

# THE NEW GLOBAL FINANCIAL LANDSCAPE: WHY EGREGIOUS INTERNATIONAL CORPORATE FRAUD SHOULD BE COGNIZABLE UNDER THE ALIEN TORT CLAIMS ACT

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## INTRODUCTION

In recent years, the Alien Tort Claims Act (ATCA)<sup>1</sup> has been invoked in a wide range of settings against an array of foreign and domestic corporations and individuals.<sup>2</sup> An extremely controversial statute,<sup>3</sup> the ATCA allows aliens to file suit for international law

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1. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).
2. See, e.g., *Mwani v. Bin Laden*, 417 F.3d 1, 4 (D.C. Cir. 2005) (discussing claims against the Al-Qaeda terrorist organization for bombings in Kenya); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (alleging that oil company defendant aided and abetted murder, torture, and enslavement of pipeline workers in Myanmar); *Abdullahi v. Pfizer*, No. 01 Civ. 8118 (S.D.N.Y. Aug. 9, 2005) (discussing suit against pharmaceutical corporation conducting clinical trials in Nigeria); *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1155 (S.D. Cal. 2005) (examining claims for alleged torture in Iraqi prisons); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 15 (E.D.N.Y. 2005) (discussing Vietnamese plaintiffs' allegations of chemical company defendant liability for injuries related to Agent Orange usage in the Vietnam war); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 542 (S.D.N.Y. 2004) (examining suit against financial institutions for purported collaboration with apartheid regime in South Africa).
3. See, e.g., *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 554 (“[T]his court must be extremely cautious in permitting suits here based upon a corporation’s doing business in countries with less than stellar human rights records, especially since the consequences of such an approach could have significant, if not disastrous, effects on international commerce.”). See also Recent Cases, *Civil Procedure—Choice of Law—Ninth Circuit Uses International Law to Decide Substantive Law Under Alien Tort Claims Act*, 116 HARV. L. REV. 1525, 1531 (2003) (noting that expansive ATCA liability “could strike deeply at the ability of parties to organize their conduct and protect their expectations”); John E. Howard, Op-Ed., *The Alien Tort Claims Act: Is Our Litigation-Run-Amok Going Global?*, U.S. CHAMBER OF COMMERCE, Oct. 2002, <http://www.uschamber.com/press/opeds/0210howardlitigation.htm> (discussing business

violations in federal court.<sup>4</sup> However, only international law violations<sup>5</sup> reflecting a mutual concern of the nations of the world are cognizable under the ATCA.<sup>6</sup>

In a significant ATCA ruling, *IIT v. Vencap*, the Second Circuit held that corporate fraud was not a violation of an international norm, and was therefore not a cognizable tort under the ATCA.<sup>7</sup> According to *Vencap* and the subsequent decisions that have cited to *Vencap* as precedent, while commercial fraud is a form of “stealing,” it fails to constitute conduct condemned by the majority of nations.<sup>8</sup> Thus, according to *Vencap* and its progeny, corporate fraud may constitute a several concern of some nations, but not the required joint concern of most countries.

However, in 1975 when *Vencap* was decided, the global financial landscape was vastly different. The interconnection between international equity and debt markets was limited. Derivatives<sup>9</sup> were in their nascent stage and posed relatively little risk to the world economy.<sup>10</sup> The instantaneous movement of capital with a mouse click was non-existent. Globalization was proceeding, but at a slower

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community’s concern that the ATCA is potentially damaging to international business and is subject to litigation abuse).

4. See 28 U.S.C. § 1350.

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

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

7. 519 F.2d 1001 (2d Cir. 1975).

8. As recently as 2004, courts have relied upon *Vencap* as authority that corporate fraud is not cognizable. See, e.g., *Arndt v. Union Bank of Switz.*, 342 F. Supp. 2d 132, 139 (E.D.N.Y. 2004).

9. Derivatives are financial contracts designed to create pure price exposure to an underlying commodity, asset, rate, index, or event. See Investorwords.com, Derivative Definition, <http://www.investorwords.com/1421/derivative.html> (last visited Sept. 24, 2006), for a definition of “derivatives.”

10. Legendary billionaire Warren Buffett and his partner, Charlie Munger, have warned that the widespread usage of derivatives may cause a severe international economic crisis. See Christopher Edmonds, Opinion, *Buffett: Expect 6%-7% Returns From the Market*, THESTREET.COM, May 3, 2003, [http://www.thestreet.com/\\_yahoo/comment/chrisedmonds/10084972.html](http://www.thestreet.com/_yahoo/comment/chrisedmonds/10084972.html); see also Martin Mayer, *The Danger of Derivatives*, WALL ST. J., May 20, 1999, at A20 (“[D]erivatives—created, sold and serviced behind closed doors by consenting adults who don’t tell anybody what they’re doing—are also a major source of the almost unlimited leverage that brought the world financial system to the brink of disaster last fall.”).

pace.<sup>11</sup> Concerns about international financing of terrorism and money laundering were minimal at best.<sup>12</sup> The potential financial losses and damage to global economic order arising from a financial implosion caused by fraud were modest and more significantly, were containable to the local economy or immediate geographic area where the collapse occurred. Given the realities of 1975, there was no international consensus, let alone cooperation, regarding the prevention of financial fraud.

Thirty years later, the world financial landscape is completely unrecognizable. National economies and capital markets are intertwined,<sup>13</sup> and a financial fiasco leading to severe financial loss can have catastrophic effects around the world, both directly and indirectly.<sup>14</sup> While in 1975 financial deception leading to collapse might have been disastrous for a particular local or regional economy, today's financial implosion could cause huge losses on an international scale. For example, the amount of outstanding derivatives contracts traded over the counter totaled approximately \$10 trillion by the close of 2005.<sup>15</sup> By the end of the first quarter of 2006, the amount of outstanding derivatives contracts traded on formal exchanges totaled \$25 trillion and over \$50 trillion for options

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11. Notwithstanding the perception that globalization is a new phenomenon, globalization has been progressing for hundreds of years. See generally Michael D. Bordo et al., *Is Globalization Today Really Different than Globalization a Hundred Years Ago?* (Nat'l Bureau of Econ. Research, Working Paper No. 7195, 1999).

12. Recent terrorist atrocities have raised the level of concern regarding the financing of terrorism. Kevin J. Fandl, *Recalibrating The War on Terror by Enhancing Development Practices in the Middle East*, 16 DUKE J. COMP. & INT'L L. 299, 299 (2006) ("Only recently, with the attacks on the United States, Spain, and the United Kingdom, has the awareness of terrorism in the Western world intensified."). See also International Convention for the Suppression of the Financing of Terrorism, *opened for signature* Jan. 10, 2000, 2178 U.N.T.S. 229, 39 I.L.M. 270 (2000) (showing a U.N. convention regarding financing of terrorist activities); *Financing Terrorism Looking in the Wrong Places*, THE ECONOMIST, Oct. 20, 2005, [http://economist.com/displaystory.cfm?story\\_id=5053373](http://economist.com/displaystory.cfm?story_id=5053373).

13. See, e.g., John W. Head, *Lessons from the Asian Financial Crisis: The Role of the IMF and the United States*, 7 KAN. J.L. & PUB. POL'Y 70, 89-90 (1998) ("[E]conomic collapse in any Asian country . . . is bad news for the rest of Asia and potentially for the rest of the world.").

14. See Lawrence L.C. Lee, *The Basle Accords As Soft Law: Strengthening International Banking Supervision*, 39 VA. J. INT'L L. 1, 2 (1998) ("[O]ne attendant risk arising from the growth of financial globalization is the potential for international financial crises which disrupt macroeconomic performance.").

15. BANK FOR INT'L SETTLEMENTS, BIS QUARTERLY REVIEW: INTERNATIONAL BANKING AND FINANCIAL MARKET DEVELOPMENTS statistical annex at A103, tbl.19 (Sept. 2006), available at [http://www.bis.org/publ/qtrpdf/r\\_qa0609.pdf](http://www.bis.org/publ/qtrpdf/r_qa0609.pdf).

on those contracts.<sup>16</sup> The leverage in the global economy, and thus the attendant risk thereto, is staggering.

Given the profound changes in the international financial markets, as well as the growing recognition that fraud poses a danger to global financial stability, this Article suggests that automatically holding financial fraud not cognizable pursuant to the ATCA is no longer valid given the new reality of our interwoven capital markets. Avoiding massive corporate fraud is not merely one nation's interest, but rather a crucial foundation underpinning the international economic structure. Preventing "Enron-like" financial implosions, failed banking systems, evisceration of tens of billions in market value, substantial job loss, destruction of employees' retirement savings, plummeting real estate valuations, and economic collapse caused by corporate fraud constitutes the quintessential example of an international norm. Therefore, select egregious corporate fraud that results in severe financial collapse, economic damage, and wealth destruction is a violation of an international norm, and should be actionable under the ATCA.<sup>17</sup>

## I. THE TRANSFORMATION OF THE FINANCIAL LANDSCAPE AND TECHNOLOGICAL INNOVATION SINCE *VENCAP*

### A. Globalization and the Rise of the Multinational Corporation

The dangers to the international economy associated with a financial fiasco dwarf the dangers formerly present in the 1970s, or even the 1980s. It is incontrovertible that the global economy in the opening decade of the twenty-first century bears little resemblance to the one in 1975 when *Vencap* was decided. Three decades post-*Vencap*, business is conducted on a hitherto unimaginable scale. Commercial enterprises operate globally, developing cutting-edge technology,<sup>18</sup> searching for new sources of raw materials,<sup>19</sup> testing

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16. *Id.* statistical annex at A108, tbl.23A.

17. This Article is not suggesting that garden-variety acts of fraud such as insider trading, executive compensation abuse, or other criminal action, which does not result in serious damage to the world economy, should be cognizable. The conduct suggested to be cognizable is egregious deception resulting in severe wealth evisceration.

18. *See, e.g.*, Intel, Intel in Your Community: Israel, <http://www.intel.com/community/israel/> (last visited Aug. 7, 2006) (noting development of Intel Corporation's Centrino Chip at its research center in Haifa, Israel).

products,<sup>20</sup> outsourcing professional services,<sup>21</sup> and operating production facilities.<sup>22</sup>

Standing at the vanguard of this world with virtual borders are large international titans of capitalism, including large multinational corporations (MNCs) based in the United States.<sup>23</sup> With ever-advancing technology,<sup>24</sup> instantaneous movement of capital,<sup>25</sup> and the explosion of trade markets,<sup>26</sup> these huge MNCs have created a new financial dynamic facilitating unprecedented economic growth and transformation. MNCs are at the pinnacle of our new global economy and enjoy staggering financial power.<sup>27</sup> As corporations

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19. See, e.g., China National Petroleum Corporation, Overseas Oil and Gas Operations, <http://www.cnpc.com.cn/english/inter/OverseasOil.htm> (last visited Aug. 7, 2006) (explaining how China's large oil corporations are vigorously searching around the globe in order to find new sources of crude oil, and noting that China's National Petroleum Company has oil exploration projects worldwide).

20. See, e.g., *Abdullahi v. Pfizer, Inc.*, 01 Civ. 8118, 2005 U.S. Dist. LEXIS 16126, at \*3 (S.D.N.Y. Aug. 9, 2005) (discussing an ATCA suit involving an American pharmaceutical corporation that conducted clinical trials in Nigeria during a meningitis outbreak).

21. See, e.g., About Outside Counsel, [www.outsidecounsel.net/about.html](http://www.outsidecounsel.net/about.html) (last visited Aug. 7, 2006) (showing how legal services for U.S. corporations are being performed overseas).

