

Disparate Treatment of the Corporate Citizen: Stark Differences Across Borders in Transnational Lawsuits

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The United States (US) has seen a dramatic increase in transnational lawsuits, many of which arise from alleged wrongs that occurred in Latin America and other civil law countries. Among other things, the availability of punitive damages and the Alien Tort Statute (neither of which is part of the traditional civil law system) have made the US a more attractive target for multinational suits. As this article discusses, while some of the US Supreme Court's recent transnational decisions – most notably *Kiobel* and *Daimler AG* – may help mitigate the deluge of transnational suits being filed in the US, there are still many factors that make the US an attractive transnational forum. Additionally, foreign plaintiffs may respond to *Kiobel* by increasing their efforts to target US-based defendants through foreign judgment recognition and enforcement suits.

US law invites transnational suits

Multinational corporations have seen a dramatic increase in US-filed transnational suits. Among other things, they are facing billions in pending Alien Tort Statute suits (arising from roughly 60 different countries) and have

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increasingly been the subject of state-law-based transnational tort suits.¹ While some of the litigation increase can be explained by an overall increase in global operations and activities, several lawsuits that have very little to do with the US (and that would be more appropriately filed elsewhere) nevertheless make their way to US courts. The key question is: why? The answer, in short, is that the US legal system is far more inviting to the multinational plaintiff than many other systems – particularly more so than civil law systems.

First, unlike many civil law jurisdictions, the US common law system allows plaintiffs to seek punitive damages in a wide range of cases. While the US Supreme Court has held that punitive damages more than ten times the compensatory damage award may violate due process,² even a single-figure multiple is a far cry from the punitive damage prohibition found in many countries. Because punitive damages can multiply the size of an award, they offer a strong incentive for plaintiffs to bring multinational suits in the US.³

Secondly, the US has a law that, in recent years, has been seen as particularly inviting of multinational suits: the Alien Tort Statute (ATS).⁴ The ATS has a long history, as it was enacted as part of the first US Judiciary Act in 1789.⁵ The Act provides that the ‘district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’.⁶ For nearly 200 years, the ATS was rarely invoked.⁷ But in 1980, the Second Circuit permitted an action to proceed under the ATS, thus encouraging further ATS suits.⁸ The case that opened the floodgates is illustrative of the extent to which US courts have been willing to entertain multinational suits having little connection to the US. There, Paraguayan citizens brought suit against a Paraguayan police official for the torture and murder of a relative in Paraguay.⁹ And plaintiffs’

1 See, eg, Jonathan C Drimmer and Sarah R Lamoree, ‘Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions’ (2011) 29 Berkeley J Int’l Law 456, 460–61, 464 (hereafter ‘Think Globally, Sue Locally’) (citing Arthur Fergensen and John Merrigan, ‘“There They Go Again”: The Trial Bar’s Quest for the Next Litigation Bonanza’ (National Legal Center for the Public Interest, January 2007), 17 fn 68; Gary Hufbauer and Nicholas Mitrokostas, ‘International Implications of the Alien Tort Statute’ (2004) 7 J Int’l Econ Law 246); see also n 11 above.

2 *State Farm Mutual Automobile Insurance Co v Campbell*, 538 US 408 (2003).

3 See, eg, Michael Koebeler, *Corporate Responsibility under the Alien Tort Statute: Enforcement of International Law through US Torts Law* (2009), 13 (observing that human rights plaintiffs prefer litigating in the US because of, among other things, the availability of punitive damages).

4 The ATS has also been referred to as the ‘Alien Tort Claims Act’, or ‘ATCA’.

5 Act of 24 September 1789, Ch 20, s 9, 1 Stat 77.

6 28 USC s 1350 (2006).

7 See *Kiobel v Royal Dutch Petroleum Co*, 621 F 3d 11, 115–16 (2d Cir 2010).

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

9 *Ibid.*

lawyers have experienced some success with these cases, including settling some for millions of dollars at relatively early stages of litigation.¹⁰

Settlement payouts and lengthy ATS proceedings that can take years before defendants can secure dismissal from the case – unless tempered by recent jurisprudence (discussed below) – is likely to encourage plaintiffs further to bring multinational ATS suits in the US. Additionally, some plaintiffs' lawyers have started avoiding ATS altogether and are instead bringing state law tort claims on behalf of foreign citizens for alleged wrongs that occurred overseas.¹¹ Particularly where the foreign countries that these claims arise from suffer from a breakdown in the rule of law, US-based defendants find themselves in a catch-22: deciding whether to move for dismissal based on forum non conveniens knowing that they cannot be sure of what will happen to them in a suit overseas, or whether to stay in the US to try to defend against a suit with potentially insurmountable barriers to access to evidence and witnesses, rife with the potential for fraud or abuse of the judicial process.¹²

