Politics And Legal Regulation In The International Business Environment: An FDI Case Study Of Alstom, S.A., In Israel

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I. INTRODUCTION

With the economic instability roiling through the European Union, companies located in the Euro Zone will be challenged truly to “think outside of the box” in structuring international growth from a now suddenly unstable home base. There is evidence that looking for investment opportunities outside the Euro Zone will continue to be a very propitious source of

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attractive economic returns. In turn, we who teach courses in International Business Transactions (IBT) will be challenged to help our students learn to lead, rather than follow, their future clients to do so as well.

Globalization’s realities and permanency became established in the American consciousness during the 1990s and the first decade of the 21st century. Concomitantly, American law students have been enrolling in IBT courses in increasing numbers. Since the nascent stirrings of an IBT specialization in the legal academy during the 1960s to 1980s, the

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[T]he EU is the world’s largest exporter of international investments, and the world’s leading recipient of foreign direct investment (FDI). By 2010, the EU’s outward FDI totaled US$ 3.88 trillion, down from US$ 9.15 trillion, while its inward FDI amounted to US$ 3.6 trillion, down from US$ 5.36 trillion. Over the last three years, the EU accounted for approximately 30% of global FDI flows.: Julien Chaisse, Promises And Pitfalls Of The European Union Policy On Foreign Investment—How Will The New EU Competence On FDI Affect The Emerging Global Regime? Journal of International Economic Law, Volume 15, Issue 1, pp. 51-84, at 52 (footnotes omitted), http://jiel.oxfordjournals.org/content/15/1/51. For a view of how this has been reflected

5 As we do so, we must be mindful not only of skills and doctrine, but also of ethics and professionalism issues that are peculiar to a law practice that includes IBT. See William F. Fox, Professional Responsibility And International Business Transactions: Five Tough Questions, SN056 ALI-ABA 515 (2008)( American Law Institute - American Bar Association Continuing Legal Education ALI-ABA Course of Study May 8 - 10, 2008); Elizabeth Spahn, International Bribery: The Moral Imperialism Critiques, 18 Minn. J. Int’l L. 155 (2009).


7 See, e.g., Samuel Robert Mandelbaum, The Legacy Of W. Gary Vause To International Legal Education And Practice In Florida, 33 Stetson L. Rev. 43, 47-48 (2003)( “Courses in international business transactions are drawing unprecedented numbers of students in colleges and universities, and providing continuing education for established business and professional persons who wish to expand their involvement in the global marketplace.”)(quoting GARY VAUSE, INTRODUCTION TO INTERNATIONAL BUSINESS TRANSACTIONS 1 (BookWorld Publications 1997))

8 The earliest mention in published American legal scholarship is Professor Donald T. Wilson’s remarks at the 1985 American Society of International Law annual meetings. See Judith R. Hall, Reporter, Academic Workshop: A Common Core For Courses In International Economic Law?, 79 Am. Soc’y Int’l L. Proc. 336, 336-337 (19875)(Remarks of the Chairman, Donald T. Wilson (“one may generalize to the point of saying that international
challenges that face students and teachers of IBT have grown as the complexity of globalization has unfolded. As Professor Dunning reminded us in his groundbreaking paper written while a member of the law faculty at the University of Reading, the study of IBT requires an interdisciplinary approach. Political and legal considerations are among the disciplines for which IBT requires us to account. Thus, law students who wish to provide advice to future clients on IBT matters should take course work not only in IBT, but also in International Civil Litigation.

Thus, time is ripe for IBT coursework to re-consider how E.U.-based multi-nationals might modify their decision-making templates for identifying and undertaking opportunities for trade involves the movement of goods, money, people, services, and information across national borders. The study of the prescriptive rules bearing on those movements is the stuff of the law of international business transactions.”

Richard B. Bilder & Valerie Epps, Book Review & Note, Teaching International Law In The 1990s. By John King Gamble. Washington, D.C.; The American Society Of International Law, 1992, 87 Am. J. Int’l L. 686, 688 (1993) (“In about fifteen law schools, more than two-thirds of the students are currently enrolled in the basic introductory course, the international business transactions course, or both.”)


12Jean J. Boddewyn & Thomas L. Brewer, International-Business Political Behavior: New Theoretical Directions, 19 Academy of Mgt Rev 119 (1994) (“Research in international business (IB) is much more infused with a consideration of political factors than its domestic counterpart. Authors of IB studies have constantly mentioned and even emphasized government as a variable, rather than a constant or given, because international firms (exporters, importers, licensors, foreign direct investors, etc.) operate under a great variety of evolving political regimes that have an impact on these firms’ entry, operation, and exit.”); Nathan M. Jensen, Firm-Level Responses to Politics: Political Institutions and the Operations of U.S. Multinationals (Paper Presented at the Conference on the Political Economy of International Finance February 9, 2007), halleinstitute.emory.edu/pdfs/PIEF_Jensen.pdf

foreign direct investment (FDI), tempering that perspective with an analysis of the potential for litigation over certain kinds of FDI. Well before the recent economic crisis in Europe came to a head, IBT scholarship recognized the challenges presented even in an ideal world by the web of overlapping regulatory regimes of national, E.U., bilateral, and multilateral rules on foreign direct investment. In addition, commentators have worked to identify various factors from both the MNE-perspective and the potential host-country prospective that are relevant to FDI proposals and projects.

My goal, therefore, has been to start American law students on the path that prepares them to assist MNEs in the FDI decision-making process; and it is in pursuit of that goal that I came to write the present article. The article grew out of my research and reflection in preparing a case-study problem for both my IBT and International Civil Litigation (ICL) course, which I designed to be complimentary and supportive of the full development of future IBT practitioners. For purposes of this article, I have taken the case study beyond limitations that might be imposed by the confines of an IBT or an ICL course. In so doing, I explore one of the most promising, yet often politically risky, FDIs – creating the infrastructure for renewable energy systems. The importance both to MNEs, and to the host states in which MNEs contribute to energy infrastructure development, cannot be overstated. Given a century of experience with the

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attendant practical travails and political pitfalls of traditional energy sources, MNEs have started
to shift more attention to renewable energy sources as FDIs:

Access to a reliable source of energy is indispensable to the stability of all
nations. Beyond the requirements of domestic demand, energy access is a
component of any national security program and can be a primary source of
wealth in producing countries. Energy producers' ability to shut off world supply
gives them a powerful bargaining position politically and economically. Recent
expropriations of foreign energy investments in fossil fuel producing countries
demonstrate the vulnerability of international energy investments to government
intervention. As an alternative, some investors avoid the fossil fuel market
altogether and instead choose renewable energy.17

This is an especially timely topic, particularly given the risks created for fossil-fuel economies
by the instability introduced during the Arab Spring.18 Many MNEs will undoubtedly seek,
assess, and ultimately decide whether to pursue new FDI opportunities in the rapidly changing
landscape of the Middle East19, as they have in India.20 Legal counsel whose practice is, or
aspires to be, one focused on international business transactions will need a good understanding
of a coherent approach to advising clients on both the business and legal aspects of FDIs.
Counsel will be required to appreciate the additional considerations that go into a true FDI
decision, as compared to a decision to “‘team up’ contractually with an entity … in another

17 Id at 320 (footnotes omitted).
18 Paul Antony Barbour, Persephone Economou, Nathan M. Jensen, & Daniel Villar, The Arab Spring: How Soon
Will Foreign Investors Return?, COLUMBIA FDI PERSPECTIVES, No. 67, May 7, 2012 , at
http://www.vcc.columbia.edu/content/arab-spring-how-soon-will-foreign-investors-return (“The events of the Arab
Spring have dramatically increased the risk perceptions of foreign investors. In directly affected countries, these
events led to disruptions in economic activity including plummeting tourism and foreign direct investment (FDI)
flows, all of which negatively impacted economic growth”); World Economic Slowdown May Hit Kingdom’s
kingdom%25E2%2580%2599s-exports (noting that “[t]he regional instability generated by the Arab Spring will increase
the risk aversion of foreign investors and the risk premium on finance in the [Saudi] Kingdom”).
19 The subject has drawn scholarly attention in European universities. See, e.g., Seyedfarhad Mirghiasimoradi,
Competitive Project Businesses in the Middle East: Opportunities and Obstacles ?, Tempere (Finland) University of
Technology, Master’s Thesis , May 9, 2012, at pp. 81-82 (summarizing the strengths and challenges for FDI in the
Middle East), http://URN.fi/URN:NBN:fi:ttty-201205221145
20 See Premila Nazareth Satyanand, Foreign Direct Investment In India’s Power Sector, Journal of Infrastructure
Development , vol. 3 no. 1 65-89 (June 2011)
country where [that] entity will produce and sell goods or provide services using the licensed trademarks, patent, knowhow, or other intellectual property rights owned by". By contrast, as Professor John Head at the University of Kansas School of Law observes, in FDI

[w]e see a different constellation of potential risks and returns facing a client. With FDI, a company no longer has an arms-length association with the production and marketing of goods in another country; instead, the company enters that other country itself, exposing itself directly to the other country’s legal and regulatory system. Doing so creates serious risks. However, doing so also creates exciting opportunities for rewarding business activities.

As part of my International Business Transactions Course, I lay out for the students a multi-stage paradigm for identifying the key factors relevant to an FDI decision. The paradigm presupposes groundwork to identify, at least conceptually, the parameters of a specific FDI proposal for specific participants in a specific host nation. Starting from that presupposition, the paradigm consists of two main stages.

In Stage One, we analyze the general business and regulatory environment for a proposed FDI. That includes a close, fact-intensively detailed examination of the host state, the MNE, and the proposed FDI project. That examination is followed by an articulation, and critical evaluation of, the three most significant arguments in favor of the MNE undertaking the proposed FDI project. In State One, students learn to do the research needed to create an accurate factual foundation; and from that foundation, students practice organizing facts according to their relevance to the FDI proposal under consideration. A key element of State One is the critical assessment of the sources employed; and after establishing the bona fides of

21 JOHN W. HEAD, GLOBAL BUSINESS LAW: THE BUSINESS AND PRACTICE OF INTERNATIONAL COMMERCE AND INVESTMENT, Ch. 9, § 1, at 384 (Carolina Academic Press 2007)
22 Id.
the sources, the key skills developed are in logical reasoning from the facts in support of business arguments, and the clear and concise articulation of those arguments.

Stage Two undertakes a critical evaluation of legal issues raised not only under the regulatory environment of the host state, but also under the legal system of the FDI investor’s home state and third-states to which the FDI investor has substantial connections. This inquiry is both inductive and deductive\(^\text{23}\); students will apply their increasing body of general knowledge concerning crucial aspects of International Business Transactions with their knowledge of international civil litigation, particularly as it takes place in the courts of the United States. The legal considerations examined serve both to transition IBT students to the study of International Civil Litigation, and to allow students who’ve previously studied International Civil Litigation to apply that learning in the specific business context of an IBT course.\(^\text{24}\)

In this article, I demonstrate how this multi-stage paradigm might be applied to identify potential FDIs worth further investigation and more detailed development. Specifically, I show how the multi-stage paradigm might work in a hypothetical FDI, using as an example one of the world’s largest MNEs, France’s Alstom, S.A., and a possible investment in Israel regarding one of Alstom’s leading businesses, the manufacture, installation, and operation of equipment and installations for using the wind to generate electrical power. Those are the subjects of Section II, infra, an application of Stage One. Then, in Section III, I undertake the Stage Two analysis to demonstrate how issues that are recognized in an IBT course can be further developed through

\(^{23}\) There are, of course, even more detailed ways to express this paradigm. See, e.g., “Conceptual Outline And Checklist Of Foreign Direct Investment Issues,” in DANIEL C.K. CHOW & THOMAS J. SCHÖENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES & MATERIALS, Ch. 6, § V, at pp. 446-448 (2d ed. Aspen 2010)(hereinafter, “CHOW & SCHÖENBAUM”)

analytic paradigms studied in International Civil Litigation, including the nature and risks to MNEs involved with litigation filed against them over FDI-related issues. One of the principle foci of this kind of litigation are suits under municipal human-rights related laws of various jurisdictions, and thus, in the Alstom-Israel FDI proposal, I examine examples from the laws of France, Quebec Province in Canada, and the United States. Special and extended attention are focused on 28 U.S.C. § 1350, colloquially known as the Alien Tort Statute (ATS) in the United States, given the extensive attention it has received in recent years, as well as the extensive expressions of angst that the corporate business community has expressed concerning human-rights litigation against MNEs over FDIs.25

The example operates on a general level of conceptual business and legal viability, which would naturally precede a second-stage, more focused review of taxation implications for

25One of the most notable expressions of business community angst, GARY C.LYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 (Policy Analysis No. 70, Institute for International Economics, 2003), proclaims in Chapter 1, entitled “Nightmare Scenario”:

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

To be sure, no decided ATS case can be cited to confirm that the nightmare scenario we have just sketched will come to pass. . . . [S]everal blockbuster cases are working their way through federal and state court systems. If plaintiff[s’] lawyers prevail, today’s imagined nightmare will become tomorrow’s reality.

Id. at 1-2 (emphasis in original)(footnotes omitted). In the period after Hufbauer and Mitrokostas’ book appeared, the claims in several ATS cases against MNEs survived dispositive motions; one awaits further trial court proceedings; and the others were settled for substantial sums. See infra notes ___.
investing MNE\textsuperscript{26}, project financing issues\textsuperscript{27}, business strategies revealed by an in-depth application of strategic operations management\textsuperscript{28}, a detailed assessment of the overall structure and specific provisions needed for a suitable joint-venture agreement,\textsuperscript{29} and the most recent thinking among strategic management scholars on traditional and newer variables considered by MNEs when making FDI decisions and their models providing a structure for applying those variables.\textsuperscript{30} While that which is undertaken here is preliminary and at varying levels of both generality and specificity, it is nonetheless the essential point of entry for American law students and lawyers examining the intersection of law and business arise from FDI in the 21\textsuperscript{st} century.

II. STAGE ONE: THE LEGAL AND BUSINESS ENVIRONMENT

In the first stage, we analyze the general business and regulatory environment for a proposed FDI. Stage One consist of a flexible inquiry, built out from a solid structure of relevant information-gathering, to which logical analysis is applied:

First, we start with a clear articulation of the FDI proposal itself. That articulation presupposes that one of the following preliminary scenarios has transpired:

\textsuperscript{26} D. Kevin Dolan, Special Issues In Structuring International Joint Ventures – Part One, 22 Tax Mgt. Int’l J. 51 (1993).
\textsuperscript{27} See JOHN W. HEAD, supra n. ____, Chapter 9, § V, at 425-447; see, e.g., William M. Stelwagon, Financing Private Energy Projects in the Third World, 37 Catholic Lawyer 45 (1996).
\textsuperscript{28} See, e.g., Laura Diaconu Business Strategies Of The Multinational Corporations, CES WORKING PAPERS, IV, [2], 141, 142 (2012)(detailing how “the international business offers the possibility of exploiting three sources of the competitive advantage, unavailable for the national companies: global efficiencies, the multinational flexibility and worldwide learning process”)(published by the Centre for European Studies (CES) at Alexandru Ioan Cuza University of Iaşi, Romania), available online at http://www.cse.uaic.ro/WorkingPapers/
\textsuperscript{29} See, e.g., Michael E. Hooton, Structuring and Negotiating International Joint Ventures, 27 Creighton L. Rev. 1013 (1994).
1. A specific MNE client has tasked its management or in-house law department to examine opportunities for new FDI in [a] a particular line of its business in [b] a specific geo-political region, market, or nation;

2. A specific MNE client has tasked its management or in-house law department to examine a specific FDI proposal, having already identified [a] the particular line of its business and [b] specific geo-political region, market, or nation.

In developing this as an IBT learning event, a course facilitator may take a number of approaches. The facilitator may assign a specific, existing FDI proposal involving a particular MNE or group of MNEs. Typically, this choice works best when there have been preliminary reports of the FDI project in the news media or through a company’s press releases – before the FDI project becomes so well delineated that there is more description of actual plans than there is imaginative research and reasoning to flesh out various directions a preliminarily described project may take. To encourage less of the former and more of the latter, the facilitator may instead assign a particular MNE with a more open-ended task to identify and evaluate any feasible FDI project for the MNE. The emphasis in that approach will be more on brainstorming about possible projects within the reasonable scope of the MNEs business, and developing processes and paradigms for narrowing a wide range of possibilities – starting with the fundamental task of identifying a geo-political regions, market, or nation as the potential host for the project.

A via media between extremes is what I have aimed for in this article: designating a specific MNE and a specific host nation, as well as a sector of the MNE’s business – wind-powered electrical generation – within which to develop the specific FDI proposal for analysis.
Developing the specific FDI proposal requires preliminary research into both the current businesses of the MNE (along with lines of business it either is considering, or should consider given particular synergies that might be realized from it), along with a suitable project for the specific host nation. Identifying the project itself can be facilitated by requiring identification of a specific company within the host nation to act as business partner in the FDI. Normally, the way in which the MNE’s business will be organized within the host state must be considered, after identifying the specific forms of business entity available under the legal tradition and legal system of the host nation. However, for purposes of this article, the more popular joint-venture arrangement is made the standing assumption.

With these parameters established, one of the most useful pairings I have found of MNE and host state is Alstom, a corporation organized under the laws of France as a Société Anonyme (S.A.), and Israel as the host nation. Although one of the world’s largest MNEs, Alstom will

31 There is no redundancy in examining not only a country’s laws, but also the legal tradition from which its laws emanate. See, e.g., Amanda Perry, Legal Systems As A Determinant Of FDI: Lessons From Sri Lanka (Wolters Kluwer 20__). Keen awareness of the characteristics of the major legal traditions is important for both MNE and counsel to keep in mind. Such awareness reduces the risks of easy glosses or approximate translations of business forms – using terminology such as “corporation” or “partnership” loosely, and with the common-law tradition’s viewpoints – which can have unexpected, unanticipated, and unwelcome results. See, e.g., Puerto Rico v. Russell & Co., 288 U.S. 376 (1933) , __, ___[long litigation history] (American partners who organized a business venture under Puerto Rico’s laws, which are part of the Spanish Civil Law heritage -- found that the rough translation of partnership into a Civil Law sociedad en comandita had, in fact, brought their venture a corporation-like juridical personality, and hence, citizenship of its situs); Baja Developments v. TSD Loredo Partners, 2010 WL 1758242 (U.S. Dist. Ct. D. Ariz. 2010) . See also, Keith S. Rosenn, Overview of Brazilian Business Forms, in Chow & Schoenbaum, supra note __, Ch. V, §D, at 539-545.

32 Sam Foster Halabi, Efficient Contracting Between Foreign Investors And Host States: Evidence From Stabilization Clauses, 31 NW. J. INT’L L. & BUS. 261, 276 (2011) (among the joint venture’s advantages as an FDI vehicle, “[i]nvestors may also reduce political risk by engaging in joint ventures,” thus “simultaneously limit[ing] an investor's exposure and increase[ing] the number of parties that might eventually pressure a government that passes an unfavorable law or regulation”).

33 Another important aspect of IBT study generally and FDI study in particular is close attention to the forms of business organizations as they exist in both other municipal law systems as well as in other legal traditions. The Société Anonyme, or S.A., is a popular and familiar business organization form within the Civil Law traditions of both France and Spain. Naomi R. Lamoreaux & Jean-Laurent Rosenthal, Legal Regime And Business's Organizational Choice: A Comparison Of France And The United States During The Mid-Nineteenth Century,
be new to many law students studying in the United States, particularly those who are encountering International Business Transactions for the first time. Selecting a distinctly non-U.S. MNE like Alstom fosters several lessons. First, there are many MNEs of enormous economic influence and power that thrive in other business cultures, even if not familiar to the American consciousness. Second, not all opportunities in international business transactions come from America-based MNEs seeking FDI. Third, the foreign MNE may well be situated to take advantage of expansion into the United States as a step in FDI projects to which an American presence may prove helpful.

Similarly, Israel is an ideal subject for students to evaluate as a host nation. Information about Israel is plentiful, and there are many original sources in English. Israel also stands distinct from many of its neighbors in the Middle East in that it has a legal, political and business culture that, while distinct, shares more in common with the American legal, political, and business culture than the American culture shares with Shari’a law states. In addition, Israel,


34 See, e.g., JOHN H. BARTON, JAMES LOWELL GIBBS, JR., VICTOR HAO LI, AND JOHN HENRY MERRYMAN, LAW IN RADICALLY DIFFERENT CULTURES 16-21 (1983)(section devoted to “Islam and Islamic Law”). As Professor Barton and his co-authors observed:

The traditional sources of the law were the Quaran itself, together with the sunna or the custom of the early Islamic community by which the reliability of individual hadith (sayings of the Prophet) were judged, the ijma or the consensus of Islamic community, and qiyas and qiyad or, respectively, analogies and personal reason from the first three sources. The intellectual guardianship and authoritative statement of the law were the responsibility of the juristic schools, not of the state or the qadi. Thus, not only was there no legislation: neither was there a doctrine of stare decisis or common-law type of law[-]making. Interpretation and statement of principles were the tasks of the ulema, or upright scholars, of the society, and of the mufi, or legal advisors to the quadi. The doctors of Al Azhar still issue fatwas or opinions on controversial points of law. There were four major juristic schools . . . that evolved during the first centuries of Islam. By about the third century of the Islamic era, the door of iijihad (personal reasoning) was closed, permitting no further change in the law. The only flexibility left then was to reject the law or to pick and choose among the doctrines of existing schools.
unlike most of its neighbors in the Middle East, has a BIT agreement with the U.S., which allows exploration of the possible roles such treaties play in an MNE’s FDI decisionmaking.

Another useful synergy between MNE and host-state in my example is the experience that Alstom has in doing business in the Middle East, and the projects—including transportation and conventional power-generation—which it has undertaken in Israel over the past decade. These include a 20-year operation and maintenance contract, worth around €330 million, with Dalia Power Energies Ltd for the 835 MW gas-fired Tzafit power plant in Israel\(^35\), a contract with Dalia Power Energies to construct two 417 MW gas-fired combined cycle units on an engineering, procurement and construction (EPC) basis\(^36\); a 50% stake in a joint venture, Horizon, based in Dimona in southern Israel, in collaboration with Israeli high-tech firms Rotem

Since the law was God’s law and could not be changed and since moral and legal principles were so intertwined, the role of the state was very different from that in the contemporary West. The state had in effect no significant legislative authority. To the contrary, its responsibility, as suggested by the task of the first Caliphs, was to uphold and help enforce and spread the *sharia*. It was through this responsibility that the state gained its legitimacy. (Some of the more religious rules of the *sharia* were enforceable only in conscience rather than through the community, however.)

The inflexibility of such a law was sensed early on and led, even in traditional Islamic law, to escape devices. From a theoretical viewpoint, the most important of these was the doctrine of *siyasa*—a doctrine that the government in fact seeks the public interest (for the ruler has some knowledge of God’s purpose for the society), and this pursuit of the public interest may necessitate deviation from the *sharia*, and that obedience is due the rule even if he deviates. It also permitted some division between the civil authority and the Caliphate. At the procedural level, the corresponding discretion and flexibility were reflected in the creation of *mazalim* or political ruler’s courts that could avoid the limitations of the *sharia* courts and often became, in direct contradiction to the *sharia*, a means of appeal form the *qadi*’s decision. There was thus a tension between the political reality and the *sharia* ideal of government. For the philosophical reasons specified above and perhaps also because the society lacked a sense of progress, this tension was not thought to be troublesome. This fact is itself an important aspect of Islamic law.

Id at 19-21.  
Industries Ltd and Gefen Biomed Investments, to finance and support the growth of innovative start-ups in the field of renewable and alternative energy and energy-saving technologies; and another joint venture, this one with Israel’s BrightSource Energy, to build solar thermal power plants throughout the Mediterranean and in Africa.

Because the purpose of this project is not to re-plough existing furrows, we look at Alstom’s past FDI record in Israel – and taking into account its Horizon joint venture to help Israel develop renewable and alternative energy sources -- and Alstom’s Wind Turbine unit becomes the perfect focus for exploring a new FDI project. This requires visualizing a new context and new issues for Alstom in a country that is familiar to it in other contexts. The FDI proposal that we will evaluate for purposes of this article, therefore, is that the France-based international energy conglomerate, Alstom Group, will joint venture with Israel-based Multimatrix, Ltd., to expand wind power output from the Golan Heights wind farm.


38 Lisa Damast, BrightSource, Alstom Partner on Solar Thermal, Green Prophet, Oct. 9, 2010, http://www.greenprophet.com/2010/10/brightsource-alstom-solar-partnership/. The plants will use a proprietary technology developed by BrightSource, which went public in 2011, that “relies on thousands of mirrors all focused on a central tower with a water boiler atop of it to heat the water and turn it to steam which then turns a conventional turbine that generates electricity.” Id

Having clearly articulated a specific FDI proposal, we will then be read to move to the next phase of our Part One analysis. Using authoritative resources\textsuperscript{40}, we undertake the information gathering process. This is not merely an exercise in fact collection. Rather, I emphasize that the facts chosen, and the way in which those facts are presented, must be filtered through, and guided by, their relevance to the specific FDI proposal under consideration.\textsuperscript{41}

In the next phase of Stage One, the evidence gathered regarding factors relevant to the specific FDI decision is discussed and critically evaluated. Emphasis is placed on establishing a number of separate, independent grounds for recommending the FDI project. An essential part of that is assessment of evidence from that country’s media about topics relevant to the FDI project, the MNE, and changes and challenges within the host nation itself. Such sources are

\textsuperscript{40} A regularly updated and detailed online resource are the Country Reports of the U.S. State Department. [www.state.gov/www/issues/economic/country_reports.html](http://www.state.gov/www/issues/economic/country_reports.html) and [http://www.state.gov/r/pa/ei/bgn/](http://www.state.gov/r/pa/ei/bgn/). Similarly useful—and sometimes more detailed—are the listings from the Central Intelligence Agency’s Factbook, [www.cia.gov/cia/publications/factbook](http://www.cia.gov/cia/publications/factbook). In addition, the Library of Congress’s Federal Research Division detailed Country Studies—a wealth of well-researched, well-documented, and well-presented information that is invaluable to the kind of search for information being undertaken in an FDI analysis. See [http://lcweb2.loc.gov/frd/cs/](http://lcweb2.loc.gov/frd/cs/). Finally, U.S. Aid Reports for countries, organized by specific geographic regions, are also helpful. [http://www.usaid.gov/locations/middle_east/countries/](http://www.usaid.gov/locations/middle_east/countries/) E.g., such as those found at, and [www.state.gov/www/issues/economic/country_reports.html](http://www.state.gov/www/issues/economic/country_reports.html). Exploration of the host nation’s media’s reporting on its own political and business affairs can be launched from [http://www.kidon.com/media-link/index.shtml](http://www.kidon.com/media-link/index.shtml). See also [http://emedia1.mediainfo.com/emedia](http://emedia1.mediainfo.com/emedia); [http://www.thepaperboy.com/welcome.html](http://www.thepaperboy.com/welcome.html).

\textsuperscript{41} Such as identification of neighboring countries: territorial size of the host country; population; political system; current office holders in the country’s executive branch (e.g., Prime Minister and/or President); identity and history of the political party currently in power; and of its allied and rival political parties; description of its current legal system, including the legal tradition (e.g., Civil Law, Common Law, Shari’a) to which its legal system belongs; description and classification of its economic system (e.g., developed or developing world; industrial or agricultural; capitalist, communist, socialist, or ‘state capitalism’); indicators for that country, and trends in those indicators, such as GNI and the GNI per capita PPP?: identification of major natural resources and discussion of any leverage, or vulnerabilities, that it creates for the host nation, along with any political issues arising from or competing sovereign claims for those resources; identification of the major products and services exported, and discussion of the markets and countries to which they are exported: identification of the major products and services that are imported, and discussion of the markets and countries from which they are imported; identification of any economic integration organizations to which the host state belongs or to which it seeks admission; and facts about the host nation’s official currency, including exchange policies and any limits on expatriation of cash earned in the FDI.
subjected to evaluation for, among other things, fairness and balance of coverage and any potential biases.

In the final phase of Stage One, a conclusion and recommendation are stated, and the bases for them are summarized. Assuming that the merits of the FDI have been proven sufficiently in this preliminary, conceptual evaluation to warrant further investigation followed by serious consideration by the investor Board, the recommendation will be to move forward.

