International Product Liability Claims Under the Alien Tort Claims Act

Joel Slawotsky*

* © 2007 Joel Slawotsky. The author is a former law clerk to the Hon. Charles H. Tenney of the Southern District of New York and an AV-rated attorney with Sonnenschein Nath and Rosenthal LLP. He has lectured at the Radzyner School of Law, Interdisciplinary Center (IDC) (Herzliya, Israel) and the School of Law of the College of Management (Rishon LeZion, Israel).

I. INTRODUCTION

The unprecedented rise in cross-border trade and global financial integration[1] has created an exceptional economic revolution in the developing world.[2] The global bull markets in stocks, commodities, real estate, outsourcing, foreign investment, and mergers created sweeping changes in the local economies of developing nations that should have resulted in improved public health.[3] However, the unparalleled globalization has, in fact, exposed relatively helpless,[4] under-educated,

1. U.N. Econ. & Soc. Council (ECOSOL), Comm. On Human Rights, *Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on Enjoyment of Human Rights*, ¶ 24, U.N. Doc. E/CN.4/2004/46 (Dec. 15, 2003) (Submitted by Fatma-Zohra Ouhachi-Vesely), *available at* http://ap.ohchr.org/documents/dpage_e.aspx?m=104 ("The increased fluidity of trade in today's global marketplace has been a channel for the movement of hazardous wastes. Lower transportation and communication costs, the difficulties in checking every container have facilitated the transfer of hazards. States have adopted more liberal trade policies. As wastes have been disguised as other products or are sent abroad for recycling, detection of these shipments has become more difficult.").

2. David Dollar, *Is Globalization Good for Your Health?*, 79 BULL. W. HEALTH ORG. 827 (2001) (citing factors such as internet usage, travel, and foreign investment).

3. Joel Slawotsky, *The New Global Financial Landscape: Why Egregious International Corporate Fraud Should Be Cognizable Under The ATCA*, 17 DUKE J. OF COMP. & INT'L L. 131, 134-49 (2006); Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 HUM. RTS. Q. 735, 743 (1999) (stating that, ideally "economic growth will increase protection of economic rights because economic growth brings increased access to health care, food, and shelter, either directly through employment and increased income or indirectly through the improvement and extension of these facilities to more people").

4. U.N. Econ. & Soc. Council, *supra* note 1, ¶ 52 ("The vulnerable groups are not able to take direct action to prevent harm, or to seek legal redress. The industries are insulated from legal action and in the rare cases where communities have initiated claims the time scales for compensation can exceed a working lifetime (see in particular the Special Rapporteur's findings on the human rights impacts and impunity, E/CN.4/2001/5, paragraphs 58-78). Poor individuals and communities face difficulties to trace and hold liable industries who have contributed to death, ill health, or environmental damage. When action is initiated, there is a lack of clarity

and uninformed populations[5] to numerous commercial and consumer products that are injurious to health.[6] Some of these products are known to be dangerous and to cause catastrophic personal injuries and are banned or severely restricted in developed nations. Despite this knowledge, these products are sold and shipped to or manufactured in the developing world.[7] Notwithstanding these actualized and potentially tragic harms,[8] the governments of many developing nations are either unable or unwilling to protect their nationals from them.[9]

---

about the legal forum, and an ability on the part of corporations to delay the outcomes indefinitely. Corporate mergers and takeovers, uncertain origins of products, and the increasing pesticide production by national companies in developing countries make action more difficult. Nevertheless, holding companies directly liable for harm will remain an important course of action, and victims may increasingly seek support from human rights and environmental lawyers in instances where claims seem likely to succeed.").

5. Knowingly selling a product to a population that is unaware of the severity of risk or unable to protect itself may also invoke a liability theory known as "negligent entrustment." The doctrine of negligent entrustment states that a person may be subject to liability for harm that results from marketing a potentially dangerous product to another whom the seller has reason to believe is likely to use the product in a manner that poses an unreasonable risk of harm to the recipient or to others. "[L]iability . . . arises from selling potentially dangerous products to consumer groups that lack the capacity to exercise ordinary care." Timothy D. Lytton, Comment, Halberstam v. Daniel *and the Uncertain Future of Negligent Marketing Claims Against Firearm Manufacturers*, 64 BROOK. L. REV. 681, 683 (1998). See, for example, *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 821-31 (E.D.N.Y. 1999), wherein plaintiffs effectively argued that the negligent entrustment doctrine was applicable to handgun manufacturers who sell to buyers likely to be involved in criminal activity. Although the comparison between "criminals" and those who "lack the capacity to exercise due care" is subtle, it convinced Judge Weinstein that the handgun industry was negligent for marketing in areas where gun laws were too weak to protect consumers from the dangers of possible handgun shootings. *Id.* at 830-31.

6. Joyce V. Millen, Alec Irwin & Jim Young Kim, *Introduction: What Is Growing? Who Is Dying?*, *in* DYING FOR GROWTH: GLOBAL INEQUALITY AND THE HEALTH OF THE POOR 3, 6-7 (Jim Young Kim et al. eds., 2000) ("[S]pecific growth-oriented policies have not only failed to improve living standards and health outcomes among the poor, but also have inflicted additional suffering on disenfranchised and vulnerable populations.").

7. U.N. Econ. & Soc. Council, *supra* note 1, executive summary ("Products that are banned, taken off the market, strictly regulated or not permitted in industrialized countries continue to be produced and exported to developing countries with incentives to consume them (advertising, linking of project financing and aid, falsification of data).").

8. For example, in India, almost 3000 people died from the 1984 Union Carbide toxic gas leak in Bhopal. Timothy H. Holtz, *Tragedy Without End: The 1984 Bhopal Gas Disaster*, *in* DYING FOR GROWTH: GLOBAL INEQUALITY AND THE HEALTH OF THE POOR, *supra* note 6, at 257 ("In the grand 'trade-off' between foreign investment and economic development on the one hand, and environmental and human safety on the other, the elite reap the monetary awards while the costs to human health are visited upon the poor.").

9. Sales of tobacco products are illustrative of this global phenomenon. *See* Jeff Collin et al., *The Framework Convention on Tobacco Control: The Politics of Global Health Governance*, 23 THIRD WORLD Q. 265, 266 (2002) (recognizing "the ability of transnational corporations (TNCs) to undermine the regulatory authority of national governments" in the context of tobacco control); Deborah Arnott, *The Killer's Lobbyists*, GUARDIAN, May 15, 2003, *available at* http://www.guardian.co.uk/analysis/story/0,3604,956270,00.html (noting the monumental influence of the tobacco lobby in the developing world); Derek Yach et al., *The*

This Article posits that under certain circumstances, the transfer of products known to cause serious injury or death should be cognizable in federal court under the Alien Tort Claims Act (ATCA). An extremely controversial statute,[10] the ATCA allows aliens to file suit for international law violations in federal court.[11] In recent years, the ATCA has been invoked in a wide range of settings against an array of foreign and domestic corporations and individuals.[12] However, only wrongs[13] reflecting the mutual concern of the nations of the world are cognizable under the ATCA.[14] Such concerns include: terrorism,[15] crimes against humanity,[16] select environmental damage,[17] war crimes,[18] torture,[19] and

---

Global Burden of Chronic Disease, 291 J. AM. MED. ASS'N 2616, 2620 (2004); Lincoln C. Chen et al., *Health as a Global Public Good*, *in* GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 284, 288-89 (1999) (commenting that globalization of advertising has contributed to tremendous growth in the developing world of chronic diseases linked to smoking).

10. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

11. *See, e.g.*, *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004) ("[T]his court must be extremely cautious in permitting suits here based upon a corporation's doing business in countries with less than stellar human rights records, especially since the consequences of such an approach could have significant, if not disastrous, effects on international commerce."); *see also*, *Civil Procedure—Choice of Law—Ninth Circuit Uses International Law To Decide Substantive Law Under Alien Tort Claims Act*, 116 HARV. L. REV. 1525, 1531 (2003) (noting that expansive ATCA liability "could strike deeply at the ability of parties to organize their conduct and protect their expectations"); John E. Howard, *The Alien Tort Claims Act: Is Our Litigation-Run-Amok Going Global?*, U.S. CHAMBER OF COMMERCE, Oct. 2002, http://www.uschamber.com/press/opeds/0210howarditigation.htm (discussing business community's concern that the ATCA is potentially damaging to international business and is subject to litigation abuse); 28 U.S.C. § 1350.

12. *See, e.g.*, Mwani v. Bin Laden, 417 F.3d 1, 4 (D.C. Cir. 2005) (discussing claims against the Al-Qaeda terrorist organization for bombings in Kenya); Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (alleging that oil company defendant aided and abetted murder, torture, and enslavement of pipeline workers in Myanmar); Abdullahi v. Pfizer, No. 01 Civ. 8118 (WHP), 2005 WL 1870811, at *1 (S.D.N.Y. Aug. 9, 2005) (discussing suit against pharmaceutical corporation conducting clinical trials in Nigeria); Saleh v. Titan Corp., 361 F. Supp. 2d 1152, 1155, 1159 (S.D. Cal. 2005) (examining claims for alleged torture in Iraqi prisons); *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 15 (E.D.N.Y. 2005) (discussing Vietnamese plaintiffs' allegations of chemical company defendant liability for injuries related to Agent Orange usage in the Vietnam war); *In re* S. African Apartheid Litig., 346 F. Supp. at 542 (describing a suit against financial institutions for purported collaboration with apartheid regime in South Africa).

13. *See, e.g.*, Filártiga v. Peña-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (noting that violations of international law can be based either on a treaty or a norm of international law).

14. *Id.* at 888 ("It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute.").

15. *Mwani*, 417 F.3d at 14 (D.D.C. 2005).

16. Kadic v. Karadžić, 70 F.3d 232, 236 (2d Cir. 1995).

17. Sarei v. Rio Tinto, PLC, 456 F. 3d 1069, 1074, 1078 (9th Cir. 2006).

18. *Kadic*, 70 F.3d at 243.

19. Cabello v. Fernández-Larios, 402 F.3d 1148, 1157-58 (11th Cir. 2005).

other, similarly outrageous misconduct[20] condemned by the majority of civilized nations.

