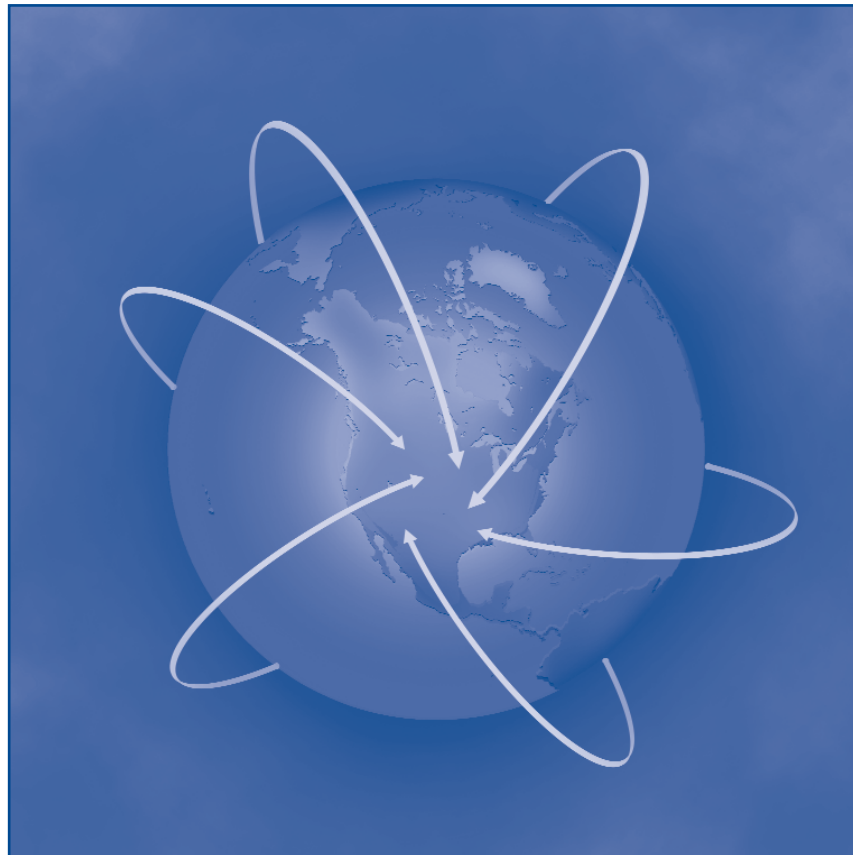




## The Teeming Shore: PLAINTIFFS AROUND THE GLOBE USE U.S. COURTS TO TARGET BUSINESS



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# The Teeming Shore: Plaintiffs Around The World Use U.S. Courts To Target Business

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For centuries, the United States has been seen around the globe as a land of opportunity and promise.<sup>1</sup> And that vision has drawn to our shores persons with diverse talents, skills, and perspectives who, as citizens, have contributed enormously to the building of our nation. Unfortunately, in recent years, that perception of the United States has begun attracting something new and less welcome – litigants. In ever increasing numbers, foreign plaintiffs and their lawyers (normally U.S. lawyers) are declaring U.S. courts to be their forum of choice for suing companies regarding alleged actions and events that have little or no connection to the United States.

Corporate counsel in this country have long experienced the frustrations and unfairness of plaintiffs' *domestic* forum shopping – the “practice of [U.S. litigants] choosing the most favorable jurisdiction or court in which a claim might be

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<sup>1</sup> Inscribed on the Statue of Liberty are the words: “Give me your tired, your poor,/Your huddled masses yearning to breathe free,/The wretched refuse of your teeming shore.” If redrafted today by certain members of the plaintiffs’ bar, the inscription would likely extend an invitation to litigants worldwide.

heard.”<sup>2</sup> Recent litigation trends make clear that corporate defendants now face increasing threats from *international* forum shopping as well. Although the cases posing such threats occur in a variety of legal contexts, they all share a common feature: plaintiffs attempt to use U.S. courts to hear cases with little relation to the United States, out of a perception that a U.S. legal forum offers them a litigating advantage.

These cases also create common difficulties. They strain relations between the United States and other nations. They distort the international trade system, impeding the efficient trading of goods and services across borders. They subject businesses to highly uncertain standards of conduct and to unpredictable liability exposure – heightening risk, increasing costs, and ultimately harming the competitiveness of firms doing business in the United States.

Although the business community has long been aware of the harms caused by abusive litigation in general, *this* sort of abuse – the importation of foreign disputes into U.S. courts – is relatively new and requires a fresh response. This paper reviews why foreign plaintiffs find U.S. courts so attractive, discusses the forum-shopping trend in three especially important areas, and outlines potential strategies to limit the abusive use of U.S. courts.

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<sup>2</sup> BLACK’S LAW DICTIONARY 666 (7th ed. 1999).

## I. THE U.S. COURT SYSTEM: A MAGNET FOR INTERNATIONAL PLAINTIFFS

Defense lawyers have long complained that the U.S. litigation process is frequently stacked in favor of plaintiffs – and against corporate defendants.

Unsurprisingly, plaintiffs and their attorneys have recognized this fact too; as a result, foreign plaintiffs have become increasingly creative in their search for ways to get into U.S. courts. A variety of factors make American courts, as the Supreme Court once put it, “extremely attractive to foreign plaintiffs.”<sup>3</sup>

- ***Liberal Discovery***: U.S. litigation involves expansive, party-controlled discovery. The American “notice pleading” system allows plaintiffs to file suits with very vague factual backing, relying on subsequent discovery to give more express content to their claims. The scope (and burden) of American discovery is unrivaled around the world, and dramatically increases the cost of litigation and the pressure to settle cases early.<sup>4</sup> Indeed, American discovery is so

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<sup>3</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981).