A. The State Of Israel And Its Environs

Situated between the Red Sea on the east and the Mediterranean Sea on its expansive west coast, the State of Israel is a parliamentary democracy, whose 7,850 square-mile territory covers an area the size of New Jersey. Israel’s 7.59 million people (composed of Jews 76.2%; Arabs 19.5%; other 4.3%) make it the 97th most populated country in the world and the seventh most populated (and the fourth most densely populated) country in the Middle East. The populace espouses religions including Judaism, Islam, Christianity, and Druze. Hebrew (official), Arabic (official), English, and Russian are the commonly-spoken languages. Egypt and Jordan abut Israel to the South; Syria borders to the northwest; and Lebanon shares Israel’s

46 Id.
47 Id.
northern border.\textsuperscript{48} Israel’s Syrian border includes a tract of disputed territory known as the Golan Heights (population 38,000, composed of 18,200 Arabs and about 20,000 Israeli settlers).\textsuperscript{49} Ninety-two per cent of Israel’s population is urban, distributed primarily among Tel Aviv-Yafo (3.2 million); the major port city, Haifa (1 million); and the capital Jerusalem (768,000).\textsuperscript{50}

Since it was created in 1948, Israel has boisterous politics\textsuperscript{51}, with 13 different political parties represented in their unicameral legislature, the Knesset, which elects a Prime Minister (currently Binyamin Netanyahu, Likud (“Consolidation” party\textsuperscript{52}),\textsuperscript{53} and a President (currently Shimon Perez), a largely ceremonial post.\textsuperscript{54} Social scientists have described the current (18\textsuperscript{th}) Knesset as “the most representative of Israel’s diversified society since the establishment of the State in 1948.”\textsuperscript{55} It in fact is a fragmented coalition among Prime Minister Netanyahu’s Likud and five other political parties across a conservative spectrum, in which Likud controls only 27

\begin{itemize}
  \item \textsuperscript{48} Id. (map of Israel and the vicinity).
  \item \textsuperscript{49} Mideast Web, supra note iii; U.S. State Dep’t, supra note iv. Israel’s Jordanian border includes the West Bank, a large area west of the River Jordan, which has been the subject of several treaties (1964, 1994) and continuing disputation. U.S. State Dep’t supra note iv. Israel’s Egyptian border includes disputed territory known as the Gaza Strip. Id. See also U.S. State Dep’t, Bureau of Consular Affairs, Travel Warning, Israel, the West Bank and Gaza (June 22, 2011) at http://travel.state.gov/travel/cis_pa_tw/tw/tw_5511.html The continuing instability and volatility make these areas unattractive for foreign direct investment. See Overseas Security Advisory Council (OSAC), Israel 2009 Crime & Safety Report, https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=8044.
  \item \textsuperscript{50} Central Intelligence Agency, World Fact Book—Israel, People and Society, https://www.cia.gov/library/publications/the-world-factbook/geos/is.html
  \item \textsuperscript{51} The World In Figures: Israel, THE ECONOMIST, Nov. 22, 2010, at http://www.economist.com/node/17510423
  \item \textsuperscript{52} Official Likud Party Website, http://en.netanyahu.org.il/
  \item \textsuperscript{53} Currently Functioning Parliamentary Groups, 18\textsuperscript{th} Knesset, Official Knesset Website, http://www.knesset.gov.il/faction/eng/FactionCurrent_eng.asp (under “Factions” tab).
  \item \textsuperscript{54} The Basic Law—President Of The State, Official Knesset Website, http://www.knesset.gov.il/laws/special/eng/basic12_eng.htm
  \item \textsuperscript{55} Israel’s 18th Knesset: Too Many Voices… Too Little Connection With the People of Israel, America’s Friends of the CeCi Blog, Apr. 26, 2010, http://cecisrael.wordpress.com/2010/04/26/israelis-18th-knesset-too-many-voices-too-little-connection-with-the-people-of-israel/ (describing research conducted by Tel Aviv University Ph.D. Candidate Asaf Becker for “The CECI Forum for Government Stability”)\end{itemize}
of 66 seats in the coalition. The Prime Minister appoints, subject to Knesset approval, an array of ministers to lead the many departments (currently 22) of Israel’s government.

Israel has a “mixed legal system of English common law, British Mandate regulations, and Jewish, Christian, and Muslim religious laws,” clearly reflective of the area’s complex history. Equally reflecting Israel’s history is the nation’s modern currency; the new Israeli Shekel (ILS), harks back to the days of King David, and its exchange rate with the U.S. dollar recently has from a high of 4.4565 (2006) to a low of 3.588 (2008). The Shekel is freely convertible, and is one of only 17 currencies that are freely convertible in the world’s currency exchange markets.

The U.S. State Department describes Israel’s economic system as “a diversified, technologically advanced economy with substantial but decreasing government ownership and a

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59 Yehudah Lev Kay, Largest Cabinet Ever Missing Health Minister—With 30 ministers and 5 deputy ministers, the new cabinet is the largest ever, but not one wanted to serve as Health Minister, Artuz Sheva (Israeli Nat’l News), Apr. 1,2009, http://www.israelnationalnews.com/News/News.aspx/130713#.Tq1wrHFGwF
63 Central Banks and CLS Currencies, Continuous Linked Settlement Bank Website, http://www.cls-group.com/About/Community/Pages/CentralBanks.aspx (noting that “CLS Bank has a central bank account with the Bank of Israel, to facilitate the settlement of the Israeli shekel”).
strong high-tech sector.” According to the World Bank, Israel’s GNI is $210,352,507,970 and its GNI per capita PPP is $27,630. Israel boasts low start-up costs for business: the World Bank reports start-up costs of businesses in Israel, as a percentage of gross national income (GNI) per capita, is 4%, similar to the U.S.’s 1%. By comparison in the region, Egypt is 6%; Jordan is 45%; Syria is 38%; and Lebanon is 75%.

Israel is also economically integrated with the major inter-governmental organizations including memberships in the Organization for Economic Cooperation and Development, the World Trade Organization, the World Intellectual Property Organization, the International Monetary Fund, the World Bank Group, European Bank for Reconstruction and Development, and the The Inter-American Development Bank. Israel also has Bilateral Investment Treaties with 37 nations and is negotiating them with several more. Israel has Free Trade Area agreements with Canada, European Free Trade Association (EFTA), European Union (EU),

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69 Israel and the WTO, http://www.wto.org/english/trade_e/countries_e/israel_e.htm
Mercosur (Southern Common Market), Mexico, Turkey, and the United States, and is negotiations with India. With Jordan and Egypt, Israel has Qualified Industrial Zones (QIZ) agreements.

Israel’s natural resources include timber, potash, copper ore, phosphate rock, magnesium bromide, clays, sand – and in 1999 and 2010, major finds of natural gas in territorial waters off Israel’s Mediterranean coast.

Israel’s main exports including “cut diamonds, high-technology equipment, and agricultural products” (especially fruits and vegetables). The United States (32.1%), Hong Kong (6.3%), India (5.1%), Belgium (5.1%) were Israel’s leading export markets in 2010. Israel imports raw materials, military equipment, investment goods, rough diamonds, grain, and consumer goods – and especially fossil fuels—oil imports are 282,200 bbl/day measured against daily consumption of 238,000 bbl/day, and electrical conception is 47 billion kWh (48th in the world) while production is only 53 billion kWh (46th in the world). Much of this is driven by Israel’s 8.7% industrial production annual growth rate, 35th in the world. Energy resources are closely tied to the region’s politics, and energy dependence or independence, and energy import

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77 Id.
78 Id.
79 Id.
or export, significantly contribute to defining the relative power and vulnerabilities of Israel and its neighbors.  

80 **GLOBAL CONNECTIONS: THE MIDDLE EAST, What Role Have Natural Resources Played In The Politics And Economy Of The Middle East?**, http://www.pbs.org/wgbh/globalconnections/mideast/questions/resource/index.html


B. The Business Proposal: Alstom’s Joint Venture With Multimatrix To Expand Golan Heights Wind Farm

The FDI proposal that we will evaluate for presentation is that the France-based international energy conglomerate, Alstom Group, will joint venture with Israel-based Multimatrix, Ltd., to expand wind power output from the Golan Heights wind farm.  

Alstom Group is “a world leader in transport infrastructure, power generation and transmission”; has business presence in 100 countries and €20.9 billion in sales during 2010-2011; and employs over 93,000 people. Alstom has 30 years’ experience designing, siting, and operating wind-powered turbines, and “operat[es] wind farms in Spain, UK, France, Italy, Portugal, Morocco, Brazil, Turkey, Japan and India.” Alstom’s 2,100 turbines currently installed or under construction can generate more than 2,700 MW.” It has expertise in on-shore, as well as off-shore, electric wind turbines, and matching equipment needs to suit the geography of the wind farm (e.g., mountainous, desert, arctic or other geographically difficult regions/climates, as well as in more space-constrained populated areas). Alstom uses proprietary technology to produce climate kits and “a unique and proven rotor support concept that protects the drive train … to ensure reliability under the most challenging and adverse conditions.” Alstom has yet to
establish a wind turbine presence in the Middle East, yet has invested in other projects in Israel, even in disputed territories and in the face of criticism at home and abroad (such as the Jerusalem Light-Rail Project).^{82}

Multimatrix, Ltd. Is a small Israel-based investments company traded on the Tel-Aviv Stock Exchange.^{83} It is notable to date only for the acquisition of two principal assets^{84}: a resort complex on the Canary Islands, and an interest in property on the wind-swept Golan Heights in Israeli territory annexed from (but still claimed by) Syria after the 1967 “Six-Days’ War”, upon which it proposes to site numerous, modern electricity-generating wind turbines.^5 Multimatrix is trying to re-develop wind energy on the Golan Heights by buying a half share of Mei Golan, a

82 Jerusalem Light Rail Project, RAILWAY-TECHNOLOGY.COM: NEWS, VIEWS AND CONTACTS FROM THE GLOBAL RAILWAY INDUSTRY, http://www.railway-technology.com/projects/jerusalem/ (2011); Daniel Machover & Adri Nieuwhof, Opinion/Editorial: French Court Decision On Jerusalem Light Rail Must Be Challenged, THE ELECTRONIC INTIFADA (27 June 2011), http://electronicintifada.net/content/french-court-decision-jerusalem-light-rail-must-be-challenged/10115#.TryGBnFGwfo (noting Alstom’s defense of its work in disputed Jerusalem territory and its victory in a French court); Abe Selig, Palestinians Irate Over New Jerusalem Light Rail: Pisgat Ze’ev-Mount Herzl First Line Will Have 23 Stations, JERUSALEM POST, Feb. 3, 2010, http://www.jpost.com/Israel/Article.aspx?id=167717 (“Jerusalem’s light rail starts test runs this spring, with its sleek silver cars gliding across the city and promising to relieve the perpetual congestion. But Palestinians see no reason to celebrate. They hope to derail the $1 billion tram because they fear it will further entrench Israeli control over east Jerusalem. They’ve asked a French court to force two French multinationals, Veolia and Alstom, out of the project and are urging Arab countries to cancel contracts with the two companies.”); Abe Selig, Palestinian Boycott Calls Won’t Hinder Jerusalem Light Rail Construction, JERUSALEM POST, Nov. 23, 2009, http://www.jpost.com/Israel/Article.aspx?id=161130 (“Despite recent calls by Palestinian Authority officials to boycott two French companies working on Jerusalem's much-anticipated light rail system, the local spokesman for one of those companies - Alstom - told The Jerusalem Post on Sunday that the light rail work was moving ahead as scheduled, and that political considerations would not interfere with the firm's completion of the project. ‘Alstom is not a political company, said the company's Israel spokesman, Nissim Zvili, a former MK and Labor Party secretary-general who served as ambassador to France from 2002 to 2005. ‘”); compare 'French Firm Drops J'lem Project Due To Political Pressure'—Dan Bus Lines Says Veolia Leaving Light Rail Project Because Of Anti-Israel Boycotts; French Transportation Company Denies Allegations, JERUSALEM POST, Nov. 28, 2010, http://www.jpost.com/NationalNews/Article.aspx?id=197093


84 http://www.reuters.com/finance/stocks/companyProfile?rpc=66&symbol=MLTX.TA

company that operates a nearly 20-year-old, now outdated wind farm on the Golan heights. Multimatrix aspires to build 160 wind turbines on the 18-acre area, and generate 450 MW of power. Multimatrix views the political situation involving Syria’s claim to the Golan Heights as not presenting much of a disincentive to developing the wind turbine farm: “If the land is returned to Syria in a peace deal, we will be compensated,” Multimatrix’s Chairman, Uri Omid, has commented: “Regardless, this project can work for us or work for them. Someone will always need the electricity.”

A decision as complex as Alstom would make in deciding to joint venture with an Israeli company to develop Golan Heights wind power involves numerous factors, a great deal of information gathering, a substantial amount of sophisticated analysis, and informed intuition on the part of seasoned managers and executives. Such complexity can be overwhelming and could prevent the learning objectives from being accomplished. For purposes of our discussion,

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87 Id.

88 An excellent roundup of various, primarily academic, templates and paradigms for evaluating FDI decisions is Sethi, Guisinger, Phelan & Berg, Trends In Foreign Direct Investment Flows: A Theoretical And Empirical Analysis, 34 J. INT’L BUS. STUDIES 315 (2006). Sethi et al. provide a bedazzling list of such templates and paradigms: industrial organization tradition; product life-cycle concept; exploitation of ownership advantages approach; risk diversification model; organizational assets and knowledge-transfer approach; internalization-of-transactions perspective, bandwagon-effect, eclectic paradigm (an ownership, location, and internalization advantages-based framework to analyze why, and when, MNEs would invest abroad); the Upsala model of incremental FDI: the resource-based approach; the evolutionary perspective; the organizational-management approach; the ownership advantages theory (encompassing technology intensity, capital intensity, and product differentiation), and the more recent “regional-variations” approach. Id. at 316-317. The authors’ regional-variations approach examines the effect of the following factors not merely on FDI within in a particular country, but FDI within a particular region, including market lucrativeness, market size, market growth, economically “liberal” host state policies (particularly concerning currency expatriation, expropriation, tax concessions, and private ownership), technological infrastructure, availability of skilled labor, absence of trade barriers, overhead costs (production, transportation, and wage costs), political stability, and “psychic” distance of host state and the related notion of “cultural proximity.” Id. at 316-318. In their model, Sethi et al. analyze from the perspective of six propositions:
therefore, I telescope the complexity into three, macro-view propositions for further research and development.\textsuperscript{89} These three reasons are the strongest militating in favor of the FDI, and they

\begin{quote}
\textbf{Proposition 1.} Notwithstanding each MNE’s unique FDI location decision, collectively such flows target economically and culturally integrated regions rather than specific countries.

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\textbf{Proposition 2.} MNE investments initially flow to the region that provides the best mix of the traditional FDI determinants.

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\textbf{Proposition 3.} Build-up of intense competitive pressures in the original host region would cause MNEs to make efficiency-seeking investments into low-wage countries to reduce costs.

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\textbf{Proposition 4.} MNEs’ efficiency and market-seeking investments into a region will be contingent upon the countries in that region adopting investor-friendly liberalization policies.

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\textbf{Proposition 5.} The optimal mix of FDI determinants for low-wage countries would be different from the mix for the developed countries – the original FDI destinations.

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\textbf{Proposition 6.} The factor of psychic distance will assume less importance in MNEs’ FDI decisions, all other factors being equal.
\end{quote}

Id. at 317-319. The authors posit that MNEs make FDI decisions in cycles, because FDI activity eventually becomes saturated in particular reasons, and thus, “[t]o remain competitive, MNEs are compelled to seek new FDI destinations that offer wage and factor cost reductions and also open up new markets,” and while “[s]uch countries/regions are also evaluated on the same traditional FDI determinants, . . . firms might now accept a different mix compared to that for the original destinations.” Id. at 318-319. Somewhat lost in Sethi et al.’s survey of factors is political risk as a potentially positive factor. See, e.g., Alfredo Jiménez, \textit{Political Risk as a Determinant of Southern European FDI in Neighboring Developing Countries}, 47 \textit{EMERGING MARKETS FINANCE \& TRADE} 59 (July-August 2011)(“Despite the fact that one might expect global flows to fall as a consequence of political risk, those from the countries in the sample increase, because they come from firms that are searching for a market niche where they can take advantage of their political capabilities”); Alfredo Jiménez & Juan Bautista Delgado-García, \textit{Proactive Management Of Political Risk And Corporate Performance: The Case Of Spanish Multinational Enterprises}, 21 \textit{INT’L BUS. REV.} __ (Elsevier 2012). More generally, I discuss political risks of Alstom’s hypothesized Golan Heights investment in Section III.C.2, infra.

\textsuperscript{89} This is consistent with the analytic framework developed and espoused by a former McKinsey & Company consultant, who has become a leading authority on techniques for expressing the business-decisionmaking process.
become the foundation of a strategic business plan. The three strongest reasons why Alstom should embrace this joint venture opportunity with Multimatrix are:

1. *Israel’s need for electrical power currently exceeds supplies and will continue to grow.*

2. *Electricity generated by wind turbines is a sustainable energy source that has great room for growth in Israel and increases Israel’s energy independence.*

3. *Israeli government support for wind-generated electrical generation is growing, and Israel’s FTA Agreement with the U.S. will permit Multimatrix to import Alstom’s American-made wind turbines duty-free.*

In Section II.C, we expand upon and evaluate each of these three reasons, seriatim, in a proposed strategic plan.

C. A Proposed Strategic Plan: Why Expanding The Golan Wind Farm In Joint Venture With Multimatrix Optimizes Alstom’s Strategic Advantages In Opening A New Market For Its Products And Services In The Middle East

1. *Israel’s Need For Electrical Power Currently Exceeds Supplies And Will Continue To Grow*

See BARBARA MINTO, THE MINTO PYRAMID PRINCIPLE: LOGIC IN WRITING, THINKING, AND PROBLEM-SOLVING, Ch. 8, pp. 121-139; Ch. 9, pp. 140-167; Ch. 10, pp. 170-176 (1991).
Israel has a dynamic economy that continues to grow: GDP has increased at a rate of 4 to 5 percent annually since 2005, and is heavily weighted to manufacturing and service industries that consume substantial amounts of electrical power. In fact, Israeli electricity consumption has grown by about 4 percent a year since the early 1990s.

This growth creates practical challenges for Israel. Certainly, Israel cannot afford to have the kind of massive electrical power outage that confronted India in July 2012, in which nearly 700 million people — one-tenth of the world’s population — were plunged into darkness in an unexpected power grid failure. While Israel’s infrastructure is more stable than India’s,
Israel is facing its own energy issues because of politics and geography. For example, McKinsey & Company found that Israeli greenhouse gas emissions are expected to double by 2030 as a result of increased energy consumption. Israel’s electricity grid is not connected to any of its neighbors’ grids. Israel imports 85 percent of its energy, mostly in the form of coal, but also in natural gas. In 2009, the country spent $5 billion on energy imports. In addition, politics makes Israel an "energy island." Thus, while recent natural gas finds in the Mediterranean will benefit some energy-consuming sectors, it will not generate additional electrical power, and the finds themselves are also embroiled in political controversy over sea boundaries with neighboring Lebanon and possible Hezbollah rocket attacks on gas refineries.

On Tuesday, India suffered the largest electrical blackout in history, affecting an area encompassing about 670 million people, or roughly 10 percent of the world’s population. Three of the country’s interconnected northern power grids collapsed for several hours, as blackouts extended almost 2,000 miles, from India’s eastern border with Myanmar to its western border with Pakistan.

For a country considered a rising economic power, Blackout Tuesday — which came only a day after another major power failure — was an embarrassing reminder of the intractable problems still plaguing India: inadequate infrastructure, a crippling power shortage and, many critics say, a yawning absence of governmental action and leadership.


96 iPlanet, supra; Heilman, supra.

97 iPlanet, supra; Heilman, supra.
launched from Lebanon.\textsuperscript{98} Israel has no backup to meet consumption, and current energy sources have been destabilized by major acts of sabotage following the instability created by the fall of the Mubarak government in Egypt.\textsuperscript{99} Israeli officials warn that as a result the country soon could encounter rolling blackouts, much as California experienced intermittently throughout the last decade. Israel already is experiencing brownouts. Heavy reliance on foreign supplies makes Israel highly subject to global price fluctuations-not to mention potential boycotts by hostile energy-exporting states.\textsuperscript{100} Thus, Israel faces both a steady and growing demand for electrical energy while at the same time having limited access to the traditional means of generating electrical power and facing environmental limitations on generating electricity by burning fossil fuels.

It is important for both law students and lawyers in this “information age” of the 21\textsuperscript{st} century to think critically about the sources, particularly non-legal sources, upon which they rely in gaining familiarity with their clients’ businesses and the context for their FDI deliberations. Indeed, the internet age has – seemingly like a \textit{jinni} from the \textit{1001 Nights}\textsuperscript{101} – allowed unprecedented access to virtually unlimited amounts of data from myriad sources with breathless alacrity. At the same time, however, never has so much misinformation been spread so widely

\textsuperscript{100} iPlanet, supra; Heilman, supra.  
\textsuperscript{101} \textit{1 The Arabian Nights: Tales Of 1001 Nights}, at 5-7, 965 (Penguin Classics 2008)(Malcom C. & Ursula Lyons, tr.). Of course, in its most baleful incarnations, the internet may be more properly comparable to an ‘\textit{ifrît}, i.e., an “evil” \textit{jinnī}. See id., at 10-25, 965. Unlike the ‘\textit{ifrît}, however, the internet cannot be beguiled into returning to its bottle. Id. at 24-25.
so quickly.\textsuperscript{102} Thus, in learning IBT, just as in learning other disciplines that require the location, collection, and assessment of online data, it is important to join the “major campaign to place digital fluency at the heart of learning,” and at the heart of digital fluency is “having the skills and knowledge to evaluate and assess” the provenance and content of the information found and the perspective and critical discernment to recognize proper modes and strategies for information searches.\textsuperscript{103} In the preliminary research into FDI options, we can begin to emphasize these skills by requiring our students to provide critical, objective assessments of the quality, potential bias, and reliability of sources on which they rely.\textsuperscript{104}


\textsuperscript{103} Id. at 7.

\textsuperscript{104} See, e.g., M. Neil Browne, et al., The Importance Of Critical Thinking For Student Use Of The Internet, 34 COLLEGE STUDENT J. No. 3 (Sept. 2000), available at http://www.freepatentsonline.com/article/College-Student-Journal/66760560.html. As M. Neil Browne, Distinguishing Teaching Professor of Economics at Bowling Green State University in Ohio, observed over a decade ago — before the problem reached the proportions it has now attained:

Students may develop a “misunderstanding of research itself” by using the Internet as a research tool, …, due partly to the decontextualized nature of information found electronically. Historical research, for example, involves recognition and appreciation of context; the handwriting, typeface, layout and paper qualities of a document are valuable clues to a document’s meaning … Such contextual clues are unavailable to students who find a document on-line as opposed to in the library archives. In using the Internet to find the majority of research on a topic, students do not learn the importance of information’s context, leading to a very narrow understanding of what careful research requires of the researcher.

The increasing reliance of students on Internet research has also been accompanied by a decline in the quality of the their work, according to some educators. They maintain that students are piecing Internet-based information together as if it were from one point of view and entirely factual, although information provided by the Web is decontextualized and sometimes unreliable.

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Without carefully considering the source from which an argument has arisen and the reasoning behind the argument’s conclusion, students are doing little to develop their minds. If the goal of our educational system is indeed to “expand students’ intellectual capacities”, … then we should expect students to evaluate any arguments they encounter. Sites on the Internet have varying purposes, perspectives, and credibility in the same way that non-electronic sources do. Any individual who wishes to conduct research via the Internet must consider these qualities.
For example, the sources cited in this subsection to support the information and observations provided are, in addition to the internationally reputable and Pulitzer-Prize winning *New York Times*, at least prima facie reliable and verifiable. For example, although the United States is a staunch ally of Israel, the State Department’s information is gathered for governmental decision-making purposes by a third-party to Israel, and therefore is not likely subject to significant distortion or bias since it is not used primarily to shape U.S. public opinion. The *iPlanet* source may be subject to more bias, because it is the product of an Israeli trade and lobbying group\(^\text{105}\) that advocates “green” and alternative energy sources\(^\text{106}\); however, the subject matter involves relatively straightforward reporting of facts that can be verified by reference to other, independent international sources (such as those of the State Department, the WTO, and the World Bank), eliminating the skewing effect seen in reporting that involves advocacy of an industry self-interested position. B’Nai B’rith, which published Heilman’s article, is a well-known Jewish fraternal organization zealously promoting Israel and its interests,\(^\text{107}\) and thus

\(^{105}\) iPlanet discloses the following about itself:
About the sponsor
Founded in 2007, the Israel Energy and Security Consortium (iConsortium) is made up of Israeli companies and organizations that have united to provide comprehensive professional greenbuilding energy savings and production retrofits, and security construction services, which integrate high-caliber greenbuilding, cleantech, and security technologies. iConsortium members are successful companies and organizations, the majority of which operate in both Israeli and overseas markets. It represents the multi-sector convergence of for-profit, not-for-profit and academia towards a common goal, by incorporating leading businesses, an award-winning environmental NPO and a business ethics expert in its core group of founding members.


\(^{106}\) http://i-consortium.com/ (“iConsortium, member-companies offer the gamut of renewable energy, energy savings and green building technologies, products and services.”)

needs to be used cautiously; however, Mr. Heilman is a reporter recognized for his objectivity and accuracy in reporting\textsuperscript{108}, and is a watchdog for accuracy in reporting by others\textsuperscript{109}. 

2. Electricity Generated By Wind Turbines Is A Sustainable Energy Source That Has Great Room For Growth In Israel And Increases Israel’s Energy Independence

Israel’s energy needs are defined by its natural resource limitations, and the current Prime Minister, Benyamin Netanyahu has led a government focused on expanding the country’s energy base and promoting new sources of energy.\textsuperscript{110} Utilities throughout the world have turned to wind-power to expand electricity-generating capacity.\textsuperscript{111} “With the advancement of technology and the dropping of production prices wind has become a serious and important component of utility generation.”\textsuperscript{112} Wind power has become a desirable and affordable means of generating electricity, and one of the fast-growing means that utilities world-wide are implementing.\textsuperscript{113} As the Global Wind Energy Council (GWEC) has observed, “there is huge and growing global demand for emissions-free wind power, which can be installed quickly, virtually everywhere in the world” and “[w]ind energy is the only power generation technology that can deliver the


\textsuperscript{113} U.S. Dep’t Energy, Wind Powering America, http://www.windpoweringamerica.gov/ (including link to PDF file, 2010 ANNUAL WIND MARKET REPORT)
necessary cuts in CO2 in the critical period up to 2020, when greenhouse cases must peak and begin to decline to avoid dangerous climate change. Among alternative energy sources, wind-generated electricity has particular attraction for Israel, for significant regions of the country are sufficiently windy on a continuous basis to sustain commercial electrical production. At present, Israel has only one wind turbine farm, located in the Golan Heights.

In addition to the reputable New York Times and Jerusalem Post, the sources for this section include information from two wind-industry groups, the American Wind Energy Association (AWEA) and the GWEC, both of which are, naturally, biased somewhat in favor of promoting wind-energy and wind-energy producers and manufacturers. Gotland University’s Report on wind-energy viability in Israel should be more balanced and objective, though it must be noted that the University has a Wind Energy Department and offers a M.S. degree in Wind Energy Project Management, and thus is likely to be influenced by a bias in favor of wind-energy manufacturers, operators, and promoters, who are likely employers and sponsors of students and graduates in the program.

3. Israeli Government Support For Wind-Generated Electrical Generation Is Growing, And Israel’s FTA Agreement With The U.S. Will Permit Multimatrix To Import Alstom’s American-Made Wind Turbines Duty-Free

The Israeli government strongly supports the development of wind-generated electricity in Israel.\textsuperscript{118} As the \textit{Jerusalem Post} reports, “Prime Minister Binyamin Netanyahu has declared the” further development of the Golan Heights wind farm a “‘national project,’” and “as fears continue to loom over energy shortages,” the expansion of wind-generated electricity on the Golan Heights is “widely supported by government officials who see a growing need for alternative energy sources in Israel.”\textsuperscript{119} Indeed, Israel’s cabinet has approved an allocation of 800 megawatts of energy production from wind farms as part of Prime Minister’s 10-Year Energy Plan for Israel, which seeks by 2020 to generate from renewable energy sources 10% of the country’s electricity.\textsuperscript{120}


\textsuperscript{119} Kalindi O’Brien, supra note 66.


“The Cabinet today approved a long-range plan to promote the production of electricity from renewable, non-polluting sources. The goal of the plan is to work to reduce the gas emissions and air pollution by the electricity industry and to ensure long-term sources of energy for Israel, while developing stable and ramified industry and encouraging innovative research. The decision was formulated on instruction from Prime Minister Benjamin Netanyahu and the National Economics Council, in cooperation with the National Infrastructures and Environmental Protection ministries.
from large-scale solar installations, 110MW from rooftop solar, 800MW from wind power and about 210MW from biogas and waste-to-energy.\textsuperscript{121} The Israeli government’s ambitious program is also creating an opportunity to enter a secondary market in wind power – individual office and apartment buildings. Manufacturing, importing, and selling smaller wind turbines for installation on roofs has already started in Tel Aviv, and Israel’s public utility authority has adopted a rule allowing individuals to generate their own wind-made electricity and sell their excess back to the electric power grid.\textsuperscript{122} Alstom is well-positioned to manufacture and import into Israel both the larger wind-turbines needed for the Golan Heights project, as well as a separate line of smaller, commercial-and-residential building units.

The decision sets a quantitative goal for electricity generation from renewable sources of 2,760 megawatts by the end of 2020, constituting 10% of electricity production in Israel. An interim goal of 1,550 megawatts by the end of 2014 was also set.

In the first stage, between 2011-2014, the quotas that have already been allocated for the production of electricity from renewable, non-polluting sources, as well as additional quotas, will be realized: 460 megawatts for large installations, 110 megawatts for installations designated for independent consumption, approximately 210 megawatts for electricity generation from bio-gas and waste, and 800 megawatts of electricity from wind power. In 2014, the National Infrastructures Ministry will formulate an updated policy in order to meet the goals for 2020.

The plan is designed to reduce surplus costs to consumers in producing electricity from these sources.


