Win or Lose in Court

Alien Tort Claims Act Pushes Corporate Respect for Human Rights. BY BILL BAUE

IT’S A LAW THAT’S BEEN on the books since 1789 — a law that has the potential to dramatically increase corporate accountability for human-rights abuses. But, amazingly, some 200 years later, we know very little about how courts will interpret the Alien Tort Claims Act (ATCA) in cases against corporations. Is it the silver bullet human-rights activists hope for — or just a weak weapon, as some multinational corporations might want to believe?

“I think ATCA is the only effective tool out there right now for advancing corporate respect for human rights, and I think it will continue to be a very effective tool,” says Terry Collingsworth, executive director of the International Labor Rights Fund. “We spent years negotiating with companies, working on voluntary codes, and at the end of the day, the companies viewed those as public relations devices.”

Collingsworth’s view has yet to be validated by the courts. Of the 36 corporate ATCA cases brought over the past 13 years, 20 have been dismissed (three quarters of these on substantive legal grounds and one quarter on procedural grounds). Three have been settled out of court and 13 are ongoing. In other words, not a single company has yet to lose — or win for that matter — a single ATCA case.

ATCA first surfaced on the corporate front in 1993, when Cristóbal Bonifaz and fellow lawyers filed the first ATCA case against a company, Texaco (now owned by Chevron). Since that time, businesses linked to human-rights abuses around the globe have been vulnerable to being labeled hostis humani generis — “an enemy of all mankind.” This characterization harkens back to the 1980 judgment in the Filártiga v. Peña-Irala case, which exhumed from obscurity the 1789 ATCA law (intended to curb piracy on the high seas by extending U.S. jurisdiction to cover breaches of international law outside its borders) and applied it to human-rights violations abroad.

Companies Winning Legal Skirmishes While Losing Moral Battles

From the broader perspective of “moral liability” (a term coined in a 2004 report by the United Kingdom think tank SustainA bility), companies can “win” the legal battle but “lose” in the court of public opinion. This is because ATCA lawyers seek not only to advance the human rights of their individual plaintiffs, but also to publicly expose corporate complicity with human-rights abuses as a way of forcing companies to improve their procedures.

Collingsworth also sees the public relations value of ATCA cases to help force companies to truly respect human rights. He partnered with Bonifaz to file the second corporate ATCA case in 1995, Doe v. Unocal, arguing the company commissioned Burmese soldiers to protect its Yadana gas pipeline, with knowledge that they forced labor and committed murder and rape. While
Bonifaz argued in the 1993 *Aguinda v. Texaco* case that environmental pollution from three decades of corporate oil exploitation *in effect* violated the human rights of Ecuadorian villagers, the Unocal case focused squarely on clear human rights abuses.

Neither case has been won or lost in court. Jurisdiction for the *Aguinda* case was transferred to Ecuador, where it is currently on trial (though no longer under ATCA). Unocal settled in 2004, reportedly for millions of dollars (although the terms were not disclosed). While that sum may seem like chump change to a multinational corporation, it appears that those companies challenged by ATCA cases continue to pay more dearly in non-financial terms.

**ATCA Litigation:**
**Reputation and Rectification**

"Frankly, the greatest risk to companies facing ATCA litigation is reputational," says Phil Rudolph of corporate social responsibility consultancy the Ethical Leadership Group and former international general counsel for McDonald's. "The truth or falsity of the claims against Unocal was never established, because the case never went to trial, but in the court of public opinion, Unocal suffered mightily by the steady drumbeat of stories about the pending litigation."

"However, I'm not confident that ATCA cases are, in fact, advancing corporate human rights policies and practices to any great extent," says Rudolph. "I believe that litigation is a profoundly inefficient and ineffective tool for addressing and resolving challenges of this nature."

Rudolph thinks that smart companies are improving their performance on human rights independent of potential ATCA liability, and the ATCA is too obscure and poorly understood to inspire action from less forward-thinking companies. Indeed, the 2004 U.S. Supreme Court decision in *Sosa v. Alvarez-Machain* clearly validated ATCA for individuals, but only addressed companies in a footnote that left the status of corporate ATCA cases frustratingly unresolved.

On the other side, Collingsworth sees ATCA as a means to an end, and hopes to curtail filings when he can start achieving the objective outside the courtroom.

"We're asking, 'How many ATCA cases do we have to bring until we have the track record to make a credible threat that if companies don't clean up their acts, we are going to sue them?"' says Collingsworth, who has filed ATCA cases against the likes of Coca-Cola, Wal-Mart, and ExxonMobil.

"Our endgame is to have corporations stop violating human rights in their foreign operations," Collingsworth concludes.  

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