<sup>4</sup> See *Societe Nationale Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 542 (1987); *id.* at 561 n.18 (Blackmun, J., dissenting); Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277, 293-94 (2002); Stephen N. Subrin, *Discovery In Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002); David Epstein et al., INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE, AND STRATEGY § 10-03, at 10-4. (3d ed. 2000). See also, e.g., Bruce W. Bean, *Doing Business in the New Russia: Rebirth of the Russian Nation*, 35 INT’L LAW. 961, 990 (2001); Craig P. Wagnild, *Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation*, 3 ASIAN-PAC. L. & POL’Y J. 1 (2002).

attractive that parties to foreign disputes have resorted to proceedings in U.S. courts to gain the discovery denied them in the foreign forum. (The Supreme Court will hear argument in one such case, *Intel v. AMD*, this spring.)<sup>5</sup>

- ***Jury Trials***: In the United States, federal and state constitutional provisions entitle many plaintiffs to jury trials. Because juries are often viewed as hostile to corporate defendants, plaintiffs suing corporations may see an advantage to proceeding in front of a U.S. jury rather than in front of a foreign judge. And, contrary to some expectations, American juries are as favorable toward foreign plaintiffs as they are toward domestic plaintiffs. Indeed, one study found that foreign plaintiffs have slightly ***higher*** win rates in American courts than do U.S. plaintiffs.<sup>6</sup>
- ***High Damage Awards***: U.S. courts frequently grant dramatically higher damage awards than do foreign courts. Some U.S. statutes provide for statutory or multiple damages far in excess of the actual harm to plaintiffs. And subject to unclearly defined constitutional

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<sup>5</sup> *Intel Corp. v. Advanced Micro Devices, Inc.*, No. 02-572 (reviewing the scope of 28 U.S.C. § 1782).

<sup>6</sup> Kevin Clement & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996).

limits, juries are often empowered to assess punitive damages for punishment and deterrence. Even for purely compensatory damages, American law both recognizes abstract harms not compensated by other systems (e.g., pain and suffering), and values those harms at higher dollar levels. This risk of higher damages, in turn, affects defendants' willingness to go to trial, and increases the settlement value of a lawsuit brought in the United States. The increase can be quite dramatic, as evidenced by the cases brought against Union Carbide by victims of the Bhopal, India chemical accident. Before settlement, independent analysts estimated the likely maximum of the claims in Indian courts as \$75 million. But, if the claims went forward in American courts, estimated compensatory damages would have been as high as \$235 million – with punitive damages potentially many times that amount.<sup>7</sup>

- ***Class Actions and Contingency Fees:*** By permitting claims to be aggregated in lawyer-controlled class actions, and permitting lawyers to accept cases under contingency fee arrangements, the U.S. system changes the risk-reward calculus in a way that creates further

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<sup>7</sup> See Douglas J. Besharov, *Forum-Shopping, Forum-Skipping, and the Problem of International Competitiveness*, in *NEW DIRECTIONS IN LIABILITY LAW*, 139, 141 (Walter Olson, ed. 1988).

incentives for plaintiffs to sue and defendants to settle. The aggregated claims in enormous class actions can create, in Judge Richard Posner's words, an "intense pressure to settle," rather than to "stake [entire] companies on the outcome of a single jury trial." Plaintiffs therefore hope for what Judge Henry Friendly once termed "blackmail settlements," even when the evidence of liability is extremely weak.<sup>8</sup> Meanwhile, under the contingency fee system, plaintiffs proceed without risk to their own finances. That risk is borne instead by the plaintiffs' attorneys, who play the odds by financing multiple suits in the hope of a few big payouts. For defendants, on the other hand, the "American Rule" on attorneys' fees means that losing plaintiffs are almost never taxed with a victorious defendant's fees. Even completely exonerated defendants will almost always be stuck with the costs of their own legal fees. This simultaneously lessens the cost to plaintiffs of pursuing unlikely claims, and increases pressure for defendants to settle quickly rather than incur the high legal fees that a full defense might entail.

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<sup>8</sup> See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (Posner, J.); Henry J. Friendly, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973). See also *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978).

Taken together, these factors make the United States an especially plaintiff-friendly place for civil litigation. The well-financed, extremely enterprising U.S. plaintiffs' bar has already recognized the strong incentives for bringing foreign disputes into our courts.

## **II. MANIFESTATIONS OF THE GLOBAL FORUM SHOPPING PROBLEM**

While over time, global forum shopping will almost certainly come to affect a wide variety of kinds of lawsuits, the trend has been especially pronounced in three areas: antitrust, customary international law, and product liability. These early manifestations of the problem provide a taste of what is to come.

### **A. Antitrust**

Antitrust provides an example of how laws enacted for the protection of U.S. consumers can make American courts a magnet for foreign plaintiffs. In addition to the procedural advantages plaintiffs generally enjoy when suing in the United States, American antitrust laws offer plaintiffs a major substantive law advantage. The United States arguably has the most stringent antitrust laws in the world – laws that afford unusual latitude for enforcement by private-party suits. And U.S. suits are especially lucrative for plaintiffs and their attorneys. Under the Clayton Act, the United States offers triple damages to victorious antitrust plaintiffs – well in excess of other nations' laws which, when they permit civil liability at all, tend



to offer more restrained measures of damages. These factors have led one commentator to describe the future as “a series of attempts to litigate [antitrust] claims on behalf of worldwide purchasers in the United States.”<sup>9</sup>

In 1982, Congress enacted the Foreign Trade Antitrust Improvements Act (“FTAIA”) to limit the reach of U.S. antitrust law in international cases.<sup>10</sup> The FTAIA says that American antitrust law applies to foreign conduct when the conduct has a “direct, substantial, and reasonably foreseeable effect” on U.S. trade or commerce, and that effect “gives rise to a claim” under the Sherman Act. Recently, some U.S. courts have accepted foreign plaintiffs’ arguments that this poorly-worded statute permits suits by foreign plaintiffs whose own injuries stemmed from the effects of worldwide cartels on non-U.S. markets, as long as the foreign plaintiff can show that the conspiracy also had some effect in the U.S. Defendants and business groups have responded that the FTAIA does not give foreign plaintiffs a remedy in U.S. court for injuries sustained in non-U.S. markets, merely because the alleged conspiracy happened to affect some other, U.S. purchaser as well. Rather, these groups say, the FTAIA only allows foreign plaintiffs to sue for injuries they themselves sustained in the U.S. market.

