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AMENDING THE ALIEN TORT CLAIMS ACT: PROTECTING HUMAN RIGHTS OR CLOSING OFF CORPORATE ACCOUNTABILITY?

*Kevin R. Carter**

Differences in the ability of classes to use the machinery of the law, if permitted to remain, lead inevitably to disparity between the rights of classes in the law itself. And when the law recognizes and enforces a distinction between classes, revolution ensues and democracy is at an end.

Reginald Heber Smith, *Justice and the Poor*, 1919

I. INTRODUCTION

In November 2005, four anonymous plaintiffs sued the automobile tire maker Firestone and its parent companies, Bridgestone Corporation and Bridgestone Americas Holdings, Inc., in a California court. None of the plaintiffs drove on defective tires or probably ever drove a car at all. Their lawsuit alleged offenses more sinister and deliberate than negligent manufacture—the transgression that led to a mandatory product recall and cloud of legal controversy for Firestone earlier this decade.

Instead the plaintiffs were all workers on an eighty-year old Firestone rubber plantation in Liberia. They each sought damages for forced labor, child labor, cruel and degrading treatment, negligent supervision, and unjust enrichment. As their complaint vividly explained, they were “trapped by poverty and coercion on a frozen-in-time Plantation operated . . . in a manner identical to [that] when it was first opened [in 1926]. . . . [T]he Firestone Plantation remains a gulag of misery . . . [where] most of the workers have never been off the plantation and do not even know that . . . slavery has been abolished.”¹

Lawyers from the International Labor Rights Fund, an organization promoting fair wages and working conditions in workplaces around the world, represent the plaintiffs in the ongoing lawsuit. They allege that Firestone’s workers spend twelve to fourteen hour shifts tapping latex from rubber trees for around three U.S. dollars a day.² “Tappers,” with the company’s approval, enlist their school-age children to help meet the planta-

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¹ Complaint at 1–2, *Roe v. Bridgestone Corp., et al.*, (C.D.CA, 2005)(No. 05-8168) [hereinafter *Firestone Complaint*].

² *Id.* at 21.

tion's unreasonably high quotas.³ Adults and children alike are exposed repeatedly to deadly pesticides and raw latex, which can cause blindness.⁴ Schools and a hospital Firestone once built for workers' families are badly decayed.⁵ For shelter, more than a dozen people crowd into small mud huts without electricity or running water while American and Japanese supervisors look on from luxurious homes on bluffs above the rubber forest.⁶

Since the plantation's workforce comes exclusively from Africa, the plaintiffs are connected to the United States only through their largely absent employer.⁷ How can the arm of American law reach a one million-acre rubber plantation half a world away from its owners? American labor laws generally do not apply outside the boundaries of the fifty states.⁸ In spite of this—or perhaps because of it—American companies have built hundreds of foreign manufacturing facilities employing tens of thousands of workers over the last twenty years—many of them in developing nations.

The plaintiffs therefore cannot rely on traditional domestic remedies provided by laws like the Civil Rights and Fair Labor Standards Acts. Nor do Liberian courts offer any prospects for relief.⁹ But because some of Firestone's alleged offenses may rise to the level of human rights violations, the plaintiffs have recourse through a long-forgotten federal law called the Alien Tort Claims Act (ATCA).¹⁰ Around 1980, foreign plaintiffs started using the ATCA to recover civil damages for human rights violations in U.S. courts when “non-functioning judiciaries” made winning local lawsuits impossible.

³ Mensiegar Karna, Jr., *Rights Groups Intensify Campaign Against Firestone*, THE ANALYST, Jan. 3, 2006, available at http://www.analystnewspaper.com/rights_groups_intensify_campaign_against_firestone.htm.

⁴ See *id.*

⁵ See *id.*

⁶ Haider Rizvi, *Firestone Sued Over “Slave” Plantation*, ONEWORLD, Dec. 8, 2005, available at http://www.corpwatch.org/print_article.php?id=12860.

⁷ Firestone was founded in 1900 by American Harvey Firestone. A Brief History of Bridgestone Americas, <http://www.bridgestone-firestone.com/news/mediacenter/BFSHistory.pdf> (last visited Feb. 28, 2007). Bridgestone (owned by a Japanese conglomerate) acquired Firestone in 1988. *Id.* “Bridgestone” is the English translation of its Japanese founder's surname. *Id.* He apparently thought that an English-sounding company name would stimulate more product sales in the United States.

⁸ Neither the National Labor Relations Act nor the Fair Labor Standards Act, for example, apply extraterritorially. See 29 U.S.C. §§ 151, 201(2000).

⁹ See Firestone Complaint, *supra* note 1, at 4 (noting that “the Plaintiffs bring their ATS actions in the United States because the judicial system in Liberia is, according to the U.S. State Department, largely dysfunctional[, corrupt,] and still suffering from the effects of the devastation brought by Liberia's recently suspended civil war”).

¹⁰ The ATCA is often also referred to as the “Alien Tort Statute.” For consistency's sake, this Note uses two shorthand references throughout: ATCA, the abbreviation for “Alien Tort Claims Act,” and simply “the Act.”

Over the last ten years, lawsuits against American multinational corporations accused of instigating, aiding, or abetting human rights violations have invoked the ATCA with increased frequency. In response to this wave of litigation, the U.S. business community, along with Bush administration officials and members of Congress, proposed to amend the ATCA to limit or foreclose lawsuits against American companies and protect U.S. foreign policy interests and foreign direct investment. So far no victim of corporate abuse has won an ATCA claim, but plaintiffs are inching closer to success. At least ten major cases are pending against American companies and could go to trial in 2007. Battle lines between business-friendly bureaucrats and human rights activists have been clearly drawn and advocates on both sides are engaged in a bitter debate implicating a vast range of social and economic policies.

This Note explores the controversy around recent efforts to amend the ATCA. After analyzing key arguments on both sides of the dispute, the Note concludes that the ATCA should remain unchanged. In its current form, the Act creates a private cause of action for foreign plaintiffs injured by American corporations operating internationally. Thus the ATCA is a crucial tool for regulating corporate behavior and helping uphold the United States' purported commitment to human rights around the world. Changes to the law would reduce its potential to supply relief in cases when American businesses dishonor that commitment.

Human rights law and international labor law are robust fields of inquiry. Studies covering globalization's impact on human rights and worldwide labor standards have flourished since the 1970s. Around that time, technological advances allowed Western companies to move substantial amounts of capital (the means of production) overseas and reduce manufacturing costs by hiring foreign workers at wages lower than those mandated in more developed countries. This Note taps into a rich vein of research and commentary on this phenomenon and on the ATCA itself. The paper's contribution lies in its analysis of specific proposed changes to the ATCA—the first in two hundred years—that could eventually become law.

