

Note

Deriving Lessons for the Alien Tort Claims Act from the Foreign Sovereign Immunities Act

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I. INTRODUCTION

Since human rights advocates resurrected the Alien Tort Claims Act¹ (ATCA) in 1980,² the Act has generated endless controversy. Famously

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1. 28 U.S.C. § 1350 (2006).

described by Judge Friendly as a “legal Lohengrin,”³ the resurrection of the ATCA spawned a heated historical debate among scholars,⁴ which has evolved into a high-stakes political and legal struggle between multinational corporations and human rights activists.⁵ In 2004, the Supreme Court addressed some of the legal questions surrounding the ATCA by finding that the statute was not merely jurisdictional but also provided a narrow cause of action for violations of certain customary international laws.⁶ But many important questions regarding the scope of the ATCA were left unanswered, and lower courts have struggled to fill in the gaps.

The greatest threat to ATCA claims, however, comes not from the Judicial Branch, but rather from the Executive Branch. Since 2001, the Bush Administration⁷ has taken a new tack in an effort to undermine the ATCA: the State Department has made repeated requests for courts to dismiss ATCA claims under the political question doctrine, claiming the cases would adversely affect U.S. foreign policy interests.⁸

Executive Branch interference in foreign affairs law is not unprecedented. Just thirty years ago, Congress passed the Foreign Sovereign Immunities Act⁹ (FSIA) to limit such interference in cases involving foreign states. The divergent tolerance for Executive Branch interference in ATCA cases versus FSIA cases lacks an adequate rationale, but this disparity has been overlooked in the debate over the ATCA. Through drawing a comparison between the current environment in ATCA litigation and the pre-FSIA environment for cases against foreign sovereigns, this Note argues that the political question doctrine is inappropriately applied in most ATCA claims, and that legislation should be enacted to reduce the influence of the Executive Branch in judicial affairs.

This analysis proceeds in five parts. Part II sketches a brief history of the FSIA and ATCA. Part III identifies the paradox created by the disparate

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

3. *Int'l Inv. Trust v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (“[A]lthough it has been with us since the first Judiciary Act . . . no one seems to know whence it came.”).

4. For example, some scholars argued that the ATCA was merely jurisdictional, see, e.g., Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 646 (2002) (noting that “the First Congress probably saw the [ATCA] . . . as an implementation of Article III alienage jurisdiction”), while others argued that the ATCA provided a cause of action to sue multinational corporations for causing severe environmental damage abroad. See, e.g., Cyril Kormos et al., *U.S. Participation in International Environmental Law and Policy*, 13 GEO. INT'L ENVTL. L. REV. 661, 672 (2001) (“[T]he [ATCA]’s contribution to international environmental law and policy is to provide a remedy for egregious environmental damage caused by private sector parties operating abroad.”).

5. See, for example, Senator Feinstein’s attempt to amend the ATCA in 2005, which was quickly withdrawn after human rights advocates protested. See *infra* notes 186-87.

6. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); David D. Christensen, Note, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After Sosa v. Alvarez-Machain*, 62 WASH. & LEE L. REV. 1219, 1222-23 (2005) (noting that many questions regarding the ATCA were left unanswered by the *Sosa* opinion).

7. References to the Bush Administration refer to the Administration of President George W. Bush.

8. See *infra* Section III.B. As this Note is concerned primarily with how the ATCA concerns U.S. foreign policy interests, I do not discuss ATCA cases brought against U.S. officials. See, e.g., *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006); see also Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105, 111-13 (2005).

9. Pub. L. No. 94-583, 90 Stat. 2892 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11)(2000).

treatment of the two statutes and asserts that the political question doctrine is responsible for the disparity. Part IV revisits the motivations of Congress when it passed the FSIA to illustrate why allowing invocation of the political question doctrine is imprudent. Part V surveys previously offered solutions to limit the application of the political question doctrine and discusses their inadequacies, concluding that a legislative approach would be the most effective solution. Finally, Part VI briefly outlines potential components of a legislative solution.

II. HISTORY OF THE FSIA AND ATCA

A. FSIA

The history of the FSIA reflects an ebb and flow of deference afforded to the Executive Branch by courts. Initially, courts dictated what immunity foreign sovereigns would receive from lawsuits, regardless of the desires of the Executive Branch. In time, though, courts acquiesced to the Executive Branch's immunity requests and gave near-complete deference to the State Department. Dissatisfied with such deference, Congress eventually enacted the FSIA, which defined explicit criteria by which courts would determine whether immunity from suit was warranted, thereby eliminating the Executive Branch's influence.

1. Early History

Through the mid-twentieth century, foreign nations (sovereigns) were granted absolute immunity, meaning that suits brought against them in U.S. courts would be dismissed for lack of jurisdiction.¹⁰ The concept of absolute immunity for sovereigns was found neither in the Constitution nor in statutes, but rather was a judicially-crafted policy.¹¹ Absolute immunity's foundation lies with *The Schooner Exchange v. M'Faddon*,¹² where the Supreme Court contemplated whether it had jurisdiction over a French armed ship in a U.S. port. Chief Justice Marshall reasoned that while a nation's jurisdiction over its own territory "is susceptible of no limitation not imposed by itself,"¹³ a sovereign would enter foreign territory only if it possessed an express or implied license of immunity from that country's jurisdiction. Without such immunity, a sovereign "would degrade the dignity of his nation, by placing [itself] . . . within the jurisdiction of another."¹⁴ Lower courts and eventually the Supreme Court adopted Marshall's language for the proposition that

10. See, e.g., *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926).

11. The Court has explained that the concept of absolute immunity was premised on comity with other nations. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Generally, absolute immunity conferred by courts on foreign sovereigns mirrored the immunity those courts provided to domestic sovereigns. See JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 5 (2d ed. 2003).

12. 11 U.S. (7 Cranch) 116 (1812).

13. *Id.* at 136.

14. *Id.* at 137.

foreign sovereigns were entitled to absolute immunity.¹⁵ In one case, the Supreme Court even granted immunity to Italy when the State Department had requested that immunity be denied.¹⁶

2. *Transition Years*

As commerce between countries increased in the twentieth century, the theory of absolute immunity came under attack. Countries began to distinguish foreign sovereigns' public acts from an increasing number of private commercial acts,¹⁷ such as acts involving sovereign-owned merchant vessels,¹⁸ to ensure that all commercial actors were treated equally. In 1938, the Supreme Court began to retreat from absolute sovereign immunity and simultaneously increased its deference to the Executive Branch by declaring that future grants of absolute immunity would be conditioned on the desires of the Executive Branch.¹⁹ By 1950, most countries had adopted a new "restrictive theory" of immunity that removed sovereign immunity for commercial acts,²⁰ with the United States following suit in 1952 when a legal advisor at the State Department, Jack Tate, wrote the now-famous "Tate letter" that eschewed absolute sovereign immunity in favor of the restrictive theory.²¹

The decision of whether to grant sovereign immunity was now completely vested in the Executive Branch.²² Typically, the State Department would determine whether a foreign sovereign deserved immunity when brought into a U.S. court.²³ The State Department would make a "suggestion" of immunity to the court, and the court would subsequently treat the State Department recommendations as binding.²⁴ While the State Department

15. See, e.g., *Berizzi Bros.*, 271 U.S. at 571; *Oliver Am. Trading Co. v. Mexico*, 5 F.2d 659 (2d Cir. 1924); *Mason v. Intercolonial Ry. of Canada*, 83 N.E. 876 (Mass. 1908).

16. See *Berizzi Bros.*, 271 U.S. 562; *The Pesaro*, 277 F. 473, 479-80 & n.3 (S.D.N.Y. 1921).

17. See DELLAPENNA, *supra* note 11, at 4 (concluding that the distinction was first noted in France and surrounding countries in the nineteenth century).

18. See *Compania Naviera Vascongado v. The Cristina*, [1938] A.C. 485, 521 (Lord Maugham) ("Half a century ago foreign Governments very seldom embarked in trade with ordinary ships... but there has been a very large development of State-owned commercial ships since the Great War, and the question whether the immunity should continue to be given to ordinary trading ships has become acute."), cited in *Republic of Mexico v. Hoffman*, 324 U.S. 30, 40-41 (1945) (Frankfurter, J., concurring); see also JOSEPH M. SWEENEY, *THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY* iii (1963) (detailing sovereign immunity cases in foreign jurisdictions).

19. See *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1926); see also *Ex parte Peru*, 318 U.S. 578, 586-90 (1943).

20. See DELLAPENNA, *supra* note 11, at 5.

21. Tate Letter, 26 DEP'T. ST. BULL. 984, 985 (1952) ("The widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts."), reprinted in *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 711 (1976) (app. 2).

22. The broad deference afforded the Executive Branch in determining whether foreign sovereigns were entitled to immunity had been outlined by the Supreme Court years earlier in *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-6 (1945), and *Ex Parte Peru*, 318 U.S. 578, 589 (1941).

23. See, e.g., *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1971); *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974); *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24 (4th Cir. 1961); *Vicente v. Trinidad*, 372 N.Y.S.2d 369 (N.Y. Sup. Ct. 1975); *Chemical Nat'l Res., Inc. v. Venezuela*, 215 A.2d 864 (Pa. 1966).

