

4-1-2013

Politics and Legal Regulation in the International Business Environment: An FDI Case Study of Alstom, S.A., in Israel

Jeffrey A. Van Detta

Follow this and additional works at: <http://repository.law.miami.edu/umblr>



Part of the [Comparative and Foreign Law Commons](#)

Recommended Citation

Jeffrey A. Van Detta, *Politics and Legal Regulation in the International Business Environment: An FDI Case Study of Alstom, S.A., in Israel*, 21 U. Miami Bus. L. Rev. 1 (2013)

Available at: <http://repository.law.miami.edu/umblr/vol21/iss1/3>

POLITICS AND LEGAL REGULATION IN THE INTERNATIONAL BUSINESS ENVIRONMENT: AN FDI CASE STUDY OF ALSTOM, S.A., IN ISRAEL

JEFFREY A. VAN DETTA¹

I.	INTRODUCTION	4
II.	STAGE ONE: THE LEGAL AND BUSINESS ENVIRONMENT .	11
	A. <i>The State of Israel and its Environs</i>	16
	B. <i>The Business Proposal: Alstom's Joint Venture with Energix to Expand the Golan Heights Wind Farm</i>	20
	C. <i>A Proposed Strategic Plan: Why Expanding the Golan Wind Farm in Joint Venture with Energix Optimizes Alstom's Strategic Advantages in Opening a New Market for its Products and Services in the Middle East</i>	25
	1. <i>Israel's Need for Electrical Power Currently Exceeds Supplies and Will Continue to Grow</i>	25
	2. <i>Electricity Generated by Wind Turbines is a Sustainable Energy Source That has Great Room for Growth in Israel and Increases Israel's Energy Independence</i>	29
	3. <i>Israeli Government Support for Wind-Generated Electrical Generation is Growing, and Israel's FTA Agreement with the U.S. Will Permit Energix to Import Alstom's American-Made Wind Turbines Duty-Free</i>	31
	4. <i>The Recommendation from the Business Environment Perspective</i>	35
III.	STAGE TWO—CRITICAL EVALUATION OF LEGAL ISSUES: NOT ONLY THOSE UNDER THE HOST STATE'S REGULATORY ENVIRONMENT, BUT ALSO THOSE UNDER THE FDI INVESTOR'S HOME STATE'S LAWS AND THE LAWS OF THIRD-STATES TO WHICH THE FDI INVESTOR HAS SUBSTANTIAL CONNECTIONS	36
	A. <i>The Role of Treaties in the IBT Decision</i>	36
	B. <i>The Role in FDI Decisions of Litigation Risk in Municipal Courts—With a Particular Emphasis on Corporate Social Responsibility</i>	43
	1. <i>Alstom's Vulnerability to Suits at Home Over its FDI</i>	

¹ Professor of Law & Associate Dean for Scholarship, Atlanta's John Marshall Law School (AJMLS), Atlanta, Georgia. Professor Van Detta teaches courses in both International Business Transactions and International Civil Litigation. He dedicates this article to the memory of James F. Van Detta, Jr. (1922–2012)—the author's father and his greatest teacher.

	<i>in Israel: Not an American in Paris, but a Nanterrean in Nanterre</i>	44
2.	<i>Alstom's Vulnerability in Francophone Courts over FDI in Israel</i>	47
3.	<i>A Frenchman in New York, not an American in Paris: Alstom's Vulnerability to International Civil Litigation in American Courts</i>	55
C.	<i>Legal Aspects of the Political Risk Inherent in Alstom's Choice of a Golan Heights FDI</i>	88
1.	<i>Syria's Claims to the Golan Heights</i>	88
2.	<i>The Impact of an Israel-Iran Armed Conflict on FDI in Israel—And the Role of Political Risk Insurance</i> ...	92
IV.	SUMMATION	106

In Memoriam
JAMES F. VAN DETTA, JR.



April 10, 1922 — February 21, 2012

Business Teacher 1948-1987

“... annuus exactis completur mensibus orbis,
ex quo reliquias divinique ossa parentis
condidimus terra maestaque sacravimus aras.
Iamque dies, nisi fallor, adest, quem semper acerbum,
semper honoratum . . . habebo.” (*Aeneid*, Bk. V, ll. 46-50)

I. INTRODUCTION

With the economic instability roiling through the European Union (EU),² companies located in the Euro Zone will be challenged truly to “think outside of the box” in structuring international growth from a now suddenly unstable home base.³ There is evidence that looking for investment opportunities outside the Euro Zone will continue to be a very propitious source of attractive economic returns.⁴ In turn, we who teach courses in International Business Transactions (IBT) will be challenged to help our students learn to lead, rather than follow, their future clients to do so as well.⁵

Globalization’s realities and permanency became established in the American consciousness during the 1990s and the first decade of the 21st

² Patrick R. Hugg, *Redefining the European Union’s Position in the Emerging Multipolar World: Strong Global Leadership Potential, Restrained by Asymmetry of Power and Dissonant Voices*, 20 TUL. J. INT’L & COMP. L. 145 (2011); Inese Vaidere, *The Impact of Regional and Cohesion Policy on the Economic Development of the EU*, EUROPEAN INTEGRATION STUDIES (Lith.), no. 5, 2011, available at <http://www.eis.ktu.lt/index.php/EIS/article/view/1092/1168> (“As the global financial and economic crisis hit the European Union, no country was left unharmed. To this day, the Member States share the burden of excessive foreign debt, inflation, budget deficit, high unemployment levels, shaken stability of the currency, and many more.”); Daniel Daianu, *Euro Zone Crisis and EU Governance: Tackling a Flawed Design and Inadequate Policy Arrangements* (Jan. 1, 2012), CASE Network Studies and Analyses No. 433, available at <http://ssrn.com/abstract=1991162>; Stefano Micossi, *Misguided Policies Risk Breaking Up the Eurozone and the EU*, (Ctr. for Eur. Pol. Stud. (Belg.) Working Paper No. 260, 2011), available at <http://ssrn.com/abstract=1996457>.

³ See, e.g., Alfredo Jimenez & Juan Bautista Delgado-Garcia, *Proactive Management of Political Risk and Corporate Performance: The Case of Spanish Multinational Enterprises*, 21 INT’L BUS. REV. (Spain), (forthcoming Dec. 2012) (manuscript at 2) available at <http://dx.doi.org/10.1016/j.ibusrev.2011.11.008> (noting that Spanish MNEs have displayed “a proactive use of political risk in the internationalization strategy . . . by taking advantage of their political capabilities in certain areas”).

⁴ For examples of how the EU has benefitted from foreign trade even in the face of the Euro Zone crisis, see Rajnish Tiwari, *Bilateral Business Defies Financial Crisis and Economic Slowdown*, INDO-GERMAN ECON., May 2012, at 19–21, available at <http://ssrn.com/abstract=2083082>. As scholar Julien Chaisse reports:

[T]he EU is the world’s largest exporter of international investments, and the world’s leading recipient of foreign direct investment (FDI). By 2010, the EU’s outward FDI totaled US\$ 3.88 trillion, down from US\$ 9.15 trillion, while its inward FDI amounted to US\$ 3.6 trillion, down from US\$ 5.36 trillion. Over the last three years, the EU accounted for approximately 30% of global FDI flows.

Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment—How Will the New EU Competence on FDI Affect the Emerging Global Regime?*, 15 J. INT’L ECON. L. 51, 52 (internal citation omitted), available at <http://jiel.oxfordjournals.org/content/15/1/51>.

⁵ As we do so, we must be mindful not only of skills and doctrine, but also of ethics and professionalism issues that are peculiar to a law practice that includes IBT. See William F. Fox, *Professional Responsibility and International Business Transactions: Five Tough Questions*, SN056 ALI-ABA 515 (2008); Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT’L L. 155 *passim* (2009).

century.⁶ Concomitantly, American law students have been enrolling in IBT courses in increasing numbers.⁷ Since the nascent stirrings of an IBT specialization in the legal academy during the 1960s to 1980s,⁸ the challenges that face students and teachers of IBT have grown as the complexity of globalization has unfolded.⁹ As Professor Dunning reminded us in his groundbreaking paper, written while a member of the law faculty at the University of Reading, the study of IBT requires an interdisciplinary approach.¹⁰ Political and legal considerations are among the disciplines for which IBT requires us to account.¹¹ Thus, law students who wish to provide advice to future clients on IBT matters should take course work not only in IBT, but also in International Civil Litigation.¹²

⁶ See Hazel L. Johnson, *Resource Guide for International Business Transactions* LEXMUNDI, available at www.lexmundi.com/images/lexmundi/PDF/ResourceGuide2004.pdf; see generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).

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

⁸ The earliest mention in published American legal scholarship is by Professor Donald T. Wilson at the 1985 American Society of International Law annual meetings. See Judith R. Hall, *A Common Core for Courses in International Economic Law?*, 79 AM. SOC'Y INT'L L. PROC. 336, 336-37 (1985) (quoting "Remarks by the Chairman, Donald T. Wilson," which include the following: "[O]ne may generalize to the point of saying that international trade involves the movement of goods, money, people, services, and information across national borders. The study of the prescriptive rules bearing on those movements is the stuff of the law of international business transactions."); Richard B. Bilder & Valerie Epps, *Teaching International Law in the 1990s*. By John King Gamble., 87 AM. J. INT'L L. 686, 688 (1993) (book review) ("In about fifteen law schools, more than two-thirds of the students are currently enrolled in the basic introductory course, the international business transactions course, or both.").

⁹ See, e.g., Brian D. Farrow, *A Lawyer's Guide to International Business Transactions*. By Walter S. Surrey & Crawford Shaw, 79 HARV. L. REV. 448, 448-49 (1965) (book review); Leo H. Phillips, *International Business Transactions in a Nutshell*. By Donald T. Wilson, 76 AM. J. INT'L L. 920 (1982) (book review); William R. Slomanson, *International Business Transactions in a Nutshell (2d Ed.)*. By Donald T. Wilson, 80 AM. J. INT'L L. 273, 274 (1986) (book review).

¹⁰ John H. Dunning, *The Study of International Business: A Plea for a More Interdisciplinary Approach*, 20 J. INT'L BUS. STUD. 411 (1989).

¹¹ Jean J. Boddewyn & Thomas L. Brewer, *International-Business Political Behavior: New Theoretical Directions*, 19 ACAD. MGMT. REV. 119, 119 (1994) ("Research in international business (IB) is much more infused with a consideration of political factors than its domestic counterpart. Authors of IB studies have constantly mentioned and even emphasized government as a variable, rather than a constant or given, because international firms (exporters, importers, licensors, foreign direct investors, etc.) operate under a great variety of evolving political regimes that have an impact on these firms' entry, operation, and exit."); Nathan M. Jensen, *Firm-Level Responses to Politics: Political Institutions and the Operations of U.S. Multinationals* (paper presented at the Conf. on the Pol. Econ. of Int'l Fin., Feb. 9, 2007), available at halleinstitute.emory.edu/pdfs/PIEF_Jensen.pdf.

¹² I introduced both of those courses to my law school's curriculum in 2007 and 2008, respectively, and

Accordingly, the time is ripe for those teaching IBT coursework to re-consider how EU-based multi-nationals might modify their decision-making templates for identifying and undertaking opportunities for foreign direct investment (FDI), tempering that perspective with an analysis of the potential for litigation over certain kinds of FDI. Well before the recent economic crisis in Europe came to a head, IBT scholarship recognized the challenges presented even in an ideal world by the web of overlapping regulatory regimes of national, EU, bilateral, and multilateral rules on foreign direct investment.¹³ In addition, commentators have worked to identify various factors from the multinational-investor perspective, and the potential host-country prospective, both of which are relevant to FDI proposals and projects.¹⁴

My goal, therefore, has been to start American law students on the path that prepares them to assist Multinational Enterprises (MNEs) in the FDI decision-making process; and it is in pursuit of that goal that I came to write the present article. The article grew out of my research and reflection in preparing a case-study problem for both my IBT and International Civil Litigation (ICL) courses, which I designed to be complimentary and supportive of the full development of future IBT practitioners. For purposes of this article, I have taken the case study beyond limitations that might be imposed by the confines of an academic course. In so doing, I explore one of the most promising, yet often politically risky, FDIs—creating the infrastructure for renewable energy systems.¹⁵ The importance of such investments cannot be overstated, both to MNEs, and to the host states in which MNEs contribute to energy infrastructure development. Given a century of experience with the attendant practical travails and political pitfalls of traditional energy

I continue to teach them annually. See <http://www.johnmarshall.edu/courses/international-business-transactions-2/> (last visited Nov. 16, 2012); <http://www.johnmarshall.edu/courses/international-civil-litigation/> (last visited Nov. 16, 2012). In each course, I employ two of the leading casebooks on those subjects. See DANIEL C.K. CHOW & THOMAS J. SCHOFENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES & MATERIALS* (2d ed. 2010); GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* (5th ed. 2011).

¹³ See Ramon Torrent, *The Contradictory Overlapping of National, EU, Bilateral, and Multilateral Rules on Foreign Direct Investment: Who is Guilty of Such a Mess?*, 34 *FORDHAM INT'L L.J.* 1377, 1378, 1398-99 (2011).

¹⁴ Mustafa Fuat Vardar, *Factors of Investment Decision for Multinational Corporations: The Case of Turkey*, J. *TURKISH WEEKLY*, <http://www.turkishweekly.net/article/343/factors-of-investment-decision-for-multinational-corporations-the-case-of-turkey.html>.

¹⁵ Daniel R. Sieck, Note, *Confronting the Obsolescing Bargain: Transacting Around Political Risk in Developing and Transitioning Economies Through Renewable Energy Foreign Direct Investment*, 33 *SUFFOLK TRANSNAT'L L. REV.* 319, 319-21 (2010).

sources, MNEs have started to shift more attention to renewable energy sources as FDIs:

Access to a reliable source of energy is indispensable to the stability of all nations. Beyond the requirements of domestic demand, energy access is a component of any national security program and can be a primary source of wealth in producing countries. Energy producers' ability to shut off world supply gives them a powerful bargaining position politically and economically. Recent expropriations of foreign energy investments in fossil fuel producing countries demonstrate the vulnerability of international energy investments to government intervention. As an alternative, some investors avoid the fossil fuel market altogether and instead choose renewable energy.¹⁶

This is an especially timely topic, particularly given the risks created for fossil-fuel economies by the instability introduced during the Arab Spring.¹⁷ Many MNEs will undoubtedly seek, assess, and ultimately decide whether to pursue new FDI opportunities in the rapidly changing landscape of the Middle East,¹⁸ as they have in India.¹⁹ Legal counsel whose practice is, or aspires to be, focused on international business transactions will need a good understanding of a coherent approach to advising clients on both the business and legal aspects of FDIs. Counsel will be required to appreciate the additional considerations that go into a true FDI decision, as compared to the joint-venture decision to "team up" contractually with an entity . . . in another country where [that]

¹⁶ *Id.* at 320 (footnotes omitted).

¹⁷ Paul Antony Barbour, Persephone Economou, Nathan M. Jensen & Daniel Villar, *The Arab Spring: How Soon Will Foreign Investors Return?*, 67 COLUMBIA FDI PERSPECTIVES, May 7, 2012, available at <http://www.vcc.columbia.edu/content/arab-spring-how-soon-will-foreign-investors-return> ("The events of the Arab Spring have dramatically increased the risk perceptions of foreign investors. In directly affected countries, these events led to disruptions in economic activity including plummeting tourism and foreign direct investment (FDI) flows, all of which negatively impacted economic growth."); *World Economic Slowdown May Hit Kingdom's Exports*, ARAB NEWS, (May 21, 2012), <http://www.arabnews.com/world-economic-slowdown-may-hit-kingdom%E2%80%99s-exports> (noting that "[t]he regional instability generated by the Arab Spring will increase the risk aversion of foreign investors and the risk premium on finance in the [Saudi] Kingdom").

¹⁸ The subject has drawn scholarly attention in European universities. See, e.g., Seyedfarhad Mirghiasimoradi, *Competitive Project Businesses in the Middle East: Opportunities and Obstacles?*, 81-82 (Apr. 2012) (master's thesis, Tempere University of Technology (Fin.)), available at <http://URN.fi/URN:NBN:fi:tty-201205221145> (summarizing the strengths and challenges for FDI in the Middle East).

¹⁹ See Premila Nazareth Satyanand, *Foreign Direct Investment in India's Power Sector*, J. INFRASTRUCTURE DEV., June 2011, at 65-89.

entity will produce and sell goods or provide services using the licensed trademarks, patent, knowhow, or other intellectual property rights owned by the MNE”²⁰ By contrast, as Professor John Head at the University of Kansas School of Law observes, in FDI—

[W]e see a different constellation of potential risks and returns facing a client. With FDI, a company no longer has an arms-length association with the production and marketing of goods in another country; instead, the company enters that other country itself, exposing itself directly to the other country’s legal and regulatory system. Doing so creates serious risks. However, doing so also creates exciting opportunities for rewarding business activities.²¹

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

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

Stage Two undertakes a critical evaluation of legal issues raised not only under the regulatory environment of the host state, but also under the legal system of the FDI investor’s home state and third-states to which the FDI investor has substantial connections. This inquiry is both

²⁰ JOHN W. HEAD, *GLOBAL BUSINESS LAW: THE BUSINESS AND PRACTICE OF INTERNATIONAL COMMERCE AND INVESTMENT* 384 (2d ed. 2007)

²¹ *Id.*

inductive and deductive;²² students will apply their increasing body of general knowledge concerning crucial aspects of International Business Transactions with their knowledge of international civil litigation, particularly as it takes place in the courts of the United States. The legal considerations examined serve both to transition IBT students to the study of International Civil Litigation and to allow students who have previously studied ICL to apply that learning in the specific business context of an IBT course.²³

In this article, I demonstrate how this multi-stage paradigm might be applied to identify potential FDIs worth further investigation and more detailed development. Specifically, I show how the multi-stage paradigm might work in a hypothetical FDI, using as an example one of the world's largest MNEs, France's Alstom, S.A., and a possible investment in Israel regarding one of Alstom's leading businesses, the manufacture, installation, and operation of equipment and installations for using the wind to generate electrical power. Those are the subjects of Section II, *infra*, an application of Stage One. Then, in Section III, I undertake the Stage Two analysis to demonstrate how issues that are recognized in an IBT course can be further developed through analytic paradigms studied in International Civil Litigation, including the nature and risks to MNEs of litigation filed against them over FDI-related issues. Suits under municipal human-rights related laws of various jurisdictions are a major source of ICL, and thus, in the Alstom-Israel FDI proposal, I examine examples from the laws of France, Quebec Province in Canada, and the United States. Special and extended attention is focused on 28 U.S.C. § 1350, colloquially known as the Alien Tort Statute (ATS) in the United States, given the extensive attention it has received in recent years, as well as the extensive expressions of angst that the corporate business community has expressed concerning human-rights litigation against MNEs over FDIs.²⁴

²² There are, of course, even more detailed ways to express this paradigm. See, e.g., "Conceptual Outline And Checklist of Foreign Direct Investment Issues," in CHOW & SCHOENBAUM, *supra* note 12, at 446-48.

²³ The importance of examining FDI within a broader legal environment is well-described in Kenneth C. Randall & John E. Norris, *A New Paradigm for International Business Transactions*, 71 WASH. U. L.Q. 599 (1993).

²⁴ One of the most notable expressions of business community angst, GARY CLYDE HUFBAUER & NICHOLAS K. MIROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (2003), proclaims the following in Chapter 1, entitled "Nightmare Scenario":

This one sentence law—the Alien Tort Statute (ATS) of 1789—could plausibly culminate in a nightmare, more than 200 years after it was enacted. Within the next decade, for example, 100,000 class action Chinese plaintiffs, organized by New York trial lawyers, could sue General Motors, Toyota, Volkswagen, General Electric, Mitsubishi, Siemens, Motorola, NTT,

The example operates on a general level of conceptual business and legal viability, which would naturally precede a second-stage, more focused review of taxation implications for the investing MNE,²⁵ project financing issues,²⁶ business strategies revealed by an in-depth application of strategic operations management,²⁷ a detailed assessment of the overall structure and specific provisions needed for a suitable joint-venture agreement,²⁸ and the most recent thinking among strategic management scholars on traditional and newer variables considered by MNEs when making FDI decisions and their models providing a structure for applying those variables.²⁹ While that which is undertaken here is preliminary and at varying levels of both generality and specificity, it nonetheless provides the essential point of entry for American law students and lawyers examining the intersection of law and business arising from FDI in the 21st century.

Nokia, and 20 other blue-chip corporations in a federal court for abetting China's denial of political rights, for observing China's restrictions on trade unions, and for impairing the Chinese environment. These plaintiffs might claim actual damages of \$6 billion and punitive damages of \$20 billion. To minimize their exposure to punitive damages, the corporations could settle for an intermediate amount, such as \$ 10 billion.

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

Id. at 1-2 (emphasis in original) (footnotes omitted). In the period after Hufbauer and Mitrokostas' book appeared, the claims in several ATS cases against MNEs survived dispositive motions; one awaits further trial court proceedings; and the others were settled for substantial sums.

²⁵ See D. Kevin Dolan, *Special Issues in Structuring International Joint Ventures – Part One*, 22 TAX MGMT. INT'L J. 51 (1993).

²⁶ See HEAD, *supra* note 20, at 425-47; see, e.g., William M. Stelwagon, *Financing Private Energy Projects in the Third World*, 37 CATH. LAW. 45, 45-48 (1996).

²⁷ See, e.g., Laura Diaconu *Business Strategies of the Multinational Corporations*, 4 CES WORKING PAPERS 141, 141-42 (2012) (Ctr. for Eur. Stud. at Alexandru Ioan Cuza University of Iasi (Rom.)), available at http://www.cse.uaic.ro/WorkingPapers/articles/CESWP2012_IV2_DIA.pdf (detailing how "the international business offers the possibility of exploiting three sources of the competitive advantage, unavailable for the national companies: global efficiencies, the multinational flexibility and worldwide learning process").

²⁸ See, e.g., Michael E. Hooton, *Structuring and Negotiating International Joint Ventures*, 27 CREIGHTON L. REV. 1013, 1013-14 (1994).

²⁹ See, e.g., Wesam M. Sedik, *The Impact of Country Risk and New Institutional Economics on Foreign Direct Investment: A Panel Data Analysis for Middle East and North Africa Region (1999-2010)* (presented at the 16th Meeting of the International Society for New Institutional Economics, University of Southern California, June, 2012), available at http://extranet.isnie.org/uploads/isnie2012/sedik_seoudy.pdf.

II. STAGE ONE: THE LEGAL AND BUSINESS ENVIRONMENT

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

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

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

In developing this as an IBT learning event, a course facilitator may take a number of approaches. The facilitator may assign a specific, existing FDI proposal involving a particular MNE or group of MNEs. Typically, this choice works best when there have been *preliminary* reports of the FDI project in the news media or through a company's press releases—i.e., before the FDI project becomes so well delineated that students are tempted to spend more time describing actual plans than on employing imaginative research and reasoning to flesh out various directions a preliminarily described project may take. To encourage less of the former and more of the latter, the facilitator may instead assign a particular MNE without a specific FDI-project in the works. That will allow the facilitator to assign the more open-ended task of identifying and evaluating any feasible FDI project for the MNE. The emphasis in that approach will be more on brainstorming about possible projects within the reasonable scope of the MNE's business, and developing processes and paradigms for narrowing a wide range of possibilities—starting with the fundamental task of identifying a geo-political region, market, or nation as the potential host for the project.

A *via media* between extremes is what I have aimed for in this article: designating a specific MNE and a specific host nation, as well as a sector of the MNE's business—wind-powered electrical generation in Alstom's case—within which to develop the specific FDI proposal for analysis.

Developing the specific FDI proposal requires preliminary research

into both the current businesses of the MNE (along with lines of business it either is considering, or should consider given particular synergies that might be realized from it), along with a suitable project for the specific host nation. Identification of a specific company within the host nation to act as business partner in the FDI can facilitate identification of the project itself. Normally, the way in which the MNE's business will be organized within the host state must be considered, after identifying the specific forms of business entity available under the legal tradition and legal system of the host nation.³⁰ However, for purposes of this article, the more popular joint-venture arrangement is the standing assumption.³¹

With these parameters established, one of the most useful pairings I have found of MNE and host state is Alstom, a corporation organized under the laws of France as a Société Anonyme (S.A.),³² with the State of Israel as the host nation. Although one of the world's largest MNEs, Alstom will be new to many law students studying in the United States, particularly those who are encountering International Business Transactions for the first time. Selecting a distinctly non-U.S. MNE like

³⁰ There is no redundancy in examining not only a country's laws, but also the legal tradition from which its laws emanate. See, e.g., AMANDA PERRY, *LEGAL SYSTEMS AS A DETERMINANT OF FDI: LESSONS FROM SRI LANKA* 14-16 (2001). Keen awareness of the characteristics of the major legal traditions is important for both MNE and counsel to keep in mind. Such awareness reduces the risks of easy glosses or approximate translations of business forms—using terminology such as “corporation” or “partnership” loosely, and with the common-law tradition's viewpoints—which can have unexpected, unanticipated, and unwelcome results. See, e.g., *Puerto Rico v. Russell & Co.*, 288 U.S. 376 (1933) (involving American partners who organized a business venture under Puerto Rico's laws—which are part of the Spanish Civil Law heritage—who found that the rough translation of partnership into a Civil Law *sociedad en comandita* had, in fact, given their venture a corporation-like juridical personality that took on the citizenship of its situs); *Baja Devs. LLC v. Loreto Partners*, CV-09-756-PHX-LOA, 2010 WL 1758242 (D. Ariz. Apr. 30, 2010) *report and recommendation adopted sub nom.* *Baja Developments LLC v. TSD Loreto Partners*, CV09-0756-PHX-LOA, 2010 WL 2232196 (D. Ariz. June 3, 2010); see also, Keith S. Rosenn, *Overview of Brazilian Business Forms*, in CHOW & SCHOENBAUM, *supra* note 12, at 539-45.

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

³² Another important aspect of IBT study generally and FDI study in particular is close attention to the forms of business organizations as they exist both in other municipal law systems as well as in other legal traditions. The Société Anonyme, or S.A., is a popular and familiar business organization form within the Civil Law traditions of both France and Spain. See Naomi R. Lamoreaux & Jean-Laurent Rosenthal, *Legal Regime and Business's Organizational Choice: A Comparison of France and the United States During the Mid-Nineteenth Century* 8 (Nat'l Bureau of Econ. Research, Working Paper No. 10288, 2004), available at <http://www.nber.org/papers/w10288>; see also Rosenn, *supra* note 30, at 541-43.

Alstom fosters several lessons. First, there are many MNEs of enormous economic influence and power that thrive in other business cultures, even if not familiar to the American consciousness. Second, not all opportunities in international business transactions come from U.S.-based MNEs seeking FDI. Third, the foreign MNE may well be situated to take advantage of expansion into the United States as a step in FDI projects to which an American presence may prove helpful.

Similarly, Israel is an ideal subject for students to evaluate as a host nation. Information about Israel is plentiful, and there are many original sources in English. Israel also stands distinct from many of its neighbors in the Middle East in that it has a legal, political and business culture that, while distinct, shares more in common with the American legal, political, and business culture than the American culture shares with Shari'a law states, for example.³³ In addition, Israel, unlike most of its neighbors in

³³ See, e.g., JOHN H. BARTON, JAMES LOWELL GIBBS, JR., VICTOR HAO LI, AND JOHN HENRY MERRYMAN, *LAW IN RADICALLY DIFFERENT CULTURES* 16-21 (1983) (explaining the history and law of Islam as a comparison to American culture). As Professor Barton and his co-authors observed:

The traditional sources of the law were the *Quaran* itself, together with the *sunna* or the custom of the early Islamic community by which the reliability of individual hadith (sayings of the Prophet) were judged, the *ijma* or the consensus of Islamic community, and *qiyas* and *yihad* or, respectively, analogies and personal reason from the first three sources. The intellectual guardianship and authoritative statement of the law were the responsibility of the juristic schools, not of the state or the *qadi*. Thus, not only was there no legislation: neither was there a doctrine of stare decisis or common-law type of law[-]making. Interpretation and statement of principles were the tasks of the *ulema*, or upright scholars, of the society, and of the mufti, or legal advisors to the *quadi*. The doctors of Al Azhar still issue *fatwas* or opinions on controversial points of law. There were four major juristic schools . . . that evolved during the first centuries of Islam. By about the third century of the Islamic era, the door of *ijihad* (personal reasoning) was closed, permitting no further change in the law. The only flexibility left then was to reject the law or to pick and choose among the doctrines of existing schools.

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

The inflexibility of such a law was sensed early on and led, even in traditional Islamic law, to escape devices. From a theoretical viewpoint, the most important of these was the doctrine of *siyasa*—a doctrine that the government in fact seeks the public interest (for the ruler has some knowledge of God's purpose for the society), and this pursuit of the public interest may necessitate deviation from the *sharia*, and that obedience is due the rule even if he deviates. It also permitted some division between the civil authority and the Caliphate. At the procedural level, the corresponding discretion and flexibility were reflected in the creation of *mazalim* or political ruler's courts that could avoid the limitations of the *sharia* courts and often became, in direct contradiction to the *sharia*, a means of appeal from the *qadi*'s decision. There was thus a tension between the political

the Middle East, has a Bilateral Investment Treaty (BIT) with the U.S., which allows exploration of the possible roles such treaties play in an MNE's FDI decisionmaking.

My example provides another useful synergy between MNE and host-state experience that Alstom has in doing business in the Middle East, and the projects—including transportation and conventional power-generation—which it has undertaken in Israel over the past decade. These include a 20-year operation and maintenance contract, worth around €330 million, with Dalia Power Energies Ltd for the 835 MW gas-fired Tzafit power plant in Israel,³⁴ a contract with Dalia Power Energies to construct two 417 MW gas-fired combined cycle units on an engineering, procurement and construction (EPC) basis;³⁵ a 50% stake in a joint venture, Horizon, based in Dimona in southern Israel, in collaboration with Israeli high-tech firms Rotem Industries, Ltd., and Gefen Biomed Investments, to finance and support the growth of innovative start-ups in the field of renewable and alternative energy and energy-saving technologies;³⁶ and another joint venture, this one with Israel's BrightSource Energy, to build solar thermal power plants throughout the Mediterranean and in Africa.³⁷

reality and the *sharia* ideal of government. For the philosophical reasons specified above and perhaps also because the society lacked a sense of progress, this tension was not thought to be troublesome. This fact is itself an important aspect of Islamic law.

Id. at 19-21.

³⁴ *A Service Contract Worth Around _330 Million for Tzafit Gas-Fired Plant in Israel*, ALSTOM (July 27, 2011), <http://www.alstom.com/press-centre/2011/7/service-contract-330-million-euros-Tzafit-gas-fired-plant-Israel/>.

³⁵ *Alstom Wins Contract Worth Approximately _500 Million to Construct Israel's Biggest Private Power Station*, ALSTOM (June 6, 2011), <http://www.alstom.com/press-centre/2011/6/alstom-wins-contract-to-construct-Israel-biggest-private-power-station/>.

³⁶ *Teaming Up With Rotem and Gefen in Israel to Promote Innovative Start-Ups in Renewable Energy and Energy Efficiency*, ALSTOM (July 3, 2011), <http://www.alstom.com/press-centre/2011/3/Alstom-teams-up-with-Rotem-and-Gefen-in-Israel-to-promote-innovative-start-ups-in-renewable-energy-and-energy-efficiency/>; see also Amiram Barkat, *Dalia Teams With Alstom for Israel's Largest Private Power Station—The Tzafit Station West of Beit Shemesh Will Have a Total Capacity of 835 Megawatts*, GLOBES: ISRAEL'S BUS. ARENA (July 31, 2011), <http://www.globes.co.il/serveen/globes/docview.asp?did=1000668977&fid=1725>; Ira Moskowitz, *France's Alstom Enters Joint Venture to Invest in Israeli Cleantech Technology—Alstom, Which is Providing the Trams for the Jerusalem Light Rail Project, Will Invest in Israeli Cleantech*, GREENPROPHET (Nov. 9, 2010), <http://www.greenprophet.com/2010/11/frances-alstom-enters-joint-venture-to-invest-in-israeli-cleantech-technology/>.

³⁷ Lisa Damast, *BrightSource, Alstom Partner on Solar Thermal*, GREENPROPHET (Oct. 9, 2010), <http://www.greenprophet.com/2010/10/brightsource-alstom-solar-partnership/>. The plants will use a proprietary technology developed by BrightSource, which went public in 2011, that “relies on thousands of mirrors all focused on a central tower with a water boiler atop of it to heat the water and turn it to steam which then turns a conventional turbine that generates electricity.” *Id.*

To avoid re-ploughing existing furrows, we look at Alstom's past FDI record in Israel. Taking into account projects such as the Horizon joint venture to help Israel develop renewable and alternative energy sources, Alstom's Wind Turbine unit becomes the perfect focus for exploring a new FDI project. This requires visualizing a new context and new issues for Alstom in a country that is familiar to Alstom in other contexts. The FDI proposal that we will evaluate for purposes of this article, therefore, is that the France-based international energy conglomerate, Alstom Group, will joint venture with Israel-based Energix-Renewable Energies, Ltd., to expand wind power output from the Golan Heights wind farm.³⁸

Having clearly articulated a specific FDI proposal, we will then be ready to move to the next phase of our Part One analysis. Using authoritative resources,³⁹ we undertake the information-gathering process. This is not merely an exercise in fact collection. Rather, I emphasize that the facts chosen, and the way in which those facts are presented, must be filtered through, and guided by, their relevance to the specific FDI proposal under consideration.⁴⁰

³⁸ Originally, Alstom's joint venture partner in a Golan Heights wind farm project would have been Multimatrix, an Israel-based firm which had acquired an interest in land on the Golan Heights. In July 2011, Multimatrix sold its stake in an Israeli wind-energy venture to Energix-Renewable Energies, Ltd. (ENRG:IT) for 45 million shekels. See Sharon Wrobel, *Israel Stocks: Delek Fuel, Delek Real Estate, Gilat, Multimatrix*, BLOOMBERG (July 13, 2011), <http://www.bloomberg.com/news/2011-07-13/israeli-stocks-delek-fuel-delek-real-estate-and-multimatrix.html>. Energix is traded on the Tel Aviv Stock Exchange. See <http://www.bloomberg.com/quote/ENRG:IT>. Thus, Alstom's joint venture partner will now be Energix, rather than Multimatrix. As of this writing, Energix's website is under construction. See <http://www.energix-group.com/> (last visited Nov. 17, 2012). For further discussion on the current state of wind energy in Israel, see, e.g., Daniel Farb, *Israel Should Catch the Wind*, GLOBES (July 31, 2011), <http://www.globes.co.il/serveen/globes/docview.asp?did=1000669294&fid=1724>; Ehud Zion Waldoks, *Draft Tender Published for Negev Wind Farms—At Present, There is Only One Facility Operating in Israel - Mei Golan Wind Energy on the Golan Height's Mount Bnei Rasan - Producing a Paltry Six MW*, JERUSALEM POST (Aug. 30, 2009), <http://www.jpost.com/HealthAndSci-Tech/ScienceAndEnvironment/Article.aspx?id=153340>.

