Trading Up: Is Section 337 the New ATS?

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ABSTRACT: There is a crisis in international human rights law. In a series of cases, the Supreme Court has drastically reduced the Alien Tort Statute's ("ATS") utility as a vehicle for transnational justice, effectively ending a remarkable four-decade string of human rights litigation under the statute. Since 1980, private plaintiffs have filed hundreds of ATS suits in federal courts seeking to hold a rogue's gallery of international despots, torturers, mass murderers, and their corporate accomplices accountable for violations of international law. But ATS suits proved controversial. The Court's hamstringing of the ATS was driven largely by concerns over assertions of extraterritorial jurisdiction by private parties that might embroil the United States in sensitive foreign policy disputes.

As internationally minded social justice activists and scholars mourn the ATS's demise, they are avidly seeking a replacement. Many increasingly look to state law and state courts as a vehicle for transnational redress. Yet, state law is even more problematic than the ATS as a vehicle for asserting extraterritorial jurisdiction.

There is a better option, at least for corporate misconduct, which accounts for the vast majority of the ATS suits. Long overlooked as a remedial tool for extraterritorial violations, section 337 unfair competition actions in the International Trade Commission ("ITC") are well-suited to hold corporations accountable for supply chain abuses. Under section 337 the ITC has the power to block the importation of goods produced abroad using a broad range of unfair methods and practices. Section 337 is also better positioned than state law remedies to withstand the criticisms that felled the ATS. Its use of in rem jurisdiction and focus on imports avoids the extraterritorial concerns

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raised by the ATS and other judicial remedies. In addition, the ITC offers an underappreciated hybrid model of private and public enforcement, which mitigates concerns that its decisions will undermine U.S. foreign policy.

Expanded use of section 337 to address misconduct abroad may be particularly attractive to American policymakers in our current circumstances. A new presidential administration is struggling to address unfair trade practices that harm domestic industries and workers while avoiding the damaging economic fall-out from the Trump trade wars. The ITC presents a ready-made tool to level the playing field for American industries, helping our economy recover from the current economic crisis while advancing human rights and environmental justice.

I. INTRODUCTION

The Supreme Court's decision in *Nestlé USA, Inc. v. Doe*[1] marks the Court's fourth exercise of appellate review over the Alien Tort Statute[2] ("ATS") in 15 years. The Court has significantly curtailed the ATS's scope in each of its three prior rulings, starting with *Sosa v. Alvarez-Machain*[3] (2004) and continuing with *Kiobel v. Royal Dutch Petroleum* (2013)[4] and *Jesner v. Arab Bank* (2018).[5]

The Court's interventions have drastically reduced the ATS's utility as a vehicle for transnational justice.[6] The end of a remarkable four-decade string of human rights litigation may have arrived.[7] Since 1980, private plaintiffs

1. *See generally* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (exercising appellate review over the Alien Tort Statute).

2. The Alien Tort Statute confers federal jurisdiction over claims brought "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2018).

3. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712–14, 719–20 (2004).

4. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115–17, 123–25 (2013).

5. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397–99, 1400, 1403–07 (2018).

6. *See* William J. Aceves, Nestlé *&* Cargill v. Doe *Series: Judicial Activism, Corporate Exceptionalism, and the Puzzlement of* Nestlé v. Doe, JUST SEC. (Dec. 11, 2020), https://www.justsecurity.org/73794/nestle-cargill-v-doe-series-judicial-activism-corporate-exceptionalism-and-the-puzzlement-of-nestle-v-doe [https://perma.cc/2LUV-6JG5] (summarizing the narrowing effect of prior rulings); William S. Dodge, *The Surprisingly Broad Implications of* Nestlé USA, Inc. v. Doe *for Human Rights Litigation and Extraterritoriality*, JUST SEC. (June 18, 2021), https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality [https://perma.cc/JRR7-W36P] (describing limiting effects of *Nestlé USA, Inc. v. Doe*). An earlier 1989 ruling in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), also fits this pattern; it limited the scope of ATS suits by holding them subject to the Foreign Sovereign Immunities Act. *See id.* at 438, 443.

7. *See* Pierre-Hugues Verdier & Paul B. Stephan, *International Human Rights and Multinational Corporations: An FCPA Approach*, 101 B.U. L. REV. 1359, 1374 (2021) ("[E]nforcement of international human rights law against corporations [under the ATS] has come to an end."); Roger P. Alford, *The Future of Human Rights Litigation After* Kiobel, 89 NOTRE DAME L. REV. 1749, 1754 (2014) (*Kiobel* "foreclose[s] the vast majority of ATS cases."); Rebecca J. Hamilton, Case Note, Jesner v. Arab Bank, *138 S. Ct. 1386*, 112 AM. J. INT'L L. 720, 720 (2018) ("The exclusion of transnational human rights litigation from U.S. federal courts is, for most practical purposes, now complete.").

have filed hundreds of ATS suits in U.S. federal court seeking to hold a rogue's gallery of international despots, torturers, mass murderers, and their corporate accomplices accountable for violations of international law.[8] The ATS litigation yielded multimillion-dollar judgments and settlements.[9] It galvanized a generation of international law scholars and human rights activists and stirred hopes for a new era of global justice.[10] At the same time, the ATS suits provoked intense controversy and raised deep questions regarding international law's interface with the U.S. legal system.[11] A rising tide of critical commentary culminated in the Supreme Court's intervention.[12]

The Court's hamstringing of the ATS was driven largely by concerns over extraterritoriality and separation of powers.[13] The private nature of ATS suits provided an additional impetus: The Court worried that private plaintiffs would embroil the United States in sensitive foreign policy disputes, whose resolution through adversarial proceedings might not accord with the public interest.[14]

As internationally minded social justice activists and scholars mourn the ATS's demise, they are avidly seeking a replacement. Many increasingly look to state law and state courts as a vehicle for transnational redress.[15] Yet, state law is even more problematic than the ATS as a vehicle for asserting extraterritorial jurisdiction over overseas misconduct. Many of the Supreme Court's concerns over the ATS would apply with added force to state litigation,[16] as well as a host of new ones largely related to foreign-relations federalism.[17]

There is a better option, at least for corporate misconduct, which accounts for the vast majority of the erstwhile ATS suits.[18] Long overlooked as a remedial tool for extraterritorial violations, section 337 unfair competition actions in the International Trade Commission ("ITC") are well-suited to hold

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8. *See generally* Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467 (2014) (describing the history of the Alien Tort Statute).

9. *See id.* at 1512–13; *see also id.* at 1517 (noting "a handful of [World War II ATS] cases settled for billions of dollars").

10. *See, e.g.*, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991) (comparing *Filártiga*, the first ATS case of the modern era, to *Brown v. Board of Education*); Charles W. Brower II, Note, *Calling All NGOs: A Discussion of the Continuing Vitality of the Alien Tort Statute as a Tool in the Fight for International Human Rights in the Wake of* Sosa v. Alvarez-Machain, 26 WHITTIER L. REV. 929, 949 (2005) (calling the ATS litigation "by far, the most effective means of accomplishing long-term progress" in human rights).

11. Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 712–15 (2012).

12. *See* Stephens, *supra* note 8, at 1521–22, 1536–41.

13. *See infra* notes 144–58 and accompanying text.

14. *See infra* notes 124–39, 159–64 and accompanying text.

15. *See* Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397, 400 & n.11 (2018) (describing "[t]he turn to state remedies" and summarizing literature).

16. *See infra* notes 185–207 and accompanying text.

17. *See infra* notes 197–211 and accompanying text.

18. *See infra* notes 97–99 and accompanying text.

corporations accountable for a wide array of foreign misdeeds.[19] Section 337 of the 1930 Trade Act not only offers a superior means of supplying global accountability compared to state law, it is also better positioned to withstand the criticisms that felled the ATS.[20] Section 337's model of administrative enforcement represents an underappreciated hybrid mechanism that combines the virtues of both private and public enforcement.[21] As such, it offers a model for extraterritorial adjudication whose potential extends beyond the ATS context.

Expanded use of section 337 to address misconduct abroad may be particularly attractive to American policymakers given our current circumstances. A new presidential administration is struggling with how to address unfair practices by foreign competitors that harm domestic industries and workers, while avoiding the damaging economic fall-out from the Trump trade wars.[22] Born in the Great Depression,[23] section 337 is the right tool at the right time to level the playing field for American industries, helping our economy recover from the current economic crisis while advancing human rights and environmental justice.

The remainder of this Article proceeds as follows: Part II examines the challenges of ensuring global accountability for violations of human rights, labor standards, and environmental justice. It explains how violations of global standards are driven by both authoritarian regimes and commercial actors seeking competitive cost-savings and observes that international governance mechanisms have had limited success holding such actors accountable. Part III then turns to U.S. mechanisms for regulating overseas misconduct, including the rise and fall of the ATS, and other potential state and federal judicial remedies. After analyzing the limits of these different approaches, Part IV argues that section 337 actions in the ITC provide a better alternative. Section 337 leverages private and public resources to block the importation of goods produced abroad using a wide range of unfair methods and practices. It avoids the extraterritorial concerns raised by the ATS and other judicial remedies, can address many of the commercial abuses previously

19. Sean A. Pager & Eric Priest, *Redeeming Globalization Through Unfair Competition Law*, 41 CARDOZO L. REV. 2435, 2474 (2020).

20. *See infra* notes 194–206 and accompanying text.

21. *See infra* notes 211–14 and accompanying text.

22. *See* Stan Anderson & William N. Walker, *Opinion: Trump's Reckless Tariffs Remain Intact. Biden's Failure to Reverse Them Has Real Consequences.*, WASH. POST (May 24, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/2021/05/24/why-is-biden-so-slow-reverse-trumps-trade-policies [https://perma.cc/GN4U-RSHW].

23. Section 337 formed part of the notorious 1930 Smoot-Hawley Tariff Act, whose tariff hikes are widely blamed by for triggering a series of "beggar-thy-neighbour" retaliations that exacerbated the Great Depression and encouraged the rise of fascism in Europe. *See Smoot-Hawley Tariff Act*, BRITANNICA, https://www.britannica.com/topic/Smoot-Hawley-Tariff-Act [https://perma.cc/S95E-JMQ5]. Much of section 337's operative language derived from the earlier 1922 Tariff Act, including the unfair competition standard on which this Article focuses. The 1922 Act, in turn, adapted its unfair competition standard from the Federal Trade Commission Act. *See* TianRui Grp. Co. v. Int'l Trade Comm'n, 661 F.3d 1322, 1330–31 (Fed. Cir. 2011).

subject to ATS suits, and holds added appeal for policymakers seeking to protect domestic industries and workers from unscrupulous competitors. Part V then concludes.

II. GLOBAL ACCOUNTABILITY & ITS DISCONTENTS

The twentieth century saw great advances in international law and regulatory governance. Treaties covering human rights, labor law, environmental protection, and other issues of global concern attracted widespread adherence.[24] Across a variety of regulatory domains, the vast majority of the world's countries committed to adhere to specific global minimum standards.[25] International organizations were formed (or reinvigorated) to develop global norms and encourage compliance.[26] On their face, such developments seemed to augur a steady convergence of standards. The reality, however, belies such expectation.

A. ENFORCEMENT FAILURES

Enforcement is the Achilles heel of international law. National sovereigns have proven more willing to sign onto international treaties than to enforce them.[27] Failures to uphold global commitments are pervasive, especially in developing countries.[28] For present purposes, it is helpful to divide such failures into general categories: (1) political violations; and (2) economically inspired violations. They are each subject to distinct dynamics involving different protagonists and diverging ramifications.

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24. *See* Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 231–36 (2004) (describing widespread adherence to international labor and human rights conventions); Andrew Long, *Global Integrationist Multimodality: Global Environmental Governance and Fourth Generation Environmental Law*, 21 J. ENV'T & SUSTAINABILITY L. 169, 180–85 (2015) (same for environmental treaties).

25. Examples of such global standards include the International Covenant on Civil and Political Rights. G.A. Res. 2200 (XXI) A (Dec. 16, 1966); Int'l Lab.Org. [ILO], *Worst Forms of Child Labour Convention* at 1–3, ILO Doc. 182 (June 17, 1999), https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_decl_fs_46_en.pdf [https://perma.cc/8ZGR-G6CV]; Int'l Lab. Org [ILO], *Abolition of Forced Labour Convention*, ILO Doc. 105, 320 U.N.T.S. 291 (June 25, 1957), https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105 [https://perma.cc/3EDC-PP3B]; TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1995); Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243; United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

26. *See* Edward D. Mansfield & Jon C. Pevehouse, *Democratization and International Organizations*, 60 INT'L ORG. 137, 138 (2006).

27. *See* Davis & Whytock, *supra* note 15, at 408 (describing the futility of seeking domestic enforcement). Signing treaties may, in fact, sometimes encourage countries to behave worse than their baseline practices before signing. *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940–41 (2002).

28. *See* Hathaway, *supra* note 27, at 1978; Pager & Priest, *supra* note 19, at 2439.

Political offenses arguably represent the archetypal human rights violation. Such transgressions are typically committed by authoritarian governments acting to suppress perceived political threats. Thuggish regimes unlawfully detain, torture, or even extra-judicially execute their opponents.[29] Such offenses often attract widespread reporting and global condemnation.[30] Committed on a mass scale, rights abuses can spur a multinational response.[31] Yet, in most cases, their systemic effect globally is modest. The targets of political repression, and their underlying dynamics, are typically rooted in the particularities of the national context and their ramifications normally remain cabined within a particular country or region.[32]

In contrast to the global condemnation surrounding authoritarian repression, a much broader set of violations are largely perpetrated out of sight: the economically inspired violations associated with the global supply chain.[33] These present a starkly contrasting profile from civil-political

29. *See* Conway W. Henderson, *Conditions Affecting the Use of Political Repression*, 35 J. CONFLICT RESOL. 120, 121–23 (1991). *See generally* Christian Davenport, *State Repression and Political Order*, 10 ANN. REV. POL. SCI. 1 (2007) (reviewing studies of repressive state actors). War crimes represent a related source of atrocities that fit generally within the "political repression" rubric for present purposes.

30. *See, e.g.*, Marwa Rashad & Mark Hosenball, *Saudi Arabia Sentences Five to Death Over Khashoggi Murder, U.N. Official Decries 'Mockery'*, REUTERS (Dec. 23, 2019, 3:47 AM), https://www.reuters.com/article/us-saudi-khashoggi/saudi-sentences-five-to-death-three-to-jail-over-khashoggi-murder-idUSKBN1YR0SY [https://perma.cc/LV57-HLSL]; Hannah Ellis-Petersen, *Rodrigo Duterte's Drug War Is 'Large-Scale Murdering Enterprise' Says Amnesty*, GUARDIAN (July 8, 2019, 1:16 AM), https://www.theguardian.com/world/2019/jul/08/rodrigo-dutertes-drug-war-is-large-scale-murdering-enterprise-says-amnesty [https://perma.cc/YKJ5-ZW79].

31. *See* Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 L. & CONTEMP. PROBS. 127, 134, 141 (1996).

32. Refugees might spill across the borders to neighboring states, as may opposition fighters. In some cases, patron states from further afield get pulled in. One may also legitimately worry that the example set by authoritarian repression will trigger imitation and create a perceived license to flout global norms. Even so, such spillover effects arguably pale in comparison to the systemic ramifications of economically inspired violations globally. *See* discussion *supra* Section II.A.

33. *See* ERIK LOOMIS, OUT OF SIGHT: THE LONG AND DISTURBING STORY OF CORPORATIONS OUTSOURCING CATASTROPHE 13–14 (2015). For example, the International Labour Organization estimated in 2016 that 73 million children were illegally engaged in hazardous work that directly threatens their welfare—representing almost 1 in 20 children globally. INT'L LAB. ORG., GLOBAL ESTIMATES OF CHILD LABOUR: RESULTS AND TRENDS, 2012-2016, at 5, 11 (2017), https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575499.pdf [https://perma.cc/QYM7-5VHA]. The number of forced laborers worldwide was pegged at 25 million. INT'L LAB. ORG. & WALK FREE FOUND., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 5 (2017), https://www.ilo.org/wcmsp5/groups/public/—dgreports/dcomm/documents/publication/wcms_575479.pdf [https://perma.cc/T68V-GFN3]. These statistics only capture two of the most egregious forms of labor abuses covered by the ILO's eight "Fundamental Conventions." *See Conventions and Recommendations*, INT'L LAB. ORG., https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang—en/index.htm [https://perma.cc/K7G9-Q9FA]. The scope and distribution of labor violations are pervasive. The same is true for environmental violations: illegal fishing, mining, toxic waste dumping, habitat destruction—the offenses span a dizzying gamut. *See*

transgressions: The main protagonists are commercial actors. Their motivation is typically cost savings, rather than regime preservation.[34] Moreover, the violations encompass a more diverse array of legal norms[35] and frequently engender systemic repercussions globally.[36]

Because economic production is enmeshed with transnational markets, the dynamics driving these violations play out on a global scale. The shift in global economic production to lower-cost suppliers in developing countries in recent decades has exploited the laxer regulatory climate typically prevailing in such jurisdictions.[37] Producers there can abuse workers, pollute the environment, and violate human rights, all while pocketing the cost savings such regulatory corner-cutting afforded.[38] National and local governments willingly turned a blind eye to such violations in order to attract foreign investment, create jobs, and promote economic growth.[39]

The systemic costs extend far beyond the direct victims. The highly mobile nature of global manufacturing pits competing source producers against one another in a globally competitive market. Accordingly, the cost savings achieved by regulatory shortcuts generate ripple effects across global markets encouraging a global race-to-the-bottom.[40] Rapacious resource extraction

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Environmental Crime, INTERPOL, https://www.interpol.int/Crimes/Environmental-crime [https://perma.cc/C84G-397Y]. Such abuses affect a broad swathe of consumer goods sold in rich world markets from food products to smartphones to diamond engagement rings. *See* Pager & Priest, *supra* note 19, at 2437–38, 2444–47.

