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The Alien Tort Statute of 1789: Time for a Fresh Look

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In 2007 the Second Circuit Court of Appeals held that US companies that had done business with apartheid South Africa could be found liable for monetary damages under the Alien Tort Statute (ATS) of 1789 (*Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 [2d Cir. 2007]). Liability arises, the Second Circuit declared, from their possible connections with human rights violations committed by South Africa during the apartheid era. Firms named in the suit include Bank of America, IBM, Coca-Cola, and General Motors. The governments of the United Kingdom, Germany, and Switzerland all opposed the lawsuit, as did the government of South Africa, which argued that the suit ran counter to its policy of reconciliation.[1] The Bush administration also opposed the suit, but the Second Circuit rejected the argument that the cases could be dismissed for foreign policy reasons.

After further proceedings, in April 2009 the Federal District Court for the Southern District of New York allowed the case to move forward, possibly to a jury trial if not settled beforehand. In its earlier decision, the Second Circuit had ruled that a jury could hold the firms liable if they were aware that their business activities may have substantially assisted the government's abusive practices, even if the firms did not intend to facilitate the abuse. "Simply doing business with a state or individual who violates the law of nations is insufficient" to be found culpable under the ATS (*Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 [2d Cir. 2007]). But, to cite one of the district court's rulings (*In re South African Apartheid Litigation*, 02-MDL-1499 [S.D.N.Y. 2009]), IBM could be held liable for selling computers and software that the government used to register and segregate citizens.

The ATS states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Apart from its brevity, four important points should be noted about the ATS:

- The act authorizes civil suits for tort claims brought by alien plaintiffs, *not* by US citizens.
- The class of potential defendants includes not only US citizens and corporations, but also foreign citizens and corporations so long as they are subject to US jurisdiction (for example, because they do business in the United States).
- The cause of action cited in an ATS suit must be grounded on a violation either of the "law of nations" or a US treaty.
- There is no territorial limit on the cause of action: It could occur in the United States, in the Congo, in China, in the deep sea, or in outer space.

Treaties constitute a growing but defined body of law. The "law of nations" is a very different animal. In 1789, the types of conduct that violated the law of nations were very limited: for example, trampling on the rights of ambassadors or engaging in piracy. The core legal question today is whether, for ATS purposes, violations of the law of nations were frozen in time in 1789, or whether that clause can be elastically expanded by the federal courts. This question was not resolved for nearly 200 years. In *Filartiga v. Pena-Irala* (630 F.2d 876, 879 [2d Cir. 1980]) the Second Circuit Court of Appeals allowed a suit filed by relatives of a Paraguayan kidnapped and tortured to death by Paraguayan officials to go forward under the ATS, elastically defining the law of nations in light of evolving

1. Curtis A. Bradley and Jack L. Goldsmith, "Rights Case Gone Wrong: A Ruling Imperils Firms and US Diplomacy," *Washington Post*, April 19, 2009.

jurisprudence (Hufbauer 2004). Since then, a number of ATS claims have made their way to the federal courts. Many were dismissed, and some were settled before trial.

The US Supreme Court did not address the scope of the law of nations until *Sosa v. Alvarez-Machain* (542 U.S. 692 [2004]) in 2004. In the majority opinion, Justice Souter wrote: "We are persuaded that federal courts should not recognize private claims under federal common law for violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when…[the ATS] was enacted." Although this ruling suggests a restrictive interpretation of the law of nations, it does not enunciate hard guidance that would preclude lower courts from opening their doors to a variety of lawsuits.

If the plaintiffs prevail in the South Africa case, it will open the door for Chinese plaintiffs to sue a host of blue-chip corporations that do business in China for abetting China's denial of political rights

No ATS suit against a multinational corporation has so far prevailed after a jury trial. Even when plaintiffs are unlikely to win based on the merits, however, they are often able to negotiate settlements. In the past, many corporations, such as Yahoo!, have preferred to settle ATS cases rather than to take their chances with a judge and jury. Companies settle for three reasons. First, once a jury hears the gory details of human rights violations, it is not likely to sympathize with a corporation's claim of noninvolvement. Second, the process of discovery in preparation for a full-fledged trial can be very expensive for the corporate defendant. Third, Justice Souter's guidance was not clear enough to allow corporate counsel to advise clients with certainty whether or not a district or circuit court would find that the stated claim amounted to a violation of the law of nations. For these reasons, the prospect of an ATS action can be costly to companies that invest abroad, even for firms that do not violate the law of nations according to Justice Souter's guidance.