22. See, e.g., Nikebiz.com, Jobs: Asia Pacific, <http://www.nike.com/nikebiz/nikebiz.jhtml?page=33> (last visited Aug. 7, 2006) (showing that Nike offers job opportunities in production facilities throughout Asia).

23. Unquestionably, large MNCs are becoming more powerful and influential. However, over-regulation of MNCs risks severe economic opportunity loss for the MNCs, the local population, and the global economy. See Vijay K. Nagaraj & Nithya V. Raman, *Are We Prepared for Another Bhopal?* (Dec. 2004), <http://www.india-seminar.com/2004/544/544%20nagaraj,%20raman.htm> (“[O]ver-regulation of multinational corporations can drive away investment, reducing the wealth of the nation and the number of available jobs.”); see also Curtis Bradley, *The Costs of Human Rights Litigation*, 2 CHL J. INT’L L. 457, 471-73 (2001) (noting that expansive MNC liability endangers U.S. business interests).

24. According to technology experts, 4G describes an environment where radio access methods will be able to inter-operate to provide communications sessions that can seamlessly “hand-off” between them. More than any other technology, 4G will have a profound impact on the entire wireless landscape. See, e.g., 4G.co.uk, About 4G, <http://www.4g.co.uk/about4g.html> (last visited Oct. 27, 2006); see also Wireless Week, <http://www.wirelessweek.com> (last visited on Aug. 7, 2006) (breaking the latest technology news).

25. See, e.g., TD Ameritrade, <http://www.tdameritrade.com> (last visited Aug. 7, 2006) (noting that capital can be transferred between banks and brokerage accounts with a mouse click and large amounts of capital can be invested in specialized exchange traded funds, American depository receipts, and single country mutual funds).

26. See Press Release, World Trade Org., *Developing Countries’ Goods Trade Share Surges to 50-Year Peak* (Apr. 14, 2005), [http://www.wto.org/english/news\\_e/pres05\\_e/pr401\\_e.htm](http://www.wto.org/english/news_e/pres05_e/pr401_e.htm) (“[D]eveloping countries saw their share in world merchandise trade rise sharply in 2004 to 31%, the highest percentage since 1950, according to WTO figures released on 14 April 2005.”).

27. See Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. SUP. 531, 538-39 (2002)

have become larger, any MNC mega-meltdown will potentially cause substantially more severe financial losses, both locally and globally than in 1975.

## B. Globalized Financial Markets, Technological Innovation, and the Internet—The New Autobahn of Commerce

Along with massive opportunities, the risk of a global financial meltdown is higher now than ever before because of our autobahn global economy. Thirty years after *Vencap*, new information systems permit real-time gathering and dissemination of information twenty-four hours a day, seven days a week. Commercial internet transactions, e-payment systems, and other technological innovations were unknown when *Vencap* was decided. New technology and products that enable both business and individuals to communicate and conduct business faster, invest globally, retrieve and disseminate information, and link the world, are released with increasing frequency.<sup>28</sup>

One of the most affected areas of the global financial system has been financial services and investment. Technology and globalization have united to produce new financial trading centers which bridge the time zone gaps between traditional trading centers.<sup>29</sup> The proposed \$20 billion “merger of equals” between the New York Stock Exchange and Euronext will create the world’s first global stock exchange which is anticipated to trade companies with a combined \$27 trillion market capitalization.<sup>30</sup> The new stock exchange, an MNC in its own right, will have offices in New York, London, Paris, and Amsterdam.<sup>31</sup>

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(noting that as of the early 1990s about thirty-seven thousand MNCs existed, and that the gross sales of several MNCs exceeded the GDPs of many nations); Bruce Mazlish, *Perspectives on Globalization from Developing States: A Tour of Globalization*, 7 *IND. J. GLOBAL LEGAL STUD.* 5, 12 (1999) (“[M]ultinationals are wealthier than about 120-130 nation-State members of the United Nations.”).

28. See, e.g., N.Y. Times, Technology, <http://www.nytimes.com/pages/technology/> (last visited Aug. 7, 2006) (showcasing examples of new technology and products).

29. See, e.g., *Gold Lifts Trading on Bourse*, GULF DAILY NEWS (Bahr.), Aug. 7, 2006, available at [http://www.gulf-daily-news.com/arc\\_printnews.asp?Article=151825](http://www.gulf-daily-news.com/arc_printnews.asp?Article=151825) (noting that Dubai has opened a gold trading market which bridges the time gap between the Far East and London gold trading).

30. News Release, NYSE Group, NYSE Group and Euronext N.V. Agree to a Merger of Equals (June 1, 2006), <http://www.nyse.com/press/1149157439121.html>.

31. *Id.* (“NYSE Euronext will be a U.S. holding company, the shares of which will be listed on the NYSE, trading in U.S. dollars, and on Euronext Paris, trading in Euros. Its U.S. headquarters will be located in New York, and its international headquarters in Paris and

Cutting-edge breakthroughs in technology and pioneering advances in investment possibilities have combined to transform and add significant leverage in the world financial markets. The huge derivatives market,<sup>32</sup> as well as the newer contracts for difference (CFDs),<sup>33</sup> are examples of this incredible leverage. New financial market innovations permit the buying and selling of both debt and equity via electronic communication networks (ECNs).<sup>34</sup> Today, large amounts of capital can be instantaneously transferred in and out of a variety of investment vehicles.<sup>35</sup> Not only is there a wide array of shares to buy and sell on formal exchanges and the over-the-counter markets, but a virtual galaxy of exchange traded funds, or ETFs,<sup>36</sup> also exist. These investment vehicles focus on single themes such as country-specific or region-specific equity indexes, oil, gold, and numerous other categories. They have attracted gargantuan sums of capital since their recent introduction. By June 2006, over \$335 billion in assets were invested in U.S. ETFs.<sup>37</sup> At the end of March 2006, nearly \$300 billion was invested in U.S. closed-end funds.<sup>38</sup> Worldwide, nearly \$20 trillion was invested in mutual funds.<sup>39</sup>

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Amsterdam (which will be the centers of operations for its international activities), with London as the centre for its derivatives business.”)

32. See, e.g., *supra* note 16 and accompanying text (referencing the \$75 trillion worth of outstanding derivatives contracts and options on those contracts).

33. CFDs are “contracts for difference” that allow investors to make very highly leveraged bets on various financial products including shares, foreign exchange, precious metals, and bonds. See *Contracts for Difference and CFD Trading*, <http://www.contracts-for-difference.com/> (last visited Sept. 29, 2006); see also *GCI Financial*, <http://www.gcitradng.com/cfd-trading.htm> (last visited Aug. 7, 2006) (showing an example of where CFDs are traded).

34. Many ECNs allow trading after-hours and sometimes even for twenty-four hours. Most of these ECN systems were not created until the late 1990s. See, e.g., *Instinet*, <http://www.instinet.com/index2.jsp> (last visited Oct. 26, 2006); *NASDAQTrader.com*, <http://www.nasdaqtrader.com>; *Bloomberg.com*, <http://www.bloomberg.com/index.html?Intro=intro2> (last visited Oct. 26, 2006).

35. For example, according to the U.S. Treasury, “the two [major] international electronic funds transfer systems handle over \$6 trillion in wire transfers” daily. United States Department of the Treasury, *Financial Crimes Enforcement Network, International Overview*, [http://www.fincen.gov/int\\_main.html](http://www.fincen.gov/int_main.html) (last visited June 20, 2006).

36. ETFs are “a type of investment company whose investment objective is to achieve the same return as a particular market index.” U.S. Securities and Exchange Commission, *Exchange-Traded Funds*, <http://www.sec.gov/answers/etf.htm> (last visited Aug. 7, 2006).

37. *Exchange-Traded Fund Assets: June 2006*, INVESTMENT COMPANY INSTITUTE, July 27, 2006, [http://www.ici.org/stats/etf/etfs\\_06\\_06.html#TopOfPage](http://www.ici.org/stats/etf/etfs_06_06.html#TopOfPage).

38. *Closed-End Fund Assets: First Quarter 2006*, INVESTMENT COMPANY INSTITUTE, June 6, 2006, [http://www.ici.org/stats/latest/cef\\_q1\\_06.html#TopOfPage](http://www.ici.org/stats/latest/cef_q1_06.html#TopOfPage).

39. See *Worldwide Mutual Fund Assets and Flows: First Quarter 2006*, INVESTMENT COMPANY INSTITUTE, Aug. 3, 2006, [http://www.ici.org/stats/latest/ww\\_03\\_06.html#TopOfPage](http://www.ici.org/stats/latest/ww_03_06.html#TopOfPage).

In addition to the investment choices in “traditional markets,”<sup>40</sup> investment options in countries that were once unthinkable are now rapidly developing. In 1975, there was a cold war between the former Soviet Union and the United States. Thirty years after *Vencap* there is substantial free-market development in Russia as well as the former “Eastern Bloc” and both equity and debt markets in these formerly communist nations are undergoing rapid development.<sup>41</sup> China has also opened its doors, and the “Great Wall” is rapidly becoming the “Great Mall.”<sup>42</sup>

Both the potential rewards and risks have become magnified as a result of the financial and technological revolutions that have overtaken the world equity, debt, and forex markets. While the dangers associated with market risk may be assuaged through prudent hedging or insurance, the risk associated with financial collapse due to a grandiose fraud cannot be underestimated.

## II. THE SECULAR BULL MARKET IN FINANCIAL FRAUD AND SCANDAL

### A. The “Old” Financial Fraud

Although corporate fraud has occurred in prior decades, these early deceptions generally did not have significant potential to cause widespread international financial turmoil. For example, in the 1970s, several Wall Street firms collapsed due to “technological incompetence and lack of capital.”<sup>43</sup> In the 1980s, the phrase “greed is good”<sup>44</sup> became a generational symbol for insider trading scandals, including the crumbling of Drexel Burnham Lambert and the Savings and Loan scandal.<sup>45</sup> However, as globalization grew in the 1990s, the

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40. Examples of traditional markets are the United States, Canada, United Kingdom, Continental Europe, and Japan.

41. See, e.g., Russian Trading System Stock Exchange, <http://www.rts.ru/?tid=541> (last visited Aug. 7, 2006).

42. See Pepe Escobar, *The Great Wall of Shopping*, ASIA TIMES ONLINE (H.K.), Jan. 14, 2005, <http://www.atimes.com/atimes/China/GA14Ad04.html>.

43. Gretchen Morgenson, *Rebound from Ruin, If Not from Distrust*, N.Y. TIMES, Sept. 8, 2002, § 3, at 1.

44. In the movie *Wall Street*, the character Gordon Gekko, addressing a shareholder meeting, states, “I am not a destroyer of companies. I am a liberator of them! The point is, ladies and gentlemen, that greed, for lack of a better word, is good. Greed is right, greed works.” WALL STREET (20th Century Fox 1987).

