scholarly method in action, see Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 155–56 (2004).

<sup>218</sup> For the range of values, we may view collective the following: *Sosa*, 542 U.S. at 716–17 (discussing the 1784 Marbois affair, which encouraged the creation of the Judiciary Act, giving the Court original jurisdiction over diplomats); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183 (2004) (discussing how piracy provides the foundation for the ATS); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006) (discussing how safe conduct inspired the ATS); see also Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995) (asserting the capture of the enemy vessels as the only scenario in which the ATS applies). *Doe v. Nestle, S.A.* 748 F. Supp. 2d 1057, 1068 n.8 (C.D. Cal. 2010).

touches and concerns the United States. Second, a court must ensure that it is specifically the *territory* of the United States that is being touched and concerned, rather than the United States generically, or the United States' interests abstractly. Lastly, a court must ensure that the territory of the United States being touched and concerned is done so in a way that, unless a federal court forum is provided to the alien(s) seeking to sue, strongly puts at risk one of the core values—neutrality, protection of diplomats, protection of aliens under safe conducts—in the ATS's history.<sup>219</sup>

This, however, will not always be an easy task in the hands of the lower federal courts. In a decision rendered two months before *Kiobel*, the Ninth Circuit reversed a federal district court's ruling that had short-circuited an attempt by Japan's whaling lobby (euphemistically named a "Research Institute") to use the ATS as a sword to thwart an Oregon-based conservation society's aggressive efforts to interfere with whaling.<sup>220</sup> Writing for the Ninth Circuit panel, Chief Judge Kozinski had no hesitation to paint with a broad brush in analogizing the conservationists' efforts to disrupt ocean whaling to piracy:

You don't need a peg leg or an eye patch.  
When you ram ships; hurl glass containers of acid;  
drag metal-reinforced ropes in the water to damage  
propellers and rudders; launch smoke bombs and  
flares with hooks; and point high-powered lasers at  
other ships, you are, without a doubt, a pirate, no

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<sup>219</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

<sup>220</sup> *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 860 F. Supp. 2d 1216 (W.D. Wash. 2012), *rev'd*, 708 F.3d 1099 (9th Cir. 2013). Invoking § 1350 in this way presents innovative avenues for MNEs, complementary to the legislative lobbying discussed *infra* Part III.B, to protecting investments, both domestic and foreign, from private activism as well as from judicial disruption. See *Shell Offshore Inc. v. Greenpeace, Inc.*, 864 F. Supp. 2d 839 (D. Alaska 2012). While Alstom would not likely be able to employ similar litigation tactics to dissuade activism against its FDI sites in Israel, such litigation might be useful were there to be activism.

matter how high-minded you believe your purpose to be.<sup>221</sup>

While the analogy asserted here is not entirely persuasive,<sup>222</sup> the slope of analogy that Judge Kozinski has started down, however, may prove even less persuasive and more slippery.<sup>223</sup> Assigning eighteenth century roles to actors in twenty-first century events has superficial appeal that conceals the substantial potential for the drawing of inapposite analogies and the application of faulty inductive reasoning that lack intellectual and historical grounding.<sup>224</sup> For example, there are those who have sought—and no doubt will renew their efforts—to use analogy to cast certain kinds of corporate FDI conduct as “piracy”<sup>225</sup> as well as “ambassadorial.”<sup>226</sup> Great care

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<sup>221</sup> *Inst. of Cetacean Research*, 708 F. 3d, at 1101. While Judge Milan D. Smith dissented from the panel’s decision to order reassignment of the case to a new district judge upon remand, he concurred in the reinstatement of the whaler’s ATS claim and the panel’s prior decision in *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*, 702 F.3d 573 (9th Cir. 2012) to preliminarily enjoin the conversation group’s activities, because “[e]ven if one believes it is barbaric to harvest whales for any purpose at the beginning of the 21st century, as practiced by Cetacean, it is clearly permitted under international law.” *Id.* at 1106 (Smith, J., concurring in part & dissenting in part).

<sup>222</sup> See generally the extensive discussion of the doctrinal underpinnings of international piracy law in Samuel Shnider, *Universal Jurisdiction Over “Operation of a Pirate Ship”: The Legality of the Evolving Piracy Definition in Regional Prosecutions*, 38 N.C. J. INT’L L. & COM. REG. 473 (2013).

<sup>223</sup> For an example of this at work, see Martha Lovejoy, Note, *From Aiding Pirates To Aiding Human Rights Abusers: Translating The Eighteenth-Century Paradigm Of The Law Of Nations For The Alien Tort Statute*, 12 YALE HUM. RTS. & DEV. L.J. 241 (2009).

<sup>224</sup> See, e.g., Kontorovich, *The Piracy Analogy*, *supra* note 218, at 183; see also Dan Hunter, *No Wilderness of Single Instances: Inductive Inference in Law*, 48 J. LEGAL EDUC. 365 (1998). See generally Dan Hunter, *Reason Is Too Large: Analogy And Precedent In Law*, 50 EMORY L.J. 1197, 1206 (2001) (comparing and contrasting analogy and inductive reasoning because “legal commentators have caused enormous problems by failing to explain how analogy differs from the related inference processes of induction and metaphor”).

<sup>225</sup> See Kontorovich, *The Piracy Analogy*, *supra* note 218, at 236–37; see, e.g., Jennifer J. Rho, Comment, *Blackbeards Of The Twenty-First Century: Holding Cybercriminals Liable Under The Alien Tort Statute*, 7 CHI. J. INT’L L. 695, 703–18 (2007) (arguing that “piracy provides a

will need to be exercised lest such analogies once again threaten to distort the ATS in the very ways the *Kiobel* Court has tried to nip in the bud.

## 2. WHAT IS A *TORT* FOR ATS PURPOSES?

Courts have largely failed to grapple with another challenging word—tort—that has been in every iteration of the statute since the Judiciary Act of 1789.<sup>227</sup> The decided cases often involve a misinterpretation of the significance of the phrase “for tort only.”<sup>228</sup>

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remarkably good analogy to cybercrime”; ergo, cybercrime should be actionable as piracy under the ATS). Such FDIs may not always be in infrastructure or commercial enterprises—it could very well be the supply of corporate personnel to whom U.S. foreign military operations are subcontracted. See, e.g., Mark Mazetti, *Pakistan’s Public Enemy: How a Single Spy Helped Turn Pakistan Against the United States*, N.Y. TIMES SUNDAY MAG., Apr. 14, 2013, at MM30, available at <http://www.nytimes.com/2013/04/14/magazine/raymond-davis-pakistan.html>; see also Jenny S. Lam, *Accountability for Private Military Contractors Under The Alien Tort Statute*, 97 CALIF. L. REV. 1459 (2009); cf. Ansel J. Halliburton, *Pirates Versus Mercenaries: Purely Private Transnational Violence at the Margins of International Law*, EXPRESSO, 2010, available at [http://works.bepress.com/ansel\\_halliburton/1](http://works.bepress.com/ansel_halliburton/1).

<sup>226</sup> Cf. Logan Michael Breed, *Regulating Our 21st-Century Ambassadors: A New Approach To Corporate Liability For Human Rights Violations Abroad*, 42 VA. J. INT’L L. 1005, 1006–07, 1013–15 (2001–2002).

<sup>227</sup> The reader is referred to the 1878, 1911, and 1948 versions of the ATS, the product of re-codification rather than amendment, which are set forth in JENNIFER K. ELSEA, *THE ALIEN TORT STATUTE: LEGISLATIVE HISTORY AND EXECUTIVE BRANCH VIEWS*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS (Oct. 2, 2003), at 6–8, available at <http://www.policyarchive.org/handle/10207/1864>.

<sup>228</sup> See generally J.M. Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT’L & COMP. L. REV. 445 (1994) (arguing that the phrase “tort only” was meant to cover prize claims involving damage or injury to property); William S. Dodge, *Which Torts In Violation Of The Law Of Nations?*, 24 HASTINGS INT’L & COMP. L. REV. 351 (2000–2001). Writing in 2001 before the Supreme Court’s *Sosa* decision, Professor Dodge

Most have tended to virtually read the word *tort* out of the statute and to ignore the critical punctuation mark—that although not included in the handwritten Judiciary Act of 1789,<sup>229</sup> was quickly interpolated by the federal judges in the 1790s discussing the ATS<sup>230</sup>—that separates

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observed that “[t]here are at least four possible standards courts might utilize to determine which torts in violation of the law of nations are actionable:

The most expansive would be to read the Alien Tort Statute as authorizing the federal courts not just to apply customary international law established by existing state practice but to create new law, analogizing to *Lincoln Mills v. Textile Workers*. The *Filartiga* court noted this possibility but did not need to adopt it, and no court has done so subsequently. A second possibility would be to read the Alien Tort Statute, in accordance with its plain language, to extend to all torts in violation of the law of nations determined in the usual way—by state practice followed out of a sense of legal obligation. This seems to be what *Filartiga* intended, although only one court has expressly adopted this reading. A third and arguably narrower reading would limit suits under the Alien Tort Statute to those that are “universal, definable, and obligatory,” and a fourth reading would limit actionable torts to a still narrower category of those that violate *jus cogens* norms.

*Id.* at 352-53 (footnotes omitted).

<sup>229</sup> See Transcript of Federal Judiciary Act (1789), available at <http://www.ourdocuments.gov/doc.php?flash=true&doc=12&page=transcript>. Original images of the handwritten documents may be viewed at <http://www.ourdocuments.gov/doc.php?flash=true&doc=12#>.

<sup>230</sup> See Judge Richard Peters in *Moxon v. The Fanny*, 17 F. Cas. 942, 947-48 (D. Pa. 1793), and Judge Thomas Bee in *Bolchos v. Darrel*, Bee 74, 3 F. Cas. 810, No. 1607 (D.S.C. 1795). In *Bochos*, Judge Bee observed:

I was at first doubtful whether this court had jurisdiction, Darrel's seizure, under the mortgage, having been made on land. But as the original cause arose at sea, every thing dependent on it is triable in the admiralty. Cro. Eliz. 685, Yel. 135, Le Caux and Eden, and other cases are full to this effect. If, indeed, I should refuse to take cognizance of the cause, there would be a failure of justice, for the court of common law of the state has already dismissed the cause as belonging to my jurisdiction in the admiralty. Besides, as the 9th section of the judiciary act of congress [Act Sept. 24, 1789, 1 Stat. 77] gives this court concurrent jurisdiction with the state courts and circuit court of the United States where

the words “tort only” from the modifier “in violation of the law of nations or a treaty of the United States.” In contrast, in their discussion of the ATS, both Federal District Judge Richard Peters in 1793 and Federal District Judge Thomas Bee in 1795 included a key mark of punctuation—the profound comma—between the concept of tort *and* the *separate* concept of a “violation of the law of nations.”<sup>231</sup> While these judicial opinions did not center on that point, that two of President Washington’s original federal trial judges naturally read the comma into the statutory language certainly shows an understanding, and a recognition of the importance, of punctuation that has in modern ATS cases been entirely ignored.<sup>232</sup> Effectively reading the

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*an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt upon this point.*

3 F. Cas. at 810 (emphases added). Similarly, Judge Peters had independently observed in *Moxon*:

Damages may be superadded, but a proceeding for a marine trespass is different, as it is entirely a suit for damages, and not for the thing itself. Neither does this suit for a specific return of the property, appear to be included in the words of the judiciary act of the United States, *giving cognizance to this court of ‘all causes where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.’* Judiciary Act, § 9 [1 Stat. 76]. ***It cannot be called a suit for a tort only***, when the property, as well as damages for the supposed trespass, are sought for.

17 F. Cas. at 947–48 (emphases added). For the identification of Richard Peters as the judge in *Moxon*, see WILLIAM R. CASTRO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL 87–90 (U. So. Carolina Pr. 2006), and for the importance of Judge Peters to the development of American law during the early Republic, see, e.g., Joseph Whitla Stinson, *Opinions of Richard Peters, 1781–1817*, 70 U. PA. L. REV. 197 (1921–1922); Peter B. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. U. L. REV. 26 (1978–1979).

<sup>231</sup> See Bolchos, 3 F. Cas. 810.

<sup>232</sup> Professors Bellia and Clark in a recent article have recognized the issue:



separate concept of tort out of the ATS, modern courts paraphrase the statute as referring to an “action for any violation of international law”<sup>233</sup> or “for violation of standard international law norms that are ‘universal, definable, and obligatory.’”<sup>234</sup> This misinterpretation is a

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Another possible reading, however, is that “only” modified “in violation of the law of nations or a treaty of the United States” to emphasize that only those torts in violation of the law of nations fell within the jurisdiction that the ATS conferred. A significant class of tort claims by aliens would not have involved law of nations violations, including claims by enemy aliens, claims for interference with real property rights, claims for private wrongs without force or violence (such as slander), or claims between aliens for injuries arising outside the US. By placing “only” before “violations of the law of nations,” Congress may have wished to emphasize that federal courts could not hear this broader range of tort claims under § 9. Moreover, in other instances the drafters of the first Judiciary Act used the word “only” to modify a subsequent prepositional phrase. A final possibility is that “only” modifies the language that appears both before and after it. In any event, the meaning of the statute does not turn on whether “only” was meant to emphasize only torts (and not breaches of contract or debts) or only those torts in violation of the law of nations (and not other torts). Under either reading, the statute conferred jurisdiction only over torts that also constituted law of nations violations.

Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law Of Nations*, 78 U. CHI. L. REV. 445, 518–19 (2011) (footnotes omitted). In downplaying its significance, however, they miss the precision with which Congress meant to communicate the intended scope of the ATS, thus resulting in the circular analyses plaguing ATS decisions today, and missing the critical parameters that the First Congress sought to place around this important class of federal-court subject matter jurisdiction, as the author explains at the conclusion of this subsection.

<sup>233</sup> See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996) (“[o]n its face, section 1350 requires the district courts to hear claims ‘by an alien for a tort only, committed in violation of the law of nations.’ . . . We read the statute as requiring no more than an allegation of a violation of the law of nations in order to invoke section 1350.”).

<sup>234</sup> See *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987); see also Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT’L L.J. 53, 88 (1981).

judicial gloss that was made by Justice Souter in *Sosa*, but had its origins earlier in *Filartiga*. In one of the first scholarly articles some thirty-five years ago that parsed § 1350, Professor Kenneth Randall correctly described how a reasonable person with legal training, but without an instrumentalist agenda, would process the language of the statute:

In order to establish jurisdiction under the Alien Tort Statute, a plaintiff must first establish that his or her action is for a tort only. Contrary to the assertions in many opinions and commentaries, this basic element of the statute does not refer to an “international tort.” While international law may provide remedies for certain types of “civil wrongs,” the specific notion of a “tort,” at least in name, does not exist in the international legal system. The “tort” element of the statute refers instead to a municipal tort under American law. An Anglo-American legal concept, torts were recognized as early as the eighteenth century. Torts derived from the action of trespass, the remedy for all “direct and immediate injuries . . .,” whether caused by intentional or negligent conduct.

Since the term “torts” does not literally exist in international law, but did exist in eighteenth century America, it is logical to conclude that the statute requires plaintiff to establish a common law tort. An examination of the possible origin of the statute supports the conclusion that the statute refers to a municipal tort.<sup>235</sup>

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<sup>235</sup> Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into The Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 33–34 (1985–1986) (footnotes omitted). As Dean Randall acknowledges, his view—with which the author is entire sympathy—was (and remains) a minority view; but although a minority view, it is also the correct view. *Id.* at 32–33. As Dean Randall noted, this approach is the one suggested by Judge Edwards in *Tel-Oren*, expressing the “‘minority view’ that the statute requires a municipal tort under American law plus a violation of the law of

Unfortunately, as earlier observed, the courts which have rendered the leading decisions in the area have chosen to operate on a view of the statute that simply bears no reality to its words. As Dean Randall observed over twenty-five years ago, “[m]any opinions simply do not discuss whether a tort has occurred under municipal law.”<sup>236</sup> Disputes over whether the tort itself must be some kind of international law cause of action or arise from international law, or over whether § 1350 simply recognizes causes of action for violations of international law, have taken the scholarship and the judicial analyses so far from the text of the statute as to make the whole enterprise seem a study in surrealism—one in which ambiguity is “refined” out of what in fact is *textual clarity*.

