



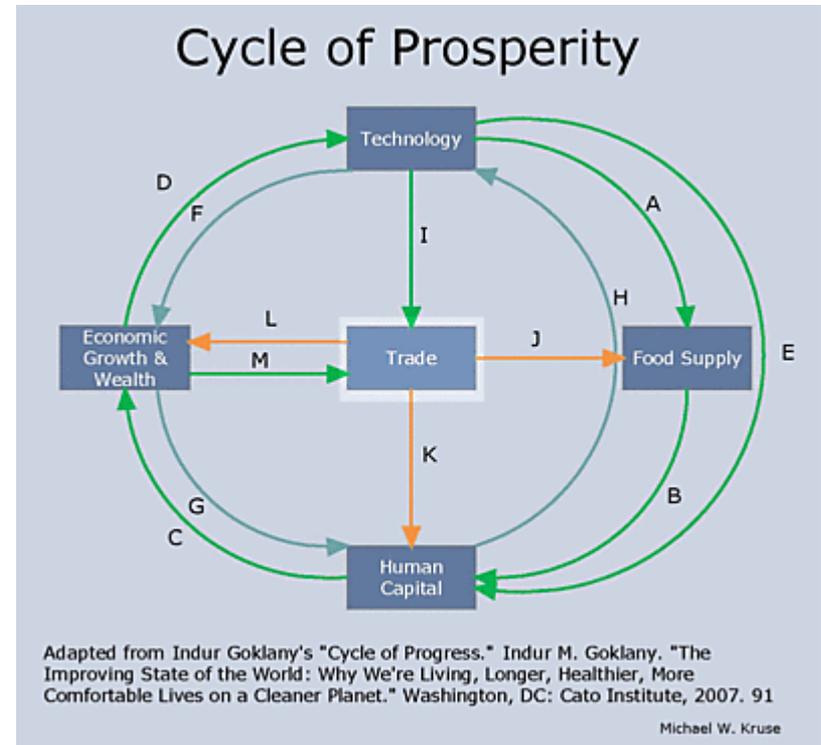
*Litigating the overseas
activities of corporations*

Geert van Calster
Leuven Law; King's College,
London; Monash

gavc@law.kuleuven.be
blog at www.gavclaw.com







US: Use of public international law to allow foreign pursuit of corporations in US (federal) courts: the Alien Torts Statute

EU: Use of private international law to allow pursuit of corporations in EU (national) courts: the Conflict of Laws



US: Alien Torts Statute - ATS

“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.

Alien Tort Statute, Judiciary Act, 1789

The dust of history settled until *Filartiga v Pena-Irala* (1980): US Second Circuit Court of Appeals

Sosa v Alvarez-Machain (2004): in order to qualify for ATS, a plaintiff must provide significant evidence for the violation of well-defined and universally accepted norms of common international law

ATS ctd.

Kiobel v Royal Dutch Petroleum, 2010: same second circuit: due to a perceived lack of precedent in international law, corporations cannot be held liable for violations of customary international law in US courts under ATS litigation (Jacobs)

Other circuits were happier to find corporations liable per international law

USSC Certiorari: whether and under what circumstances US courts may recognize a cause of action under the Alien Torts Statute, for violations of the law of nations, occurring within the territory of a sovereign other than the United States. (Hereby ignoring the corporate culpability question which actually triggered certiorari)

ATS ctd.

With reference to Morrison v National Australia Bank (2010): when a statute gives no clear indication of an extraterritorial application, it has none.

In Kiobel, the Court did not find convincing argument in either text, history, or purpose of the ATS, which could rebut the presumption against extraterritoriality.

applying U. S. law to pirates does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences.

Comity being used as a presumption *against* application of foreign laws or, here, public international law.

ATS ctd.

The SC concludes *On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.*

Post Kiobel

Daimler v Bauman USSC 2014: general jurisdiction other than in the State of incorporation applies only when a foreign company's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."

[with judge Ginsburg referring to the EU's Brussels I recast Regulation]

ATS ctd.

‘Apartheid litigation’ [Lungisile Ntsebeza et al v Ford General motors and IBM].

Scheindlin USDJ:

Applicants must show that companies concerned acted *‘not only with the knowledge but with the purpose to aid and abet the South African regime’s tortious conduct as alleged in these complaints’*.



The EU side of the debate

Pursuing a mother or holding company in the EU is easy as far as the simple jurisdictional test is concerned

Article 4 Brussels I recast: companies ‘domiciled’ in the EU [corporate or registered seat] can always be sued there.

Forum non conveniens cannot apply [per Owusu, CJEU C-281/02]; lis alibi pendens can post January 2015 but only in limited circumstances]

Non-EU based companies may be joined under ‘residual’ national rules of civil procedure

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The more challenging step is applicable law.

Litigation in a CSR context tends to be based on tort. In the EU, this triggers application of the 'Rome II Regulation', 864/2007.

General rule is *lex loci damni* – not often the preferred law for plaintiff

Exceptions?



EU ctd. - Exceptions

- Environmental damage: *lex loci damni* or *lex loci delicti commissi*.
 - Whether that *locus delicti commissi* is in the EU triggers *Apartheid* type discussion.
 - Moreover: which law is to determine that attribution to the mother company? : the *lex causae* per the general rule? Or the *lex fori*?
 - (Similar discussion for piercing the corporate veil: *lex societatis*? *Lex fori*? *Lex causae*?)
- Article 4(3) Rome II: when it is clear from the circumstances of the case that it is '*manifestly*' more closely connected with a country other than *locus damni*, the law of that country shall apply instead.

EU ctd.

Interesting recent example: Court at the Hague in
Milieudefensie et al v Shell

[with Rome II not yet applying *ratione temporis*].



Comparative conclusions

US: Less trigger happy on the adjudicative side. However quite eager of course on the prescriptive side: Foreign corrupt practices act - FCPA; Criminal law (racketeering etc. – See FIFA); Export controls and sanctions law (often also criminally sanctioned).

EU: Easy threshold on the adjudicative side, not necessarily attractive on the applicable law side.

Not much traction to change that. One alternative route that is being pursued is that of 'Compacts': international regulatory co-operation, eg with EHS standards /Bangladesh.





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