³⁹ For regularly updated and detailed online resources of nations, see the Fact Sheets of the U.S. State Department, U.S. DEP'T OF STATE, COUNTRIES & REGIONS, <http://www.state.gov/misc/list/index.htm>. Similarly useful—and sometimes more detailed—are the listings from the Central Intelligence Agency's Factbook, www.cia.gov/cia/publications/factbook. In addition, the Library of Congress's Federal Research Division detailed Country Studies—a wealth of well-researched, well-documented, and well-presented information that is invaluable when conducting a proper FDI analysis. See *Country Studies*, LIBR. OF CONG. (Sept. 20, 2012), <http://lcweb2.loc.gov/frd/cs/>. Exploration of the host nation's media's reporting on its own political and business affairs can be launched from <http://www.kidon.com/media-link/index.shtml>.

⁴⁰ Such as identification of neighboring countries; territorial size of the host country; population; political system; current office holders in the country's executive branch (e.g., Prime Minister and/or President); identity and history of the political party currently in power, and of its allied and rival political parties; description of its current legal system, including the legal tradition (e.g., Civil Law, Common Law, Shari'a) to which its legal system belongs; description and classification of its economic system (e.g., developed or developing world;

In the next phase of Stage One, we discuss and critically evaluate the evidence gathered regarding factors relevant to the specific FDI decision. Emphasis is placed on establishing a number of separate, independent grounds for recommending the FDI project. In examining each ground for the recommendation, we pay particular attention to evidence from the host country's media sources about topics relevant to the FDI project, the MNE, and changes and challenges within the host nation itself. Such sources are subjected to evaluation for, among other things, fairness and balance of coverage and any potential biases.

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

A. The State of Israel and its Environs

Situated between its small southern coastline on the Red Sea and its expansive western coastline on the Mediterranean Sea, the State of Israel is a parliamentary democracy,⁴¹ whose 7,850 square-mile territory covers an area roughly the size of New Jersey.⁴² Israel's 7.59 million people (composed of Jews 76.2%; Arabs 19.5%; other 4.3%) make it the 97th most populated country in the world⁴³ and the seventh most populated

industrial or agricultural; capitalist, communist, socialist, or 'state capitalism'); indicators for that country, and trends in those indicators, such as GNI and the GNI per capita PPP; identification of major natural resources and discussion of any leverage, or vulnerabilities, that it creates for the host nation, along with any political issues arising from or competing sovereign claims for those resources; identification of the major products and services exported, and discussion of the markets and countries to which they are exported; identification of the major products and services that are imported, and discussion of the markets and countries from which they are imported; identification of any economic integration organizations to which the host state belongs or to which it seeks admission; and facts about the host nation's official currency, including exchange policies and any limits on expatriation of cash earned in the FDI.

⁴¹ CIA, Israel: *Government*, in THE WORLD FACTBOOK (2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html>.

⁴² CIA, Israel: *Geography*, in THE WORLD FACTBOOK (2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html> (describing Israel as "slightly larger than New Jersey").

⁴³ CIA, Israel: *People and Society*, in THE WORLD FACTBOOK (2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html>.

(and the fourth most densely populated)⁴⁴ country in the Middle East.⁴⁵ The populace espouses religions including Judaism, Islam, Christianity, and Druze.⁴⁶ Hebrew (official), Arabic (official), English, and Russian are the commonly-spoken languages.⁴⁷ Egypt and Jordan abut Israel to the south and southwest, respectively;⁴⁸ Syria borders to the northeast; and Lebanon shares Israel's northern border.⁴⁹ Israel's Syrian border includes a tract of disputed territory known as the Golan Heights (population 38,000, composed of 18,200 Arabs and about 20,000 Israeli settlers).⁵⁰ Ninety-two per cent of Israel's population is urban, distributed primarily among Tel Aviv-Yafo (3.2 million); the major port city, Haifa (1 million); and the capital Jerusalem (768,000).⁵¹

Since it was created in 1948, Israel has boisterous politics,⁵² with 13 different political parties represented in their unicameral legislature, the Knesset, which elects a Prime Minister (currently Binyamin Netanyahu, Likud ("Consolidation" party)⁵³)⁵⁴ and a President (currently Shimon Perez), a largely ceremonial post.⁵⁵ Social scientists have described the current (18th) Knesset as "the most representative of Israel's diversified society since the establishment of the State in 1948."⁵⁶ It in fact is a

⁴⁴ Mideast Web, Middle East Population At A Glance—Geography and Population (May 2006), <http://www.mideastweb.org/geogpop.htm>.

⁴⁵ For more information about Israel, see *Background Notes: Israel—Profile*, U.S. STATE DEP'T, UNDER SECRETARY FOR PUB. DIPLOMACY & PUB. AFFAIRS—BUREAU OF PUB. AFFAIRS (Near East), <http://www.state.gov/r/pa/ei/bgn/3581.htm>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Israel's Jordanian border includes the West Bank, a large area west of the River Jordan, which has been the subject of two treaties (1964 & 1994) and continuing disputation; Israel's Egyptian border includes disputed territory known as the Gaza Strip. *Id.*; see also *Travel Warning: Israel, the West Bank and Gaza*, U.S. STATE DEP'T, BUREAU OF CONSULAR AFFAIRS (June 22, 2011), http://travel.state.gov/travel/cis_pa_tw/tw/tw_5511.html (showing that continuing instability and volatility make these areas unattractive for FDI).

⁴⁹ *Id.* (map of Israel and the vicinity).

⁵⁰ *Id.*; see also Overseas Security Advisory Council (OSAC), *Israel 2009 Crime & Safety Report*, <https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=8044>.

⁵¹ CIA, *Israel: People and Society*, in *THE WORLD FACTBOOK* (2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html>.

⁵² See *The World in Figures: Israel*, *ECONOMIST* (Nov. 22, 2010), at <http://www.economist.com/node/17510423>.

⁵³ LIKUD, <http://www.likud.org.il/> (last visited Nov. 15, 2012).

⁵⁴ See *Currently Functioning Parliamentary Groups*, 18TH KNESSET, http://www.knesset.gov.il/faction/eng/FactionCurrent_eng.asp (under "Factions" tab) (last visited Nov. 15, 2012).

⁵⁵ The Basic Law—President of the State, Official Knesset Website, http://www.knesset.gov.il/laws/special/eng/basic12_eng.htm

⁵⁶ *Israel's 18th Knesset: Too Many Voices. Too Little Connection With the People of Israel*, AMERICA'S

fragmented coalition among Prime Minister Netanyahu's Likud and five other political parties across a conservative spectrum, in which Likud controls only 27 of 66 seats in the coalition.⁵⁷ The Prime Minister appoints, subject to Knesset approval,⁵⁸ an array of ministers to lead the many departments (currently 22)⁵⁹ of Israel's government.⁶⁰

Israel has a "mixed legal system of English common law, British Mandate regulations, and Jewish, Christian, and Muslim religious laws,"⁶¹ clearly reflective of the area's complex history. Equally reflective of Israel's history is the nation's modern currency; the new Israeli Shekel (ILS) harkens back to the days of King David, and its exchange rate with the U.S. dollar recently has ranged from a high of 4.4565 (2006) to a low of 3.588 (2008).⁶² The Shekel is freely convertible,⁶³ and is one of only 17 currencies that are freely convertible in currency exchange markets.⁶⁴

The U.S. State Department describes Israel's economic system as "a diversified, technologically advanced economy with substantial but decreasing government ownership and a strong high-tech sector."⁶⁵ Among its economic vitals are GDP growth: 3.4%; GDP: \$227bn (PPP: \$229bn); Inflation: 2.4%; GDP per head and \$29,410 (PPP: \$29,690).⁶⁶

FRIENDS OF THE CECI BLOG (Apr. 26, 2010), <http://cecisrael.wordpress.com/2010/04/26/israels-18th-knesset-too-many-voices-too-little-connection-with-the-people-of-israel/> (describing research conducted by Tel Aviv University Ph.D. Candidate Asaf Becker for "The CECI Forum for Government Stability").

⁵⁷ *Israeli Politics: Can the Doves Take Off Again? A Split in Israel's Labour Party may give the Peace-Minded Left a New Lease of Life*, ECONOMIST (Jan. 20, 2011), available at <http://www.economist.com/node/17963325>.

⁵⁸ See *Prime Minister's Office*, ISRAEL GOV. PORTAL, <http://www.pmo.gov.il/PMOEng/Government/Panel/> (last visited Nov. 15, 2012).

⁵⁹ See *Prime Minister's Office*, ISRAEL GOV. PORTAL, <http://www.pmo.gov.il/PMOEng/Government/Offices/> (last visited Nov. 15, 2012).

⁶⁰ See Yehudah Lev Kay, *Largest Cabinet Ever Missing Health Minister—With 30 ministers and 5 deputy ministers, the new cabinet is the largest ever, but not one wanted to serve as Health Minister*, ARTUZ SHEVA (Apr. 1, 2009), <http://www.israelnationalnews.com/News/News.aspx/130713#.Tq1wRHFGwf>.

⁶¹ CIA, *Israel: Government*, in THE WORLD FACTBOOK (2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html>.

⁶² CIA, *Israel: Economy-Exchange Rate*, in THE WORLD FACTBOOK (2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html>.

⁶³ Sharon Wrobel, *Shekel Begins Trading On Global Market*, JERUSALEM POST (May 26, 2008), available at <http://www.jpost.com/Business/BusinessNews/Article.aspx?id=102359>.

⁶⁴ Moti Bassok, *Israelis Can Soon Travel the World with Shekels in Their Pockets*, HAARETZ (Feb. 14, 2008), <http://www.haaretz.com/news/israelis-can-soon-travel-the-world-with-shekels-in-their-pockets-1.239265>.

⁶⁵ *Background Notes: Israel*, *supra* note 45.

⁶⁶ *The World in Figures*, *supra* note 52 (This contrasts with its neighbor, Egypt, whose vitals are GDP growth: 5.5%; GDP: \$253bn (PPP: \$534bn); Inflation: 10%; and GDP per capita: \$2,940 (PPP: \$6,190); and the United States, whose vitals are GDP growth: 1.5%; GDP: \$14,996bn (PPP: \$14,996bn); Inflation: 1.0%; and GDP per capita: \$48,010 (PPP: \$48,010)).

According to the World Bank, Israel's GNI is \$210,352,507,970 and its GNI per capita PPP is \$27,630.⁶⁷ Israel boasts low start-up costs for business: the World Bank reports start-up costs of businesses in Israel, as a percentage of gross national income (GNI) per capita, is 4%, similar to the U.S.'s 1%. By comparison in the region, Egypt is 10%; Jordan is 14%; Syria is 17%; and Lebanon is 67%.⁶⁸

Israel is also economically integrated with the major inter-governmental organizations including memberships in the World Trade Organization,⁶⁹ the World Intellectual Property Organization,⁷⁰ the International Monetary Fund, the World Bank Group, the Organization for Economic Cooperation and Development, the European Bank for Reconstruction and Development, and the Inter-American Investment Corporation.⁷¹ Israel also has Bilateral Investment Treaties with 37 nations and is negotiating them with several more.⁷² Israel has Free Trade Area agreements with Canada, European Free Trade Association (EFTA), European Union (EU), Mercosur (Southern Common Market), Mexico, Turkey, and the United States, and is negotiations with India.⁷³ With Jordan and Egypt, Israel has Qualified Industrial Zones (QIZ) agreements.⁷⁴

Israel's natural resources include timber, potash, copper ore, phosphate rock, magnesium bromide, clays, sand, and—as revealed by major finds during exploration in 1999 and 2010—natural gas in territorial waters off Israel's Mediterranean coast.⁷⁵

⁶⁷ This compares to Egypt's \$214,529,580,920 GNI and \$6,030 GNI per capita PPP, and the United States' \$14,365,600,000,000 GNI and \$47,310 GNI per capita PPP. *GNI Per Capita, PPP (Current International \$)—2010*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GNP.PCAP.PP.CD> (last updated 2012); *GNI (Current US\$)—2010*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GNP.MKTP.CD> (last updated 2012).

⁶⁸ *Cost of Business Start-Up Procedures (% of GNI per Capita)—2011*, WORLD BANK, <http://data.worldbank.org/indicator/IC.REG.COST.PC.ZS> (last updated 2012).

⁶⁹ *Israel and the WTO*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/countries_e/israel_e.htm (last visited Nov. 15, 2012).

⁷⁰ *Information By Country: Israel*, WORLD INTEL. PROP. ORG., http://www.wipo.int/members/en/details.jsp?country_id=79&country_code=IL (last visited Nov. 15, 2012).

⁷¹ *International Organizations*, MINISTRY OF FIN., <http://eng.mni.gov.il/FinanceIsrael/Pages/en/EconomicData/InternationalOrganizations.aspx> (last visited Nov. 15, 2012).

⁷² *International Agreements*, MINISTRY OF FIN., <http://eng.mni.gov.il/FinanceIsrael/Pages/en/EconomicData/InternationalAgreements.aspx> (last visited Nov. 15, 2012).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Israel and its Natural Resources: What A Gas! Israel's New Gas Finds May Affect Its Strategic Friendships*, TOO, ECONOMIST (Nov. 11, 2010), available at <http://www.economist.com/node/17468208>.

Israel's main exports include "cut diamonds, high-technology equipment, and agricultural products" (especially fruits and vegetables).⁷⁶ The United States (32.1%), Hong Kong (6.3%), India (5.1%), and Belgium (5.1%) were Israel's leading export markets in 2010.⁷⁷ Israel imports raw materials, military equipment, investment goods, rough diamonds, grain, and consumer goods—and especially fossil fuel (including oil imports of 282,200 bbl/day measured against daily consumption of 238,000 bbl/day, and electrical consumption of 47 billion kWh (48th in the world) as compared to production of only 53 billion kWh (45th in the world)).⁷⁸ Notably, the Israeli Ministry of Energy and Water Resources forecasts increased demand for electrical power in Israel and a doubling of electrical consumption in Israel by 2020.⁷⁹ Energy resources are closely tied to the region's politics, and energy dependence or independence, and energy import or export, significantly contribute to defining the relative power and vulnerabilities of Israel and its neighbors.⁸⁰

B. The Business Proposal: Alstom's Joint Venture with Energix to Expand the Golan Heights Wind Farm

The FDI proposal that we will evaluate for presentation is that the France-based international energy conglomerate, Alstom Group, will joint venture with Israel-based Energix, Ltd., to expand wind power output from the Golan Heights wind farm.⁸¹

Alstom Group is a world leader in transport infrastructure, power generation and transmission; has business presence in 100 countries and realized \$20.9 billion in sales during 2010–2011; and employs over 93,000 people. Alstom has 30 years' experience designing, siting, and operating wind-powered turbines, and operates wind farms in Spain, UK, France, Italy, Portugal, Morocco, Brazil, Turkey, Japan and India. Alstom's 2,100 turbines currently installed or under construction can generate more than

⁷⁶ CIA, Israel: *Economy*, in THE WORLD FACTBOOK (2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *The National Energy Sector in Israel—Factors Contributing to the Increase in the Demand for Electricity*, MINISTRY OF ENERGY & WATER RES., <http://energy.gov.il/English/Subjects/Electricity/Pages/GxmsMniElectricitySector.aspx> (last visited Dec. 31, 2012).

⁸⁰ See *What Role Have Natural Resources Played in the Politics And Economy of the Middle East?*, PBS—GLOBAL CONNECTIONS, <http://www.pbs.org/wgbh/globalconnections/mideast/questions/resource/index.html> (last visited Nov. 16, 2012).

⁸¹ See, e.g., *Israel Should Catch the Wind*, *supra* note 38; *Draft Tender*, *supra* note 38.

2,700 MW. It has expertise in on-shore, as well as off-shore, electric wind turbines, and in matching equipment needs to suit the geography of the wind farm (e.g., mountainous, desert, arctic or other geographically difficult regions/climates, as well as in more space-constrained populated areas). Alstom uses proprietary technology to produce climate kits and a unique and proven rotor support concept that protects the drive train to ensure reliability under the most challenging and adverse conditions. Alstom has yet to establish a wind turbine presence in the Middle East, yet has invested in other projects in Israel, even in disputed territories and in the face of criticism at home and abroad (such as the Jerusalem Light-Rail Project).⁸²

Energix purchased its stake in the Golan Heights wind project from Multimatrix, Ltd., in June 2011,⁸³ and has most recently invested in a pair of wind-energy projects in Poland.⁸⁴ Energix describes itself as “an

⁸² The source for information on Alstom's business is Alstom's own website. See, e.g., <http://www.alstom.com/about-us/> (last visited December 21, 2012); <http://www.alstom.com/power/renewables/wind/turbines/> (last visited December 21, 2012). The information on Alstom's involvement in the Jerusalem Light-Rail Project comes from a variety of sources. See *Jerusalem Light Rail Project*, RAILWAY-TECHNOLOGY, <http://www.railway-technology.com/projects/jerusalem/> (2011) (last visited Nov. 16, 2012); Daniel Machover & Adri Nieuwhof, *Opinion/Editorial: French Court Decision On Jerusalem Light Rail Must Be Challenged*, ELECTRONIC INTIFADA (June 27, 2011), <http://electronicintifada.net/content/french-court-decision-jerusalem-light-rail-must-be-challenged/10115#.TryGBnFGwfo> (noting Alstom's defense of its work in disputed Jerusalem territory and its victory in a French court); Abe Selig, *Palestinians Irate Over New Jerusalem Light Rail*, JERUSALEM POST (Feb. 3, 2010), <http://www.jpost.com/Israel/Article.aspx?id=167717> (“Jerusalem's light rail starts test runs this spring, with its sleek silver cars gliding across the city and promising to relieve the perpetual congestion. But Palestinians see no reason to celebrate. They hope to derail the \$1 billion tram because they fear it will further entrench Israeli control over east Jerusalem. They've asked a French court to force two French multinationals, Veolia and Alstom, out of the project and are urging Arab countries to cancel contracts with the two companies.”) (emphasis added); Abe Selig, *Palestinian Boycott Calls Won't Hinder Jerusalem Light Rail Construction*, JERUSALEM POST (Nov. 23, 2009), <http://www.jpost.com/Israel/Article.aspx?id=161130> (“Despite recent calls by Palestinian Authority officials to boycott two French companies working on Jerusalem's much-anticipated light rail system, the local spokesman for one of those companies – Alstom – told The Jerusalem Post on Sunday that the light rail work was moving ahead as scheduled, and that political considerations would not interfere with the firm's completion of the project. ‘Alstom is not a political company, said the company's Israel spokesman, Nissim Zvili, a former MK and Labor Party secretary-general who served as ambassador to France from 2002 to 2005.’”); see also ‘French Firm Drops J'lem Project Due To Political Pressure’—Dan Bus Lines Says Veolia Leaving Light Rail Project Because of Anti-Israel Boycotts; French Transportation Company Denies Allegations, JERUSALEM POST (Nov. 28, 2010), <http://www.jpost.com/NationalNews/Article.aspx?id=197093>.

⁸³ *Energix Invests NIS 45m in Golan Wind Energy Projects—The Company has Replaced Multimatrix as Mei Golan Wind Energy Development's Partner*, AHK (July 14, 2011), <http://israel.ahk.de/en/news/news-single/artikel/energix-invests-nis-45m-in-golan-wind-energy-projects/?cHash=972a80277ac4e0278030c273e067687a>.

⁸⁴ Aviv Levi, *Energix To Invest In Wind Energy In Poland—The Company Will Invest Up To 25 Million In Two Wind Energy Projects*, GLOBES (February 12, 2012), <http://www.globes.co.il/serveen/globes/docview.asp?did=1000726284&fid=1725>

alternative energy company that invests in wind energy projects,”⁸⁵ is listed on the Tel Aviv Stock Exchange (TASE),⁸⁶ and made its IPO on TASE in May 2011.⁸⁷ It is an appointed market-maker for its securities.⁸⁸ Its predecessor-in-interest, Multimatrix, is a small Israel-based investments company that has also been listed on the Tel-Aviv Stock Exchange.⁸⁹ Unlike Energix, Multimatrix is not primarily an energy company; indeed, Multimatrix has been notable to date only for the acquisition of two principal assets:⁹⁰ a resort complex on the Canary Islands, and an interest in property on the wind-swept Golan Heights in Israeli territory annexed from (but still claimed by) Syria after the 1967 “Six-Days’ War,” upon which it proposed to site numerous, modern electricity-generating wind turbines.⁹¹ Multimatrix sought to re-develop wind energy on the Golan Heights by buying a half share of Mei Golan, a company that operates a

⁸⁵ Overview, REUTERS (2012), <http://www.reuters.com/finance/stocks/overview?symbol=ENRG.TA>.

⁸⁶ For Energix’s TASE listing, see <http://www.tase.co.il/TASEEng/General/Company/companyMainData.htm?companyID=001581&shareID=011233.63&subDataType=3>. As another stock exchange explains, “market makers are important players in the marketplace, as they support the liquidity of securities by providing continuous bid and ask quotations. Holders of securities that have appointed market makers can be confident that they can sell their holdings at any time. Through enhancing the liquidity of securities, market makers contribute to the maintenance of an efficient and orderly market.” *Market Makers*, NASDAQ OMX ARMENIA, http://www.nasdaqomx.am/en/market_makers.htm. See also Robert B. Thompson, *Market Makers and Vampire Squid: Regulating Securities Markets after the Financial Meltdown*, 89 WASH. U. L. REV. 329 (2011); Rafi Eldor, Shmuel Hauser, Batia Pilo, & Itzik Shurki, *The Contribution of Marketmakers to Liquidity and Efficiency of Options Trading in Electronic Markets*, 30 J. BANKING & FIN. 2025, 2025–40 (2006); Kumar Venkataramana & Andrew C. Waisburda, *The Value of the Designated Market-Maker*, 42 J. FIN. & QUANT. ANAL. 735 (2007); John F. Gould & Allan W. Kleidon, *Market Maker Activity on Nasdaq: Implications for Trading Volume*, 1 STAN. J.L. BUS. & FIN. 11 (1994).

⁸⁷ Aviv Levy, *Energix Renewable Energy Raises NIS 146m In IPO—Energix Builds and Operates Small Photovoltaic Facilities*, GLOBES (May 2, 2011), <http://www.globes.co.il/serveen/globes/docview.asp?did=1000642262&fid=1725>.

⁸⁸ See *Energix-Renewables Energies Ltd*, TEL AVIV STOCK EXCHANGE, <http://www.tase.co.il/TASEEng/General/Company/companyMainData.htm?companyID=001581&subDataType=0&shareID=01123355> (market maker status denoted by “MM” next to stock symbol; hold cursor over notation to see status”).

⁸⁹ *Markets—Multimatrix Ltd (MLTX.TA)*, REUTERS, <http://www.reuters.com/finance/stocks/companyProfile?rpc=66&symbol=MLTX.TA> (last visited Nov. 15, 2012).

In September 2012, after it had sold its interest in the Golan Heights wind farm project to Energix, Multimatrix suspended trading in its shares on the TASE. See *Multimatrix Ltd*, TEL AVIV STOCK EXCHANGE, <http://www.tase.co.il/TASEEng/General/Company/companyMainData.htm?companyID=000052&> (last visited Nov. 15, 2012).

⁹⁰ *Company Profile—Multimatrix Ltd (MLTX.TA)*, REUTERS, <http://www.reuters.com/finance/stocks/companyProfile?rpc=66&symbol=MLTX.TA> (last visited Nov. 16, 2012).

⁹¹ Maurice Picow, *Multimatrix Invests Millions In Israel’s Small Wind Market*, GLOBAL PROPHET (May 8, 2010), <http://www.greenprophet.com/2010/05/wind-energy-golan-heights/>. Please recall that in June 2011, Multimatrix sold its interest in the Golan Heights wind farm to another Israeli company, Energix. See *supra* text accompanying note 38.

nearly 20-year-old, now outdated wind farm on the Golan Heights,⁹² and it is that half share that Energix purchased in 2011.⁹³ Energix's predecessor, Multimatrix, aspired to build 160 wind turbines on the 18-acre area, and generate 450 MW of power. In purchasing Multimatrix's interest in the project for 45 million shekels,⁹⁴ Energix presumably shares the view that Multimatrix had of the political situation involving Syria's claim to the Golan Heights as not presenting much of a disincentive to developing the wind turbine farm: "If the land is returned to Syria in a peace deal, we will be compensated," Multimatrix's former Chairman, Uri Omid,⁹⁵ once commented: "Regardless, this project can work for us or work for them. Someone will always need the electricity."⁹⁶

A decision as complex as Alstom would be making in deciding to joint venture with an Israeli company to develop Golan Heights wind power involves numerous factors, a great deal of information gathering, a substantial amount of sophisticated analysis, and informed intuition on the part of seasoned managers and executives. Such complexity can be overwhelming to students in an IBT course and could prevent the learning objectives from being accomplished.⁹⁷ For purposes of our

⁹² Ari Rabinovitch, *Israel Uses Golan To Build Wind Energy Industry*, REUTERS (Apr. 29, 2010), <http://uk.reuters.com/article/2010/04/29/us-israel-energy-wind-idUKTRE63S37320100429>.

⁹³ Sharon Wrobel, *Israel Stocks: Delek Fuel, Delek Real Estate, Gilat, Multimatrix*, BLOOMBERG (July 13, 2011), <http://www.bloomberg.com/news/2011-07-13/israeli-stocks-delek-fuel-delek-real-estate-and-multimatrix.html>. In addition, Energix presumably also purchased Multimatrix's "35% of a wind farm in Tel Assaya, Israel, [that] produces six megawatt of electricity and is about to be upgraded to 14 megawatts" which Multimatrix had purchased along with "50% of another wind farm under development in the Golan heights, with expected capacity of 400 megawatts, for the sum of NIS 38 million." *Multimatrix Ltd. Acquires Holdings in Two Wind Farms in Israel*, REUTERS (Nov. 30, 2011), <http://www.reuters.com/finance/stocks/MLTX.TA/key-developments/article/2035673>

⁹⁴ *Id.*

⁹⁵ Mr. Omid resigned effective March 5, 2012. *Multimatrix Ltd Announces Resignation of Chief Executive Officer, Mr. Uri Omid*, REUTERS (March 4, 2012), <http://www.reuters.com/finance/stocks/MLTX.TA/key-developments/article/2495110>.

⁹⁶ *Multimatrix Ltd. Acquires Holdings in Two Wind Farms in Israel*, REUTERS (Nov. 30, 2011), <http://www.reuters.com/finance/stocks/MLTX.TA/key-developments/article/2035673>.

⁹⁷ An excellent roundup of various, primarily academic, templates and paradigms for evaluating FDI decisions is Sethi, Guisinger, Phelan & Berg, *Trends in Foreign Direct Investment Flows: A Theoretical and Empirical Analysis*, 34 J. INT'L BUS. STUD. 315 (2006). Sethi et al. provide a bedazzling list of such templates and paradigms: industrial organization tradition; product life-cycle concept; exploitation of ownership advantages approach; risk diversification model; organizational assets and knowledge-transfer approach; internalization-of-transactions perspective, bandwagon-effect, eclectic paradigm (an ownership, location, and internalization advantages-based framework to analyze why, and when, MNEs would invest abroad); the Upsala model of incremental FDI; the resource-based approach; the evolutionary perspective; the organizational-management approach; the ownership advantages theory (encompassing technology intensity, capital intensity, and product differentiation), and the

discussion, therefore, I telescope the complexity into three, macro-view propositions for further research and development.⁹⁸ These three reasons are the strongest militating in favor of the FDI, and they become the foundation of a strategic business plan. In assessing the FDI under consideration, students should see that the three strongest reasons why Alstom should embrace this joint venture opportunity with Energix are:

more recent "regional-variations" approach. *Id.* at 316-17. The authors' regional-variations approach examines the effect of the following factors not merely on FDI within a particular country, but FDI within a particular region, including market lucrativeness, market size, market growth, economically "liberal" host state policies (particularly concerning currency expatriation, expropriation, tax concessions, and private ownership), technological infrastructure, availability of skilled labor, absence of trade barriers, overhead costs (production, transportation, and wage costs), political stability, and "psychic" distance of host state and the related notion of "cultural proximity." *Id.* at 316-18. In their model, Sethi et al. analyze from the perspective of six propositions:

Proposition 1. Notwithstanding each MNE's unique FDI location decision, collectively such flows target economically and culturally integrated regions rather than specific countries.

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

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

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

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

Proposition 6. The factor of psychic distance will assume less importance in MNEs' FDI decisions, all other factors being equal.

Id. at 317-19. The authors posit that MNEs make FDI decisions in cycles, because FDI activity eventually becomes saturated in particular reasons, and thus, "[t]o remain competitive, MNEs are compelled to seek new FDI destinations that offer wage and factor cost reductions and also open up new markets," and while "[s]uch countries/regions are also evaluated on the same traditional FDI determinants, . . . firms might now accept a different mix compared to that for the original destinations." *Id.* at 318-19. Somewhat lost in Sethi et al.'s survey of factors is political risk as a potentially positive factor. See, e.g., Alfredo Jiménez, *Political Risk as a Determinant of Southern European FDI in Neighboring Developing Countries*, 47 EMERGING Mkts. Fin. & Trade 59 (July-August 2011) ("Despite the fact that one might expect global flows to fall as a consequence of political risk, those from the countries in the sample increase, because they come from firms that are searching for a market niche where they can take advantage of their political capabilities"); Jiménez & Delgado-García, *supra* note 3. More generally, I discuss political risks of Alstom's hypothesized Golan Heights investment in Section III.C.2, *infra*.

⁹⁸ This is consistent with the analytic framework developed and espoused by a former McKinsey & Company consultant, who has become a leading authority on techniques for expressing the business-decisionmaking process. See generally BARBARA MINTO, MINTO PYRAMID PRINCIPLE: LOGIC IN WRITING, THINKING, AND PROBLEM-SOLVING 121-67, 170-76 (1991).

1. *Israel's need for electrical power currently exceeds supplies and will continue to grow.*
2. *Electricity generated by wind turbines is a sustainable energy source that has great room for growth in Israel and increases Israel's energy independence.*
3. *Israeli government support for wind-generated electrical generation is growing, and Israel's FTA Agreement with the U.S. will permit Energix to import Alstom's American-made wind turbines duty-free.*

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

C. A Proposed Strategic Plan: Why Expanding the Golan Wind Farm in Joint Venture with Energix Optimizes Alstom's Strategic Advantages in Opening a New Market for its Products and Services in the Middle East

1. Israel's Need for Electrical Power Currently Exceeds Supplies and Will Continue to Grow

Israel has a dynamic economy that continues to grow: GDP has increased at a rate of 4 to 5 percent annually since 2005,⁹⁹ and is heavily weighted to manufacturing and service industries that consume substantial amounts of electrical power.¹⁰⁰ In fact, Israeli electricity consumption has grown by about 4 percent a year since the early 1990s.¹⁰¹

This growth creates practical challenges for Israel.¹⁰² Certainly, Israel cannot afford to have the kind of massive electrical power outage that confronted India in July 2012, in which nearly 700 million people—one-tenth of the world's population—were plunged into darkness in an

⁹⁹ *Israel Heading Towards Ending Fossil Fuel Dependence*, iPLANET ENERGY INDUSTRY NEWS (Jan. 9, 2011), <http://iplanetenergynews.com/index.php/2011/01/09/israel-heading-towards-ending-fossil-fuel-dependence> [hereinafter "iPLANET"]; Uriel Heilman, *Is An Israeli Energy Revolution in the Offing?*, B'NAI B'RITH MAGAZINE, Spring 2010, available at <http://www.urielheilman.com/0401-israel-alternative-energy.html>.

¹⁰⁰ U.S. STATE DEP'T, Under Secretary for Public Diplomacy and Public Affairs— Bureau of Public Affairs (Near East), Background Notes: Israel—Economy, <http://www.state.gov/r/pa/ei/bgn/3581.htm#econ> (Dec. 10, 2010).

¹⁰¹ iPLANET, *supra* note 99; Heilman, *supra* note 99.

¹⁰² See, e.g., Gregg Tepper & Stuart Winer, *Electricity Grid Stretched to Brink as Sweltering Israelis Turn to Air Conditioners for Relief—Power Outages May Occur in Coming Days if Electricity Use Exceeds Supply; Public Asked to Reduce Consumption in Late Afternoon*, TIMES OF ISRAEL (July 17, 2012), available at <http://www.timesofisrael.com/israel-sets-2012-electricity-consumption-record/>

unexpected power grid failure.¹⁰³ While Israel's infrastructure is more stable than India's, Israel is facing its own energy issues because of politics and geography.¹⁰⁴ For example, McKinsey & Company found that Israeli greenhouse gas emissions are expected to double by 2030 as a result of increased energy consumption.¹⁰⁵ Israel's electricity grid is not connected to any of its neighbors' grids. Israel imports 85 percent of its energy, mostly in the form of coal, but also in natural gas. In 2009, the country

¹⁰³ See, e.g., Santanu Choudhury, Romit Guha & Saurabh Chaturvedi, *After Blackout, India Seeks to Restore Faith—Electricity is Back But Confidence Will Take Longer; Economic Prospects, Investor Patience Dwindle*, WALL ST. J. (Aug. 1, 2012), available at <http://online.wsj.com/article/SB10000872396390443687504577563001658535464.html>; Sruthi Gottipat, *India Endures World's Largest Blackout*, N.Y. TIMES (July 31, 2012), available at <http://india.blogs.nytimes.com/2012/07/31/india-hosts-worlds-largest-blackout/>. Reporter Gottipat put the event in perspective:

The colossal power failure that swept through half of India early Tuesday afternoon, causing disruptions in the lives of hundreds of millions of people, has earned India a new and dubious distinction: Host of the World's Largest Blackout.

Some 600 million people were estimated to be affected after power was halted in 11 states in northern and eastern India and in the country's capital of 16 million people. Imagine most of Europe without power, or more people powerless than the populations of the United States, Mexico and Central America combined.

Id. As two other reporters observed:

It had all the makings of a disaster movie: More than half a billion people without power. Trains motionless on the tracks. Miners trapped underground. Subway lines paralyzed. Traffic snarled in much of the national capital.

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

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

Jim Yardley & Gardiner Harris, *India Staggered by Power Blackout; 670 Million People in Grip*, N.Y. TIMES (Aug. 1, 2012), available at <http://www.nytimes.com/2012/08/01/world/asia/power-outages-hit-600-million-in-india.html>; see also Gardiner Harris & Vikas Bajaj, *As Power is Restored in India, the 'Blame Game' Over Blackouts Heats Up*, N.Y. TIMES (Aug. 1, 2012), available at <http://www.nytimes.com/2012/08/02/world/asia/power-restored-after-india-blackout.html>.