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<sup>9</sup> Spencer Weber Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 LOYOLA CONSUMER L. REV. 523, 534-35 (2002). See also Ronald Davis, *International Cartel & Monopolization Cases Expose a Gap in Foreign Trade Improvements, Act*, ANTITRUST, Summer 2001.

<sup>10</sup> 15 U.S.C. § 6a.

Critics of such suits point to a variety of harmful effects. *First*, the prospect of U.S. triple damages may hurt worldwide antitrust enforcement by discouraging cartel members from breaking ranks and coming forward to law enforcement authorities here or abroad. The European Commission and the United States, for instance, both maintain leniency policies for cartel-exiters on the theory that price-fixing cartels are extremely difficult to detect without an admission of guilt by one-time members. Such leniency policies typically promise defecting price-fixers protection from criminal prosecution and other government proceedings, but can do nothing to protect them from U.S. civil lawsuits. The higher the cost of these lawsuits, the less likely a company will find it advantageous to break with a cartel and inform the authorities. As a result, allowing foreign plaintiffs to sue in U.S. courts may seriously impede antitrust enforcement efforts.

*Second*, allowing these suits means applying U.S. law to regulate conduct in other countries. Not surprisingly, foreign governments – including many of our closest allies – have strenuously objected to such lawsuits. Some nations have passed statutes designed to thwart this American intrusion into what they consider their internal affairs. Britain, Canada, the Netherlands, Australia, New Zealand, Germany, and France all have adopted such laws.<sup>11</sup> American attempts at

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<sup>11</sup> See generally Joseph Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505 (1998); Spencer Waller, ANTITRUST (cont'd)

extraterritorial regulation are not appreciated by foreign nations and could impede international cooperation in antitrust enforcement. In order to combat cross-border conspiracies, U.S. regulators need access to foreign governments' evidence, which may be less forthcoming if other governments think the result would be unwarranted U.S. civil suits.

*Third*, the U.S. antitrust standards which these cases impose on actors in overseas markets may conflict with what the national governments overseeing those markets think is desirable. This creates grave uncertainties for companies, which, instead of relying on the policies and safe-harbors of those foreign regulators, must also consider U.S. civil antitrust law. (Consider a hypothetical merger between two companies doing business around the world. These companies would have to consider not only what European regulators require for the European market, and American regulators for the American market, but also what the EU wants for America, and vice versa.) With more than 100 nations dictating varying antitrust laws and policies, the resultant confusion and uncertainty would be tremendous. The extension of U.S. antitrust law in this way

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AND AMERICAN BUSINESS ABROAD (3d ed. 1997); Wilbur Fugate, FOREIGN COMMERCE AND THE ANTITRUST LAWS (5th ed. 1996); Hannah Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219 (2001). See also A. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act*, 75 AM. J. INT'L L. 257 (1981).

undercuts foreign nations' interest in developing and enforcing their own antitrust policies.

And *finally*, there is a risk of introducing unfairness into the foreign markets. Because the new form of extraterritorial U.S. law would have no practical effect on companies without a U.S. presence, participants in foreign markets will be subject to differing antitrust rules (and liability), distorting the playing field.

A few examples will illustrate the scope of the problem.

- In one case, several named plaintiffs brought a federal court class action on behalf of *non*-U.S. customers of overseas auctions held by Christie's and Sotheby's. No U.S. citizens were included in the proposed classes. Plaintiffs claimed the two auction houses had conspired to fix the amount of the buyer's premium and seller's commission. While the conspiracy at issue had also affected auctions in the U.S., all U.S. buyers and sellers had already settled separately, so the remaining case had little connection to the U.S. economy. The district court dismissed the lawsuit, but the Second Circuit reversed, allowing the case to go forward. (The case ultimately settled.)<sup>12</sup>

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<sup>12</sup> *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir. 2002). The authors' law firm served as counsel to one of the parties in this case and in several other cases discussed

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- Other lawsuits have alleged a worldwide conspiracy to fix prices in graphite electrodes. Plaintiffs have brought such suits in the United States, even though they admitted that the U.S. accounted for only 10% or less of the total worldwide harm.<sup>13</sup>
- Plaintiffs have sued in the United States alleging price conspiracies in European futures markets and currency markets.<sup>14</sup>

On April 26, 2004, the Supreme Court will hear argument on another such case, *F. Hoffman-La Roche v. Empagran*. *Empagran* is a lawsuit by foreign plaintiffs claiming to have overpaid for vitamins purchased in non-U.S. markets as a result of an international price-fixing conspiracy. The district court dismissed the case, but the appellate court reversed, holding that the case could go forward in a U.S. court so long as the defendant's conduct violated the Sherman Act, and so long as the conduct's harmful effect on U.S. commerce gave rise to a claim by "someone" – even if that someone was not the foreign plaintiff.<sup>15</sup> A variety of

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herein. The Chamber of Commerce of the United States filed an *amicus* brief in support of review in the auction house cases.

<sup>13</sup> See, e.g., *Ferromin Int'l Trade Corp. v. UCAR Int'l Inc.*, 153 F. Supp 2d 700 (E.D. Pa. 2001).