45. See John Greenwald, *Predator’s Fall*, TIME.COM, Feb. 26, 1990, <http://www.time.com/time/magazine/article/0,9171,969468,00.html> (describing the collapse and

risks to world economic order grew as well. The implosion of Long-Term Capital Management (LTCM) in 1998 demonstrated the potential international ramifications of an implosion in a single country.<sup>46</sup> LTCM, a specialist in trading government bonds, employed derivatives to obtain significant leverage to significantly increase profits. Unfortunately, the derivatives also added tremendous risk to LTCM's portfolio, and when market conditions eroded, LTCM collapsed and had to be rescued to avoid banking and brokerage failures in the American financial system. The Asian currency crisis of the late 1990s also demonstrated the perils of financial contagion, which is the risk that a financial crisis in one nation will spread and afflict the financial system of other nations.<sup>47</sup> Financial contagion has been defined as "the cross-country transmission of shocks or the general cross-country spillover effects."<sup>48</sup>

## B. The "New" Financial Fraud

The "fraud bull" shows no sign of slowdown. Indeed, scandals involving deceit in both American and international corporations are continuing at a torrid pace.<sup>49</sup> However, it is crucial to appreciate the

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bankruptcy of Drexel Burnham); John K. Villa, *That's Where the Money is: Bank Crimes Move Beyond Robbery to Fraud*, 9 BUS. L. TODAY 32 (May/June 2000), available at <http://www.abanet.org/buslaw/blt/blt00may-money.html> ("Many of the most serious problems uncovered in the S&L crisis involved insiders who phoned the books to make a sick financial institution appear healthy. That was often accomplished by buying uncollectible loans out of the bank with the proceeds of new, and probably equally uncollectible loans, before the bank examiners arrived.").

46. See Press Briefing, Int'l Monetary Fund, Press Conference on the IMF's Annual International Capital Markets Report (Sept. 11, 2000), <https://www.imf.org/external/np/tr/2000/tr000911.htm>; see *Wall Street Rescue for Hedge Funds*, BBC NEWS, Sept. 25, 1998, <http://news.bbc.co.uk/2/hi/business/179884.stm> ("Long-Term Capital Management specialised in bond arbitrage, trying to exploit differences in the price of government debt in different countries. It is believed to have lost heavily when Russia effectively defaulted on its short-term GKO bonds last month. At the beginning of September it admitted that its capital base had shrunk by half, to \$2.3bn. But because of its use of so-called derivatives, the fund's exposure was estimated at \$40bn to \$80bn—the sum total of the bets it had made around the world about the direction of bonds.").

47. See Int'l Monetary Fund Staff, *The Asian Crisis: Causes and Cures*, FINANCE & DEVELOPMENT, June 1998, at 18, available at <http://www.imf.org/external/pubs/ft/fandd/1998/06/pdf/imfstaff.pdf>.

48. Contagion of Financial Crises, The World Bank Group (Sept. 15, 2000), <http://www1.worldbank.org/economicpolicy/managing%20volatility/contagion/definitions.html#broad>.

49. According to the Federal Bureau of Investigations (FBI):

The FBI has not observed any major changes in criminal trends relating to Corporate Fraud. It is anticipated that the number of cases will continue to flourish. The FBI is committed to this problem. It remains the #1 priority within the Financial Crimes

different nature of the current scandals as opposed to the impact from the “old financial fraud” of prior decades. The “new financial fraud” is notorious for the depth of financial depravity and is qualitatively different. The recent Enron scandal is one example of the impact of “new financial fraud”: “In a matter of months, a bad crop of U.S. corporate executives incinerated trillions of dollars in wealth and destroyed the lives of thousands of innocent employees.”<sup>50</sup> As world-renowned financier Felix Rohatyn stated, the previous collapses “didn’t cost 50,000 jobs, people’s savings and a decline in market value of trillions of dollars . . . [t]his [situation] is not about a bunch of rogue CEOs.”<sup>51</sup>

A review of a single day’s *Wall Street Journal* speaks volumes as to the extent of the financial scandal plaguing the world. In only one day’s *Wall Street Journal* the following was reported: the former CEO of Health South, Richard Scrushy, was convicted of bribery in his attempt to obtain a seat on a state regulatory panel;<sup>52</sup> large companies Apple Computer and Computer Associates disclosed “irregularities” with respect to the dating of stock options to key executives;<sup>53</sup> over fifty companies are being investigated by the U.S. Securities and Exchange Commission (SEC) and prosecutors with respect to option dating and numerous officers and directors have either been terminated or have resigned over these scandals;<sup>54</sup> the U.S. Commodity Futures Trading Commission filed a complaint against BP PLC for purported manipulation of the propane futures

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Section. There are presently 405 Corporate Fraud cases being pursued by FBI field offices throughout the United States. This represents a 100 percent increase over the number of Corporate Fraud cases pending at the end of Fiscal Year 2003. Eighteen of the current pending cases involve losses to public investors which individually exceed \$1 billion. The volume of cases has yet to reach a plateau, with three to six new cases being initiated each month.

FINANCIAL CRIMES SECTION, FEDERAL BUREAU OF INVESTIGATION, FINANCIAL CRIMES REPORT TO THE PUBLIC: CORPORATE FRAUD (2005), available at [http://www.fbi.gov/publications/financial/fcs\\_report052005/fcs\\_report052005.htm#b1](http://www.fbi.gov/publications/financial/fcs_report052005/fcs_report052005.htm#b1).

50. Editorial, *Pinstripes to Prison Stripes*, L.A. TIMES, Jan. 16, 2004, at B-14.

51. Morgenson, *supra* note 43 (citing notable financier Felix Rohatyn and calling the Enron and WorldCom legacies a “greater and longer-lasting impact on the economy” than previous scandals because they involved “venerable financial institutions . . . at the heart of the . . . debacles”).

52. See Valerie Bauerlein, *Scrushy is Convicted in Bribery Case—Prosecutors Savor Victory Over HealthSouth Ex-CEO After ‘05 Fraud Acquittal*, WALL ST. J., June 30, 2006, at A3.

53. James Bandler, Nick Wingfield & William M. Bulkeley, *Apple and CA Report Problems in Options Grants*, WALL ST. J., June 30, 2006, at A3.

54. *Id.*

market;<sup>55</sup> and alleged breaches of fiduciary duties on the part of senior management led to a prosecutorial raid on a South Korean Bank.<sup>56</sup>

While such news underscores the frequency of financial gamesmanship, it is the high profile financial failures that have caused a sharp erosion of the public's trust in corporations. A cavalcade of high profile corporate failures has eroded corporate images worldwide.<sup>57</sup> Well-respected firms, such as Enron, WorldCom, Healthsouth, Adelphia Communications, Royal Dutch, and many others,<sup>58</sup> have placed a spotlight on the potential for corporate misconduct.<sup>59</sup> There are even trading cards focusing on corporate scandal.<sup>60</sup>

In addition, while most attention is usually riveted to the huge losses stemming from the plunge in share prices, that loss may be dwarfed by non-stock market losses. Indeed, although equity and debt markets are very significant, there are other serious financial ramifications such as lost salaries, lost retirement savings, increased foreclosures, and lower values for real estate. The income reduction due to job destruction may dwarf the losses in equity and debt markets.

*1. Examples of the "New" Financial Fraud.* The surge in highly unethical behavior is not relegated to one particular type of fraud or one particular genre of defendant. The diversity of actors is substantial and ranges from traders, banks, junior level employees,

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55. See Chip Cummins, *A Glimpse Inside BP Trading—Documents in Fresh Complaints Reveal Dealing-Room Strategies; Sharing of 'Lessons Learned,'* WALL ST. J., June 30, 2006, at C1.

56. See Jeongjin Lim & Lina Yoon, *Prosecutors Raid South Korea Bank—Move Against KEB Comes After Audit Finds Fault With 2003 Sale of Lender,* WALL ST. J., June 30, 2006, at C3.

57. Corporate scandals involving corporations such as WorldCom and Enron have led to a substantial distrust of corporations. See, e.g., *Sarbanes-Oxley: A Price Worth Paying?*, THE ECONOMIST, May 19, 2005, at 70, available at [http://www.economist.com/business/display\\_story.cfm?story\\_id=3984019](http://www.economist.com/business/display_story.cfm?story_id=3984019).

58. For example, in October 2005, approximately two months after going public, the commodities trading firm Refco filed for bankruptcy due to an accounting scandal. The Refco bankruptcy is believed to be the fourth largest to date. Large amounts of public investor money were lost and confidence in the market was lessened. See Eric Dash & Jenny Anderson, *How a Big Investor Fell into the Refco Deal*, N.Y. TIMES, Oct. 19, 2005, at C4.

59. See generally REBECCA SMITH & JOHN R. EMSHWILLER, 24 DAYS: HOW TWO WALL STREET JOURNAL REPORTERS UNCOVERED THE LIES THAT DESTROYED FAITH IN CORPORATE AMERICA (2003).

60. David Plotz, *Corporate Scandal Trading Cards: Collect 'Em All*, SLATE, July 19, 2002, <http://www.slate.com/id/2068382/>.

and law firms to the highest echelon of corporate management.<sup>61</sup> Rogue financial traders have set up fake trades purportedly making money while in truth losing billions.<sup>62</sup> International banks have committed fraud to the tune of billions.<sup>63</sup>

WorldCom management perpetrated a huge financial hoax through accounting fraud totaling over \$3 billion.<sup>64</sup> Once the second largest communications corporation, WorldCom executives committed fraud and deceived investors on a grand scale.<sup>65</sup> WorldCom's financial problems led to the firing of seventeen thousand employees and caused severe economic dislocation.<sup>66</sup>

Another multi-billion dollar accounting fraud was perpetrated by large hospital chain owner HealthSouth.<sup>67</sup> This involved manipulation of the corporation's financial records and the fabrication of accounting entries.<sup>68</sup>

The biggest corporate scandal of 2005 was the collapse of Refco months after issuing equity shares to the public. Refco was a major

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61. See, e.g., *supra* notes 52, 58; *infra* notes 64, 90-101 and accompanying text; *Crisis Meeting Over \$750m Bank Fraud*, BBC NEWS, Feb. 8, 2002, <http://news.bbc.co.uk/1/hi/business/1806431.stm> (noting that Allied Irish Banks suffered a nearly one billion dollar fraud-related loss). Enron's principal outside counsel, Vinson & Elkins (V&E), was sued on the basis that the firm participated with and helped Enron with respect to its corporate fraud. See generally *In re Enron Corp. Sec. Derivatives & ERISA Litig.*, 235 F. Supp. 2d 549 (S.D. Tex. 2002). V&E moved to dismiss the claims but the court refused, holding that the firm could potentially be liable. *Id.* at 704-05. V&E settled the litigation for \$30 million. The Associated Press, *Vinson & Elkins to Pay Enron \$30 Million to Settle Claims*, LAW.COM, June 2, 2006, <http://www.law.com/jsp/article.jsp?id=1149152717089>. Other prestigious law firms are also being sued for their alleged involvement in the fraudulent schemes of their clients. The National Law Journal, *Creative Litigation Ensnarers Outside Counsel in Shareholder Suits*, LAW.COM, Jan. 24, 2006, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1138023312254> (describing allegations that law firms representing Refco and Adelphia Communications aided their clients to commit fraud).

62. See William Leith, *How to Lose a Billion*, THE GUARDIAN (London), Oct. 26, 2002, at 34, available at <http://business.guardian.co.uk/story/0,3604,818620,00.html>.

63. Jill Treanor, *BCCI Settlement Costs Top \$1.2bn*, THE GUARDIAN (London), May 15, 2003, at 18, available at <http://business.guardian.co.uk/story/0,3604,956218,00.html>; see also *Japan's \$1-Billion Scam*, ASIaweek, Oct. 27, 1995, available at <http://www.asiaweek.com/asiaweek/95/1027/biz2.html> (describing fraud at Japan's Daiwa bank).

64. *WorldCom's Woes*, FORBES.COM, Aug. 9, 2002, <http://www.forbes.com/2002/06/26/worldcom.html>.

