

LIABILITY FOR DEFECTIVE CHINESE PRODUCTS UNDER THE ALIEN TORT CLAIMS ACT

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A growing number of reports have linked death¹ and serious injury worldwide to an array of consumer products manufactured in China.² Across the globe, from Australia,³ New Zealand,⁴ Shanghai,⁵ Singapore,⁶

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1. Over eighty people died after ingesting the blood thinner Heparin which contained a defective component ingredient. Justin Blum, *Tainted Drug Imports Set Off Warnings, Not FDA Action*, BLOOMBERG.COM, May 30, 2008, <http://www.bloomberg.com/apps/news?pid=20601103&sid=aphMT.TmocZM> (“The agency received a ‘wake-up call’ this year after the deaths of 81 people who took the blood thinner heparin, according to a top FDA official. The drug was contaminated by an ingredient from China.”). Forty Panamanians died in 2006 due to defective Chinese toothpaste. Emily Brown, *Chinese Toothpaste for Hotels Is Recalled Worldwide*, BLOOMBERG.COM, Aug. 13, 2007, <http://quote.bloomberg.com/apps/news?pid=20601087&sid=amatJ.lmPcTI> (“The substance, mixed with cough syrup, was responsible for more than 40 deaths in Panama beginning in September 2006, according to the FDA Web site.”). Deaths have also been attributed to jewelry with dangerously high lead levels.

In 2006, a 4-year-old child died after eating a piece of costume jewelry routinely given away with purchases by sneaker manufacturer Reebok. The cause of death: lead poisoning. “I was shocked a child had died,” says the owner of a nine-person jewelry manufacturing company in New York. Although her company’s products were not involved, the entrepreneur wanted to be sure the necklaces and bracelets she was making in China were safe. She had them tested and discovered the lead content was off the charts.

Jeremy Quittner, *The China Code*, BUS. WK. ONLINE, Aug. 17, 2007, http://www.businessweek.com/smallbiz/content/aug2007/sb2007089_716295.htm?campaign_id=rss_daily.

2. The quality of Chinese products is also a problem in China.

False wine labels don’t fall into the category of bogus antibiotics, which killed seven people in China last year. No one has perished from sipping a mock merlot. But the same toxic toothpastes and anti-freeze-tainted cough syrups that killed dozens of people in Panama and Haiti were on store shelves in China until last month. Other items recalled overseas—including seafood tainted with antibiotics, flammable baby clothes, unsafe extension cords and exploding batteries—generally remain in stores in China.

Tim Johnson, *Wine May Not Be What It Seems in China*, MCCLATCHY NEWSPAPER, Aug. 22, 2007, http://www.mcclatchydc.com/staff/tim_Johnson/story/19122.htm.

3. See Yuko Narushima, *Fisher-Price Toys Recalled in Australia*, SYDNEY MORNING HERALD, Aug. 2, 2007, <http://www.smh.com.au/news/national/fisherprice-toys-recalled-in-australia/2007/08/02/1185648026354.html> (“Mattel Australia recalled 43,000 Fisher-Price toys today after characters including Dora the Explorer, Sesame Street’s Ernie and Barney the Dinosaur were found to be coated in dangerous levels of lead.”).

4. *Id.* (“In New Zealand, 1300 toys from eight product lines were recalled.”). See also *Toxic Clothes?*, REUTERS, Aug. 22, 2007, <http://www.timesnow.tv/Newsdtls.aspx?NewsID=2172> (“The latest under the scanner is clothing. New Zealand government has announced it’s investigating Chinese textiles for dangerous chemicals.”).

Malaysia,⁷ the EU,⁸ and Thailand⁹ to the United States,¹⁰ dangerous defects are being discovered, products are being recalled, and people have been seriously injured by products manufactured in China. The allegedly defective products include baby bibs,¹¹ boy-scout badges,¹² chocolate,¹³ food,¹⁴ mattresses,¹⁵ pharmaceuticals,¹⁶ tires,¹⁷ toothpaste,¹⁸ toys,¹⁹ vitamins,²⁰ and other consumer items.

5. Defective Chinese toys were removed from stores in Shanghai.

Toys 'R' Us Asia Ltd., a unit of Hong Kong-based Li & Fung Group, said it removed from its stores Chinese-made toys that contained lead, a day after eight U.S. companies recalled products tainted with the dangerous metal.

The Hong Kong-based company removed the "Totally Me Funky Room Decorating Sets" from its stores in the city, Shanghai, Singapore, Malaysia and Thailand, it said in a faxed-statement [sic] today. The statement didn't say how many items were withdrawn.

Kelvin Wong, *Toys 'R' Us Asia Removes China-Made Products Containing Lead*, BLOOMBERG.COM, Oct. 5, 2007, <http://www.bloomberg.com/apps/news?pid=20601080&sid=aAIDU0WQIGXI&refer=asia>.

6. *Id.*

7. *Id.*

8. Nearly half of all 2006 product recalls in the EU involved defective Chinese products. *See EU Trade Chief Warns China on Toy Safety*, REUTERS, Aug. 20, 2007, <http://in.reuters.com/article/businessNews/idINIndia-29067120070820> ("In 2006, China accounted for almost half of the 924 defective products reported by the EU's consumer protection system, RAPEX, which heightened tensions over China's trade surplus with the EU.").

9. Wong, *supra* note 5.

10. *See infra* notes 11, 13. *See also* Jake Hooker & Walt Bogdanich, *Tainted Drugs Tied to Maker of Abortion Pill*, N.Y. TIMES, Jan. 31, 2008, at A1 ("A huge state-owned Chinese pharmaceutical company that exports to dozens of countries, including the United States, is at the center of a nationwide drug scandal after nearly 200 Chinese cancer patients were paralyzed or otherwise harmed last summer by contaminated leukemia drugs.").

11. Eric Lipton, *Some Baby Bibs Said to Contain Levels of Lead*, N.Y. TIMES, Aug. 15, 2007, at C1, available at <http://www.nytimes.com/2007/08/15/business/15lead.html> ("Certain vinyl baby bibs sold at Toys "R" Us stores appear to be contaminated with lead, laboratory tests have shown, making the inexpensive bibs another example of a made-in-China product that may be a health hazard to children.").

12. Felix Lowe, *Lead Scare for Scout Badges Made in China*, TELEGRAPH.CO.UK, May 10, 2007, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/10/05/wscout105.xml> ("Chinese products took another turn for the worse after it emerged that as many as 1.6 million plastic Chinese-made scout badges could be recalled after a test revealed high levels of lead in the paint.").

13. *See Recalls May Hurt China's Foreign Revenue*, ECONOMIC TIMES, Sept. 12, 2007, http://economictimes.indiatimes.com/News/International_Business/Steady_rise_in_US_recalls_likely_to_eat_into_Chinas_overseas_revenue_/articleshow/2360240.cms ("This year, 60% of US recalls were of Chinese-made products ranging from vitamins to chocolate, according to New York Democratic Senator Charles Schumer.").