Conduct found to be lacking the "mutual concern" that is a predicate for finding ATCA jurisdiction includes: commercial wrongdoing,[21] negligence and wrongful death,[22] property destruction,[23] and the generic claim of "right to life and health."[24]

While negligence and wrongful death suits have traditionally failed to satisfy the requirement of violation of the law of nations, this Article suggests that select types of negligent conduct should be cognizable under the ATCA, to wit, the sale of known hazardous products, particularly those banned, severely restricted, or the subject of repetitive punitive damage awards[25] in developed nations.

There are two reasons to permit ATCA jurisdiction. One, our integrated financial and corporate world has caused a revolutionary change in the way products are manufactured and distributed, resulting in large numbers of people in developing nations being exposed to dangerous products. These same products are banned, restricted, or subject to lawsuits in developed nations, and the transfer of the products to the third-world amounts to a global double standard.[26] The ATCA can

---

20. *See, e.g.*, Tachiona v. Mugabe, 234 F. Supp. 2d 401, 423 (S.D.N.Y. 2002) (discussing summary execution).

21. Hamid v. Price Waterhouse, 51 F.3d 1411, 1418 (9th Cir. 1995).

22. Benjamins v. British European Airways, 572 F.2d 913, 916 (2d Cir. 1978); Jones v. Petty Ray Geophysical Geosource, 722 F. Supp. 343, 348 (S.D. Tex. 1989).

23. Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 464 (S.D.N.Y. 2006).

24. Courts have rejected claims alleging a defendant violated generic norms as the "right to life" or "right to health." Flores v. S. Peru Copper Corp., 414 F.3d 233, 254 (2d Cir. 2003).

25. The repugnancy is magnified when the product sold is the same product that is banned, withdrawn, or severely restricted in the nation of manufacture. When the scientific evidence is so overwhelming that governments ban and/or restrict domestic usage of the product, or the corporate manufacturers themselves withdraw the product, and, despite the ban or restriction, the products are marketed and sold elsewhere, the conduct can only be considered quasi-criminal. Similarly, if the product has been the target of personal injury suits and punitive damages have been awarded, then this corroborates the claim that the act of selling such products outside of the jurisdiction was reprehensible.

26. The global double standard arises when known hazardous products are not used in one country but those same products are marketed in another nation. *See, e.g.*, U.N. Econ. & Soc. Council, *supra* note 1, ¶ 59 ("Another aspect in many of the reported cases is the difference in behaviour of a company operating in a developed country which has relatively strict rules protecting people and the environment, and the behaviour of the same company in a developing country. This has led to allegations of exploitation of people living under oppressive regimes and of people living in countries where health and safety and environmental protection standards are less stringent or less stringently enforced. Complaints about such double standards have arisen in relation to cases previously reported, for example that of Thor Chemicals in South Africa. The company closed its United Kingdom asbestos factories in 1968 because of intervention by the Health and Safety Executive, but continued operating in South Africa for a further 20 years, causing death and disability to many of its workers, as well as environmental devastation.").

enforce avoidance of double standards, not through coercion or government regulation, but rather through the free market of civil liability.

Two, the Supreme Court of the United States acknowledged that the law of nations changes so that previously unrecognized torts may, over time, evolve into wrongs reflecting the mutual concern of civilized nations.[27] A review of customary international law reveals that concerns over the selling of products known to cause death and serious injury have reached a critical mass and provide a quintessential example of conduct that constitutes the mutual concern of nations. Therefore, under the appropriate circumstances, the sale, transfer, or manufacture of products known to be dangerous outside the United States, that results in severe personal injury and/or death, is a violation of an international norm and should be actionable under the ATCA.

II. THE DEVELOPED WORLD'S KNOWLEDGE REGARDING HAZARDOUS PRODUCTS

In recent decades, there has been a sea of change with respect to concerns over product liability in the industrialized nations of the Western world.[28] Manifestations of the phenomenon of mass-tort product liability litigation include suits over asbestos,[29] breast implants,[30] DES,[31] the diet-drug Fen-phen,[32] tobacco,[33] and Vioxx.[34] These are examples of

---

27. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) (holding that customary international law must adapt to new conditions and that the law of nations must be interpreted in light of existing conditions).

28. *See* Andy Reinhardt & Rachel Tiplady, *Europe Says: Let's Get the Lead Out*, BUS. WK., Feb. 7, 2005, at 12; Toshio Aritake & Noah J. Smith, *Japanese Manufacturers to Discontinue Use of Lead, Mercury, Other Substances*, 26 INT'L ENV'T REP. (BNA) No. 15 at 752 (July 16, 2003); Paul E. Hagen & Mateo Davis, *Key International Agreements and Initiatives Addressing Chemicals, Wastes, and Heavy Metals*, 2005 A.L.I.-A.B.A. 19, 26 (2005).

29. The enormity of asbestos litigation is overwhelming. "No litigation in American history has involved as many individual claimants . . . resulted in as much compensation to claimants, compelled the number of defendant' bankruptcies . . . as asbestos litigation." Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1819 (1992).

30. PBS.org, Breast Implants on Trial: Chronology of Silicone Breast Implants, http://www.pbs.org/wgbh/pages/frontline/implants/cron.html (last visited Sept. 5, 2007).

31. James A. Henderson, Jr., *Products Liability: DES Litigation: The Tidal Wave Approaches Shore*, 3 CORP. L. REV. 143, 143 (1980).

32. Alison Frankel, The Fen-Phen Follies, AM. LAW., Mar. 1, 2005 *available at* http://www.law.com/jsp/article.jsp?id=1109597691121.

33. *Q & A: Tobacco Litigation*, BBC NEWS, June 7, 2001, http://news.bbc.co.uk/2/hi/business/1374938.stm.

34. *See* Peter Geier, *Vioxx Litigation Goes Federal*, NAT'L L.J., Nov. 29, 2005, http://www.law.com/jsp/article.jsp?id=1133188929454.

products once commonly used but subsequently either banned, restricted, withdrawn, or made the target of numerous lawsuits. In many cases, the alleged injuries are horrendous, and plaintiffs allege that the defendants' had actual or constructive knowledge of the product's dangerous properties, constituting particularly reprehensible conduct.[35] Compensatory verdicts tend to be high and reflect the severity of the injury (i.e., death or serious bodily harm) as well as the magnitude of fault.[36] Serious injuries have resulted in awards of substantial damages.[37]

In the most egregious cases, juries found that defendants had actual knowledge that the products were hazardous, but despite that knowledge, the products remained on the market and were sold or marketed to consumers or end-users.[38] Evidence in numerous cases revealed substantial moral culpability.[39] Product liability litigation has resulted in large punitive damage awards and/or global settlements of tens of billions of dollars and has resulted in numerous corporate bankruptcies.[40]

Sometimes, products are voluntarily withdrawn[41] and/or governments impose bans on the domestic sale and usage of these products.[42] However, while lawsuits and bans eliminate and/or limit the domestic usage of a dangerous product, neither bans nor the threat of domestic lawsuits impose a financial deterrence with respect to the

---

35. JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE §§ 6.20-.21 (Clark, Boardman, & Callahan 1997) (1981).

36. *See, e.g.*, Kreppein v. Celotex Corp., 969 F.2d 1424, 1426-27 (2d Cir. 1992) ("[L]iability should be apportioned according to relative degrees of fault for the injury, which may include not only the strength of the causal link but also the magnitude of fault.").

37. Large verdicts have been awarded by juries in asbestos litigation. *See, e.g.*, $25 million dollar verdict for asbestos induced lung cancer, http://uslawyersdb.com/lawnews968. In Vioxx litigation, a jury awarded $253 million against Merck. Diedtra Henderson & Sasha Pfieffer, *Merck Told To Pay $253 in Vioxx Suit: Texas Jury Says Drug Firm Liable in Man's Death*, BOSTON GLOBE, Aug. 20, 2005, http://www.boston.com/news/nation/articles/2005/08/20/merck_told_to_pay_253m_in_vioxx_suit.

38. Punitive damages are frequently awarded where there has been a failure to warn despite actual knowledge of the product's dangerousness. *See* GHIARDI & KIRCHER, *supra* note 35, § 6.20-.22.

39. *See* Racich v. Celotex Corp. 887 F.2d 393 (2d Cir. 1989).

40. *See* Deborah Hensler et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 8-9 IFAND INST. FOR CIVIL JUSTICE, (Documented Briefing, Aug. 2001), *available at* http://www.rand.orgpublications/DB/DB362.0.

41. *See, e.g.*, Press Release, Merck, Merck Announces Voluntary Worldwide Withdrawal of Vioxx (Sept. 30, 2004), *available at* http://www.vioxx.com/vioxx/documents/english/vioxx_press_release.pdf.

42. Laurent Vogel, Asbestos in the World, HESA News Letter (HESA Brussels Belg.), June 2005 at 7, *available at* http://hesa.etui-rehs.org/uk/newsletter/files/Newsletter27p7-21.pdf. The United States also severely restricts asbestos use although there is an absence of a complete ban. *See* EPA, EPA Asbestos Material Bans: Clarification (May 18, 1999), *available at* http://www.ewg.org/reports/asbestos/documents/pdf/asb-bans2.pdf.

selling of dangerous products abroad.[43] There are various scenarios where products can be sold or manufactured to circumvent liability. In nations where litigation or government decree has forced manufacturers to cease manufacturing or selling a product, a corporation may establish facilities in a third country to sell the product in that particular nation or elsewhere.[44] Alternatively, when only domestic consumption or usage is banned, corporations may continue to manufacture the banned product for distribution in other countries. Because many developing nations represent lucrative markets for these products, it is not beyond the creative process to establish methods circumventing domestic laws.

The following are some examples of known dangerous products[45] that have been exported to other countries or manufactured in other nations when domestic production was prohibited or substantially limited.

A. Asbestos

Unquestionably, asbestos products have caused death and serious injury to a very large number of persons.[46] Asbestos is considered by the

---

43. For example, asbestos has been banned in the EU since 2005. *See* EU Directive on the Protection of Workers from the Risks Related to Exposure to Asbestos at Work (2003/18/EC); EU Directive on the Marketing and Use of Asbestos (1999/77/EC)). *But see* Vogel, *supra* note 42, at 7-8. European corporations continue to earn profits from asbestos business elsewhere in the world.

44. For example, Amatex's Mexican asbestos factories and Givaudan's (Hoffman-LaRoche) trichlorophenol plant in Seveso, Italy.