¹⁰⁴ Cf. Editorial, *When Half of India Loses Electricity, Time for Lessons on Going Local India's Electricity Grid Went Out for 600 Million People Tuesday. The Historic Blackout Shows How Nations Must Reconsider Big, Complex Infrastructure Like Centralized Electric Utilities*, CHRISTIAN SCIENCE MONITOR (July 31, 2012), available at <http://www.csmonitor.com/Commentary/the-monitors-view/2012/0731/When-half-of-India-loses-electricity-time-for-lessons-on-going-local>; Jeff Myhre, *Indian Blackout Lesson: Invest in Infrastructure*, FOREIGN POL'Y ASS'N NETWORK (August 3, 2012), available at <http://foreignpolicyblogs.com/2012/08/03/indian-blackout-lesson-invest-in-infrastructure/>.

¹⁰⁵ IPIANET, *supra* note 99; Heilman, *supra* note 99.

spent \$5 billion on energy imports.¹⁰⁶ In addition, politics makes Israel an “energy island.” Thus, while recent natural gas finds in the Mediterranean will benefit some energy-consuming sectors, these finds will not be used to generate additional electrical power, and the finds themselves are also embroiled in political controversy over sea boundaries with neighboring Lebanon and and face possible Hezbollah rocket attacks on gas refineries launched from Lebanon.¹⁰⁷ Israel has no backup to meet consumption, and current energy sources have been destabilized by major acts of sabotage following the instability created by the fall of the Mubarak government in Egypt.¹⁰⁸ Israeli officials warn that as a result, the country soon could encounter rolling blackouts, much as California experienced intermittently throughout the last decade. Israel already is experiencing brownouts. Heavy reliance on foreign supplies makes Israel highly subject to global price fluctuations—not to mention potential boycotts by hostile energy-exporting states.¹⁰⁹ Thus, Israel faces both a steady and growing demand for electrical energy while at the same time having limited access to the traditional means of generating electrical power and facing environmental limitations on generating electricity by burning fossil fuels.

It is important for both law students and lawyers in this “information age” of the 21st century to think critically about the sources, particularly non-legal sources, upon which they rely in gaining familiarity with their clients’ businesses and the context for their FDI deliberations. Indeed, the internet age has—seemingly like a *jinni* from the *1001 Nights*¹¹⁰—allowed unprecedented access to virtually unlimited amounts of data from myriad sources with breathless alacrity. At the same time, however, never has so much misinformation been spread so widely so quickly.¹¹¹ Thus, in learning IBT, just as in learning other disciplines that require the location,

¹⁰⁶ iPIANET, *supra* note 99; Heilman, *supra* note 99.

¹⁰⁷ Ethan Bronner, *Natural Gas Deposits Improve Israel's Energy Outlook*, N.Y. TIMES (Aug. 20, 2010), available at <http://www.nytimes.com/2010/08/21/world/middleeast/21israel.html>.

¹⁰⁸ *Blasts Hit Egypt's Gas Pipeline to Israel, Jordan—Saboteurs Blew up a Sinai Pipeline on Thursday, Halting Gas Supplies from Egypt to Israel and Jordan in the Sixth Such Attack Since the Overthrow of President Hosni Mubarak*, REUTERS (Nov. 10, 2011), available at <http://www.reuters.com/article/2011/11/10/us-egypt-gas-explosion-idUSTRE7A92RD20111110> [hereinafter, *Saboteurs*].

¹⁰⁹ iPIANET, *supra* note 99; Heilman, *supra* note 99.

¹¹⁰ 1 ARABIAN NIGHTS: TALES OF 1001 NIGHTS, at 5-7, 965 (Penguin Classics 2008) (Malcom C. & Ursula Lyons, trans.). Of course, in its most baleful incarnations, the internet may be more properly comparable to an *ifrit*—an “evil” *jinni*. See *id.* at 10-25, 965. Unlike the *ifrit*, however, the internet cannot be beguiled into returning to its bottle. *Id.* at 24-25.

¹¹¹ See, e.g., JAMIE BARTLETT & CARL MILLER, TRUTH, LIES, AND THE INTERNET: A REPORT INTO YOUNG PEOPLE'S DIGITAL FLUENCY (2011), available at <http://www.demos.co.uk/publications/truth-lies-and-the-internet>.

collection, and assessment of online data, it is important to join the “major campaign to place digital fluency at the heart of learning,”; and at the heart of digital fluency is “having the skills and knowledge to evaluate and assess” the provenance and content of the information found and the perspective and critical discernment to recognize proper modes and strategies for information searches.¹¹² In the preliminary research into FDI options, we can begin to emphasize these skills by requiring our students to provide critical, objective assessments of the quality, potential bias, and reliability of sources on which they rely.¹¹³

For example, the sources cited in this subsection to support the information and observations provided are, in addition to the internationally reputable and Pulitzer-Prize winning *New York Times*, at least prima facie reliable and verifiable. Thus, although the United States is a staunch ally of Israel, the State Department’s information is gathered for governmental decision-making purposes by a third-party to Israel, and therefore is not likely subject to significant distortion or bias since it is not used primarily to shape U.S. public opinion. The *iPlanet* source may be

¹¹² *Id.* at 7.

¹¹³ See, e.g., M. Neil Browne, et al., *The Importance of Critical Thinking for Student Use of the Internet*, 34 COLLEGE STUDENT J. No. 3 (Sept. 2000), available at <http://www.freepatentsonline.com/article/College-Student-Journal/66760560.html>. As M. Neil Browne, Distinguishing Teaching Professor of Economics at Bowling Green State University in Ohio, observed over a decade ago—before the problem reached the proportions it has now attained:

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

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

. . . .

Without carefully considering the source from which an argument has arisen and the reasoning behind the argument’s conclusion, students are doing little to develop their minds. If the goal of our educational system is indeed to “expand students’ intellectual capacities”, . . . then we should expect students to evaluate any arguments they encounter. Sites on the Internet have varying purposes, perspectives, and credibility in the same way that non-electronic sources do. Any individual who wishes to conduct research via the Internet must consider these qualities.

Id. at 3 (citations omitted).

subject to more bias, because it is the product of an Israeli trade and lobbying group¹¹⁴ that advocates “green” and alternative energy sources;¹¹⁵ however, the subject matter involves relatively straightforward reporting of facts that can be verified by reference to other, independent international sources (such as those of the State Department, the WTO, and the World Bank), eliminating the skewing effect seen in reporting that involves advocacy of an industry’s self-interested position. B’Nai B’rith, which published Heilman’s article, is a well-known Jewish fraternal organization zealously promoting Israel and its interests,¹¹⁶ and thus needs to be used cautiously; however, Mr. Heilman is a reporter recognized for his objectivity and accuracy in reporting,¹¹⁷ and is a watchdog for accuracy in reporting by others.¹¹⁸

2. *Electricity Generated by Wind Turbines is a Sustainable Energy Source That has Great Room for Growth in Israel and Increases Israel’s Energy Independence*

Israel’s energy needs are defined by its natural resource limitations, and the current Prime Minister, Benjamin Netanyahu, has led a government focused on expanding the country’s energy base and promoting new

¹¹⁴ iPlanet discloses the following about itself:

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

About iPlanet Energy News, iPLANET, <http://iplanetenergynews.com/index.php/about-2/> (last visited Nov. 15, 2012).

¹¹⁵ iCONSORTIUM, <http://i-consortium.com/> (“iConsortium, member-companies offer the gamut of renewable energy, energy savings and green building technologies, products and services.”) (last visited Nov. 15, 2012).

¹¹⁶ Alfred M. Lilienthal, *The Changing Role of B’nai B’rith’s Anti-Defamation League*, WASH. REP. ON MID. E. AFFAIRS (June 1993), <http://www.wrmea.com/backissues/0693/9306018.htm>.

¹¹⁷ See Minnesota Public Radio, *Conflict Coverage And Journalistic Objectivity*, Aug. 15, 2006, <http://minnesota.publicradio.org/display/web/2006/08/15/midmorning1/>; see, e.g., *Honest Reporting in Canada*, <http://www.honestreporting.ca/hrc-in-news.aspx>; *Award-Winning Stories by Uriel Heilman*, URIELHEILMAN.COM, <http://www.urielheilman.com/award.html> (last visited Nov. 16, 2012).

¹¹⁸ See, e.g., Uriel Heilman, *Playing Fast and Loose with the Facts at NGO Monitor*, JEWISH TELEGRAPHIC AGENCY (June 17, 2009), <http://blogs.jta.org/telegraph/article/2009/06/17/1005957/playing-fast-and-loose-with-the-facts-at-ngo-monitor>.

sources of energy.¹¹⁹ Utilities throughout the world have turned to wind-power to expand electricity-generating capacity.¹²⁰ “With the advancement of technology and the dropping of production prices wind has become a serious and important component of utility generation.”¹²¹ Wind power has become a desirable and affordable means of generating electricity, and one of the fast-growing means that utilities world-wide are implementing.¹²² As the Global Wind Energy Council (GWEC) has observed, “there is huge and growing global demand for emissions-free wind power, which can be installed quickly, virtually everywhere in the world” and “[w]ind energy is the only power generation technology that can deliver the necessary cuts in CO₂ in the critical period up to 2020, when greenhouse gases must peak and begin to decline to avoid dangerous climate change.”¹²³ Among alternative energy sources, wind-generated electricity has particular attraction for Israel; significant regions of the country are sufficiently windy on a continuous basis to sustain commercial electrical production.¹²⁴ At present, Israel has only one wind turbine farm, located in the Golan Heights.¹²⁵

In addition to the reputable *New York Times* and *Jerusalem Post*, the sources for this section include information from two wind-industry groups, the American Wind Energy Association (AWEA) and the GWEC, both of which are, naturally, biased somewhat in favor of promoting wind-energy and wind-energy producers and manufacturers. Gotland University’s Report on wind-energy viability in Israel should be

¹¹⁹ See Andrew Revkin, *What If: On Uprisings, Oil Kingdoms and the Energy Gap*, N.Y. TIMES (Feb. 3, 2011), available at <http://dotearth.blogs.nytimes.com/2011/02/03/what-if-on-uprisings-oil-kingdoms-and-the-energy-gap>.

¹²⁰ See, e.g., Mathew L. Wald, *Taming Untruly Wind Power*, N.Y. TIMES (Nov. 4, 2011), available at <http://www.nytimes.com/2011/11/05/business/energy-environment/as-wind-energy-use-grows-utilities-seek-to-stabilize-power-grid.html> [hereinafter Wald, *Taming*]; Mathew L. Wald, *Is Wind Worth it?*, N.Y. TIMES (Oct. 19, 2011), available at <http://green.blogs.nytimes.com/2011/10/19/is-wind-worth-it/> [hereinafter Wald, *Worth it?*].

¹²¹ *Utilities and Wind Power*, American Wind Energy Association, <http://www.awea.org/learnabout/utility/index.cfm>.

¹²² *Wind Powering America*, U.S. DEPT. ENERGY, http://www.windpoweringamerica.gov/pdfs/2011_annual_wind_market_report.pdf.

¹²³ *Wind is a Global Energy Source*, GWEC, http://www.gogreen.ae/greenstory_view.php?storyid=1281.

¹²⁴ YOUSRI ODEH, WIND POWER POTENTIAL IN PALESTINE/ISRAEL, AN INVESTIGATION STUDY FOR THE POTENTIAL OF WIND POWER IN PALESTINE/ISRAEL, WITH EMPHASIS ON THE POLITICAL OBSTACLES 18, (Gotland University, Swed.) (June 6, 2011), available at http://www.hgo.se/wpmaster/2615-hgo/version/default/part/AttachmentData/data/Wind_Power_Potential_in_Palestine%20%282%29.pdf (discussing findings relevant to Golan Heights region).

¹²⁵ Sharon Udasin, *Experts: Israel Stagnant on wind, renewable energy*, JERUSALEM POST (June 17, 2012), <http://www.jpost.com/Sci-Tech/Article.aspx?id=274200>.

more balanced and objective, though it must be noted that the University has a Wind Energy Department and offers a M.S. degree in Wind Energy Project Management, and thus is likely to be influenced by a bias in favor of wind-energy manufacturers, operators, and promoters, who are likely employers and sponsors of students and graduates in the program.¹²⁶

3. *Israeli Government Support for Wind-Generated Electrical Generation is Growing, and Israel's FTA Agreement with the U.S. Will Permit Energix to Import Alstom's American-Made Wind Turbines Duty-Free*

The Israeli government strongly supports the development of wind-generated electricity in Israel.¹²⁷ As the *Jerusalem Post* reports, "Prime Minister Binyamin Netanyahu has declared the" further development of the Golan Heights wind farm a "national project," and "as fears continue to loom over energy shortages," the expansion of wind-generated electricity on the Golan Heights is "widely supported by government officials who see a growing need for alternative energy sources in Israel."¹²⁸ Indeed, Israel's cabinet has approved an allocation of 800 megawatts of energy production from wind farms as part of Prime Minister's 10-Year Energy Plan for Israel, which seeks by 2020 to generate from renewable energy sources 10% of the country's electricity.¹²⁹ "Between now and 2014, the government is looking for 460MW from large-scale solar installations, 110MW from rooftop solar, 800MW from wind power and about 210MW from biogas and waste-to-energy."¹³⁰ The Israeli government's ambitious program is also creating an opportunity to enter a secondary market in wind power—individual office and apartment buildings. Manufacturing, importing, and selling

¹²⁶ See, e.g., *Master Program in Wind Power Project Management*, GOTLAND U. <http://www.hgo.se/utbud/hgo/en/TAMWM> (last visited Nov. 16, 2012).

¹²⁷ Ira Moskowitz, *Wind energy in Israel: Wind Farm on Golan Heights a National Project*, REVE (Sept. 25, 2010), http://www.evwind.es/noticias.php?id_not=7515; Sharon Udasin, *Local firm to construct more Golan Heights wind turbines*, JERUSALEM POST (Aug. 24, 2011), <http://www.jpost.com/Sci-Tech/Article.aspx?id=235179>; Oliver Wagg, *Israel Government Approves 2.8GW 2020 Renewables Goal—Israel's Cabinet has Given the Go-Ahead to a Plan to Generate 10% of the Country's Electricity from Renewables by 2020*, RECHARGE: THE GLOBAL SOURCE FOR RENEWABLE ENERGY NEWS (July 18, 2011), http://www.rechargenews.com/business_area/politics/article267837.ece.

¹²⁸ Kalindi O'Brien, *Golan Heights Wind Farm Production to Begin Soon*, JERUSALEM POST (Sept. 27, 2010), <http://www.jpost.com/HealthAndSci-Tech/ScienceAndEnvironment/Article.aspx?id=189440>.

¹²⁹ Gil Ronen, *Cabinet Approves Electricity Production from Renewable Sources*, ARUTZ SHEVA (July 17, 2011), <http://www.israelnationalnews.com/News/News.aspx/145798#.UKu5YYdT-ZY>.

¹³⁰ Wagg, *supra* note 127.

smaller wind turbines for installation on roofs has already started in Tel Aviv, and Israel's public utility authority has adopted a rule allowing individuals to generate their own wind-made electricity and to sell their excess back to the electric power grid.¹³¹ Alstom is well-positioned to manufacture and import into Israel both the larger wind-turbines needed for the Golan Heights project, as well as a separate line of smaller, commercial and residential building units.

In 2010, Alstom announced the opening of a new wind-turbine assembly manufacturing plant sited in Amarillo, Texas,¹³² which is the latest component of its North American Wind Operations Division headquartered in Richmond, Virginia.¹³³ Ground was broken on the facility¹³⁴; certification of its production processes are underway¹³⁵; and the U.S. Energy Department has already awarded Alstom a \$4.1 million "to research and develop advanced control systems and integrated sensors that increase energy production and lower the capital cost[s]" of electricity-generating wind turbines.¹³⁶ The American presence is especially timely, because it will allow Alstom to take advantage of the Free Trade Area agreement between the United States and Israel,¹³⁷ the first FTA into which the U.S. entered 25 years ago.¹³⁸ Under Annex I of the FTA, products "of the United States" are imported duty-free into

¹³¹ Zafir Rinat, *On the Roof, Wind Turbines to Bring Power*, HAARETZ (May 15, 2008), <http://www.haaretz.com/print-edition/features/on-the-roof-wind-turbines-to-bring-power-1.245923>; Jonathan Shapira, *Israel Sets Feed-In Tariff for Wind Power*, CLEANTECH INVESTING IN ISRAEL (Feb. 22, 2009), <http://cleantech-israel.blogspot.com/2009/02/israel-sets-feed-in-tariff-for-wind.html>.

¹³² See *Alstom Outlines Plans for North American Wind Turbine Assembly Facility*, PRNEWswire (May 25, 2010), <http://multivu.prnewswire.com/mnr/alstom/43916/>.

¹³³ U.S. Locations, ALSTOM, <http://www.alstom.com/us/locations/> (Turbine engineering, manufacturing and service center; power automation & controls, excitation systems, monitoring and diagnostics).

¹³⁴ *Alstom Breaks Ground With Wind Turbine Nacelle Assembly Facility in Amarillo, Texas*, PRNEWswire (May 27, 2010), <http://www.prnewswire.com/news-releases/alstom-breaks-ground-with-wind-turbine-nacelle-assembly-facility-in-amarillo-texas-95024609.html>.

¹³⁵ *Alstom Wind Turbine Starts N. American Certification Testing*, TEXAS TECH NEWS (Feb. 2, 2011), <http://today.ttu.edu/2011/02/alstom-wind-turbine-starts-n-american-certification-testing/>; Kevin Welch, *Alstom Energy Begins Work On First Wind Turbine Nacelles*, AMARILLO GLOBE-NEWS (May 30, 2012), <http://amarillo.com/news/local-news/2012-05-31/alstom-energy-begins-work-first-wind-turbine-nacelles> ("Set-up of Alstom's LEED silver-certified Amarillo wind turbine nacelle assembly is complete, and [it has] hired 25 people to begin an initial production run of 3-megawatt nacelles to validate its processes.").

¹³⁶ *DOE Awards \$4.1m Research Grant to Alstom*, ENERGY BUS. REV. (Sept. 19, 2011), <http://wind.energy-business-review.com/news/doe-awards-41m-research-grant-to-alstom-190911>.

¹³⁷ *International Agreements*, MINISTRY OF FIN., <http://eng.mni.gov.il/FinanceIsrael/Pages/en/EconomicData/InternationalAgreements.aspx> (last visited Nov. 15, 2012).

¹³⁸ *Israel Free Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/israel-fta> (last visited Nov. 15, 2012).

Israel.¹³⁹ To be considered a “product of the United States,” an item must qualify as “wholly the growth, product, or manufacture of the United States of America or is a new or different article of commerce that has been grown, produced, or manufactured in the United States of America,” and “the sum of (a) the cost or value of the materials produced in the United States of America plus (b) the direct cost of processing operations performed in the United States of America is not less than 35 percent of the appraised value of the article at the time it is entered into Israel.”¹⁴⁰ Although Alstom currently manufactures a portion of the wind turbine components outside of the U.S., there are indications it plans nacelle manufacture in the Texas facility as well as wind turbine assembly;¹⁴¹ and the assembled wind turbines will qualify for tariff-free treatment because at the Texas facility they will be “substantially transformed into a new article having a new name, character, or use.”¹⁴² In addition, “To benefit from the provisions of the U.S.-Israel FTA, qualifying goods exported to Israel must be accompanied by a special ‘US Certificate of Origin for Exporting to Israel.’”¹⁴³ Should there be any disputes with customs officials in Israel over the status or documentation of imported wind-turbines, the FTA provides a dispute resolution process facilitated by the Joint Committee.¹⁴⁴ Alstom can also be assured of protection of its intellectual property by Article 14 of the Treaty; Article 14 provides “national and most favored nation treatment with respect to obtaining, maintaining and enforcing” legal protections on American and Israeli companies’ intellectual and industrial property of all kinds.¹⁴⁵

France, unlike the U.S., does not have an FTA with Israel. While Israel enjoys trade concessions granted through the application of the EU-Israel Association Agreement to its territory, the territorial requirement does not include the Arab territories occupied by Israel, such as the Golan

¹³⁹ *Israel Free Trade Agreement*, Arts. 2(2), 2(3), Annexes II, III, TRADE COMPLIANCE CENTER, http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp (last visited Nov. 15, 2012).

¹⁴⁰ *Id.* at Annex III; see *U.S.-Israel Free Trade Agreement*, EXPORT.GOV, http://export.gov/FTA/israel/eg_main_017711.asp (last visited Nov. 15, 2012).

¹⁴¹ Walt Nett, *Tech Wind Researchers Partnering In Offshore-Turbine Study*, LUBBOCK AVALANCHE-JOURNAL, (Sept. 20, 2011), <http://lubbockonline.com/business/2011-09-20/tech-wind-researchers-partnering-offshore-turbine-study#>.

¹⁴² *Export-Import Assistance, U.S.-Based Companies Exporting To Israel*, AMERICA-ISRAEL CHAMBER OF COMMERCE/CHICAGO, http://www.americaisrael.org/scripts/exp_Index.asp (last visited Nov. 15, 2012).

¹⁴³ *U.S.-Israel Free Trade Agreement, Documenting Origin, Obtaining the U.S.-Israel FTA Certificate of Origin*, EXPORT.GOV, http://http://export.gov/fta/israel/eg_main_017713.asp.

¹⁴⁴ *Israel Free Trade Agreement*, Arts. 17, 19, TRADE COMPLIANCE CENTER, http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp (last visited Nov. 15, 2012).

¹⁴⁵ *Id.* at Art. 14.

Heights.¹⁴⁶ Thus, Alstom's operations in France would appear not to benefit directly from the Association Agreement's amelioration of tariffs.¹⁴⁷ However, Alstom's FDI in Israel would not involve imports from Occupied Territories in the EU, but rather, exports from the EU into Occupied Territories. It is not clear whether Israel would impose tariffs on items Alstom might import into Israel bound for the Golan heights in retorsion¹⁴⁸ for the EU's stance that goods imported from the Occupied Territories into the EU do not get the benefit of tariff amelioration. Yet, even with that qualification, it bears noting that the Association Agreement is under fire from within and without the EU, and there is ongoing condemnation within the EU of Israeli resistance to certain EU policy imperatives for the occupied territories.¹⁴⁹

Besides the government sources on treaties and energy policy, which are evidently reliable reports of legal documents and pronouncements, the sources used in this section come from a variety of industry- and company-specific sources that are not entirely objective, and often choose to put actions, trends, and challenges into the light most favorable to them. As such, those sources—and the print and online media reportage

¹⁴⁶ See, e.g., Andrew Rettman, *EU Court Strikes Blow Against Israeli Settlers*, EU OBSERVER (Feb. 25, 2010), available at <http://euobserver.com/foreign/29558>. The report notes a decision by the European Court of Justice in a case concerning whether syrup for soft drinks imported into the E.U. by Brita from an Occupied Territories producer, Soda-Club, was entitled to the tariff preferences for "products of Israel" recognized in the EU-Israel Association Agreement. *Id.* The report quotes the critical holding of the European Court of Justice that Soda-Club should have obtained papers from the Palestinian Authority instead if it wanted any customs breaks. *Id.* ("Products obtained in locations which have been placed under Israeli administration since 1967 do not qualify for the preferential treatment provided for under that [EU-Israel] agreement. . ."). Whether this ruling has persuaded Israeli's custom authorities to withdraw tariff amelioration for certain E.U. imports as a retorsionary measure, or whether such a measure has even been suggested or considered in Israel, remains indeterminate in the author's research to date.

¹⁴⁷ *Id.*; see, e.g., Victor Kattan, *A Message for the EU: Withdrawing Preferential Trade with Israel is an Appropriate Response to Israel's Violation of International Human Rights Law*, BADIL (Summer 2005), available at <http://www.badil.org/articulo-74-/item/917-a-message-for-the-eu-withdrawing-preferential-trade-with-israel-is-an-appropriate-response-to-israel%E2%80%99s-violation-of-international-human-rights-law#3>.

¹⁴⁸ *Rétorsion*, as it was originally formulated in French diplo-speak, describes "a legal, but deliberately unfriendly act," taken by one nation in retaliation for a similar, equally unfriendly, lawful act of another nation, in hopes of "compel[ling] the offending state to change its unfriendly conduct." Christopher C. Joyner, *Coercion*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum ed., 2008).

¹⁴⁹ DELEGATION OF THE EUROPEAN UNION TO ISRAEL, STATEMENT BY HIGH REPRESENTATIVE CATHERINE ASHTON ON THE ISRAELI DECISION TO EXPEDITE SETTLEMENT ACTIVITY (Apr. 2, 2011), http://eeas.europa.eu/delegations/israel/press_corner/all_news/news/2011/20111102_01_en.htm (expressing EU's "dee[p] concer[n]" due to "the latest Israeli decisions to expedite settlement activities in response to Palestinian accession to UNESCO," declaring that "Israeli settlement activity is illegal under international law," and "call[ing] on Israel to reverse this decision").

based on those sources—must be viewed cautiously and tested repeatedly as additional information comes to light, particularly if the new information is inconsistent rather than corroborating.

4. *The Recommendation from the Business Environment Perspective*

Alstom's opportunity to enter into the Middle Eastern market through Energix's investment in the Golan Heights wind farm is timely both in terms of Israel's energy needs and Alstom's expansion of its world-wide wind-energy presence. Wind energy has become a real player in electrical generation throughout the world, and Israel's close trade relationship with the United States, where Alstom has established a strong presence, makes the Golan Heights project an ideal showcase market for Alstom in the region, where Israel's neighbors are also looking to wind-generation to ease electricity supply shortages. The venture is not without risk: most wind-suitable areas in Israel, offshore as well as onshore, are part of disputed territories,¹⁵⁰ vulnerable to terrorism,¹⁵¹ and subject to the political volatility that has characterized the region since 1948; moreover, some energy experts have called for a turn to nuclear rather than hydro-or-wind generation;¹⁵² exploitation of recently discovered offshore natural gas fields¹⁵³ may increase the supply of other, extant energy sources that might be redirected to electricity production;¹⁵⁴ and Israel's political tensions with most of its neighbors may cloud the impact that a showcase project should have.¹⁵⁵ However, Alstom has shown itself capable of rising above the static and making even the most controversial projects, like Jerusalem's light rail, work.¹⁵⁶ This proposed venture is far less risky; involves territory where the dispute (with Syria) has been for some time a "cold" rather than a "hot" dispute; is founded on information that is overall reliable; and involves a country with fewer energy options than most (and whose sudden natural-gas richness also comes with potentially serious political complications and vulnerabilities to sabotage and terrorism), making its commitment to wind-energy more credible and sustainable. The balance for a French multi-national like Alstom, which

¹⁵⁰ ODIH, *supra* note 124, at 3–4.

¹⁵¹ See, e.g., *Saboteurs*, *supra* note 108.

¹⁵² See, e.g., Wald, *Taming*, *supra* note 120; Wald, *Worth it?*, *supra* note 120.

¹⁵³ *Israel and its Natural Resources*, *supra* note 75.

¹⁵⁴ Bronner, *supra* note 107.

¹⁵⁵ See ODIH, *supra* note 124, at 32–37.

¹⁵⁶ See *supra* authorities cited in note 82.

seeks a truly global presence, tips decisively in favor of approving a proposed joint venture with Energix.

III. STAGE TWO—CRITICAL EVALUATION OF LEGAL ISSUES: NOT ONLY THOSE UNDER THE HOST STATE'S REGULATORY ENVIRONMENT, BUT ALSO THOSE UNDER THE FDI INVESTOR'S HOME STATE'S LAWS AND THE LAWS OF THIRD-STATES TO WHICH THE FDI INVESTOR HAS SUBSTANTIAL CONNECTIONS

A. *The Role of Treaties in the IBT Decision*

Webs of treaties used to be the stuff of diplomatic intrigue¹⁵⁷ and disastrous, trip-wire networks of alliances that led to conflagrations such as World War I.¹⁵⁸ Since the Bretton Woods agreement in 1946,¹⁵⁹ however, bilateral treaties concerning trade, along with multilateral conventions, have become the superstructure on which a complex, globalized trade system has been erected.

One of the most important developments in IBT has been its most recent phase. Since the 1960s, a "centralized global atmosphere" emerged, and concomitantly, "legal institutions are creating a true body of substantive international law to regulate many transnational business deals."¹⁶⁰ The United States' first bilateral trade agreement was concluded with Israel in 1985.¹⁶¹ Since then, the United States has negotiated and ratified for FTAs with 16 more countries, and has negotiated and ratified BITs with over four nations.¹⁶² Some have criticized the use of such treaties as inimical to, or at least a deterioration of, the World Trade

¹⁵⁷ See, e.g., SIR ARTHUR CONAN DOYLE, *The Naval Treaty* (1889), in II THE ANNOTATED SHERLOCK HOLMES: THE FOUR NOVELS AND FIFTH-SIX SHORT STORIES COMPLETE, at 167-92 (William S. Baring-Gould ed. 1967).

¹⁵⁸ WINSTON S. CHURCHILL, 1 THE WORLD IN CRISIS: 1911-1918, 1-13 (1938).

¹⁵⁹ See, e.g., Gerald M. Meier, *The Bretton Woods Agreement: Twenty-Five Years After*, 23 STAN. L. REV. 235, 236 (1971) (noting that the entities created by the Bretton Woods Agreement—"[t]he International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and the General Agreement on Tariffs and Trade (GATT)—have been the dominant international economic organizations since World War II.").

¹⁶⁰ Kenneth C. Randall & John E. Norris, *supra* note 23, at 160.

¹⁶¹ Overview of the Israel Free Trade Agreement, U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/israel-fta>

¹⁶² Summary of U.S. Free Trade Agreements, U.S. DEP'T OF STATE, <http://www.state.gov/e/eeb/tpp/bta/fta/c26474.htm>; United States Bilateral Investment Treaties, U.S. DEP'T OF STATE, <http://www.state.gov/e/eb/ifd/bit/117402.htm>.

Organization regime. In a recent discussion of FTAs, Professor Paul Gathii observed that—

[t]he continued breakdown of WTO negotiations—indicated by the collapse of ministerial meetings in Seattle in 1999 and in Cancún, Mexico in 2003—has led developed nations to a shift towards regional and bilateral agreements to further goals that have been delayed or frustrated at the WTO. Negotiations stalled when the ministerial conference in 1999 was cancelled due to a lack of agreement among the countries and large protest activities outside the conference building. In Cancún, the negotiations collapsed again. This time, developing countries were unwilling to negotiate the “Singapore issues.” The “Singapore issues” refers to four things—competition policy, trade facilitation, investment liberalization, and government procurement—which developed countries have sought to negotiate with a view to arriving at new agreements covering these four areas since 1996. In August 2004, three of the issues—investment, competition, and government procurement—were, by agreement, dropped from the Doha agenda. Negotiations for trade facilitation, however, would continue. As one commentator noted, this “ended, for the time being, the developed countries’ attempt to greatly expand the WTO by introducing three new major areas of liberalization.”¹⁶³

¹⁶³ James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421, 441–42 (2011) (footnotes omitted). Professor Gathii also takes note of a less sanguine subtext of the regionalization trend:

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

Id. at 445–46 (footnotes omitted). See also Professor Gathii’s article in which he reviews the arguments “over whether regional trade agreements are building or stumbling blocks” to developing nations, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 N.C. J. INT’L L. & COM. REG. 571 (2010).

Other observers, however, see the FTAs as emblematic of “the pluralistic reality of U.S. trade policy making,” which encourages other nations to “learn how to penetrate the U.S. decision-making process and to persuade enough of the machinery to advance their interests, including when those interests have been to negotiate a bilateral or free trade accord.”¹⁶⁴ The FTA and BIT agreements, therefore, assume an outsized importance when a MNE of the dimension, diversity, and divisions boasted by an Alstom surveys its opportunities for leveraging various aspects of its operations. The presence—or absence—of meaningful FTA or BIT treaties vis-à-vis the location of relevant divisions, operations, and assets can become, as in the Alstom-Energix hypothetical FDI presented here, an important factor. Indeed, the U.S.-Israel FTA has had a significant, positive impact for MNEs that seek to do business between the two countries. As the U.S. State Department notes of that FTA, one of its effects is that “[i]n 2011, the United States was Israel’s largest trading partner” exchanging “almost \$37 billion in total merchandise trade.”¹⁶⁵ While several previously signed FTAs are still pending for various reasons, the Senate ratified a major FTA with South Korea in 2011, which went into force in 2012.¹⁶⁶

Yet, FTAs and BITs can also become a point of leverage by stronger economic nations over less-dominant nations. By entering into an FTA, a nation such as Israel can create increasingly optimized conditions for FDI by businesses affiliated with its trading-partner nations; but at the same time, it can unwittingly create a tool for future economic leverage by those nations in pursuit of political agendas.¹⁶⁷ This is especially true as the sensitivity towards the linkages between economics and human rights continue to be the subject of increasing international debate among advocacy organizations, governments, and scholars. For Israel, this has had particular significance in the political hand that the nations of the European Union have sought to play with respect to disputes over occupied territories and ethnically distinct groups within those territories. We see this manifested particularly in the context of the EU-Israel Trade Association Agreement, as well as in public communications between the

¹⁶⁴ Richard E. Feinberg, *The Political Economy of United States’ Free Trade Agreements*, 26 THE WORLD ECONOMY 1037-38 (2003) available at <http://irps.ucsd.edu/assets/004/5362.pdf>.

¹⁶⁵ See *Benefits of Free Trade Agreements—Israel*, U.S. DEP’T OF STATE, <http://www.state.gov/e/eb/tpp/bta/fta/c26474.htm> (last visited Nov. 15, 2012).

¹⁶⁶ See *id.*

¹⁶⁷ See Jane Kelsey, *Confronting Trade-Related Human Rights in a GATS-Compatible World*, L. SOC. JUST. & GLOBAL DEV. 1, 3 available at http://www.go.warwick.ac.uk/elj/lgd/2007_1/kelsey.

EU's representative in Israel and the Government of Israel.¹⁶⁸

In 2010, the European Court of Justice (ECJ) rendered a judgment in *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, which put squarely in issue the status under the Trade Association Agreement of products originating in the Occupied Territories.¹⁶⁹ By way of background, as a recent commentator observed:

A core principle in trade relations that generates disagreements between parties to BITs is that of "rules of origin." Determining the country of origin of a product is a critical factor in determining whether customs benefits will apply to the product. The "rules of origin" issue is one of the main features of the 1995 European Community-Israel Association Agreement (AA). In 1997, the question raised in various EU Member States was whether Israeli settlements in the Occupied Territories, namely the West Bank, Gaza Strip, East Jerusalem, and the Golan Heights, constituted part of the territory of the State of Israel—did products produced in these Israeli settlements violate the rules of origin pursuant to the AA?