34. *See generally* Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 764–69 (2014) (describing how the draconian cost-cutting that multinational firms exact from their global suppliers leads to abuses).

35. Economic producers can and often do achieve cost savings by transgressing a broad spectrum of human rights, labor, environmental norms, as well as intellectual property rights. *See* Mengxin Li, *Clothing Brands' Business Practices Fuel Factory Abuses*, HUM. RTS. WATCH (Apr. 23, 2019, 9:00 PM), https://www.hrw.org/news/2019/04/23/clothing-brands-business-practices-fuel-factory-abuses [https://perma.cc/KP7D-9AQV]; *see also On the Margins of Profit: Rights at Risk in the Global Economy*, HUM. RTS. WATCH (Feb. 18, 2008), https://www.hrw.org/report/2008/02/18/margins-profit/rights-risk-global-economy [https://perma.cc/JT49-XW3D] (documenting a wide range of supply chain abuses implicating a diversity of human rights norms). Some commercial scofflaws engage in multiple violations within a single enterprise: dumping waste, mistreating workers, bribery, piracy, smuggling, etc. *See, e.g.*, Ian Urbina, *'Sea Slaves': The Human Misery that Feeds Pets and Livestock*, N.Y. TIMES (July 27, 2015), https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html [https://perma.cc/QSZ2-XKZ6].

36. *See* James Boeving, *Half Full . . . or Completely Empty?: Environmental Alien Tort Claims Post* Sosa v. Alvarez-Machain, 18 GEO. INT'L ENV'T L. REV. 109, 113–14 (2005) (describing how "decisionmaking in one country often affects the environmental quality in another country" and noting concerns over "race to the bottom" dynamics).

37. *See* Pager & Priest, *supra* note 19, at 2439, 2477.

38. *Id.* at 2444, 2448.

39. *See* Boeving, *supra* note 36, at 113–14.

40. *See id.*; Parella, *supra* note 34, at 757, 790. Multinational companies take advantage of such competition by sourcing short-term production contracts to extract maximum cost savings, often setting prices at levels so low that suppliers are forced to engage in regulatory shortcuts in order to make a profit. *See id.* at 790. In some cases, foreign suppliers explicitly

and plantation agriculture by industrial-scale actors can impoverish local economies, spawn corruption, cause ecological collapse, and exacerbate political conflicts in source countries.[41] Such dynamics undercut the global rule of law, tarnish capitalism and free trade, and contribute to the current backlash against globalization.[42]

B. INTERNATIONAL SOLUTIONS FALL SHORT

International governance mechanisms have proven largely incapable of imposing meaningful accountability for violations of global norms described above. Most international organizations lack meaningful enforcement powers.[43] Moreover, geopolitical and bureaucratic constraints have prevented them from effectively wielding what little authority they possess. Proposals to empower international governance institutions with greater authority to enforce global standards have generally proven non-starters.[44] Attempts to introduce labor

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tout regulatory laxity in their local jurisdiction as a competitive virtue. *See id.* at 761. Multinational companies, in effect, facilitate a form of regulatory arbitrage, sourcing production from the weakest regulatory links. *See id.* at 757, 761, 776. Even well-intentioned firms and regulators often have no choice but to turn a blind eye to abusive practices in order to remain competitive in the global market. *See* Pager & Priest, *supra* note 19, at 2448–49.

41. *See* Boeving, *supra* note 36, at 115; Mark Kernan, *The Economics of Exploitation: Indigenous Peoples and the Impact of Resource Extraction*, COUNTERPUNCH (Aug. 20, 2015), https://www.counterpunch.org/2015/08/20/the-economics-of-exploitation-indigenous-peoples-and-the-impact-of-resource-extraction [https://perma.cc/N6YB-JKFN].

42. *See* Mark Broad, *Why Is Globalisation Under Attack?*, BBC NEWS (Oct. 6, 2016), https://www.bbc.com/news/business-37554634 [https://perma.cc/28N9-EEDH] (citing estimate that "Chinese imports explain 44% of the decline in employment" in U.S. manufacturing from 1990 to 2007); Joseph E. Stiglitz, *Globalization and Its New Discontents*, PROJECT SYNDICATE (Aug. 5, 2016), https://www.project-syndicate.org/commentary/globalization-new-discontents-by-joseph-e—stiglitz-2016-08 [https://perma.cc/KW35-6PBQ] (noting in the United States, "[m]edian income for full-time male workers is actually *lower* in real (inflation-adjusted) terms than it was 42 years ago").

43. Davis & Whytock, *supra* note 15, at 408.

44. Pager & Priest, *supra* note 19, at 2451–52. It is worth noting that the most formidable international accountability mechanisms tend to be reserved for the relatively rare cases when civil-political violations occur on a mass-scale and/or spawn destabilizing geopolitical effects: e.g., genocide, war crimes, and mass-scale refugee migrations. *See* Hun Joon Kim & J.C. Sharman, *Accounts and Accountability: Corruption, Human Rights, and Individual Accountability Norms*, 68 INT'L ORG. 417, 439 (2014); Kritz, *supra* note 31, at 134, 141. Such cases may trigger multilateral interventions such as International Criminal Court indictments, United Nations Special Rapporteurs, or even Security Council Resolutions. *See generally* Mark Pallis, *The Operation of UNHCR's Accountability Mechanisms*, 37 N.Y.U. J. INT'L. L. & POL. 869 (2005) (discussing the accountability mechanisms implemented by an agency of the United Nations in regards to refugee status and refugee camps); *About the Court*, INT'L CRIM. CT., https://www.icccpi.int/about [https://perma.cc/WFT3-TXTN] ("The International Criminal Court (ICC) investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression."); *History*, INT'L CT. JUST., https://www.icj-cij.org/en/history [https://perma.cc/QUP7-49QZ] (explaining the history of the ICJ in answering international legal questions and solving international legal disputes). By contrast, the far more pervasive but lower profile economic violations do not attract such solicitude. *See* Kritz, *supra* note 31, at 134, 141. Enforcement responsibility is instead devolved to national sovereigns in the countries where the violations occur. *See id.* at 134; *see also*

standards to the World Trade Organization ("WTO") in the 1990s, for example, were consistently blocked, and proposals for global economic governance exposed as utopian.[45]

In today's anti-globalist age, renewing such efforts is all but unthinkable. Multilateral institutions are under widespread assault, their existing authority challenged.[46] Any expectation of more effective global mechanisms to enforce human rights, environmental law, and labor standards must be ratcheted down accordingly. With national sovereigns "[un]willing to cede [meaningful] enforcement powers to international [organizations]," the latter have been relegated to a largely hortatory role, coordinating policy statements, gathering statistics, and promulgating best practices.[47]

Reform initiatives aimed at the private sector have proven similarly ineffective.[48] International corporate responsibility codes promulgated with great fanfare by the United Nations and the Organisation for Economic Co-operation and Development ("OECD") have proven similarly toothless. Again, lack of enforcement authority hamstrings such endeavors.[49] Without motivated national sovereigns willing to enforce international commitments on the ground, global governance regimes have little hope of achieving meaningful reforms.

Thus, although multilateral solutions may, in principle, offer the first-best option, they cannot be counted on in the short term. Instead, unilateral initiatives undertaken by individual nation states may offer a viable path forward. While some fear that unilateralism undermines global cooperation,[50] others emphasize that "unilateralism and multilateralism can reinforce one another in a dynamic, productive relationship."[51] The following sections consider

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Eric Posner, *The Case Against Human Rights*, GUARDIAN (Dec. 4, 2014, 1:00 AM), https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights [https://perma.cc/PP2K-XS8F] (highlighting the ineffectiveness of international human rights law enforcement).

45. Pagnattaro, *supra* note 24, at 206–07.

46. *See* Peter S. Goodman, *The Post-World War II Order Is Under Assault from the Powers That Built It*, N.Y. TIMES (Mar. 26, 2018), https://www.nytimes.com/2018/03/26/business/nato-european-union.html [https://perma.cc/HVC8-5LG9]. While the Biden Administration has sought to repair foreign relations, the anti-globalist forces that fueled Trump's rise have hardly disappeared. Moreover, the erratic nature of U.S. politics has itself created further headwinds to U.S. leadership in the form of lingering distrust overseas. *See* Angela Dewan & Luke McGee, *Biden Says 'America Is Back,' but 'America First' Has Haunted His First 100 Days*, CNN (Apr. 28, 2021, 8:19 AM), https://www.cnn.com/2021/04/28/world/biden-100-days-foreign-policy-intl/index.html [https://perma.cc/RU2W-F3FP].

47. Pager & Priest, *supra* note 19, at 2452.

48. Pagnattaro, *supra* note 24, at 208.

49. Pager & Priest, *supra* note 19, at 2457–59.

50. Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 849 (2009).

51. *See* Maggie Gardner, *Channeling Unilateralism*, 56 HARV. INT'L L.J. 297, 299–300 (2015) (explaining that "unilateral acts can help generate international law when multilateral processes fail, promote the internalization of international norms, coerce reluctant states to comply with international commitments, and generate convergence around higher regulatory standards"

the potential for the United States to play a constructive unilateralist role by exercising extraterritorial jurisdiction over foreign misconduct.

C. *Is Extraterritorial Enforcement the Answer?*

If local sovereigns are unwilling or unable to ensure compliance with global norms, and international organizations cannot hold them accountable, could the United States fill the enforcement gap by exercising extraterritorial jurisdiction? The United States is certainly well-positioned to exert such authority. As the world's largest economy, it enjoys abundant leverage over transnational commerce. Many leading companies are based here, and many more wish to access the U.S. market.[52] The United States also features a highly developed legal system with effective enforcement mechanisms to apply its writ, both national and transnationally. A chorus of international scholars have argued that by acting to extraterritorially enforce international law, the United States reinforces the global rule of law and fills a vital need that would otherwise go unmet.[53] Such arguments have particular resonance now at a time when global governance badly needs a reboot.

As noted, until recently the ATS was the primary vehicle for the United States to assert extraterritorial jurisdiction over overseas violations. The next Part reviews the history of ATS litigation and explores some lessons from the experience. It then turns to the search for alternatives rooted in both state and federal law.

III. U.S. Vehicles for Regulating Overseas Misconduct

The saga of ATS litigation has long dominated international discourse on human rights enforcement. Therefore, it is worth reviewing both the promise and limitations of the ATS as a vehicle for transnational redress. ATS litigation inspired in many the hope of a meaningful mechanism to prosecute human rights abuses and provide global accountability. However, criticisms of private extraterritorial suits eventually led the Supreme Court to intervene and curb this burgeoning enterprise. As human rights advocates increasingly look to state law alternatives, the jurisprudential concerns that led to the ATS's demise merit closer exploration.

(footnotes omitted)); *see also* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 164–67 (1998) ("[W]hile judicial unilateralism may create friction in the short run, it is more likely to lead to international cooperation in the end.").

52. *See* Verdier & Stephan, *supra* note 7, at 1362.

53. *See, e.g.*, Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 271 (2006) ("U.S. courts could help provide meaningful regulation of economically harmful behavior. . . . [by] mobiliz[ing] available resources to address a problem that concerns the international community at large." (footnotes omitted)); Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 FOREIGN AFFS. 102, 115 (2000) (arguing that litigation in "effective national courts" such as the U.S. judiciary can offset weaknesses of the international legal regime).

A. THE PROMISE OF ATS LITIGATION

The ATS is a 1789 statute that languished virtually unused for almost two centuries before being pressed into service in the late twentieth century, beginning with the landmark 1980 decision of the Second Circuit Court of Appeals in *Filártiga v. Peña-Irala*.[54] The *Filártiga* decision spurred a decades-long torrent of transnational litigation.[55] Close to 200 cases were filed, netting multimillion-dollar payouts and encompassing many of the landmark world-historical events of the past century.[56] As noted, the statute's practical utility has been curtailed by recent Supreme Court rulings.[57] Yet, Congress could easily resuscitate the statute should it so desire. Moreover, the ATS remains the yardstick against which potential replacements must be measured. Accordingly, it is worth considering the pros and cons of the ATS litigation.

The ATS's appeal rested largely on two features: (1) the breadth of the statute's substantive reach; and (2) the private right of action it extended to a vast array of plaintiffs. In combination, these features held out the enticing prospect of an effective mechanism to enforce international law and advance human rights.

The ATS employs sweeping language that encompasses any "tort . . . committed in violation of the law of nations or a treaty of the United States."[58] Given the evolving, amorphous nature of customary international law, an enormous array of violations could potentially be cognized as actionable offenses. International activists duly sought to test these limits in court. Claims were made against a diverse mix of defendants whose ranks included both famous and powerful names as well as obscure ones.[59] The

54. Filártiga v. Peña-Irala, 630 F.2d 876, 887–88 (2d Cir. 1980); Stephens, *supra* note 8, at 1470 (noting "the ATS had been virtually ignored for almost 200 years"). In *Filártiga*, the Second Circuit held that federal courts had jurisdiction under the ATS to hear a suit between citizens of Paraguay alleging "an act of torture committed by a state official against one held in detention [in] violat[ion of] established norms of the international law of human rights." *Filártiga*, 630 F.2d at 880. The court explained that federal courts applying the ATS "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Id.* at 881.

55. After *Filártiga*, the number of civil actions filed under the ATS alleging human rights violations "skyrocketed." *See* RALPH G. STEINHARDT & ANTHONY D'AMATO, THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY, at vii (1999).

56. *See, e.g.*, Stephens, *supra* note 8, at 1512–17, 1531 (describing ATS claims arising from the Nazi Holocaust, apartheid South Africa, the Srebrenica genocide, and the U.S. war on terror).

57. *See supra* notes 3–7.

58. 28 U.S.C. § 1350 (2018).

59. *See, e.g.*, Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 461–62 & nn.39–40 (2011) (describing suits against Fortune 500 companies such as Coca-Cola, Walmart, Texaco, Ford, and Yahoo and encompassing "some two-dozen industries in total"); Stephens, *supra* note 8, at 1512–13, 1517, 1527–28, 1531 (describing suits against German and Swiss corporations, Chinese, Israeli, and U.S. officials, a former Filipino dictator, and the leader of the Bosnian Serbian proto-state).

resultant ATS suits spanned a wide gamut, encompassing both civil-political abuses as well as violations committed by commercial actors.[60]

Not only is the substantive reach of the ATS capacious, so is the right of action it confers. The ATS offers relief to any "alien" tortiously injured by a breach of international law. Thus, the entire non-U.S. population of the world could potentially qualify as plaintiffs. And indeed, a diverse array of plaintiffs duly materialized from the proverbial seven corners of the world to file ATS claims in U.S. courthouses.[61]

By furnishing a viable mechanism for private plaintiffs to bring international law claims into U.S. district courts, the ATS offered a long-sought mechanism to render violations of international law justiciable and enforceable.[62] Human rights advocates looked forward to a new era of accountability in which victims around the world could seek relief in a court of law.[63] International law scholars embraced the prospect of the vast new body of precedent that such litigation would generate.[64] Some also argued that the processes of transnational adjudication under the ATS would strengthen the global commitment to international law and reinforce human rights norms abroad.[65]

B. CONTROVERSIAL FEATURES OF ATS LITIGATION

The features that made the ATS enticing to plaintiffs—its sweeping language and capacious right of action—proved anathema to critics.[66] Moreover, the ATS's statutory idiosyncrasies, jurisprudential enigmas, and extraterritorial context exacerbated the controversial nature of the litigation.

To begin with, considerable disagreement surrounded the meaning of the operative phrase "a tort . . . committed in violation of the law of nations or a treaty of the United States."[67] The evolving nature of customary international law and the epistemological subjectivity surrounding the process of identifying such norms led to charges that ATS cases were functioning as

60. *See* Drimmer & Lamoree, *supra* note 59, at 463; Stephens, *supra* note 8, at 1487, 1517–20.

61. Drimmer & Lamoree, *supra* note 59, at 464 (noting "cases have arisen from roughly sixty different countries").

62. *See* Stephens, *supra* note 8, at 1484, *cf. id.* at 1478 (describing pre-ATS obstacles to domestic enforcement of international law, including non-self-executing treaties).

63. *See id.* at 1484, 1489–90; Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 601 (2013) ("[T]he ATS has garnered worldwide attention and has become the main engine for transnational human rights litigation in the United States.").

64. Stephens, *supra* note 8, at 1490.

65. *See* Harold Hongju Koh, Review Essay, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2657–59 (1997) (describing how transnational judicial dialogues serve to internalize international norms).

66. Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 472 (2001) (criticizing ATS's open-ended structure as promoting uncertainty).