Section II briefly discusses the ATCA's revival after nearly two centuries of neglect. This section summarizes several important cases whose holdings set the stage for the Act's application to corporations. Section III reviews the main arguments for and against amending the ATCA. It evaluates several criticisms and defenses raised by human rights groups, members of Congress, the Bush administration, and business executives. Section IV examines a proposed law submitted to the Senate Judiciary Committee in October 2005 intended to "clarify" the ATCA. The bill was withdrawn under pressure from human rights groups, but the draft offers valuable insights into the motives of ATCA reformers. Finally, section V argues that the ATCA should remain unchanged because its power to protect human rights

outweighs its possible negative impact on American overseas investments and foreign policy efforts.

II. UNDERSTANDING THE ALIEN TORT CLAIMS ACT

A. *The Alien Tort Claims Act's History*

1. Creation and Purpose

The ATCA is an ancient law by American standards. It was part of the 1798 Judiciary Act, one of the first bills the Founders enacted after the Constitution's ratification. Its entire text—a single sentence—reads as follows:

The district courts shall have original jurisdiction for 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.¹¹

Essentially, the Act opens American courts to non-citizen plaintiffs who are victims of a tort committed in violation of an international law recognized by the United States. More specifically, the Act confers subject matter jurisdiction on the federal district courts in cases where aliens bring a tortious claim for conduct that violates the terms of a treaty to which the United States is a signatory, or any act contrary to the “law of nations.”

This latter provision (an act contrary to the “law of nations”) functions as a sort of residuary clause. Treaty interpretation is a relatively straightforward process. Committing an act specifically proscribed by treaty language constitutes an actionable tort under the ATCA. The “law of nations,” on the other hand, is not precisely defined, neither in the Act nor the field of international law generally. One scholar says the “law of nations” refers to “the body of rules and principles of action which are binding upon civilized states in their relations with one another.”¹² Original sources for the “law of nations” vary and are often inconsistent. This inconsistency has made it difficult to determine exactly what protections the ATCA affords and what offenses it covers.

Legal historians do not fully understand why the Founders drafted the ATCA. One theory holds that the law was meant to discourage citizens from provoking foreigners on U.S. soil (and thereby avoid triggering wars amidst the fragile peace that followed the end of the American Revolution).¹³ Another suggests that the Act codified a moral obligation of the new

¹¹ 28 U.S.C. § 1350 (2000).

¹² JAMES L. BRIERLY, *THE LAW OF NATIONS* 1 (6th ed. 1963).

¹³ See Brad J. Kieserman, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 *CATH. U.L. REV.* 881, 891 (1999).

nation to police international legal norms within its borders.¹⁴ Still another says it was designed to safeguard foreign merchants conducting commerce on the seas.¹⁵ The most plausible reason is that the Act protected foreign diplomats from tortious acts during their appointed terms of service in the United States.¹⁶ What is certain is that the ATCA reflects its drafters' belief that the law of international norms should be incorporated into American federal common law.¹⁷

Just as little is known about what parties the ATCA was designed to protect. Who qualifies as an “alien?” And who (or what) exactly is subject to suit under the ATCA? Must—or may—defendants be foreigners as well? Could the Founders, in the days before the rise of commercial corporations as they are known today, have envisioned American businesses being liable under the Act? Courts had few chances to consider these questions until near the end of the twentieth century because the ATCA was so seldom invoked. Moreover, before the mid-twentieth century, international law was understood to govern only diplomacy between nation-states. In other words, international laws applied to and could be violated only by governments, not people.

After World War II, increased economic productivity encouraged global commerce and more frequent interactions between Americans and citizens of different countries. It therefore made sense for courts to apply international law to the relationships between people, and not just nations. Courts began holding that “persons” should be seen as “subject to and benefiting from” international law.¹⁸

It is important to note that the conventional legal definition of “persons” includes both human individuals and entities, including corporations, that share the same rights as individuals. Legally speaking, corporations are “entit[ies] having authority under law to act as a single person . . . [or] a group or succession of persons established in accordance with legal rules into a legal or juristic person.”¹⁹ Thus corporations have theoretically been susceptible to suit under the ATCA for as long as courts have held that the ATCA should apply to non-state actors.

But probably the most contentious issue in interpreting the ATCA is whether the statute merely confers jurisdiction or does something more—that is, whether it actually *creates a cause of action* for a plaintiff to sue for

¹⁴ See *id.*

¹⁵ See GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING THE MONSTER: THE ALIEN TORT STATUTE OF 1789*, at 3, n.1 (2003).

¹⁶ See Kieserman, *supra* note 13, at 891.

¹⁷ *Id.* at 893, n.57 (citations omitted).

¹⁸ BARRY E. CARTER, PHILLIP R. TRIMBLE, & CURTIS A. BRADLEY, *INTERNATIONAL LAW*, at 15 (4th ed. 2003).

¹⁹ *BLACK'S LAW DICTIONARY* 341 (7th ed. 1999).

a tort committed in violation of a treaty or customary international law. Those arguing that the statute furnishes its own cause of action believe that the phrase “for any civil action” creates a private right to sue. Opponents of this view say that the statute only provides a jurisdictional grant. According to this perspective, before a plaintiff can actually sue under the ATCA, the U.S. Congress must pass “enabling” legislation listing one or more tortious claims (e.g., torture, slavery, or some other internationally recognized offense) for which the ATCA confers jurisdiction on the federal courts.

As discussed below, the Second Circuit Court of Appeals proposed its own solution to this problem in a 1979 opinion binding courts only within that circuit. In 2004, the U.S. Supreme Court affirmed the Second Circuit’s view in a landmark decision—*Sosa v. Alvarez-Machain*—that strengthened the ATCA’s influence in human rights cases.²⁰ *Sosa* was the impetus prompting ATCA reform proposals from indignant corporate executives and the Bush administration. The debate rages on today.

2. *Filartiga* and the ATCA’s Rediscovery

The ATCA was practically forgotten for its first two centuries. No more than two recorded cases directly addressed it before 1979.²¹ The following year, the Second Circuit tackled the jurisdiction versus cause-of-action question in *Filartiga v. Pena-Irala*.²²

Plaintiff Joel Filartiga was a Paraguayan doctor and political opponent of Alfredo Stroessner, who became Paraguay’s president in 1954. In 1976, Americo Norberto Pena-Irala, a Stroessner crony, kidnapped and tortured to death the doctor’s seventeen-year old son Joelito. Pena had the boy’s mutilated body delivered to the home of the victim’s sister, Dr. Filartiga’s daughter, Dolly, and informed her that Joelito had been killed in reprisal for her father’s political activities. Filartiga filed a criminal charge in the Paraguayan courts, but shortly afterward his lawyer was abducted, shackled to a wall in the local police headquarters, and threatened with death. Not surprisingly, the Paraguayan case went nowhere.²³

Some years later, while both were living in New York City, Dolly Filartiga sued Pena in federal district court over her brother’s torture, a violation of international law covered by the ATCA. The district court granted Pena’s motion to dismiss because it believed the court lacked subject matter jurisdiction. Its reasoning was based on prior Second Circuit decisions hold-

²⁰ 542 U.S. 692 (2004).

