

Human Rights Overseas

Courts have enforced strict gatekeeping function in dismissing suits under the Alien Tort Claims Act.

BY LEE G. DUNST

It is now commonplace for companies with international operations to be drawn into the U.S. courts to resolve commercial disputes arising out of events occurring far beyond the borders of the United States. However, companies increasingly are having to litigate here issues concerning their alleged participation in violations of international law. In recent years, the Alien Tort Claims Act (an obscure U.S. statute that had remained essentially unused for more than 200 years) has been utilized by many non-U.S. plaintiffs to file U.S. lawsuits against companies, alleging that those corporations are responsible for human rights-related violations occurring outside the U.S.

Over the last few months, in particular, there have been several important events in U.S. courts concerning cases under the Alien Tort Claims Act (also known as the Alien Tort Statute or Alien Tort Act), which highlight some important themes in this area and may provide some guideposts for companies facing these lawsuits in the future. For example, the recent, highly publicized \$15.5 million settlement of one such case filed against Royal Dutch Shell concerning its activities in Nigeria may prove to increase the number of such

suits filed in the U.S. At the other end of the spectrum, however, federal courts across the country have issued several key decisions upholding dismissal of cases filed under the act and may provide companies with additional ammunition to fight these suits.

A Law Revived

The act provides U.S. courts with jurisdiction over “any civil action by an alien for a tort, only committed in violation of the laws of nations or a treaty of the United States.”¹ The act originally was targeted at discrete international law violations such as piracy at sea and infringement of the rights of ambassadors and essentially laid dormant since the act became law in 1789. However, the act was revived in the 1980s and 1990s as non-U.S. plaintiffs filed lawsuits in the United States seeking damages against state actors and some individuals for violations of international law occurring outside the U.S., including human rights violations such as genocide, torture and other war crimes. Initially, most of these lawsuits were filed by individual plaintiffs against foreign governments or government officials for their alleged role in human rights violations occurring outside the U.S.

The U.S. Supreme Court weighed in on the scope of the act in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), holding that “the federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted.” The Supreme Court,

however, refrained from explaining what qualifies as an “international law norm,” and, thus, left this issue open for further litigation in the lower courts.

Similarly, the *Sosa* decision left the door open for the potential reach of the act to expand to corporations, as the Supreme Court stated in a footnote that “[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.”² Relying on *Sosa* and its progeny, plaintiffs have asserted a controversial theory for expanded liability, alleging that corporations conspired with or aided and abetted non-U.S. governments perpetrating the alleged international law violations. Approximately 50 cases have been filed under the act in recent years against corporations for their alleged role in human rights violations occurring in numerous countries, including Argentina, China, Colombia, Indonesia, Nigeria, Papua New Guinea, South Africa and Sudan.

Courts and Juries

For the most part, these cases filed against corporations have proven to be dismal failures, as companies sued under the act have many effective defenses available to them. In fact, most U.S. courts have heeded the direction of the Supreme Court that the scope of liability under the act should be limited and, as such, have enforced a strict gatekeeping function in dismissing many of these cases on jurisdictional grounds, such as lack of personal jurisdiction and forum non conveniens. Also, the courts have invoked so-called “prudential” concerns to dismiss

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these cases, such as failure to exhaust local remedies, international comity/abstention, the act of state doctrine (such as deference to legitimate public acts by a government within its territory) and political question doctrine (such deference to the U.S. government regarding foreign relations).

Relying on these gatekeeping doctrines, several federal courts recently have issued important decisions dismissing cases filed against companies under the act. In *Bauman v. DaimlerChryslerAG*,³ the U.S. Court of Appeals for the Ninth Circuit recently upheld the dismissal of a lawsuit against DaimlerChrysler concerning its alleged involvement in Argentina's so-called "dirty war" in the 1970s in connection with a strike at a Mercedes-Benz plant in Argentina. After permitting the parties to engage in limited discovery on jurisdictional issues, the district court dismissed the case due to the lack of personal jurisdiction, and the existence of an alternative forum in Argentina.