If ATS suits could sharply reduce human rights violations abroad, a great many of them might be justified. However, it seems unlikely that these lawsuits will have the desired effect on human rights practices. Hufbauer et al. (2008) calculated that sanctions against foreign governments designed to achieve improvements in human rights are successful in only 15 percent of cases. Moreover, ATS suits are directed against corporations, not governments, and they are often remote in time from the offense in question: The apartheid suit is moving through the courts eighteen years after apartheid ended. It is uncertain that delayed penalties will deter future abuses; the possibility is there, but the deterrence record of past human rights sanctions is not strong. All in all, ATS suits seem no more likely to pay off in improved human rights than economic sanctions. To be sure, successful suits will put money in the pockets of some victims. But ATS suits will also chill investment in non-OECD countries, retarding economic growth in these areas. This will increase human suffering, not alleviate it.

Potential targets of ATS suits include US and foreign firms doing business in countries that account for 5 billion people and half the world economy.[2] These countries are mainly poor. In 2007 two-way US merchandise trade with countries at risk for ATS suits was about $1.3 trillion, and the stock of foreign direct investment (FDI) from all sources was about $2.7 trillion (see table 1). Hufbauer and Mitrokostas (2003) estimated that full-blown litigation could disrupt tens of thousands of US jobs related to exports and inward FDI.

If the plaintiffs prevail in the South Africa case, it will open the door for Chinese plaintiffs to sue a host of blue-chip corporations that do business in China for abetting China's denial of political rights. In addition, a potential wave of litigation carries other hazards:

- US court decisions will conflict with jurisdictional claims of other states, particularly when plaintiffs and defendants are both foreign and the violation occurred outside US territory.
- They will harm relations with foreign states that are home to multinational firms hit with ATS suits.[3]
- Court decisions will interfere with the executive branch's responsibility for foreign affairs under the US Constitution.

2. Even India, which is generally thought to be well managed, is susceptible to human rights litigation. Amnesty International (2008) details a number of human rights violations connected with economic development in India. In 2008 "unlawful methods were increasingly used" to deal with protests against fast-tracked irrigation, mining, manufacturing, and business projects, such as a conflict between private Communist Party–allied militias and armed supporters of local organizations in West Bengal that spawned a "range of human rights violations" including unlawful killings, forced evictions, excessive police force, and violence against women.

3. In the past, countries such as France and Britain have used blocking measures to thwart US economic sanctions and antitrust actions, passing laws instructing their corporations not to comply with US executive branch orders and judicial determinations. The same response can be expected if multimillion dollar judgments are handed down in ATS litigation.

In order to avert looming ATS suits, multinational corporations themselves should work to devise a code of conduct that would both establish minimum standards for firms and provide a defense against prospective ATS litigation. However, it took two decades after the US Foreign Corrupt Practices Act was passed in 1977 for OECD members to agree on a Convention for Combating Bribery of Foreign Public Officials.[4] This precedent suggests that a corporate code may take years to negotiate and implement.

In the meantime, the US government should take action. The executive branch may be reluctant to press the issue, since Professor Harold Koh, recently appointed the legal adviser to the State Department, has argued for a broad interpretation of "aiding and abetting liability" under the ATS. Accordingly, Congress should take the lead and enumerate violations of the law of nations that definitively create causes of action under the ATS. This enumeration should be patterned after the Torture Victims Protection Act of 1991, which allows domestic and foreign plaintiffs to file civil suits in the United States against foreign officials who commit torture or extrajudicial killings.[5] In addition, Congress should confer exclusive jurisdiction on the US District Court for the District of Columbia and the Court of Appeals for the Federal Circuit for torts brought by alien plaintiffs for wrongs that occurred abroad.[6] Among other things, ATS suits have significant foreign policy implications, and to allow dozens of federal district courts and all twelve circuit courts to hear these cases will detract from a clear and unified US foreign policy in this important area.

4. This convention remains poorly enforced (Transparency International 2008).

5. The Torture Victims Protection Act was enacted by Congress to codify the holding in *Filartiga v. Pena-Irala*.

6. Hufbauer and Mitrokostas (2003) recommended that Congress confer exclusive jurisdiction on federal courts (preempting state courts) for all tort claims brought by alien plaintiffs for wrongs that occurred abroad. This policy brief goes one step further.

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Table 1 US and world trade and foreign direct investment (FDI) with countries at risk for ATS suits, 2007 (billions of US dollars)