65. *Id.*

66. *Id.*

67. Carrie Johnson, *5 Years for HealthSouth Fraud*, WASH. POST, Dec. 10, 2005, at D01.

68. See *Fifth Chief Financial Officer at HealthSouth to Admit Fraud*, N.Y. TIMES, Apr. 25, 2003, at C13; Milt Freudenheim, *HealthSouth Audit Finds as Much as \$ 4.6 Billion in Fraud*, N.Y. TIMES, Jan. 21, 2004, at C2; Reed Abelson, *HealthSouth's Bondholders Await Ruling*, N.Y. TIMES, Mar. 31, 2004, at C1.

commodities and futures contracts brokerage with 200,000 customers.<sup>69</sup> In August 2005, Refco went public at \$22 a share and the shares jumped twenty-five percent in one day.<sup>70</sup> The market capitalization was approximately \$4 billion.<sup>71</sup> Although Refco claimed \$75 billion in assets at the time of its initial public offering (IPO), in October 2005, it subsequently conceded assets of \$16 billion.<sup>72</sup> Shortly after going public, Refco admitted that an internal audit revealed a \$430 million receivable owed to Refco by an entity controlled by CEO Phillip Bennett.<sup>73</sup> Bennett is alleged to have engaged in off-setting transactions with a hedge fund client of Refco at the end of each quarter to keep the bad debt off Refco's books.<sup>74</sup> Eventually, Refco filed for bankruptcy.<sup>75</sup> In March 2006, it became known that Refco had \$525 million in worthless bonds in offshore accounts.<sup>76</sup> Creditors alleged that Bennett had been fraudulently maintaining the firm's records for years.<sup>77</sup> Refco shares during January 2007 were trading at around forty cents.<sup>78</sup> At least one mutual fund has been adversely affected.<sup>79</sup>

Corporate fraud is not limited to American MNCs.<sup>80</sup> According to SEC Commissioner Cynthia Glassman, "corporate scandals were not specific to the United States. With the revelation of fraud and corporate governance abuses at Parmalat, Hollinger, Royal Ahold, and others, it became apparent that the issues and need for reform raised by the U.S. scandals were in fact confronting the markets and regulatory regimes globally."<sup>81</sup>

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69. Abelson, *supra* note 68.

70. *Refco*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Refco> (last visited Aug. 7, 2006).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. See OTC Bulletin Board Info Center, [http://www.otcbb.com/asp/Info\\_Center.asp](http://www.otcbb.com/asp/Info_Center.asp) (search "Symbol" for "RFXCQ") (last visited Jan. 7, 2007).

79. Alistair Barr, *Rydex Sphinx Fund Hit by Refco demise*, MARKETWATCH, Dec. 30, 2005, <http://www.marketwatch.com/> (search for "Rydex Sphinx fund hit by Refco demise").

80. See *An Enron Plea That Reverberates*, WASH. POST, Jan. 18, 2004, at F02 (calling the recent European scandals the "Chapter 2" to Enron's "first chapter in the corporate scandal saga").

81. Cynthia A. Glassman, Comm'r, U.S. Sec. and Exchange Comm'n, Remarks before the European Corporate Governance Summit, An SEC Commissioner's View: The Post-Sarbanes-

Europe's Parmalat now stands under investigation for the "disappearance" of €10 billion, earning the Italian giant the nickname "Europe's Enron."<sup>82</sup> The British securities authority has accused Royal Dutch Shell of "'unprecedented misconduct' for misleading the markets over the reporting of oil and gas reserves."<sup>83</sup> The company has admitted that it overstated its future reserves of crude oil—the lifeblood of an energy corporation's future revenue—by twenty-five percent.<sup>84</sup> During the trading session following its admission, £3 billion was wiped off its market capitalization.<sup>85</sup>

Another recent scandal has earned a company the title "Enron of Spain."<sup>86</sup> Allegedly, a Spanish postage stamp company assured stamp buyers "guaranteed annual returns of six to ten percent in their stamp collection investments, depending on how many years they held the stamps."<sup>87</sup> Evidently, these stamps could be bought for "one-tenth" of what the company valued the stamps.<sup>88</sup> "The allegation is that rather than earning investment returns, early investors were simply being paid out of revenues that later investors brought to the party—essentially a Ponzi scheme."<sup>89</sup>

2. *Enron's Conduct and Impact.* While the above examples illustrate the rampant scandals of recent years, Enron Corporation's machinations, and subsequent collapse, provides the archetype example of conduct that should be cognizable under the ATCA. The

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Oxley Environment for Foreign Issuers (Mar. 2, 2005), (transcript available at <http://www.sec.gov/news/speech/spch030205cag.htm>).

82. Deborah Hargreaves, *Market Insight: Impact of 'Europe's Enron' Pales Next to the Original*, THE FIN. TIMES (London), Jan. 7, 2004, at 44.

83. Terry Macalister, *Shell's Shame: FSA Spells out Abuse*, THE GUARDIAN (London), Aug. 25, 2004, at 22, available at <http://business.guardian.co.uk/story/0,3604,1290141,00.html>.

84. *Id.*

85. *Id.*

86. Richard Behar, *'Enron of Spain' Fallout Ripples Into U.S. Markets*, FOXNEWS.COM, June 8, 2006, <http://www.foxnews.com/story/0,2933,198526,00.html> ("Some experts are calling it the 'Enron of Spain,' the biggest financial scam that country has ever known. A Spanish prosecutor has warned it might have 'grave repercussions for the Spanish economy.' And now, the shock waves are rippling into U.S. markets, where the full effects are still unknown.").

87. *Id.*

88. *Id.*

89. *Id.* "Ponzi schemes are a type of illegal pyramid scheme named for Charles Ponzi, who duped thousands of New England residents into investing in a postage stamp speculation scheme back in the 1920s . . . Decades later, the Ponzi scheme continues to work on the 'rob-Peter-to-pay-Paul' principle, as money from new investors is used to pay off earlier investors until the whole scheme collapses." U.S. Securities and Exchange Commission, "Ponzi" Schemes, <http://www.sec.gov/answers/ponzi.htm> (last visited Jan. 7, 2007).

Enron fraud is one of the biggest financial debacles ever and has served to focus attention on the outrageous fraud committed by some corporate behemoths.<sup>90</sup>

The defunct energy trader was a major employer<sup>91</sup> and at its zenith, the seventh-largest corporation in America.<sup>92</sup> Enron shares were a highly touted investment and considered by many well-respected analysts and commentators as a “must own” stock. *Fortune* listed Enron as one of “10 Stocks to Last the Decade.”<sup>93</sup> *Fortune* also praised Enron “as America’s most innovative firm for five years running.”<sup>94</sup> In 1999, CFO Magazine named Enron’s Chief Financial Officer (CFO), Andrew Fastow, “CFO of the Year.”<sup>95</sup>

While Enron appeared to be in excellent financial health—a highly successful corporation creating a surge in wealth for both investors and employees alike<sup>96</sup>—the truth was quite the opposite. Enron was not a giant profit generator, but was rather involved in a myriad of deceptions and frauds. The more spirited and creative outrageous misconduct of Enron includes: creating a fake trading area to deceive analysts, business partners, and investors;<sup>97</sup> recording fraudulent transactions intended to simultaneously hide substantial losses and create large imaginary profits;<sup>98</sup> and establishing a myriad

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90. See, e.g., Jeffrey D. Van Niel & Nancy B. Rapoport, *Dr. Jekyll & Mr. Skilling: How Enron’s Public Image Morphed from the Most Innovative Company in the Fortune 500 to the Most Notorious Company Ever*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 77 (Nancy B. Rapoport & Bala G. Dharan eds., 2004); KURT EICHENWALD, CONSPIRACY OF FOOLS: A TRUE STORY (2005).

91. Prior to bankruptcy, Enron employed nearly twenty thousand people. See Dan Ackman, *Enron the Incredible*, FORBES.COM, Jan. 15, 2002, <http://www.forbes.com/2002/01/15/0115enron.html>.

92. *Id.*

93. *Fortune* described Enron as possibly continuing with a twenty-five percent per year increase in earnings, in part because of broadband. David Rynecki, *10 Stocks to Last the Decade*, FORTUNE, Aug. 14, 2000, at 118.

94. William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1276 (2002).

95. Russ Banham, *The Finest in Finance: Andrew S. Fastow, Capital Structure Management*, CFO MAG., Oct. 1, 1999, at 62.

96. Enron claimed its sales rose from \$13 billion in 1996 to \$100 billion in 2000 and claimed they would double again by 2002, which would have made it the world’s second biggest corporation in terms of sales. See Ackman, *supra* note 91.

97. Jason Leopold, *Questioning the Books: Enron Executives Helped to Create Fake Trading Room*, WALL ST. J., Feb. 20, 2002, at A4 (“Former Enron Corp. Chief Executive Ken Lay and former President Jeff Skilling were personally involved in stage-managing a fake trading room to impress analysts.”).

98. See Bratton, *supra* note 94, at 1286 (examining Enron’s use of special purpose entities to fraudulently conceal losses and generate earnings).

of sham offshore entities to both evade fraud detection and to record non-existent earnings.<sup>99</sup> Eventually the fraud became public, and soon thereafter Enron filed for bankruptcy. As a result of the fraud, Enron's shares became nearly worthless, causing tremendous loss to investors, wiping out employees' retirement savings that in many cases constituted their life's savings, eviscerating thousands of jobs, and resulting in overall severe long-term financial ruin for thousands of families.<sup>100</sup> The brazenness of Enron's top management was breathtaking: "Enron's principals abused the system in plain view, taking advantage of the considerable slack it extends to successful actors. Although they did not disclose everything, they disclosed more than enough to put the system's layers of monitors on notice that their earnings numbers were soft and their liabilities understated."<sup>101</sup>

A dramatic example of the smoke and mirrors used by Enron was the presentation of Enron Energy Service's (EES) purported "war room." The "war room" was a surreal Hollywood-like environment where analysts and investors were shown an illusion of a booming, hugely profitable business: a massive open space room, throngs of employees all seemingly intensely working on the phone or at desks or staring at computer screens, allegedly finalizing transactions and making profitable trades.<sup>102</sup> Huge overhead screens showed the sites of EES's many purported contracts and prospects. Real-time commodity prices were displayed on a continuous basis.<sup>103</sup> "It was impressive," according to Merrill Lynch stock analyst John Olson.<sup>104</sup> Unfortunately for Enron's business partners, employees, and investors, the EES "war room" was bogus. The entire sham trading room had been staged. The visitors to the "war room" were

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99. David Barboza, *Ex-Executives Say Sham Deal Helped Enron*, N.Y. TIMES, Aug. 8, 2002, at A1 (discussing Enron's use of sham deals to meet year-end profit targets).

100. Former Enron employees have suffered severe financial hardship including losing their retirement savings, being forced to return to work after retirement, and home foreclosures. See Julie Appleby, *Many Who Lost Savings, Jobs Pleased*, USA TODAY, May 26, 2006, available at [http://usatoday.com/money/industries/energy/2006-05-25-enron-workers-usat\\_x.htm](http://usatoday.com/money/industries/energy/2006-05-25-enron-workers-usat_x.htm) ("After Enron went bankrupt in 2001, [Rinard, a former Enron employee] and his wife, Vicki, had to sell their home and buy a much smaller one. Like many other former Enron employees, they gave up plans for travel, retirement and helping the grandkids.")