Thirdly, US courts have rendered personal jurisdiction decisions that are inviting more foreign suits. Perhaps most notably, though it was just reversed by the US Supreme Court, the US Court of Appeals for the Ninth Circuit went so far as to extend personal jurisdiction to claims having virtually nothing to do with the US based in part on a premise that the US has a unique interest in policing alleged international misconduct.¹³ In fact, the US Court of Appeals found that Daimler AG, a German corporation (not licensed to do business in the US), could nevertheless be subject to

10 See, eg, 'Think Globally, Sue Locally', n 1 above, 465.

11 See, eg, *Mejia v Dole Food Co* and *Rivera v Dole Food Co*, Los Angeles Superior Court Case Nos BC340049, BC379820 (17 June 2009).

12 See, eg, *Osorio v Dole Food Co*, 665 F Supp 2d 1307, 1342 (SD Fla 2009) (refusing to recognise \$97 million Nicaraguan judgment issued under a law specially enacted to target foreign defendants: 'The substitution of otherwise generally applicable laws with an oppressive legal regime applying only to a few select foreign defendants is the very antithesis of "basic fairness", as contemplated by the international concept of due process'), aff'd sub nom *Osorio v Dow Chem Co*, 635 F 3d 1277, 1279 (11th Cir 2011) (affirming the district court's refusal to recognise the judgment on the first three cited bases for non-recognition and declining to reach the 'broader issue of whether Nicaragua as a whole "does not provide impartial tribunals"'), cert denied *Osorio v Dow Chem Co*, 132 S Ct 1045 (2012).

13 *Bauman v DaimlerChrysler Corp*, 644 F 3d 909, 927 (9th Cir 2011) ('American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses').

general jurisdiction because an indirect corporate subsidiary distributed Daimler AG-manufactured vehicles in California.¹⁴

Finally, there are several other factors that – though they are becoming more popular overseas as well – also make the US an attractive transnational target, such as the availability of class actions, contingency fees and pre-trial discovery.¹⁵

In contrast, traditional civil law systems provide far fewer incentives to sue than the US common law system. Most civil law countries do not allow punitive damages, they do not have the ATS and the way litigation costs are generally structured is to deter litigation rather than encourage it. The Chilean civil law system provides a good example.¹⁶

First, in most civil law countries, punitive damages may not be awarded. Rather, the amount in controversy is constrained by the harm suffered.¹⁷ Civil law repudiates any form of unjust enrichments,¹⁸ penalties need to be established in the law before the harmful action occurred and monetary penalties are paid to the state, not to the victim. The underlying principle driving the award of damages in civil law is that all harm attributable to another person must be compensated by the one that causes the harm up to the point the victim has been made whole – nothing more.¹⁹ This principle is known as the full remediation principle, which seeks to place the victim in the same position it would be if the injury had not taken place at all. This

14 *Ibid* 931 (holding that, for purposes of establishing general jurisdiction, distributor Mercedes Benz USA, a Delaware LLC with its principal place of business in New Jersey, was the agent of German corporation DaimlerChrysler and thus DaimlerChrysler was subject to general jurisdiction in California based on Mercedes Benz USA's sales of vehicles in California).

15 Jan Wouters, Leen De Smet and Cedric Ryngaert, *Tort Claims Against Multinational Companies for Foreign Human Rights Violations Committed Abroad: Lessons From the Alien Tort Claims Act?* Institute for International Law Working Paper No 46 November 2003 (available at www.law.kuleuven.be/iir/nl/onderzoek/wp/WP46e.pdf).

16 Many Latin American countries have adopted the Chilean Civil Code as their own, which greatly influenced their legal systems. While modern changes in many countries have certainly made each civil law country's legal system unique in its own right, the Chilean Civil Code is still the backbone of many Latin American systems. Francisco Aninat – co-author of this article – is admitted in Chile and practises there.

17 See, eg. Chilean Civil Code, Art 1556: 'Damages are comprised by consequential damages and loss of profits, whether from not having fulfilled the obligation or for having complied with it imperfectly, or for having delayed its fulfillment. This with the exception of cases where law limits expressly to consequential damages.'

18 There are many provisions in the Chilean Civil Code that are an application of the principle that forbids any form of unjust enrichment. One of these provisions is Art 2295, which allows a claim for the reimbursement of what has been paid by mistake.