\textsuperscript{121} Oliver Wagg, Israel Government Approves 2.8GW 2020 Renewables Goal--Israel’s Cabinet Has Given The Go-Ahead To A Plan To Generate 10% Of The Country’s Electricity From Renewables By 2020, RECHARGE: THE GLOBAL SOURCE FOR RENEWABLE ENERGY NEWS, July 18, 2011, at http://www.rechargenews.com/business_area/politics/article267837.ece

In 2010, Alstom announced the opening of a new wind-turbine assembly manufacturing plant sited in Amarillo, Texas\textsuperscript{123}, which is the latest component of its North American Wind Operations Division headquartered in Richmond, Virginia.\textsuperscript{124} Ground was broken on the facility,\textsuperscript{125} and certification of its production processes are underway,\textsuperscript{126} and the U.S. Energy Department has already awarded Alstom a $4.1 million “to research and develop advanced control systems and integrated sensors that increase energy production and lower the capital cost[s]” of electricity-generating wind turbines.\textsuperscript{127} The American presence is especially timely, because it will allow Alstom to take advantage of the Free Trade Area agreement between the United States and Israel,\textsuperscript{128} the first FTA into which the U.S. entered 25 years ago.\textsuperscript{129} Under Annex I of the FTA, products “of the United States” are imported duty-free into Israel.\textsuperscript{130} To be considered a “product of the United States,” an item must qualify as “wholly the growth, product, or manufacture of the United States of America or is a new or different article of

\textsuperscript{127} Staff Writer, DOE Awards $4.1m Research Grant To Alstom, ENERGY BUSINESS REVIEW, Sept. 19, 2011, http://wind.energy-business-review.com/news/doe-awards-41m-research-grant-to-alstom-190911
\textsuperscript{128} Israel Finance Ministry, International Agreements—Free Trade Area (FTA) Agreements, http://eng.mni.gov.il/FinanceIsrael/Pages/en/EconomicData/InternationalAgreements.aspx
\textsuperscript{130} Israel Free Trade Agreement, Arts. 2(2), 2(3), Annexes II, III, TRADE COMPLIANCE CENTER, http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp
commerce that has been grown, produced, or manufactured in the United States of America,” and “the sum of (a) the cost or value of the materials produced in the United States of America plus (b) the direct cost of processing operations performed in the United States of America is not less than 35 percent of the appraised value of the article at the time it is entered into Israel.”

Although Alstom currently manufactures a portion of the wind turbine components outside of the U.S., there are indications it plans nacelle manufacture in the Texas facility as well as wind turbine assembly; and the assembled wind turbines will qualify for tariff-free treatment because at the Texas facility they will be “substantially transformed into a new article having a new name, character, or use.”

In addition, “To benefit from the provisions of the U.S.-Israel FTA, qualifying goods exported to Israel must be accompanied by a special ‘US Certificate of Origin for Exporting to Israel.’” Should there be any disputes with customs officials in Israel over the status or documentation of imported wind-turbines, the FTA provides a dispute resolution process provided by the Joint Committee. Alstom can also be assured of protection of its intellectual property by Article 14 of the Treaty, that provides “national and most favored nation treatment with respect to obtaining, maintaining and enforcing” legal protections on American and Israeli companies’ intellectual and industrial property of all kinds.

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133 Export-Import Assistance, U.S.-Based Companies Exporting To Israel, AMERICA-ISRAEL CHAMBER OF COMMERCE/Chicago, http://www.americaisrael.org/scripts/exp_Index.asp
134 Id. (“This certificate must be official, i.e., green in color. It can be purchased from one of the Association of American-Israel Chambers of Commerce or a printing house.”).
135 Israel Free Trade Agreement, Arts. 17, 19, TRADE COMPLIANCE CENTER, http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp
France, unlike the U.S., does not have an FTA with Israel. While Israel enjoys trade concessions granted through the application of the EU-Israel Association Agreement to its territory, the territorial requirement does not include the Arab territories occupied by Israel, such as the Golan Heights.\footnote{See, e.g., Andrew Rettman, EU court strikes blow against Israeli settlers, EU Observer, Feb. 25, 2010, at \url{http://euobserver.com/foreign/29558}. The report note a decision by the European Court of Justice in a case concerning whether syrup for soft drinks imported into the E.U. by Brita from an Occupied Territories producer, Soda-Club, was entitled to the tariff preferences for “products of Israel” recognized in the EU-Israel Association Agreement. Id. The report quotes the critical holding of the European Court of Justice that But the court said Soda-Club should have obtained papers from the Palestinian Authority instead if it wanted any customs breaks. “[p]roducts obtained in locations which have been placed under Israeli administration since 1967 do not qualify for the preferential treatment provided for under that [EU-Israel] agreement,’ … referring to the 1967 Six-Day War.” Id. Whether this ruling has persuaded Israeli’s custom authorities to withdraw tariff amelioration for certain E.U. imports as a retorsionary measure, or whether such a measure has even been suggested or considered in Israel, remains indeterminate in the author’s research to date. For a detailed legal analysis of the European Court of Justice’s ruling, see} Thus, Alstom’s operations in France would appear not to benefit directly from the Association Agreement’s amelioration of tariffs\footnote{See, id; see, e.g., Victor Kattan, \textit{A Message for the EU: Withdrawing Preferential Trade with Israel is an Appropriate Response to Israel’s Violation of International Human Rights Law}, http://www.badil.org/articulo-74/item/917-a-message-for-the-eu-withdrawing-preferential-trade-with-israel-is-an-appropriate-response-to-israel%E2%80%99s-violation-of-international-human-rights-law#3 (2004).}, although Alstom’s FDI in Israel would not involve imports from Occupied Territories in the E.U., but rather, exports from the E.U. into Occupied Territories; and it is not clear whether Israel would impose tariffs on items Alstom might import into Israel bound for the Golan heights in retorsion\footnote{\textit{Rétorsion}, as it was originally formulated in French diplo-speak, describes “a legal, but deliberately unfriendly act,” taken by one nation in retaliation for a similar, equally unfriendly, lawful act of another nation, in hopes of “compel[ling] the offending state to change its unfriendly conduct.” Christopher C. Joyner, \textit{Coercion}, in \textit{THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW} (R Wolfrum ed. Oxford University Press, 2008)(online edition, available at www.mppepil.com).} for the E.U.’s stance that goods imported from the Occupied Territories into the E.U. do not get the benefit of tariff amelioration. Yet, even with that qualification, it bears noting that the Association Agreement
is under fire from within and without the E.U., and there is ongoing condemnation within the
E.U. of Israeli resistance to certain E.U. policy imperatives for the occupied territories.\footnote{See id; \textsc{Delegation Of The European Union To Israel, Statement By High Representative Catherine Ashton On The Israeli Decision To Expedite Settlement Activity} (02/11/2011), \url{http://eeas.europa.eu/delegations/israel/press_corner/all_news/news/2011/20111102_01_en.htm} (expressing EU’s "deep concern" due to "the latest Israeli decisions to expedite settlement activities in response to Palestinian accession to UNESCO," declaring that "Israeli settlement activity is illegal under international law", and "call[ing] on Israel to reverse this decision").}

Besides the government sources on treaties and energy policy, which are evidently
reliable reports of legal documents and pronouncements, the sources used in this section come
from a variety of industry- and company-specific sources that are not entirely objective, and
often choose to put actions, trends, and challenges into the light most favorable to them. As
such, those sources – and the print and online media reportage based on those sources – must be
viewed cautiously and tested repeatedly as additional information comes to light, particularly if
the new information is inconsistent rather than corroborating.

4. The Recommendation From The Business Environment Perspective

Alstom’s opportunity to enter into the Middle Eastern market through Multimatrix’s
investment in the Golan Heights wind farm is timely both in terms of Israel’s energy needs and
Alstom’s expansion of its world-wide wind-energy presence. Wind-energy has become a real
player in electrical generation throughout the world, and Israel’s close trade relations with the
United States, where Alstom has established a strong presence, makes the Golan Heights project
an ideal showcase market for Alstom in the region, where Israel’s neighbors are also looking to
wind-generation to ease electricity supply shortages. The venture is not without risk: most
wind-suitable areas in Israel, offshore as well as onshore, are part of disputed territories\footnote{\textsc{Youssef Odeh, Wind Power Potential In Palestine/Israel, An Investigation Study For The Potential Of Wind Power In Palestine/Israel, With Emphasis On The Political Obstacles}},
vulnerable to terrorism\textsuperscript{142}, and subject to the political volatility that has characterized the region since 1948; some energy experts have called for a turn to nuclear rather than hydro-or-wind generation\textsuperscript{143}; exploitation of recently discovered offshore natural gas fields\textsuperscript{144} may increase the supply of other, extant energy sources that might be redirected to electricity production\textsuperscript{145}; and Israel’s political tensions with most of its neighbors may cloud the impact that a showcase project should have\textsuperscript{146}. However, Alstom has shown itself capable of rising above the static and making even the most controversial projects, like Jerusalem’s light rail, work.\textsuperscript{147} This proposed venture is far less risky; involves territory where the dispute (with Syria) has been for some time a “cold” rather than a “hot” dispute; is founded on information that is overall reliable; and involves a country with fewer energy options than most (and whose sudden natural-gas richness also comes with potentially serious political complications and vulnerabilities to sabotage and terrorism), making its commitment to wind-energy more credible and sustainable. The balance for a French multi-national like Alstom, which seeks a truly global presence, tips decisively in favor of approving the proposed joint venture with Multimatrix.


\textsuperscript{146}See YOUSRE ODEH, supra note 89, at 32-37.

\textsuperscript{147}See authorities cited in note 41, supra.
III. STAGE TWO—CRITICAL EVALUATION OF LEGAL ISSUES: NOT ONLY THOSE UNDER THE HOST STATE’S REGULATORY ENVIRONMENT, BUT ALSO THOSE UNDER THE FDI INVESTOR’S HOME STATE’S LAWS AND THE LAWS OF THIRD-STATES TO WHICH THE FDI INVESTOR HAS SUBSTANTIAL CONNECTIONS

A. The Role of Treaties In The IBT Decision

Webs of treaties used to be the stuff of diplomatic intrigue and disastrous, trip-wire networks of alliances that led to conflagrations such as World War I. Since the Bretton Woods agreement in 1946, however, bilateral treaties concerning trade, along with multilateral conventions, have become the superstructure on which a complex, globalized trade system has been erected.

One of the most important developments in IBT has been its most recent phase since the 1960s, during which a centralized global atmosphere emerged, and, concomitantly, to which “legal institutions are creating a true body of substantive international law to regulate many transnational business deals. “ The United States’ first bi-lateral trade agreement was concluded with Israel in 1985. Since then, the United States has negotiated and ratified FTAs with 16

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150 See, e.g., Gerald M. Meier, The Bretton Woods Agreement: Twenty-Five Years After, 23 STAN. L. REV. 235, 237 (1970-1971) (noting that the entities created by the Bretton Woods Agreement — “[t]he International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and the General Agreement on Tariffs and Trade (GATT)” — “have been the dominant international economic organizations since World War II.”).
more countries, and has negotiated and ratified BITs with over four nations. Some have criticized the use of such treaties as inimical to, or at least a deterioration of, the World Trade Organization regime. In a recent discussion of FTAs, Professor Paul Gathii observed that

The continued breakdown of WTO negotiations—indicated by the collapse of ministerial meetings in Seattle in 1999 and in Cancún, Mexico in 2003—has led developed nations to a shift towards regional and bilateral agreements to further goals that have been delayed or frustrated at the WTO. Negotiations stalled when the ministerial conference in 1999 was cancelled due to a lack of agreement among the countries and large protest activities outside the conference building. In Cancún, the negotiations collapsed again. This time, developing countries were unwilling to negotiate the “Singapore issues.” The “Singapore issues” refers to four things—competition policy, trade facilitation, investment liberalization, and government procurement—which developed countries have sought to negotiate with a view to arriving at new agreements covering these four areas since 1996. In August 2004, three of the issues—investment, competition, and government procurement—were, by agreement, dropped from the Doha agenda. Negotiations for trade facilitation, however, would continue. As one commentator noted, this “ended, for the time being, the developed countries’ attempt to greatly expand the WTO by introducing three new major areas of liberalization.”

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153 James Thuo Gathii, The Neoliberal Turn In Regional Trade Agreements, 86 Wash. L. Rev. 421, 441-442 (2011)(footnotes omitted). Professor Gathii also takes note of a less sanguine subtext of the regionalization trend:

… the United States and EU have found that it is much easier to negotiate with countries individually or in small groups than at the WTO. This strategy serves the interests of developed nations because they can use their market power to leverage negotiations to their advantage over much weaker economies. Bilateralism favors those with more resources since it limits the ability of weaker states to form cross-issue alliances which could increase their ability to negotiate with richer States. Similarly, WTO adjudication in the Dispute Settlement Body increases the likelihood that developing countries will gain better outcomes than in bilateral negotiations. By contrast, FTAs give powerful governments the opportunity to consolidate their vision of market governance through debt conditions, enforceable trade commitments and tied aid. An example is the Aid for Trade program, a $41.7 billion program that conditions aid to developing countries on subscription to the package of reforms imposed by big donors and lenders, including international financial institutions. Aid for Trade may further indebt developing economies and undermine rather than contribute to poverty eradication. FTAs therefore give powerful governments an opportunity to “more directly and less publicly [pressure] weaker governments to make extensive commitments.”

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Id at 445-446 (footnotes omitted). See also Professor Gathii’s article in which he reviews the arguments “over whether regional trade agreements are building or stumbling blocks” to developing nations, African Regional Trade Agreements as Flexible Legal Regimes, 35 N.C. J. Int'l L. & Com. Reg. 571 (2010).
Other observers, however, see the FTAs as emblematic of “the pluralistic reality of U.S. trade policy making,” which encourage other nations to “learn how to penetrate the U.S. decision-making process and to persuade enough of the machinery to advance their interests, including when those interests have been to negotiate a bilateral or free trade accord.”\textsuperscript{154} The FTA and BIT agreements, therefore, assume an outsized importance when a MNE of the dimension, diversity, and divisions boasted by an Alstom surveys its opportunities for leveraging various aspects of its operations. The presence – or absence – of meaningful FTA or BIT treaties vis-à-vis the location of relevant divisions, operations, and assets can become, as in the Alstom-Multimatrix hypothetical FDI presented here, an important factor. Indeed, as the U.S.-Israel FTA has had a significant, positive impact for MNEs that seek to do business between the two countries. As the U.S. State Department notes of that FTA, one of its effects is that “[i]n 2011, the United States was Israel’s largest trading partner” exchanging “almost $37 billion in total merchandise trade.”\textsuperscript{155} While several previously signed FTAs are still pending for various reasons, the Senate ratified a major FTA with South Korea in 2011, which went into force in 2012.\textsuperscript{156}

Yet, FTAs and BITs can also become a point of leverage by stronger economic nations over less-dominant nations. By entering into an FTA, a nation such as Israel can create increasingly optimized conditions for FDI by businesses affiliated with its trading-partner

\textsuperscript{154} Richard E. Feinberg, The Political Economy Of United States’ Free Trade Agreements, 26 THE WORLD ECONOMY 1019-1040, 1019, 1037-1038 (2003). The article is accessible from Professor Feinberg’s faculty page at the University of California—San Diego, http://irps.ucsd.edu/faculty/faculty-directory/richard-feinberg.htm

\textsuperscript{155} U.S. Dep’t of State, Benefits Of Free Trade Agreements — Israel, http://www.state.gov/e/eb/tpp/bta/fta/c26474.htm

\textsuperscript{156} U.S. Dep’t of State Benefits Of Free Trade Agreements — South Korea, http://www.state.gov/e/eb/tpp/bta/fta/c26474.htm
nations; but at the same time, it can unwittingly create a tool for future economic leverage by those nations in pursuit of political agendas. 157 This is especially true as the sensitivity towards the linkages between economics and human rights continue to be the subject of increasing international debate among advocacy organizations, governments, and scholars. For Israel, this has had particular significance in the political hand that the nations of the European Union have sought to play with respect to disputes over occupied territories and ethnically distinct groups within those territories. We see this in the context of the E.U-Israel Trade Association Agreement, as well as in public communications between the EU’s representative in Israel and the Government of Israel. 158

In 2010, the European Court of Justice (ECJ) rendered a judgment in Brita GmbH v. Hauptzollamt Hamburg-Hafen, which put squarely in issue the status under the Trade Association Agreement of products originating in the Occupied Territories. 159 By way of background, as a recent commentator observed:

A core principle in trade relations that generates disagreements between parties to BLTs is that of “rules of origin.” Determining the country of origin of a product is a critical factor in determining whether customs benefits will apply to the product. The “rules of origin” issue is one of the main features of the 1995 European Community-Israel Association Agreement (AA). [FN13] In 1997, the question

159 Case C-386/08, Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen, 2010 ECJ EUR-Lex LEXIS 63 (Feb. 25, 2010). The ECJ’s Opinion and Judgment may be downloaded in various languages from http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=386/08&td=ALL. For a spirited, and divided, scholarly commentary upon the case, see the various postings as Julian Ku, ECJ Rules that West Bank Goods are NOT “Made in Israel”, Opinio Juris, Feb. 27, 2010, at http://opiniojuris.org/2010/02/27/ecj-rules-that-west-bank-goods-are-not-made-in-israel/. Some commentators contended that “while it is true that now the products made in the West Bank are not going to fall within the scope of the EC-Israel Agreement, they are not going to be subject to import duties”, because “[t]he EC-PLO Agreement will apply to these goods instead,” while other commentators insist that “the EU/PLO agreement is only applicable if the PLO administration is the exporting state and issues proof of origin.” Id.
raised in various EU Member States was whether Israeli settlements in the Occupied Territories, namely the West Bank, Gaza Strip, East Jerusalem, and the Golan Heights, constituted part of the territory of the State of Israel—did products produced in these Israeli settlements violate the rules of origin pursuant to the AA?

Several European customs authorities began to challenge Israel by demanding that it verify the origins of goods coming from the Israeli settlements. This dispute developed into a major source of friction between Israel and Europe.160

In Brita, German drink-filter and drink-dispenser company Brita GmbH “contested the customs duties imposed on it by the German authorities for importing drink-makers for sparkling water manufactured in the West Bank for which the Israeli customs authorities issued a movement certificate attesting to the Israeli origin of those products.”161 Brita sought to import these goods from Israeli producer Soda-Club, made at a site in Mishor Adumin in the West Bank,162 to the east of Jerusalem, and sought to overturn the German court decision denying the goods preferential duties treatment on the grounds, inter alia, that products were made in the Israeli-

160 Sharon Prado & Lior Zehmer, Bilateralism And The Politics Of European Judicial Desire, 17 COLUM. J. EUR. L. 263, 266 (2011). The European Commission had repeatedly taken the position that “according to UN General Assembly and Security Council resolutions, no Israeli settlement in the West Bank, Gaza Strip, East Jerusalem, or the Golan Heights could be considered part of the territory of the State of Israel.” Id. at 277. In response, “the Israeli interpretation of its recognized area was very different from the European position,” and “[d]uring closed Israeli-EU meetings and in inter-ministerial correspondences, Israel argued that, under domestic law, East Jerusalem and the Golan Heights formed part of the territory of the country.” Id. at 278.


162 As Prado and Zehmer explain the lay of the land—

The manufacturing facility of Soda-Club is located in the Adumim Industrial Park in Maale Adumim, the largest Israeli settlement in the occupied Palestinian West Bank between Jerusalem and Jericho. Even though Soda-Club’s systems and accessories are produced in the Palestinian Occupied Territories, Brita marked all of these products “Made in Israel” and applied for an exemption from customs duties under the AA. To that end, Brita filed customs declarations stating that the State of Israel was the country of origin of these systems and accessories. Soda-Club presented invoices declaring that the goods were all produced in Israel.

Prado & Zehmer, supra note __, at 282.
occupied territories. In presenting the case to the Court, Advocate General Yves Bot urged the ECJ to rule that “goods certified by the Israeli customs authorities as being of Israeli origin but which prove to originate in the occupied territories, more specifically the West Bank, are not entitled either to the preferential treatment under the EC-Israel Agreement or to that under the EC-PLO Agreement.” The ECJ’s lengthy and technocratic-sounding ruling went against Brita’s position (and that of Israeli customs authorities), but in a more nuanced way:

[T]he Court (Fourth Chamber) hereby rules:

1. The customs authorities of the importing Member State may refuse to grant the preferential treatment provided for under the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States … and the State of Israel… signed in Brussels on 20 November 1995, where the goods concerned originate in the West Bank. Furthermore, the customs authorities of the importing Member State may not make an elective determination, leaving open the questions of which of the agreements to be taken into account – namely, the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States … and the State of Israel […] and the Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community … and the Palestine Liberation Organisation (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, … signed in Brussels on 24 February 1997 –

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164 As Professor Engle explains:

The Advocate General is a post which has no real parallel in U.S. law. The Advocate General writes advisory opinions which can be analogized to an “amicus curiae” brief. The ECJ may or may not take the Advocate General’s opinion into account and may or may not use in reaching its final verdict. The Advocate General’s opinion has no binding authority.


applies in the circumstances of the case and of whether proof of origin falls to be issued by the Israeli authorities or by the Palestinian authorities.

2. … the customs authorities of the importing State are not bound by the proof of origin submitted or by the reply given by the customs authorities of the exporting State where that reply does not contain sufficient information … to enable the real origin of the products to be determined. Furthermore, the customs authorities of the importing State are not obliged to refer to the Customs Cooperation Committee … a dispute concerning the territorial scope of that agreement.166

Of course, for Alstom’s situation in a Golan Heights FDI, Alstom would be exporting its equipment and services to the Golan Heights, rather than importing anything into the E.U. from the Golan Heights. Although the normal sovereign response to a ruling like Brita might be engage in retorsion by subjecting E.U.-imports to heightened tariffs at the border of the Golan Heights (or at another border of Israel, such as the port at Haifa), there is no indication Israel has taken that path. Nor would it make much sense for Israel to do so. No Israeli-based company is competing with Alstom, and Israel needs Alstom’s technology and expertise. Moreover, tariffing the Alstom imports would serve only to drive up the cost, of the wind power, and diminish the viability of a major wind farm, that will serve Israeli’s grid.

While all of this does not directly impact the particular FDI deal under consideration in this article, it does suggest an environment of partisanship within the E.U. and a strong contingency of E.U. nations and officials to use economic and diplomatic pressure to incentivize Israel to slow – indeed, cease – activities in the Occupied Territories that expand its claims to sovereignty. Indeed, increasing the pressure brought on by the Brita decision, the E.U.’s High Representative for Foreign Affairs became the medium for the E.U. to rebuke Israel’s renewed

166 Judgment of the Court, Case C-386/08, Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen, 2010 ECJ EUR-Lex LEXIS 63 (Feb. 25, 2010). The case is discussed in the larger context of
pace in settling occupied territories. Alstom would not wish to become caught up in this
dispute in ways that have more than public relations impacts, particularly after the controversy – and litigation – attendant to its work on another Occupied Territories project, the Jerusalem Light Railway.

A final set of observations should be devoted to Israel’s own efforts to weave its commerce into the tapestry of international trade. For its own part, Israel has worked to create a web of BITs, although it has marched to the beat of its own drummer in doing so:

Between 1976 and 2004, Israel signed 34 agreements, four of which have not been ratified as of yet. Most of these agreements were signed with developing countries and emerging economies, where Israel had strong, rising investment interests. the few agreements that were signed with countries in which Israel had no significant investment interest, the agreements served either specific strategic or diplomatic goals, or were part of a broader framework of international economic agreements (trade, double-taxation, etc). The vast majority of these agreements do not reflect reciprocal investment relations and they strengthen Israel's status as a state in transition from a developing to a developed economy.

Noteworthy is the fact that Israel “traditionally tends to avoid negotiating BITs with other developed countries, as part of the view that developed countries should not sign BITs among themselves,” and “[s]ince Israel views itself as a developed country with a stable economy, it has made it a general rule not to sign or negotiate BITs with other developed countries, with the

exceptions of France and Germany.”

Israel’s BITs with both nations, however, have been superseded by the European Union, and, as discussed above, the E.U.-Israel Trade Association Agreement, with its strictures about the Occupied Territories, has replaced it.
B. The Role In FDI Decisions Of Litigation Risk In Municipal Courts—With A Particular Emphasis On Corporate Social Responsibility

Notions of corporate social responsibility have assumed greater roles in MNE activities, reflecting “increasing ethical demands made not of states, but of firms, which are now perceived as more capable to address a large range of complaints.”\textsuperscript{172} This is particularly true of French MNEs, such as Alstom, which came relatively late to the appreciation of public, as distinguished from internal corporate, accountability for corporate social responsibility.\textsuperscript{173} As a result, French MNEs are “the leaders in a great many African and Middle Eastern countries, some of which have very poor human rights records.”\textsuperscript{174} Thus, French MNEs, such as Alstom, “are confronted with a double threat”: they are “increasingly exposed to NGO criticism” for their activities (including those through subsidiaries) in developing countries, and at the same time, “elements of US society—the courts or the media—will react negatively on the basis of those reports.”\textsuperscript{175}

Litigation is a tool of strategic business management, and it can also be employed as a tool by which private parties or organizations use the municipal courts of various countries to control the activities of MNEs, including to hobble or even stop particular FDI projects. This

\textsuperscript{172} Ariel Colonos & Javier Santiso, Vive La France! French Multinationals And Human Rights, 27 Human Rts Qtrly 1307, 1308, 1328 (2005)(noting evolution of corporate social responsibility perspectives from narrow focus on “staff-industrial relations within French corporations” to “environmental issues,” relationships “between businesses and their external parties, cities, the social fabric surrounding them, and their fellow citizens” and “[f]inally, and as the last stage in this expansion … a number of French firms are now asked to account for their activities abroad from a human rights perspective.”).

\textsuperscript{173} Id. At 1311, 1322 (noting that “with Anglo-American funds ever more present in their capital structure, French firms became singularly receptive over the course of the 1990s to developments in North America, adopting and adapting to the emerging normative standards”).

\textsuperscript{174} Id. At 1332; see id. At 1333. The authors observe that French attitudes holding that “human rights shold not be taken into account in the framing of foreign policy” and FDIs because that “would create an obstacle to the decision making process.” Id. At 1343-1344.

\textsuperscript{175} Id. at 1339-1340.
has certainly proven to be the case with FDIs in the Occupied Territories of Israel.\textsuperscript{176} Such litigation is often viewed as a peculiarly American phenomenon; but other nations and their court systems are now among the forums hosting such disputes.

In the following subsections, litigation in municipal courts of France; Quebec Province, Canada; and the United States, arising from MNE activity, including FDIs, in other nations, is examined, and the impact of such lawsuits on Alstom’s hypothesized FDI in the Golan Heights is assessed.

1. Alstom’s Vulnerability To Suits At Home Over Its FDI In Israel: Not An American In Paris, But A Nanterrean In Nanterre

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

\textsuperscript{176} See, e.g., Yashai Blank, Legalizing The Barrier: The Legality And Materiality Of The Israeli/Palestine Separation Barrier, 46 Tex. Int'l L.J. 309, 311 & n. 8 (2011)(analyzing the “legal campaign against” the wall erected in the Occupied Territories, including” (1) the legal norms in which the litigators and the courts operated; (2) the theoretical approaches--often of extra-legal disciplines--regarding the harm that the barrier caused (or might cause); and (3) the strategic and tactical choices taken by the various NGOs which spearheaded the campaign, often a result of compromises among disagreeing parties”). Professor Blank notes that “One of the most difficult dilemmas which anti-wall activists had to address was the question whether to pursue a legal course of action or focus on extra-legal activity such as advertising and public demonstrations. Another was the following: what legal strategy should be adopted in order to combat the barrier?” Id. 311 n. 8.
Alstom’s exposure to such suits is very much worth considering, particularly in light of a case brought in France against Alstom for alleged violations in Alstom’s participation in the Jerusalem Light Rail Project.\(^{177}\) Two NGOs the Association France Palestine Solidarité (AFPS) and the Palestinian Liberation Organization (PLO) sued Alstom and Veolia Transport, another contractor working on the Jerusalem Light Rail Project, in the French Courts, contending that they were collaborating in the violation of international law through their work on building a tramway through the occupied territories in Israel.\(^{178}\) The papers initiating the legal action in the French Court of Grand Instance at Nanterre “to cancel the Israeli contract given to Alstom, which will provide the train carriages, and to Veolia Transport, the public transport operator. \(^{179}\) The French appeals court (cour d’appel) affirmed an interlocutory decision of the Nanterre court that the courts of France had subject matter jurisdiction over the claims asserting violation of


\(^{178}\) Id. at ; see also Aurine Crémieu, Rubrique “En Mouvement” *Israel et Territoires Occupés*, La Chronique, Mar. 1, 2006, available at http://www.amnesty.fr/index.php/amnesty/s_informer/la_chronique/mars_2006_sommaire/israel_et_territoires Occup. Kaleck refers to the suit in France against Alstom in the following context that will be useful to framing our discussion of Alstom’s vulnerability to suit in both France and the U.S. on any project – light rail or wind turbine farms – that it undertakes in the Occupied Territories:

As stated earlier, the U.S. ATCA is a unique phenomenon. No European jurisdiction offers a civil remedy that is specifically designed to compensate victims of human rights violations committed abroad. Universal jurisdiction has not been codified in European civil law--that is, outside of the criminal context--and it can be said that European civil legislation is not yet designed to handle cases of transnational human rights crimes.

Nevertheless, some countries have successfully provided other civil remedies for human rights violations, including the United Kingdom, the Netherlands, France, and Germany.

international law, as well as over the claims asserted under France’s Civil Code.\textsuperscript{180} That in and of itself is quite an important ruling, for it opens the French courts to future cases filed against Alstom and other MNEs alleging violations (or complicity in violating) international legal norms.

The litigation before the Nanterre court went on for four years, according to the Paris-based law firm, August & Debouzy Advocats\textsuperscript{181}:

\begin{quote}
[T]he Nanterre Civil Court (Tribunal de Grande Instance) has just ruled that the French companies Veolia Transport, Alstom and Alstom Transport’s membership of an Israeli consortium in charge of building and operating the Jerusalem light rail system did not constitute a violation of public international law.

In February 2007, the French association France Palestine Solidarité (AFPS), joined several weeks later by the Palestine Liberation Organisation (PLO), sued the French companies before the Nanterre Civil Court requesting that they be prohibited from participating in the consortium and arguing that the light rail project violated various rules of public international law regarding, inter alia, the status of the areas beyond the East Jerusalem “Green Line” as “occupied territories”.

