CHAPTER 8

US Litigation Update

JENNIFER GREEN AND PAUL HOFFMAN*

[Editor's Note: The following chapter presents a number of lawsuits in the US against MNCs, based on alleged violations of international law. One significant addition to this list is the lawsuit *Bowoto et al.* v. *Chevron*, filed in the San Francisco federal district court in the Northern District of California. The lawsuit, claiming Chevron oil company has violated international human rights standards by its alleged role in the killing of several Nigerian protestors, will proceed in US federal court despite the company's move to transfer the case to Nigeria.

The claim, brought under the Alien Tort Claims Act, was filed by the Center for Constitutional Rights on behalf of Nigerians who were injured while protesting the company's activities in the oil-rich but impoverished Delta region. On may 25, 1998, over 100 activists took over Chevron's Parabe off-shore oil platform. The ensuing stand off, which lasted for four days, only ended when members of the notorious Nigerian security forced, The Mobile Police, landed on the platform on Chevron transports. In the ensuing melee, two activists were killed and several were injured.

US District Judge Charles Legge rejected Chevron's argument that Chevron's California-based parent company could not be held responsible for the activities of its Nigerian subsidiary. However, Judge Legge did not address the substance of the allegations against Chevron. A motion to dismiss the case by Chevron is likely to be heard in the late Spring or Summer of 2000.]

* Jenifer Green is with the Center for Constitutional Rights. Paul Hoffman is with the law firm of Postwick & Hoffman, and is a member of the International Executive Committee of Amnesty International.

 | DOI:10.1163/9789004482678_010

1 CASES AGAINST CORPORATIONS

Doe v. Unocal, 963 F.Supp. 880 (C.D. Cal. 1997), *NCGUB v. Unocal*, 176 F.R.D. 329 (C.D. Cal. 1997)

These cases have been in an intensive discovery phase, including numerous depositions in the United States and Asia. For months the parties and the Court struggled over the terms of a Protective Order that would govern the defendants' use of plaintiff identifying information in their investigation because of the security risks to the plaintiffs. These issues, and issues regarding the scope of privileges in discovery have taken a prominent role in the litigation of the case. The District Judge has dismissed the giant French oil company Total from the *Doe v. Unocal* case for lack of personal jurisdiction and this decision has been appealed.

The Court had stated that it wants most of the discovery completed by September 1999 and for a hearing on expected summary judgement motions to be set in December 1999. The trial is scheduled to start in the late spring of 2000.

Wiwa v. Royal Dutch Petroleum (Southern District of New York)

This case charges Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell) with complicity in the November 10, 1995 hanging of Ken Saro-Wiwa, John Kpuinen, two of nine leaders of MOSOP (Movement for the Survival of the Ogoni People), the torture and detention of Owens Wiwa, and the wounding of a woman who was peacefully protesting the bulldozing of her crops in preparation for a Shell pipeline, who was shot by Nigerian troops called in by Shell. The case was brought under Alien Tort Claims Act and alleges violations of the Racketeer Influenced and Corrupt Organizations Act (RICO).

Defendants moved to dismiss both the initial and the amended complaints on the grounds of lack of personal jurisdiction over Royal Dutch/Shell, *forum non conveniens* (defendants argued that the case should be heard in the Netherlands or England), and lack of subject matter jurisdiction (defendants argued, *inter alia,* that ATCA did not apply to a corporation and that the claim was precluded by the political question and act of state doctrines, as well as Nigerian law on corporate liability). The court then ordered preliminary discovery on the question of personal jurisdiction over the corporation.

Final briefing on the motion to dismiss was completed at the end of September and the motion was argued December 5, 1997. On March 31, 1998, Magistrate Judge Henry Pitman recommended that the Court grant defendants' motion to dismiss (1) for lack of personal jurisdiction and (2) pursuant to the doctrine of *forum non conveniens*. Both parties filed timely objections to those portions of the Magistrate Judge's Recommendations and Report with which they disagreed. On September 25, 1998, Judge Kimba Wood concluded that personal jurisdiction was appropriate in New York, but adopted and accepted the Report in concluding that defendants' motion to dismiss should be granted for *forum non conveniens* and that England was a more convenient forum.

Plaintiffs filed a Motion for Reconsideration of the dismissal for *forum non conveniens*, arguing that the Court failed to impose the conditions necessary to ensure that an adequate forum against all defendants was available and that *forum non conveniens* dismissal of their claims brought under the Alien Tort Claims Act was inappropriate.