14. *See Chinese Dumplings Sicken 10 Japanese*, USA TODAY, Jan. 30, 2008, http://www.usatoday.com/news/world/2008-01-30-tainted-dumplings_N.htm?csp=34 ("[T]en Japanese were sickened, including a child who fell into a coma, after eating Chinese-made dumplings contaminated with insecticide . . .").

15. Ting Ting Ng, *U.S. Recalls of China Goods Almost Triple Since June*, BLOOMBERG.COM, Sept. 11, 2007, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aTgMBrHfRjGM&refer=home> ("Beter Bed Holding NV, Europe's largest mattress retailer, recalled 1,310 mattresses imported from China on Aug. 17 because they may contain poisonous materials.").

This Article discusses whether jurisdiction exists pursuant to the Alien Tort Claims Act (“ATCA”)²¹ for suits claiming death and serious injury arising out of these hazardous products. An extremely contentious statute,²² the ATCA permits aliens to file suit for violations of customary international law. Both corporations and individuals have been forced to defend themselves for an array of misconduct alleged to constitute violations of international law.²³ However, to invoke ATCA jurisdiction,

16. Hooker & Bagdanich, *supra* note 10.

17. *Tires Made in China Recalled*, WASH. TIMES, Aug. 10, 2007, <http://www.washingtontimes.com/article/20070810/BUSINESS/108100044/1006> (“A tire importer said yesterday it would recall 255,000 Chinese-made tires it claims are defective because they lack a safety feature that prevents tread separation.”).

18. *See* Brown, *supra* note 1 (“Chinese toothpaste distributed to hotels worldwide by a U.S. company has been recalled because it may contain a chemical used in antifreeze, adding to recent cases of unsafe food and drug imports.”).

19. *See, e.g.*, U.S. CONSUMER PROD. SAFETY COMM’N, RECALL ALERT #07-556, *Gemmy Industries Corp. Recalls Flashing Eyeball Toys Due to Chemical Hazard*, June 7, 2007, <http://www.cpsc.gov/cpsc/pub/prerel/prhtml07/07556.html> (description of kerosene-filled toy eyeball); *Mattel Recalls 18.2 Million Chinese-Made Toys*, CTV.CA, Aug. 14, 2007, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070814/china_recall_070814/20070814?hub=TopStories&s_name= (“Mattel Inc. has announced further recalls affecting millions more Chinese-made toys due to lead paint and the presence of small, powerful magnets that could be ingested by children.”).

20. *See* ECONOMIC TIMES, *supra* note 13.

21. Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

22. *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.”); Michael Freedman, *Ich bin ein Tort Lawyer*, FORBES, Jan. 6, 2003, at 49, *available at* <http://www.forbes.com/global/2003/0106/017.html> (last visited June 1, 2008) (“Foreigners have had some success suing U.S. companies in America. They rely on the Alien Tort Claims Act, a 1789 law that gives U.S. courts wide jurisdiction over suits alleging human-rights violations. Unocal, for instance, has been sued in California by Burmese residents on slave labor charges. But the cable-car case [the trial of fourteen German and Austrian and three U.S. companies for damages resulting from a deadly cable-car fire in Austria] goes further, forcing foreign companies to come to the U.S. to defend themselves against personal injury and mass disaster claims that took place thousands of kilometers away.”).

23. *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, 936 (9th Cir. 2002) (alleging that oil company defendant aided and abetted the murder, torture, and enslavement of pipeline workers in Myanmar); *Abdullahi v. Pfizer*, No. 01 Civ. 8118, 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 (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. 2d at 542 (S.D.N.Y. 2004) (suit against financial institutions for purported collaboration with apartheid regime in South Africa).

only wrongs²⁴ reflecting the mutual concern of the nations of the world are cognizable.²⁵ To date, the ambit of claims found by courts to satisfy the “global mutual concern” standard include terrorism,²⁶ crimes against humanity,²⁷ environmental damage,²⁸ war crimes,²⁹ torture³⁰ and other similar outrageous misconduct³¹ condemned by the majority of civilized nations.

Violations of international law that affect only the individual concerns of relatively few nations are not actionable under the ATCA. Conduct found to be lacking the required “global mutual concern” that is a predicate for finding ATCA jurisdiction includes commercial wrongdoing,³² ordinary negligence and wrongful death cases,³³ confiscation of property³⁴ and the generic claim of “right to life and health.”³⁵ While negligence and wrongful death suits have traditionally failed to satisfy the “violation of the law of nations” requirement, this Article suggests that select types of negligent conduct should be cognizable under the ATCA. In particular, this Article advances the argument that the ATCA should apply to the grossly negligent oversight of outsourced manufacture and/or the sale of known hazardous products, especially those products that are banned, known to be hazardous, severely restricted, or the subject of repetitive punitive damage awards³⁶ in developed nations. Accordingly, in circumstances when Chinese

24. *See, e.g.*, *Filártiga v. Peña-Irala*, 630 F.2d 876, 880–81 (2d Cir. 1980) (noting that violations of international law can be based either on a treaty or a norm of international law).

25. *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.”).

26. *Mwani*, 417 F.3d at 1.

27. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

28. *Sarei v. Rio Tinto*, 487 F.3d 1193 (9th Cir. 2007), *reh’g granted*, 499 F.3d 923 (9th Cir. 2007).

29. *Kadic*, 70 F.3d at 232.

30. *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005).

31. *See, e.g.*, *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 426 (S.D.N.Y. 2002) (summary execution).

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

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

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

35. Courts have rejected claims alleging a defendant violated generic norms such as the “right to life” or “right to health.” *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 254–55 (2d Cir. 2003).

36. The repugnancy is magnified when the product sold is already 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 a product, or the corporate manufacturers themselves withdraw the product, yet despite the ban or restriction the products are marketed and sold elsewhere, the conduct can only be considered quasi-criminal. Similarly, personal injury suits resulting in a grant of punitive damages would corroborate the claim that selling the product outside of the jurisdiction was reprehensible.

manufacturers or their international partners either were or should have been aware that the products were defective, or alternatively, should have reasonably known that lax safety precautions³⁷ were creating conditions conducive to the international transfer of dangerous products, the ATCA should be available to plaintiffs who have suffered death or serious injury.

