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Cover Page Footnote

J.D. Candidate, 2009, Fordham University School of Law. Thank you to Professor Marc Arkin for her invaluable guidance, my family for their support, and Patrick for his patience.

ALIEN TORT STATUTE ACCOMPLICE LIABILITY CASES: SHOULD COURTS APPLY THE PLAUSIBILITY PLEADING STANDARD OF *BELL ATLANTIC v. TWOMBLY*?

*Amanda Sue Nichols**

When a corporation operating abroad either conspires with, or aids and abets, an oppressive regime in violating human rights, victims can seek redress in U.S. courts under the Alien Tort Statute. In assessing such claims, some courts have chosen to apply a liberal pleading standard, while others have applied a heightened pleading standard to combat frivolous lawsuits. This Note suggests that courts should apply a third standard—the plausibility standard applied to claims under section 1 of the Sherman Act by the U.S. Supreme Court in Bell Atlantic Corp. v. Twombly. *This Note argues that applying that standard to Alien Tort Statute accomplice liability claims best addresses procedural and practical concerns of both the government and defendants, while ensuring that the judicial system continues to afford plaintiffs the ability to seek justice.*

INTRODUCTION

On July 26, 2007, in the case of *Romero v. Drummond Co.*, an Alabama jury became the first to issue a verdict in a case brought against a corporation under the Alien Tort Statute[1] (ATS) for aiding and abetting a state actor in violating human rights.[2] Since the U.S. Court of Appeals for the Second Circuit held in *Kadic v. Karadžić* that individuals could bring claims under the ATS against private actors acting together with state actors,[3] plaintiffs have brought a significant number of cases alleging that a corporation either conspired with or aided and abetted a government actor

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1. 28 U.S.C. § 1350 (2000). Although enacted in 1789, plaintiffs rarely brought cases under the statute until it resurfaced in 1980. *See infra* notes 18–21 and accompanying text. Historically, the statute was referred to as the Alien Tort Claims Act (ATCA); however, the U.S. Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004), held that the statute is jurisdictional and does not create a cause of action. Thus, the statute is now frequently referred to as the Alien Tort Statute (ATS). Quotes referring to the statute as the ATCA remain unchanged.

2. See *infra* Part I.A.2.c for a discussion of *Romero v. Drummond Co.*, the first, and thus far only, ATS accomplice liability case to reach the trial stage.

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

in perpetrating human rights abuses.[4] Thus, although *Drummond* resulted in an acquittal, it sent a strong message that plaintiffs were going to hold not only state actors but anyone else who may have been complicit in their actions accountable for human rights abuses.[5] For some, the fact that a case like *Drummond* reached the trial stage at all is objectionable; they fear that factually weak complaints may be upheld, leading to excessive, costly, and time-consuming litigation,[6] not to mention potential harm to foreign policy objectives and corporate reputations.[7] This Note advocates that one possible way to address these concerns is through the pleading standard applied to ATS accomplice liability claims—an issue on which courts remain divided.

Some courts have adhered to the traditional notice pleading requirement of Federal Rule of Civil Procedure 8(a), letting claims continue that are ultimately dismissed through summary judgment or result in a settlement.[8] Others have opted to combat the perceived harms of ATS accomplice liability litigation by applying a de facto heightened pleading standard, essentially requiring plaintiffs to prove elements of their claim at the initial stage of a case as opposed to during summary judgment or trial.[9] The pleading standard applied is significant because, while there is "[the] risk that too high a pleading standard will prevent the discovery necessary to

4. *See In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1274 (S.D. Fla. 2006) ("Within the last decade, a significant number of cases have been filed that allege that major United States corporate entities are vicariously liable for human rights abuses abroad under the ATCA . . . ."). The proliferation of ATS accomplice liability cases is a direct effect of globalization, which has led to greater corporate investment in developing countries and, as a result, has increased awareness of the human rights abuses some of those countries perpetrate. *See* Terry Collingsworth, *Beyond Public Relations: Bringing the Rule of Law to Corporate Codes of Conduct in the Global Economy*, 6 Corp. Governance 250, 250 (2006) (noting that part of what attracts these corporations is the cost-saving opportunities presented by operating in a country with a government "willing to inflict economic and human rights abuses on its own people"). Furthermore, given the practical difficulties of reaching governmental actors, plaintiffs increasingly only sue the corporations for their role in the perpetration of human rights violations. *See* Frank Christian Olah, *MNC Liability for International Human Rights Violations Under the Alien Tort Claims Act: A Review & Analysis of the Fundamental Jurisprudence and a Look at Aiding & Abetting Liability Under the Act*, 25 Quinnipiac L. Rev. 751, 752–53 (2007) ("[C]ertain defenses available to ATCA defendants (e.g., personal jurisdiction, forum non conveniens, the act of state doctrine, the doctrine of international comity, the political question doctrine, foreign sovereign immunity, and head-of-state immunity) often result in the foreign government party being dismissed from the case leaving the [corporation] as the only available defendant." (citations omitted)).

5. Given the conflation of conspiracy and aiding and abetting claims in ATS cases, for the purposes of this Note the term "accomplice liability" will refer to claims that a corporation either aided and abetted or conspired with a state actor in violating the law of nations.

6. *See infra* Part II.B.

7. *See infra* Part II.C.

8. *See, e.g.*, Wiwa v. Royal Dutch Petrol. Co., No. 96 CIV. 8386, 2002 WL 319887, at *14 (S.D.N.Y. Feb. 28, 2002); Doe I v. Unocal Corp., 963 F. Supp. 880, 895 (C.D. Cal. 1997).

9. *See, e.g.*, Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242, 1247–50 (11th Cir. 2005); *Sinaltrainal*, 474 F. Supp. 2d at 1287.

unearth involvement in the misdeeds that Congress hoped to remedy through the ATCA [Alien Tort Claims Act]," conversely, "there is also a risk that vague, conclusory, and attenuated allegations will allow individuals . . . to engage in unwarranted international 'fishing expeditions' against corporate entities and to abuse the judicial process in order to pursue political agendas."[10] The application of varying pleading standards in ATS cases has demonstrated the problems that can arise at either extreme: the low bar of the notice pleading standard risks causing settlement pressure and allowing frivolous and excessive litigation, whereas the high bar of the heightened pleading standard risks preventing legitimate claims from going forward. Moreover, the variability of the pleading standard, and the inconsistent outcomes that can result, combine to create unpredictability.

Underscoring the existing confusion, one district court has explicitly asked higher courts to clarify this issue. After applying a heightened pleading standard in *In re Sinaltrainal Litigation*, Judge Jose E. Martinez of the Southern District of Florida concluded his opinion by requesting that the appellate court clarify the proper pleading standard for ATS accomplice liability claims, stating,

> In light of the growing number of ATCA lawsuits involving corporate defendants, issues of what level of pleading is necessary in the ATCA context, of how to determine vicarious liability, [and] of the extent to which state action may be imputed to private actors . . . are becoming increasingly urgent.[11]

One possible resolution to the problem identified by Judge Martinez—that can strike the balance the courts desire to achieve—is applying the plausibility reading of Rule 8(a) as articulated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*.[12]

Twombly was a class action lawsuit brought by a group of plaintiffs alleging that four incumbent local exchange carriers (ILECs) violated section 1 of the Sherman Act by conspiring to restrain trade that resulted in "inflate[ed] charges for local telephone and high-speed Internet services."[13] The Second Circuit reversed the district court's dismissal of the complaint for failure to state a claim, and the Supreme Court "granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct."[14] The Supreme Court held that to state a claim for relief adequately under section 1, plaintiffs must plead sufficient additional facts beyond parallel conduct to render a conspiratorial agreement plausible—facts typically required after the completion of discovery. This decision reversed the Supreme Court's canonical reading of Rule 8(a) that "a complaint should not be dismissed for failure to state a

10. *Sinaltrainal*, 474 F. Supp. 2d at 1275.
11. *Id.* at 1302.
12. 127 S. Ct. 1955, 1965–66 (2007); *see infra* Part I.B.3.
13. *Twombly*, 127 S. Ct. at 1961–62.
14. *Id.* at 1963.

claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[15]

Since *Twombly*, the circuit courts have expressed confusion as to whether the plausibility reading applies to all claims, only antitrust claims, or any claim with elements and discovery burdens similar to antitrust cases.[16] Indeed, in his dissent in *Twombly*, Justice John Paul Stevens wrote, "Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer."[17] This Note, by analyzing the implications of all three pleading standards in ATS accomplice liability cases, explores Justice Stevens's question and suggests that, at the very least, the plausibility standard should also apply to ATS accomplice liability claims. Like antitrust cases, such claims have been interpreted to require a showing of conspiratorial agreement in order to state a claim and have similar procedural concerns. In addition to discussing the similarities between antitrust and ATS accomplice liability cases, this Note also explores whether the plausibility standard can address the concerns of the government and corporate defendants regarding the procedural and practical repercussions of ATS accomplice liability cases, while ensuring that plaintiffs are still afforded a fair opportunity to seek redress for human rights violations.

In doing so, this Note examines several key aspects of the ATS and its policy rationales, as well as the recent decision in *Twombly*. Part I of this Note addresses the background of the ATS as a jurisdictional statute and the basis for bringing accomplice liability claims under it. Additionally, Part I addresses the notice and heightened pleading standards as well as *Twombly*, in which the Supreme Court endorsed a plausibility standard for antitrust conspiracy claims. Part II discusses the rationale for the application of each standard to ATS accomplice liability cases, and procedural and policy considerations for determining the appropriate standard. Part III concludes by relying on the analysis in Parts I and II in finding that the plausibility standard articulated in *Twombly* is the proper standard to apply to ATS accomplice liability cases against corporations.

I. FOUNDATIONAL DOCTRINE: THE ATS AND PLEADING STANDARDS

Cases brought under the ATS are unique among those heard in American courts. Diversity is not required, international law governs, and federal courts only have subject matter jurisdiction if the plaintiff can properly show that the alleged offense is part of the law of nations. Part I.A discusses the background of the ATS in U.S. courts and the requirements for properly bringing a claim to establish jurisdiction. It also specifically

15. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).
16. *See infra* note 199 and accompanying text.
17. *Twombly*, 127 S. Ct. at 1988 (Stevens, J., dissenting).

addresses the origins of accomplice liability claims under the ATS, the elements of pleading conspiracy and aiding and abetting claims, and the facts of *Romero v. Drummond Co.*, the first ATS accomplice liability case to reach the trial stage.

Establishing subject matter jurisdiction is only the first hurdle faced by plaintiffs in ATS cases; this Note predominantly focuses on the second: pleading a claim sufficient to withstand a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. The current lack of a uniform pleading standard has led to unpredictable and inconsistent outcomes. Part I.B addresses notice pleading, heightened pleading, and plausibility pleading.

A. The ATS

1. The Revitalization of the ATS

Originally codified as section 9 of the 1789 Judiciary Act, the statute commonly referred to as the ATCA or ATS states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[18] When ascertaining the content of the law of nations, a court must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today, as long as it is pled with the same particularity as those claims recognized in 1789.[19]

In the approximately 200 years following its enactment, only one case was successfully brought under the ATS.[20] The statute resurfaced in 1980 when the Second Circuit decided the seminal case of *Filartiga v. Pena-Irala*, which reaffirmed that federal courts had jurisdiction over claims brought under the ATS that were (1) by an alien, (2) for a tort, and (3) committed in violation of the law of nations.[21] In *Filartiga*, the plaintiffs, citizens of the Republic of Paraguay, alleged that Americo Norberto Pena-Irala, in his capacity as inspector general of police in Asunción, Paraguay, tortured and killed their family member, Joelito Filartiga, in retaliation for his father's political activities and beliefs.[22] The Second Circuit held that the torture was a violation of the law of nations, and therefore conferred subject matter jurisdiction on the court under the ATS.[23] The court stressed that torture was a particularly "well-established, universally recognized norm[] of international law," and that there remains the requirement that courts, in deciding whether the ATS confers jurisdiction, "engag[e] in a more searching preliminary review of the merits than is required . . . under

18. 28 U.S.C. § 1350 (2000).

19. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 (2004). See *infra* notes 30–34 and accompanying text for a more detailed discussion of the Supreme Court's decision in *Sosa*.

20. *Sosa*, 542 U.S. at 712.

21. Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

22. *Id.* at 878.

23. *Id.* at 887, 890.

the more flexible 'arising under' formulation."[24] Although the *Filartiga* court did not elaborate as to why a "more searching preliminary review" is required, it set the stage for the application of a higher standard of review to claims brought under the ATS.

The next development in ATS litigation, also in the Second Circuit, was *Kadic*. This case addressed whether plaintiffs, Croat and Muslim citizens of Bosnia-Herzegovina, could bring a claim against Radovan Karadžić, president of the self-proclaimed republic of Srpska, for his role in the human rights abuses perpetrated against them by Bosnian-Serb military forces.[25] The Second Circuit held that a private actor operating under color of law—meaning "act[ing] together with state officials or with significant state aid"—in violation of the law of nations, could be held accountable under the ATS.[26] Acknowledging that, by allowing suits against private actors it was opening the door to more ATS cases, the Second Circuit in *Kadic* emphasized that there was still a high bar for showing that an act violates a customary law of nations by stating that "it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations."[27] Although this formulation related to the requirements for satisfying subject matter jurisdiction,[28] it would later be relied upon by courts in 12(b)(6) motions to justify applying a heightened standard for pleading accomplice liability claims.[29]

The decisions in *Filartiga* and *Kadic* created uncertainty as to the exact nature of the ATS and what constituted the law of nations. In 2004, the Supreme Court attempted to clarify these issues in *Sosa v. Alvarez-Machain*, defining the ATS as a purely jurisdictional statute and holding that common law provides a cause of action under the ATS as long as it is "defined with a specificity comparable to the features of the 18th-century paradigms."[30] On the issue of defining the law of nations, the Court

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24. *Id.* at 887–88.

25. Kadic v. Karadžić, 70 F.3d 232, 237 (2d Cir. 1995).

26. *Id.* at 245.

27. *Id.* at 238.

28. On August 10, 2000, a New York jury found Radovan Karadžić guilty of committing genocide and awarded the Kadic plaintiffs a $745 million judgment and injunction against Karadžić. Maria T. Vullo, *Prosecuting Genocide*, 2 Chi. J. Int'l L. 495, 500–01 (2001).

29. *See infra* notes 168–69 and accompanying text.

30. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004); *see also* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 285 (2d Cir. 2007) (Hall, J., concurring) (stating that the Supreme Court decided *Sosa* "in an attempt to clarify the problems posed by the ATCA"). The eighteenth-century paradigms referred to by the Court in *Sosa* were the "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa*, 542 U.S. at 724. Although the Court did not provide an explanation as to the exact level of specificity required, it did conclude that unlawful detention of an individual for one day did not meet the standard. *Id.* at 738 ("It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."). Furthermore, Justice Stephen Breyer in his concurring opinion provided examples of possible violations of international law that would be actionable under the ATS, such as "torture, genocide, crimes against humanity, and war crimes." *Id.* at 762.

stressed the "collateral consequences" and "potential implications for the foreign relations of the United States of recognizing such causes," and thus the need for "a high bar to new private causes of action for violating international law."[31] The Court did not specify whether this "high bar" involved pleading the violation or referred to the type of act necessary to establish subject matter jurisdiction.

As a result of the Court's decision in *Sosa*, the Second Circuit, in a subsequent case, found that "a federal court faced with a suit alleging a tort in violation of international law must undertake two distinct analytical inquiries."[32] The first step in the analysis is to determine that the court has jurisdiction, which the court can accomplish by establishing that the offense is a violation of a law of nations under the sources of international law recognized by the Statute of the International Court of Justice.[33] Once the court establishes jurisdiction, the second line of inquiry is to determine "whether a common-law cause of action should be created to provide a remedy for the alleged violation of international law."[34] Only after a court concludes it has jurisdiction and that the alleged offense is one that can be heard under the ATS may the court look at the sufficiency of the pleading to determine whether it states a claim for relief.