²¹ Donald J. Kochan, *No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 105–06 (2005).

²² 630 F.2d 876 (2nd Cir. 1980).

²³ *Id.*

ing that “violations of the law of nations do not occur when the aggrieved parties are nationals of the acting state.”²⁴ (Pena was presumed to have acted on the Paraguayan government’s behalf.) But the Second Circuit Court of Appeals reversed the dismissal, holding that its earlier rule was “clearly out of tune with the current usage and practice of international law.”²⁵ The Court suggested that all the world’s nations should police torture whether inflicted on a government’s own citizens or otherwise.

Filartiga was significant mainly for two reasons. First, the case expanded the range of offenses to which the ATCA applied. The Second Circuit declined to hold, as previous cases had, that the only “law of nations” violations chargeable under the ATCA were those U.S. courts recognized in 1789.²⁶ Rather, new international norms should be regularly acknowledged according to civilization’s evolving moral standards. The Court created a test for determining when an offense believed to violate international law comes within the ATCA’s coverage: (1) “the wrong must be a violation that ‘commands the general assent of civilized nations’”; (2) “the prohibition against the wrong must be ‘clear and unambiguous’”; and (3) “the nations of the world must demonstrate expressly by international accords ‘that the wrong is of mutual, and not merely several, concern.’”²⁷

Second, and equally important, the Court held that the ATCA creates a cause of action rather than just conferring jurisdiction in cases involving international law violations.²⁸ Because the case did not bind other federal circuits, however, this issue was not altogether settled. Four years later, in *Tel-Oren v. Libyan Arab Republic*, Judge Robert Bork of the District of Columbia Circuit rejected the Second Circuit’s view and held that the ATCA did no more than confer jurisdiction on federal courts to hear claims *for which a cause of action was created* through separate Congressional legislation.²⁹ With competing circuits reaching different conclusions about the extent of the ATCA’s power, uncertainty over the jurisdiction versus cause-of-action question persisted for another twenty years.

ATCA cases following *Filartiga* dealt further with the question of who could be charged under the Act. In 1995, the Second Circuit considered the ATCA again in *Kadic v. Karadžić*.³⁰ Victims of brutal crimes committed by Bosnian-Serb military forces during the disintegration of Yugoslavia

²⁴ *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (quoting *Dreyfus v. Von Finck*, 534 F.2d 24, 31 (1976)).

²⁵ *Id.* (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980)).

²⁶ *See generally* 630 F.2d 876 (2d Cir. 1980).

²⁷ Kieserman, *supra* note 13, at 899 (footnotes omitted).

²⁸ Courtney Shaw, *Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act*, 54 STAN. L. REV. 1359, 1365 (2002).

²⁹ 726 F.2d 774 (1984).

³⁰ 70 F.3d 232 (2d Cir. 1995).

used the ATCA to sue the militia's commander in the United States. Initially, a district court dismissed for lack of subject matter jurisdiction, ruling that under *Filartiga*, the ATCA confers jurisdiction (and creates a cause of action) only in cases where an international tort is committed by a *state actor*. But Karadžić commanded a militia representing a government recognized by neither the United States nor the United Nations, so the district court did not consider him a "state actor."³¹

The Second Circuit once again reversed. It held that especially when violations of customary international law are egregious, the ATCA confers federal subject matter jurisdiction even on private actors—that is, individual persons. In other words, "state action is not necessary for a cognizable violation of the law of nations to exist."³² Given corporations' historic classification as "persons," the *Filartiga* holding exposed American multinational companies to ATCA liability for the first time.

B. *Recent Interpretations and Application of the ATCA*

1. Corporations Come Under Fire: The *Unocal* Case

If the ATCA creates its own cause of action, and if corporations are eligible defendants, then what level of culpability is required for liability to attach? ATCA jurisprudence evolved along these lines a few years after *Kadic*. In 1997, the California energy company Unocal became the first American corporation sued for human rights abuses under the ATCA.³³ In *Doe v. Unocal*, the plaintiffs were rural villagers in Burma, where Unocal was constructing a pipeline to transport oil welled in the Indian Ocean to land-based processing facilities.³⁴ The plaintiffs claimed that members of the Burmese military, hired to protect the pipeline project's American supervisors, brutally raped, tortured, and killed villagers building helipads and clearing forest for Unocal buildings.

The case survived the defendant's motion to dismiss for lack of subject matter jurisdiction,³⁵ but it failed to survive a motion for summary judgment. The Ninth Circuit Court of Appeals reversed the summary judgment ruling. It found sufficient evidence of cognizable human rights abuses

³¹ Nor could Karadžić be granted head of state immunity. The head of state immunity doctrine is based on common law principles. The district court explained that if the U.S. president had explicitly recognized the Bosnian-Serb faction and asked that Karadžić be given head of state immunity, its consideration of the case would amount to an improper advisory opinion, requiring dismissal on that ground. *See generally Doe v. Karadžić*, 866 F. Supp. 734 (1994).

³² Kochan, *supra* note 21, at 115.

³³ *See Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D.Cal.1997).

³⁴ *Id.* at 883–85.

³⁵ *Id.* at 884.

and concluded that Unocal could be responsible for those abuses if it provided “knowing practical assistance or encouragement that ha[d] a substantial effect on the perpetration of the crime[s].”³⁶ The Ninth Circuit likened this degree of involvement to “aiding and abetting.” The court remanded the case to the Central District of California.

Rather than defend itself at trial, Unocal settled the suit in late 2004 for an undisclosed amount of money. Human rights advocates were quick to read into the settlement an admission of guilt on Unocal’s part. ATCA critics charged that the plaintiffs’ claims were unfounded and that they comprised nothing more than a “strike suit” intended to force Unocal to settle rather than risk more damaging publicity and costly litigation. The Burmese plaintiffs might narrowly have missed a chance to win the first ATCA judgment against an American corporation. But the Ninth Circuit’s decision clearly underscored corporations’ vulnerability despite the case’s outcome.