45. In addition to products, there are many situations wherein conduct goes undeterred in third-world countries. The same conduct would be prohibited in the United States and other developed nations. For example, gold mining corporations use extraction methods in the third-world that produce mercury poisoning. *See* Paul Hams, Colombian Gold Rush: If Country Can Limit Its Internal Violence, the precious Metal Could Make for Rich Pickings, S.F. GATE, Feb. 6, 2007, *available at* http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/02/06/BUGQENV5AE1.DTL ("At a small mill near the Quintana mine where Cambridge Mineral is exploring, miners add mercury, a neurotoxin with highly toxic vapors, to the wok-size steel pan that is used to agglomerate gold particles, using their fingers to mix it into the grit. 'The people have problems with mercury, it stays in their bodies,' said Antonio Castillo, mine manager at Quintana. Once the grit has been panned away, the remaining liquid is poured into a piece of cloth and the mercury squeezed out through the fabric to leave a ball of gold-mercury amalgam. The miners perform the task without gloves or masks to protect them against the fumes that damage the lungs, kidneys and brain.").

46. According to the World Health Organization,

> there is no evidence for a threshold for the carcinogenic effect of asbestos and that increased cancer risks have been observed in populations exposed to very low levels, the most efficient way to eliminate asbestos-related diseases is to stop using all types of asbestos. Continued use of asbestos cement in the construction industry is a particular concern because the workforce is large, it is difficult to control exposure, and in-place materials have the potential to deteriorate and pose a risk to those carrying out alterations, maintenance and demolition. In its various applications, asbestos can be

International Labour Organization (ILO) to be the most prevalent carcinogen used worldwide.[47] Death and injury from asbestos is staggering, with hundreds of thousands of deaths linked to asbestos exposure.[48] Currently over forty nations ban asbestos[49] and efforts are underway for a global asbestos ban.[50]

The knowledge of asbestos dangers is not new. In *Borel v. Fibreboard Paper Products Corp.*, the court found that the asbestos industry and others had actual knowledge of asbestos hazards back in the 1920s-1930s.[51] Asbestos, although banned or strictly regulated in the vast majority of Western developed nations, continues to be manufactured in third-world countries and/or shipped to those nations for domestic usage or scrap.[52]

While many nations have banned asbestos, and the scientific evidence regarding its dangers is incontrovertible and widely known, asbestos continues to be sold around the world.[53] In addition to using asbestos-containing insulation products in new construction, some developing nations have found big business in the scrapping of other

---

> replaced by some fibre materials and by other products which pose less or no risk to health.

World Health Organization (WHO), Elimination of Asbestos-Related Diseases, at 2, Sept. 2006, http://www.who.int/occupational_health/publications/asbes tosrelateddiseases.pdf.

47. Press Release, ILO, Asbestos: The Iron Grip of Latency (Jan. 10, 2006), http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang__en/WCMS_076282/index.htm.

48. *Id.* ("The ILO estimates that 100,000 people die each year from work-related asbestos exposure. Asbestos-caused cancers will kill at least 15,000 people in Japan in the next five years, and up to 100,000 people in France over the next 20 to 25 years. In the United States, hundreds of thousands of injury claims have been filed since the 1970s for deaths, cancers and other health problems related to asbestos exposure, bankrupting dozens of U.S. companies.").

49. ILO to Promote Global Asbestos Ban, HAZARDS MAG., http://www.hazards.org/asbestos/ilo.htm ("The task is now to increase the number of countries that have already eliminated future asbestos use from the present 40 countries to at least 100 in the coming 10 years.").

50. *Id.* ("Asbestos is the most important single factor causing death and disability at work, some 100,000 fatalities a year. The most fundamental right at work is the right to life and health."); Invitation to Press Conference, Finnish Inst. of Occupational Health, EV and ILO to start promoting Global Asbestos Ban Aug. 2006, http://www.hvbg.de/e/asbest/index.html ("EU and ILO to start promoting global asbestos ban.").

51. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1083 (5th Cir. 1973).

52. Selling Death, HAZARDS MAG., http://www.hazards.org/asbestos/sellingdeath.htm (last visited Oct. 9, 2007).

53. *See* Vogel, *supra* note 43. ("Even today, many European multinationals employ double standards: asbestos-free in Europe, but still using asbestos elsewhere in the world."); Laurie Kazan-Allen, *The Asbestos War*, 9 INT'L J. OCUP. ENVTL HEALTH 173, 173 (2003), *available at* http://hesa.etui-rehs.org/uk/dossiers/files/IJOEH_KazanAllen.pdf; Barry Castleman, *WTO Confidential: The Case of Asbestos*, 32 INT'L J. HEALTH SERV. 489, 501 (2002), *available at* http://hesa.etui-rehs.org/uk/dossiers/files/WTO-castleman.pdf.

countries' outmoded ships, producing asbestos exposure for the shipyard workers.[54]

Given that hundreds of juries in the United States consistently found corporations reckless in selling asbestos without adequate warnings in the 1940s and 1950s, selling asbestos or shipping old asbestos in the twenty-first century is—at a minimum—an act of wanton disregard for the safety of others and may constitute quasi-intentional conduct.

B. E-Waste

Hazardous e-waste products, such as electronic equipment, are a growing problem.[55] E-waste is transported to developing nations and exposes their populations to hazardous materials.[56] E-waste often contains poisons such as cadmium, lead, mercury, and chromium and is exported to developing nations for "recycling."[57] These toxic materials accumulate in the human body and can lead to serious organ damage, impairment of health function, and cancer.[58] Lead, used in computer

54. The developing world has become the destination of choice for scrapping obsolete ships. The third-world is the leader in scrapping ships because there is an abundance of low-cost employees, an absence of health regulations, and a lack of meaningful risk of liability. *See* Aage Bjorn Andersen, *Worker Safety in the Ship-breaking Industries* 2-3, 11, 15-16 (Int'l Labour Office Geneva, Working Paper No. 167, 2001). Moreover, most developing nations desire that the hard currency these jobs provide as well as employment so they are not enthusiastic about warning the workers or protecting them. In India, the vessel scrapping industry produces about ten percent of the country's steel production as well as thousands of jobs. The shipyards provide jobs to 40,000 in India and 25,000 in Bangladesh. John F. Sawyer, *Shipbuiding and the North-South Debate: Economic Development or Environment and Labor Catastrophe?*, 20 PA. ST. INT'L L. REV. 535, 547-49 (2002). In these countries, workers lack proper training and protective gear and often use bare hands to remove asbestos-containing materials. *Id.* at 550. It has been estimated that one in four Indian workers will contract cancer because of their shipyard work. *Id.*

55. The rate of e-waste growth is three times higher than typical municipal waste. *See* Council Directive 2002/95, Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment, 2003 O.J. (L 37/19). In the United States, an estimated two million tons of e-waste is discarded every year, including 133,000 discarded computers every day. Brad Stone, *Recycling: Tech Trash, E-Waste: By Any Name, It's an Issue*, NEWSWEEK, Dec. 12, 2005, at 11.

56. U.N. Econ. & Soc. Council, *supra* note 1, ¶ 29 ("The Special Rapporteur continues to receive communications regarding the export from industrialized countries of hazardous electronic wastes (e-wastes) for recycling in developing countries, particularly in Asia. E-wastes encompasses a broad and growing list of electronic devices ranging from large household appliances such as refrigerators, air conditioners, as well as hand-held cellular phones, personal stereos, and consumer electronics to computers. It is estimated that by 2007, there will be more than 700 million "obsolete" computers in the United States alone.").

57. Elizabeth Grossman, *'Digital Dumps' Heap Hazards at Foreign Sites*, WASH. POST, Dec. 12, 2005, at A7.

58. *Id.* ("Intact computer equipment is not hazardous, but when computer and television screens, circuit boards, batteries, and other high-tech electronics are broken up or burned or degrade, they release toxic materials that include lead, cadmium, barium, mercury and chromium. Plastic components contain brominated flame retardants that accumulate in human blood and fat

monitors and soldering of circuit boards, is particularly toxic and can cause serious injury to the human nervous system, blood system, and kidneys.[59] Mercury, used in many consumer electronics, can cause brain damage.[60]

C. Pesticides

As global agriculture has grown, the need to employ pesticides to increase crop yields has also grown.[61] Substantial evidence corroborates the view that "unforeseen and disastrous environmental consequence" results from extensive pesticide use.[62] A large percentage of pesticides that are either banned or severely restricted in developed countries are exported to third-world nations.[63] For example, in the Philippines, farmers use and are poisoned by pesticides banned in the United States.[64] In Costa Rica, banana plantation employees sued pesticide manufacturers for injuries arising from the use of the banned pesticide DBCP.[65] The United States banned DBCP in 1979,[66] yet corporations continued to sell DBCP internationally.[67] This pesticide has been linked to sterility, birth defects, and cancer.[68]

While developed nations are aware of the risks attendant to pesticide usage, many residents of developing nations are killed or seriously injured annually from banned or restricted pesticides.[69] It has

---

tissue and can disrupt the body's hormonal balance. When burned, some of these plastics release dioxins and furans, persistent pollutants linked to a host of health problems, including cancer.").

59. EPA.gov, Protect Your Family From Lead In Your Home, http://www.epa.gov/lead/pubs/leadpdfe.pdf. (last visited Sept. 12, 2007).

60. Green Peace.org, The Dangers of Mercury, http://www.greenpeace.org/usa/news/get-tested-for-mercury-contami/the-dangers-of-mercury (last visited Sept. 12, 2007).

61. Natasha C. Robinson, *Pesticides: What Will the Future Reap?*, 28 WM. & MARY ENVTL. LAW & POL'Y REV. i (2003).

62. *Id.*

63. U.N. Econ. & Soc. Council, *supra* note 1, ¶ 49 ("The Special Rapporteur continues to receive reports about export of pesticides and other chemicals from developed to developing countries which have been banned in their countries of origin.").

64. World Health Org. Reg'l Office for the W. Pac., Management of Pesticide Poisoning, http://www.wpro.who.int/hse/pages/abstract9.html (last visited Sept. 5, 2007) ("Chemicals popular in the Philippines have been banned or severely restricted in the United States further, farmers do not know the consequences of mishandling these chemicals. Acute pesticide poisoning has been traced to unsafe practices in the handling, storing and disposal of pesticides.").

65. *See* Don Mayer & Kyle Sable, *Yes! We Have No Bananas: Forum Non Conveniens and Corporate Evasion*, 4 INT'L BUS. L. REV. 130, 137 (2004).

66. *Id.* at 133.