19 For example, Chilean Civil Code, Art 1558 provides that in the presence of 'malice, [the debtor] is responsible for all the damages that were an immediate or direct result of failure to comply with an obligation or have delayed its compliance'. So, even if the debtor acts with malice, the debtor's responsibility ends with the immediate harm caused – nothing else.

means that damages in civil law systems only comprise losses, such as loss of earnings, property damages and medical expenses or general non-economic damages, such as pain and suffering or emotional distress.²⁰ In other words, the damages are determined by the loss suffered, never by the wrongfulness of the action.²¹ From the traditional civil law perspective, awarding damages beyond the loss suffered would entail an unjust enrichment of the victim as the damages would not go to compensate any harm. So, punitive damages, as a sum exceeding the loss suffered, may not be awarded.

In addition to prohibiting punitive damages, some civil law countries refuse to recognise foreign judgments awarding punitive damages on the basis that such judgments violate public policy.²² And in Chile and several other civil law countries, one of the constitutional guarantees is that all penalties need to be established in the law before the punishable action is perpetrated.²³ This is yet another reason that the imposition of punitive damages, the goal of which is not compensation, is banned.

Secondly, though civil law countries have diverse jurisdictional rules, a law such as the ATS is a rarity, and does not exist in Chile. According to Chilean law, the general rule is that Chilean courts have jurisdiction over the civil torts perpetrated in Chilean sovereign territory by both Chileans and foreigners,²⁴ over the assets located in Chile even if they are owned by foreigners²⁵ and over Chilean nationals with regard to their family relationships even if they are residing outside Chile.²⁶ Also, according to the Chilean rules for assigning

20 For more details on types of damages recognised by Chilean law, see Enrique Barros Bourie, [*Treatise on Torts*] *Tratado de Responsabilidad Extracontractual* (Chile: Editorial Jurídica de Chile 2007), 230 et seq.

21 *Ibid* 158 ('the precise definition of malice has no practical significance as the one it has in criminal law given the equalization civil law makes the effects of malice and gross negligence' for purposes of compensation) (free-hand translation).

22 The problems enforcing punitive damages awards in both France and Germany are well known and serve as a clear example of this point. See, eg, 'Punitive Damages and French Public Policy', available at http://hal.inria.fr/docs/00/32/58/29/PDF/Navoya_University_trois_parties_v._9.pdf.

23 Chilean Constitution, Art 19(3) paras 7–8: 'No crime shall be punished with another penalty than that established by legislation that predates the commission unless the new law is more favorable to the defendant. No law may impose punishment for acts that are not expressly categorized as offenses or misdemeanors by legislation that precedes the act' (free-hand translation).

24 Chilean Civil Code, Art 14: 'The law is binding to all inhabitants of the Republic, even aliens' (free-hand translation).

25 Chilean Civil Code: Art 16: 'Assets located in Chile are subject to Chilean laws even though their owners are aliens and do not reside in Chile' (free-hand translation).

26 Chilean Civil Code, Art 15: 'Chileans will be bound by Chilean laws establishing obligations and civil rights in spite of their place of residency in an alien country: ... (ii) regarding obligations and rights that derive from family relations but only regarding Chilean spouses or relatives' (free-hand translation).

jurisdiction, the general rule is that the Chilean judge with jurisdiction to hear a case is the one corresponding to the domicile of the defendant.²⁷

Thirdly, civil law countries tend to discourage litigation by imposing barriers through filing fees that can be substantially more than those in the US. For example, in Argentina, in some instances filing a complaint might require the plaintiff to pay as much as three per cent of the amount sought in the lawsuit.²⁸ In other countries, such as Chile, legal expenses are almost always paid by each party. The only exception is when one of the parties files a frivolous complaint or defence,²⁹ but even when this happens the valuation of the legal fees and other expenses by the court substantially underestimates the actual payments made by the party.

Thus, a plaintiff's lawyer looking to profit from global litigation is likely to pay more to sue in civil law countries, will not be able to seek punitive damages and will not necessarily have inviting foreign jurisdictional statutes at his or her disposal. Given the substantial cross-border business between the US and Latin America, this makes the US the far more attractive target between the two for multinational suits.

Recent Supreme Court jurisprudence may help restore the global litigation balance

And while these fundamental legal differences cast the US as a particularly hospitable environment for plaintiffs seeking to bring transnational suits, recent Supreme Court jurisprudence may be a first step towards restoring a balance. Two decisions, in particular, merit note in this regard.

First, in *Kiobel v Royal Dutch Shell Petroleum Co.*,³⁰ the Supreme Court held that the ATS presumptively does not apply extraterritorially. Nigerian nationals residing in the US sued Dutch, British and Nigerian corporations pursuant to the ATS, alleging that the corporations aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria.