Yet indeed, *tort* does have an independent and specific meaning, and one that is fully consonant with the understanding of leading lawyers of the early Republic. As an initial matter, despite some speculation to the contrary,<sup>237</sup> *tort* was a legal term of art that was in use during the time of the Judiciary Act’s drafting and in the legal discourse of the early Republic. While Blackstone, the leading legal primer for colonial lawyers, did not make the assignation of *tort* (apparently preferring instead the solidly Anglicized “private wrong” rather than the Law-French *tort*),<sup>238</sup> the term was hardly novel among

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nations or a treaty,” as opposed to “majority view” that drew, as in *Filartiga*, only upon international law to determine liability. *Id.* at 37–38 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 782 (D.C. Cir. 1984) (Edwards, J., concurring)).

<sup>236</sup> *Id.* at 36 n.152.

<sup>237</sup> LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 261–64, 409–27 (1973) (“All in all, tort law was not a highly developed field in 1776, or for a good many years thereafter.”); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780–1860*, at 85–99, 201 (1977) (“Indeed, until the ideological triumph of the will theory of contracts after 1825, jurists did not yet perceive any fundamental conflict between contractual and customary duties.”).

<sup>238</sup> See Michael L. Rustad, *Review: A REVISIONIST HISTORY OF TORT LAW: FROM HOLMESIAN REALISM TO NEOCLASSICAL RATIONALISM*, by Alan Calnan, 15 L. & POL. BOOK REV. 350, 352–53 (2005), available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/calnan505.htm>; see also Robert W. Drane & David J. Neal, *On Moral Justifications for the Tort/Crime Distinction*, 68 CAL. L. REV. 398, 402 n.11 (1980) (citing 3 W. BLACKSTONE, *COMMENTARIES* \*2) (“Blackstone attempted to couch his definition as more than an appeal to authority by arguing that crime involves harm to public interests while tort involves only the interests of

American lawyers. For example, a search of the Westlaw database that collects all reportable cases from earlier eras (called Allcases-Old) for simply the term *tort* and a date restriction to cases decided before 1840<sup>239</sup> produces some 1,975 federal and state cases employing the word *tort*—an exceptional number of cases considering this was an era when case reporting was barely in its infancy and at best, done sporadically and ad hoc for most courts.<sup>240</sup>

The oldest of the reported cases to use the word *tort* (and to distinguish it from *contract*) is a decision from a colonial Maryland court that preceded the Judiciary Act by some fifty-five years.<sup>241</sup> It again appears in this colonial court in 1756, this time used extensively both by the court, as well by counsel in the summary of their argument, which is focused on the common-law form of action

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individuals.”). Perhaps even more illuminating of the fog Blackstone’s nascent concept of tort law, John F. Witt has observed:

In his Commentaries [Blackstone] worked excruciatingly hard (and not always successfully) to trim the unruly brambles of the common law into the kind of carefully ordered rationality that characterized the civil law and natural law traditions. As John Goldberg has recently observed, Blackstone sought to do just this for the smattering of common law actions that he grouped under the rubric of “torts or wrongs.”

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To the modern ear, Blackstone’s approach is at once foreign and familiar. The motley assemblage of ancient writs can leave the reader feeling a little like Jeremy Bentham, who dismissed as ridiculous the entire Blackstonian enterprise of finding reason hidden deep within the common law’s historical nooks and crannies.

John Fabian Witt, *Contingency, Immanence, and Inevitability in the Law of Accidents*, 1 J. TORT L., 1, 4–5 (2005) (footnotes omitted).

<sup>239</sup> The search terms are: tort & da(bef 1840).

<sup>240</sup> Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part I: Back to the Future from the Roberts Court to Learned Hand—Context and Congruence*, 12 BARRY L. REV. 53 (2009).

<sup>241</sup> *Black v. Digges’ Ex’rs*, 1 H. & McH. 153, (Provincial Court, Proprietary Province of Maryland, 1744).

known as *trover*<sup>242</sup> and the tort of conversion that underlies it.<sup>243</sup> Indeed, the court's opinion cites to what appears to be some kind of treatise, entitled *Law of Torts*, for the proposition that "[i]n trover the conversion is the gist of the action."<sup>244</sup> Torts make an appearance in a 1779 case from colonial Virginia in which the term was, as it would be again in the Judiciary Act of 1789, used to describe the subject matter jurisdiction of a court:

[t]he commissions of the crown gave the courts which were established a most ample jurisdiction over all maritime contracts, *and over torts and injuries*, as well in ports as upon the high seas; and acts of parliament enlarged, or rather recognized, this jurisdiction, by giving or confirming cognizance of all seizures for contraventions of the revenue laws.<sup>245</sup>

The earliest federal courts, organized under the Articles of Confederation, also seemed no strangers to the word *torts* in the sense familiar to us, and used the word with a comfort and easy familiarity that suggests it was well known and understood in the

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<sup>242</sup> F.W. MAITLAND, EQUITY: ALSO, THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES (A.H. Chaytor & W.J. Whittaker eds., 1909) ("Select Writs—The Case Trover"), available at <http://www.fordham.edu/halsall/basis/maitland-formsofaction.asp> (part of the Internet Medieval Sourcebook).

<sup>243</sup> Leach v. Slater, 1 H. & McH. 513, (Provincial Court, Proprietary Province of Maryland 1773).

<sup>244</sup> *Id.* As the defendant's attorney, one S. Chase, is reported having argued to the court:

There has been a demand and refusal, within three years, therefore the act does not attach. Trover is an action founded on a tort. The defendant must have been guilty of some illegal act, to charge him with a conversion. The whole tort consists in the wrongful conversion. 1 Burr. 31. The right to purchase is lawful, consequently the user under that purchase is lawful. Suppose one steals my horse and sells it, the purchaser is not guilty of a wrong, nor subject to an action, before a demand and refusal; if it were otherwise, a man might be made answerable for a tort against his own intent.

*Id.*

<sup>245</sup> *In re* First Case of the Judges, 4 Call 1, (Va. 1779) (emphasis added).

lawyers' lexicon almost twenty years before the Judiciary Act of 1789.<sup>246</sup> The Superior Court of Connecticut used *tort* in 1786 to contradistinction to pleas sounding in contract, as did courts in Connecticut, Pennsylvania, Virginia, and South Carolina.<sup>247</sup> *Tort* was common enough parlance that in a 1790 case, the Superior Court in Philadelphia could speak of common practices of juries deliberating in torts cases—a discussion that will resonate with an utmost contemporary ring with any active trial lawyer of the twenty-first century:

The first objection, as to the manner of the jury collecting the sense of its members, with regard to the quantum of damages, does not appear to us to be well founded, or at all similar to the case of casting lots for their verdict. *In torts and other cases, where there is no ascertained demand*, it can seldom happen that jurymen will, at once, agree upon a precise sum to be given, in damages; there will necessarily arise a variety of opinions, and mutual concessions must be expected; a middle sum may, in many cases, be a good rule; and though, it is possible, this mode may sometimes be abused by a designing juryman, fixing upon an extravagantly high, or low sum, yet unless such abuse appears, the fraudulent design will not be presumed.<sup>248</sup>

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<sup>246</sup> See, e.g., *Keane v. The Gloucester*, Bee 399, 2 U.S. 36, 39, 2 Dall. 36, 39, 14 F.Cas. 163 (Fed. Ct. App. 1782) (“[t]he libellants do not seek a compensation for a wrong; they are not in pursuit of damages for a tort.”).

<sup>247</sup> *Bradley v. Camp*, 1 Kirby 77, 1 Am. Dec. 13 (Conn. Super. Ct. 1787); *accord Eastwick v. Hugg*, 1 U.S. 222, 1 Dall. 222, (Pa. Com. Pl. 1787); *Middleton’s Ex’rs v. Robinson*, 1 Bay 58, 1 S.C.L. 58 (Courts of Common Pleas and General Sessions of the Peace of South Carolina 1787); *Respublica v. Sparhawk*, 1 U.S. 357, 1 Dall. 357 (Pa. 1787); *Brown v. Belches*, 1 Va. 9, 1 Wash. 9 (Va. 1791).

<sup>248</sup> *Cowperthwaite v. Jones*, 2 U.S. 55, 56, 2 Dall. 55, 56 (Pa. Com. Pl. Aug. 1790) (emphasis added). We find the word *tort* in common usage in Virginia, too, as revealed by a 1790 case involving the tort of slander to title. *Ross v. Pines*, 3 Call 568, 7 Va. 568 (Va. 1790) (“With respect to the

By 1800, the Supreme Court of Pennsylvania had gone so far as to recognize that gross negligence by a maritime pilot, although licensed by the state, was actionable as the tort of negligence—and that court was perfectly comfortable with using the word *negligence* as though it were part of the common legal parlance, just a decade after the Judiciary Act of 1789.<sup>249</sup> Indeed, we find in a South Carolina case (and a state statute discussed in that case) a list of causes of action denominated as torts to include “trespass, trover, detinue, slander, or assault and battery or other action, arising merely from tort . . . .”<sup>250</sup>

Within this milieu, a federal district court in 1796 had occasion to cite to the ATS in support of its exercise of subject matter jurisdiction over a case brought by a sea captain claiming ownership of a group of enslaved individuals.<sup>251</sup> Federal District Judge Thomas Bee (who, in this nascent era of court reporting as averred to above reported his own case decisions), like the many courts of this era surveyed above, used the term *tort* within the ATS just as naturally and comfortably as the numerous cases used the word in a wide variety of other legal contexts—and, obviously taking the familiarity of his audience into account, had no need to pause

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damages, the evidence does not show the amount; *but, this being a tort*, the jury was not bound by exact calculation.” (emphasis added)); *accord* *Hoomes v. Kuhn*, 4 Call 274, 8 Va. 274 (Va. 1791) (in a civil suit for assault and battery, the court observed that it “never interferes with the verdict in an action of tort, unless the sum found is excessive”). Far from being exceptional, references to *torts* in a manner that suggested an assumption that the decision’s audiences are both comfortable and familiar occur in other contexts as well. *See, e.g.,* *Shelton v. Shelton*, 1 Va. 53, 1 Wash. 53 (Va. 1791) (“2 Vern. 747, was a hard case in itself, and I believe would not at this day be so determined, under its particular circumstances. But the rule there laid down seems a good general one, ‘that where goods in a house are devised, a voluntary removal of them in the testator’s life time, *without tort or fraud*, is a revocation.”) (emphasis added)).

<sup>249</sup> See *Bussy v. Donaldson*, 4 U.S. 206, 4 Dall. 206, 1 L.Ed. 802 (Pa. 1800).

<sup>250</sup> *State v. Huntington*, 1 Tread. 325, 3 Brev. 111, 5 S.C.L. 111, 6 S.C.L. 325, (S.C. Const. Ct. App. 1813).

<sup>251</sup> *Bolchos v. Darrel*, Bee 74, 3 F. Cas. 810 (D.S.C. 1795). Judge Bee described the nature of the action as follows: “Captain Bolchos captured and brought into this port a Spanish prize; on board of which were these slaves, formerly mortgaged to Savage, whose agent, [Edward] Darrel, by virtue of Savage’s mortgage, seized and sold them.” *Id.*

over the term as if it would be exceptional, unique, or different than it was typically used as a feature of America's municipal law.<sup>252</sup> There is nothing "alien" about Congress's use of the word *tort* in the Judiciary Act; it means nothing more, nor nothing less, than the term meant in the currency of legal language of the colonial and the early

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<sup>252</sup> *Id.* Judge Bee ultimately determined that a U.S.–France treaty precluded the return of the enslaved persons to the party claiming ownership by mortgage:

It is certain that the law of nations would adjudge neutral property, thus circumstanced, to be restored to its neutral owner; but the 14th article of the treaty with France alters that law, by stipulating that the property of friends found on board the vessels of an enemy shall be forfeited. Let these negroes, or the money arising from the sale, be delivered to the libellant.

*Id.* at 811. It is a bitter irony that the first time the ATS appears in reported decisions was in a case in which it was being invoked by slaveholders in aid of an alleged property right—a generation after Lord Mansfield's decision in *R v. Knowles, ex parte Somerset* (1772) 20 State Tr 1, declaring slavery to be against the law of England and declaring that no one claimed to be a slave could be forcibly removed from England. *Id.* ("no master ever was allowed here to take a slave by force to be sold abroad because he had deserted from his service, or for any other reason whatever; we cannot say the cause set forth by this return is allowed or approved of by the laws of this kingdom, therefore the man must be discharged."). See Jeffrey A. Van Detta, *Requiem For A Heavyweight*, 67 ALB. L. REV. 965, 992 (citing R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 368 (1985)) (noting that in the similar case of *L'Amistad*, Justice Story hewed closely to the legal linguistics of property law in freeing slaves escaped from Spanish claimants, viewing the issue before him "not [as] whether slavery in general was good, bad, moral, or legal but whether certain Spaniards owned certain Africans."). Though clearly a man limited by his times, Judge Bee was nonetheless a remarkable jurist of the early Republic period, serving as the Federal District Judge in South Carolina for twenty-two years. See Thomas M. Stubbs, *South Carolina's Federal Justices and Judges*, 8 S.C.L.Q. 403, 407 (1955–1956); see also *Honorable Thomas Bee*, SINGLETONFAMILY.ORG <http://www.singletonfamily.org/getperson.php?personID=I275635&tree=1> (last visited May 21, 2013) (noting that Judge Bee hosted President Washington at Bee's Church Street home during a 1791 visit to Charleston, and that President Washington had appointed Bee to the federal judgeship the year before).



Republic era.<sup>253</sup> As Professors Bellia and Clark observe in their recent article elucidating the ATS within the context of “the law of nations” as it was understood in the eighteenth century:

§ 14 of the Judiciary Act [of 1789] authorized federal courts to issue common law writs that “may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.” The First Congress soon thereafter provided in the Process Act of 1789 that “the forms of writs and executions . . . in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.” Although the *Sosa* Court correctly concluded that federal courts would employ the common law forms of action in ATS cases, the Court was apparently unaware that Congress had expressly directed federal courts to do so in these statutes. Thus, when Congress conferred jurisdiction upon federal courts to hear alien claims “for a tort only in violation of the law of nations or treaty of the United States,” it fully expected them to recognize and employ the common law causes of action then in use.<sup>254</sup>

What makes a tort one that also violates the law of nations is the character of the actors—such as a diplomat as the victim of a tort or the circumstances of its commission—such as the failure to protect an alien or her property while in American territory, i.e., the safe-

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<sup>253</sup> For a differing viewpoint that states that it reaches an expansive interpretation that is nonetheless more faithful to the intent of Congress in adopting the Judiciary Act, see William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists”*, 19 HASTINGS INT’L & COMP. L. REV. 221 (1996). Without elaborating this footnote into a separate law review article of its own, the author simply notes here that, as reflected throughout this article, he disagrees with a number of Professor Dodge’s inferences, which he sees as inferences that, while drawn from eighteenth century materials, are drawn with a twentieth century perspective that creates cognitive dissonance.

<sup>254</sup> Bellia & Clark, *supra* note 232, at 545.

conduct theory of the ATS.<sup>255</sup> Read in this way, the statute entirely avoids the problems expressed in a July 1789 letter from Edmund Pendleton<sup>256</sup> to James Madison (that scholars only recently seem to

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<sup>255</sup> Thomas D. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006); Bellia & Clark, *supra* note 232, at 540–45. As Professors Bellia and Clark observe, the statute

was designed to redress ordinary torts committed by private US citizens against aliens. The reason was simple: any intentional common law tort committed with force by a US citizen against the person or property of an alien constituted a violation of the law of nations and imposed an obligation on the United States to redress the injury or become responsible to the alien’s nation. Thus, it was the basic party alignment—rather than some specific characteristic of the underlying intentional tort—that triggered jurisdiction under the ATS.