<sup>14</sup> See, e.g., *In re Copper Antitrust Litig.*, 117 F. Supp 2d 875 (W.D. Wisc. 2001); *Sniado v. Bank Austria AG*, 174 F. Supp 2d 159 (S.D.N.Y. 2001).

<sup>15</sup> *Empagran v. F. Hoffman-LaRoche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003).

business groups and trade associations (including both the Chamber of Commerce of the United States and the International Chamber of Commerce) have filed amicus briefs supporting a narrower interpretation of the antitrust laws.

The United States government has also made clear that it does not consider this type of extraterritorial regulation helpful. In *Empagran*, the U.S. Department of Justice Antitrust Division and the Federal Trade Commission have submitted a joint brief objecting to overbroad application of U.S. antitrust laws.<sup>16</sup> The government fears two ill effects for this kind of lawsuit. The government is concerned that the prospect of hefty multiple damages in U.S. civil suits will keep cartel members from coming forward to government agencies – interfering with the government’s “robust amnesty program” that has “been responsible for cracking more international cartels than all of the Division’s search warrants, secret audio or videotapes, and FBI interrogations *combined*.”<sup>17</sup> And, the government fears these lawsuits will strain cooperation between this country’s law enforcement and other nations’ – setting back the overall effort to break international cartels.

The Supreme Court is expected to issue its decision in *Empagran* by June 28, its last public session of the Term. Although a favorable decision would go a

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<sup>16</sup> Brief for the United States as Amicus Curiae Supporting Petitioners, *F. Hoffman-LaRoche Ltd. v. Empagran, S.A.*, No. 03-724.

<sup>17</sup> *Id.* at 19-20 (italics in original).

long way towards resolving this particular manifestation of the global forum shopping problem, the business community will still need to stay alert for other attempts to turn U.S. courts into the antitrust enforcer regarding events occurring elsewhere in the world. A favorable ruling in *Empagran* might, for instance, be undercut by plaintiffs' resort to state antitrust statutes.

### **B. Customary International Law Suits and the Alien Tort Statute**

Foreign plaintiffs also increasingly resort to U.S. courts to resolve human rights and other customary international law disputes that have little connection to the United States. The current vehicle of choice for these suits is the 200-year old Alien Tort Statute (ATS), which gives federal courts “jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>18</sup> By definition, ATS suits involve non-U.S. plaintiffs; the statute applies to civil actions “by an alien.” The statute was almost entirely a dead letter until, in the 1980s, human rights organizations began invoking it in efforts to obtain from U.S. courts recoveries for human rights violations by officials of foreign governments.

Since that time, scholars and jurists have debated whether the statute creates not merely “jurisdiction” to hear lawsuits based on whatever causes of action and

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<sup>18</sup> 28 U.S.C. § 1350. The statute is also sometimes referred to as the Alien Tort Act (ATA), or the Alien Tort Claims Act (ATCA).

rights the United States has separately created, or whether it also created a cause of action itself. In addition, there is a serious dispute regarding the scope and type of international law violations actionable under the ATS – is it just the kinds of violations (such as piracy, and assaults on ambassadors) known to the Congress that enacted the statute? Or does the ATS allow suits for violations of an ever-increasing number of norms of customary international law?

Relying on legal theories drawn from a bewildering number of international treaties, conventions, and resolutions (many of them explicitly rejected by the U.S. government), the plaintiffs in these cases typically contend that corporate defendants (or their foreign subsidiaries) have either violated international law themselves, or have become legally responsible for the conduct or policies of foreign regimes. To date, most U.S. courts have interpreted the ATS expansively, finding a cause of action, and allowing claims under “evolving standards” of international law.

In addition to alleging violations of international human rights, such as genocide, slavery and official torture, ATS lawsuits against corporations have involved claims challenging the adequacy of financial disclosures, and the lease or purchase of properties expropriated by foreign governments.<sup>19</sup> They have alleged

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<sup>19</sup> *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995) (financial impropriety); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2001) (expropriation).

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corporate misconduct ranging from environmental damage to improper pharmaceutical testing.<sup>20</sup> They have extended to industries such as food products, transportation, banking, insurance, chemical manufacturing, and technology.<sup>21</sup> And they have turned on conduct occurring in nations as diverse as Egypt, Nigeria, Papua New Guinea, and Sudan.<sup>22</sup> Plaintiffs have even used the ATS to revive historical grievances that appeared to have been otherwise settled. One suit sought damages for the tragic 1984 India chemical accident at Bhopal—even though the defendant company had already settled the claims with the Indian government.<sup>23</sup> Numerous lawsuits currently consolidated for multidistrict proceedings in the U.S. District Court for the Southern District of New York seek to hold dozens of U.S. and multinational corporations liable under the ATS for doing business in South

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<sup>20</sup> See, e.g., *Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003) (environmental claims); *Abdullahi v. Pfizer*, 77 Fed. App. 48 (2d Cir. 2003) (clinical investigation of medications).

<sup>21</sup> See, e.g., *Villeda Aldana v. Fresh Del Monte*, No. 02cv3399 (FAM) (S.D. Fla., dismissed Dec. 12, 2003) (agriculture); *Digwamaje v. IBM Corp. et. al.*, No. 02cv6218 (JES) (S.D.N.Y. filed Aug. 2, 2002) (transportation, banking, chemical manufacturing, and technology).

<sup>22</sup> See, e.g., *Bigio v. Coca-Cola Co.*, *supra* (Egypt); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (Nigeria); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (Papua New Guinea); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (Sudan).

<sup>23</sup> See *Bano v. Union Carbide Corp.*, 273 F.3d 120 (2d Cir. 2001).

