

DC Court of Appeals Reinstates Alien Tort Statute (ATS) Claims Against Exxon Mobil for Complicity in Extraterritorial Acts Raising Policy Considerations for Multinationals

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View the opinion - <http://1.usa.gov/pE1M2r>

Corporate social responsibility (CSR) in the context of human rights due diligence, and the correlative financial performance of multinationals, was made a more nuanced policy consideration by another Court of Appeals decision.

On Friday, July 8, 2011, the U.S. Court of Appeals for the District of Columbia Circuit, reinstated a lawsuit by Indonesian villagers that seeks to hold Exxon Mobil Corp. liable for alleged killings and torture committed by Indonesian soldiers guarding its natural gas operations in the country's Aceh province. In its 2 to 1 decision, the Court delineates its rationale and position vis-à-vis the New York Circuit Court of Appeals opinion which reached an opposite result on the ATS claims:

For the reasons that follow, we conclude that aiding and abetting liability is well established under the ATS. We further conclude under our precedent that this court should address Exxon's contention on appeal of corporate immunity and, contrary to its view and that of the Second Circuit, we join the Eleventh Circuit in holding that neither the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations. (p. 3).

The split between the circuits likely presages that the issue will be addressed by Congress or the U.S. Supreme Court.

The other holdings of the decision included affirming the dismissal of the plaintiffs-appellants' Torture Victim Protection Act claims and a reversal of the dismissal of the plaintiff-appellants' non-federal tort claims, which, along with the ATS claims, were remanded to the district court.

Policy Implications

The import of the current decision is one of policy considerations for American multinationals, which is to say, the issue is one of risk management hedging strategies: will individuals and or NGOs pursue claims against individual executives or not? Will multinationals indemnify those executives or not? Finally, how can this litigation risk be prioritized against other risks stemming from the same facts?

Ultimately, if corporations cannot be sued under the ATS in U.S. courts (as they cannot be prosecuted by the International Criminal Court), the risk analysis turns on the question of indemnification of executive employees. As Raymond M. Brown, Chair of the White Collar, Corporate and International Human Rights Compliance Group has written recently and prior to the decision in the present case: "At the present time, whether you can sue a corporation in US federal courts for human rights violations committed abroad depends on where in the US such a case is filed as the Circuit Courts of Appeal are "split" on this issue. **However, there is no dispute that individuals, including corporate executives, may be sued under the ATCA [a/k/a, ATS].** [emphasis added]."

At the end of the day, whether or not corporations can be sued in U.S. courts under the ATCA/ATS, brand damage suffered from the reaction of stakeholders (investors, customers, and employees, among others) to a human rights allegation, justiciable or not, may be equally as important a risk consideration for executives. In what has been termed a "virtuous circle", CSR has been positively linked with corporate financial performance. While it is beyond the scope of this Alert to frame the many implications of brand damage springing from ill repute, the globalization of our society ensures that significant negative financial impacts would likely spring from reputational harms based on human rights due diligence missteps.

In a sense, comparing the potential magnitude of harm from a federal court decision versus other mishaps, such as an SEC violation of the Dodd-Frank requirements for conflict minerals in one's supply chain versus a well documented and reported human rights violation, is a nearly impossible feat unless one comprehends that each of those categories of risk are underscored by reputational or brand damage. In that light, whether corporations can be sued in U.S. courts is almost in consequential; while the timing of the financial impacts may be different by category of misstep, the financial result of a well documented human rights violation by a prominent brand would be the far greater risk. In a WSJ article by John Bussey on June 3, 2011 entitled, "Measuring the Human Cost of an iPad Made in China", Bussey frames the issue this way with regard to the explosion killing three people at a Chinese Foxconn plant where iPads are manufactured: "If the body count had been 103 instead of three, global public opinion would have been more mightily stirred. And in that instance, an arm's length would have proved little protection for the company and its brand." Apple's brand value is estimated at \$153 billion.

To read more about the business implications of human rights due diligence, a link to Raymond M. Brown's memorandum, *Assisting Business Leaders in Meeting the "Corporate Responsibility To Respect Human Rights"* may be found at this link: <http://bit.ly/ozf2BU>

Published Articles (Cont.)

To read Mr. Brown's article on the BP disaster, "**BP Executives' Human-Rights Miscalculation: Have They Bet the Company?**", originally published by *DiversityInc.*, [click here](#).