There are two reasons to permit ATCA jurisdiction. First, our new worldwide financial order has caused pioneering transformations in global manufacturing and distribution.³⁸ In a quest for enhancing corporate profitability and improvement in shareholder value,³⁹ corporations have increasingly outsourced⁴⁰ a substantial percentage of their manufacturing to other nations, particularly to developing countries such as China.⁴¹ Absent a local presence, there is a substantial decrease in corporate supervision over the manufacturing process and an accompanying inability to conduct routine inspections. Moreover, in many locales, government regulation is either lacking or non-existent, leaving supervision, inspections, and testing as the only methods of ensuring quality control. Furthermore, the outsourced factories have a financial incentive to utilize inferior or hazardous parts and workmanship so as to maximize profits. In China, where government supervision is lackluster and international

37. Responsibility would depend on various factors such as whether the defendant undertook inspections of the Chinese factories, whether procedures were in place to ensure quality and safety, whether the defendant was aware of prior inadequate safety measures, and the extent to which the defendant acted reasonably to ensure adequate quality controls were instituted and properly maintained.

38. See *Vice Premier Urges Improvement in Quality of China-Made Products*, Jan. 3, 2008, http://news.xinhuanet.com/english/2008-01/03/content_7360762.htm (“Chinese Vice Premier Wu Yi demanded that quality supervisors and inspectors nationwide be fully aware of the new challenge posed by the internationalization and politicization of quality problems.”).

39. Pete Engardio & Dexter Roberts, “*The China Price*,” *BUS. WK.*, Dec. 6, 2004, 1, available at http://www.businessweek.com/magazine/content/04_49/b3911401.htm (stating that outsourcing manufacturing to China has allowed “U.S. multinationals from General Motors . . . to Proctor & Gamble . . . and Motorola” to earn big profits).

40. In this Article, outsourcing means “offshoring”—moving the manufacturing facilities to a foreign country—in this case China. See Scott W. Pink, *Recent Trends in Outsourcing: Understanding and Managing the Legal Issues and Risk*, 781 *PLI/PAT* 363, 370 (2004) (describing various types of outsourcing, including offshoring which “occurs when a company outsources a function currently being performed in one country to another country where the labor and other costs of that function are substantially lower.”).

41. See Blum, *supra* note 1 (“U.S. drug companies turned to ingredients supplied by businesses in China and other countries with lower labor and regulatory costs to save money.”). See also Pete Engardio, *The Future of Outsourcing: How It’s Transforming Whole Industries and Changing the Way We Work*, *BUS. WK.*, Jan. 30, 2006, available at http://www.businessweek.com/magazine/content/06_05/b3969401.htm (providing an example of how a U.S. manufacturer’s largest customer insisted the business move overseas to China to provide lower-cost goods).

corporate supervision difficult,⁴² local facilities can easily exploit unchecked manufacturing processes to their financial advantage.

Second, the Supreme Court has acknowledged that “the law of nations changes,” so that a previously unrecognized tort may, over time, evolve into a wrong reflecting the global mutual concern.⁴³ A review of customary international law reveals that apprehension over the marketing of hazardous products offers an archetypical example of conduct that constitutes the mutual concern of nations.⁴⁴ Therefore, under suitable circumstances, the sale, transfer, or manufacturing of Chinese products resulting in severe personal injury and/or death is a contravention of an international norm and as such should be actionable under the ATCA.

I. PRODUCT MANUFACTURE: THE NEW REALITY

The unprecedented rise in cross-border trade and global financial integration⁴⁵ has created an exceptional economic revolution. The global

42. Chinese companies do not fear inspections.

More than 700 Chinese drug makers are registered with the FDA, but the cash-strapped agency conducted just 14 inspections in China last fiscal year. And the visits are seldom a surprise, because the Chinese government generally warns companies in advance. Moreover, Chinese regulators do not inspect plants that export all their products to the United States and other countries.

Todd Wallack, *Drug Makers Stick by China: Life Sciences Companies Establishing Roots Despite Contamination Trouble*, BOSTON GLOBE, Mar. 14, 2008, at C1. In fact, China’s industrial growth has outpaced its regulatory capacity.

In recent months the world has learned that China’s breakneck industrialization, like that of the United States, Japan and South Korea before it, has outrun the ability of the country’s regulatory regime to ensure product safety and quality control.

The recent outbreak of multiple Chinese product scandals, from tainted pet food to lead-painted toys, poses serious risk management challenges to U.S. retailers, importers and manufacturers that sell or incorporate in their own goods, products and parts manufactured in China.

James M. Davis, *Risks Made in China: Manufacturers Love China Because the Chinese Make Products More Cheaply Than Just About Anyone Else. But the Past 18 Months Have Been Difficult and Expensive for Several U.S. Manufacturers That Have Faced Big Product Recalls*, RISK & INSURANCE, Jan. 2008, available at http://findarticles.com/p/articles/mi_m0BJK/is_1_19/ai_n24239640/pg_1 (last visited June 12, 2008).

43. *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).

44. See *infra* Part III.B.

45. U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Economic, Social and Cultural Rights: Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights*, ¶ 29, U.N. Doc. E/CN.4/2004/46 (Dec. 15, 2003) (prepared by Fatma-Zohra Ouhachi-Vesely) (“The increased fluidity of trade in today’s global marketplace has been a channel for the movement of hazardous [products]. Lower transportation and

bull markets in stocks, commodities, real estate, outsourcing, foreign investment, and mergers have created sweeping changes in the international economic order. Corporations have established manufacturing facilities around the globe seeking to leverage cost differentials.⁴⁶ Unparalleled globalization has resulted in thousands of products manufactured in the developing world, where production standards and enforcement mechanisms might be lackluster compared to those in developed nations. In addition, the rapid growth in the developing world has led to a surge in “home market” products being exported to developed nations.

Genuine risks abound for creating, distributing, and seriously injuring numerous consumers around the world. The reason is simple: businesses have established factories and outsourced manufacturing to many nations. These various facilities are often geographically removed from the location of the business and thus oversight is substantially challenged. In addition, the laws of the jurisdiction where the products are manufactured may not be vigorously enforced and/or the local managers may shirk their oversight responsibilities. It is also possible that the business may not be willing to or capable of enforcing its own oversight in a far away country.

The dangers associated with defective products have become apparent with the increasing reports of defectively manufactured products in China. Indeed, over the last year, legitimate concern regarding the safety of products manufactured in China and other nations,⁴⁷ but exported globally, has reached a critical mass. There have been international recalls of many products whose manufacture was outsourced either wholly or partly to China.⁴⁸

Numerous reasons have been cited for the egregious lapses in product safety: unprecedented domestic growth in China and the accompanying inability of regulators to cope with the thousands of newly built factories,⁴⁹

communication costs, the difficulties in checking every container have facilitated the transfer of hazards. States have adopted more liberal trade policies.”)

46. Engardio & Roberts, *supra* note 39, at 102 (noting that Chinese factories can manufacture many products at “50% less” cost than their U.S. counterparts).