Africa during the apartheid era.<sup>24</sup> (Plaintiffs in those cases allege that the mere decision to do business in South Africa violated the law of nations by propping up the apartheid regime.) And other lawsuits have alleged corporate cooperation in Axis-power abuses during World War II.<sup>25</sup>

Because no other nation has a similar statute, ATS lawsuits place companies with a U.S. presence (that is, companies that are subject to the jurisdiction of U.S. courts) at a unique competitive disadvantage in the global marketplace.

Companies sued under the ATS often find it difficult or impossible to join other parties potentially responsible for the alleged wrongdoing, many of whom may not be subject to the jurisdiction of U.S. courts. This is particularly true with regard to foreign sovereigns, whose actions are often the real target of ATS litigation, but who are protected by sovereign immunity and the act of state doctrine. Companies often find that evidence necessary for the defense of ATS claims is located abroad and may be inaccessible.

The threat of ATS lawsuits can result in higher insurance costs, difficulties accessing capital markets, and negative effects on shareholder confidence and stock prices. Because the risks and costs of ATS litigation fall exclusively on companies with a U.S. presence, the economic downside uniquely and adversely

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<sup>24</sup> See *In re South African Apartheid Litig.*, MDL No. 1499 (JES) (S.D.N.Y.).

<sup>25</sup> See, e.g., *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003); *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000).

affects the U.S. economy. According to one study of ATS litigation, “more than 50 [multinational corporations] are in the dock; and the damages claimed [in ATS lawsuits] exceeds \$200 billion.” ATS litigation “could diminish U.S. merchandise trade (imports plus exports) by \$50 billion to \$60 billion with the target countries,” putting “more than 100,000 U.S. manufacturing jobs at risk.”<sup>26</sup>

On March 30, 2004, the Supreme Court for the first time will hear argument on the meaning and scope of the ATS in *Sosa v. Alvarez-Machain*.<sup>27</sup> The Chamber of Commerce of the United States, together with other leading business associations, has filed briefs noting the costs ATS suits impose on business, and urging the Court to rein in abusive ATS litigation. The Chamber maintains that the ATS is merely a jurisdictional statute, and does not itself create any cause of action. In addition, the United States government has filed briefs arguing that the ATS should not be applied to extraterritorial conduct, and noting that ATS cases irritate foreign governments and often interfere with sensitive U.S. foreign policy decisions. A Supreme Court decision in *Sosa* that limited the ATS to causes of action created expressly by statute or treaty could significantly improve the

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<sup>26</sup> Gary Clyde Hufbauer & Nicholas K. Mitrokostas, Institute for International Economics, *Awakening Monster: The Alien Tort Statute of 1789*, at 7 (2003) (citation omitted).

<sup>27</sup> *Sosa v. Alvarez-Machain*, No. 03-539. The Plaintiff in *Sosa* is a Mexican citizen who sued another Mexican national, alleging the latter violated international law by forcibly abducting him in Mexico and bringing him to the United States for trial by U.S. authorities. While the *Sosa* case happens to be a dispute between individuals, the vast majority of ATS cases filed over the past 10 years target U.S. or multinational corporations.

business climate. As in the antitrust case, the decision in *Sosa* is expected by June 28.

It should be stressed, however, that even a Supreme Court decision squarely limiting the scope of the ATS would not entirely solve the problem for several reasons. **First**, there would remain a separate federal cause of action for plaintiffs under the Torture Victim Protection Act (TVPA) for another, much more limited, set of international human rights issues.<sup>28</sup> Foreign plaintiffs already are seeking to expand dramatically the definition of “torture” to encompass a wider variety of claims against corporations. For example, earlier this year, Vietnamese civilians allegedly injured by Agent Orange during the Vietnam War filed suit under the TVPA against dozens of chemical manufacturers, claiming that exposure to Agent Orange constituted torture under international law.<sup>29</sup>

**Second**, the plaintiffs’ bar and human rights groups will almost certainly turn to Congress to overturn any limitations the Supreme Court might place on ATS litigation. If this effort is successful, companies may be faced with congressionally established causes of action that could be even more expansive than the court-created actions currently available under the ATS. The American

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<sup>28</sup> See 28 U.S.C. § 1350 note.

<sup>29</sup> See *The Vietnam Ass’n for Victims of Agent Orange/Dioxin et al. v. The Dow Chemical Co. et al.*, No. 04 CV 0400 (E.D.N.Y. Jan. 30, 2004).

Bar Association's Section of International Law and Practice has formed an Alien Tort Statute Working Group within the Section's International Litigation Committee, to "study various proposals for revision of the ATS," with the goal of making policy recommendations "on the basis of common ground" between the plaintiffs' and defense bars.<sup>30</sup>

*Third*, and perhaps more worrisome, plaintiffs most likely will attempt to bring similar lawsuits in state courts under state laws. Indeed, state legislatures (such as California's) are often more ready than Congress to pass legislation to facilitate claims by foreign plaintiffs against corporations. For example, after claims by European Holocaust survivors against German, U.S. and other companies were dismissed by federal courts, the California legislature enacted statutes allowing such suits in California state courts.<sup>31</sup>

Even in the absence of specific legislation, plaintiffs are increasingly relying on state common law as the basis for lawsuits that largely mirror ATS claims. In one such case, Burmese villagers alleging human rights abuses by the Burmese military brought suit in California state court against Unocal Corporation, after identical claims were dismissed by federal court. The state court ruled that even though plaintiffs' claims arose entirely in Burma as a result of acts by the Burmese

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<sup>30</sup> See [http://www.abanet.org/intlaw/divisions/business/intl\\_lit/message.html](http://www.abanet.org/intlaw/divisions/business/intl_lit/message.html)

<sup>31</sup> Cal. Civ. Proc. Code § 354.6.

government, it would apply California law because Burmese law was indeterminate. While Unocal recently won a major victory on one issue in the case, the claims are still pending, and other corporations can expect to see copycat suits in state courts in the years to come.

