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On the Frontier of **Alien Tort Claims**

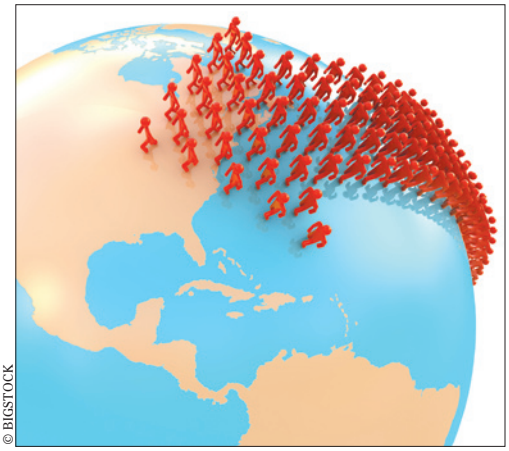
Still fighting long and expensively over corporate liability.

BY LEE G. DUNST

SINCE THE 1980s, civil plaintiffs have attempted to use the Alien Tort Claims Act (act) to hold private corporations responsible in U.S. courts for alleged human rights violations committed abroad. Although courts generally have accepted the theoretical possibility of such corporate liability and sometimes have permitted claims to proceed under an aiding and abetting or conspiracy theory, no corporate defendant to date has been found liable for any international law violations alleged by plaintiffs.

In fact, courts have restricted the use of the act, and numerous cases have been dismissed, often on forum non conveniens or other jurisdictional grounds. However, several cases have gone to trial or resulted in settlement, and eager plaintiffs continue to file new cases under the act, which usually take years to work their way through the courts and impose significant litigation costs on defendant corporations, leading some commentators to refer to this as "the Wild West of transnational tort cases."[1]

The question now is whether the U.S. Supreme Court will step in and reign in the "Wild West" environment surrounding litigation under the act.



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An Old Statute Comes to Light

In 1789, Congress passed the act, creating jurisdiction in federal court over a "very limited category [of claims] defined by the law of nations and recognized at common law."[2]

Under the act, "[t]he district courts shall have original jurisdiction of 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."[3] This grant of jurisdiction originally was aimed at solving the problems of the 18th century, such as international piracy, violations of safe conducts, and infringement of the rights of ambassadors. The act laid virtually dormant for the next 200 years, but several groundbreaking cases in the 1980s expanded the scope of the act, leading to a sharp increase in litigation.

A federal court only can adjudicate an action under the act if (1) a non-U.S. citizen sues, (2) for a tort, (3) committed in violation of the laws of nations or a treaty ratified by the United States.[4] Possible defenses to U.S. jurisdiction over such a claim include lack of personal jurisdiction, forum non conveniens, the political question doctrine, exhaustion of local remedies and international comity.

Beginning in 1980 with the seminal Second Circuit case of *Filartiga v. Pena-Irala*,[5] the courts have broadened the category of claims covered by the act to include alleged human rights violations recognized by international law. However, 14 years later, the Supreme Court in *Sosa v. Alvarez-Machain* limited the category of cases over which the courts have jurisdiction, 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 [the act] was enacted."[6]

However, the Court failed to define an "international law norm," and, as a result, many lower courts have allowed a wide latitude for foreign plaintiffs to continue filing their human rights claims under numerous theories.

Potential Corporate Liability

In *Sosa*, the Supreme Court left open the door to possible corporate liability, when it mentioned 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."[7]

Since then, plaintiffs have rushed in and filed numerous cases against private corporations, usually under a conspiracy or aiding and abetting theory. In turn, this has spawned years of

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extensive and expensive litigation, involving lengthy motion practice and discovery, usually resulting in dismissal of the cases seeking corporate liability.

The courts have found numerous grounds under which to dismiss cases filed under the act. For example, in 2000, former residents of Papua New Guinea filed a class action lawsuit against Australian mining company Rio Tinto PLC, alleging that the company was complicit in alleged international law violations in connection with its mining operations. After numerous lower court decisions and appeals to the Ninth Circuit (including an en banc reversal of an earlier panel decision),[8] the district court recently dismissed most of the case under a prudential exhaustion requirement (to wit, failure to exhaust legal remedies outside the United States), especially when the nexus between the plaintiffs' claims and the U.S. is deemed weak.[9]

However, the district court permitted some of the claims to go forward under the theory that the de minimis nexus to the United States was outweighed by the universal concern of alleged crimes against humanity, war crimes, and racial discrimination. Rio Tinto has appealed the district court's ruling to the Ninth Circuit, and the appeal currently is pending.

In another recent case, Colombian plaintiffs filed suit in May 2009 against Alabama-based Drummond Company Inc., accusing the company of allegedly paying Colombian militias to protect their business interests in Colombia through the alleged use of violence. In April 2010, the district court granted most of Drummond's motion to dismiss, holding that the plaintiffs were required to show that Drummond purposefully assisted the conduct alleged in the complaint.[10] However, the plaintiffs' aiding and abetting claims against Drummond survived the motion to dismiss.