67. *Id.*

68. *Id.*

69. Press Release, WHO, Children Are Facing Health Risks from Pesticide Poisoning (Sept. 24, 2001), http://www.who.int/mediacentre/news/notes/2004/np19/en/.

been estimated that pesticide poisoning leads to thousands of annual deaths, with children particularly affected.[70] Indeed, while almost all pesticide poisoning injuries occur in the developing world, these nations account for only twenty to twenty-five percent of worldwide pesticide use.[71]

III. PHARMACEUTICAL OUTSOURCING OF EXPERIMENTAL DRUGS

In the United States, public awareness of dangerous drugs has led to a surge in pharmaceutical litigation alleging design defects and failures to warn.[72] At times, major drug manufacturers deny liability but agree to globally resolve suits.[73] In other cases, the manufacturers defend the suits.[74] Yet, the fact remains that a drug's dangerous effects will result in lawsuits and financial damage to the corporation either through settlement or trial.

In contrast, many residents of third-world nations lack such knowledge, and/or recourse to courts may be unavailing. Therefore, many pharmaceutical manufacturers may strategically choose third-world nations to serve as test markets for new drugs.[75] This occurs because citizens of developed nations, aware of the risks involved in experimental new drugs, may not be willing to serve as subjects for a nominal sum, resulting in an inadequate number of volunteers. Many pharmaceutical companies are outsourcing clinical drug trials to underdeveloped nations, such as India,[76] Nigeria, and Russia.[77] Drug trials are a pre-requisite to obtaining FDA approval, and a large group of human research subjects are needed.[78] A third-world government's desire

---

70. *Id.*

71. *Id.*; WHO/UNEP Working Group, 1990, *Public Health Impact of Pesticides Used In Agriculture*, World Health Org., Geneva, Switz..

72. *See, e.g.*, Davis v. Wyeth Lab., Inc., 399 F.2d 121, 128-29 (9th Cir. 1968).

73. See Lily's settlement of Zyprexa cases. *See Eli Lily To Pay $700M in Zyprexa Settlement*, FOX NEWS.COM, Jan. 10, 2005, http://www.foxnews.com/story/o,2933,159192,00.html.

74. *See, e.g.*, Aaron Smith, *Merck Vows To Keep Fighting the Vioxx War*, CNNMONEY.COM. Aug., 3, 2006, http://money.cnn.com/2006/08/03/news/companies/Vioxx/index.htm.

75. *See* Sonia Shah, *Globalizing Clinical Research: Big Pharma Tries Out First World Drugs on Unsuspecting Third World Patients*, NATION, July 1, 2002, *available at* http://www.thenation.com/doc/20020701/shah.

76. *Drug Trials Outsourced to India*, BBC NEWS, Apr. 22, 2006, http://news.bbc.co.uk/1/hi/world/south_asia/4932188.stm.

77. *See* Abrahm Lustgarten, *Drug Testing Goes Offshore*, FORTUNE, Aug. 8, 2005, at 68.

78. Samantha Evans, *The Globalization of Drug Testing: Enforcing Informed Consent Through the Alien Tort Claims Act*, 19 TEMP. INT'L & COMP. L.J. 447, 447 (2005).

for additional revenue, coupled with the lack of knowledge of its citizens, provides an excellent environment for testing new drugs.[79]

IV. THE ALIEN TORT CLAIMS ACT

As detailed *supra*, there are numerous hazardous products that are either sold, transferred to, or manufactured in developing nations. The question, then, is whether the ATCA can be invoked by citizens of these nations for injuries arising from these products.

A. The Statute

Despite existing for over 200 years, the ATCA had been, until 1980, a stealth statute rarely invoked.[80] Notwithstanding the brevity of its words,[81] the statute has been found to be difficult to interpret. As one court noted, there is "complexity involved in the application of this cryptic statute in the context of a globalized economy and evolving international organizations."[82] The ATCA provides federal jurisdiction for "any civil action by an alien for a tort . . . committed in violation of the law of nations[83] or a treaty of the United States."[84] The statute permits aliens to file claims against American and foreign corporations and individuals for select tortious conduct committed in foreign countries.[85]

To be actionable, the tort must constitute a violation of the law of nations[86] or violate a treaty of the United States.[87] Conduct violates the

---

79. *Id.* at 478 ("Third World citizens are unaware of the notion of informed consent, which mandates that human research subjects must be 'adequately informed of the risks and benefits of the trial, of their rights as participants, and their choice whether or not to participate.' This has enabled researchers in host countries to evade informed consent and to enroll the large pools of individuals necessary to carry out trials. Because these experiments are perceived as the only way to obtain otherwise unaffordable medical treatment, this abuse is ignored by Third World governments. Sadly, because most studies in underdeveloped nations involve risky drugs and very little independent oversight, foreign clinical drug trials have frequently resulted in serious injuries and death to uninformed individuals, who may have elected not to participate had they been notified of the risks involved.").

80. *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (noting the dearth of cases that had previously arisen pursuant to the ATCA).

81. "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." 28 U.S.C. § 1350 (2000).

82. Maugein v. Newmont Mining Corp., 298 F. Supp. 2d 1124, 1130 (D. Colo. 2004) (rejecting defamation of character as actionable under the ATCA).

83. There is no bright-line test and courts have grappled with the issue of which torts are cognizable.

84. 28 U.S.C. § 1350 (2000).

85. Sosa v. Alvarez-Machain, 542 U.S. 692, 720-21 (2004).

86. *See* Mwani v. Bin Laden, 417 F.3d 1, 14 n.14 (D.C. Cir. 2005).

87. 28 U.S.C. § 1350.

law of nations if it contravenes "well-established, universally recognized norms of international law."[88] These norms must be "specific, universal, and obligatory."[89] If a norm is binding on nations, it is referred to as a *jus cogens*.[90] A *jus cogens* violation satisfies, but is not required to meet, the ATCA requirement.[91] Therefore, a tort can be cognizable if the conduct violates a treaty or a universally acknowledged norm of international law, whether or not the norm is a *jus cogens*.

Many torts have been rejected as predicate offenses permitted under the ATCA. Noncompliance with a particular form of representative government is not considered a violation of the law of nations.[92] Brief, arbitrary detention has also been found not to be actionable.[93] Sexual violence by itself has also been rejected.[94] Additionally, courts have held that seizure of property within a nation's borders does not constitute a violation, unless the actor is acting under color of law.[95]

Generally, courts have found that commercial claims and negligence suits lack the mutual concern of the majority of civilized nations to justify ATCA jurisdiction.[96] Examples of commercial conduct and negligence claims that courts have specifically held not actionable because they failed to meet the standard of international consensus include fraud,[97] conversion,[98] negligence and wrongful death,[99] defamation,[100] child custody,[101] and libel.[102]

B. Modern History of ATCA Litigation

The current wave of ATCA litigation can be traced to the United States Court of Appeals for the Second Circuit's landmark decision in

---

88. *See* Kadic v. Karadžić, 70 F.3d 232, 239 (2d Cir. 1995) (quoting Filártiga v. Peña-Irala, 630 F.2d 876, 887-88 (2d Cir. 1980)).

89. *In re* Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994).

90. Doe I v. Unocal, 395 F.3d 932, 945 n.14 (9th Cir. 2003).

91. *Id.* at 945 n.15.

92. Igartúa-de la Rosa v. United States, 417 F.3d 145, 151 (1st Cir. 2005), *cert. denied*, 541 U.S. 1035 (2006).

93. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004).

94. *See* Doe I v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24 (D.D.C. 2005).

95. *See* Bigio v. Coca-Cola Co., 239 F.3d 440, 448-49 (2d Cir. 2000) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(f) (1987)).

96. *See* Slawotsky, *supra* note 3, at 132, 150.

97. Hamid v. Price Waterhouse, 51 F.3d 1411, 1418 (9th Cir. 1995).

98. *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

99. Benjamins v. British European Airways, 572 F.2d 913, 916 (2d Cir. 1978).

100. Maugein v. Newmont Mining Corp., 298 F. Supp. 2d 1124, 1130 (D. Colo. 2004).

101. Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978).

102. Akbar v. N.Y. Magazine Co., 490 F. Supp. 60, 63 (D.D.C. 1980).

Filártiga v. Peña-Irala.[103] In *Filártiga*, the central issue was whether torture constituted a "violat[ion of] the law of nations," thus allowing plaintiffs' ATCA suit to proceed.[104] If the plaintiff could establish an international consensus with respect to torture's illegality pursuant to customary international law, the torture claims would be actionable.

Filártiga held that to be cognizable pursuant to the ATCA, a norm of international law must constitute a universal mutual concern.[105] "It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [Alien Tort Statute]."[106] The court held that to be a cognizable claim, the international law violation must be one that is universally condemned.[107] Pursuant to *Filártiga*, only concerns of a mutual dimension, rather than one of several concerns, will be cognizable.[108]

In analyzing whether torture was a violation of international law, the court found that the law of nations is not rigid, but flexible, and reflects an evolving standard of international law.[109] The Second Circuit noted that new norms of customary law may arise. "[T]he courts are not to prejudge the scope of the issues that the nations of the world may deem important to . . . their common good."[110] This broad and flexible definition meant that new torts might become actionable if an

---

103. 630 F.2d 876 (2d Cir. 1980). In *Filártiga*, two members of a Paraguayan family brought suit against a former Paraguayan police inspector for the torture and death of a third family member. *Id.* at 878. The court held that "deliberate torture perpetrated under color of official authority violates" the law of nations, and that ATCA jurisdiction is proper. *Id.* In arriving at this holding, the court interpreted Supreme Court precedents as establishing four propositions: first, the law of nations is part of federal common law, and cases arising under the law of nations arise under the laws of the United States as required by Article III of the Constitution, *id.* at 886; second, the "law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law'" *id.* at 880 (citing United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)); third, a norm must command "the general assent of civilized nations" to be part of the law of nations, *id.* at 881 (citing The Paquete Habana, 175 U.S. 677, 694 (1900)); and fourth, the law of nations must be interpreted "not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Id.*

104. *Id.* at 880.

105. *See id.* at 888.

106. *Id.*

107. *See id.* at 878.

108. *Id.* at 888. Similarly, in *Flores v. South Peru Copper Corp.*, the Second Circuit stated that the law of nations in ATCA litigation refers to customary international law, meaning "those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." 343 F.3d 140, 154 (2d Cir. 2003) (depublished).

109. *See Filártiga*, 630 F.2d at 884-87.