47. Several nations routinely violate food safety standards. Jyoti Thottam, *The Growing Dangers of China Trade*, TIME, June 28, 2007, at 29

48. See Carlo P. Mallo, *DOH Continues Checking China-Made Products*, Aug. 9, 2007, <http://www.sunstar.com.ph/static/dav/2007/08/09/news/doh.continues.checking.china.made.products.html> (Philippine Bureau of Food and Drugs “found formaldehyde content in White Rabbit Creamy Candy, Milk Candy, Bairong Grape Biscuits, and Yong Kang Foods Grape Biscuits when it tested several China-made food products.”).

49. Hundreds of thousands of factories have sprung up in China in recent years. Robyn Meredith & Suzanne Hoppough, *Why Globalization Is Good*, FORBES, Apr. 16, 2007, at 64 (“Since the reforms started, \$600 billion has flooded into the country, \$70 billion of it in the past year. Foreigners built

a tendency of manufacturers to view safety leniently,⁵⁰ and the desire to maximize profit by lowering expenses through the substitution of inferior component products.⁵¹ The unprecedented recalls and discoveries of harmful products have focused international attention on China's safety and damaged China's international business reputation. Indeed, the chief of China's food and drug safety regulatory body was executed for allowing these products to be sold within China and exported abroad.⁵²

II. THE ALIEN TORT CLAIMS ACT

While seldom used for almost two centuries, ATCA litigation has been increasingly utilized as a basis for lawsuits alleging breaches of international law.⁵³ Ironically, despite the brevity of the statute,⁵⁴ the ATCA has been difficult to construe. The Second Circuit recently noted that the ATCA is both complex and controversial.⁵⁵

hundreds of thousands of new factories as the Chinese government built the coal mines, power grid, airports and highways to supply them.”)

50. Simon Elegant, *Where the Coal Is Stained with Blood*, TIME, Mar. 12, 2007, at 32 (“With some 17,000 of these small mines now operating (as well as thousands of illegal mines), supervision by government authorities is virtually nonexistent. To maximize profits, mine owners ramp up production far above sanctioned levels, exceed the regulated number of miners and neglect safety equipment and procedures.”). The government cannot keep up with the many small factories opening in China.

Statistics show there are more than 1 million food-processing factories in China, 70 per cent of which are small ones with less than 10 employees. They are usually poorly equipped and hidden in the suburbs or countryside, dodging government inspection.

While we blame the food producers and sellers for their greed, immorality or just plain carelessness, a fragmented and inefficient government supervision system should be held responsible for the perpetual headache.

Rousseau Chen, *From Farm to Table, Focus on Food Safety*, CHINADAILY.COM, Apr. 8, 2006, http://www.chinadaily.com.cn/bizchina/2006-04/08/content_563302.htm (last visited June 12, 2008).

51. See *supra* note 46.

52. See *China Food Safety Head Executed*, BBC.COM, July 10, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6286698.stm>.

53. 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). See also Vivian Grosswald Curran, *Globalization [sic], Legal Transnationalization and Crimes Against Humanity: The Lipietz Case*, 56 AM. J. COMP. L. 363, 391 (2008) (“In the United States, the ATCA, enacted in 1789, was revived in 1980, allowing U.S. federal courts to entertain cases in which torts may have been committed anywhere in the world.”).

54. “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. The ATCS confers federal subject matter jurisdiction when three independent conditions are satisfied: (1) an alien sues, (2) for a tort, (3) committed in violation of the law of nations or a treaty ratified by the United States. *Vietnam Ass’n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 115–16 (2d Cir. 2008).

55. See *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 264 (2d Cir. 2007) (Katzmann, J., concurring) (“While the [Supreme] Court did not definitively resolve all of the complex and controversial questions the ATCA raises . . .”). Another court commented that there is “complexity

Pursuant to the ATCA, federal jurisdiction exists for civil actions filed by aliens injured by conduct which constituted a violation of the law of nations⁵⁶ or a treaty of the United States.⁵⁷ The scope of potential defendants is broad and includes claims against American and foreign corporations and individuals for select tortious conduct committed in foreign countries.⁵⁸

While the range of potential defendants is extensive, the extent of possible tortious conduct is narrow. For jurisdiction to exist, the conduct tort must involve a contravention of the “law of nations”⁵⁹ or constitute a breach of a treaty of the United States.⁶⁰ Conduct that encompasses a flouting of the “law of nations” is action that contravenes “well-established, universally recognized norms of international law,”⁶¹ and must be “specific, universal and obligatory.”⁶² If a norm is obligatory on nations it is known as a “*jus cogens*”⁶³ and violations of such norms are by themselves sufficient to invoke ATCA jurisdiction.⁶⁴

Historically, courts have rejected a broad array of conduct as predicate offenses under the ATCA. The following examples of failed ATCA jurisdiction illustrate the ambit of conduct held insufficient to constitute a violation of customary international law: non-compliance with a particular

involved in the application of this cryptic statute in the context of a globalized economy and evolving international organizations” *Maugein v. Newmont Mining Corp.*, 298 F. Supp. 2d 1124, 1130 (D. Colo. 2004). Numerous issues continue to divide the courts.

In fragmented opinions in October, the U.S. Court of Appeals for the Second Circuit found that corporations can be liable under the Alien Tort Claims Act (ATCA) for actions that aid and abet violations of international law by other actors. However, the court’s four opinions (a 15-page per curiam opinion and separate opinions by each of the judges, totaling 147 pages) set out varying views on the legal test to be applied in determining aiding-and-abetting liability.

Second Circuit Issues Divided Ruling on “Aiding and Abetting” Rights Violations, 102 AM. J. INT’L L. 183, 183 (2008) (footnote omitted).

56. Courts have struggled with the issue of which torts are cognizable. *See, e.g., Khulumani*, 504 F.3d at 267 (“[T]he Supreme Court did not discuss the requirements for invoking this jurisdictional grant in a particular case.”).

57. 28 U.S.C. § 1350.

58. *Sosa*, 542 U.S. at 721.

59. *Vietnam Ass’n for Victims of Agent Orange*, 517 F.3d at 116 (“In the broader context, the law of nations has become synonymous with the term ‘customary international law,’ which describes the body of rules that nations in the international community ‘universally abide by, or accede to, out of a sense of legal obligation and mutual concern.’”).

60. *Flores v. S. Peru Copper Corp.*, 414 F.3d 65, 79 (2d Cir. 2003).

61. *See Kadić v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (quoting *Filártiga v. Peña-Irala*, 630 F.2d 876, 888 (2d Cir. 1980)).

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

63. *Doe I v. Unocal Corp.*, 395 F.3d 932, 945 n.14 (9th Cir. 2002).