Some cases have been dismissed outright for failure to state a viable claim. In August 2009, the Eleventh Circuit affirmed a dismissal of claims brought by Colombian union leaders and others against Coca-Cola.[11] Plaintiffs claimed that Coca-Cola allegedly collaborated with Colombian paramilitary forces to commit acts of violence against the plaintiffs in retaliation for attempting to unionize. The district court dismissed the claims against Coca-Cola and the Eleventh Circuit affirmed, finding that the plaintiffs failed to show that they had viable claims under the recently heightened Rule 12(b)(6) dismissal standard.

Similarly, in 2009, several plaintiffs brought suit against numerous oil companies, including the El Paso Corporation, NuCoastal Corporation, and Bayoil, alleging that the companies illegally purchased oil from Iraq, and the money derived from those sales had been used by Saddam Hussein to pay suicide bombers and carry out terrorist attacks. The defendants moved to dismiss the claim, arguing that the plaintiffs lacked standing because they could not show that their injuries were fairly traceable to the defendant's actions.

The district court dismissed the claims in their entirety, noting that the suicide bombers made independent decisions to carry out the attacks, and there was no evidence that the attacks would have been prevented had the defendants not allegedly provided money to the Iraqi government.[12]

The district court further stated that the act required plaintiffs to show that defendants "acted with the purpose of assisting terrorists to murder or maim innocent civilians" in order to bring an aiding and abetting claim, and that merely showing a violation of the U.N. Oil-for-Food program was not sufficient.[13] Without this showing of purpose, plaintiffs failed to show a violation of the definite, universally accepted standards of international law. Plaintiffs are appealing the decision to the Fifth Circuit.

Since the 1980s, civil plaintiffs have attempted to use the 1789 Alien Tort Claims Act to hold private corporations responsible, in U.S. courts, for alleged human rights violations committed abroad.

Dismissals and Other Defeats

Sometimes these cases are tossed out because they simply do not belong in U.S. courts.

In 2009, the Second Circuit affirmed the dismissal on forum non conveniens grounds of claims against Coca-Cola that its managers allegedly directed local police to attack a group of workers who were protesting the lack of unions at a plant in Turkey.[14] The Second Circuit held that a dismissal was appropriate because none of the plaintiffs were U.S. citizens, the bottling plant was owned and operated by a Turkish company, and an adequate alternative forum existed in Turkey. Given these factors, the court felt that it was likely that plaintiffs were motivated by forum shopping, and had attempted to gain an advantage by bringing the suit in the United States.

On limited occasion, claims under the act have survived to go to trial, but still with no success. In 1999, Nigerian citizens filed a lawsuit under against Chevron Corporation, alleging that the company aided and abetted the Nigerian government in alleged violations of international law after Chevron allegedly requested assistance from Nigerian military forces to end environmental protests against Chevron's oil drilling.

After years of motion practice and dismissal of most of the claims, the case ultimately went to trial in late 2008 and the jury returned its verdict, relieving Chevron of all liability. Subsequently, the district court denied the plaintiffs' motions for a rehearing and for judgment as a matter of law, finding that "the jury's verdict was not against the clear weight of the evidence."[15] Subsequently, plaintiff appealed and the Ninth Circuit has yet to issue its decision.

Overall, these cases have resulted in only limited success for plaintiffs. For example, in 1996, relatives of murdered environmental activists brought suit against the Royal Dutch/Shell Group, alleging that Shell was complicit in the alleged human rights violations committed by the Nigerian government to quiet environmental protestors opposed to Shell's oil drilling in the country.

After approximately 13 years of litigation and on the eve of trial, the case settled in June 2009, with Shell agreeing to pay $15.5 million to compensate the plaintiffs for their injuries and the deaths of their relatives (while Shell explicitly maintained its innocence, claiming that it was not involved in the alleged crimes that the Nigerian government committed against the plaintiffs and their families). Nevertheless, this settlement certainly incentivized other plaintiffs to continue to bring cases under the act.

As the review of these cases makes evident, litigation under the act takes a very long time and spawns years of expensive litigation.

For example, in a long-standing and free-wheeling litigation in the Southern District of New York, plaintiffs claimed that more than 50 multinational corporate defendants are secondarily liable for aiding and abetting the former apartheid regime

of South Africa for violations of international law. Since the filing of the original complaint in 2002, this case has spawned more than eight years of extensive motion practice in the district and appellate courts (including a certiorari petition to the Supreme Court), as the corporate defendants have fought to get out of the case.

While some defendants have been successful in extricating themselves, the case has continued on for years with extensive and expensive motion practice.