67. 28 U.S.C. § 1350 (2018).

vehicles for judicial activism.[68] The murky history surrounding the statute's origins and intended purpose and its long period of desuetude bolstered charges of illegitimacy surrounding the endeavor.[69] Critics attacked the importation of customary law "alien to our political and legal traditions"[70] by "unelected federal judges" that contravened traditional U.S. constitutional principles.[71] Furthermore, the need for federal courts to fashion federal common law based on their interpretation of customary international law made the ATS jurisprudentially problematic in the post-*Erie Railroad Co. v. Tompkins*[72] era, leading to highly technical debates regarding the interface between these realms and the appropriate standards and time frames that would govern key questions.[73]

Second, the ATS's role as a litigation magnet exacerbated the substantive controversies surrounding its meaning. As foreigners flocked to U.S. courthouses, importing disputes arising in distant lands between parties with little or no connection to the United States, critics protested: Why should the United States bear the burden of hearing such cases? Did Congress really intend to clog federal dockets with alien tort claims? Why should the United States act as the world's self-appointed policeman?[74]

Conversely, foreign governments decried such extraterritorial exercise of U.S. jurisdiction as "weaponized litigation designed to discriminate against outsiders."[75] Critics worried that such perceived aggression would invite political

68. *See* David J. Bederman, *International Law Advocacy and Its Discontents*, 2 CHI. J. INT'L L. 475, 479 (2001) ("A consistent theme of attack on international human rights advocacy has been that artful litigators, bolstered by the siren-songs of international law academics, have tricked otherwise sensible federal judges into unduly broadening the scope of the ATS and to throw their usual judicial caution to the winds."); Bradley, *supra* note 66, at 465–68 (criticizing judicial lawmaking in ATS domain as unprincipled and undemocratic).

69. *See* Verdier & Stephan, *supra* note 7, at 1374 (describing "the legal basis for these suits [as] wafer thin"); *cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) (describing "the ATS [as] a 'legal Lohengrin'" that "no one seems to know whence it came," and which, "for over 170 years after its enactment[,] it provided jurisdiction in only one case" (quoting IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d. Cir. 1975))).

70. Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 369 (1997).

71. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 868–74 (1997) (emphasis omitted).

72. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78–80 (1938).

73. *See Sosa*, 542 U.S. at 740–50 (Scalia, J., concurring) (citing scholarship on these questions). Scalia argued that the Court's characterization of the ATS as "a jurisdictional statute creating no new causes of action" precluded federal common law–making authority entirely. *Id.* at 741–43 (quoting *id.* at 724 (majority opinion)).

74. *See* Stephens, *supra* note 8, at 1482.

75. Verdier & Stephan, *supra* note 7, at 1375; *see also* Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1484 (2008) (noting "[f]oreigners are by definition outsiders with no vote and presumably little formal ability to influence" the processes and laws to which they are subjected).

retaliation or obstruction.[76] As a global superpower, such unilateral bullying feeds into a long history of perceived U.S. imperialism that could undercut efforts to solve the underlying problems through more constructive means.[77] Such diplomatic sensitivities were exacerbated "by the . . . perception that the United States is hypocritical when it comes to international human rights law."[78] The antagonism and resistance provoked by extraterritorial meddling could discredit the very norms they purport to advance and thereby reduce the willingness of other countries to undertake internal reforms.[79]

Third, because international law is addressed primarily to state actors, many of the ATS cases raised difficult questions regarding sovereign immunities, political questions, acts of state, and related comity doctrines.[80] As U.S. courts struggled to navigate these uncertainties, criticisms of their institutional and jurisprudential shortcomings mounted.[81] Both ATS critics and U.S. government officials increasingly opposed the litigation on separation of power grounds, arguing that foreign relations should be the exclusive province of the executive.[82]

Finally, the foreign relations repercussions triggered by U.S. courts sitting in judgment of the conduct of foreign officials further heightened the stakes.[83] Several foreign governments filed amicus briefs objecting to ATS litigation.[84] The U.S. government, for its part, increasingly urged that ATS be reined in to avoid roiling tensions further.[85]

The preceding controversies played out differently depending on the type of claim at issue. Political repression cases presented a different mix of concerns than corporate abuse because political repression cases, by their very

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76. Verdier & Stephan, *supra* note 7, at 1377–78; Paul B. Stephan, *A Becoming Modesty —U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 658 (2002).

77. Buxbaum, *supra* note 53, at 304–05.

78. Bradley, *supra* note 66, at 469.

79. Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305, 2343–44 (2004).

80. Bradley, *supra* note 66, at 466–67.

81. *See* Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 181 (providing detailed critique of federal judiciary's institutional deficiencies). Ku & Yoo concluded that:

> In light of these considerations, it seems that the executive branch is superior to the courts for achieving the ATS's statutory purpose. The executive branch has better means for developing information on foreign affairs, has far more tools to bring to bear against violators of human rights or international law, and can display more flexibility in responding to changing international conditions while remaining more accountable politically.

Id. at 198.

82. Bradley, *supra* note 66, at 460, 467–68; Stephens, *supra* note 8, at 1494, 1505, 1530.

83. Bradley, *supra* note 66, at 460–62.

84. Verdier & Stephan, *supra* note 7, at 1376 n.70.

85. *See* Stephens, *supra* note 8, at 1504–05, 1530, 1533.

nature, tend to implicate state action.[86] *Filártiga* itself epitomizes this genre, as the case turned on torture by a Paraguayan police official. Civil-political claims following in *Filártiga*'s mold predominated in the early years of the ATS litigation. The substantive claims often involved violations of clearly established human rights (e.g., torture, genocide, murder).[87] The controversies instead focused on the scope of sovereign immunities, as well as attendant diplomatic repercussions.[88] Moreover, given the frequent absence of a U.S. nexus to either the parties or to the violations, these cases encountered recurring obstacles related to personal jurisdiction. In many cases, plaintiffs relied on "tag" jurisdiction, sometimes under questionable circumstances such as serving foreign officials who were attending the United Nations.[89] For similar reasons, enforcing judgments proved equally problematic.[90] This begged the question of whether the value of achieving such symbolic victories outweighed the costs.[91]

By contrast, the corporate cases often involved defendants with clear ties to the United States, making jurisdiction and enforceable remedies less problematic. While such jurisdictional barriers remain significant, and indeed have intensified with recent Supreme Court rulings,[92] the focus of controversy in corporate cases lay elsewhere. Indeed, the very legitimacy of holding corporations accountable under international law was itself contested.[93]

Even if one accepts that corporations can be subject to international law, the corporate claim cases present further complications. As private actors, the direct liability of corporations is largely limited to a narrow set of *jus cogens* norms that govern private actors; among these, forced labor claims figured prominently as ATS claims.[94] By contrast, other international labor norms and most international environmental law is typically not binding on private entities

86. The few exceptions typically involved quasi-political entities whose state status remained unrecognized. *See, e.g.*, *id.* at 1517 (discussing *Kadic v. Kazadzic*, 70 F.3d 232 (2d Cir. 1995), which addressed the genocide perpetrated by the Bosnian Serb proto-state).

87. *See id.* at 1487.

88. Bradley, *supra* note 66, at 460–62.

89. *See id.* at 469–70; *see also* Stephan, *supra* note 76, at 632.

90. *See* Stephens, *supra* note 8, at 1487 (noting none of the seven plaintiffs awarded judgments in the early period were able to collect); *see also* Bradley, *supra* note 66, at 459 (same).

91. *Compare* Stephens, *supra* note 8, at 1489–90 (providing a positive assessment), *with* Bradley, *supra* note 66, at 460, 473 (providing a negative view).

92. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 929 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 885–87 (2011); Bristol-Myers Squibb Co. v. Superior Ct. of Cal., S.F. Cnty., 137 S. Ct. 1773, 1781–83 (2017); Daimler AG v. Bauman, 571 U.S. 117, 139, 142 (2014).

93. See Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 376–89 (2011).

94. Pagnattaro, *supra* note 24, at 214–18, 227–28.

such as corporations, and thus could not supply the basis for an ATS claim absent state action. These are addressed to governments alone.[95]

To bring other ATS claims, plaintiffs sought to hold corporate actors responsible for state-sanctioned violations.[96] Such strategies raised complex and controversial questions regarding the extent to which corporations could be held directly or indirectly liable for the misdeeds of others.[97] Moreover, on a political level, the tactical necessity of tying corporate actions to government misconduct transformed private claims into public litigation, magnifying concerns over potential diplomatic repercussions.[98]

Corporate cases comprised a "second wave" of ATS claims, but they quickly grew to predominate.[99] While claims in the 1990s targeted European firms allegedly complicit in World War II abuses, a 1996 case against Unocal for contemporary labor abuses in Burma brought the ATS corporate campaign into the modern era.[100] Unocal was accused of aiding and abetting the use of slave labor in the construction of a petroleum pipeline.[101] The case settled after a Ninth Circuit ruling allowed the ATS claim to go forward.[102] Dozens of corporate ATS claims followed within a decade.[103] Business leaders protested the suits as a "legal shakedown" filed for *in terrorem* effect.[104] Critics warned the economic fallout of such rampant litigation could threaten jobs and investment.[105] Critics also accused ATS suits of unfairly penalizing United States-based corporations and thereby encouraging corporate restructuring/offshoring to minimize exposure to U.S. law.[106] Conversely, proponents argued

95. *Cf. id.* at 226 (noting that international labor law norms typically focus on state actors); Boeving, *supra* note 36, at 122, 135 (noting that most environmental norms are addressed to state actors).

96. *See* Pagnattaro, *supra* note 24, at 228.

97. *See id.* at 228–30; Ku, *supra* note 93, at 366 (discussing the range of issues implicated by secondary liability claims, including choice of law, domestic vs. international, and scienter standards for aiding and abetting, knowledge vs. purpose). Similar controversies attended claims for vicarious liability and negligence lodged against multinational companies operating through subsidiaries and contractors overseas. *See* Pagnattaro, *supra* note 24, at 230.

98. Childress, *supra* note 11, at 734–35.

99. *See* Drimmer & Lamoree, *supra* note 59, at 460.

100. Doe I v. Unocal Corp., 395 F.3d 932, 940 (9th Cir. 2002).

101. *Id.* at 939–42.

102. *Id.* at 962; Doe v. Unocal, HADSELL STORMER RENICK & DAI LLP, https://www.hadsellstormer.com/our-cases/landmark-cases/doe-v-unocal [https://perma.cc/JQU8-A67J].

103. Stephens, *supra* note 8, at 1517–18.

104. *Id.* at 1518–22; Childress, *supra* note 11, at 736–37.

105. Stephens, *supra* note 8, at 1522; Boeving, *supra* note 36, at 145–46.

106. Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2193–97 (2012) (arguing that imposing ATS liability will lead to economically inefficient restructuring to place such activities outside the jurisdictional reach of U.S. courts).

that holding corporations accountable for overseas violations could deter misconduct and improve supply chain governance.[107]

C. PRIVATIZING INTERNATIONAL LAW

As the controversy over ATS litigation mounted, another aspect of the endeavor attracted its own share of debate: namely, the propriety of allowing private individuals to litigate claims rooted in public international law. As "U.S. courts have [emerged as] the venue of choice for [private transnational] suits,"[108] such privatized enforcement raises a set of twin concerns: Should private litigants be allowed to shape public international law in this fashion?[109] And should regulatory policy be delegated to courts in the first place?

1. Advantages of Private Enforcement

There are a number of advantages to private enforcement of legal norms. First, so-called "private attorney[s] general" supplement the resources of public enforcers, who are chronically under-resourced and over-worked.[110] Thus, private rights of action leverage private resources in pursuit of public goods.[111] This may be particularly helpful in the context of human rights abuses abroad, which often go unaddressed by weak or complicit home governments and may not be high priorities for U.S. officials (or may conflict with other foreign policy objectives).

Second, private parties supplement the information of public enforcers and may have better information about certain types of problems.[112] It is

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107. Chimène I. Keitner, *Some Functions of Alien Tort Statute Litigation*, 43 GEO J. INT'L L. 1015, 1016–17 (2012).

108. Slaughter & Bosco, *supra* note 53, at 102.

109. This question is embedded in a broader normative debate over the role of private attorney generals domestically. *See, e.g.*, Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662–63 (2013); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1429–30 (2000). That debate, however, is largely beyond the present scope.

110. *See* Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 850–51, 885–86 (2016) ("Effective enforcement of civil-rights laws depends on private litigation . . . ."); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 218 (1983) ("The conventional theory of the private attorney general stresses that . . . private litigation . . . multipl[ies] the total resources committed to the detection and prosecution of the prohibited behavior."); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 221 (1992) (Congress frequently gives agencies "difficult or even impossible tasks," sets "unrealistic deadlines" for actions, and then "appropriates inadequate resources" for the job.); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 191 ("[T]he enforcement wings of both federal and state environmental agencies are often woefully understaffed and underfunded.").

111. *See, e.g.*, J. I. Case Co. v. Borak, 377 U.S. 426, 430–33 (1964) (finding an implied private right of action in part because the SEC does not have time to investigate all potential violations of the securities laws).

112. Burbank et al., *supra* note 109, at 663–64; Gilles, *supra* note 109, at 1429–30 ("[T]he federal government routinely looks to private citizens or entities to aid in the enforcement of

impossible for public enforcers to monitor and detect every potential violation of law.[113] This is particularly true in foreign countries with weak states far from the metropolitan centers of the global economy and international institutions. In many cases, private parties have far more detailed and immediate information about overseas abuses that might be addressed through the legal system.[114]

Third, private parties may bring enforcement actions when government officials would not because of political constraints, diplomatic concerns, or bureaucratic ossification.[115] When international regulatory mechanisms fail, advocates argue that "plaintiffs should be [free] to . . . bypass[] the uncertainty of political negotiations and compensat[e] for the weakness of international tribunals by turning to effective national courts."[116] Defenders of the ATS and transnational litigation argue that private suits often supply "the scalpel needed to cut through the tangled web of money and politics and lay bare the moral and social dimensions of global wrongdoing."[117] They insist "that human rights are ultimately too important to be left to the unscrutinized domain of governments and government officials."[118]

Private litigation of international law questions also offers systemic benefits that extend beyond the immediate parties including generating valuable precedent,[119] reinforcing international law,[120] and propagating compliance norms.[121] Finally, several scholars note that private litigation can also spur

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laws, often on the theory that the most likely initial source of information about wrongdoing is the citizenry, whose millions of 'eyes on the ground' see far more than federal investigators ever could.").

113. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969) (finding "[t]he Attorney General has a limited staff and often might be unable to uncover quickly" every new violation of law).

114. For example, workers and other injured parties will likely be the first to know of violations of labor rights, workplace health and safety concerns, or environmental abuses. Non-governmental organizations ("NGOs") have extensive reporting networks that can capture such data and leverage it through private litigation. Commercial actors also acquire firsthand knowledge of supply chain improprieties through their own compliance efforts that they can leverage in suits against less scrupulous competitors.

115. *See* Burbank et al., *supra* note 109, at 664–65 (noting tendency of public regulators to under-enforce due to capture or ideological preferences); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1226, 1298 (1982) (discussing capture and diseconomies of scale).

116. Slaughter & Bosco, *supra* note 53, at 115.

117. *Id.* at 112.

118. Beth Stephens, *Individual Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 435 (2002); *see also* Paul D. Carrington, *Qui Tam: Is False Claims Law a Model for International Law?*, 2012 U. CHI. LEGAL F. 27, 33 (stressing utility of private claims since "business regulators may themselves be corrupt").

119. *See supra* notes 64–65 and accompanying text.

120. Koh, *supra* note 65, at 2357–59; Childress, *supra* note 11, at 726–27.

121. Chimène I. Keitner, *Response: Optimizing Liability for Extraterritoriality Torts: A Response to Professor Sykes*, 100 GEO. L.J. 2211, 2214 (2012) (describing how liability rulings in transnational cases "exert a compliance pull" that promotes corporate social responsibility norms "beyond the

productive public law responses. The publicity triggered by transnational litigation can put substantive issues on the agenda for political resolution and trigger spillover effects that lead to enduring, widespread reforms.[122] Private lawsuits can thus spur multilateral solutions that advance public law.[123] In sum, private enforcement of international legal norms supplements the financial and information resources of public enforcers, mitigates political constraints on government action, and contributes to the evolution of international law in socially useful directions.

2. Criticism of Private Enforcement of International Law

Privatized enforcement is not without its downsides. Private parties may use litigation for socially unproductive ends.[124] More generally, private enforcement shifts control over regulatory policy from politically accountable public officials and institutions to politically unaccountable private litigants and unelected federal judges. In the process, private enforcement may upset carefully calibrated public enforcement policies and aggravate international relations.[125] Indeed, for traditionalists, the very idea of privatizing "international law has the whiff of an unpleasant oxymoron, implying a role for individuals in a legal system in which . . . only sovereign states are legitimate players."[126]

framework of formal adjudication"); Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 118 (2009) (describing "the transnational shadow of the law" that such rulings cast in influencing actors outside the litigation process).

122. *See* Slaughter & Bosco, *supra* note 53, at 106–08.

123. *See* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 164–67 (1998). "[J]udicial unilateralism may create friction in the short run, [but] it is more likely to lead to international cooperation in the end." *Id.* at 164.

124. Private suits efforts may be duplicative and wasteful or lead to over-deterrence. Private motivations may lead to skewed enforcement and opportunistic behavior. Private parties may also bring cases establishing bad precedents that a public enforcer with an eye towards developing the law would not. Even worse, private plaintiffs may bring "strike suits"—non-meritorious cases brought in the hopes that the defendant will settle rather than face the cost and bad publicity of protracted litigation. *See* Burbank et al., *supra* note 109, at 671 ("[P]rosecuted litigation is guided by private (often economic) interests that may be in conflict with the public interest."); Stewart & Sunstein, *supra* note 115, at 1297; Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 961, 970–71 (1994).