27 Chilean Organic Code of Courts, Art 134: 'In general, the judge with subject matter jurisdiction to hear and pass judgment on a civil law suit or to intervene in a non-contentious procedure is the one of defendant's or the interested party's domicile' (free-hand translation) Chile has signed the Convention Against Torture and other treaties, but this is, of course, distinct from the ATS.

28 Argentine Law No 23898, Art 2: 'All causes of action, whatever their nature, subject to pecuniary appreciation a fee of three percent (3%)... This fee is calculated on the value of the disputed object that constitutes the claim of the obligor' (free-hand translation).

29 Chilean Code of Civil Procedure, Art 144: 'The losing party in a trial or mini trial will be forced to assume the winning party's legal costs. The court may however waive the obligation when it appears that the losing party had plausible motives to litigate' (free-hand translation).

30 133 S Ct 1659 (2013).

While noting that the ATS was ‘strictly jurisdictional’ and ‘does not directly regulate conduct or afford relief’, the Court held that the statute was nonetheless subject to the canon of statutory interpretation known as the presumption against extraterritorial application. ‘That canon provides that ‘[w]hen a statute gives no clear indication of an extraterritorial application, it has none’,³¹ and reflects the ‘presumption that United States law governs domestically but does not rule the world’.³² The Court noted that international comity concerns ‘implicated in any case arising under the ATS, are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign’.³³ Finding that the ATS did not indicate extraterritorial application sufficient to overcome the presumption, the Court held: ‘there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.’³⁴

While it remains too early to tell exactly how the decision in *Kiobel* will affect ATS suits, and while subsequent lower court decisions indicate a disregard for the force of *Kiobel*,³⁵ the Supreme Court’s holding could – potentially – help rein in the greatest abuses of the ATS and discourage the filing of frivolous ATS suits. By emphasising that the ATS does not provide a mechanism for forcing US courts to entertain suits having virtually no connection to the US, *Kiobel* could somewhat minimise the draw to the US for multinational suits.

Secondly, on 14 January 2014, in *Daimler AG v Bauman*, the US Supreme Court unanimously held that it violates due process for a court to exercise general personal jurisdiction over a foreign corporation with no employees or facilities in the US based solely on the fact that an indirect corporate subsidiary conducts business in the forum state.³⁶ There, plaintiffs argued that Daimler AG (a German corporation) could be subject to suit in California for an alleged wrong that related to an Argentine subsidiary and occurred in Argentina,

31 *Morrison v National Australia Bank Ltd*, 561 US —, —, 130 S Ct 2869, 2878, 177 L Ed 2d 535 (2010).

32 *Microsoft Corp v AT & T Corp*, 550 US 437, 454, 127 S Ct 1746, 167 L Ed 2d 737 (2007).’

33 *Ibid* 1665.

34 *Ibid* 1668.

35 See *Doe v Nestle USA, Inc*, 738 F 3d 1048, 1049 (9th Cir 2013) (‘In light of intervening developments in the law, we conclude that corporations can face liability for claims brought under the Alien Tort Statute, 28 USC § 1350. *Kiobel v Royal Dutch Petroleum*, 133 S Ct 1659, 1669, 185 L Ed 2d 671 (2013) (suggesting in dicta that corporations may be liable under ATS so long as presumption against extraterritorial application is overcome)’); John Bellingier, ‘Undeterred by *Kiobel*, Ninth Circuit Allows *Doe v Nestle* ATS Claims to Continue’, 23 December 2013 (available at www.lawfareblog.com/2013/12/undeterred-by-kiobel-ninth-circuit-allows-doe-v-nestle-ats-claims-to-continue).

36 No 11-965 (14 January 2014) (slip op).

simply because Mercedes-Benz USA, an indirect corporate subsidiary, distributed Daimler AG-manufactured vehicles in California. Though the Ninth Circuit found that there was general personal jurisdiction, the US Supreme Court reversed and rejected the expansive approach to personal jurisdiction: ‘Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority.’³⁷ The Court also explained that ‘[t]he Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. *Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case*’.³⁸ After considering examples from other countries, the Court concluded: ‘Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the “fair play and substantial justice” due process demands.’³⁹

In rejecting this over-expansive approach to the exercise of general personal jurisdiction just two months ago, the Supreme Court took a significant step towards ensuring that actions in US courts have at least some connection to the fora.

Together, *Daimler AG* and *Kiobel* have the potential to help reduce the deluge of transnational suits. And it appears that the US Supreme Court is trying to make clear that already overburdened US courts are not required to entertain multinational suits having little or nothing to do with the US – and in some cases (perhaps many) – they do not have the jurisdictional power to do so.