2. Conspiracy and Aiding and Abetting Claims

a. *Subject Matter Jurisdiction of Accomplice Liability Claims Under the ATS*

In order for a court to have subject matter jurisdiction over an ATS accomplice liability case, the court must first find that the plaintiff alleged that the private actor assisted in a crime that is a violation of the law of nations.[35] After determining that the underlying crime is a law of nations violation, the court then decides whether there is a cause of action under the statute for the type of accomplice liability alleged. Thus far, courts have recognized two forms of accomplice liability actionable under the ATS: "liability as a conspirator and liability for aiding and abetting."[36]

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31. *Sosa*, 542 U.S. at 727.

32. *Khulumani*, 504 F.3d at 266.

33. *Id.* at 267. The identified sources of law include:

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

Id. (citing the Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060, 3 Bevans 1153, 1187).

34. *Id.*

35. *See supra* notes 30, 33 and accompanying text.

36. *See* Courtney Shaw, Note, *Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act*, 54 Stan. L. Rev. 1359, 1383 (2002). Although most courts have found accomplice liability to be actionable under the ATS, courts and commentators are still

Prior to *Sosa*, the most notable application of accomplice liability to corporations in the ATS context was in *Doe I v. Unocal Corp.*[37] Relying on the Second Circuit's color of law analysis in *Kadic*,[38] the U.S. District Court for the Central District of California determined that a corporation could be treated as a private actor under the ATS, providing the court with subject matter jurisdiction over the claim.[39] Although the case eventually settled, *Unocal* set the stage for plaintiffs to bring future claims against corporations, either for being active participants in, or knowingly acting in support of, a foreign sovereign's violation of the law of nations. Despite the uncertainty created by the *Unocal* decision regarding the liability of corporations, the Supreme Court in *Sosa* did not directly address the issue because it was not a relevant question in the case.[40]

One of the first post-*Sosa* cases to examine and reaffirm corporate accomplice liability was *Presbyterian Church of Sudan v. Talisman Energy, Inc.*[41] In *Presbyterian Church*, the plaintiffs, non-Muslim Africans from southern Sudan, sought to hold Talisman Energy, Inc., a Canadian corporation, liable for having "conspired with or aided [The Republic of Sudan] in committing three crimes recognized under international law: genocide, crimes against humanity, and war crimes."[42] Relying on *Sosa*, Talisman moved to dismiss, claiming that "corporate liability and secondary liability are not sufficiently definite and accepted in international law to support an ATS claim."[43] The U.S. District Court for the Southern District of New York disagreed with defendant Talisman's interpretation of *Sosa* and held that "customary international law provides for secondary

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debating the type of crimes for which plaintiffs can hold private actors liable. For a discussion of the post-*Sosa* circuit split regarding whether or when corporate liability provides jurisdiction under the ATS, see generally Tim Kline, Note, *A Door Ajar or a Floodgate?: Corporate Liability After* Sosa v. Alvarez-Machain, 94 Ky. L.J. 691 (2006).

37. 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002). For a more detailed discussion of *Unocal*, see *infra* notes 152–59.

38. Kadic v. Karadžić, 70 F.3d 232, 245 (2d Cir. 1995).

39. *Unocal*, 963 F. Supp. at 890–91.

40. In fact, the only mention of corporate liability in *Sosa* is a footnote where the Court states, "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004); *see also* Olah, *supra* note 4, at 770–71 (noting the Court's omission in addressing corporate liability, and claiming that "the [*Sosa*] Court appeared in the footnote to implicitly affirm the cognoscibility of ATCA claims against [corporate] defendants").

41. 374 F. Supp. 2d 331 (S.D.N.Y. 2005) (dismissing defendants' motion for judgment on the pleadings).

42. Presbyterian Church v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 638–39 (S.D.N.Y. 2006) (granting defendants' summary judgment motion). Regarding conspiracy, the complaint alleged

> that Talisman conspired with the Government to carry out a campaign of ethnic cleansing, including extrajudicial killing, war crimes, forcible displacement, military bombings and assaults on civilian targets, confiscation and destruction of property, kidnapping, rape, and enslavement against the non-Muslim, African Sudanese population living in and near the oil concession areas.

Id. at 662.

43. *Presbyterian Church*, 374 F. Supp. 2d at 334.

liability."[44] After five years of discovery and motion practice, the court ultimately granted Talisman's motion for summary judgment and precluded the plaintiffs from filing another amended complaint.[45] The court dismissed the conspiracy claims on the ground that under international law "the offense of conspiracy is limited to conspiracies to commit genocide and to wage aggressive war," neither of which were alleged in the complaint.[46] Not all courts, however, have recognized this limitation on conspiracy claims. For example, one year earlier the U.S. Court of Appeals for the Eleventh Circuit, relying on domestic law, extended the reach of corporate conspiracy liability to a number of violations of international law, including crimes against humanity.[47] Thus, although some courts disagree as to which law of nations violations are actionable, most have accepted that "international law provides for the imposition of liability on a party that does not directly perform the underlying act."[48]

b. *Pleading Third Party Liability Under the ATS*

Once the court has determined that the threshold of subject matter jurisdiction has been established, and that there is a cause of action for the particular law of nations violation under the ATS, the next hurdle the plaintiffs face is pleading the elements of their claim.[49] There are no uniform criteria for pleading ATS conspiracy or aiding and abetting claims,

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44. *Id.* at 337–38. For a further discussion of the sources of international law supporting aider and abettor liability, see *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007) (analyzing international law's treatment of aider and abettor liability and finding that is was "sufficiently 'well-established [and] universally recognized' to be considered customary international law for the purposes of the [ATS]" (quoting Kadic v. Karadžić, 70 F.3d 232, 236 (2d Cir. 1995))); Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 Harv. Hum. Rts. J. (forthcoming Summer 2008) (manuscript at 1), *available at* http://ssrn.com/abstract=1004765.

45. *Presbyterian Church*, 453 F. Supp. 2d at 679, 689.

46. *Id.* at 663.

47. *See* Cabello v. Fernandez-Larios, 402 F.3d 1148, 1158–59 (11th Cir. 2005) (per curiam) (relying on the criteria established in *Halberstam v. Welch*, 705 F.2d 472, 481, 487 (D.C. Cir. 1983), to prove that an individual was part of a burglary conspiracy, and outlining the requirements for proving a conspiracy to commit crimes against humanity, mistreatment, torture, or extrajudicial killing under the ATS). Although not the subject of this Note, courts are unclear "'as to what body of law applies to ancillary issues that may arise, such as whether a third party may be held liable in tort' for a violation of international norms." *Khulumani*, 504 F.3d at 287 (Hall, J., concurring) (quoting Doe I v. Unocal Corp., 395 F.3d 932, 965 (9th Cir. 2002) (Reinhardt, J., concurring)). As Judge Peter W. Hall noted in his concurring opinion in *Khulumani*, "*Sosa* at best lends Delphian guidance on the question of whether the federal common law or customary international law represents the proper source from which to derive a standard of [third party] liability under the ATCA." *Khulumani*, 504 F.3d at 286.

48. *See* Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 285–86 & n.33 (E.D.N.Y. 2007) (collecting cases).

49. Some courts, such as in *Sinaltrainal*, also require that the complaint sufficiently plead a claim in order to survive a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *See infra* note 176 and accompanying text.

but there are common elements. For example, one shared element is the requirement that the corporation have knowledge that its actions amounted to complicity in human rights abuses, meaning that it had either a tacit or an express agreement with a state actor to perpetrate those abuses.

In assessing whether a complaint adequately states a claim of complicity, most courts rely on the U.S. Court of Appeals for the Ninth Circuit's statement in *Doe I v. Unocal Corp.* regarding the key mens rea element of aider and abettor liability: that a plaintiff must show the defendant rendered "knowing practical assistance, or encouragement, which has a substantial effect on the perpetration of the crime."[50] Specifically, in *Unocal*, the Ninth Circuit held that international precedent requires that a corporation have either actual or constructive knowledge that its actions would substantially assist in the commission of a law of nations violation.[51] Significantly, the knowledge requirement ensures that there is at least a tacit, if not an explicit, agreement. Relying on *Unocal*, the Southern District of New York later outlined a more detailed standard in *Presbyterian Church*, stating,

> To show that a defendant aided and abetted a violation of international law, an ATS plaintiff must show:
>
> 1) that the principal violated international law;
>
> 2) that the defendant knew of the specific violation;
>
> 3) that the defendant acted with the intent to assist that violation, that is, the defendant specifically directed his acts to assist in the specific violation;
>
> 4) that the defendant's acts had a substantial effect upon the success of the criminal venture; and
>
> 5) that the defendant was aware that the acts assisted the specific violation.[52]

Although aiding and abetting claims do not require an explicit agreement, the *Presbyterian Church* articulation of the elements of an ATS aiding and abetting claim suggests that a plaintiff must show a tacit agreement, whereby the corporate defendant implicitly agrees to act as an accomplice to a state actor by having knowledge of, and affirmatively assisting, that state actor's violation of the law of nations.

The most common criteria courts use for analyzing the sufficiency of an ATS conspiracy claim is the joint action test. "Traditionally, either a conspiracy or 'willful participation' with the state actor will satisfy the

50. Doe I v. Unocal Corp., 395 F.3d 932, 951 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *reh'g en banc*, 403 F.3d 708 (9th Cir. 2005).

51. *Id.* at 950–51; *see also* Philip A. Scarborough, Note, *Rules of Decisions for Issues Arising Under the Alien Tort Statute*, 107 Colum. L. Rev. 457, 479–80 (2007).

52. Presbyterian Church of Sudan v. Talisman Energy Inc., 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006).

'joint action test.'"[53] The joint action test "address[es] situations in which a private individual, acting in concert with the government, commits the challenged acts."[54] In the context of ATS conspiracy claims, the joint action test looks to "whether state officials and private parties acted in concert in effecting a particular deprivation of constitutional rights."[55] As one commentator has noted regarding ATS conspiracy claims, "Knowledge and intent are crucial to the imposition of liability on the basis of joint action" in order to ensure that a corporation is not held liable in cases where it is "unaware that its actions or those of its sovereign host are violating the human rights of others."[56] Thus, regardless of whether the claim against a corporation is one of aiding and abetting or one of conspiracy, plaintiffs must plead facts sufficient to show that the corporation had an agreement, tacit or explicit, with a state actor to undertake acts that furthered a law of nations violation.

c. *ATS Accomplice Liability on Trial:* Romero v. Drummond Co.

On July 26, 2007, an Alabama jury reached a verdict in the first case alleging accomplice liability against a corporation under the ATS to reach the trial stage, *Romero v. Drummond Co.* As the attorneys for both sides agree, the outcome of this case and the issues pending on appeal may have a substantial effect on future ATS accomplice liability cases.[57]

On March 14, 2002, plaintiffs, the Sintramienergetica trade union and relatives of Valmore Locarno Rodriquez, Victor Hugo Orcasita Amaya, and Gustavo Soler Mora, brought suit under the ATS against Drummond Co., Drummond Ltd., and Gary N. Drummond, alleging that the defendants were liable for the use of the Colombian paramilitaries as their agents in bringing about the wrongful deaths of Locarno, Orcasita, and Soler, all leaders of the union.[58] Initially the plaintiffs only asserted claims of extrajudicial killing and "denial of fundamental rights to associate and organize," choosing to plead their aiding and abetting claims under Alabama law.[59] The complaint was eventually joined with four related actions, and after five years of discovery and summary judgment motions, the defendants were reduced to

53. Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1304 (S.D. Fla. 2003), *aff'd in part, vacated in part*, 416 F.3d 1242 (11th Cir. 2006). The joint action test is one of four tests used to determine whether private conduct constitutes state action. *Id.* The other three tests are (1) the nexus test, (2) the symbiotic relationship test, and (3) the public function test. *Id.*

54. Doe I v. Unocal Corp., 110 F. Supp. 2d 1294, 1307 (C.D. Cal. 2000), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

55. *Id.* at 1305 (citation omitted).

56. Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. Davis J. Int'l L. & Pol'y 119, 134 (2007).

57. Jay Reeves, *Labor Loses Landmark Case: Both Sides Say Appeals Rulings Likely Will Set the Precedent for U.S. Companies Abroad*, Hous. Chron., July 28, 2007, at A16.

58. Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250, 1253–54 (N.D. Ala. 2003).

59. *Id.* at 1255–56.

Drummond Ltd. and the head of its Colombian operations, Augusto Jimenez.[60] Additionally, the aiding and abetting claim was brought under the ATS, as opposed to Alabama law, and the issues were narrowed such that at trial the judge instructed the jury that, to prevail, "the families and union must prove Drummond knowingly aided the killers and committed what amounts to a war crime in Colombia."[61]

In its summary judgment order, the district court dismissed the torture claims under the ATS, Torture Victims Protection Act (TVPA), and Alabama common law; the extrajudicial killing claim under the TVPA; and all claims against Drummond Co.[62] The court denied summary judgment as to the aiding and abetting claims, holding that "Plaintiffs have put forward sufficient evidence to create a genuine issue of material fact as to Defendants' liability for violation of the Alien Tort Claims Act, under a theory of aiding and abetting liability."[63] The court left open whether the plaintiffs could bring conspiracy claims contingent on whether it decided to admit certain deposition testimony—although ultimately it was not permitted.[64]

Thus, at trial, in order to hold defendants liable for the deaths of the three union leaders' plaintiffs had to show

> 1. *First*, that defendants substantially assisted some person or persons who personally committed or caused one or more of the murders; and
>
> 2. *Second*, that at the time the assistance was provided, defendants knew that their actions would assist in the murders.[65]

After two weeks of trial, the jury "rejected plaintiffs' claims, finding that there was insufficient evidence to hold the defendant . . . liable for aiding and betting [sic] the alleged assassination and torture of union leaders by paramilitary groups."[66] The decision led to what some call "a defeat for labor in a test of whether companies can be held responsible in U.S. courtrooms for their conduct overseas."[67] Drummond attorney Robert Mittelstaedt noted that the acquittal will send a message to potential

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60. Defendant's Trial Brief at 1–2, Romero v. Drummond Co., No. CV-03-BE-0575-W (N.D. Ala. June 15, 2007).

61. Jay Reeves, *Drummond Coal Killings: Trial for Deaths of Colombian Labor Leaders Goes to Jurors*, Press-Register (Mobile, Ala.), July 26, 2007, at B2.

62. *See* Order, *Drummond*, No. CV-03-BE-0575-W (Mar. 5, 2007).

63. *Id.* at 4.

64. *Id.* at 4 n.4.

65. Pretrial Order at 5, *Drummond*, No. CV-03-BE-0575-W (June 20, 2007); *see also* Defendant's Trial Brief, *supra* note 60, at 3 (stating that the plaintiffs had to prove "not only that defendants substantially assisted the paramilitaries but also that defendants knew and intended that the paramilitaries would assassinate [the three leaders]" and that they did so "in order to further some political or military goal of the paramilitaries" (emphasis omitted)).

66. Faith E. Gay & J. Noah Hagey, *Outside Counsel: Corporate Liability Under the Alien Claims Tort Claims Act*, N.Y. L.J., Oct. 24, 2007, at 4; *see also* Jury Verdict Form, *Drummond*, No. CV-03-BE-0575-W (July 26, 2007).

67. Jay Reeves, *Drummond Cleared in Colombia Killings*, Press-Register (Mobile, Ala.), July 27, 2007, at 2B.

plaintiffs that "it's not enough to make wild, unsubstantiated allegations and hope juries will be swayed."[68] The plaintiffs' claims, however, survived both a 12(b)(6) motion to dismiss and a motion for summary judgment, calling into question the notion that the claims were "frivolous."