2. The *Sosa v. Alvarez-Machain* Case: *Filartiga* Confirmed

In 2004 the ATCA debate came to a head in *Sosa v. Alvarez-Machain*.³⁷ In *Sosa*, Dr. Humberto Alvarez-Machain sued the U.S. government for kidnapping him (a violation of the “law of nations”) in 1985. Alvarez was suspected in the murder of an American Drug Enforcement Agency (DEA) agent in Mexico. When Mexico refused to extradite him, American officials recruited several Mexicans, including petitioner Jose Francisco Sosa, to abduct Alvarez and bring him to the United States, where he could be charged and brought to court. A California jury acquitted Alvarez of involvement in the agent’s murder, and the doctor then sued the U.S. government for his detention.

The case reached the Supreme Court on appeal, meaning its result would fix the rules governing the ATCA’s application throughout the federal court system. The Court affirmed *Filartiga*’s holding that claims under the ATCA do not first require separate Congressional action. The majority opinion, authored by Justice Souter, explained that:

the reasonable inference from the historical materials is that the [ATCA] statute was intended to have practical effect the moment it became law. . . . The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.³⁸

³⁶ Doe I v. Unocal Corp. 395 F.3d 932, 947 (2002).

³⁷ 542 U.S. 692 (2004).

³⁸ *Id.* at 724.

Sosa was a major front in the ATCA amendment battle. Dozens of *amicus* briefs were filed in support on each side. Corporation lobbyists argued that the law should not be applicable absent separate legislation by Congress. Meanwhile, the Bush administration's position was, as one vocal critic characterized it, that "the entire [ATCA] law should cease to function."³⁹ These and other opponents argued that the administration's approach was inconsistent with prior judicial interpretation as well as the language of the ATCA itself—which plainly states that "aliens" can bring a "civil action" for a "tort." In a March 2004 editorial, Professor Anthony Sebok noted the irony of the administration's skepticism about the ATCA's purpose given Republicans' traditional devotion to "textualist" approaches to statutory interpretation.⁴⁰

Dr. Alvarez-Machain lost his case in *Sosa*—the Court found that his abduction and brief detention did not constitute a violation of customary international law. But *Sosa* resolved the Circuit Courts' differences over the cause-of-action question and made clear that foreign plaintiffs could sue either public officials or private parties in U.S. courts for serious human rights abuses. The Supreme Court's decision put corporations doing business abroad on notice.

Before *Sosa*, the ATCA debate smoldered among a small crowd of corporate lawyers, human rights advocates, and political buffs. Aside from some modest publicity generated when Holocaust survivors sued Swiss banks that supported Germany's Nazi regime, few news items about the ATCA reached the public. But *Sosa* carried the discussion beyond the business and lobbying communities and raised the interest of non-profit groups and private citizens concerned about corporate accountability and human rights.

In *Sosa*, the Supreme Court cast aside conservatives' pleas to reject the Second Circuit's *Filartiga* holding. The Court instead affirmed *Filartiga*, verifying that the ATCA created its own cause of action—without the need for further legislation—for plaintiffs who could prove injury by a violation of international law. Supreme Court watchers quickly anticipated that business lobbyists would try to persuade Congress to revise the ATCA in light of the Court's holding. And in fact, in light of their conclusion that no actionable tort occurred in *Sosa*, the Justices invited Congress to specify which offenses should trigger ATCA jurisdiction.⁴¹ It took nearly a year, but

³⁹ EarthRights International, *In Our Court: ATCA, Sosa, and the Triumph of Human Rights*, 5 (July 2004), available at <http://www.earthrights.org/files/Reports/inourcourt.pdf> [hereinafter EarthRights International Report].

⁴⁰ Anthony J. Sebok, *FindLaw Forum: The Supreme Court Confronts the Alien Tort Claims Act: Should the Court Gut the Law, as the Administration Suggests?* (Mar. 22, 2004), <http://writ.news.findlaw.com/sebok/20040322.html> (last visited Feb. 13, 2007).

⁴¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

one member accepted the invitation. Before turning to that member's proposal, the next section examines the substance of the ATCA amendment debate.

III. PRESERVATION OR EVISCERATION?: ANALYZING THE ARGUMENTS FOR AND AGAINST ATCA AMENDMENTS

Though public debate has intensified, much discussion about the ATCA is still confined to exchanges between the three branches of government and between representatives of human rights organizations and members of Congress, business executives, and Bush administration officials. In particular, the International Labor Rights Fund (ILRF) and its Executive Director, Terry Collingsworth, have vigorously defended the ATCA while overseeing at least six pending ATCA lawsuits.⁴² The ILRF's opinions are reflected in a series of papers and press releases that discuss their ongoing representation of ATCA plaintiffs. This section relies on that material and on federal court filings and government documents to describe both parties' positions.

A. *Arguments Favoring ATCA Amendment*

1. Who Favors Amendment?

Generally, those favoring ATCA amendment represent large international companies and their supporters in state and federal government. This includes corporate legal counsel, corporate executives, and national lobbying associations representing small and large businesses. In addition, the Bush administration, which strongly backs the business community, believes ATCA litigation compromises corporations' ability to expand operations, generate profit, and bring new products to foreign markets. These groups believe that the threat of ATCA litigation needlessly prevents corporations from conducting operations in any country with a questionable human rights record.

The ATCA debate splits somewhat along ideological lines—with conservatives supporting change and liberals supporting the status quo—but the breakdown is not entirely clear-cut. For example, as Section IV explains, a Democratic Senator introduced a 2005 bill that proposed sweeping changes to the ATCA. And no doubt some human rights advocates agree

⁴² The International Labor Rights Fund (ILRF) was founded in 1986. According to the Fund's web site, the ILRF "promote[s] enforcement of labor rights internationally through public education and mobilization, research, litigation, legislation, and collaboration with labor, government and business groups." International Labor Rights Fund, *About the International Labor Rights Fund*, <http://www.laborrights.org/> (last visited Mar. 11, 2007).

with the Bush administration's position that the current ATCA undermines other, more direct efforts to strengthen human rights.

2. What Are the Arguments for Amendment?

Those who support amending the ATCA level two main criticisms against the recent trend in litigation. One is that ATCA lawsuits make it difficult for the executive branch to negotiate foreign policy. Non-citizen plaintiffs often implicate their own countries' governments when bringing human rights claims in American courts. Foreign officials resent the condemnatory signals these cases send as well as having their legal disputes appropriated by the U.S. judicial system. ATCA reformers argue that this "judicial imperialism" patronizes foreign governments, undermines their sovereignty, and thereby creates a dangerous obstacle to effective diplomacy. For U.S. courts to provide recourse to other countries' citizens suggests, rightly or wrongly, that those countries' court systems are not equipped to handle human rights cases.⁴³

A second criticism is that ATCA litigation threatens foreign trade and foreign direct investment. A potential "floodgates" problem exists because so many American corporations now do business abroad. If enough plaintiffs recover damages under the ATCA, other corporate suits will follow and the floodgates will burst, forcing corporations to withdraw from overseas operations out of fear that adverse judgments could drain their assets. Some observers see ATCA litigation "threaten[ing] to spin out of control" and believe that corporations' fear of ATCA lawsuits will cause them to forego lucrative investment opportunities in underdeveloped nations.⁴⁴

a. September 11, 2001 and the Foreign Policy Problem

Most of the ATCA cases filed in U.S. courts have involved grievous human rights abuses (e.g., slavery or torture). Government agents in the plaintiffs' home country, acting in complicity with corporate agents or at least without the corporation's disapproval, allegedly perpetrate many of the abuses. When federal courts hear ATCA cases involving accusations against foreign governments, those governments are impliedly served notice that their human rights safeguards fail to meet international standards. This, according to ATCA critics, undercuts diplomatic efforts between American officials and the country in question, a problem that has only worsened since the terrorist attacks of September 11, 2001.