*Id.* at 542–43. See also M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. INT’L LAW. 316, 320–22 (2009) (arguing that the House emendation of “foreigner” from the Senate Bill to “alien” in the Judiciary Act as passed evidences an even further narrowing of the scope of the ATS to apply: “Considering Article III of the Constitution and the related provisions in the Judiciary Act of 1789, along with the late eighteenth century legal, international, and general uses and definitions of “alien” and “foreigner”—in conjunction with relevant changes that occurred from the Senate’s handwritten draft of the judicial bill through subsequent codifications of relevant sections of the Judiciary Act of 1789—it is fair to say that an understanding of what Congress intended by the deceptively simple change from “foreigner” to “alien” was a narrowing of the ATS; making it available to “aliens” but not to “foreigners,” . . . in other words, making it available only to residents of the United States.”).

<sup>256</sup> While perhaps not as well known as the other Founders, Pendleton served through the *cursus honorum* of public service in the Revolutionary period and the early Republic, holding the offices, among others, of Member of the Virginia Committee of Revisors (with Thomas Jefferson), President of the Constitutional Ratifying Convention in Virginia, President of Virginia’s Committee of Public Safety (equivalent of Governor), and President (Chief Justice) of the Virginia Supreme Court of Appeals. See Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1131 (2012); David A. Erhart, “*I Am In Control Here*”: *Constitutional And Practical Questions Regarding Presidential Succession*, 51 U. LOUISVILLE L.

have brought to the table, so to speak, in the discussion of the ATS's original meaning):

[W]hat is meant by a Tort? Is it intended to include suits for the Recovery of debts, or on breach of Contracts, as a reference to the laws of Nations & Federal treaties seems to indicate; or does it only embrace Personal wrongs, according to [its] usual legal meaning, or violations of Personal or Official privilege of foreigners? [I]n the last case it will probably be unexceptionable, in the former, very inconvenient.<sup>257</sup>

Looking at the ATS from a non-anachronistic viewpoint (i.e., from the viewpoint of contemporaries such as Judges Richard Peters and Thomas Bee and Congressman Edmund Pendleton) would greatly facilitate—and simplify—its application. First, it would remove forms of liability based on negligence or absolute fault that would have been exotic, hybrid, and untenable to eighteenth century legal minds, which some courts have nonetheless imposed.<sup>258</sup> Second, it would end the elusive hunt set off by *Sosa*'s assumption that courts have a limited common law power to recognize new

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REV. 323, 336 n.115 (2013); William G. Merkel, *A Founding Father on Trial: Jefferson's Rights Talk and the Problem of Slavery During the Revolutionary Period*, 64 RUTGERS L. REV. 595, 603 n.20 (2012); Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 23 (2011); Michael J. Klarman, *The Founding Revisited*, 125 HARV. L. REV. 544, 570 n.153 (2011) (book review).

<sup>257</sup> Letter from Edmund Pendleton to James Madison (July 3, 1789), in 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, 444, 446 (Maeva Marcus & James R. Perry eds., 1992), quoted in Bellia & Clark, *supra* note 232, at 518 n.352; also in Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 621 (2002).

<sup>258</sup> See, e.g., *Abdullahi v. Pfizer*, 562 F.3d 163 (2d Cir. 2009), and note especially the very strong dissent, 562 F.3d at 191, 194–95 (Wesley, J., dissenting) (“Instead of following and applying our framework, the majority substitutes in its place a compelling narrative,” employing “several sources that it believes demonstrate a customary norm against medical experimentation by non-state entities and weaves them together to reach its conclusion.”).

claims “based on the present-day law of nations” so long as they “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18<sup>th</sup>-century paradigms.”<sup>259</sup> Third, it would eliminate the “state actor” requirement that *Sosa* read into the ATS,<sup>260</sup> which is confusing, ahistorical, and has led to a tortured jurisprudence as ATS plaintiffs have tried to plead around it using “aiding and abetting” allegations.<sup>261</sup>

### 3. CAN A CORPORATION BE A PROPER ATS DEFENDANT?

Although the Second Circuit’s rationale in *Kiobel*—that corporations cannot be proper defendants in ATS corporations because “customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations”<sup>262</sup>—was both unprecedented<sup>263</sup> and created the circuit split on which the Supreme Court relied on granting certiorari in the first place, the court did not decide that issue.<sup>264</sup> The extensive

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<sup>259</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004).

<sup>260</sup> See, e.g., Michael Giuseppe Congiu, *From Rights to Remedies: The Alien Tort Claims Act*, *Sosa v. Alvarez-Machain and the State Action Requirement*, 2 S.C. J. INT’L L. & BUS. 427 (2005–2006).

<sup>261</sup> See, e.g., Michael Garvey, Comment, *Corporate Aiding and Abetting Liability under the Alien Tort Statute: A Legislative Prerogative*, 29 B.C. THIRD WORLD L.J. 381 (2009); see also James Morrissey, *Presbyterian Church of Sudan v. Talisman Energy, Inc.: Aiding and Abetting Liability under the Alien Tort Statute*, 20 MINN. J. INT’L L. 144 (2011).

<sup>262</sup> *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 120 (2d Cir. 2010), *aff’d on other grounds*, 133 S. Ct. 1659 (2013).

<sup>263</sup> Geoffrey Pariza, *Genocide, Inc.: Corporate Immunity to Violations of International Law after Kiobel v. Royal Dutch Petroleum*, 8 LOY. U. CHI. INT’L L. REV. 229, 247 (2010–2011) (observing that “*Kiobel* marks a dramatic departure from the consensus among U.S. courts”).

<sup>264</sup> The Second Circuit stands alone in its view of per se exemption of corporations from the ATS. Compare *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011) (Posner, J.); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748–49 (9th Cir. 2011) (en banc), *vacated and remanded on other grounds*, *Rio Tinto PLC v. Sarei*, NO. 11-649, 2013 WL 1704704

briefing by the parties, by amici, by the Solicitor General on behalf of the United States, and the oral argument held in February 2012 all went for naught. It might very well seem nothing short of amazing—indeed, appalling—that the Court appeared to have ducked the very issue on which the case was decided by the Second Circuit. Corporations have filed numerous motions to dismiss on the basis of the Second Circuit panel’s holding in *Kiobel*,<sup>265</sup> and the outcome of those motions—indeed, the precedential effect of the *Kiobel* panel decision in the Second Circuit itself, where a large portion of ATS cases have been filed—remains unsettled, going on two and a half years after the *Kiobel* panel filed its maverick decision in October 2010.

The corporate liability issue,<sup>266</sup> however, is a *faux* issue—one that, frankly, some Second Circuit judges, seemingly in frustration

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(U.S. Apr. 22, 2013); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Beanal v. Freeport–McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir.1999); *Krishanthi v. Rajaratnam*, No. 09–CV–05395, 2011 WL 2607108 (D.N.J. June 11, 2011). See Kristin L. Leveille, *Debate Two Hundred Years in the Making: Corporate Liability and the Presumption against Extraterritoriality under the Alien Tort Statute*, 50 HOUS. L. REV. 653 (2012).

<sup>265</sup> See, e.g., Jennifer L. Karnes, Comment, *Pirates Incorporated?: Kiobel v. Royal Dutch Petroleum Co. and the Uncertain State of Corporate Liability for Human Rights Violations Under the Alien Tort Statute*, 60 BUFFALO L. REV. 823 (2012); Pariza, *supra* note 263, at 253 n.231 (citing *Mastafa v. Chevron Corp.*, No. 10 Civ 5646(JSR), 2010 WL 4967827 at \*3 (S.D.N.Y. 2010) (dismissing plaintiffs’ complaint alleging Chevron had aided Saddam Hussein commit human rights abuses because corporations cannot be liable for violations of international law)); see also *Aziz v. Alcolac Inc.*, 2009 cv 00869, *appeal docketed*, No. 10-1908 (4th Cir. Dec. 8, 2010) (requesting dismissal on the grounds that corporations cannot be liable for violations of international law under the ATS); *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810, 818 (S.D. Ind. 2010) (dismissing Liberian children’s claims of child labor, holding that corporate liability is not a rule of customary international law); *Viera v. Eli Lilly & Co.*, 1:09-cv-0495-RLY-DML, 2010 WL 3893791 at \*5 (S.D. Ind. Sept. 30, 2010) (dismissing Brazilian residents’ claims of environmental contamination because ATS action may not be maintained against corporate defendant), *aff’d on other grounds*, 643 F.3d 1013, 1017 (7th Cir. 2011).

<sup>266</sup> Jonathan Drimmer, *Resurrection Ecology and The Evolution Of The Corporate Alien Tort Movement*, 43 GEO. J. INT’L L. 989 (2012); Lorelle Londeis, *Corporation Face of the Alien Tort Claims Act: How an Old Statute*

with the inability of the Circuit to tame the corporate campaigns being waged using the ATS as the tool and the Southern District of New York as the workshop,<sup>267</sup> produced as if out of thin air.<sup>268</sup> While the Second Circuit opinion in *Kiobel* expended great energy on the contemporary debate<sup>269</sup> over corporate liability for tort, neither *Kiobel*, nor *Sosa* for that matter, bother to look at a far more significant question, one most pertinent to the question of interpreting § 1350: Did American law recognize that a corporation had the juridical personality to be a proper defendant for a tort claim in a civil court of general jurisdiction?

The status of a variety of civil practice concepts and rules during the early Republic is challenging to discern. Simultaneously, the country was passing from colonial status through revolution and war to an emergent independent nation. At the same time, a distinct American legal system and experimental philosophy of law were arising and reifying. The English Common Law was, simultaneously, employed as the foundation for the new legal order while at the same time being constrained, and in some quarters, even reviled, as a badge of colonial servitude. These political and legal

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*Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141 (2005).

<sup>267</sup> See *Kiobel*, 621 F.3d at 116–17 (Cabrane, J.). Judge Cabranes barely suppressed his apparent view that the ATS is little more than a demand for extortion followed by a press conference. See *id.* Corporate counsels have expressed even less generous views. See, e.g., Andrew J. Pincus & Kevin Ranlett, *Class Action Trends—U.S. Supreme Court—Supreme Court Holds That Alien Tort Statute Doesn't Apply Extraterritorially*, MAYER-BROWN CLASS DEFENSE: CUTTING-EDGE ISSUES IN CLASS-ACTION LAW & POLICY, Apr. 17, 2013, <http://www.classdefenseblog.com/2013/04/17/supreme-court-holds-that-alien-tort-statute-doesnt-apply-extraterritorially/>.

<sup>268</sup> Judge Cabranes took some umbrage at a similar suggestion made by Judge Pierre Leval, who concurred in the judgment but strongly dissented from the entirety of Judge Cabranes's corporate liability analysis. *Kiobel*, 621 F.3d at 122 n.24. Other commentators have observed that “Judge Leval’s lengthy concurrence is more of a scathing dissent insofar as it completely rejects the majority’s rationale.” Pariza, *supra* note 259, at 241.

<sup>269</sup> See, e.g., Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

changes were also accompanied by economic transformation.<sup>270</sup> In no area was this more dynamic than in the origins of corporate form and corporate doctrine in American law. As Morton Horowitz has observed, “[a]s late as 1780, colonial legislatures had conferred charters on only seven business corporations, and a decade later the number had increased to but forty. However, in the last ten years of the eighteenth century, 295 additional corporate charters were granted.”<sup>271</sup> Against this expanding milieu, the activities of these early corporations began to create conflict with other citizens who claimed injury as a result. Among these injuries were various torts. Case law in this era is sparse, for the practices regarding the publication of court decisions had not taken hold, and the willingness to make financial commitments to such an enterprise had not yet taken the powerful hold they would in the second half of the nineteenth century.<sup>272</sup> Yet, the court decisions accessible from the early Republic show clear support for corporate entity liability for tort.

*Riddle v. Proprietors of Merrimack River Locks and Canals*<sup>273</sup> provides an early example. The corporate entity responsible for the construction and operation of a canal contended that a corporation was not a proper defendant in a boat owner’s claim for damages due to negligence (at the time called “trespass on the case”) in the construction and operation of the canal. Citing English precedent from no less an authority than Lord Mansfield in *Mayor of Lynn v.*

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<sup>270</sup> The foregoing passage sprang full-formed from the author’s head, somewhat like the goddess Athena is said to have sprung from the head of Zeus, as the product of much reading and reflection since he first wrote on legal matters of the Colonial Era (Jeffrey A. Van Detta, Comment, *Compelling Governmental Interest Jurisprudence of the Burger Court: A New Perspective on Roe v. Wade*, 50 ALB. L. REV. 675 (1986)) and is perhaps symptomatic of a tendency in the author, brought to his attention by the late Dean John E. Ryan (1938–2008), to be “Van Detta on everything.” However, support for these ideas may generally be found in Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23, 43–50 (2002).

<sup>271</sup> MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at 112 (1977) (citing J.S. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 24 (1917)).

<sup>272</sup> Van Detta, *The Decline and Fall of the American Judicial Opinion*, Part I, *supra* note 240, at 68–69 & n.80 (discussing the early history of case reporting practices).

<sup>273</sup> 7 Mass. 169, 1810 WL 1012 (Mass. 1810).

*Turner*, the court rejected the entity's arguments: "By this decision it is settled that case will lie against a corporation for neglect of a corporate duty, by which the plaintiff suffers."<sup>274</sup> Similar early decisions came from courts in New Hampshire and New York.<sup>275</sup>

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<sup>274</sup> *Id.* at 12 (citing Cowp. 86).

<sup>275</sup> Looking retrospectively, the Connecticut Supreme Court collected the following early authorities in an 1867 decision on the question of corporate liability for negligence:

But when a corporation is charged with the performance of some public duty, as a condition, express or implied, upon which it holds its corporate powers; when a grant is made to a corporation of some special power or privilege at its request, out of which public duties grow; and when some special duty is imposed upon a corporation not belonging to it under the general law with its consent; in these and like cases, if the corporation is guilty of negligence in the discharge of such duty, thereby causing injury to another, it is liable to an action in favor of the party injured. *The Mayor of Lynn v. Turner*, Cowper, 86; *Henly v. The Mayor of Lyme*, 5 Bingham, 91; *Eastman v. Meredith*, 36 N. Hamp., 284; *Riddle v. Proprietors of Locks and Canals*, 7 Mass., 187; *Bigelow v. Randolph*, 14 Gray, 543; *Conrad v. Village of Ithaca*, 16 N. York, 158; *Weet v. Trustees of the Village of Brockport*, 16 N. York, 161.

*Jones v. City of New Haven*, 34 Conn. 1, 8 (1867). Obviously, the extent of corporate liability was to grow further, and to evolve past some of the formalistic distinctions that these earlier courts made about the circumstances under which a corporation could be held liable for negligence. This evolution started in the early Republic, with cases like *Riddle*, where courts began the process of moving away from the "model . . . [based on] the eighteenth century conception of a municipal corporation . . ." Horowitz, *supra* note 271, at 113. Those seeking to exploit the benefits of the corporate form while shedding burdens were as assiduous in that era in that pursuit as their twenty-first century heirs; this is well-illustrated by Professor Horowitz:

For a time, the corporation continued to occupy a twilight zone in the eyes of the law, sometimes conceived of as a public instrumentality, at other times regarded as a private entity. While they sought to emphasize their recently acknowledged private nature when claiming constitutional protection of corporate



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property, corporation continued to underline their public service functions in order to claim both the power of eminent domain and freedom from competition. Attempting to take advantage of the eighteenth century notion that public instrumentalities were protected from competition, corporations continued to argue both that their charters were grants of exclusive property interests and that economic rivalry was, in effect, a private law nuisance to property.