101. Bratton, *supra* note 94, at 1283.

102. Leopold, *supra* note 97.

103. See *id.*

104. Olson raised questions concerning Enron and was fired by Merrill Lynch. BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* 180 (2003).

deluded into believing what they observed was accurate.<sup>105</sup> Top management was convicted of defrauding the public in violation of numerous federal laws.<sup>106</sup>

### III. FINANCIAL CONTAGION

American titans of capitalism can no longer be considered immune from the effects of foreign-based financial scandals. World capital markets, the foundation of financial growth, are, in essence, moving forward toward international financial integration.<sup>107</sup> For example, the New York Stock Exchange and Euronext are merging.<sup>108</sup> Unlike 1975, there is now a realistic danger of a domino effect as an “Enron-type” fraud may cause a financial storm to spread to the United States from overseas. Leading academic institutions have established programs to study financial contagion.<sup>109</sup> As stated by the European Commissioner for Internal Market and Services,

Higher levels of integration and concentration are increasing the number of cross-border financial institutions, which raises challenges in controlling and managing systemic risk. Financial stability was traditionally a national responsibility, but these new market structures mean that there is a need for greater international co-operation, information exchange and, where appropriate, formal arrangements.<sup>110</sup>

The European Commissioner added, “The corporate scandals of recent years and the fallout that they created underlined how interdependent our economies really are. It is our job as regulators to come up with frameworks that, to the extent possible, bring about

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105. *Id.* at 179-80. *See also* Leopold, *supra* note 97.

106. *See* Christopher Palmeri, *Guilty Verdicts for Enron Brass*, BUSINESSWEEK ONLINE, May 25, 2006, [http://businessweek.com/investor/content/may2006/pi20060525\\_754989.htm](http://businessweek.com/investor/content/may2006/pi20060525_754989.htm).

107. *See* Lee, *supra* note 14, at 10 (“Modern banks conduct diversified operations across borders to diversify their earning sources and enhance their profits. Advances in data processing and telecommunications have enabled banks to offer global services easily, even without establishing a physical presence in some markets.”); *see also* Pierre Fleuriot, *Financial Regulation As the Safeguard of Balances in a Global Context*, in FINANCIAL MARKETS REGULATION 33, 33 (Alain Jeunemaitre ed., 1997).

108. *See* NYSE Group, NYSE Group and Euronext Agree to Merge, <http://www.nyse.com/about/newsevents/1149243292355.html> (last visited Oct. 26, 2006); *see also supra* notes 30-31 and accompanying text.

109. *See, e.g.*, Cambridge Endowment for Research in Finance, Research Projects, <http://www.cerf.cam.ac.uk/research/index.php?current=4> (last visited June 22, 2006).

110. Charlie McCreevy, European Comm’r for Internal Mkts. and Servs., Opening Address to the 4th INFINITI Conference on International Finance: Globalization and Financial Services (June 12, 2006), (transcript available at <http://europa.eu.int/rapid/pressReleasesAction.do?Reference=SPEECH/06/365&format=HTML&aged=0&language=EN&guiLanguage=en>).

financial stability and reduce the risk of contagion of financial crises.”<sup>111</sup>

An example of this concern arose from the fallout from Enron’s financial collapse. Enron Australia’s liquidation led to concern and speculation regarding the International Swaps and Derivatives Association’s model documentation for derivative transactions.<sup>112</sup> Another illustration of concern over financial contagion is in the realm of global banking. With regard to the interconnection among banks, there is substantial concern that the insolvency of a major foreign banking enterprise may cause U.S. banks to also fail.<sup>113</sup> Due to the tremendous increase in global finance and banking commencing in the late 1970s and 1980s, Congress recognized that banking regulation must incorporate an international consensus on capital adequacy ratios.<sup>114</sup> Congress assigned the responsibility of capital adequacy to the Board of Governors of the Federal Reserve by enacting the International Lending Supervision Act of 1983 (ILSA)<sup>115</sup>: “ILSA was a direct response to the international debt crisis and its impact on the U.S. banking system.”<sup>116</sup> ILSA permitted the Federal Reserve to develop, negotiate and implement, in conjunction with foreign central banks, capital adequacy standards and the adoption of uniform rules for commercial banks.<sup>117</sup> This emphasis on international agreement was an acknowledgement that the Federal Reserve’s power to prevent domestic financial implosions was limited and insufficient without agreement with foreign central

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111. *Id.*

112. See Christopher J. Mertens, *Australian Insolvency Law and the 1992 ISDA Master Agreement—Catalyst, Reaction and Solution*, 15 PAC. RIM L. & POL’Y J. 233, 233 (2006).

113. See generally Steven L. Schwarcz, *Framework for Foreign-Back Insolvency: An Open Research Agenda*, 1 REV. L. & ECON. 81 (2005).

114. OECD, Glossary of Statistical Terms: Capital Adequacy Ratio, <http://stats.oecd.org/glossary/detail.asp?ID=6193> (last visited Nov. 30, 2006) (“The capital adequacy ratio is an analytical construct in which regulatory capital is the numerator and risk-weighted assets is the denominator. The minimum ratio of regulatory capital to risk-weighted assets is set at 8 percent (the core regulatory capital element should be at least 4 percent). These ratios are considered the minimum necessary to achieve the objective of securing over time soundly-based and consistent capital ratios for all international banks.”).

115. International Lending Supervision Act of 1983, Pub. L. No. 98-181, 97 Stat. 1153, 1278 (1983) (codified as amended in scattered sections of 12 U.S.C.).

116. SUSAN BURHOUSE ET AL., *BASEL AND THE EVOLUTION OF CAPITAL REGULATION: MOVING FORWARD, LOOKING BACK* (2003), <http://www.fdic.gov/bank/analytical/fyi/2003/011403fyi.html>.

117. See International Lending Supervision Act of 1983, Pub. L. No. 98-181, § 908, 97 Stat. 1153, 1278 (1983) (codified as amended in scattered sections of 12 U.S.C.).

banks.<sup>118</sup> The continued recognition of the growing risk to the global economy due to banking integration led to the 1988 international agreement by central bank governors of the Group of Ten (G-10) countries on capital adequacy known as the Basel Capital Accord and a current proposed Basel II.<sup>119</sup>

#### IV. ACTA LITIGATION

##### A. The Alien Tort Claims Act

Despite existing for over two hundred years, the ATCA had been, until 1980, a “stealth statute” and rarely invoked.<sup>120</sup> Notwithstanding the brevity of its words,<sup>121</sup> the statute has been found difficult to interpret. One court noted that there is “complexity involved in the application of this cryptic statute in the context of a globalized economy and evolving international organizations.”<sup>122</sup> The ATCA provides federal jurisdiction for any civil action by an alien and for a tort committed in violation of the law of nations<sup>123</sup> or a treaty of the United States.<sup>124</sup> The statute permits aliens to file claims against American and foreign corporations and individuals for select tortious conduct committed in foreign countries.<sup>125</sup>

To be actionable, the tort must constitute a violation of the “law of nations”<sup>126</sup> or violate a treaty of the United States.<sup>127</sup> Conduct

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118. See 1 MICHAEL GRUSON & RALPH REISNER, REGULATION OF FOREIGN BANKS: UNITED STATES AND INTERNATIONAL 4-4 (1995) (explaining that when the first “risk-based capital proposal [by the Federal Reserve pursuant to ILSA] was issued for public comment in early 1986,” the consensus “emphasized the importance of achieving uniformity of capital standards with other countries”).

119. The Federal Reserve Board, Basel II Capital Accord, <http://www.federalreserve.gov/generalinfo/basel2/> (last visited Nov. 30, 2006).

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

121. ACTA reads, “The district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2000).

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

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

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

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

126. See *Mwani v. Bin Laden*, 417 F.3d 1, 14 n.14 (D.C. Cir. 2005); *Flores v. S. Peru Copper Corp.*, 406 F.3d 65, 80 (2d Cir. 2003) (depublished).

127. *Flores*, 406 F.3d at 79.

violates the “law of nations” if it contravenes “well-established, universally recognized norms of international law.”<sup>128</sup> These norms must be “specific, universal and obligatory.”<sup>129</sup> If a norm is binding on nations it is referred to as a “*jus cogens*.”<sup>130</sup> A *jus cogens* violation satisfies, but is not required to meet, the ATCA requirement.<sup>131</sup> Therefore, a tort can be cognizable if the conduct violates a treaty or a universally acknowledged norm of international law, whether or not the norm is a *jus cogens*.

Many torts have been rejected as predicate offenses permitted under the ATCA. Non-compliance with a particular form of representative government is not considered a violation of the law of nations.<sup>132</sup> Brief arbitrary detention has also been found not actionable.<sup>133</sup> Sexual violence by itself has been rejected.<sup>134</sup>

Courts have held that seizure of property within a nation’s borders does not constitute a violation, unless the actor is acting under color of law.<sup>135</sup> Examples of commercial conduct that courts have specifically held not actionable because they failed to meet the standard of international consensus include fraud,<sup>136</sup> conversion,<sup>137</sup> negligence and wrongful death,<sup>138</sup> defamation,<sup>139</sup> child custody,<sup>140</sup> and libel.<sup>141</sup>

*1. Modern History of ATCA Litigation.* The current wave of ATCA litigation can be traced to the Second Circuit’s landmark decision in *Filártiga v. Peña-Irala*.<sup>142</sup> In *Filártiga*, the central issue was

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

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

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

131. *Id.* at 945 n.15.

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

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

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

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

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

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

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

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

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

141. *Akbar v. New York Magazine Co.*, 490 F. Supp. 60, 63 (D.D.C. 1980).

142. 630 F.2d 876 (2d Cir. 1980). In *Filártiga*, two members of a Paraguayan family brought suit against a former Paraguayan police inspector for the torture and death of a third family member. *Id.* The court held that “deliberate torture perpetrated under color of official

whether torture constituted a “violation of the law of nations,” thus allowing plaintiffs’ ATCA suit to proceed.<sup>143</sup> If the plaintiff could establish an international consensus with respect to torture’s illegality pursuant to customary international law, the torture claims would be actionable.

*Filártiga* held that to be cognizable pursuant to the ATCA, a norm of international law must constitute a universal mutual concern<sup>144</sup>: “It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [Alien Tort Statute].”<sup>145</sup> The court held that to be a cognizable claim, the international law violation must be one that is universally condemned.<sup>146</sup> Pursuant to *Filártiga*, only concerns of a mutual dimension, rather than one of several concern, will be cognizable.<sup>147</sup>

In analyzing whether torture was a violation of international law, the court found that the “law of nations” is not rigid, but flexible, and reflects an evolving standard of international law.<sup>148</sup> The Second Circuit noted that new norms of customary law may arise: “[T]he courts are not to prejudge the scope of the issues that the nations of the world may deem important to . . . their common good.”<sup>149</sup> This

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authority” violates the law of nations, and that ATCA jurisdiction was proper. *Id.* at 878. In arriving at this holding, the court interpreted Supreme Court precedents as establishing four propositions: first, the law of nations is part of federal common law, and cases arising under the law of nations arise under the laws of the United States as required by Article III of the Constitution, *see id.* at 880; second, the “law of nations ‘may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law,’” *id.* at 880 (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)); third, a norm must command “the general assent of civilized nations” to be part of the law of nations, *see id.* at 881 (citing *The Paquete Habana*, 175 U.S. 677, 694 (1900)); and fourth, the law of nations must be interpreted “not as it was in 1789, but as it has evolved and exists among the nations of the world today,” *id.* at 881 (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 198 (1796)).

143. *Id.* at 878.

144. *See id.* at 888.

145. *Id.*

146. *See generally id.*

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

148. *See Filártiga*, 630 F.2d at 887.