Several European customs authorities began to challenge Israel by demanding that it verify the origins of goods coming from the Israeli settlements. This dispute developed into a major source of friction between Israel and Europe.¹⁷⁰

¹⁶⁸ See generally Sharon Prado & Lior Zemer, *Bilateralism and the Politics of European Judicial Desire*, 17 COLUM. J. EUR. L. 263 (2011).

¹⁶⁹ Case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, 2010 ECJ EUR-Lex LEXIS 63 (Feb. 25, 2010) available at <http://curia.europa.eu/juris/liste.jsf?language=EN&jur=C,T,F&num=386/08&td=ALL> [hereinafter *Brita Case*]. For a spirited, and divided, scholarly commentary upon the case, see the various postings as Julian Ku, *ECJ Rules that West Bank Goods are NOT "Made in Israel,"* OPINIO JURIS (Feb. 27, 2010), <http://opiniojuris.org/2010/02/27/ecj-rules-that-west-bank-goods-are-not-made-in-israel/>. Some commentators contended that "while it is true that now the products made in the West Bank are not going to fall within the scope of the EC-Israel Agreement, they are no[t] going to be subject to import duties," because "[t]he EC-PLO Agreement will apply to these goods instead," while other commentators insist that "the EU/PLO agreement is only applicable if the PLO administration is the exporting state and issues proof of origin." *Id.*

¹⁷⁰ Prado & Zehmer, *supra* note 168, at 266. The European Commission had repeatedly taken the position that "according to UN General Assembly and Security Council resolutions, no Israeli settlement in the West Bank, Gaza Strip, East Jerusalem, or the Golan Heights could be considered part of the territory of the State of Israel." *Id.* at 277. In response, "the Israeli interpretation of its recognized area was very different from the European position," and "[d]uring closed Israeli-EU meetings and in inter-ministerial correspondences, Israel argued that, under domestic law, East Jerusalem and the Golan Heights formed part of the territory of the country." *Id.* at 278.

In *Brita*, German drink-filter and drink-dispenser company Brita GmbH “contested the customs duties imposed on it by the German authorities for importing drink-makers for sparkling water manufactured in the West Bank for which the Israeli customs authorities issued a movement certificate attesting to the Israeli origin of those products.”¹⁷¹ Brita sought to import these goods from Israeli producer Soda-Club, made at the Mishor Adumin industrial park located east of Jerusalem in the West Bank territory,¹⁷² and sought to overturn the German court decision denying the goods preferential duties treatment on the grounds, *inter alia*, that products were made in the Israeli-occupied territories.¹⁷³ In presenting the case to the Court, Advocate General Yves Bot¹⁷⁴ urged the ECJ to rule that “goods certified by the Israeli customs authorities as being of Israeli origin but which prove to originate in the occupied territories, more specifically the West Bank, are not entitled either to the preferential treatment under the EC-Israel Agreement or to that under the EC-PLO Agreement.”¹⁷⁵ The ECJ’s lengthy and technocratic-sounding ruling went against Brita’s position (and that of Israeli customs authorities), but in a more nuanced way:

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

1. The customs authorities of the importing Member State may refuse to grant the preferential treatment provided for under the

¹⁷¹ “Opinion of Advocate General Bot,” *Brita Case*, *supra* note 169, at ¶ 2.

¹⁷² As Prado and Zehmer explain the lay of the land:

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

Prado & Zehmer, *supra* note 168, at 282.

¹⁷³ *EU Court Keeps West Bank Out of EU-Israel Trade Deal*, EU BUSINESS (Feb. 25, 2010), available at <http://www.eubusiness.com/news-eu/mideast-unrest.2vf>.

¹⁷⁴ As Professor Engle explains:

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

The Advocate General’s opinion has no binding authority.

Eric Allen Engle, *EU-Israel Free Trade & the Occupied Territories*, HARV. INT’L L.J. (Nov. 2009), available at <http://www.harvardilj.org/2009/11/eu-israel-free-trade-the-occupied-territories/> (quoting note 2).

¹⁷⁵ “Opinion of Advocate General Bot,” *Brita Case*, *supra* note 169, at ¶ 8.

Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States . . . and the State of Israel . . . signed in Brussels on 20 November 1995, where the goods concerned originate in the West Bank. Furthermore, the customs authorities of the importing Member State may not make an elective determination, leaving open the questions of which of the agreements to be taken into account – namely, the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States . . . and the State of Israel [;] and the Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community . . . and the Palestine Liberation Organisation (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, . . . signed in Brussels on 24 February 1997 – applies in the circumstances of the case and of whether proof of origin falls to be issued by the Israeli authorities or by the Palestinian authorities.

2. [T]he customs authorities of the importing State are not bound by the proof of origin submitted or by the reply given by the customs authorities of the exporting State where that reply does not contain sufficient information . . . to enable the real origin of the products to be determined. Furthermore, the customs authorities of the importing State are not obliged to refer to the Customs Cooperation Committee . . . a dispute concerning the territorial scope of that agreement.¹⁷⁶

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

¹⁷⁶ "Judgment of the Court," *Brita Case*, *supra* note 169, at ¶ 74.

While all of this does not directly impact the particular FDI deal under consideration in this article, it does suggest an environment of partisanship within the EU, and a strong contingent of EU nations and officials ready to use economic and diplomatic pressure to incentivize Israel to slow—indeed, cease—activities in the Occupied Territories that expand its claims to sovereignty. By increasing the pressure brought on by the *Brita* decision, the EU's High Representative for Foreign Affairs became the medium for the EU to rebuke Israel's renewed pace in settling occupied territories.¹⁷⁷ Alstom would not wish to become caught up in this dispute in ways that have more than public relations impact, particularly after the controversy—and litigation—attendant to its work on another Occupied Territories project, the Jerusalem Light Railway.

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

Between 1976 and 2004, Israel signed 34 agreements, four of which have not been ratified as of yet. Most of these agreements were signed with developing countries and emerging economies, where Israel had strong, rising investment interests. The few agreements that were signed with countries in which Israel had no significant investment interest, the agreements served either specific strategic or diplomatic goals, or were part of a broader framework of international economic agreements (trade, double-taxation, etc). The vast majority of these agreements do not reflect reciprocal investment relations and they strengthen Israel's status as a state in transition from a developing to a developed economy.¹⁷⁸

Noteworthy, too, is the fact that Israel “traditionally tends to avoid

¹⁷⁷ See, e.g., Raffaella A. Del Sarto, *Israel, the EU and the Union for the Mediterranean*, 16 MEDITERRANEAN POL. 117 (2011); see also *Statement By EU High Representative Catherine Ashton On Settlement Expansion*, UNITED NATIONS INFORMATION SYSTEM ON THE QUESTION OF PALESTINE (UNISPAL), (June 8, 2012), available at <http://unispal.un.org/UNISPAL.NSF/0/B018709AAC07D1D785257A1A00469086>. The E.U. has now expanded its criticism of Israel's definition of its borders to areas within the boundaries established before the 1967 and 1973 wars. See Ora Coren, *European Union: Parts of Modi'in do not Belong to Israel—List Released by EU says Modi'in-Maccabim-Re'ut Municipality, Situated Halfway Between Jerusalem and Tel Aviv is Part of a 1948 No-Man's Land Between Israel, West Bank*, HAARETZ, Aug. 14, 2012, <http://www.haaretz.com/news/diplomacy-defense/european-union-parts-of-modi-in-do-not-belong-to-israel.premium-1.458222>.

¹⁷⁸ Efraim Chalamish, *An Oasis in the Desert: The Emergence of Israeli Investment Treaties in the Global Economy*, 32 LOY. INT'L & COMP. L. REV. 123 (2010).

negotiating BITs with other developed countries, as part of the view that developed countries should not sign BITs among themselves,” and “[s]ince Israel views itself as a developed country with a stable economy, it has made it a general rule not to sign or negotiate BITs with other developed countries, with the exceptions of France and Germany.”¹⁷⁹ Israel’s BITs with both nations, however, have been superseded by the European Union,¹⁸⁰ and, as discussed above, the EU Israel Trade Association Agreement, with its strictures about the Occupied Territories, has replaced it.¹⁸¹

*B. The Role in FDI Decisions of Litigation Risk in Municipal Courts—
With a Particular Emphasis on Corporate Social Responsibility*

Notions of corporate social responsibility have assumed greater roles in MNE activities, reflecting “increasing ethical demands made not of states, but of firms, which are now perceived as more capable to address a large range of complaints.”¹⁸² This is particularly true of French MNEs, such as Alstom, which came relatively late to the appreciation of *public*, as distinguished from *internal corporate*, accountability for corporate social

¹⁷⁹ *Id.* at 132 (citing *Entre le Gouvernement de la Republique Française et le Gouvernement de l’Etat d’Israel sur l’encouragement et la protection reciproques des investissements* [Treaty between the Government of the Republic of France and the Government of the State of Israel Concerning the Encouragement and Reciprocal Protection of Investments, available at http://www.unctad.org/sections/dite/ia/docs/bits/france_israel_fr.pdf]).

¹⁸⁰ *Id.* at 152 n.120 (observing that “the European Union and Israel are currently negotiating the future status of BITs that were signed between Israel and countries that joined the EU since the ratification of that particular BIT” because “the EU has a separate trade and investment policy, bilateral investment treaties of member states with third parties can be either unnecessary or inconsistent”). The Israeli Finance Ministry lists no BIT with France, although it does continue to list a BIT with Germany. See *Ministry of Finance—International Agreements—Bilateral Investment Treaties (BIT)*, <http://www.financeisrael.mof.gov.il/FinanceIsrael/Pages/En/EconomicData/InternationalAgreements.aspx>; accord *Government of Israel—Economic Mission*, http://www.israeleconomicmission.com/index.php?option=com_content&task=view&id=76&Itemid=52. The International Centre for the Settlement of Investment Disputes (ICSID) database of BITs, however, continues to list the French-Israeli BITs as one of 103 BIT treaty entries for France, and one of 36 BIT treaty entries for Israel. See *ICSID Database of Bilateral Investment Treaties*, <https://icsid.worldbank.org/ICSID/FrontServlet>.

¹⁸¹ See *supra* notes 168–170.

¹⁸² Ariel Colonomos & Javier Santiso, *Vive La France! French Multinationals And Human Rights*, 27 HUM. RTS. Q. 1307, 1308, 1328 (2005) (noting evolution of corporate social responsibility perspectives from narrow focus on “staff-industrial relations within French corporations” to “environmental issues,” relationships “between businesses and their external parties, cities, the social fabric surrounding them, and their fellow citizens” and “[f]inally, and as the last stage in this expansion . . . a number of French firms are now asked to account for their activities abroad from a human rights perspective.”).

responsibility.¹⁸³ As a result, French MNEs are “the leaders in a great many African and Middle Eastern countries, some of which have very poor human rights records.”¹⁸⁴ Thus, French MNEs, such as Alstom, “are confronted with a double threat”: they are “increasingly exposed to NGO criticism” for their activities (including those through subsidiaries) in developing countries, and at the same time, “elements of US society—the courts or the media—will react negatively on the basis of those reports.”¹⁸⁵

Litigation is a tool of strategic business management, and it can also be employed as a tool by which private parties or organizations use the municipal courts of various countries to control the activities of MNEs, including to hobble—or even stop—particular FDI projects. This has certainly proven to be the case with FDIs in the Occupied Territories of Israel.¹⁸⁶ Such litigation has often been viewed as a peculiarly American phenomenon; but other nations and their court systems are now among the fora hosting such disputes.

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

1. *Alstom’s Vulnerability to Suits at Home Over its FDI in Israel:
Not an American in Paris, but a Nanterrean in Nanterre*

A relevant, yet less obvious, set of risks attendant to FDIs arise from lawsuits brought in the *home* state(s) of an MNE. For an MNE that has the global span of an Alstom, this translates into legal entanglements in countries other than the host state. These entanglements portend both

¹⁸³ *Id.* at 1311, 1322 (noting that “with Anglo-American funds ever more present in their capital structure, French firms became singularly receptive over the course of the 1990s to developments in North America, adopting and adapting to the emerging normative standards”).

¹⁸⁴ *Id.* at 1332. The authors observe that French attitudes holding that “human rights should not be taken into account in the framing of foreign policy” and FDIs because that “would create an obstacle to the decision making process.” *Id.* at 1343–44.

¹⁸⁵ *Id.* at 1338–40.

¹⁸⁶ See, e.g., Yishai Blank, *Legalizing the Barrier: The Legality and Materiality of the Israel/Palestine Separation Barrier*, 46 TEX. INT’L L.J. 309, 311 (2011) (analyzing the “legal campaign against” the wall erected in the Occupied Territories, including “(1) the legal norms in which the litigators and the courts operated; (2) the theoretical approaches—often of extra-legal disciplines—regarding the harm that the barrier caused (or might cause); and (3) the strategic and tactical choices taken by the various NGOs which spearheaded the campaign, often a result of compromises among disagreeing parties”).

protractedness and costliness. The costs include not only the potential litigation, but also the difficulties that such lawsuits create for the MNE with investors and the public at-large, not to mention politicians in the home states who may seek to use the stage created by litigation against the MNE to pursue legislative or regulatory investigations.

Alstom's exposure to such suits is very much worth considering, particularly in light of a case brought in France against Alstom concerning the Jerusalem Light Rail Project.¹⁸⁷ Two NGOs, the Association France Palestine Solidarité (AFPS) and the Palestinian Liberation Organization (PLO), sued Alstom and Veolia Transport, another contractor working on the Jerusalem Light Rail Project, in the French Courts, contending that these MNEs were collaborating in the violation of international law through their work on building a tramway through the occupied territories in Israel.¹⁸⁸ The papers initiating the legal action in the French Court of Grand Instance at Nanterre sought a court order "to cancel the Israeli contract given to Alstom, which will provide the train carriages, and to Veolia Transport, the public transport operator."¹⁸⁹ Significantly, the complaint survived the usual procedural defenses. The French appeals court affirmed an interlocutory decision of the Nanterre court that the courts of France had subject matter jurisdiction over the claims asserting violation of international law, as well as over the claims asserted under

¹⁸⁷ See Harriet Sherwood, *Jerusalem's Long-Awaited Light Railway Splits Opinion*, GUARDIAN, August 17, 2011, <http://www.guardian.co.uk/world/2011/aug/17/jerusalem-light-railway-opinion?INTCMP=SRCH> (noting that the railway opened in 2011).

¹⁸⁸ Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. J. INT'L L. 927, 971-72 (2009); see also Aurine Crémieu, Rubrique, "En Mouvement" *Israel et Territoires Occupés*, CHRONIQUE, (Mar. 1, 2006), available at http://www.amnesty.fr/index.php/amnesty/s_informer/la_chronique/mars_2006_sommaire/israel_et_territoires_occup. Kaleck refers to the suit in France against Alstom in the following context that will be useful to framing our discussion of Alstom's vulnerability to suit in both France and the U.S. on any project – light rail or wind turbine farms – that it undertakes in the Occupied Territories. Kaleck refers to the suit in France against Alstom in the following context that will be useful to framing our discussion of Alstom's vulnerability to suit in both France and the U.S. on any project – light rail or wind turbine farms – that it undertakes in the Occupied Territories:

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

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

Id. at 971-72 & n.307 (internal citations omitted).

¹⁸⁹ Rory McCarthy & Angelique Chrisafis *PLO Disputes Jerusalem Rail Plan*, GUARDIAN, Oct. 23, 2007, <http://www.guardian.co.uk/world/2007/oct/26/france.israel?INTCMP=SRCH>.

France's Civil Code.¹⁹⁰ That in and of itself is quite an important ruling, for it opens the French courts to future cases filed against Alstom and other MNEs alleging violations (or complicity in violating) international legal norms.

The litigation before the Nanterre court consumed four years, according to the Paris-based law firm, August & Debouzy Avocats, before it was resolved in the MNEs' favor.¹⁹¹

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

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

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

¹⁹⁰ *August & Debouzy Advise Veolia Transport on the Lawsuit Between Veolia, Alstom and the Palestine Liberation Organisation*, AUGUST & DEBOUZY AVOCATS, <http://www.august-debouzy.com/en/495/august-debouzy-advise-veolia-transport-lawsuit-between-veolia-alstom-and-palestine-liberation-or> (last visited Nov. 15, 2012).

¹⁹¹ *Overview*, AUGUST & DEBOUZY AVOCATS, <http://www.august-debouzy.com/en/about-us.html> (last visited Nov. 15, 2012).

AFPS and the PLO have lodged an appeal against this judgment.¹⁹²

Another activist organization calls Alstom's FDI in Jerusalem "[b]uilding the infrastructure of the occupation," and contends that Alstom "is actively supporting Israel's colonial ambitions in Jerusalem," is complicit in "violations of international law and alleged war crimes," is "profiting directly from Israel's occupation," and is "help[ing] to cement Israel's hold on occupied East Jerusalem and tie the surrounding settlements even more firmly into the State of Israel."¹⁹³ Activists against Alstom also recently claimed that the publicity and debate generated by their opposition were the cause of a failed Alstom bid "to build the build a high-speed railway on the Muslim pilgrim[age] route between Mecca and Medina in Saudi Arabia," a project claimed to be worth \$10 billion.¹⁹⁴

2. *Alstom's Vulnerability in Francophone Courts over FDI in Israel*

France has not been the only nation to see litigation under its municipal laws over an FDI in Israel. The Courts of Québec Province in Canada, for example, have been the forum for at least one lawsuit filed over an FDI in Israel, *Bil'in (Village Council) & Yassin v. Green Park International Inc.*¹⁹⁵ In *Bil'in*, the municipal authority over the Palestinian village of Bil'in, and a group of residents, sued two Québec corporations for their involvement in building housing for Israelis in the West Bank.¹⁹⁶ The plaintiffs' filings in the suit included what the Québec Superior Court described as the essence of their legally complex and contentious case:

¹⁹² *August & Debouzy*, *supra* note 190.

¹⁹³ Briefing: Veolia: Building the Infrastructure of the Occupation, PALESTINIAN GRASSROOTS ANTI-APARTHEID WALL CAMPAIGN, http://www.stopthewall.org/downloads/pdf/Veolia_briefing_final.pdf; Briefing: Alstom: Building the Infrastructure of the Occupation, PALESTINIAN GRASSROOTS ANTI-APARTHEID WALL CAMPAIGN, <http://stopthewall.org/alstom-building-infrastructure-occupation>

¹⁹⁴ *BDS Claims Victory After Alstom Project Derails*, MA'AN NEWS AGENCY, Oct. 27, 2011, <http://www.maannews.net/eng/viewdetails.aspx?id=433036>. The activists also claim that "Alstom suffered blows when a Swedish pension fund excluded it from its investment portfolio, as did the Dutch ASN Bank, due to involvement in Israel's occupation of Palestinian land." *Id.*

¹⁹⁵ *Bil'in Village Council v. Green Park Int'l*, 2009 CanLII 4151 (Can. Q. S.C.) available at http://www.canlii.org/en/qc/qccs/doc/2009/2009qccs4151/2009qccs4151.html#_ftn59 [hereinafter *Bil'in*]

¹⁹⁶ Stephen Pitel, *Quebec Court Stays Palestinian Claim Against West Bank Builders*, CONFLICTOFLAWS.NET, (Sept. 27, 2009), <http://conflictolaws.net/2009/quebec-court-stays-palestinian-claim-against-west-bank-builders/>.

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

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

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

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

[8] The Plaintiffs ask that their action be decided according to Canadian and Québec laws, rather than the laws where the injurious acts and injuries allegedly occurred, arguing that the courts of Israel will refuse to find that Israel is in violation of the international instruments on which they rely.¹⁹⁷

The suit raised a plethora of issues, including the recognition of a foreign judgment (in litigation that had transpired among the parties in Israel); whether such a foreign judgment would be afforded *res judicata* effect; and if so, the extent to which the Canadian court would accord claim preclusive effect to the foreign judgment.¹⁹⁸ Ultimately, the court gave limited *res judicata* effect to the prior Israeli judgments; but the crux of the court's opinion was to find that the case belonged, in the court's view, in Israel, and thus the court effected a *forum non conveniens* dismissal.¹⁹⁹

While these Québec corporations managed to avoid even more protracted litigation in Canada, there are elements of the *Bil'In* opinion that could be cause for concern to an MNE like Alstom, i.e., an MNE with significant investments in Israel. The Québec court—like the courts in France—was willing to give more than short shrift to the notion that Israel's obligations under customary international law and international conventions might well be enforceable against a corporation found to be “assisting” Israel in alleged international law violations. The court speculated about this potential in discussing the effect of the broad concept of a “delict”—literally, a “fault”, or what common-law lawyers commonly a call “tort”—under the Québec Civil Code, after concluding that although Israeli law normally would apply under the *lexi loci delicti* choice of law principle, the content of Israeli's law had not been pleaded or proven, and therefore the court was free to apply the Québec Civil

¹⁹⁷ *Bil'In*, *supra* note 195, ¶¶ 5–8.

¹⁹⁸ *Id.* at ¶¶ 18–19.

¹⁹⁹ *Id.* at ¶¶ 207–335. In the United States, there has been considerable debate over whether *forum non conveniens* provides a proper procedural disposition of similar cases brought under the Alien Tort Statute. See Section III.C.3, *infra*. Compare Aric K. Short, *Is the Alien Tort Statute Sacrosanct—Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N. Y. U. J. INT'L. L. & POL. 1001 (2001) (pro-*forum non conveniens*) with Erin Foley Smith, *Right to Remedies and the Inconvenience of Forum Non Conveniens: Opening U.S. Courts to Victims of Corporate Human Rights Abuses*, 44 COLUM. J.L. & SOC. PROBS. 145 (2010); Kathy Lee Boyd, *Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41 (1998); and P.J. Kee, Comment, *Expanding the Duties of the Vigilant Doorkeeper: ATS Litigation and the Inapplicability of the Act of State Doctrine and Forum Non Conveniens*, 83 TUL. L. REV. 495 (2008) (against application *forum non conveniens*).

Code. The Civil Code provision at issue imposes a very broad, and (from an MNE's perspective) ill-defined, duty on all persons:

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

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

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.²⁰⁰

²⁰⁰ Civil Code of Québec, L.R.Q. 2012 c. C-1991, § 1457. § 1457 is part of the civil-law code style of statute, relatively unfamiliar to most American lawyers outside of Louisiana or Puerto Rico; it is contained, like a nesting doll, within Civil Code "CHAPTER III—CIVIL LIABILITY, SECTION I—CONDITIONS OF LIABILITY, § 1.— General provisions." *Id.* The usages that have grown up around that statute in civil-law Québec are different than the understanding might be in a common-law province:

[33] As we noted above, the general rules of civil liability set out in art. 1457 C.C.Q. are based on fault. [translation] "This is a universal concept, since it applies every time a victim alleges that a person who caused injury is liable under the general rules" of art. 1457 C.C.Q. "To answer this question, the standards provided for in statutes and regulations, often called 'legislative' standards", [sic] must be analysed [sic] in light of the basic concept of civil fault.

[34] In Québec civil law, the violation of a legislative standard does not in itself constitute civil fault. For that, an offence provided for in legislation must also constitute a violation of the standard of conduct of a reasonable person under the general rules of civil liability set out in art. 1457 C.C.Q. The standard of civil fault corresponds to an obligation of means. Consequently, what must be determined is whether there was negligence or carelessness having regard to the specific circumstances of each disputed act or each instance of disputed conduct. This rule applies to the assessment of the nature and consequences of a violation of a legislative standard.

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

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

From that starting point, future litigants challenging an FDI in Israel might seek to link together the following portions of the Québec court's opinion, starting with its views on at least one of the international treaty obligations allegedly violated with the Québec corporations' help:

(i) Fourth Geneva Convention

[148] ★★★

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

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

[150] Article 49(6) provides that "The Occupying Power shall not (. . .) transfer parts of its own civilian population into the territory it occupies."

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

[152] They further allege, and this is of vital importance, that the Fourth Geneva Convention is considered "customary international law binding all countries" [If so, the Fourth Geneva Convention is part of the domestic (or "municipal") law of Israel.²⁰¹

The litigants could next turn to the Québec court's ruminations

Bil' In, *supra* note 195 at ¶ 172 (quoting *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64) (internal citations omitted).

²⁰¹ *Bil' In*, *supra* note 195, at ¶¶ 148-52.

about whether allegations of corporate assistance to Israel could be an actionable “delict” or “fault” against the corporations themselves:

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

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

[190] *The Defendants’ contention that the rights created by the Fourth Geneva Convention inure to the exclusive benefit of signatory states and that only states and their agents are subject to its obligations are therefore not decisive: if the Plaintiffs’ allegations are true, a trial judge could find that the Corporations are at fault for knowingly participating in Israel’s alleged illegal Policy.*²⁰²

To complete the argument, the litigants would then likely cite the Québec court’s conclusions from the premises set forth above:

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

[204] To summarize, the Superior Court has jurisdiction over defendants domiciled in Québec regarding a civil action based on extracontractual liability for an injury caused and suffered in a foreign country. The law that normally applies in such case is the law of the country where the injurious act occurred, i.e. where the injury was caused. That law must be proven. In the absence of proof, by default, the Superior Court will apply the substantive law of Québec.

[205] Under Québec law, a defendant will incur civil liability if he causes damages to another by his fault. Knowingly favouring a breach of a High Contracting Party’s undertakings pursuant to an international instrument or knowingly assisting a state in the perpetration of a war crime are both civil faults. Assuming for

²⁰² *Id.* at ¶¶ 188-90 (emphasis supplied).

purposes of discussion that the Defendants knowingly assisted Israel for the purpose of committing a war crime as alleged, the Defendants committed a civil fault and are liable to appropriate civil remedies. This is consistent with a restrictive interpretation of state immunity that limits its benefit to sovereign entities and their agents.

[206] Given the grave consequences of dismissing an action without a hearing on the merits, as a rule, an action ought not be dismissed summarily on a motion based on art. 165(4) C.C.P. unless such action is obviously not founded.[76] In the case at bar, a generous reading of the Action, considered as a whole, does not lead to the inescapable conclusion that it is unfounded in law even if the facts alleged are true.²⁰³

The Québec court left the plaintiffs to seek their judicial remedy in the courts of Israel, rather than in the courts of Québec: “this is one of those exceptional situations where the Superior Court is compelled to decline jurisdiction on the basis of *forum non conveniens*, as the Plaintiffs have selected a forum having little connection with the Action in order to inappropriately gain a juridical advantage over the Defendants and where the relevant connecting factors, considered as a whole, clearly point to the [Israeli High Court of Justice] as the logical forum and the authority in a better position to decide.”²⁰⁴ Yet, the Québec court also wrote quite a bit

²⁰³ *Id.* at ¶¶ 204–06.

²⁰⁴ *Id.* at ¶ 335. Of course, as Professor Reichman, of the Haifa University Law Faculty, has observed of the pressures that such matters bring on courts in Israel:

[T]he Israeli example suggests that two factors may be worth considering in assessing the [Israeli Supreme] Court's response to pressure generated by an emergency situation. The first is the duration of the conflict and its acuteness. The second is the structure of the communication between the municipal court and the international and transnational legal community.

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

that might become a roadmap for future litigation over challenges to FDI in Israel. While tucked away in this trial court opinion, and influenced in part by some of the idiosyncrasies of the parties' pleadings, arguments, and litigation choices, the logic laid down by the Quebec court in this dictum could have sweeping consequences should a plaintiff or group of plaintiffs with standing seek to sue an MNE, such as Alstom, in the courts of Canada, alleging that the MNE violated international law through its contractual activities with the Government of Israel.²⁰⁵

occupation. This dynamic, in turn, carried with it an institutional price the Court had to pay. In Israel, the institutional capital of the Court, measured by its diffuse public confidence, has suffered in part because of the heightened friction with the security establishment.

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

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

Amnon Reichman, *Judicial Independence in Times of War: Prolonged Armed Conflict and Judicial Review of Military Actions in Israel*, 2011 UTAH L. REV. 63, 94-95. See also *Bil'in*, *supra* note 195, at ¶¶ 251-65 (discussing viability of the plaintiffs' claims in the Israeli HCJ).

²⁰⁵ While to some observers it may seem like Quixotic tilting at windmills, there is a very serious and coordinated effort afoot in international human rights advocacy circles to use the courts of any Western country as venues for putting on trial—even only if for the publicity it generates—MNEs who are alleged to aid and abet governments in violating, or themselves with government support are alleged to violate directly, a wide range of rights characterized under the human-rights rubric. See generally François Larocque, *Recent Developments in Transnational Human Rights Litigation: A Postscript to Torture as Tort*, 46 OSGOODE HALL L.J. 605, 654 (2008) (“The developments in transnational human rights litigation since 2001 are wide-ranging and far-reaching.”); François Larocque & Mark C. Power, *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* (CRAIG SCOTT, ED.) 41 Osgoode Hall L.J. 147 (2003) (book review); Craig Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*,

3. *A Frenchman in New York, not an American in Paris: Alstom's Vulnerability to International Civil Litigation in American Courts*

a. *International Litigation in U.S. Courts*

Alstom is also vulnerable to international civil litigation in U.S. courts, which have been the forum for a number of suits arising out of Arab-Israeli conflict.²⁰⁶ There's nothing like getting sued in an American court. Most often, such suits end up in the U.S. federal courts, either because the cause of action arises under federal law, or because the cause of action falls within the alienage jurisdiction that Article III of the U.S. Constitution empowers the federal courts to exercise and which Congress actuated in 28 U.S.C. § 1332(d); and a MNE with non-U.S. citizenship may use the Removal Statute to displace such cases filed against them even when they have been filed originally in courts of a state, commonwealth,

26 YALE J. INT'L L. 487, 515 (2001) (speaking of the search for "a means for plaintiffs to seek compensation from companies practicing an unabashed form of militarized commerce in joint ventures with human rights abusing regimes"). It is worth noting that the Canadian Parliament recently enacted a law (appellated the "Justice for Victims of Terrorism Act") that purports to give Canadian courts an enhanced subject matter jurisdiction that "brings Canada into the very small group of states in which it is possible to use domestic courts to seek redress for violations of international law"—but "the Act is limited to responsibility for acts of terrorism, and does not cover other violations of international law such as torture and war crimes, despite some earlier calls for a wider ambit." René Provost, *Canada's Alien Tort Statute*, EILJ: TALK! (March 29, 2012), <http://www.ejiltalk.org/canadas-alien-tort-statute/>. While it is obvious that this kind of law would not reach cases pleaded under the facts of *Bil'In* or, as discussed in Section III.B.3.c, *infra*, *Corrie v. Caterpillar*, it is not clear whether this law may be a first step in a widening assertion of subject matter jurisdiction by the Canadian Parliament, or even the Canadian federal courts, over alleged violations of a wider range of human rights under the protection of international law. See *id.*, wherein Professor Provost writes that "[i]t is noteworthy that the Act is limited to responsibility for acts of terrorism, and does not cover other violations of international law such as torture and war crimes, despite some earlier calls for a wider ambit." For a dual English-French official text of the Act, see Parliament of Canada, Bill C-110, 60-61 ELIZABETH II <http://parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5465759&File=29#1>. The Preamble states:

And whereas Parliament considers that it is in the public interest to enable plaintiffs to bring lawsuits against terrorists and their supporters, which will have the effect of impairing the functioning of terrorist groups in order to deter and prevent acts of terrorism against Canada and Canadians .

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows —

See also Joanna Harrington, *If Not Torture, Then How About Terrorism – Canada Amends Its State Immunity Act*, EILJ: TALK! (March 28, 2012), at <http://www.ejiltalk.org/if-not-torture-then-how-about-terrorism-canada-amends-its-state-immunity-act/>

²⁰⁶ See generally Adam N. Schupack, *The Arab-Israeli Conflict and Civil Litigation Against Terrorism*, 60 DUKE L.J. 247 (2010).

or territory of the United States.²⁰⁷

b. A Slice of Alstom's Prior Experience in U.S. Courts: In re Alstom Securities Litigation

Nearly a decade ago, Alstom got a strong lesson of what “Litigation-American Style” can be like in a class-action securities fraud case filed against Alstom in the U.S. federal courts. The mere “whiff of grapeshot” in America’s courts—the filing of the action—sent shudders through Alstom, which was financially quite a bit more vulnerable a decade ago than today. As *The Guardian* reported the litigation effect:

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

The news – which came one day after a controversial €3.2bn (£2.2bn) rescue plan for Alstom was agreed – appeared to unsettle investors, who began to fret about the company’s long term viability, sending its shares plunging 14% on the Paris stock exchange at one stage.²⁰⁸

Alstom battled this case in the U.S. federal courts for seven years; and but for the grace of an intervening U.S. Supreme Court decision in *Morrison* narrowing the extraterritorial reach of the federal securities laws,²⁰⁹ Alstom would still be embroiled in a very large litigation,²¹⁰ which the District Judge whittled down after refusing to certify a class of “trans-national” plaintiffs in 2008,²¹¹ and in dismissing claims based on

²⁰⁷ See generally BORN & RUTLEDGE, *supra* note 13. This is the text that the author uses to teach International Civil Litigation, the companion to the author’s IBT course.

²⁰⁸ Andrew Osborne, *Alstom Investors Flee on News of U.S. Lawsuit*, GUARDIAN, Sept. 23, 2003, <http://www.guardian.co.uk/business/2003/sep/24/france.internationalnews>

²⁰⁹ *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2873 (2010).

²¹⁰ Kelly Morris White, Note, *Is Extraterritorial Jurisdiction Still Alive? Determining the Scope of U.S. Extraterritorial Jurisdiction in Securities Cases in the Aftermath of Morrison v. National Australia Bank*, 37 N.C. J. INT’L L. & COM. REG. 1187, 1232-33 (2012); see also Merritt B. Fox, *Securities Class Actions Against Foreign Issuers*, 64 STAN. L. REV. 1173, 1220 & n.125 (2012).

²¹¹ See Gary W. Johnson, Note, *Rule 23 and the Exclusion of Foreign Citizens as Class Members in U.S. Class Actions*, 52 VA. J. INT’L L. 963 (2012). As the Note’s author aptly describes this waystation in Alstom’s sojourn through the U.S. federal courts:

In *In re Alstom S.A. Securities Litigation*, the plaintiffs sought to certify a class of U.S., Canadian,

foreign-exchange sales of Alstom shares in 2010 on the authority of *Morrison*.²¹² That serendipitous and signal corporate victory does not

French, English, and Dutch citizens, entities who purchased stock in Alstom, a French multinational conglomerate, and certain subsidiaries, including a U.S. subsidiary. The Alstom court noted, "Courts may properly consider *res judicata* concerns when evaluating the Superiority Requirement with respect to a proposed class that includes foreign class members." The defendants argued that "a United States class action is not a superior method for adjudicating Plaintiffs' claims because a resulting judgment would not be given preclusive effect by courts in France, England, the Netherlands, and Canada." The court held that the plaintiffs failed to prove that "French courts would more likely than not recognize and give preclusive effect to any judgment rendered" and refused to certify a class consisting of French citizens. This conclusion was only after the Alstom court extensively considered French law.