24. See *supra* note 23; GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 201 (3d ed. 1996).

represented that its immunity determinations resulted from objectively applying the restrictive theory of immunity, in practice the determinations were also driven by political and diplomatic considerations.²⁵

3. Modern History

Congress eventually became dissatisfied with the State Department's seemingly arbitrary application of the restrictive theory of immunity²⁶ and the State Department acknowledged that it was failing to apply the restrictive theory objectively.²⁷ In response, Congress, with the endorsement of President Ford,²⁸ codified the Tate letter in the 1976 Foreign Sovereign Immunities Act, which limits the deference afforded to the Executive Branch. The FSIA grants jurisdiction and removes sovereign immunity for specific types of conduct by foreign states.²⁹ Most pertinent to this Note, the FSIA includes a commercial activities exception that codifies the restrictive theory of immunity. Under the commercial activities exception, the FSIA removes sovereign immunity for any action resulting from: (1) "commercial activity carried on in the United States by [a] foreign state;" (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere;" or (3) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."³⁰ By placing the determination of sovereign immunity entirely within the Judicial Branch,³¹ Congress hoped to mitigate the influence politics had on determinations of sovereignty.³²

While foreign sovereigns continue to enjoy a presumption of immunity in U.S. courts,³³ two significant changes have taken place in the past century. First, the United States, along with most other countries, adopted the restrictive theory of immunity that removes sovereign immunity when

25. See Mark B. Feldman, *Foreign Sovereign Immunity in the United States Courts 1976-1986*, 19 VAND. J. TRANSNAT'L L. 19, 20 (1986); DELLAPENNA, *supra* note 11, at 29. This will be discussed further in Section IV.A.

26. See DELLAPENNA, *supra* note 11, at 29-30 ("Expediency, rather than principle, came to shape the [State] Department's suggestions.").

27. See *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 35 (1976) [hereinafter *1976 Hearings*] (testimony of Monroe Leigh, Department of State Legal Advisor) (testifying that the State Department "has not always been able to resist the[] pressures" to grant sovereign immunity).

28. See Statement on Signing the Foreign Sovereign Immunities Act of 1976, 3 PUB. PAPERS 2609 (Oct. 22, 1976).

29. See 28 U.S.C. § 1605(a)(1)-(7) (2000).

30. See 28 U.S.C. § 1605(a)(2) (2000). There continues to be disagreement over the meaning of "direct effect." See Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat It Like One*, 5 CHI. J. INT'L L. 675, 683-96 (2005).

31. See Jeffrey Rabkin, Note, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2132-33 (1995) ("Importantly, courts have understood the Act to end the State Department's authority to determine the extent of sovereign immunity in a particular case, and to shift that responsibility entirely to the judiciary.").

32. See H.R. REP. NO. 94-1487, at 9 (1976) ("A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.").

33. The FSIA provides exceptions to otherwise absolute immunity.

sovereign states operate in a commercial capacity like other private actors. Second, the United States aimed to isolate the determination of sovereign immunity from political and diplomatic pressures by explicitly codifying every exception to immunity and placing the determination squarely within the power of the Judicial Branch.

B. ATCA

The history of the ATCA lies in contrast to the historical development of the FSIA. Instead of insulating judicial decisions from the political branches, ATCA claims have been increasingly subject to Executive Branch interference. Determining which claims were cognizable under the ATCA was historically the province of the Judicial Branch. Within the past six years, however, courts have acquiesced to Executive Branch requests to dismiss ATCA claims under the political question doctrine.

1. Early History

The early history of the ATCA provides few clues to Congress's intent in passing the statute and the proper roles for the political and judicial branches. The modern ATCA statute, 28 U.S.C. § 1350, closely resembles the statute passed as part of the First Judiciary Act of 1789.³⁴ The statute now reads: "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."³⁵ Numerous scholars have searched unsuccessfully through the journals of the Continental Congress³⁶ and the commentary of our nation's founders in an attempt to derive the motivation of the First Congress in passing the ATCA³⁷ and to determine what types of torts the First Congress intended to cover under "the law of nations."³⁸ Instead, given the paucity of legislative history, scholars have been forced to rely on textual analysis³⁹ and ATCA case law. In the 190-year period between the

34. The First Judiciary Act granted to federal courts "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 782 (D.C. Cir. 1984) (Edwards, J., concurring) (citing Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1789)).

35. 28 U.S.C. § 1350 (2000).

36. See, e.g., William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 226-27 (1996).

37. See, e.g., Lucien J. Dhooze, *The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 GEO. J. INT'L L. 3, 11-12 (2003) (citing commentators who assert various motivations for passage of the ATCA in 1789, ranging from national security concerns to concerns about the U.S. economy).

38. See *id.* at 11 (noting that some scholars believe the purpose of the ATCA was to protect public and private human rights abuses while others believe the ATCA was drafted to address a specific maritime crime); see also James Wilson, *Of the Law of Nations, Lectures on Law* (1791), reprinted in 3 THE FOUNDERS' CONSTITUTION 70, 71 (Philip B. Kurland & Ralph Lerner eds., 1987) ("The law of nations, properly so called, is the law of states and sovereigns, obligatory upon them in the same manner, and for the same reasons, as the law of nature is obligatory upon individuals.").

39. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718 (2004) ("Given the poverty of drafting history, modern commentators have necessarily concentrated on the text [of the ATCA] . . .").

statute's enactment in 1789 and 1980, when the modern history of the ATCA began, the statute was invoked only twenty-one times⁴⁰ and courts found jurisdiction under the ATCA in only three of those cases.⁴¹ As the Supreme Court recently stated, "despite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended [in enacting the ATCA] has proven elusive."⁴²

2. Modern History

The modern history of the ATCA reflects an initial effort by courts to expand the scope of the ATCA, only to recently reverse course by deferring to the Bush Administration's efforts to undermine ATCA claims. In 1979, a Paraguayan physician filed a lawsuit in a New York federal district court against a former government official of Paraguay, alleging that the official and others had tortured and killed the physician's son in Paraguay because of the physician's political beliefs.⁴³ The Second Circuit, undeterred by the rarely invoked ATCA, held that torture was a violation of the law of nations and was thus actionable under the ATCA. In 1995, the Second Circuit held that the ATCA applied not only to public officials, but to private actors as well. In *Kadic v. Karadzic*, the Second Circuit confronted claims of rape, forced prostitution, forced impregnation, torture, assault, battery, summary execution, and wrongful death allegedly perpetrated by Bosnian-Serb military forces during the Bosnia-Herzegovina civil war.⁴⁴ While Karadzic proclaimed himself to be the President of Srpska, a Bosnian-Serb republic within the country,⁴⁵ the district court concluded that Karadzic's faction did "not constitute a recognized state" and its members did "not operate under the color of any recognized state law."⁴⁶ Without reaching the question of whether Karadzic operated under the color of another state's law,⁴⁷ the Second Circuit held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."⁴⁸ Such conduct includes piracy, genocide, and war crimes.⁴⁹

40. See Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4 n.15 (1985) (listing the twenty-one cases).

41. See Dhooze, *supra* note 37, at 12-13 (discussing the three cases).

42. *Sosa*, 542 U.S. at 718-19.

43. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); see also Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991) (emphasizing *Filartiga*'s importance by analogizing it to *Brown v. Board of Education*, 347 U.S. 483 (1954)).

44. 70 F.3d 232, 236-37 (2d Cir. 1995).

45. *Id.* at 237.

46. *Id.* at 237-38 (quoting *Doe v. Karadzic*, 866 F. Supp. 734, 741 (S.D.N.Y. 1994)).

47. Violations of the law of nations have traditionally required action under the color of state law. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 792-93 & 814 n.22 (D.C. Cir. 1984) (Edwards, J., concurring).

48. *Kadic*, 70 F.3d at 239-40. The Second Circuit found support for this proposition by examining the historical prohibition against piracy. See, e.g., 1 Op. Att'y Gen. 57, 59 (1798) (early opinion by an Attorney General regarding American citizens aiding the French fleet to plunder British property off the coast of Sierra Leone in 1795). Similarly, the Restatement of the Foreign Relations Law of the United States proclaimed that "[i]ndividuals may be held liable for offenses against international law, such as piracy, war crimes, or genocide." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. II, introductory note (1986) [hereinafter RESTATEMENT].

49. See RESTATEMENT, *supra* note 48, pt. II, introductory note.

Following *Kadic*, the number of ATCA claims grew dramatically.⁵⁰ ATCA claimants alleged either that the defendants had operated under the color of state law⁵¹ or that the offense was of such a nature that a private actor violated the law of nations without operating under the color of state law.⁵² In addition, corporations were targeted for committing actionable torts in concert with states.⁵³ Expanding the scope of the ATCA to cover private citizens and corporations predictably drew strong criticism from scholars⁵⁴ and businesspeople.⁵⁵ In 2004, ATCA claims were placed in jeopardy when the Supreme Court granted *certiorari* in *Sosa v. Alvarez-Machain*⁵⁶ to determine, in part, whether the ATCA provided a cause of action or was solely jurisdictional.⁵⁷ The Bush Administration argued strenuously that the ATCA should not be read to provide a cause of action.⁵⁸ The Court, however, disagreed and held that “although the [ATCA] is a jurisdictional statute . . .

50. Between 1980 and 1995, approximately twenty cases, leading to decisions available online, alleged jurisdiction under the ATCA. Between 1995 and 2003 (roughly half the time), the number of claims more than doubled to forty-one. See Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 9 & n.40 (2003) (listing all ATCA claims between 1980 and 2003). Many ATCA claims, however, were dismissed at initial stages for failing to state a cognizable claim under ATCA or for failing to allege sufficient facts to support an ATCA claim. See, e.g., *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Maugein v. Newmont Mining Corp.*, 298 F. Supp. 2d 1124 (D. Colo. 2004).

51. The claim was that the defendants had operated in this manner as a state actor or in concert with the state. See, e.g., *Doe v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004). Courts have analogized acting in concert with the state to the “color of law” jurisprudence under 42 U.S.C. § 1983 (2000). See *Kadic*, 70 F.3d at 245 (“A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid.”) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

52. *Kadic*, 70 F.3d at 239.