110. *Id.* at 888.

international acknowledgement developed with respect to the conduct. The court also held that torture was actionable under the ATCA.[111] Significantly, *Filártiga*'s far-reaching implication was endorsed by the Supreme Court.[112] *Filártiga* was followed by several high-profile cases against both foreign nationals and corporations.[113]

In *Sosa v. Alvarez-Machain*, the Supreme Court confirmed the ATCA as a potential vehicle to remedy certain outrageous conduct.[114] Rejecting the expansive view of the ATCA argued by plaintiffs' counsel, the Court ruled the ATCA was jurisdictional and did not provide a statutory cause of action.[115] However, the Court found the ATCA did vest federal courts with the power to hear violations of the law of nations, which is incorporated into federal common law, thereby providing the cause of action in ATCA litigation.[116] The Court found that the scope of the claims authorized by that statute was limited,[117] and approved a conservative approach to ascertaining the precise violations actionable under the ATCA.[118] The Court limited section 1350 (the ATCA) to suits that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable" to the torts recognized by the First Congress of the United States as violating the law of nations.[119] The paradigm violations noted by the Court were offenses against ambassadors, violations of safe conducts, and piracy.[120] However, the Court, citing *Filártiga*, held that international law violations must be evaluated in terms of current norms, not the norms of the eighteenth century.[121] Lower courts were provided with the ability to approve previously unrecognized torts if the conduct were to become the subject of universal concern.[122] Following *Sosa*, major corporations continued to

---

111. *Id.* at 878.

112. Sosa v. Alvarez-Machain, 542 U.S. 692, 724-25, 731 (2004).

113. Joel Slawotsky, *Doing Business Around the World: Corporate Liability Under the Alien Tort Claims Act*, 2005 MICH. ST. L. REV. 1065, 1074-76 (discussing post-*Filártiga* cases).

114. *Sosa*, 542 U.S. at 715. The Court underscored the validity of the ATCA in *Rasul v. Bush*, where the Court affirmed that the prisoners detained at Guantanamo might potentially use the ATCA to file actions. 542 U.S. 466, 485 (2004). Thus, according to the Court, aliens detained as terror suspects may bring suit against U.S. officials for violations of international law. *Id.*

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

116. *Id.*

117. *Id.*

118. *Id.* at 725.

119. *Id.*

120. *Id.* at 724. Some have argued that terrorism is substantially equivalent to piracy. *See* Mwani v. Bin Laden, 417 F.3d 1, 14 (D.C. Cir. 2005) (stating that terrorism is a colorable claim under the ATCA.).

121. *Sosa*, 542 U.S. at 732.

122. *Id.*

face ATCA litigation.[123] Many of the cases demonstrate a continued difficulty in applying the ATCA, causing the courts to issue conflicting rulings.[124]

C. *The Law of Nations*

When plaintiffs base their ATCA claims on the law of nations, rather than on a treaty, they must demonstrate that defendants' conduct breached a *universal* norm of international law,[125] meaning a norm that is "specific, universal and obligatory."[126] A norm is universal and obligatory if: (1) no state condones the act in question, and there is a recognizable universal consensus of prohibition against it; (2) there are sufficient criteria to determine whether a given action constitutes an occurrence of the prohibited act and thus violates the norm; and (3) the prohibition is nonderogable and thus binding at all times upon all persons.[127]

The law of nations "results from a general and consistent practice of states which is followed by them from a sense of legal obligation."[128] *Sosa* did not articulate an easy method for courts to interpret the law of nations. Indeed, as one court stated, "it would have been unquestionably

---

123. *See, e.g.*, Doe I v. Exxon Mobil, 393 F. Supp. 2d 20 (D.D.C. 2005) (international oil company defendant); *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7 (E.D.N.Y. 2005) (ATCA claims against American chemical corporations); *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (banking defendants).

124. Courts have arrived at conflicting decisions on a variety of ATCA issues. *Compare In re Agent Orange*, 373 F. Supp. 2d at 63 (holding war crimes and crimes against humanity have no statute of limitations), *with* Cabello v. Fernández-Larios, 402 F.3d 1148 (11th Cir. 2005) (holding statute of limitations on ATCA claims is ten years); *compare* Enahoro v. Abubakar, 408 F.3d 877, 884-85 (7th Cir. 2005) (holding torture is not actionable under the ATCA), *with In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994) (holding torture actionable under the ATCA); *compare In re Agent Orange*, 373 F. Supp. 2d at 52 (holding ATCA encompasses aiding and abetting liability), *with In Re* S. *African Apartheid Litig.*, 346 F. Supp. 2d at 550 (ATCA is limited to direct liability).

125. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999) ("[T]he ATS applies only to shockingly egregious violations of universally recognized principles of international law . . . . [Plaintiff] fails to show that these treaties and agreements enjoy universal acceptance in the international community." (internal quotation marks omitted)); *see also* Filártiga v. Peña-Irala, 630 F.2d 876, 888 (2d Cir. 1980) ("It is only where the nations of the world have demonstrated that the wrong is of mutual and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute.").

126. *In re Estate of Marcos*, 25 F. 3d at 1475.

127. *Id.*

128. Jama v. U.S. INS, 22 F. Supp. 2d 353, 362 (D.N.J. 1998) (citing United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)) ("The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'"); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986).

preferable for the lower federal courts if the Supreme Court had created a bright-line rule."[129]

Despite this, courts will usually have jurisdiction if plaintiffs can allege an international law violation of joint, rather than several, concern, as evidenced by agreements and regulations.[130] In evaluating whether a specific claim meets the jurisdictional requirements of the ATCA, a court will consider: (1) whether the complaint identifies a specific, universal, and obligatory norm of international law; (2) whether that norm is recognized by the United States; and (3) whether there has been a violation of the same.[131] "Courts faced with making this determination may be guided by judicial decisions enforcing the law of nations, the work of jurists and the general usage and practice of nations."[132] Courts may also look at non self-executing treaties and international agreements to determine accepted norms of international law.[133]

V. THE SELLING, MARKETING, TRANSFERRING, AND MANUFACTURING OF KNOWN HAZARDOUS PRODUCTS SHOULD BE COGNIZABLE UNDER THE ATCA

In deciding whether ATCA jurisdiction exists, the issue is whether the conduct constitutes a violation of the law of nations. Does the transboundary distribution of products known to cause serious injury and death constitute conduct that engenders the condemnation of the civilized world, thus qualifying it as a violation of an international norm?[134] Is there a global interest in avoiding double standards wherein dangerous products are transferred to nations whose populations are unaware of the

---

129. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 547.

130. Courts may disagree over what constitutes "universal acceptance" under international law. *Compare* Mendonca v. Tidewater, Inc., 159 F. Supp. 2d 299, 301-02 (E.D. La. 2002), *aff'd*, 33 F. App'x 705 (5th Cir. 2002) (finding that racial discrimination does not violate the law of nations because the Convention on the Elimination of Racial Discrimination does not enjoy "universal acceptance"), *with* Tachiona v. Mugabe, 234 F. Supp. 2d 401, 439-40 (S.D.N.Y. 2002) ("Systematic racial discrimination . . . is proscribed as [a] violation[] of international standards in various international instruments.").

131. Nat'l Coal. Gov't of Burma v. Unocal, Inc., 176 F.R.D. 329, 345 (C.D. Cal. 1997).

132. *In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001); Kadic v. Karadžić, 70 F.3d 232, 238 (2d Cir. 1995); *see also* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 165 (5th Cir.1999); Siderman de Blake v. Arg., 965 F.2d 699, 714-15 (9th Cir.1992).

133. *See* Sarei v. Rio Tinto P.L.C., 456 F.3d 1069, 1078 (9th Cir. 2006) ("As for the UNCLOS [United Nations Convention on the Law of the Sea] claim, the treaty has been ratified by at least 149 nations, which is sufficient for it to codify customary international law that can provide the basis of an ATCA claim.").

134. Dean T. Jamison et al., *International Collective Action in Health*, 351 LANCET 514, 515 (1998) ("Although responsibility for health remains primarily national, the determinants of health and the means to fulfill that responsibility are increasingly global.").

risks? Across the globe, there is growing concern over hazardous products and a growing acceptance of products liability law as a means to compensate injured parties. These concerns (1) are recognized universally, (2) establish legal requirements, (3) relate to obligations that are of mutual concern, and (4) are specific and enforceable.[135]

A. The Supreme Court's Approval of the Law of Nations' Adaptability

1. The *Filártiga* Holding that International Law Evolves with Changing Conditions

In the Second Circuit's *Filártiga* ruling, the court stated that to be actionable under the ATCA, the conduct must constitute a violation of an international norm that reflects a concern of all nations.[136] The court stated that the norm must "command the 'general assent of civilized nations'" to be part of the law of nations and that the law of nations must be interpreted "not as it was in 1789, *but as it has evolved and exists among the nations of the world today*."[137]

The crucial holding in *Filártiga* was the acknowledgement that norms of international law do change over time.[138] The court said that what might not be a violation of international law today might be held to be a violation in the future.

2. The Supreme Court's Endorsement of *Filártiga*

In *Sosa v. Alvarez-Machain*, the Supreme Court specifically commented with approval on *Filártiga*, leaving no doubt that the Second Circuit's holding that the law of nations evolves over time is the correct approach. The Court held: "The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filártiga v. Peña-Irala*."[139] *Sosa* held that in determining the viability of new actions, "we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[140]

---

135. Arndt v. UBS AG, 342 F. Supp 2d 132, 139 (E.D.N.Y. 2004) (citing Flores v. S. Peru Corp. 343 F.3d 140, 154-56).

136. *See Filártiga*, 630 F.2d at 880.

137. *Id.* at 881 (emphasis added).

138. *Id.* at 887.

139. *Sosa*, 542 U.S. at 731.

140. *Id.* at 725.

In addition to the Supreme Court's validation of the "evolving law" approach, there is a U.S. Congressional endorsement. In enacting the Torture Victim Protection Act, Congress enhanced the ATCA, but explicitly stated that the ATCA "should remain intact to permit suits based on . . . norms that already exist or may *ripen in the future* into rules of customary international law."[141]

Based on the aforementioned Supreme Court's endorsement of *Filártiga* and the Congressional acknowledgement that torts "may ripen in the future," conduct that may not have been cognizable under the ATCA at one time may become actionable at a later date. While courts have been reluctant to find negligence an actionable tort,[142] the Supreme Court has endorsed an approach whereby torts, other than the three original predicate offenses, are cognizable.[143] As demonstrated *infra*, the transfer of known dangerous products to populations unaware of risks or unprotected by their governments constitutes a violation of customary international law.