Indeed, as of the writing of this Note, the appeal of the jury verdict is pending in the Eleventh Circuit, with plaintiffs "contesting the trial court's refusal to allow out-of-court, nondeposition testimony of former paramilitary members into the record."[69] The district court judge prohibited "the testimony of three men the union said had firsthand knowledge of Drummond's links with antiunion gunmen allied with the United Self-Defense Forces of Colombia," for various procedural reasons.[70] If the Eleventh Circuit finds that the district court improperly excluded deposition testimony, it is possible that it will order a new trial on the conspiracy claims.[71]

B. *Pleading Standards*

The first step in bringing a lawsuit is filing a complaint stating the allegations against the party or parties from whom the plaintiff(s) seeks relief. Except for cases pleading fraud or mistake,[72] the allegations in complaints are governed by Federal Rule of Civil Procedure 8(a), which states that a complaint must contain

> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.[73]

If a complaint fails to meet this standard on its face, the defendant can move to dismiss the action under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.[74] If the court finds that the complaint fails to state a claim, it can either dismiss the action, or grant the plaintiff(s) leave

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68. Reeves, *supra* note 57 (citation omitted).

69. Gay & Hagey, *supra* note 66, at 9.

70. Russell Hubbard, *Colombia Case Appealed; Company Sued over Three Slayings*, Birmingham News, Dec. 15, 2007, at 1C.

71. *Id.*

72. Pleading allegations of fraud or mistake are governed by Federal Rule of Civil Procedure 9(b), which states that, "[i]n alleging fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b).

73. Fed. R. Civ. P. 8(a).

74. Federal Rule of Civil Procedure 12(b)(6) states,

> Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . failure to state a claim upon which relief can be granted . . . .

to amend the complaint. A 12(b)(6) motion is typically brought prior to the discovery stage of the litigation.[75]

The following sections discuss the three approaches taken by courts in the level of specificity required in pleading a claim to survive a 12(b)(6) motion to dismiss. Part I.B.1 discusses notice pleading, the most liberal interpretation of Rule 8(a). Part I.B.2 addresses the de facto heightened pleading standard applied by courts to specific types of claims. The unofficial nature of the heightened pleading standard—it has been explicitly repudiated by the Supreme Court—means that its application to particular claims varies by case; there is also uncertainty surrounding whether all or some of the elements of the claim require a more specific level of pleading than the liberal requirements of notice pleading. The final standard, discussed in Part I.B.3, is the Supreme Court's recently adopted plausibility standard, which requires enough facts supporting a claim to render it conceivable. Depending on the case, it can require more specificity than the notice pleading standard, but less than the courts have required when applying a heightened pleading standard.

1. Notice Pleading

One of the primary functions of a complaint is to put the defendant on notice of the claims being asserted against him.[76] At common law, pleadings served the concurrent functions of "(1) providing notice of a claim or defense, (2) stating facts, (3) narrowing issues to be litigated, and (4) allowing for quick disposition of sham claims and defenses."[77] The committee drafting the Federal Rules of Civil Procedure—led by Yale Law School Dean Charles Clark—sought to codify a more "simple, uniform, and transsubstantive" concept of pleading, and thus enacted Rule 8, requiring that pleadings serve the single role of notice as opposed to "the multiple functions of notice, fact development, winnowing, and early disposition."[78] The Supreme Court's Advisory Committee on Rules for Civil Procedure codified these additional procedural functions in other rules such as those governing discovery and summary judgment.[79]

The Supreme Court first acknowledged the primary notice function of Rule 8(a) in the 1947 case *Hickman v. Taylor*, when it observed that the

75. There are instances where discovery may have begun prior to the 12(b)(6) motion. One such instance is a motion to dismiss a complaint that has been amended since discovery began. Although the immense burdens of discovery are relevant to the issue addressed in this Note, the actual details of discovery are not. For further discussion of the Federal Rules surrounding discovery, see Richard L. Marcus et al., Civil Procedure: A Modern Approach 342–54 (4th ed. 2005), and Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987, 992–94 (2003).

76. 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1202 (3d ed. 2004).

77. Christopher M. Fairman, *Heightened Pleading*, 81 Tex. L. Rev. 551, 556 (2002).

78. *Id.*

79. *Id.* at 556–57.

Federal Rules "restrict the pleadings to the task of general notice-giving."[80] Ten years later the Supreme Court reinforced the notice pleading standard in *Conley v. Gibson*.[81] In *Conley*, the Court stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[82] Thus, in order to satisfy the notice pleading standard of Rule 8(a) all that is required is "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[83] The rationale both of the framers of Rule 8 and the Supreme Court in its construction of the Rule intended to preserve the litigant's ability to get his day in court, and to uphold the principle that "the purpose of pleading is to facilitate a proper decision on the merits."[84] The term "notice pleading" is misleading, however, insofar as a plaintiff cannot simply state a "bare averment that he wants relief and is entitled to it."[85] In reality, notice pleading still requires an appropriate number of facts supporting the allegation, such that there is adequate information regarding the claim for relief for the defendant to answer.[86] This specificity varies because "[w]hat constitutes a short and plain statement must be determined in each case on the basis of the nature of the action, the relief sought, and the perspective positions of the parties in terms of the availability of information and a number of other pragmatic matters."[87]

2. Heightened Pleading

The Federal Rules of Civil Procedure do not contain a heightened pleading requirement outside of Rule 9, and the Supreme Court has explicitly and repeatedly rejected grafting such a requirement onto Rule 8.[88] This, however, has not stopped lower courts from attempting to raise the pleading bar in certain classes of claims, including those brought under the

80. Hickman v. Taylor, 329 U.S 495, 501 (1947).

81. 355 U.S. 41 (1957).

82. *Id.* at 45–46.

83. *Id.* at 47 (internal quotation marks omitted); *see also* Wright & Miller, *supra* note 76, at 89–90 ("[P]leadings under the rules simply may be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon, to provide some guidance in a subsequent proceeding as to what was decided for purposes of res judicata and collateral estoppel, and to indicate whether the case should be tried to the court or to a jury. No more is demanded of the pleadings than this . . . . ").

84. *Conley*, 355 U.S. at 48.

85. Wright & Miller, *supra* note 76, at 94–95.

86. *Id.*

87. Allan Ides, Bell Atlantic *and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice* 610 (Loyola-LA Legal Studies Paper No. 2007-36, 2007), *available at* http://ssrn.com/abstract=1012971 (quoting Wright & Miller, *supra* note 76, § 1216, at 240–41).

88. *See infra* notes 94–107 and accompanying text.

ATS.[89] As a result of this continued application of a heightened pleading standard, Professor Christopher Fairman claims that notice pleading has become something of a "myth" insofar as, "[s]ometimes subtle, other times overt, federal courts in every circuit impose non-Rule-based heightened pleading in direct contravention of notice pleading doctrine,"[90] leading "courts [to] require certain elements of a claim or subsets of a broader category of a claim to be pleaded with greater factual detail."[91]

Courts initially experimented with a heightened pleading standard in cases involving violations of 42 U.S.C. § 1983.[92] The use of a heightened pleading standard originated as a "tool to deal with the uncertainties surrounding the substantive law of qualified immunity" in order to protect government defendants from frivolous lawsuits.[93] In response, the Supreme Court rejected the use of a heightened pleading standard based on Rule 8(a) in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*.[94] *Leatherman* involved two separate incidents of police misconduct for which the plaintiffs sued, among other defendants, the municipal corporations that employed the police officers.[95] The defendants maintained that the "degree of factual specificity required of a complaint by the Federal Rules of Civil Procedure varies according to the complexity of the underlying substantive law," and thus asked the court to apply a heightened pleading standard to allegations of municipal liability under § 1983.[96] The Supreme Court held that the heightened pleading requirement could not be squared with the liberal notice pleading requirement of Rule 8, and that an amplification of the standard "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."[97] Although some commentators believed that *Leatherman* essentially ended the use of a heightened pleading standard in all areas of the law,[98] the decision created a circuit split as to whether the holding banned heightened

89. *See infra* Part II.B.2; *see also* Gay & Hagey, *supra* note 66, at 9 (noting that "[c]ourts have also enforced a rigorous heightened pleading standard and closely scrutinized pleadings that allege vicariously liability for third-party misconduct").

90. Fairman, *supra* note 75, at 988.

91. *Id.* at 1002. In *The Myth of Notice Pleading*, Christopher Fairman also describes a more extreme version of heightened pleading referred to as "hyperpleading," which requires that the plaintiff "state facts supporting each of the elements of a claim." *Id.* at 1008. Although prior to *Twombly* this standard was applied in claims brought under section 1 of the Sherman Act, it has never been applied in ATS cases and thus will not be addressed in this Note. *See id.* at 1008 n.143

92. For further discussion of the genesis of heightened pleading in civil rights cases, see Fairman, *supra* note 77, at 574–96.

93. *Id.* at 574.

94. 507 U.S. 163 (1993).

95. *Id.* at 164–65.

96. *Id.* at 167.

97. *Id.* at 168. The Court essentially determined that it would be unfair to have a "more demanding rule for pleading a complaint under [one type of case] than for pleading other kinds of claims for relief." *Id.* at 167.

98. *See, e.g.*, Nancy J. Bladich, Comment, *The Revitalization of Notice Pleading in Civil Rights Cases*, 45 Mercer L. Rev. 839, 851 (1994); *see also* Fairman, *supra* note 77, at 583.

pleading altogether, permitted heightened pleading in all but municipal liability cases under § 1983, or only disallowed heightened pleading in cases involving subjective intent as an element of a constitutional claim.[99]

In *Swierkiewicz v. Sorema, N.A.*,[100] the Supreme Court attempted to resolve the subsequent disarray regarding Rule 8 pleading standards. There the Supreme Court addressed the question of whether to uphold the Second Circuit's heightened pleading requirement that an employment discrimination complaint contain facts supporting each element of a prima facie case.[101] In *Swierkiewicz*, Akos Swierkiewicz, a Hungarian native, brought an employment discrimination suit alleging that his demotion and subsequent termination from his job as senior vice president and chief underwriting officer of a reinsurance company was the result of discrimination based on national origin and age.[102] Looking to the prima facie case requirements set forth in *McDonnell Douglas Corp. v. Green*,[103] the Second Circuit required Swierkiewicz to "allege in his complaint: (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination."[104] After review of the complaint, the court dismissed the claim.[105] In reversing the Second Circuit's decision, the Supreme Court restated its reliance on *Conley* and held that the heightened pleading requirement was incompatible with Rule 8(a)'s simplified pleading standard, which "relies on liberal discovery rules and summary judgment motions," and not pleadings, "to define disputed facts and issues and to dispose of unmeritorious claims."[106] The Court further stressed its earlier statement in *Leatherman* that a heightened pleading standard can only be brought about "'by the process of amending the Federal Rules, and not by judicial interpretation.'"[107]

Despite the Supreme Court's rejection of a heightened pleading standard in *Swierkiewicz*, some courts limit the holding to employment discrimination cases and continue to apply a heightened pleading standard where they deem it necessary to prevent excessive or frivolous litigation.[108] Courts continue to subject to the heightened pleading standard allegations of conspiracy where "the underlying tort [is] fraud" and conspiracies

99. For a more in-depth discussion of the circuit split, see Fairman, *supra* note 77, at 583–90.

100. 534 U.S. 506 (2002).

101. *Id.* at 508.

102. *Id.* at 508–09.

103. 411 U.S. 792 (1973).

104. *Swierkiewicz*, 534 U.S. at 510.

105. *Id.* at 515.

106. *Id.* at 512.

107. *Id.* at 515 (quoting Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993)).

108. For a more detailed discussion of post-*Swierkiewicz* judicially imposed heightened pleading standards involving antitrust, civil rights, conspiracy, copyright, defamation, negligence, and RICO claims, see Fairman, *supra* note 75, at 1011–59.

alleged "between private actors and government officials."[109] Whether a heightened pleading standard applies to the conspiracy element of section 1 violations of the Sherman Act has proved particularly controversial,[110] a controversy eventually leading to the Supreme Court's 2007 decision in *Twombly*,[111] which seemingly established a new standard—plausibility pleading.

3. Plausibility Pleading

In *Twombly*, the Supreme Court reassessed *Swierkiewicz* and its commitment to the position that the Rules relied on discovery and summary judgment—not pleadings—to weed out frivolous claims. In the context of antitrust conspiracy claims, the Court articulated a new pleading standard—the "plausibility pleading standard"—requiring that the pleaded facts "raise a reasonable expectation that discovery will reveal evidence" of those facts.[112]

Twombly was a class action suit brought by William Twombly and Lawrence Marcus on behalf of a class of local telephone and high-speed internet subscribers against four ILECs.[113] The plaintiffs alleged that the ILECs violated section 1 of the Sherman Act by conspiring with one another to stifle the competition from competitive local exchange carriers (CLECs), thereby restraining trade in violation of the Sherman Act.[114] The scheme, they alleged, involved the ILECs "engaging in parallel conduct in their respective service areas to inhibit the growth of upstart CLECs."[115]

Section 1 of the Sherman Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[116] As explained by Professor Allan Ides of Loyola Law School, this language has been interpreted as to comprise three elements: (1) a concerted action, (2) that unreasonably restrains trade or competition, and (3) that has an effect on interstate commerce.[117] Professor Ides further notes that the concerted action comes in the form of an agreement, and thus it is not "sufficient to show that a defendant or defendants restrained trade or engaged in anticompetitive practices. They must have agreed among

109. *Id.* at 1036.

110. *See id.* at 1003. Courts continue to apply a heightened pleading standard in cases that are "aimed at the state of mind of the defendant," by "requir[ing] specific evidence of unlawful intent to be pleaded when subjective intent is an element of . . . [the] claim." *Id.*

111. *See infra* Part I.B.3.

112. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007).

113. *Id.* at 1962 & n.1 (noting that "the four ILECs [incumbent local exchange carriers] named in this suit [are]: BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc.").

114. *Id.* at 1961–62.

115. *Id.* at 1962 (internal quotation marks omitted).

116. 15 U.S.C. § 1 (2007).

117. Ides, *supra* note 87, at 619.

themselves to do so."[118] This agreement element is central to section 1 Sherman Act claims, and thus to *Twombly*, because plaintiffs in section 1 claims must show more than parallel conduct to support an inference of an agreement to restrain trade.[119] As Professor Ides states,

> A plaintiff might show, for example, that the conduct at issue would have been against each defendant's economic self-interest in the absence of concerted action or that the collective defendants had a common motive that altered the choices that would have been made based solely on motivations of individual self-interest. This additional evidence is sometimes referred to as a "plus factor," and without it a plaintiff seeking to establish an agreement in restraint of trade solely by means of parallel conduct cannot prevail.[120]

Thus, the articulation of the plausibility standard formed in response to the question of whether the plaintiff's complaint in *Twombly*, where they "rest[ed] their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the [defendants],"[121] was sufficient to survive the defendant's 12(b)(6) motion to dismiss.

In facing this question, the district court in *Twombly* imposed a heightened pleading standard—although the court claimed it was not applying a special pleading standard—and held that, to withstand a motion to dismiss in a section 1 conspiracy claim, the "plaintiffs must always assert facts that, if true, support the existence of a conspiracy, such as motivation or conduct that lends itself to an inference of an agreement."[122] Upon finding that the plaintiff's complaint alleged "nothing more than parallel conduct," the district court granted the defendant's motion to dismiss.[123]

The Second Circuit reversed the district court's dismissal, essentially finding that in order to survive a 12(b)(6) motion to dismiss, a section 1 conspiracy claim does not have to be plausible, it merely cannot be implausible.[124] The Second Circuit further explained that to dismiss a section 1 conspiracy claim alleging anticompetitive conduct would require a court to find that no set of facts existed that permitted "a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."[125] The Second Circuit reasoned that

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118. *Id.* (citing William C. Holmes, Antitrust Law Handbook § 2:2 (2006 ed.)).

119. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993).

120. Ides, *supra* note 87, at 620.

121. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1970 (2007).

122. Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 180 (S.D.N.Y. 2003).

123. *Id.* at 189; *see also* A. Benjamin Spencer, *Plausibility Pleading* 10 (Wash. & Lee Legal Studies Paper No. 2007-17, 2007), *available at* http://ssrn.com/abstract=1003874 (explaining that the district court "read [the complaint] to allege mere conscious parallelism, which taken alone did not state a claim under section 1 of the Sherman Act").

124. Twombly v. Bell Atl. Corp., 425 F.3d 99, 111 (2d Cir. 2005) (stating that, "short of the extremes of 'bare bones' and 'implausibility,' a complaint in an antitrust case need only contain the 'short and plain statement of the claim showing that the pleader is entitled to relief' that Rule 8(a) requires").

125. *Id.* at 114.

such a determination was typically more appropriate at the summary judgment stage after discovery.[126] The Supreme Court granted certiorari to address "the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct."[127]

After fifty years of reliance on the interpretation of Rule 8(a) set forth in *Conley*,[128] the Court determined it was "time for a fresh look at adequacy of pleading when a claim rests on parallel action."[129] The Court held that the plaintiffs' assertions of parallel conduct were insufficient to state a claim under section 1 of the Sherman Act, and that "nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy."[130] Instead, the Supreme Court found that plaintiffs "rest[ed] their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs."[131] Thus, the Court agreed with the defendants that "resistance to the upstarts was [nothing] more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance."[132]

By requiring plaintiffs alleging a conspiracy through parallel conduct to plead additional facts, the Court overturned its previous interpretation of Rule 8(a) in *Conley* that a court should not dismiss a complaint for failure to state a claim unless "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[133] The Court stressed that it was not attempting to amend the Federal Rules by judicial fiat, and that the plausibility reading was compatible with the intentions of Rule 8(a) because, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests."[134] Essentially, the Court modified its position on what constitutes a sufficient "factual allegation" and stated that, without "some further factual enhancement" of an allegation of parallel conduct suggesting a conspiracy, the complaint "stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'"[135] The Court explained that it was not requiring

126. *Id.* (relying on the common requirement at the summary judgment stage that "a plaintiff must show the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy" (citation omitted)).

127. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1963 (2007).

128. *See supra* notes 82–83 and accompanying text.

129. *See Twombly*, 127 S. Ct. at 1968 n.7. In support of their reassessment of Rule 8(a), the Court cited numerous cases in order to show that "*Conley*'s 'no set of facts' language ha[d] been questioned, criticized, and explained away long enough." *Id.* at 1969.

130. *Id.* at 1971.

131. *Id.* at 1970.

132. *Id.* at 1971.

133. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

134. *Twombly*, 127 S. Ct. at 1965 n.3.

135. *Id.* at 1966.

plaintiffs to meet a heightened pleading standard,[136] but was rather simply interpreting notice pleading under Rule 8(a) to require "enough facts to state a claim to relief that is plausible on its face."[137]

Two weeks after issuing its decision in *Twombly*, the Supreme Court decided *Erickson v. Pardus*.[138] In *Erickson*, the plaintiff brought claims against Colorado prison officials under 42 U.S.C. § 1983 for violations of his Eighth and Fourteenth Amendment protections against cruel and unusual punishment, as a result of the prison's termination of his hepatitis C treatments.[139] The district court had dismissed the complaint for failure to state a claim, and the U.S. Court of Appeals for the Tenth Circuit affirmed.[140] The Supreme Court determined that the Tenth Circuit failed to abide by the liberal pleading standard of Rule 8(a) when it found the plaintiff's claims "too conclusory to establish for pleading purposes that petitioner had suffered 'a cognizable independent harm' as a result of his removal from the hepatitis C treatment program."[141] Notably, the Supreme Court cited *Twombly*'s quotation of *Conley* in its restatement of the liberal notice pleading standard, and failed to apply, or even mention, *Twombly*'s plausibility requirement.[142] The Court's failure to cite *Twombly*'s plausibility requirement in *Erickson*, raised questions as to whether the standard would apply generally to all cases, or was limited to "the narrow context of Section One claims based on parallel conduct."[143]

II. RATIONALE AND CONSIDERATIONS FOR DETERMINING THE APPLICABLE PLEADING STANDARD

The lack of guidance on adjudicating accomplice liability claims brought against corporations under the ATS, and the disagreement over whether the emphasis on limiting the ATS's reach extends to pleading standards, has created unpredictability regarding which standard will be applied in a given case. As some commentators have noted, cases that impose a heightened pleading standard, such as *Sinaltrainal*,[144] require plaintiffs to "plead specific details of [their] allegations [which] forces [them] to engage in the kind of pre-litigation fact-finding generally absent from American

136. In fact, the Court reaffirmed its decision in *Swierkiewicz* that a heightened pleading standard is impermissible under the Federal Rules. *Id.* at 1973–74.

137. *Id.* at 1974.

138. 127 S. Ct. 2197 (2007) (per curiam).

139. *Id.* at 2197–98.

140. *Id.* at 2198.

141. *Id.* at 2200 (citation omitted).

142. *See id.* at 2200; Konrad L. Cailteux & B. Keith Gibson, *Federal Court Applies Brakes to Alien Tort Statute Litigation*, Counsel's Advisory (Wash. Legal Found., Washington, D.C.), Feb. 10, 2006.

143. Thomas P. Brown & Christine C. Wilson, Bell Atlantic Corp. v. Twombly*: A Tectonic Shift in Pleading Standards (Or Just a Tremor)?*, Legal Backgrounder (Wash. Legal Found., Washington, D.C.), Aug. 24, 2007, at 4.

144. *In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1282 (S.D. Fla. 2006).

cases."[145] Conversely, when courts analyzed complaints under a notice pleading standard, such as in *Unocal*[146] and *Wiwa v. Royal Dutch Petroleum Co.*,[147] courts were "willing to entertain claims based on allegations of corporate complicity in egregious human rights abuses, and will[ing] [to] give plaintiffs some leeway in stating the factual basis of their claims."[148] The addition of *Twombly*'s plausibility pleading standard provides a third possible approach to pleading claims in ATS cases, which will likely compound the confusion.

It is in the interest of predictability, uniformity, and justice to determine the approach that best addresses the needs of plaintiffs, defendants, and the judicial system as a whole.[149] Part II.A explores the rationale behind each standard and its application—or in the case of the plausibility standard, its possible application—to ATS accomplice liability claims. Part II.B discusses the procedural considerations, namely the impact of discovery on the parties and the courts, and the burden on the judicial system. Part II.C addresses the effect of ATS accomplice liability cases on foreign policy and corporate reputation.

A. *Rationale and Application to ATS Accomplice Liability Cases*

1. Notice Pleading

Rule 8(a)'s notice pleading standard is intended to create a liberal pleading environment that allows litigants their day in court.[150] In the first case where plaintiffs successfully pled a claim of accomplice liability, *Doe I v. Unocal Corp.*, the court applied a notice pleading standard.[151] In *Unocal*, Burmese villagers sued Unocal, alleging that it was "liable for international human rights violations perpetrated by the Burmese military in furtherance and for the benefit of the pipeline portion of [a] joint venture project."[152] Having found it had ATS subject matter jurisdiction based on alleged violations of the law of nations,[153] the district court turned to Unocal's 12(b)(6) motion to dismiss for failure to state a claim. Although Unocal claimed that "plaintiffs' allegations establish the presence of a business

145. Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. Int'l L. & Foreign Aff. 81, 113 (1999).

146. *See infra* notes 153–54.

147. No. 96 CIV. 8386, 2002 WL 319887, at *14 (S.D.N.Y. Feb. 28, 2002).

148. Zia-Zarifi, *supra* note 145, at 123.

149. *See* Fairman, *supra* note 77, at 625 (noting that the unpredictability in applying varying pleading standards leads to the unsurprising consequences of "[w]hole categories of cases [being] deemed frivolous [and] [p]laintiffs suffer[ing] prediscovery dismissal, often for failure to plead facts relating to the defendant's state of mind").

150. *See id.* at 557.

151. Doe I v. Unocal Corp., 963 F. Supp. 880, 895 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

152. Doe I v. Unocal Corp., 110 F. Supp. 2d 1294, 1295–96 (C.D. Cal. 2000), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

153. *Unocal*, 963 F. Supp. at 892.

relationship with [the government actors] and nothing more," the court found that "plaintiffs could conceivably prove facts to support their allegations . . . [that defendants] have either conspired or acted as joint participants" in the violation of the law of nations.[154] Litigation and discovery continued, and the district court granted Unocal's motion for summary judgment in *Doe I v. Unocal Corp.*,[155] finding that plaintiffs could not adequately show that the company had participated in or had knowledge of the human rights abuses.[156] On appeal, the Ninth Circuit reversed.[157] While a rehearing en banc was pending, the case settled for an undisclosed sum, believed to be substantial.[158] According to the joint statement from Unocal and the plaintiffs, "[T]he settlement . . . compensate[d] plaintiffs and provide[d] funds enabling plaintiffs and their representatives to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region."[159] The parties announced the settlement on March 21, 2005, one day before the Ninth Circuit was to reconsider the summary judgment motion.

In support of applying a notice pleading standard to ATS accomplice liability claims, Terrence Collingsworth, executive director of the International Labor Rights Fund and counsel for plaintiffs in numerous ATS accomplice liability cases, argues that accomplice liability cases against corporations are often "the only way for the victims of human rights abuses by U.S. companies to win legal redress."[160] In most cases, victims are unable to seek redress from foreign governments due to procedural hurdles.[161] Given that the notice pleading rule was designed to allow litigants their day in court, a heightened pleading standard for ATS plaintiffs frustrates that purpose, making it likely that they will never get their day in court. As Harold Koh, dean of Yale Law School and noted international human rights advocate, stated in opposition to the elimination

154. *Id.* at 896.

155. 110 F. Supp. 2d at 1296.

156. *Id.* at 1306–07 ("Plaintiffs present no evidence that Unocal 'participated in or influenced' the military's unlawful conduct; nor do Plaintiffs present evidence that Unocal 'conspired' with the military to commit the challenged conduct.").

157. Doe I v. Unocal Corp., 395 F.3d 932, 962 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *reh'g en banc*, 403 F.3d 708 (9th Cir. 2005).

158. *See* Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners at 15, Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007) (No. 05-1126) [hereinafter WLF Brief] (stating that "[p]ublished accounts suggest that Unocal paid close to $30 million to settle the case").

159. EarthRights Int'l, Final Settlement Reached in Doe v. Unocal (March 21, 2005), http://www.earthrights.org/legalfeature/final_settlement_reached_in_doe_v._unocal.html (providing the text of the joint statement issued by the plaintiffs and Unocal regarding the final settlement agreement).

160. Julie Kay, *Federal Judge: Help Us Apply Alien Tort Claims Act*, Palm Beach Daily Bus. Rev., Oct. 30, 2006, at A1. Terrence Collingsworth further points out that U.S. courts tend to be the only option because these plaintiffs may be unable "to get a fair legal hearing in their own countries, and may fear that if they file a suit at home, they will face violent retaliation." *Id.*

161. *See* Olah, *supra* note 4, at 752–53.

of corporate liability under the ATS, "[C]orporate counsel have nothing to fear but fear itself. If you are sued frivolously under ATS, don't panic, litigate. But if you genuinely care about corporate responsibility, you should put your efforts into developing these kinds of standards and encouraging responsible companies to meet them."[162] On the other hand, proponents of a heightened pleading standard—or even no liability at all—fear that there will be an increase in frivolous lawsuits brought by individuals seeking to publicize poor conditions in a particular country, that there will be a decrease in foreign investment, and that ultimately corporations will be held liable "simply for doing business in a difficult country."[163] While these are valid fears, as of the writing of this Note, no plaintiff outside of those involved in the *Unocal* settlement has ever prevailed in an ATS accomplice liability case.[164] Moreover, "there is little evidence that the suits are curtailing corporate activity abroad."[165]

2. Heightened Pleading

In light of the proliferation of ATS accomplice liability cases brought against corporations, some courts have opted to apply a heightened pleading standard to the claims, thereby "subjecting allegations of corporate derivative liability to heightened scrutiny."[166] Courts applying a heightened pleading standard explain this greater burden by citing the emphasis on particularity and the reluctance to find subject matter jurisdiction in the earlier ATS cases.[167] For example, the Southern District of Florida in *Sinaltrainal* justified its application of a heightened pleading standard by citing the language in *Sosa* that "federal courts should exercise 'great caution' when considering new causes of action,"[168] the *Kadic* holding that a plaintiff must plead more than "a merely colorable violation of the law of nations,"[169] and a 2005 decision by the Eleventh Circuit to uphold a district court case applying a heightened pleading standard to an ATS vicarious liability claim.[170] Specifically, the court "require[d] some heightened

162. Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. Int'l Econ. L. 263, 274 (2004).

163. *Id.* at 263. See *infra* Parts II.B and II.C for more detailed discussions of possible negative effects on litigants, foreign policy, and the judicial system when courts apply a notice pleading standard.

164. Saad Gul, *The Supreme Court Giveth and the Supreme Court Taketh Away: An Assessment of Corporate Liability Under § 1350*, 109 W. Va. L. Rev. 379, 409 (2007).

165. *Id.* at 418.

166. Gay & Hagey, *supra* note 66, at 9.

167. *See, e.g.*, Defendants' Motion to Dismiss Plaintiffs' Complaint and Incorporated Memorandum of Law at 19 n.17, Doe v. Drummond Co., No. 06-61527-CIV (S.D. Fla. Jan. 25, 2007).

168. *In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1282 (S.D. Fla. 2006).

169. *Id.* at 1287.

170. *Id.* at 1284. The court relied on *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1248 (11th Cir. 2005), in which the U.S. Court of Appeals for the Eleventh Circuit chose not to reverse the district court's application of a heightened pleading standard to vicarious liability claims brought against Del Monte Fresh Produce, N.A., for its role in

pleading standard when determining whether the complaints . . . sufficiently [pled] facts showing that Defendants violated the law of nations," and held that this standard should be applied, "particularly with regard to allegations concerning conspiracy or joint action that purport to establish that the Defendants acted under the color of official authority."[171]

The *Sinaltrainal* court combined four cases brought by plaintiffs against corporate entities and one individual involved in the business of bottling and distributing Coca-Cola products, alleging that they were "vicariously liable, through theories of conspiracy, aiding and abetting, or joint action, for the violent actions of paramilitary members—whose actions should be imputed to the Republic of Colombia in an attempt to intimidate [Sinaltrainal] union members and squelch [Sinaltrainal] union activity."[172] The plaintiffs alleged that the paramilitaries were state actors under the color of law, and that managers of the four bottling plants had conspired with the paramilitaries to intimidate and help eliminate the union members.[173] The court applied the joint action test to the relationship between the paramilitaries and the defendants, which requires that a plaintiff show a conspiracy between the private and state actors.[174] Additionally, as noted above, the court chose to impose a heightened pleading standard, essentially requiring plaintiffs to prove the existence of the conspiracy in their complaint.[175] The application of a heightened pleading standard to plaintiffs' claims is especially significant because the court determined that a failure to show a conspiracy was equivalent to lacking a colorable claim for a violation of the law of nations, thus stripping the court of subject matter jurisdiction.[176]

The court examined the four complaints in which plaintiffs alleged that the defendants "affirmatively acted to benefit from the civil war [in Colombia] by making arrangements to have the paramilitaries target their

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human rights violations against a Guatemalan labor union, emphasizing that "'[s]ome minimal pleading standard does exist'" and that "'[p]leadings must be something more than an ingenious academic exercise in the conceivable.'" *Id.* (citations omitted).