⁴³ See HUFBAUER & MITROKOSTAS, *supra* note 15, at 47–48.

⁴⁴ *Id.* at 7.

The increase in ATCA litigation has coincided with the Bush administration's efforts to recruit allies in Muslim-majority countries in the war on terror. Administration members believe that ATCA litigation seriously threatens these crucial diplomatic efforts. A recent ATCA case against Exxon Mobil (brought by the ILRF) illustrates this problem.

In July 2002, less than a year after the September 11th terrorist attacks, foreign plaintiffs sued the Exxon Mobil corporation for supposedly encouraging Indonesian soldiers to assault and torture workers at one of its off-shore oil facilities in Indonesia's Aceh province. The Court of Appeals for the District of Columbia Circuit asked the U.S. State Department to brief them on the lawsuit's potential negative effect on foreign policy strategies in Southeast Asia. The State Department responded with a letter asking that the Court dismiss the lawsuit.⁴⁵

Partly motivating the State Department's request was another letter sent by Indonesia's U.S. ambassador. The ambassador's letter stated that "as a matter of principle, [Indonesia] cannot accept the extraterritorial jurisdiction of the United States over an allegation against an Indonesian government institution . . . for operations taking place in Indonesia."⁴⁶ The State Department thus urged dismissal on grounds that the "[government of Indonesia] may respond to the litigation by curtailing cooperation with the United States on issues of substantial importance to the United States" and that the lawsuit "could potentially disrupt the ongoing and extensive [U.S.] efforts to secure Indonesia's cooperation in the fight against international terrorist activity."⁴⁷ The court declined to dismiss the case, and as of January 2007 the parties were preparing for trial.

Similar tensions have arisen over ATCA cases from South Africa. Plaintiffs have sued American companies that collaborated with apartheid-era businesses in the 1970s and 1980s. The South African government opposes the lawsuits because it believes the suits compromise the country's own efforts to fashion a post-apartheid legal system that "achieves reconciliation and reconstruction."⁴⁸

⁴⁵ EarthRights International Report, *supra* note 38, at 10–12.

⁴⁶ Letter from Soemadi D.M. Brotodiningrat, Ambassador of Indonesia, to Richard Armitage, Deputy Secretary of State, U.S. Department of State (July 15, 2002), available at <http://www.laborrights.org/projects/corporate/exxon/stateexxonmobil.pdf> (following letter from Taft, U.S. Department of State).

⁴⁷ Letter from William H. Taft, IV, Office of the Legal Adviser, U.S. Dep't of State, to the Honorable Louis F. Oberdorfer, U.S. Dist. Court, D.C. Circuit (July 29, 2002), available at <http://www.laborrights.org/projects/corporate/exxon/stateexxonmobil.pdf>.

⁴⁸ Brief for Nat'l Foreign Trade Council, et al. as Amici Curiae Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339) [hereinafter Brief for the Petitioner].

Amicus briefs from the *Sosa* case set forth similar assertions. For example, the National Foreign Trade Council's brief insists that ATCA litigation "interferes with" foreign policy because such litigation has the effect of letting "private litigants . . . substitute their own human rights agenda for that of the country's elected officials."⁴⁹ Moreover, the brief argues that the executive branch needs flexibility to balance its human rights agenda with its trade, investment, and economic cooperation agendas.⁵⁰ American foreign policy's effectiveness, the brief suggests, depends on the executive's ability to prioritize one agenda over another in any given part of the world.

b. Curtailed Foreign Direct Investment and the "Floodgates" Problem

ATCA critics view the increase in lawsuits as a gathering storm of ATCA litigation that will overwhelm the overseas American business community with accusations of human rights abuse. A flood of ATCA litigation could erode American business initiative in foreign markets and subject U.S. corporations to costly judgments. Two Institute for International Economics researchers published a monograph in July 2003 outlining many of the economic problems that "awakening [the ATCA] monster" could cause. The study characterized the problem with this example:

Within the next decade . . . 100,000 class action Chinese plaintiffs, organized by New York trial lawyers, could sue General Motors, Toyota, Volkswagen, General Electric, Mitsubishi, Siemens, Motorola, NTT, Nokia, and 20 other blue-chip corporations in a federal court for abetting China's denial of political rights, for observing China's restrictions on trade unions, and for impairing the Chinese environment. These plaintiffs might claim actual damages of \$6 billion and punitive damages of \$20 billion. To minimize their exposure to punitive damages, the corporations could settle for an intermediate amount, such as \$10 billion.⁵¹

The study paints a stark picture for corporations. As the authors suggest, if enough ATCA lawsuits succeed, plaintiffs' lawyers will sue any corporation suspected of tolerating human rights abuses at its overseas facilities. Even if the claims are meritless, those companies will face "enormous discovery costs" in the course of proving the allegations untrue.⁵² Plaintiffs' lawyers would likely not be susceptible to libel lawsuits for any public statements about the allegations made before or during trial, putting a company's reputation at further risk.⁵³ Finally, the study argues that prolif-

⁴⁹ *Id.* at 13.

⁵⁰ *See id.* at 13-14.

⁵¹ HUFBAUER & MITROKOSTAS, *supra* note 15, at 1.

⁵² *Id.* at 7.

⁵³ *Id.*

erating ATCA lawsuits will reduce American investments overseas. The authors estimate that some fifty-five billion dollars in U.S. foreign direct investment could be forfeited due to threats of ATCA litigation.

The *Sosa* briefs echo most of these economic worries. The National Foreign Trade Council told the *Sosa* court that the potential for ATCA litigation puts American companies at an unfair disadvantage in international markets since it “can result in higher insurance costs, difficulties accessing capital markets, and negative effects on shareholder confidence and stock prices. The foreseeable result,” says the Council’s brief, “is less investment and trade with developing countries, and less international trade overall.”⁵⁴

Corporations and their representatives within the lobbying community and the federal government make a strong case that ATCA lawsuits impede policy implementation and negatively impact investment overseas. And the reactions of foreign governments—including Indonesia and South Africa—vindicate the Bush administration’s belief that the lawsuits offend other countries’ ideas of sovereignty. The question the ATCA’s defenders raise is whether those concerns should prevail over foreign workers’ right to seek redress in American courts.