The discussions pertained to the application of the rules of public international law as well as to the route of the light rail system, the conditions of its construction along pre-existing roadways and how it was perceived by local populations. In its judgment, the Nanterre Civil Court first excluded the application of the rules of public international law invoked by the PLO and AFPS to private companies. However, the Civil Court also confirmed that neither the signature of the concession agreement by these companies and their subsidiaries, nor the route and operating conditions of the light rail system constituted a fault under Article 1382 of the French Civil Code, as claimed by AFPS and PLO.
\end{quote}

\textsuperscript{180} The Jerusalem Light Rail Transit (JLRT)——

Finally, the Court dismissed the voluntary joinder of the PLO in this case. AFPS and the PLO have lodged an appeal against this judgment.\(^{182}\)

Another activist organization calls Alstom’s FDI in Jerusalem “[b]uilding the infrastructure of the occupation,” and contends\(^{183}\)

Activists against Alstom because the Jerusalem FDI recently claimed that the publicity and debate generated by their opposition were the cause of a failed Alstom bid “to build a high-speed railway on the Muslim pilgrim[age] route between Mecca and Medina in Saudi Arabia,” a project claimed to be worth $10 billion.\(^{184}\)

2. Alstom’s Vulnerability In Francophone Courts Over FDI In Israel

France has not been the only nation to see litigation under its municipal laws over an FDI in Israel. The Courts of Québec Province in Canada, for example, have been the forum for at least one lawsuit filed over an FDI in Israel, *Bil’In (Village Council) & Yassin v. Green Park International Inc.*\(^{185}\) In *Bil’In*, the municipal authority over the Palestinian village of Bil’in, and a group of residents, sued two corporations incorporated in Québec for their involvement in


\(^{183}\) The Grassroots Palestinian Anti-Apartheid Wall Campaign, *Briefing*, available at http://www.stopthewall.org/search/node/Alstom

\(^{184}\) *BDS Claims Victory After Alstom Project Derails*, Ma’an News Agency, Oct. 27, 2011, at http://www.maannews.net/eng/viewdetails.aspx?id=433036. The activists also claim that “Alstom suffered blows when a Swedish pension fund excluded it from its investment portfolio, as did the Dutch ASN Bank, due to involvement in Israel’s occupation of Palestinian land.” Id.


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building housing for Israelis in the West Bank. The plaintiffs’ filings in the suit included what the Québec Superior Court described as the essence of their legally complex and contentious case:

[5] The Plaintiffs' civil action is largely summarized in the following paragraph of the motion introducing their action:

24. The Village pleads that the corporate Defendants, on their own behalf and as agents of the State of Israel, are constructing residential and other buildings and are creating a new dense settlement neighbourhood on the lands of the Village and are marketing and selling therein condominium units and other built up areas to the civilian population of the occupying power, the State of Israel, for the purpose of transferring the civilian population of Israel to the village’s land and removing the population of the Village from their land. In so doing, the corporate Defendants are aiding, abetting, assisting and conspiring with the State of Israel in carrying out an illegal purpose. The Defendant, LaRoche, is deemed legally to be liable for the conduct of the corporate Defendants in her capacity as their sole registered director and officer. The Defendants, and each of them, are therefore in violation of the aforesaid Article 49(6) of the Fourth Geneva Convention dated August 12, 1949, Section 3(1), Schedule V Protocol 1, Part 1, Article 1 (1) and Schedule V Protocol 1, Part V, Section 11, Article 85 (4)(a) of the Geneva Conventions Act, R.S. 1985, c. G-3 , Articles 8(2)(b(viii) and 25 (c) of the Rome Statute of the International Criminal Court dated July 17, 1998, Section 6(1)(c), 6(3) and 6 (4) of the Canadian Crimes against Humanity and War Crimes Act S.C. 2000, c. 24, Sections 6 and 8 of the Charter of Human Rights and Freedoms, R.S.Q., c. C-12 and Article 1457 of the Civil Code of Québec.

[6] More succinctly, the Plaintiffs allege that by transferring part of its civilian population to territory it occupies in the West Bank, Israel is violating international law as well as Canadian and Québec laws and that by constructing and selling condominiums exclusively to Israeli civilians, the Defendants are assisting Israel in the perpertration of war crimes.

[7] On those bases, the Plaintiffs seek declarations that the Defendants are in violation of the legal provisions mentioned above. They also seek punitive damages, the immediate cessation of the Defendants’ activities, the demolition of the buildings in dispute and a complete accounting.

[8] The Plaintiffs ask that their action be decided according to Canadian and Québec laws, rather than the laws where the injurious acts and injuries allegedly occurred, arguing that the courts of Israel will refuse to find that Israel is in violation of the international instruments on which they rely.\(^{187}\) The suit raised a plethora of issues, including the recognition of a foreign judgment (in litigation that had transpired among the parties in Israel), whether such a foreign judgment would be afforded res judicata effect, and if so, the extent of claim preclusion that the Canadian court would accord to the foreign judgment.\(^{188}\) Ultimately, the court gave limited res judicata effect to the prior Israeli judgments; but the crux of the court’s opinion was to find that the case belonged, in the court’s view, in Israel, and thus the court effected a forum non conveniens dismissal.\(^{189}\)

While these Quebec corporations managed to avoid even more protracted litigation in Canada, there are elements of the *Bil’In* opinion that could be cause for concern to an MNE like Alstom, with significant investments in Israel. The Quebec court – like the courts in France – were willing to give more than short shrift to the notion that Israel’s obligations under international customary law and convention might well be enforceable against a corporation

\(^{187}\) *Bil’In* slip opinion at ¶¶ 5-8, pp.

\(^{188}\) *Bil’In* slip opinion, supra note __, at ¶¶ 18-19.

found to be “assisting” Israel in alleged international law violations. The court speculated about this potential in discussing the effect of the broad concept of a “delict” – or “fault” – under the Quebec Civil Code, after concluding that although Israeli law normally would apply under the lex loci delicti choice of law principle, the content of Israeli’s law had not been pleaded or proven, the Quebec Civil Code could therefore be applied. The Civil Code provision at issue imposes a very broad, and ill-defined from an MNE’s perspective, duty on all persons

1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.190

190 Civil Code of Québec, LRQ, c C-1991, s 1457, available at http://www.canlii.org/en/qc/laws/stat/lrq-c-c-1991/latest/lrq-c-c-1991.html#sec1457_smooth. Section 1457 is part of the civil-law code style of statute, relatively unfamiliar to most American lawyers outside of Louisiana or Puerto Rico; it is contained, like a nesting doll, within Civil Code “CHAPTER III —CIVIL LIABILITY, SECTION I —CONDITIONS OF LIABILITY, § 1. — General provisions”. Id. The usages that have grown up around that statute in civil-law Quebec are different than the understanding might be in a common-law province:

[33] As we noted above, the general rules of civil liability set out in art. 1457 C.C.Q. are based on fault (Baudouin and Deslauriers, at p. 149). [translation] “This is a universal concept, since it applies every time a victim alleges that a person who caused injury is liable under the general rules” of art. 1457 C.C.Q. (P.-G. Jobin, “La violation d’une loi ou d’un règlement entraîne-t-elle la responsabilité civile?” (1984), 44 R. du B. 222, at p. 223). To answer this question, the standards provided for in statutes and regulations, often called “legislative standards”, must be analysed in light of the basic concept of civil fault.

[34] In Québec civil law, the violation of a legislative standard does not in itself constitute civil fault (Morin v. Blais, 1975 CanLII 3 (SCC), [1977] 1 S.C.R. 570; Compagnie d’assurance Continental du Canada v. 136500 Canada inc., [1998] R.R.A. 707 (C.A.), at p. 712; Jobin, at p. 226). For that, an offence provided for in legislation must also constitute a violation of the standard of conduct of a reasonable person under the general rules of civil liability set out in art. 1457 C.C.Q. (Union commerciale Compagnie d’assurance v. Giguère, [1996] R.R.A. 286 (C.A.), at p. 293). The standard of civil fault corresponds to an obligation of means. Consequently, what must be determined is whether there was negligence or carelessness having regard to the specific circumstances of each disputed act or each instance of disputed conduct.
From that starting point, future litigants challenging an FDI in Israel might seek to link together the following portions of the Quebec court’s opinion, starting with its views on at least one of the international treaty obligations violated with the Quebec corporations’ help:

(i) Fourth Geneva Convention

[148] ***

In 1949, four new Geneva Conventions were adopted [Reference omitted.]…Convention IV is new, since it is the first one dealing exclusively with the protection of civilians in times of war. Indeed, until 1949, IHL [International Humanitarian Law] was mainly concerned with the protection of combatants. However, the Convention supplements some Hague Regulations on land warfare relating to civilians. The Convention focuses on the treatment of civilians who are under the jurisdiction of the enemy, either in its territory or in occupied territory. To a lesser extent, it also seeks to protect civilians from attacks and other effects of war.

[149] In Article 1, the High Contracting parties undertake to respect and ensure respect for the Convention "in all circumstances".

This rule applies to the assessment of the nature and consequences of a violation of a legislative standard.

[35] The French position is different. In French law, the violation of a legislative standard in itself constitutes civil fault (Jobin, at p. 229). This means that it is not necessary [translation] “to find negligence, imprudence, carelessness or something deficient in the conduct of the person who caused the injury” (Viney and Jourdain, at p. 328). Thus, where a legislative standard is violated, the general rules of civil liability transform the standard into an obligation of result, since the victim can [translation] “establish fault by proving a simple material fact without having to show that the conduct of the person who caused the injury was also morally or socially blameworthy” (Viney and Jourdain, at p. 342).

[36] In Québec, art. 1457 C.C.Q. imposes a general duty to abide by the rules of conduct that lie upon a person having regard to the law, usage or circumstances. As a result, the content of a legislative standard may influence the assessment of the duty of prudence and diligence that applies in a given context. In a civil liability action, it will be up to the judge to determine the applicable standard of conduct — the content of which may be reflected in the relevant legislative standards — having regard to the law, usage and circumstances.

_Bil’In_ slip opinion, supra note___, at ¶ 172 (quoting St. Lawrence Cement Inc. v. Barrette, 2008 SCC 64 (CanLII), 2008 SCC 64.)
[150] Article 49(6) provides that "The Occupying Power shall not (...) transfer parts of its own civilian population into the territory it occupies".

[151] The Plaintiffs allege that Israel has ratified the Fourth Geneva Convention.

[152] They further allege, and this is of vital importance, that the Fourth Geneva Convention is considered "customary international law binding all countries". If so, the Fourth Geneva Convention is part of the domestic (or "municipal") law of Israel.¹⁹¹

The litigants could next turn to the court’s ruminations about whether allegations of corporate assistance to Israel could be an actionable “delict” or “fault” against the corporations themselves:

[188] … Defendants would be under the general obligation not to prejudice the Plaintiffs by favouring even indirectly a breach by Israel of its undertakings as a High Contracting Party pursuant to the Fourth Geneva Convention. Knowingly participating in such breach would constitute a civil fault, as would an intentional participation to a war crime.

[189] Allegations of this nature are made against the Corporations and Defendant Laroche.[69]

[190] The Defendants’ contention that the rights created by the Fourth Geneva Convention inure to the exclusive benefit of signatory states and that only states and their agents are subject to its obligations are therefore not decisive: if the Plaintiffs’ allegations are true, a trial judge could find that the Corporations are at fault for knowingly participating in Israel’s alleged illegal Policy.¹⁹²

To complete the argument, the litigants would then likely cite the Quebec courts’ conclusions from the premises set forth above:

(c) Conclusions whether the Action is unfounded in law even if the facts alleged are true

¹⁹¹ Bil’In slip opinion, supra note __, at ¶¶ 148-152
¹⁹² Bil’In slip opinion at ¶¶ 188-190.
To summarize, the Superior Court has jurisdiction over defendants domiciled in Québec regarding a civil action based on extracontractual liability for an injury caused and suffered in a foreign country. The law that normally applies in such case is the law of the country where the injurious act occurred, i.e. where the injury was caused. That law must be proven. In the absence of proof, by default, the Superior Court will apply the substantive law of Québec.

Under Québec law, a defendant will incur civil liability if he causes damages to another by his fault. Knowingly favouring a breach of a High Contracting Party's undertakings pursuant to an international instrument or knowingly assisting a state in the perpetration of a war crime are both civil faults. Assuming for purposes of discussion that the Defendants knowingly assisted Israel for the purpose of committing a war crime as alleged, the Defendants committed a civil fault and are liable to appropriate civil remedies. This is consistent with a restrictive interpretation of state immunity that limits its benefit to sovereign entities and their agents.

Given the grave consequences of dismissing an action without a hearing on the merits, as a rule, an action ought not be dismissed summarily on a motion based on art. 165(4) C.C.P. unless such action is obviously not founded.[76] In the case at bar, a generous reading of the Action, considered as a whole, does not lead to the inescapable conclusion that it is unfounded in law even if the facts alleged are true.\[206\]

The Quebec court left the plaintiffs to seek their judicial remedy in the courts of Israel, rather than the courts of Quebec: “this is one of those exceptional situations where the Superior Court is compelled to decline jurisdiction on the basis of *forum non conveniens*, as the Plaintiffs have selected a forum having little connection with the Action in order to inappropriately gain a juridical advantage over the Defendants and where the relevant connecting factors, considered as a whole, clearly point to the [Israeli High Court of Justice] as the logical forum and the authority in a better position to decide”\[194\]. Yet, the

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\[193\] *Bil’In* slip opinion at ¶ 204-206.
\[194\] Id. at ¶ 335. Of course, as Professor Reichman, of the Haifa University Law Faculty, has observed of the pressures that such matters bring on courts in Israel:
Quebec court also wrote quite a bit that might become a roadmap for future litigation

... the Israeli example suggests that two factors may be worth considering in assessing the [Israeli Supreme] Court's response to pressure generated by an emergency situation. The first is the duration of the conflict and its acuteness. The second is the structure of the communication between the municipal court and the international and transnational legal community.

Regarding the first factor, to the extent that the Court is faced with a prolonged armed conflict that entails control over civilian population lacking recourse to meaningful alternative judicial venues, the Court faces not only pressure to accommodate the military, but also a countervailing pressure to provide the civilian population under occupation access to legal process. Under such circumstances it has become increasingly difficult for the Court to maintain threshold barriers (such as justiciability or a deferential attitude towards the discretion of the security establishment), when such doctrinal hurdles were already relaxed in other areas of the law applicable in Israel. The longer the armed conflict lasts, the more routine it becomes and the more difficult it is for the Court to treat it with a set of legal tools designed to distance the Court from contentious cases. As the discussion in this Article reveals, the Israeli Court has, slowly but surely, established itself over the occupied territories as a court with powers and doctrines similar to those it holds with respect to Israel's sovereign territory, and thus was able to accord some protection to the rights of the Palestinians living under a regime of belligerent occupation. This dynamic, in turn, carried with it an institutional price the Court had to pay. In Israel, the institutional capital of the Court, measured by its diffuse public confidence, has suffered in part because of the heightened friction with the security establishment.

It is because of this tension between two opposing views regarding the concept of judicial independence that the Israeli example is interesting. When the issue is the application of international norms amidst an armed conflict, there is no easy solution to this tension. The Court has realized--at least since the 1990s--that the transnational community is a necessary check on its discretion when adjudicating cases pertaining to the military commander's use of his occupying power under international law. By providing reasons addressed at the international community of jurists, the Court can be seen as seeking to alleviate some of the concerns that might otherwise be associated with its judgments (e.g. judgments reflecting the perspective of only one side of the conflict). Courts fully removed from the case may notice whether the decision of the Israeli Court is overly tilted to the Israeli side, and thus serve as a useful audience.

At the same time, the Court harnessed the presence of the international audience in order to address its domestic audience. It has insisted that in a globalized world, ignoring the international community may lead to greater interventions and loss of independence. In so doing, the dependence of the Court on the presence of the international community--but not on its actual intervention--serves as a buffer between the Court and the pressure generated by the security establishment. But, dependence on the international community does not sacrifice the position of the Court as an independent municipal court worthy of the confidence of the citizens of the forum state. Perhaps, following the debate regarding international tribunals, this position can be termed as “bounded nondependence” or “restricted independence.” Time will tell to what extent the Israeli Supreme Court will be able to continue walking on this tightrope and whether the emergence of hierarchical international courts, such as the ICJ, will disrupt this balance.

Amnon Reichman, Judicial Independence In Times Of War: Prolonged Armed Conflict And Judicial Review Of Military Actions In Israel, 2011 Utah L. Rev. 63, 94-95 (footnotes omitted). See also Bil’In slip opinion at ¶¶ 251-265 (discussing viability of the plaintiffs’ claims in the Israeli HCJ).
over challenges to FDI in Israel. While tucked away in this trial court opinion, and
influenced in part by some of the idiosyncrasies of the parties’ pleadings, arguments, and
litigation choices, the logic laid down by the Quebec court in this dictum could have
sweeping consequences should a plaintiff or group of plaintiffs with standing seek to sue
an MNE, such as Alstom, in the courts of Canada, alleging that the MNE violated
international law through its contractual activities with the Government of Israel.195

195 While to some observers it may seem like Quixotic tilting at windmills, there is a very serious and coordinated
effort afoot in international human rights advocacy circles to use the courts of any Western country as venues for
putting on trial – even only if for the publicity it generates – MNEs who are alleged to aid and abet governments in
violating, or themselves with government support are alleged to violate directly, a wide range of rights
characterized under the human-rights rubric. See generally François Larocque, Recent Developments in
Transnational Human Rights Litigation: A Postscript to Torture as Tort, 46 Osgoode Hall L.J. 605, 654 (2008)(“
The developments in transnational human rights litigation since 2001 are wide-ranging and far-reaching.”); François
Larocque & Mark C. Power, Book Review of Torture as Tort: Comparative Perspectives on the Development of
Transnational Human Rights Litigation by Craig Scott, ed., 41 Osgoode Hall L.J. 147 2003); Craig Force se, ATCA’s
Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act, 26 Yale J. Int’l L. 487, 515(2001)(speaking of the search for “a means for plaintiffs to seek compensation from companies practicing an
unabashed form of militarized commerce in joint ventures with human rights abusing regimes”). It is worth noting
that the Canadian Parliament recently enacted a law (appellated the Justice for Victims of Terrorism Act) that
purports to give Canadian courts an enhanced subject matter jurisdiction that “brings Canada into the very small
group of states in which it is possible to use domestic courts to seek redress for violations of international law” —
but “the Act is limited to responsibility for acts of terrorism, and does not cover other violations of international law
such as torture and war crimes, despite some earlier calls for a wider ambit.” René Provost, Canada’s Alien Tort
http://www.ejiltalk.org/canadas-alien-tort-statute/. While it is obvious that this kind of law would not reach cases
pleaded under the facts of Bil’In, or, as discussed in Section III.B.3.c, infra, Corrie v. Caterpillar, it is not clear
whether this law may be a first step in a widening assertion of subject matter jurisdiction by the Canadian
Parliament, or even the Canadian federal courts, over alleged violations of a wider range of human rights under the
protection of international law. See id., wherein Professor Provost writes that “[i]t is noteworthy that the Act is
limited to responsibility for acts of terrorism, and does not cover other violations of international law such as torture
and war crimes, despite some earlier calls for a wider ambit.” For a dual English-French official text of the Act, see
Parliament of Canada, Bill C-110, 60-61 ELIZABETH II
Preamble states:

And whereas Parliament considers that it is in the public interest to enable plaintiffs to bring
lawsuits against terrorists and their supporters, which will have the effect of impairing the
functioning of terrorist groups in order to deter and prevent acts of terrorism against Canada and
Canadians … Now, therefore, Her Majesty, by and with the advice and consent of the Senate and
House of Commons of Canada, enact as follows —
3. A Frenchman In New York, Not An American In Paris: Alstom’s Vulnerability To International Civil Litigation In American Courts

a. International Litigation In U.S. Courts

Alstom is also vulnerable to international civil litigation in U.S. courts, which have been the forum for a number of suits arising out of Arab-Israeli conflict. There’s nothing like getting sued in an American court. Most often, such suits end up in the U.S. federal courts, either because the cause of action arises under federal law, or because the cause of action falls within the alienage jurisdiction that Article III of the U.S. Constitution empowers the federal courts to exercise and which Congress actuated in 28 U.S.C. § 1332(d); and a MNE with non-U.S. citizenship may use the Removal Statute to displace such cases filed against them even when they have been filed originally in courts of a state, commonwealth, or territory of the United States.

b. A Slice Of Alstom’s Prior Experience In U.S. Courts: In re Alstom Securities Litigation

Nearly a decade ago, Alstom got a strong lesson of what “Litigation-American Style” can be like when a class-action securities fraud case was filed against Alstom in the U.S. federal courts. The mere “whiff of grapeshot” in America’s courts – the filing of the action – sent

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\(^{197}\) See generally GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS*, at ___ (5th ed. 2011), the text that I use to teach International Civil Litigation, the companion to my IBT course at Atlanta’s John Marshall Law School.
shudders through Alstom, which was financially quite a bit more vulnerable a decade ago than today. As *The Guardian* reported the litigation effect:

Debt-stricken French engineering group Alstom received a sharp reminder yesterday that its fight for survival is just beginning when it emerged that the manufacturer of London Underground trains is facing a class action lawsuit in the United States.

The news - which came one day after a controversial €3.2bn (£2.2bn) rescue plan for Alstom was agreed - appeared to unsettle investors, who began to fret about the company's long term viability, sending its shares plunging 14% on the Paris stock exchange at one stage.¹⁹⁸

Alstom battled this case in the U.S. federal courts for seven years; and but for the grace of an intervening U.S. Supreme Court decision in *Morrison* narrowing the extraterritorial reach of the federal securities laws¹⁹⁹, Alstom would still be embroiled in a very large litigation²⁰⁰, which the District Judge whittled down after refusing to certify a class of “trans-national” plaintiffs in 2008²⁰¹, and in dismissing claims based on foreign-exchange sales of Alstom shares in 2010, on

²⁰¹ Gary W. Johnson, Note, *Rule 23 And The Exclusion Of Foreign Citizens As Class Members In U.S. Class Actions*, 52 Va. J. Int'l L. 963 (2012). As the Note’s author aptly describes this waystation in Alstom’s sojourn through the U.S. federal courts:

In *In re Alstom S.A. Securities Litigation*, the plaintiffs sought to certify a class of U.S., Canadian, French, English, and Dutch citizens, entities who purchased stock in Alstom, a French multinational conglomerate, and certain subsidiaries, including a U.S. subsidiary. The Alstom court noted, “Courts may properly consider res judicata concerns when evaluating the Superiority Requirement with respect to a proposed class that includes foreign class members.” The defendants argued that “a United States class action is not a superior method for adjudicating Plaintiffs' claims because a resulting judgment would not be given preclusive effect by courts in France, England, the Netherlands, and Canada.” The court held that the plaintiffs failed to prove that “French courts would more likely than not recognize and give preclusive effect to any
the authority of *Morrison*. That does not prevent executive level management, however, from being sued, being served, being deposed, and having to expend considerable emotional and

judgment rendered” and refused to certify a class consisting of French citizens. This conclusion was only after the Alstom court extensively considered French law.

Id. at 972-973 (footnotes omitted)(citing 253 F.R.D. 266, 272 (S.D.N.Y. 2008)). Although the court did find that plaintiffs sufficiently demonstrated that English, Dutch, and Canadian courts “would more likely than not recognize and give preclusive effect to any judgment rendered” by it with respect to some of the defendants named in the class action,” id. at 973 n.56, Alstom nonetheless persuaded the District Judge to “to modify” the proposed class “to delete the inclusion of French persons or entities as to all Defendants, English persons or entities as to Alstom, and Dutch persons or entities as to Alstom.” 253 F.R.D. at 272.

*In re Alstom, S.A. Securities Litigation*, 741 F.Supp.2d 469 (S.D.N.Y. 2010). West’s first headnote in the case captures its ruling in a nutshell:

Securities fraud claims of plaintiffs who purchased securities on French stock exchange would be dismissed under United States Supreme Court’s decision in *Morrison v. National Australia Bank*, which enunciated a new “transactional” rule for determining the extraterritorial application of the United States securities laws, and held that § 10(b) applies to only the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States. *Securities Exchange Act of 1934*, § 10(b), 15 U.S.C.A. § 78j(b).

Id. at 469. The rest of the story, however, is found in Judge Victor Marrero’s eloquent introduction to his opinion:

On what can literally be called the eve of summary judgment, the parties present to the Court two issues more commonly addressed much earlier in litigation on a Fed.R.Civ.P. 12(b)(6) (“Rule 12(b)(6”)” motion*471 to dismiss. The first issue, raised by defendants, is whether the securities fraud claims of the putative class in this case, including purchasers of securities on a French stock exchange, remain viable after the United States Supreme Court’s decision in *Morrison*.

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The first complaint was filed in this case more than seven years ago on August 29, 2003. … The next round of dispositive motions in this case, following the completion of several years of discovery, principally in France, are currently scheduled to be submitted in two months [i.e., November 2010].

Id. at 470, 471. The listing of counsel is prodigious, and the bills likely mirror that, see id. at 470-471; and the litany of previous decisions in the case give some clue into its inconvenience and cost:


Id. at 471. After seven years of transcontinental litigation, Judge Marerro emphatically rejected the plaintiffs’ arguments that the United States had legislative jurisdiction over the conduct that plaintiffs had urged were regulated by U.S. federal securities laws:
professional time defending against, international civil litigation in U.S. courts – all of which comes at a considerable transaction cost to the MNE.

c. Relic – Or Modern Human-Rights Litigation Sword? The Curious Career Of The Alien Tort Statute As A Significant Source Of U.S. Litigation Risk To MNEs

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.

Plaintiffs argue that purchases of Alstom securities recorded on Euronext are domestic transactions under Morrison because such purchases were initiated in the United States. Plaintiffs’ submission to the Court, though less than a model of clarity, also suggests that because these common shares were registered and listed on the NYSE, though not actually purchased there, these Euronext transactions fulfill the letter of Morrison’s rule that the federal securities fraud laws apply to transactions in securities “listed on a domestic exchange.”

The Court is not persuaded by either argument.

Id. at 471-472. However, there are plaintiffs left in the case, which continues pending on summary judgment motions, for the District Court’s ruling merely applied only to “claims of Plaintiffs who purchased securities on foreign exchanges,” where were the only group of plaintiffs “dismissed from this action.” Id. at 473.

203 See, e.g., Hannah L. Buxbaum, Personal Jurisdiction Over Foreign Directors In Cross-Border Securities Litigation, 35 J. Corp. L. 71 (2009); In re Alstom S.A. Sec. Litig., 406 F. Supp. 2d 346, 401 (S.D.N.Y. 2005) (observing that “it would have been foreseeable to those creating and disseminating the [registration statements] that the documents would have an effect in the United States”, in the course of considering personal jurisdiction over inside French directors).

204 Also noteworthy are the anti-bribery laws under which Alstom management has been investigated. See, e.g., Frank C. Razzano & Travis P. Nelson, The Expanding Criminalization Of Transnational Bribery: Global Prosecution Necessitates Global Compliance, 42 Int'l Law. 1259, 1278-1279, 1281 (2008)(in addition to a prosecution in Italy, “nineteen investigations are under way in France concerning payments of hundreds of millions of dollars in bribes to secure contracts in Asia and Latin America between 1998 and 2003 by Alstom in connection with projects in those regions”); Richard Grime & Ann Savage, Fcpa Jurisdiction Over Foreign Entities & Individuals: The Trend Of Increasingly Aggressive Enforcement, 1696 PLI/Corp 163 (Sept. 28, 2008) (Practising Law Institute Corporate Law and Practice Course Handbook Series--White Collar Crime 2008: Prosecutors and Regulators Speak)(noting that among the major MNEs “subject to prosecution and investigation in more than one country include Alstom (Switzerland, France, Brazil, and Mexico)

205 28 U.S.C. § 1350, captioned “Alien’s Action for Tort.” Some sources refer to this statute as “The Alien Tort Claims Act” or ACTA. That practice is incorrect for at least three reasons. First, it misleading suggests that the statute is the product of a focused, separate piece of legislation devoted to tort claims by aliens. See Curtis A. Bradley, The Alien Tort Statute and Article III, 42 Va. J. Int'l L. 587, ___ (2002) (explaining that “Alien Tort Statute” is more accurate than the “Alien Tort Claims Act” since § 1350 is a subject-matter jurisdiction statute that in and of itself creates no cause of action). It is evident from its undistinguished and virtually uncommented upon
These 33 words, couched as a jurisdictional statute enacted within the Judiciary Act of 1789, would hardly seem to the source of a major threat to Alstom, a French MNE, as it undertakes FDI in Israel.

Indeed, prior to 1980, the Alien Tort Statute would have been irrelevant to this – and similar – FDIs by MNEs anywhere.

However, as explained in this subsection, the ATS has become a major source of risk, expense, and transactional costs for all MNEs over which the U.S. federal courts have personal jurisdiction; and while the risk to MNEs, such as Alstom, whose projects are sited in political tinderboxes, such as Jerusalem and the Golan Heights, is considerable—and needs to be understood by both IBT counsel and the MNE—the Supreme Court may be on the verge of inclusion in an omnibus court establishment bill that such an impression is utterly false. Second, it makes it sound as if the law were conceptually and temporally related to a modern statute, the Federal Torts Claims Act, or FTCA, but the two could not be more different. See, 28 U.S.C. §§ 1346 (b), 2671 et seq; see, e.g., Feres v. United States, 340 U.S. 135 (1950); Dalehite v. United States, 346 U.S. 15, 26-30 (1953). Finally, the U.S. Supreme Court has consistently appelled the statute “the Alien Tort Statute,” beginning with Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 436 (1989), and continuing with Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). As Judge Kim McLane Wardlaw has observed:

Panels of our Court have referred to this statute by no fewer than three different names. See, e.g., Alperin v. Vatican Bank, 410 F.3d 532, 541 (9th Cir.2005) (“Alien Tort Statute”); Deutsch v. Turner Corp., 317 F.3d 1005, 1017 (9th Cir.2003) (“Alien Tort Claims Act”); Martinez v. City of Los Angeles, 141 F.3d 1373, 1377 (9th Cir.1998) (“Alien Tort Act”). Because the Supreme Court most recently used the appellation “Alien Tort Statute,” Sosa v. Alvarez-Machain, 542 U.S. at 697, …, we do so too.