Id. at 972-73 (footnotes omitted) (citing *In re Alstom S.A. Securities Litigation*, 253 F.R.D. 266, 281-82 (S.D.N.Y. 2008)). Although the court did "find that plaintiffs sufficiently demonstrated that English, Dutch, and Canadian courts 'would more likely than not recognize and give preclusive effect to any judgment rendered' by it with respect to some of the defendants named in the class action," *id.* at 973 n.56, Alstom nonetheless persuaded the District Judge "to modify[]" the proposed class "to delete the inclusion of French persons or entities as to all Defendants, English persons or entities as to Alstom, and Dutch persons or entities as to Alstom." *In re Alstom S.A. Securities Litigation*, 253 F.R.D. at 272.

²¹² *In re Alstom, S.A. Securities Litigation*, 741 F. Supp. 2d 469 (S.D.N.Y. 2010). As Judge Victor Marrero stated in his eloquent introduction to the opinion:

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

...

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

Id. at 470-71. The listing of counsel is prodigious, and the bills likely mirror that, *see id.*; and the litany of previous decisions in the case gives some clue as to its inconvenience and cost:

Plaintiffs' allegations are detailed more fully in the Court's prior opinions in this action, *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346 (S.D.N.Y. 2005) ("Alstom I"), *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433 (S.D.N.Y. 2005) ("Alstom II"), *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 402 (S.D.N.Y. 2005) ("Alstom III"), *In re Alstom SA Sec. Litig.*, 454 F. Supp. 2d 187 (S.D.N.Y. 2006) ("Alstom IV"), and *In re Alstom Sec. Litig.*, 253 F.R.D. 266 (S.D.N.Y. 2008).

Id. at 471. After seven years of transcontinental litigation, Judge Marrero emphatically rejected the plaintiffs' arguments that the United States had legislative jurisdiction over the conduct that plaintiffs had urged were regulated by U.S. federal securities laws:

Plaintiffs argue that purchases of Alstom securities recorded on Euronext are domestic transactions under *Morrison* because such purchases were initiated in the United States. Plaintiffs' submission to the Court, though less than a model of clarity, also suggests that because these common shares were registered and listed on the NYSE, though not actually purchased there, these Euronext transactions fulfill the letter of *Morrison*'s rule that the federal securities fraud laws apply to transactions in securities "listed on a domestic exchange." *Morrison*, 130 S. Ct. at 2886.

prevent executive-level management, however, from being sued, being served, being deposed, and having to expend considerable emotional and professional time defending against international civil litigation in U.S. courts²¹³—all of which comes at a considerable transaction cost to the MNE.²¹⁴

c. Relic—or Modern Human-Rights Litigation Sword? The Curious Career of the Alien Tort Statute as a Significant Source of U.S. Litigation Risk to MNEs

*The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*²¹⁵

The Court is not persuaded by either argument.

Id. at 471-72. However, there are plaintiffs left in the case, which continues pending on summary judgment motions, for the District Court's ruling merely applied only to "claims of Plaintiffs who purchased securities on foreign exchanges," where were the only group of plaintiffs "dismissed from this action." *Id.* at 473.

²¹³ See, e.g., Hannah L. Buxbaum, *Personal Jurisdiction Over Foreign Directors In Cross-Border Securities Litigation*, 35 J. CORP. L. 71 (2009); *In re Alstom S.A. Sec. Litig.*, 406 F. Supp. 2d 346, 401 (S.D.N.Y. 2005) (observing that "it would have been foreseeable to those creating and disseminating the [registration statements] that the documents would have an effect in the United States," in the course of considering personal jurisdiction over inside French directors).

²¹⁴ Also noteworthy are the anti-bribery laws under which Alstom management has been investigated. See, e.g., Frank C. Razzano & Travis P. Nelson, *The Expanding Criminalization of Transnational Bribery: Global Prosecution Necessitates Global Compliance*, 42 INT'L LAW. 1259, 1281 (2008) (in addition to a prosecution in Italy, "nineteen investigations are under way in France concerning payments of hundreds of millions of dollars in bribes to secure contracts in Asia and Latin America between 1998 and 2003 by Alstom in connection with projects in those regions"); Richard Grime & Ann Savage, *FCPA Jurisdiction over Foreign Entities & Individuals: The Trend of Increasingly Aggressive Enforcement*, in PRACTISING LAW INST., CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES—WHITE COLLAR CRIME 2008: PROSECUTORS AND REGULATORS SPEAK 163, 189 (2008) (noting that the class of major MNEs "subject to prosecution and investigation in more than one country include[s] Alstom (Switzerland, France, Brazil, and Mexico)").

²¹⁵ 28 U.S.C. § 1350, captioned "Alien's Action for Tort." Some sources refer to this statute as "The Alien Torts Claims Act" or "ACTA." That practice is incorrect for at least three reasons. First, it misleading suggests that the statute is the product of a focused, separate piece of legislation devoted to tort claims by aliens. See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 592-97 (2002) (explaining that "Alien Tort Statute" is more accurate than the "Alien Tort Claims Act" since § 1350 is a subject-matter jurisdiction statute that in and of itself creates no cause of action). It is evident from its undistinguished and virtually unmentioned upon inclusion in an omnibus court establishment bill that such an impression is utterly false. Second, it makes it sound as if the law were conceptually and temporally related to a modern statute, the Federal Torts Claims Act, or FTCA, but the two could not be more different. See 28 U.S.C. §§ 1346(b), 2671-2680 (2006); see, e.g., *Feres v. United States*, 340 U.S. 135 (1950); *Dalehite v. United States*, 346 U.S. 15, 26-30 (1953). Finally, the U.S. Supreme Court has consistently appellated the statute "the Alien Tort Statute,"

These 33 words, couched as a jurisdictional statute enacted within the Judiciary Act of 1789, would hardly seem the source of a major threat to Alstom, a French MNE, as it undertakes FDI in Israel. Indeed, prior to 1980, the Alien Tort Statute would have been irrelevant to this—and similar—FDIs by MNEs anywhere.

However, as explained in this subsection, the ATS has become a major source of risk, expense, and transactional costs for all MNEs over which the U.S. federal courts have personal jurisdiction;²¹⁶ and while the risk to MNEs, such as Alstom, whose projects are sited in political tinderboxes such as Jerusalem and the Golan Heights, is considerable—and needs to be understood by both IBT counsel and the MNE—the Supreme Court may be on the verge of bringing the curious career of the ATS as a regulator of FDI to an abrupt (but well-deserved) close, as discussed in the concluding paragraphs of this subsection.²¹⁷

The ATS was originally the 9th section of the Judiciary Act of 1789, collected with along with all the other jurisdictional provisions appearing in that Act, by which Congress fulfilled Article III's directive that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."²¹⁸ Nor was the ATS the marquee attraction of 9th section of the 1789 Judiciary Act; it was simply enumerated among the many bases for subject matter in Section 9's lengthy laundry list:

SEC. 9. And be it further enacted, That the district courts shall

beginning with *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 436 (1989), and continuing with *Sosa v. Alvarez-Machain*, 542 U.S. 692 *passim* (2004). As Judge Kim McLane Wardlaw has observed:

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

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

²¹⁶ *See, e.g.,* Travis Robert-Ritter, *Achilles' Heel: How the ATS and NAFTA Have Combined to Create Substantial Tort Liability for US Corporations Operating in Mexico*, 42 U. MIAMI INTER-AM. L. REV. 443 (2011).

²¹⁷ For an international perspective on the extraterritoriality aspect of the Supreme Court's deliberations in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *reh'g en banc denied*, 642 F.3d 379 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011), see Barrie Sander, *Kiobel: The US steals the Headlines in First Round of Supplemental Briefs on Universal Civil Jurisdiction under the Alien Tort Statute*, EILJ: TALK! (June 26, 2012), <http://www.ejiltalk.org/kiobel-the-us-steals-the-headlines-in-first-round-of-supplemental-briefs-on-universal-civil-jurisdiction-under-the-alien-tort-statute/>.

²¹⁸ U.S. CONST. ART. III, § 1.

have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. **And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.** And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.²¹⁹

It was against this background that U.S. Circuit Court of Appeals Judge Henry J. Friendly—recently the subject of a thorough intellectual biography that called him “greatest judge of his era”—confronted one of only four recorded, up to that time, post-enactment attempts by litigants

²¹⁹ Judiciary Act of 1789, ch. 20, 1 Stat. 73, available at <http://www.ourdocuments.gov/doc.php?flash=true&doc=12&page=transcript> (emphasis added). See generally Wythe Holt, “To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421 (1989).

in 190 years to invoke the ATS.²²⁰ In *ITT v. Vencap, Ltd.*,²²¹ a Luxemburg-based investment trust chose the U.S. federal courts in which to sue a Bahamian corporation and several individual defendants over a foreign investment in which the trust made allegations of fraud, conversion and corporate waste.²²² Subject matter jurisdiction was one of the principal issues, and, in particular, whether the federal securities laws provided subject matter jurisdiction of an action seeking damages or rescission by defrauded foreign individuals where United States was used as basis for manufacturing fraudulent security devices for export.²²³ In the course of evaluating these questions, the district court had considered, in addition to the securities laws, that the Alien Tort Statute might plausibly provide subject matter jurisdiction for the litigation. Judge Friendly, however, was not impressed; and in his discussion on that contention, he pithily and penetratingly summed up the very problematic nature of the ATS:

This leaves 28 U.S.C. § 1350 which confers jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”. This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came. We dealt with it some years ago in *Khedivial Line, S. A. E. v. Seafarers’ Union*, 278 F.2d 49, 52 (2d Cir. 1960) (per curiam). At that time we could find only one case where jurisdiction under it had been sustained, in that instance violation of a treaty, *Bolchos v. Darrell*, 3 Fed.Cas.

²²⁰ DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 1-3, 346-59 (2012). Judge Richard Posner has written of Friendly that:

[O]ne might suppose that he was a formalist judge par excellence, deploying text and precedent to produce decisions that satisfied the legal profession’s longing for formal correctness and objective validity. But that was not the kind of judge he was. He tempered academic brilliance with massive common sense. He was less mercurial, more matter-of-fact, than any of the other great judges. . . . He saw cases not as intellectual puzzles to be solved but as practical disputes to be resolved sensibly and humanely. He bent his powerful legal intelligence to the service of shaping legal doctrine to the enablement of sensible results in individual cases. The aim was to improve the law—American law is in constant need of improvement, in fact is a mess to a degree that only insiders can appreciate—without unduly perturbing the doctrinal and institutional framework that provides necessary stability and continuity.

Richard A. Posner, *Foreword* to DORSEN, *supra*, at xiii.

²²¹ 519 F.2d 1001 (2d Cir. 1975).

²²² *Id.* at 1004.

²²³ *Id.* at 1015.

810, No.1, 607 (D.S.C. 1795); there is now one more. See *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857, 863-65 (D.Md. 1961). Here there is no allegation of anyone's violating a treaty. The reference to the law of nations must be narrowly read if the section is to be kept within the confines of Article III. We cannot subscribe to plaintiffs' view that the Eighth Commandment "Thou shalt not steal" is part of the law of nations. While every civilized nation doubtless has this as a part of its legal system, a violation of the law of nations arises only when there has been "a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se." *Lopes v. Reederei Richard Schroder*, 225 F.Supp. 292, 297 (E.D.Pa. 1963). See also *Damaskinos v. Societa Navigacion Interamericana, S. A., Pan.*, 255 F.Supp. 919, 923 (S.D.N.Y. 1966); *Valanga v. Metropolitan Life Insurance Co.*, 259 F.Supp. 324, 328 (E.D.Pa. 1966). We therefore turn to the two sections of the securities laws.²²⁴

An MNE might well think that Judge Friendly's lucid and persuasively logical reasoning would have conclusively settled the matter—far from it. As an MNE with far-flung FDIs, a European company such as Alstom might well see subsequent court decisions, leading in 1997 to the assumption of extraterritorial, foreign corporate liability under the ATS, in the following terms: Just as a provenance devoid of detail *allows* characters in Wagner's 1843 opera *Lohengrin* to speculate recklessly about the identity and purpose of the knight whose name is not spoken,²²⁵ and *encourages* directors of that opera to project their own idiosyncrasies into its realization,²²⁶ the blank slate of the ATS

²²⁴ *Id.* (internal citations have been updated to reflect proper requirements).

²²⁵ See, e.g., ERNEST NEWMAN, "Lohengrin," in *THE WAGNER OPERAS*, 105-68 (1991).

²²⁶ Critic Fiona Maddocks observed of Hans Neuenfels's controversial new production of *Lohengrin* in Bayreuth:

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

Fiona Maddocks, *Bayreuth Festival 2010*, GUARDIAN U.K.: OBSERVER July 31, 2010, <http://www.guardian.co.uk/music/2010/aug/01/lohengrin-bayreuth-maddocks-review> (noting that Hans Neuenfels's controversial new production of *Lohengrin* in Bayreuth contained elements that "hardly feature in the original of Wagner's [production]").

<http://www.guardian.co.uk/music/2010/aug/01/lohengrin-bayreuth-maddocks-review>

has *allowed—even encouraged*—litigants and more than a few courts to paint canvasses of the most fantastic imagination with the 33 words of that Act, starting with Judge Friendly's head-line seeking colleague (and successor as Chief Judge²²⁷) Judge Irving Kaufman²²⁸ in *Filartiga v.*

²²⁷ Arnold H. Lubasch, *Kaufman Due to Succeed Friendly on U.S. Bench; Takes Over May 28 as Chief Appeals Judge in 2d Circuit*, N.Y. TIMES, Apr. 6, 1973, <http://select.nytimes.com/gst/abstract.html?res=F40C14FE395C1A7A93C4A9178FD85F478785F9>

²²⁸ See, e.g., Marilyn Berger, *Judge Irving Kaufman, of Rosenberg Spy Trial and Free-Press Rulings, Dies at 81*, N.Y. TIMES, Feb. 3, 1992, <http://www.nytimes.com/1992/02/03/nyregion/judge-irving-kaufman-of-rosenberg-spy-trial-and-free-press-rulings-dies-at-81.html>. The obituary included a number of insightful observations by those familiar with Judge Kaufman's work:

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

"I'm sure the decision plagued him to his last days," Prof. Yale Kamisar of the University of Michigan Law School said of the Rosenberg case, adding that Judge Kaufman was "someone whose desire for recognition was not easily fulfilled."

"He continued to write on public issues for a very long time and he certainly worked hard on developing an image of a thoughtful, liberal, sensitive, concerned person on public issues," Professor Kamisar said.

.....

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

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

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

.....

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

Id. In his analytic and intellectual biography of Judge Friendly, David M. Dorsen recounts how then-District Judge Kaufman lobbied hard for appointment to the Circuit, and when Friendly had received endorsements from Justice Frankfurter, Judge Learned Hand, and the American Bar Association (which rated Friendly "exceptionally well qualified"), Kaufman tried to, in effect, negotiate Friendly out of the picture by "suggest[ing] the following compromise: Kaufman would get the next slot, and in turn he would support Friendly for Hincks's spot." DORSEN, *supra* note 220, at 75. (Judge Carroll Hincks had been appointed the Circuit Judge from Connecticut by President Eisenhower in 1953, and he took senior status in 1959. See *Biographical Directory of Federal Judges—Hincks, Carroll Clark*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1052&cid=999&ctype=na&instate=na>.) Friendly's response was, in essence, that Kaufman was insulting his intelligence with "the ruse, since

Pena-Irala.²²⁹

While the cause of ending extra-judicial torture and bringing torturers to account for their wrongs is a powerful one, it would not be unreasonable for the counsel to an MNE to conclude that surely *Filartiga* was wrongly decided as a matter of statute reading.²³⁰ Indeed, supporters in Congress of more aggressive human rights laws recognized just how problematic *Filartiga* was, for they took the extraordinary step of amending the ATS in 1992, after proper deliberation and legislative process, to codify *Filartiga* in a supplemental statute (as a Note to § 1350) called the Torture Victims Protection Act (TVPA).

Hinck's successor obviously would be from Connecticut," not Judge Friendly's home state, New York. DORSEN, *supra* note 220, at 75 & n.27.

²²⁹ 630 F.2d 876 (2d Cir. 1980). True to a pattern that emerged over the years, Judge Kaufman's opinion was headline news in the New York Times: Marcia Chambers, *Court Says Alien Can Sue For Torture in Paraguay; Lower Court Ruling Overturned Decision Is Unanimous*, N.Y. TIMES, July 1, 1980, <http://select.nytimes.com/gst/abstract.html?res=FA0714FE385C11728DDDA80894DF405B8084F1D3>. The drama was palpable:

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

...

The ruling by the United States Court of Appeals for the Second Circuit establishes for the first time that federal courts have the power and jurisdiction to try purported acts of torture and award civil damages if a violation of the law of nations has been proved. The opinion leaves open to further litigation the date on which the statute of limitations begins to run. *Id.* Of course, the opinion left far more open than the limitations issue; it left open a veritable Pandora's box of questions that have proven to be legislative in nature and a poor fit for common-law style judicial decisionmaking. *See, e.g.,* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (four-paragraph per curiam opinion followed by 52-pages of separate concurring opinions by then-Circuit Judges Edwards, Robb, and Bork); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010), *reh'g denied* (with concurring opinion filed by Chief Judge Jacobs), 642 F.3d 468 (2d Cir. 2011), *reh'g en banc denied* (with concurring opinion filed by Chief Judge Jacobs and dissenting opinions by Judges Lynch and Katzmann), 642 F.3d 379 (2d Cir. 2011), *cert denied*, 132 S. Ct. 248 (Sept. 3, 2011), *then cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011), argued Feb. 27, 2012 and set for reargument and supplemental briefing during October Term 2012, *see* Order List for 565 U.S., Case 10-1491, issued March 5, 2012, available from link at <http://www.scorusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al/>; *see also* *Kiobel v. Royal Dutch Petroleum*, OYEZ PROJECT (Oct. 2012), http://www.oyez.org/cases/2010-2019/2011/2011_10_1491 (reargument and supplemental briefing to address whether and when the Alien Tort Statute allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (*en banc*), *petition for cert. filed*, 80 USLW 3335 (Nov 23, 2011) (NO. 11-649).

²³⁰ *See Sarei*, 671 F.3d at 806-08 (Kleinfeld, J., dissenting); *Tel-Oren*, 726 F.2d at 799 (Bork, J., concurring in the result).

A foreign observer, such as an MNE's general counsel, of American legal developments might be understandably puzzled by the order in which the legislative process proceeded, and skeptical of the whole affair—*i.e.*, that Judge Kaufman had, in effect, written the statute that Congress had not enacted in 1789; and that Congress in 1992 enacted, in effect, the statute that Judge Kaufman had written in the guise of a judicial opinion. If that view sounds a bit cynical, the cynicism by an MNE's general counsel would be understandable; it is one largely shared by their governments.²³¹ From where MNEs and foreign sovereigns stand, the

²³¹ See, e.g., Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, (U.S. June 13, 2012), 2012 WL 2312825. The positions articulated in this brief are worth examining in some detail; the consistent remonstrance of European and other sovereigns against the expansiveness of the ATS is reflective of the concerns of MNEs domiciled within their territories, such as Alstom, and deserves more attention by scholars, courts, and Congress:

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

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

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

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

...

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

This brief is intended to set out the views of two nations that historically have been concerned with

Second Circuit created a new statute out of whole cloth, opening the door to make the U.S. federal courts a forum for allowing private parties to attempt to turn legislative and executive matters of great complexity and serious foreign policy implications into federal lawsuits. In so doing, the path to serious and direct confrontations between the federal courts and the political branches of government was set before MNEs that make FDIs in politically volatile areas of the world. In his limited concurrence in the U.S. Supreme Court's only ruling on the ATS, *Sosa v. Alvarez-Machain*, Justice Scalia clearly articulated the kinds of legal difficulties that MNEs have faced when trying to assess the broader legal environment of their FDIs beyond the municipal law of their host states:

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

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

American law—the law made by the people's democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court.²³²

Presciently, Judge Robert Bork warned in his 1986 concurring opinion in *Tel-Oren v. Libyan Arab Republic*²³³ that *Filartiga* was fundamentally flawed:

the extraterritorial exercise of jurisdiction by the U.S. courts because of its inconsistency with international law. It echoes the views expressed by other governments in ATS, antitrust and securities cases before this Court including the Governments of Australia, Belgium, Canada, France, Germany, and Japan.

Id. at *1-4 (footnotes omitted).

²³² 542 U.S. at 748, 750-51 (2004) (Scalia, J., concurring in part & concurring in the judgment).

²³³ 726 F.2d at 799 (Bork, J., concurring in the result).

The question in this case is whether appellants have a cause of action in courts of the United States for injuries they suffered in Israel. Judge Edwards contends, and the Second Circuit in *Filartiga* assumed, that Congress' grant of jurisdiction also created a cause of action. That seems to me fundamentally wrong and certain to produce pernicious results. For reasons I will develop, it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal. It will be seen below, however, that no body of law expressly grants appellants a cause of action; the relevant inquiry, therefore, is whether a cause of action is to be inferred. That inquiry is guided by general principles that apply whenever a court of the United States is asked to act in a field in which its judgment would necessarily affect the foreign policy interests of the nation.²³⁴

Even lawyers of a non-originalist judicial philosophy would have to concede that the only reasonable explanation for the 1789 Congress to have included the ATS clause in the 1789 Judiciary Act was out of fear of retribution from other nations, not in order to pass judgment on them.²³⁵ The ATS was a response to incidents involving a tort committed against

²³⁴ *Id.* at 801.

²³⁵ See Michele Landis Dauber, *The War Of 1812, September 11th, And The Politics Of Compensation*, 53 DePaul L. Rev. 289, 289 (2003) ("The sufferers too well remember, the toilsome days and sleepless nights of December, 1813 and January, 1814; and while they remember the want of governmental protection, the smoking ruins, the devastation and the sufferings, they will burn with indignation, not to be quenched, until that government, (who denied them protection, in the hour of danger, and who now actually turns a deaf ear to their petitions,) shall amply remunerate their losses, by a prompt and honorable liquidation of their claims.") (quoting Smith Salisbury, *Niagara Frontier Claims*, Buff. Gazette, Jan. 28, 1817, at 3); Curtis A. Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 AM. J. INT'L L. 1, 18, 19 (2012) ("Under the customary international law of the late 1700s, when the ATS was enacted, the United States would have had a duty to ensure that certain torts in violation of international law, especially those committed by its citizens, were punished and redressed"; thus, Congress enacted the ATS to "vindicate U.S. responsibilities under international law . . . rather to sit in judgment on the actions of foreign governments and their corporations."); see also *Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring in the judgment). In *Tel-Oren*, Judge Robb reminds us of the dangers of anachronistic thinking when we overlay old statutory language with modern-day aspirations:

We ought not to parlay a two hundred years-old statute into an entree into so sensitive an area of foreign policy. We have no reliable evidence whatsoever as to what purpose [§ 1350] was intended to serve. We ought not to cobble together for it a modern mission on the vague idea that international law develops over the years. Law may evolve, but statutes ought not to mutate. To allow § 1350 the opportunity to support future actions of the sort both countenanced in *Filartiga* and put forward here is to judicially will that statute a new life. Every consideration that informs the sound application of the political question doctrine militates against this result. My colleagues concede that

an ambassador and concern for enforcing safe-conducts when America was young, vulnerable to at least three European nations (England, France, and Spain) with large foot-holds in North America, and ill-prepared for military action against those powers, as amply demonstrated 25 years later in the War of 1812.²³⁶ To assume that *Filartiga's* reading of the ATS—and the even broader readings of the ATS that were bootstrapped in *Filartiga's* wake—had anything to do with either the intention of or words used by the 1789 Congress would strike counsel to MNEs across the globe as delusional.²³⁷ From the pragmatist point-of-view with which the business

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

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

²³⁶ *Ali Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1099 (D.C. Cir. 2011) (Williams, J., concurring) (“The concern was that U.S. citizens might engage in incidents that could embroil the young nation in war and jeopardize its status or welfare in the Westphalian system.”). While the author does not entirely agree with some of his interpretation of the historical record or the inferences he draws therefrom, Professor Lee’s 2006 article on the ATS at least refocuses the discussion of the ATS to a rational, rather than upon a fanciful or an anachronistic, context. See Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 896-907 (2006). One of Professor Lee’s most worthy points is that “suit in domestic court for tort remedies by an alien against the one who injured his person or property was mainly a political expedient premised on the host sovereign’s hope that if the alien received a speedy and fair remedy, the other sovereign might not be informed of, or act upon, the safe-conduct breach, diminishing the risk that the offended sovereign would exercise its lawful right to make war.” *Id.* at 881.

²³⁷ In *Tel-Oren*, Judge Robb more politely, yet just as pointedly, observed that in cases of the tortured versus the torturer, or the victims versus the terrorist, “[w]e are here confronted with the easiest case and thus the most difficult to resist,” which he described as “a similar magnet” to that which “drew the Second Circuit into its unfortunate position in *Filartiga*”:

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

community approaches problems, the clearest thinking on this point came from Judge Bork in *Tel-Oren*:

I have discovered no direct evidence of what Congress had in mind when enacting the provision. The debates over the Judiciary Act in the House—the Senate debates were not recorded—nowhere mention the provision, not even, so far as we are aware, indirectly.

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

What little relevant historical background is now available to us indicates that those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations. A broad reading of section 1350 runs directly contrary to that desire. It is also relevant to a construction of this provision that until quite recently nobody understood it to empower courts to entertain cases like this one or like *Filartiga*.²³⁸

726 F.2d at 826–27 (Robb, J., concurring in the result) (internal citation omitted).

²³⁸ 726 F.2d at 812–13 (footnotes omitted). As Judge Bork continued:

Though it is not necessary to the decision of this case, it may be well to suggest what section 1350 may have been enacted to accomplish, if only to meet the charge that my interpretation is not plausible because it would drain the statute of meaning. The phrase “law of nations” has meant various things over time. It is important to remember that in 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover *Clearly, cases like this*

Yet, it did not take long for the federal courts to assume that MNEs could be sued in the U.S. federal courts on ATS claims involving injuries sustained by individuals and groups entirely outside of U.S. sovereign territory.²³⁹ Those courts did so without thinking through the separation-

and Filartiga were beyond the framers' contemplation. That problem is not avoided by observing that the law of nations evolves. It is one thing for a case like *The Paquete Habana* to find that a rule has evolved so that the United States may not seize coastal fishing boats of a nation with which we are at war. It is another thing entirely, a difference in degree so enormous as to be a difference in kind, to find that a rule has evolved against torture by government so that our courts must sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens. The latter assertion raises prospects of judicial interference with foreign affairs that the former does not. *A different question might be presented if section 1350 had been adopted by a modern Congress that made clear its desire that federal courts police the behavior of foreign individuals and governments. But section 1350 does not embody a legislative judgment that is either current or clear and the statute must be read with that in mind.*

Id. at 813 (citations omitted) (emphases added). One does not have to share Judge Bork's social philosophies or political conservatism (see, e.g., SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996)) to see that no theory of rational statutory interpretation supports the federal courts' reanimation of the ATS from 1980 onwards. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 268-72 (explaining the "Extraterritoriality Canon" of statutory interpretation, and quoting Justice Robert H. Jackson's admonition that "if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting.") (quoting *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953)). Or, as it was reportedly put by a very pragmatic jurist and a committed internationalist, Chief Judge Charles Evans Hughes, "[i]t is well to be liberal, but not messy." See generally FRED W. FRIENDLY, MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS 105 (1981) (discussing the judicial philosophy of Chief Justice Hughes).

²³⁹ These include: *Doe v. Unocal*, 248 F.3d 915 (9th Cir. 2001), involving allegations of human rights violations against indigenous people in Burma during the construction of a pipeline, which was settled, see "*Doe v. Unocal*," EARTH RIGHTS INT'L, <http://www.earthrights.org/legal/doe-v-unocal>; and *Wiwa v. Royal Dutch Shell*, 226 F.3d 88, (2d Cir. 2000), involving allegations of complicity in human rights violation against a Nigerian poet and activist who was executed by the Nigerian government; the case settled on the eve of trial for \$15.5 million, see "*Wiwi v. Royal Dutch Shell*," EARTH RIGHTS INT'L, <http://www.earthrights.org/legal/wiwa-v-royal-dutchshell>. A less sanguine view of these developments was offered by Second Circuit Judge José A. Cabranes, who has explained that the ATS is:

[A] jurisdictional provision unlike any other in American law and of a kind apparently unknown to any other legal system in the world. Passed by the first Congress in 1789, the ATS lay largely dormant for over 170 years. . . . Then, in 1980, the statute was given new life, when our Court first recognized in *Filartiga v. Pena-Irala* that the ATS provides jurisdiction over (1) tort actions, (2) brought by aliens (only), (3) for violations of the law of nations (also called "customary international law" including, as a general matter, war crimes and crimes against humanity—crimes in which the perpetrator can be called "hostis humani generis, an enemy of all mankind." Since that time, the ATS has given rise to an abundance of litigation in U.S. district courts. For the first fifteen years after *Filartiga*—that is, from 1980 to the mid-1990s—aliens brought ATS suits in our courts only against notorious foreign individuals; the first ATS case alleging, in effect, that a corporation (or "juridical" person) was an "enemy of all mankind" apparently was brought as recently as 1997.

of-powers implications, let alone the ahistoricity, of this expansion.²⁴⁰

Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 116 & n.5 (2d Cir. 2010) (noting that “[t]he first ATS case brought against a corporate defendant appears to have been *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff’d in part and rev’d in part*, 395 F.3d 932 (9th Cir. 2002)”) (footnote omitted). On October 17, 2011, the U.S. Supreme Court granted petitions for writs of certiorari to review *Kiobel v. Royal Dutch Shell* (2d Cir. 2010) and *Mohamad v. Rajoub* (D.C. Cir. 2011). See Trey Childress, *United States Supreme Court to Again Consider the Alien Tort Statute*, CONFLICTOFLAWS.NET (Oct. 17, 2011), <http://conflictoflaws.net/2011/united-states-supreme-court-to-again-consider-the-alien-tort-statute/>. The Court proceeded to decide the *Mohamad* case, *sub nom.* *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (Apr. 18, 2012), holding that the term “individual” within the TVPA did not include a corporation as a juridical entity, though the term would, of course, include specific individuals through whom a corporation operates. Writing for a unanimous Court, Justice Sotomayor put the TVPA in a perspective that emerges from a confluence of its text, as well as materials comprising its legislative history:

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

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

132 S. Ct. at 1710. In a discussion that, although treating an interpretative issue of a different nature than the one in *Kiobel*, may be prescient of the ultimate rationale the Court reaches on restricting extraterritorial application of the ATS, Justice Sotomayor concluded “[t]he text of the TVPA convinces us that Congress did not extend liability to organizations, sovereign or not. There are no doubt valid arguments for such an extension. But Congress has seen fit to proceed in more modest steps in the Act, and it is not the province of this Branch to do otherwise.” *Id.* at 1710–11. For a discussion of the *Mohamad* case and its impact on international human rights litigation in the U.S. courts, see Alberto Bernabe, *Supreme Court decides Mohamad v. Rajoub: no cause of action against corporations under Torture Victim Protection Act*, TORTS BLOG (Apr. 23, 2012), <http://bernabetorts.blogspot.com/2012/04/supreme-court-decides-mohamad-v-rajoub.html>, which includes many links to a wide spectrum of legal and popular media discussion of the ruling, such as Adam Liptak, *Justices Limit Suits Under Law on Torture*, N.Y. TIMES, Apr. 18, 2012, at A20.

²⁴⁰ See, e.g., John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 307 n.22 (2006) (“[D]efenders of the use of contemporary international law want to use evolving standards of an international law that has grown in scope to become a kind of local municipal law and changed in nature from natural to positive law. In this respect, modern international law does not resemble the law of nations known to the Framers.”).

Nor did they consider the business ramifications of permitting such litigation. As one human-rights advocacy group, the “Center for Justice and Accountability” (CJA), boasts on its website:

Beginning in the mid-1990s, a new class of ATS suits emerged that aimed to hold multinational corporations accountable for complicity in human rights abuses. Although backlash from certain sectors of the business community unleashed heated criticism of this use of the ATS, attempts to repeal or attenuate the statute have failed.²⁴¹

Even scholars neutral, or favorably disposed, toward such a use of the ATS are compelled to admit that “[a]s a practical matter, plaintiffs choose to sue under the ATS to forum shop their way into a U.S. court in hopes of finding a more favorable forum in which to litigate their case.”²⁴² A leading scholar of MNE trends in FDI has summarized so well the corporate view of the ATS, that it provides the basic starting point for our discussion of a new—and potentially potent—kind of political risk to enterprises such as Alstom’s East Jerusalem Light-Rail Project, as well as our hypothetical Golan Heights Wind Farm project:

Multinationals also encountered a new form of political risk – legal action in developed countries, notably the United States, for alleged human rights abuses in developing countries. Although there remained no international law regarding the human rights obligations of multinationals, companies found themselves increasingly vulnerable to litigation under the obscure Alien Tort Claims Act (ATCA) of 1789. This 33-word act of the newly-established United States specified that “The district courts shall have original jurisdiction of any civil action by an alien for a tort (civil wrong) only, committed in violation of the law of nations or a treaty of the United States.” The Act lay dormant for almost two hundred years, until in 1979 it was used against a Paraguayan police inspector living in the United States, who was accused of torturing and killing the son of a Paraguayan dissident in Paraguay. The victim’s relatives won a \$10 million judgment, which was

²⁴¹ *The ATS in the Modern Era—Corporate Accountability for Aiding and Abetting*, CTR. JUST. & ACCOUNTABILITY, <http://www.cja.org/article.php?id=435> (last visited Nov. 15, 2012).

²⁴² Donald Earl Childress, III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 723 (2012).

never paid.²⁴³

Professor Jones observed that for FDI purposes, MNEs have to be aware that “for multinationals, the most significant feature of [ATS] was that, in addition [to] individuals, companies could be sued in US courts for internationally recognized human rights violations anywhere in the world.”²⁴⁴ This represents an especially troublesome wrinkle for MNEs, because “[a]lthough it proved difficult to win [ATS] cases, the legal costs and bad publicity generated by the cases became a major issue for companies,” particularly for MNEs such as Alstom: “Given the political and security circumstances in many developing countries, especially in Africa, [ATS] obliged multinationals to give increased attention to human rights and environmental strategies, and to resolve complex issues related to different legal and ethical standards between some developed and some developing countries.”²⁴⁵ As of this writing, Mercedes-Benz is going to school on this lesson in *Bauman v. DaimlerChrysler Aktiengesellschaft*,²⁴⁶ an ATS case involving claims by “twenty-two Argentinian residents . . . against DaimlerChrysler Aktiengesellschaft (DCAG) alleging that one of DCAG’s subsidiaries, Mercedes-Benz Argentina (MBA) collaborated with state security forces to kidnap, detain, torture, and kill the plaintiffs and/or their relatives during Argentina’s ‘Dirty War,’” a conflict that “began in 1976 when the military overthrew the government of President Isabel Peron and set up a military dictatorship.”²⁴⁷

Nor would it be unprecedented for litigants to use the ATS as a vehicle for challenging an MNEs participation in an Israel-based FDI. In fact, it has already occurred. Another major corporate project partner of Israel’s, Caterpillar, was sued in the U.S. under the ATS for allegedly aiding and abetting alleged human-rights violations in the Occupied

²⁴³ Geoffrey Jones, *Multinational Strategies and Developing Countries in Historical Perspective* 34-35 (Harvard Business School Entrepreneurial Management Working Paper No. 10-076, 2010) available at www.hbs.edu/research/pdf/10-076.pdf (working draft of paper initially presented at the International Business History Conference, Hitotsubashi University, Tokyo January 8-10, 2010).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 36.