171. *Sinaltrainal*, 474 F. Supp. 2d at 1287. The court in *Sinaltrainal* acknowledged the Supreme Court's disapproval of heightened pleading standards, but observed that "it appears that the heightened pleading standard in the context of certain cases . . . is still the law of this Circuit." *Id.* at 1286. Specifically, the court was referring to the Eleventh Circuit's "stringent standard" for conspiracy cases, as expressed in *Fullman v. Graddick*, 739 F.2d 553, 556–57 (11th Cir. 1984), which states that, in "conspiracy actions, courts have recognized that more than mere conclusory notice pleading is required." *Id.* at 556.

172. *Sinaltrainal*, 474 F. Supp. 2d at 1276.

173. *Id.* at 1278.

174. *Id.* at 1292.

175. *See id.* at 1287 ("After careful deliberation, this Court concludes that it is appropriate to require some heightened pleading standard when determining whether the complaints in the instant cases sufficiently plead facts showing that Defendants violated the law of nations."); *see also supra* notes 168–71 and accompanying text.

176. *Sinaltrainal*, 474 F. Supp. 2d at 1287. The *Sinaltrainal* court conflated Rules 12(b)(1) and 12(b)(6), finding that "it appears that the ability of a plaintiff to state a claim under the ATCA, a jurisdictional statute, has some bearing on the process of determining whether subject matter jurisdiction exists for 12(b)(1) purposes." *Id.* at 1285.

union leaders."[177] The complaint containing the most expansive description of a conspiracy, the Gil complaint, was brought by the estate of Isidro Segundo Gil, a former union member allegedly murdered by paramilitaries at the Bebidas y Ahmentos de Uraba (Bebidas) bottling plant in Colombia, and Luis Adolfo Cardona, a Sinaltrainal union leader who allegedly witnessed the murder and was then kidnapped, beaten, and threatened by the paramilitaries.[178] In addition to outlining the actions of the paramilitaries in intimidating the union workers, burning down the union office, murdering Gil at the Bebidas plant, and subsequently kidnapping and torturing Cardona, the complaint also alleged that plant manager Ariosto Milan Mosquera, who was forced to rehire union workers after a judge found his discharge of them unlawful, "aggressively and [publicly] threaten[ed] to destroy the union" and "conspired with local paramilitary leaders to 'drive the Union out of the [Bebidas] bottling plant using threats of violence, and if required, actual violence.'"[179] As evidence in support of the conspiracy, the complaint alleged that

- Mosquera "publicly announced that he would use the paramilitaries in Carepa to destroy the union";[180]
- in the presence of the paramilitaries, Mosquera informed a member of the local union executive board that he would "sweep away the union," which was followed by renewed threats of violence by the paramilitaries;[181]
- defendant Richard I. Kirby, who allegedly controlled Bebidas, knew about the conspiracy with the paramilitaries;[182]
- Mosquera "openly socialized with the paramilitary forces," and "'provided [them] with Coke products for their parties'";[183]
- the paramilitaries who were intimidating the employees "were also given free access to the Coke bottling plant";[184]
- although the union requested as part of a labor agreement that the Sinaltrainal leadership be protected from "'the imminent threat of attack by the paramilitaries acting in

177. *Id.* at 1289. These complaints were the Gil complaint, Garcia complaint, Galvis complaint, and Leal complaint. *Id.* at 1278–81.
178. *Id.* at 1278.
179. *Id.* at 1278–79.
180. *Id.* at 1294.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*

furtherance of a specific conspiracy with Mosquera,'" Bebidas and defendant Richard Kirby refused;[185] and

- the two paramilitaries who murdered Gil and subsequently kidnapped and tortured Cardona were "'*among* the paramilitaries that had *previously appeared* at the plant with Mosquera.'"[186]

Although the court found that all of these acts combined did provide "some sense of the alleged scope of the conspiracy," it ultimately held that the complaint was insufficient because it lacked specific facts as to the mechanics of the conspiracy and any explicit agreement.[187] Without more detailed evidence regarding the scope of the alleged explicit agreement, the court found that the plaintiffs failed to show that the relationship between Bebidas and the paramilitaries, or even that their common distaste for the union, was related to a conspiracy.[188] Furthermore, the court noted that even if there were a conspiracy, there was no evidence that Mosquera was acting within the scope of his employment in his relationship with the paramilitaries, or that Richard Kirby was involved.[189]

Given that the court acknowledged that the complaint "certainly implies or suggests that these events are linked by a common plan,"[190] the complaint arguably could have survived under a notice, or even plausibility, pleading standard. Nevertheless, under a heightened pleading standard, the court found that the "murky allegations of a vague conspiracy between Mosquera and unspecified paramilitaries to use threats and violence to 'drive away' union leaders and 'destroy the union' [were] not sufficient."[191] The court in *Sinaltrainal* granted defendant's Federal Rule of Civil Procedure 12(b)(1) motion to dismiss, determining that the plaintiffs failed to "plead adequate facts to demonstrate the necessary level of relationship between the Defendants and the paramilitaries," and thus there was no

185. *Id.* at 1295.
186. *Id.*
187. *Id.* at 1294.
188. *Id.* at 1295.
189. *Id.* at 1295–96. As to the other three complaints, the court found as follows:
(1) Galvis complaint: "Plaintiffs 'information and belief' driven conspiracy allegations [were] devoid of names, dates, or locations regarding a conspiracy to rid the plant of the union or intimidate Galvis specifically." *Id.* at 1298.
(2) Garcia complaint: "Plaintiffs' Complaint fails to allege specific facts as to the individuals involved in the conspiracy, its terms, or when it was formed," and therefore the "allegations [were] insufficient to demonstrate more than a merely colorable violation of the law of nations." *Id.* at 1300.
(3) Leal complaint: Although the closest to meeting the heightened pleading standard, the court held that, "on balance, the tenor of the conspiracy dimension of the complaint, when read as a whole tends to be too 'conclusory, vague and general.'" *Id.* at 1301 (citation omitted).
190. *Id.* at 1296. However, the court contradicted itself when, as a sidenote, it stated that, in an abundance of caution, even under a notice pleading standard the complaints would fail because they were "rife with legal conclusions, which [the] Court need not accept as well-pleaded." *Id.* at 1289.
191. *Id.* at 1296.

viable claim of accomplice liability, relieving the court of subject matter jurisdiction.[192] Therefore, in practice, a heightened pleading standard in ATS accomplice liability cases places a higher burden on plaintiffs than both the notice and plausibility standards. At least in *Sinaltrainal*, the heightened pleading standard required that plaintiffs plead facts showing not only that the conspiracy was plausible, but that a conspiracy existed.

After the Supreme Court's decisions in *Leatherman* and *Swierkiewicz*, it is questionable whether interpreting Rule 8(a) to allow heightened pleading is permissible in any context. Indeed, the Supreme Court reaffirmed its objection to heightened pleading standards in *Twombly*, by refusing to apply a heightened pleading standard to section 1 Sherman Act claims, requiring a plaintiff to allege "'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief."[193] Thus, the similarity in the elements of the complaint between ATS accomplice liability and section 1 Sherman Act claims[194] suggests that the Supreme Court would hold the application of the standard equally improper.

3. Plausibility Pleading

The rationale behind the Supreme Court's decision to apply a plausibility pleading standard in *Twombly* is central to the question of the standard's applicability outside the antitrust context.[195] Some commentators focus on the Court's "reliance on policies of efficiency and sound judicial administration as the justification for its new reading of the rule."[196] Others see the plausibility requirement as articulating what is necessary to show an "agreement" sufficient to put defendants on notice.[197] Courts have also addressed the question of what the Supreme Court's rationale suggests

192. *Id.* at 1290, 1293.

193. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1973–74 (2007) (citation omitted).

194. *See infra* Part II.A.3.b.

195. Indeed, the question of the plausibility standard's applicability is far from answered, and continues to be debated. *See, e.g.*, Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 Va. L. Rev. *In Brief* 121, 127–28 (2007), http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf (noting that the questions raised by the Court's decisions in *Twombly* and *Erickson* will lead to future litigation over the meaning and application of the plausibility standard); Richard O. Halloran, *A Return to Fact Pleading? Viable Complaints After* Twombly, Ariz. Att'y, Sept. 2007, at 20 (discussing the applicability of the plausibility pleading standard to Arizona state cases); Patrick A. Jackson & John D. McLaughlin, Jr., *Supreme Court Announces New "Plausibility" Standard for Rule 12(b)(6) Dismissal: Not Just Any "Conceivable" Set of Facts Will Do*, Am. Bankr. Inst. J., July–Aug. 2007, at 34 (discussing the potential impact of the plausibility standard on bankruptcy cases); Comment, 121 Harv. L. Rev. 305 (2007) (analyzing the Court's rationale in applying the plausibility standard in *Twombly*, and noting the problems with allowing a case-by-case application of the plausibility pleading standard).

196. Spencer, *supra* note 123, at 19; *see* Comment, *supra* note 195, at 309 (explaining that the plausibility pleading standard was the result of a cost-benefit analysis).

197. *See* Ides, *supra* note 87, at 626–32 (stating that to require a plausible allegation of a conspiratorial agreement "would be to say that allegations of a material element of a claim might be deemed adequate even when no inference of the material element can be drawn from the asserted allegations"). *Id.* at 628.

about the wider applicability of the plausibility standard. For example, shortly after the Supreme Court's mixed signals in *Twombly* and *Erickson*, the Second Circuit faced the pleading issue in *Iqbal v. Hasty*.[198] After analyzing *Twombly*, the Second Circuit found that at the very least *Twombly*'s plausibility standard ought to apply in cases "where massive discovery is likely to create unacceptable settlement pressures," and that *Twombly* was clearly intended to set a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."[199] Courts have yet to apply the plausibility pleading standard to ATS accomplice liability claims. However, the similar practical concerns and material elements of antitrust and ATS accomplice liability claims suggest that, regardless of which rationale is more persuasive, the plausibility standard can be applied to ATS accomplice liability cases.

a. *Comparing Antitrust and ATS Accomplice Liability: Practical Concerns*

Those focusing on practical concerns look to the Supreme Court's suggestion that applying a plausibility pleading standard would increase efficiency, combating costly and time-consuming litigation.[200] In *Twombly* the Court found that "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence."[201] Furthermore, the *Twombly* majority responded to the dissent's assertion that controlled discovery could solve these concerns:

> [D]etermining whether some illegal agreement may have taken place between unspecified persons at different ILECs (each a multibillion dollar corporation with legions of management level employees) at some point over seven years is a sprawling, costly, and hugely time-consuming undertaking not easily susceptible to the kind of line drawing and case management that the dissent envisions.[202]

Similarly, the corporations at issue in ATS accomplice liability cases tend to be "multibillion dollar corporations with legions of management-level employees."[203] Additionally, allegations in ATS cases involve actions

198. 490 F.3d 143 (2d Cir. 2007).

199. *Id.* at 157–58. The U.S. Court of Appeals for the Third Circuit has also recently grappled with the issue of the plausibility standard's applicability outside of the antitrust context. Acknowledging that the "the issues raised in *Twombly* are not easily resolved, and likely will be a source of controversy for years to come," the Third Circuit declined to apply the plausibility standard "so narrowly as to limit [it] to the antitrust context." Phillips v. County of Allegheny, No. 06-2869, 2008 WL 305025, at *6 (3d Cir. Feb. 5, 2008).

200. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1966–67 (2007).

201. *Id.* at 1967 (citation and internal quotation marks omitted).

202. *Id.* at 1967 n.6.

203. *Id.* The fact that these corporations are multibillion dollar entities is one of the main motivators behind bringing these suits. *See* Olah, *supra* note 4, at 751–52 (noting that these enormous corporations "have the deep pockets to compensate alleged injuries; their name

performed in foreign countries and complicated issues regarding state actors, making discovery even more time-consuming and costly. In fact, in its amicus brief in *Twombly*, the Washington Legal Foundation (WLF) anticipated, and indeed supported, the application of the plausibility standard to ATS accomplice liability cases.[204] In advocating the application of a plausibility standard to combat costly and excessive discovery, the WLF recognized the similar harms faced by defendants in antitrust and ATS accomplice liability cases. The WLF's main argument for why a plausibility reading of Rule 8(a) should be required for antitrust cases, a position with which the Supreme Court agreed, was as follows:

> [I]f we require companies to comply with massively expensive discovery requests in antitrust suits that may allege such conspiracies but that provide no specific allegations suggesting that a conspiracy actually took place, [the authors] fear[] that business will be conducted less efficiently and the antitrust laws will end up discouraging the very competition they were designed to promote.[205]

The WLF then cited ATS accomplice liability cases as an example of claims similar to antitrust cases insofar as the burdens of discovery often lead to insufficient outcomes.[206] Furthermore, the WLF's fear that the use of a lower pleading standard in antitrust cases may negatively affect future business activity is similar to concerns expressed by the Bush administration and the business community regarding the effect of ATS accomplice liability cases on future foreign investment.[207]

Additionally, one of the biggest hurdles faced by defendants in ATS accomplice liability cases is establishing the connection between the actions of the corporation and those of the state actor prior to discovery.[208] Similarly, direct evidence of a conspiratorial agreement in antitrust cases is "often impossible to obtain," and thus "an illegal agreement must often be inferred from circumstantial evidence, including the public conduct and 'business behavior' of competitors, as well as market facts."[209] Therefore, the application of the plausibility standard in both ATS accomplice liability and antitrust cases benefits defendants by requiring plaintiffs to provide facts in the complaint that may be difficult to obtain prior to discovery.

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brands provide the publicity necessary to attract international attention; and their overseas operations are generally the locus and the raison d'etre for the alleged wrongs").

204. *See generally* WLF Brief, *supra* note 158.

205. *Id.* at 2.

206. *Id.* at 13–15 (implying that discovery burdens in ATS accomplice liability cases induce settlement because "the inability of defendants to prevail on meritorious Rule 12(b)(6) motions to dismiss has forced the settlement of numerous suits despite what often appear to be factually insufficient allegations in the complaint").

207. *See infra* Part II.C.2.

208. *See infra* Part II.B.1.

209. Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003), *rev'd on other grounds*, 127 S. Ct. 1955 (2007) (quoting Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954)).

Finally, since the decision in *Twombly*, courts have begun to acknowledge the similar practical concerns and suggest that the plausibility standard may apply to ATS accomplice liability complaints. In a footnote to his concurring opinion in *Khulumani v. Barclay National Bank Ltd.*, Judge Edward Korman stated,

> In deciding this motion, [the district court] should also consider applying the pleading standard enunciated in [*Twombly*]. The standard seems particularly appropriate to the class actions in this case, which are intended to coerce a settlement rather than provide the framework for a trial which we all know will never take place.[210]

b. *Comparing Antitrust and ATS Accomplice Liability: Elements of a Claim*

The similarity between the elements required to plead an antitrust conspiracy claim and those required to plead accomplice liability under the ATS suggests that courts could apply the plausibility standard to ATS accomplice liability claims. In order to bring a conspiracy claim under section 1 of the Sherman Act, as the plaintiffs did in *Twombly*, "'[t]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from [an] independent decision or from an agreement, tacit or express.'"[211] A material element of section 1 antitrust claims is the existence of an agreement, meaning that separate actions taken by defendants toward a common goal—parallel conduct—are insufficient to satisfy this element.[212] Thus, in the absence of an agreement showing an anticompetitive conspiracy, antitrust plaintiffs have failed to state a claim.[213] Similarly, a material element of an ATS accomplice liability claim is that "the defendant acted with the intent to assist that violation, that is, the defendant specifically directed his acts to assist in the specific violation."[214] To state an ATS accomplice liability claim, plaintiffs must show that the parallel conduct between defendant corporations and state actors was the result of either an explicit or tacit agreement, rather than a coincidence.[215] This

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210. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 333 n.15 (2d Cir. 2007).