Corrie v. Caterpillar, Inc, 503 F.3d 974, 979 n. 5 (9th Cir. 2007).

See, e.g., Travis Robert-Ritter, Achilles' Heel: How the ATS and NAFTA Have Combined to Create Substantial Tort Liability for US Corporations Operating in Mexico, 2 U. Miami Inter-Am. L. Rev. 443 (2010-2011)
bringing the curious career of the ATS as a regulator of FDI to an abrupt (but well-deserved) close, as discussed in the concluding paragraphs of this subsection.²⁰⁷

The ATS was originally the ⁹th section of the Judiciary Act of 1789, collected with along with all the other jurisdictional provisions appearing in that Act, by which Congress fulfilled Article III’s directive that “[t] judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”²⁰⁸ Nor was the ATS the marquee attraction of ⁹th section of the 1789 Judiciary Act; it was simply enumerated among the many bases for subject matter in Section 9’s long laundry list:

SEC. 9. And be it further enacted, That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the


United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.209

It was against this background that U.S. Circuit Court of Appeals Judge Henry J. Friendly – recently the subject of a thorough intellectual biography that called him “greatest judge of his era” – confronted one of only four recorded, up to that time, post-enactment attempts by litigants in 190 years to invoke the ATS.210 In ITT v. Vencap Ltd.211, a Luxemburg-based investment trust chose the U.S. federal courts in which to sue a Bahamian corporation and several individual defendants over a foreign investment in which the trust made allegations of fraud, conversion and corporate waste.212 Subject matter jurisdiction was one of the principal issues, and, in particular, whether the federal securities laws provided subject matter jurisdiction of an action seeking damages or rescission by defrauded foreign individuals where United States was used as


210DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA Ch. 3, at xiii,1-3, 346-359 (Harvard U. Pr. 2012). Richard Posner has written of Friendly that one might suppose that he was a formalist judge par excellence, deploying text and precedent to produce decisions that satisfied the legal profession’s longing for formal correctness and objective validity. But that was not the kind of judge he was. He tempered academic brilliance with massive commence sense. He was less mercurial, more matter-of-fact, than any of the other great judges … He saw cases not as intellectual puzzles to be solved but as practical disputes to be resolved sensibly and humanely. He bent his powerful legal intelligence to the service of shaping legal doctrine to the enablement of sensible results in individual cases. The aim was to improve the law—American law is in constant need of improvement, in fact is a mess to a degree that only insiders can appreciate—without unduly perturbing the doctrinal and institutional framework that provides necessary stability and continuity.

211519 F.2d 1001 (2d Cir. 1975).

212Id.
basis for manufacturing fraudulent security devices for export. In the course of evaluating these questions, the district court had considered, in addition to the securities law, that the Alien Tort Statute might plausibly provide subject matter jurisdiction for the litigation. Judge Friendly, however, was not impressed; and in his discussion of that contention, he more pithily and penetratingly summed up the very problematic nature of the ATS:

This leaves 28 U.S.C. § 1350 which confers jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”. This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came. We dealt with it some years ago in Khedivial Line, S. A. E. v. Seafarers' Union, 278 F.2d 49, 52 (2 Cir. 1960) (per curiam). At that time we could find only one case where jurisdiction under it had been sustained, in that instance violation of a treaty, Bolchos v. Darrell, 3 Fed.Cas. 810, No.1,607 (D.S.C.1795); there is now one more. See Abdul-Rahman Omar Adra v. Clift, 195 F.Supp. 857, 863-65 (D.Md.1961). Here there is no allegation of anyone's violating a treaty. The reference to the law of nations must be narrowly read if the section is to be kept within the confines of Article III. We cannot subscribe to plaintiffs' view that the Eighth Commandment “Thou shalt not steal” is part of the law of nations. While every civilized nation doubtless has this as a part of its legal system, a violation of the law of nations arises only when there has been “a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se.” Lopes v. Reederei Richard Schroder, 225 F.Supp. 292, 297 (E.D.Pa.1963). See also Damaskinos v. Societa Navigacion Interamericana, S. A., Pan., 255 F.Supp. 919, 923 (S.D.N.Y.1966); Valanga v. Metropolitan Life Insurance Co., 259 F.Supp. 324, 328 (E.D.Pa.1966). We therefore turn to the two sections of the securities laws.

An MNE might well think that Judge Friendly’s lucid and persuasively logical reasoning would have conclusively settled the matter. Far from it. As an MNE with far-flung FDIs, a European company such as Alstom might well see subsequent court decisions, leading in 1997 to the

213 Id.
assumption of extraterritorial, foreign corporate liability under the ATS, in the following terms:

Just as a provenance devoid of detail allows characters in Wagner’s 1843 opera *Lohengrin* to speculate recklessly about the identity and purpose of the knight whose name is not spoken, and encourages directors of that opera to project their own idiosyncrasies into its realization, the blank slate of the ATS has allowed – even encouraged – litigants and more than a few courts to paint canvases of the most fantastic imagination with the 33 words of that Act, starting with Judge Friendly’s head-line seeking colleague (and successor as Chief Judge) Judge Irving Kaufman in *Filartiga v. Pena-Irala*.  

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215 Critic Fiona Maddocks observed of Hans Neuenfels's controversial new production of *Lohengrin* in Bayreuth:

> Lab rats, a dead horse and bridesmaids with long, pert rodent tails and hybrid dahlias on their heads hardly feature in the original of Wagner’s *Lohengrin*. Nor does a fat, cloned baby which crawls out of its placenta and severs its own umbilical cord, tossing it to the people of Brabant like a string of raw Bavarian sausages: a doubtful new era begins.


The obituary included a number of insightful observations by those familiar with Judge Kaufman’s work:

> It was Judge Kaufman's hope that he would be remembered for his role not in the Rosenberg case, the espionage trial of the century, but as the judge whose order was the first to desegregate a public school in the North; who was instrumental in streamlining court procedures, who rendered innovative decisions in antitrust law and, most of all, whose rulings expanded the freedom of the press.

"I'm sure the decision plagued him to his last days," Prof. Yale Kamisar of the University of Michigan Law School said of the Rosenberg case, adding that Judge Kaufman was "someone whose desire for recognition was not easily fulfilled."
"He continued to write on public issues for a very long time and he certainly worked hard on developing an image of a thoughtful, liberal, sensitive, concerned person on public issues," Professor Kamisar said.

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In 1975, Judge Kaufman was forced to cancel a speech at a graduation ceremony at Pomona College in California because of disturbances at a rally over reopening the trial. He wrote in an article in The New York Times Magazine that the potential threat from the appearance did not arise from the nature of his planned remarks, "but rather from a continuing pattern of harassment because of a trial I presided over more than 20 years ago, prior even to the birth of the vast majority of present university students."

"I felt it unfortunate," he wrote, "if not unfair, that these old issues should affect an invitation to speak today, for in the intervening years I had written decisions in a wide range of cases."

And he was known to carry clippings endorsing his conduct of the trial in his breast pocket, to quote from at dinner parties.

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A law professor at Yale University, Geoffrey Hazard, said: "I think he was an extraordinarily able and energetic person. It is also true that he felt a strong inclination to be in the public eye. I think his inclination in that regard diminished the professional appreciation of his judicial abilities."

Id. In his analytic and intellectual biography of Judge Friendly, David M. Dorsen recounts how then-District Judge Kaufman lobbied hard for appointment to the Circuit, and when Friendly had received endorsements from Justice Frankfurter, Judge Learned Hand, and the American Bar Association (which rated Friendly “exceptionally well qualified”), Kaufman tried to, in effect, negotiate Friendly out of the picture by “suggest[ing] the following compromise: Kaufman would get the next slot, and in turn he would support Friendly for Hincks’s spot.” DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA Ch. 3, at 75 (Harvard U. Pr. 2012). (Judge Carroll Hincks had been appointed the Circuit Judge from Connecticut by President Eisenhower in 1953, and he took senior status in 1959. See Biographical Directory of Federal Judges—Hincks, Carroll, at http://www.fjc.gov/servlet/nGetInfo?jid=1052&cid=999&ctype=na&instate=na.) Friendly’s response was, in essence, that Kaufman was insulting his intelligence with “the ruse, since Hinck’s successor obviously would be from Connecticut,” not Judge Friendly’s home state, New York. DAVID M. DORSEN, supra, at 75 & n.27.

218 630 F.2d 876 (2d Cir. 1980). True to a pattern that emerged over the years, Judge Kaufman’s opinion was headline news in The New York Times: Marcia Chambers, Court Says Alien Can Sue For Torture in Paraguay; Lower Court Ruling Overturned Decision Is Unanimous, N.Y. Times, July 1, 1980, at B3. The drama was palpable:

Relying on an obscure statute enacted by the Congress in 1789, the three-judge panel held that the plaintiffs, Joel Filartiga, and his daughter Dolly, were entitled to sue, Americo Pena-Irala, the police official, for the torture-murder four years ago of Joeltita, Dr. Filartiga’s 17-year-old son. Mr. Pena is now in Paraguay.

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While the cause of ending extra-judicial torture and bringing torturers to account for their wrongs is a powerful one, it would not be unreasonable for the counsel to an MNE, such as Alstom, to conclude that *Filartiga* was surely wrongly decided as a matter of statute reading. Indeed, supporters in Congress of more aggressive human rights laws recognized just how problematic *Filartiga* was, for they took the extraordinary step of amending the ATS in 1992 by a proper legislative deliberation and process to codify *Filartiga* in a supplemental statute called the Torture Victims Protection Act (TVPA). An observer of American legal developments might be understandably puzzled by the order in which the legislative process proceeded — *i.e.*, Judge Kaufman had written a statute that Congress had not in 1789; the Congress in 1992 enacted, in effect, the statute that Judge Kaufman wrote.

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The ruling by the United States Court of Appeals for the Second Circuit establishes for the first time that federal courts have the power and jurisdiction to try purported acts of torture and award civil damages if a violation of the law of nations has been proved. The opinion leaves open to further litigation the date on which the statute of limitations begins to run.


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219 See *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 806-808 (9th Cir. 2011)(en banc)(Kleinfeld, J., dissenting); *Tel-Oren v. Libyan-Arab Republic*, 726 F.2d 774, 799 (Bork, J., concurring in the result).
Such a viewpoint of a foreign-based MNE, such as Alstom, would be understandable; it is one largely shared by their governments.\textsuperscript{220} From where MNEs and foreign sovereigns stand,

\textsuperscript{220} See, e.g., Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, 2012 WL 2312825 (June 13, 2012). The positions articulated in this brief are worth examining in some detail; the consistent remonstration of European and other sovereigns against the expansiveness of the ATS is reflective of concerns about the MNEs domiciled within their territories, such as Alstom, and deserve more attention by scholars, courts, and Congress:

The Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland (“U.K.”) (collectively “the Governments”) are committed to the rule of law, including the promotion of, and protection against violations of, human rights. It has been the longstanding view of the Governments that a State must protect the human rights of those within its jurisdiction, and must provide appropriate remedies for violations of those rights.

The Governments firmly believe that corporations should not be able to act with impunity vis-à-vis human rights issues, and that they should respect human rights. Accordingly, the Governments have recognized that the operations of corporations can have both beneficial and detrimental impacts on the enjoyment of human rights by those affected by their operations and are engaged in multilateral dialogue to determine how best to address this at the international level.

Nevertheless, just as international law imposes human rights obligations on States, it imposes restraints on the assertion of jurisdiction by one State over civil actions between persons that primarily concern another State. Jurisdictional restraints are a fundamental underpinning of the international legal order and are essential to maintaining international peace and comity. The Governments are, therefore, opposed to broad assertions of extraterritorial jurisdiction over alien persons arising out of foreign disputes with little, or no, connection to the United States (“U.S.”). Such assertions of jurisdiction are contrary to international law and create a substantial risk of jurisdictional and diplomatic conflict. They may also prevent another State with a greater nexus to such cases from effectively resolving a dispute.

As such, the Governments have maintained their concern with the extraterritorial application of U.S. law over a long period of time. They have expressed their concern in numerous amicus briefs submitted to this Court, including a brief by the Governments at an earlier stage of these proceedings …

The Governments remain deeply concerned about the failure by some U.S. courts to take account of the jurisdictional constraints under international law when construing the ATS, which in turn has led those courts to entertain suits by foreign plaintiffs against foreign defendants for conduct that took place entirely in the territory of a foreign sovereign. In this regard, for example, the U.K., Germany, Switzerland and South Africa sent diplomatic notes to the U.S. reasserting their opposition to a broad assertion of extraterritorial jurisdiction in an ATS case based on South Africa's Apartheid history.

This brief is intended to set out the views of two nations that historically have been concerned with the extraterritorial exercise of jurisdiction by the U.S. courts because of its inconsistency with international law. It echoes the views expressed by other governments in ATS, antitrust and
the Second Circuit created a new statute out of whole cloth, opening the door to make the U.S. federal courts a forum for allowing private parties to attempt to turn legislative and executive matters of great complexity and serious foreign policy implications into federal lawsuits. In so doing, the path to serious and direct confrontations between the federal courts and the political branches of government was set before MNEs that make FDIs in politically volatile areas of the world. In his limited concurrence in the U.S. Supreme Court’s only ruling on the ATS, *Sosa v. Alvarez-Machain*, Justice Scalia clearly articulated the kinds of legal difficulties that MNEs have faced when trying to assess the broader legal environment of their FDIs beyond the municipal law of their host states:

> The Second Circuit, which started the Judiciary down the path the Court today tries to hedge in, is a good indicator of where that path leads us: directly into confrontation with the political branches.

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We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regards as norms of international law into American law.

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American law—the law made by the people’s democratically elected representatives—does not recognize a category of activity that is so universally

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Id. at *1-*4 (footnotes omitted).
And Judge Robert Bork warned of the very problematic nature of *Filartiga* in his 1986 concurring opinion in *Tel-Oren v. Libyan Arab Republic*:

> The question in this case is whether appellants have a cause of action in courts of the United States for injuries they suffered in Israel. Judge Edwards contends, and the Second Circuit in *Filartiga* assumed, that Congress’ grant of jurisdiction also created a cause of action. That seems to me fundamentally wrong and certain to produce pernicious results. For reasons I will develop, it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal. It will be seen below, however, that no body of law expressly grants appellants a cause of action; the relevant inquiry, therefore, is whether a cause of action is to be inferred. That inquiry is guided by general principles that apply whenever a court of the United States is asked to act in a field in which its judgment would necessarily affect the foreign policy interests of the nation.

Even lawyers of a non-originalist judicial philosophy would have to concede that the only reasonable explanation for the 1789 Congress to have included the ATS clause in the 1789 Judiciary Act was out of fear of retribution from other nations, not in order to pass judgment on them. The ATS was a response to incidents involving a tort committed against an

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222 726 F.2d 774, 799 (Bork, J., concurring in the result).
223 Id. at 801.
224 See, e.g., Tel-Oren, 726 F.2d at 827 (Robb, J., concurring in the judgment):

> We ought not to parlay a two hundred years-old statute into an entree into so sensitive an area of foreign policy. We have no reliable evidence whatsoever as to what purpose [§ 1350] was intended to serve. We ought not to cobble together for it a modern mission on the vague idea that international law develops over the years. Law may evolve, but statutes ought not to mutate. To allow § 1350 the opportunity to support future actions of the sort both countenanced in *Filartiga* and put forward here is to judicially will that statute a new life. Every consideration that informs the sound application of the political question doctrine militates against this result. My colleagues
ambassador and concern for enforcing safe-conducts when America was young, vulnerable to at least three European nations (England, France, and Spain) with large foot-holds in North America, and was ill-prepared for military action against those powers, as amply demonstrated 25 years later in the War of 1812. To assume that Filartiga’s reading of the ATS – and the even broader readings of the ATS that were bootstrapped in Filartiga’s wake – had anything to do with either the intention of or words used by the 1789 Congress would strike counsel to MNEs across the globe as delusional. From the pragmatist point-of-view with which the

concede that the origins and purposes of this statute are obscure, but it is certainly obvious that it was never intended by its drafters to reach this kind of case.

Id (citations omitted); see also Lawsuits and Foreign Policy, Wash. Post, Aug. 12, 2000, at A20 (“proceed[ing] under an ill-conceived but now well-accepted reading of a 1789 law that... is a modern graft on a largely moribund statute” is “troubling” because, inter alia, “international human rights law did not exist in the 18th century.”);

While the author does not entirely agree with some of his interpretation of the historical record or the inferences he draws therefrom, Professor Lee’s 2006 article on the ATS at least refocuses the discussion of the ATS to a rational, rather than upon a fanciful or an anachronistic, context. See Thomas H. Lee, The Safe-Conduct Theory Of The Alien Tort Statute, 106 Colum. L. Rev. 830-896-907 (2006). One of Professor Lee’s most worthy points is that “suit in domestic court for tort remedies by an alien against the one who injured his person or property was mainly a political expedient premised on the host sovereign’s hope that if the alien received a speedy and fair remedy, the other sovereign might not be informed of, or act upon, the safe-conduct breach, diminishing the risk that the offended sovereign would exercise its lawful right to make war.” Id. at 881.

In Tel-Oren, Judge Robb more politely, yet just as pointedly, observed that in cases of the tortured versus the torturer, or the victims versus the terrorist, “[w]e are here confronted with the easiest case and thus the most difficult to resist,” which he described as “a similar magnet” to that which “drew the Second Circuit into its unfortunate position in Filartiga”:

I do not doubt for a moment the good intentions behind Judge Kauffman's opinion in Filartiga. But the case appears to me to be fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure. The refusal to separate rhetoric from reality is most obvious in the passage which states that “for the purposes of civil liability, the torturer has become-like the pirate and slave trader before him- hostis humani generis, an enemy of all mankind.” 630 F.2d at 890. This conclusion ignores the crucial distinction that the pirate and slave trader were men without nations, while the torturer (and terrorist) are frequently pawns, and well controlled ones, in international politics. When Judge Kauffman concluded that “[o]ur holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence,” id., he failed to consider the possibility that ad hoc intervention by courts into international affairs may very well rebound to the decisive disadvantage of the nation. A plaintiff's individual victory, if it entails embarrassing disclosures of this country's approach to the control of the terrorist phenomenon, may in fact be the collective's defeat. The political question
business community approaches problems, the clearest thinking on this point came from Judge Bork in *Tel-Oren*:

I have discovered no direct evidence of what Congress had in mind when enacting the provision. The debates over the Judiciary Act in the House—the Senate debates were not recorded—nowhere mention the provision, not even, so far as we are aware, indirectly. See 1 Annals of Cong. 782-833 (J. Gales ed. 1789).

Historical research has not as yet disclosed what section 1350 was intended to accomplish. The fact poses a special problem for courts. A statute whose original meaning is hidden from us but which, if its words are read incautiously with modern assumptions in mind, is capable of plunging our nation into foreign conflicts, ought to be approached by the judiciary with great circumspection. It will not do simply to assert that the statutory phrase, the “law of nations,” whatever it may have meant in 1789, must be read today as incorporating all the modern rules of international law and giving aliens private causes of action for violations of those rules. It will not do because the result is contrary not only to what we know of the framers’ general purposes in this area but contrary as well to the appropriate, indeed the constitutional, role of courts with respect to foreign affairs.

What little relevant historical background is now available to us indicates that those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations. The Federalist No. 80 (A. Hamilton). A broad reading of section 1350 runs directly contrary to that desire. It is also relevant to a construction of this provision that until quite recently nobody understood it to empower courts to entertain cases like this one or like *Filartiga*.²²⁷

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²²⁷ 726 F.2d at 812-813 (footnotes omitted). As Judge Bork continued:

Though it is not necessary to the decision of this case, it may be well to suggest what section 1350 may have been enacted to accomplish, if only to meet the charge that my interpretation is not plausible because it would drain the statute of meaning. The phrase “law of nations” has meant various things over time. It is important to remember that in 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover. … *Clearly, cases like this and Filartiga were beyond the framers’ contemplation.* That problem is not avoided by observing that the law of nations evolves. It is one thing for a case like *The Paquete Habana* to find that a rule has evolved so that the United States may not seize coastal fishing boats of a nation with which we are at war. It is another thing entirely, a difference in degree so enormous as to be a
Yet, it did not take long for the federal courts to assume that MNEs could be sued in the U.S. federal courts on ATS claims involving injuries sustained by individuals and groups entirely outside of U.S. sovereign territory. Those courts did so without thinking through the difference in kind, to find that a rule has evolved against torture by government so that our courts must sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens. The latter assertion raises prospects of judicial interference with foreign affairs that the former does not.

228 These include [1] Doe v. Unocal, involving allegations of human rights violations against indigenous people in Burma during the construction of a pipeline, which was settled. See http://www.earthrights.org/legal/doe-v-unocal; Wiwa v. Royal Dutch Shell, involving allegations of complicity in human rights violation against a Nigerian poet and activist who was executed by the Nigerian government; the case settled on the eve of trial for $15.5 million. See http://www.earthrights.org/legal/wiwa-v-royal-dutchshell; [3] Abdullahi v. Pfizer, 562 F.3d 163 (2d Cir. 2009), which was settled. A less sanguine view of these developments was offered by As Second Circuit Judge José A. Cabranes, who has explained that the ATS is a jurisdictional provision unlike any other in American law and of a kind apparently unknown to any other legal system in the world. Passed by the first Congress in 1789, the ATS lay *116 largely dormant for over 170 years. ... Then, in 1980, the statute was given new life, when our Court first recognized in Filartiga v. Pena-Irala that the ATS provides jurisdiction over (1) tort actions, (2) brought by aliens (only), (3) for violations of the law of nations (also called “customary international law” including, as a general matter, war crimes and crimes against humanity-crimes in which the perpetrator can be called “hostis humani generis, an enemy of all mankind.” Since that time, the ATS has given rise to an abundance of litigation in U.S. district courts. For the first fifteen years after Filartiga—that is, from 1980 to the mid-1990s—aliens brought ATS suits in our courts only against notorious foreign individuals; the first ATS case alleging, in effect, that a corporation (or “juridical” person) was an “enemy of all mankind” apparently was brought as recently as 1997.

Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 116 & n. 5 (2d Cir. 2010)(noting that “[t]he first ATS case brought against a corporate defendant appears to have been Doe v. Unocal Corp., 963 F.Supp. 880 (C.D.Cal.1997), aff’d in part and rev’d in part, 395 F.3d 932 (9th Cir.2002).”) (footnote omitted). On October 17, 2011, the U.S. Supreme
separation-of-powers implications, let alone the ahistoricity, of this expansion.\(^{229}\) Nor did they consider the business ramifications of permitting such litigation. As one human-rights advocacy group, the “Center for Justice and Accountability” (CJA), boasts on its website:

Court granted petitions for writs of certiorari to review Kiobel v. Royal Dutch Shell (U.S. 2d Cir. 2010) and Mohamad v. Rajoub (D.C. Cir. 2011). See http://conflictoflaws.net/2011/united-states-supreme-court-to-again-consider-the-alien-tort-statute/ . The Court proceeded to decide the Mohamad case, sub nom. Mohamad v. Palestinian Authority, 565 U.S. ___, 132 S.Ct. 1702 (Apr. 18, 2012), holding that the term “individual” within the TVPA did not include a corporation as a juridical entity, though the term would, of course, include specific individuals through whom a corporation operates. Writing for a unanimous Court, Justice Sotomayor put the TVPA in a perspective that emerges from a confluence of its text, as well as materials comprising its legislative history:

Petitioners' final argument is that the Act would be rendered toothless by a construction of “individual” that limits liability to natural persons. They contend that precluding organizational liability may foreclose effective remedies for victims and their relatives for any number of reasons. Victims may be unable to identify the men and women who subjected them to torture, all the while knowing the organization for whom they work. Personal jurisdiction may be more easily established over corporate than human beings. And natural persons may be more likely than organizations to be judgment proof. Indeed, we are told that only two TVPA plaintiffs have been able to recover successfully against a natural person—one only after the defendant won the state lottery. See Jean v. Dorelien, 431 F.3d 776, 778 (C.A.11 2005).

We acknowledge petitioners' concerns about the limitations on recovery. But they are ones that Congress imposed and that we must respect. “[N]o legislation pursues its purposes at all costs,” Rodriguez v. United States, 480 U.S. 522, 525–526, … (1987) (per curiam), and petitioners' purposive argument simply cannot overcome the force of the plain text. We add only that Congress appeared well aware of the limited nature of the cause of action it established in the Act. See, e.g., 138 Cong. Rec. 4177 (1992) (remarks of Sen. Simpson) (noting that “as a practical matter, this legislation will result in a very small number of cases”); 137 Cong. Rec. 2671 (1991) (remarks of Sen. Specter) (“Let me emphasize that the bill is a limited measure. It is estimated that only a few of these lawsuits will ever be brought”).

565 U.S. ___, 132 S. Ct. at 1710. In a discussion that, although treating an interpretative issue of a different nature than the one in Kiobel, may prescient of the ultimate rationale the Court reaches on restricting extraterritorial application of the ATS, Justice Sotomayor concluded “The text of the TVPA convinces us that Congress did not extend liability to organizations, sovereign or not. There are no doubt valid arguments for such an extension. But Congress has seen fit to proceed in more modest steps in the Act, and it is not the province of this Branch to do otherwise.” Id. at 1710-1711. For a discussion of the Mohamad case and its impact on international human rights litigation in the U.S. courts, see Alberto Bernabe, Supreme Court decides Mohamad v. Rajoub: no cause of action against corporations under Torture Victim Protection Act, TORTS BLOG, Apr. 23, 2012, at http://bernabetorts.blogspot.com/2012/04/supreme-court-decides-mohamad-v-rajoub.html, which includes many links to a wide spectrum of legal and popular media discussion of the ruling, such as Adam Liptak, Justices Limit Suits Under Law on Torture, N.Y. Times, Apr. 18, 2012, at A20.

\(^{229}\)See, e.g., John O. McGinnis, Foreign to Our Constitution, 100 Nw. U. L. Rev. 303, 307 n.22 (2006) (“[D]efenders of the use of contemporary international law want to use evolving standards of an international law that has grown in scope to become a kind of local municipal law and changed in nature from natural to positive law. In this respect, modern international law does not resemble the law of nations known to the Framers.”).
Beginning in the mid-1990s, a new class of ATS suits emerged that aimed to hold multinational corporations accountable for complicity in human rights abuses. Although backlash from certain sectors of the business community unleashed heated criticism of this use of the ATS, attempts to repeal or attenuate the statute have failed.\textsuperscript{230}

Even scholars neutral, or favorably disposed, toward such a use of the ATS are compelled to admit that “[a]s a practical matter, plaintiffs choose to sue under the ATS to forum shop their way into a U.S. court in hopes of finding a more favorable forum in which to litigate their case.”\textsuperscript{231} A leading scholar of MNE trends in FDI has summarized so well the corporate view of the ATS, that it provides the basic starting point for our discussion of a new – and potentially potent – kind of political risk to enterprises such as Alstom’s East Jerusalem Light-Rail Project, as well as our hypothetical Golan Heights Wind Farm project:

Multinationals also encountered a new form of political risk – legal action in developed countries, notably the United States, for alleged human rights abuses in developing countries. Although there remained no international law regarding the human rights obligations of multinationals, companies found themselves increasingly vulnerable to litigation under the obscure Alien Tort Claims Act (ATCA) of 1789. This 33-word act of the newly-established United States specified that “The district courts shall have original jurisdiction of any civil action by an alien for a tort (civil wrong) only, committed in violation of the law of nations or a treaty of the United States.” The Act lay dormant for almost two hundred years, until in 1979 it was used against a Paraguayan police inspector living in the United States, who was accused of torturing and killing the son of a Paraguayan dissident in Paraguay. The victim’s relatives won a $10 million judgment, which was never paid.\textsuperscript{232}


\textsuperscript{232} Geoffrey Jones, \textit{Multinational Strategies and Developing Countries in Historical Perspective}, Harvard Business School Entrepreneurial Management Working Paper No. 10-076, at 34-35 (working draft of paper initially presented at the International Business History Conference held at Hitotsubashi University, Tokyo on January 8-10, 2010). The paper is currently available in HBS’s online collection at www.hbs.edu/research/pdf/10-076.pdf, and additional
Professor Jones observed that for FDI purposes, MNEs have to be aware that “for multinationals, the most significant feature of [ATS] was that, in addition [to] individuals, companies could be sued in US courts for internationally recognized human rights violations anywhere in the world.” This places an especially troublesome wrinkle for MNEs, because “[a] lthough it proved difficult to win [ATS] cases, the legal costs and bad publicity generated by the cases became a major issue for companies,” particularly for MNEs such as Alstom: “Given the political and security circumstances in many developing countries, especially in Africa, [ATS] obliged multinationals to give increased attention to human rights and environmental strategies, and to resolve complex issues related to different legal and ethical standards between some developed and some developing countries.”

Mercedes-Benz is going to school on this lesson as of this writing in *Bauman v. DaimlerChrysler Aktiengesellschaft*, an ATS case involving claims by “twenty-two Argentinian residents … against DaimlerChrysler Aktiengesellschaft (DCAG) alleging that one of DCAG's subsidiaries, Mercedes-Benz Argentina (MBA) collaborated with state security forces to kidnap, detain, torture, and kill the plaintiffs and/or their relatives during Argentina's ‘Dirty War,’” a conflict that “began in 1976 when the military overthrew the government of President Isabel Peron and set up a military dictatorship.”

