

The Metropolitan Corporate Counsel®

www.metrocorpcounsel.com

Volume 17, No. 7

© 2009 The Metropolitan Corporate Counsel, Inc.

July 2009

Hot Issues Alerts – Law Firms

The Alien Tort Statute – Corporate Social Responsibility Takes On A New Meaning

Jordan W. Cowman

**AKIN GUMP STRAUSS HAUER &
FELD LLP**

Recently, Corporate Social Responsibility took on a new and enhanced meaning when Royal Dutch Shell settled with the plaintiffs for over \$15 million in an Alien Tort Statute (ATS) lawsuit filed in New York federal court. Businesses with operations, suppliers or other dealings with the developing world are prime targets for ATS lawsuits, and had better sit up and take notice of this increasingly popular theory of recovery. This is the second significant public settlement to end this type of litigation, which, as defendants find, is controversial and very expensive.

On June 6, 2009, while maintaining that the allegations were false, Royal Dutch Shell agreed to pay \$15.5 million to settle an ATS lawsuit brought in New York federal court, based on Shell's alleged wrongdoing in Nigeria. In a nutshell, that lawsuit, filed in 1996, alleged that Shell was complicit with the government of Nigeria in some tragic events, including the brutal execution of Ken

Jordan W. Cowman is a Partner in the Dallas, Texas, office of Akin Gump Strauss Hauer & Feld LLP. He specializes in international labor and employment law and counseling on employment litigation, international public policy, cross-border matters and corporate compliance.



Jordan W. Cowman

Saro-Wiwa, a human rights activist who was involved with a protest movement against environmental and other injustice there. From the beginning, Shell vigorously defended itself, maintaining that it had no part in the violence and refuting what it said were false allegations. The New York district court ruled for the plaintiffs on a number of key pre-trial issues. After 13 years of battling in court, which resulted in a 91-page docket sheet and what had to be a very significant bill for legal fees and costs, the parties settled the case for over \$15 million. Where did the \$15+ million go? *The Wall Street Journal* reported that "... \$5 million of the settlement amount would go into a trust fund for the Ogoni people and the balance to lawyers' fees and the 10 plain-

tiffs who brought the case."

Is your business going to be the next ATS defendant? If your business is high profile and does business in the developing world, the safe answer is "yes." Increasingly, transnationals can be made to answer in the U.S. for "aiding and abetting" human rights violations by foreign governments, even where the transnational is engaged in ordinary, lawful commercial transactions. This type of litigation appears to be well coordinated among a select group of clever, talented and entrepreneurial plaintiffs' counsel. And this latest \$15+ million settlement is just the tonic the plaintiffs' bar needed to energize them to file more of these claims.

The Alien Tort Statute – A Brief History

The ATS was enacted by the first Congress in 1789 and is codified at 28 U.S.C. §1350. It is written simply and concisely: "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." The ATS, originally intended to address piracy on the high seas and resolve offenses against ambassadors, lay nearly dormant for about two centuries. Then, in 1980, the case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), resurrected the ATS, which now has become a viable way to sue transnational businesses in U.S. federal courts for heinous acts conducted in other parts of the world.

In *Filartiga*, the plaintiff's son

Please email the interviewee at jcowman@akingump.com with questions about this interview.

allegedly was kidnapped and tortured to death in Paraguay by defendant Pena, who was then Inspector General of Police in Asuncion, Paraguay. Defendant Pena later made his way to the U.S. Filartiga's relatives, upon realizing Pena was in the U.S., served Pena with a lawsuit filed pursuant to the ATS. Although the district court did not see the connection, the Second Circuit Court of Appeals reversed the district court's dismissal of the complaint for want of federal jurisdiction. Over the next 30 years, using the ATS to sue businesses for employment practices and human rights abuses abroad has gained increasing legitimacy as more courts follow the path blazed by the Second Circuit, and thereby allow the claims to proceed.

Filartiga captured the attention of human rights lawyers and non-governmental organizations which have filed dozens of lawsuits against U.S. businesses, with claims ranging from genocide and torture to rape, murder and torts of varying natures. The alleged crimes have no connection to the employees of the transnational business. These civil actions often seek to hold transnational businesses liable for alleged violations perpetrated by governments and militaries which cannot be held accountable in another forum. These lawsuits claim that the transnational business is complicit in the human rights abuses because they knew or should have known of them and they somehow benefited from the alleged criminal acts by foreign governments and military organizations.