²⁴⁶ 644 F.3d 909 (9th Cir. 2011) (resolving in favor of plaintiffs solely the issue whether long-arm jurisdiction in California existed over the German parent corporation through its separately incorporated American subsidiary under the sovereignty and convenience branches of *International Shoe v. Washington*, 326 U.S. 310 (1945), and its progeny such as *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)).

²⁴⁷ *Id.* at 911-12 & n.3, *reh’g en banc denied by a divided court*, 676 F.3d 774 (9th Cir. 2011) (O’Scannlain, J., joined by Tallman, Bybee, Callahan, Bea, M. Smith, Ikuta, and N.R. Smith, J.J., dissenting from denial of rehearing en banc), *petition for cert. filed*, 80 USLW 3461 (Feb 06, 2012) (NO. 11-965).

Territories by bulldozer sales to Israel when the bulldozers were used in constructing and expanding settlements in the Occupied Territories.

In *Corrie v. Caterpillar, Inc.*,²⁴⁸ Judge Kim McLane Wardlaw succinctly set out the theory behind the ATS claim in the case:

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

Following the Six Day War in 1967, Israel occupied and took control of the West Bank and Gaza Strip. Caterpillar is the world's leading manufacturer of heavy construction and mining equipment. Among its customers is the IDF, which since 1967 has utilized Caterpillar bulldozers to demolish homes in the Palestinian Territories. According to plaintiffs' complaint, Caterpillar sold the bulldozers to the IDF despite its actual and constructive notice that the IDF would use them to further its home destruction policy in the Palestinian Territories; a policy plaintiffs contend violates international law. Seventeen members of plaintiffs' families—sixteen Palestinians and one American—were killed or injured in the course of the demolitions.²⁴⁹

While the complaint against Caterpillar was dismissed by the District Court and by the Ninth Circuit, those courts *did not find* that [1] corporations *were not* appropriate ATS defendants; [2] the FDI of Caterpillar in Israel, given the *Filartiga* and progeny re-write of the statute, *was outside of* the ATS; or [3] the ATS *is inapplicable* to extraterritorial conduct. Instead, those courts dismissed that particular complaint solely because the U.S.-government actually paid for Caterpillar's sale of equipment to Israel, which put the political question doctrine squarely into play:

²⁴⁸ 503 F.3d 974 (9th Cir. 2007), *aff'g* 403 F. Supp. 2d 1019 (W.D. Wash. 2005).

²⁴⁹ 503 F.3d at 977.

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

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

★★★

We cannot intrude into our government's decision to grant military assistance to Israel, even indirectly by deciding this challenge to a defense contractor's sales. Plaintiffs' claims can succeed only if a court ultimately decides that Caterpillar should not have sold its bulldozers to the IDF. Because that foreign policy decision is committed under the Constitution to the legislative and executive branches, we hold that plaintiffs' claims are nonjusticiable. . . .²⁵⁰

Thus, the failure of the particular ATS claim in *Corrie* can provide no succor to MNEs in Alstom's position.²⁵¹ A case filed against Alstom over a

²⁵⁰ 503 F.3d at 982 (citations & footnotes omitted).

²⁵¹ Indeed, Ms. Corrie's parents sued the state of Israel in the courts of that country. Rory McCarthy, *Rachel Corrie's Family Bring Civil Suit Over Human Shield's Death In Gaza—Parents Want Case To Highlight Events That Led To American Activist's Death Under Israeli Army Bulldozer*, GUARDIAN, Feb. 23, 2010, <http://www.guardian.co.uk/world/2010/feb/23/corrie-death-law-case>. It appears that the suit did not encompass Caterpillar; but it conceivably might well have. The suit went to trial in March 2012 before Haifa District Court Judge Oded Gershon. Joanna Paraszczuk, *Court To Decide Rachel Corrie Case In August*, JERUSALEM POST, May 7, 2012, <http://www.jpost.com/NationalNews/Article.aspx?id=268949>; Erin Cunningham, *Seven Years After Rachel*

Golan Heights wind-project might well get more traction under the ATS, and subject Alstom to the considerable transactional costs attendant to American-style discovery and civil practice, the generation of negative public opinion and negative opinion among investors and analysts, and the costs of settlement²⁵²—which corporate ATS defendants have incurred in more than a few cases—just to bring the legal proceedings to a definitive

Corrie Death, Her Parents Sue Israel—Seven Years After US Activist Rachel Corrie was Hit and Killed by a Bulldozer Driven by an Israel Soldier, her Parents are Suing the Israeli Military for Culpability in the Incident, CHRISTIAN SCIENCE MONITOR, March 17, 2010, <http://www.csmonitor.com/World/Middle-East/2010/0317/Seven-years-after-Rachel-Corrie-death-her-parents-sue-Israel>. In August 2012, after a lengthy trial of the Corrie family's claims, the court in Haifa returned a defense verdict, finding no intentionally tortious or negligent act or omission on the part of Israel's government or military, and finding contributory negligence by Ms. Corrie. Harriet Sherwood, *Rachel Corrie's Death was an Accident, Israeli Judge Rules—Judge Finds no Fault in Military Investigation that Cleared Defence Force of Responsibility for Protester Being Killed by Bulldozer*, GUARDIAN, Aug. 28, 2012, <http://www.guardian.co.uk/world/2012/aug/28/rachel-corrie-verdict-accident-judge>; Yonah Jeremy Bob, *Haifa Court Rules Against Rachel Corrie Family—Judge Invokes “Combatant Activities” Exception, says US Activist who was Killed by IDF Bulldozer Could Have Avoided Danger*, JERUSALEM POST, Aug. 28, 2012, <http://www.jpost.com/NationalNews/Article.aspx?id=282862>. For an extensive summary of Judge Gershon's opinion, see Ben Lynfield, *Israeli Court Dismisses Corrie Family's Lawsuit, Ending Effort To Put Army On Trial*, CHRISTIAN SCIENCE MONITOR, Aug. 28, 2012, <http://www.csmonitor.com/World/Middle-East/2012/0828/Israeli-court-dismisses-Corrie-family-s-lawsuit-ending-effort-to-put-army-on-trial-video>. The proceedings were extensive, expensive, and generated a great deal of public attention — something that most MNEs would want to avoid. See Jodi Rudoren & Danielle Ziri, *Court Rules Israel Is Not at Fault in Death of American Activist*, N.Y. TIMES, Aug. 28, 2012, <http://www.nytimes.com/2012/08/29/world/middleeast/court-rules-israel-wasnt-at-fault-in-rachel-corries-death.html>.

²⁵² This has been very pointedly expressed by the Second Circuit's Chief Judge, Dennis Jacobs, who expressed concern that such a use of ATS litigation permits—

invasive discovery that ensues [which] could coerce settlements that have no relation to the prospect of success on the ultimate merits. American discovery in such cases uncovers corporate strategy and planning, diverts resources and executive time, provokes bad public relations or boycotts, threatens exposure of dubious trade practices, and risks trade secrets. I cannot think that other nations rely with confidence on the tender mercies of American courts and the American tort bar. These coercive pressures, combined with pressure to remove contingent reserves from the corporate balance sheet, can easily coerce the payment of tens of millions of dollars in settlement, even where a plaintiff's likelihood of success on the merits is zero. Courts should take care that they do not become instruments of abuse and extortion.

Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268, 271 (2d Cir. 2011) (Jacobs, C.J., concurring in denial of rehearing), *cert. denied*, 132 S. Ct. 248 (Sept. 3, 2011), *cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011), argued Feb. 27, 2012 and set for reargument and supplemental briefing during October Term 2012, see Order List for 565 U.S., Case 10-1491, issued March 5, 2012, available from link at <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al/>; *accord*, *Kiobel v. Royal Dutch Petroleum*, 621 F.3d at 116 (Cabrane, J.) (“Such civil lawsuits, alleging heinous crimes condemned by customary international law, often involve a variety of issues unique to ATS litigation, not least the fact that the events took place abroad and in troubled or chaotic circumstances. The resulting complexity and uncertainty—combined with the fact that juries hearing ATS claims are capable of awarding multibillion-dollar verdicts—has led many defendants to settle ATS claims prior to trial.”).

close.²⁵³ Indeed, the objective, it seems, of more than a few ATS suits filed against MNEs is to reset the context and terms of activism in opposition to the FDIs of those MNEs.²⁵⁴ The effect of the ATS-litigation risk on MNEs—whether U.S.-based²⁵⁵ or foreign-based—is more than *de*

²⁵³ As Professor Childress has noted recently, there have been ATS cases against corporations that have been tried to plaintiff's verdicts. See Childress, *supra* note 243, at 713 n.25. The decisions to which he cites are: *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008), *appeal filed*, No. 09-4483-cv (2d Cir.) (awarding a \$1.5 million ATS judgment against corporate defendant); *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008) (\$80 million ATS judgment against corporate defendant). Professor Childress also notes that "there have been two trials in which defendants have prevailed. See *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010); *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008)."

²⁵⁴ Professor Childress has articulated the apparent strategy in such cases:

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

Childress, *supra* note 242, at 725–26 (footnotes omitted); see also *Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098, 1101 (S.D.N.Y. 1973) (in airline's suit against insurer to cover loss of aircraft that terrorists hijacked and destroyed, long-time federal judge Frankel observed that "[w]e have been led by the nature of the insurance questions to touch in the trial upon large topics of history, politics, and human sorrow in the Middle East" and that "all involved have been made aware that people called as witnesses, as well as others allied in political interest with them, have seen fit to hope or believe that their causes might be advanced or obstructed by an American court's reasons for saying one group of insurers rather than another must pay for the destroyed airplane"). For a recent example of an ATS complaint, replete with narratives and photographs in its body, that seems designed primarily as a press release, consider the lawsuit filed by Professor Anthony D'Amato, acting as lead counsel, on behalf of Hungarian victims of the Holocaust against Hungary's national railway. See *Abelesz v. Magyar Nemzeti Bank*, 2012 WL 3590804 (7th Cir. Aug. 22, 2012); *Abelesz v. OPT Bank*, 2012 WL 3590802 (7th Cir. Aug. 22, 2012); *Abelesz v. Erste Group Bank, A.G.*, 2012 WL 3590815 (7th Cir. Aug. 22, 2012); Julian Ku, *D'Amato Sues Hungarian Railways for Holocaust-Era Complicity*, OPINIO JURIS (Feb. 17, 2010, 3:24 PM), <http://opiniojuris.org/2010/02/17/damato-sues-hungarian-railways-for-holocaust-era-complicity/> (links to complaint).

²⁵⁵ Jack L. Goldsmith & Alan O. Sykes, Commentary, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1137 (2007); see also *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 845 (7th Cir. 1999) (Posner, J.) (noting that the place of a foreign tort, not a U.S.

minimis; it creates considerable problems for the United States, as well as for the MNEs, as Chief Judge Dennis Jacobs of the U.S. Second Circuit Court of Appeals explained in a recent, high-profile ATS case:

All the cases of the class affected by this [ATS] case involve transnational corporations, many of them foreign. Such foreign companies are creatures of other states. They are subject to corporate governance and government regulation at home. They are often engines of their national economies, sustaining employees, pensioners and creditors—and paying taxes. I cannot think that there is some consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them—and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees. Such proceedings have the natural tendency to provoke international rivalry, divisive interests, competition, and grievance—the very opposite of the universal consensus that sustains customary international law. . . . Is it plausible that customary international law supports proceedings that would harm other civilized nations and be opposed by them—or be tantamount to “judicial imperialism?”²⁵⁶

Thus, the *Corrie* case does not by any means preclude viable ATS lawsuits against other corporations, such as Alstom, which are working on projects sited in the Occupied Territories.

From the viewpoint of an MNE such as Alstom, whose core businesses are often FDIs, the *Sarei v. Rio Tinto, PLC* litigation is perhaps the epitome of how costly, divisive, and dangerous ATS litigation can be to MNEs. No less than eight published federal court opinions has it

courtroom, “is the place that has the greatest interest in striking a reasonable balance among safety, cost, and other factors pertinent to the design and administration of a system of tort law. Most people affected whether as victims or as injurers by accidents and other injury-causing events are residents of the jurisdiction in which the event takes place. So if law can be assumed to be generally responsive to the values and preferences of the people who live in the community that formulated the law, the law of the place of the accident can be expected to reflect the values and preferences of the people most likely to be involved in accidents—can be expected, in other words, to be responsive and responsible law, law that internalizes the costs and benefits of the people affected by it.”).

²⁵⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 270 (2d Cir. 2011) (Jacobs, C.J., concurring in denial of rehearing), *cert. denied*, 132 S. Ct. 248 (Sept. 3, 2011), *cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011), argued Feb. 27, 2012 and set for reargument and supplemental briefing during October Term 2012, 132 S. Ct. 1738 (March 5, 2012); see also Order List for 565 U.S., Case 10-1491, issued March 5, 2012, (available from link at <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al/>).

spawned.²⁵⁷ Six of these published opinions are by the Ninth Circuit—including two separate rehearings en banc. Two opinions are from the U.S. District Court in Los Angeles. The crown jewel of these labyrinthine proceedings, however, is the latest opinion, issued in October 2011. In what might be mistaken for a dramatization of the Tower of Babel story, the Ninth Circuit's opinion is prodigiously long, prodigiously confusing, and prodigiously unhelpful to a rational planning process by MNEs, like Alstom, that as part of making an FDI decision might want to make a realistic risk assessment of ATS litigation in an American forum.²⁵⁸

One might be justified in asking—given 170 pages of slip opinion containing hundreds of citations to case law from around the world and non-legal sources as well—“wither the 33-words with which Congress expressed the ATS in the 1789 Judiciary Act?”²⁵⁹ They are *nowhere* to be

²⁵⁷ *Sarei v. Rio Tinto PLC.*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *aff'd in part, vacated in part, rev'd in part*, 456 F.3d 1069, (9th Cir. 2006), *withdrawn and superseded on reh'g in part* by 487 F.3d 1193, (9th Cir. 2007), *reh'g en banc granted* by 499 F.3d 923 (9th Cir. 2007), *rev'd by*, 550 F.3d 822 (9th Cir. 2008), *on remand*, 650 F. Supp. 2d 1004 (C.D. Cal. 2009), *aff'd*, 671 F.3d 736, (9th Cir. 2011) (en banc), *petition for cert. filed*, 80 USLW 3335 (Nov 23, 2011); *see also* *Sarei v. Rio Tinto, PLC*, 625 F.3d 561 (9th Cir. 2010).

²⁵⁸ Indeed, a critical pressure point is whether the MNE can prevail at the (relatively) early stage of the Fed. R. Civ. P. 12(b)(6) motion to dismiss, which may be brought on the many grounds debated in the eight *Sarei* opinions, or under the reinvigorated pleading standards that the Supreme Court left to the federal district and appeals courts through *Bell Atlantic v. Twombly*, 550 U.S. 554 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See* Jordan D. Shepherd, *When Sosa Meets Iqbal: Plausibility Pleading In Human Rights Litigation*, 95 MINN. L. REV. 2318 (2011); *see also* *Kiobel*, 621 F.3d at 155 (Leval, J., concurring only in the judgment) (after extensively, and bitterly, responding to the 2-judge majority's opinion on corporate liability under the ATS, concluding that the suit must be dismissed “because the pertinent allegations of the Complaint fall short of mandatory standards established by decisions of this court and the Supreme Court,” which “establish a requirement that, for a complaint to properly allege a defendant's complicity in human rights abuses perpetrated by officials of a foreign government, it must plead specific facts supporting a reasonable inference that the defendant acted with a purpose of bringing about the abuses”)

²⁵⁹ As a legal commentator observed at the time the October 2011 en banc opinions in *Sarei* were issued:

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

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

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

. . . .

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

Shaun Martin, *Sarei v. Rio Tinto PLC*, CALIFORNIA APPELLATE REPORT—THOUGHTS ON RECENT NINTH CIRCUIT AND CALIFORNIA APPELLATE CASES FROM PROFESSOR SHAUN MARTIN AT THE UNIVERSITY OF SAN

found in most of the *Sarei* opinion. Yet, an MNE such as Alstom might well share Judge Kleinfeld's astonishment at the result of the *Sarei* en banc decision, which prompted him to observe that "[o]ur decision makes the Ninth Circuit the best place in the world to bring class actions against deep-pocket private defendants to recover compensatory and punitive damages and attorneys' fees for the evils so prevalent all over the world," a consequence which Judge Carlos Bea characterized as tantamount to a "claim of supervisory authority over the entire planet [that] is unwise as well as legally incorrect."²⁶⁰

Judge Kleinfeld's *cri de couer* has apparently found resonance with the Supreme Court, and the Court may be on the verge of bringing the curious career of the ATS as a regulator of FDI to end.²⁶¹ After had been granted certiorari in *Kiobel v. Royal Dutch Petroleum* to consider whether an ATS claim lay against a corporation²⁶²—a point on which, as just about

DIEGO SCHOOL OF LAW, OCT. 25, 2011, <http://calapp.blogspot.com/2011/10/sarei-v-rio-tinto-9th-cir-oct-25-2011.html>.

²⁶⁰ 671 F.3d at 814 (Bea, J., dissenting).

²⁶¹ Some student commentators have predicted otherwise, contending that the "the context in which the First Congress enacted the Alien Tort Statute provides enough evidence to overcome the presumption against extraterritorial application." Michelle K. Fiechter, *Extraterritorial Application of the Alien Tort Statute: The Effect of Morrison v. National Australia Bank, Ltd. on Future Litigation*, 97 IOWA L. REV. 959 (2012). Other student commentators have—as so many federal courts have until the Supreme Court apparently appears set to call them on—assumed extraterritorial applicability, and thereby missed what is shaping up to be the decisive issue in the case. See, e.g., Tyler G. Banks, Note, *Corporate Liability Under the Alien Tort Statute: The Second Circuit's Misstep Around General Principles of Law in Kiobel V. Royal Dutch Petroleum Co.*, 26 EMORY INT'L L. REV. 227 (2012).

²⁶² The principle "argument that has been raised for corporate liability is that current American law, as well as the law in many other countries, recognizes the personhood of corporations." Maria Florencia Librizzi, *The Alien Tort Statute and Corporate Liability: Looking Ahead to the Supreme Court Decision in Kiobel*, N.Y.U. J. INT'L L. & POL. Feb. 12, 2012, <http://nyujilp.org/the-alien-tort-statute-and-corporate-liability-looking-ahead-to-the-supreme-court-decision-in-kiobel/#refX>. Because "corporations have many of the same rights and obligations that a natural person has," it would seem "plausible, therefore, that corporations should be amenable to suit under the ATS":

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

Id. at 32-34 (footnotes omitted); see also Matthew E. Danforth, Note, *Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations*, 44 CORNELL INT'L L.J. 659, 661 (2011). Some international rights advocates have pointed out, however, some very significant unintended consequences that will flow from a recognition of corporations as juridical persons in international law. See, e.g., Jose E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1 (2011).

every other aspect of the ATS, the circuits differ²⁶³—the first oral argument of *Kiobel* demonstrated that at least some members of the Supreme Court had become concerned with the very notion that the ATS has been regularly asserted in cases far beyond Congress's legislative jurisdiction. For example, Justice Kennedy at the first oral argument in *Kiobel* very quickly interjected a concern that “no other nation in the world permits its courts to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection.”²⁶⁴ Justice Alito commented: “I think the question is whether there's any other country in the world where these plaintiffs could have brought these claims against the respondents.”²⁶⁵ Chief Justice John Roberts added that “[i]f there is no other country where this suit could have been brought, regardless of what American domestic law provides, isn't it a legitimate concern that allowing the suit itself contravenes international law?”²⁶⁶ Shortly after these exchanges in the first oral argument, the Court ordered supplemental briefing, followed by a new oral argument on October 1, 2012, in which the Court's desire to limit the ATS's extraterritorial reach was palpable.²⁶⁷

The purpose of this aspect of an FDI analysis is not to defend corporate misconduct. Complicity of MNEs in the murder, torture, enslavement, wrongful detention, and other criminal abuses of human being beings—e.g., “ethnic cleansing, genocide, torture” and other

²⁶³ The only Circuit to squarely hold that corporations are not juridical persons within the ambit of § 1350 is the Second. See *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 118–20 (2d Cir. 2010). The remaining Circuits which have addressed the issue, whether as a holding or in dicta, have held that corporations, like private individuals, are proper defendants under § 1350. See *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017–21 (7th Cir. 2011); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 39–57 (D.C. Cir. 2011); *Sarei v. Rio Tinto*, 550 F.3d 822, 831 (9th Cir. 2008); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008). Notably, the Court has ruled that the TVPA's specific reference to “individual” in defining its scope—a term conspicuously absent in the 200-years older § 1350—does not include “corporations.” *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012).

²⁶⁴ Lyle Denniston, *Argument Recap: Downhill, from the Start*, SCOTUSblog (Feb. 28, 2012, 3:05 PM), <http://www.scotusblog.com/2012/02/argument-recap-downhill-from-the-start/>. Links to audio and text transcripts of the oral argument are available on <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al/>. However, within a month after this oral argument, a Dutch court appears to have done just what Justice Kennedy had observed was unprecedented. See *infra* note 281.

²⁶⁵ Denniston, *supra* note 264.

²⁶⁶ *Id.*

²⁶⁷ An audio and text archive of both the first and second oral arguments are available on the webpage devoted to the *Kiobel* case by IIT Chicago-Kent College of Law's Oyez Project. See http://www.oyez.org/cases/2010-2019/2011/2011_10_1491

human rights violations—are serious, and intolerable.²⁶⁸ Corporate social responsibility is a modern, and overdue, movement²⁶⁹ that gives MNEs the opportunities, as well as the incentives, to self-police and to participate in the formulation of a legal regime that effectively regulates MNE conduct²⁷⁰—and to the extent MNEs fail to do so, gives home- and host-state governments the standards by which to legislate compliance.²⁷¹

²⁶⁸ Goldsmith & Sykes, *supra* note 255, at 1146; see also Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 L. & SOC'Y REV. 635 (2004) (arguing that from the “perspective of a C[orporate] S[ocial] R[esponsibility] field that exists above and beyond any concrete judicial outcome, the career of the [Alien Tort Statute] cases, by forcing the issue of corporations and human rights into the open, already shapes corporate behavior because it forces corporations to reflect upon, if not to institutionalize, human rights-related issues”).

²⁶⁹ See, e.g., Donald J. Kochan, *Legal Mechanization of Corporate Social Responsibility Through Alien Tort Statute Litigation: A Response to Professor Branson with Some Supplemental Thoughts*, 9 SANTA CLARA J. INT'L L. 251, 254 (2011) (“The corporate social responsibility discussion raises three principal issues about how a moral corporation lives its life: how a corporation chooses its self-interest versus the interests of others, when and how it should help others if control decisions may harm the shareholder owners, and how far the corporation must affirmatively go to help right the perceived wrongs in the world in which it operates.”) (footnotes omitted).

²⁷⁰ See, e.g., Norbert Horn, *International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives*, 30 AM. U. L. REV. 923 (1981); A. A. Fatouros, *On the Implementation of International Codes of Conduct: An Analysis of Future Experience*, 30 AM. U. L. REV. 941 (1981); Richard D. Kauzlarich, *Review of the 1976 OECD Declaration on International Investment and Multinational Enterprises*, 30 AM. U. L. REV. 1009 (1981); but see Timothy W. Stanley, *International Codes of Conduct for MNC's: A Skeptical View of the Process*, 30 AM. U. L. REV. 976 (1981).

²⁷¹ A leading model is the Guidelines for MNEs that the Organization for Economic Cooperation and Development issued originally in 1976. See Daniel Plaine, *OECD Guidelines for Multinational Enterprises*, 11 INT'L L. 339, 339-41 (1977); Jernej Letnar Cernic, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises*, 3 HANSE L. REV. 71 (2008). The OECD Guidelines are not mere window-dressing. As Professor Cernic observes, the OECD Guidelines are—

the only corporate responsibility instrument formally adopted by state governments. The OECD Guidelines are recommendations addressed to enterprises operating in OECD countries. However, corporations are encouraged to extend good practices throughout the universe. The Guidelines form part of a broader and balanced instrument of rights and obligations – the OECD Declaration on International Investment and Multinational Enterprises. In this regard, the OECD Member States are obliged to establish National Contact Points (NCP) which has the primary responsibility to ensure the follow-up of the Guidelines at the national level.

Id. at 77; see also Ashley L. Santner, *A Soft Law Mechanism For Corporate Responsibility: How the Updated Oecd Guidelines for Multinational Enterprises Promote Business for the Future*, 43 GEO. WASH. INT'L L. REV. 375, 376-77 & n.5 (2008). The Guidelines have been updated five times since they were first adopted in 1976. See “OECD Guidelines for International Enterprises,” OECD, <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/oecdguidelinesformultinationalenterprises.htm> (last visited Nov. 15, 2012). The institution of NCPs was designed to provide a specific accountability element to OECD concept of MNE regulation, which involves voluntary compliance, home-state government pressure, and corporate peer pressure as well as institutional investor pressure. See Santner, *supra* at 376 n.4. For a detailed discussion of how NCPs are organized and operate within the 42 nations that have them, including the United States and France, see Leyla Davarnejad, *In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes Under the Oecd*

But such regulation should be more predictable and clearly stated than the common-law-style case adjudication that courts have attempted under the ATS, particularly where that adjudication is done by courts in nations other than where the MNE's conduct, or the effects of the MNE's

Guidelines for Multinational Enterprises, 2011 J. DISP. RESOL. 351 (2011). Speaking of the Corporate Social Responsibility (CSR) initiatives that are part of the OECD movement, Ms. Davarnejad writes:

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

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

Id. at 354-55 (footnotes omitted). The progress made in the United States in OECD implementation, including NCPs, is compared to that of France and the Netherlands. See Christopher N. Francoise, *A Critical Assessment of the United States' Implementation of the OECD Guidelines for Multinational Enterprises*, 30 B.C. INT'L & COMP. L. REV. 223, 228 n.41 (2007) ("[T]he U.S. NCP is the Office of Investment Affairs, a part of the Bureau of Economic and Business Affairs located in the Department of State. In contrast to the U.S. institutional arrangement, other adhering nations such as the Netherlands and France use interdepartmental offices, which assign different government ministries various bureaucratic roles."); Bureau of Economic and Business Affairs, U.S. DEPT OF STATE, OECD: U.S. National Contact Point, <http://www.state.gov/e/eb/oecd/usncp/us/index.htm>. The Bureau describes the NCP's "main functions" as to: (1) promote awareness of the Guidelines to business, civil society, and the general public; and (2) work with business, civil society and the public on all matters relating to the Guidelines, including in circumstances when a party raises concerns ("specific instance") regarding an MNE's observance of the Guidelines," and adds that "[i]n some cases, NCPs may facilitate a voluntary mediation or conciliation process among the interested parties." <http://www.state.gov/e/eb/oecd/usncp/index.htm>. The details of the "specific instance" process—which the Bureau describes as providing "a forum to assist MNE's and interested parties (such as employee organizations or NGOs), in resolving questions regarding the consistency of an MNE's activities with the Guidelines"—are summarized at <http://www.state.gov/e/eb/oecd/usncp/specificinstance/index.htm>, and beginning in 2011, the Bureau has released reports on "specific instances" which it has mediated.

<http://www.state.gov/e/eb/oecd/usncp/specificinstance/assessments/index.htm>. All NCPs provide to the OECD Secretariat an annual summary of past and current specific instance submissions, and the Bureau has provided a table summarizing specific instances addressed by the U.S. NCP as of June 2011 at <http://www.state.gov/e/eb/oecd/usncp/links/rls/183060.htm>, as well as detailed summaries of two specific instances that it released in February 2012, *The Lead Group and Innospec*, <http://www.state.gov/e/eb/oecd/usncp/links/rls/183059.htm>, and in March 2012, *UNITE HERE and LSG Sky Chefs*, <http://www.state.gov/e/eb/oecd/usncp/links/rls/185107.htm>, and

conduct, transpired.²⁷² A legislative process, like the one that led to Congress's enactment of the TVPA, allows for a considerably more nuanced and holistic assessment of the wide range of relevant economic and foreign relations factors implicated in such law-making than courts can even approach in case-by-case adjudication.²⁷³ Judge Bork's observation in *Tel-Oren* is quite apropos here: that the subjects to which courts have been asked since *Filartiga* to extend the ATS are far better committed to "a modern Congress that ma[kes] clear its desire that the federal courts police the behavior of foreign individuals and governments" in a statute that "embod[ies] a legislative judgment that is" both "current" and "clear."²⁷⁴ Judge Robb, who also wrote a separate

²⁷² Goldsmith & Sykes, *supra* note 255, at 1147 (nothing importance of goal to "eliminate[e] . . . distorting economic effect by ensuring that all firms are subject to the same standard of liability for torts committed in a particular place"); see also Jack L. Goldsmith, Note, *Interest Analysis Applied to Corporations: The Unprincipled Use of a Choice of Law Method*, 98 YALE L.J. 597 (1989).

²⁷³ For example, in addition to the question of whether, and if so, to what extent, an ATS-successor statute applies extraterritorially, there are questions such as whether aliens suing under the ATS should have to exhaust local remedies before being allowed to bring an ATS-like suit in the U.S. federal courts. Compare, e.g., Ron A. Ghatan, *The Alien Tort Statute and Prudential Exhaustion*, 96 CORNELL L. REV. 1273, 1274-75, 1292-93, 1297, 1298-1300 (2011) (recommending the that the reach of the ATS be limited by requiring *prudential* exhaustion of local remedies "in which there is a weak nexus to the United States "and alleged violation of norms that are not Peremptory," which "could greatly reduce the number of claims available to plaintiffs under the ATS") with *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1225-26, 1235-36 (9th Cir. 2007) (Bybee, J., dissenting) (arguing that "international law *requires* exhaustion of local remedies as a condition to bringing an international cause of action in a foreign tribunal," such as an ATS suit in a U.S. federal court, and that "[e]ven if international law did not so require exhaustion, I would, as an exercise in discretion, require it as a matter of our domestic law"), vacated en banc, 550 F.3d 822 (9th Cir. 2008); see also IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 472-73 (6th ed. 2003) (explaining the general rule of *mandatory* exhaustion: "A claim will not be admissible on the international plane unless the individual alien or corporation concerned has exhausted the legal remedies available to him in the state which is alleged to be the author of the injury. This is a rule which is justified by practical and political considerations. . . .").

²⁷⁴ 726 F.2d at 813 (Bork, J., concurring). For example, former State Department Legal Advisor John Bellinger identified several recurring areas under § 1350 to which call out for legislation to bring both currency and clarity:

[C]ontinued litigation under the ATS reflects fundamental problems with how lower courts have approached these suits. These problems center on five key issues: First, whether the ATS applies extraterritorially—that is, whether a U.S. court can properly apply U.S. federal common law under the ATS to conduct that occurred entirely in the territory of a foreign State. Second, even if such a cause of action could properly be recognized, whether exhaustion of adequate and available local remedies in that foreign country should be a prerequisite to bringing an ATS suit. Third, whether corporations or other private entities may be held liable under the ATS for aiding and abetting human rights abuses perpetrated by foreign governments. A fourth issue is how to apply [the Supreme Court's] requirement that an international law norm be sufficiently accepted and specific. And fifth, in what circumstances should courts dismiss suits based on what *Sosa* referred to as "case-specific deference to the political branches"?

concurrence in *Tel-Oren*, echoed Judge Bork's observation: given the "broad and novel questions" raised in § 1350 cases, "courts ought not to appeal for guidance to the Supreme Court, but should instead look to Congress and the President. Should these branches of the Government decide that questions of this sort are proper subjects for judicial inquiry, they can then provide the courts with the guidelines by which such inquiries should proceed."²⁷⁵ While recent attempts at such legislation have gone nowhere,²⁷⁶ the impending Supreme Court decision in *Kiobel* should rekindle an effort for which scholars called for a generation ago,²⁷⁷

John B. Bellinger, III, *Enforcing Human Rights In U.S. Courts And Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 5-6 (2009). We must remark here that in the interim while this article was being readied for press, Judge Bork passed away at age 85. See Paul J. Larkin, Jr., *On the Death of Judge Robert Bork*, THE FOUNDRY, Dec. 19, 2012, <http://blog.heritage.org/2012/12/19/on-the-death-of-judge-robert-bork/>.

²⁷⁵ 726 F.2d at 827 (Robb, J., concurring).

²⁷⁶ See 109 CONG. REC. S11433-S11436 (daily ed. Oct. 17, 2005); see also Philip Mariani, Comment, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. PA. L. REV. 1363, 1384 & n.1 (2008) (noting that "[o]n October 17, 2005, a bill entitled the Alien Tort Statute Reform Act was introduced in the Senate, proposing to amend 28 U.S.C. § 1350 in order to, among other things, 'clarify jurisdiction of Federal Courts over a tort action brought by an alien,'" but that [o]nce introduced, this bill was referred to the Committee on the Judiciary; at the time of this writing, no further action has been taken on the bill") (citing S. 1874, 109th Cong. (2005).); Keith A. Petty, *Who Watches the Watchmen: Vigilant Doorkeeping, the Alien Tort Statute, and Possible Reform*, 31 LOY. INT'L & COMP. L. REV. 183, 185, 217-19 (2009) (proposal for amending § 1350 by, inter alia, "mirror[ing] the CIL violations specified in the Third Restatement of Foreign Relations Law," "adding a simple provision to the statute allowing for case by case deference to the executive when cognizable foreign policy interests are at stake"); Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT'L L. & POL'Y 119 (2007); see also Roger Alford, *What is Feinstein Thinking in Amending the ATS?*, OPINIO JURIS, (Oct. 22, 2005), <http://lawofnations.blogspot.com/2005/10/what-is-feinstein-thinking-in-amending.html> (describing the details of Senator Feinstein's proposed amendment and her rationales for the proposal); Roger Alford, *Senate Considers Removing International Law from the Alien Tort Statute*, OPINIO JURIS (Oct. 19, 2005), <http://lawofnations.blogspot.com/2005/10/senate-considers-removing.html> (observing that "Sen. Feinstein is proposing that Congress 'de-internationalize' the Alien Tort Statute" by replacing the current judicial practice of "looking to foreign courts or international tribunals (or to international law professor articles)" and instead creating a full statutory scheme so that the courts "considering a claim under the ATS would look to the text of the statute and the legislative history") (also providing the text of the proposed bill); Roger Alford, *Feinstein Withdraws ATS Amendment*, OPINIO JURIS (Oct. 26, 2005), <http://lawofnations.blogspot.com/2005/10/feinstein-withdraws-ats-amendment.html>, (describing Senator Feinstein's "terse letter to Senator Specter states that while the legislation was designed to address concerns about the clarity of the existing statute in light of *Sosa* 'I believe that the legislation in its present form calls for refinement in light of concerns raised by human rights advocates, and thus a hearing or other action by the Committee on this bill would be premature.'").