Nor would it be unprecedented for litigants to use the ATS as a vehicle for challenging an

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233 Id. At 36. The very concept of American federal courts regulating the conduct of foreign-based MNEs under the rubric of the ATS raises troubling problems, as 644 F.3d 909 (9th Cir. 2011)(resolving in favor of plaintiffs solely the issue whether long-arm jurisdiction in California existed over the German parent corporation through its separately incorporated American subsidiary under the sovereignty and convenience branches of *International Shoe v. Washington*, 326 U.S. 310 (1945), and its progeny such as *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980))

235 Id. at 911-912 & n.3), *reh’g en banc denied by a divided court, 676 F.3d 774 (9th Cir. 2011)* (O'Scannlain, J., joined by Tallman, Bybee, Callahan, Bea, M. Smith, Ikuta, And N.R. Smith, J.J., dissenting from denial of rehearing en banc), *petition for certiorari filed, 80 USLW 3461* (Feb 06, 2012)(NO. 11-965)
MNEs participation in an Israel-based FDI. In fact, it has already occurred. Another major corporate project partner of Israel's, Caterpillar, was sued in the U.S. under the ATS for allegedly aiding and abetting alleged human-rights violations in the Occupied Territories by bulldozer sales to Israel when the bulldozers were used in constructing and expanding settlements in the Occupied Territories. In *Corrie v. Caterpillar, Inc.* 236, Judge Kim McLane Wardlaw succinctly set out the theory behind the ATS claim in the case:

Plaintiffs Cynthia and Craig Corrie, Mahmoud Al Sho'bi, Fathiya Muhammad Sulayman Fayed, Fayeza Ali Mohammed Abu Hussein, Majeda Radwan Abu Hussein, and Eida Ibrahim Suleiman Khalafallah filed this action after their family members were killed or injured when the Israeli Defense Forces (“IDF”) demolished homes in the Palestinian Territories using bulldozers manufactured by Caterpillar, Inc., a United States corporation. The IDF ordered the bulldozers directly from Caterpillar, but the United States government paid for them.

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Following the Six Day War in 1967, Israel occupied and took control of the West Bank and Gaza Strip. Caterpillar is the world's leading manufacturer of heavy construction and mining equipment. Among its customers is the IDF, which since 1967 has utilized Caterpillar bulldozers to demolish homes in the Palestinian Territories. According to plaintiffs' complaint, Caterpillar sold the bulldozers to the IDF despite its actual and constructive notice that the IDF would use them to further its home destruction policy in the Palestinian Territories; a policy plaintiffs contend violates international law. Seventeen members of plaintiffs' families-sixteen Palestinians and one American-were killed or injured in the course of the demolitions. 237

While the complaint against Caterpillar was dismissed by the District Court and by the Ninth Circuit, those courts *did not find* that [1] that corporations were not appropriate ATS defendants; [2] the FDI of Caterpillar in Israel, given the Filartiga and progeny re-write of the statute, was outside of the ATS; or [3] that the ATS is inapplicable to extraterritorial conduct. Instead, those

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236 503 F.3d 974 (9th Cir. 2007), aff'g 403 F.Supp.2d 1019 (W.D. Wash. 2005).
237 503 F.3d at 977.
courts dismissed that particular complaint solely because the U.S.-government actually paid for Caterpillar’s sale of equipment to Israel, which put the political question doctrine squarely into play:

The decisive factor here is that Caterpillar's sales to Israel were paid for by the United States. Though mindful that we must analyze each of the plaintiffs' "individual claims," ..., each claim unavoidably rests on the singular premise that Caterpillar should not have sold its bulldozers to the IDF. Yet these sales were financed by the executive branch pursuant to a congressionally enacted program calling for executive discretion as to what lies in the foreign policy and national security interests of the United States. See 22 U.S.C. § 2751 (stating that the purpose of the Arms Export Control Act, which authorizes the FMF program, is to support “effective and mutually beneficial defense relationships in order to maintain and foster the environment of international peace and security essential to social, economic, and political progress”).

Allowing this action to proceed would necessarily require the judicial branch of our government to question the political branches' decision to grant extensive military aid to Israel. It is difficult to see how we could impose liability on Caterpillar without at least implicitly deciding the propriety of the United States' decision to pay for the bulldozers which allegedly killed the plaintiffs' family members.

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We cannot intrude into our government's decision to grant military assistance to Israel, even indirectly by deciding this challenge to a defense contractor's sales. Plaintiffs' claims can succeed only if a court ultimately decides that Caterpillar should not have sold its bulldozers to the IDF. Because that foreign policy decision is committed under the Constitution to the legislative and executive branches, we hold that plaintiffs' claims are nonjusticiable …

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238 503 F.3d at 982 (citations & footnotes omitted)
Thus, Alstom can take no comfort the lack of success under the ATS exemplified in Corrie.\textsuperscript{239} A case filed against Alstom over a Golan Heights wind-project might well get more traction under the ATS, and subject Alstom to the considerable transactional costs attendant to American-style discovery and civil practice, the generation of negative public opinion and negative opinion among investors and analysts, and the costs of settlement\textsuperscript{240} – which corporate ATS defendants


\textsuperscript{240} This has been very pointedly expressed by the Second Circuit’s Chief Judge, Dennis Jacobs, who expressed concern that such a use of ATS litigation permits invasive discovery that ensues could coerce settlements that have no relation to the prospect of success on the ultimate merits. American discovery in such cases uncovers corporate strategy and planning, diverts resources and executive time, provokes bad public relations or boycotts, threatens exposure of dubious trade practices, and risks trade secrets. I cannot think that other nations rely with confidence on the tender mercies of American courts and the American tort bar. These coercive pressures, combined with pressure to remove contingent reserves from the corporate balance sheet, can easily coerce the payment of tens of millions of dollars in settlement, even where a plaintiff’s likelihood of success on the merits is zero. Courts should take care that they do not become instruments of abuse and extortion.
have incurred in more than a few cases – just to bring the legal proceedings to a definitive close.\textsuperscript{241} Indeed, the objective, it seems, of more than a few ATS suits filed against MNEs is to reset the context and terms of activism against the FDIs of those MNEs.\textsuperscript{242} The effect of the

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\textsuperscript{241} And, as Professor Childress has noted recently, there have been ATS cases against corporations that have been tried to plaintiff’s verdicts. See Donald Earl Childress, III, \textit{The Alien Tort Statute, Federalism, And The Next Wave Of Transnational Litigation}, 100 Geo. L.J. 709, 713 n.25 (2012). The decisions to which he cites are: Chowdhury v. Worldtel Bangladesh Holding, Ltd., 588 F. Supp. 2d 375 (E.D.N.Y. 2008), appeal filed, No. 09-4483-cv (2d Cir.) (awarding a $1.5 million ATS judgment against corporate defendant); Licea v. Curacao Drydock Co., 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008) ($80 million ATS judgment against corporate defendant). Professor Childress also notes that “there have been two trials in which defendants have prevailed. See Bowoto v. Chevron Corp., 621 F.3d 1116 (9th Cir. 2010); Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008).”

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\textsuperscript{242} Professor Childress has articulated the apparent strategy in such cases:

\begin{quote}
In light of the dim chances for success in ATS cases based on the small number of plaintiff judgments to date, it is arguable that modern uses of the ATS against corporations have not been driven solely by forum shopping and choice of law, but rather by the signaling value that is offered when bringing suit against a corporation for alleged violations of international law. By alleging that a corporation is violating international law, plaintiffs subject corporations to brand damage while gaining significant publicity in hopes of both encouraging policy change and a monetary settlement. The use of the ATS converts a claim sounding in tort against a corporation into a claim sounding as a violation of international law. This has the potential to create public-relations problems for corporations, and thus force a settlement, because no corporation wishes to be known as a human-rights abuser or violator of international law. Put another way, it seems that the real value of an ATS case is that it transforms a tort case into a human-rights case. The public-relations fallout from being labeled a human-rights abuser is perhaps much greater than the fallout from committing a tortious act. As a litigation tactic, it is not totally clear that this has worked, although there is some evidence that nonlegal ends have been reached on account of bringing suit under the ATS. While some settlements have been reached, most corporations have marched forward to defend ATS cases and have achieved favorable results.
\end{quote}

Donald Earl Childress, III, \textit{The Alien Tort Statute, Federalism, And The Next Wave Of Transnational Litigation}, 100 Geo. L.J. 709, 725-726 (2012) (footnotes omitted); cf. Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 368 F.Supp. 1098, 1101 (S.D.N.Y. 1973) (in airline’s suit against insurer to cover loss of aircraft that terrorists hijacked and destroyed, long-time federal judge Frankel observed that “[w]e have been led by the nature of the insurance questions to touch in the trial upon large topics of history, politics, and human sorrow in the Middle East” and that “all involved have been made aware that people called as witnesses, as well as others allied in political interest with them, have seen fit to hope or believe that their causes might be advanced or obstructed by an American court’s reasons for saying one group of insurers rather than another must pay for the destroyed airplane”).
ATS-litigation risk on MNEs—whether U.S.-based or foreign-based—is more than de minimis, and creates considerable problems for the United States, as well as for the MNEs, as Judge Dennis Jacobs of the U.S. Second Circuit Court of Appeals explained in a recent, high-profile ATS case:

All the cases of the class affected by this [ATS] case involve transnational corporations, many of them foreign. Such foreign companies are creatures of other states. They are subject to corporate governance and government regulation at home. They are often engines of their national economies, sustaining employees, pensioners and creditors—and paying taxes. I cannot think that there is some consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them—and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees. Such proceedings have the natural tendency to provoke international rivalry, divisive interests, competition, and grievance—the very opposite of the universal consensus that sustains customary international law .... Is it plausible that customary international law supports proceedings that would harm other civilized nations and be opposed by them—or be tantamount to “judicial imperialism?”

Thus, the Corrie case does not by any means preclude viable Alien Tort Statute lawsuits end

For a recent example of an ATS complaint, replete with narratives and photographs in its body, that seems designed primarily as a press release, see the lawsuit filed by Professor Anthony D’Amato, acting as lead counsel, on behalf of Hungarian victims of the Holocaust against Hungary’s national railway. Abelesz v. Magyar Nemzeti Bank, 2012 WL 3590804 (7th Cir. Aug. 22, 2012); Abelesz v. OPT Bank, 2012 WL 3590802 (7th Cir. Aug. 22, 2012); Abelesz v. Erste Group Bank, A.G., 2012 WL 3590815 (7th Cir. Aug. 22, 2012); see Julian Ku, D’Amato Sues Hungarian Railways for Holocaust-Era Complicity, OPINIO JURIS, http://opiniojuris.org/2010/02/17/damato-sues-hungarian-railways-for-holocaust-era-complicity/ (with link to the complaint).

243 Jack L. Goldsmith & Alan O. Sykes, Commentary, Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp., 120 Harv. L. Rev. 1137, 1137 (2007); see also 174 F.3d 842, 845 (7th Cir. 1999)(Posner, J.)(noting that the place of a foreign tort, not a U.S. courtroom, “is the place that has the greatest interest in striking a reasonable balance among safety, cost, and other factors pertinent to the design and administration of a system of tort law. Most people affected whether as victims or as injurers by accidents and other injury-causing events are residents of the jurisdiction in which the event takes place. So if law can be assumed to be generally responsive to the values and preferences of the people who live in the community that formulated the law, the law of the place of the accident can be expected to reflect the values and preferences of the people most likely to be involved in accidents--can be expected, in other words, to be responsive and responsible law, law that internalizes the costs and benefits of the people affected by it.”).

against other corporations, such as Alstom, which are working on projects sited in the Occupied Territories.

From the viewpoint of an MNE such as Alstom, whose core businesses are often FDIs, perhaps the epitome of how costly, divisive, and dangerous ATS litigation can be to MNEs is *Sarei v. Rio Tinto, PLC*. No less than eight published federal court opinions has it spawned.\(^{245}\) Six of these published opinions are by the Ninth Circuit—including two separate rehearings *en banc*. Two opinions are from the U.S. District Court in Los Angeles. The crown jewel of these labyrinthine proceedings, however, is the latest opinion, issued in October 2011. In what might be mistaken for a dramatization of the Tower of Babel story, the Ninth Circuit’s opinion is prodigiously long, prodigiously confusing, and prodigiously unhelpful to a rational planning process by MNEs, like Alstom, that as part of making an FDI decision might want to make a realistic risk assessment of ATS litigation in an American forum.\(^{246}\)


\(^ {246}\) Indeed, a critical pressure point is whether the MNE can prevail at the (relatively) early stage of the Fed. R. Civ. P. 12(b)(6) motion to dismiss, which may be brought on the many grounds debated in the eight Sarei opinions, or under the reinvigorated pleading standards that the Supreme Court left to the federal district and appeals courts through *Bell Atlantic v. Twombly*, 550 U.S. 554 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See Jordan D. Shepherd, *When Sosa Meets Iqbal: Plausibility Pleading In Human Rights Litigation*, 95 Minn. L. Rev. 2318 (2011); see also Kiobel, 621 F.3d at ____ (Leval, J., concurring only in the judgment)(after extensively, and bitterly, responding to the 2-judge majority’s opinion on corporate liability under the ATS, concluding that the suit must be dismissed “because the pertinent allegations of the Complaint fall short of mandatory standards established by decisions of this court and the Supreme Court,” which “establish a requirement that, for a complaint to properly allege a defendant’s complicity in human rights abuses perpetrated by officials of a foreign government, it must plead specific facts supporting a reasonable inference that the defendant acted with a purpose of bringing about the abuses”).
One might be justified in asking – given 170 pages of slip opinion containing hundreds of citations to case law from around the world and non-legal sources as well – “wither the 33-words with which Congress expressed the ATS in the 1789 Judiciary Act?” They are nowhere to be found in most of the Sarei opinion. Yet, an MNE such as Alstom might well share Judge Kleinfled’s astonishment at the result of the Sarei en banc decision, that “[o]ur decision makes the Ninth Circuit the best place in the world to bring class actions against deep-pocket private defendants to recover compensatory and punitive damages and attorneys’ fees for the evils so prevalent all over the world,” which he characterized as a “claim of supervisory authority over the entire planet is unwise as well as legally incorrect.”

Judge Kleinfeld’s cri de couer has apparently found resonance with the Supreme Court, and the Supreme Court may be on the verge of bringing the curious career of the ATS as a

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247 As a legal commentator observed at the time the October 2011 en banc opinions in Sarei were issued:

An Alien Tort Statute case arising out of the operations of the Rio Tinto mining group on the island of Bougainville, Papua New Guinea and the resulting uprising against Rio Tinto that led to military intervention and numerous deaths.

These things transpired in the 1980s. The docket number of this appeal begins with "02-". This is not the second time this case has been before the Ninth Circuit. This is the second time it's been before an en banc Ninth Circuit court.

It's important. It's long-running. And it's hopelessly fractured. You can barely tell the result even with a scorecard.

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The whole shebang is 170 single-spaced pages. Of dense, dense prose. One of the dissents alone - - Judge Kleinfeld’s -- has 136 footnotes of its own.


248 671 F.3d at 814 (Bea, J., dissenting).
regulator of FDI to end.\textsuperscript{249} After having granted certiorari in \textit{Kiobel v. Royal Dutch Petroleum} to consider whether an ATS claim lay against a corporation\textsuperscript{250} — a point on which, as just about every other aspect of the ATS, the circuits differ\textsuperscript{251} — the oral argument of \textit{Kiobel} demonstrated that at least some members of the U.S. Supreme Court had become concerned with the very notion that the ATS has been regularly asserted in cases far beyond its legislative jurisdiction.

For example, Justice Kennedy at the February 21, 2012 oral argument in \textit{Kiobel} very quickly

\textsuperscript{249} Some student commentators have predicted otherwise, contending that the “argues that the context in which the First Congress enacted the Alien Tort Statute provides enough evidence to overcome the presumption against extraterritorial application.” Michelle K. Fiechter, \textit{Extraterritorial Application of the Alien Tort Statute: The Effect of Morrison v. National Australia Bank, Ltd. on Future Litigation}, 97 Iowa L. Rev. 959 (2012). Other student commentators have—as so many federal courts have until the Supreme Court apparently appears set to call them on—assumed extraterritorial applicability, and thereby missed what is shaping up to be the decisive issue in the case. E.g., Tyler G. Banks, \textit{Corporate Liability Under The Alien Tort Statute: The Second Circuit’s Misstep Around General Principles Of Law In Kiobel V. Royal Dutch Petroleum Co.}, 26 Emory Int’l L. Rev. 227 (2012).

\textsuperscript{250} The principle “argument that has been raised for corporate liability is that current American law, as well as the law in many other countries, recognizes the personhood of corporations.” Maria Florencia Librizzi, \textit{The Alien Tort Statute and Corporate Liability: Looking Ahead to the Supreme Court Decision in Kiobel}, N.Y.U. J. Int’l L. & Politics, Feb. 12, 2012, at http://nyujilp.org/the-alien-tort-statute-and-corporate-liability-looking-ahead-to-the-supreme-court-decision-in-kiobel/#refX. Because “corporations have many of the same rights and obligations that a natural person has,” it would seem “plausible, therefore, that corporations should be amenable to suit under the ATS”:

\begin{quote}
This conclusion is consistent with Citizens United v. Federal Election Commission, in which the Supreme Court decided that the “government may not, under the First Amendment suppress political speech on the basis of the speaker’s corporate identity. By analogy, it is reasonable to conclude that corporations should be held liable when aiding and abetting torts. In this context, a ruling diminishing corporate responsibility for human rights violations would be in tension with the recent ruling protecting corporate rights in the framework of personhood.
\end{quote}

Id. at 32-34 (footnotes omitted); see also Matthew E. Danforth, Note, \textit{Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations}, 44 Cornell Int’l L.J. 659, 661 (2011). Some international rights advocates have pointed out, however, some very significant unintended consequences that will flow from a recognition of corporations as juridical persons in international law. See, e.g., Jose E. Alvarez, \textit{Are Corporations “Subjects” of International Law?}, 9 SantaClaraJ. Int’lL. 1 (2011)(available at: http://digitalcommons.law.scu.edu/scujil/vol9/iss1/1).

\textsuperscript{251} The only Circuit to squarely hold that corporations are not juridical persons within the ambit of § 1350 is the Second. See \textit{Kiobel v. Royal Dutch Petroleum}, 621 F.3d 111, 118–20 (2d Cir. 2010). The remaining Circuits which have addressed the issue, whether as a holding or in dicta, have held that corporations, like private individuals, are proper defendants under § 1350. See Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017–21 (7th Cir. 2011); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 39–57 (D.C. Cir. 2011); Sarei v. Rio Tinto, 550 F.3d 822, 831 (9th Cir. 2008); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008). Notably, the Court has ruled that the TVPA’s specific reference to “individual” in defining its scope — a term conspicuously absent in the 200-years older § 1350 — does not include “corporations.” Mohamad v. Palestinian Auth., 566 U.S. ___, 132 S.Ct. 1702 (2012).
interjected a concern that “no other nation in the world permits its court to exercise universal
civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no
connection.”\textsuperscript{252} Justice Alito commented: “I think the question is whether there’s any other
country in the world where these plaintiffs could have brought these claims against the
respondents.”\textsuperscript{253} The Chief Justice, John Roberts, added that “[i]f there is no other
country where this suit could have been brought, regardless of what American domestic law provides,
isn’t it a legitimate concern that allowing the suit itself contravenes international law?”\textsuperscript{254}

The purpose of this aspect of an FDI analysis is not to defend corporate misconduct.
Complicity of MNEs in the murder, torture, enslavement, wrongful detention, and other criminal
abuses of human being beings – e.g., “ethnic cleansing, genocide, torture” and other human
rights violations — are serious, and intolerable.\textsuperscript{255} Corporate social responsibility is a modern,
and overdue, movement\textsuperscript{256} that gives MNEs the opportunities, as well as the incentives, to self-
police and to participate in the formulation of a legal regime to effectively regulate MNE

\begin{footnotesize}
\begin{enumerate}
\item Lyle Denniston, \textit{Argument Recap: Downhill, From The Start}, SCOTUSblog (Feb. 28, 2012, 3:05 PM),
http://www.scotusblog.com/2012/02/argument-recap-downhill-from-the-start/. Links to audio and text transcripts of
the oral argument are available on http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-
al/. However, within a month after this oral argument, a Dutch court appears to have done just what Justice
Kennedy had observed was unprecedented. See note __, infra.

\item Id.

\item Id.

\item Goldsmith & Sykes, supra note __, at 1146; see Ronen Shamir, \textit{Between Self-Regulation And The Alien Tort
Claims Act: On The Contested Concept Of Corporate Social Responsibility}, 38 Law & Soc’y Rev. 635
(2004)(arguing that from the “perspective of a C[orporate] S[ocial] R[esponsibility] field that exists above and
beyond any concrete judicial outcome, the career of the [Alien Tort Statute] cases, by forcing the issue of
corporations and human rights into the open, already shapes corporate behavior because it forces corporations to
reflect upon, if not to institutionalize, human rights-related issues”).

\item See, e.g., Donald J. Kochan, \textit{Legal Mechanization of Corporate Social Responsibility Through Alien Tort Statute
Litigation: A Response to Professor Branson with Some Supplemental Thoughts}, 9 SANTA CLARA J. INT’L L. 251, 254
(2011) (“The corporate social responsibility discussion raises three principal issues about how a moral corporation
lives its life: how a corporation chooses its self-interest versus the interests of others, when and how it should help
others if control decisions may harm the shareholder owners, and how far the corporation must affirmatively go to
help right the perceived wrongs in the world in which it operates.”)(footnotes omitted).
\end{enumerate}
\end{footnotesize}
conduct, and to the extent MNEs fail to do so, gives home- and host-state governments the standards by which to legislate compliance. But such regulation should be more predictable


258 A leading model is the Guidelines for MNEs that the Organization for Economic Cooperation and Development issued originally in 1976. Daniel Plaine, OECD Guidelines for Multinational Enterprises 11 Int'l L. 339, 339-341 (1977); Jernej Letnar Cernic, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises* (December 17, 2008). Hanse Law Review (HanseLR), Vol. 3, No. 1, September 2008. Available at SSRN: [http://ssrn.com/abstract=1317263](http://ssrn.com/abstract=1317263). The OECD Guidelines are not mere window-dressing. As Professor Cernic observes, the OECD Guidelines is the only corporate responsibility instrument formally adopted by state governments. The OECD Guidelines are recommendations addressed to enterprises operating in OECD countries. However, corporations are encouraged to extend good practices throughout the universe. The Guidelines form part of a broader and balanced instrument of rights and obligations – the OECD Declaration on International Investment and Multinational Enterprises. In this regard, the OECD Member States are obliged to establish National Contact Points (NCP) which has the primary responsibility to ensure the follow-up of the Guidelines at the national level.

Id. at 77; see also Ashley L. Santner, *A Soft Law Mechanism For Corporate Responsibility: How The Updated Oecd Guidelines For Multinational Enterprises Promote Business For The Future*, 43 Geo. Wash. Int'l L. Rev. 375, 376-377 & n. 5 (2008); Since their adoption in 1976, the OECD Guidelines have been revised and reiterated on five occasions. See The Guidelines have been updated five times since they were first adopted in 1976. See Guidelines for Multinational Enterprises: About, Org. for Econ. Co-operation & Dev., http://www.oecd.org/about/0,3347,en_2649_34889_1_1_1_1_1,00.htm. The institution of NCPs was designed to provide a specific accountability element to OECD concept of MNE regulation, which involves voluntary compliance, home-state government pressure, and corporate peer pressure as well as institutional investor pressure:

The role of ... NCPs is to further the effectiveness of the [MNE] Guidelines. NCPs will operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence.... An NCP can consist of senior representatives from one or more Ministries, may be a senior government official or a government office headed by a senior official, be an interagency group, or one that contains independent experts. Representatives of the business community, worker organisations and other non-governmental organisations may also be included.

See Santner, supra, at 376 n. 4 (citing Org. for Econ. Co-operation & Dev., OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, in OECD Guidelines for Multinational Enterprises 13, 75 (2011)). For a detailed discussion of how NCPs are organized and operate within the 42 nations that have them, including the United States and France, see Leyla Davarnejad, *In The Shadow Of Soft Law: The Handling Of Corporate Social Responsibility Disputes Under The Oecd Guidelines For Multinational Enterprises*, 2011 J. Disp. Resol. 351 (2011). Speaking of the Corporate Social Responsibility (CSR) initiatives that are part of the OECD movement, Ms. Davarnejad writes:
and clearly stated than the common-law-style case adjudication that courts have attempted under the ATS, particularly where that adjudication is done by courts in for a other than where the MNE’s conduct, or the effects of the MNE’s conduct, transpired.\footnote{Goldsmith & Sykes, supra note __, at 1147 (nothing importance of goal to “eliminate[e] … distorting economic effect by ensuring that all firms are subject to the same standard of liability for torts committed in a particular place”); see also Jack L. Goldsmith, Note, Interest Analysis Applied To Corporations: The Unprincipled Use Of A Choice Of Law Method, 98 Yale L.J. 597 (1988-1989).}

A legislative process, like

Not only are the dimensions and subject matter of CSR manifold, there is also debate about whether CSR standards have or ought to have a hard law nature CSRs can be legally binding or voluntary, depending on whether MNEs are bound by domestic law or whether they respond to societal expectations. The normative quality and significance of internationally agreed CSR standards are often unclear, however.

It is important to note that when discussing CSRs’ international initiatives and their legal quality, a distinction should be made between governmental, nongovernmental/private, and multi-stakeholder acts. The Guidelines represent a governmental initiative because only the adhering countries can determine how to change and implement the Guidelines. In addition, representatives on the part of civil society--in particular business, trade unions, and NGOs--are consulted concerning all aspects of the Guidelines, including their implementation. However, the Guidelines have to be distinguished from multi-stakeholder initiatives, which are very common in the context of CSR. In terms of these initiatives various private actors cooperate and determine their form and content, sometimes with and sometimes without the contribution of governments.

Id. at 354-355(footnotes omitted). The progress made in the United States in OECD implementation, including NCPs, is compared to that of France and the Netherlands, see Christopher N. Francoise, A Critical Assessment of the United States’ Implementation of the OECD Guidelines for Multinational Enterprises, 30 B. C. Int'l & Comp. L. Rev. 223 (2007). “[T]he U.S. NCP is the Office of Investment Affairs, a part of the Bureau of Economic and Business Affairs located in the Department of State. In contrast to the U.S. institutional arrangement, other adhering nations such as the Netherlands and France use interdepartmental offices, which assign different government ministries various bureaucratic roles.” Id. & n. 41; see Bureau of Economic and Business Affairs, U.S. Dep’t of State, OECD: U.S. National Contact Point, \url{http://www.state.gov/e/eb/oecd/usncp/us/index.htm}. The Bureau describes the NCP’s “main functions” as to: (1) promote awareness of the Guidelines to business, civil society, and the general public; and (2) work with business, civil society and the public on all matters relating to the Guidelines, including in circumstances when a party raises concerns (“specific instance”) regarding an MNE’s observance of the Guidelines,” and adds that “[i]n some cases, NCPs may facilitate a voluntary mediation or conciliation process among the interested parties.” \url{http://www.state.gov/e/eb/oecd/usncp/index.htm}. The details of the “specific instance” process—which the Bureau describes as providing “a forum to assist MNE’s and interested parties (such as employee organizations or NGOs), in resolving questions regarding the consistency of an MNE’s activities with the Guidelines”—are summarized at \url{http://www.state.gov/e/eb/oecd/usncp/specificinstance/index.htm}, and beginning in 2011, the Bureau has released reports on “specific instances” which it has mediated. \url{http://www.state.gov/e/eb/oecd/usncp/specificinstance/assessments/index.htm}. All NCPs provide to the OECD Secretariat an annual summary of past and current specific instance submissions, and the Bureau has provided a table summarizing specific instances addressed by the U.S. NCP as of June 2011 at \url{http://www.state.gov/e/eb/oecd/usncp/links/rls/183060.htm}, as well as detailed summaries of two specific instances that it released in February 2012, \textit{The Lead Group and Innospec}, \url{http://www.state.gov/e/eb/oecd/usncp/links/rls/183059.htm}, and in March 2012, \textit{UNITE HERE and LSG Sky Chefs}, \url{http://www.state.gov/e/eb/oecd/usncp/links/rls/185107.htm}, and
the one that led to Congress’s enactment of the TVPA, allows for a considerably more nuanced and holistic assessment of the wide range of relevant economic and foreign relations factors implicated in such law-making than courts can even approach in case-by-case adjudication.\footnote{260} Judge Bork’s observation in Tel-Oren is quite apropos here: that the subjects to which courts have been asked since Filartiga to extend the ATS are far better committed to “a modern Congress that ma[kes] clear its desire that the federal courts police the behavior of foreign individuals and governments” in a statute that “embod[i]es a legislative judgment that is” both “current” and “clear.”\footnote{261} Judge Robb, who also wrote a separate concurrence in Tel-Oren, 

\footnote{260} For example, in addition to the question of whether, and if so, to what extent, an ATS-successor statute applies extraterritorially, there are questions such as whether aliens suing under the ATS should have to exhaust local remedies before being allowed to bring an ATS-like suit in the U.S. federal courts. Compare, e.g., Ron A. Ghata, The Alien Tort Statute and Prudential Exhaustion, 96 Cornell L. Rev. 1273, 1274-1275, 1292-1293, 1297, 1298-1300 1(2011) (recommending the that the reach of the ATS be limited by requiring \textit{prudential} exhaustion of local remedies “in which there is a weak nexus to the United States “ and alleged violation of norms that are not Peremptory,” which “could greatly reduce the number of claims available to plaintiffs under the ATS”) with \textit{Sarei v. Rio Tinto, PLC}, 487 F.3d 1193, 1225–26, 1235–36 (9th Cir. 2007) (Bybee, J., dissenting)(arguing that “international law requires exhaustion of local remedies as a condition to bringing an international cause of action in a foreign tribunal,” such as an ATS suit in a U.S. federal court, and that “[e]ven if international law did not so require exhaustion, I would, as an exercise in discretion, require it as a matter of our domestic law”), vacated en banc, 550 F.3d 822 (9th Cir. 2008); see also \textit{Ian Brownlie, Principles of Public International Law} 472-73 (6th ed. 2003) (explaining the general rule of \textit{mandatory} exhaustion: “A claim will not be admissible on the international plane unless the individual alien or corporation concerned has exhausted the legal remedies available to him in the state which is alleged to be the author of the injury. This is a rule which is justified by practical and political considerations....”).}
echoed Judge Bork’s observation: given the “broad and novel questions . . .” raised in § 1350 cases, “courts ought not to appeal for guidance to the Supreme Court, but should instead look to Congress and the President. Should these branches of the Government decide that questions of this sort are proper subjects for judicial inquiry, they can then provide the courts with the guidelines by which such inquiries should proceed.” While recent attempts at such legislation have gone nowhere, the impending Supreme Court decision in Kiobel should rekindle an effort for which scholars called for a generation ago, and continue to call for today. Thus, MNEs,


262 726 F.2d at 827 (Robb, J., concurring).
263 See, S. 1870, __ Cong. Rec. S11433-S11436 (Oct. 17, 2005), at e.g., Philip Mariani, Comment, Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act, 156 U. Pa. L. Rev. 1363, 1384 & n.1 (2008)(noting that “[o]n October 17, 2005, a bill entitled the Alien Tort Statute Reform Act was introduced in the Senate, proposing to amend 28 U.S. C. § 1350 in order to, among other things, ‘clarify jurisdiction of Federal Courts over a tort action brought by an alien’”, but that [o]nce introduced, this bill was referred to the Committee on the Judiciary; at the time of this writing, no further action has been taken on the bill”) (citing S. 1874, 109th Cong. (2005).); Keith A. Petty, Who Watches the Watchmen: Vigilant Doorkeeping, the Alien Tort Statute, and Possible Reform, 31 Loy. L.A. INT’L & COMP. L. REV. 183, 185, 217-219 (2009)(proposal for amending § 1350 by, inter alia, “mirror[ing] the CIL violations specified in the Third Restatement of Foreign Relations Law,” “adding a simple provision to the statute allowing for case by case deference to the executive when cognizable foreign policy interests are at stake”); Lucien J. Dhooge, A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations, 13 U.C. DAVIS J. INT’L L. & POL’Y 119, (2007); see also Roger Alford, What is Feinstein Thinking in Amending the ATS?, Opinio Juris, Oct. 22, 2005, at http://lawofnations.blogspot.com/2005/10/what-is-feinstein-thinking-in-amending.html (describing the details of Senator Feinstein’s proposed amendment and her rationales for the proposal); Roger Alford, Senate Considers Removing International Law from the Alien Tort Statute, Opinio Juris, Oct. 19, 2005, at http://lawofnations.blogspot.com/2005/10/senate-considers-removing.html (observing that “Sen. Feinstein is proposing that Congress “de-internationalize” the Alien Tort Statute” by replacing the current judicial practice of “looking to foreign courts or international tribunals (or to international law professor articles)” and instead creating a full statutory scheme so that the courts “considering a claim under the ATS would look to the text of the statute and the legislative history”)(also providing the text of the proposed bill); Roger Alford, Feinstein Withdraws ATS Amendment, Opinio Juris, http://lawofnations.blogspot.com/2005/10/feinstein-withdraws-ats-amendment.html, Oct. 26, 2005 (describing Senator Feinstein’s “terse letter to Senator Specter states that while the legislation was designed to address concerns about the clarity of the existing statute in light of Sosa ‘I believe that the legislation in its present form calls for refinement in light of concerns raised by human rights advocates, and thus a hearing or other action by the Committee on this bill would be premature.’”)