*Id.* at 114. Other early cases holding corporate entities liable to tort claimants include *Weld v. Proprietors of Side Booms in Androscoggin River*, 6 Greenl. 93, 93, 6 Me. 93, 99, 1829 WL 291, \*5 (Me. May Term 1829); *Chesnut Hill & Springhouse Turnpike Co. v. Rutter*, 4 Serg. & Rawle 6, 8 Am. Dec. 675, *McCready v. Philadelphia Guardians of the Poor*, 9 Serg. & Rawle 94, 11 Am. Dec. 667, 1822 WL 1992 (Pa. 1822) (holding that the actions of trover and trespass for mesne profits lie against guardians of the poor who had been incorporated by act of the state assembly); *Goshen & Sharon Turnpike Co. v. Sears* 7 Conn. 86 (1829) (“[O]wners of public roads were always bound to repair them, and liable for damages occasioned by their neglect, as already shewn. Corporations are artificial persons, and, for certain purposes, are considered as natural ones; e.g. they have been denominated occupiers of land, deemed inhabitants of cities, &c. and bound to repair bridges *ratione tenore suo terrarum*. They have sued, and have been sued, as citizens.”); *see also Adams v. Wiscasset Bank*, 1 Greenl. 361, 1 Me. 361, 1821 WL 290 (Me.), 10 Am. Dec. 88 (1821) (finding corporations answerable to suit, citing authorities where the suit against the corporate defendant sounded in tort, but without specifically stating whether the suit *sub judice* sounded in tort); *Lyman v. White River Bridge Co.*, 2 Aik. 255, 16 Am. Dec. 205, 1827 WL 1380 (Vt. 1827). In *White*, the Vermont Supreme Court provided some very clear-minded reasoning, reflective of what obviously was a strong current in American law flowing from the Republic’s birth:

This case, and the others referred to, are entirely decisive, that a corporation, as such, may be sued in an action on the case for a tort.

But it is said, that, admitting that a corporation is liable in an action on the case for a tort, yet it cannot commit a trespass, or be answerable in that form of action. But if an action on the case will lie against a corporation for a tort, there seems to be no good reason why trespass will not also lie. The distinction between the two actions is not, whether the act complained of was accompanied with force, or whether there was an intent to do the injury; but whether the injury was the direct and immediate effect of the act complained of, or was

The federal courts of the early Republic, in cases such as the 1827 federal circuit decision in *Fowle v. Corporation of Alexandria*, also appear to have taken cognizance of *Riddle* and its general principle of corporate liability for negligence, although continuing to treat “public” corporations more leniently than private ones.<sup>276</sup>

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the collateral consequence of some act previously done. If a corporation is liable in case for consequential damages, proceeding from an act authorized by them, they may, and ought to be liable in trespass, for an immediate or direct injury, arising from an act authorized by them, or done by their command. Indeed, there seems to be no difference, either on principle, or on technical grounds, as to the liability of a corporation, in actions of the case *ex delicto*, and actions of trespass.

Lyman v. White River Bridge Co., 2 Aik. 255, 16 Am. Dec. 205, 1827 WL 1380 (Vt. 1827). Some courts, while recognizing corporate tort liability, excepted certain tort claims based on personal assault, battery, and trespass. See, e.g., Orr v. Bank of U.S., 1822 WL 4, \*5, 1 Ohio 36, 43, 13 Am. Dec. 588, 588, 1 Hammond 36, 36 (Ohio Apr. Term 1822). The reasoning for decisions such as Orr was explained seventeen years later by the same court:

The whole reasoning proceeds upon the inconsistency of suing a corporation in a form of action which presupposes the injury to have been committed with force and arms, and is, therefore, equally applicable to trespass upon the person and upon reality. It is true the objection may be denominated a technical one; but even a technical rule, after it has become a general one, should for that reason alone be preserved, unless manifest inconvenience would be the consequence. But here none such can result. The individual members of the corporation would be liable in their personal capacity, if the circumstances of the case would warrant it.

Footnote v. City of Cincinnati, 9 Ohio 31, 33–34 (1839).

<sup>276</sup> *Fowle v. Common Council of Alexandria*, 28 U.S. (3 Pet.) 398, 409–10 (U.S. 1830), *aff'g*, 3 Cranch C.C. 70, 9 F. Cas. 606, 3 D.C. 70, No. 4993 (C.C.D. Dist. Col. Apr. Term 1827). The case involved allegations that the municipal corporation had not required the statutory bond for a particular auctioneer, who failed to remit to the plaintiff the monies earned from auctioning goods for plaintiff, and who turned out to be entirely insolvent. The bond requirement was intended to provide a measure of compensatory

Any doubts about the state of the law must be resolved in favor of a general understanding that private corporations were held liable for torts, and the support comes from no less an authority than Chief Justice Marshall, writing in an appeal from the federal circuit decision in *Fowle*:

The common council has granted a license to carry on the trade of an auctioneer, which the law did not empower that body to grant. Is the town responsible for the losses sustained by individuals from the fraudulent conduct of the auctioneer? He is not the officer or agent of the corporation, but is understood to act for himself as entirely as a tavern keeper, or any other person who may carry on any business under a license from the corporate body.

Is a municipal corporation, established for the general purposes of government, with limited legislative powers, liable for losses consequent on its having misconstrued the extent of its powers, in granting a license which it had no authority to grant, without taking that security for the conduct of the person obtaining the license, which its own ordinances had been supposed to require, and which might protect those who transacted business with the persons acting under the license? We find no case in which this principle has been affirmed.

That corporations are bound by their contracts is admitted; *that money corporations, or those carrying on business for themselves, are liable for torts is well settled*: but that a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a non-feasance, by an omission of the corporate body to observe a law of its own, in which no penalty is provided, is a principle for which we can find no precedent.<sup>277</sup>

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insurance to consignors, such as plaintiff, who were injured by an auctioneer's misfeasance or nonfeasance.

<sup>277</sup> *Fowle*, 28 U.S. at 409–10 (emphasis added). The distinction being drawn is between public corporations, “such as towns and societies,” versus

Thus, in the mind of one of the contemporaries politically and professionally connected to the drafters of the Judiciary Act of 1789,<sup>278</sup> which included the ATS, it was well settled “[t]hat money corporations, or those carrying on business for themselves, are liable for torts.”<sup>279</sup>

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money corporations, which were the privately organized corporations for profit with which we are familiar today, as is evident from the explanation offered by Justice Ingersoll of the Supreme Court of Errors in Connecticut, in a case in which a money corporation’s power was challenged to enact “a by-law, duly made and passed by said company, on the 20th day of September, 1810 . . . providing, that at all future meetings of said company, ‘the vote should be determined by the majority of the shares, which each vote should represent, either as his own property, or as attorney for other persons.’” *State ex rel. Kilbourn v. Tudor*, 5 Day 329, 1812 WL 131 (Conn.), 5 Am. Dec. 162, at \*3, \*4–\*5 (Conn. 1812) (noting that private, “money” corporations have the powers of judicial persons).

<sup>278</sup> John Marshall was serving in the Virginia House of Burgesses at the time, although he had been a delegate to Virginia’s ratification convention. The Committee in Philadelphia impressed to draft the Judiciary Act included Marshall’s fellow Virginia politician, Richard Henry Lee, as well as Ellsworth, Paterson, McClay, Strong, Basset, Few, and Wingate. They were to “comprise a Committee, to bring in a bill for organizing the Judiciary of the United States.” Henry J. Bourguignon, *The Federal Key To The Judiciary Act Of 1789*, 46 S.C. L. REV. 647, 667 (1995).

<sup>279</sup> In an 1839 decision, Justice Bates of the Supreme Court of Delaware made the most well-written, thoughtful, and scholarly survey of the law of corporate liability for tort, as it was at the dawn of the Republic, as it had developed since that time, and as it was developing into the foreseeable future: “it is much more reasonable to say that where a corporation is authorized by law to make a road, if any injury is done in the course of making that road by the persons employed under its authority, it shall be responsible in the same manner that an individual is responsible for the acts of his servants touching his business,” and that “there is no solid ground for a distinction between contracts and torts.” *Whiteman v. Wilmington & S.R. Co.*, 2 Harr. 514, 2 Del. 514, 1839 WL 172, at \*5–\*6 (Del. Super. Ct. 1839). Justice Bates rejected the corporation’s advocacy of a liability exemption, presciently observing that “[t]here is certainly nothing in reason or justice to entitle them to the exemption claimed. Numerous as they have become, and constantly multiplying in the midst of us as they are, it would be unjust to society, as well as unreasonable in itself, to suffer them

This history—coupled with a proper interpretation of the ATS that treats “tort” and “violation of the law of nations” as separate elements—dispenses with the entirely fallacious reasoning provided in Judge Cabranes’ majority opinion for the Second Circuit panel in *Kiobel*. Judge Leval’s elaborate critique of Judge Cabranes’ majority opinion is a most worthy one<sup>280</sup>—but, as he is wont to do, Judge Richard Posner boiled the many pages of Leval’s arguments down to a very straightforward set of propositions in an opinion for his circuit soundly and emphatically rejecting Judge Cabranes’ reasoning:

The outlier is the split decision in *Kiobel*. . . , which indeed held that because corporations have never been prosecuted, whether criminally or civilly, for violating customary international law, there can’t be said to be a principle of customary international law that binds a corporation.

The factual premise of the majority opinion in the *Kiobel* case is incorrect. At the end of the Second World War the allied powers dissolved German corporations that had assisted the Nazi war effort, along with Nazi government and party organizations—and did so on the authority of customary international law. . . . The second of these [dissolution orders] found that I.G. Farben (the German chemical cartel) had “knowingly and prominently engaged in building up and maintaining the German war potential,” and it ordered the seizure of all its assets and that some of them be made “available for reparations.”

And suppose no corporation *had* ever been punished for violating customary international law.

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to escape the consequences of direct injuries inflicted upon citizens by their agents in the prosecution of their business.” *Id.*

<sup>280</sup> *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 154–88 (Leval, J., concurring in the judgment).

There is always a first time for litigation to enforce a norm; there has to be.<sup>281</sup>

Judge Posner then proceeded to pose a thought-provoking question to which the *Kiobel* majority had seemed oblivious:

We have to consider *why* corporations have rarely been prosecuted criminally or civilly for violating customary international law; maybe there's a compelling reason. But it seems not; it seems rather that the paucity of cases reflects a desire to keep liability, whether personal or institutional, for such violations within tight bounds by confining it to abhorrent conduct—the kind of conduct that invites criminal sanctions. It would have seemed tepid to charge the Nazi war criminals with battery, wrongful death, false imprisonment, intentional infliction of emotional distress, fraud, conversion, trespass, medical malpractice, or other torts. And it was natural in light of the perceived effect of the Nuremberg trials on German and international opinion concerning the type of practices in which Hitler's government had engaged that a tradition would develop of punishing violations of customary international law by means of national or international criminal proceedings; it was a way of underscoring the gravity of violating customary international law.<sup>282</sup>

Judge Posner then illuminated several other points to bring his concise analysis full-circle, noting that “[t]he Alien Tort Statute, moreover, is civil, and corporate tort liability is common around the world,” and thus,

[i]f a corporation complicit in Nazi war crimes could be punished criminally for violating customary international law, as we believe it could

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<sup>281</sup> *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1017 (7<sup>th</sup> Cir. 2011) (citations omitted).

<sup>282</sup> *Id.* at 1018.

be, then *a fortiori* if the board of directors of a corporation directs the corporation's managers to commit war crimes, engage in piracy, abuse ambassadors, or use slave labor, the corporation can be civilly liable.<sup>283</sup>

The Supreme Court in *Kiobel* missed an opportunity to resolve the issue that brought the case to the Court in the first place, by simply citing, even in a footnote, Judge Posner's reasoning with approval. Of course, Judge Posner's reasoning is persuasive of its own accord and does not need the sanction of a Supreme Court majority to establish its correctness. Considering how closely the Second Circuit was divided on the plaintiffs-appellants' en banc rehearing petition and that the Second Circuit prior to *Kiobel* had shown no difficulty with corporate liability under the ATS,<sup>284</sup> one can only hope that going forward, the circuit will abandon the ill-starred reasoning of the *Kiobel* panel and will choose no longer to follow it as circuit law, both in light of its outlier status and the evident disdain with which all nine Justices treated it by assuming corporate liability *sub silentio* in all four opinions they filed in *Kiobel* and by feeling no need to state the obvious—that Judge Cabranes was, as Judge Posner so politely put it, “incorrect.”

#### 4. LINGERING ISSUES FOR FORUM NON CONVENIENS, POLITICAL QUESTION DOCTRINE, ACT-OF-STATE DOCTRINE, EXHAUSTION OF LOCAL REMEDIES IN ATS SUITS—AND THE *COUP DE GRÂCE* OF FEDERAL PLEADING IN THE *TWOMBLY-IQBAL* AGE

Alstom and other MNEs are unlikely to face a *Kiobel*-like ATS suit over FDI after the Supreme Court has put to rest the notion of such “foreign-cubed” lawsuits. However, E.U.-based MNEs might very well see ATS suits in scenarios in which the ATS claims might be said to “touch and concern the territory of the United States.” Such ATS suits would then shift the focus once again to the intractable and perennial procedural issues that are of unique uncertainty and complexity in ATS cases. While some commentators have criticized the use of procedural dismissals in

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<sup>283</sup> *Id.* at 1019–21 (citations omitted).

<sup>284</sup> *E.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 91–92 (2d Cir. 2000); *see Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174 (2d Cir.2009).

ATS cases,<sup>285</sup> the procedural issues are not phantoms, but rather, are quite substantial in the context of any transnational litigation, especially those involving FDIs generally and even more specifically, FDIs that require substantial corporate cooperation and coordination with the host country's government. Among these unresolved issues are whether ATS claims require prudential exhaustion,<sup>286</sup> are particularly vulnerable to forum non conveniens dismissals,<sup>287</sup> raise non-judiciable political questions,<sup>288</sup> are barred by the act-of-state doctrine,<sup>289</sup> require state-action to be proven,<sup>290</sup> whether the ATS statute of limitations should be "borrowed" from the ten-year period adopted under the TVPA,<sup>291</sup> and whether the executive branch should be invited to submit statements of interest in

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<sup>285</sup> Rosaleen T. O'Gara, *The Use Of Procedural Dismissals Under The Alien Tort Statute*, 52 ARIZ. L. REV. 797 (2010).

<sup>286</sup> Ron A. Ghatan, *The Alien Tort Statute and Prudential Exhaustion*, 96 CORNELL L. REV. 1273 (2011).

<sup>287</sup> Nicholas A. Fromherz, *A Call for Stricter Appellate Review of Decisions on Forum Non Conveniens*, 11 WASH. U. GLOBAL STUDIES L. REV. 527 (2012); P.J. Kee, *Expanding the Duties of the Vigilant Doorkeeper: ATS Litigation and the Inapplicability of the Act of State Doctrine and Forum Non Conveniens*, 83 TUL. L. REV. 495 (2009); Matthew R. Skolnik, *Forum Non Conveniens Doctrine In Alien Tort Claims Act Cases: A Shell Of Its Former Self After Wiwa*, 16 EMORY INT'L L. REV. 187 (2002); Aric K. Short, *Is the Alien Tort Statute Sacrosanct—Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001 (2000–2001).

<sup>288</sup> See, e.g., Amy Endicott, *The Judicial Answer: Treatment of the Political Question Doctrine in Alien Tort Claims*, 28 BERKELEY J. INT'L L. 537 (2010); Deborah Azar, *Simplifying the Prophecy of Justiciability in Cases Concerning Foreign Affairs: A Political Act of State Question*, 9 RICH. J. GLOBAL L. & BUS. 471 (2010).

<sup>289</sup> Samuel W. Bettwy, *Subject Matter Jurisdiction And Foreign Governments: Act Of State, Sovereign Immunity, And The Alien Tort Statute*, 80 AM. SOC'Y INT'L L. PROC. 221 (1986).

<sup>290</sup> Michael Barsa & David Dana, *Three Obstacles to the Promotion of Corporate Social Responsibility by Means of the Alien Tort Claims Act: The Sosa Court's Incoherent Conception of the Law of Nations, the Purposive Action Requirement for Aiding and Abetting, and the State Action Requirement for Primary Liability*, 21 FORDHAM ENVTL. L. REV. 79 (2010).