149. *Id.* at 888.

broad and flexible definition meant that new torts might become actionable if there developed an international acknowledgement with respect to the conduct. The court also held that torture was actionable under the ATCA. Significantly, *Filártiga*'s far-reaching implication was endorsed by the Supreme Court.<sup>150</sup> *Filártiga* was followed by several high-profile cases against both foreign nationals and corporations.<sup>151</sup>

In *Sosa v. Alvarez-Machain*, the Supreme Court confirmed the ATCA as a potential vehicle to remedy certain outrageous conduct.<sup>152</sup> Rejecting the expansive view of the ATCA argued by plaintiffs' counsel, the Court ruled the ATCA was jurisdictional and did not provide a statutory cause of action.<sup>153</sup> However, the Court found the ATCA did vest federal courts with the power to hear violations of the law of nations, which is incorporated into federal common law, thereby providing the cause of action in ATCA litigation.<sup>154</sup> The Court found that the scope of the claims authorized by that statute was limited,<sup>155</sup> and approved a conservative approach to ascertaining the precise violations actionable under the ATCA.<sup>156</sup> The Court limited § 1350 (the ACTA) to suits that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable" to the torts recognized by the First Congress as violating the law of nations.<sup>157</sup> The paradigm violations noted by the Court were offenses against ambassadors, violations of safe conducts, and piracy.<sup>158</sup> However, the Court, citing *Filártiga*, held that international law violations must be evaluated in terms of current norms, not the norms of the eighteenth century.<sup>159</sup> Lower courts were

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150. See *infra* notes 211-12 and accompanying text.

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

152. 542 U.S. 692, 714 (2004). The Court underscored the validity of the ATCA in *Rasul v. Bush*, where the Court affirmed that the prisoners detained at Guantánamo might potentially use the ATCA to file actions. 542 U.S. 466 (2004). Thus, according to the Court, aliens detained as terror suspects may bring suit against U.S. officials for violations of international law. *Id.* at 468.

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

154. *Id.* at 720.

155. *Id.* at 724.

156. *Id.* at 725.

157. *Id.*

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

159. *Sosa*, 542 U.S. at 725.

provided with the ability to approve previously unrecognized torts if the conduct becomes the subject of universal concern.<sup>160</sup> Following *Sosa*, major corporations continued to face ATCA litigation,<sup>161</sup> with many of the cases demonstrating a continued difficulty in applying the ATCA, causing the courts to issue conflicting rulings.<sup>162</sup>

2. *The Law of Nations.* When plaintiffs base their ATCA claims on the law of nations, rather than on a treaty, they must demonstrate that defendants' conduct breached a *universal* norm of international law,<sup>163</sup> meaning a norm that is "specific, universal and obligatory."<sup>164</sup> A norm is universal and obligatory if: (1) no state condones the act in question and there is a recognizable universal consensus of prohibition against it; (2) there are sufficient criteria to determine whether a given action constitutes an occurrence of the prohibited act and thus violates the norm; and (3) the prohibition is non-dirigible and thus binding at all times upon all persons.<sup>165</sup>

The law of nations "results from a general and consistent practice of states which is followed by them from a sense of legal obligation."<sup>166</sup> *Sosa* did not articulate an easy method for courts to

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160. *See id.*

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

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

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

164. *Beanal*, 197 F.3d at 165.

165. *See generally In re Estate of Ferdinand Marcos*, 25 F.3d at 1475.

166. *Jama v. U.S. INS*, 22 F. Supp. 2d 353, 362 (D.N.J. 1998) ("The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that

interpret the law of nations. Indeed as one court stated, “it would have been unquestionably preferable for the lower federal courts if the Supreme Court had created a bright-line rule.”<sup>167</sup>

Despite this, courts will usually have jurisdiction if plaintiffs can allege an international law violation of joint, rather than several, concern, as evidenced by agreements and regulations.<sup>168</sup> In evaluating whether a specific claim meets the jurisdictional requirements of the ATCA, a court will consider: (1) whether the complaint identifies a specific, universal, and obligatory norm of international law; (2) whether that norm is recognized by the United States; and (3) whether there has been a violation of the same.<sup>169</sup> Courts faced with making this determination may be guided by judicial decisions enforcing the law of nations, the work of jurists, and the general usage and practice of nations.<sup>170</sup> Courts may also look at non self-executing treaties and international agreements to determine accepted norms of international law.<sup>171</sup>

## B. The ATCA and Corporate Fraud

1. *Rulings on Fraud Prior to Vencap.* Historically, courts have been reluctant to expand ATCA liability into the commercial realm. The case often cited as the initial authority for this refusal is the nearly fifty-year old holding in *Lopes v. Schroder*.<sup>172</sup> In *Lopes*, the court found that the unseaworthiness of a ship was not actionable

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law.”); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

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

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

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

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

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

172. 225 F. Supp. 292 (E.D. Pa. 1963).

pursuant to the ATCA.<sup>173</sup> The *Lopes* court found the principle of unseaworthiness was not a universal concern but rather a doctrine of American law, or, a several concern of the United States.<sup>174</sup> *Lopes* noted that the only torts cognizable under the ATCA were those affecting nations generally, or, those of a joint concern.<sup>175</sup> Since unseaworthiness was not part of the law of nations, it could not be a predicate for filing suit under the ATCA.<sup>176</sup>

Similarly, in *Valanga v. Metropolitan Life Insurance Co.*,<sup>177</sup> the court decided that an American insurance company's allegedly fraudulent conduct in refusing to pay the proceeds of an insurance policy to a foreign plaintiff did not constitute a violation of the law of nations.<sup>178</sup> The court, citing *Lopes*, rejected ATCA jurisdiction, stating, "A violation of the law of nations means a violation of those standards by which nations regulate their dealings with one another *inter se*."<sup>179</sup> The court noted that the "personal injury actions such as those found in the *Lopes* case *do not raise the specter of widespread international impact* [and similarly] actions to recover funds based upon life insurance contract obligations do not impress this Court as being of the caliber of the cases which have been allowed recourse" pursuant to the ATCA.<sup>180</sup>

In *Abiodun v. Martin Oil Service, Inc.*, plaintiffs claimed that the defendant oil corporation committed fraud against them.<sup>181</sup> They alleged that the defendant promised to train them as company managers, but instead trained them to be employed as service station attendants.<sup>182</sup> The court held that the purported deception failed to constitute a tort in violation of the law of nations and was thus not actionable under the ATCA.<sup>183</sup>

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173. *See id.* at 295.

174. *Id.*

175. *See id.* at 297.

176. *See id.* (holding that the torts cognizable under the ATCA include violations "of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealing *inter se*").

177. 259 F. Supp. 324 (E.D. Pa. 1966).

178. *Id.* at 327.

179. *Id.* at 328.

180. *Id.* (emphasis added).

181. 475 F.2d 142 (7th Cir. 1973).

182. *Id.* at 143-44.

183. *Id.* at 145. *See also* *Benjamins v. British European Airways*, 572 F.2d 913, 916 (2d Cir. 1978) (holding that air crashes do not fall within the ambit of the ATCA after plaintiff estate of a victim of an airplane crash filed a tort action against an airline for wrongful death).

2. *The Second Circuit's Vencap Ruling.* While the above-referenced cases demonstrate the historical reluctance of courts to permit ATCA claims based upon commercial liability, the Second Circuit's ruling in *Vencap* is particularly important because it has been cited as precedent for cases holding corporate fraud not cognizable under the ATCA.<sup>184</sup> In *Vencap*, a foreign investment fund filed suit against a foreign corporation for "fraud, conversion, and corporate waste."<sup>185</sup> The court held that although conduct leading to fraud was universally condemned,<sup>186</sup> to be actionable, the conduct must constitute a violation of the law of nations.<sup>187</sup> The Second Circuit, noting that the law of nations "must be narrowly read,"<sup>188</sup> held that while laws against theft are part of the legal system of many states,<sup>189</sup> theft was not a violation of the law of nations pursuant to the *Lopes* standard.<sup>190</sup> Citing to *Lopes*, *Vencap* stated a violation of the law of nations arises when "[a] violation by one or more individuals of those standards, rules, or customs [occurs] (a) affecting the relationship between states or between an individual and a foreign state and (b) used by those states for their common good and/or in dealings *inter se*."<sup>191</sup>

According to *Vencap*, the international financial fraud at issue was not actionable since the conduct failed to constitute a violation of international law.<sup>192</sup> While *Vencap* was not sanctioning fraud, it found that the factual underpinning of the particular claim failed to constitute a universal concern.<sup>193</sup>

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184. See, e.g., *Arndt v. Union Bank of Switz.*, 342 F. Supp. 2d 132, 139 (E.D.N.Y. 2004); *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995); *DeWit v. KLM Royal Dutch Airlines*, 570 F. Supp. 613 (S.D.N.Y. 1983) (holding an employment dispute not actionable).

185. *ITT v. Vencap*, 519 F.2d 1001, 1003 (2d Cir. 1975).

186. *Id.* at 1015 (referencing the prohibition against theft in the Ten Commandments).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* (citing *Lopes v. Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963)).

192. *Id.* at 1015. *Filártiga v. Peña-Irala* referenced *Vencap* and noted *Vencap*'s statement that even if every nation's law forbids theft, that would not mean that "the Eighth Commandment, 'Thou Shalt not steal' . . . [is incorporated into] the law of nations." 630 F.2d 876, 888 (2d Cir. 1980) (quoting *Vencap*, 519 F.2d at 1015).

193. See *Vencap*, 519 F.2d at 1015.

In *Hamid v. Price Waterhouse*, the Ninth Circuit affirmed a dismissal of claims that banking fraud violated the law of nations.<sup>194</sup> The court held that “looting of a bank by its insiders, and misrepresentations about the bank’s financial condition, have never been in the traditional classification of international law. These are garden variety violations of statutes, banking regulations, and common law.”<sup>195</sup> The *Hamid* court cited to *Vencap* and held that the fraudulent conduct did not violate the law of nations.<sup>196</sup>

In *Arndt v. Union Bank of Switzerland*, the court reiterated that financial fraud was not actionable under the ATCA.<sup>197</sup> The court conceded that the question of whether a tort violates customary international law “has found no easy answer.”<sup>198</sup> Nevertheless, the court, citing to *Vencap* and several other cases,<sup>199</sup> joined other courts in holding fraud not actionable.<sup>200</sup> The *Arndt* court concluded that the fraud in the case did not constitute “‘wrongs’ expressed by mutual concern and reflected in ‘international accords.’”<sup>201</sup> *Arndt* stated that to be actionable the violation must be of a rule: “(1) ‘universally recognized’ by states; (2) establish[ing] a legal obligation; (3) address[ing] wrongs that are of mutual, and not merely individual, concern to states; and (4) specific enough to be enforced.”<sup>202</sup>

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194. 51 F.3d 1411, 1414 (9th Cir. 1995) (noting that the complaint alleged that defendants violated the law of nations by causing the bank to loan money to criminals and to insiders and bribing or lying to bank regulators).

195. *Id.* at 1418.

196. *Id.* (citing *Vencap*, 519 F.2d at 1015). The court stated:

We agree with the view of the Second Circuit, as stated in *IIT*: we cannot subscribe to plaintiffs’ view that the Eighth Commandment “Thou shalt not steal” is part of the law of nations. While every civilized nation doubtless has this as a part of its legal system, a violation of the law of nations arises only when there has been “a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*.”

*Id.*

197. 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004).

198. *Id.* at 138.

199. *Id.* at 139-40 (citing *Abiodun v. Martin Oil Serv., Inc.*, 475 F.2d 142, 145 (7th Cir. 1973); *De Wit v. KLM Royal Dutch Airlines*, 570 F. Supp. 613, 618 (S.D.N.Y. 1983); *Canadian Overseas Ores Ltd. v. Compania De Acero Del Pacifico*, 528 F. Supp. 1337, 1347 (S.D.N.Y. 1982)).

200. *Id.* at 139-41.

201. *Id.* at 141 (quoting *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 155-56 (2d Cir. 2003) (depublished)).