264 Kenneth C. Randall, Further Inquiries Into The Alien Tort Statute And A Recommendation, 18 N.Y.U. J. INT’L L. & Pol’y 473, ___ (1986). In a nutshell, Professor Randall proposed a more comprehensive, detailed, and substantive (rather than purely jurisdictional) ATS, in order to “specifically address the judiciary’s express difficulties with the statute” and to “clarify the statute's language and jurisdictional requirements; direct courts to sustain jurisdiction
such as Alstom, should embrace the opportunity to this debate and contribute meaningfully to it\textsuperscript{266}, for a domestication of the ATS in \textit{Kiobel} will not pretermit the need for the kinds of claims found in ATS cases to be addressed.\textsuperscript{267} Any evaluation of Alstom’s risk posed by its FDIs in

where specific international law violations are at issue; and provide guidance to the courts on the applicability of certain judicial abstention doctrines.” Id. at 512. Professor Randall provides the text of his proposed §§ 1350(a), (b), & (c), along with detailed commentary about his rationales and sources for his proposed statute. See id. at 511-532. In addition to defining 8 specific categories of international law violations encompassed within his revision, Professor Randall explicitly creates a conduit between the Executive Branch and the federal courts in such cases in his § 1350(c): “Where a district court has jurisdiction under subsection (a), the action may not be dismissed, in whole or in part, based on either the act-of-state or political question doctrines, unless the executive branch of the government determines, that, based on the foreign policy interests of the United States, the application of those doctrines is required in a specific case and a suggestion to that effect is filed with the court. Id. at 528; see Roger Alford, The Feinstein Amendment and Presidential Waivers, Opinio Juris, Oct. 25, 2005, \url{http://lawofnations.blogspot.com/2005/10/feinstein-amendment-and-presidential_25.html} (describing the Executive “veto” provision of Senator Feinstein’s proposed, then withdrawn, Alien Tort Statute Dismissals on forum non conveniens or sovereign immunity grounds (per the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 et seq.) Id. at 528-532. See also Kenneth C. Randall, \textit{Federal Jurisdiction Over International Law Claims: Inquiries Into The Alien Tort Statute}, 18 N.Y.U. J. Int’l L. & Pol. 1 (1985). It is interesting to note that Professor Randall did not appear to think that extraterritorial application of the ATS was a major issue; in fact, he assumed that the ATS applies extraterritorially. Randall, 18 N.Y.U. J. Int’l L. & Pol. at 513-514 (“contexts other than those involving the Alien Tort Statute, judicial jurisdiction over extraterritorial acts has been increasingly upheld”). However, in the 26 years since the publication of Professor Randall’s article, the Supreme Court has taken a different approach, demanding more evidence—especially statutory text—that overcomes the general presumption against extraterritorial application of Congressional legislation. See, e.g., Morrison v. National Australia Bank, Ltd., 562 U.S. ___, 130 S.Ct. 2869 (2010)(unanimous 8-0 opinion written by Justice Scalia); \textit{Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts}, Ch. 43, \textit{Extraterritoriality Canon}, at 268-272 (2012); Genevieve Beyea, Morrison v. National Australia Bank and the Future of Extraterritorial Application of the U.S. Securities Laws (February 28, 2011), Ohio State Law Journal, Vol. 72, Forthcoming. Available at SSRN: \url{http://ssrn.com/abstract=1773766} or \url{http://dx.doi.org/10.2139/ssrn.1773766}; Rachel Doyle, \textit{The Presumption Against Extraterritoriality}: Pakootas v. Teck Cominco Metals Ltd. and Transboundary Environmental Harm after Morrison v. National Australia Bank Ltd. (May 30, 2012), available at SSRN: \url{http://ssrn.com/abstract=2070852}; see also R. Davis Mello, Life After Morrison: Extraterritoriality And Rico, 44 VAND. J. TRANSNAT’L L. 1385, 1414 (2011)(advocating This Note advocates a third approach that the Racketeer-Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (2006), “should have domestic application when a plaintiff alleges the commission of enough predicate acts in the United States within the statutory time period to establish a “pattern of racketeering activity,” regardless of the situs of the enterprise or the commission of additional predicate acts in a foreign jurisdiction. This approach represents the best way to reconcile prior RICO jurisprudence with the Court’s renewed emphasis on the presumption against extraterritorial application of U.S. laws in Morrison.”).\textsuperscript{268} Tyler G. Banks, Note, supra note___ at 279; Michael Garvey, Comment, \textit{Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Legislative Prerogative}, 29 B.C. Third World L.J. 381 (2009).\textsuperscript{269} See, e.g., Lauren A. Dellinger, \textit{Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act Litigation While Simultaneously Building a Better Business Reputation}, 40 Cal. W. Int’l L.J. 55 (2009)\textsuperscript{267} Tyler G. Banks, Note, supra note ___, at 279. Mr. Banks observes:

[O]ne more solution to this problem lurks in ATS litigation and is actually hinted at by the majority in \textit{Kiobel}. The majority wrote, in conclusion, “[N]othing in this opinion limits or
Israel, whether the Jerusalem Light Rail Project in the West Bank Occupied Territories or a hypothesized wind-energy project in the disputed Golan Heights, should include a discussion of the larger question whether Alstom will seek to influence the policy and laws of its host nations, as well as its home state, through participation in political and legislative processes, as well as in litigation over the scope of laws that may impact Alstom’s present and future business strategies.

Id. at 279 (footnotes omitted). The point is well-taken, even if the article may betray youthful exuberance in its failure to consider the countervailing costs of such lawsuits, or the realpolitik extent of their effect on U.S. foreign relations in a rapidly-changing global socio-economic and political landscape. Indeed, a court in the Netherlands recently exercised what amounts to universal jurisdiction of the kind sought by ATS plaintiffs. See Dutch Courts Compensate Palestinian For Libya Jail—A Dutch Court Has Awarded 1m Euros ($1.3m; £838,000) In Compensation To A Palestinian Doctor Who Was Imprisoned In Libya For Eight Years For Allegedly Infecting Children With HIV/Aids, BBC NEWS, March 28, 2012, at http://www.bbc.co.uk/news/world-middle-east-17537597

Recently, a Japanese foundation representing whaling interests attempted to use § 1350 to turn the tables on activists who oppose whaling, by suing a “Washington-based conservation organization, which engaged in frequent confrontations with whalers in the Southern Ocean, …, alleging a violation of their right to free navigation at sea and piracy” and “moved for a preliminary injunction requiring organization's ships and boats to stay at least 800 meters from their vessels, and prohibiting attacks on the whaling crew members or its ships.” Institute of Cetacean Research v. Sea Shepherd Conservation Soc'y, __F.Supp.2d ___, 2012 WL 958545 (W.D. Wash. March 19, 2012). However, another MNE recently enjoyed success in a similar injunction suit, invoking federal maritime subject matter jurisdiction under 28 U.S.C. § 1333 against planned activism by Greenpeace directed at artic oil exploration. Shell Offshore Inc. v. Greenpeace, Inc., __F.Supp.2d ___, 2012 WL 1067968 (D. Alaska Mar. 28, 2012). Such offensive use of the U.S. federal courts by MNEs is an innovative avenue, complementary to legislative lobbying, to protecting investments, both domestic and foreign, from private activism as well as from judicial disruption. Of course, the observation is one relevant to general strategy; Alstom would not likely be able to employ similar litigation tactics to dissuade activism against its FDI sites in Israel. However, such litigation might be useful were there to be activism directed against its North American subsidiaries, including the nacelle production facility it opened in Texas.

For example, BP America, Caterpillar, Conoco Phillips, General Electric, Honeywell, and International Business Machines have stepped forward in an effort to influence the Supreme Court’s rulings on extraterritoriality, as well as corporate amenability, in Kiobel, through an Amicus Brief prepared by lead counsel including former Solicitor General Paul Clements, now in private practice:
C. Legal Aspects Of The Political Risk Inherent In Alstom’s Choice Of A Golan Heights FDI

1. Syria’s Claims To The Golan Heights

While trade treaties may create legal strategic advantage and municipal law may create legal risk, the politics of the Golan Heights as host to the Alstom-Matimatrix FDI has discernible legal implications that Alstom cannot ignore. Israel wrested the Golan Heights territory from Syria in the course of 1967’s Six-Day War.\footnote{Preface, \textit{On The Legal Status Of The Golan Heights: Application Of Israeli Law Or Annexation?}, 20 Brook. J. Int'l L. 331 (1994).} After the subsequent, and brief, 1973 conflict between Syria and Israel and a 1974 “disengagement agreement,” or cease-fire, the Golan Heights (except 100 square kilometers ceded back in 1974) remained in a legal limbo but a practical stasis.\footnote{See Muhammad Muslih, \textit{The Golan: Israel, Syria, and Strategic Calculations}, 47 Middle East Journal 611, 621, 625-627 (Autumn, 1993).} The Golan Heights Law, enacted by Israel’s Parliament in 1981, changed that status by applying Israeli law, jurisdiction and administration to the Golan Heights, which Syria

Amici are corporations that have extensive operations around the world BP America, Inc. (on behalf of the global group of BP companies), Caterpillar, Inc., ConocoPhillips Company, General Electric Company, Honeywell International, Inc., and International Business Machines Corporation are industry leaders in various business sectors, including energy, construction, transportation, health care, and information technology.

Amici strongly condemn human rights violations, and each company abides by its detailed corporate social responsibility policy. Yet many amici have been and may continue to be defendants in suits predicated on various expansive theories of liability under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, based on their operations - or those of their subsidiaries - in developing countries. Those suits impose severe litigation and reputational costs on corporations that operate in developing countries and chill further investment. Amici have a strong interest in ensuring that the ATS is applied in an appropriately circumscribed manner, consistent with its text and original purposes. And because plaintiffs may seek to bring ATS suits against corporate officers and directors even if the Court affirms the decision below on the issue of corporate liability, amici have a strong interest in ensuring \*2 that the Court resolve the pendent issues of extraterritorial application and aiding and abetting liability that constitute the root causes of ongoing diplomatic tension.

complained to the United Nations Security Council constituted annexation in violation of international law, and which the U.N. Security Council and General Assembly rebuked. However, the actions and reactions at that point were more symbolic than substantive, and a new stasis emerged.

For some years after the row of the early 1980s, the dispute over Israel’s development of the Golan Heights has not been as “hot” as the disputes over the development of Jerusalem and the West Bank. Syria did not concede its claims, and remained concerned about the commanding vista the Heights have over Damascus; Israel did not budge on its insistence that the return of any portion of the Golan Heights must be met by Syrian recognition of Israel and accession to Israeli-security demands. There were stirrings of a possible land-for-peace-and-recognition deal in the early 1990s, and during the first term of President Bill Clinton, the United States attempted to facilitate dialogue between Hafez al-Assad, Syria’s President 1971-2000, and

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273 According to Professor Sheleff, the 1981 Golan Heights Law—

is quite simply an affirmation the existing situation in the Heights where Israeli law fills a void caused by an absence of regular Syrian institutions, such as a judiciary. This vacuum formed because the majority of the population fled the Heights during the Six Day War, [FN16] when the territory was occupied by the Israeli Defense Force (I.D.F.). Thus, for a substantial period of time prior to the passing of the Golan Heights Law, Syrian law had ceased to be an effective legal instrument in the Golan Heights, and legal problems were solved either by I.D.F. institutions, or, and perhaps principally, by the autonomous activities of the Druze community which comprised most of the Syrian population remaining in the Heights after the termination of the war. The customs of the community and the influence of its leaders are the central factors in resolving day-to-day disputes and legal questions facing the local population.

Leon Sheleff, supra note __, at 337-338 (footnotes omitted).  
274 See Muhammad Muslih, supra note __, at ___; Asher Maoz, supra note __, at ___; Leon Sheleff, supra note __, at ___.

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Yitzhak Rabin, Israel’s Prime Minister (1992-1995). However, now that the “Arab Spring”, which swept from Libya to Egypt, has now reached Syria. The stasis that has remained in effect since 1973 is entering into uncharted territory. It is certain that the post-Assad Syria that emerges from the current civil war will not likely be a significant military threat to Israel or its occupation of the Golan heights anytime soon. As one anti-Assad activist was quoted by journalists recently observing:

Like other critics, Mr. Amasha said that Mr. Assad had made no genuine effort to liberate the Golan Heights and had opposed Israel only “on television.” He said he believed that only a strong democratic Syria could liberate the territory, whether through war or through negotiations.

While the Druze populace left behind in the Golan Heights and under the authority of Israel have largely continued identifying with both Syria and the Assad family, how they will react to these changes in the long run is unclear, because pronounced divisions have arisen within the Druze community. Viewing the situation more holistically, it remains equally unclear whether a breakdown in the Assad autocracy will result in problems of sabotage, terrorism, and other destabilization along the buffer that the Golan Heights provides between Syria and Israel. As the BBC reporting has explained —

275 See Muhammad Muslih, supra note __, at ___; Asher Maoz, supra note __, at ___; Leon Sheleff, supra note __, at ___.
Technically, the two countries have been in a state of war since 1948. Israel also continues to occupy the Golan Heights, Syrian territory which it captured in 1967 and later annexed, in a move that is not internationally recognised.

Yet under President Bashar al-Assad, there has been a long-standing truce and for the past 40 years the border between the two countries has been relatively calm.

Now Israeli leaders are revising their strategic assessments. There are worries that fleeing Syrian refugees could try to enter the Golan Heights and that Mr Assad's missiles and chemical weapons arsenal could fall into the wrong hands.  

While Israel has made it plain that it does not want to ignite a regional war by unilateral intervention, and that it prefers coordinated international action, the Israeli government has not sought to secret the fact that it has contingency plans for military

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281 Id. The BBC goes on to describe the Israeli concerns as of August 2012:

"As far as Israel was concerned this was the devil we knew. We knew it was an ally of Iran, we knew it supplied weapons to [the Lebanese militant group] Hezbollah and supported [the Palestinian militant group] Hamas but at the same time, this was a regime which kept the border with Israel very quiet for almost 40 years. Now there's uncertainty."

The greatest fear is for the security of Syria's stockpiles of weapons. Israel believes that Hezbollah or rogue Islamist groups like al-Qaeda could try to seize advanced missile systems or chemical and biological weapons.

"One can assume that if the Hezbollah can have a rocket equipped with chemical or biological warhead they might very easily fire it against Israel," says Danny Yatom, former head of the Israeli intelligence agency, Mossad.

"I assume that Israel will not sit idle and if we have information chemical agents or biological agents are about to fall into the hands of the Hezbollah we will not spare any effort to prevent it."

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Back in the Golan Heights, Israeli troops can be seen in locations on the rocky hillsides that they do not usually man.

Id.
strikes against Syria’s chemical weapons storehouses and military convoys suspected of
transporting chemical weapons from those storehouses. 282

Though the Golan Heights is quiet today — and the blades of wind-turbines may
turn unimpeded in the winds of the Heights — the situation in Syria grows more volatile
with each passing day, and the risk to people and property in the Golan Heights, as in
other border areas with Syria, grows proportionately, as the New York Times has
described it in a very compelling summary of the situation:

The country appeared to be unraveling in what looks like a sectarian civil war. Sunni Muslims who have fled the country described a government crackdown that is more pervasive and more sectarian than previously understood, with civilians affiliated with Mr. Assad’s Alawite sect shooting at their onetime neighbors as the military presses what many Sunnis see as a campaign to force them to flee their homes and villages.

The conflict has become a war of attrition that grows more dangerous as it goes along. Tensions have spilled over borders into Lebanon, Iraq, Turkey and Jordan and raised fears that radical Islamic militants will find a new cause for recruitment. 283

Even if the conflict is contained, and the fears of terrorist or insurrectionist infiltration along with the nightmares of chemical and biological weapons falling into their hands are abated, MNEs with the kinds of FDIs in the Golan Heights as Alstom is considering in our hypothetical FDI problem still must worry about the status of the investment in the

282 Id. An excellent, regularly updated summary on the events in Syria surrounding the end of the Assad regime and the escalation of an internal civil war may be found at Times Topics: Bashar al-Assad, http://topics.nytimes.com/top/reference/timestopics/people/a/bashar_al_assad/index.html
wake of a new government that may, once it is on its feet, take up the return of the Golan Heights as a central theme.\textsuperscript{284}

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

In addition, Alstom’s ties to the U.S. in our hypothetical FDI might prove to be disadvantageous if the Golan Heights were to revert to Syrian control, even in the absence of an expropriation. Because the U.S. government designated Syria as a state sponsor of terrorism, Syria has been subject to the U.S. Department of Commerce’s Export Administration Regulations (EAR) for over thirty years.\textsuperscript{285} U.S. businesses find that FDIs in Syria are impracticable, due to the EAR prohibitions on the export of almost all U.S. products to Syria, and due to other restrictions, such as the Grassley Amendment’s prohibitions on taking tax credits for taxes paid in Syria and the Syria Accountability Act (SAA) of 2004’s authorization of the President to prohibit, under authority of the SAA, all U.S. business and investment activity in Syria at any time.\textsuperscript{286}

\footnotesize


\textsuperscript{286} Id.
As serious as the risks from Syrian civil war and an unpredictable aftermath may be\(^\text{287}\), another shadow looms over a wind-power FDI in Israel: the palpable potential for an armed conflict involving Israel and Iran. This set of risks is discussed in the next section, along with the ameliorative impact of political-risk insurance.

2. The Impact Of An Israel-Iran Armed Conflict On FDI In Israel—And The Role Of Political Risk Insurance

Any FDI in Israel—not just in the volatile Occupied Territories—carries with it a particular set of risks created by an arms race between Israel and Iran in the midst of what has been called “an Arab Cold War.”\(^\text{288}\) While Iran was the second Middle-Eastern nation to recognize Israel in the 1950s and maintained cooperative relations during the reign of Reza Pahlavi\(^\text{289}\), Iran since 1979 has been in a state of total hostility toward Israel, which Iran does not recognize and which Iranian leaders have repeatedly vowed to destroy.\(^\text{290}\) Such threats assumed a new urgency when it became clear that the production of nuclear fuel in Iran had proceeded to the point where uranium could be enriched to “weapons-grade” levels\(^\text{291}\), and, concomitantly, that the Iranian military had successfully


\(^{291}\) Id. See, e.g., David E. Sanger, *Harder Push To Stop Iran from Making Nuclear Fuel*, N.Y. Times, Dec. 11, 2010, at A6; Cody Coombs, *Blue Morning-Glories In The Sky: Correcting Sanctions To Enforce Nuclear Nonproliferation In Iran*, 19 Ind. Int'l & Comp. L. Rev. 419 (2009). Mr. Coombs explains the American viewpoint on these events as follows:
Over the past several decades, Iran has vigorously pursued nuclear technology under the pretense of its need for nuclear energy. However, increasing amounts of evidence have surfaced that suggests that Iran's nuclear program has not been entirely based on peaceful purposes. The International Atomic Energy Agency (IAEA), the enforcement agency behind the Nuclear Nonproliferation Treaty (NPT), has attempted to enforce the NPT provisions of nonproliferation through the use of various sanctions. So far, Iran has refused to comply with NPT provisions. Iran's refusal to comply with the provisions of the NPT, despite IAEA sanctions, has become a reoccurring theme among nuclear threat nations.

Id. at 419 (footnotes omitted). These views are echoed in the polite language of diplomacy that appears in the published reports and communiques of the International Atomic Energy Agency:

"As announced by the Director General earlier this week, we met today to discuss the structured approach paper. The Agency team came to the meeting in a constructive spirit with the desire and intention of finalising the paper. We presented a revised draft which addressed Iran's earlier stated concerns. However, there has been no progress and, indeed, Iran raised issues that we have already discussed and added new ones. This is disappointing. A date for a follow-on meeting has yet to be fixed."

IAEA Statement After Iran Meeting, IAES PRESS RELEASES, June 8, 2012, at http://www.iaea.org/newscenter/pressreleases/2012/prn201216.html (statement by IAEA Deputy Director General Herman Nackaerts). One of the cornerstones of the IAEA Mission Statement is to “verify[] through its inspection system that States comply with their commitments, under the Non-Proliferation Treaty and other non-proliferation agreements, to use nuclear material and facilities only for peaceful purposes.” http://www.iaea.org/About/mission.html. As of April 2012, the IAEA has 154 member nations, including the United States (since 1957), Israel (since 1957), and Iran (since 1958). See http://www.iaea.org/About/Policy/MemberStates/. For other points of view, see, e.g., Mehrzad Boroujerdi & Todd Fine, Symposium, A Nuclear Iran: The Legal Implications of a Preemptive National Security Strategy, 57 Syracuse L. Rev. 619, 628 (2007), in which Professor Boroujerdi and Mr. Fine observe:

While the Iranian negotiating style is fierce and clever, the course of the nuclear crisis does not necessarily indicate that Iran is inherently untrustworthy. Iran is attempting to achieve what it can within the rules of a game that is stacked against it. One strange element of the current IAEA farce, for example, is that Iran has voluntarily offered much of the information that has now placed them in trouble. There is no doubt that any agreement with Iran must be accompanied by careful verification and skepticism, but the assumption that they can never be trusted for cultural reasons is discriminatory and borders on racism.

Id. at 628 (footnotes omitted). Boroujerdi & Fine also criticize the sanctions-policy as fueling the Iranian approach that the sanctioning nations criticize:

By not treating the Iranian regime as a legitimate government, the United States excludes Iran from conventional markets and central international institutions. For example, Iran was forced to illicitly pursue nuclear components via the Khan network instead of pursuing normal channels that would appear more consistent with the NPT. The United States has essentially forced Iran to pursue its nuclear program in a way that will raise fears of its hostile intentions.

At the very least, an engagement policy might minimize the security implications of Iran's development of nuclear weapons. Even limited cooperation means that Iran is less likely to fear that the United States aims to topple the regime, the one scenario where Iranian leaders might engage in high risk behavior. If we permit the assumption that their desire for nuclear weapons is
tested missiles that might be used to deliver a nuclear payload to Israel and other nations.

Most alarming to an MNE considering any new FDI in Israel, previous suggestions\(^ {292}\) of a “pre-emptive” military strike of some sort have resurfaced\(^ {293}\), and they include public statements by Israel’s Prime Minister and Defense Minister that Israel is prepared to take unilateral, military action to thwart Iran’s ability to develop nuclear weapons. Indeed, some of the dialogue about the “pre-emptive” strike notion in reputable American sources has taken on a kind of \textit{Dr. Strangelove} quality of surreality.\(^ {294}\)

The implications of armed conflict for FDIs in a conflict zone are obviously not propitious. Perhaps that is why there appears to be no studies published in English not purely aggressive, some of the other motives behind their nuclear policy can be addressed in negotiations. It is precisely these assumptions, such as the inherent need for confrontation, that must be questioned. Once the rigid necessity of halting Iran's nuclear program at all costs is removed as the orienting assumption in the discussion, a number of other possibilities and interesting considerations are opened.

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\(^{294}\)I offer as Exhibit A the article recently appearing in the estimable publication, \textit{Foreign Affairs}: Matthew Kroenig, \textit{Essay Time to Attack Iran: Why a Strike is the Least Bad Option} 91\textit{Foreign Aff.} 78 (2012). Mr. Kroenig's Essay drew a sharp rebuke: Colin H. Kahl, \textit{Not Time to Attack Iran: Why War Should Be a Last Resort} 91\textit{Foreign Aff.s} 16 (2012). The comparisons of Kroenig’s article to the Stanley Kubric 1964 film, \textit{Dr. Strangelove, Or How I Learned To Stop Worrying And Love The Bomb}, are striking. See Charles Maland, \textit{Dr. Strangelove} (1964): \textit{Nightmare Comedy and the Ideology of Liberal Consensus} 31 American Quarterly 697, 699-700, 703-705, 708 (Winter 1979)( Special Issue: Film and American Studies)(discussing the perverse comedy of discussing “survivable” thermonuclear warfare in magazines “such as \textit{U.S. News and World Report},” that “carried a cover article, ‘If Bombs Do Fall,’ which told readers that plans were underway to allow people to write checks on their bank accounts even if the bank were destroyed by nuclear attack.”)
exploring the impact of an Israel-Iran conflict on FDI in Israel.\textsuperscript{295} Recent studies have focused, however, on the negative impact the present conflicts and regional instability are having on foreign FDI in Middle Eastern nations.\textsuperscript{296} The impact of open warfare would be almost unimaginably devastating, especially to energy infrastructure targets such as windmill farms, solar energy arrays, and conventional power plants.\textsuperscript{297} Various armed conflicts in the Middle East, Asia, and Africa over the last 50 years have demonstrated the extent of devastation to populations, as well as FDIs, that can occur when armed conflict destroys energy infrastructures.\textsuperscript{298}

Some investment advisors have warned that corporate and individual investors should “probably think twice before investing in the Israeli economy until the rhetoric

\textsuperscript{295}There have been recent studies, however, of the economic consequences of the “cold war” between Iran, Israel, and other Middle Eastern nations. See Mohammed Nuruzzaman, \textit{Conflicts Between Iran And The Gulf Arab States: An Economic Evaluation}, 36 Strategic Affairs 542 (July 2012)(noting that “[s]cholars and experts have mostly analysed the conflicts through political and strategic prisms while neglecting their economic dimensions”). See also Ariel Cohen & Kevin DeCorla-Souza, \textit{Eurasian Energy and Israel’s Choices}, MIDEAST SECURITY AND POLICY STUDIES No. 88, at 3, 32-34 (The Begin-Sadat Center For Strategic Studies—Bar-Ilan University 2011)(observing that “[s]urrounded by unfriendly and unreliable neighbors, Israel is an energy island,” and suggesting strategy for maintaining viability of energy infrastructures “to help Israel navigate … constantly shifting politics and security” issues). The general media have only recently started to run features considering the impact of an Israel-Iran armed conflict on the economy of Israel. See, e.g., Jean-Luc Renaudie, Is Israeli economy under threat in case of Iran war?, \textit{MIDDLE EAST ONLINE}, Aug. 16, 2012, http://www.middle-east-online.com/english?id=53931


between Israel and Iran cools.”

Israeli press coverage has included socio-economists who warn the cost of war would be massive, the damage from an Iranian counterstrike “inestimable,” along with those who contend that “credit default swaps on Israeli bonds – ‘a classic measurement of the risk the market assigns to a state’ – have not risen,” that “the possibility of Israel attacking Iran does not affect whether foreigners invest in the country,” and that “a brief, successful Israeli strike could benefit the local economy.”