Country	US imports	US exports	US FDI	World FDI
Sub-Saharan Africa				
Angola	12.2	1.3	0.9	12.2
Burkina Faso	0	0	n.a.	0.8
Cameroon	0.3	0.1	0.1	3.8
Central African Republic	0	0	n.a.	0.2
Democratic Republic of Congo	0.2	0.1	(D)	1.5
Republic of Congo	3.1	0.1	0.2	3.8
Cote d'Ivoire	0.6	0.2	0.2	5.7
Ethiopia	0.1	0.2	0	3.6
Ghana	0.2	0.4	(D)	3.6
Kenya	0.3	0.6	0.2	1.9
Madagascar	0.3	0	0	1.8
Mozambique	0	0.1	0	3.2
Nigeria	32.5	2.7	–0.8	62.8
Rwanda	0	0	0	0.2
Senegal	0	0.2	0	0.6
Sierra Leone	0	0.1	0	0.5
South Africa	9.1	5.2	4.8	93.5
Sudan	0	0.1	n.a.	13.8
Tanzania	0	0.2	(D)	5.9
Uganda	0	0.1	(D)	2.9
Zambia	0	0.1	0.1	5.4
Zimbabwe	0.1	0.1	(D)	1.5
North Africa				
Algeria	17.4	1.6	5.5	11.8
Egypt	2.4	5.3	7.5	50.5
Libya	3.4	0.5	1.1	6.6
Morocco	0.6	1.3	0.2	32.5
Tunisia	0.4	0.4	0.2	26.2
Central Asia/Former USSR				
Afghanistan	0.1	0.5	0	1.1
Armenia	0	0.1	0	2.4
Azerbaijan	1.7	0.2	5.8	6.6
Belarus	1	0.1	0	4.5
Georgia	0.2	0.3	0.1	5.3
Kazakhstan	1.2	0.7	4.9	43.4
Kyrgyzstan	0	0	n.a.	0.8
Moldova	0	0.1	0	1.8
Russia	19.1	6.7	13	324.1
Tajikistan	0	0.1	(*)	1

(table continues next page)

Table 1 US and world trade and foreign direct investment (FDI) with countries at risk for ATS suits, 2007 (billions of US dollars) *(continued)*

Country	US imports	US exports	US FDI	World FDI
Central Asia/Former USSR *(continued)*				
Turkey	4.6	6.4	4.9	145.6
Turkmenistan	0.2	0.2	0	3.9
Ukraine	1.2	1.3	1.3	38.1
Uzbekistan	0.2	0.1	(D)	1.6
East Asia				
China	323.1	61	28.3	327.1
North Korea	0	0	n.a.	1.4
South Asia				
Bangladesh	3.4	0.5	0.2	4.4
India	23.9	16.3	13.6	76.2
Nepal	0.1	0	0	0.1
Pakistan	3.6	2	0.7	20.1
Sri Lanka	2.1	0.2	0.1	3.5
Southeast Asia				
Cambodia	2.5	0.1	0	3.8
Indonesia	14.4	4.1	10	59
Malaysia	32.8	10.2	15.7	76.7
Myanmar	0	0	(*)	5.4
Papua New Guinea	0.1	0.1	0.1	2.3
Philippines	9.4	7.3	6.7	19
Thailand	22.7	7.8	15	85.7
Vietnam	10.5	1.8	0.3	40.2
Latin America				
Argentina	4.3	5.1	14.9	66
Bolivia	0.3	0.3	0.3	5.3
Brazil	25	21.7	41.6	328.5
Colombia	9.3	7.9	5.6	56.2
Cuba	0	0.4	0	0.1
Dominican Republic	4.2	5.8	0.9	8.3
Ecuador	6.1	2.7	0.7	10.3
El Salvador	2	2.2	1.4	5.9
Guatemala	3	3.9	0.5	6.5
Guyana	0.1	0.2	(D)	1.2
Haiti	0.5	0.7	0.2	0.4
Honduras	3.9	4.3	1	4.3
Jamaica	0.7	2.2	0.7	8.6
Mexico	210.2	119.4	91.7	265.7
Nicaragua	1.6	0.8	0.2	3.1
Panama	0.4	3.5	6.2	14.6

(table continues next page)

Table 1 US and world trade and foreign direct investment (FDI) with countries at risk for ATS suits, 2007 (billions of US dollars) *(continued)*

Country	US imports	US exports	US FDI	World FDI
Latin America *(continued)*				
Paraguay	0.1	1.2	(D)	2
Peru	5.2	3.8	6.8	24.7
Venezuela	37.6	9.8	10	44
Middle East				
Bahrain	0.6	0.6	0.1	12.9
Iran	0.2	0.1	(D)	5.3
Iraq	11	1.5	(D)	1.2
Jordan	1.3	0.8	0.1	14.5
Kuwait	4.2	2.3	(D)	0.9
Lebanon	0.1	0.8	0.2	21.1
Oman	0.9	1	(D)	5.9
Qatar	0.5	2.6	7.1	7.3
Saudi Arabia	35.3	9.8	5.3	76.1
Syria	0.2	0.4	(D)	9.7
Yemen	0.3	0.6	0.8	2.4
Total	930.8	365.6	336.9	2675.3

(*) = negligible
(D) = data withheld to prevent disclosure from individual companies

Note: Total US imports are based on US imports for consumption, according to general customs value. Total US exports represent the FAS (free alongside ship) value of domestic exports.

Sources: BEA (2007); USITC (2009); UNCTAD (2008).