Foreign judgment recognition and enforcement remains a transnational loophole

If recent US jurisprudence does help discourage the filing of original multinational suits in the US, US-based businesses will nevertheless need to be on guard against foreign judgment recognition and enforcement suits. Indeed, all 50 US states permit the recognition and enforcement of foreign judgments without a treaty, upon the showing of certain conditions. The US

37 *Ibid* 2.

38 *Ibid* 23 (emphasis added).

39 *Ibid* (citations omitted).

has already seen a dramatic increase in foreign judgment recognition and enforcement suits over the past ten years.^{40,41}

Many plaintiffs appear to see recognition and enforcement suits as a vehicle for making an end run around the traditional US trial process.⁴² Instead of engaging in pre-trial discovery and a full US trial on the merits, they file suits asking US courts to domesticate foreign judgments and to treat the factual findings and evidence from the foreign proceeding as the law of the case – often based on little more than proof of the foreign judgment itself.⁴³ If the foreign judgment is the product of fraud, corruption or a breakdown in the rule of law, it presents a grave threat to the US system, but unfortunately it can also be difficult and time-consuming for defendants to reveal the deficiencies in foreign judgments.⁴⁴

For example, a group of US-based lawyers amassed more the \$2bn in Nicaraguan judgments on behalf of Nicaragua residents against a handful of US-based corporations, and began bringing the judgments to be recognised and enforced in the US.⁴⁵ Though the court ultimately concluded that the special Nicaraguan law enacted to govern the lawsuits, which presumed the defendants' guilt, was 'the very antithesis of "basic fairness", as contemplated by the international concept of due process',⁴⁶ it nevertheless took defendants several years to get a ruling denying recognition and enforcement.

In another case, *Bank Mellī Iran v Pahlavi*,⁴⁷ two Iranian banks served the sister of the former Shah of Iran ('Pahlavi') by publication in Iran and obtained default judgments against her totalling \$32m. The banks instituted an action in California to enforce the judgments pursuant to the Algerian

40 Marcus S Quintanilla and Christopher A Whytock, 'The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law' (2012) 18 *Southwestern Journal of International Law* 31, 37.

41 See generally Restatement Third of Foreign Relations Law s 481 et seq; Uniform Foreign-Country Money Judgments Recognition Act, ULA FC Money JMT s 3(a) (2005) (the majority of US states have implemented a version of the Model Act, which permits recognition of foreign judgments without a treaty; those that have not typically have common law recognition and enforcement standards that derive from the Supreme Court's decision in *Hilton v Guyot*, 159 US 113 (1895) or the Restatement).

42 See, eg, *Osorio v Dole Food Co*, 665 F Supp 2d 1307 (SD Fla 2009), aff'd *Osorio v Dow Chem Co*, 635 F 3d 1277, 1279 (11th Cir 2011), cert denied *Osorio v Dow Chem Co*, 132 S Ct 1045 (2012); see also *Bridgeway Corp v Citibank*, 45 F Supp 2d 276, 288 (SDNY 1999), aff'd *Bridgeway Corp v Citibank*, 201 F 3d 134 (2d Cir 2000).

43 See nn 42 above and 44 below.

44 See, eg, William E Thomson and Perlette Michèle Jura, *Confronting the New Breed of Transnational Litigation, Abusive Foreign Judgments* (US Chamber Institute for Legal Reform, October 2011).

45 *Osorio v Dole Food Co*, 665 F Supp 2d 1307, 1312–14 (SD Fla 2009).

46 *Ibid* 1342.

47 58 F 3d 1406, 1408 (9th Cir 1995).

Accords and the California Uniform Foreign Money-Judgments Recognition Act. In response, Pahlavi explained that she ‘could not expect fair treatment from the courts of [the foreign sovereign], could not personally appear before those courts, could not obtain proper legal representation in [the foreign state], and could not even obtain local witnesses on her behalf’.⁴⁸ As the Ninth Circuit explained in denying recognition to the Iranian judgment, ‘[t]hose are not mere niceties of American jurisprudence. They are ingredients of “civilized jurisprudence”. They are ingredients of basic due process’.⁴⁹

Conclusion

In sum, because of its plaintiff-friendly legal system, which is particularly inviting to transnational suits, US courts are likely to continue to see a disproportionate number of transnational suits – whether they are original actions first filed in the US or whether they are presented in the form of requests for recognition and enforcement of foreign judgments. This is particularly true when the alternative fora for the disputes are civil law countries. If US courts respect and implement *Kiobel* and *Daimler AG*, it may help mitigate the influx of transnational suits, but recognition and enforcement reform could become increasingly important.

48 *Ibid* 1413.

49 *Ibid* (citations omitted).