Plaintiffs' Motion for Reconsideration was granted in part but denied in part. The Court granted plaintiffs' motion solely to the extent that it imposed the following conditions on its dismissal for *forum non conveniens*: that defendants consent to service of process, comply with all applicable discovery rules, consent to pay any judgement rendered, waive any security bond that might be required and waive any statute of limitations defence if the action is committed within one year of the final disposition of this matter. The Court denied plaintiffs' motion to condition dismissal on defendants' waiver of procedural doctrines that plaintiffs argued could preclude plaintiffs from any remedy before English courts.

The Court further denied plaintiffs' motion for reconsideration made in light of a Second Circuit October 5, 1998 decision. In *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998). Plaintiffs argued that the District Court should determine that a *forum non conveniens* dismissal is inappropriate in this action brought under the Alien Tort Claims Act, and that a dismissal in this case would vitiate Congressional intent. Plaintiffs have appealed the ruling; defendants have cross-appealed the ruling on personal jurisdiction. The briefing will be completed by June 1999.

The plaintiffs are represented by Center for Constitutional Rights, and attorneys Julie Shapiro, Paul Hoffman, Lee Crawford Boyd, and Jody Kelley, Alex Ward and Greg Lisa of Jenner & Block.

Doe v. Gap, Civ. 99-329 (filed C.D. Cal. January 13, 1999)

Class action lawsuit challenges garment production system on US soil based upon peonage and involuntary servitude, and violations of the rights of women, under which tens of thousands of foreign guest workers work for unfair wages in unlawful sweatshop conditions in the Commonwealth of the Northern Mariana Islands. The defendants are garment contractors and retailers and manufacturers of the CNMI-manufactured garments sold in the U.S.A.: The Gap, Inc., The Associated Merchandising Corp., Cutter & Buck, Inc., Dayton-Hudson Corp., J.C. Penney Company, Inc., J. Crew

Group Inc., Jones Apparel Group, Inc., Lane Bryant, Inc., The Limited, Inc., The May Department Stores Company, Nordstrom Inc., Oskosh B'Gosh, Inc., Sears Roebuck and Company, Tommy Hilfiger USA, Inc., Wal-Mart Stores Inc., Warnaco Group Inc., American Pacific Textile, Inc., Concorde Garment Manufacturing Corp, Diorva Saipan Ltd. Global Manufacturing Inc., Hansae (Saipan), Inc., Marianas Garment Manufacturing, Inc., Micronesian Garment Manufacturing Inc., Mirage (Saipan), Inc., Top Fashion Corp., United International Corp, U.S. CNMI Development Corp. The complaint alleges violations of the Alien Tort Claims Act, the Racketeer Influenced and Corrupt Organizations Act ('RICO') and torts actionable under the federal indentured servitude and anti-peonage statutes and state common and international law.

The case was brought by the law firms of Milberg, Weiss, Bershad, Hynes & Lerach; Altshuler, Berzon, Nussbaum, Berzon & Rugin, Galloway & Associates, and Bushnell, Caplan & Fielding, LLP.

Two related cases were filed in 1999, one under the Fair Labor Standards Act in federal court and another in state court by Global Exchange, Sweatshop Watch and UNITE charging unfair business practices under California Business and Professions Codes. (*Union of Needletrades Industrial and Textile Employees v. The Gap*, 300474, plaintiffs alleged clothing retailers including The Gap Inc., Tommy Hilfiger and J. Crew deceived the public about labour abuses at their Saipan factories and that the manufacturers clothes are mislabelled. For more information, see www.saipan.com.

Eastman Kodak v. Kavlin, 978 F. Supp. 1078 (S.D.Fla. 1997)

Eastman Kodak employee Juan Jose Carballo brought suit against Kodak subsidiary Casa Kavlin and one of its officers, Susuana Kavlin. Carballo claimed that false criminal charges were brought against him and that he was maltreated and arbitrarily detained for eight to ten days in Bolivia. The defendant filed a motion to dismiss the complaint on the grounds of lack of personal jurisdiction, *forum non conveniens* and failure to state a claim under Bolivian law and the Alien Tort Claims Act.