53. See, e.g., *Doe v. Unocal Corp.*, 395 F.3d 932, 953 (9th Cir. 2002) (concluding at the summary judgment stage that colorable evidence existed to find that Unocal aided and abetted the Burmese government in the forced labor of Burmese citizens). The Unocal case was subsequently dismissed after a settlement was reached. See Marc Lifsher, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline; A Deal Ends a Landmark Case Brought by Villagers who Said Soldiers Committed Atrocities*, L.A. TIMES, Mar. 22, 2005, at C1; *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (dismissing the case after a settlement was reached).

54. See, e.g., Bradley, *supra* note 4, at 647 (“If nothing else, courts may find that the original history of the Alien Tort Statute provides a basis for judicial restraint in the face of ever-expanding claims about the Statute’s scope.”); GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789*, at 1 (2003) (describing a “nightmare scenario” where “100,000 class action Chinese plaintiffs, organized by New York trial lawyers, could sue General Motors, Toyota, . . . and 20 other blue-chip corporations in federal court for abetting China’s denial of political rights, for observing China’s restrictions on trade unions, and for impairing the Chinese environment.”).

55. See John E. Howard, Vice President of International Policy and Programs, U.S. Chamber of Commerce, Op-Ed., *The Alien Tort Claims Act: Is Our Litigation-Run-Amok Going Global?* (Oct. 2002), <http://www.uschamber.com/press/opeds/0210howardlitigation.htm>.

56. 542 U.S. 692 (2004).

57. See David G. Savage, *Foreign Abduction Case Goes to Court: The Justices Today Will Consider Whether a 1789 Law Allows Victims of Human Rights Abuses Overseas To File Lawsuits in U.S. Courtrooms*, L.A. TIMES, Mar. 30, 2004, at A10.

58. See Brief for United States as Respondent Supporting Petitioner at 6, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 182581 (“The Ninth Circuit erred . . . in concluding that Section 1350 is anything other than a grant of jurisdiction. By its terms, Section 1350 simply confers jurisdiction on the federal courts over a specified class of cases. It does not expressly confer any private right of action, it contains no language from which it might be possible to infer a private right, and, in particular, it lacks the ‘rights-creating language’ that is ‘critical’ to the creation of a private right of action.”).

[it] 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.”⁵⁹ While the Court concluded that the common law could evolve to incorporate modern violations of the laws of nations, it constrained the expansion of ATCA claims by noting 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 § 1350 was enacted.”⁶⁰ In *Sosa*, the Court addressed some foundational concerns regarding the ATCA but left many key questions unanswered, such as whether private individuals and corporations could be held liable under the ATCA.⁶¹

3. *Developments Under the Bush Administration*

Although the Court ruled against the Bush Administration’s request to read the ATCA solely as a jurisdictional statute, the Administration had already developed a new strategy for defeating ATCA claims. Beginning in 2001,⁶² the Bush Administration claimed that adjudicating ATCA claims interfered with U.S. foreign policy interests and the claims should therefore be dismissed under the political question doctrine—a judicially-created doctrine by which a court will dismiss a case if it involves a question more appropriately addressed by a political branch.⁶³ This represented a dramatic shift from past Republican and Democratic administrations.⁶⁴ Rather than finding that the political question doctrine was inapplicable to ATCA claims or that the Executive Branch was inappropriately interfering with judicial affairs, lower courts have deferred to the Executive Branch and therefore dismissed ATCA claims.⁶⁵ As a result, the Executive Branch has been able to effectively grant immunity to ATCA defendants in U.S. courts. Such grants of immunity are especially troubling when conferred upon private individuals and corporations for claims resulting from commercial activity. When compared to the instances where immunity is granted in FSIA litigation, one observes a rather odd paradox.

59. *Sosa*, 542 U.S. at 724.

60. *Id.* at 732 (noting that this limitation is consistent with the Second Circuit’s opinion in *Filartiga* and Judge Edwards concurring opinion in *Tel-Oren*).

61. *Id.* at 732 n.20.

62. *See Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1118, 1208-09 (C.D. Cal. 2002), *rev’d*, 456 F.3d 1069 (9th Cir. 2006) (dismissing ATCA claim on political question grounds following a Statement of Interest filed by the U.S. State Department in 2001).

63. *See Baker v. Carr*, 369 U.S. 186, 211 (1962) (noting that foreign affairs issues “frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature”); *see also infra* Section III.A.

64. While past Republican administrations argued for a narrow reading of the ATCA, no administration had argued that cases should be dismissed under the political question doctrine. *See* Brian C. Free, Comment, *Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Litigation*, 12 PAC. RIM. L. & POL’Y J. 467, 474-76 (2003).

65. *See, e.g., Sarei*, 221 F. Supp. 2d at 1118; *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005); *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005), *cert. denied*, 126 S.Ct. 1418 (2006).

III. IDENTIFYING THE PARADOX AND ITS CAUSE

A. *Identifying the Paradox*

The treatment of foreign states under the FSIA and the treatment of private actors under the ATCA appear oddly inconsistent. While foreign states continue to enjoy a presumption of immunity, that immunity is removed in U.S. courts when claims arise from a state's "commercial activity," such as a breach of contract. To obtain jurisdiction, a U.S. court need only determine that the commercial activity had a *direct effect* in the United States, not that the violative act itself occurred in the United States.⁶⁶ In one example, two Panamanian corporations and a Swiss Bank brought a FSIA action in a U.S. court against Argentina for defaulting on a bond payment that was to be made to a bank account in New York.⁶⁷ The Supreme Court held that New York being the "place of performance" for the contract was sufficient to remove Argentina's sovereign immunity protections.⁶⁸

In contrast, private actors, including U.S. corporations, facing ATCA claims for violating the law of nations have been granted effective immunity by having their cases dismissed under the political question doctrine.⁶⁹ This is surprising for three reasons. First, private actors, unlike foreign sovereigns, have no historical entitlement to immunity for their actions and do not start with a presumption of immunity.⁷⁰ Second, unlike relatively less egregious commercial claims, violations of the law of nations are a narrow set of claims that encompass appalling conduct, such as war crimes, genocide, and slavery. One would expect violators of the law of nations to face greater accountability than those who breach a commercial contract. Finally, many ATCA defendants are either U.S. corporations or foreign corporations with bases of operation in the United States.⁷¹ Again, one would expect the United States to be equally, if not more, interested in regulating the behavior of companies operating within its own borders than regulating the behavior of a foreign sovereign.

Some may claim this is not a paradox at all by arguing that FSIA claims involve activity occurring in the United States or having a direct effect in the United States. ATCA claims, on the other hand, typically involve activity occurring abroad. One may assert that the United States should be more concerned with conduct directly affecting the United States than conduct occurring abroad. The underlying statutes providing the causes of action, however, make no such distinction. In granting U.S. courts jurisdiction over FSIA and ATCA claims, Congress gave no indication that valid claims involving foreign conduct should be pursued any less vigorously than those inside the United States. To the contrary, the United States has long aimed to

66. See 28 U.S.C. § 1605(a)(2) (2000).

67. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

68. *Id.* at 617-19.

69. See *supra* note 65.

70. See Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 FOREIGN AFF., Sept.-Oct. 2002, at 102, 107 ("corporations do not have sovereign immunity").

71. See, e.g., *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

regulate the conduct of its citizens abroad.⁷² The distinction between domestic and foreign activities is therefore a red herring and fails to explain the disparity in immunity provided to ATCA and FSIA defendants.

B. *Explaining the Paradox*

The effective immunity granted to ATCA defendants is a direct result of a policy change by the Bush Administration. Certain previous administrations have viewed the ATCA less favorably than others,⁷³ but the Bush Administration has taken a more active role in asking courts to dismiss ATCA claims than any past president. The strategy for requesting that a court dismiss a claim is to assert that a given ATCA suit will harm the foreign relations of the United States, as determined by the President, and that the court should dismiss the claim under the political question doctrine.⁷⁴ While past administrations have invoked the political question doctrine in cases that implicate treaties signed by the United States,⁷⁵ the Bush Administration has invoked the political question doctrine in ATCA cases where treaties are not implicated and only a general foreign policy interest exists.⁷⁶ Historically, courts have not dismissed such cases,⁷⁷ but surprisingly, in response to this unprecedented assertion of the political question doctrine, most courts have acquiesced with near-complete deference to the Executive Branch.⁷⁸ The result is that since 2001, multiple ATCA claims have been dismissed under the political question doctrine, providing effective immunity to the defendants in U.S. courts. This Section will summarize how the political question doctrine is invoked followed by examples of ATCA cases that reflect the recent policy change.

1. *Explanation of Political Question Doctrine*

The political question doctrine evokes substantial debate among scholars,⁷⁹ especially within the context of foreign affairs. Proponents of the

72. See, e.g., 18 U.S.C. § 2423(c) (Supp. 2006) (subjecting U.S. citizens who engage in illicit sexual conduct abroad to up to thirty years in prison); Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (2000) (prohibiting corporations and their employees from bribing foreign officials).

73. See Free, *supra* note 64, at 474-75.

74. The views of the Executive Branch are typically expressed through a Statement of Interest submitted by the U.S. State Department to the relevant court, pursuant to 28 U.S.C. §§ 516-517. See, e.g., *Sarei*, 221 F. Supp. 2d at 1181.

75. See, e.g., *Flatow v. Islamic Republic of Iran*, 305 F.3d 1249, 1251-52 & n.4 (D.C. Cir. 2002) (reviewing Statement of Interest filed in 1998 that referenced U.S. obligations under the Vienna Convention); *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 642 (4th Cir. 2000) (reviewing Statement of Interest filed in 1998 that references U.S. obligations under a Treaty of Friendship and General Relations between the United States and Spain).