B. *Arguments Against ATCA Amendments*

1. Who Opposes Amendments?

Behind proposals to leave the ATCA unchanged is a network of human rights organizations, law professors, and citizen groups supporting stricter accountability for multinational corporations. Each sees the ATCA as an important tool for protecting foreign workers’ rights and for ensuring that multinational corporations do not knowingly tolerate abuses committed by their employees or by agents of host country governments with whom they may be cooperating.

Human rights groups have had a vital role in distributing information about the ATCA’s purpose and coordinating opposition to proposed amendments. In July 2004, shortly after the Supreme Court’s *Sosa* ruling, the organization EarthRights International produced a detailed report about the Alien Tort Claims Act and what it called a “war on ATCA” being waged by the Bush administration and corporate lobbyists.⁵⁵ The report captured the sentiments of most ATCA supporters in suggesting that “the real provocation for this [anti-ATCA] stance from a business-friendly Administration is not a principled legal objection to ATCA, but a desire to end the cases against corporations.”⁵⁶

⁵⁴ Brief for the Petitioner, *supra* note 47, at 11.

⁵⁵ See generally EarthRights International Report, *supra* note 38.

⁵⁶ *Id.* at 12.

Several law professors have figured prominently in the ATCA debate through their affidavits and *amicus* briefs in ATCA cases, scholarly articles, opinion pieces, and consultations with courts and government agencies. Two such professors are quoted below.

2. What Are the Arguments for Leaving the ATCA Unchanged?

Opponents of ATCA amendment argue that the Act supports social justice for foreign citizens employed by or working alongside American multinational corporations. Because their influence on the legal process is less direct than that of the business lobby and the executive branch, the case made by those supporting ATCA preservation comprises a rebuttal to points raised by those favoring amendment. Thus those who defend the status quo argue that the ATCA does *not* hamper foreign policy efforts and does *not* stifle foreign direct investment. The ERI Report contemplates that even if the law did cause those outcomes, their consequences would not warrant "eviscerating" all the ATCA's provisions.⁵⁷

With respect to diplomacy and U.S. foreign policy goals, ERI claims that "by promoting respect for human rights, [the] ATCA *implements* U.S. foreign policy" rather than undermining it.⁵⁸ Pointing out that "Congress has mandated that 'a principle goal' of U.S. foreign policy 'shall be to promote the increased observance of internationally recognized human rights by all countries,'" the group emphasizes that enforcing ATCA claims actually furthers the goal of promoting human rights.

In building its case against Exxon Mobil, the ILRF solicited an affidavit from Harold Koh, former Assistant Secretary of State for Democracy, Human Rights, and Labor and currently Dean of Yale Law School.⁵⁹ Koh asserted that claims such as those made by the Exxon Mobil plaintiffs "are subject to judicially manageable standards and do not require policy determinations that properly fall within non-judicial discretion."⁶⁰

The Act's supporters also doubt the Bush administration's claims that ATCA litigation hurts the executive branch's efforts in the war on terror. Collingsworth even contends that with respect to the Exxon Mobil case "the State Department has compromised its credibility on human rights issues by taking a position . . . utterly lacking in objective support and . . . inconsistent with past efforts directed to improving human rights in Indone-

⁵⁷ *Id.* at 13.

⁵⁸ *Id.* at 33 (emphasis in original).

⁵⁹ Terry Collingsworth, *Separating Fact From Fiction in the Debate Over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F.L. REV. 563, 565 (2003).

⁶⁰ *Id.*

sia.”⁶¹ He points out that American efforts to stimulate human rights advances in Indonesia have had little success given the Indonesian government’s repeated “failure[s to] . . . punish human rights violations perpetrated by its military security forces.”⁶² Perhaps more important, as Harvard law professor and former National Committee on Terrorism member Juliette Kayyem observed in an Exxon Mobil affidavit, it is often American multinational companies’ exploitative behavior that fuels anger among foreign populations and instigates terrorism in the first place.⁶³

Finally, the Act’s supporters discount claims that ATCA litigation will limit overseas investment and adversely affect the U.S. economy. Collingsworth writes that “there are few companies . . . seeking to invest in projects that would compel knowing corporate participation in genocide, war crimes . . . or crimes against humanity. . . . [T]he ATCA will have no impact on legitimate foreign investment.”⁶⁴ Moreover, it seems unlikely that cash-strapped developing countries would decline foreign direct investment in their infrastructure. Thus corporations cannot plausibly argue that foreign governments may resist corporate expansion in their countries rather than risk being implicated in human rights violations.

IV. THE FEINSTEIN PROPOSAL: AN ANALYSIS

A. *What the Bill Proposes*

One member of Congress recently responded to the *Sosa* court’s request for guidance on the ATCA’s future scope. On October 15, 2005, California senator Dianne Feinstein, a Democrat, introduced Senate Bill S.1874, titled the “Alien Tort Statute Reform Act.”⁶⁵ Rather than simply list the offenses that would trigger ATCA jurisdiction, the bill recommended changing the Act wholesale. According to Senator Feinstein, one of the bill’s purposes was to “clarify jurisdiction” of the federal courts in ATCA cases following the *Sosa* decision.⁶⁶ More broadly, the drafters designed the bill to “balance the competing interests of U.S. companies and human rights groups.”⁶⁷

Many of Feinstein’s proposed revisions mirror proposals by the business community. The bill surely received some of its inspiration from

⁶¹ *Id.* at 574.

⁶² *Id.* at 576.

⁶³ *See id.* at 577.

⁶⁴ *Id.* at 570.

⁶⁵ S. 1874, 109th Cong. (2005).

⁶⁶ *Id.*

⁶⁷ Marcel Herbke, *US Bill Puts Oil Before Human Rights*, GLOBAL POLICY FORUM, Oct. 26, 2005, <http://www.globalpolicy.org/intljustice/atca/2005/1026oil.htm>.