The district court rejected this motion. The court's opinion contained a detailed analysis of arbitrary arrest and detention and held that those who conspire with state actors are liable. An evidentiary hearing on personal jurisdiction was held and the corporate defendant was dismissed. The case against Susana Kavlin proceeded. On February 12, 1998, a Bolivian court entered a final judgement against Eastman Kodak and awarded damages to the plaintiff Casa Kavlin, S.A., the former defendant in the U.S. action. In March 1998, defendants moved for leave to amend their answer and affirmative defences, adding the affirmative defence of collateral estoppel. The court rejected this motion because of 'the current state of the judicial system and Defendant's alleged influence over litigation in Bolivia'. The case recently reached a successful settlement for plaintiffs; the terms of the settlement are undisclosed.

Beanal v. Freeport-McMoran, 969 F. Supp. 362 (E.D. La. 1997)[1]
Plaintiff Tom Beanal, Indonesian citizen and member of Amungme tribe, filed class action against Freeport McMoran for cultural genocide, human rights violations and environmental torts for open pit copper, gold and silver mine at the Grasberg Mine in Indonesia. On April 10, 1997, the court ruled that the plaintiff had standing to allege cultural genocide of the Amungme tribe, certain human rights violations and environmental torts, but stated that plaintiff should amend the complaint. 969 F.Supp. 362 (E.D. La. 1997)). Defendants' motion to strike the second amended complaint was granted on August 7, 1997 for failure to state a claim, 1997 U.S. Dist. LEXIS 12001. On March 3, 1998, the court granted defendant's motion to strike the third amended complaint and dismissed with prejudice plaintiffs's claims. Plaintiffs appealed to the Fifth Circuit. Briefing was completed in January 1999. Plaintiffs are represented by Martin Regan, Regan & Boishea, a New Orleans law firm.

Amici curiae were filed by EarthJustice and EarthRights International arguing environmental human rights violations constitute customary international law violations. The Center for Constitutional Rights, Center for Justice and Accountability and Four Directions Council filed an *amicus* arguing that the court erred in its ruling on genocide, failing to properly analyze the standards for cultural genocide and ignoring customary international law which provides a right to culture.

Alomang v. Freeport-McMoran, 97-1349; 718 So. 2d 971 (La.App. 4 Cir, 1998)
Yosofa Alomang brought a class action in state court of Louisiana charging state torts related to cultural genocide and environmental violations. A March 1998 appellate ruling reversed the lower court dismissal, rejecting defendants' arguments that there were no state law violations alleged, that the defendants was a separate legal entity from the corporation in Indonesia, that the Act of State doctrine precluded the claims and that the Indonesian government was an indispensable party. The case was remanded for further proceedings consistent with the opinion. Rehearing was granted April 15, 1998. Reported at 1998 La. App. LEXIS 2119. Another motion to dismiss was denied on February 25, 1999.

1 [Editor's note: On November 29, 1999, the Fifth Circuit Court of Appeals upheld the dismissal of the case on the grounds that plaintiff had failed to provide adequate factual underpinning for his claims.]

Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998)

Two consolidated cases, *Aguinda v. Texaco*, S.D.N.Y. Dkt. No. 93 Civ. 7527 (on behalf of residents of the Oriente region of Ecuador) and *Ashanga v. Texaco Inc.*, S.D. Dkt. No. 94 Civ. 9266 (residents of Peru), allege that Texaco polluted the rain forests and rivers in Ecuador and Peru during oil exploration activities in Ecuador between 1964 and 1992: dumping toxic by-products in local rivers, leaked petroleum into the environment, resulting in physical injuries, including pre-cancerous growths.

In 1993, Texaco moved to dismiss on the grounds of *forum non conveniens*, comity, and failure to join an indispensable party – the Republic of Ecuador. The Ecuadoran ambassador wrote a letter to the court in support of this motion. The late Judge Vincent Broderick reserved decision on the motion. *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y. 1994).

After a period of discovery, Texaco renewed its motion to dismiss. Counsel for the Republic of Ecuador again supported the motion and submitted an affidavit by the Ecuadoran ambassador. The court granted Texaco's motion to dismiss as to the Aguinda plaintiffs. *Aguinda v. Texaco, Inc.* 945 F.Supp. 625 (S.D.N.Y. 1996), for *forum non conveniens* and comity, citing *Sequiha v. Texaco, Inc.,* 847 F.Supp. 61 (S.D. Tex. 1994), and failure to join indispensable parties (Petroecuador and the Republic of Ecuador). Plaintiffs filed a motion for reconsideration and the Republic of Ecuador filed a motion to intervene, this time in favour of plaintiffs due to a change in government, which resulted in the Ecuadoran government's statement that the case should be heard in the U.S. court. The District Court (Judge Rakoff) denied both motions. The plaintiffs appealed.