76. See *infra* Section III.B.

77. See Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 457-63 (2002) (offering examples of cases where "U.S. citizens and foreigners forced the judiciary to consider one of the most controversial issues of our foreign and domestic policy").

78. See *infra* Section III.B.

79. ERWIN CHEMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.8.1, at 128 (2d ed. 2002) ("In many ways, the political question doctrine is the most confusing of the justiciability doctrines.").

doctrine find its foundation in *Marbury v. Madison*,⁸⁰ when Justice Marshall wrote:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. . . . The acts of such an officer, as an officer, can never be examinable by the courts.⁸¹

Since *Marbury*, numerous cases have contained references to the Executive Branch's unique role in foreign policy.⁸² In *Baker v. Carr*,⁸³ the Court identified six factors indicating whether a case involved a political question and stated that if any of the factors were "inextricable" from the case, the court should dismiss the case on political question grounds.⁸⁴ The last three factors are particularly relevant to ATCA claims: "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."⁸⁵

Scholars critical of courts dismissing ATCA claims under the political question doctrine assert three primary objections. First, the political question doctrine is "an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts."⁸⁶ Second, they argue that courts should defer on political question grounds only when reviewing actions that the Constitution commits to a political branch, such as the President's prerogative to recognize foreign governments.⁸⁷ Finally, in a

80. 5 U.S. (1 Cranch) 137 (1803).

81. *Id.* at 165-66.

82. See, e.g., *Baker v. Carr*, 369 U.S. 186, 211 (1962) (noting that cases involving foreign affairs "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature"); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (finding that the Executive Branch decisions regarding foreign affairs "are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry"); *United States v. Curtiss-Wright Exp. Corp.* 299 U.S. 304, 319-20 (1936) (noting the "exclusive power of the President as the sole organ of the federal government in the field of international relations"). But see THOMAS M. FRANCK, *POLITICAL QUESTIONS/ JUDICIAL ANSWERS* 19 (1992) ("It is particularly odd that several of the most redolent dicta seemingly making the political question doctrine mandatory in foreign-relations cases are not merely substantively irrelevant to the cases in which they originate but that those cases often repeal the application of the political-question doctrine to various other, domestic issues.").

83. 369 U.S. 186 (1962).

84. *Id.* at 217.

85. *Id.*

86. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L. J. 597, 622 (1976); see also John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1407 (1988) ("[I]t's not even clear that it is a 'doctrine': even in its heyday it was never more than a congeries of excuses for not deciding issues otherwise properly before the court.").

87. Michael E. Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135, 1156 (1970) ("The statement 'this is a political question and the Court will not upset the Executive's determination' is no different analytically from the statement 'this is a question arising under the commerce clause and the congressional enactment before us was within

related criticism, some scholars contend that ATCA claims should be spared from the political question doctrine since the doctrine does not justify judicial abstention in interpreting statutes, even if the statute implicates foreign policy.⁸⁸ In spite of these criticisms, U.S. courts, since 2001, have dismissed ATCA claims under the political question doctrine at the behest of the Executive Branch.

2. *The Political Question Doctrine in Practice*

Two factors are responsible for courts' dismissals of ATCA claims by invoking the political question doctrine. First, the Bush Administration has asserted the political question doctrine in ATCA cases when past administrations had not. Second, courts typically accept the Executive Branch's request for dismissal on political question grounds without further inquiry.

Prior to 2002, an ATCA case had never been dismissed on political question grounds.⁸⁹ In fact, prior to 2001,⁹⁰ no administration had ever requested that ATCA claims be dismissed on political question grounds.⁹¹ Certain administrations had even been supportive of ATCA claims. The Carter Administration filed a memorandum in the *Filartiga* case in response to a request from the Second Circuit. The memo, signed jointly by the State and Justice Departments, expressed clear support for the ATCA, stating that once a valid cause of action exists, "there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights."⁹² In *Kadic*, the Clinton Administration, when asked by the court, responded that the case raised no political questions,⁹³ even though the

the power of Congress to pass."); see also HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 219-220 (1990) (arguing that the Court has applied the political question doctrine in interpreting the Constitutional powers of political branches, not in abdicating its responsibility.).

88. See *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("[O]ne of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones [bearing on American relations with Japan]."); BETH STEPHENS & MICHAEL RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 143 (1996) ("[I]f the courts were to apply the political question doctrine to suits under § 1350 . . . the statute[] would be [a] nullit[y]; [its] very essence is that [it] concern[s] activities by officials in foreign countries."); see also KOH, *supra* note 87, at 220 (asserting that even proponents of a broader political question doctrine would concede that "the courts have a special duty to look closely when executive conduct in foreign affairs infringes directly upon individual rights").

89. See STEPHENS & RATNER, *supra* note 88, at 141 (noting that no ATCA suit had ever been dismissed under the political question doctrine); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1208-09 (C.D. Cal. 2002), *rev'd*, 456 F.3d 1069 (9th Cir. 2006) (dismissing ATCA claims based on political question doctrine).

90. *Sarei*, 221 F. Supp. 2d at 1181 (Statement of Interest filed on Nov. 5, 2001).

91. Free, *supra* note 64, at 475-76 ("The George W. Bush Administration has fundamentally shifted the executive position concerning § 1350 litigation, contending that general foreign policy concerns should prevent federal court adjudication of human rights cases.").

92. Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146, reprinted in David Cole et al., *Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in Trajano v. Marcos*, 12 HASTINGS INT'L & COMP. L. REV. 1, 34-47 (1988).

93. 70 F.3d 232, 250 (1995).

defendant was in the midst of negotiating an end to the region's civil war.⁹⁴ While the Reagan Administration opposed an ATCA claim brought against Ferdinand Marcos, it asserted that the ATCA's jurisdiction should be read more narrowly,⁹⁵ not that dismissal was justified on political question grounds.

Since 2001, however, the Bush Administration has submitted numerous Statements of Interest requesting that courts find ATCA claims non-justiciable under the political question doctrine. These requests may be divided into two basic categories: cases involving private actors as defendants, and cases involving public officials as defendants. The relevance of this distinction will be discussed further in Part V. With respect to private actors, the first case dismissing an ATCA claim on political question grounds was *Sarei v. Rio Tinto PLC*, involving the British mining company, Rio Tinto, which had processing plants in the United States and had opened a copper mine in the Bougainville region of Papua New Guinea.⁹⁶ The plaintiffs alleged that Rio Tinto conspired with the Papua New Guinea government to commit war crimes during a ten-year insurrection sparked by the mine's operations.⁹⁷ After denying the defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim,⁹⁸ the court turned to the Statement of Interest it had received in November 2001 from the Attorney General (on behalf of the State Department).⁹⁹ In the Statement, the Administration asserted "that continued adjudication of this lawsuit 'would risk a potentially serious adverse impact on the [Bougainville] peace process, and hence on the conduct of [United States] foreign relations.'"¹⁰⁰ In response, the plaintiffs introduced statements by negotiators to the Bougainville Peace Agreement which claimed that the litigation "has not affected, and will not disturb, the peace negotiations."¹⁰¹ The court made clear, however, that the Statement of Interest controlled: "[T]he court must accept the statement of foreign policy provided by the executive branch as conclusive of its view of that subject; it may not assess whether the policy articulated is wise or unwise, or whether it is based on misinformation or faulty reasoning."¹⁰² As a result, the court held "that all claims must be dismissed on the basis of the political question

94. Elaine Sciolino, *Sarajevo Pact: Diplomacy on a Roll*, N.Y. TIMES, Sept. 15, 1995, at A8 (reporting on Mr. Karadzic, among others, signing an agreement to lift the siege on Sarajevo approximately one month before the D.C. Circuit issued its opinion).

95. STEPHENS & RATNER, *supra* note 88, at 19 (citing Brief for United States as Amicus Curiae at 9-10, 15, 26-27, *Trajano v. Marcos*, Nos. 86-2448, 86-15039, 1989 WL 76894 (9th Cir. 1989) (mem.)).

96. 221 F. Supp. 2d 1116, 1121 (C.D. Cal. 2002), *rev'd*, 456 F.3d 1069 (9th Cir. 2006). While the Ninth Circuit recently reversed the lower court's dismissal on political question grounds, the court relied heavily on the fact that the State Department did not explicitly request that the court dismiss the case on political question grounds rather than holding that the political question doctrine was generally inapplicable. 456 F.3d at 1082-83.

97. *Id.* at 1127-29.

98. *Id.* at 1208. *But see id.* (granting the motion to dismiss with regard to environmental claims).

99. The Statement of Interest was submitted in response to a request from the court. *See id.* at 1180-81.

100. *Id.* at 1181 (citing the Statement of Interest) (alteration in original).

101. *Id.*

102. *Id.* at 1181-82.

doctrine.”¹⁰³ Under the court’s logic, the President would be able to extinguish almost any claim before a U.S. court by simply asserting that the claim would detrimentally affect U.S. foreign policy since the court apparently would be unable to question such an assertion.