Sosa amicus briefs filed by pro-corporation groups opposing ATCA litigation. And it seems directly responsive to charges that the ATCA “has been transformed from its intended role as a jurisdictional provision applicable to a small class of cases into a serious impediment to companies engaged in international trade, investment, and operations, and a major irritant to the United States in its dealings with other nations.”⁶⁸

Overall, Feinstein’s bill would have lengthened the ATCA, detailing what specific torts are actionable and who can bring a cause of action. It would have also limited the conditions under which a corporation (or any private actor) would be liable.⁶⁹ Had the proposed statute become law, it would have changed the outcome in future cases like those discussed in Section I. The following paragraphs discuss the parts of the bill with the greatest impact on plaintiffs’ ability to sue. All come under Section 2 of the bill.⁷⁰

Subsection (b) defines various terms common to ATCA cases. “Defendant” would include “any person subject to the jurisdiction of the United States, including” U.S. citizens, naturalized residents (both temporary and permanent), and partnerships, corporations, or “other legal entit[ies]” organized under U.S. law.⁷¹ This subsection partly leaves open the question who might qualify as “subject to the jurisdiction of the United States.” Corporations determined to avoid ATCA liability might creatively structure their businesses in such a way as to make offending sectors not subject to U.S. law. Subsection (a) also specifically forbids courts from hearing any case involving a tort committed by a “foreign state” within its sovereign territory.

Subsection (b)(3) sets forth a list of torts actionable under the ATCA—extrajudicial killings, genocide, piracy, slave trading, slavery, and torture. Presumably, the list was meant to be exclusive. While many corporate ATCA cases filed prior to 2007 involved one or more of these offenses, the torts often were not committed by American (or Western) employees but by foreign workers or military personnel under contract with the defendant. When read together with subsection (a)’s requirements, subsection (b)(3) seems to foreclose lawsuits in nearly all situations where plaintiffs are injured by non-resident employers in their own country.

Amendment opponents are likely to find subsections (c) through (f) as unpalatable. Subsection (c) specifies that ATCA liability only attaches to “direct participant[s] acting *with specific intent* to commit a tort referred to

⁶⁸ Brief for the Petitioner, *supra* note 47, at 5.

⁶⁹ Alien Tort Statute Reform Act, S. 1874, 109th Cong. (2005).

⁷⁰ The bill contains two sections: Section 1, “Short Title” and Section 2, “Suits by Aliens.”

⁷¹ Alien Tort Statute Reform Act, S. 1874, 109th Cong. (2005).

in subsection (a).⁷² This portion would relieve corporations of wrongdoing in cases where plaintiffs were unable to prove malicious intent on the corporation's part (which would seem true in any case where foreign soldiers or government agents commit alleged abuses). This would eliminate liability under the "aiding and abetting" standard legitimized in *Unocal*.⁷³ As long as corporations do no more than provide moral support to the tortfeasors, they would remain free from liability.

Subsection (d) demands that plaintiffs exhaust their remedies "in the place where the injury occurred." As the Firestone plaintiffs' complaint suggests, obtaining relief in many developing countries' court systems is simply not possible. Requiring plaintiffs to exhaust local remedies virtually guarantees that many will never reach U.S. courts; instead their cases will pend indefinitely in courts in their home countries.⁷⁴ Equally possible is that some foreign governments may pressure their judiciary to ignore or dismiss controversial cases.

Human rights groups likely take greatest issue with subsection (e). This part gives the president authority to request that federal courts not hear cases that could conflict with the executive branch's foreign policy efforts. That provision reads as follows:

No court in the United States shall proceed in considering the merits of a claim under subsection (a) if the President, or a designee of the President, adequately certifies to the court in writing that such exercise of jurisdiction will have a negative impact on the foreign policy interests of the United States.⁷⁵

Permitting the president to overrule court jurisdiction on a case-by-case basis would likely implicate concerns over constitutional separation of powers. But that possibility clearly reflects the Bush administration's desire that the executive branch control which ATCA cases come before the courts and which do not.

Subsection (f) covers "procedural requirements." Under this section, "the first and last names of all plaintiffs shall be disclosed in the complaint filed with the court." No exception is provided, however, in cases where plaintiffs' lives or safety may be at risk if their identity is disclosed. (Anonymous plaintiffs file virtually all ATCA lawsuits against multinational corporations.) Finally, subsection (h) requires that plaintiffs bring ATCA claims within ten years of the date of the injury.

⁷² *Id.* (emphasis added).

⁷³ Eliza Strickland, *Was DiFi Batting for Big Oil?*, EAST BAY EXPRESS, Nov. 9, 2005, http://www.laborrights.org/press/general/feinsteinatca_eastbayexpress_110905.htm.

⁷⁴ Several federal circuits read an exhaustion requirement into the ATCA already; still others borrowed a ten-year statute of limitations from the Torture Victims Protection Act.

⁷⁵ Alien Tort Statute Reform Act, S. 1874, 109th Cong. (2005).

B. *Reaction to the Bill*

Human rights advocates reacted quickly to Feinstein's proposal. Critics flooded her office with complaints within days of the bill's introduction in Congress. As a result, Feinstein asked that Congress remove the bill from consideration pending "refinement in light of concerns raised by human rights advocates."⁷⁶

The criticisms were two-fold. First, the revisions would supersede key ATCA decisions like *Filartiga* and *Sosa*. Second, opponents argued, Feinstein only submitted the bill in response to pressure from multinational corporations headquartered in her Congressional district. Feinstein observed in her Senate floor remarks that "numerous companies in California are in the midst of these [ATCA] lawsuits as defendants."⁷⁷ The oil company Chevron, which contributed more than thirty thousand dollars to Feinstein's campaigns between 1989 and 2005, has its principle offices in San Ramon, California. Significantly, Nigerian plaintiffs named Chevron a defendant in an ATCA lawsuit scheduled for trial in late 2006.⁷⁸

Feinstein evidently has no plans to reintroduce the bill, but any member of Congress who relies heavily on corporate campaign contributions may pursue ATCA amendments in the future.⁷⁹ At any rate, Feinstein's bill, now part of the Congressional Record, is a model for what the ATCA may look like if corporations and their supporters can quiet resistance from human rights organizations and persuade Congress to revise the Act.

V. WHY THE ATCA SHOULD REMAIN UNCHANGED

Globalization has transformed the world economy and cast doubt on the validity of certain aspects of classic trade theory. Historically, a corporation's means of production were fixed in one location. Thus companies would export their manufactured goods for sale in countries whose businesses lacked the capacity to produce those same goods at lesser expense. Once corporations could "outsource" the manufacturing process, labor costs became much more variable. Domestic labor laws requiring minimum wages and fringe benefits no longer constrained a company's bottom line—companies simply moved labor-intensive operations to other countries with fewer wage and labor regulations.

⁷⁶ Letter from Senator Dianne Feinstein to Senator Arlen Specter, Chairman, Judiciary Committee (Oct. 25, 2005), available at <http://www.earthrights.org/files/Documents/feinsteinatca.pdf>.

⁷⁷ Strickland, *supra* note 72.