On Aug. 28, 2009, the Ninth Circuit upheld the dismissal in a split 2-1 decision, concluding that there was insufficient personal jurisdiction over Germany-based DaimlerChrysler. This decision was not without controversy, as the dissenting judge complained that "[t]he result is to shield foreign corporations from actions in American courts—although they have structured their affairs so as to reap vast profits from American markets—and to deprive plaintiffs, including those who allege grave human rights abuses, of access to justice."

Similarly, on Aug. 11, 2009, the U.S. Court of Appeals for the Eleventh Circuit issued a decision in *Sinaltrainal v. Coca-Cola Company*,⁴ which may prove to have broad implications for the future of cases filed under the act. In this case, plaintiffs alleged that Coca-Cola bottlers in Colombia collaborated with Colombian paramilitary forces in "the systematic intimidation, kidnapping, detention, torture, and murder of Colombian trade unionists." However, the district court dismissed the complaint and the Eleventh Circuit upheld that ruling.

In doing so, the Eleventh Circuit relied extensively upon the Supreme Court's recent *Ashcroft v. Iqbal* decision in addressing the adequacy of the complaint,

which must have "facial plausibility" to survive dismissal, and noted that Rule 8 of the Federal Rules of Civil Procedure demands "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." The Eleventh Circuit then applied the *Iqbal* standard to plaintiffs' conclusory allegations against Coca-Cola and held that they were insufficient to survive dismissal. The use of the *Iqbal* standard to dismiss the *Coca-Cola* case may signal a new era for lawsuits under the act as plaintiffs will be required to plead sufficient facts to form a plausible legal theory.

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Further, even when these cases occasionally survive dismissal, they still have not fared too well with juries at the end of the day. Most recently, in March 2009, a jury in federal court in San Francisco rejected all remaining claims against Chevron Corporation concerning its alleged responsibility for human rights abuses committed by the Nigerian government which allegedly used force to combat an environmental protest against Chevron's oil drilling in Nigeria. After one month of testimony, the jury concluded that Chevron was not liable and that the Nigerian government was responsible for the violent end to the protest.

However, success does not always come fast or easy in these cases. For example, the Chevron case (which ultimately ended with full victory for the company) took nearly 10 years to make its way through the U.S. legal system, with extensive motion practice and complicated discovery preceding the company's ultimate success before a U.S. jury. Similarly, various lawsuits against Royal Dutch Shell alleging liability for alleged human rights violations

committed by the Nigerian government in connection with the company's oil drilling operations had been pending in the U.S. courts from 1996 until the recent settlement in June 2009. Even those recent cases that ended with dismissal, such as the *Coca-Cola* and *DaimlerChrysler* cases, took more than five years to make their way through the U.S. legal system.

Also, the well-publicized and controversial South Africa apartheid litigation highlights the legal and factual challenges to corporate liability under the act. In this case, plaintiffs originally purported to represent "all persons living in South Africa between 1948 and 1994 claiming injury from that nation's system of apartheid" and sought more than \$400 billion in damages from more than 50 well-known international corporations. However, the original complaint included no specific allegations of any actual misconduct by any of these companies, other than the fact that they engaged in trade in South Africa and, according to the plaintiffs, apartheid would not have occurred in the same way in South Africa without the commercial activity of the corporate defendants. For several years, the federal district and appellate courts have been grappling with the breadth of corporate liability under this theory.

Most recently, on April 8, 2009, the New York federal district court issued a decision in the South Africa case, both upholding and limiting the availability of a corporate aiding and abetting theory under the act.⁵ In order to allege an aiding and abetting cause of action, the plaintiff must demonstrate that the defendants gave "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime" and was not "simply doing business with a state or individual who violates the law of nations." Also, the plaintiff must allege that the defendants acted with the requisite mens rea. Thus, to proceed with an aiding and abetting theory in this case, the district court held that plaintiffs must prove both the defendants' actus reus, requiring more than "just business" with the South African government, and mens rea, consisting of knowledge that their actions were contributing to apartheid in South Africa.