In a more recent case against an American oil company, Occidental Petroleum, Colombian citizens alleged that Occidental provided financial assistance to the Colombian military in exchange for protection from left-wing guerrillas.¹⁰⁴ According to the plaintiffs, on one occasion, Occidental assisted the Colombian Army during a bombing raid of the town of Santo Domingo where they knowingly attacked civilians.¹⁰⁵ The citizens of Santo Domingo brought an ATCA claim against Occidental for war crimes, extrajudicial killing, torture, and crimes against humanity, and the court denied Occidental’s motion to dismiss the claims.¹⁰⁶ The State Department filed a Statement of Interest in which it “expressed its view that this litigation would interfere with its approach to encouraging the protection of human rights in Colombia.”¹⁰⁷ Applying the *Baker* test, the court held that “two [of the factors]—lack of respect for coordinate branches and adherence to a policy decision—apply. Thus the Court dismisses the instant action as raising a non-justiciable political question.”¹⁰⁸ As a consequence of finding the claim non-justiciable due to the Administration’s generalized foreign policy concerns, a U.S. corporation was effectively granted immunity after allegedly violating the law of nations.¹⁰⁹

The second class of cases involves defendants who are public officials. In a recent D.C. Circuit case, the court considered an ATCA suit brought against the Japanese Minister of Foreign Affairs by Chinese, Taiwanese, South Korean, and Filipina women who were subjected to sexual slavery and torture by Japan during World War II.¹¹⁰ The United States filed a Statement of Interest asking the court to find the claim non-justiciable since “judicial intrusion into the relations between Japan and other foreign governments would impinge upon the ability of the President to conduct the foreign relations of the United States.”¹¹¹ The court considered the political question doctrine and noted the peace treaties that had been signed by the countries in the region following the end of World War II. The court concluded that “adjudication by a domestic court not only ‘would undo’ a settled foreign

103. *Id.* at 1208-09. The court reached this conclusion after applying the *Baker* test. *See id.* at 1194-99; *see also supra* note 96.

104. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1168-69 (C.D. Cal. 2005).

105. *Id.* at 1168.

106. *Id.* at 1183.

107. *Id.* at 1194 (“Notably, the State Department apparently agrees with Plaintiffs that a wrong has occurred: ‘On January 3, 2003, the U.S. Embassy in Bogotá informed the Colombian government of the U.S. decision to suspend assistance to CACOM-1, the Colombian Air Force unit involved in the Santo Domingo incident.’”) (citing the Statement of Interest).

108. *Id.* at 1195.

109. In certain cases, the administration requested that the court dismiss the case on political question grounds, but the court instead dismissed the claims for lack of subject matter jurisdiction. *See, e.g., Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005); *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

110. *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005), *cert. denied*, 126 S.Ct. 1418 (2006).

111. *Id.* at 48.

policy of state-to-state negotiation with Japan, but also could disrupt Japan's 'delicate' relations with China and Korea, thereby creating 'serious implications for stability in the region.'"¹¹² While the court accepted the government's request for judicial abstention, it did so only after considering the persuasiveness of the government's argument.¹¹³ Another recent ATCA case brought against a public official involves Falun Gong members suing a former mayor of Beijing and a former Deputy Provincial Governor for torture and arbitrary detention.¹¹⁴ The Administration again submitted a Statement of Interest encouraging the court to find the case non-justiciable since U.S. courts sitting "'in judgment on the acts of foreign officials taken within their own countries pursuant to their government's policy. . . can serve to detract from, or interfere with, the Executive Branch's conduct of foreign policy.'"¹¹⁵ In the end, the court found an intermediate solution by granting a declaratory judgment in favor of the plaintiffs but refusing to grant damages or injunctive relief.¹¹⁶

One case stands out as a clear exception to the deference typically afforded to the Executive Branch's requests since the court refused to concede to the Administration's request to find an ATCA claim non-justiciable.¹¹⁷ In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, a district court reviewed an ATCA claim brought by Sudanese citizens claiming that Talisman, a Canadian energy company with a subsidiary in the United States, "collaborated with Sudan in 'ethnically cleansing' civilian populations surrounding oil concessions located in southern Sudan in order to facilitate oil exploration and extraction activities."¹¹⁸ The State Department submitted a Statement of Interest,¹¹⁹ in part stating that "'when the government in question protests that the U.S. proceeding interferes with the conduct of its foreign policy in pursuit of goals that the United States shares, we believe that considerations of international comity and judicial abstention may properly come into play.'"¹²⁰ Attached to the Statement of Interest was a letter from the Canadian government asking for the court to abstain.¹²¹ The court distinguished the Statement of Interest from those provided in earlier cases by noting that the Administration "has not advised this Court that the continuation of this lawsuit will adversely affect the Government's relations

112. *Id.* at 52 (quoting the Statement of Interest).

113. *Id.*

114. *Doe v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004).

115. *Id.* at 1271 (quoting the Statement of Interest).

116. The court did not invoke the political question doctrine but found the acts were sanctioned by the Chinese government and were subject to the Act of State doctrine, which precludes damages and injunctive relief. *See id.* at 1306, 1311.

117. The court in *Doe v. Liu Qi* noted that it had not found "a single case in which a court permitted a lawsuit to proceed in the face of an expression of concern such as that communicated by the State Department here." *Id.* at 1298.

118. 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882 (DLC), 2004 WL 1920978, at *2 (S.D.N.Y. Aug. 27, 2004) (mem.).

119. Although the court referred to the State Department's submission as a "State letter," to be consistent, I refer to it as a Statement of Interest.

120. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882 (DLC), 2005 WL 2082846, at *2 (S.D.N.Y. Aug. 30, 2005) (quoting the Statement of Interest).

121. *Id.* at *1.

with Canada or threaten the goal of achieving peace in Sudan.”¹²² Despite the request of Canada and the Department of State, the court retained jurisdiction, finding that “dismissal is only warranted . . . where the nexus between the lawsuit and that foreign policy is sufficiently apparent and the importance of the relevant foreign policy outweighs the public’s interest in vindicating the values advanced by the lawsuit.”¹²³

An examination of ATCA cases since *Filartiga* shows a dramatic change in the Executive Branch’s policy toward ATCA claims beginning in 2001. Courts have deferred to the Executive Branch’s requests to abstain from ATCA claims with varying degrees but most courts bow to the Executive Branch’s request with little examination of the asserted foreign policy interest. The next Part discusses how this variable application of the political question doctrine is similar to the application of the restrictive theory of sovereign immunity prior to the enactment of the FSIA.

IV. AN OLD PROBLEM RETURNS

As Part III established, the Bush Administration has recently introduced the political question doctrine into ATCA jurisprudence. This politicization of ATCA litigation has come in two forms. First, the Executive Branch faces political pressure from foreign countries and U.S. corporations to ask courts to abstain from hearing ATCA cases. Second, Executive Branch requests for judicial abstention reflect a political branch’s power over legal claims. These problems are not novel. Just thirty years ago, Congress faced the same concerns about the application of the restrictive theory of sovereign immunity prior to the enactment of the FSIA. As one FSIA drafter stated, a “primary objective” of the FSIA was: “to depoliticise sovereign immunity cases by transferring determinations of sovereign immunity from the State Department to the courts”¹²⁴ This Part asserts that the concerns of Congress prior to enacting the FSIA are analogous to the current concerns about the ATCA.

As discussed in Part II, in the period between 1952, when the State Department announced it would enforce the restrictive theory of sovereign immunity, and 1976, when Congress passed the FSIA, the Executive Branch instructed courts to grant or deny foreign sovereign immunity requests.¹²⁵ The State Department even set up a “quasi-judicial process through which foreign governments could petition for immunity.”¹²⁶ In advocating for the passage of the FSIA, the State and Justice Departments voiced two concerns related to the politicization of the determination of sovereign immunity. First, foreign governments were placing pressure on the State Department to request

122. *Id.* at *6.

123. *Id.* at *7. The court, however, later granted summary judgment to the defendants on the merits of the claim. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882 (DLC), 2006 WL 2602145 (S.D.N.Y. Sept. 12, 2006).

124. Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder’s View*, 35 INT’L & COMP. L.Q. 302, 304-05 (1986).

125. See *supra* notes 22-25.

126. See George Kahale, III, & Matias A. Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT’L L. 211, 215 (1979).

immunity on their behalf.¹²⁷ Second, the State Department was being placed in a position of deciding issues of law.¹²⁸ These concerns will be evaluated in turn.

A. *Pressure from Foreign Governments*

Eliminating the pressure that foreign governments exerted on the State Department was a key goal of the FSIA.¹²⁹ During Congressional hearings leading up to the passage of the FSIA, the Acting Legal Advisor to the State Department wrote that in the period from 1960 to 1972, the State Department had received forty-eight requests from foreign governments asking that the State Department request immunity on the country's behalf.¹³⁰ At a later hearing, the Legal Adviser at the State Department was surprisingly forthcoming when he testified that when faced with pressure from a foreign government, "we would hope that in most cases we would be able to resist this, but in practice I would have to say to you in candor that the State Department, being a political institution, has not always been able to resist these pressures."¹³¹ Evidence of political pressure was also apparent from the inconsistent application of the restrictive theory of immunity by the State Department.¹³²

Although the current Administration has not complained of foreign countries exerting pressure on the State Department over ATCA litigation, there are indications that such pressure exists. In two ATCA cases previously discussed, *Talisman Energy, Inc.* and *Liu Qi*, the foreign governments filed Statements of Interest along with the United States. In *Talisman Energy, Inc.*, the Canadian government filed a Statement of Interest on behalf of an energy company headquartered in Canada.¹³³ The court noticed that the Statement of Interest submitted by the State Department was not as strongly worded as in other cases and did not take a position on the merits of the litigation.¹³⁴ While

127. See *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. 34 (1973) [hereinafter 1973 *Hearings*] (Letter from Attorney General Richard G. Kleindienst and Secretary of State William P. Rogers to the Speaker of the House of Representatives (Jan. 16, 1973) ("The transfer of this function to the courts will also free the Department [of State] from pressures by foreign states to suggest immunity and from any adverse consequences resulting from the unwillingness of the Department to suggest immunity.")).

128. *Id.* ("[I]t is not satisfactory that a department, acting through administrative procedures, should in the generality of cases determine whether the plaintiff will or will not be permitted to pursue his cause of action.").