<sup>291</sup> Alka Pradhan, *The Statute of Limitations for Alien Torts: A Reexamination After Kiobel*, 21 IND. INT'L & COMP. L. REV. 229 (2011).



every case and, if so, whether the federal courts should defer to them.<sup>292</sup>

The pleading regime inaugurated by the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*<sup>293</sup> and *Ashcroft v. Iqbal*<sup>294</sup> imposes a "plausibility-pleading standard"—"[i]n reality," Professor Arthur Miller observes, "a form of fact pleading by another name"<sup>295</sup>—requiring trial judges "to evaluate the strength of the factual 'showing' of each claim for relief and thus determine whether it should proceed."<sup>296</sup> This regime, now often known in colloquial brevity as *Twiqbal*,<sup>297</sup> has spelled particular trouble for ATS cases,<sup>298</sup> which are long on allegations but short on critical facts.<sup>299</sup> Although

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<sup>292</sup> Margarita S. Clarens, *Deference, Human Rights and the Federal Courts: The Role of the Executive in Alien Tort Statute Litigation*, 7 DUKE J. COMP. & INT'L L. 415 (2007). Compare Derek Baxter, *Protecting The Power Of The Judiciary: Why The Use Of State Department "Statements Of Interest" In Alien Tort Statute Litigation Runs Afoul Of Separation Of Powers Concerns*, 37 RUTGERS U. L.J. 807 (2006), with Brian C. Free, *Awaiting Doe v. Exxon Mobil Corp.: Advocating The Cautious Use Of Executive Opinions In Alien Tort Claims Act Litigation*, 12 PAC. RIM L. & POL'Y J. 467 (2003).

<sup>293</sup> 550 U.S. 544 (2007).

<sup>294</sup> 556 U.S. 662 (2009).

<sup>295</sup> Arthur R. Miller, *From Conley To Twombly To Iqbal: A Double Play On The Federal Rules Of Civil Procedure*, 60 DUKE L.J. 1, 20 (2010).

<sup>296</sup> *Id.* at 23.

<sup>297</sup> *RHJ Med. Ctr., Inc. v. City of Dubois*, 754 F. Supp. 2d 723, 730 (W.D. Pa. 2010) (noting that *Twombly* and *Iqbal* are commonly referred to collectively as *Twiqbal*).

<sup>298</sup> James E. von der Heydt, *Ripple Effects: The Unintended Change To Jurisdictional Pleading Standards After Iqbal*, 60 CLEV. ST. L. REV. 799, 834–35 (2012) (citing *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260–61 (11th Cir. 2009)) ("The conspiracy allegations in *Sinaltrainal* invite comparisons with *Iqbal* itself, and its holding can be defended as another instance of identifying plaintiff's failure to plead plausible facts adequate to activate a federal statute."); Jordan D. Shepherd, Note, *When Sosa Meets Iqbal: Plausibility Pleading in Human Rights Litigation*, 95 MINN. L. REV. 2318 (2011); *Civil Procedure—Pleading Requirements—Eleventh Circuit Dismisses Alien Tort Statute Claims Against Coca-Cola Under Iqbal's Plausibility Pleading Standard*, 123 HARV. L. REV. 580 (2009) (discussing *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1270 (11th Cir. 2009)).

<sup>299</sup> Jean-Marie Simon, *The Alien Torts Claims Act: Justice Or Show Trials?*, 11 B.U. INT'L L.J. 1, 4, 31–32 (1993). The difficulty is well illustrated in a recent federal district court decision applying *Iqbal* to ATS

some courts and commentators have urged that *Twiqbal* shouldn't be rigorously applied to what they would characterize as jurisdictional pleading, the far more prevalent view subjects ATS claims to the rigors of *Twiqbal*, and many complaints are found wanting. For example, even in *Kiobel*, the corporate liability and extraterritoriality issues were ultimately unnecessary to the decision of the case, for even Judge Leval, who of all the judges reviewing *Kiobel* was the most amicably disposed to the plaintiffs' case, performed a

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claims in a case where Iraqi nationals filed a five-count complaint against eleven business entities, and one individual who allegedly owned and operated one of entities, alleging that Iraqi nationals were killed or seriously injured by defendants while defendants provided security services for United States government:

[P]laintiffs must allege facts in their complaints that give rise to a plausible entitlement to relief for claims alleging war crimes pursuant to the ATS. In other words, *the facts alleged in the complaint*, assumed to be true, *must create a plausible inference that each of the elements required to state a claim for war crimes under the ATS is met.* Thus, in order to prevail on defendants' motions, the *complaints must state facts that would allow a trier of fact plausibly to infer that defendant Prince (i) intentionally (ii) killed or inflicted serious bodily harm (iii) on innocent civilians (iv) during an armed conflict and (v) in the context of and in association with that armed conflict.* Plaintiffs have failed to meet this burden as to the ATS war crimes claims in each of the five cases.

*In re XE Services Alien Tort Litigation*, 665 F. Supp. 2d 569, 589–90 (E.D. Va. 2009) (citation omitted) (emphases added); *accord Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401–02 (4th Cir. 2012) (finding lack of factual particularity in complaint attempting to plead that chemical manufacturer violated ATS by selling thiodiglycol (TDG) to Iraqi government, which then used TDG to manufacture mustard gas to attack members of ethnic minority group); *Weisskopf v. United Jewish Appeal-Fed'n of Jewish Philanthropies of N.Y., Inc.*, 889 F. Supp. 2d 912 (S.D. Tex. 2012) (finding that “there are no nonconclusory allegations that Defendants knew that Israelis were allegedly violating Plaintiff’s human rights and that Defendants intended to further those violations” and “[a]bsent well-pled allegations that Defendants intended to further a primary violation of the law of nations, Plaintiff’s ATS claims must be dismissed.”).

devastating *Twiqbal* analysis of the complaint and would, like every other judge who has looked at this course, dismiss it. “When read together,” Judge Leval wrote,

*Presbyterian Church of Sudan v. Talisman Energy, Inc.*, and *Iqbal* establish a requirement that, for a complaint to properly allege a defendant’s complicity in human rights abuses perpetrated by officials of a foreign government, it must plead specific facts supporting a reasonable inference that the defendant acted with a purpose of bringing about the abuses.<sup>300</sup>

The challenge posed for putative ATS plaintiffs is daunting,<sup>301</sup> and likely to continue to be the *coup de grâce* even to ATS cases that survive the other perils in the procedural gauntlet.<sup>302</sup>

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<sup>300</sup> *Kiobel*, 621 F.3d 111, 188–89 (Leval, J., concurring in part and dissenting in part) (citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir.2009)).

<sup>301</sup> See, e.g., *Mamani v. Berzain*, 654 F.3d 1148, 1156 (In a case brought under the ATS by Relatives of victims killed during time of severe civil unrest in Bolivia against that country’s former president and former minister of defense, holding that “[t]he Complaint in this case has all of the flaws against which *Iqbal* warned.”). Congress has witnessed some stirrings around legislatively abrogating *Iqbal*, see Benjamin J. Williams, Case Comment, *Civil Procedure—Pleading: The United States Supreme Court Revisits The Pleading Standard Under Bell Atlantic Corp. v. Twombly, Making Surviving A Motion To Dismiss More Difficult—Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), 86 N.D. L. REV. 383, 402–03 (2009) (discussing Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009), introduced by Senator Specter). Its lead sponsor, however, Senator Arlen Specter, lost a 2010 Senate re-election bid in the primaries, and passed away in 2011. Sheryl Gay Stolberg, *Arlen Specter, Pennsylvania Senator, Is Dead at 82*, N.Y. TIMES, Oct. 15, 2012, at A22. The bill was not enacted in the 2009 or 2010 Congressional sessions, and appears to have returned to Committee, not to again emerge. See Notice Pleading Restoration Act of 2010, S. 4054 (111th), available at <http://www.govtrack.us/congress/bills/111/s4054>; see also Michael R. Huston, Note, *Pleading with Congress to Resist the Urge to Overrule Twombly and Iqbal*, 109 MICH. L. REV. 415 (2010). Other efforts were to be directed at the Rules Advisory Committee. See Williams, *supra* note 301, at 403–05. Because of the transactional costs involved and the priority of other issues, it is very unlikely that there will be legislation or a new federal rule to abrogate *Twiqbal*. See Paul Stancil,

5. NEW LIMITATIONS ON THE EXERCISE OF EXTRATERRITORIAL  
PERSONAL JURISDICTION IN ATS CASES OVER FOREIGN MNES  
THROUGH THEIR U.S. SUBSIDIARIES: THE SUPREME COURT GRANTS  
DIAMLERCHRYSLER'S PETITION FOR WRIT OF CERTIORARI FROM THE  
NINTH CIRCUIT'S *BAUMAN* DECISION

The Supreme Court is poised to recognize another significant procedural limitation on ATS suits. Having granted certiorari in *DaimlerChrysler, A.G. v. Bauman*,<sup>303</sup> the Court is likely to take the next step on the path it hewed in *Goodyear Dunlop Tires Operations*,

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*Congressional Silence and the Statutory Interpretation Game*, 54 WM. & MARY L. REV. 1251, 1318–24 (2013).

<sup>302</sup> As Professor Miller describes the impact of *Twiqbal*:  
Moreover, why were *Twombly* and *Iqbal* necessary? The 1986 summary judgment trilogy had made that motion a powerful pretrial terminator, especially when coupled with judicial control over the pretrial process. For a quarter century, successive amendments to the Federal Rules had impressed limits on the extent of discovery, established mandatory disclosure, and narrowed the scope of what matters could be inquired into under the discovery rules. For years \*53 before *Twombly* and *Iqbal*, the Rule 12(b)(6) dismissal rate had been rising. Judicial gatekeeping seemed to be working. The Supreme Court's *coup de grace* simply was not needed.

Arthur R. Miller, *supra* note 295, at 52–53 (footnotes omitted); see Amanda Sue Nichols, Note, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of Bell Atlantic v. Twombly?*, 76 FORDHAM L. REV. 2177, 2221–25 (2008) (arguing that “ATS accomplice liability cases deal with similar types of claims and defendants as the Supreme Court envisioned when it established the plausibility standard, and thus it is legally consistent to apply the plausibility standard to ATS accomplice liability claims.”); see also Jeffrey M. Sweeney, *Corporate Aiding And Abetting Under The Alien Tort Statute: A Proposal For Evaluating The Facial Plausibility Of A Claim*, 56 LOY. L. REV. 1037, 1040–41, 1058–69 (2010) (proposing standards by which courts can apply *Twiqbal* to ATS claims).

<sup>303</sup> *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011), *cert. granted*, 2013 WL 1704716 (U.S. Apr. 22, 2013).

*S.A. v. Brown*<sup>304</sup> of limiting exorbitant exercises of personal jurisdiction over foreign-based MNEs through their American subsidiaries. While the court used *Brown* to answer the question, whether “foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State,”<sup>305</sup> the Court will use *Bauman* to answer negatively the question whether a foreign parent corporation will have the subsidiary’s U.S.-contacts attributed to it as the basis for exercising general personal jurisdiction. The Court decided some twenty-five years ago that service on the U.S. subsidiary of a foreign parent can be sufficient to satisfy the notice requirement for personal jurisdiction,<sup>306</sup> that does not imply that the U.S. subsidiary’s contacts with the U.S. are sufficient to establish a basis for personal jurisdiction.

Although Daimler AG is a German public stock company that does not manufacture or sell products, own property, or employ workers in the United States, and maintains a separate corporate identity from its subsidiaries,

the Ninth Circuit nevertheless held that DaimlerChrysler, A.G., is subject to general personal jurisdiction in California—and can therefore be sued in the State for alleged human-rights violations committed in Argentina by an Argentine subsidiary against Argentine residents—because it has a different, indirect subsidiary that distributes Daimler AG-manufactured vehicles in California.<sup>307</sup>

As, among other things, an ATS case, *Bauman* represents a particularly important and especially expansive personal jurisdiction exercised through an implied agency theory.<sup>308</sup> It is the paradigm for

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<sup>304</sup> 131 S. Ct. 2846 (2011).

<sup>305</sup> *Id.* at 2850.

<sup>306</sup> *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

<sup>307</sup> *Petition for Writ of Certiorari, DaimlerChrysler AG v. Bauman*, No. 11-965 (Feb. 6, 2012).

<sup>308</sup> 644 F.3d at 920. The other relevant legal test in these scenarios—the “alter-ego” test—clearly did not apply given the scrupulousness with which the parent and subsidiary observed their separate corporate identities. *See id.*

triangulating (some might say, “bootstrapping”) extraterritorial personal jurisdiction in ATS cases. That triangulation seeks to use the relationships of a foreign (e.g., E.U.) -based parent corporation to subsidiaries in a host country and to American subsidiaries to create a basis for hailing the parent into a U.S. court. In this case, the triangulation seeks to use the American *subsidiary* to hail the German *parent* before the U.S. federal courts to defend claims that a *second subsidiary*, Mercedes-Benz Argentina, “collaborated with state security forces to kidnap, detain, torture, and kill the Argentine workers and labor activists Argentina’s ‘Dirty War’”—a war which “began in 1976 when the military overthrew the government of President Isabel Peron and set up a military dictatorship.”<sup>309</sup> A unanimous Ninth Circuit panel held that

In light of [the parent corporation’s] pervasive contacts with the forum state through [its Michigan-based, North American subsidiary], including the extensive business operations of that subsidiary, the interest of California in adjudicating important questions of human rights, our substantial doubt as to the adequacy of Argentina as an alternative forum, and the various issues discussed above with respect to Germany, we hold that [the parent] “has not met its burden of presenting a compelling case that the exercise of jurisdiction would not comport with fair play and substantial justice.”<sup>310</sup>

Federal courts in six of the circuits have rejected this jurisdictional logic.<sup>311</sup> The Ninth Circuit itself narrowly declined

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<sup>309</sup> 644 F.3d at 911–12 & n.3.

<sup>310</sup> *Id.* at 930.

<sup>311</sup> See *Singh v. Daimler*, AG, 902 F. Supp. 2d 974, 980 (E.D. Mich. 2012) (discussing the disagreement and rejecting the *Bauman* agency approach); see, e.g., *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 648–49 (8th Cir. 2003); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990); *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362–63 (6th Cir. 2008); *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 540 (7th Cir. 1998) (Posner, C.J.); *Mylan Labs., Inc. v. Akzo*,

rehearing, prompting seven circuit judges to dissent.<sup>312</sup> *Brown* augurs the resolution of the issue in *Bauman*,<sup>313</sup> which is likely to compliment *Kiobel* as another milestone in scaling back the long arm of American law's span.

*B. IS THERE ANY HUMAN DIGNITY IN PURSUING HUMAN RIGHTS  
CLAIMS THROUGH ATS LITIGATION THAT IS MARKED OVERWHELMINGLY  
BY THE ABSENCE OF ENFORCEABLE JUDGMENTS HOLDING ANY  
MALEFACTOR TO ACCOUNT? THE WARRANT OF CONGRESSIONAL  
ACTION*

Judge Roger Robb's observation in *Tel-Oren* serves more broadly as an appropriate epitaph to the insoluble problems of ATS litigation as it has been conceptualized since 1980—resulting in much litigation but little by way of finding of liability and virtually nothing by way of enforcement of the few liabilities found: “To grant the initial access in the face of an overwhelming probability of frustration of the trial process as we know it is an unwise step.”<sup>314</sup>

Can there be any dignity for victims of outrages that violate the law of nations through a statute primarily employed “more to draw attention to a political cause than to seek redress in U.S. courts”?<sup>315</sup> Can there be any justice when precious few individuals or corporations accused of a spectrum of abhorrent conduct are ever actually adjudicated liable after a full trial,<sup>316</sup> let alone compelled to

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N.V., 2 F.3d 56, 62–63 (4th Cir.1993); *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293–94 (11th Cir. 2000).