211. *Twombly*, 127 S. Ct. at 1964 (quoting *Paramount Film*, 346 U.S. at 540).

212. Ides, *supra* note 87, at 627.

213. *Id.* As Professor Allan Ides notes, a material element of section 1 claims is the ability to show a conspiratorial agreement and thus "an unadorned allegation of parallel conduct is the equivalent of no allegation of an agreement whatsoever." *Id.* Therefore, in order to state a claim for relief adequately, "a sufficient outline or adumbration of a § 1 claim must include allegations supportive of that material element." *Id.* Ides's reasoning would suggest that if there is a claim in which an agreement is a material element and the averments in the complaint rest entirely on parallel conduct, then the complaint fails to state a claim on which relief can be granted.

214. Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006).

215. *See supra* Part I.A.2.b (noting that ATS conspiracy claims require an explicit agreement whereas ATS aiding and abetting claims seemingly require only a tacit agreement through knowledge, assistance, and endorsement of a state actor's law of nations violation).

implies that separate actions taken by the defendants and the state actors toward a common goal—parallel conduct—would be insufficient to satisfy this element. Accordingly, in the absence of a tacit or explicit agreement, ATS plaintiffs have not supported their claim of conspiracy or aiding and abetting.

The plausibility standard articulated in *Twombly* states that even if some set of facts might exist in the future to show an agreement, without additional facts in the complaint making the existence of an agreement more plausible than not, pleading parallel conduct alone would be insufficient to support a claim under section 1.[216] Therefore, even if some set of facts might exist in the future to show a tacit or explicit agreement between a defendant corporation and state actor to commit human rights abuses, without additional facts in the complaint making the existence of an agreement more plausible than not, pleading parallel conduct alone would be insufficient to support an ATS accomplice liability claim. Thus, the rationale behind the plausibility standard, which is based on the existence of an agreement as a material element necessary to state a section 1 claim, logically suggests that the plausibility standard could be applicable to ATS accomplice liability cases.

B. *Procedural Considerations*

1. Discovery Difficulties

The costly and time-consuming nature of litigation is a substantial concern to all parties in ATS accomplice liability cases. These harms are not unique to ATS accomplice liability cases. Indeed, "[a] study of nearly 1000 civil cases . . . found discovery responsible for, on average, half of the total cost of litigation."[217] The received wisdom is that, because "[d]efendants attempt to thwart plaintiffs by burying them in documents [and] plaintiffs abuse interrogatory requests to go on 'fishing expeditions' and to pressure defendants to settle possibly unmeritorious claims," litigation can drag on for an excessively long time.[218] These burdens,

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Often, plaintiffs in ATS accomplice liability cases rely on parallel action by corporations and state actors to support the inference of a conspiracy. For example, in support of their conspiracy allegations, the plaintiffs in *Sinaltrainal* cited antiunion statements and conduct by both the Colombian paramilitaries and the defendant corporation. *See supra* notes 180–86 and accompanying text. The defendants presented an alternate theory similar to parallel conduct, asserting that the plaintiffs' complaint merely "aggregates a series of conclusory assertions concerning the alleged acts of paramilitaries in Colombia against certain labor union members." Defendants' Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction and Memorandum of Law at 8, *In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273 (S.D. Fla. 2006) (No. 01-03208).

216. *See supra* notes 134–37 and accompanying text.

217. Comment, *supra* note 195, at 312 n.67 (citing Thomas E. Willging et al., Fed. Judicial Ctr., Discovery and Disclosure Practice, Problems, and Proposals for Change 15 (1997)).

218. Comment, *supra* note 195, at 313.

however, can be a necessary evil for plaintiffs, especially in conspiracy cases that tend to involve "facts that plaintiffs cannot access before being afforded the opportunity for discovery."[219] Thus, defendants, particularly in ATS accomplice liability cases, seek a higher pleading standard to prevent cases from reaching discovery, while plaintiffs favor a lower pleading standard because they rely on discovery to gather facts necessary to support their claims.

A comparison of *Sinaltrainal* and *Drummond*, both cases in which the plaintiffs alleged that a defendant corporation conspired with Colombian paramilitaries to intimidate and eradicate a local union, illustrates the importance of discovery in ATS accomplice liability cases.[220] While the facts were remarkably similar, the procedural outcomes were drastically different—*Sinaltrainal* was dismissed for failure to state a claim under a heightened pleading standard, while *Drummond*, which applied a notice pleading standard, proceeded to trial.

In *Sinaltrainal*, the court required plaintiffs to show in the complaint the existence of an explicit agreement between the corporate and individual defendants and the Colombian paramilitaries to murder and intimidate members of the Sinaltrainal union.[221] Even though averments in the complaint were arguably sufficient under a notice pleading standard, they lacked the requisite factual detail to reach the level of heightened specificity required by the court.[222] In response to the allegations of conspiracy in one of the four complaints, the court noted that combined the facts did provide "some sense of the alleged scope of the conspiracy," but nevertheless held that the complaint was insufficient because it lacked specific facts as to the mechanics of the conspiracy and as to the existence of any explicit agreement.[223]

Rather than dismissing the complaint, the court in *Sinaltrainal* could have allowed the plaintiffs to proceed to discovery, as in *Drummond*, to establish the facts supporting the existence of the conspiracy. For example, the *Drummond* plaintiffs also alleged conspiracy, and even though the court initially dismissed the claim on summary judgment, the court reconsidered the issue in light of documents and deposition testimony supporting a conspiratorial agreement between the defendants and the paramilitaries.[224] Specifically, on reconsideration, plaintiffs presented evidence showing the

219. Spencer, *supra* note 123, at 32.

220. *Compare supra* Part I.A.2.c (describing the facts and allegations in *Drummond*), *with supra* notes 177–89 (describing the facts and allegations in *Sinaltrainal*).

221. *See In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1287, 1296 (S.D. Fla. 2006) (noting that "some level of specificity is required to link the 'explicit agreement' between [defendant] and the paramilitaries to the horrible acts that occurred").

222. *See id.* at 1296; *supra* notes 188–92 and accompanying text.

223. *Sinaltrainal*, 474 F. Supp. 2d at 1294.

224. *See* Plaintiffs' Motion for Reconsideration of Conspiracy, Agency, and State Action Issues at 1, Romero v. Drummond Co., CV-03-BE-0575-N (N.D. Ala. July 7, 2007) (citing Pretrial Order, *supra* note 65, at 4 n.2).

defendants' and paramilitaries' common goal of eradicating the union,[225] that certain individuals witnessed employees of Drummond meeting with the paramilitary terrorist organization on numerous occasions,[226] that Drummond employees stated that the paramilitaries were "taking care" of their problem with the union,[227] and that Colombian military members were prevented from ambushing the terrorist group on Drummond property because the paramilitaries were Drummond's "friends."[228] Although the plaintiffs were unable to try the conspiracy claims—because the court excluded certain depositions for procedural reasons[229]—the evidence acquired through discovery shows that the type of information the *Sinaltrainal* court found lacking in the plaintiffs' initial complaint may be discoverable.[230] Thus, by applying a heightened pleading standard and requiring proof of the conspiracy at the pleading stage in *Sinaltrainal* despite the existence of plausible claims of conspiracy, plaintiffs were never given the opportunity to conduct adequate discovery and defendants were given a free pass for potential human rights violations.

Courts adjudicating antitrust cases face similar tension between a plaintiff's ability to secure necessary facts prediscovery and the excessive discovery burdens faced by defendants. Indeed, it was for this very reason that the Supreme Court held in a 1976 antitrust case that, "'in antitrust cases where the proof is largely in the hands of the alleged conspirators, . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.'"[231] Conversely, the majority in *Twombly* no longer found this concern determinative in antitrust cases alleging conspiracy under section 1 of the Sherman Act, as evidenced by

225. *Id.* at 3–4 (discussing evidence that "Drummond shared the [paramilitaries'] goal of eliminating the Union" and citing examples of antiunion statements made by Drummond employees).

226. *Id.* at 2–3 (citing the deposition of Edwin Guzman, a member of the Colombian military, who stated that "he and four other Colombian soldiers accompanied a high-level Drummond manager, Mitchell, to meet with a high-ranking [paramilitary] commander, 'Cebolla,' on Drummond property").

227. *Id.* at 3–4 (citing evidence that "stated that the paramilitaries would 'take care of' Drummond's problems with the attacks upon the trains," which Drummond officials had blamed on union members).

228. *Id.* at 3–4 (citing the deposition testimony of Edwin Guzman and Isnardo Ropera, two members of the Colombian military, who testified that a Drummond employee actually stopped them "from ambushing a paramilitary unit on Drummond property, telling them that he did not want them to attack his 'friends'").

229. The court still permitted plaintiffs to bring the aiding and abetting claim, which relied on similar facts and evidence of cooperation between Drummond and the Colombian paramilitaries. *See* Pretrial Order, *supra* note 65, at 5. Additionally, the admissibility of these depositions is currently on appeal and, if admitted, the Eleventh Circuit could remand the case for a new trial. *See supra* note 71 and accompanying text.

230. *In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1295 (S.D. Fla. 2006) (noting that "the allegations never state that the explicit conspiracy entailed this mechanism to bring about the end of the union").

231. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1983 (2007) (Stevens, J., dissenting) (quoting Hosp. Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746 (1976)); *see supra* note 70 and accompanying text.

the fact that the Supreme Court opted to apply the more demanding plausibility standard. One of the Supreme Court's justifications for *Twombly*'s plausibility pleading standard was to increase efficiency by combating costly and time-consuming litigation.[232] While there are numerous similarities between the types of discovery burdens in antitrust and ATS cases,[233] the foreign location of the offenses, evidence, and witnesses in ATS cases could tip the balance in favor of applying the less stringent notice pleading standard. Additionally, the defendant corporations in ATS cases tend to be organized in very complex "multi-tiered corporate structures consisting of a dominant parent corporation, subholding companies, and scores or hundreds of subservient subsidiaries scattered around the world,"[234] making discovery difficult to expedite and coordinate. Not only is the discovery more complicated, but the plaintiff's ability to gather facts prediscovery is hindered in ATS cases because most plaintiffs "liv[e] in fear of abusive governments and fac[e] hostile corporations unwilling to provide them with facts."[235] This is especially problematic because "most of the information is in the hands of States or MNCs [multinational corporations] unwilling to cooperate with plaintiffs."[236]

Furthermore, while the plausibility pleading standard may lower discovery costs by increasing 12(b)(6) dismissals,[237] it has the potential to lead to the premature dismissal of socially beneficial cases, or to higher costs for plaintiffs, who would have to spend more money on fact-finding before filing a complaint.[238] Although these arguments exist in the antitrust context,[239] these harms are amplified in ATS accomplice liability cases where some argue the publicity from litigation can instigate change in

232. *Twombly*, 127 S. Ct. at 1966–67; *see also supra* notes 200–02. Notably, not all commentators believe that courts should use a cost-benefit analysis to determine the applicable pleading standard. As one commentator explains, "[A] judicial opinion is simply the wrong forum for engaging in a consequentialist revision of procedural rules." Comment, *supra* note 195, at 313. Specifically, the application of a more demanding pleading standard should not be determined on a case-by-case basis where the court can "rely only on the facts of the case before it and the Justices' own intuitions," but is more appropriately determined by the Advisory Committee on Civil Rules that has an opportunity to review all of the empirical research on the costs and benefits of applying a higher pleading standard. *Id.*

233. *See supra* notes 200–10.

234. Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 Am. J. Comp. L. 493, 493 (2002).

235. Zia-Zarifi, *supra* note 145, at 122.

236. *Id.*

237. *See* Dodson, *supra* note 195, at 126 (highlighting that the plausibility standard "invites defendants to file motions to dismiss under Rule 12(b)(6) with greater frequency where the complaint does not allege supporting facts, and it suggests that at least some of those motions should be granted with more regularity").

238. Comment, *supra* note 195, at 314.

239. *See id.* (noting that, if *Twombly* had gone forward and revealed a conspiracy, it would have combated the "massive social cost of the defendants' anticompetitive practices").

corporate activity abroad,[240] and plaintiffs already face high costs at the early stage of litigation by having to defend against numerous procedural barriers.[241] Furthermore, the same procedural barriers that raise plaintiffs' costs benefit defendants by providing additional opportunities to dismiss frivolous cases or cases improperly brought in the United States.[242] In the antitrust context, some argue that the plausibility standard safeguards defendants from meritless lawsuits to the detriment of plaintiffs unable to procure documents to illuminate a conspiracy prior to discovery.[243] Conversely, the fact that many courts in ATS accomplice liability cases apply a more demanding heightened pleading standard suggests that in reality applying a plausibility standard to ATS accomplice liability cases may benefit plaintiffs. Thus, although it is arguable that the plausibility standard is less central to combating the practical concerns in ATS accomplice liability cases than in antitrust cases—because it leads to greater inequity than under a notice pleading standard—it could be more beneficial to plaintiffs than the status quo.

2. Burden on the Courts

The legal and factual complexities of ATS accomplice liability cases produce litigation lasting years, even decades, leading "courts [to] endure countless rounds of motion practice, amended pleadings, court hearings and appeal[s]," much of which centers on the foreign relations implications of these cases.[244] Courts respond with the increased use of discretionary prudential doctrines, and in some instances heightened pleading standards, to prevent these cases from going forward.[245] As the defendants in *Sinaltrainal* argued, applying a notice pleading standard to accomplice liability allegations linking private actors and state actors would "impose significant burdens on the U.S. judicial system—straining the resources of federal courts, imposing jury duty on communities having no relation to events at issue, and entangling the parties in conflicts of law issues and foreign legal systems."[246]

Proponents of a notice pleading standard point to preexisting legal barriers such as forum non conveniens, the political question doctrine, the act of state doctrine, exhaustion of remedies, dormant foreign affairs power, and international comity, which serve to limit claims that are frivolous or should be brought in other forums. In fact, courts utilize these barriers as a

240. *See infra* notes 265–68 and accompanying text.
241. *See infra* Part II.B.2.
242. *See infra* Part II.B.2.
243. *See* Dodson, *supra* note 195, at 124.
244. Gay & Hagey, *supra* note 66, at 4.
245. *Id.* at 4, 9.
246. *In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1290 n.23 (S.D. Fla. 2006).

way to "avoid the ultimate difficulties faced by parties and [the] judicial system in [ATS accomplice liability] cases."[247]

For example, the act of state and political question doctrines are policies "under which a court will decline to exercise jurisdiction it admittedly has, because the issues presented are non-justiciable, and both explicitly reflect the constitutional separation of powers."[248] Principles of international comity often lead courts to defer to foreign law as part of a general accommodation shown by one sovereign to another.[249] Finally, the most common ground for dismissal in ATS accomplice liability suits is the forum non conveniens doctrine.[250] Under the doctrine of forum non conveniens "a court may resist imposition upon its jurisdiction even when jurisdiction is authorized" if an alternative forum exists.[251] After determining an adequate alternative forum exists, the court then balances a number of factors involving the private interests of the parties and relevant public interests.[252]

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247. Gay & Hagey, *supra* note 66, at 9; *see* Gul, *supra* note 164, at 409 (stating that these prudential considerations essentially "bar the ATS litigant's access to his day in federal court"); *see also* 14D Charles Alan Wright, Arthur R. Miller & Edward J. Cooper, Federal Practice and Procedure § 3828 (3d ed. 2007) ("The motion to dismiss for forum non conveniens serves as an important tool for dealing with those plaintiffs seeking the aid of favorable American laws . . . who bring cases in American courts when their claims have only nominal or tangential connection to this country.").