Whether Alstom would — or should — share such a sanguine view is a difficult question to answer without a good deal more — and more reliable — data.

However, part of any answer that involves an Alstom FDI in Israel needs to include the availability of insurance protection against the risk of losses on a wind-energy FDI in the event an Israeli-Iranian armed conflict. Indeed, it has aptly been observed that “[a] company's ability to procure PRI is often crucial to its continuing investment in developing countries.” Private-market insurance for war and other “force majeure”


War with Iran would at minimum cost the Israeli government billions of shekels, and this is assuming that the conflict is confined to areas outside of Israeli sovereignty. If the Iranians were to counterstrike in Israeli territory, the potential pitfalls for the economy are massive.


301 As of this writing, the first hopeful note was sounded in many months, for peace rather than war. See David E. Sanger & Eric Schmitt, To Calm Israel, U.S. Offers Ways To Restrain Iran, N.Y. TIMES, Sept. 3, 2012, at A1.

302 For a thorough discussion of the kinds of risks inherent to energy FDIs and strategies that have been developed to address those risks, see Erik J. Woodhouse, The Obsolescing Bargain Redux? Foreign Investment In The Electric Power Sector In Developing Countries, 38 N.Y.U. J. INT’L L. & POL’Y 121 (2005-2006).

kinds of investment risks exists, but may be prohibitively expensive.\textsuperscript{304} As one commentator observed when surveying the availability of private sector political risk insurance in 1996, “[t]he private insurance industry has been called a boutique provider of specialized political risk products as opposed to the more substantial and uniform government programs,” because, for example, they do not use “standardized rating schedules” but instead “individually appraises risks on a commercial basis, which is subject to supply and demand considerations as well as particular risk characteristics,” and thus, the private sector “has never been a particularly robust or stable source of political risk insurance.”\textsuperscript{305} That is not to say, however, that there is any shortage of insurers and insurance syndicates who offer some form of political risk coverage; but it is

\textsuperscript{304} In 1996, Maura Perry described the daunting challenges facing private-market FDI insurers:

\begin{quote}
There are several characteristics of the political risk insurance market that inhibit insurers' performance and increase the cost of the services they provide. In order to diversify risk, insurers must be able to form large pools of independent insurance contracts. “Independent” means that an event resulting in a claim under one contract must have no bearing on the likelihood of claims under any other contract. Political risk is difficult to diversify because of the relatively small number of political jurisdictions worldwide and the potentially wide-ranging impact of political risk events. The result is that, no matter how large a pool of political risk insurance contracts one may be able to form, a significant proportion of the portfolio is subject to a host of potential claims arising from the realization of a common political risk. The common risk of nationalization faced by oil producers in the Middle East in the 1970's is one example. An insurer will have difficulty achieving stable earnings from a portfolio of contracts subject to similar risks.

The diverse nature of political risks and the non-random manner in which claims arise require insurers to expend resources on understanding the risks they assume. Just as there is a higher research burden imposed on the provider of insurance against death by car accident than on the provider of insurance against death by lightning strike, the provider of political risk insurance must investigate and understand the specific characteristics of each risk to be insured.

A further consequence of carrying a portfolio of interdependent, non-homogeneous and non-random risks is that resources must also be devoted to portfolio management. [FN221] The insurer must constantly be aware of the business it carries and must engage in hedging techniques, such as purchasing reinsurance, to avoid large simultaneous losses.
\end{quote}


\textsuperscript{305} Maura B. Perry, \textit{supra} note __, at 536 (1996)(footnote omitted).
not always easy to estimate what kinds of coverage limits and premiums will attend to a political risk insurance issued in the private sector. Indeed, when the “Arab Spring” came to Egypt in 2011, premiums for political risk insurance for projects in Egypt quickly rose 12%-15%.

For American businesses, the Overseas Private Investment Corporation (OPIC) has provided insurance of FDI in countries specifically listed by Congress in the acts authorizing OPIC:

From its inception in 1971, OPIC has been charged with operating a political risk insurance business that both supplements the private sector and earns a profit. According to its authorizing legislation, the agency is to avoid competition with private sector sources of finance and political risk insurance by serving as the financier or insurer “of last resort.” At the same time, OPIC is to earn sufficient revenue from its activities to operate on a self-sustaining basis.

OPIC insurance has traditionally provided 10 times the coverage limits for nearly seven times the policy duration limits for a wider range of risks than political risk insurance offered in the private insurance markets. However, OPIC strictly limits its policy

306 See, e.g., Lijana Baublytea, Martin Mullinsa & John Garveya, 2012 Journal of Risk Research 1-16 (Apr. 15, 2012)( demonstrating that “the basis of decision-making and risk selection in the London Political Risk Insurance (PRI) market is a combination of Art and Science with such factors as trust and reputation playing an important role . . . and examining different methods and strategies of political risk underwriting employed in the insurance market, which does not rely on statistical tools as seen in more traditional insurance types”); see, e.g., Lloyd’s, Political Risks Insurance, Lloyd’s Risk Locator, http://www.lloyds.com/Redirect-pages/Risk_locator/Political_risks_insurance (discussing differences in location of risk, and thus ranges of premiums, for “political risks insurance,” including “trade-related cover”; “other asset cover”; “insurance of assets against political violence”; and “global contract”).


holders to three categories of insureds, each of which has a substantial nexus to the
United States and each of which is essentially under American control:

[1] a U.S. citizen;
[2] a corporation, partnership, or other association created under the
laws of the U.S., its states, or territories beneficially owned by U.S.
citizens; or
[3] a foreign business at least 95% owned by U.S. citizens or by
associations owned by U.S. citizens.310

Neither Alstom, nor its American subsidiary311, meet these definitions. Obviously,
Alstom is unlikely to qualify for OPIC-issued insurance on a Golan Heights FDI, even
considering the substantial involvement of Alstom’s Texas-based nacelle production
facility in such an undertaking. However, Alstom as at least two other sources of
government-backed FDI political risk insurance – programs offered through the World
Bank, and through its home state, France.

310 Paul E. Comeaux & N. Stephen Kinsella, Political Risk in Developing Countries: Bilateral Investment Treaties,
311 See, e.g., Kathryn Gordon, Investment Guarantees and Political Risk Insurance: Institutions, Incentives, &
Developments, OECD Investment Division Working Papers 2009/1, at 8 (noting that only “[s]even PRI providers
offer coverage for foreign corporations with domestic presence (Australia, Austria, Belgium, France, Netherlands,
Turkey and the United Kingdom”), available for download from
loosely referred to as “Alstom Wind, North America” (AWN/A) (http://www.ryancompanies.com/projects/Alstom-
Wind-North-America/), but which appears to in fact be a limited-liability corporation called Alstom Wind Texas
LLC, which is a Delaware corporation headquartered in Connecticut. See, e.g.,
facility is one of 37 it maintains in the U.S., divided among Grid, Transport, Power, and Corporate Headquarters
segments of Alstom’s businesses, which employ “10,000 employees in locations that span 47 states and the District
Indeed, it is precisely because “[m]any national insurance programs” — such as OPIC — “due to their respective national objectives, contain strict eligibility requirements that exclude many investors and investments” that the World Bank Group created the Multilateral Investment Guarantee Agency (MIGA), an international financial institution offering political risk insurance guarantees for FDIs in developing-world countries, to “overcom[e] some of these shortcomings and hel[p] to fill the gaps.” MIGA political risk insurance is structured and operated similarly to OPIC political risk insurance; however, MIGA operates with a number of broad policy objectives beyond those that animate OPIC’s activities. For example, as one of the entities constituting the World Bank, MIGA is among—

the Group’s individual institutions [which] have also introduced programs dedicated to creating and promoting an ethical code for businesses. The Group’s institutions have produced guidelines that concern several independent fields and outline certain requirements that must be satisfied before and during project financing. These guidelines and their underlying policies address environmental protection, sustainable development, and the protection of indigenous peoples and reflect general principles of international law although they do not explicitly refer to them. In order to strengthen the guidelines and increase borrower accountability, the Group provides two grievance mechanisms that allow for individual complaints concerning major projects. The Inspection Panel (Panel), established in 1994, receives complaints concerning loans under the IDA or IBRD. After the Group created the Panel, other development banks established similar accountability mechanisms. The establishment of a Compliance

Advisor/Ombudsman (CAO) to govern complaints concerning the IFC and the MIGA followed the establishment of the Panel 1999.315

MIGA is, however, somewhat of an enigma. While since its inception, 175 nations have acceded to the MIGA Treaty, and MIGA has insured some 600 projects in an aggregate amount exceeding $21 billion of guarantees for over 600 projects. “[t]o date, MIGA has only paid out three claims” (while negotiating a resolution in “fifty disputes over its guaranteed investments to prevent claims filings”).316

France, too, has its own national insurer of French firms seeking protection of their FDI, an agency called Compagnie Française d'Assurance Pour Le Commerce Extérieur, known by the acronym COFACE.317 Founded in 1946 as a French governmental agency and privatized in 1990, COFACE is an example of an export credit agency (ECA), which many countries have created318 in the last 60 years to insure foreign sales transactions and longer-term FDI projects undertaken by home-state businesses.319 COFACE offers political risk insurance along the general outlines of OPIC’s program—and Alstom comes squarely within companies eligible to become insureds of

317 http://www.coface.com/CofacePortal/COM_en_EN/pages/home/Who_we_are
318 See the listings and details for numerous ECAs in Janet Koven Levit, The Dynamics Of International Trade Finance Regulation: The Arrangement On Officially Supported Export Credits, 45 HARV. IN’L L.J. 65, 142-150 & nn. 345-378 (2004)
319 See, e.g., id; see also MIGA’s Political Risk Insurance Center, at http://www.pri-center.com/directories/priessentials.cfm (“Most public providers are national export credit agencies (ECAs), which may cover both export credit/trade transactions, as well as longer-term investments. ECAs usually support investors and lenders from their home country going into developing countries, and may also have mandates to support development and be self-sustaining.”)
COFACE. Political risk can be insured for periods of 5 to 15 years, at premiums ranging from .7% to 1% of the total value of the investment. How COFACE might go about assessing the risks posed by Alstom’s hypothesized Golan Heights FDI is unknowable; COFACE “has a proprietary risk evaluation system.”

Similarly to COFACE (but in contrast to OPIC), Lloyd’s of London, the world’s most famous private insurance market, provides little transparency into premiums of the political risk insurance it offers, the methodology for calculating premiums, the limits of financial exposure Lloyd’s syndicates are willing to assume, or how those limits are determined. In 2012, one of the Lloyd’s brokers, RFIB Group, noted that the private market for political risk insurance is centered in London, where 10 corporate entities—of which Chartis, Sovereign, and Zurich are dubbed “the ‘big three’”—and 25 syndicates on Lloyd’s market are involved in negotiating and issuing political risk insurance. Fifteen London-based brokers interact with these insurers to create the bulk of the private pool of

320 Sidney Posel, Factoring Accounts Receivable in France: Some Legal Aspects and American Comparisons, 57 Tul. L. Rev. 292, 326 n.124 (1982) (noting that COFACE offers credit insurance against “political risks” for foreign investors);
321 Maura B. Perry, supra note ___, at 584 (table).
322 Kathryn Gordon, supra note ___, at Annex Table 8.
323 http://www.lloyds.com/Risk_locator/Political_risks_insurance. Sagicor, one of the Lloyd’s syndicates, states that its “program line” limit for political risk insurance is $7.5 million. http://www.sagicoratlloyd.com/sagicor-lloyds/pecuniary-lines. See also Nathan Jensen, Political Risk, Democratic Institutions, and Foreign Direct Investment, 70 J. Politics 1040, 1043 & n. 36 (Cambridge, Oct. 2008)(noting that “[p]olitical risk insurerscharge premiums for political risk coverage against the confiscation of firms’ assets(expropriation risk), restricting the repatriation of profits or other capital transactions (transfer risk) or risks associated with war or civil disturbance (political violence risk),” but that it “does not cover all types of political risk, … coverage is expensive”; the “political risk insurance industry remains far less quantitative than other part of the insurance industry”; [a] study commissioned by the Federal Reserve Bank of New York found that the cost of political risk insurance coverage was one of the major reasons why most firms don’t purchase political risk insurance coverage”; “much of the political risk insurance coverage is essentially the same product used 50 years ago and … doesn’t appropriately cover a number of important risks faced by multinationals.”)
insurance contracts to cover credit and political risks.\textsuperscript{325} The private-market political risk policies are limited in duration, as well as in coverage limits; most fall within the range of two to three years, and as the tenor is lengthened, the number of insurers with the capacity to insure decreases; the outermost private-market limits are 15 years, which are available from only a few of the private-market insurers.\textsuperscript{326}

From this general information about political risk insurance and insurance markets, several observations can be made in the case of Alstom and a hypothesized Golan Heights investment. First, it is likely that Alstom can find political risk insurance coverage for its Golan Heights FDI from a number of different sources, both public and private. Second, Alstom must be scrupulously careful to avoid bribery of any government official, or even the arguable appearance of bribery, not only because of anti-bribery laws such as the Foreign Corrupt Practices Act\textsuperscript{327} and the OECD Anti-Bribery Convention\textsuperscript{328}, but also because an allegation of bribery in connection with the FDI

\textsuperscript{325} Id. at 5. Chubb Insurance Group withdrew from the credit and political risks market in May 2010. Id at 8.
\textsuperscript{326} Id. at 9; Nathan Jensen, supra, 70 J. POLITICS at 1042-1043 & nn. 32-36.
\textsuperscript{327} 15 U.S.C. §§ 78dd-1, et seq. Recent U.S. enforcement efforts have focused on foreign MNEs. See Leslie Wayne, Foreign Firms Most Affected by a U.S. Law Barring Bribes, N.Y. Times, Sept. 4, 2012, at B1 (noting that nine of the 10 MNEs that most recently have reached large settlements with the U.S. Justice Department have been foreign, including a French MNE, Alcatel-Lucent). In recent years, Alstom has had a number of serious allegations of bribery in FDI leveled against it. See Claudio Gatti, Alstom at Center of Web of Bribery Inquiries, N.Y. Times, April 29, 2010, at http://www.nytimes.com/2010/03/30/business/global/30alstom.html. However, Alstom, S.A., may no longer be directly subject to the Act because, \textit{inter alia}, its shares are no longer traded on U.S. stock exchanges, one of the bases for jurisdiction, and are now exclusively traded on the Paris Stock Exchange. See id. at §78-1(a); see, e.g., New York Stock Exchange to Suspend Trading in ALSTOM and Moves to Remove From the List, News Releases, NYSE Euronext, Aug. 13, 2004, http://www.nyse.com/press/1092392705795.html.
typically is itself grounds for retroactive cancellation of the political-risk insurance policy and denial of any coverage for an occurrence. 329 Third, Alstom must take heed of the moral-hazard clauses in FDI insurance that “exclude coverage of events that the insured entity might reasonably have been expected to avoid”—such as undertaking an investment in areas during a time when armed conflict may, from a post hoc perspective, have seemed imminent. Third, finding political-risk insurance meeting the extent of coverage needed should war between Israel and one of it neighbors eventuates may be difficult, given that the relatively modest coverage limits available in private markets. Even the higher limits available through an export credit agency such as COFACE (or OPIC, if an Alstom subsidiary were to qualify) may be taxed to compensate Alstom in the event war or terrorism destroys the hypothesized Golan Heights wind farm. Alstom’s comparable wind-farm projects in other areas of the world are valued at least ten times greater than even the most generous coverage limit ($20 million) provided by OPIC. 331 Like many FDI projects, this one risks being underinsured. 332 This presents a
challenge for Alstom in protecting its FDI. “[T]he limits of insurance and the number of deductibles are typically determined on a per occurrence basis,” and “[i]f the per occurrence limit of insurance is adequate to cover the insured’s loss, it does not matter whether a loss involves one occurrence or multiple occurrences”; but where the per occurrence limit of insurance does not fully compensate the insured for its loss, whether a loss constitutes one occurrence or multiple occurrences can be a significant issue.”

Of course, Alstom might seek to deal with these limits by taking out multiple policies of
political risk insurance\textsuperscript{335}, and by seeking a definition of insurable “occurrence” or “loss” that would cover to policy limits the sub-units of the project, such as each wind turbine, rather than merely the project as an entirety.\textsuperscript{336}

Thus, Alstom will have to make, as it and other MNEs that work in politically volatile regions must do before each FDI, a careful cost-benefit analysis:

In addition to availability of particular political risk coverage, the cost of such coverage may be a factor. As a general rule, premiums for political risk coverage will be higher in certain countries than others. Private insurers tend to be more expensive, but can often be more flexible in the amount and types of coverage offered for particular risks than multilateral agencies, like MIGA, or export credit agencies (ECAs) sponsored by specific governments. The availability and cost of political risk insurance should be weighed against the benefits, after a careful

\textsuperscript{335} Insurance against terrorism risks will be required as well, and the insurability of those risks in the wake of highly organized terror-attacks against public infrastructure targets has tightened the market. See Andrew Gerrish, Note, \textit{Terror CATs: TRIA’s Failure to Encourage a Private Market for Terrorism Insuranceand How Federal Securitization of Terrorism Risk May Be a Viable Alternative}, 68 \textit{WASH. \\& LEE L. REV.} 1825 (2011).

\textsuperscript{336} An analogous issue was presented concerning property insurance on the World Trade Center towers, which were destroyed on September 11, 2001. The owners had obtained property insurance binders for the complex from some two dozen insurance companies, in the aggregate amount of $3.5 billion “per occurrence.” When the owners made a $7 billion insurance claim — purporting to treat the destruction of each tower as a separate “occurrence” — the insurers insisted that the events constituted but one occurrence, limiting payment to $3.5 billion. Federal court litigation ensued, and complications arose from the fact that “occurrence” was defined in draft policy language circulated to some of the insurers as “all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes.” See World Trade Center Properties, LLC v. Hartford Fire Ins. Co., 345 F.3d 154 (2d Cir. 2003). For a discussion of the implications of this litigation for commercial insureds and insurers, see Scott M. Seaman & Jason R. Schulze, \textit{World Trade Center Litigation}, in \textit{Allocation of Losses in Complex Insurance Coverage Claims}, Ch. 7, “The Issue Of Number Of Occurrences, at § 7.9 (Nov. 2011); see also Irene S. Kaptzis, Note, \textit{Looking Beyond The Sunset: International Perspectives On The Terrorism Risk Insurance Act Of 2002 And The Issue Of Its Renewal}, 29 \textit{BROOK. J. INT’L L.} 827, 855-856 & n. 179 (2004); Scott G. Johnson, \textit{Ten Years After 9/11: Property Insurance Lessons Learned}, 46 \textit{TORT TRIAL \\& INS. PRAC. L.J.} 685, 686-687 (2011)(noting “myriad of coverage issues, including the number of occurrences, the period of indemnity for time element coverage, the meaning of physical loss or damage, civil authority and ingress and egress coverages, contingent business interruption coverage, insurable interest, contamination and consequential loss exclusions, terms of insurance binders, the scope of replacement cost, and salvage and recoveries, among others”). Eventually, some of the insurers were found to have bound themselves to a definition of occurrence that treated the destruction of each tower as a separate occurrence. SR Intern. Business Ins. Co., Ltd. v. World Trade Center Properties, LLC, 467 F.3d 107, 140(2d Cir. 2006)(noting that “the jury's determination that the insurers provided different coverage is … a reflection of the fact that the parties were at various stages of negotiating coverage when the two hijacked airplanes destroyed the WTC”). For an excellent discussion of the problem more generally for the insurers and insureds, see Michael Murray, Note, \textit{The Law Of Describing Accidents: A New Proposal For Determining The Number Of Occurrences In Insurance}, 118 Yale L. J. 1484 (2009), which would provide much food for thought to Alstom and its counsel when Alstom seeks to insure risks such as the ones emanating from a hypothesized Golan Heights FDI.
review of deductible limits and exclusions offered by a given provider, the provider's payment history in the host country, and the availability of other mitigating factors. Such factors include the existence of a reliable bilateral investment treaty, the negotiation of an investment agreement for the project, the availability of international arbitration to enforce contractual obligations, an [MNE’s] familiarity with the host country and its courts, and opinions of experienced counsel. Based on this type of comparative analysis, many [MNE]s will elect to self-insure or partially self-insure for all or certain elements of political risk in a given host country, or to rely on other forms of risk mitigation, particularly in exceptionally high-risk countries where insurance premiums will be high or the desired coverage either limited or unavailable.  

What makes Alstom’s hypothesized FDI in Israel more complex and challenging is that it is not the host country’s actions toward Alstom that pose the significant risks. Rather, the risks emanate from actions that Israel and the neighboring states of Syria and Iran may take against the other.

IV. SUMMATION

In a recent interview, the Chair of the American Bar Association’s House of Delegates, attorney Linda Klein, observed that “‘U.S. lawyers are going to have to be part of the global economy and international legal industry, or they won’t survive.’”  

Similarly, MNEs in Europe will need to look outside the Euro Zone for FDIs, if they are to pursue a path of growth. Using lessons from courses in International Business Transactions (IBT) and International Civil Litigation (ICL), we have constructed a framework within which European MNEs can make an initial evaluation of proposals for FDIs outside of the Euro Zone. We fleshed out that framework as we considered an

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hypothesized—yet, entirely plausible—investment by Alstom, S.A., in Israel’s energy sector: joint-venturing with Israel’s Multimatrix, Ltd., to build a 75-turbine-farm on the wind-swept Golan Heights.

A major energy infrastructure project in disputed territory in a politically volatile and strategic area of the world calls forth many of the key issues, with business and legal issues intertwined, that IBT and ICL address: legal regulatory and business environment of the host state; politics, diplomatic relations, and legal regulatory environment of the MNE’s home state; and political, diplomatic, and legal regulatory environments of the home state’s broader political affiliations (such as E.U. membership) as well as of third states (including Canada and the ubiquitous use of U.S. federal courts in efforts to regulate MNE activities).

This article has demonstrated how a multi-stage paradigm might be applied to identify potential FDIs worth further investigation and more detailed development. In Stage One, we analyze the general business and regulatory environment for a proposed FDI, including a close, fact-intensively detailed examination of the host state, Israel; the MNE, Alstom, S.A.; the proposed FDI project, a greatly expanded and updated wind-power project on the Golan Heights to generate badly-needed electricity for Israel’s rapidly increasing demand; the proposed form of the FDI, a joint venture with a host state partner; and the proposed host-state joint venture partner, Multimatrix, Ltd., a small Israel-based investments company traded on the Tel-Aviv Stock Exchange that is notable having purchased a half-share in Mei Golan, a company that operates a two-decades old, outdated wind farm on the wind-swept Golan Heights in Israeli territory annexed from (but still claimed by) Syria after the 1967 “Six-Days’ War”, upon which it proposes to
site numerous, modern electricity-generating wind turbines. Having established the parameters of the FDI proposal, we next articulated, and evaluated critically, the three most significant arguments in favor of the MNE undertaking the proposed FDI project: [1] that Israel’s need for electrical power currently exceeds supplies and will continue to grow; [2] that electricity generated by wind turbines is a sustainable energy source that has great room for growth in Israel and increases Israel’s energy independence; and [3] that Israeli government support for wind-generated electrical generation is growing, and Israel’s FTA Agreement with the U.S. will permit Multimatrix to import Alstom’s American-made wind turbines duty-free. This evaluation included an objective evaluation of potential bias and interest in the sources used in formulating the FDI proposal, as well as an examination of other supporting reasons, including Alstom’s expertise in wind-turbines and wind-farm installation and management, as well as Alstom’s familiarity with the region’s politics and its unwavering commitment to a previously undertaken FDI in Israel, the Jerusalem Light Railway.

Having determined in Stage One that the Alstom’s hypothesized FDI in Israel has arguments of substance in its favor, we proceeded to the Stage Two analysis, in which we began with a deeper look at strategic advantage from the IBT perspective, particularly as to the specific provisions of relevant Free Trade Agreements (FTAs) and Bilateral Trade Agreements among states relevant to the FDI. We discovered that while the E.U. had superseded the 1983 France-Israel BIT with an E.U.-Israel Trade Association Agreement,
which has already led to litigation in the European Court of Justice, *Brita GmbH v. Hauptzollamt Hamburg-Hafen*,\(^\text{339}\) excluding from that Agreement of products originating in the Occupied Territories. While this does not necessarily mean that Israel would engage in retorsion by heightened tariffs of E.U.-originated equipment, such as Alstom’s wind turbines, before entry into Israel, the dispute around the legitimacy of Israel’s commercial and development activities in the Occupied Territories poses potential complications for an FDI site in any of the Occupied Territories. Thus, we find that the Alstom’s newly-established production facility in Texas may permit Alstom to build its turbines for a Golan Heights FDI in the United States, and thus allow Alstom to enjoy the advantages of the U.S.-Israel FTA providing a way to ensure importation of Alstom’s wind turbines into Israel without ensnarement in escalating E.U. rhetoric and trade-related actions and rulings designed to discourage Israel’s continued exercise of sovereignty over the Occupied Territories.

Navigating trade-agreement landscape may prove, however, to be the least of Alstom’s problems with the legal risk. We can identify further—and significant—legal risks using the analytic paradigms studied in International Civil Litigation. These paradigms enhanced our understanding of the deeper-seated legal and political risks involved in a proposed FDI, including the nature and scope of litigation filed against MNEs over FDI-related issues. Municipal human-rights related laws of various jurisdictions provide a potentially potent source of legal risk. Accordingly, Stage Two

next penetrated deeply into various municipal legal systems possibly put into play because of the MNE’s home state affiliation, the diplomatic relations and international political situation of the host state, and the connection of an FDI project to other states. Thus, we examined recent litigation against Alstom in the courts of Nanterre Province, France, challenging its FDI in the Jerusalem Light Railway as a violation of international law\(^\text{340}\); against another company’s Occupied-Territory investment in the courts of Québec Province in Canada, *Bil’In (Village Council) & Yassin v. Green Park International Inc.*\(^\text{341}\); and against Caterpillar, Inc. in the United States federal court for the death of an activist protesting in the Occupied Territories against Israeli’s razing of Palestinian residences to replace with Israeli homes, in a highly-publicized case, *Corrie v. Caterpillar, Inc.*,\(^\text{342}\) filed by the activists parent’s under the Alien Tort Statute.\(^\text{343}\). Because of the escalation of federal court litigation against MNEs under the Alien Tort Statute, we devoted special and extended attention on the developing case-law in the area, culminating in a Circuit Court case currently before the U.S. Supreme Court, *Kiobel v. Royal Dutch Petroleum*,\(^\text{344}\) which has the potential either to solidify some 32 years of


\(^{342}\) 503 F.3d 974, 979 n. 5 (9th Cir. 2007). See notes __ - __, supra, and accompanying text.


\(^{344}\) 621 F.3d 111 (2d Cir. 2010), reh’g denied (with concurring opinion filed by Chief Judge Jacobs), 642 F.3d 468 (2d Cir. 2011), reh’g en banc denied (with concurring opinion filed by Chief Judge Jacobs and dissenting opinions by Judges Lynch and Katzmann), 642 F.3d 379 (11th Cir. 2011), cert denied, 132 S.Ct. 248 (Sept. 3, 2011), then cert
judicial precedent expanding the scope of the Alien Tort Statute—or effectively to end Alien Tort Statute suits against most MNEs, either on the ground that corporations are not juridical persons under the statute, or on the ground that the statute does not reach MNE conduct that occurs outside of U.S. territory. In any event, the risks of Alien Tort Statute litigation against MNEs such as Alstom remains, for now, real and palpable; and pending cases such as *Sarei v. Rio Tinto, PLC*,345 involving claims by citizens of Papua, New Guinea against an Anglo-Australian mining company of alleged human rights violations occurring entirely in New Guinea, demonstrate the risks for Alstom and strongly suggest that MNEs like Alstom need to become involved in both legislative, as well as judicial, processes if they hope to see the extraterritorial application of this statute trimmed.

Finally, we examined the risks posed to Alstom’s FDI in Israel by the political situations in Syria and Iran. With the potential for damage to, or destruction of, a Golan Heights FDI should the Syrian conflict widen, or in the event Israel launches a preemptive strike against Iran’s nuclear fuel enrichment facilities, we examined the concept of political risk insurance. In reviewing the available paradigms of political risk insurance for FDIs available under the international MIGA program, national programs such as OPIC and COFACE, and private insurance markets, we examined the strengths and weaknesses in detail, and noted critical issues that Alstom would have to address.

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345 671 F.3d 736 (9th Cir. 2011)(en banc), cert. pet. filed, 80 USLW 3335 (Nov 23, 2011)(NO. 11-649).
both in negotiating for such coverage as well as in making the economic decision whether
the Golan Heights project was worth the cost of adequate political risk insurance.

The point of all that has gone before in this article is not to reach a specific
conclusion or to counsel a particular outcome. Particularly since the FDI itself is
hypothetical only, deciding whether Alstom should undertake it, and if so, how it should
be structured, is unnecessary. Rather, the point is the intellectual journey itself that we
made through these issues, and the rich array of resources that we have located,
organized, and made available throughout the copious footnotes in this article, which will
well serve future FDI analyses. As Jean-Yves Tadie said of Marcel Proust’s In Search Of
Lost Time (À La Recherche Du Temps Perdu), the “ability to fashion a general
interpretation from ostensibly ephemeral events and characters is precisely what makes
these events and characters free of any apparent staleness,” because “we are able to slip
into Proust’s world and can apply his analyses to the company we find ourselves in or the
situations we face.”\(^{346}\) So, too, are we able to slip into Alstom’s world created by this
hypothesized FDI, and we can apply the analytic paradigms developed in this article to
businesses we find ourselves advising, and the FDI situations which they face.

\(^{346}\) Jean –Yves Tadie, Introduction, in 1 Marcel Proust, In Search of Lost Time (Swann’s Way) xii (C.K. Scott