129. See H.R. REP. NO. 94-1487, at 7 (1976) ("Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination.").

130. 1973 *Hearings*, *supra* note 127, at 49 (Letter from Charles N. Brower to Congressman Donohue (July 24, 1973)).

131. 1976 *Hearings*, *supra* note 27, at 35 (Testimony of Monroe Leigh) (stating further that "this consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see established").

132. See *Jet Line Servs., Inc. v. M/V Marsa El Hariga*, 462 F. Supp. 1165, 1169 (D. Md. 1978) (citing to pre-FSIA cases inconsistent with the restrictive theory of immunity); Kahale & Vega, *supra* note 126, at 216 & n.30.

133. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882 (DLC), 2005 WL 2082846, at *2 (S.D.N.Y. Aug. 30, 2005).

134. See *id.* at *2, *6-7.

the State Department may have preferred to not take a position at all, the Department may have felt compelled to submit a half-hearted Statement of Interest given the United States's close relationship with Canada. Similarly, it is doubtful that the State Department could ignore the forceful Statement of Interest China submitted in a case brought against Chinese public officials. In *Liu Qi*, the court noted that China's Statement of Interest "concludes with a reiteration of the detrimental effects of adjudication on the common interests of the two nations."¹³⁵ In a third case, *Doe v. Exxon Mobile Corp.*, the Department of State attached a letter from the Indonesian ambassador to the United States with its Statement of Interest.¹³⁶ The State Department made clear that questioning the conduct of Indonesia's military (even though they were not named defendants in the suit) "would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism."¹³⁷ Given that the defendant-countries in these three cases voiced strong opposition to U.S. courts hearing the claims, it seems likely that the pressure exerted on the State Department by foreign governments in ATCA suits is comparable to the pressure faced prior to the FSIA.

Compounding the pressure exerted by foreign governments, the U.S. government must also endure strong lobbying from corporations facing liability from ATCA claims. More generally, the U.S. business community has long been an opponent of the ATCA. The opposition has been led by the National Foreign Trade Council (NFTC), the U.S. Chamber of Commerce, the U.S. Council of International Business, and the International Chamber of Commerce.¹³⁸ Some opponents in the corporate community have used rather alarmist rhetoric to galvanize opposition to the ATCA. In 2002, the Vice President of International Policy and Programs at the U.S. Chamber of Commerce wrote an article asking rhetorically: "Did you know that, under current U.S. law, foreigners could sue your company in U.S. courts—if you simply did business, paid taxes and complied with the laws of a foreign country in which those foreigners allege that an atrocity occurred?"¹³⁹ Another book predicted that ATCA "litigation could diminish US merchandise trade (imports plus exports) by \$50 to \$60 billion with the target countries."¹⁴⁰ In response to the ATCA, a variety of strategies have emerged to help corporations avoid liability under the ATCA. These include lobbying the President and Congress to amend the ATCA to make it solely jurisdictional,¹⁴¹ encouraging defendants to consider a political question doctrine defense when

135. *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1271 (N.D. Cal. 2004).

136. 393 F. Supp. 2d 20, 22 (D.D.C. 2005).

137. *Id.*

138. See Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1, 7 (2004).

139. Howard, *supra* note 55. Of course, no such claim has ever been upheld in a U.S. court.

140. HUFBAUER & MITROKOSTAS, *supra* note 54, at 38. The authors identified "target countries" based on the country's human rights record and political and economic freedom. See *id.* at 13-36.

141. See Daniel T. Griswold, USA Engage, *Abuse of 18th Century Law Threatens U.S. Economic and Security Interests* (Jan. 25, 2003), http://www.usaengage.org/legislative/2003/alientort/cato_griswold.html.

faced with an ATCA suit,¹⁴² and requesting a “generic letter from the executive branch asserting that any judicial involvement in such disputes would interfere with U.S. foreign policy-making.”¹⁴³ All of these strategies involve pressuring the Executive Branch to help corporate defendants achieve a favorable outcome. Given the strong influence business leaders have over U.S. foreign policy,¹⁴⁴ this lobbying effort may prove even more powerful than that engaged in by foreign countries.

B. *Political Branch Answering Legal Questions*

Another aspect of depoliticizing restrictive immunity determinations was to limit the ability of the Executive Branch to make legal determinations. As one State Department legal adviser stated, the FSIA “would eliminate our peculiar and, in my view, outdated practice of having a political institution, namely, the State Department, decide many of these questions of law.”¹⁴⁵ In passing the FSIA, Congress stated that “a principal purpose” of the bill was to “assur[e] litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.”¹⁴⁶ This comports with a fundamental tenet of our judicial system that political actors should not be making legal determinations.¹⁴⁷

While most Executive Branch intervention in ATCA cases has focused on foreign policy concerns and not legal determinations,¹⁴⁸ there are instances where the Executive Branch has attempted to thrust a legal determination on the court. In the case brought by Falun Gong followers against Chinese officials, the court faced the question of whether the acts of the officials constituted official state acts, thereby triggering the Act of State doctrine.¹⁴⁹ The United States, in its Statement of Interest, attempted to provide an answer when it warned that “U.S. courts should be cautious when asked to sit in judgment on the acts of foreign officials taken within their own countries pursuant to their government's policy.”¹⁵⁰ The court agreed, concluding that the Chinese government's “alleged repression of the Falun Gong movement and violation of the international human rights of Falun Gong practitioners

142. See Richard T. Marooney & George S. Branch, *Corporate Liability Under the Alien Tort Claims Act: United States Court Jurisdiction over Torts*, 12 CURRENTS: INT'L TRADE L.J. 3, 11 (2003).

143. Kenny Bruno, *De-Globalizing Justice: The Corporate Campaign To Strip Foreign Victims of Corporate-Induced Human Rights Violations of the Right To Sue in U.S. Courts*, MULTINAT'L MONITOR, Mar. 1, 2003, at 13.

144. See Lawrence R. Jacobs & Benjamin I. Page, *Who Influences U.S. Foreign Policy?*, 99 AM. POL. SCI. REV. 107, 120 (2005) (concluding after an empirical analysis that “internationally oriented business leaders exercise strong, consistent, and perhaps lopsided influence on the makers of U.S. foreign policy”).

145. 1976 Hearings, *supra* note 27, at 25.

146. H.R. REP. NO. 94-1487, at 7 (1976); S. REP. NO. 94-1310, at 9 (1976).

147. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is, emphatically, the province and duty of the judicial department, to say what the law is.”)

148. Cf. *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004) (discussing the distinction between the Executive Branch intervening on legal grounds versus foreign policy grounds in the FSIA context). This assumes, of course, that the asserted foreign policy interests are not pretextual.

149. See *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1292-95 (N.D. Cal. 2004). If the court held that the actions fell under the Act of State doctrine, they would be entitled to considerably greater deference. See generally *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

150. *Liu Qi*, 349 F. Supp. 2d at 1271 (quoting the Statement of Interest).

appears to be consistent with and pursuant to the unofficial policy of the national government.”¹⁵¹ The question of whether a public official’s act constituted an official state act is a legal question analogous to querying whether a foreign sovereign’s conduct was non-commercial in nature and thus subject to immunity under the pre-FSIA standard.

V. RESOLVING THE PROBLEM

A number of scholars have realized the consequences of overly-broad deference to the Executive Branch in ATCA litigation. In turn, many have proposed solutions for how to limit deference to the Executive Branch in ATCA litigation.¹⁵² This Part will address the three main categories of solutions that have been proposed to date and address why each is unlikely to succeed. By drawing a comparison to the FSIA, I conclude that legislation is the strategy most likely to succeed in limiting overly-broad deference to the Executive Branch. Furthermore, the prospect of passing legislation that limits deference to the Executive Branch is plausible.

A. *Previously Voiced Options for Limiting Deference to the Executive*

Scholars who have criticized the degree to which courts defer to the Executive Branch in ATCA litigation have focused on three options for resolving the problem.¹⁵³ First, they argue that courts should stop giving as much deference to the Executive Branch since this judge-created deference is not appropriate in ATCA claims. Second, they argue that multinational corporations (MNCs) should self-police their behavior in order to limit the motivation for ATCA litigation. Finally, some scholars propose an international regulatory system to hold MNCs responsible for violating the law of nations. Each of these solutions is unlikely to succeed for reasons discussed in greater detail below.

1. *Stop Deferring*

Multiple scholars have argued that globalization has changed the way that foreign states interact with one another and that strong deference toward the Executive Branch with regard to cases implicating foreign affairs is no longer appropriate. One prominent foreign relations law scholar notes that “[i]ncreasing global interdependence and the dissolution between public and private international law mean that almost any issue with a foreign element can now be viewed to ‘affect’ foreign affairs. . . . As the categories of ‘foreign relations’ . . . expand, the justification for a judicial foreign relations effects

151. *Id.* at 1293.

152. It is important to note that I am not proposing eliminating deference to the Executive Branch or even the political question doctrine. This Note only asserts that courts’ deference to the Executive Branch should be checked by Congress when it becomes too broad, as is the case with respect to the ATCA.

153. Since most individual ATCA defendants are public officials for whom immunity from suit is relatively less troublesome, *see infra* Part V (discussing the distinction between public and private actors), scholars have primarily focused on restricting Executive Branch interference with claims against multinational corporations.

test diminishes.”¹⁵⁴ Another scholar argues that, as a consequence of increasing globalization, individual rights should receive greater deference than concerns about foreign affairs.¹⁵⁵ An additional argument concedes that deference to the Executive Branch is still owed when, for example, “a suit would directly impede national security efforts by the executive during wartime” but that otherwise, “a court should carefully and independently examine the assertions of the executive.”¹⁵⁶

While these arguments make compelling theoretical assertions, it seems unlikely that courts will be any less deferential in the near future. In a recent FSIA case, the Supreme Court noted that “should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference”¹⁵⁷ Given the long history of deference to the Executive Branch in the realm of foreign affairs,¹⁵⁸ hoping that courts will suddenly change the degree of deference afforded in ATCA cases seems futile.