248. Ralph G. Steinhardt, International Civil Litigation: Cases and Materials on the Rise of Intermestic Law 581 (2002). The act of state doctrine "prevents courts from inquiring into the validity of the public acts of a foreign sovereign committed within its own territory." 4B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1111 (3d ed. 2002); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (noting that the act of state doctrine limits the judicial branch's ability to "pass[] on the validity of foreign acts of state [that] may hinder rather than further [the] country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere"). The political question doctrine when applied to international cases "limits the exercise of federal jurisdiction and forecloses judicial inquiry into the propriety . . . of political decisions based on executive discretion." Steinhardt, *supra*, at 581 (citing Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 483–84 (D.N.J. 1999)).

249. *See* Steinhardt, *supra* note 248, at 226.

250. *See* Gul, *supra* note 164, at 409–10 ("*Forum non conveniens* tends to be particularly efficacious in ATS cases because under the terms of the statute the plaintiff must be an alien, and thus uniquely vulnerable to this procedural device.").

251. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947); *see also* Steinhardt, *supra* note 248, at 109 (explaining that forum non conveniens is a doctrine "under which a court may decline to exercise judicial jurisdiction, when some significantly more convenient alternative forum exists").

252. *See Gulf Oil*, 330 U.S. at 508–09. As outlined by the Supreme Court in *Gulf Oil*, the relevant private interests are

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Id. at 508. There are additional relevant public interests:

> [A]dministrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for

Given that the relevant acts take place abroad, and the witnesses and documents tend to be abroad, most cases pled under the ATS would be more appropriately litigated in the foreign country where the tortious action occurred. Indeed, as one commentator notes, "[O]n many occasions, federal courts have determined that human rights, mass torts, or products liability claims arising from injuries in foreign countries, some allegedly caused by American defendants, would be more properly litigated in the country in which the injuries were sustained."[253] This logic does not necessarily apply in ATS cases, however, because the alternative forum considered is typically the location of the tort, and the tortious actions in ATS accomplice liability cases tend to occur in developing countries with inadequate judicial systems. As a result courts may be reluctant to dismiss an ATS accomplice liability case on forum non conveniens grounds.

Koh points to additional procedural hurdles when arguing against the claim that corporate accomplice liability leads to burdensome litigation. He summarizes the barriers posed to plaintiffs bringing ATS accomplice liability cases:

> To be actionable, the acts committed by a private corporation:
>
> (a) Must be brought in a proper forum with personal jurisdiction and venue;
>
> (b) Must not be barred by statute of limitations;
>
> (c) Must state a claim upon which relief can be granted, which means alleging either a transnational offense that either a state or private individual could commit . . .
>
> (d) The claim must be proven, not just pleaded, and the plaintiff has a significant burden of proving the link between cause and effect.[254]

With all of these obstacles, he contends, there is little risk of burdening the courts with excessive, inappropriate, or frivolous litigation, which seemingly renders a heightened pleading standard unnecessary.[255] The

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> holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 508–09.

253. Wright, Miller & Cooper, *supra* note 247, at 623.

254. Koh, *supra* note 162, at 269.

255. *Id.* Notably, one of the barriers listed by Harold Hongju Koh is that plaintiffs must ultimately prove, not simply plead, their claims and that they specifically must "show much, much more than simply that the multinational enterprise has chosen to invest in a 'troublesome country.'" *Id.* In other words, Koh highlights the potential problem of reading corresponding conduct by a corporation and a state actor as conspiratorial simply because the corporation has chosen to invest in a country with an oppressive regime. Adopting a heightened or plausibility pleading standard could ensure that the decision to invest in a

prudential doctrines, however, are discretionary, whereas those cited by Koh—with the exception of the proof requirement—are formulaic. Thus, if the pleading standard ultimately applied does not relieve the burden on the courts, plaintiffs are likely to face increased use of prudential doctrines to dismiss their claims.

C. *Policy Considerations*

1. The Effect on Corporate Reputation

ATS accomplice liability places corporate behavior abroad in the spotlight regardless of guilt, making the effect on corporate reputation both an impetus for change and a deterrent for future investment. While providing plaintiffs with a forum for bringing claims is important, a liberal standard is not without its drawbacks. One concern in particular is that a low standard leads to "lengthy and ultimately unsuccessful" litigation where, regardless of guilt, "corporate defendants suffer prolonged public relations indignities."[256] The corporations involved in these cases "are often highly sensitive to public reaction to the inflammatory allegations in many ATS filings regarding the alleged acts of foreign subsidiaries or joint venture partners."[257] The two most notable ATS accomplice liability cases where courts applied a notice pleading standard were *Estate of Valmore Lacarno Rodriquez v. Drummond Co.*[258] and *Unocal.*[259] While Drummond chose to fight the charges all the way through to trial,[260] and prevailed, Unocal settled.[261] Both avenues proved to be incredibly costly, and the fact that Drummond eventually prevailed does not erase the negative publicity it received throughout the litigation. Indeed, despite its victory, Drummond will continue to face high financial and reputational costs as the case proceeds on appeal.

Some commentators believe that corporate reputation played a substantial role in the disposition of the *Unocal* litigation, noting that after nine years of negative publicity and costly litigation Unocal was unwilling to risk continuation amid predictions that the Ninth Circuit would send the case to trial.[262] Notably, Unocal did not accept responsibility for the

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developing country does not influence the courts' view of the facts. However, given that many courts are turning to the prudential doctrines to limit the number of ATS accomplice liability cases going forward, this concern has little relevance.

256. Gay & Hagey, *supra* note 66, at 4.

257. *Id.*

258. 256 F. Supp. 2d 1250, 1253–54 (N.D. Ala. 2003). This case was later consolidated with similar actions and proceeded as *Romero v. Drummond Co.*

259. *See supra* notes 153–54 and accompanying text.

260. *See supra* Part I.A.2.c.

261. *See supra* notes 157–58 and accompanying text.

262. *See, e.g.*, Lisa Roner, *Unocal Settles Landmark Human Rights Suits*, Ethical Corp., Dec. 20, 2004, http://www.ethicalcorp.com/content.asp?ContentID=3312 ("Many tort experts predicted the California 9th Circuit appeals court . . . would send the Unocal case to trial . . . .").

alleged crimes in the settlement joint press release, which suggests the settlement may simply have been a way for the corporation to cut its losses in light of the negative publicity.[263] If negative publicity creates an incentive for a company to settle regardless of guilt, then the fact that a lower pleading standard might allow more frivolous lawsuits could deter future foreign investment.[264]

Nevertheless, creating an incentive to settle lawsuits is not necessarily a negative consequence, especially considering that in many of these cases the damaging publicity is not only warranted, but is the incentive corporations need to make changes in the way they conduct activities abroad. Some commentators predict that the prospect of increasingly expensive settlements could change corporate behavior, leading to fewer human rights abuses and thus fewer lawsuits in the future. As Terrence Collingsworth notes, after a few more companies are forced to pay a substantial amount in settlements, "shareholders will demand that their companies take human rights seriously and move away from a public relations strategy to a compliance strategy."[265] Indeed, one commentator noted in response to the *Unocal* settlement,

> Unocal's willingness to pay substantial sums rather than continue to litigate, coupled with the recent trend in enforcing accountability for aiding and abetting liability . . . will hopefully make corporations who operate in close contact with perpetrators of human rights abuses think very carefully about their role in these wrongdoings.[266]

Dismissing ATS accomplice liability cases under a more stringent pleading standard might shorten a corporation's exposure to negative publicity, undermining the publicity that creates the incentive for reform. According to Steven Schnably, a professor of international law at the University of Miami Law School, these cases "can result in great publicity and put pressure on the company to correct a situation and make people more aware of what's going on."[267] This benefit is not theoretical; indeed, according to Collingsworth, who was counsel for the plaintiffs in *Sinaltrainal*, since the inception of the lawsuit against Coca-Cola bottling

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263. *See* Benjamin C. Fishman, Note, *Binding Corporations to Human Rights Norms Through Public Law Settlement*, 81 N.Y.U. L. Rev. 1433, 1452 (2006) (noting that Unocal's reaffirmation of their commitment to human rights—as opposed to acceptance of responsibility—in the settlement press release suggested that the settlement should "induce feelings of gratitude rather than vindication").

264. See *infra* notes 275–72 and accompanying text for a discussion of how constructive engagement and foreign investment benefit developing countries and their citizens.

265. Collingsworth, *supra* note 4, at 258.

266. Rachel Chambers, *The* Unocal *Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, 13 Hum. Rts. Brief 14, 16 (2005), *available at* http://www.wcl.american.edu/hrbrief/13/unocal.pdf?rd=1; *see also* Herz, *supra* note 44, at 42 (explaining that corporations can correct the situation by "conduct[ing] due diligence and implement[ing] operational safeguards to decrease the risk that their government partners or members of the security forces will commit abuses on their behalf, or that the company will be complicit in such abuses").

267. Kay, *supra* note 160.

companies in Colombia for aiding and abetting Colombian paramilitaries in perpetrating human rights abuses, conditions at the plant have improved.[268]

While a heightened or plausibility pleading standard may lead to fewer ATS accomplice liability cases by dismissing them in the initial stages of litigation, a lower pleading standard that changes the way corporations operate overseas may lead to fewer ATS accomplice liability cases by eliminating the violations of human rights altogether. Thus, if the fear of negative publicity from an ATS accomplice liability case could drastically change corporate behavior abroad, courts applying a lower pleading standard would have to accept that some of the lawsuits are frivolous and unfairly punish innocent corporations. While this may be a cost courts are willing to accept, it could backfire by deterring future investment, leading to fewer ATS accomplice liability cases at the expense of those citizens and countries that rely on foreign investment for development and survival. Thus, given the gravity of the decisions made by a corporation based on negative publicity from ATS accomplice liability cases, the effect on corporate reputation is a significant consideration in determining the applicable pleading standard.

2. Foreign Policy

Proponents of a heightened pleading standard in ATS accomplice liability cases see it as a necessary hurdle to prevent interference with U.S. foreign policy. The defendants in *Sinaltrainal* argued that without a heightened pleading standard "[f]oreign businesses with even the slightest connections to the United States will face higher legal costs, and U.S. companies will be deterred from doing business in foreign countries, harming international and domestic markets."[269] These defendants are not alone in their concerns. For as long as the concept of accomplice liability against corporations has existed, its opponents have claimed that litigation under the ATS against corporate defendants "threatens US foreign policy, endangers corporations, will discourage trade and foreign investment in dozens of developing countries, and will undermine the war against terrorism."[270]

According to the Bush administration[271] and members of the business community, ATS accomplice liability cases "may discourage U.S. and foreign corporations from investing in precisely the areas of the world where economic development may have the most positive impact on

268. *Id.*

269. *In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1290–91 & n.23 (S.D. Fla. 2006).

270. Koh, *supra* note 162, at 264.

271. Although previous administrations have dealt with the issues discussed in this section, this Note focuses on ATS accomplice liability cases brought between the *Sosa* decision and March 2008, all of which were filed during the administration of George W. Bush.

economic and political conditions."[272] With respect to foreign policy concerns, the Bush administration has asserted that "aiding and abetting liability interferes with the United States' ability to use constructive engagement in conducting foreign relations,"[273] and therefore constructive engagement should be the exclusive model for monitoring and preventing human rights abuses by corporations in foreign countries.[274] Thus, although the foreign policy argument is mainly geared toward eliminating accomplice liability, it also supports the application of a heightened pleading standard. This accomplishes the goal of minimizing the number of cases heard, allowing the government to rely on constructive engagement to regulate corporate behavior abroad while minimizing economic harms and promoting democracy.

The administration bases its view of constructive engagement on the premise that corporate investment leads to greater political and economic growth in developing nations.[275] The theory is that, when oppressive regimes are exposed to corporate influences, they will be educated in democratic values; in addition, they will become the focus of international media scrutiny and investor pressure.[276] Proponents of this view hope that the combination of these forces will result in political liberalization, the creation of a middle class, and a more informed populace.[277] Moreover, individuals who live in countries with abusive regimes rely on that corporate investment for their own livelihoods, including those plaintiffs harmed by the corporations. Thus, according to proponents of constructive engagement, the proliferation of accomplice liability against corporations in U.S. courts will undermine this foreign policy and the benefits derived by future investment in the developing world.[278]

Although, as a prudential matter, foreign policy concerns can prevent certain cases from proceeding,[279] the Supreme Court in *Sosa* suggests that

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272. Brief for the United States as Respondent Supporting Petitioner at 44–45, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339). The National Foreign Trade Council and other probusiness organizations made a similar argument in an amicus curiae brief submitted in *Khulumani*. *See* Herz, *supra* note 44, at 20 n.58 and accompanying text.

273. Herz, *supra* note 44, at 18 (citing Brief for the United States of America as Amicus Curiae at 4, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141-CV, 05-2336-CV); Brief for the United States of America as Amicus Curiae in Support of Affirmance at 16–18, Corrie v. Caterpillar, Inc., No. 05-36210 (9th Cir. Aug. 11, 2006); Supplemental Brief of the United States of America as Amicus Curiae at 14, Doe I v. Unocal Corp., 395 F.3d 932, 951 (9th Cir. 2002) (Nos. 00-50603, 00-56628)). Herz further notes that the administration bases its advocacy for the exclusivity of engagement as the way to promote corporate reform on the premise that "it would limit the ability of the government to use economic engagement as a tool to promote human rights, and is therefore incompatible with U.S. foreign policy." Herz, *supra* note 44, at 2.

274. Herz, *supra* note 44, at 18.

275. *See id.* at 28.

276. *Id.* at 27–31.

277. *Id.*

278. *Id.* at 27.

279. For example, courts have the discretion to dismiss cases contested by the executive for foreign policy purposes under the dormant federal affairs power, which "reserves power over foreign affairs exclusively to the federal government and precludes states and

in ATS accomplice liability cases such analysis should be done on a case-by-case basis.[280] Indeed, the Court acknowledged that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."[281] Notably, the Court suggested weighing foreign policy concerns in each individual case, not permitting general foreign policy concerns to create a blanket exception to hearing ATS accomplice liability cases.[282] Thus, given that a less demanding pleading standard does not prevent a court from dismissing an ATS accomplice liability case on foreign policy grounds, a heightened pleading standard may not be necessary to achieve the benefits of constructive engagement.

Furthermore, Richard Herz, senior attorney for EarthRights International, specifically addresses the administration's claim that ATS accomplice liability cases interfere with the benefits of constructive engagement.[283] In analyzing the impact of accomplice liability cases on corporate behavior, Herz found that employing accomplice liability and constructive engagement in tandem best promotes reform abroad.[284] In order for the engagement model to produce the beneficial results of promoting democracy and reform in countries with oppressive regimes, corporations cannot be complicit in the oppression.[285] Consequently, "[p]otential

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municipalities from interfering with the foreign affairs power of the federal government." Carol E. Head, Note, *The Dormant Foreign Affairs Power: Constitutional Implications for State and Local Investment Restrictions Impacting Foreign Countries*, 42 B.C. L. Rev. 123, 124 (2000) (citing Louis Henkin, Foreign Affairs and the United States Constitution 162 (1996)).

280. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) (noting that a "possible limitation" in deciding whether to dismiss cases under the ATS is "a policy of case-specific deference to the political branches").