High Court Review Still Lacking

This "Wild West" environment of litigation under the act could be transformed, however, if the U.S. Supreme Court were to step in and grant a certiorari petition. To date, this has not happened.

For example, in 2001, various Sudanese plaintiffs filed suit against Talisman Energy, alleging that the Canadian company aided and abetted the Sudanese government in human rights abuses in order to protect its oil interests. Specifically, plaintiffs alleged that Talisman knowingly provided fuel and runways for the government that was used for bombing raids against civilians.

The district court dismissed the claims, holding that the plaintiffs needed to prove that Talisman assisted the Sudanese government with the purpose of aiding and abetting violations of international law. The Second Circuit affirmed, holding that "the standard for imposing accessorial liability under the act 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."[16]

The plaintiffs have filed a pending petition of certiorari with the Supreme Court to address

(1) whether federal common law tort principles or international law provides the standard for civil aiding and abetting or conspiracy liability;

(2) whether the mental element for civil aiding and abetting liability, under either federal common law or international law, permits liability based on a showing that the defendant knowingly provided substantial assistance to gross human rights violations, or whether a plaintiff must also show that the defendant had the purpose to assist such human rights violations; and

(3) whether plaintiffs may assert conspiracy or joint criminal enterprise theories of liability based on federal common law or international law and, if so, whether in the context of such joint action, plaintiffs satisfy their burden of proof by demonstrating that the defendant knew of an illegal purpose of the joint criminal enterprise and that it was assisting in achieving that illegal purpose.

In turn, Talisman has filed a conditional cross-motion for certiorari, requesting that, if the Supreme Court granted the plaintiffs' petition, it should also decide the threshold issue of whether the act is applicable to corporations. As of the date of this article, this petition is pending.

In another closely watched case, Nigerian plaintiffs brought suit in 2001 against Pfizer, alleging that the company violated international law by allegedly conducting medical experimentation on children with an unapproved drug. They claim that this violated international norms prohibiting involuntary medical experimentation on humans.

The district court dismissed the claims on the grounds that the act did not provide subject matter jurisdiction over the claims because the act does not contain a remedy for medical experimentation claims. The Second Circuit reversed, holding that medical experimentation cases could be enforced through the act.[17]

Pfizer then petitioned the Supreme Court to address (1) whether jurisdiction can extend to a private actor based on alleged state action by a foreign government where there is no allegation that the government knew of or participated in the specific acts by the private actor claimed to have violated international law; and (2) whether, absent state action, a complaint that a private actor has conducted a clinical trial of a medication without adequately informed consent can surmount the "high bar for private causes of action" that the Supreme Court recognized in *Sosa*.

However, much to the chagrin of those looking for clarity in this area, the Court declined to grant Pfizer's certiorari petition on June 29, 2010.

The Future

The act, initially drafted for the limited purposes of protecting ambassadors' rights and combating piracy in the 18th century, has come unglued from its moorings, as it has been used by non-U.S. citizens to sue private corporations for their alleged involvement in overseas human rights violations.

Recently, courts have dismissed most such claims on jurisdictional and other grounds. However, absent intervention by the Supreme Court to bring order to this "Wild West" environment, the act remains an avenue for plaintiffs to hold corporations hostage for alleged international law violations committed by foreign governments, as companies may face lengthy and expensive litigation, trials, and settlements when being sued.

1. Jonathan Drimmer, "Think Globally, Sue Locally," The Wall Street Journal, June 19, 2010.

2. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

3. 28 U.S.C. §1350 (1948).

4. *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 116 (2d Cir. 2008).

5. 630 F.2d 876 (2d Cir. 1980).

6. 542 U.S. at 732.

7. 542 U.S. at 732 n.20.

8. *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 825 (9th Cir. 2008).

9. *Sarei v. Rio Tinto, PLC*, 650 F. Supp.2d 1004, 1032 (C.D.Cal. 2009).

10. *Jane Doe v. Drummond*, 2:09-cv-01041 (N.D. Ala. April 30, 2010), available at http://www.earthrights.org/sites/default/files/documents/4-30-10-Order-MTD-memorandum-opinion-Drummond.pdf.

11. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1257 (9th Cir. 2009).

12. *Abecassis v. Wyatt*, Civ.A. No. H-09-3884, 2010 WL 1286871, at *16 (S.D. Tex. March 31, 2010).

13. Id. at *28.

14. *Turedi v. Coca-Cola Co.*, 343 Fed.Appx. 623 (2d Cir. 2009).

15. *Bowoto v. Chevron Corp.*, No. C. 99-02506, 2009 WL 593872, at *2 (N.D. Cal. March 4, 2009).

16. *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244, 247 (2d Cir. 2009).

17. *Abdullahi v. Pfizer Inc.*, 562 F.3d 163, 168 (2d Cir. 2009).