²⁷⁷ Kenneth C. Randall, *Further Inquiries into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT'L L. & POL. 473, 539 (1986). In a nutshell, Dean Randall proposed a more comprehensive, detailed, and substantive (rather than purely jurisdictional) ATS, in order to "specifically address the judiciary's express[ed] difficulties with the statute" and to "clarify the statute's language and jurisdictional requirements; direct courts to

and continue to call for today.²⁷⁸ Thus, MNEs, such as Alstom, should embrace the opportunity to contribute meaningfully to this debate,²⁷⁹ for a domestication of the ATS in *Kiobel* will not pretermitt the need to address the kinds of claims found in ATS cases.²⁸⁰ Any evaluation of risk

sustain jurisdiction where specific international law violations are at issue; and provide guidance to the courts on the applicability of certain judicial abstention doctrines.” *Id.* at 512. Dean Randall provided the text of his proposed §§ 1350(a), (b), & (c), along with detailed commentary about his rationales and sources for his proposed statute. *See id.* at 511–32. In addition to defining eight specific categories of international law violations encompassed within his revision, Dean Randall would explicitly create a conduit between the Executive Branch and the federal courts via his § 1350(c): “Where a district court has jurisdiction under subsection (a), the action may not be dismissed, in whole or in part, based on either the act-of-state or political question doctrines, unless the executive branch of the government determines that, based on the foreign policy interests of the United States, the application of those doctrines is required in a specific case and a suggestion to that effect is filed with the court. *Id.* at 528–532. *See also* Roger Alford, *The Feinstein Amendment and Presidential Waivers*, *OPINIO JURIS* (Oct. 25, 2005), http://lawofnations.blogspot.com/2005/10/feinstein-amendment-and-presidential_25.html (describing the Executive “veto” provision of Senator Feinstein’s proposed, then withdrawn, Alien Tort Statute dismissals on forum non conveniens or sovereign immunity grounds (per the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601)); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT’L L. & POL. 1 (1985). It is interesting to note that Dean Randall did not appear to think that extraterritorial application of the ATS was a major issue; in fact, he assumed that the ATS applies extraterritorially. Randall, *supra* at 513–14 (“contexts other than those involving the Alien Tort Statute, judicial jurisdiction over extraterritorial acts has been increasingly upheld”). However, in the 26 years since the publication of Dean Randall’s article, the Supreme Court has taken a different approach, demanding more evidence—especially statutory text—that overcomes the general presumption against extraterritorial application of Congressional legislation. *See, e.g.*, *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010) (unanimous 8–0 opinion written by Justice Scalia); SCALIA & GARNER, *supra* note 238, at 268–72; Genevieve Beyea, *Morrison v. National Australia Bank and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 OHIO ST. L.J. 549 (2012); Rachel Doyle, *The Presumption Against Extraterritoriality: Pakootas v. Teck Cominco Metals Ltd. and Transboundary Environmental Harm after Morrison v. National Australia Bank Ltd.* (May 30, 2012), available at <http://ssrn.com/abstract=2070852>; *see also* R. Davis Mello, *Life After Morrison: Extraterritoriality and Rico*, 44 VAND. J. TRANSNAT’L L. 1385, 1414 (2011) (advocating a third approach that RICO “should have domestic application when a plaintiff alleges the commission of enough predicate acts in the United States within the statutory time period to establish a “pattern of racketeering activity,” regardless of the situs of the enterprise or the commission of additional predicate acts in a foreign jurisdiction. This approach represents the best way to reconcile prior RICO jurisprudence with the Court’s renewed emphasis on the presumption against extraterritorial application of U.S. laws in *Morrison*.”).

²⁷⁸ Banks, *supra* note 261, at 279; Michael Garvey, Comment, *Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Legislative Prerogative*, 29 B.C. THIRD WORLD L.J. 381 (2009).

²⁷⁹ *See, e.g.*, Lauren A. Dellinger, *Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act Litigation While Simultaneously Building a Better Business Reputation*, 40 CAL. W. INT’L L.J. 55 (2009)

²⁸⁰ Banks, *supra* note 261, at 279. Mr. Banks observes:

[O]ne more solution to this problem lurks in ATS litigation and is actually hinted at by the majority in *Kiobel*. The majority wrote, in conclusion, “[N]othing in this opinion limits or forecloses corporate liability other than the ATS—including the domestic statutes of other States—and nothing in this opinion limits or forecloses Congress from amending the ATS to bring corporate defendants within our jurisdiction.” From this, it is clear that a congressional mandate could bring corporations

posed by Alstom's FDIs in Israel, whether the Jerusalem Light Rail Project in the West Bank Occupied Territories or a hypothesized wind-energy project in the disputed Golan Heights, should include a discussion of the larger question whether Alstom will seek to influence the policy and laws of its host nations,²⁸¹ as well as its home state, through participation in political and legislative processes, as well as amicus participation in litigation over the scope of laws that may impact Alstom's present and future business strategies.²⁸²

back within the scope of the ATS. This is not as unlikely a scenario as it may seem. Congress has previously codified at least one violation of international norms beyond the three recognized paradigms, which served as the basis of the *Sosa* decision—the Torture Victim Protection. Yet, it is also clear that pro-corporate interest lobbying efforts would not sit quietly while Congress attempted to provide a means of possible worldwide corporate liability in U.S. courts.

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

²⁸¹ Recently, a Japanese foundation representing whaling interests attempted to use § 1350 to turn the tables on activists who oppose whaling, by suing a “Washington-based conservation organization, which engaged in frequent confrontations with whalers in the Southern Ocean, . . . alleging a violation of their right to free navigation at sea and piracy” and “moved for a preliminary injunction requiring organization’s ships and boats to stay at least 800 meters from their vessels, and prohibiting attacks on the whaling crew members or its ships.” *Institute of Cetacean Research v. Sea Shepherd Conservation Soc’y*, 2012 WL 958545 (W.D. Wash. March 19, 2012). However, another MNE recently enjoyed success in a similar injunction suit, invoking federal maritime subject matter jurisdiction under 28 U.S.C. § 1333 against planned activism by Greenpeace directed at arctic oil exploration. *Shell Offshore Inc. v. Greenpeace, Inc.*, 2012 WL 1067968 (D. Alaska Mar. 28, 2012). Such offensive use of the U.S. federal courts by MNEs is an innovative avenue, complementary to legislative lobbying, to protecting investments, both domestic and foreign, from private activism as well as from judicial disruption. Of course, the observation is one relevant to general strategy; Alstom would not likely be able to employ similar litigation tactics to dissuade activism against its FDI sites in Israel. However, such litigation might be useful were there to be activism directed against its North American subsidiaries, including the nacelle production facility it opened in Texas.

²⁸² For example, BP America, Caterpillar, Conoco Phillips, General Electric, Honeywell, and International Business Machines have stepped forward in an effort to influence the Supreme Court’s rulings on extraterritoriality, as well as corporate amenability, in *Kiobel*, through an Amicus Brief prepared by lead counsel including former Solicitor General Paul Clements, now in private practice:

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

Amici strongly condemn human rights violations, and each company abides by its detailed corporate

C. Legal Aspects of the Political Risk Inherent in Alstom's Choice of a Golan Heights FDI

1. Syria's Claims to the Golan Heights

While trade treaties may create legal strategic advantage and municipal law may create legal risk, the politics of the Golan Heights as host to the Alstom-Energix FDI has discernible legal implications that Alstom cannot ignore. Israel wrested the Golan Heights territory from Syria in the course of 1967's Six-Day War.²⁸³ After the subsequent, and brief, 1973 conflict between Syria and Israel and a 1974 "disengagement agreement," or cease-fire, the Golan Heights (except 100 square kilometers ceded back in 1974) remained in a legal limbo but a practical stasis.²⁸⁴ The Golan Heights Law, enacted by Israel's Parliament in 1981, changed that status by applying Israeli law, jurisdiction and administration to the Golan Heights, which Syria complained to the United Nations Security Council constituted annexation in violation of international law, and which the U.N. Security Council and General Assembly rebuked.²⁸⁵ However, the actions and reactions at that point were more symbolic than substantive, and a new stasis emerged.²⁸⁶

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

Brief of Amici Curiae BP America, Caterpillar, Conoco Phillips, General Electric, Honeywell, and International Business Machines in Support of Respondents, 2012 WL 392536, at *1-2 (February 3, 2012) (footnote omitted).

²⁸³ Preface, *On the Legal Status of the Golan Heights: Application of Israeli Law or Annexation?*, 20 BROOK. J. INT'L L. 331 (1994).

²⁸⁴ See Muhammad Muslih, *The Golan: Israel, Syria, and Strategic Calculations*, 47 MIDDLE E. J. 611, 621, 625-27 (1993).

²⁸⁵ *Id.* at 624; Asher Maoz, *The Application of Israeli Law to the Golan Heights is Annexation*, 20 BROOK. J. INT'L L. 355, 386-88 (1994); Leon Sheleff, *The Application of Israeli Law to the Golan Heights is not Annexation*, 20 BROOK. J. INT'L L. 333 (1994).

²⁸⁶ According to Professor Sheleff, the 1981 Golan Heights Law:

[I]s quite simply an affirmation the existing situation in the Heights where Israeli law fills a void caused by an absence of regular Syrian institutions, such as a judiciary. This vacuum formed because the majority of the population fled the Heights during the Six Day War, [FN16] when the territory

For some years after the row of the early 1980s, the dispute over Israel's development of the Golan Heights has not been as "hot" as the disputes over the development of Jerusalem and the West Bank. Syria did not concede its claims, and remained concerned about the commanding vista the Heights have over Damascus; Israel did not budge on its insistence that the return of any portion of the Golan Heights must be met by Syrian recognition of Israel and accession to Israeli security demands.²⁸⁷ There were stirrings of a possible land-for-peace-and-recognition deal in the early 1990s, and during the first term of President Bill Clinton, the United States attempted to facilitate dialogue between Hafez al-Assad, Syria's President (1971-2000), and Yitzhak Rabin, Israel's Prime Minister (1992-1995).²⁸⁸ However, now the "Arab Spring," in its sweep from Libya to Egypt, has at last reached Syria.²⁸⁹ The stasis that has remained in effect since 1973 is in jeopardy as the sovereign players enter into uncharted territory. Yet, despite the uncertainty that lies ahead, there seems to be one certainty—that the post-Assad Syria that emerges from the current civil war will not likely be a significant military (as opposed to terroristic) threat to Israel or its occupation of the Golan Heights anytime soon. As one anti-Assad activist was quoted by journalists recently to have observed:

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

was occupied by the Israeli Defense Force (I.D.F.). Thus, for a substantial period of time prior to the passing of the Golan Heights Law, Syrian law had ceased to be an effective legal instrument in the Golan Heights, and legal problems were solved either by I.D.F. institutions, or, and perhaps principally, by the autonomous activities of the Druze community which comprised most of the Syrian population remaining in the Heights after the termination of the war. The customs of the community and the influence of its leaders are the central factors in resolving day-to-day disputes and legal questions facing the local population.

Leon Sheleff, *supra* note 285, at 337-38 (footnotes omitted).

²⁸⁷ See, e.g., *id.* at 340-41.

²⁸⁸ See Clyde Haberman, *Rabin Hints Peace Could Cost Golan*, N.Y. TIMES, Apr. 22, 1994, <http://www.nytimes.com/1994/04/22/world/rabin-hints-peace-could-cost-golan.html>. That dialogue was cut short by Mr. Rabin's death at the hands of a domestic assassin in November 1995. David Grossman, *The Night Our Hopes for Peace Died*, U.K. GUARDIAN, Nov. 3, 2005.

²⁸⁹ *Towards the Endgame: The World Should Start Preparing for What Comes After Syria's President Bashar Assad*, ECONOMIST, July 21, 2012, at 9.

war or through negotiations.²⁹⁰

While the Druze populace left behind in the Golan Heights and under the authority of Israel have largely continued identifying with both Syria and the Assad family,²⁹¹ how the Druze will react to these changes in the long run is unclear, because pronounced divisions have arisen within the Druze community.²⁹² Viewing the situation more holistically, it remains equally unclear whether a breakdown in the Assad autocracy will result in problems of sabotage, terrorism, and other destabilization along the buffer that the Golan Heights provides between Syria and Israel.²⁹³ As the BBC reporting has explained:

Technically, the two countries have been in a state of war since 1948. Israel also continues to occupy the Golan Heights, Syrian territory which it captured in 1967 and later annexed, in a move that is not internationally recognised.

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

Now Israeli leaders are revising their strategic assessments. There are worries that fleeing Syrian refugees could try to enter the Golan Heights and that Mr Assad's missiles and chemical weapons arsenal could fall into the wrong hands.²⁹⁴

²⁹⁰ Isabel Kershner, *Buqata Journal: Echoes of Syria's War in the Golan Heights*, N.Y. TIMES, Aug. 8, 2012, at A6.

²⁹¹ *With Syria's Civil War Within Earshot, Golan Heights Druze Loyalty to Assad Begins to Fray*, WASHINGTON POST, July 28, 2012, http://www.washingtonpost.com/world/middle_east/with-syrias-civil-war-within-earshot-golan-heights-druze-loyalty-to-assad-begins-to-fray/2012/07/28/gJQAspJPFX_story.html.

²⁹² *Id.*; Isabel Kershner, *Buqata Journal: Echoes of Syria's War in the Golan Heights*, N.Y. TIMES, Aug. 8, 2012, at A6.

²⁹³ Yolande Knell, *Syria Crisis Felt in Israel and Occupied Golan Heights*, BBC NEWS—MIDDLE EAST, Aug. 2, 2012, <http://www.bbc.co.uk/news/world-middle-east-19017502>.

²⁹⁴ *Id.* ("As far as Israel was concerned this was the devil we knew. We knew it was an ally of Iran, we knew it supplied weapons to [the Lebanese militant group] Hezbollah and supported [the Palestinian militant group] Hamas but at the same time, this was a regime which kept the border with Israel very quiet for almost 40 years. Now there's uncertainty.") (quoting chairman of the Middle East department at Tel Aviv University, Eyal Zisser). The BBC goes on to report the Israeli concerns as of August 2012:

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

"One can assume that if the Hezbollah can have a rocket equipped with chemical or biological

While Israel has made it plain that it does not want to ignite a regional war by unilateral intervention, and that it prefers coordinated international action, the Israeli government has not sought to secret the fact that it has contingency plans for military strikes against Syria's chemical weapons storehouses and military convoys suspected of transporting chemical weapons from those storehouses.²⁹⁵

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

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

The conflict has become a war of attrition that grows more dangerous as it goes along. Tensions have spilled over borders into Lebanon, Iraq, Turkey and Jordan and raised fears that radical Islamic militants will find a new cause for recruitment.²⁹⁶

Even if the conflict is contained, and the fears of terrorist or insurrectionist infiltration (along with the nightmares of chemical and biological weapons falling into their hands) are abated, MNEs with the

warhead they might very easily fire it against Israel," says Danny Yatom, former head of the Israeli intelligence agency, Mossad.

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

...

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

Id.

²⁹⁵ *Id.* An excellent, regularly updated summary on the events in Syria surrounding the end of the Assad regime and the escalation of an internal civil war may be found at *Bashar al-Assad*, N.Y. TIMES—TIMES TOPICS, http://topics.nytimes.com/top/reference/timestopics/people/a/bashar_al_assad/index.html.

²⁹⁶ *Bashar al-Assad*, N.Y. TIMES—TIMES TOPICS, http://topics.nytimes.com/top/reference/timestopics/people/a/bashar_al_assad/index.html.

kinds of FDIs in the Golan Heights as Alstom is considering in our hypothetical still must worry about the status of the investment in the wake of a new government that may, once it is on its feet, take up the return of the Golan Heights as a central theme.²⁹⁷

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

In addition, Alstom's ties to the U.S. in our hypothetical FDI might prove to be disadvantageous if the Golan Heights were to revert to Syrian control, even in the absence of an expropriation. Because the U.S. government designated Syria as a state sponsor of terrorism, Syria has been subject to the U.S. Department of Commerce's Export Administration Regulations (EAR) for over thirty years.²⁹⁸ U.S. businesses find that FDIs in Syria are impracticable, due to the EAR prohibitions on the export of almost all U.S. products to Syria, and due to other restrictions, such as the Grassley Amendment's prohibitions on taking tax credits for taxes paid in Syria and the Syria Accountability Act (SAA) of 2004's authorization for the President to prohibit, under authority of the SAA, all U.S. business and investment activity in Syria at any time.²⁹⁹

As serious as the risks may be from both a Syrian civil war and an unpredictable aftermath,³⁰⁰ another shadow looms over a wind-power FDI in Israel: the palpable potential for an armed conflict involving Israel and Iran. This set of risks is discussed in the next section, along with the ameliorative impact of political-risk insurance.

2. *The Impact of an Israel-Iran Armed Conflict on FDI in Israel— And the Role of Political Risk Insurance*

Any FDI in Israel—not just in the volatile Occupied Territories—

²⁹⁷ See, e.g., Fred Kaplan, *The Syrian Endgame: There are no Guarantees. But in Almost Every Scenario, the Violence Will Persist*, SLATE, July 20, 2012, http://www.slate.com/articles/news_and_politics/war_stories/2012/07/whether_bashar_al_assad_falls_or_not_the_fighting_in_syria_is_likely_to_persist_for_a_long_time.html

²⁹⁸ U.S. COMMERCIAL SERV., U.S. DEPT. OF COMMERCE, *Investment Climate: Openness to Foreign Investment*, in *DOING BUSINESS IN SYRIA: 2010 COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES* 26, 26-31 (2010).

²⁹⁹ *Id.*

³⁰⁰ See, e.g., David D. Kilpatrick, *Egyptian President Warns Assad That "Your Time Won't Be Long"*, N.Y. TIMES, Sept. 6, 2012, at A1.

carries with it a particular set of risks created by an arms race between Israel and Iran in the midst of what has been called "an Arab Cold War."³⁰¹ While Iran was the second Middle-Eastern nation to recognize Israel in the 1950s and maintained cooperative relations during the reign of Reza Pahlavi,³⁰² Iran after 1979 has been in a state of total hostility toward Israel, which post-Shah Iran does not recognize and which Iranian leaders have repeatedly vowed to destroy.³⁰³ Such threats assumed a new urgency when it became clear that the production of nuclear fuel in Iran had proceeded to the point where uranium could be enriched to "weapons-grade" levels,³⁰⁴ and, concomitantly, that the Iranian military

³⁰¹ Curtis Ryan, *The New Arab Cold War and the Struggle for Syria*, 42 MIDDLE E. REP. (Spring 2012), available at <http://www.merip.org/mer/mer262>.

³⁰² See SOHRAB SOBHANI, *THE PRAGMATIC ENTENTE: ISRAELI-IRANIAN RELATIONS, 1948-1988*, at 4-8 (1989).

³⁰³ Quinton Cannon Farrar, *U.S. Energy Sanctions and the Race to Prevent Iran From Acquiring Weapons of Mass Destruction*, 79 FORDHAM L. REV. 2347, 2350-51 & nn.18-23 (2011).

³⁰⁴ *Id.* See, e.g., David E. Sanger, *Harder Push to Stop Iran from Making Nuclear Fuel*, N.Y. TIMES, Dec. 11, 2010, at A6; Cody Coombs, *Blue Morning-Glories in the Sky: Correcting Sanctions to Enforce Nuclear Nonproliferation in Iran*, 19 IND. INT'L & COMP. L. REV. 419 (2009). Mr. Coombs explains the American viewpoint on these events as follows:

Over the past several decades, Iran has vigorously pursued nuclear technology under the pretense of its need for nuclear energy. However, increasing amounts of evidence have surfaced that suggests that Iran's nuclear program has not been entirely based on peaceful purposes. The International Atomic Energy Agency (IAEA), the enforcement agency behind the Nuclear Nonproliferation Treaty (NPT), has attempted to enforce the NPT provisions of nonproliferation through the use of various sanctions. So far, Iran has refused to comply with NPT provisions. Iran's refusal to comply with the provisions of the NPT, despite IAEA sanctions, has become a reoccurring theme among nuclear threat nations. *Id.* at 419 (footnotes omitted). These views are echoed in the polite language of diplomacy that appears in the published reports and communiqués of the International Atomic Energy Agency:

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

IAEA Statement After Iran Meeting, IAEA PRESS RELEASES, June 8, 2012, <http://www.iaea.org/newscenter/pressreleases/2012/prm201216.html> (statement by IAEA Deputy Director General Herman Nackaerts). One of the cornerstones of the IAEA Mission Statement is to "verify[] through its inspection system that States comply with their commitments, under the Non-Proliferation Treaty and other non-proliferation agreements, to use nuclear material and facilities only for peaceful purposes." <http://www.iaea.org/About/mission.html>. As of April 2012, the IAEA has 154 member nations, including the United States (since 1957), Israel (since 1957), and Iran (since 1958). See "Member States of the IAEA," IAEA, <http://www.iaea.org/About/Policy/MemberStates/> (last visited Nov. 15, 2012). For other points of view, see, e.g., Mehrzad Boroujerdi & Todd Fine, *Symposium, A Nuclear Iran: The Legal Implications of a Preemptive National Security Strategy*, 57 SYRACUSE L. REV. 619, 628 (2007), in which Professor Boroujerdi and Mr. Fine observe:

had successfully tested missiles that might be used to deliver a nuclear payload to Israel and other nations.³⁰⁵ Most alarmingly to an MNE considering any new FDI in Israel, previous suggestions³⁰⁶ of a “pre-emptive” military strike of some sort have resurfaced, and they include public statements by Israel’s Prime Minister and Defense Minister that Israel is prepared to take unilateral, military action to thwart Iran’s ability to develop nuclear weapons.³⁰⁷ Indeed, some of the dialogue about the

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

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

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

At the very least, an engagement policy might minimize the security implications of Iran’s development of nuclear weapons. Even limited cooperation means that Iran is less likely to fear that the United States aims to topple the regime, the one scenario where Iranian leaders might engage in high risk behavior. If we permit the assumption that their desire for nuclear weapons is not purely aggressive, some of the other motives behind their nuclear policy can be addressed in negotiations. It is precisely these assumptions, such as the inherent need for confrontation, that must be questioned. Once the rigid necessity of halting Iran’s nuclear program at all costs is removed as the orienting assumption in the discussion, a number of other possibilities and interesting considerations are opened.

Id. at 634 (footnote omitted). For Iran’s own articulation of its positions, see the listed Communiqués from Iran’s Permanent Mission to the IAEA at http://www.iaea.org/newscenter/focus/iaeciran/ms_communications.shtml, and the English-language pages at the website of the Atomic Energy Agency of Iran (AEAI), at <http://www.aeoi.org.ir/Portal/Home/>. For views that endeavor to walk a *via media*, see PBS—FRONTLINE TEHRAN BUREAU, <http://www.pbs.org/wgbh/pages/frontline/tehranbureau/2010/11/iran-primer-timeline-of-irans-foreign-relations.html> (last visited Nov. 15, 2012).

³⁰⁵ See, e.g., *Iran Tests Anti-Ship Missile*, UNITED PRESS INTERNATIONAL, Sept. 25, 2012, http://www.upi.com/Top_News/World-News/2012/09/25/Iran-tests-anti-ship-missile/UPI-95061348576527/; Uzi Rubin, *Showcase of Missile Proliferation: Iran’s Missile and Space Program*, ARMS CONTROL TODAY (ARMS CONTROL ASSOCIATION), January/February 2012, http://www.armscontrol.org/act/2012_01-02/Showcase_of_Missile_Proliferation_Irans_Missile_and_Space_Program.

³⁰⁶ See, e.g., Gregory D. Koblenz, *Coercive Nonproliferation: Israel’s Use of Coercive Diplomacy to Prevent the Proliferation of Weapons of Mass Destruction*, 2011 Am. Pol. Sci. Ass’n Ann. Meeting 1, available at <http://ssrn.com/abstract=1900518>.

³⁰⁷ Israeli Prime Minister Netanyahu made the most recent, pointed warnings:

"pre-emptive" strike notion in reputable American sources has taken on a kind of *Dr. Strangelove* quality of surreality.³⁰⁸

The implications of armed conflict for FDIs in a conflict zone are obviously not propitious. Perhaps that is why there appears to be no studies published in English exploring the impact of an Israel-Iran conflict on FDI in Israel.³⁰⁹ Recent studies have focused, however, on the negative impact the present conflicts and regional instability are having on FDI in

In a bravura performance at the UN's General Assembly on September 27th, aimed at winning international support for an attack on Iran's nuclear facilities, he pulled out a picture of a cartoonish bomb intended to show how close the Islamic Republic is to being able to build the real thing.

With a further flourish, he took out a red pen and drew a line near the bomb's neck. That, Mr Netanyahu said, represented the point when Iran would have sufficient 20%-enriched uranium to produce enough of the weapons-grade variety needed for a nuclear warhead. Sanctions, he pointed out, had done nothing to slow the pace of Iran's enrichment programme. On the basis of inspectors' reports by the UN's own nuclear watchdog, the International Atomic Energy Agency (IAEA), he forecast that Iran would get there by the spring or early summer of next year [i.e., in 2013]. When it did, it should be held to have crossed a red line that would trigger a military response, not just on Israel's part, but, by implication, on America's too.

Iran's Nuclear Programme: A Red Line and a Reeling Rial—Sanctions May Be Taking Their Toll as Israel's Prime Minister Tries to Set a New Red Line to Block Iran's Nuclear Plans, THE ECONOMIST, Oct. 6, 2012, <http://www.economist.com/node/21564229>; see David Isenberg, *Israeli Attack on Iran's Nuclear Facilities Easier Said than Done*, CATO INSTITUTE (Feb. 13, 2012), available at <http://www.cato.org/publications/commentary/israeli-attack-irans-nuclear-facilities-easier-said-done>.

³⁰⁸ What one might call "Exhibit A" is the article recently appearing in the estimable publication, *Foreign Affairs*: Matthew Kroenig, Essay *Time to Attack Iran: Why a Strike is the Least Bad Option*, 91 FOREIGN AFFS. 78 (2012). Mr. Kroenig's Essay drew a sharp rebuke: Colin H. Kahl, *Not Time to Attack Iran: Why War Should be a Last Resort*, 91 FOREIGN AFFS. 16 (2012). The comparisons of Kroenig's article to Stanley Kubric's 1964 film, *Dr. Strangelove, Or How I Learned to Stop Worrying and Love the Bomb*, are striking. See Charles Maland, *Dr. Strangelove (1964): Nightmare Comedy and the Ideology of Liberal Consensus* 31 AM. Q. 697, 699-700, 703-05, 708 (1979) (discussing the perverse comedy of discussing "survivable" thermonuclear warfare in magazines "such as *U.S. News and World Report*," that "carried a cover article, 'If Bombs Do Fall,' which told readers that plans were underway to allow people to write checks on their bank accounts even if the bank were destroyed by nuclear attack.").

³⁰⁹ There have been recent studies, however, of the economic consequences of the "cold war" between Iran, Israel, and other Middle Eastern nations. See Mohammed Nuruzzaman, *Conflicts Between Iran and the Gulf Arab States: An Economic Evaluation*, 36 STRATEGIC AFFS. 542 (2012) (noting that "[s]cholars and experts have mostly analysed the conflicts through political and strategic prisms while neglecting their economic dimensions"). See also Ariel Cohen & Kevin DeCorla-Souza, *Eurasian Energy and Israel's Choices*, 88 MIDEAST SECURITY AND POLICY STUDIES at 3, 32-34 (The Begin-Sadat Center for Strategic Studies—Bar-Ilan University 2011) (observing that "[s]urrounded by unfriendly and unreliable neighbors, Israel is an energy island," and suggesting strategy for maintaining viability of energy infrastructures "to help Israel navigate . . . constantly shifting politics and security" issues). The general media have only recently started to run features considering the impact of an Israel-Iran armed conflict on the economy of Israel. See, e.g., Jean-Luc Renaudie, *Is Israeli Economy Under Threat in case of Iran War?*, MIDDLE EAST ONLINE, Aug. 16, 2012, <http://www.middle-east-online.com/english/?id=53931>

Middle Eastern nations.³¹⁰ The impact of open warfare would be almost unimaginably devastating, especially to energy infrastructure targets such as windmill farms, solar energy arrays, and conventional power plants.³¹¹ Various armed conflicts in the Middle East, Asia, and Africa over the last 50 years have demonstrated the extent of devastation to populations, as well as FDI, that can occur when armed conflict destroys energy infrastructures.³¹²

Some investment advisors have warned that corporate and individual investors should “probably think twice before investing in the Israeli economy until the rhetoric between Israel and Iran cools.”³¹³ Israeli press coverage has included socio-economists who warn the cost of war would be massive, and the damage from an Iranian counterstrike “inestimable;” along with those who contend that “credit default swaps on Israeli bonds – ‘a classic measurement of the risk the market assigns to a state’ – have not risen,” that “the possibility of Israel attacking Iran does not affect whether foreigners invest in the country,” and that “a brief, successful Israeli strike could benefit the local economy.”³¹⁴ Whether Alstom would—or should—share such a sanguine view is a difficult question to answer without a good deal more—and more reliable—data.³¹⁵

³¹⁰ See, e.g., Sedik, *supra* note 29.

³¹¹ Alexander E. Farrell et al., *Energy Infrastructure And Security*, 29 ANN. REV. OF ENVIR. AND RESOURCES 421, 429-30 (2004); Karen Smith Stegena et al., *Terrorists Versus the Sun: Desertec in North Africa as a Case Study for Assessing Risks to Energy Infrastructure*, 14 RISK MGMT. 3 (2012); Ali Khajavi, *A Realistic Outlook for Iraq's Oil Production in 2030*, MIDDLE E. ECON. SURV., (July 3, 2012), <http://www.mees.com/en/articles/1874-a-realistic-outlook-for-iraqs-oil-production-in-2030> (detailing damage to Iraq's energy infrastructure in the wakes of various wars); see also Brett van Niekerk & Manoj S. Maharaj, *Relevance of Information Warfare Models to Critical Infrastructure Protection*, 39 SCIENTIA MILITARIA: S. AFRICAN J. MIL. STUD. 99 (2012); Jennifer Giroux & Caroline Hilpert, *The Relationship Between Energy Infrastructure Attacks and Crude Oil Prices*, J. ENERGY SEC., (October 27, 2009), http://www.ensec.org/index.php?option=com_content&view=article&id=216:the-relationship-between-energy-infrastructure-attacks-and-crude-oil-prices&catid=100:issuecontent&Itemid=352.

³¹² Jenny Sin-hang Ngai, *Energy as a Human Right in Armed Conflict: A Question or Universal Need, Survival, and Human Dignity*, 37 BROOK. J. INT'L L. 579 (2012).

³¹³ Sean Geary, *How Conflict with Iran would Affect the Israeli Economy*, EMERGING MONEY (Aug. 16, 2012), <http://emergingmoney.com/technology/iran-israeli-economy-eis-teva-mlnx/>. Mr. Geary continues:

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

Id.

³¹⁴ Moti Bassok & Hagai Amit, *Lengthy Iran Conflict Likely To Cost Israeli Economy Billions of Shekels—Former Finance Ministry Director General says Nuclear Iran Involves Considerable Economic Cost to Israel, Adds that War with Iran Would be much more Expensive than Second Lebanon War*, HAARETZ, Aug. 16, 2012, <http://www.haaretz.com/business/lengthy-iran-conflict-likely-to-cost-israeli-economy-billions-of-shekels-1.458060>

³¹⁵ As of this writing, the first hopeful note was sounded in many months, for peace rather than war. See

However, part of any answer that involves an Alstom FDI in Israel needs to include the availability of political-risk insurance (PRI) protection against the risk of losses on a wind-energy FDI in the event an Israeli-Iranian armed conflict.³¹⁶ Indeed, it has aptly been observed that “[a] company’s ability to procure PRI is often crucial to its continuing investment in developing countries.”³¹⁷ Private-market insurance for war and other force majeure-style investment risks exists, but may be prohibitively expensive.³¹⁸ As one commentator observed when surveying the availability of private sector political risk insurance in 1996, “[t]he private insurance industry has been called a boutique provider of specialized political risk products as opposed to the more substantial and uniform government programs,” because, for example, they do not use “standardized rating schedules” but instead “individually appraise risks on a commercial basis, which is subject to supply and demand considerations

David E. Sanger & Eric Schmitt, *To Calm Israel, U.S. Offers Ways to Restrain Iran*, N.Y. TIMES, Sept. 3, 2012, at A1.

³¹⁶ For a thorough discussion of the kinds of risks inherent to energy FDIs and strategies that have been developed to address those risks, see Erik J. Woodhouse, *The Obsolescing Bargain Redux? Foreign Investment in the Electric Power Sector in Developing Countries*, 38 N.Y.U. J. INT’L L. & POL’Y 121 (2006).

³¹⁷ Jennifer M. DeLeonardo, Note, *Are Public and Private Political Risk Insurance Two of a Kind? Suggestions for a New Direction for Government Coverage*, 45 VA. J. INT’L L. 737, 739 (2005).

³¹⁸ In 1996, Maura Perry described the daunting challenges facing private-market FDI insurers:

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

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

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

Maura B. Perry, *Model for Efficient Foreign Aid: The Case for the Political Risk Insurance Activities of the Overseas Private Investment Corporation*, 36 VA. J. INT’L L. 511, 545–46 (1996) (footnotes omitted).

as well as particular risk characteristics,” and thus, the private sector “has never been a particularly robust or stable source of political risk insurance.”³¹⁹ That is not to say, however, that there is any shortage of insurers and insurance syndicates who offer some form of political risk coverage; but it is not always easy to estimate what kinds of coverage limits and premiums will attend to PRI issued in the private sector.³²⁰ Indeed, when the “Arab Spring” came to Egypt in 2011, PRI premiums for projects in Egypt quickly rose 12%–15%.³²¹

For American businesses, the Overseas Private Investment Corporation (OPIC) has provided PRI for FDIs in countries specifically listed by Congress in the legislation authorizing OPIC:

From its inception in 1971, OPIC has been charged with operating a political risk insurance business that both supplements the private sector and earns a profit. According to its authorizing legislation, the agency is to avoid competition with private sector sources of finance and political risk insurance by serving as the financier or insurer “of last resort.” At the same time, OPIC is to earn sufficient revenue from its activities to operate on a self-sustaining basis.³²²

OPIC insurance has traditionally provided ten times the coverage limits for nearly seven times the policy duration limits for a wider range of risks than PRI offered in the private insurance markets.³²³ However, OPIC strictly limits its policy holders to three categories of insureds, each

³¹⁹ *Id.* at 536 (1996) (footnote omitted).