281. *Id.*

282. *Id.* Courts are more than capable of performing this case-by-case analysis. For example, in a case "against approximately fifty corporate defendants and hundreds of 'corporate Does,'" alleging that "defendants actively and willingly collaborated with the government of South Africa in maintaining a repressive, racially based system known as 'apartheid,'" the U.S. Court of Appeals for the Second Circuit remanded the question of whether the case presented a nonjusticiable issue to the district court. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 258 (2d Cir. 2007). However, the Second Circuit noted that "not every case 'touching foreign relations' is nonjusticiable and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis." *Id.* at 263 (quoting Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57, 69 (2d Cir. 2005)). Additionally, in *Doe I v. Unocal Corp.*, the Central District of California stated that whether they held Unocal responsible for complicity with the Burmese government in violating human rights abuses would "not reflect on, undermine or limit the policy determinations made by [the legislative and executive] branches with respect to human rights violations in Burma." 963 F. Supp. 880, 894 n.17 (C.D. Cal. 1997).

283. *See* Herz, *supra* note 44.

284. *See id.* at 4.

285. *See id.* at 34 (noting that, "by definition, complicity in egregious violations of fundamental human rights norms supports the very abuses that a constructive engagement policy seeks to end").

liability for those companies that aid and abet abuses creates incentives for companies to do what the engagement model requires and, thus, to actively promote reform."[286] According to Herz, the fact that ATS accomplice liability cases "present the risk of large verdicts and serious harm to corporate reputation" provides the incentive for companies "to alter the way they interact with repressive regimes or members of foreign militaries that provide corporate security."[287] Furthermore, Herz notes that "[t]he actual filing and litigation of a case against a corporation that has abetted abuses" will provide an example of democracy to oppressive regimes by illustrating "how an independent judiciary operates in a free society."[288] Essentially, the benefits of constructive engagement in some situations are only realized, and in others enhanced, by the coexistence of ATS accomplice liability.

Regarding the concern that ATS accomplice liability deters foreign investment, Herz argues that, even if it does deter investment, it would only be by "corporations unwilling or unable to invest without being complicit in egregious abuses."[289] Significantly, these same corporations would not further the goals of constructive engagement. Herz further notes that none of the opponents of ATS accomplice liability have "presented any empirical evidence suggesting that corporations will decline significant investment opportunities based on the possibility that they will be [subject to accomplice liability] . . . . Nor have they provided any evidence that corporations with substantial investments will pull out of existing projects."[290] Saad Gul provides one example supporting the idea that ATS accomplice liability does not deter further investment.[291] In *Royal Dutch Petroleum*, the court applied the notice pleading standard of Rule 8(a) when assessing the 12(b)(1) and 12(b)(6) motions to dismiss plaintiff's suit "against two European oil companies . . . which plaintiffs allege directed and aided the Nigerian government in violating plaintiffs' rights."[292] The court held that "plaintiffs allege[d] various acts that, if proven, would demonstrate 'a substantial degree of cooperative action between' corporate defendants and Nigerian officials in conduct that violated plaintiffs'

286. *Id.* at 4.

287. *Id.* at 5. Herz explains that this incentive of potential litigation is necessary because "corporations involved in abuses may prefer the stability of their existing partnership with autocratic regimes over the uncertainty of democratization." *Id.* at 35.

288. *Id.* at 45–46.

289. *Id.* at 25. Herz further claims that even if some innocent corporations were deterred, the administration's argument rests on the idea that "many" corporations would be deterred, which would not be, nor has it been, the case. *Id.* at 25–26.

290. *Id.* at 24.

291. *See generally* Gul, *supra* note 164.

292. Wiwa v. Royal Dutch Petrol. Co., No. 96 CIV. 8386, 2002 WL 319887, at *1 (S.D.N.Y. Feb. 28, 2002). Here, "Plaintiffs allege violations of seven international norms: (1) summary execution . . . ; (2) crimes against humanity . . . ; (3) torture . . . ; (4) cruel, inhuman, or degrading treatment . . . ; (5) arbitrary arrest and detention . . . ; (6) violation of the rights to life, liberty and security of person . . . ; and (7) violation of the right to peaceful assembly and association . . . ." *Id.* at *6.

rights."[293] Despite the concern that this decision would deter future foreign investment, Gul noted that "there is little evidence that the suits are curtailing corporate activity abroad; Shell and Chevron both announced extensive investment in Nigeria despite ATS suits being filed against them for activities there."[294]

III. COURTS SHOULD APPLY THE PLAUSIBILITY STANDARD TO ATS ACCOMPLICE LIABILITY CASES

Parts I and II of this Note discussed the direct and indirect implications of three pleading standards on ATS accomplice liability cases: a liberal notice standard benefiting plaintiffs by allowing them to wait until discovery to fully develop their claims, a heightened pleading standard benefiting defendants by effectively barring cases from going forward, and a plausibility standard that benefits both parties by filtering out frivolous claims while allowing plaintiffs more leeway in stating a claim prior to discovery. Courts must hold corporations who have violated human rights accountable, and the system should not be averse to providing legitimate plaintiffs this relief because of the potential negative repercussions from frivolous cases. Thus, given the similarity between antitrust and ATS accomplice liability claims, as well as the ability to balance the plethora of concerns regarding the impact of ATS accomplice liability on plaintiffs' rights, the judicial system, foreign policy, and corporate behavior, courts should uniformly apply *Twombly*'s plausibility pleading standard to ATS accomplice liability claims.

A. *How the Plausibility Standard Affects an ATS Accomplice Liability Claim*

In the context of ATS accomplice liability cases, applying a plausibility pleading standard will likely lead to fewer dismissals than the heightened pleading standard, but more than the notice pleading standard.[295] The heightened pleading standard applied to ATS accomplice liability claims requires plaintiffs to plead facts with a heightened specificity, essentially requiring plaintiffs to prove the relationship between the corporation and the state actor at the pleading stage.[296] Conversely, the plausibility standard requires that plaintiffs plead sufficient facts to render the relationship plausible.[297] Logically, while the plausibility standard will still lead to the dismissal of some complaints that would otherwise survive under a notice pleading standard, it will allow nonfrivolous claims otherwise dismissed under a heightened pleading standard. Reanalyzing the *Sinaltrainal* complaint under a plausibility standard illustrates the potential difference in

293. *Id.* at *13.
294. Gul, *supra* note 164, at 418.
295. *See supra* note 237.
296. *See supra* text accompanying notes 190–92.
297. *See supra* note 137 and accompanying text.

outcome when applying a plausibility standard to ATS accomplice liability cases.

Under the heightened pleading standard, the court dismissed the *Sinaltrainal* complaint because the plaintiffs were unable to prove the existence of a conspiracy between the defendant corporation and the Colombian paramilitaries.[298] Courts would deal with these grounds for dismissal differently under a plausibility standard, because in *Twombly* the Supreme Court stated that, to satisfy the plausibility standard, allegations of parallel conduct "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."[299] The plaintiffs in *Twombly* relied on the parallel motives of each ILEC wanting to prevent competition in their respective service areas and the parallel actions they took to further that goal to imply a conspiracy.[300] Conversely, while the plaintiffs in *Sinaltrainal* similarly relied on the parallel motives of the Bebidas plant and the paramilitaries in intimidating and destroying the union,[301] they also showed a questionable relationship between the corporation and the paramilitaries, as well as knowledge of the joint intent.[302] These facts seemingly raise a suggestion of a preceding agreement sufficient to satisfy the plausibility requirement. Further supporting the *Sinaltrainal* complaint satisfying the plausibility standard is the Court's statement in *Twombly* that in order for a complaint to meet the plausibility standard the pleaded facts must "raise a reasonable expectation that discovery will reveal evidence" of those facts.[303] Given the information plaintiffs were able to elicit through discovery in *Drummond*,[304] a case with remarkably similar facts and allegations to *Sinaltrainal*,[305] there was certainly a "reasonable expectation" that discovery would reveal evidence of the alleged conspiracy. Thus, this example shows how the application of a plausibility pleading standard will likely lead to fewer 12(b)(6) dismissals of ATS accomplice liability claims.

B. *Applying the Plausibility Standard to ATS Accomplice Liability Claims Is Legally Consistent with the Supreme Court's Rationale in* Twombly

ATS accomplice liability cases deal with similar types of claims and defendants as the Supreme Court envisioned when it established the plausibility standard, and thus it is legally consistent to apply the plausibility standard to ATS accomplice liability claims. The similarity between the elements of pleading a violation of section 1 of the Sherman

298. *See supra* notes 190–92 and accompanying text.
299. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1966 (2007).
300. *See supra* notes 113–15 and accompanying text.
301. *See supra* notes 180–81 and accompanying text.
302. *See supra* notes 182–86 and accompanying text.
303. *Twombly*, 127 S. Ct. at 1965.
304. *See supra* notes 224–29 and accompanying text.
305. *See supra* note 220 and accompanying text.

Act and ATS accomplice liability claims,[306] the large multitiered corporate structure of the defendant corporations,[307] and the practical concerns about excessive and costly litigation[308] suggest that the Supreme Court would, and should, apply the plausibility reading to ATS accomplice liability cases.

While similar, ATS accomplice liability claims and parties are not identical to antitrust claims and parties, raising potential reasons why courts applying the plausibility standard to ATS accomplice liability cases may not be ideal. In addition to the social costs of dismissing potentially meritorious ATS accomplice liability cases,[309] the discovery costs are seemingly more extensive than in antitrust cases because almost all of the witnesses and documents are overseas.[310] However, the increased cost of discovery in ATS accomplice liability cases is tempered by the fact that a defendant can have cases dismissed under discretionary prudential doctrines such as the act of state and political question doctrines, international comity, and forum non conveniens.[311] With the exception of forum non conveniens, these are not typically doctrines of which a defendant can take advantage in antitrust cases, thus distributing evenly the burdensome discovery costs in the long run. The impact on plaintiffs in ATS accomplice liability cases is far more severe than on antitrust plaintiffs given that in the status quo they face the amplified costs from additional procedural barriers and in obtaining prediscovery documents from corporations and state actors.[312] The application of a heightened or plausibility pleading standard will only add to their prelitigation costs by increasing their prelitigation fact-finding.[313]

While the cost-benefit analysis in ATS accomplice liability cases appears to favor applying a more liberal notice pleading standard, the real-world implications of such a standard also merit consideration. If the rules or the Supreme Court mandated a notice pleading standard be applied to ATS accomplice liability claims, courts would simply increase their use of prudential doctrines to dismiss cases they do not find sufficient.[314] Furthermore, despite the Supreme Court's continued rejection of heightened pleading standards, courts in ATS accomplice liability cases continue to apply heightened standards, leading to unpredictable and inequitable outcomes.[315] On incredibly similar facts, the plaintiffs in *Drummond* had their day in court, whereas those in *Sinaltrainal* had their complaint dismissed. While a plausibility pleading standard does not completely solve the unpredictability problem, it does allow those courts hesitant to

306. *See supra* Part II.A.3.b.
307. *See supra* notes 202–03 and accompanying text.
308. *See supra* Part II.B.
309. *See supra* notes 265–68, 238–40 and accompanying text.
310. *See supra* notes 234, 236 and accompanying text.
311. *See supra* Part II.B.2.
312. *See supra* notes 234–36 and accompanying text.
313. *See supra* notes 241–42 and accompanying text.
314. *See supra* note 247 and accompanying text.
315. *See* Part II.A.2.

apply a notice pleading standard a less extreme option than the heightened pleading standard, and those applying a notice pleading standard a reprieve from some of the excessive litigation burdens in cases lacking merit.

C. *Balancing the Concerns: How Applying the Plausibility Standard Will Affect Foreign Investment and Corporate Behavior*

If, as this Note argues, the plausibility standard will lead to fewer dismissals than the heightened pleading standard, and more dismissals than the notice pleading standard, it will also make more progress in allaying the concerns over the effect of ATS accomplice liability cases on foreign investment and the need for a change in corporate behavior. The government and corporate opponents of ATS accomplice liability suggest that, under a cost-benefit analysis, ATS suits against corporations should not be permitted—and, if they are, the pleading standard should be set very high—because, whereas a few plaintiffs might benefit from a lawsuit, the deterrence of future foreign investment harms the entire population of the country.[316] This nearsighted view, however, ignores that ATS accomplice liability cases have the potential to do more than benefit a few plaintiffs. Indeed, simply bringing an ATS accomplice liability suit against a corporation has the potential to serve as an impetus for change benefiting not just the plaintiffs involved in the suit, but also the population of any country in which the corporation operates.[317] Herz rightfully points out that ATS accomplice liability cases and constructive engagement can work together to benefit all parties.[318] Without assurance that plaintiffs will not bring frivolous suits, it may deter innocent corporations from investing—a concern Herz finds unpersuasive because he believes the innocent corporations deterred will be few in number.[319] That said, although there is no current evidence of deterrence,[320] given the increasing expense of litigation and settlements, it may become too costly for any corporation to risk investment in a developing country with an oppressive regime. Thus, the risk of deterred foreign investment should be taken into account when determining the proper pleading standard, because without it everyone loses.

Applying the plausibility standard will help allay some of the government's concerns regarding a negative impact on constructive engagement and decreased foreign investment because corporations will be less likely to fear prosecution simply for operating in a country with an oppressive regime. Unlike under a heightened pleading standard, corporations cannot be as confident that they will be free from liability under the plausibility standard, thus continuing to allow ATS accomplice

316. *See supra* notes 275–78 and accompanying text.
317. *See supra* notes 265–68 and accompanying text.
318. *See supra* notes 284–88 and accompanying text.
319. *See supra* note 289 and accompanying text.
320. *See supra* note 290 and accompanying text.

liability to assist constructive engagement in effecting social change and encouraging better corporate behavior.

CONCLUSION

Not only are ATS accomplice liability cases needed to hold corporations accountable for their role in human rights abuses abroad, but they also serve as a lightning rod for change.[321] Corporate investment in the developing world benefits both the economic growth of the corporations as well as the social, political, and economic growth of the population of the country in which corporations invest. Accountability for the actions they take in furtherance of that investment encourages changes in corporate behavior that ensure that the benefits of investment for the population materialize. The pleading standard applied in ATS accomplice liability cases should balance the significance of the crime and positive impacts the litigation has on corporate behavior against the negative effect that ATS accomplice liability cases can have on litigants, foreign investment, and the judicial system.[322]

Applying a notice pleading standard, while preserving the intentions of Rule 8(a) in providing plaintiffs their day in court[323] unduly burdens defendants, who face substantial reputational and financial costs;[324] courts that sustain years of litigation and discovery on unsubstantiated claims;[325] and citizens of countries with oppressive regimes who rely on foreign investment that litigation and settlement costs might deter. A heightened pleading standard, while addressing many of these harms by substantially decreasing the number of cases that survive a motion to dismiss, raises the bar too high, leading courts to dismiss cases with merit and undermining the tools of discovery typically available to plaintiffs to develop the facts that support their claims.[326] Although the plausibility pleading standard as articulated in *Twombly* requires more factual specificity than notice pleading, it is not as stringent as the heightened pleading standard currently applied in ATS accomplice liability cases because it requires plausibility, not proof.

By imposing a standard that continues to expose corporate defendants to liability while shielding them from some frivolous lawsuits, the plausibility standard balances plaintiffs' rights and the need to encourage responsible corporate behavior while protecting courts and defendants from excessive and costly litigation. Given that the possibility of excessive and costly litigation in frivolous lawsuits could deter some corporations from future foreign investment, the plausibility standard prevents ATS accomplice liability from punishing the many for the crimes of the few.

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321. *See supra* notes 265–68, 283–90 and accompanying text.
322. *See supra* Parts II.B, II.C.
323. *See supra* Part II.A.1; *see also supra* note 84 and accompanying text.
324. *See supra* notes 256–57, 234–38, 240–42 and accompanying text.
325. *See supra* notes 246, 269 and accompanying text.
326. *See supra* notes 220–29 and accompanying text.