B. Avoiding Death and Serious Injury Is an International Norm

In *Sosa*, the Court cited approvingly to Judge Kaufman's remarks in *Filártiga* that a torturer is like a pirate—an enemy of all mankind.[144] Is not a producer of products who knows they can cause widespread death and serious injury an enemy of all people? Unlike the era of 200 years ago, today's highly mobile transportation system, vigorous world trade, and financial integration facilitates widespread transfer of products.

There is a universal consensus that avoiding death and serious personal injury is a shared mutual interest of all civilized nations.[145] All nations have an interest in protecting their citizens from death and serious injury. Indeed, the main purpose of nations is the protection of its citizens. This function is so essential and so important that protecting health trumps other "lesser" rights.[146]

---

141. Kadic v. Karadžić, 70 F.3d 232, 241 (2d Cir. 1995) (emphasis added).

142. *See, e.g.*, IIT v. Vencap, 519 F.2d 1001, 1015-16 (2d Cir. 1975).

143. *See Sosa*, 542 U.S. at 724-29.

144. *Id.* at 732.

145. This Article is not suggesting that garden-variety negligent conduct which does not result in death and serious injury should be cognizable. The conduct suggested to be cognizable is egregious deception and or criminally negligent behavior.

146. Michael Kirby, *The Right to Health Fifty Years On: Still Skeptical?*, 5 HEALTH & HUM. RTS. 7, 16 (1999) ("In the past, when human rights impinged on public health, they were usually discussed as a legal concept in terms of the right of public health authorities, acting for the state, to depart from human rights of individuals in the name of the public health of the whole community."); Chris Brown, *Universal Human Rights: A Critique*, *in* HUM. RTS. IN GLOBAL POLITICS 103, 110 (Tim Dunne & Nicholas J. Wheeler eds., 1999) (noting that human rights may

1. International Agreements and Treaties Demonstrate that the Sale of Known Hazardous Products Violates Customary International Law

Multilateral treaties are evidence of customary international law.[147] In addition to court decisions, scholars consider such agreements a "general principle . . . of law recognized by civilized nations" in accordance with article 38(1)(c) of the Statute of the International Court of Justice.[148] When many countries are party to an agreement, the principle is widespread; it is supported by the overwhelming number of civilized nations and it is an accepted principle of law.[149] While it is unlikely that the transboundary shipment of hazardous products rises to the level of a *jus cogens* norm,[150] exporting dangerous products is a violation of an international norm.

a. Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) provides that "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."[151] Pursuant to the UDHR, each person has a "right to *a standard of living adequate for the health* and well-being of himself and of his family, including food, clothing, housing and *medical care* and necessary social services."[152] The UDHR has been vested by the international community with tremendous "legitimacy through [the community's] actions, including its legal and political invocation at the national and

---

not be "absolutes to be defended in all circumstances"); Peter D. Jacobson & Soheil Soliman, *Co-opting the Health and Human Rights Movement*, 30 J. L., MED. & ETHICS 705, 713 (2002) ("Writings on health and human rights consistently recognize that individual rights can be limited to protect public health."). The International Covenant on Civil and Political Rights explicitly permits derogation from individual negative rights where "provided by law, . . . necessary to protect public safety, order, *health* or morals or the fundamental rights and freedoms of others." International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 12, S. Exec. Doc. E, 95−2 at 27 (1978), 999 U.N.T.S. 171, 176 (entered into force Mar. 23, 1976) (emphasis added).

147. *Sarei*, 456 F.3d at 1078 ("As for the UNCLOS [United Nations Convention on the Law of the Sea] claim, the treaty has been ratified by at least 149 nations, which is sufficient for it to codify customary international law that can provide the basis of an ATCA claim.").

148. U.N. Charter art. 38, para. 1.

149. *See Sarei*, 456 F.3d at 1078.

150. *Jus cogens* is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

151. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., art. 28, U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

152. *Id.* at art. 25.

international levels."[153] This "right to life" is a long-standing principle of international law, and clearly, the right to health is subsumed within the broader right to life.[154] Moreover, the right to life is considered a *jus cogens*[155] rule pursuant to which no deviation is permitted.[156]

The selling of products known to cause death and serious injury which results in death is murder.[157] Even if the product is known likely to cause injury rather than definitively, constructive knowledge of the dangerous propensities of a product should be considered murder.[158] When conduct evinces a reckless disregard for health, it constitutes a violation of international law.[159] The selling of products known to cause death or serious injury violates both the letter and spirit of the UDHR.

b. The Basel Convention

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) is an international agreement with over 160 parties[160] on the transboundary movement of hazardous waste products.[161] The Basel Convention imposes liability "directly on individuals, including corporations, and requires signatory states to enact domestic regulatory measures to punish offenders."[162]

Under the Basel Convention, the international movement of hazardous waste products "should be permitted only when the transport

153. Jonathan M. Mann et al., *Health and Human Rights*, *in* HEALTH AND HUM. RTS. 7, 16 (1994).

154. UDHR art. 3, G.A. Res. 217 A (III) Dec. 10, 1948 ("Everyone has the right to life, liberty and the security of the person."); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) Dec. 16, 1966.

155. *See* Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545, 575-76 (2000).

156. *Id.* at 578 (noting that "murder" includes the creation of conditions likely to result in death).

157. *Id.*

158. *See id.* at 577-79. "'[M]urder' is a violation of customary international law." When an actor's mens rea rises to the level required to prove murder, an ATCA claim exists, which "includes the creation of conditions likely to result in death." *Id.*

159. *See id.* at 577.

160. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, annex 1, Mar. 22, 1989, 28 I.L.M. 649, 678, *available at* http://www.basel.int/text/con-e-rev.pdf.

161. Press Release, Basel Convention, U.N. Env't Programme, Basel Convention on Hazardous Wastes and UNEP Regional Seas Programme To Fight Coastal Pollution Together Mar. 1, 2005, http://www.basel.int/press/presre1010305.doc.

162. Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT'L & COMP. L. REV. 429, 443 (2004).

and the ultimate disposal of such wastes is environmentally sound."[163] A subsequent 1995 Basel Ban Amendment prohibits transboundary movements of hazardous wastes from Organization for Economic Co-operation and Development (OECD) developed states to final disposal in non-OECD less developed states.[164]

Article 4 of the Basel Convention prohibits the "export of hazardous wastes or other wastes" to a member nation that has banned all imports, and, significantly, where a nation has a reasonable belief that waste products "will not be managed in an environmentally sound manner."[165] Article 4 is an embodiment of evolving international law that places a burden on a party to have a reasonable belief that an exported hazardous product will not cause injury to the native population. Article 11 of the Basel Convention permits nations to negotiate bilateral, multilateral, and regional transboundary agreements, if these arrangements "do not derogate from the environmentally sound management of hazardous wastes."[166]

A purpose of the Basel Convention is to prohibit the transfer of hazardous substances that will cause death or serious injury.[167] Substances known to cause cancer or chronic disease are within the ambit of the Basel Convention.[168] The products are not to be transported from one nation to another unless the receiving nation is adequately informed and has appropriate facilities to handle the product.[169] Hazardous waste material includes, "waste substances and articles containing or contaminated with polychlorinated biphenyls (PCBs) and/or polychlorinated terphenyls (PCTs) and/or polybrominated biphenyls (PBBs)," lead, and asbestos.[170] Moreover, several other

---

163. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *supra* note 160, 25 I.L.M. at 659.

164. Basel Ban Amendment, Sept. 22, 1995, 34 I.L.M. 850. The Basel Convention entered into force in 1992, however, the Amendment has not yet entered into force because it is awaiting ratification from three-fourths of the parties accepting it. It currently has sixty-one ratifications, sixty-two ratifications are needed to enter into force. *See* Secretariat of the Basel Convention, Status of Ratification, http://www.basel.int/ratif/frsetmain.php (last visited Sept. 5, 2007).

165. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *supra* note 160, 28 I.L.M. at 661-62.

166. *Id.* at 668.

167. *See id.* at 680. The annex states that poisonous characteristics are "[s]ubstances or wastes liable either to cause death or serious injury or to harm human health if swallowed or inhaled or by skin contact." *See also id.* at 658 (affirming that states are responsible for the fulfillment of their international obligation concerning health).

168. *Id.* ("Substances . . . if they are inhaled or ingested . . . may involve delayed or chronic effects, including carcinogenicity.").

169. *Id.* at 662.

170. *Id.* at 678.

regional and multilateral treaties banning the transboundary movement of hazardous waste corroborate that exporting hazardous products to developing countries violates customary international law.[171] The transfer to or manufacture in less developed nations of known hazardous products violates customary international law.

c. The International Covenant on Economic, Social, and Cultural Rights

According to the International Covenant on Economic, Social, and Cultural Rights (ICESCR) everyone has the right "to the enjoyment of just and favourable conditions of work which ensure . . . [s]afe and healthy working conditions."[172] The marketing and selling of banned or dangerous products to less developed nations is a violation of the ICESCR inasmuch as such products are known to be injurious to health and safety. The ICESCR obligates nations, similar to the Stockholm Convention, to provide technical knowledge and aid to developing countries.[173] The ICESCR requires that developing nations receive training and guidance to improve their populations' safety and health.[174] The U.N. Office of the High Commissioner for Human Rights has noted these requirements on the part of the developed world in its commentary to article 2 of the ICESCR.[175]

---

171. Such treaties include: the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes Within Africa, 1994, *available at* http://www.opcw.org/html/db/cwc/more/bamako.html, the Izmir Protocol (Mediterranean Sea) (not yet in force) http://www.basel.int/article11/mediterranean.doc, Agreement Amending the Fourth ACP-EC Convention of Lome, Nov. 4, 1995, *available at* http://www.acpsec.org/en/conventions/lome4_bis_e.htm, (evidencing a commitment from European Community states to African, Caribbean, and Pacific States) the Rotterdam Convention, Sept. 10, 1998, *available at* http://www.pic.int/ (requiring notification and consent prior to transboundary shipment of hazardous waste), and the Waigani Treaty (South Pacific), http://www.sidsnet.org/mir/pacific/forumsec/docs/Gen_Docs/wc.htm. *See also* Basel Action Network, Country Status-Waste Trade Ban Agreements, *available at* http://www.ban.org/country_status/country_status_chart.html.