2. *Self-Policing*

Another potential solution is to have corporations self-police their behavior to prevent actions that give rise to ATCA claims.¹⁵⁹ Numerous efforts have been made to create codes of conduct for multinational corporations. These efforts began in the 1970s with the drafting of the United Nations Code of Conduct for Transnational Corporations, which was never passed.¹⁶⁰ Since then, individuals have also attempted to formulate corporate codes of conduct. The most prominent of these was the Sullivan Principles, a code of conduct prohibiting discrimination by businesses operating in apartheid South Africa.¹⁶¹ Corporations voluntarily pledged compliance to the Sullivan Principles and reported on their efforts.¹⁶² Congress has also attempted to intervene, proposing legislation (none of which passed) containing voluntary corporate codes of conduct for MNCs operating in the

154. Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1413 (1999).

155. See Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 653 (2002).

156. Lorelle Londis, Comment, *The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141, 196 (2005).

157. Republic of Austria v. Altmann, 541 U.S. 677, 702 (2004) (citation omitted).

158. See United States v. Curtiss-Wright Exp. Co., 299 U.S. 304, 320 (1936) (describing the “delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress”).

159. See Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 78 n.187 (2002) (“The concept of voluntary codes of conduct rests upon a historical tradition of corporate self-regulation, tracing back to medieval Europe, through to the beginnings of the U.S. industrial economy.”).

160. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Transnational Corps., *Development and International Economic Co-operation: Transnational Corporations*, 2d Sess., Agenda Item 7(d), at 1, U.N. Doc. E/1990/94 (June 12, 1990).

161. The [Sullivan] Statement of Principles (Fourth Amplification), Nov. 8, 1984, *reprinted in* 24 I.L.M. 1496 (1985).

162. See Stephens, *supra* note 159, at 79.

former Soviet Union and China.¹⁶³ More recently, the United Nations Sub-Commission on the Promotion and Protection of Human Rights approved the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights."¹⁶⁴ These Norms "represent a landmark step in holding businesses accountable for their human rights abuses . . ."¹⁶⁵ In part, these Norms are notable because they are non-voluntary—they call on NGOs to report businesses that are not meeting the minimum standards of the Norms.¹⁶⁶

All of these corporate codes of conduct suffer from a lack of enforceability. Even the most recent Norms require other international bodies,¹⁶⁷ or states¹⁶⁸ to enforce their principles. The architect of the Sullivan Principles later conceded that they were ineffective, "largely because of the lack of enforcement mechanisms."¹⁶⁹ As shareholders pay more attention to human rights abuses perpetrated by MNCs, there is some hope that purely economic incentives, such as shareholder retention, will drive MNCs to self-enforce these codes of conduct.¹⁷⁰ The recent allegations of abuses in Myanmar and Colombia, however,¹⁷¹ suggest that these economic incentives are insufficient to prevent egregious human rights abuses.¹⁷² Without stronger enforceability mechanisms, the prospect that ATCA litigation will become obsolete in the face of improved conduct of MNCs seems equally unlikely as courts limiting their deference.

163. See Slepak Principles Act, S. 1018, 101st Cong. (1989) (including principles for business operating in the former Soviet Union to protect Soviet workers). The Slepak Principles Act was based on a code of conduct developed by a Soviet émigré, Vladimir Slepak. See Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 170 & n.95 (1997); see also H.R. 3489, 102d Cong. (1991) (proposed code of conduct for businesses operating in China).

164. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *Norms*].

165. David Weissbrodt & Muria Kruger, *Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 901 (2003).

166. See *id.* at 913; see also *Norms*, *supra* note 164, at para. 16 (indicating that businesses will be subject to periodic monitoring that is independent and transparent, and includes input from relevant stakeholders).

167. See Weissbrodt & Kruger, *supra* note 165, at 918 (describing how the ILO, OECD, or World Bank may adopt the Norms to develop standards on which to measure the conduct of MNCs).

168. *Id.* at 922 ("[T]he Norms can strengthen the will of governments to insist that businesses avoid human rights abuses.").

169. See Stephens, *supra* note 159, at 79 & n.191.

170. See Frey, *supra* note 163, at 159 & n.28 (1997) (discussing how shareholder dissatisfaction forced Pepsico to sell a plant in Burma due to protests about its human rights record); see also Weissbrodt & Kruger, *supra* note 165, at 902 ("There is also increasing reason to believe that greater respect for human rights by companies leads to greater sustainability in emerging markets and better business performance.") (citations omitted); Simon Chesterman, *Oil and Water: Regulating the Behavior of Multinational Corporations Through Law*, 36 N.Y.U. J. INT'L L. & POL. 307, 328 (2004) (equating the codes of conduct to marketing tools).

171. See generally *supra* Section III.B.

172. See, e.g., John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 496-98 (2000) (describing how Unocal's alleged abuses in Burma violated its own code of conduct).

3. *International Organization Enforcement*

Responding to the lack of enforceability of corporate codes of conduct, some human rights advocates have championed for enforcement through international treaties.¹⁷³ One possibility is that ATCA-like claims may be brought in the International Criminal Court (ICC),¹⁷⁴ but the drafting history of the Rome Statute enacting the ICC suggests that the ICC does not have jurisdiction over corporations.¹⁷⁵ Furthermore, the United States has refused to sign a variety of international conventions that would have required the United States to hold MNCs accountable for human rights violations abroad.¹⁷⁶ This lack of enthusiasm for international regulation spans both Democratic and Republican administrations. For these reasons, the likelihood that the United States would enter into a treaty that would subject U.S. MNCs to an international tribunal or to internationally established causes of action is extremely low.¹⁷⁷

B. *Legislative Solution*

This Note proposes that the most effective solution to the overly-broad deference afforded to the Executive Branch is a legislative one. This conclusion is reached primarily by looking to the pre-FSIA history to see how political branches responded when they believed too much authority rested with the Executive Branch in deciding which cases should be dismissed under the restrictive theory of sovereign immunity. The political branches did not expect that the Executive Branch would spontaneously decide to apply the restrictive theory of sovereign immunity more objectively, nor did they rely on foreign sovereigns to police their own conduct, nor did they rely on an international body to adjudicate and enforce claims against a foreign sovereign. Rather, Congress and the Executive Branch acted in concert to place the authority to adjudicate claims authorized by Congress squarely in the Judicial Branch. By doing so, they reduced the pressure that foreign governments could place on the Executive Branch, thereby reducing the

173. See generally Borchien Lai, Comment, *The Alien Tort Claims Act: Temporary Stopgap Measure or Permanent Remedy?*, 26 NW. J. INT'L L. & BUS. 139, 142 (2005) ("The leaders of the world and human rights advocates must work together to craft a permanent solution, such as an international tribunal, instead of placing all their eggs in this porous, fragile basket of the ATCA."); Glen Kelley, Note, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 515, 517-18 & n.201 (2001).

174. See Maurice Nyberg, *At Risk from Complicity with Crime*, FIN. TIMES, July 28, 1998, at 15 (warning "[c]ommercial lawyers" that the ICC treaty "could create international criminal liability for employers, officers and directors of corporations.").

175. Chesterman, *supra* note 170, at 327-28 (discussing how the drafters specifically declined to include liability for "legal persons," suggesting that corporate liability is unlikely).

176. See Lena Ayoub, *Nike Just Does It—And Why the United States Shouldn't: The United States' International Obligation To Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 422-25 (1999) (enumerating the international conventions pertaining to human rights violations to which the United States has failed to become a signatory).

177. See RAYMOND J. WALDMANN, *REGULATING BUSINESS THROUGH CODES OF CONDUCT* 6 (1980) ("It is generally agreed that there is little likelihood that MNCs will be subject to the authority of a comprehensive international regulatory organization in the near future.")

foreign policy implications of the State Department's decisions,¹⁷⁸ and they further ensured that litigants whose claims were entitled to a day in court received such an opportunity.¹⁷⁹ A similar intervention could take place with respect to the ATCA. By detailing when ATCA liability should exist, Congress will remove pressure from the Executive Branch as to the foreign policy implications of ATCA litigation and will encourage courts to make legal determinations as to when ATCA litigation should proceed rather than defer to a decision by the Executive Branch.

A legislative solution is also preferable because it retains questions pertaining to foreign affairs in a political branch. While deference in foreign affairs often focuses on the Executive Branch,¹⁸⁰ Congress also has an important role.¹⁸¹ As one scholar notes, Congress "plays a largely reactive role in the conduct of U.S. foreign relations, exercising the most influence when the qualities of legislation (public deliberation, relative immutability, comprehensiveness, and democratic legitimacy) are most appropriate."¹⁸² The solution for the problem of overly-broad deference would ideally be a comprehensive solution demanding significant deliberation and expertise in foreign affairs, which the Judicial Branch lacks.

While the prospect for legislation sympathetic to ATCA claims is dim under the Bush Administration, future intervention is possible. This too is similar to the FSIA, which was passed at the request of the Executive Branch and would not have been passed without the approval of a sympathetic Congress. Congress and the President have repeatedly shown their willingness to pass and sign legislation that places liability on corporate behavior outside U.S. borders. The most prominent of these is the Foreign Corrupt Practices Act (FCPA), passed in 1977, and amended most recently in 1998, which prohibits corporations and their employees from bribing foreign officials.¹⁸³ The FCPA is not dissimilar from the ATCA in that they both are aimed at stopping behavior that harms the image of the United States abroad.¹⁸⁴ Furthermore, in order to pass the FCPA, the Congress and the President likely had to overcome opposition from the business community. Congress has also

178. See H.R. REP. NO. 94-1487, at 7 (1976) ("A principal purpose of this bill [establishing FSIA] is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations . . .").