### **C. Product Liability**

In recent years, many suits have targeted U.S. companies, asserting tort claims in which foreign nationals allege injuries sustained abroad. The suits seek to take advantage not only of the procedural advantages noted at the outset of this paper, but also of the United States' relatively liberal product liability laws. For example:

- Plaintiffs' lawyers filed U.S. class actions purporting to represent hundreds of thousands of British, Canadian, Australian, and New Zealand breast-implant recipients in their suits against a variety of U.S. implant manufacturers and distributors. The foreign class members were "neither citizens nor residents of the United States," and had "received all their implants outside the United States." The district court judge overseeing multi-district litigation proceedings eventually dismissed the suits by British, Canadian, and Australian women, but allowed the New Zealand plaintiffs' suits to continue,

because a New Zealand law would have barred certain claims from being heard in that country.<sup>32</sup>

- More than 80 Irish plaintiffs sued American manufacturers of blood clotting factor concentrates, alleging that they had contracted AIDS from the defendants' contaminated products. The plaintiffs admitted that the blood products at issue had all been administered in Ireland through Irish health care providers and institutions, and subject to Irish regulations. It was also admitted that all of the evidence of the patients' medical history and treatment was located in Ireland, as were the health care professionals who had administered the products.<sup>33</sup>
- Shortly after Bridgestone/Firestone, Inc., announced a tire recall in the United States in August 2000, advertisements appeared in other countries, including Mexico and Venezuela, seeking plaintiffs for lawsuits to be filed in U.S. courts. Eventually, hundreds of suits against Bridgestone/Firestone and various vehicle manufacturers were filed by non-U.S. plaintiffs in state and federal courts, relating to accidents that occurred outside the United States, and involving tires

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<sup>32</sup> *In re Silicone Gel Breast Implants Prods. Liability Litig.*, 887 F. Supp 1469 (N.D. Ala. 1995) (MDL).

<sup>33</sup> *Doe v. Hyland Therapeutics Division*, 807 F. Supp 1117 (S.D.N.Y. 1992).

and vehicles manufactured, assembled or sold by foreign subsidiaries outside of the United States.<sup>34</sup>

- Jamaican and Costa Rican nurseries sued a U.S. chemical company alleging that the company's agricultural fungicide was defective. The plaintiffs sought damages for loss of inventory, lost profits, and costs to clean up the nurseries.<sup>35</sup>
- Parents of a toxic shock syndrome (TSS) victim sued an American corporation that had designed and tested tampons manufactured by an English subsidiary. Both the deceased victim and her parents (the plaintiffs) were citizens of the United Kingdom; the victim's use of the product and her death occurred in England as well. The district court noted that were the case to proceed in the United States, the defendant would be unable to implead a potentially liable co-tortfeasor (the subsidiary), which had "manufactured, marketed, labeled, and sold the tampons."<sup>36</sup>

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<sup>34</sup> See, e.g., *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 190 F. Supp. 2d 1125 (S.D. Ind. 2002).

<sup>35</sup> *Proyectos Orchimex de Costa Rica, S.A. v. E. I. DuPont de Nemours & Co.*, 896 F. Supp 1197 (M.D. Fla. 1995).

<sup>36</sup> *Kilvert v. Tambrands*, 906 F. Supp 790 (S.D.N.Y. 1995).



- Several Greek, German, and British individuals (or their estates) sued a variety of defendants for injuries sustained in a yachting accident off the coast of Port of Poros, Greece. The accident involved a "tender" serving a U.K.-registered yacht, owned by a U.K. company that was itself owned by a Mexican citizen.<sup>37</sup>

The use of U.S. courts to redress injuries sustained overseas by foreign plaintiffs has several unfortunate effects. *First*, these suits may be unusually hard to defend. It is often difficult or impossible to join other parties who contributed to the injury, many of whom are not be subject to the jurisdiction of United States courts. This results in extra unfairness for the defendants who would be legally entitled to indemnification or contribution from those absent parties. Moreover, critical defense evidence may be located abroad, and inaccessible to litigants and the court. For instance, witnesses who could testify to a plaintiff's contributory negligence or cast doubt on the veracity of his injury allegations may not be subject to a U.S. court's compulsory process.<sup>38</sup>

*Second*, the possibility of suits being filed in *both* the U.S. and foreign jurisdiction, together with the differences in the standards of care required by U.S. and foreign legal regimes, leads to enormous uncertainty regarding the scope of

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<sup>37</sup> *Warn v. M/Y Maridome*, 961 F. Supp 1357 (S.D. Cal. 1997).

<sup>38</sup> *See, e.g., Piper*, 454 U.S. at 257-59.

potential claims for a given product. Companies that behave responsibly in accordance with a foreign country's care standards may nevertheless find themselves facing liability under more stringent standards imposed by U.S. courts – or vice versa. These factors increase the risk, uncertainty, and cost of overseas operations and investment. The threat of multiple lawsuits and uncertain standards can result in higher insurance costs, difficulties accessing capital markets, and negative effects on shareholder confidence and stock prices. The foreseeable result is less international trade overall.

*Third*, the application of U.S. liability rules in these cases may make it necessary for U.S. manufacturers to design products for export to developing nations at *American* standards for safety – standards that far exceed what foreign customers are willing to pay for, given the economic realities of their home markets. It is clear that such a climate will result in U.S. manufacturers losing profitable sales opportunities to foreign firms. For instance, under a 1985 EC directive, manufacturers have a complete defense if their product defect stems from compliance with a mandatory government regulation. But “[t]hat is not the law in most of the United States.”<sup>39</sup> Rather, most U.S. jurisdictions permit

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<sup>39</sup> Victor E. Schwartz, *Making Product Liability Work For You*, in *PRODUCT LIABILITY AND INNOVATION: MANAGING RISK IN AN UNCERTAIN ENVIRONMENT*, 30, 35 (Janet Hunziker & Trevor Jones, eds. 1994).

plaintiffs to try to prove that the feature required by regulators nevertheless rendered the product defective, or the defendant negligent.