<sup>312</sup> *Bauman v. DaimlerChrysler Corp.*, 676 F.3d 774, 775 (9th Cir. 2011) (O’Scannlain, J., dissenting from denial of petition for en banc reh’g).

<sup>313</sup> *Id.* at 775–76, n.1.

<sup>314</sup> *Tel-Oren v. PLO*, 726 F.2d 774, 824 (Robb, J., concurring); *see, e.g., Sarah H. Cleveland, The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971 (2004).

<sup>315</sup> Simon, *supra* note 299.

<sup>316</sup> As Simon very emphatically pointed out, “since plaintiffs bringing lawsuits under section 1350 assume that a defendant will not appear in court and that a default judgment will be entered, the option of bringing unsubstantiated claims is even more appealing,” because “[p]laintiffs’ attorneys, knowing with some assurance that they will never be called upon to defend or support such allegations, have nothing to lose by including them in the complaint.” *Id.* at 71. Simon also observed a striking selectivity in

pay the penalties and to make restitution to their victims? As an astute student commentator observed twenty years ago:

[D]espite an understandable desire to redress terrible and often massive human rights violations, neither evidentiary standards, forum issues, nor questions of fairness have ever been raised as to the propriety of forcing foreign defendants to litigate uniquely testimonial and witness-based issues in U.S. courts. Somehow the tragic nature of plaintiffs' claims implies that such questions are irrelevant. The presumption seems to be that such lawsuits should go forward on political and moral grounds alone. For plaintiffs' attorneys who pursue it, the Alien Tort Statute has also become an unabashed beacon of political correctness.<sup>317</sup>

Yet, as the student commentator noted, we should “ask whether such cases should be filed at all, given the dearth of evidence they present,”<sup>318</sup> and the fact that “both the ability to obtain personal jurisdiction over a defendant and the potential media value are determinative of who will be served with a section 1350 lawsuit.”<sup>319</sup>

It bears worth pausing here to emphasize that the purpose of this aspect of an FDI analysis is not to defend corporate misconduct. Complicity of MNEs in the murder, torture, enslavement, wrongful detention, and other criminal abuses of human beings, e.g., “ethnic cleansing, genocide, torture” and other human rights violations, is serious, and intolerable.<sup>320</sup> Corporate social responsibility is a

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those ATS suits chosen to be filed in U.S. courts, seemingly one to exempt “politically leftist governments.” *Id.* at 78 (footnotes omitted).

<sup>317</sup> *Id.* at 4.

<sup>318</sup> *Id.* at 31 (elaborating that “plaintiffs’ lawyers routinely file lawsuits devoid of any rudimentary adherence to evidentiary standards,” and rely on evidence that “contain[s] hearsay and double hearsay problems.”).

<sup>319</sup> *Id.* at 32.

<sup>320</sup> See Goldsmith & Sykes, *supra* note 40, at 1146; see also Ronen Shamir, *Between Self-Regulation And The Alien Tort Claims Act: On The Contested Concept Of Corporate Social Responsibility*, 38 LAW & SOC’Y REV. 635 (2004) (arguing that from the “perspective of a C[orporate]



modern, and overdue, movement<sup>321</sup> that gives MNEs the opportunities, as well as the incentives, to self-police and to participate in the formulation of a legal regime to effectively regulate MNE conduct,<sup>322</sup> and to the extent MNEs fail to do so, gives home- and host-state governments the standards by which to legislate compliance.<sup>323</sup> But such regulation should be more predictable and

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S[ocial] R[esponsibility] field that exists above and beyond any concrete judicial outcome, the career of the [Alien Tort Statute] cases, by forcing the issue of corporations and human rights into the open, already shapes corporate behavior because it forces corporations to reflect upon, if not to institutionalize, human rights-related issues”).

<sup>321</sup> See, e.g., Donald J. Kochan, *Legal Mechanization of Corporate Social Responsibility Through Alien Tort Statute Litigation: A Response to Professor Branson with Some Supplemental Thoughts*, 9 SANTA CLARA J. INT’L L. 251, 254 (2011) (“The corporate social responsibility discussion raises three principal issues about how a moral corporation lives its life: how a corporation chooses its self-interest versus the interests of others, when and how it should help others if control decisions may harm the shareholder owners, and how far the corporation must affirmatively go to help right the perceived wrongs in the world in which it operates.”).

<sup>322</sup> See, e.g., Norbert Horn, *International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives* 30 AM. U. L. REV. 923 (1980–1981); A.A. Fatouros, *On the Implementation of International Codes of Conduct: An Analysis of Future Experience*, 30 AM. U. L. REV. 941 (1980–1981); Richard D. Kauzlarich, *The Review of the 1976 OECD Declaration on International Investment and Multinational Enterprises*, 30 AM. U. L. REV. 1009 (1980–1981). But see Timothy W. Stanley, *International Codes of Conduct for MNC’s: A Skeptical View of the Process*, 30 AM. U. L. REV. 973 (1980–1981).

<sup>323</sup> A leading model is the Guidelines for MNEs that the Organization for Economic Cooperation and Development issued originally in 1976. Daniel Plaine, *OECD Guidelines for Multinational Enterprises*, 11 INT’L L. 339, 339–41 (1977); Jernej Letnar Čerňič, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises*, 3 HANSE L. REV. 77 (2008), available at <http://ssrn.com/abstract=1317263>; see also Ashley L. Santner, *A Soft Law Mechanism For Corporate Responsibility: How The Updated OECD Guidelines For Multinational Enterprises Promote Business For The Future*, 43 GEO. WASH. INT’L L. REV. 375, 376–77 & nn.4–5 (2008). For a detailed discussion of how forty-two OECD nations, including the United States and France, have implemented the Guidelines by establishing National Contact Points, see Leyla Davarnejad, *In The Shadow Of Soft Law: The Handling Of Corporate Social Responsibility Disputes Under The OECD Guidelines For Multinational Enterprises*, 2011 J. DISP. RESOL. 351 (2011); Christopher N.

clearly stated than the common law-style case adjudication that courts have attempted under the ATS, particularly where that adjudication occurs in the courts of a country other than that where the MNE's conduct, or the effects of the MNE's conduct, transpired.<sup>324</sup> A legislative process, like the one that led to Congress's enactment of the TVPA,<sup>325</sup> allows for a considerably more nuanced and holistic assessment of the wide range of relevant economic and foreign relations factors implicated in such law-making than courts can even approach in case-by-case adjudication.<sup>326</sup> The subjects to which courts have been asked to

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Francoise, *A Critical Assessment of the United States' Implementation of the OECD Guidelines for Multinational Enterprises*, 30 B.C. INT'L & COMP. L. REV. 223 (2007); see also Bureau of Economic and Business Affairs, U.S. Dep't of State, *OECD: U.S. National Contact Point*, <http://www.state.gov/e/eb/oecd/usncp/us/index.htm>. In addition, the governments of developed nations can encourage developing-country governments to regulate more responsibly within their own borders by using the existing network of international trade-statutes and international trade treaties as a system of pressures and rewards for reform. See, e.g., Ian Urbina, *Unions Press To End Special Trade Status For Bangladesh*, N.Y. TIMES, May 31, 2013, at B1 ("After several deadly factory disasters in Bangladesh — including the collapse of an eight-story garment factory last month that left at least 1,127 people dead — labor advocates are stepping up pressure on the Obama administration, calling for it to convey its disapproval of working conditions in the country by revoking its special trade status.")

<sup>324</sup> Goldsmith & Sykes, *supra* note 40, at 1147 (noting importance of goal to "eliminate[e] . . . distorting economic effect by ensuring that all firms are subject to the same standard of liability for torts committed in a particular place"); see also Jack L. Goldsmith III, Note, *Interest Analysis Applied To Corporations: The Unprincipled Use Of A Choice Of Law Method*, 98 YALE L.J. 597 (1989).

<sup>325</sup> Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)).

<sup>326</sup> See also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 472–73 (6th ed. 2003) (explaining the general rule of *mandatory* exhaustion: "A claim will not be admissible on the international plane unless the individual alien or corporation concerned has exhausted the legal remedies available to him in the state which is alleged to be the author of the injury. This is a rule which is justified by practical and political considerations. . . ."). Compare Ghatan, *supra* note 282, at 1274–75, 1292–93, 1297–1300

extend the ATS are far better committed to “a modern Congress that ma[kes] clear its desire that the federal courts police the behavior of foreign individuals and governments” in a statute that “embod[ies] a legislative judgment that is” both “current” and “clear.”<sup>327</sup> Moreover, the American people, through their elected representatives, should be given the opportunity to be heard on whether, and to what extent, they want U.S. courts opened to ATS litigation, rather than leaving the matter entirely to the preferences of federal judges and other “litigation elites.”<sup>328</sup> While recent attempts at such legislation have gone nowhere,<sup>329</sup> the Supreme Court’s 2013 decision in *Kiobel* should rekindle an effort for which scholars called for a generation ago,<sup>330</sup> and continue to call for today.<sup>331</sup> Thus,

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(recommending the that the reach of the ATS be limited by requiring *prudential* exhaustion of local remedies “in which there is a weak nexus to the United States” and “alleged violation of norms that are not Peremptory,” which “could greatly reduce the number of claims available to plaintiffs under the ATS”), *with Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1225–26, 1235–36 (9th Cir. 2007) (Bybee, J., dissenting) (arguing that international law requires exhaustion of local remedies as a condition to bringing an international cause of action in an American tribunal, and domestic law should require it), *vacated en banc on other grounds*, 550 F.3d 822 (9th Cir. 2008).

<sup>327</sup> *Tel-Oren*, 726 F.2d at 813 (Bork, J., concurring); see John B. Bellinger III, *Enforcing Human Rights In U.S. Courts And Abroad: The Alien Tort Statute And Other Approaches*, 42 VAND. J. TRANSNAT’L L. 1, 5–6 (2009).

<sup>328</sup> Judith Kimerling, *Oil, Contact, And Conservation In The Amazon: Indigenous Huaorani, Chevron, And Yasuni*, 24 COLO. J. INT’L ENVTL. L. & POL’Y 43, 97–98 (2013).

<sup>329</sup> See, e.g., Mariani, *supra* note 158, at 1384 & n.1 (2008) (citing S. 1874, 109th Cong. (2005); S. 1870, 109th Cong. Rec. S11433-S11436 (Oct. 17, 2005)); Petty, *supra* note 167, at 185, 217–19 (2009); Lucien J. Dhooze, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT’L L. & POL’Y 119 (2007); see also Roger Alford, *What is Feinstein Thinking in Amending the ATS?*, OPINIO JURIS (Oct. 22, 2005, 10:45 AM), <http://lawofnations.blogspot.com/2005/10/what-is-feinstein-thinking-in-amending.html>; Roger Alford, *Feinstein Withdraws ATS Amendment*, OPINIO JURIS (Oct. 26, 2005, 8:05 AM), <http://lawofnations.blogspot.com/2005/10/feinstein-withdraws-ats-amendment.html>.

<sup>330</sup> See, e.g., Kenneth C. Randall, *Further Inquiries Into The Alien Tort Statute And A Recommendation*, 18 N.Y.U. J. INT’L L. & POL. 473, 511–32 (1986).

MNEs, such as Alstom, should embrace the opportunity to this debate and contribute meaningfully to it,<sup>332</sup> for a domestication of the ATS in *Kiobel* will not premit the need for the kinds of claims found in ATS cases to be addressed. Any evaluation of Alstom's risk posed by its FDIs in Israel—whether the Jerusalem Light Rail Project in the West Bank Occupied Territories or a hypothesized wind-energy project in the disputed Golan Heights—should include a discussion of the larger question whether Alstom will seek to influence the policy and laws of its host nations, as well as its home state through participation in political and legislative processes and in litigation over the scope of laws that may impact Alstom's present and future business strategies.<sup>333</sup>

However, candor requires observing that Congress cannot be hoped to enact ATS amendments anytime soon when it cannot even confirm sufficient numbers of judges to the very federal courts that are to hear cases under an amended statute.<sup>334</sup> Thus, it is becoming

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<sup>331</sup> See Brittany A. Shugart, *Relieving The Vigilant Doorkeeper: Legislative Revision Of The Alien Tort Statute In The Wake Of Judicial Lawmaking*, 22 S. CAL. REV. L. & SOCIAL JUSTICE 91 (2012); Tyler G. Banks, Note, *Corporate Liability Under The Alien Tort Statute: The Second Circuit's Misstep Around General Principles Of Law In Kiobel v. Royal Dutch Petroleum Co.*, 26 EMORY INT'L L. REV. 227, 279 (2012); Garvey, *supra* note 261.

<sup>332</sup> See, e.g., Lauren A. Dellinger, *Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act Litigation While Simultaneously Building a Better Business Reputation*, 40 CAL. W. INT'L L.J. 55 (2009).

<sup>333</sup> For example, several MNEs seek to influence the U.S. Supreme Court's rulings on extraterritoriality, as well as corporate amenability, in *Kiobel*. Brief for BP America et al. as Amici Curiae Supporting Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 2012 WL 392536, at \*1-\*2 (Feb. 3, 2012).

<sup>334</sup> See, e.g., Editorial, *Courts Without Judges*, N.Y. TIMES, Apr. 7, 2013, at SR10 ("Of 856 federal district and circuit court seats, 85 are unfilled—a 10 percent vacancy rate" with "[m]ore than a third of the vacancies hav[ing] been declared 'judicial emergencies' based on court workloads and the length of time the seats have been empty."); Geoffrey W. Peters, *G.O.P. Delays on Nominees Raise Tension*, N.Y. TIMES, May 12,

more common for MNEs to take the lead in establishing the kinds of industry standards and protocols that may prevent the kinds of tragedies that give rise to ATS litigation, an approach most recently exemplified by the agreement of “several of the world’s largest apparel companies . . . to a landmark plan to help pay for fire safety and building improvements” in the wake of the deaths of 1100 workers when a garment factory in Bangladesh collapsed in April 2013.<sup>335</sup> An MNE like Alstom, who has so much at risk in FDIs, should take the lead in establishing practices and compliance programs that minimize the kinds of risks that will grow into ATS claims if they eventuate.<sup>336</sup>

### III. *KIOBEL* AS A PYRRHIC VICTORY? THE EXAMPLE OF CHEVRON’S DECISION TO DEFEND ENVIRONMENTAL TORT LITIGATION IN ECUADOR INSTEAD OF MANHATTAN; OR, THE ROAD TO *CHEVRON CORP. V. NARANJO*

Some commentators on *Kiobel* have asserted that corporate counsel are everywhere celebrating the demise of “foreign-cubed”

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2013, at A1; Carl Hulse, *Blocked Bids to Fill Judgeships Stir New Fight on Filibuster*, N.Y. TIMES, Mar. 9, 2013, at A1.

<sup>335</sup> Steven Greenhouse & Jim Yardley, *Global Retailers Join Safety Plan For Bangladesh*, N.Y. TIMES, May 14, 2013, at A1.

<sup>336</sup> For an excellent discussion of this approach, see David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT’L L. 334, 334–35, 396–97 (2011) (arguing that “[t]he ultimate goal should be to make social and human rights issues an integral part of a corporation’s business strategy in order to benefit the company and its stakeholders”); see also David Shea Bettwy *The Human Rights And Wrongs Of Foreign Direct Investment: Addressing The Need For An Analytical Framework*, 11 RICH. J. GLOBAL L. & BUS. 239 (2011) (advocating that “because FDI can result in positive, though not automatic, human rights impacts, international efforts to develop universal codes of corporate social responsibility should be complemented by efforts to develop a methodology for objectively gauging and predicting impacts of FDI on human rights”); Han, *supra* note 62 (advocating that China’s MNEs be mindful in planning FDIs of the risks of ATS suits and make strategic plans to avoid creating the liabilities in the first place).

