

## Courts mixed on foreign claims

**Suits under the Alien Tort Claims Act could threaten international operations.**

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Despite the US Supreme Court's effort to clarify the Alien Tort Claims Act (ATCA), the divergence between lower courts interpreting the law continues to expand. While some courts have construed the ATCA narrowly, limiting the cases that can be brought, others have interpreted the Act broadly, recognizing novel claims and theories of liability. Emblematic of that schism are two cases decided this summer, one filed in New York involving an energy company's role in oil development in Sudan, and one in California involving Papua New Guinea mining operations. These ATCA cases, and others like them, continue to necessitate especially careful forethought for oil and gas companies in their overseas operations.

The ATCA has been part of US federal law since 1789. It permits aliens to file civil lawsuits in the United States for discrete wrongs — "violations of the law of nations," which in 1789 meant piracy, ambassadorial attacks, and safe conducts violations. Because the reach of international criminal law traditionally has been restricted to misconduct by states or state officials, acts under the ATCA must be committed in connection with some kind of governmental authority; namely, misdeeds by government agents or private actors acting with the imprimatur of government power.

For nearly 200 years, this narrow law remained dormant. In 1980, it was revived in a landmark case. The plaintiffs, Paraguayan citizens, filed suit in New York under the ATCA against a Paraguayan police official for acts of torture and murder in Paraguay. The lawsuit thus had no US link; the acts were committed abroad, by a non-US citizen, against a non-US citizen. When the lawsuit was permitted to proceed, there was an ATCA explosion. Scores of multi-million dollar lawsuits were filed against individuals and corporations — including particularly oil, gas and other extraction companies — based on a variety of foreign actions often bearing little relationship to the "law of nations" as understood in 1789 or today.

In 2004, the Supreme Court stepped in to try and restore order to the ATCA chaos. The Court urged judges to exercise restraint in recognizing new ATCA claims. Though it did not limit the act to violations accepted in 1789, it declared that the ATCA would apply to "a narrow set" of international harms

that are “obligatory and universal,” and defined with specificity.

Unfortunately, the court’s attempt to clarify and limit the ATCA has done neither. In cases involving oil and gas companies, lower courts have squabbled in deciding whether certain widely recognized international claims fall under the ATCA. Likewise, some courts have rejected ATCA lawsuits outright, declining to intrude into the affairs of foreign countries; others have not hesitated to let such cases proceed. Some courts have taken a hard line regarding theories of liability, like when a parent company is liable for a subsidiary’s acts; others have taken a more lenient approach.

Two major decisions, issued in August and September, exemplify this disorder. In *Sarei vs. Rio Tinto*, residents of the island of Bougainville filed suit in California, claiming Rio Tinto is guilty of environmental devastation and racial discrimination in conducting its mining operations, and war crimes and crimes against humanity for acts of the Papua New Guinea military committed at the company’s implied behest. The trial court dismissed the case after the US government opposed it, citing concerns about disrupting a peace process in Bougainville. The court of appeals reinstated the suit and allowed most of the claims to proceed, including marine pollution under a United Nations convention — though prior decisions consistently have rejected ATCA environmental claims, and the court failed to indicate what provisions of the convention may have been breached, much less explain how they are universal or specifically defined as the Supreme Court mandated.

That permissive approach to the ATCA contrasts starkly to *Presbyterian Church of Sudan vs. Talisman Energy*, a September decision. The plaintiffs claimed Talisman, in developing oil operations in Sudan, conspired with the Sudanese government to wrongfully clear civilian areas, constituting genocide, crimes against humanity and war crimes. The court rejected the conspiracy theory — though other courts have recognized it — and found Talisman’s decision to engage in oil explorations could not by itself constitute knowing encouragement of improper government acts.

These two decisions readily show the ongoing lack of consistency among courts confronted with ATCA claims. One court broadly construed the law, recognizing a novel claim of marine pollution despite other courts’ consistent rejection of ATCA environmental claims and a plea by the US government that the case be dismissed. The other interpreted the ATCA narrowly, denying a legal theory that other courts have embraced and refusing to find that corporate decisions alone constitute complicity in government misconduct.

For oil and gas companies, and other multinational corporations, such inconsistency provides little comfort. Conduct may or may not be cognizable under the ATCA. Acts of a foreign subsidiary may or may not be attributable

to a parent company. Interactions with foreign government officials may or may not create vicarious liability for government misdeeds, or turn acts of employees into government conduct.

In the face of such uncertainty, careful planning and heightened attention to ATCA concerns becomes paramount. Relationships with and control over subsidiaries should be reviewed carefully. In contracting with government entities, companies must delineate respective roles and responsibilities, incorporate provisions demanding compliance with pertinent domestic and international laws, and insulate themselves from transgressions of government officials over whom they have no control for acts they never would encourage. Most important, companies cannot turn a blind eye to wrongs done on their behalf by employees or government officials, but must establish meaningful oversight and compliance mechanisms to discourage and investigate potential offenses — important inside and outside the ATCA context.

Through such planning, supervision, and attention to corporate responsibility, the hazards posed by an uncertain ATCA landscape can be minimized. The lack of unambiguous ATCA expectations, while perhaps unsettling, can reasonably be obviated as a practical matter. Thus, although ATCA uncertainties may continue to grow, corporate exposure need not.