The Shell game ends

Some good news for multinationals

BETWEEN the administrations of George Washington and Jimmy Carter, the Alien Tort Statute (ATS) lay dormant. The statute grants American district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or of a treaty of the United States". At the age of 190 it sprang back to life on April 6th 1979, when it was used to allow two Paraguayans to sue a former Paraguayan policeman in an American court for acts of torture committed in Paraguay.

Since then, roughly 150 lawsuits have been filed against American and foreign corporations for actions committed around the world. Four local plaintiffs used the ATS to sue Unocal in a federal court in Los Angeles for human-rights violations allegedly committed during the construction of an oil pipeline in Myanmar. A human-rights organisation used it to sue Yahoo on behalf of two Chinese democracy activists for actions committed in China by a subsidiary. ATS suits against DaimlerChrysler and Rio Tinto, among others, are pending. Though most ATS cases have been dismissed or settled, the costs of settlements can be high and the negative publicity damaging.

Multinational companies will therefore cheer the Supreme Court's unanimous decision in Kiobel v Royal Dutch Petroleum (Shell), released on April 17th. It dramatically limits the ability of plaintiffs to file suit against corporations in American courts for actions committed abroad.

The ruling stems from a case brought in New York by 12 Nigerian plaintiffs living in America. They allege that Shell was complicit in human-rights violations—including murder, rape, theft and destruction of property—committed by Nigeria's armed forces in the region of Ogoniland. A federal appeals court dismissed their suit, arguing that the ATS provides no grounds for corporate-liability lawsuits. But as the 150 ATS suits show, other courts have disagreed. The Supreme Court agreed to hear the case in order to settle the question.

In an earlier ruling, in 2004, the court cautiously ruled that the ATS permitted lawsuits for "a modest number of international law violations", such as piracy and crimes involving ambassadors, which would have been recognised when it was adopted. The court's Kiobel ruling goes much further. It holds that the ATS does not apply to actions committed by foreign companies, and noted a strong presumption against applying American law outside the United States, "There is no indication," wrote John Roberts, the chief justice, "that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms".

In a separate concurrence, four of the court's liberals took a slightly softer tack, arguing that the ATS should allow suits that prevent America from becoming "a safe harbour…for a torturer or other common enemy of mankind". But that reasoning still does not permit foreign nationals to use American courts to sue foreign companies for acts committed on foreign soil. Those who want American courts to adjudicate on the world's problems will have to look elsewhere.

Fonte: The Economist, London, v. 407, n. 8832, p. 34, 20th – 26th abr. 2013.