64. *Id.* at 945 n.15.

form of representative government,⁶⁵ brief arbitrary detention,⁶⁶ sexual violence alone,⁶⁷ seizure of property within a nation's borders (unless the actor is acting under color of law),⁶⁸ commercial claims and negligence suits,⁶⁹ fraud,⁷⁰ conversion,⁷¹ negligence and wrongful death,⁷² defamation,⁷³ child custody,⁷⁴ and libel.⁷⁵

A. Recent Developments in ATCA Litigation

The current popularity of ATCA litigation can be tracked to the Second Circuit's watershed opinion in *Filártiga v. Peña-Irala*.⁷⁶ In *Filártiga*, the question was whether torture constituted a "violation of the law of nations," thereby providing ATCA jurisdiction.⁷⁷

According to *Filártiga*, to be actionable under the ATCA, the conduct must constitute a contravention of international law that involves universal mutual concern.⁷⁸ "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

65. *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 151 (1st Cir. 2005).

66. *See Sosa*, 542 U.S. at 738.

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

68. *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) (1986)).

69. *See Joel Slawotsky, The New Global Financial Landscape: Why Egregious International Corporate Fraud Should Be Cognizable Under the ATCA*, 17 DUKE J. COMP. & INT'L L. 131 (2006).

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

71. *IIT v. Vencamp, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

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

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

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

75. *Akbar v. New York Magazine Co.*, 490 F. Supp. 60, 64 (D.D.C. 1980).

76. *Filártiga v. Peña-Irala*, 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.* The court held that "deliberate torture perpetrated under color of official authority" violates the law of nations, and that ATCA jurisdiction is proper. *Id.* at 878. 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. *See id.* at 880. 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.* (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. *See id.* at 881 (citing *The Paquete Habana*, 175 U.S. 677, 694 (1900)). 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.* at 881 (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 198 (1796)).

77. *Id.* at 878.

78. *See id.* at 888.

the [ATCA].”⁷⁹ *Filártiga* held that to be a cognizable claim, the conduct must be universally condemned.⁸⁰ Thus, only shared concerns, rather than several concerns, will be cognizable.⁸¹

The Second Circuit found that the “law of nations” is not unyielding, but adaptable, and reflects a developing standard of international law.⁸² The court hinted at its acknowledgement that international law was growing. “[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.”⁸³ This expansive and elastic characterization meant that novel torts might become actionable as the concern of nations evolved. Significantly, the Supreme Court approved *Filártiga*’s sweeping proposition.⁸⁴ Following *Filártiga*, numerous high-profile suits were filed against both foreign nationals and corporations alleging violations of international law.⁸⁵

The Supreme Court’s landmark ruling in *Sosa v. Alvarez-Machain*, endorsed the ATCA as a budding vehicle to address outrageous conduct in a global context.⁸⁶ Disagreeing with plaintiffs’ counsel, the Court ruled the ATCA was jurisdictional and by itself failed to create a statutory cause of action.⁸⁷ Nevertheless, the Court held the statute vested federal courts with the authority to judge violations of the law of nations, which is included in federal common law, thereby providing the basis of ATCA jurisdiction.⁸⁸ The Court found that the range of claims was restricted,⁸⁹ and approved a conservative method of ascertaining the contours of violations actionable under the ATCA.⁹⁰ The Court constrained Section 1350 (the ATCA) to suits that “rest on a norm of international character accepted by the

79. *Id.*

80. *See generally id.*

81. *Id.* Similarly, in *Flores v. S. 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).

82. *See Filártiga*, 630 F.2d at 887.

83. *Id.* at 888.

84. *See infra* pp. 533–34.

85. *See* 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).

86. 542 U.S. 692, 714 (2004). The Court underscored the validity of the ATCA in *Rasul v. Bush*, 542 U.S. 466 (2004), in which it affirmed that the prisoners detained at Guantanamo might potentially use the ATCA to file actions. Thus, according to the Court, aliens detained as terror suspects may bring suit against U.S. officials for violations of international law. *Id.* at 485.

87. *Sosa*, 542 U.S. at 713.

88. *Id.* at 720.

89. *Id.* at 724.

90. *Id.* at 725.

civilized world and defined with a specificity comparable” to the torts recognized by the First Congress as violating the law of nations.⁹¹ The archetypical violations referenced by the Court were offenses against ambassadors, violations of safe conducts, and piracy.⁹²

However, the Court, citing *Filártiga*, held that violations of international law must be assessed in the context of contemporary standards, not the norms of the eighteenth century.⁹³ Trial courts thus gained the authority to allow previously unrecognized torts if the behavior in question develops into the subject of universal concern.⁹⁴ Following *Sosa*, international corporations continued to be named defendants in ATCA suits,⁹⁵ with courts grappling over the complexity of the ATCA and filing conflicting opinions.⁹⁶

B. *The Law of Nations*

While an international law violation based upon a breach of a treaty fairly clearly falls under the scope of the ATCA, a claim based upon a violation of the law of nations is more complex. For the latter, plaintiffs must establish a breach of a *universal* norm of international law,⁹⁷ i.e., a standard of conduct that is “specific, universal and obligatory.”⁹⁸ A norm

91. *Id.*

92. *Id.* at 720. Some have argued that terrorism is substantially equivalent to piracy. *See* Mwani v. Bin Laden, 417 F.3d 1, 14 (D.C. Cir. 2005) (terrorism is a colorable claim under the ATCA).

93. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

94. *See id.*

95. *See, e.g.*, *Doe 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 542 (S.D.N.Y. 2004) (banking defendants).

96. Courts have arrived at conflicting decisions on a variety of ATCA issues. *Compare In re Agent Orange*, 373 F. Supp. 2d 7 (war crimes and crimes against humanity have no statute of limitations), with *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (statute of limitations on ATCA claims is ten years); also compare *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005) (torture is not actionable under the ATCA), with *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994) (torture actionable under the ATCA); also compare *In re Agent Orange*, 373 F. Supp. 2d at 52 (ATCA encompasses aiding and abetting liability), with *In Re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (ATCA is limited to direct liability).

97. *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*, 630 F.2d 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.”).

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

is universal and obligatory if: (1) no state condones the conduct and there is universal proscription of it, (2) there are satisfactory standards to ascertain whether a given act comprises an occurrence of the forbidden act, and (3) the prohibition is compulsory at all times upon all persons.⁹⁹

The law of nations “results from a general and consistent practice of states which is followed by them from a sense of legal obligation.”¹⁰⁰ *Sosa* failed to enunciate a simple technique for courts to interpret the law of nations. In reality, as one court stated, “it would have been unquestionably preferable for the lower federal courts if the Supreme Court had created a bright-line rule.”¹⁰¹

Jurisdiction thereby hinges on whether plaintiffs can establish an international law violation of joint, rather than several, concern, substantiated by international agreements and regulations.¹⁰² In determining whether a specific type of conduct satisfies the jurisdictional requirements of the ATCA, a court will evaluate: (1) whether the plaintiff names an explicit, global, and binding norm of international law; (2) whether that norm is acknowledged by the United States; and (3) whether defendant’s conduct demonstrates a violation of the norm.¹⁰³ In evaluating plaintiff’s claims, courts will examine rulings applying the law of nations, the common customs and procedure of various nations,¹⁰⁴ and non-self-

99. *Id.*

100. Sources of international law generally include:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Vietnam Ass’n for Victims of Agent Orange, 517 F.3d at 116; *Jama v. U.S. INS*, 22 F. Supp. 2d 353, 362 (D.N.J. 1998) (“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).