125. *See* David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 630–41 (2013); Grundfest, *supra* note 124, at 968–71; Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 569–82 (2016); Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1, 7–10 (1996); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 119 VA. L. REV. 93, 95 (2005).

126. Stephens, *supra* note 118, at 433. Stephens marshals evidence debunking this claim, tracing a long history of private enforcement, and arguing the notion that international law is exclusively the preserve of national sovereigns is a fairly recent conceit. *Id.* at 445–63.

Critics charge that private lawsuits "distort the structure of international law and . . . undermine the measured progress of foreign relations."[127] Such suits

> shift[] responsibility for official condemnation and sanction of foreign governments away from elected political officials to private plaintiffs and their representatives. . . . These actors, however, have neither the expertise nor the constitutional authority to determine US foreign policy. Nor, unlike our elected officials, will these actors have the incentive to weigh the benefits of this litigation against its foreign relations costs.[128]

Critics warn that private litigation frames issues narrowly in ways that miss the bigger picture.[129] They worry that private suits will disrupt negotiations through political channels and warn that "[r]ulings by U.S. courts cannot substitute for the hard work of reaching consensus within foreign states on respect for human rights and responsible development."[130] Indeed, the effect of such suits may be precisely the opposite: antagonizing trade partners, undermining international cooperation, and provoking obstruction and retaliation.[131] Moreover, setting foreign policy through private litigation raises acute separation of power concerns: It risks "the Judiciary . . . erroneously adopt[ing] an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."[132]

Finally, private enforcement is decentralized in ways that impede the implementation of consistent and coherent policy. Thousands of "private attorneys general" may file uncoordinated suits in district courts spread across the country, resulting in inconsistent opinions in similar cases.[133] As a result, potential defendants may face different legal requirements in different parts of the country.[134] Public enforcement also struggles with consistency across the federal judiciary. But public enforcers can facilitate more uniform enforcement through centralized control over decisions to institute enforcement actions. In addition, in the context of foreign affairs, we generally expect that

127. *Id.* at 434; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) (voicing concern over the "collateral consequences of making international rules privately actionable").

128. Bradley, *supra* note 66, at 460.

129. *See* Parrish, *supra* note 75, at 1461–62, 1489 n.179, 1489–90.

130. Slaughter & Bosco, *supra* note 53, at 111.

131. Parrish, *supra* note 75, at 1491–92.

132. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013) .

133. Burbank et al., *supra* note 109, at 678; Stewart & Sunstein, *supra* note 115, at 1292–93.

134. Pierce, *supra* note 125, at 8–9 ("The many inconsistent judicial opinions purporting to define 'owner or operator,' as that term is used in [the Comprehensive Environmental Response, Compensation, and Liability Act, to] illustrate the problems that are potentially created by private rights of action. The judicial opinions are massively inconsistent and incoherent.").

"[d]ecisions . . . [that] touch on foreign relations . . . [should] be made with one voice."[135]

Misgivings over private enforcement in the international realm are magnified by the concerns over the institutional shortcomings of courts in this domain.[136] Skeptics cast doubt on the ability of federal judges to navigate the complexities of international law doctrines.[137] They warn that judges are easily misled by "artful litigators, bolstered by the siren-songs of international law academics."[138] Critics complain further that litigation "create[s] piecemeal solutions to global problems," that can "lead[] to inconsistent [rulings]" and "encourage overregulation."[139]

In sum, critics charge that private enforcement of international law is politically unaccountable, potentially wasteful, and risks creating an inconsistent and unstable foreign policy driven by private parties and judicial preferences rather than the elected representatives of sovereign states.

D. THE SUPREME COURT ACTS TO LIMIT ATS SUITS

The debate over the merits of ATS litigation and private enforcement of international law generally found its way into the courts. The resulting litigation ended with the Supreme Court decisively curbing the scope for future ATS claims. As noted, this pruning occurred in four stages. However, some common themes ran throughout the Court's rulings, many of which reprised criticisms made in the scholarly debate; these were: (1) antipathy to the United States' role as a global litigation magnet; (2) misgivings over extraterritorial meddling; (3) separation of power concerns; and (4) a desire to rein in private transnational suits with public-law ramifications.

1. The United States as a Litigation Magnet

Discomfort over the United States' role as a litigation magnet predated the ATS litigation. In *Morrison v. National Australia Bank*, for example, Justice

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135. Arizona v. United States, 567 U.S. 387, 409 (2012).

136. John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT'L & COMPAR. L. REV 747, 764, 770–73 (arguing "that American foreign policy itself will be ill-served by judicializ[ation]").

137. *See* Ku, *supra* note 93, at 390 ("When entertaining ATS claims, U.S. courts will typically cite other U.S. court opinions for statements about the content of international law[,] . . . [e]xpos[ing] courts to a cascade of missed issues and errors that can compound over time because courts continue to cite only each other."); Bradley, *supra* note 66, at 467 (noting "federal courts generally lack both the institutional resources and the democratic authority" to resolve the complex issues raised by transnational public law litigation).

138. *See* Bederman, *supra* note 68, at 479; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 749–50 (Scalia, J., concurring) (criticizing "internationalist law professors and human rights advocates" who redefined the law of nations "to mean the consensus of states on *any* subject," as determined by those same self-serving advocates).

139. Parrish, *supra* note 75, at 1489–90; *see also* Geoffrey Sant, *So Banks Are Terrorists Now?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533, 573 (2013) (noting how private enforcement of the Anti-Terrorism Act risks overdeterrence).

Scalia noted fears that the United States "has become the Shangri-La of class-action litigation."[140] The broad right of action conferred on non-U.S. nationals made the ATS a natural lightning rod for such concerns. That some of the parties filing ATS suits were seen as hostile to U.S. interests only added fuel to the fire.[141] In *Kiobel*, the second ATS case to reach the Court, Justice Roberts expressed doubt "that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms."[142] Echoing rhetoric expressed elsewhere regarding "legal imperialism," the Court also suggests it would be presumptuous for "any nation, meek or mighty" to undertake this role.[143]

2. Extraterritorial Meddling

Such expression of humility ties in to the second theme—concerns over extraterritorial meddling—which features prominently in all four Supreme Court decisions. *Sosa* warns that aggressive interventions under the ATS "would raise risks of adverse foreign policy consequences."[144] It quoted a Federal Circuit concurrence by Judge Bork expressing misgivings over "requir[ing] 'our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens.'"[145] Such concerns led the *Sosa* Court to construe the ATS narrowly to only reach "violations of international law . . . norm[s] that [are] specific, universal, and obligatory."[146]

Kiobel responds to these concerns by formally invoking the presumption against extraterritorial application of federal law to restrict ATS cases to violations involving factual circumstances that "touch and concern" U.S territory.[147] The Court notes that "[t]his presumption 'serves to protect against

140. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 270 (2010); *see also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 (1981) (expressing concern that foreign plaintiffs flocking to U.S. courts would "further congest already crowded courts").

141. *See* Stephens, *supra* note 8, at 1531, 1536 (describing perception of human rights accountability as aiding U.S. enemies and impeding the U.S. war on terror). *Sosa* provides a concrete case in point: the plaintiff was accused of aiding the torture and murder of a U.S. agent. Sosa v. Alvarez-Machain, 542 U.S. 692, 697 (2004).

142. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 123 (2013).

143. *Id.*

144. *Sosa*, 542 U.S. at 727–28.

145. *Id.* at 728 (quoting Tel–Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.D.C. 1984) (Bork, J., concurring)); *see also id.* at 749–50 (Scalia, J., concurring) (decrying "[t]he notion that a law of nations . . . can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* . . . .").

146. *Id.* at 732 (quoting *In re* Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994)).

147. *See Kiobel*, 569 U.S. at 124–25. The presumption against extraterritoriality was an established canon of interpretation. It holds that courts should not assume Congress intended to legislate beyond U.S. borders and reflects "[t]he presumption that United States law governs domestically but does not rule the world . . . ." Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454–55 (2007). In recent years, the Supreme Court has ratcheted up the force of the

unintended clashes between our laws and those of other nations which could result in international discord.'"[148] *Kiobel* notes the protests lodged already by foreign governments over the perceived meddling that ATS litigation entailed.[149] Finally, the Court revisits *Sosa*'s language urging judicial caution regarding unintended foreign policy consequences.[150] The *Jesner* Court, in turn, amplifies such cautionary language in both prior decisions to impose a further narrowing construction on the ATS precluding foreign corporate liability.[151] Noting that Jordan, too "considers the instant litigation to be a 'grave affront' to its sovereignty," the Court seeks to avoid provoking such foreign-relations tensions.[152] Finally, the *Nestlé* Court held that ATS suits could not bypass the presumption against extraterritoriality merely by alleging domestic corporate decision-making that occurred at the defendant's U.S.-based corporate headquarters.[153] The Court noted that "[t]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."[154]

3. Separation of Powers

The Court's reluctance to provoke foreign controversies via extraterritorial litigation is couched not as a general statement about territorial restraint. Rather, it reflects a specific view of the institutional limits of the federal judiciary. This brings up the third theme of the ATS trilogy, separation of powers. While foreign policy conflicts potentially arise whenever the United States acts extraterritorially, the Court recognizes that sometimes the national interest justifies such risks. However, it emphasizes that the decision to brave such foreign complications should properly be reserved to the political branches and not made by Article III federal courts.[155] As the *Jesner* Court explains,

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presumption, requiring a clear and specific indication of extraterritorial intent. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255, 265, 269, 272–73 (2010).

148. *Kiobel*, 569 U.S. at 115 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

149. *Id.* at 124.

150. *Id.* at 116–17.

151. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018).

152. *Id.* (quoting Brief for the Hashemite Kingdom of Jordan as Amicus Curiae Supporting Respondent at 3, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (No. 16-499)).

153. *See* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021) ("[A]llegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS.").

154. *Id.* (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010)).

155. *Kiobel*, 569 U.S. at 116 ("[Congress] alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957))); *id.* ("[T]he potential [foreign policy] implications . . . of recognizing . . . . causes [under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004))); *see also Nestlé*, 141 S. Ct. at 1940 ("The Judiciary does not have the 'institutional capacity' to consider all factors relevant to creating a cause of action that

"[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns."[156] Both *Sosa and Jesner invoke such separation of power concerns to justify their reluctance to extend* liability under the ATS.[157] The *Jesner* Court explains that such "judicial caution . . . 'guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.'"[158]

4. Private Enforcement

The final theme running throughout the Court's ATS cases focused on the special concerns raised by private litigation of public international norms.[159] The Court worries that private plaintiffs may act as unaccountable loose cannons that needlessly provoke foreign policy conflicts to advance their own narrow interests.[160] Accordingly, the ATS cases can be read as a surgical intervention by the Court that responded to the problematic aspects of extraterritorial litigation by *private* actors. Indeed, Paul Stephan has argued persuasively that the Court's modern case law curbing extraterritorial litigation reflects the Court's particular concern over the foreign relations complications posed by private suits.[161] This point was underscored emphatically in the Court's subsequent *Nabisco* decision, which upheld extraterritorial application of the RICO statute under its public enforcement prong, but precluded private extraterritorial actions under RICO brought by private plaintiffs.[162] It quoted language from both *Sosa* and *Kiobel* to emphasize that "providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct."[163] By contrast, public enforcement mechanisms incorporate political controls that make them responsive to the

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will 'inherent[ly]' affect foreign policy." (opinion of Thomas, J.) (quoting *Jesner*, 138 S. Ct. at 1386)).

156. *Jesner*, 138 S. Ct. at 1403 (citing *Kiobel*, 569 U.S. at 116–17).

157. *Sosa*, 542 U.S. at 728; *Jesner*, 138 S. Ct. at 1407–08.

158. *Jesner*, 138 S. Ct. at 1407 (quoting *Kiobel*, 569 U.S. at 124).

159. *See Kiobel*, 569 U.S. at 117 ("[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution." (quoting *Sosa*, 542 U.S. at 727)). The Court elaborated that "[t]hese concerns [over private suits] . . . are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign." *Id.*

160. *See Sosa*, 542 U.S. at 727 (calling "for a high bar to new private causes of action for violating international law" to avoid blundering into foreign relations complications that impinge on the prerogatives of the political branches).

161. Paul B. Stephan, *Private Litigation as a Foreign Relations Problem*, 110 AM. J. INT'L L. UNBOUND 40, 40–44 (2016).

162. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2102–03, 2105–08 (2016).

163. *Id.* at 2106 (noting that "[t]he creation of a private right of action . . . permit[s] enforcement without the check imposed by prosecutorial discretion." (quoting *Sosa*, 542 U.S. at 727)) (citing *Kiobel*, 569 U.S.).

broader national interest and ensure that the nation speaks with one voice in foreign relations.[164]

E. FEDERAL ALTERNATIVES

With the ATS's effective demise, scholars and activists have embarked on an urgent quest for a viable replacement. In principle, it makes sense to focus on federal law as the primary vehicle for international redress. The federal government is recognized as the "sole organ" of foreign policy, and federal law plays the lead role on key international law issues.[165] However, the menu of federal alternatives—for both public and private enforcement—has long seemed inadequate, particularly when it comes to regulating corporate misconduct.

1. Public Enforcement

Given the Supreme Court's expressed preference for public enforcement mechanisms to regulate extraterritorial application of U.S. law, it seems prudent to consider public options first. However, even a cursory survey reveals that public enforcement mechanisms addressing the domains covered by the ATS litigation are severely limited. With the exception of federal unfair competition law, which will be addressed in Part IV, and trade sanctions, which tend to be reserved for high-profile offenders,[166] most of the available mechanisms for redress are narrowly tailored. Even collectively, they fall far

164. *See* Stephan, *supra* note 161, at 43 ("When we do law as foreign policy, the Court seems to be saying, we want it done by political actors who must face political accountability for their choices, not by litigants and judges who have no such responsibility.").

165. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964).

166. Sanctions have been used to target misconduct in the erstwhile ATS's bailiwick (such as recent sanctions against Chinese firms implicated in Xinjiang prison camps). *See Before Leaving Office, Mike Pompeo Accused China of Genocide*, ECONOMIST (Jan. 23, 2021), https://www.economist.com/china/2021/01/23/before-leaving-office-mike-pompeo-accused-china-of-genocide [https://www.perma.cc/BV8G-DDRW]. However, they do not offer a generally available, nor adequate substitute for the ATS. A detailed discussion of federal sanctioning authority is beyond the present scope. Suffice to say that trade sanctions carry their own set of drawbacks. Sanctions are often viewed as a hostile act that engenders diplomatic repercussions and potential retaliation. *See generally* Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 25 U. PA. J. INT'L ECON. L. 455 (2004) (discussing the diplomatic costs of sanctions regimes). Moreover, trade sanctions work best against overseas offenders where the United States has commercial, financial, or technological leverage; otherwise, they can be ineffective. *See, e.g.*, Thihan Myo Nyun, *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions Against the Military Government of Burma/Myanmar*, 7 WASH. U. GLOB. STUD. L. REV. 455, 493 (2008) ("the United States has very little leverage over Myanmar because its economic stake in the country is limited"). Sanctions are also often difficult to calibrate and target precisely and can trigger unexpected blowback and collateral damage that harms U.S. domestic firms. *See* Adam Smith, *A High Price to Pay: The Costs of the U.S. Economic Sanctions Policy and the Need for Process Oriented Reform*, 4 UCLA J. INT'L L. & FOREIGN AFFS. 325, 338–45 (1999). They are exceptional tools, rather than a general-purpose solution for targeting overseas misconduct. *See id.* at 353–54.

short of the broad-spectrum solution that the ATS afforded. Furthermore, public enforcement is not without its own drawbacks.

First, it should be noted that most federal statutes do not apply extraterritorially. Thus, while the United States has many laws that implement or parallel international human rights, labor, and environmental law, few of these apply to conduct overseas.[167] Congress has enacted a handful of statutes that expressly criminalize specific human rights violations committed overseas. These primarily address political violations such as torture,[168] genocide,[169] and war crimes.[170] As such, they are generally not applicable to corporate supply chain misconduct.[171]

Second, the relatively few non-criminal statutes that do apply extraterritorially to misconduct in the ATS bailiwick tend to be narrowly focused. Whereas the ATS could be readily applied to a wide array of human rights and international labor law violations, the analogous public enforcement vehicles target a narrow range of violations siloed within specific subject-matter domains. Thus, the Forced Labor Statute regulates forced labor, but not other types of labor abuses.[172] The Foreign Corrupt Practices Act ("FCPA") targets bribery of foreign officials, but not other types of corrupt practices.[173] The Lacey Act is limited to the illegal taking and selling of specified natural resources.[174] The narrow remit of these statutes limits their utility against foreign misconduct. Such statutes can also be evaded by adaptive responses or rendered obsolete by changed circumstances.

Third, because public enforcement requires specific agencies to act, it remains hostage to a host of associated constraints. Public enforcement mechanisms often suffer from persistent resource constraints that make them

167. *See* Bruce Alan Rosenfield, Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1014–17, 1022–24 (1976). Federal statutes with extraterritorial reach generally focus on criminal acts or economic misconduct (e.g., securities and antitrust violations). *Id.* at 1011–14, 1017–20. As such, they offer a poor substitute for targeting the violations that were the ATS's bread-and-butter.

168. *See* 18 U.S.C. § 1091 (2018).

169. *See id.* § 2340A

170. *See id.* § 2441; *see also id.* § 2442 (prohibiting the recruitment or use of child soldiers).