In fact, the Second Circuit issued an important ruling on Oct. 2, 2009,

which adds further clarity to the mens rea standards for accessorial liability under the act. In its recent decision in *Presbyterian Church of Sudan v. Talisman Energy Inc.*, the Second Circuit imposed a higher pleading standard, requiring that “the mens rea standard for aiding and abetting liability in Alien Tort Statute actions is purpose rather than knowledge alone.”⁶ In this case, which involves allegations against a Canadian oil company concerning its purported assistance to the government in Sudan in the forced movement of civilians residing near oil facilities, the court concluded that “plaintiffs have not established Talisman’s purposeful complicity in human rights abuses.”

In reaching that conclusion, the Second Circuit stated that “the standard for imposing accessorial liability under the Alien Tort Statute must be drawn from international law; and that under international law a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses.” While this newly articulated standard certainly provides additional clarity for accessorial liability (and provides defendants with additional tools to attack these complaints), this test still may require a highly fact-intensive analysis for the courts to address in the future.

Other Developments

Also, several recent events could have the effect of increasing the number of filings under the act in the future. Most prominent is the June 2009 settlement of long-running litigation against Royal Dutch Shell for alleged complicity in the human rights violations committed by the Nigerian government to quiet environmental protestors opposed to Shell’s oil drilling in the country. After nearly 13 years of litigation, including extensive motion practice and discovery, the parties settled the case on the eve of trial. Shell agreed to pay \$15.5 million to compensate the plaintiffs for their injuries and the deaths of their relatives, while the company maintained its innocence, claiming that it was not involved in the actions that the Nigerian government committed against the plaintiffs and their families. Nevertheless, the Shell settlement certainly may incentivize

plaintiffs to file additional claims under the act in the future.

Also, corporate defendants in the past have effectively defended themselves by pointing to the act of state doctrine, requiring deference to foreign governments which do not want the U.S. courts to assert jurisdiction. This defense, however, needs the foreign government to agree with that view. For example, the South African government had opposed the U.S. apartheid litigation for many years and the federal courts cited this opposition in its decisions. Notably, in September 2009, the South African government withdrew its prior opposition to the U.S. lawsuit and, in a letter to the U.S. judge, noted that the “remaining claims are based on aiding and abetting very serious crimes, such as torture, extrajudicial killing committed in violation of international law by the apartheid regime” and concluded that the U.S. court is “an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law.” As such, the defendants lose a potentially useful tool in seeking dismissal of claims under the act.

Finally, even if a complaint asserting federal claims under the act is dismissed, a plaintiff still could try to pursue similar claims under state law. One example of this strategy is playing out in a case filed against ExxonMobil in federal court in the District of Columbia. The case (which has been pending for more than eight years and been the subject of extensive motion practice) originally was filed under the act, alleging that the company was responsible for abuse and acts of violence by members of the Indonesian military retained by the company. The federal court dismissed the claims under the act, but later permitted the plaintiffs to amend the complaint and totally abandon their federal law claims. Rather, plaintiffs now assert various state law claims, including wrongful death, battery, false imprisonment, negligence and infliction of emotional distress. The case is still pending at this time and may still be dismissed, but this state law route provides eager plaintiffs with another avenue to try to keep alive their claims against corporations regarding alleged violations of international law.

In sum, the trend in the courts has been to dismiss these cases and, as the recent *Coca-Cola* case demonstrates, the

courts are willing to erect high barriers to pursuit of cases. At the same time, there is no indication that new filings are slowing down and the recent \$15.5 million Shell settlement may incentivize plaintiffs to file additional cases in the future. Further, the lengthy time to litigate these cases, including extensive motion practice and jurisdictional discovery as U.S. courts continue to grapple with the appropriate scope of the act, suggests that companies may continue in the future to face U.S. lawsuits seeking to impose liability for alleged complicity in state-sponsored violations of international law occurring far beyond the borders of the United States.

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1. 28 U.S.C. §1350.
2. *Sosa*, 542 U.S. at 732 n.20.
3. ___F.3d___, No. 07-15386 (9th Cir. Aug 28, 2009).
4. ___F.3d___, No. 06-15851 (11th Cir. Aug. 11, 2009).
5. *In re South African Apartheid Litig.*, 2009 WL 960078, *4 (SDNY April 8, 2009).
6. *Presbyterian Church of Sudan v. Talisman Energy Inc.*, No. 07-0016 (2d Cir. Oct. 2, 2009).