202. *Id.* at 139 (citing *Flores*, 343 F.3d at 154-56; *Filártiga v. Peña-Irala*, 630 F.2d 876, 888 (2d Cir. 1980)).

The post-*Vencap* rulings are not persuasive for three reasons. First, these courts have not paid attention to *Filártiga*'s specific notation that the law of nations may change over time, thus leaving the possibility that over time, corporate fraud may become the subject of mutual concern, thereby constituting a violation of an international norm.<sup>203</sup> Second, the violations this Article suggests as being cognizable are not routine fraud but rather the type of conduct which involves "the specter of widespread international impact"<sup>204</sup> and leads to an "Enron-like" financial collapse, where substantial wealth is destroyed, accompanied by other severe loss such as elimination of thousands of jobs and tremendous collateral economic damage. Third, as will be demonstrated below, by the very standards articulated by *Filártiga*, *Flores*, and *Arndt*, severe corporate fraud now satisfies the criteria of international mutual concern for finding jurisdiction under the ATCA.

#### V. REASONS TO MOVE BEYOND AN AUTOMATIC FINDING OF NO LIABILITY

Today's international financial problems—corporate accounting and fraud, terrorism, organized crime, money laundering, banking failures, and securities fraud—are universally recognized wrongs of mutual concern.<sup>205</sup> Severe financial fraud that could lead to megameltdowns is a substantial joint concern expressed in international agreements, cooperation, and accords. Indeed, the prevention of financial fraud is the subject of numerous international agreements, and cooperation, and is recognized as a pillar of maintaining global financial order. All civilized nations have a significant self-interest in maintaining economic order and the prevention of financial fraud is now a universal concern.<sup>206</sup>

Across the globe, government institutions have formed networks of their own, ranging from the Basel Committee of Central Bankers

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203. See *Filártiga*, 630 F.2d at 881.

204. *Valanga v. Metro. Life Ins. Co.*, 259 F. Supp. 324, 328 (E.D. Pa. 1966).

205. See generally E. Anthony Wayne, *Internationalizing the Fight*, EJOURNAL USA 6 (Sept. 2004), available at <http://usinfo.state.gov/journals/ites/0904/ijee/ijee0904.pdf> (discussing the Global War on terrorism finance).

206. See generally *infra* notes 236-65 (referencing the specific international agreements and accords listing corporate fraud as a major global concern and developing methods to combat such activity).

to ties between law enforcement agencies and securities regulators.<sup>207</sup> These concerns over corporate fraud are (1) recognized universally; (2) establish legal requirements; (3) relate to obligations that are of mutual concern; and (4) specific and enforceable.<sup>208</sup> Therefore, under the very governing standards articulated by *Filártiga*, *Vencap*, and *Arndt*, “Enron-like” corporate criminal fraud should be actionable under the ATCA.

A. The Supreme Court’s Approval of the Second Circuit’s Holding that the Law of Nations Must Adapt to New Conditions

1. *The Filártiga Holding that International Law Evolves with Changing Conditions.* In the Second Circuit’s *Filártiga* ruling, the court stated that to be actionable under the ATCA, the conduct must constitute a violation of an international norm that reflects a concern to all nations.<sup>209</sup> The court stated that a norm must “command the ‘general assent of civilized nations’” to be part of the law of nations and that the law of nations must be interpreted “not as it was in 1789, but as it has evolved and exists among the nations of the world today.”<sup>210</sup>

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

2. *The Supreme Court’s Endorsement of Filártiga.* In *Sosa v. Alvarez-Machain*, the Supreme Court specifically commented with approval on *Filártiga*, leaving no doubt that the Second Circuit’s interpretation that the law of nations evolves over time is the correct approach. The Court held: “The position we take today has been assumed by some federal courts for 24 years, ever since the Second

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207. See General Information on IOSCO, <http://www.iosco.org/about> (last visited Aug. 7, 2006) (outlining the basic purposes of the International Organization of Securities Commissions, which are: (1) “to cooperate together to promote high standards of regulation in order to maintain just, efficient and sound markets;” (2) “to exchange information on their respective experiences in order to promote the development of domestic markets;” (3) “to unite their efforts to establish standards and an effective surveillance of international securities transactions;” and (4) “to provide mutual assistance to promote the integrity of the markets by a rigorous application of the standards and by effective enforcement against offenses”).

208. *Id.*

209. See 630 F.2d 876, 880 (2d Cir. 1980).

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

Circuit decided *Filártiga v. Peña-Irala*.<sup>211</sup> *Sosa* held that in determining the viability of new actions, “we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”<sup>212</sup>

In addition to the Supreme Court’s validation of the “evolving law” approach, there is a U.S. Congressional endorsement. In enacting the Torture Victim Protection Act (TVPA), Congress enhanced the ATCA through the TVPA, but explicitly stated that the ATCA “should remain intact to permit suits based on . . . norms that already exist or may *ripen in the future* into rules of customary international law.”<sup>213</sup>

Based on the Supreme Court’s endorsement of *Filártiga* and the legislative intent of Congress, conduct that may not have been cognizable under the ATCA at one time may become actionable at a later date. While courts have been reluctant to find corporate fraud an actionable tort,<sup>214</sup> the Supreme Court has endorsed an approach whereby torts other than the three original predicate offenses are cognizable.<sup>215</sup>

In deciding whether to find reprehensible conduct actionable under the ATCA, the issue is whether the conduct is a violation of the law of nations. Does corporate fraud that causes severe financial collapse constitute conduct that engenders the condemnation of the civilized world, thus qualifying it for a violation of an international norm? As will be discussed below, concerns about egregious financial fraud and global economic stability have indeed ripened in recent years and are now universal.

## B. Avoiding Financial Collapse is an International Norm

Deterring foreign-based corporate criminal fraud is an issue of mutual concern. Former Federal Reserve Chairman Alan Greenspan, addressing claims of corporate misconduct, opined that allegations of corporate fraud “undermine the very basis on which the

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211. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004).

212. *Id.* at 725.

213. H.R. REP. NO. 102-367, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 84, 86 (emphasis added).

214. *See, e.g.*, *IIT v. Vencap*, 519 F.2d 1001, 1015-16 (2d Cir. 1975); *Arndt v. Union Bank of Switz.*, 132 F. Supp. 2d 132, 141 (E.D.N.Y. 2004).

215. *See Sosa*, 542 U.S. at 730-31.

world's greatest financial markets thrive."<sup>216</sup> The losses involved in egregious financial misconduct are no longer containable to a particular nation. There is a universal consensus that avoiding financial collapse is a shared mutual interest of all civilized nations. The entire international community has a paramount interest in preventing staggering loss and the ATCA should be a vehicle to help deter such fraud.

Anti-corruption initiatives, barely in existence until the last several years, have reached a critical mass.<sup>217</sup> The International Organization of Security Commissions (IOSCO), an organization composed of over one hundred members,<sup>218</sup> has several working groups, one of which is focused on multinational disclosure and accounting.<sup>219</sup> In February 2005, the IOSCO reported that the integrity and foundation of the global economy was in danger due to rampant high-profile corporate fraud worldwide.<sup>220</sup> The IOSCO Report commented that these corporate scandals were not confined

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216. The Associated Press, *Greenspan: Companies Must Restore Trust*, MSNBC.COM, Apr. 16, 2004, <http://www.msnbc.msn.com/id/4757117/>.

217. See, e.g., Bureau for International Narcotics and Law Enforcement Affairs, U.S. Department of State, Anticorruption Timeline Fact Sheet, <http://www.state.gov/p/inl/rls/fs/31263.htm> (last visited June 22, 2006) (listing international conferences and meetings focused on combating corruption).

218. Ordinary Members of IOSCO, [http://www.iosco.org/lists/display\\_members.cfm?memID=1&orderBy=none](http://www.iosco.org/lists/display_members.cfm?memID=1&orderBy=none) (last visited Sept. 25, 2006).

219. See IOSCO Working Committees, <http://www.iosco.org/about/index.cfm?section=workingcmts> (last visited Sept. 25, 2006).

220. TECHNICAL COMM. OF THE INT'L ORG. OF SEC. COMM'NS, STRENGTHENING CAPITAL MARKETS AGAINST FINANCIAL FRAUD ii (2005), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD192.pdf>. The report stated:

Over the past several years, a series of very high-profile financial scandals involving large publicly-traded companies appeared to create doubts in the minds of investors throughout the world about the integrity of global capital markets. While, at first, the largest of these scandals seemed limited to the United States, more recent events—including the December 2003 discovery of financial improprieties at Parmalat S.P.A. in Italy followed by other scandals in various jurisdictions—demonstrated that this phenomenon was not peculiar to any one market and the concerns raised by these financial scandals were truly global in nature. Members of the Technical Committee of the International Organization of Securities Commissions recognize that these investor doubts must be answered if financial stability and economic prosperity are to be maintained. Consequently, the Technical Committee formed a Task Force of Chairmen charged with investigating the issues uncovered by these financial scandals and identifying any broad trends. It was also tasked with making recommendations about the enhancements securities regulators should undertake to ensure that the current regulatory framework remains robust and serves to protect the integrity of global capital markets, restore investor confidence, and combat financial fraud, notwithstanding significant changes in the marketplace.

*Id.*

to any particular jurisdiction, but rather were global in nature.<sup>221</sup> The report also emphasized that the entire global economic structure was at risk to of collapse due to financial fraud.<sup>222</sup> As will be demonstrated below, the prevention of corporate fraud and avoidance of financial collapse is a universal concern.

### C. The United States

The United States recognizes that economic security forms a crucial underpinning of overall national security. Indeed, the Secret Service's second directive, after protection of the President, is the safeguarding of the American financial system.<sup>223</sup> Congress enacted the Foreign Corrupt Practices Act of 1977 (FCPA), which regulates the foreign activities of U.S. companies.<sup>224</sup> The FCPA contains specific accounting provisions<sup>225</sup> that require proper recording of transactions and disposition of assets.<sup>226</sup> Interestingly, in an amendment, Congress required the President to consult with other nations and negotiate an international agreement on fighting corporate corruption.<sup>227</sup> This emphasis on international cooperation underscores that corporate fraud is not a several concern but a universal one.

In the wake of Enron and other scandals, the Corporate Fraud Task Force (CFTF) was created by Executive Order in July of 2002.<sup>228</sup> The CFTF was established to direct the prosecution of serious financial crimes and formulate recommendations on preventing major corporate fraud.<sup>229</sup> In addition, Congress enacted the Sarbanes-Oxley Act (SOX)<sup>230</sup> to reform corporate governance vesting regulators with broad powers to impose new accountability rules on senior

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221. *Id.*

222. *See id.*

223. *See* United States Secret Service, Frequently Asked Questions, <http://www.secret-service.gov/faq.shtml> (last visited June 20, 2006) ("Today, the Secret Service's mission is two fold: protection of the President, Vice President and others; and protection of our nation's financial system.").

224. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

225. *See* 15 U.S.C. § 78(m)(b) (2000).

226. *Id.*

227. *See* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, § 5003(d)(1), 102 Stat. 1415, 1424 (codified as amended in scattered sections of 15 U.S.C.).