171. The main exceptions are the prohibitions on human trafficking and forced labor, which could, in theory, apply to many corporate economic misconduct cases. *Id.* §§ 1589–1590, 1596. However, corporate prosecutions based on these statutes would face serious legal and practical challenges. *See* Verdier & Stephan, *supra* note 7, at 1389–93.

172. *See* 19 U.S.C. § 1307 (prohibiting importation of goods "mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor"). Thus, abuse of child labor, for example, is not covered by this prohibition absent the use of force.

173. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd–1(a)(1).

174. *See* 16 U.S.C. § 3372(a).

woefully inadequate to deal with the scale of global problems.[175] The government often lacks the resources to prosecute offenders effectively or at scale.[176] Enforcement may be balkanized between different departments raising coordination problems.[177] Public enforcers may also lack access to the information necessary to detect violations or to properly appreciate their significance. Lack of motivation and bureaucratic lethargy can also be factors. Faced with multiple competing priorities and limited resources, agency directors may well accord a low priority to prosecuting violations perpetrated by foreign actors in distant lands.[178]

Political economies supply their own disincentives. Human rights, labor law, and environmental lobbies do not have the same clout as multinational business interests who prefer the status quo. And, of course, political ideology

175. Sunstein, *supra* note 110, at 221 (Congress frequently gives agencies "difficult or even impossible tasks, appropriates inadequate resources, [and] sets unrealistic deadlines for actions.").

176. Thompson, *supra* note 110, at 191 ("[T]he enforcement wings of both federal and state environmental agencies are often woefully understaffed and underfunded.").

177. *See, e.g.*, *The Lacey Act*, U.S. SUSTAINABILITY ALL., https://thesustainabilityalliance.us/lacey-act [https://perma.cc/4BYG-G5V9] ("[T]he U.S. Department of Agriculture's Animal and Plant Health Inspection Service . . . is responsible for the plant provisions of the Lacey Act (including wood products) and [the Department of Interior's Fish and Wildlife Service] is responsible for the wildlife provisions of the Lacey Act. The Department of Homeland Security, which controls U.S. customs and monitors borders through Customs and Border Protection, supports this work.").

178. Such constraints are apparent in the faltering track record of Forced Labor and Lacey Act enforcement. Decades of doing little to nothing were followed by intermittent bursts of activity, typically spurred by a brief period of media-fanned publicity leading to congressional hearings all focused on a specific enforcement sector without much long-term reform, follow-through, or—critically—additional resource allocation. *See, e.g.*, Samuel Witten, Claire E. Reade & Grace A. Kim, *US Authorities Increase Enforcement of Ban on Importing Goods Made with Forced Labor*, ARNOLD & PORTER (June 17, 2020), https://www.arnoldporter.com/en/perspectives/publications/2020/06/us-ban-on-goods-made-with-forced-labor [https://perma.cc/HF8Z-XDZL] (noting that "[f]rom November 2000 through February 2016, CBP did not issue a single enforcement action"); PERVAZE A. SHEIKH, CONG. RSCH. SERV., THE LACEY ACT: COMPLIANCE ISSUES RELATED TO IMPORTING PLANTS AND PLANT PRODUCTS 2, 7–8 (2014). Forced Labor enforcement has been stepped up recently following elimination of a statutory roadblock. *See* Elliott Brewer, *Closed Loophole: Investigating Forced Labor in Corporate Supply Chains Following the Repeal of the Consumptive Demand Exception*, 28 KAN. J.L. & PUB. POL'Y 86, 86, 89–90 (2018). Yet, enforcement here still suffers from critical informational and resource constraints. *See* John Foote, *Can the U.S. End Supply Chain Links to Forced Uighur Labor?*, LAWFARE (Feb. 2, 2021, 11:57 AM), https://www.lawfareblog.com/can-us-end-supply-chain-links-forced-uighur-labor [https://perma.cc/8GS5-BH8H] (noting that federal enforcers are "left to rely on the kindness of strangers to obtain information of relevance to" target enforcements). The FCPA offers perhaps the best case for public enforcement, with quite vigorous enforcement in recent years. *See* Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 431–33 (2012). However, even here, resources remain limited, and none of these government enforcers come close to targeting more than a small fraction of global violators. *Id.* at 490; *see also* GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE, *supra* note 33, at 55 (underscoring prevalence of forced labor violations). As such, an argument can be made for allowing private plaintiffs to supplement public enforcers in these domains as a source of additional deterrence. *See, e.g.*, Mark, *supra*, at 490–91.

can impose its own constraints. In recent years, currents of anti-globalism, legal isolationism, and deregulation have militated against prioritizing overseas enforcement.[179]

2. Private Enforcement

Given the shortcomings of the public enforcement model, scholars and activists have sought private law vehicles to supplement the public ones. Federal law does offer two vehicles for extraterritorial private actions in domains covered by the ATS. Once again, these apply to a limited set of human rights abuses in the political realm.

The Torture Victims Protection Act ("TVPA") allows private suits for torture or extrajudicial killing overseas.[180] A statutory exception to the Foreign Sovereign Immunities Act ("FSIA") permits private suits for state-sponsored terrorism.[181] Both statutes are narrowly drawn.[182] They are also subject to conditions that further limit their utility. For example, the TVPA does not permit suits against corporations, is limited to acts committed under color of official authority, and has a domestic exhaustion requirement.[183] The anti-terrorist FSIA exception, for its part, requires that the State Department have designated the offending country as a state sponsor of terrorism prior to the acts given rise to the claim.[184] As such, the remit of these statutes falls well-short of the wide range of international violations that ATS suits targeted. In particular, they offer little purchase against the corporate misconduct cases that dominated the erstwhile ATS docket.

F. STATE LAW ALTERNATIVES

Given the shortcomings of potential federal replacements for the ATS, global justice activists and scholars have continued their quest for a robust, broad-spectrum solution. Increasingly, commentators have gravitated toward state law as the most promising candidate.[185] Yet, state law actions face many of the same jurisdictional obstacles that plagued the ATS litigation and raise

179. Although the Biden administration undoubtedly values foreign engagement more than its predecessor, given domestic constraints and priorities, it is hard to see a dramatic reversal happening any time soon.

180. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2018).

181. *Id.* § 1605A(c).

182. The TVPA is limited to torture. The FSIA exceptions only apply to a closed set of terrorist acts: torture, extrajudicial killing, aircraft sabotage, hostage taking.

183. Mohamad v. Palestinian Auth., 566 U.S. 449, 451, 453, 461 (2012).

184. 28 U.S.C. § 1605A(a). The right of action is also limited to U.S. citizens and government employees. *Id.* § 1605A(c).

185. *See, e.g.*, Davis & Whytock, *supra* note 15, at 400, 411–13; Childress, *supra* note 11, at 739–41; Alford, *supra* note 7, at 1749–51; Stephens, *supra* note 8, at 1469–70, 1541. The *U.C. Irvine Law Review* devoted an entire symposium issue to examining the prospect of state litigation as the likely successor to the ATS. *See* Symposium, *Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1 (2013).

similar normative concerns.[186] Indeed, many of the Supreme Court's objections to the ATS apply with even greater force in the state law context. Moreover, state law actions raise additional concerns, including potential conflicts with the federal government's position as the "sole organ" of foreign policy.[187]

As private actions, state law claims raise the same concerns about politically unaccountable private parties commandeering foreign policy and provoking foreign conflicts for private gain.[188] Likewise, concerns over state courts becoming a magnet for transnational suits and the resultant perceptions of judicial imperialism remain equally troubling.[189] Indeed, the inadequacy of private litigation as a mechanism to balance sensitive foreign relations issues may loom even larger in state court actions.[190] State courts, as a rule, are even *less* institutionally qualified to handle such sensitive issues effectively than federal courts.[191] They are *less* likely to navigate complex issues of international law and comity successfully.[192] Accordingly, the risk of foreign policy complications that preoccupied the Supreme Court in its ATS cases would become heightened should such litigation shift to state courts.[193]

Moreover, state law actions raise further problems: The potential for diverging rulings as transnational litigation plays out across 50 different states creates uncertainty and potential conflicts. Difficult choice of law and jurisdictional questions must be navigated.[194] Those engaged in transnational

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186. *See* Davis & Whytock, *supra* note 15, at 403 ("[H]uman rights litigation in state courts faces some of the same headwinds as ATS litigation."); Christopher A. Whytock, Donald Earl Childress III & Michael D. Ramsey, Foreword, *After* Kiobel*—International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1, 6 (2013) ("[L]imits, such as personal jurisdiction, foreign sovereign immunity, and the act of state doctrine, apply equally in state court . . . . [S]tates have their own versions of the forum non conveniens doctrine." (footnotes omitted)).

187. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936) (describing the "President as the sole organ of the federal government in the field of international relations").

188. *See* Davis & Whytock, *supra* note 15, at 417–18.

189. Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison v. National Australia Bank, 92 B.U. L. REV. 535, 549 (2012) ("[S]tate courts have many of the same attributes that have made federal courts . . . a 'Shangri-La' for litigation."); Davis & Whytock, *supra* note 15, at 416–17 (describing prospect of state court litigation trampling on foreign sovereign interests).

190. *See* Davis & Whytock, *supra* note 15, at 416–18.

191. Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend?*, 3 U.C. IRVINE L. REV. 25, 40–41 (2013) ("State judges are likely to be less familiar with international law principles, and, in practice, are often dismissive of arguments that they are bound by treaties . . . ." (footnote omitted)).

192. *See* Florey, *supra* note 189, at 551–53; *see also id.* at 538 (arguing state legislatures are generally less responsive than Congress to foreign relations concerns). Nor are state executives liable to be any better. *See, e.g.*, Reynaldo Anaya Valencia, Craig L. Jackson, Leticia Van de Putte & Rodney Ellis, Avena *and the World Court's Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas's Independence from the World*, 23 YALE L. & POL'Y REV. 455, 455–56 (2005).

193. *See* Davis & Whytock, *supra* note 15, at 417.

194. *See* Childress, *supra* note 11, at 742–49.

commerce must henceforth reckon with far less uniformity and predictability than reliance on federal law would supply.[195]

Translating human rights claims and other international law grievances into common-law tort actions under state law also raises the specter that important nuances get lost in translation.[196] Critics worry that the resultant distortions will imperil the progressive development of human rights law.[197] The balkanized nature of state litigation across multiple jurisdictions exacerbates such concerns.[198]

There are other obstacles, too. It is far from clear how receptive state courts and state law will be to extraterritorial actions. Commentators note that state law has lagged behind its federal counterpart in applying a robust presumption against extraterritorial application of state law.[199] This may reflect a naïve understanding of the normative stakes.[200] However, the comparative receptiveness of state courts to extraterritorial claims may be changing. Recent rulings have tightened standards in several states.[201] A flood of foreign tort claims could accelerate this gate-closing process.

Finally, even if state law permits extraterritorial claims, federal law stands as a further source of limits. Constitutional due process limits generally constrain the extraterritorial reach of state law.[202] Moreover, extraterritorial state law actions must also confront specific federalism-related doctrines designed to minimize state meddling in foreign affairs. Cases that require state courts to sit in judgment of foreign sovereigns, for example, will likely

195. Florey, *supra* note 189, at 566–68.

196. *See* Davis & Whytock, *supra* note 15, at 412 n.82 (summarizing concerns "that applying tort law in state courts rather than international law in federal courts can trivialize human rights violations . . . 'reducing [them] to no more (or less) than a garden-variety municipal tort'" (quoting Xuncax v. Gramajo, 886 F. Supp. 162, 183 (D. Mass. 1995))). These concerns derive from the necessity to recast ATS human rights claims into either common law tort actions or transitory tort claims under foreign law. Some also note that state unfair competition law offers a potential alternative. *E.g.*, Alford, *supra* note 7, at 1758–61. For a comparison of their respective merits, *see* Sean A. Pager & Jenna C. Foos, *Laboratories of Extraterritoriality*, 29 GEO. MASON L. REV. 164, 171–79 (2021).

197. Davis & Whytock, *supra* note 15, at 412 & n.82. Childress also worries that the deterrent value of ATS suits will be diminished by translating human rights claims into common law torts because "[t]he public-relations fallout from being labeled a human-rights abuser is perhaps much greater than the fallout from committing a tortious act." Childress, *supra* note 11, at 725.

198. Parrish, *supra* note 191, at 41–42 (describing tension between human rights law's universalist outlook and "the idea of states as laboratories, each developing its own novel version").

199. *See* Anthony J. Colangelo, Essay, *International Law in U.S. State Courts: Extraterritoriality and "False Conflicts" of Law*, 48 INT'L LAW. 1, 2 (2014).

200. *See* Florey, *supra* note 189, at 551 (criticizing state court choice of law analyses for paying inadequate attention to extraterritoriality concerns, treating foreign law essentially the same as any other sister-state).

201. *See* Pager & Foos, *supra* note 196, at 204, 213–14 (compiling cases).

202. *See* Hannah L. Buxbaum, *Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy*, 27 DUKE J. COMPAR. & INT'L L. 381, 394 (2017); Childress, *supra* note 11, at 751–52.

run afoul of dormant foreign policy doctrine.[203] State interventions that discriminate against or unduly burden transnational commerce face scrutiny under the foreign dormant commerce doctrine.[204] Moreover, conflicts, either explicit or implicit, with federal law or policy risk being preempted directly under the heightened preemption standard applicable to foreign affairs.[205] Such doctrinal limitations serve "the federal . . . interest in speaking with one voice on issues of foreign relations,"[206] reflecting a value on uniformity that the ATS itself was intended to advance; this makes it all the more ironic that such actions should now devolve into a cacophony of state law litigation.[207]

None of this is to say that state law actions are precluded entirely. They have their place in the arsenal of potential remedies. However, a federal solution remains the preferred option. If only we could find a broad-spectrum vehicle supporting private federal actions, one that would reach a significant swath of overseas misconduct while overcoming the objections raised by the Supreme Court in its ATS trilogy. Yet, there is such a candidate that commentators have overlooked. Section 337 actions in the International Trade Commission ("ITC") may well fit the bill.

IV. PRIVATE ADMINISTRATIVE ENFORCEMENT IN THE ITC

Like the ATS prior to *Filártiga*, section 337 of the 1930 Tariff Act represents a little known statute whose broad authority to target foreign violations has languished largely unused for over a century outside of a narrow range of intellectual property cases.[208] In 2011, however, the Federal Circuit upheld the use of section 337's prohibition on unfair competition "in importation" to sanction misappropriation of trade secrets that occurred entirely on foreign soil.[209] While *TianRui*'s holding focused on trade secrets, the case opens the possibility that other forms of extraterritorial unfair competition could be similarly targeted, including a broad range of supply

203. *See* Zschernig v. Miller, 389 U.S. 429, 441 (1968) (striking down Oregon statute because "even in absence of a treaty, a State's policy may disturb foreign relations").

204. Buxbaum, *supra* note 202, at 392–93.

205. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374–86 (2000); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413–20 (2003).

206. Childress, *supra* note 11, at 753.

207. Stephens, *supra* note 8, at 1473–74.

208. The bulk of section 337 claims arise under section 337(a)(1)(B), which covers the importation of goods that infringe a U.S. patent or copyright. However, this Article focuses on the first paragraph of section 337, namely section 337(a)(1)(A), which covers "[u]nfair methods of competition . . . in . . . importation," a much broader catch-all provision. 19 U.S.C. § 1337(a)(1)(A) (2018).

209. TianRui Grp. Co. v. Int'l Trade Comm'n, 661 F.3d 1322, 1335 (Fed. Cir. 2011) (blocking the importation of steel railway wheels produced in China using proprietary processes stolen by the defendant).

chain misconduct.[210] Section 337 thus offers the enticing prospect of a potential replacement for ATS litigation in the corporate realm, which accounted for the vast majority of the ATS cases. Moreover, section 337's basis in agency enforcement offers crucial advantages over ATS's Article III-based, private law model.

Since the Federal Circuit upheld the extraterritorial claim in *TianRui*, complainants have filed over a dozen unfair competition actions under section 337 to block the importation of products on grounds based on overseas misconduct.[211] The defendants in these cases were foreign manufacturers who produced goods using misappropriated trade secrets in their production process. These actions yielded successful outcomes for the complainant in the vast majority of cases.[212]

A. A PRIMER ON SECTION 337 UNFAIR COMPETITION ACTIONS

Under section 337(a)(1)(A) of the 1930 Tariff Act, the International Trade Commission has the authority to block imports into the United States arising from "[u]nfair methods of competition and unfair acts."[213] In practice, the ITC does not appear to distinguish unfair "methods" from "acts."[214] However, "unfairness" is intended to supply an open-ended standard with capacious scope, as the following subsection elaborates.[215]

To grant relief, the ITC must also determine that the respondent's unfair conduct has the threat or effect of "destroy[ing] or substantially injur[ing] an industry in the United States."[216] "[P]revent[ing] the establishment of such an industry" or "restrain[ing] or monopoliz[ing] trade and commerce in the

210. *See* Michael Buckler & Beau Jackson, *Section 337 as a Force for "Good"? Exploring the Breadth of Unfair Methods of Competition and Unfair Acts Under § 337 of the Tariff Act of 1930*, 23 FED. CIR. BAR J. 513, 553–59 (2014).

211. *See, e.g.*, In the Matter of Certain Botulinum Toxin Products, Processes for Manufacturing or Relating to Same and Certain Products Containing Same, Inv. No. 337-TA-1145 (Dec. 16, 2020) (Final); In the Matter of Certain Lithium ION Batteries, Battery Cells, Battery Modules, Battery Packs, Components Thereof, and Processes Therefor, Inv. No. 337-TA-1159 (Feb. 14, 2020) (Initial).