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

102. 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.”).

103. See *Nat’l Coal. Gov’t. of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 345 (C.D. Cal. 1997).

104. *Kadić v. Karadzic*, 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. Argentina*, 965 F.2d 699, 714–15 (9th

executing treaties and international agreements to determine accepted norms of international law.¹⁰⁵

III. DEFECTIVE CHINESE 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. Therefore, the existence of ATCA jurisdiction hinges on whether the distribution of products which are known or should have been known to cause serious injury and death constitutes conduct that engenders the condemnation of the civilized world, thus qualifying it as a violation of an international norm.¹⁰⁶ Across the globe, there is a growing concern over hazardous products, and a growing acceptance of products liability law as a means of compensating injured parties.¹⁰⁷ These concerns (1) are recognized universally, (2) establish legal requirements, (3) relate to obligations of mutual concern, and (4) are specific and enforceable.¹⁰⁸

A. *The Supreme Court's Approval of the Adaptability of the Law of Nations—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, conduct must constitute a violation of an international norm that reflects a concern of all nations.¹⁰⁹ The Court stated that a norm must command the "general assent of civilized nations"

Cir. 1992); *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001).

105. *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.")

106. Dean T. Jamison et al., *International Collective Action in Health: Objectives, Functions, and Rationale*, 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.")

107. John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507, 508–09 (2007) ("Recent developments in France, Germany, and the European Union, as well as in Canada, Australia, and Spain point toward greater receptivity toward punitive damages and the enforcement of these foreign awards.")

108. *Arndt v. Union Bank of Switz.*, 342 F. Supp. 2d 132, 139 (E.D.N.Y. 2004) (citing *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 154–56 (2d Cir. 2003); *Filártiga v. Peña-Irala*, 630 F.2d 876, 888 (2d Cir. 1980)).

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

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.*”¹¹⁰

The crucial holding in *Filártiga* was the acknowledgement that norms of international law do change over time. The Court in effect was saying that what might not violate international law today might nevertheless be held to do so in the future.

1. The Supreme Court’s Endorsement of Filártiga

In *Sosa*, 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.¹¹¹ 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.*”¹¹² *Sosa* held that in determining the viability of new actions, “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.”¹¹³

There exists U.S. congressional endorsement of this “evolving law” approach in addition to the Supreme Court’s validation. In enacting the Torture Victim Protection Act (TVPA) 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.”¹¹⁴

Based on the Supreme Court’s endorsement of *Filártiga* and 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

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

111. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (a plaintiff’s claim “must be gauged against the current state of international law”). *See also* *Khulumani v. Barclay Nat. Bank, Ltd.*, 504 F.3d 254, 264 (2d Cir. 2007) (Katzmann, J., concurring) (“*Sosa* endorsed our Court’s prior approach to the ATCA to the extent that we recognized that the Act created jurisdiction for a narrow set of violations of international law”); *Sosa*, 542 U.S. at 720 (“Congress intended the [ATCA] to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”); *Filártiga*, 630 F.2d at 887–88 (construing the ATCA “as opening the federal courts for adjudication of . . . well-established, universally recognized norms of international law”).

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

113. *Id.* at 725.

114. H.R. REP. NO. 102-367, at 4 (1991) (emphasis added).

find negligence an actionable tort,¹¹⁵ the Supreme Court has endorsed an approach whereby torts other than the three original predicate offenses are cognizable.¹¹⁶ As demonstrated below, 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 approvingly cited Jude Kaufman's remarks in *Filártiga* that a torturer, like a pirate, is an enemy of all mankind.¹¹⁷ The world has changed considerably in the two centuries since the ATCA was passed. Today's highly mobile transportation system, vigorous world trade, and financial integration facilitate widespread transfer of products, with the result that a producer or distributor of products who knows or should know that the products can cause widespread death and serious damage is, indeed, an enemy of all people.

1. International Agreements

There is a universal consensus that preventing death and serious personal injury is a collective reciprocal interest of all civilized states.¹¹⁸ All nations have an interest in protecting their citizens from death and serious injury. In determining whether a given offense is a violation of customary international law, courts "look to the sources of law identified by the Statute of the International Court of Justice ("ICJ Statute") as the proper sources of international law."¹¹⁹ These include "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states"¹²⁰ Protecting health is so essential and so important that protecting health trumps other "lesser" rights.¹²¹ The United Nations Covenant on Economic, Social and Cultural

115. See, e.g., *IIT v. Vencap*, 519 F.2d 1001, 1015–16 (2d Cir. 1975); *Arndt v. Union Bank of Switz.*, 342 F. Supp. 2d 132, 140 (E.D.N.Y. 2004).

116. See *Sosa*, 542 U.S. at 730–31.

117. *Id.* at 732.

118. See *infra* notes 119–26. This Article does not suggest that garden-variety negligent conduct which does not result in death or serious injury should be cognizable. The conduct suggested to be cognizable is egregious deception and/or criminally negligent behavior.

119. *Khulumani v. Barclay Nat. Bank, Ltd.*, 504 F.3d 254, 267 (2d Cir. 2007).

120. *Id.*

121. Michael Kirby, *The Right to Health Fifty Years on: Still Skeptical?*, 4 HEALTH & HUMAN RIGHTS 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.");

Rights¹²² already applies to businesses in such areas as food,¹²³ water,¹²⁴ and health.¹²⁵ The Global Sullivan Principles of Social Responsibility,¹²⁶ a voluntary global code of conduct, reflect universal concerns.¹²⁷ The Principles include promises to “[p]rovide a safe and healthy workplace; protect human health and the environment; and promote sustainable development.”¹²⁸

As evidenced by the accords and agreements of leading global organizations, such as the UN, and the laws and international cooperation of many nations, the restricted export of products known to cause death or serious injury is reflective of the mutual concern of nations; therefore any export of these substances constitutes a violation of an international norm.¹²⁹ It is beyond peradventure that civilized nations share a mutual concern regarding the avoidance of dangerous products.

Chris Brown, *Universal Human Rights: A Critique*, in HUMAN RIGHTS IN GLOBAL POLITICS 103, 109–10 (Tim Dunne & Nicholas J. Wheeler eds., 1999) (noting that human rights are not “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, art. 12, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95–2 at 27 (1978), 999 U.N.T.S. 171, 176 (entered into force Mar. 23, 1976) (emphasis added).