228. Exec. Order. No. 13,271, 3 C.F.R. § 13271 (2003).

229. *Id.*

230. The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

management,<sup>231</sup> to deter fraudulent financial statements,<sup>232</sup> and to improve public accounting oversight mechanisms.<sup>233</sup> SOX codifies financial crime as a federal criminal violation.<sup>234</sup> Significant fines and penalties are contained in SOX.<sup>235</sup>

#### D. International Concern

As concerns over financial wrongdoing have spread globally,<sup>236</sup> many countries and international organizations have articulated concerns about corporate mischief that could cause financial implosion on a global scale. The International Monetary Fund (IMF) has been involved in stabilizing nations involved in financial meltdowns.<sup>237</sup> The IMF has declared that corporate fraud and corruption are destabilizing to the global economy and has adopted guidelines to avoid financial meltdowns and to improve transparency.<sup>238</sup> The World Bank has established the Oversight Committee on Fraud and Corruption,<sup>239</sup> runs integrity workshops,<sup>240</sup> and urges reporting of fraud.<sup>241</sup>

The IOSCO has articulated regulatory principles and standards of auditor oversight, corporate governance, and transparency in an attempt to prevent financial fraud.<sup>242</sup> The IOSCO is working with the Organization of Economic Cooperation and Development (OECD),<sup>243</sup> as well as other international organizations and law

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231. See, e.g., 15 U.S.C. §§ 7243-7244 (Supp. III 2003).

232. See, e.g., § 7241.

233. See § 7211.

234. See, e.g., 18 U.S.C. § 1348 (Supp. III 2003).

235. See, e.g., 15 U.S.C. § 78ff(a) (Supp. III 2003); see also Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 378-79 (2003) (providing examples of criminal penalties in tables 1 and 2).

236. See James Cox, *Asia Shakes Up Cozy, Corrupt Business Practices*, USA TODAY, Jan. 28, 1998, at 4B.

237. See What the IMF Does, <http://www.imf.org/external/work.htm> (last visited Sept. 13, 2006).

238. See News Brief, IMF, IMF Adopts Guidelines Regarding Governance Issues (Aug. 4, 1997), available at <http://www.imf.org/external/np/sec/nb/1997/nb9715.htm>.

239. The World Bank Group, Helping Prevent Corruption World-Wide, <http://www.worldbank.org/html/extdr/spring99/corruption-pb.htm> (last visited Aug. 7, 2006).

240. See *id.*

241. See *id.*

242. See TECHNICAL COMM. OF THE INT'L ORG. OF SEC. COMM'NS, *supra* note 220, at ii-iii.

243. The OECD responded to the spreading concern over international bribery by passing the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions. Convention on Combating Bribery of Foreign Officials in International Business

enforcement agencies in an attempt to encourage international cooperation against corporate fraud.<sup>244</sup> The IOSCO notes that today's global economy demands international cooperation in the fight against financial machinations.<sup>245</sup>

In 1989, the Group of Seven major industrialized nations organized to discuss money laundering and set up the Financial Action Task Force (FATF).<sup>246</sup> The FATF drafted recommendations that are regularly updated to reflect changing financial conditions.<sup>247</sup> The FATF defines certain categories of offenses that reflect international norms. Included in this list of criminal misconduct are: fraud, piracy, and market manipulation, as well as other offenses.<sup>248</sup> The FATF's recommendations are a reflection of the world's mutual concern about improper financial conduct.

In 1996, the Organization of American States (OAS) passed the Inter-American Convention against Corruption (OAS Convention).<sup>249</sup> The OAS is a multinational organization representing nearly forty nations.<sup>250</sup> The OAS Convention requires parties to the Convention to consider the applicability of measures within their own system requiring corporations to maintain accurate financial records<sup>251</sup> and provide transparency.<sup>252</sup>

The goals of the European Community Securities Law are to protect investors and to ensure uniform standards.<sup>253</sup> This requires an avoidance of financial crisis that can erode the stability of the market. The European Union (EU) utilizes Directives, conventions, and

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Transactions, Dec. 18, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1 (1998), available at [http://www.oecd.org/document/21/0,2340,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html).

244. TECHNICAL COMM. OF THE INT'L ORG. OF SEC. COMM'NS, *supra* note 220, at v, vii, ix, 29.

245. *Id.* at 29 ("These scandals have been notable not just because of their cross-border nature of the alleged wrongdoing, but also because of the cross-border enforcement cooperation among securities regulators and law enforcement authorities that followed.").

246. See About the FATF, [www.fatf-gafi.org/pages/0,2966,en\\_3225039\\_32236836\\_1\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/pages/0,2966,en_3225039_32236836_1_1_1_1_1,00.html) (last visited Aug. 7, 2006).

247. *Id.*

248. See FATF, 40 Recommendations Glossary, [http://www.fatf-gafi.org/glossary/0,2586,en\\_32236889\\_35433764\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/glossary/0,2586,en_32236889_35433764_1_1_1_1,00.html) (last visited Oct. 2, 2006).

249. Inter-American Convention Against Corruption, Mar. 29, 1996, S. TREATY DOC. NO. 105-39, 35 I.L.M. 724 (1996), available at <http://www.oas.org/juridico/english/treaties/b-58.html>.

250. About the OAS, <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/documents/eng/memberstates.asp> (last visited Nov. 29, 2006).

251. Inter-American Convention Against Corruption, *supra* note 249, art. III, cl. 10.

252. See *id.* art. III, cls. 4,5,9,10, art. XVI.

253. Manning Gilbert Warren III, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, 31 HARV. INT'L L.J. 185, 215 (1990).

regulations to advance these goals. Some examples of Directives are ones that require certain financial information to be published<sup>254</sup> and ones that require financial disclosures to be reviewed by qualified auditors and establish professional requirements of the auditors.<sup>255</sup> Other Directives prohibit companies from deluding the market with inaccurate or misleading information<sup>256</sup> or obligate disclosure and transparency rules.<sup>257</sup> Another example of a European Directive is the Interim Reports Directive, which mandates that companies which have publicly traded shares provide semi-annual balance sheets to provide investors with information.<sup>258</sup>

European nations have also expressed their concern about fraud generally with the Criminal Law Convention on Corruption of the Council of Europe.<sup>259</sup> Other examples are the various EU directives and agreements aimed at preventing corporate fraud and money laundering.<sup>260</sup> Serious fraud and corruption are considered criminal activities.

The U.N. General Assembly has established an ad-hoc committee to investigate the viability of a U.N. convention against corruption.<sup>261</sup> In addition, the Declaration against Corruption and Bribery in International Commercial Transactions has become a U.N. Resolution.<sup>262</sup> The Resolution encourages nations to establish anti-corruption measures.<sup>263</sup>

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254. Council Directive 83/349, art. 7(2)(b)(bb), 1983 O.J. (L 193) 1, 4 (EEC).

255. Council Directive 84/253, arts. 2-6, 1984 O.J. (L 126) 20, 21-26 (EEC).

256. Council Directive 2003/6, art. 2(c), 2003 O.J. (L 96) 16, 20 (EC).

257. See Council Directive 2004/39, art. 25, 2004 O.J. (L 145) 1, 21 (EC).

258. Alexander B. St. John, *The Regulation of Cross-Border Public Offerings of Securities in the European Union: Present And Future*, 29 DENV. J. INT'L L. & POL'Y 239, 246 (2001).

259. See Criminal Law Convention on Corruption pmbl., Jan. 27, 1999, Europ. T.S. No. 173.

260. See Financial Crime, The EU Single Market, [http://ec.europa.eu/internal\\_market/company/financial-crime/index\\_en.htm](http://ec.europa.eu/internal_market/company/financial-crime/index_en.htm) (last visited Nov. 29, 2006).

261. See generally U.N. Gen. Assembly [UNGA], Ad Hoc Comm. for the Negotiation of a Convention Against Corruption, *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the Work of Its First to Seventh Sessions*, ¶ I, U.N. Doc. A/55/422 (Oct. 7, 2003), available at [http://www.unodc.org/pdf/crime/convention\\_corruption/session\\_7/422e.pdf](http://www.unodc.org/pdf/crime/convention_corruption/session_7/422e.pdf); UNGA, Ad Hoc Comm. for the Negotiation of a Convention Against Corruption, *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the Work of Its First to Seventh Sessions, Addendum: Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention Against Corruption*, U.N. Doc. A/58/422/Add.1 (Oct. 7, 2003), available at [http://www.unodc.org/pdf/crime/convention\\_corruption/session\\_7/422add1.pdf](http://www.unodc.org/pdf/crime/convention_corruption/session_7/422add1.pdf).

262. G.A. Res. 51/191, U.N. Doc. A/RES/51/191 (Dec. 16, 1996).

263. *Id.* ¶ 3.

As detailed above, concerns over corporate fraud have led to widespread international agreement and cooperation on corporate financial abuse over the last thirty years. These concerns are not relegated to one or two nations, but rather are joint and mutual as evidenced by universal consensus and substantial agreement.<sup>264</sup> The fight against corporate fraud reflects concerns that: “(1) [are] ‘universally recognized’ by states; (2) establish a legal obligation; (3) address wrongs that are of mutual, and not merely individual, concern to states; and (4) [are] specific enough to be enforced.”<sup>265</sup> It is beyond peradventure that civilized nations share a mutual concern regarding the avoidance of corporate fraud. As evidenced by the accords and agreements of leading global organizations, such as the IMF, World Bank, and others, as well as the laws and international cooperation of many nations, financial misconduct that leads to a mega-meltdown and collapse constitutes a violation of an international norm.

#### E. Select Enron-Type Conduct

It is crucial to note that this Article is not suggesting that conduct encompassing ordinary market risk or garden-variety fraud should be actionable pursuant to the ATCA.<sup>266</sup> Only outrageous conduct with an international impact and which results in severe wealth destruction should be actionable under the ATCA. The category of claims suggested in this article capable of triggering jurisdiction are limited to “Enron-like” fraud.

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264. See, e.g., TECHNICAL COMM. OF THE INT’L ORG. OF SEC. COMM’NS, *supra* note 220, at iii. The report states:

[I]n modern capital markets, where capital flows easily across national borders, cross-border enforcement cooperation perhaps is the single most powerful tool securities regulators and law enforcement authorities have at their disposal to prevent, deter, detect and prosecute cross-border financial fraud. In the process of reviewing the key regulatory issues highlighted by these recent financial scandals, the Technical Committee determined that, in many cases, regulatory principles or standards designed to address the weaknesses identified in this Report have already been developed. In other words, the Technical Committee is of the view that, in very many cases, there already is a widespread consensus about what regulatory problems exist and how these problems can be solved.

*Id.*

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

266. Market risk is the “risk of losses in on- and off-balance-sheet positions arising from movements in market prices.” BASLE COMM. ON BANKING SUPERVISION, OVERVIEW OF THE AMENDMENT TO THE CAPITAL ACCORD TO INCORPORATE MARKET RISKS 1 (1996), available at [www.bis.org/publ/bcbs23.pdf](http://www.bis.org/publ/bcbs23.pdf).

## CONCLUSION

Recent years have witnessed a surge in global financial deception resulting in substantial wealth evisceration. While the types of conduct found to be cognizable under the ATCA to date have not included severe corporate financial wrongdoing, these prior rulings do not reflect our current financially intertwined world. Powerful reasons exist for permitting the invocation of ATCA jurisdiction in limited circumstances for corporate financial misconduct. The quintessential example of the type of deception where ATCA jurisdiction is appropriate is the conduct that caused the Enron debacle.

Avoiding “Enron-like” financial implosions, failed banking systems, the evisceration of tens of billions of dollars worth of market value, the destruction of retirement savings on a grand scale, plummeting real estate valuations, and economic collapse based upon corporate fraud constitutes an international norm. All countries have a crucial interest in maintaining world economic prosperity. The foundation of world economic stability is at stake. Since globalization, the financial services revolution, and global market integration have brought these negative outcomes from being confined locally to the specter of international contagion, the ATCA should be allowed to form the basis of jurisdiction for the Enron-type of corporate fraud.