172. International Covenant on Economic, Social, and Cultural Rights, opened for signature Dec. 16, 1966, art. 7, 993 U.N.T.S. 3, 6 [hereinafter ICESCR].

173. *Id.* art. 2 ("[E]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means. . . .").

174. *Id.* art. 6.

175. The Nature of States Parties Obligations (art. 2, para. 1), ICESCR General Comment 3, para. 13 (1990), U.N. Office of the High Commissioner for Human Rights, U.N. Doc. E/1991/23, *available at* http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument.

d. Stockholm Convention on Persistent Organic Pollutants

The export of hazardous materials for disposal is addressed under the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention), which went into force on May 17, 2004.[176] Pursuant to the Stockholm Convention, a party to the treaty may export persistent organic pollutants (POPs), including PCBs, only "[f]or the purpose of environmentally sound disposal."[177] The treaty specifically warns that PCBs are "[n]ot [to be] transported across international boundaries without taking into account relevant international rules, standards, and guidelines."[178] Therefore, a nation seeking to export POPs must analyze its duties under international law. In article 12, the treaty obligates developed nations to provide "timely and appropriate technical assistance" to the developing countries and parties with economies in transition.[179] This is further evidence of customary international law underscoring the violation of international law resulting from exporting known hazardous products.

e. OECD

OECD decisions have also incorporated international concern over the transboundary movement of hazardous waste products.[180] OECD guidelines prohibit export of hazardous wastes from OECD countries to nonmember countries lacking proper disposal facilities.[181] The United

176. Stockholm Convention on Persistent Organ Pollutants, art. 3, para. 1(a), May 22, 2001, U.N. Doc. UNEP/Pops/CONF/4, 40 I.L.M. 532-34; On April 11, 2002, then EPA Administrator Christine Todd Whitman announced that President Bush was submitting the Stockholm Convention on Persistent Organ Pollutants to the United States Senate for its consideration and ratification. President Bush endorsed the treaty in a Rose Garden Ceremony on April 19, 2001. Press Release, EPA, President Bush Sends the Stockholm Convention on Persistent Organic Pollutants to Senate for Ratification; Submits Legislation to Congress to Implement Treaty (Apr. 11, 2002), http://yosemite1.epa.gov/opa/admpress.nsf/blab9f485b098972852562e7004dc686/cd4fa7597611989185256b980057b5cf?OpenDocument.

177. Stockholm Convention on Persistent Organic Pollutants, *supra* note 176, art. 2 para. 2(b)(i).

178. *Id.* art. 6(d)(iv).

179. *Id.* art. 12(l).

180. *See* Convention on the Organisation for Economic Co-Operation and Development, art. 5(a), Dec. 14, 1960, 12 U.S.T. 1728, 888 U.N.T.S. 179; James Salzman, *Labor Rights, Globalization, and International Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769, 185 (2000).

181. *See* OECD Decision and Recommendation of the Council Concerning the Control of Transfrontier Movements of Hazardous Waste, June 5, 1986 (establishing a three-tier system for the shipment of waste within the OECD area); OECD Decision/Recommendation of the Council on Exports of Hazardous Wastes from the OECD Area, June 5, 1986, 1986 O.E.C.D. C(86)64 (final), para. I(iv) 25 I.L.M. 1010, 1011 (prohibiting shipments from OECD to non-OECD countries unless the wastes are directed to an adequate disposal facility); OECD Decision of the

States acknowledges the OECD decisions and has issued a regulation incorporating the obligations of the OECD, although it has continued to transport to non-OECD countries lacking sufficient disposal facilities.[182] The export of hazardous products to populations lacking proper training or knowledge regarding the risks associated with known hazardous products would contravene OECD policy and obligations.

f. Other Agreements

As concerns over product safety have spread globally, many countries and international organizations have established regulations regarding hazardous products. The increase in world trade has significantly influenced international law. For example, the movement of products between nations has become the subject of international regulation. The Cartagena on Biosafety is illustrative of the universal concern over health safety due to transboundary movement of biotechnology products.[183] The Lugano Convention provides for liability for damages caused by activity to the environment.[184]

The U.N. Covenant on Economic, Social and Cultural Rights already applies to businesses in such areas as food,[185] water,[186] and health.[187] The Global Sullivan Principles of the Sullivan Foundation (Sullivan Principles) also reflect these universal concerns.[188] The Sullivan

---

Council on Transfrontier Movements of Hazardous Wastes, May 27, 1998, 1998 O.E.C.D. C(88)90 (final) (addressing reporting).

182. *See* FTC Imports and Exports of Hazardous Waste: Implementation of OECD Council Decision C(92)39 Concerning the Control of Transfrontier Movement of Wastes Destined for Recovery Operations, 61 Fed. Reg. 16,290-91 (Apr. 12, 1996) (noting that this final rule is necessary to implement OECD Council Decision C(92)39/FINAL and incorporating that decision by reference); *But cf.* 40 C.F.R. § 262 (2005) (imposing only notification and consent requirements for exports to non-OECD countries, and not addressing the requirement for adequate disposal facilities).

183. Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000), http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf (last visited Oct. 11, 2007) ("[Certain articles] seek to ensure the development of appropriate procedures to enhance the safety of biotechnology in the context of the Convention's overall goal of reducing all potential threats to biological diversity, taking into account the risks of human health.").

184. Council of Europe: Convention Civil Liability Resulting from Activities Dangerous to the Environment, art. 6-7, June 21, 1993, 32 I.L.M. 1228.

185. U.N. Econ. & Soc. Council, Committee on Econ., Soc. and Cultural Rts., *General Comment 12: The Right to Adequate Food*, U.N. Doc. E/C.12/1999/5.

186. U.N. Econ. & Soc. Council, Committee on Econ., Soc. and Cultural Rts., *General Comment 15: The Right to Water*, U.N. Doc. E/C.12/2002/11.

187. U.N. Econ. & Soc. Council, Committee on Econ., Soc. and Cultural Rts., *General Comment 14: The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/4.

188. Former U.S. Secretary of State Colin Powell, "These are principles that have become universal, that are well known to all of us. Principles that talk about corporate responsibility for

Principles include: provide a safe and healthy workplace; protect human health and the environment; and promote sustainable development.[189]

As evidenced by the accords and agreements of leading global organizations, such as the United Nations, as well as the laws and international cooperation of many nations, the export of products known to cause death or serious injury is reflective of the mutual concern of nations and constitutes a violation of an international norm. It is beyond peradventure that civilized nations share a mutual concern regarding the avoidance of dangerous products.

2. Product Liability Laws

In addition to the examples of customary international law embodied in the international agreements above, liability for the reckless disregard of the health and safety of others is a widely accepted principle of international product liability law.[190] Product liability law is becoming a global phenomenon with the vast majority of nations recognizing it as a special field. Most product liability legislation is "driven by an increasing concern for consumer protection which has become the leading, albeit not the uniform, paradigm in this area."[191]

Indeed, "product liability has established itself in the vast majority of economically developed countries, is recognized as a special subject in many other parts of the world, and [has] a tendency . . . to spread further. In short, it is fast becoming a global phenomenon."[192]

---

those nations that are in need." Global Sullivan Principles, Quotes, http://www.thesullivanfoundation.org/gsp/principles/quotes/default.asp (last visited Aug. 29, 2007).

189. Global Sullivan Principles, Sullivan Found., http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp. (last visited Sept. 8, 2007).

190. *See, e.g.*, WILLIAM HOFFMAN & SUSANNE HILL-ARNING, GUIDE TO PRODUCT LIABILITY IN EUROPE 3-4 (Kluwer Law & Tax 1994); Comm'n of the European Communities, First Report on the Application of the Council Directive on the Approximation of Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products (85/374/EEC) (Dec. 13, 1995) COM (05) 617 final (cited as EC Report I) [hereinafter *EC Report I*]; *Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products*, at 8-9, COM (2001); Comm'n of the European Communities, *Green Paper, Liability for Defective Products* para. 2.2, COM (1999) 396 final (July 28, 1999) (cited as Green Paper); PRODUCT LIABILITY IN THE ASIA-PACIFIC (Jocelyn Kellam ed., 1995); Cheon-Soo Kim, *Theories and Legislation of Products Liability in the Southeast Asian Countries*, 6 J. OF SOC. SCI. RES. 55 (1999); James Henderson & Aaron D. Twerski, *What Europe, Japan, and other Countries Can Learn from the New American Restatement of Products Liability*, 34 TEX. INTL. L.J. 1 (1999).

191. *See* Mathais Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 756 (2003).

192. *Id.* at 757.

a. United States

The law of product liability is well entrenched in American law. Indeed, the fastest growing segment of product liability is mass torts, and a tremendous number of lawsuits alleging that products have caused serious injury and death have proceeded through the courts.[193] The volume of these cases is large, and specialized courts with special masters or mediators and designated judges have been established to hear these types of cases.[194] Clearly, the marketing of products known to cause disastrous injuries is considered reprehensible and actionable. While both compensatory and punitive damages are available, the latter damages are appropriate only when the defendant had knowledge of the harmful effects of the product or acted with gross indifference to the safety of others.[195]

b. International

Across the globe, there is a growing recognition that product liability laws are a vehicle to compensate parties injured from dangerous products. Pursuant to the 1985 European Union Product Liability Directive, a manufacturer is liable for damage caused by a product defect.[196] According to the directive, a product is defective if it fails to provide adequate safety.[197] Additionally, the German legislature has passed a special statute on pharmaceuticals (Arzneimittelgesetz)

---

193. Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 883-85 (2007) ("For the last twenty years, mass toxic tort litigation has dominated academic, judicial, and public policy debate over product liability litigation. Scholars chronicled the civil justice system's response to mass litigation arising out of exposure to asbestos and Agent Orange, and the use of pharmaceutical products and medical devices, including Bendectin, blood factor concentrate, intrauterine contraceptive devices, and silicone gel breast implants. Appellate opinions discussed the impact of mass litigation procedures on corporate decision-making. Legal ethicists debated the fairness of mass settlements. Journalists highlighted the role of larger-than-life (and richer than Croesus) mass tort plaintiff attorneys in shaping the litigation. Committees of judges and practitioners debated how to mold civil procedure rules to fit mass tort cases. Risk analysts were asked to predict the advent of the 'next mass tort,' and practitioners nominated candidates for the title. And in 2003, perhaps the most telling indicator of the rise of mass tort litigation, John Grisham published *King of Torts*, the story of a public defender who amasses millions when he colludes with a corporation to settle a (rather outlandish) mass product defect lawsuit.").