122. International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. (entered into force Jan. 3, 1976).

123. U.N. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, General Comment 12, *Right to Adequate Food*, UN Doc. E/C.12/1999/5 (May 12, 1999).

124. U.N. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, General Comment 15, *The Right to Water*, UN Doc. E/C.12/2002/11 (Jan. 20, 2003).

125. U.N. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, General Comment 14, *The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4 (Aug. 11, 2000).

126. The Global Sullivan Principles, <http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp> (last visited Mar. 2, 2008).

127. According to 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 those nations that are in need.” The Principals: Notable Quotes, <http://www.thesullivanfoundation.org/gsp/principles/quotes/default.asp> (last visited Mar. 2, 2008).

128. The Global Sullivan Principles, *supra* note 126.

129. 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.” *Universal Declaration of Human Rights*, G.A. Res. 217A, art. 2B, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR]. Pursuant to the UDHR, every 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[.]” UDHR, *supra*, art. 25. The UDHR has been vested by the international community with tremendous “legitimacy through their actions, including its legal and political invocation at the national and international levels.” See Jonathan M. Mann et al., *Health and Human Rights*, HEALTH AND HUMAN RIGHTS 7, 16 (1994). 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. UDHR, *supra*, art. 3 (“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), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966). Moreover, the right to life is considered a *jus cogens* rule pursuant to which no deviation is permitted. When death results from the sale of products known to cause death or serious injury, murder has occurred. See Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT’L L. 545, 577–79 (2000) (noting that “murder” “includes the creation of conditions likely to result in death”). Even if the product is known to likely, rather than definitively, cause injury, constructive knowledge of the dangerous propensities of a product should be considered murder. See *id.* (stating that “murder” is a violation of customary international law, and an ATCA claim exists where an actor’s mens rea rises to the level of that required to prove murder). As a result, the creation of conditions likely to result in death through conduct evincing a reckless disregard for health constitutes a violation of international law. Thus, the selling of products known to cause death or serious injury should constitute a breach of both the letter and spirit of the UDHR since causing death is a direct contravention of the UDHR.

Under the customary state practice which emerged from international and national military prosecutions involving mistreatment of war prisoners and civilians, ‘murder’ includes the creation of conditions likely to result in death if the creation of such conditions rises to the level of common-law manslaughter. *That offense typically involves some degree of negligence additional to that necessary to support ordinary tort liability, although how much more is not entirely clear. The critical point for present purposes is that international law does not require a mens rea of purpose or even knowledge to prove murder.*

Id. at 578 (emphasis added) (footnotes omitted). See also The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Annex I, Mar. 22, 1989, 28 I.L.M. 649, 678, available at <http://www.basel.int/text/con-e-rev.pdf> (last visited Feb. 19, 2008) [hereinafter Basel] (an international agreement with over one hundred sixty parties, on trans-boundary movement of hazardous waste products). Basel’s purpose is to prohibit the transfer of hazardous substances likely to cause death or serious injury. See *id.*, Annex III. The Annex states these substances include “[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.” *Id.* Substances known to cause cancer or chronic disease are within the ambit of Basel. *Id.* (“Substances . . . if they are inhaled or ingested . . . may involve delayed or chronic effects, including carcinogenicity.”). 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. *Id.* art. 4. 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. *Id.*, Annex I. 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> (last visited Feb. 19, 2008). The Basel Convention imposes liability “directly on individuals, including corporations, and requires signatory states to enact domestic regulatory measures to punish offenders.” 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). Moreover, several other regional and multilateral treaties banning the trans-boundary movement of hazardous waste corroborates that exporting hazardous products to developing countries violates customary international law. See generally The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa (1994), <http://www.opcw.org/html/db/cwc/more/bamako.html> (last visited Mar. 2, 2008); Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and Their Disposal (not yet in force), <http://www.ban.org/Library/izmir.html> (last visited Mar. 2, 2008); The Lomé IV Convention, Nov. 4, 1995, http://www.acpsec.org/en/conventions/lome4_bis_e.htm (last visited Mar. 2, 2008). The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, <http://www.pic.int/home.php?type=t&id=49&sid=16> (last visited Mar. 2, 2008); The Waigani Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes

2. *Product Liability Laws*

Liability for the reckless disregard for the health and safety of others is a widely accepted principle of international product liability law.¹³⁰ Product liability legislation is driven in large part by increasing concern for consumer protection.

a. *United States Law*

Product liability law is well entrenched in American law. Indeed, the fastest growing segment of product liability is mass torts.¹³¹ A tremendous number of lawsuits alleging faulty and dangerous products have proceeded through the courts. The volume of these cases is large and requires specialized courts with special masters or mediators and designated judges to hear these types of cases.¹³² The marketing of products known to cause disastrous injuries is clearly considered reprehensible and actionable in the United States. Both compensatory and punitive damages are available to plaintiffs (the latter damages are appropriate when the defendant had knowledge of the harmful effects of the product).¹³³

and to Control the Transboundary Movement and Management of Hazardous Wastes Within the South Pacific Region, Sept. 16, 1995, http://www.sidsnet.org/mir/pacific/forumsec/docs/Gen_Docs/wc.htm (last visited Mar. 2, 2008). See also Basel Action Network, Country Status—Waste Trade Ban Agreements, http://www.ban.org/country_status/country_status_chart.html (last visited Mar. 2, 2008).

130. See, e.g., Cheon-Soo Kim, *Theories and Legislation of Products Liability in the Southeast Asian Countries*, 6 J. SOC. SCI. RES., 55 (1999); Symposium on Products Liability: Comparative Approaches & Transnational Litigation, 34 TEX. INT'L. L.J. 1 (1999).

131. The following passage neatly summarizes the trend toward mass tort litigation:

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*, [sic] the story of a public defender who amasses millions when he colludes with a corporation to settle a (rather outlandish) mass product defect lawsuit.

Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 883–85 (2007) (footnotes omitted).

132. See N.J. Judiciary, *Vioxx*, <http://www.judiciary.state.nj.us/mass-tort/vioxx/index.htm> (last visited Mar. 2, 2008).

133. Michael Rustad, *How the Common Good Is Served by the Remedy of Punitive Damages*, 64 TENN. L. REV. 793, 809 (1997) ("In the typical punitive damages case, a firm has knowledge of its

b. International Law

Across the globe there is a growing recognition that product liability laws are a vehicle to compensate parties injured by dangerous products. Pursuant to the 1985 European Union Product Liability Directive,¹³⁴ a manufacturer is liable for damage caused by a product defect.¹³⁵ According to the Directive, a product is defective if it fails to provide adequate safety.¹³⁶ Another example is the German legislature's enactment of a special statute on pharmaceuticals (the *Arzneimittelgesetz*) providing for strict liability and forcing drug manufacturers to ensure liability coverage.¹³⁷

Pursuant to 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."¹³⁸

In addition, products banned in EU countries are prohibited from being sent to other nations.¹³⁹ Export from the European Community of dangerous products that have been the subject of a decision shall be prohibited unless the decision provides otherwise.¹⁴⁰ The EU also provides for protection from the ill effects of pesticides,¹⁴¹ asbestos,¹⁴² and chemical agents.¹⁴³

product's defective and dangerous nature, but fails to protect the public.").