ATS suits.<sup>337</sup> Yet, having “freed” themselves from an American federal courtroom, is there really cause even for optimism—let alone jubilation—among corporate counsel and corporate boards at MNEs? One might very well think that—*until* the cautionary tale of another MNE, Chevron (which got exactly what it demanded when Judge Jed Rakoff liberated the corporation from an American courtroom but demanded from the corporation a written agreement “to being sued on these claims (or their Ecuadorian equivalents) in Ecuador, to accept service of process in Ecuador, and to waive for 60 days after the date of this dismissal any statute of limitations-based defenses that may have matured since the filing of the instant Complaints”),<sup>338</sup> is considered, compared, and contrasted.

Ecuador provided the setting where Texaco and Gulf Oil, years before Chevron absorbed them, were busy exploring for and exploiting the oil deposits their geologists had identified in Ecuador’s Amazon rainforest.<sup>339</sup> In 1992, Ecuador brought an end to the leases that permitted exploration and exploitation, and a full panoply of international dispute resolution arose.<sup>340</sup> Ecuador—more precisely, the Superior Court of Justice of Nueva Loja (Lago Agrio) and the Provincial Court of Justice of Sucumbios—also provided the setting for the court proceedings to which Chevron agreed in return for the *forum non conveniens* dismissal in New York, which have become

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<sup>337</sup> See, e.g., Julian Ku, *SCOTUS Votes 9-0 that Corporations Cannot Be Sued Under ATS for Extraterritorial Acts Without U.S. Interest At Stake*, OPINIO JURIS (Apr. 17, 2013, 11:52 AM), <http://opiniojuris.org/2013/04/17/scotus-votes-9-0-that-corporations-cannot-be-sued-under-ats-for-extraterritorial-acts-without-u-s-interest-at-stake/>.

<sup>338</sup> *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 539 (S.D.N.Y. 2001); see Van Detta, *Justice Restored*, *supra* note 3, at 94–102 (2003) (discussing *Aguinda v. Texaco, Inc.*, 945 F. Supp. 626 (S.D.N.Y. 1996), *vacated and remanded sub nom*; *Jota v. Texaco, Inc.*, 157 F.2d 153 (2d Cir. 1998), *forum non conveniens* motion again granted on remand, 142 F. Supp. 2d 534 (S.D.N.Y. 2001)).

<sup>339</sup> Kimerling, *supra* note 328.

<sup>340</sup> Jason Burke, *Defining Investor Confidence: Avoiding Interpretive Uncertainty in Chevron Corp. v. Ecuador*, 34 B.C. INT’L COMP. L. REV. 463 (2011).

known as the Lago Agrio Litigation.<sup>341</sup> As one journalist wrote of the litigation:

By the time the judge, Nicolás Zambrano, issued his decision [in the suit that the Ecuadorian plaintiffs had originally tried to file in New York but whose choice of forum was ousted by Chervon's invocation of forum non conveniens], the case had been going on for eighteen years. It had outlasted jurists on two continents. Zambrano was the sixth judge to preside in Ecuador; one federal judge in New York had died before he could rule on the case. The litigation even outlasted Texaco: in 2001, the company was subsumed by Chevron, which inherited the lawsuit. The dispute is now considered one of the nastiest legal contests in memory, a spectacle almost as ugly as the pollution that prompted it.<sup>342</sup>

The judgment was for \$9.5 billion, and in addition, Judge Zambrano<sup>343</sup> ordered Chevron to issue within two weeks of the judgment's entry an apology to the Ecuadorian people whose environment, families, and persons were harmed by Texaco's activities in Ecuador—or face a doubling of the judgment to \$19 billion.<sup>344</sup> Chevron issued no apology.<sup>345</sup> That Chevron appears not

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<sup>341</sup> For a recently published overview discussing the Lago Agrio Litigation and the various Ecuadorian courts and proceedings involved in the determination, see Kimerling, *supra* note 328, at 73–79 & n. 74. For Chevron's side of the story, see <http://www.chevron.com/ecuador/>. For the plaintiffs' side of the story, see <http://chevrontoxico.com/>.

<sup>342</sup> Keefe, *supra* note 17.

<sup>343</sup> Lawrence Hurley, *Judge at Heart of Landmark Oil Pollution Case Unfazed by Spotlight*, N.Y. TIMES, May 17, 2011, <http://www.nytimes.com/gwire/2011/05/17/17greenwire-judge-at-heart-of-landmark-oil-pollution-case-89753.html?pagewanted=all>.

<sup>344</sup> Simon Romero & Clifford Krauss, *Ecuador Judge Orders Chevron to Pay \$9 Billion*, N.Y. TIMES, Feb. 14, 2011, <http://www.nytimes.com/2011/02/15/world/americas/15ecuador.html>; Luis Angel Saavedra, *Chevron Trying to Avoid Historic Ecuador Verdict*, NOTIEN, Mar. 24, 2011, <http://hdl.handle.net/1928/12370>.

<sup>345</sup> *Chevron Wins Halt to \$18 Billion Judgment in Ecuador Pollution Case*, ENV'T NEWS SERVICE, Mar. 7, 2011, <http://www.ens-newswire.com/ens/mar2011/2011-03-07-02.html>.

to have grasped, or at least to have dismissively disregarded, the motivators, attitudes, and perspectives of the Ecuadorian stakeholders, has been eloquently elucidated elsewhere.<sup>346</sup> For present purposes, it suffices to observe that Chevron instead mounted a multi-forum, multi-front campaign against the integrity of the Ecuadorian courts, the Ecuadorians' counsel,<sup>347</sup> and the Ecuadorian proceeding.<sup>348</sup> As the plaintiffs' lawyers considered strategically where to seek enforcement of the judgment,<sup>349</sup> Chevron unleashed a

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<sup>346</sup> Theodore MacDonald, *Amazonian Indigenous Views on the State: A Place for Corporate Social Responsibility?*, 33 SUFFOLK TRANSNAT'L L. REV. 439 (2010). Other perspectives on the Ecuador litigation emerge from viewing it through the three-principle framework established by John Ruggie, Special Representative to the U.N. Secretary General, who introduced them in a report to the U.N. Human Rights Council. See Chris Jochnik & Nina Rabaeus, *Business and Human Rights Revitalized: A New UN Framework Meets Texaco in the Amazon*, 33 SUFFOLK TRANSNAT'L L. REV. 413, 420–21 (2010).

<sup>347</sup> Jonathan Stempel, *Chevron Grills U.S. Lawyer In \$19 Bln Ecuador Pollution Case*, THOMSON REUTERS NEWS & INSIGHT, Apr. 16, 2013, [http://newsandinsight.thomsonreuters.com/New\\_York/News/2013/04\\_-\\_April/Chevron\\_grills\\_U\\_S\\_lawyer\\_in\\_\\$19\\_bln\\_Ecuador\\_pollution\\_case/](http://newsandinsight.thomsonreuters.com/New_York/News/2013/04_-_April/Chevron_grills_U_S_lawyer_in_$19_bln_Ecuador_pollution_case/) (discussing *Chevron Corp. v. Donziger*, 11 Civ. 0691 LAK, (S.D.N.Y. 2011)). Published opinions in the ongoing case include *Chevron Corp. v. Donziger*, 840 F. Supp. 2d 773 (S.D.N.Y. 2012); *In re Chevron Corp.*, 709 F. Supp. 2d 283 (S.D.N.Y. 2010), *aff'd sub nom.*, *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011); *In re Chevron Corp.*, 736 F. Supp. 2d 773 (S.D.N.Y. 2010); *In re Chevron Corp.*, 749 F. Supp. 2d 135 (S.D.N.Y. 2010); *In re Chevron Corp.*, 749 F. Supp. 2d 141 (S.D.N.Y. 2010), *aff'd sub nom.*, *Lago Agrio v. Chevron Corp.*, 409 F. App'x 393 (2d Cir. 2010); *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011) (“Donziger I”) (granting preliminary injunction); *Chevron Corp. v. Donziger*, 800 F. Supp. 2d 484 (S.D.N.Y. 2011) (“Donziger II”) (granting separate trial and expedited discovery on claim for declaratory judgment).

<sup>348</sup> See, e.g., Howard M. Erichson, *The Chevron-Ecuador Dispute, Forum Non Conveniens, and the Problem of Ex Ante Inadequacy*, 1 FORDHAM J. COMPLEX LITG. (forthcoming), available at <http://ssrn.com/abstract=2245889>.

<sup>349</sup> To date, lawyers for the plaintiffs have filed judgment enforcement proceedings against Chevron in three different countries: Canada, Brazil, and Argentina. Kimerling, *supra* note 328, at 96–97 & nn.153–55. On May 1,



heavy barrage of litigation on two fronts: “a lawsuit against the plaintiffs and their lawyers in federal court in New York, and an arbitration proceeding against Ecuador in The Hague,” and each of the cases is “based on allegations of fraud and other misconduct by the Lago Agrio plaintiffs’ legal team, allegations of improper collusion between representatives of the plaintiffs and Ecuadorian government officials, and allegations of systemic failures in the administration of justice in Ecuador.”<sup>350</sup> The arbitration proceeded under a U.S.–Ecuador Bilateral Investment Treaty (BIT),<sup>351</sup> and it has yielded an interim award “directing Ecuador to ‘take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within or without Ecuador of any judgment’ against Chevron in the Lago Agrio lawsuit, pending further order by the panel,”<sup>352</sup> to which the Lago Agrio court has declined to follow, because “under Ecuadorian law, based on international commitments and constitutional law—the obligations of the state pursuant to

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2013, the Ontario Superior Court of Justice denied enforcement against assets of Chevron’s Canadian subsidiaries on the grounds of their separate corporate identities. Linda Nguyen, *Ontario Judge Dismisses \$19B Ecuador Environmental Judgment Against Chevron*, THE CANADIAN PRESS, May 1, 2013, <http://ca.news.yahoo.com/ontario-judge-dismisses-19b-ecuador-environmental-judgment-against-235357906.html>. By contrast, an Argentine judge froze Chevron’s local assets pending the outcome of judgment enforcement proceedings, Emily Schmall, *Argentina: Chevron’s Assets Are Frozen*, N.Y. TIMES, Nov. 8, 2012, at A9, a ruling affirmed by an Argentine appeals court, Guido Nejamkis, *Argentine Court Upholds Freeze On Chevron Assets*, REUTERS, Jan. 30, 2013, <http://www.reuters.com/article/2013/01/30/us-chevron-argentina-idUSBRE90T1AI20130130>, which has prompted Chevron to threaten pulling out of a major joint-venture with Argentina’s recently renationalized state oil monopoly, Yacimientos Petroliferos Fiscales (YPF). See *Argentina: YPF Boss Hits Out At Chevron Embargo Order*, LA NACION (ARG.), Mar. 28, 2013, 2013 WLNR 8124719. Meanwhile, Chevron has sought leave to join in its New York lawsuit the Washington, D.C. firm that is leading efforts to enforce the judgment. See Mark Singleton, *Chevron Responds To Legal Attacks By Washington Law Firm Patton Boggs With Allegations Of Malicious Prosecution, Fraud And Deceit*, INT’L BUS. TIMES NEWS, May 14, 2013, 2013 WLNR 11822182.

<sup>350</sup> Kimerling, *supra* note 328, at 77–78 (footnote omitted).

<sup>351</sup> Bilateral Investment Treaty with the Republic of Ecuador, U.S.–Ecuador, Aug. 27, 1993, S. Treaty Doc. No. 103-15. For a discussion of the role and impact of BITs and Free Trade Agreements on FDI decisions, see Van Detta, *supra* note 15, at 36–43.

<sup>352</sup> Kimerling, *supra* note 324, at 82-84 & nn.113–21.

human rights norms take precedence over international commercial obligations and the authority of an arbitral panel,” and “the most recent arbitral order directing the court to take all ‘necessary measures’ to prevent enforcement of the Lago Agrio judgment conflicted with the court’s obligation, as part of the State, to guarantee effective judicial remedies.”<sup>353</sup>

Then there is Chevron’s New York litigation against plaintiffs’ counsel. Before describing that litigation, a moment’s pause is worthwhile to reflect that one must consider the effect on all economic aspects of a company’s sustenance and growth when there is pending litigation and considerable uncertainty about the size of potentially massive exposure—a problem that Chevron has faced for many years since it acquired Gulf and Texaco.<sup>354</sup> The litigation has been filled with the same kinds of tactics and urgency to disengage the MNE from the American courtroom—and the resulting, unexpected, and potentially catastrophic challenges of litigation in Ecuador.<sup>355</sup>

Chevron seeks to diffuse investor concern through an aggressive RICO-based lawsuit in the Southern District of New York,<sup>356</sup> and to “turn” American courts “against” the Ecuadorian plaintiffs.<sup>357</sup> The strategy has succeeded in stalling efforts to enforce the judgment outside of Ecuador—which the plaintiffs must, since Chevron no

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<sup>353</sup> *Id.* at 85.

<sup>354</sup> Jason Burke, *Defining Investor Confidence: Avoiding Interpretive Uncertainty in Chevron Corp. v Ecuador*, 34 B.C. INT’L & COMP. L. REV. 463 (2011).

<sup>355</sup> Donald K. Anton, *Public International Law and International Civil Litigation: From Ecuador to the United States and Back (Twice)—Chevron v. Donziger* (Nov. 15, 2011) (forthcoming), available at SSRN: <http://ssrn.com/abstract=1960251>.

<sup>356</sup> Lawrence Hurley, *Chevron’s RICO Lawsuit in Pollution Case Part of Wider Legal Strategy*, N.Y. TIMES, Feb. 2, 2011, <http://www.nytimes.com/gwire/2011/02/02/greenwire-chevrons-rico-lawsuit-in-pollution-case-part-o-68778.html>.

<sup>357</sup> *Id.* (“The lawsuit fits squarely within Chevron’s strategy of seeking to turn U.S. courts against the plaintiffs.”).

longer has assets in the country<sup>358</sup>—but it may be doing as much harm with the investing public as good, as amply evidenced by respected media coverage of Chevron’s RICO litigation:

An environmental case that has pitted Chevron against Ecuadorean Amazon villagers for two decades has taken another bizarre twist, with an American consulting firm now recanting research favorable to the villagers’ claims of pollution in remote tracts of jungle.

. . . .

. . . [T]he plaintiffs claim that Chevron pressured Stratus to retract its assessment in exchange for dismissal of legal claims in a countersuit filed by Chevron made against the firm—claims that could have pushed the consulting business into bankruptcy.

“Stratus deeply regrets its involvement in the Ecuador litigation,” the firm said. It remains unclear whether this development with Stratus will have much impact on Chevron’s appeals, because the judge also based his ruling on other environmental assessments. The judge ruled that back in the 1970s, Texaco had left an environmental mess in oil drilling operations while operating as a partner with the Ecuadorean state oil company, and that Chevron, which bought Texaco in 2001, must apologize for and was liable for the damage.

. . . .

Chevron has been playing hardball for at least four years. The company produced video recordings from pens and watches wired with bugging devices that suggested a bribery scheme surrounding the proceedings and involving a judge

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<sup>358</sup> Professor Kimerling gives a very thorough and well-documented account of Chevron’s New York litigation. See Kimerling, *supra* note 328, at 85–98.

hearing the case. An American behind the secret recordings was a convicted drug trafficker.

But the oil company appeared to gain the upper hand three years ago when it won a legal bid to secure the outtakes from a documentary about the case, “Crude,” in which Mr. Donziger was shown describing the need to pressure a Ecuadorean judge and boasting of meetings with Ecuadorean officials.

In a sworn statement filed in an American court, Alberto Guerra, an Ecuadorean judge who heard the Chevron case in 2003 and 2004, accused Nicolas Zambrano, the judge who issued the \$18 billion verdict against Chevron, of taking a \$500,000 bribe from the plaintiffs. Mr. Zambrano denied the charge, and in his own affidavit, said that Mr. Guerra had told him that Chevron would offer him \$1 million in return for a favorable judgment.

Chevron has denied offering any bribes.<sup>359</sup>

Even *Businessweek*—a publication generally sympathetic to Chevron’s allegations of impropriety in Ecuador’s courts—has observed:

So the case, which began two decades ago, continues. Unable to enforce their \$19 billion judgment in Ecuador, where Chevron has no assets to speak of, the plaintiffs are trying to get courts in Argentina, Brazil, and Canada to allow the seizure of company assets in those countries. Chevron is fighting those ancillary suits tooth and nail.