³²⁰ See, e.g., Lijana Baublyte et. al., *Political Risk Underwriting in the London Insurance Market. How Do They Do It?* 11 III GLOBAL CONF. ON BUS. AND ECON. (2011) (demonstrating that “the basis of decision-making and risk selection [in the London Political Risk Insurance (PRI) market] is still largely based on a face-to-face approach with such factors as trust, reputation and intuition playing an important role”); see, e.g., *Political Risks Insurance*, LLOYD’S, http://www.lloyds.com/Redirect-pages/Risk_locator/Political_risks_insurance (discussing differences in location of risk, and thus ranges of premiums, for “political risks insurance,” including “trade-related cover”; “other asset cover”; “insurance of assets against political violence”; and “global contract”) (last visited Nov. 15, 2012).

³²¹ Cyril Tuohy, *Egypt Causes Price Spike For Political Risk Insurance—Expert Sees a “Pause” in the Marketplace for Political Risk Insurance as Carriers Scramble to Reassess Middle East Exposures*, RISK & INS., Feb. 11, 2011, <http://www.riskandinsurance.com/story.jsp?storyId=533329908>.

³²² Perry, *supra* note 318, at 513 (1995) (footnote omitted); Pablo M. Zylberglait, Note, *OPIC’s Investment Insurance: The Platypus of Governmental Programs and Its Jurisprudence*, 25 I. & POL’Y INT’L BUS. 359 (1993).

³²³ Perry, *supra* note 318, at 534–36; Ashton B. Inniss, Note, *Rethinking Political Risk Insurance: Incentives For Investor Risk Mitigation*, 16 SW. J. INT’L L. 477, 488–90 (2010).

of which has a substantial nexus to the United States and each of which is essentially under American control:

- [1] a U.S. citizen;
- [2] a corporation, partnership, or other association created under the laws of the U.S., its states, or territories beneficially owned by U.S. citizens; or
- [3] a foreign business at least 95 % owned by U.S. citizens or by associations owned by U.S. citizens.³²⁴

Neither Alstom, nor its American subsidiary,³²⁵ meet these definitions. Obviously, Alstom is unlikely to qualify for OPIC-issued insurance on a Golan Heights FDI, even considering the substantial involvement of Alstom's Texas-based nacelle production facility in such an undertaking. However, Alstom has at least two other sources of government-backed FDI political risk insurance—programs offered through the World Bank, and through its home state, France.

Indeed, it is precisely because “[m]any national insurance programs”—such as OPIC—“due to their respective national objectives, contain strict eligibility requirements that exclude many investors and investments” that the World Bank Group created the Multilateral Investment Guarantee Agency (MIGA),³²⁶ an international financial institution offering political risk insurance guarantees for FDIs in developing-world countries, to “overcom[e] some of these shortcomings

³²⁴ Paul E. Comeaux & N. Stephen Kinsella, *Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 1, 36 (1994).

³²⁵ See, e.g., Kathryn Gordon, *Investment Guarantees and Political Risk Insurance: Institutions, Incentives, & Developments*, OECD (Investment Division Working Papers 2009/1, at 8) (noting that only “[s]even PRI providers offer coverage for foreign corporations with domestic presence (Australia, Austria, Belgium, France, Netherlands, Turkey and the United Kingdom)”), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718484. The Amarillo, Texas facility is owned by an entity loosely referred to as “Alstom Wind, North America” (AWNA) (<http://www.ryancompanies.com/projects/Alstom-Wind-North-America/>), but which appears to in fact be a limited-liability corporation called Alstom Wind Texas LLC, which is a Delaware corporation headquartered in Connecticut. See, e.g., *Alstom Wind Texas LLC*, BIZAPEDIA, <http://www.bizapedia.com/de/ALSTOM-WIND-TEXAS-LLC.html>. Alstom's Amarillo facility is one of 37 it maintains in the U.S., divided among Grid, Transport, Power, and Corporate Headquarters segments of Alstom's businesses, which employ “10,000 employees in locations that span 47 states and the District of Columbia.” See *supra* note 132.

³²⁶ MIGA was actually the product of the World-Bank sponsored Convention Establishing the Multilateral Investment Guarantee Agency, which opened for states' signatures in October 1985 and entered into force in April 1988. Malcolm D. Rowat, *Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA*, 33 HARV. INT'L L.J. 103, 105 & n.9, 126-34 (1992).

and hel[p] to fill the gaps.”³²⁷ MIGA’s PRI is structured and operated similarly to the PRI offered by OPIC; however, MIGA operates with a number of broad policy objectives beyond those that animate OPIC’s activities.³²⁸ For example, as one of the entities constituting the World Bank, MIGA is among—

the Group’s individual institutions [which] have also introduced programs dedicated to creating and promoting an ethical code for businesses. The Group’s institutions have produced guidelines that concern several independent fields and outline certain requirements that must be satisfied before and during project financing. These guidelines and their underlying policies address environmental protection, sustainable development, and the protection of indigenous peoples and reflect general principles of international law although they do not explicitly refer to them. In order to strengthen the guidelines and increase borrower accountability, the Group provides two grievance mechanisms that allow for individual complaints concerning major projects. The Inspection Panel (Panel), established in 1994, receives complaints concerning loans under the IDA or IBRD. After the Group created the Panel, other development banks established similar accountability mechanisms. The establishment of a Compliance Advisor/Ombudsman (CAO) to govern complaints concerning the IFC and the MIGA followed the establishment of the Panel 1999.³²⁹

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

³²⁷ Comeaux & Kinsella, *supra* note 324, at 40–45.

³²⁸ Inniss, *supra* note 323, at 490–92; see also Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 78–79 & nn.50–55 (2008).

³²⁹ Miriam Mafessanti, *Corporate Misbehavior & International Law: Are There Alternatives To “Complicity”?*, 6 S.C. J. INT’L. L. & BUS. 167, 224–24 & nn.382–87 (2010) (footnotes omitted). MIGA “has developed Environmental and Social Review Procedures and Safeguard Policies, modeled on the Performance Standards of the [International Finance Corporation], which bind its private sector clients.” *Id.* at 229 & n.427.

to prevent claims filings").³³⁰

France, too, has its own national insurer of French firms seeking to protect their FDIs, an agency called *Compagnie Française d'Assurance Pour Le Commerce Extérieur*, known by the acronym COFACE.³³¹ Founded in 1946 as a French governmental agency and privatized in 1990, COFACE is an example of an export credit agency (ECA), which many countries have created³³² in the last 60 years to insure foreign sales transactions and longer-term FDI projects undertaken by home-state businesses.³³³ COFACE offers political risk insurance along the general outlines of OPIC's program—and Alstom easily qualifies as one of those companies eligible to become insureds of COFACE.³³⁴ Political risk can be insured for periods of 5 to 15 years, at premiums ranging from 0.7% to 1% of the total value of the investment.³³⁵ How COFACE might go about assessing the risks posed by Alstom's hypothesized Golan Heights FDI is unknowable; COFACE "has a proprietary risk evaluation system."³³⁶

Similarly to COFACE (but in contrast to OPIC), Lloyd's of London, the world's most famous private insurance market, provides little transparency into premiums of its PRI product, the methodology for calculating premiums, the limits of financial exposure which Lloyd's syndicates are willing to assume, or how those limits are determined.³³⁷ In

³³⁰ Sam Foster Halabi, *Efficient Contracting Between Foreign Investors And Host States: Evidence From Stabilization Clauses*, 31 NW. J. INT'L L. & BUS. 261, 274-75 (2011).

³³¹ *Who We Are*, COFACE, http://www.coface.com/CofacePortal/COM_en_EN/pages/home/Who_we_are (last visited Nov. 15, 2012).

³³² See the listings and details for numerous ECAs in Janet Koven Levit, *The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits*, 45 HARV. INT'L L.J. 65, 142-50 & nn.345-78 (2004).

³³³ See, e.g., *id.*; see also *PRI Essentials*, POLITICAL RISK INSURANCE CENTER, <http://www.pri-center.com/directories/priessentials.cfm> (last visited Nov. 15, 2012) ("Most public providers are national export credit agencies (ECAs), which may cover both export credit/trade transactions, as well as longer-term investments. ECAs usually support investors and lenders from their home country going into developing countries, and may also have mandates to support development and be self-sustaining.").

³³⁴ Sidney Posel, *Factoring Accounts Receivable in France: Some Legal Aspects and American Comparisons*, 57 TUL. L. REV. 292, 326 n.124 (1982) (noting that COFACE offers credit insurance against "political risks" for foreign investors).

³³⁵ Perry, *supra* note 318, at 584 (table).

³³⁶ Gordon, *supra* note 325, at Annex Table 8.

³³⁷ LLOYD'S, *supra* note 320. Sagicor, one of the Lloyd's syndicates, states that its "program line" limit for political risk insurance is \$7.5 million. *Political Risk, Credit, Surety and Terrorism*, SAGICOR AT LLOYD'S (2012), <http://www.sagicoratlloyds.com/sagicor-lloyds/pecuniary-lines>. See also Nathan Jensen, *Political Risk, Democratic Institutions, and Foreign Direct Investment*, 70 J. POL. 1040, 1043, n.36 (2008) (noting that "[p]olitical risk insurers charge premiums for political risk coverage against the confiscation of firms' assets (expropriation risk), restricting the repatriation of profits or other capital transactions (transfer risk) or risks associated with war or civil

2012, one of the Lloyd's brokers, RFIB Group, noted that the private market for PRI is centered in London, where 10 corporate entities—of which Chartis, Sovereign, and Zurich are dubbed “the ‘big three’”—and 25 syndicates on Lloyd's market are involved in negotiating and issuing political risk insurance.³³⁸ Fifteen London-based brokers interact with these insurers to create the bulk of the private pool of insurance contracts to cover credit and political risks.³³⁹ The private-market PRI policies are limited in duration, as well as in coverage limits; most fall within the range of two to three years, and as the tenor is lengthened, the number of insurers with the capacity to insure decreases; the outermost private-market limits are 15 years, which are available from only a few of the private-market insurers.³⁴⁰

From this general information about PRI and insurance markets, we can make several observations regarding Alstom's hypothesized Golan Heights investment. First, it is likely that Alstom can find PRI coverage for its Golan Heights FDI from a number of different sources, both public and private. Second, Alstom must be scrupulously careful to avoid bribery of any government official, or even the arguable appearance of bribery, not only because of anti-bribery laws such as the Foreign Corrupt Practices Act³⁴¹ and the OECD Anti-Bribery Convention,³⁴² but also

disturbance (political violence risk),” but that it “does not cover all types of political risk, coverage is expensive”; the “political risk insurance industry remains far less quantitative than other parts of the insurance industry”; [a] study commissioned by the Federal Reserve Bank of New York found that the cost of political risk insurance coverage was one of the major reasons why most firms don't purchase political risk insurance coverage”; “much of the political risk insurance coverage is essentially the same product used 50 years ago and . . . doesn't appropriately cover a number of important risks faced by multinationals.”).

³³⁸ TOBY HEPPEL, RFIB GROUP, *THE PRIVATE INSURANCE MARKET FOR CREDIT AND POLITICAL RISKS* 4 (2012), available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Toby%20Heppel%20Presentation.pdf>.

³³⁹ *Id.* at 5. Chubb Insurance Group withdrew from the credit and political risks market in May 2010. *Id.* at 8.

³⁴⁰ *Id.* at 9; Nathan Jensen, *supra* note 337, at 1042-43 & nn.32-36.

³⁴¹ 15 U.S.C. §§ 78dd-1. Recent U.S. enforcement efforts have focused on foreign MNEs. See Leslie Wayne, *Foreign Firms Most Affected by a U.S. Law Barring Bribes*, N.Y. TIMES, Sept. 4, 2012, at B1 (noting that nine of the 10 MNEs that most recently have reached large settlements with the U.S. Justice Department have been foreign, including a French MNE, Alcatel-Lucent). In recent years, Alstom has had a number of serious allegations of bribery in FDI leveled against it. See Claudio Gatti, *Alstom at Center of Web of Bribery Inquiries*, N.Y. TIMES, April 29, 2010, <http://www.nytimes.com/2010/03/30/business/global/30alstom.html>. However, Alstom, S.A., may no longer be directly subject to the Act because, inter alia, its shares are no longer traded on U.S. stock exchanges, one of the bases for jurisdiction, and are now exclusively traded on the Paris Stock Exchange. See *supra* at §78-1(a); see, e.g., *New York Stock Exchange to Suspend Trading in ALSTOM and Moves to Remove From the List*, NYSE EURONEXT, Aug. 13, 2004, <http://www.nyse.com/press/1092392705795.html>.

³⁴² See *OECD Convention on Combating Bribery of Foreign Public Officials in International Business*

because an allegation of bribery in connection with the FDI typically is itself grounds for retroactive cancellation of the PRI policy and denial of any coverage for an occurrence.³⁴³ Third, Alstom must take heed of the moral-hazard clauses in FDI insurance that “exclude coverage of events that the insured entity might reasonably have been expected to avoid”³⁴⁴—such as undertaking an investment in areas during a time when armed conflict may, from a post hoc perspective, have seemed imminent. Fourth, finding a PRI policy sufficient to satisfy the extent of coverage needed should war between Israel and one of its neighbors eventuate may be difficult, given the relatively modest coverage limits available in private markets. Even the higher limits available through an export credit agency such as COFACE (or OPIC, if an Alstom subsidiary were to qualify) may be taxed to compensate Alstom in the event war or terrorism destroys the hypothesized Golan Heights wind farm. Alstom’s comparable wind-farm projects in other areas of the world are valued at least ten times greater than even the most generous coverage limit (\$20 million) provided by OPIC.³⁴⁵ Like many FDI projects, this one risks

Transactions, OECD (2011), <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/oecdconventiononcombatingbriberyofforeignpublicofficialsininternationalbusinesstransactions.htm>. Both France, *France – OECD Anti-bribery Convention*, OECD, <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/france-oecdanti-briberyconvention.htm>, and the United States, *United States – OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/unitedstates-oecdanti-briberyconvention.htm>, have ratified the Convention and enacted implementing legislation. Prior to implementing the OECD Convention, France seemed to treat bribery of foreign officials as cost of doing business. See, e.g., Scott D. Syfert, *Capitalism or Corruption? Corporate Structure, Western Investment and Commercial Crime in the Russian Federation*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 357, 403 (1999) (observing that at the time, “payments in most of the world [we]re considered a routine cost of business,” and citing the example of COFACE, which at the time “over[ed] foreign bribery as export risk”); Christopher F. Dugan & Vladimir Lechtman, *The FCPA in Russia and Other Former Communist Countries*, 91 AM. J. INT'L L. 378, 379 (1997) (“Essentially free from legal constraints, Japanese, European and Russian businesses are reported to rely freely on bribes to obtain what they want. The United States is virtually alone in outlawing bribery of foreign officials, in stark contrast to other states’ conscious acquiescence in overseas “commissions.” The French agency Coface, a government entity providing credit and insurance to French investors in the Third World, has been charged with active participation in such transactions.”).

³⁴³ Gordon, *supra* note 325, at 9 (noting presence of such clauses in COFACE insurance contracts). The World Bank recently debarred two Alstom subsidiaries because their employees allegedly offered bribes to Zambian government officials in the early 2000s to win a contract for power plant construction. See Dionne Searcey & David Crawford, *World Bank Punishes Units of Alstom SA for Bribery*, WALL ST. J., Feb. 23, 2012, <http://online.wsj.com/article/SB10001424052970203918304577238943984834040.html>

³⁴⁴ Gordon, *supra* note 325, at 3.

³⁴⁵ Energix’s predecessor, Multimatrix, aspired to build 160 wind turbines on the 18-acre area, and generate 450 MW of power. Ari Rabinovitch, *Israel Uses Golan To Build Wind Energy Industry*, REUTERS, Apr. 29, 2010, <http://uk.reuters.com/article/2010/04/29/us-israel-energy-wind-idUKTRE63S37320100429>. Comparably, recent Alstom projects provide a good gauge by which to measure the magnitude of the FDI value

being underinsured.³⁴⁶ A challenge is therefore presented to Alstom as it seeks to protect its FDI. “[T]he limits of insurance and the number of deductibles are typically determined on a per occurrence basis,” and “[i]f the per occurrence limit of insurance is adequate to cover the insured’s loss, it does not matter whether a loss involves one occurrence or multiple occurrences”; but where the per occurrence limit of insurance does not fully compensate the insured for its loss, whether a loss constitutes one occurrence or multiple occurrences can be a significant issue.”³⁴⁷ Of course, Alstom might seek to deal with these limits by taking out multiple policies³⁴⁸ of PRI,³⁴⁹ and by seeking a definition of insurable “occurrence” or “loss” that would cover to policy limits the sub-units of the project, such as each wind turbine, rather than merely the project as an

for comparison to political risk coverage limits See, e.g., *Alstom Builds Whitelee Onshore Wind Farm*, ALSTOM (Sept. 2010), <http://www.alstom.com/uk/projects/power/whitelee/> (describing \$250 million (£200 million) project for “Scottish Power Renewables . . . to build a 217 MW extension to the Whitelee wind farm in Scotland” of some 75 wind turbines under a contract including “supply, transportation, installation, commissioning, and operation [and] maintenance”); *Alstom Will Supply Equipment To Four Wind Farms In Brazil*, ALSTOM (SEPT. 4, 2012), <http://www.alstom.com/press-centre/2012/4/85822/> (describing contract valued at \$165 million (£130 million) in which, “[i]n addition to the [supply and installation of 40] wind turbines, Alstom will be responsible for the supply and installation of electrical systems and substations throughout the complex” located in the Brazilian State of Rio Grande do Sul). Even very modest wind-farm projects, such as Alstom’s in Ethiopia, would appear to exceed even OPIC coverage limits. See *Alstom Grid Wins Subcontract With CYMI For Around £17 Million Project To Supply Equipment For Ethiopian Electric Power Corporation*, ALSTOM (June 12, 2012), <http://www.alstom.com/press-centre/2012/6/alstom-grid-wins-subcontract-with-cymi-for-around-17-million-project-t> (“Alstom has signed a subcontract with Spanish company CYMI (ACS Group), to supply and manufacture equipment for the Ethiopian Utility (EEPSCO) as part of the Electricity Transmission System Improvement Project (ETSIP) in Ethiopia”); see also *Following a Planning Hitch, Ethiopia’s First Wind Farm is Back on Track—After Some Three Years of Planning, Securing Financing, and Infrastructure Work, Sub-Saharan Africa’s Largest Wind Farm is Poised for Completion in Ethiopia’s Tigray Province*, RENEWABLES INTERNATIONAL, (Oct. 5, 2011), <http://www.renewablesinternational.net/following-a-planning-hitch-ethiopia-s-first-wind-farm-is-back-on-track/150/505/30897/> (noting Alstom’s supply of 54 turbines as part of £283 million project).

³⁴⁶ Alex Khachaturian, “Are We in Good Hands?” *The Adequacy of American and Multilateral Political Risk Insurance Programs in Fostering International Development*, 38 CONN. L. REV. 1041, 1044, 1054-55, 1057-62 (2006) (noting gaps in political risk insurance coverage plans).

³⁴⁷ Scott G. Johnson, *Ten Years After 9/11: Property Insurance Lessons Learned*, 46 TORT TRIAL & INS. PRAC. L.J. 685, 687 (2011) (footnotes omitted).

³⁴⁸ Given Alstom’s resources and ability to obtain the attention of government officials, it might be in a position to persuade public political risk insurers (such as OPIC and MIGA) to partner with private political risk insurers as *co-insurers* to increase coverage amounts, encourage more insurers to have confidence in insuring a particular risk, and to put their “real informational advantage” to work in “act[ing] as a superior sorter of risk. DeLeonardo, *supra* note 317, at 781-89.

³⁴⁹ Insurance against terrorism risks will be required as well, and the insurability of those risks in the wake of highly organized terror-attacks against public infrastructure targets has tightened the market. See Andrew Gerrish, Note, *Terror CATs: TRIA’s Failure to Encourage a Private Market for Terrorism Insurance and How Federal Securitization of Terrorism Risk May Be a Viable Alternative*, 68 WASH. & LEE L. REV. 1825 (2011).

entirety.³⁵⁰

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

In addition to availability of particular political risk coverage, the cost of such coverage may be a factor. As a general rule, premiums for political risk coverage will be higher in certain countries than others. Private insurers tend to be more expensive, but can often be more flexible in the amount and types of coverage offered for particular risks than multilateral agencies, like MIGA, or export credit agencies (ECAs) sponsored by specific governments. The availability and cost of political risk insurance should be weighed against the benefits, after a careful review of deductible limits and exclusions offered by a given provider, the provider's payment history in the host country, and the availability of other mitigating factors. Such factors include the existence of a reliable bilateral

³⁵⁰ An analogous issue was presented concerning property insurance on the World Trade Center towers, which were destroyed on September 11, 2001 and is detailed by *World Trade Center Properties, LLC v. Hartford Fire Ins. Co.*, 345 F.3d 154 (2d Cir. 2003), *abrogated on other grounds by*, *Wachovia Bank v. Schmidt*, 546 U.S. 303 (2006). (The owners had obtained property insurance binders for the complex from some two dozen insurance companies, in the aggregate amount of \$3.5 billion "per occurrence." When the owners made a \$7 billion insurance claim—purporting to treat the destruction of each tower as a separate "occurrence"—the insurers insisted that the events constituted but one occurrence, limiting payment to \$3.5 billion. Litigation ensued, and complications arose from the fact that "occurrence" was defined in draft policy language circulated to some of the insurers as "all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes."). For a discussion of the implications of this litigation for commercial insureds and insurers, see Scott M. Seaman & Jason R. Schulze, *World Trade Center Litigation*, in *ALLOCATION OF LOSSES IN COMPLEX INSURANCE COVERAGE CLAIMS* "at § 7.9 (2011); see also Irene S. Kaptzis, Note, *Looking Beyond the Sunset: International Perspectives on the Terrorism Risk Insurance Act of 2002 and the Issue of its Renewal*, 29 *BROOK. J. INT'L L.* 827, 855-56 & n.179 (2004); Scott G. Johnson, *Ten Years After 9/11: Property Insurance Lessons Learned*, 46 *TORT TRIAL & INS. PRAC. L.J.* 685, 686-87 (2011) (noting "myriad of coverage issues, including the number of occurrences, the period of indemnity for time element coverage, the meaning of physical loss or damage, civil authority and ingress and egress coverages, contingent business interruption coverage, insurable interest, contamination and consequential loss exclusions, terms of insurance binders, the scope of replacement cost, and salvage and recoveries, among others"). Eventually, some of the insurers were found to have bound themselves to a definition of occurrence that treated the destruction of each tower as a separate occurrence. *SR Intern. Business Ins. Co., Ltd. v. World Trade Center Properties, LLC*, 467 F.3d 107, 140 (2d Cir. 2006) (noting that "the jury's determination that the insurers provided different coverage is . . . a reflection of the fact that the parties were at various stages of negotiating coverage when the two hijacked airplanes destroyed the WTC"). For an excellent discussion of the problem more generally for the insurers and insureds, see Michael Murray, Note, *The Law of Describing Accidents: A New Proposal for Determining the Number of Occurrences in Insurance*, 118 *YALE L.J.* 1484 (2009), which would provide much food for thought to Alstom and its counsel when Alstom seeks to insure risks such as the ones emanating from a hypothesized Golan Heights FDI.

investment treaty, the negotiation of an investment agreement for the project, the availability of international arbitration to enforce contractual obligations, an [MNE's] familiarity with the host country and its courts, and opinions of experienced counsel. Based on this type of comparative analysis, many [MNE]s will elect to self-insure or partially self-insure for all or certain elements of political risk in a given host country, or to rely on other forms of risk mitigation, particularly in exceptionally high-risk countries where insurance premiums will be high or the desired coverage either limited or unavailable.³⁵¹

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

IV. SUMMATION

In a recent interview, the Chair of the American Bar Association's House of Delegates, attorney Linda Klein, observed that "U.S. lawyers are going to have to be part of the global economy and international legal industry, or they won't survive."³⁵² Similarly, MNEs in Europe will need to look outside the Euro Zone for FDIs, if they are to pursue a path of continuous growth. Using lessons from courses in International Business Transactions (IBT) and International Civil Litigation (ICL), we have constructed a framework within which European MNEs can make an initial evaluation of proposals for FDIs outside of the Euro Zone. We fleshed out that framework as we considered an hypothesized—yet, entirely plausible—investment by Alstom, S.A., in Israel's energy sector: joint-venturing with Israel's Energix-Renewable Energies, Ltd., to build a 75-turbine farm for generating electricity on the wind-swept Golan Heights.

A major energy infrastructure project in disputed territory within a politically volatile and strategic area of the world calls forth many of the key issues, with business and legal aspects intertwined, that IBT and ICL address: legal, regulatory and business environments of the host state;

³⁵¹ Randel R. Young & Richard Devine, *Managing Risk in Emerging Market Hydrocarbon Development Projects*, 55 ROCKY Mtn. MINERAL L. INST. § 30.07 (2009).

³⁵² Meredith Hobbs, *Ideas Follow Klein from ABA Stint: After Chairing House of Delegates for Two Years, she Ponders Lawyers' Challenges Overseas and at Home*, DAILY REPORTER, Aug. 17, 2012, at 3.

politics, diplomatic relations, as well as legal, regulatory, and business environments of the MNE's home state; and political, diplomatic, as well as legal, regulatory, and business environments of the home state's broader political affiliations (such as EU membership) as well as of third states that are seen to provide "magnet" fora for litigation (including Canadian courts and the U.S. federal courts, the latter used obliquely by an array of plaintiffs in efforts to regulate MNE activities).

This article has demonstrated how a multi-stage paradigm might be applied to identify potential FDIs worth further investigation and more detailed development.

In Stage One, we analyzed the general business and regulatory environment for a proposed FDI, including a close, fact-intensively detailed examination of the host state, Israel; the MNE, Alstom, S.A.; the proposed FDI project, a greatly expanded and updated wind-power project on the Golan Heights to generate badly-needed electricity for Israel's rapidly increasing demand; the proposed form of the FDI, a joint venture with a host-state partner; and the proposed host-state joint venture partner, Energix, Ltd., a small Israel-based company traded on the Tel-Aviv Stock Exchange that purchased Multimatrix's stake in a two-decades old, outdated wind farm on the wind-swept Golan Heights in Israeli territory annexed from (but still claimed by) Syria after the 1967 "Six-Days' War," upon which it proposes to site numerous, modern electricity-generating wind turbines.

Having established the parameters of the FDI proposal, we next articulated, and evaluated critically, the three most significant arguments in favor of the MNE undertaking the proposed FDI project: [1] that Israel's need for electrical power currently exceeds supplies and will continue to grow; [2] that electricity generated by wind turbines is a sustainable energy source that has great room for growth in Israel and increases Israel's energy independence; and [3] that Israeli government support for wind-generated electrical power is growing, and Israel's FTA Agreement with the U.S. will permit Energix to import Alstom's American-made wind turbines duty-free. This evaluation included an objective evaluation of potential bias and interest in the sources used in formulating the FDI proposal, as well as an examination of other supporting reasons for the FDI, including Alstom's expertise in wind-turbines and wind-farm installation and management, as well as Alstom's familiarity with the region's politics and its unwavering commitment to a previously undertaken FDI in Israel, the Jerusalem Light Railway.

Having determined in Stage One that the Alstom's hypothesized FDI in Israel commands arguments of substance in its favor, we proceeded to

the Stage Two analysis, in which we began with a deeper look at strategic advantage from the IBT perspective, particularly as to the specific provisions of relevant Free Trade Agreements (FTAs) and Bilateral Trade Agreements (BITs) among states relevant to the FDI. We discovered that the EU had superseded the 1983 France-Israel BIT with an EU-Israel Trade Association Agreement, and that latter agreement has already led to litigation in the European Court of Justice, *Brita GmbH v. Hauptzollamt Hamburg-Hafen*,³⁵³ in which the ECJ confirmed that products originating in the Occupied Territories are excluded from the benefits of the Agreement. While this ECJ ruling does not necessarily portend retorsion by Israel through heightened tariffs of EU-originated equipment (such as Alstom's wind turbines), the dispute around the legitimacy of Israel's commercial and development activities in the Occupied Territories poses potential complications for an FDI site in any of those lands. Thus, we observed that the Alstom's newly-established production facility in Texas may permit Alstom to build its turbines for a Golan Heights FDI in the United States, and thereby allow Alstom to enjoy the advantages of the U.S.-Israel FTA while simultaneously opening a path to ensure importation of Alstom's wind turbines into Israel without ensnarement in escalating EU rhetoric, or in trade-related actions and rulings, designed to discourage Israel's continued exercise of sovereignty over the Occupied Territories.

Navigating the trade-agreement landscape may prove, however, the least of Alstom's problems with legal risk. We identified additional—and significant—legal risks using the analytic paradigms studied in International Civil Litigation. These paradigms enhanced our understanding of the deeper-seated legal and political risks involved in a proposed FDI, which include the nature and scope of litigation filed against MNEs over FDI-related issues. Municipal human-rights laws of various jurisdictions provide a potentially potent source of legal risk. Accordingly, Stage Two next penetrated deeply into various municipal legal systems whose laws may come into play in a variety of ways—e.g., because of the MNE's home state affiliation, the diplomatic relations and international political situation of the host state, and the connection of an FDI project to other states. Thus, we examined recent litigation against Alstom in the courts of Nanterre Province, France, challenging as a violation of international law its FDI in the Jerusalem Light Railway;³⁵⁴ against another company's Occupied-Territory investment filed in the

³⁵³ *Brita Case*, *supra* note 169.

³⁵⁴ *August & Dehouzy*, *supra* note 190.

courts of Québec Province in Canada, *Bil'In (Village Council) & Yassin v. Green Park International Inc.*;³⁵⁵ and against Caterpillar, Inc. in the United States federal courts for the death of an activist protesting Israel's razing of Palestinian residences to make way for Israeli homes, in a highly-publicized case, *Corrie v. Caterpillar, Inc.*,³⁵⁶ filed under the Alien Tort Statute³⁵⁷ by the parents of the activist. Because of the escalation of federal court litigation against MNEs under the Alien Tort Statute, we devoted special and extended attention on the developing case-law in the area, culminating in a Circuit Court case currently before the U.S. Supreme Court, *Kiobel v. Royal Dutch Petroleum*,³⁵⁸ which has the potential either to solidify some 32 years of judicial precedent expanding the scope of the Alien Tort Statute—or effectively to end Alien Tort Statute suits against most MNEs either on the ground that corporations are not juridical persons under the statute or that the statute does not reach MNE conduct that occurs outside of U.S. territory. In any event, the risks of Alien Tort Statute litigation against MNEs such as Alstom remains, for now, real and palpable; and pending cases such as *Sarei v. Rio Tinto, PLC*³⁵⁹—brought by citizens of Papua, New Guinea against an Anglo-Australian mining company alleged to have committed human rights violations occurring entirely in New Guinea—demonstrate the risks for Alstom and strongly suggest that MNEs need to become involved in the legislative, as well as judicial, processes which are reconsidering the ATS's scope if MNEs hope to see the extraterritorial application of this statute trimmed.

Finally, we examined the risks that the political situations in Syria and Iran pose to Alstom's FDI in Israel. With the potential for damage to, or destruction of, a Golan Heights FDI should the Syrian conflict widen, or in the event Israel launches a preemptive strike against Iran's nuclear fuel enrichment facilities, we examined the concept of political risk insurance. In reviewing the paradigms of political risk insurance for FDIs available

³⁵⁵ *Bil'In*, *supra* note 195.

³⁵⁶ 503 F.3d 974, 979 n.5 (9th Cir. 2007). *See supra* notes 249–257 and accompanying text.

³⁵⁷ 28 U.S.C. § 1350. *See supra* notes 215–248 and accompanying text.

³⁵⁸ 621 F.3d 111 (2d Cir. 2010), *reh'g denied* (with concurring opinion filed by Chief Judge Jacobs), 642 F.3d 468 (2d Cir. 2011), *reh'g en banc denied* (with concurring opinion filed by Chief Judge Jacobs and dissenting opinions by Judges Lynch and Katzmann), 642 F.3d 379 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 248 (Sept. 3, 2011), *cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011), argued Feb. 27, 2012 and set for reargument and supplemental briefing during October Term 2012, *see* Order List for 565 U.S., Case 10-1491, issued March 5, 2012, available from link at <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al/>. *See supra* notes 258–283 and accompanying text.

³⁵⁹ 671 F.3d 736 (9th Cir. 2011) (*en banc*), *petition for cert. filed*, 80 USLW 3335 (Nov 23, 2011) (NO. 11-649). *See supra* notes 258–260 and accompanying text.

under the international MIGA program, national programs such as OPIC and COFACE, and private insurance markets, we examined their various strengths and weaknesses in detail, and noted critical issues that Alstom would have to address both in negotiating for such coverage as well as in making the economic decision whether the Golan Heights project was worth the cost of adequate political risk insurance.³⁶⁰

The point in discussing the many FDI issues and actors that we have covered is not to reach a specific conclusion or to counsel a particular outcome. Particularly since the FDI itself is hypothetical only, deciding whether Alstom should undertake it, and if so, how it should be structured, is unnecessary for our purposes. Rather, the point is the intellectual journey itself that we made through these issues, and the rich array of resources that we have located, organized, and made available throughout the copious footnotes in this article, which will well serve future FDI analyses. As Jean-Yves Tadie said of Marcel Proust's *In Search of Lost Time* (*À la Recherche du Temps Perdu*), the "ability to fashion a general interpretation from ostensibly ephemeral events and characters is precisely what makes these events and characters free of any apparent staleness," because "we are able to slip into Proust's world and can apply his analyses to the company we find ourselves in or the situations we face."³⁶¹ So, too, are we able to slip into Alstom's world created by this hypothesized FDI; and once there, we can apply the analytic paradigms developed in this article to businesses we find ourselves advising, and to the FDI decisions they must make.

³⁶⁰ See *supra* notes 284-353 and accompanying text.

³⁶¹ Jean-Yves Tadie, *Introduction*, in 1 MARCEL PROUST, *IN SEARCH OF LOST TIME* (Swann's Way) xii (C.K. Scott Moncrieff & Terence Kilmartin, trans., Folio Society 2000).