134. Council Directive 85/374, 1985 O.J. (L 210) 29 (EC), available at <http://osha.europa.eu/data/legislation/63>.

135. *Id.* art. 1.

136. *Id.* art. 8.

137. See Wandt, *German Approaches to Product Liability*, 34 TEX. INT'L L.J. 71, 90–91 (1999).

138. Council Directive 85/374, *supra* note 134.

139. The European Commission, *Rapid Alert System for Non-food Consumer Products*, http://ec.europa.eu/consumers/cons_safe/prod_safe/gpsd/reviseGPSD_en.htm (last visited Mar. 2, 2008).

140. Council Directive 2001/95, 2002 O.J. (L 011) 4–17 (EC), available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001L0095&mode=l=guichett (last visited Mar. 2, 2008).

141. Council Directive 91/414, 1991 O.J. (L 230) 1–32 (EEC), available at <http://osha.europa.eu/data/legislation/72> (last visited Mar. 2, 2008).

142. Council Directive 83/477, 1983 O.J. (L 263) 25 (EEC), available at <http://osha.europa.eu/legislation/directives/A/2/2/2> (last visited Mar. 2, 2008). The EU Directive on the protection of workers from the risks related to exposure to asbestos at work reflects international concern over asbestos exposure.

143. Council Directive 80/1107, 1980 O.J. (L 327) 8 (EEC), available at <http://osha.europa.eu/legislation/directives/A/2/1> (last visited Mar. 2, 2008).

In the United Kingdom, the UK Health and Safety at Work Act of 1974¹⁴⁴ imposes a duty on an employer to ensure the health, safety, and welfare of employees and a similar duty towards other persons.¹⁴⁵ Interestingly, the Act may be amended in light of globalization in order to impose liability on corporations for conduct leading to injury abroad.¹⁴⁶

In Canada, Bill C-45¹⁴⁷ provides for prosecution of organizations and individuals both for regulatory contraventions and for criminally reckless and intentional conduct that shows disregard for worker and public safety.¹⁴⁸

3. *Punitive Damages for Outrageous Misconduct*

Globally, punitive damages are imposed¹⁴⁹ in litigation for reckless and wanton disregard for human safety and health.¹⁵⁰ The standard for assessing punitive damages is essentially identical internationally—outrageous misconduct.¹⁵¹ Punitive damages seek both to punish the

144. Health and Safety at Work Act, 1974, c. 37 (U.K.).

145. Under the provisions of the Health and Safety at Work Act, 1974, individual and corporate employers are bound by a legal duty to do all that is reasonably practicable to ensure the health and safety of employees and other persons. Memorandum Submitted by Roy Thornley to the U.K. Parliament Select Comm. on Home Affairs (Aug. 23, 2005) ¶ 5, available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/540/540we132.htm> (last visited Mar. 2, 2008).

146. *Id.* ¶ 38.

147. An Act to Amend the Criminal Code (Criminal Liability of Organizations), 2003 S.C., ch. 21 (Can.).

148. Dept. of Justice (Can.), Parliament Passes Bill C-45: Stronger Laws Affecting the Criminal Liability of Organizations, Oct. 31, 2003, http://www.canada-justice.ca/eng/news-nouv/nr-cp/2003/doc_31024.html.

149. Generally, punitive awards are not imposed for private actions in civil law countries, but are available in many common law countries.

Most civil law countries limit recovery of damages in private actions to compensatory damages. These countries prohibit punitive damages in private actions because they consider punitive damages a form of punishment that is appropriate only in criminal proceedings. By contrast, punitive damages are generally available in common law countries, although the circumstances under which they are allowed and the amounts permitted differ from country to country.

Gotanda, *Charting Developments*, *supra* note 107, at 510. Nevertheless, some civil law countries such as Norway, Poland, Brazil, Israel, and the Philippines do allow for punitive awards. See John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 397 & n.27 (2004).

150. See, e.g., Gotanda, *Punitive Damages: A Comparative Analysis*, *supra* note 149, at 392–93 n.2.

151. *Id.* at 395 n.12.

wrongdoer and also to deter reprehensible conduct,¹⁵² particularly when it is motivated by willfulness or maliciousness.¹⁵³

In common law systems such as Australia, Canada, England, New Zealand, and the United States, the levying of punitive damages is accepted and imposed in appropriate cases.¹⁵⁴

In those situations when punitive damages have in fact been imposed for exposing persons to dangerous products, the same conduct committed internationally should also be considered reckless and be cognizable under the ATCA.

CONCLUSION

While the types of torts found to be cognizable under the ATCA to date have not included personal injury,¹⁵⁵ these prior rulings do not reflect our current globalized marketplace. With the proliferation of free trade and the reduction in political and economic hurdles, developing nations are undergoing dynamic growth. Product manufacture is being increasingly outsourced to environments lacking local regulation by the host government and the capability to conduct surprise inspections or the ability to ensure adequate quality control. The failure to monitor the outsourced facilities has led to death and serious injury.

A quintessential example of the type of misconduct that necessitates ATCA jurisdiction is the global distribution of hazardous products, particularly those products containing substances known to be hazardous, previously banned or withdrawn, or those not subject to quality control. Liability should not be limited to defendants with actual knowledge of defective manufacturing conditions but should also be considered when defendants should have known the defective conditions existed or were likely to exist. The unwillingness to properly supervise and inspect outsourced manufacturing facilities where these dangerous products are internationally distributed is a tort that should be cognizable under the

152. *Id.* at 396 n.17.

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

154. Gotanda, *Punitive Damages: A Comparative Analysis*, *supra* note 149, at 398–440.

155. Lucien J. Dhooge, *The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 GEO. J. INT'L L. 3, 73 (2003) (“Claims based upon defamation and negligence have also been rejected as inadequate bases for ATCA jurisdiction.”). 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 or reasonably known (i.e., those products containing known hazardous material) to cause death and serious personal injury should be actionable under the ATCA.

ATCA as manifestations of our current globalized marketplace and heightened awareness of product safety.

Products manufactured in China that contain poisons, hazardous materials, or substandard component parts are defective products. The distribution of such products touches the joint concern of the entire civilized world, not merely the individual interests of a few nations. Accordingly, the manufacture and distribution of such products constitutes a violation of international law and should be cognizable under the ATCA.