Another recent case example is *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002), where plaintiffs brought suit against Unocal in California under the ATS and state laws on behalf of Burmese citizens, claiming that Unocal's business dealings in Burma led to its being complicit with the Burmese military in committing heinous human rights abuses in that Unocal knew or should have known about such abuses. After years of procedural wrangling in the California state and federal court systems, the Ninth Circuit held that Unocal could be subject to liability for such abuses, and agreed with the plaintiff's lawyers that Unocal should be made to stand trial. *Doe v. Unocal* settled in December, 2004 for an undisclosed sum.

Unforeseen Consequences Of Alien Tort Statute Claims

Plaintiffs' lawyers and human rights activists see great promise in the ATS as a means to combat human rights abuses around the world. But U.S. businesses trying to provide jobs and financial opportunities in difficult locations see the potential misuse of the ATS against businesses who have no legal authority to combat local policies and whose foreign-based competitors can do business there with impunity. Activists are using the ATS to punish the very U.S. businesses whose presence may be the best way to introduce improved domestic policies and may ultimately be doing more harm than good.

As the jurisdictional lid is off the ATS cookie jar, the ATS has been rediscovered, and its power is being systematically unpacked by the plaintiffs' bar. Use of the ATS as a sword against transnational businesses is becoming a significant consideration in deciding where to invest and do business around the world. ATS litigation deters U.S. investment in, and trade with, the very countries most needing the inflow of foreign capital and ideals, a result that should not be underestimated.

The lure of lucrative settlements now makes the ATS a vehicle for abuse in the hands of overzealous plaintiffs' lawyers. ATS claims likely will increase markedly. Furthermore, defendants will feel increased pressure to settle as U.S. courts become more amenable to allowing ATS claims to proceed. While there are varied reasons to settle litigation, a defendant facing the prospect of a decade or more litigating, extensive world-wide discovery and seemingly endless procedural motions, coupled with the likely prospect of negative and graphic publicity campaigns, has ample incentive to settle even the most dubious claims. Defending against actions allegedly committed by foreign governments or militaries that occurred thousands of miles away from the U.S. court deciding them is no small matter. Even if the claim can be defeated at trial, a defendant will have to weigh the costs of attaining that result against the legal fees and negative publicity that accompany this type of litigation.

To date, no court has yet held a U.S. transnational company liable under the ATS. But with success measured by

increased court acceptance of these cases and the prospect of a generous settlement, the plaintiffs' bar surely will keep trying. Moreover, the plaintiffs' bar is getting cleverer by the minute, carefully tuning-up litigation strategy with each successive court ruling. It is a matter of time before we have an ATS jury verdict for the plaintiff, which will intensify the pressure to settle ATS claims. Now more than ever, transnational companies doing business in or with developing countries must add the risk of ATS litigation in the U.S. to the expected uncertainty associated with investment and trade in any country with human rights issues, even where U.S. foreign policy expressly encourages and incentivizes investment.

The *Doe* and very recent *Wiwa v. Shell*, 2009 U.S. App. LEXIS 11873, June 3, 2009 (2d Cir.), cases (and confidential settlements of other ATS cases) prove one thing: in addition to publicity and other types of campaigns by various non-governmental organizations against international businesses, transnational businesses can be brought into U.S. courts and made to defend themselves against alleged human rights abuses committed by foreign governments and militaries.

The threat of protracted, costly litigation adds to the political pressure brought against companies doing international business. Rather than being heralded as the purveyor of Western values and significantly improved opportunities, transnational companies doing business in these locations may now be vilified in U.S. district courts as well as the court of public opinion.

Human rights abuses are not acceptable. However, if transnational companies bring jobs and wages to people who are otherwise abused by their government and local military, should those companies be held accountable for the abuses going on around them? In the end, such litigation may prove more costly than is measured by the enormous sums of money spent litigating and settling. Even where companies have been vindicated in trial, what about the damage to the company's reputation and the economic cost? If U.S. businesses withdraw from the developing world, in part as a result of ATS litigation, the local citizens will be left more vulnerable than they would be if they were working.