A manufacturer who knows that a feature required by European regulators will open it up to liability in U.S. courts has two options: either it can withdraw from the European market, in order to protect itself from the claim that would result from adhering to European requirements; or it can comply with the European regulation but raise the product's price to cover the expected liability payouts to European customers suing in U.S. courts. The latter course may price the product out of the European market in any case. In addition, the imposition of U.S. safety standards on products for foreign markets undercuts the foreign government's interest in setting its own policy. As the U.S. Court of Appeals for the Fifth Circuit observed in one case, tort law involves a "trade-off" of "competing interests and costs, . . . involving interests of victims, of consumers, of manufacturers, and of various other economic and cultural values."<sup>40</sup>

These decisions should be made for each country by that country's own democratic institutions. It makes no sense for "a United States court to replace the policy preference of the Mexican government with our own view of what is a good

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<sup>40</sup> *Gonzales v. Chrysler Corp.*, 301 F.3d 377, 381 (5th Cir. 2002).

policy for the citizens of Mexico.”<sup>41</sup> It has often been proposed that U.S. tort law’s bias towards compensating plaintiffs deters useful experimentation and innovation. One former DuPont executive, for instance, reports on how his company decided not to market a product with potential use in earthquake-proofing buildings, out of concern for the litigation that would surely follow any failures.<sup>42</sup> It is one thing for U.S. courts to decide that the risks of such experimentation outweigh the benefits for American citizens; it is quite another to make that decision for other nations’ citizens around the globe.

Plaintiffs’ efforts to make our courts the product liability tribunal for the world are likely to hit U.S. businesses especially hard. Companies without a U.S. presence are jurisdictionally immune from suit in U.S. courts. The greater the U.S. presence, the more likely a company will be subject to U.S. courts’ jurisdiction in a variety of locales, and will have easily attachable assets making judgments collectible. This means that U.S. companies (or companies with extensive U.S. operations and employees) are at a significant competitive disadvantage against their foreign competitors—facing unique risks and uncertainty in planning, financing, and insuring. They will either have to absorb these added costs, or cede

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<sup>41</sup> *Id.* at 382.

<sup>42</sup> Alexander MacLachlan, *Risk Management in the Chemical Industry*, in PRODUCT LIABILITY AND INNOVATION, 47, 50.

profitable ventures to other nations' companies.<sup>43</sup> Like the antitrust and human rights issues discussed above, the Americanization of international tort law is a growing problem the business community needs to address.

### **III. STRATEGIES FOR ADDRESSING THE GLOBAL SHOPPING PROBLEM**

Plaintiffs' ability to bring what are essentially foreign disputes into U.S. courts is not an inexorable consequence of globalization. Rather, it is a product of U.S. legal doctrine. Because an American court is considered to have general personal jurisdiction over any company that regularly "does business" in the court's territory, there is no absolute constitutional bar to suing companies in the U.S. for their conduct all over the world. However, limits on global forum shopping can come from other sources, such as doctrines of judicial restraint, international agreements, or legislative action.

#### **A. Judicial Restraint, and the Doctrine of *Forum Non Conveniens***

Even if personal jurisdiction over the defendant exists in a particular case, U.S. courts nevertheless can dismiss an action arising out of foreign conduct under the doctrine of *forum non conveniens*. That doctrine gives courts discretion to dismiss an action that would better be handled somewhere else – for instance,

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<sup>43</sup> Of course, foreign companies with a U.S. presence have a third option that is equally harmful to the U.S. economy: they can downgrade their U.S. presence, shut down U.S. operations, and shift U.S. jobs overseas.

when another forum is closer to the pertinent witnesses and evidence, or when the other forum has greater expertise and authority in applying the relevant law.

*Forum non conveniens* has obvious relevance in global forum shopping cases.<sup>44</sup>

But there remain serious limitations to the doctrine's effectiveness.

One standard part of the *forum non conveniens* analysis is an inquiry into the adequacy of the foreign court as an alternative venue for hearing the case.<sup>45</sup>

Plaintiffs frequently argue that some imperfection of the foreign court (for instance, a crowded docket, or allegations of corruption), or some less plaintiff-friendly feature of the foreign venue's law, render the alternative forum inadequate.

Moreover, the *forum non conveniens* doctrine may be applied more stingily (or not applied at all) in some state courts.<sup>46</sup> Finally, because the trial court judge exercises broad discretion, application of the *forum non conveniens* doctrine is unpredictable, and effective appellate review may not be available.

The uncertainties and limitations of the *forum non conveniens* doctrine were starkly illustrated in the litigation arising out of the Bridgestone/Firestone tire

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<sup>44</sup> See generally Douglas W. Dunham & Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 BROOK J. INT'L L. 665 (1999).

<sup>45</sup> See *Piper*, *supra*, 454 U.S. at 254.