179. Following the passage of the FSIA, it seems that the Executive Branch submits Statements of Interest only when the case implicates U.S. treaty obligations. See, e.g., *Flatow v. Islamic Republic of Iran*, 305 F.3d 1249 (D.C. Cir. 2002); *Anderman v. Fed. Rep. of Austria*, 256 F. Supp. 2d 1098 (C.D. Cal. 2003) (executive agreement).

180. See *supra* note 82.

181. See, e.g., the FSIA, Pub. L. No. 94-583, 90 Stat. 2892 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11) (2000).

182. Goldsmith, *supra* note 154, at 1398.

183. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (1977), amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, tit. V, § 5003(c), 102 Stat. 1107, 1419 (1988) (codified at 15 U.S.C. § 78dd-2).

184. See S. REP. NO. 95-114, at 3 (1977) (describing the need for the FCPA, the Senate Report declared that "[t]he image of American democracy abroad has been tarnished."); see also WALLACE L. TIMMENY & ROBERT B. VON MEHREN, *FOREIGN CORRUPT PRACTICES ACT: THREE YEARS AFTER PASSAGE* 13 (1981) ("The legislative history reflects that a primary concern of Congress was the damage that such payments has [sic] caused to American relations with foreign nations in critical areas of the world."); S. REP. NO. 102-249 (1991) (Conf. Rep.) (praising the ATCA for providing a cause of action against nearly universally condemned offenses).

been willing to pass legislation to protect human rights abroad, for example by passing the Torture Victim Protection Act in 1994.¹⁸⁵ In addition, in 2005, Senator Feinstein proposed amending the ATCA,¹⁸⁶ but ended up withdrawing her bill from consideration just one week after she offered it, due in part to strong opposition from human rights groups.¹⁸⁷ History shows that Congress has the ability and interest to pass legislation holding individuals and corporations accountable for their actions overseas. Congress is also well aware of the ATCA and has recently tried to amend it. Therefore, if a President and Congress agree that articulating ATCA claims more clearly will reduce the foreign policy implications of the Act and dissuade the State Department from requesting effective immunity for violators of the law of nations, it seems feasible that Congress could enact a FSIA-like solution for the ATCA.

VI. POSSIBLE STATUTORY PROVISIONS

Determining what provisions should be included in any legislative solution requires analysis beyond the scope of this Note. This Part suggests two areas for potential legislation solely to provide a more concrete example of how a legislative solution may reduce the broad deference currently granted to the Executive Branch. First, Congress could differentiate between ATCA defendants who are private actors versus public officials. Second, Congress could explicitly state when the concerns of the Executive Branch regarding U.S. foreign policy are most relevant.

1. *Public/Private Distinction*

One of the most troubling consequences of Executive Branch deference that Congress could remedy is the effective immunity granted to private actors. While holding foreign public officials liable in U.S. courts invites obvious foreign policy concerns, it is unclear why private actors, often acting in a commercial capacity, should have immunity for violations of the law of nations.¹⁸⁸ Even if the offending corporation, for example, worked closely with a foreign government, Congress could decide that a condition of operating in the United States (sufficient to constitute minimum contacts to obtain personal jurisdiction¹⁸⁹), is that companies will be held accountable for violating the law of nations. Such a condition would not be unreasonable, especially when compared to the prohibition against bribing foreign officials.¹⁹⁰ As the district court in *Talisman Energy, Inc.* eloquently stated:

185. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (Supp. V 1993)) (subjecting individuals to civil damages for the torture or extrajudicial killing of any individual, U.S. citizen or alien, under the actual or apparent authority, or color of law, of any foreign nation).

186. See S. 1874, 109th Cong. (2005), 151 CONG. REC. S11423, 11433 (2005).

187. See Eliza Strickland, *Was DiFi Batting for Big Oil?*, EAST BAY EXPRESS (Nov. 9, 2005) (describing the opposition). The content of the bill will be described in further detail in Part VI, *infra*.

188. See *supra* Section III.A.

189. See *Asahi Metal Industry Co. v. Super. Ct.*, 480 U.S. 102, 103 (1987) (discussing what constitutes minimum contacts).

190. See 15 U.S.C. § 78dd-2 (2000) (codification of the FCPA).

[T]he United States and the international community retain a compelling interest in the application of the international law proscribing atrocities such as genocide and crimes against humanity. To the extent that . . . Talisman's arguments request this Court in its discretion to decline to exercise its jurisdiction over past events in order to avoid conflict with future Canadian foreign policy, the seriousness of the alleged past events counsel in favor of exercising jurisdiction.¹⁹¹

Congress may decide that the Executive Branch's opinion is more relevant when foreign public officials are sued under the ATCA. Concerns about having U.S. officials being held liable in foreign countries as well as the relationship with the country of the allegedly offending officials suggests a greater chance that U.S. foreign policy interests may be closely related to the case. Congress may therefore grant a more deferential standard for determining when a public official's acts constitute official acts of state and therefore deserve immunity under the Act of State doctrine. Congress may decide, on the other hand, that any individual who violates the law of nations, regardless of whether he or she is a public official, should be held accountable. In 1964, Congress enacted analogous legislation in response to a Supreme Court case where the Court refused, under the Act of State Doctrine, to consider the expropriation of land within Cuba by the Cuban government.¹⁹² In response, Congress passed the Hickenlooper Amendment, which stated that courts should not consider an expropriation by a foreign state an official act under the Act of State doctrine.¹⁹³ Congress could pass similar legislation declaring that violations of the law of nations, including acts committed by foreign public officials, cannot be protected under the Act of State doctrine.

2. *Executive Deference*

Congress may also attempt to limit Executive deference by explicitly stating when courts should consider the input of the Executive Branch. Certain circumstances are likely to implicate foreign affairs, and the input of the Executive Branch in such circumstances may be more helpful for the court. For example, courts have historically deferred to the Executive Branch when the State Department reports that a certain holding by the court would violate our international treaty obligations.¹⁹⁴ In one case previously discussed, the court dismissed a claim since it would seem to infringe on a treaty signed between two foreign countries (Japan and South Korea) following World War II.¹⁹⁵ Even when treaty obligations are not involved, other international obligations could warrant Executive Branch input.¹⁹⁶ Finally, as discussed

191. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882 (DLC), 2004 WL 1920978, at *7 (S.D.N.Y. Aug. 27, 2004).

192. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

193. *See Hickenlooper Amendment*, Pub. L. No. 88-633, 78 Stat. 1009, 1013 (1964) (codified at 22 U.S.C. § 2370 (2000)) [hereinafter Hickenlooper Amendment].

194. *See supra* note 75.

195. *See Hwang Geum Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1418 (2006).

196. *Cf. Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1231-32 (11th Cir. 2004) (discussing obligations of the Foundation Agreement between Germany and the United States under which Germany set up a fund to compensate victims of the Nazi regime in exchange for having all claims channeled through the Foundation).

above, Congress may decide that special deference is appropriate when the claim involves a public official of a foreign government.

Senator Feinstein's 2005 proposed bill to reform the ATCA instructed courts on when to consider Executive Branch input. Unfortunately, the bill instructed courts to grant the Executive Branch the broad deference this Note militates against: "No court . . . shall proceed in considering the merits of a claim under [ATCA] 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."¹⁹⁷ The proposed bill, however, indicates that Congress is willing to instruct courts as to when they should consider Executive Branch input.¹⁹⁸ An added benefit of restricting the role of the Executive Branch, as the drafters of the FSIA realized, is that as authority is vested in a non-political branch (i.e. the Judicial Branch), the foreign policy implications of immunity decisions are actually reduced.¹⁹⁹ Therefore, excluding the State Department from certain aspects of ATCA claims mitigates the damage to U.S. foreign policy interests caused by making decisions adverse to foreign parties. In the case of the ATCA, Congress should exercise its authority to limit the broad deference currently granted to the Executive Branch.²⁰⁰

VII. CONCLUSION

The Executive Branch will continue to play a critical role in U.S. foreign affairs. At times, it may be appropriate for the State Department to intervene to request that a court dismiss an ATCA claim when proceeding would violate U.S. treaty obligations or seriously harm U.S. foreign policy interests. When Congress, however, through a deliberative process codifies a cause of action, including those that apply extraterritorially, courts should give pause before immediately dismissing a potentially valid claim under the political question doctrine. Should the courts grant too much deference to the Executive Branch, as this Note has demonstrated occurred with respect to the ATCA, Congress should respond. The problem may be a structural one in that the Executive Branch feels compelled to intervene based on political pressures from foreign governments or domestic corporations and, as in the case of the FSIA, a willing Executive Branch would gladly transfer the authority to make such determinations over to the courts. Thoughtful Congressional intervention will help courts apply the ATCA more consistently across defendants and will help ensure that victims of violations of the law of nations will receive the due process they deserve.

197. S. 1874, 109th Cong. § 1350(e) (2005).

198. Cf. Hickenlooper Amendment, *supra* note 193. Note, however, that the Hickenlooper Amendment allows the court to apply the Act of State doctrine if the President determines that application of the doctrine is "required in that particular case by the foreign policy interests of the United States." *Id.*

199. See *supra* note 178.

200. Should Congress elect to act with regard to ATCA, there are a number of other aspects of the ATCA unrelated to Executive Branch deference that scholars believe Congress should clarify. See, e.g., Christensen, *supra* note 6, at 1257-65 (discussing the need to better define the standards for aiding and abetting under the ATCA).