194. *See* New Jersey Judiciary Online, Vioxx Information Center, http://www.judiciary.state.nj.us/mass-tort/vioxx/index.htm (last visited Oct. 11, 2007).

195. Joel Slawotsky, *The Impropriety of Levying Punitive Damages on Innocent Successor Corporations*, 38 DUQ. L. REV. 49, 64 (1999).

196. EC Report I, *supra* note 190, at 29.

197. *Id.* art. 8.

providing for strict liability and forcing drug manufacturers to ensure liability coverage.[198]

Pursuant to European Union (EU) law, injuries caused by defective products are cognizable. "Whereas the protection of the consumer requires compensation for death and personal injury to protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect."[199]

In addition, products banned in EU countries are prohibited from being sent to other nations.[200] "Export from the [European] Community of dangerous products [that] have been the subject of a decision . . . shall be prohibited unless the decision provides otherwise."[201]

The EU also provides for protection from the ill effects of pesticides,[202] asbestos,[203] and chemical agents.[204] The EU Directive on the protection of workers from the risks related to exposure to asbestos at work reflects international concern over asbestos exposure.

In the United Kingdom, the Health and Safety at Work Act of 1974 imposes a duty on an employer to ensure the health, safety, and welfare of employees and a similar duty towards other persons.[205] Interestingly, this act may be amended in light of globalization in order to impose liability on corporations for conduct leading to injury abroad.[206]

In Canada, Bill C-45 provides for prosecution of organizations and individuals for both regulatory contraventions and simultaneously, as criminals for reckless and intentional conduct that shows disregard for worker and public safety.[207]

---

198. *See* Manfred Wandt, *German Approaches to Product Liability*, 34 TEX. INT'L. L.J. 71, 83, 90-91 (1999).

199. Council Directive 85/374, 1985 O.J. (L 210) 29, 29.

200. Council Directive 2001/95 art. 13(3), 2001 O.J. (L11) 4, 12 (EC).

201. *Id.*

202. Council Directive 91/414, 1991, O.J. (L 230) (EC).

203. Council Directive 2003/18 pmbl, 2003 O.J. (L97) 48, 18 (EC).

204. Council Directive 98/24 pmbl, 1998 O.J. (L 131) 11 (EC).
Council Directive 2003/18 pmbl, 2003 O.J. (L 97) 48, 18 (EC).

205. Under the provisions of the U.K. Health and Safety at Work etc Act 1974, individual and corporate employers are bound by a duty imposed by law to do all that is reasonably practicable to ensure the health and safety of employees and other persons. Health and Safety at Work etc. Act, 1974, e.37 (Eng.), *available at* http://www.hse.gov.uk/legislation/hswa.pdf.

206. *See* Health & Safety Executive, Statement of Forthcoming Regulations in 2007/8, http://www.hse.gov.uk/legislation/forthcoming.htm (last visited Oct. 11, 2007).

207. Press Release, Can. Dept. of Justice, Parliament Passes Bill C-45: Stronger Laws Affecting the Criminal Liability (Oct. 31, 2003), *available at* http://www.canada-justice.ca/en/news/nr/2003/doc_31024.html.

c. Punitive Damages for Outrageous Misconduct

Internationally, punitive damages are assessed[208] in personal injury litigation for reckless and wanton disregard for human health and safety.[209] Globally, the standard for imposing punitive damages is similar—outrageous misconduct.[210] Punitive damages are designed to punish and deter nefarious,[211] especially willful, or malicious conduct.[212]

In common law systems, the concept and imposition of punitive damages is well entrenched. Australia, Canada, England, New Zealand, and the United States award punitive damages.[213]

---

208. Generally, punitive awards are not imposed in civil law countries in private actions, but are available in many common law countries. In addition, the majority of civil law nations limit recovery of damages in private actions to an amount that restores a party to its preinjury condition. However, some civil law countries such as those of Norway, Poland, Brazil, Israel, and the Philippines allow for punitive awards. *See* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 82, 86-87, 93-94 (Andre Turk ed., J.C.B. Mohr 1916); Civil Code of the Polish People's Republic, art. 448 (Polish Academy of Sciences Institute of State and Law trans., 1981); Código Civil [C.C.] arts. 1547, 1550 (Braz.) (Joseph Wheless trans., 1920); Israel Gilead, *Tort Law*, *in* THE LAW OF ISRAEL: GENERAL SURVEYS 275, 474 (Itzhak Zamir & Sylviane Colobo eds., 1995); Civil Code arts. 2197, 2216, 2233-35 (Phil.).

209. John Y. Gotanda, Punitive Damages: A Comparative Analysis, 42 COLUM. J. TRANSNAT'L L. 391, 392-93; *see, e.g.*, *id.* at 392 n.2.

210. *See* DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 3.9 (1973) (citing RESTATEMENT OF TORTS § 908 (1939)); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 275 (1935). Punitive damages differ from aggravated damages. Aggravated damages are compensatory in nature, awarded when high-handed conduct increases the injury to the plaintiff. Aggravated damages are often awarded "for injury caused to the plaintiff's feelings caused by insult, humiliation and the like." Lamb v. Cotogno, (1987) 164 C.L.R. 1, 8 (Austl.). By contrast, punitive damages are intended to punish. However, the distinction between the exemplary and aggravated damages is not always clear as commentator notes: "'Aggravated damage' indicates that the loss to the plaintiff is increased and can therefore only have reference, or lead on, to compensatory damages; but 'aggravated damages' is ambiguous in this respect and could refer equally to compensatory damages and to exemplary damages." HARVEY MCGREGOR, MCGREGOR ON DAMAGES 211 n.1 (14th ed. 1980).

211. *See* Smith v. Wade, 461 U.S. 30, 54 (1983) ("Punitive damages are awarded . . . 'to punish [the defendant] for his outrageous conduct and to deter . . . others like him from similar conduct in the future.'" (quoting RESTATEMENT (SECOND) OF TORTS § 908(1) (1979))); *see also* LINDA J. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.2(A)(1) (4th ed. 2000) ("The most frequently stated purpose of punitive damages is to punish the defendant for his wrongdoing and to deter him and others from similar misconduct.").

212. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 364-66, 373-74 (1994).

213. *See* Lamb v. Cotogno, 164 C.L.R. 1 (1987); Musca v. Astle Corp. Pty. Ltd., 80 A.L.R. 251 (1988); Lackersteen v. Jones, 92 F.L.R. 6 (1988); H.S. v. Mundy, 9 D.L.R.3d 446 (Ont. Co. Ct. 1969); Civil Code, S.Q., ch. 64, art. 1621 (Que.) (1991); Wilkes v. Wood, 98 Eng. Rep. 489, 498 (C.P. 1763); Rookes v. Barnard, [1964] All E.R. 367 (H.L.); Cassell & Co., v. Broome, [1972] 1 All E.R. 801 (H.L.); Donselaar v. Donselaar, [1982] 1 N.Z.L.R. 97; Taylor v. Beere, [1982] 1 N.Z.L.R. 81; TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993). *See also* FRANCIS TRINDADE & PETER CANE, THE LAW OF TORTS IN AUSTRALIA 242-43 (1985); S.M. WADDAMS, THE LAW OF DAMAGES 562 (1983); JOHN W. MORRISON, THE INSURABILITY OF PUNITIVE DAMAGES: COMMENT & JURISDICTIONAL ANALYSIS 10-12 (1985); STEPHEN M.D. TODD,

In those situations where punitive damages have, in fact, been imposed for exposing persons to dangerous products, the same conduct committed internationally should also be considered reckless and a violation of customary international law and thus be cognizable under the ATCA.

C. Select Conduct

It is crucial to note that this Article is not suggesting that conduct encompassing ordinary gross negligence should be actionable pursuant to the ATCA. Only outrageous misconduct, such as the marketing of products known to cause death and serious personal injury, should be actionable under the ATCA. The category of claims capable of triggering jurisdiction suggested in this Article is limited to products causing devastating injury accompanied by the defendant's knowledge of the product's danger.

A court reviewing an international product liability suit should evaluate several factors in ascertaining whether ATCA jurisdiction exists. These factors will be useful in determining whether the conduct is condemned by the majority of civilized nations and thus fulfills the requirement that it be the subject of the mutual concern of nations. The factors are: (1) whether the manufacture or usage of the product has been banned, (2) whether punitive awards have been assessed against a manufacturer of the product, (3) whether there is evidence that the hazards of the product were known to the defendant, (4) whether the product has been voluntarily withdrawn in developed nations, and (5) whether a defendant has entered into global settlements to resolve mass torts litigations in other countries.

VI. CONCLUSION

Concomitant with increased scientific knowledge, recent years have witnessed a surge in global trading and the export of various products. While the types of torts found to be cognizable under the ATCA to date have not included personal injury, these prior rulings do not reflect our current globalized marketplace. With the proliferation of free trade and

---

THE LAW OF TORTS IN NEW ZEALAND (3d ed. 2001); RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO LAW AND PRACTICE § 1.2 (1991). Punitive damages also are available in Northern Ireland and the Republic of Ireland. *See* Whelan v. Madigan, [1978] I.L.R.M. 136 (H.C.); Garvey v. Ireland, [1981] I.L.R.M. 226 (H.C.); *see also* BRYAN M.E. MCMAHON & WILLIAM BINCHY, IRISH LAW OF TORTS 559 (2d ed. 1990); LAW REFORM COMM'N, CONSULTATION PAPER ON AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES (1998), http://www.lawreform.ie/publications/data/Irc/Irc_97.html.

the reduction in political and economic hurdles, developing nations are undergoing dynamic growth. Products are being exported to rapidly expanding markets. The interests of the governments in some developing nations do not always comport with notions of consumer protection and adequate warnings of product dangers. In addition, corporations may not have sufficient financial disincentive from exporting these dangerous products.

Does the international export of products known to cause catastrophic injuries constitute a mutual concern of nations? While the types of conduct found to be cognizable under the ATCA have not included negligence, powerful reasons exist for permitting the invocation of ATCA jurisdiction in limited circumstances for outrageous misconduct. A quintessential example of the type of misconduct where ATCA jurisdiction is appropriate is the selling of known hazardous products, particularly those substances previously banned, restricted, or withdrawn. The selling of known dangerous products which have previously resulted in substantial death and serious injury is a form of egregious and reckless tortious conduct constituting a violation of customary international law and it should be cognizable under the ATCA.