<sup>46</sup> See Robert A. Leflar, *Choice of Law for Products Liability: Demagnetizing the United States Forum*, 52 ARK. L. REV. 157, 158-59 & n.9 (noting that Virginia, Louisiana, and Washington all have more plaintiff-friendly law on the issue than the federal courts). See also, e.g., *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990).

recall, discussed above. A federal court in Texas dismissed on *forum non conveniens* grounds an action arising out of that controversy brought by several Mexican plaintiffs.<sup>47</sup> The Fifth Circuit affirmed, though it required the trial court to allow the claims to be refilled in Texas should the claims prove impossible to pursue in Mexico.<sup>48</sup> By contrast, a federal court in Indiana refused to dismiss lawsuits by scores of Venezuelan plaintiffs on the grounds that Venezuela might not provide an adequate forum.<sup>49</sup> The Seventh Circuit declined to review the district court's decision on a writ of mandamus, noting that "orders denying motions to dismiss for *forum non conveniens* are normally reviewed only after final judgment in a case."<sup>50</sup> Given the uncertainties in even the federal courts' application of *forum non conveniens*, it may be helpful to consider possible legislative action to codify and clarify the rule.

## **B. International Agreements: The Hague Conference's Proposed Convention**

Another aid in the fight against global forum shopping could come from the Hague Conference on Private International Law, which began working on a

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<sup>47</sup> See *Vasquez v. Bridgestone/Firestone, Inc.*, 192 F. Supp. 2d 715 (E.D. Tex. 2001).

<sup>48</sup> See *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665 (5th Cir. 2003).

<sup>49</sup> See *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 190 F. Supp. 2d 1125 (S.D. Ind. 2002).

<sup>50</sup> *In re Ford Motor Co. and Bridgestone/Firestone N.A. Tire LLC*, 344 F.3d 648, 652 (7th Cir. 2003).

convention to govern jurisdiction and the recognition foreign judgments in 1992, at the request of the U.S. government. Although the United States declined to sign a draft convention in 1999, there may still be hope for a convention acceptable to all participants.

The problems to be worked out stem from the substantial differences between the U.S. and other nations' notions of jurisdiction. Civil law nations may be "profoundly uncomfortable" American courts' willingness to find jurisdiction based on doing business or minimum contacts, "which they find vague and unpredictable."<sup>51</sup> Indeed, the 1999 draft of the Convention would have prohibited those concepts as a ground for jurisdiction.<sup>52</sup> On the other hand, the United States is subject to constitutional restrictions which prohibit, for instance, jurisdiction based solely on the place of an injury without regard to the defendant's connections to that place<sup>53</sup> – a type of jurisdiction permitted by European nations' Brussels Convention of 1968.<sup>54</sup> Furthermore, American corporations may be

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<sup>51</sup> *Hearing on Negotiations at the Hague Conference for a Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments Before the House Subcommittee On Courts and Intellectual Property of the Committee on the Judiciary* 7 (June 29, 2000) (Statement of Jeffrey D. Kovar, Asst. Legal Advisor for Private Int'l Law, U.S. Dept. of State).

<sup>52</sup> Preliminary drafts and working papers for the proposed convention can be found at <http://www.hcch.net/e/workprog/jdgm.html>.

<sup>53</sup> *See, e.g., World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

<sup>54</sup> *See* William E. O'Brien, Jr., *The Hague Convention on Jurisdiction and Judgments: The Way Forward*, 66 Mod. L. Rev. 491, 493 (2003).



unusually displeased by being sued at home by foreign plaintiffs, precisely because of the disadvantages defendants face in American courts.<sup>55</sup>

There are also questions, though, about whether a draft acceptable to all parties would go far enough in solving the global forum shopping problem for multinational corporations. Some groups have proposed that the Convention contain a general exclusion overriding choice-of-forum clauses when those clauses were imposed through contracts of adhesion, or even whenever the plaintiff to the suit is an individual, rather than a business, purchaser.<sup>56</sup> Such exclusions would, obviously, diminish the Convention's usefulness for business.

Furthermore, the efficacy of any treaty in solving the United States' forum shopping problem will, as a practical matter, depend on the details of domestic implementing regulation. One commentator has suggested that Congress, in its implementing legislation, "expressly confer jurisdiction upon the federal courts" for the recognition of foreign judgments, to avoid possible anti-foreign bias in state

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<sup>55</sup> THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS: RECORDS OF THE CONFERENCE HELD AT NEW YORK UNIVERSITY SCHOOL OF LAW ON THE PROPOSED CONVENTION 17 (Andreas F. Lowenfeld & Linda J. Silberman, eds. 2001) (comment by Peter E. Nygh).

<sup>56</sup> See Anandashankar Mazumdar, *Electronic Commerce: Hague Group Issues New Draft of Choice of Courts Treaty Including Options on Scope*, BNA Daily Report for Executives, Feb. 14, 2003.

courts.<sup>57</sup> Hence, while the proposed Hague Convention could do some good in mitigating the global forum shopping problem, achieving such a result will require the vigilance and participation of business both in the treaty negotiations and in later implementing legislation.

### **C. Statutory Fixes for Particular Industries**

Finally, particular industries with especially serious concerns may need targeted legislative relief. For instance, in 1982, Congress responded to the needs of U.S. offshore oil service companies by enacting a statute barring foreign employees of U.S. owned drilling platforms located in other nation's waters from suing for injuries under the Jones Act, unless the employee could establish a complete absence of remedies under both own nation's laws and the laws of the locale of the platform.<sup>58</sup> It may be that other industries also need such targeted relief in order to be able to compete in the global marketplace. And the relief need not always be legislative. For example, the Supreme Court has found Presidential agreements a persuasive basis on which to limit state law impingements on the insurance industry resulting from Holocaust claims.<sup>59</sup> But to be effective in the

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<sup>57</sup> THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS, *supra*, at 121 (comment by Linda J. Silberman).

<sup>58</sup> *See* 46 U.S.C. app. § 688(b).

<sup>59</sup> *See Am. Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003).

long run, such relief must be very carefully drafted. For example, the current fight over the meaning of the FTAIA, which was itself originally drafted to clarify the reach of U.S. antitrust law, shows that any ambiguities are likely to be exploited by those attempting to assert claims.



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