⁷⁸ *Id.*

⁷⁹ *Id.*

The debate over whether Congress should amend the ATCA to limit corporate liability parallels a broader debate about disparities in global labor standards. In general, ATCA reformers believe stimulating economic growth in developing countries provides crucial long-term benefits that outweigh any short-term financial hardships experienced by those countries' workforces. Having workers perform difficult manual labor for low wages is preferable to having them turn to crime or prostitution—alternatives that the ATCA's critics think likely where population outpaces job growth. The ATCA's proponents, on the other hand, believe some corporations simply exploit social and economic conditions in countries with less stringent labor laws.

The business community and the Bush administration expect a flood of ATCA litigation to irreparably harm the U.S. and world economy and deprive "millions of impoverished people . . . [of] an opportunity to participate in global markets."⁸⁰ Administration officials appear to believe that foreign investment is too essential to the welfare of both Americans and the international community for legislators to let ATCA litigation impede such efforts. ATCA opponents accept the possibility that human rights abuses may go unremedied in exchange for corporations' chance to tap the vast resources of developing nations. The Act's critics justify low wages and substandard working conditions on the ground that industrialization inevitably entails some degree of short-term economic hardship. Besides, being employed in low-income countries is still better than being unemployed and impoverished. This section sets forth several reasons why Congress should reject these arguments as well as proposals to amend the ATCA.

First, these views ignore the real suffering of people forced to work in substandard—indeed, often life-threatening—conditions. Entire generations of the working class should not have to sacrifice their dignity and well-being to achieve widespread prosperity in developing nations. That the world's industrialized countries experienced long, formative periods of environmental pollution, inequality, and human isolation should not relieve those countries of the moral obligation to help developing nations do so more efficiently. There is no justice in permitting Western corporations to profit by ignoring basic human rights and living standards—even if providing foreign workers with jobs temporarily lifts them from poverty.

Second, corporations that take advantage of foreign workers, weak legal systems, and unscrupulous government officials must be accountable when they violate human rights. When corporations commit human rights abuses (or less severe labor abuses) or encourage abuses by foreign governments or their agents, they erode working-class initiative and frustrate

⁸⁰ HUFBAUER & MITROKOSTAS, *supra* note 15, at 2.

workers' impulses toward self-preservation and personal improvement. This, in turn, obstructs social change and democratization. And the United States and other Western countries lose credibility on the world stage when they do away with corporate regulatory mechanisms like the ATCA.

The ATCA cannot be used to settle wage disputes or other small-scale, "shop-floor" worker grievances. Instead the Act is invoked only to remedy the most egregious human rights violations, including forms of coercion that amount to slavery and torture. Concerns that "the [ATCA] could lead U.S. courts to become judicial instruments of imperial overstretch, . . . [which] would be viewed abroad as blatant American imperialism" seem overstated.⁸¹ It is not so much making justice available to plaintiffs in U.S. courts as letting American corporations mistreat foreign workers that brews resentment in other countries. Most corporate defendants in ATCA lawsuits to date are American companies, and surely benevolent governments would be willing to give up a measure of judicial independence in exchange for its citizens' welfare, even if it loses investments as a result.

No country, whether developed or not, should strive to reverse globalization. Globalization's best features generate jobs and quickly move goods and information to countries around the world. They also raise living standards in industrialized countries through economic expansion and creation of high-skill, high-paying jobs. Globalization has made affordable consumer goods more widely available to low-income people in the United States and elsewhere. But the lack of a worldwide, enforceable system of labor standards makes too many foreign workers victims of corporate abuse. Until better international regulations exist, litigation made possible by laws like the ATCA provides those workers' most effective recourse.

The ATCA needs no amending. As the Act's supporters point out, courts can and do filter out weak or frivolous ATCA claims. Decisions already rendered in the Courts of Appeals and the Supreme Court established reasonable guidelines about the sorts of plaintiffs that should have standing. The Act does not seriously threaten U.S. foreign direct investment or foreign policy efforts, and even if it does, those outcomes are worth preventing the sacrifice too often forced on scores of foreign workers. The ATCA can offset multinational corporations' political influence and freedom from oversight by consistently remedying international human rights violations that occur in the context of the workplace. As the world's richest nation, the United States has a special moral responsibility to help developing countries avoid the worst episodes of industrialization.

⁸¹ *Id.* at 9.

VI. CONCLUSION

For two centuries the Alien Tort Claims Act languished in obscurity, attracting little notice in American courts. In the last ten years, lawyers have used this long-neglected law to bring human rights abusers to justice and to hold American companies responsible for the welfare of foreign workers. Multinational corporations sometimes turn a blind eye to the tactics of foreign officials who work with or supervise the companies' employees. The companies' response to criticism is that American businesses should not interfere in a sovereign country's politics. But these responses are fundamentally dishonest. Modern multinational corporations are, in fact, "alone in possessing the size, technology, and economic reach necessary to influence human affairs on a global basis."⁸² When corporations aggressively enter other countries to tap natural resources and recruit low-wage workforces, they must accept a corresponding duty to help uphold basic human rights.

The ATCA partly resulted from the Founders' efforts to "show European powers that the [United States] would not tolerate flagrant violations of the 'law of nations[.]'"⁸³ The Founders probably never imagined the ease with which Americans can now conduct commerce with other countries. But even in the grim conditions of life and work in colonial America, they might have mustered some sympathy for the Firestone plaintiffs. They wrote the ATCA for a purpose, and their belief then that the United States had a moral responsibility to uphold international law resonates today with those who oppose amending the Act.

The ATCA debate is highly nuanced, as are the controversial judicial opinions that have shaped the way courts interpret the Act. Those supporting change—a strong confederation of business executives, lobbyists, and lawyers—have tremendous influence with legislators and could ultimately muster enough support to abolish the ATCA in its current form. One ATCA plaintiff's lawyer says:

We're taking on powerful interests that have the resources and ability to get to legislators. On the other hand, we're supported by a pretty strong human-rights community that feels very strongly about this statute. It would be hard for Congress to pass something like the Feinstein bill, because [it represents] such a clear anti-human rights position.⁸⁴

And as Professor Sebok points out:

⁸² Kieserman, *supra* note 13, at 882 (citations omitted).

⁸³ HUFBAUER & MITROKOSTAS, *supra* note 15, at 3.

⁸⁴ Strickland, *supra* note 72.

It may be the case that the ATCA could be improved. But that is not the job of the Supreme Court—it is the job of . . . Congress. The ATCA means exactly what it says, and if the Bush administration doesn't like it, it should explain to the American people—not the Supreme Court—why it should be changed.⁸⁵

Modifying the Act might spare American corporations expensive lawsuits and help developing nations expand their economies. But ATCA amendments could also mean that enormous human sacrifices are made in exchange for long-term economic progress and short-term corporate profit. Preventing those sacrifices is worth more than the promise of faster growth. The ATCA should continue to serve as a check on the power of formidable corporations and as a means of upholding the United States' pledge to protect human rights around the world.

⁸⁵ Sebok, *supra* note 39.