Meanwhile in New York, the company has sued Donziger and his Ecuadorian clients under the

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<sup>359</sup> Clifford Krauss, *Consultant Recants in Chevron Pollution Case in Ecuador*, N.Y. TIMES, Apr. 13, 2013, <http://www.nytimes.com/2013/04/13/business/research-recanted-in-oil-pollution-case-in-ecuador.html>.

U.S. civil racketeering law. A trial is scheduled for October. More strangeness doubtless will ensue. At some point, it would be nice if, apart from the haze of judicial mayhem in Ecuador, the rogue oil on the ground got cleaned up.<sup>360</sup>

Meanwhile, Chevron's own tactics may eventually boomerang—as with the Ecuadorian Judge who has accused Judge Zambrano of bribery and complicity in taking his findings from ex parte writings of the Ecuadorian plaintiffs' counsel:

Kent Robertson, a spokesman for Chevron, acknowledged in an interview that the company has paid Guerra and has promised to pay him more. Chevron paid the former Ecuadorian judge \$38,000 “for information,” some of which was stored on cell phones and computer drives, Robertson said. The company has helped Guerra and four members of his family move from Ecuador to the U.S., and has promised to provide the former jurist and his relatives with \$12,000 a month for housing and other living expenses for the next two years, Robertson added. Chevron has also told Guerra that it will pay for health insurance for the family and for legal representation, should Guerra need it. “Guerra asked to come to the United States out of concern for his safety and the safety of his family,” Robertson said. “We agreed to help.”<sup>361</sup>

What should our takeaway be from Chevron's experience to date? “For now,” Professor Judith Kimerling recently observed,

this new chapter in the litigation appears to be shifting much of the focus of the legal and political contest from allegations about Texaco's misconduct to allegations of misconduct by the lawyers and activists who manage the Lago Agrio

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<sup>360</sup> Paul M. Barrett, *Judicial Mayhem In Chevron's Pollution Case*, BUSINESSWEEK, Apr. 5, 2013, <http://www.businessweek.com/articles/2013-04-05/judicial-mayhem-in-chevrons-pollution-case>.

<sup>361</sup> Paul Barrett, *Payoffs To Ex-Judge Are Latest Twist In Chevron Case*, BUSINESSWEEK, Jan. 28, 2013, <http://www.businessweek.com/articles/2013-01-28/payoffs-to-ex-judge-are-latest-twist-in-chevron-case>.

case, and from concern about the rights of the affected communities to the rights of Chevron.<sup>362</sup>

Meanwhile, as the author of the *Businessweek* article observed, “[t]wo things are clear amid the swirl of novelistic characters, character assassination, and betrayal”—“[f]irst, the legal skirmishing shows no sign of relenting anytime soon”; and “[s]econd, while the lawyers do battle around the world, many thousands of farmers and indigenous Indians in the Ecuadorian rainforest continue to live in close proximity to oil contamination.”<sup>363</sup>

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<sup>362</sup> Kimerling, *supra* note 328, at 97. Lessons abound for putative plaintiffs’ counsel in high-profile, FDI-based cases, too, including: Don’t have a film crew follow you around for some 600 hours of raw footage to make a documentary about your clients’ case, and thereby waive the attorney-client privilege to your entire “litigation files and hard drives” after the MNE successfully subpoenas the outtakes of the film from the filmmaker, revealing quite a few things which you’d wish you’d never said or done. See Kimerling, *supra* note 328, at 87–89.

<sup>363</sup> *Id.* However, the plaintiffs and Mr. Donziger may well be overwhelmed in the corporate equivalent of the “surge strategy” employed by the United States in the Afghanistan Conflict. Attorney Donziger’s own attorneys are seeking to withdraw from defending him in Chevron’s RICO litigation set for trial next fall, due to, among other things, estimated attorneys’ fees of \$5 million for Mr. Donziger alone, extensive and expensive pre-trial discovery taken by Chevron whose costs the federal district court judge apparently has ordered to be shared equally between Chevron and Mr. Donziger (along with two of his Ecuadorian clients), and the firepower of Chevron’s own legal team, which is alleged to be composed of 2000 legal professionals at 60 law firms, including 114 Gibson, Dunn & Crutcher attorneys alone. See Donziger & Associates, *Bias of Federal Judge and Chevron’s Abusive Tactics Prompt Law Firm to Withdraw from Ecuador Case*, CSRWIRE, May 3, 2013, [http://www.csrwire.com/press\\_releases/35574-Bias-of-Federal-Judge-and-Chevron-s-Abusive-Tactics-Prompt-Law-Firm-to-Withdraw-from-Ecuador-Case](http://www.csrwire.com/press_releases/35574-Bias-of-Federal-Judge-and-Chevron-s-Abusive-Tactics-Prompt-Law-Firm-to-Withdraw-from-Ecuador-Case). Many of the assertions of the self-serving news release are repeated in the Memorandum in Support of the Motion to Withdraw as Counsel, filed May 3, 2013, in *Chevron Corporation v. Donziger*, Case No. 11–CV–0691 (LAK) (U.S. Dist. Ct. S.D.N.Y.) (Document No. 1100). The author has never seen a law firm file a pleading quite like that Memorandum. If even half of its allegations are proven true,

## CONCLUSION

For the E.U.-based MNE, the opportunities presented by FDIs in the energy sector remain powerfully attractive, and no amount of risk as perceived *ex ante* is likely to be judged as of greater weight than the promising allure of future market advantage, yet-to-be realized profits that seem within the corporate grasp, and the opportunity to boldly go where no other MNE has gone before—or to go where many MNEs have tried and failed, but with the assurance that this time, things will be different. The complex and contradictory history of E.U.-based MNEs trying repeatedly to find sustainable partnerships with the Russian Federation to explore and exploit Siberian natural gas and oil reserves, for example, encapsulates all of these experiences.<sup>364</sup>

Similarly, the experiences of Chevron in Ecuador's courts and Royal Dutch Petroleum in America's courts—where the fallout of high-risk FDIs in the energy sector has been the subject of decades of ongoing litigation—demonstrate the vicissitudes that come of the use

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the Second Circuit will have a very interesting time sorting through the proceedings if there is an appeal.

<sup>364</sup> Compare, e.g., *BP To Buy Back \$8bn In Shares After Russian Sale*, BBC NEWS, Mar. 22, 2013, <http://www.bbc.co.uk/news/business-21893040?print=true>, Angel Gonzalez, *BP Executive Expects Rosneft Stake to Yield Partnerships in Russia*, WALL ST. J., May 6, 2013, <http://online.wsj.com/article/BT-CO-20130506-707889.html>, and *Russian Energy Twilight For BP In Russia*, THE ECONOMIST, June 9, 2012, <http://www.economist.com/node/21556629>, with *Sakhalin Island: Journey to Extreme Oil*, BLOOMBERGBUSINESSWEEK MAGAZINE, May 14, 2006, <http://www.businessweek.com/stories/2006-05-14/sakhalin-island-journey-to-extreme-oil>, John Stepek, *Royal Dutch Shell's trouble with Russia*, MONEYWEEK, Oct. 8, 2007, <http://www.moneyweek.com/investments/stock-markets/royal-dutch-shells-trouble-with-russia>, Andrew E. Kramer, *Maps and Mythmakers*, N.Y. TIMES, Dec. 1, 2005, <http://www.nytimes.com/2005/12/01/business/01maps.html>, Neela Banerjee, *From Russia, With Bankruptcy: A High Cost for BP Amoco's Investment in an Oil Concern*, N.Y. TIMES, Aug. 13, 1999, <http://www.nytimes.com/1999/08/13/business/russia-with-bankruptcy-high-cost-for-bp-amoco-s-investment-oil-concern.html>, and Richard W. Stevenson, *Oil Companies Tread Warily Into Russia's Decrepit Fields*, N.Y. TIMES, Nov. 26, 1993, <http://www.nytimes.com/1993/11/26/business/oil-companies-tread-warily-into-russia-s-decrepit-fields.html>.

of civil litigation as the weapon of choice by those who have no other access to what they perceive as a leveled playing field with an MNE. Chevron hoped to end environmental tort litigation it inherited from Texaco by getting out of the U.S. federal courts on what the corporation thought to be an empty promise to show up for litigation in the courts of Ecuador. Chevron won that battle, only to lose the war to a \$19 billion judgment from a local court that was derided by the company; and the American courts, when the Ecuadorian proceedings started a decade ago in Lago Agrio—which was a decade after the plaintiffs first brought their case to the federal court in New York<sup>365</sup>:

That one of the biggest oil pollution trials in recent years is taking place here, in a honky-tonk border town known for its poverty and violence, was never really expected. The judicial system here is poor and archaic, based on 17th-century French law. This week, lawyers for the plaintiffs

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<sup>365</sup> Getting to the Ecuadorian court system was a crusade for Chevron-Texaco:

In November 1993, a lawsuit on behalf of residents of the rain forest area known as Oriente was initiated in a federal court in New York, close to Texaco's international headquarters in Westchester County. The suit charges that Texaco dumped millions of gallons of toxic waste into hundreds of unlined open pits and from there into estuaries and rivers, thus exposing residents to disease-causing pollutants. The plaintiffs seek a thorough cleanup of the area, an assessment of the long-term health effects of the contamination and damage compensation that may exceed \$1 billion.

Despite being sued on its own home turf, ChevronTexaco fought fiercely to have the case dismissed. After more than 10 years of litigation on this jurisdictional issue alone, a federal appeals court finally ruled that "reasons of convenience" pointed to the jurisdiction of a rural Ecuadorean court.

César Chelala & Alejandro M. Garro, *Ecuador: Taking An Oil Giant To Task Over Rain Forest Pollution*, N.Y. TIMES, Jan. 13, 2004, [http://www.nytimes.com/2004/01/13/opinion/13iht-edcesar\\_ed3\\_.html](http://www.nytimes.com/2004/01/13/opinion/13iht-edcesar_ed3_.html).



simply presented the judge with a list of witnesses who should be called.<sup>366</sup>

Similarly, as an editorialist wrote in 1999:

Ecuador's courts cannot handle the case or enforce a judgment. Ecuador does not admit class-action suits, has no experience with cases like this one and relegates all environmental disputes to an administrative tribunal, where the largest fine has been a few thousand dollars. This case belongs in an American court, where the contesting claims can be fairly weighed.<sup>367</sup>

Yet, Ecuador rose to the challenge—the provincial court marshaled 100,000 pages of evidence and wrote a decision imposing a devastating liability on Chevron—which had given up the layers of procedural safeguards developed over decades of international civil litigation in U.S. courts on the chance that neither the plaintiffs nor the Ecuadorian courts could actually try the case.<sup>368</sup>

Chevron's choice has proven unwise—particularly in light of how well Royal Dutch Shell has done in its U.S. federal court litigation—and Chevron, along with its shareholders worldwide, will pay the price, whether the milder (but not insubstantial) millions of dollars for attorneys' fees, or the more painful execution of a multi-billion dollar judgment.

In an altogether polar opposite experience, Royal Dutch Petroleum has been fighting cases arising out of its ill-starred

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<sup>366</sup> Juan Forero, *Texaco Goes on Trial in Ecuador Pollution Case*, N.Y. TIMES, Oct. 23, 2003, <http://www.nytimes.com/2003/10/23/business/texaco-goes-on-trial-in-ecuador-pollution-case.html>.

<sup>367</sup> *Texaco and Ecuador*, N.Y. TIMES, Feb. 19, 1999, <http://www.nytimes.com/1999/02/19/opinion/texaco-and-ecuador.html>.

<sup>368</sup> One wonders whether lawyers and corporate executives involved in formulating and implementing the forum non conveniens strategy have the introspection to reflect on District Judge Jed Rakoff's observation, in granting their motion after years of asserting the argument to get out of U.S. courts, that "the notion that a New York federal jury is better equipped than an Ecuadorian judge to apply Ecuadorian law to Spanish-language testimony and documents relating to 30 years' of activities by an Ecuador-sponsored Consortium in an Amazonian rain forest is preposterous." *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 552 (S.D.N.Y. 2001).

Nigerian FDI for nearly two decades in the federal courts of the United States, having settled one on the courthouse steps for nearly \$16 million—the equivalent of a mere interest service payment on the \$16 billion judgment from which Chevron is currently struggling to extricate itself—and having won another, outright, in the U.S. Supreme Court’s *Kiobel* decision. Now, the face of FDI litigation in U.S. courts will be remade, as one of the most risk-creating litigation strategies in the American arsenal—the ATS lawsuit—can no longer fuel the corporate doomsday scenarios pitched a decade ago in hues worthy of a Maurice Sendak set design for a Tim Burton horror film.<sup>369</sup> With a stroke of the judicial pen, Chief Justice John Roberts and a unanimous Supreme Court in *Kiobel* opened the metaphorical blinds to admit the morning sun so that the MNEs, and their insurers, feverishly haunted by such visions, could awake and see that the nightmare was—largely—but a childish dream.

In between these wide-ranging and ambitious FDI projects that resulted in similarly wide-ranging and ambitious litigation, a E.U.-based MNE undertaking a modest infrastructure FDI by building a modern wind farm to generate electricity on Israel’s Golan Heights faces proportionally similar risks—heightened by the risks of regional conflicts boiling over into war, exposure to terrorism, the possibility of litigation in third states, and the animadversion of substantial segments of the international community arrayed against Israel’s territorial claims in the occupied territories.

In this article, we have walked in the shoes of a variety of constituents to such an FDI—individuals with varying interests; nations with competing interests; lawyers and judges in common law and civil law court systems; diplomats, negotiators and implementers of international trade treaties; and insurers of political and other FDI risks. By tracing through these steps—bounded by the real FDI and litigation experiences of Royal Dutch Petroleum and Chevron, and the hypothesized FDI experience of Alstom in Israel—we have woven a tapestry of perspective, insight, experience, and informed speculation that will serve us as participants, no matter what the capacity, in future FDI scenarios of the global economy. The end of

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<sup>369</sup> HUFBAUER & MITROKOSTAS, *supra* note 16.

this journey invites us to begin another, as the permutations of triumphs and tribulations of FDI in the modern network of legal protections and liabilities can never be exhausted, but can be navigated within the parameters that studies such as this one help to establish. Indeed, on May 14, 2013, wind-energy made headlines in media reports that “[m]ore than 573,000 birds are killed by the country’s wind farms each year, including 83,000 hunting birds such as hawks, falcons and eagles,” while at the same time, “wind power, a pollution-free energy intended to ease global warming, is a cornerstone of President Barack Obama’s energy plan,” with “a \$1 billion-a-year tax break to the industry that has nearly doubled the amount of wind power in his first term”; but at the political cost of creating the perceptions that “like the oil industry under President George W. Bush, lobbyists and executives have used their favored status to help steer U.S. energy policy,” and that the supposedly “green industry [has been] allowed to do not-so-green things,” such as “kill[ing] protected species with impunity and conceal[ing] the environmental consequences of sprawling wind farms.”<sup>370</sup>

One might be forgiven if this latest example of unintended consequences conjures to mind a paraphrase of the signature observation of Roseanne Roseannadanna, the late Gilda Radner’s fictional characterization of an urban sage, that “[i]f it’s not one thing, it’s always another!”<sup>371</sup>

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<sup>370</sup> Dina Cappiello, *AP Impact: Wind Farms Get Pass On Eagle Deaths*, U.S. NEWS & WORLD REPORT, May 14, 2013, <http://www.usnews.com/science/news/articles/2013/05/14/ap-impact-wind-farms-get-pass-on-eagle-deaths>.

<sup>371</sup> Michael J. Madison, *Reconstructing The Software License*, 35 LOY. U. CHI. L.J. 275, 340 n.230 (2003); George B. Reese, *Conflict of Laws—1992 Survey of New York Law*, 43 SYRACUSE L. REV. 213, 213 n.2 (1992).