On October 5, 1998, the Second Circuit ruled that dismissal on the ground of *forum non conveniens* was erroneous in the absence of a condition requiring Texaco to submit to jurisdiction in Ecuador. The Second Circuit ordered the District Court to make an evaluation of whether a dismissal on the grounds of *forum non conveniens* 'would frustrate Congress's intent to provide a federal forum for aliens suing domestic entities for violation of the law of nations'. On the question of the failure to include indispensable parties, the Court ruled that it was necessary on remand for the District Court to reconsider this issue in light of the government of Ecuador's changed litigation position. The case was remanded and oral argument was heard in February 1999. The ruling by the District Court is pending.

The plaintiffs-appellants are represented by the Law Office of Cristobal Bonifaz; Kohn, Swift & Graf, and Sullivan & Damen. The government of Ecuador and Petroecuador (movant-appellants) are represented by Ronald Minkoff.

Kasky v. Nike, San Francisco Superior Court

This suit charges Nike Inc. with violating California Business and Professions Code 17200. The suit alleges that workers who make Nike products in China, Indonesia and Vietnam are not paid living wages and must work long hours in dangerous working conditions for little pay, and the company violated 17200 because Nike mislead the public about the working conditions of labourers, claiming that its contracts with suppliers forbid slave labour, corporal punishment and other abusive practices.

Defence counsel moved to dismiss the case based on a First Amendment defence, saying that Nike can't be sued for speech made in 'self-defense' after its labour practices were subject to public criticism. On February 8, 1999, Judge David Garcia dismissed the case without written opinion. Plaintiffs' counsel Allan Caplan of Bushnell, Caplan & Feilding announced that plaintiffs would appeal. Plaintiffs are also represented by Milberg, Weiss, Bershad, Hynes & Lerach.

Gurab v. Federal Laboratories, Inc.& TransTechnology Corp.

In 1992 CCR filed a claim in Pennsylvania state court on behalf of two of the plaintiffs in a related case in the Western District of Pennsylvania, *Abu-Zeinah et al. v. Federal Laboratories, Inc. and TransTechnology Corp.* (W.D. Pa.)

The suit was brought by families of Palestinians who were killed by exposure to CS gas, a lethal 'riot control' weapon manufactured and distributed by Federal Laboratories, Inc. and TransTechnology Corp. It alleged that the companies sold CS gas to the Israeli armed forces despite their knowledge that Israel's use of CS gas had resulted in many civilian deaths.

The plaintiffs asserted that even though this gas was designed to be sprayed outdoors, Israeli forces fired it directly at people or in enclosed or confined residential spaces without giving any warning or allowing people any means of escape, thereby exposing peaceful civilians not involved in 'rioting' or other unlawful activity to the gas. International human rights groups, including the UN Relief and Works Agency and Amnesty International, reported that at least 80 Palestinians have died since December 1987 as a result of exposure to CS gas.

While the federal claim was still active, CCR did not pursue the state action, but upon dismissal of the federal claim on jurisdictional grounds in December 1994, CCR re-activated this suit. Federal Labs and TransTechnology moved to dismiss the case, filing an almost identical motion to that filed in federal court (which the federal court denied). CCR opposed this motion. In fall 1996, the court rejected the defendants' new attempts to end the case and ruled that plaintiffs would be permitted to go to trial. A second motion to dismiss was filed and rejected in 1998. The case was set for trial in 1999; however, a settlement has been reached, subject to court approval.

2 SELECTED HOLOCAUST CASES

Since 1996, a series of cases have been brought against Swiss, Austrian and German banks for the return of money belonging to Holocaust victims, against European insurance companies for refusing to pay out on insurance policies purchased by Holocaust victims, German and U.S. companies for the use of slave labour during the Holocaust, and claims concerning the Nazi theft of art. A forthcoming article summarizes the 46 cases pending and gives a detailed legal analysis of their development. Michael Bazyler, 'Litigating the Holocaust', *University of Richmond Law Rev.* (1999). The cases summarized below are discussed in more detail in Professor Bayzler's articles.

In addition to Professor Bayzler's article, a recent article by Anita Ramasastry discusses the Swiss bank litigation: 'Secrets and Lies? Swiss Banks and International Human Rights', 31 *Vand.J. Transnat'l L.Rev.*, p. 325 (1998).