212. *See* Pager & Priest, *supra* note 19, at 2465–66.

213. 19 U.S.C. § 1337(a)(1)(A) (2018) (prohibiting "[u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States").

214. In this regard, the ITC diverges notably from the FTC, which has distinguished between comparable language and assigned them distinct meanings. *See* Pager & Foos, *supra* note 196, at 179–85.

215. *See infra* notes 227–30 and accompanying text.

216. 19 U.S.C. § 1337(a)(1)(A)(i). Such injuries are normally quantified through evidence of lost sales, profits, etc. 19 C.F.R. § 210.12 (2020). For a more detailed discussion of the ITC's injury determination methodology, see Buckler & Jackson, *supra* note 210, at 532–33.

United States" also qualify as redressable injuries.[217] "[I]n practice, the ITC has not imposed a high threshold for satisfying the injury element . . . ."[218]

Section 337 actions usually begin with a complaint filed by an aggrieved competitor. However, the ITC has the authority, rarely used, to initiate proceedings sua sponte.[219] The proceedings are a hybrid between private litigation and agency investigations, conducted on an expedited schedule and typically concluded within 18 months of the initial complaint.[220] The normal remedy for a section 337 violation is an exclusion order barring the unfairly produced goods from the U.S. market; damages are not available. The ITC also has substantial discretion to tailor or withhold remedies according to the public interest.[221]

Section 337 does not specify any particular body of law to govern assessments of unfairness. In *TianRui*, the Administrative Law Judge ("ALJ") initially applied Illinois trade secret law.[222] On appeal, the Federal Circuit reversed and held that federal law should control to ensure a uniform national standard.[223] Yet, the misappropriation in that case occurred in China. What of Chinese law?

The *TianRui* court acknowledged the potential that granting relief could create an international conflict of law. It took pains to defuse such concerns. The court noted that both China and the United States were bound by the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement,[224] which provided a shared minimum standard of trade secrecy protection. It also cited the respondent's own assurance (in its forum non conveniens motion) that Chinese law would provide an adequate remedy in the case as evidence that there was no conflict between U.S. and Chinese law.[225] Such

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217. 19 U.S.C. § 1337(a)(1)(A)(ii)–(iii). Section 337 unfair competition actions also apply to a broad standard of domestic industry: Any significant domestic investment or employment in a sector that competes with the allegedly unfair products can qualify. *See* Buckler & Jackson, *supra* note 210, at 531–32.

218. *See* Buckler & Jackson, *supra* note 210, at 533.

219. 19 U.S.C. § 1337(b)(1).

220. Young Eng'rs, Inc. v. U.S. Int'l Trade Comm'n, 721 F.2d 1305, 1312–15 (Fed. Cir. 1983); Jonathan J. Engler, *Section 337 of the Tariff Act of 1930: A Private Right-of-Action to Enforce Ocean Wildlife Conservation Laws?*, 40 ENV'T L. REP. NEWS & ANALYSIS 10513, 10517 (2010). Complaints are referred to an administrative law judge ("ALJ"), who conducts the initial investigation through adversarial proceedings under auspices of the Administrative Procedure Act. 19 C.F.R. § 210.36 (2002). Adverse decisions may be appealed to the ITC Board of Commissioners and from there to Federal Circuit.

221. Engler, *supra* note 220, at 10517. Exclusion orders are also subject to Presidential review and veto. 19 U.S.C. § 1337(j).

222. TianRui Grp. Co. v. Int'l Trade Comm'n, 661 F.3d 1322, 1325 (Fed. Cir. 2011).

223. *Id.* at 1327–28.

224. *See* TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1995) (aiding in the transfer of intellectual property between countries).

225. *TianRui Grp. Co.*, 661 F.3d at 1332–33.

solicitousness for international conflicts, however, was undermined in a subsequent Federal Circuit case where U.S. and Chinese trade secrecy law yielded directly conflicting outcomes. The panel brushed aside conflict concerns in a terse per curium opinion, holding that U.S. law alone controlled the outcome.[226]

B. APPLICABILITY BEYOND INTELLECTUAL PROPERTY

Although most recent cases have involved misappropriation of technology, section 337's prohibition on unfair competition is not limited to stolen trade secrets. The statutory language was deliberately written using open-ended language "broad enough to prevent every type and form of unfair practice . . . ."[227] As noted, the only requirements are unfair practices related to importation that cause domestic injury. In *TianRui*, the manufacturer's use of stolen technology to manufacture steel railway wheels gave it an unfair advantage in exporting the wheels to the United States.[228] However, assume that instead of using misappropriated trade secrets, the Chinese manufacturer in that case had engaged in other violations during the production process that resulted in equivalent cost saving: e.g., using forced labor or employing environmentally harmful practices. So long as these cost savings passed through into the end market pricing of the finished wheels exported to the United States, the Chinese manufacturer would enjoy the same undeserved advantage over competitors in the U.S. market. Such unfair competition would, if it caused the requisite injury, therefore be actionable under section 337(a)(1)(A).

Indeed, any violation of law during the production process that confers a downstream cost advantage could potentially be actionable under this theory: use of child labor,[229] dumping toxic waste, unlawful land seizures, unsafe work practices; the list goes on and on.[230] The only requirement is proof that such regulatory shortcuts yield quantifiable cost savings significant enough to undermine domestic competitors.[231]

The extent to which section 337 would authorize the ITC to pursue extraterritorial unfair competition claims based on violations in domains *other*

226. Sino Legend Chem. Co. v. Int'l Trade Comm'n, 623 F. App'x 1016, 1016 (Fed. Cir. 2015), *cert. denied*, Sino Legend Chem. Co. v. Int'l Trade Comm'n, 137 S. Ct. 711 (2017). As discussed below, the potential for international conflicts to cause foreign policy friction is partly mitigated by the limited nature of the ITC remedies and by the provision for presidential vetoes. *See infra* notes 261–63 and accompanying text. Nonetheless, the wisdom of basing extraterritorial actions on a unilateral application of U.S. law remains open to question.

227. S. REP. NO. 67-595, at 4 (1922).

228. *TianRui Grp. Co.*, 661 F.3d at 1335–37.

229. *Cf.* Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011) ("Businesses in countries that have and enforce laws against child labor are hurt by competition from businesses that employ child labor in countries in which employing children is condoned.").

230. *See* Buckler & Jackson, *supra* note 210, at 552–58.

231. Pager & Priest, *supra* note 19, at 2470.

than trade secrecy was expressly contested in the Federal Circuit's *TianRui* decision. Dissenting in that case, Judge Moore warned that:

> The potential breadth of this holding is staggering. Suppose that goods were produced by workers who operate under conditions which would not meet with United States labor laws or workers who were not paid minimum wage or not paid at all—certainly United States industry would be hurt by the importation of goods which can be manufactured at a fraction of the cost abroad because of cheaper or forced labor.[232]

The majority dismissed these concerns in a footnote:

> The dissent's concern about the possible extension of section 337 to other foreign business practices, such as the underpayment (or nonpayment) of employees, is unwarranted. At oral argument, the Commission explicitly disavowed any such authority. Moreover, in the analogous context of the Federal Trade Commission Act, the Supreme Court long ago responded to similar concerns by holding that the prohibition on "unfair methods of competition" does not encompass "practices . . . opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."[233]

The *TianRui* majority sets this limiting standard by quoting language from a Supreme Court decision in a Federal Trade Commission ("FTC") case, *FTC v. Gratz*, whose limiting construction of federal unfair competition law was overruled by later precedent.[234] More recent cases reject the idea that unfair competition should be reduced to a closed set of paradigm cases. Rather, the Supreme Court has noted that Congress deliberately chose "the broader and more flexible phrase 'unfair methods of competition'" to escape the narrow construction given to unfair competition at common law.[235] Moreover, "[t]he legislative history consistently evidences Congressional intent to vest the [ITC] with broad enforcement authority to remedy unfair trade acts."[236] The

232. *TianRui Grp. Co.*, 661 F.3d at 1338 (Moore, J., dissenting).

233. *Id.* at 1330 n.3 (majority opinion) (citing F.T.C. v. Gratz, 253 U.S. 421, 427 (1920)).

234. F.T.C. v. Brown Shoe Co., 384 U.S. 316, 320–21 (1966) ("Later cases of this Court, however, have rejected the *Gratz* view and it is now recognized in line with the dissent of Mr. Justice Brandeis in *Gratz* that the Commission has broad powers to declare trade practices unfair."). Note: relying on FTC precedent to interpret section 337 is appropriate because section 337's unfair competition standard was borrowed from section 5 of the FTC, and the provisions contain very similar language and have long been construed *in pari materia*.

235. F.T.C. v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 311–12 (1934).

236. Suprema, Inc. v. Int'l Trade Comm'n, 796 F.3d 1338, 1350 (Fed. Cir. 2015).

Supreme Court confirmed the open-ended nature of federal unfair competition law in its 1972 *Sperry & Hutchinson* decision.[237]

Even assuming the *Gratz* standard remained good law, the majority's analysis seems questionable on many levels. First, the so-called "disavowal" of section 337 authority to sanction labor abuses made by an ITC staff attorney at oral argument focused on minimum wage issues rather than more egregious abuses.[238] This seems reasonable. After all, there is no global minimum wage, and the United States therefore has no basis to object to low pay overseas.[239] However, forced labor clearly *is* unlawful and would seem to epitomize a practice "characterized by . . . oppression" under the *Gratz* standard.[240]

Many other forms of supply chain misconduct, including child labor abuses, human trafficking, and toxic waste dumping, are often similarly "characterized by deception, bad faith, fraud, or oppression."[241] Since all of these practices violate clearly established global norms recognized by the United States and virtually the entire world, they are also manifestly "opposed to good morals" and "against public policy."[242] To the extent such regulatory shortcuts yield competitive advantages that undercut legitimate businesses,

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237. F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 244–45 n.5 (1972) (endorsing Commission's view that even non-deceptive conduct not previously considered unlawful could be found unfair where it: "(1) . . . offends public policy . . . within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) . . . is immoral, unethical, oppressive, or unscrupulous; [or] (3) . . . causes substantial injury to consumers (or competitors or other businessmen).").

238. *See* Buckler & Jackson, *supra* note 210, at 521 & n.52.

239. That said, the United States has entered into bilateral Free Trade Agreements with several countries that do contain minimum wage provisions. Accordingly, a minimum wage violation by producers in *these* countries potentially *could* support a section 337 unfair competition claim.

240. Buckler & Jackson, *supra* note 210, at 520; *see* Int'l Lab. Org. [ILO], *Abolition of Forced Labour Convention*, ILO Doc. 105, 320 U.N.T.S. 291 (June 25, 1957). As it happens, because the Department of Labor has statutory authority to block imported goods made with forced labor, the ITC took the position in 1933 that it should abstain from such cases out of interagency comity. Given the longstanding underenforcement of the Forced Labor statute, however, such deference seems questionable today. In any case, other labor abuses clearly remain fair game under section 337. *See* Buckler & Jackson, *supra* note 210, at 529–30 (citing U.S. TARIFF COMM'N, REPORT TO THE PRESIDENT, RUSSIAN ASBESTOS, REPORT NO. 67, at 5 (1933)). Indeed, that the ITC felt need to declare its abstention in the *specific* context of forced labor arguably underscores the assumption that such abuses otherwise generally do fall within section 337's purview.

241. F.T.C. v. Gratz, 253 U.S. 421, 427 (1920).

242. On child labor, see generally INT'L LAB.ORG., WORST FORMS OF CHILD LABOUR CONVENTION (1999), https://www.ilo.org/wcmsp5/groups/public/—-ed_norm/declaration/documents/publication/wcms_decl_fs_46_en.pdf [https://perma.cc/8ZGR-G6CV]. On trafficking, see International Convention on Civil and Political Rights art. 8 (Dec. 16, 1966); G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Dec. 12, 2000). On toxic waste, see generally, e.g., MINAMATA CONVENTION ON MERCURY (2013), http://www.mercuryconvention.org/Portals/11/documents/conventionText/Minamata%20Convention%C200n%M⊠ercury_e.pdf [https://perma.cc/ZU54-8NVF].

such violations also harm competition.[243] Accordingly, the majority's own standard would seem to support a broader application of section 337 than it acknowledges.

To be sure, the ITC has not to date used the full extent of its authority to sanction unfair competition. To date, section 337 unfair competition cases have focused on misappropriation, deception, or disparagement.[244] However, there have been a handful of non-traditional section 337 unfair competition claims in recent years that have ventured beyond its usual trade secret/deception remit.[245] Most of these have involved tortious interference with contract claims.[246]

Further support for a broader reading of section 337 is found in other sources of unfair competition law. Section 5 of the FTC Act contains analogous language to section 337 that has also been construed capaciously.[247] While FTC enforcement today emphasizes consumer harms, older FTC precedent granted unfair competition relief based on allegations of general commercial immorality.[248] Moreover, state unfair competition law, for its part, *has* been specifically applied to target corporate supply chain misconduct. Indeed, the *Unocal* case, which ushered in the era of ATS corporate litigation, had a state-law counterpart action brought under California unfair competition law.[249]

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243. *Cf.* FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 313 (1934) ("A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt [represents] the kind of unfairness at which [federal unfair competition law is] aimed.").

244. *See* Jay H. Reiziss, *The Distinctive Characteristics of Section 337*, 8 J. MARSHALL REV. INTELL. PROP. L. 231, 235–36 n.27 (2009) (summarizing case law).

245. *See* David A. Hickerson, *New Types of Section 337 Investigations at the International Trade Commission*, FOLEY & LARDNER LLP (July 1, 2018), https://www.foley.com/en/insights/publications/2018/07/new-types-of-section-337-investigations-at-the-int [https://perma.cc/RET8-QFYQ].

246. *See, e.g.*, In the Matter of Certain Electric Fireplaces, Components Thereof, Manuals for Same, Certain Processes for Manufacturing or Relating to Same and Certain Products Containing Same, Inv. Nos. 337-TA-791, 337-TA-826, USITC Pub. 4552 (Aug., 2015) (Final) (discussing section 337(a)(1)(A) claims lodged for tortious interference and breach of contract); In the Matter of Certain Industrial Automation Systems and Components Thereof Including Control Systems, Controllers, Visualization Hardware, Motion Control Systems, Networking Equipment, Safety Devices, and Power Supplies, Inv. No. 337-TA-1074, USITC Pub. 4982 (Oct. 23, 2018) (Final) (discussing tortious interference); In the Matter of Certain Foodservice Equipment and Components Thereof, Inv. No. 337-TA-1166 (July 9, 2020) (Preliminary) (discussing tortious interference and breach of employment agreements).

247. William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 935–37 (2010); U.S. FED. TRADE COMM'N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (2015).

248. For example, *Keppel* involved a lottery scheme in products pitched at children. F.T.C. v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 304–05 (1934).

249. Doe I v. Unocal Corp., Nos. BC 237 980, BC 237 679, 2002 WL 33944506 (Cal. Super. Ct. June 11, 2002).

The favorable outcomes in *Unocal* and related California precedent offer successful examples of unfair competition law's potential.[250]

There is no reason why these precedents could not be emulated in the federal law context.[251] Federal unfair competition law is flexible enough to adapt to the new challenges of global trade. Congress deliberately conferred broad discretion upon both the FTC and ITC to apply unfair competition standards to meet evolving societal needs. Moreover, courts have emphasized that these open-ended standards should not be confined to the contours set by existing precedent, but must remain flexible to redress novel forms of competitive abuses.[252] This comports with a longstanding tradition of unfair competition law functioning as "a flexible legal instrument [that] adapts itself to technological, social, and political changes" in order to promote justice.[253] Accordingly, in principle, the basis for deploying federal unfair competition law to regulate supply chain abuses seems clear, as several commentators have averred.[254] All that is required is a test case to establish a viable precedent.

C. A Comparison Between Section 337 and the ATS

Section 337 compares favorably with the ATS on a number of grounds. First, section 337 does not raise the same concerns with extraterritorial application as the ATS. In *Kiobel*, the Court barred ATS suits absent proof that they "touch[ed] and concern[ed]" U.S. territory because the Court concluded that the ATS did not "evince 'a clear indication of extraterritoriality.'"[255] By contrast, section 337 is expressly directed at "unfair[ness] in importation,"[256] which clearly indicates it is "not a statute in which Congress had only 'domestic concerns in mind.'"[257] In addition, the legislative history bolsters the

250. *See* Pager & Priest, *supra* note 19, at 2472.

251. *See* SECTION OF INTELL. PROP. L., AM. BAR ASS'N, A LAWYER'S GUIDE TO SECTION 337 INVESTIGATIONS BEFORE THE U.S. INTERNATIONAL TRADE COMMISSION 224 (Tom M. Schaumberg ed., 4th ed. 2016) ("[N]otwithstanding the [ITC's] predominant focus on intellectual property-based allegations, Section 337 could reach a wide variety of 'unfair acts' that have yet to be the subject of an investigation . . . .").

252. *Keppel*, 291 U.S. at 310–14 & n.2; *In re* W. C. Von Clemm, 229 F.2d 441, 444 (C.C.P.A. 1955).

253. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION ch. 1 § 1:16 (4th ed. 1998). Indeed, unfair competition law has proved a fertile source of legal innovation over the years from which many novel causes of action have emerged from trademark infringement to false advertising to trade secret misappropriation. *Cf.* INTELLECTUAL PROPERTY, UNFAIR COMPETITION AND PUBLICITY: CONVERGENCES AND DEVELOPMENT 19 (Nari Lee, Guido Westkamp, Annette Kur & Angsar Ohly eds., 2014) (describing unfair competition law's role as "incubator" of new rights).

254. *See* Buckler & Jackson, *supra* note 210, at 513 n.1 (summarizing commentary).

255. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 118, 124–25 (2013) (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 265 (2010)).

256. 19 U.S.C. § 1337(a)(1)(A) (2018).

257. Pasquantino v. United States, 544 U.S. 349, 372 (2005) (quoting Small v. United States, 544 U.S. 385, 388 (2005)).

conclusion that Congress was concerned with practices outside the United States that harmed U.S. industries and commerce.

At the same time, the extraterritorial effects of section 337 are indirect and strictly limited by the remedies available to the Commission. The Commission may not regulate, proscribe, or punish activity outside the United States. It cannot award monetary damages. It can only exclude imports from the U.S. market.[258] Finally, a nexus to U.S. territory—i.e., the importation of goods—is an express requirement of the Commission's jurisdiction.[259] Moreover, section 337's harm element reinforces the territorial focus of the statute by requiring injury to a domestic industry or market. Thus, there is a plausible argument that section 337 is not subject to the presumption against extraterritoriality because its focus is domestic.[260]

Even assuming the presumption does apply, section 337's domestic injury requirement restricts the statute to regulating conduct that "touch[es] and concern[s] the territory of the United States . . . with sufficient force to" dispel any concern over its extraterritorial reach.[261] The Federal Circuit relied on a mishmash of the preceding rationales in dismissing a challenge to extraterritorial application of section 337 in *TianRui*.[262]

Second, the domestic injury requirement limits the extraterritorial conduct that section 337 can reach. This assuages the concerns raised in the ATS cases regarding overburdened federal dockets. The ITC's streamlined procedures also allow for quicker, less expensive adjudication than federal courts.[263] These features, combined with section 337's focus on domestic injury and remedy, offers strong grounds to brush aside complaints over legal imperialism.

Third, whereas the ATS required personal jurisdiction over defendants, which is often difficult to obtain over foreign parties, section 337 relies on *in rem* jurisdiction over the articles being imported.[264] Given the Supreme Court's recent tightening of personal jurisdiction standards in transnational cases,[265] this represents a huge advantage not only over the ATS, but also as compared to all the other bases for private actions discussed above.[266] Many

258. 19 U.S.C. § 1337(d)–(g) (2018).

259. Reiziss, *supra* note 244, at 231 ("The importation, or even the expected importation, of a product forms the basis for the [Commission's] jurisdiction, not the actions of any particular party.").

260. See Rochelle Dreyfuss & Linda Silberman, *Misappropriation on a Global Scale: Extraterritoriality and Applicable Law in Transborder Trade Secrecy Cases*, 8 CYBARIS INTELL. PROP. L. REV. 265, 300 (2017).

261. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

262. TianRui Grp. Co. v. Int'l Trade Comm'n, 661 F.3d 1322, 1329–32 (Fed. Cir. 2011); *see also* Dreyfuss & Silberman, *supra* note 260, at 300–01 (critiquing and elaborating on the *TianRui* extraterritoriality analysis).

263. SECTION OF INTELL. PROP. L., AM. BAR ASS'N, *supra* note 251, at 2; *infra* notes 274–75 and accompanying text.

264. *See* Reiziss, *supra* note 244, at 231.

265. *See supra* notes 86–87 and accompanying text.

266. *See supra* notes 178–79, 183–85 and accompanying text.

foreign manufacturers that commit overseas violations lack sufficient contacts with the United States to subject them to in personam jurisdiction. However, so long as they export their end products to the U.S. market, they can be caught under section 337.[267]

This broader jurisdictional reach of section 337 helps assuage concerns that enforcement under U.S. law will unfairly penalize domestic companies and lead to inefficient corporate restructuring.[268] Section 337 catches foreigners who want to access U.S. markets, even if they are not based here. And unlike the ATS, whose judgments often proved unenforceable, section 337 supplies an effective remedy: an order denying access to the U.S. market.

In rem jurisdiction may offer an additional advantage. While admittedly untested, an argument exists that section 337 applies to the importation of goods by downstream intermediaries where the overseas manufacturer used unfair methods to produce them, even where the intermediary itself was innocent and lacked prior knowledge of the malfeasance. The Forced Labor Statute, which contains similar *in rem* language, has been construed in this fashion. Importantly, it arose in the same 1930 Tariff Act as section 337, making it logical to read the two *in pari materia*.[269] The ability to hold multinational companies accountable for misconduct by their suppliers would vastly increase the deterrent value of section 337 suits by incentivizing such firms to step up compliance efforts across their entire supply chain.[270]

Fourth, in contrast to the murky origins of the ATS and the intent behind it, the congressional intent behind section 337 is relatively clear: The provision was included as a part of the protectionist Tariff Act.[271] Congress intended section 337 to provide broad protection, insulating U.S. industries from the effects of unfair competition overseas.[272] Competition from foreign producers that violates global norms unfairly deprives U.S. industries of the level playing field that such standards are supposed to ensure.[273]

Fifth, the explicit commercial focus of section 337 offers a further advantage: Because unfair competition is private commercial law, the ability to target corporate defendants is axiomatic. This bypasses the need to show that international norms have horizontal effect on private parties, as required

267. *See* SECTION OF INTELL. PROP. L., AM. BAR ASS'N, *supra* note 251, at 10–11 (describing manifold advantages of *in rem* jurisdiction in transnational litigation).

268. *See supra* note 104 and accompanying text.

269. *See* Pager & Priest, *supra* note 19, at 2511–13.

270. *See id.* at 2518 (arguing that such a hub-and-spoke strategy would propagate, routinize, and internalize regulatory compliance norms over time).

271. *See In re* Orion Co., 71 F.2d 458, 465 (C.C.P.A. 1934).

272. *See* Suprema, Inc. v. Int'l Trade Comm'n, 796 F.3d 1338, 1350–51 (Fed. Cir. 2015); S. REP. NO. 67-595, at 3 (1922).

273. *See* Frischer & Co. v. Bakelite Corp., 39 F.2d 247, 259 (C.C.P.A. 1930) ("[T]he purpose of [section 337 was] to give to industries of the United States, not only the benefit of the favorable laws and conditions to be found in this country, but also to protect such industries from being unfairly deprived of the advantage of the same . . . .").

by the ATS. If a source country has signed on to an environmental protection treaty—e.g., banning certain mining practices—then it is arguably unfair competition for producers from that country to use those proscribed practices and thereby gain an undeserved advantage over more scrupulous competitors elsewhere, regardless of the treaty's horizontal effects.

Finally, as private commercial law, there is no need to link unfair competition to state action. Thus, section 337 avoids the foreign relations debacles that the ATS caused by implicating foreign governments in illegal acts. It also removes the need to grapple with the act of state doctrine and sovereign immunity concerns. And by harnessing commercial competitors who have a built-in incentive to challenge overseas rivals, section 337 potentially enlists a powerful set of well-resourced plaintiffs to combat supply chain misconduct.[274]

In short, section 337 actions offer a number of structural advantages over ATS litigation. In particular, by supporting commercially focused in rem claims based on clear statutory authority, with remedies limited to the protection of U.S. markets, section 337 minimizes many of the objections to extraterritorial jurisdiction that proved fatal to the ATS. The advantages of section 337 actions go beyond the structural features of the underlying statute. As the following Section explains, they also comprise significant institutional advantages related to the adjudicating forum.

D. ADVANTAGES OF ENFORCEMENT THROUGH AGENCY ADJUDICATION

The ITC, as a federal agency, offers significant advantages over an Article III court as a forum to adjudicate cases touching upon foreign relations and commerce, including specialized expertise in extraterritorial cases, hybridized elements of both public and private enforcement, greater capacity to coordinate a coherent import policy, explicit authority to weigh the public interest, and political control over cases with foreign policy implications. Given that much of the Supreme Court's misgivings over the ATS related to concerns over the institutional competence of federal courts in foreign relations as well as worries that private plaintiffs will needlessly provoke foreign conflicts, the institutional features of the ITC seem well-suited as a corrective.

1. Specialized Expertise

Unlike the ATS, which poses the awkward spectacle of federal courts having to determine what qualifies as customary international law within the scope of an archaic statute, section 337 confers the question of what counts as "unfair" to the expertise of a federal agency, the ITC. Unlike an Article III judge, who is typically a generalist and rarely (if ever) hears ATS claims, the ITC hears only a specific category of cases and has institutional expertise to adjudicate disputes implicating international trade, domestic industries, and "unfair importation." The ITC has a staff of approximately 365, including

274. *See* Pager & Priest, *supra* note 19, at 2459–60, 2463.

international trade analysts (investigators and experts in particular industries), international economists, attorneys, and technical support personnel.[275] The ITC ALJs and the Commissioners themselves

> are focused on hearing and deciding [import] cases, year after year. They develop expert knowledge of [international trade and import] law[], and the types of entities, instruments, and practices that frequently appear in [their] cases. Many of [their] cases involve somewhat technical [areas], and [ITC adjudicators] become knowledgeable about these [areas].[276]

Although the definition of "unfair methods of competition and unfair acts"[277] may evolve over time, the ITC's specialization allows it to make decisions more quickly because ITC ALJs and Commissioners need less time to familiarize themselves with complex issues or nuances of trade, economics, and unfair competition law.[278] As noted, ITC proceedings adhere to an expedited schedule that typically concludes within 18 months of the initial complaint.[279] In addition, specialization facilitates more accurate decision-making because ITC adjudicators are better able to assess technical evidence and the relative merits of similar, yet distinct, claims.[280]

Moreover, section 337 directs the ITC to consult with other federal agencies, including the Department of Health and Human Services, the Department of Justice, and the FTC, another federal agency that grapples with the meaning of "unfair competition."[281] Not only does this enhance the institutional expertise of the ITC, it also facilitates a more coherent and coordinated government policy towards trade than is possible through private enforcement in Article III courts, thereby ensuring that the United States speaks with "one voice" in foreign relations.

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275. *See About the USITC*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/employment.htm; https://www.usitc.gov/press_room/about_usitc.htm [https://perma.cc/JL54-7HSU].

276. Andrew Ceresney, Director, SEC Div. of Enf't, Remarks to the American Bar Association's Business Law Section Fall Meeting (Nov. 21, 2014) (comparing administrative and judicial resolution of cases brought by the Securities and Exchange Commission).

277. 19 U.S.C. § 1337(a)(1)(A) (2018).

278. *See* LAWRENCE BAUM, SPECIALIZING THE COURTS 32–33 (2011) (discussing perceived efficiency advantages); Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists Versus Generalists*, 36 FORDHAM INT'L L.J. 788, 794 (2013) ("The ability early on to spot a gap in either a party's economic reasoning or its factual allegations is surely improved by frequent exposure to recurring economic issues. The learning curve may be fairly steep, even for antitrust cases, but the generalist judge who sees one antitrust case every year or two would surely be slower to progress down that curve than would the judge who sees such cases weekly.").

279. *See supra* note 220 and accompanying text.

280. *See* Ginsburg & Wright, *supra* note 278, at 797–98.

281. 19 U.S.C. § 1337(b)(2).

2. Hybrid Enforcement

The institutional advantages of the ITC go beyond its specialized expertise. The ITC's administrative scheme marries aspects of both public and private enforcement, which offers particularly salient benefits in the context of adjudicating cases based on events that occurred abroad.

The overwhelming majority of complaints filed in the ITC are by non-governmental parties, who directly supplement the resources and information available to the agency and lend support to the Commission's public mandate. Indeed, private parties harmed by unfair competition will often have better access to information regarding the inner workings and cost structure of their industries than public enforcers.[282] This is particularly true where the base of operations occurs in faraway lands whose conditions and context are foreign to public officials in the United States.

After a complaint is filed, the ITC investigates the complaint using adversarial proceedings to assess its merits, with the complainants and respondents providing the agency with evidence and arguments.[283] Thus, private actions in the ITC supplement the information and expertise of the Commission by bringing first-hand knowledge of section 337 violations to the Commission's attention.[284] At the same time, ITC procedures have built-in mechanisms to temper the excesses of private plaintiffs and ensure that its investigations do not clash with other foreign policy aims.[285]

The information provided to the ITC in adversarial proceedings may in turn inform public enforcement actions or advice to the political branches to address unfair competition and acts. First, although section 337 actions usually begin with a complaint filed by an aggrieved competitor, the ITC has the authority to initiate proceedings sua sponte.[286] The ITC could make greater use of this authority to investigate widespread or systemic problems brought to its attention in individual cases or unfair acts that harm smaller domestic industries who are less likely to have the resources to pursue their own complaints. Second, the ITC is charged with providing the political branches with independent analysis and information on tariffs, trade, and competitiveness.[287] The information developed in private enforcement actions can inform this advice. In this way, the ITC has the potential to forge an efficient division of labor between public and private enforcement.

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282. For this reason, U.S. trade law relies heavily on industry groups to initiate complaints against foreign dumping and subsidies, in addition to section 337 actions.

283. 19 C.F.R. § 210.36 (2021).

284. Stewart & Sunstein, *supra* note 115, at 1298; Thompson, *supra* note 110, at 192.

285. *See infra* notes 287–88 and accompanying text. The ITC may also abstain from investigations that would trench on a sister agency's authority. *See* Amarin Pharm., Inc. v. Int'l Trade Comm'n, 923 F.3d 959, 965 (Fed. Cir. 2019).

286. 19 U.S.C. § 1337(b)(1) (2018).

287. *See About the USITC*, *supra* note 275.

3. Coherent Import Policy

Another advantage of the ITC over a judicial forum is its ability to implement a more coherent, uniform, yet flexible trade policy. Private complaints in the ITC are resolved using the Commission's understanding of section 337 in light of U.S. policy, rather than the views of any one of 2,758 federal district judges. The ITC openly considers the policy implications of its interpretations of section 337, whereas courts often ignore, avoid, or do not entirely understand the policy implications of their decisions. As noted, the ITC also coordinates policy with sister agencies across the executive branch.

In addition, where federal courts often offer conflicting interpretations of law,[288] the ITC can provide a single, unified interpretation of unfair competition. These interpretations provide the basis for the ITC to issue nation-wide injunctions involving the goods over which it exercises in rem jurisdiction. Although federal courts do issue nation-wide injunctions, such court injunctions have increasingly raised concerns that it is inappropriate for a single federal judge to set national policy.

At the same time, the ITC has more flexibility to change its positions over time because the ITC is not bound by stare decisis. Federal courts, in contrast, are bound by "super-strong" stare decisis when interpreting statutory provisions.[289] Thus, the ITC may adjust its interpretation of unfair competition and acts in response to changes in international trade, domestic industries, or shifts in the political winds.[290]

The ITC can also provide more guidance to non-parties than courts. While courts are prohibited from issuing advisory opinions, federal agencies are encouraged to do so. While courts are institutionally averse to deciding more than is necessary, nothing prevents the ITC from offering guidance beyond the specific parties in its proceedings.[291] Indeed, part of its mandate is to provide just such guidance.

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288. Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 428–29 (2010).

289. Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1047–48 (2006) (quoting William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988)).

290. *See id.* at 1047–48 n.51 (citing examples). Some might reasonably question whether shifting course according to the political winds is desirable. To address fully this concern would take us beyond the present scope. However, the Supreme Court has consistently emphasized that foreign policy is the province of the political branches. Indeed, the failure of the ATS litigation to take into account geopolitical sensitivities was one of the Court's core objections to such suits. *See supra* notes 162–65 and accompanying text. In any case, as an independent agency, the ITC is only partly responsive to political pressure. For further exploration of these issues, see generally Michael Sant'Ambrogio and Sean Pager, *Adjudication and Extraterritoriality*, (2022) (unpublished manuscript) (on file with authors).

291. *See, e.g.*, Emily S. Bremer, *The Agency Declaratory Judgment*, 78 OHIO ST. L.J. 1169, 1179–83 (2017).

4. Weighing of the Public Interest

The ITC is also more responsive to public interest (including foreign policy) considerations than federal courts. While federal courts sometimes invite or accept amicus briefs addressing public or government interests, their primary responsibility is to resolve the case or controversy before them, and, in the context of adjudicating private rights, can sometimes fail to take cognizance of the broader ramifications of their decisions. By contrast, a section 337 action "is not purely private litigation 'between the parties' but rather is an 'investigation' by the Government into unfair methods of competition or unfair acts in the importation of articles into the United States."[292] The hybridized nature of section 337 proceedings is further underscored by the participation of the ITC's Office of Unfair Import Investigations ("OUII"), which serves as an independent third party representing the public interest throughout the investigation. The OUII can propound discovery, interrogate witnesses, and brief issues just like private parties. Guided by the OUII's investigating attorney, the ITC can tailor or withhold remedies based on its determination of the public interest.[293]

5. Political Controls over Foreign Policy

The ITC's status as an executive branch agency also insulates it from the separation of powers concerns the Supreme Court repeatedly cited in its decisions reigning in the ATS. The six ITC Commissioners are nominated by the President, confirmed by the Senate, and are expected to implement federal trade policy.[294] Although judges are nominated and confirmed by the Senate, aside from a few hot-button issues, the Senate avoids focusing on the policy perspectives of judicial nominees.[295] In contrast, confirmation hearings for executive branch nominees, including the ITC Commissioners, overtly focus on their policy perspectives.[296] In addition, the President chooses the Chairman and Vice Chairman of the ITC from among the current Commissioners for two-year terms, although each must come from a different political party.[297] Similarly, no more than three commissioners may be from any one political party.[298] The commissioners serve nine-year terms and may only be removed for cause.[299] Nevertheless, despite their insulation from day-

292. Young Eng'rs, Inc. v. U.S. Int'l Trade Comm'n, 721 F.2d 1305, 1315 (Fed. Cir. 1983).

293. *See* SECTION OF INTELL. PROP. L., AM. BAR ASS'N, *supra* note 251, at 8–9, 37–38.

294. *See* 19 U.S.C. § 1330(a) (2018).

295. Michael Sant'Ambrogio, *Private Enforcement in Administrative Courts*, 72. VAND. L. REV. 425, 471–72 (2019).

296. *Id.*

297. 19 U.S.C. § 1330(c)(1), (3)(B).

298. *Id.* § 1330(a).

299. *Id.* § 1330(b); Leah A. Hamlin, *Qualified Tenure: Presidential Removal of the FBI Director*, 44 OHIO N.U. L. REV. 55, 74 (2018) (suggesting that the Court inferred for-cause removal protections

to-day partisan politics, the ITC is expected to implement U.S. trade policy as articulated by Congress and the Executive Branch and provide the political branches with its best analysis and advice.[300]

Finally, the ITC has one more exceedingly rare feature, even among executive branch agencies, which further insulates it from the separation of powers concerns that arise when Article III courts decide cases with foreign policy implications. Namely, decisions by the ITC are reviewable by the President. When the ITC determines that a party is in violation of section 337, the ITC publishes its decision in the *Federal Register* and transmits a copy of its decision and proposed remedies to the President, who then has 60 days in which to disapprove the ITC's decision on policy grounds.[301] If the President does so, then the ITC's decision has no force or effect.[302]

This political control mitigates the central concern with courts adjudicating foreign policy disputes.[303] To the extent an ITC decision has foreign policy implications that the President deems adverse to the interests of the United States or his foreign policy objectives, the President may block the decision from taking effect. At the same time, when making such a decision the President will have the benefit of a record developed in adversarial proceedings before the ITC and the Commission's reasoned opinion.[304] In addition, the record and ITC opinion will increase the transparency of both the underlying trade problem and the President's response.

In sum, the ITC provides a more accessible, expert, and politically accountable forum for the resolution of private disputes over foreign commercial misconduct than Article III courts. Its hybrid structure blends the strengths of both public and private enforcement models. And its grounding in the executive branch, subject to political oversight and inter-action coordination, insulates it against the separation of powers and private enforcement concerns raised by the Supreme Court in the ATS context.

E. ADVANTAGES OF SECTION 337 OVER STATE LAW ACTIONS

Section 337's advantages over proceedings in Article III courts apply with even greater force to state law adjudication.[305] In particular, the unified voice and agency expertise supplied by the ITC in resolving commercial disputes touching on international trade policy offer a vastly superior alternative to relying on state courts to balance the often complex issues and sensitive

for SEC Commissioners based on their terms of office, the structure of the multi-member agency, its quasi-judicial character, and creation pre-*Humphrey's Executor*).

300. *See supra* notes 283, 290 and accompanying text.

301. 19 U.S.C. § 1337(j).

302. *Id.* § 1337(j)(2).

303. *See supra* notes 125–32, 155–57 and accompanying text.

304. 19 U.S.C. § 1337(j).

305. With some minor exceptions: e.g., state courts can issue advisory opinions (although they don't usually as a rule).

foreign relations considerations that such cases implicate. Moreover, the ITC's institutional advantages in framing coherent and politically astute policies based on intergovernmental coordination, explicit weighing of the public interest, and responsiveness to political controls provides an appealing contrast to the specter of 50 different jurisdictions reaching mutually inconsistent and conflicting rulings based on narrow parochial interests asserted by the litigants, untethered by broader considerations of the national interest. Finally, as a federal agency enforcing federal law, the ITC is not constrained by preemption or other limiting doctrines related to foreign relations federalism that can bar state law actions. Accordingly, on many dimensions, section 337 provides a more attractive replacement for ATS litigation than state judiciaries.

F. LIMITATIONS OF SECTION 337 ACTIONS

The biggest limitations on section 337's ability to substitute for the ATS or state law actions are a mirror of its strengths: its commercial focus, in rem structure, and domestic injury requirement. These statutory limits restrict the range of cases that can be brought in the ITC. In addition, the ITC has adopted prudential limitations on standing, which further restrict who can initiate a claim.

1. Inherent Limitations

First, section 337's commercial focus means that it offers little recourse against civil-political abuses by governments. Thus, *Filártiga* and other ATS cases premised on political violations could not be refashioned into section 337 claims. Section 337 only has bearing as a substitute for the corporate misconduct side of the erstwhile ATS docket.

That said, the corporate cases represented the overwhelming majority of ATS claims. Moreover, there are alternative remedies to redress many political violations. Thus, a modern day *Filártiga* could file suit under the TVPA in the United States. Other countries have also proven increasingly willing to criminally prosecute violations of civil-political human rights abuses under universal jurisdiction.[306] Accordingly, the enforcement void is arguably greater for commercial misconduct.

Second, section 337's basis in in rem jurisdiction means it can be used only when end products arising from foreign violations are imported to the United States.[307] Foreign entities that do not export to the United States will evade scrutiny. While access to the U.S. market remains a crucial aim for many exporters, more localized enterprises could operate with impunity.

306. *See Laws to Catch Human-Rights Abusers Are Growing Teeth*, ECONOMIST (Jan. 2, 2021), https://www.economist.com/international/2021/01/02/laws-to-catch-human-rights-abusers-are-growing-teeth [https://perma.cc/58ZX-9QH8]. As noted, international tribunals offer a further backstop to prosecute large-scale violations; sources cited *supra* note 44.

307. *See supra* notes 266–70 and accompanying text.

Finally, section 337 requires proof of injury to a domestic industry.[308] This restricts section 337's purview to overseas violations that have a commercially significant effect on the downstream U.S. market. As such, corporate misconduct by exporters may evade ITC scrutiny if the commercial ramifications are not substantial.[309] Thus, even *Unocal* may have evaded section 337 sanctions absent proof that the Burmese violations yielded cost savings that passed down into end-market pricing.[310]

Furthermore, if a comparable U.S. domestic industry does not exist, then even violations with significant commercial effects may escape sanction.[311] This would not have posed an obstacle in *Unocal* since the United States does have domestic oil producers. However, it lacks palm oil plantations. Thus, the manifold environmental abuses committed by foreign palm oil producers could evade section 337 scrutiny.

That said, section 337 complaints can target unfair methods of competition on the basis that the resulting imports "prevent the establishment of such a[] [domestic] industry."[312] Some parts of the United States, such as Hawaii, have climates suitable for tropical agriculture. The question would then become whether credible evidence could be mustered showing that a domestic palm oil industry would have launched *but for* the unfair competition from the offending imports.

In short, while the structural limitations of section 337 make it an imperfect substitute for the full spectrum of erstwhile ATS claims, ITC unfair competition actions do offer a flexible tool to target many significant forms of transnational corporate supply chain violations. Their unrealized potential deserves closer examination.

2. Self-Imposed Limits

Unfortunately, the ITC has itself adopted self-imposed limits that impair the effectiveness of section 337 as a tool to redress foreign supply chain violations. Two of these limitations seem excessive or unwarranted: (a) the ITC's unwillingness to initiate sua sponte investigations; and (b) its restrictive standing requirements.

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308. 19 U.S.C. § 1337(a)(1)(A).

309. Similarly, claims based on historical wrongs (such as the World War II-era ATS cases) would not be actionable.

310. *Cf.* Bowoto v. Chevron Corp., 481 F. Supp. 2d 1010, 1015 (N.D. Cal. 2007) ("Plaintiffs present no evidence that killing or otherwise suppressing protestors saves defendants money, or otherwise increases their profit margin. Plaintiffs therefore fail to present evidence that defendants gained a competitive advantage in the United States, or impacted the U.S. economy . . . ." (footnote omitted)).

311. Section 337 does allow for injuries to prospective industries, but not purely speculative ones.

312. 19 U.S.C. § 1337(a)(1)(A)(ii).

First, the ITC has generally been unwilling to initiate federal investigations sua sponte. Although section 337 gives the ITC this power, it has exercised it only twice, with the last occasion occurring in 1981.[313] Relying on private complainants to initiate investigations has its shortcomings: Some commercial interests with skeletons in their supply chains may be hesitant to file a complaint against a competitor; nascent industries may not always have pertinent information about unfair practices abroad. Accordingly, the ITC should consider making more frequent use of self-initiated investigations based on consultation with its sister agencies to address priority areas of foreign unfair competition or fill recognized enforcement gaps.[314] In doing so, it could also solicit input, informational resources, and expertise from NGOs and other supply chain activists as the next subpoint contemplates.

Second, the ITC has also adopted restrictive standing requirements for private complainants to initiate investigations. The ITC has generally mirrored the standing requirements applied by Article III courts in enforcing federal statutes.[315] The result is that only members of an industry directly affected by foreign unfair competition are likely to have standing to bring a section 337 complaint. However, such constraints can pose collective action problems where multiple competitors are affected, but none wants to incur the costs of unilateral enforcement and allow the others to free ride in the benefits. Alternatively, in some sectors, all the principal actors may be equally complicit, and none wishes to throw the first stone. The logical alternative in such a scenario would be to allow NGOs, labor unions, or other publicly minded organizations to file a complaint. Yet, such complainants typically lack standing.[316]

We question whether such rigid standing restrictions make sense. As an expert federal agency charged with protecting U.S. industries and advancing the public interest, the ITC occupies a very different institutional position than Article III courts. The ITC also has more limited remedial authority, largely restricted to exclusion orders. As such, reflexive replication of the statutory standing requirements applied in federal court is arguably inappropriate and unduly restrictive. Given the ITC's recognized power to hear cases *sua sponte* and its public interest safeguards, and given the need to prove injury to a domestic *industry* as a prerequisite for any remedy,[317] the ITC

313. Buckler & Jackson, *supra* note 210, at 549; SECTION OF INTELL. PROP. L., AM. BAR ASS'N, *supra* note 251, at 75 & n.1.

314. *Cf.* Matt Rizzolo, Brendan McLaughlin & Nicole Pobre, *ITC Already Has Authority Offered by Trade Secret Misuse Bill*, LAW360 (July 13, 2021, 5:03 PM), https://www.law360.com/articles/1402626/itc-already-has-authority-offered-by-trade-secret-misuse-bill [https://perma.cc/5DSA-KGSY] (making the case for proactive use of ITC authority under section 337).

315. *See* F. Scott Kieff, *Private Antitrust at the U.S. International Trade Commission*, 14 J. COMPETITION L. & ECON. 46, 48 (2018).

316. *See* 19 C.F.R. § 210.12(a)(7) (2021); Buckler & Jackson, *supra* note 210, at 548.

317. *See* Kieff, *supra* note 315, at 51–53.

should consider relaxing such standing restrictions and allow greater license for NGOs to initiate complaints in the public interest.

G. DEVELOPING THE ITC'S CAPACITY

Despite the foregoing limitations, the ITC has the capacity to do much more. The ITC has the authority to undertake more investigations sua sponte, to relax its standing rules for private complainants, and to bar the importation of goods with supply chain abuses that violate international legal norms. None of this requires legislative action by Congress. Moreover, the time is ripe for the ITC to play a more assertive role in policing supply chain abuses. Across the political spectrum, there is increasing demand to protect American companies from unfair practices by our trading partners; the unqualified embrace of free trade by both parties is a thing of the past. Yet, few policymakers want a repeat of the Trump trade wars, fought with the blunt instrument of retaliatory tariffs. Section 337 actions provide a more precise way to target abusive practices that actually harm American industries. And it addresses unfair practices in a fairer and more deliberative way than trade sanctions. Thus, section 337 actions allow the United States to strike a balance between its commitment to free trade and its commitment to rooting out the labor, environmental, and human rights abuses that give globalization a bad name.

The new administration is still finding its footing with trade policy and has an unparalleled opportunity to use the ITC to further its commitment to fairer free trade. There is currently one vacancy on the six-member Commission, and President Biden will have the opportunity to nominate at least three more commissioners during his current term. He will also have the opportunity to nominate the Chair and Vice-Chair of the Commission. The President should nominate commissioners committed to blocking imports produced using unfair methods and practices that violate international legal norms. The President should also direct the ITC to consider ways in which it can address such abuses more systemically. Indeed, the President could also issue an executive order declaring the prosecution of overseas supply chain misconduct a government priority and calling upon other regulatory bodies of the executive branch to coordinate the sharing of information and enforcement responsibilities with the ITC.

In particular, U.S. trade policy would benefit from greater coordination between the FTC and ITC. The FTC currently has more resources than the ITC and could compile evidence regarding patterns of misconduct in particular industries and regions overseas and thereby provide guidance on compliance efforts.[318] However, the ITC has broader jurisdiction over imports, bears an explicitly protectionist mandate, and allows for private actions. Ideally, the two agencies would work together: The FTC would engage

318. *See* Pager & Priest, *supra* note 19, at 2513–14.

in fact-finding to provide the substantive basis to aggressively target unfair competition in supply chains, and the ITC would harness private actions and deploy its in rem jurisdiction to enforce FTC mandates.

If Congress and the President are serious about tackling abuses that give importers unfair trading advantages and harm domestic industries, they should give the ITC the resources necessary to proactively level the playing field for American companies. Doing so would muster an effective response to the void left by the erstwhile ATS litigation, level the playing field for American companies, and potentially make a real dent in the long-festering problem of supply chain abuses.

V. CONCLUSION

The demise of the ATS has left social justice advocates searching for an effective vehicle to address serious human rights, labor and environmental abuses that evade international law. At the same time, a new presidential administration is struggling with how to remedy unfair practices committed by our trading partners, while avoiding the damaging economic fallout of a repeat of the Trump trade wars. Section 337 actions in the ITC can meet both these needs. Section 337 offers a ready-made tool for addressing a wide range of overseas misconduct. Created in 1930 as part of a tariff act, section 337 is explicitly designed to provide broad protection for domestic industries harmed by unscrupulous foreign competitors. Moreover, Congress wrote section 337 with capacious language, allowing the ITC to define and refine the meaning of "unfairness methods of competition or unfair acts" as new industries, production methods, and trade practices give rise to novel forms of abuse and anti-competitive behavior.

Unlike the ATS or other state or federal laws aimed at misconduct abroad, section 337 does not raise the same concerns over assertion of extraterritorial jurisdiction. There is no question that Congress intended the ITC to provide remedies for abuses that occurred beyond our borders, thus overcoming any presumption against extraterritoriality. Yet at the same time the remedies available under section 337 are limited to blocking imports at the border and excluding the goods from the U.S. market. Moreover, the way in which the ITC takes jurisdiction over a case, relying on in rem jurisdiction over the imported goods, further limits both its extraterritorial reach and the potential for foreign relations friction.

Finally, unlike the imposition of retaliatory tariffs, which often lead to trade wars and significant collateral damage, section 337 provides a precisely tailored remedy for overseas abuses: blocking the importation of the goods tainted by the misconduct. At the same time, the political accountability of the ITC to the President ensures that ITC orders will not interfere with U.S. foreign policy objectives.

To be sure, the ITC cannot remedy all global injustices. The ITC cannot hold foreign governments directly accountable for human rights abuses, nor

address every competitive challenge American companies face in international trade. Moreover, even when the ITC offers a potential remedy for unfair practices, there may not always be an aggrieved plaintiff with the incentive to file a complaint. Nevertheless, the ITC has far more potential than is currently realized as a tool for remedying violations of global norms in production processes—including labor abuses, human trafficking, environmental destruction, unlawful land seizures, and much more. The good news is that the burgeoning extraterritorial complaints following *TianRui* suggests that some lawyers and ITC Commissioners appear interested in a more robust role for the ITC policing overseas misconduct. But the ITC can go farther still to expand its remit. It can and should embrace the original intent of Congress for section 337's unfair competition standard "to prevent every type and form of unfair practice" that confers an unlawful competitive advantage resulting in harm to U.S. industries.[319]

To realize its full potential, the Commission should also make greater use of its sua sponte authority to initiate investigations and relax its standing barriers to allow non-commercial parties to represent the domestic interests harmed by unfair imports. The ITC might initiate its own investigations of unfair practices when collective action problems prevent private parties from filing a complaint. The ITC should also take advantage of its freedom from constitutional standing requirements and permit NGOs, unions, and other public interest organizations to file section 337 complaints. Doing so would better position the ITC to fulfill its mandate to level the playing field for American companies.

Born amidst an economic crisis a century ago, section 337 offers the right tool for the crisis of the moment. Once again, American industries are scrambling to recover from a global economic collapse. Once again, American policymakers are looking for ways to protect domestic industries and workers harmed by unfair acts by foreign competitors. What is new is that we now also have a network of lawyers and social justice activists who seek to hold foreign actors accountable for human rights, labor, and environmental abuses around the globe. With the demise of the ATS, global justice advocates need a new accountability mechanism. Such advocates and protectionist-minded policymakers thus share a common interest in targeting unscrupulous foreign competitors. They should look to section 337 unfair competition actions in the ITC for a remedy.

319. S. REP. NO. 67-595, at 3 (1922).