2.1 Cases Against Swiss Banks

In re Holocaust Victims Assets Litigation

Series of three unjust enrichment cases brought in the Eastern District of New York against three Swiss banks. In mid-August 1998, a settlement agreement was reached for $1.2 billion. The defendants made the first installment into a trust account in November 1998; distribution will be left to a Special Master appointed by the court.

2.2 Cases Against German and Austrian Banks

Watman v. Deutsch Bank, et al. (No. 98 Civ. 3938) (S.D.N.Y. filed June 3, 1998) and *Duveen v. Deutsch Bank* (No. 98 CV 06620) (E.D.N.Y., filed October 28, 1998).

Two class action suits against German and Austrian banks for, *inter alia*, looting gold and other personal property from Jews during the Holocaust, and financing and profiting from the proceeds of slave labour.

2.3 Cases Against Insurance Companies

Drucker Cornell v. Assicurazionie Generali S.P.A. (97 CV 02262) (S.D.N.Y., March 31, 1997). *Winters v. Assicurazioni Generali S.P.A.* (98 CV 9186) (S.D.N.Y. December 30, 1998).

Two class action lawsuits brought against 16 European insurance companies. A series of individual actions by individual heirs are also pending in state courts. Currently the national Association of Insurance Commissioners is negotiating with the defendant companies for the establishment of a fund to pay on the disputed.

Iwanowa v. Ford, 98 Civ. 959 (D.N.J. filed March 4, 1998)

The first class action brought under ATCA on behalf of thousands of persons who were compelled to perform forced labor under inhuman conditions for defendant Ford Werke, A.G., the German subsidiary of defendant Ford Motor Company between 1941 and 1945. The suit also alleged unjust enrichment. A motion to dismiss was filed March 30, 1998, arguing that plaintiffs' unjust enrichment and implied employment contract claims fail to state a cause of action upon which relieve can be granted. The defendants argued that the claims would fail under German law, that they would be time-barred under state law (Michigan, Delaware, or New Jersey); that they failed to state a cognizable claim against Ford for alleged violations of the law of nations. Briefing was completed in August 1998. The ruling is pending.

Counsel for the plaintiffs are Goldstein, Lite and DePalma (New Jersey); Milberg, Weiss, Bershad, Hynes & Lerach LLP (New York and Los Angeles, Dohen, Milstein, Hausfeld & Toll, P.L.L.C. (Washington, D.C.), and Professor Burt Neuborne of New York University Law School.

Similar suits have been filed against Volkswagen, Siemens and Heinkel. Milberg, Weiss, Berhad, Hynes & Lerach intends to file shortly a series of similar suits against Daimler-Chrysler, AEG, Telefunken, General Motors, Continental, BMW and others. Milberg Weiss is also representing plaintiffs in a suit against Degussa for having invented and provided to the SS the poison gas Zyklon B, used to murder millions in Nazi concentration camp gas chambers and for his profiteering through the smelting of precious metals seized from victims of Nazi persecution including dental gold, glasses frames, jewelry and religious and ornamental items seized from the victims. (For regular updates, see the Web site of Milberg, Weiss <www.milberg.com>.)

Kor et al. v. Bayer AG, No. TH99-036-C (SD IN, Feb. 17, 1999) Class action lawsuit filed against German chemical and pharmaceutical giant, Bayer AG, alleging that the company assisted Joseph Mengele in experiments on concentration camp inmates by supplying chemicals and germs to inject the subjects, supplying experimental drugs and medications to infected inmates, and then using the results of these experiments to develop and market new products. The named plaintiff, Eva Kor, and her twin sister Miriam, were subjected to experiments at Auschwitz. Specific documentation links a concentration camp doctor and Bayer employee, Dr. Helmuth Vetter to the experiments, and correspondence between Bayer and the camp commander discusses Bayer's purchase of 150 female concentration camp inmates. Violations of international law alleged include the Geneva Convention on the Treatment of Non-Combatants.

Lawyers for the plaintiffs are Cohen & Malad of Indianapolis; Lieff, Cabraser, Heimann & Bernstein in New York; Milberg, Weiss, Bershad, Hynes & LeRach in New York, and Cohen, Milstein, Hasefeld & Toll in Washington, DC; Martin Mendelshohn in Washington, D.C.; Professor Burt Neuborne of New York University Law School; Much, Shelist, Freed, Dennenberg, Ament & Rubinstein in Chicago.