1-1-2011

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Holding Multinational Corporations Accountable?

Achilles' Heels in Alien Tort Claims Act Litigation

Douglas M. Branson*

I. Introduction

The Alien Tort Claims Act (ATCA) or Alien Tort Statute (ATS) permits federal courts to take jurisdiction over claims arising out of certain torts no matter where in the world the torts occurred. The Act permits non-citizens (aliens) to take advantage of this significant grant of subject matter jurisdiction provided only that the alien, and thus the court, obtain territorial (personal) jurisdiction over the defendant.

The territorial presence which will support jurisdiction may be minimal. One plaintiff obtained jurisdiction over the Dutch-English Royal Dutch Shell because Royal Dutch maintained a small shareholder relations office in New York. So-called transitory jurisdiction will also do. A plaintiff obtained territorial jurisdiction over a Serbian-Bosnian war criminal by having the defendant served during a transfer at New York's Kennedy Airport.

The first case of the modern era (not against a multinational) involved an unfortunate visit to New York by a Paraguayan police official who had helped torture a youthful suspect to death in Asunción. The deceased's next-of-kin found and served the police official in New York. The federal district court thereafter accepted subject matter jurisdiction, which the Court of Appeals for the Second Circuit upheld. Prior to that time, in 170 years, the reporters contained only a single ATS opinion.

So far, then, Alien Tort Claims Act suits seem to be a perfect solution for those seeking to

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3. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) ("[W]henever an alleged torturer is found and served with process within our borders, section 1350 [the Alien Tort Claims Act] provides federal jurisdiction.").
4. See Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 254 (2d Cir. 2009).
hold large corporations accountable for environmental degradation, human rights violations, and other acts in distant foreign countries. That is especially true as to multinational corporations, all or most all of which, like Royal Dutch, have a presence of some sort in the United States.\(^5\) Of the 500 largest multinationals, a recent study characterizes 186 as having a United States domicile, 126 with homes in the European Union, and 108 with headquarters in Japan.\(^6\) Of those 500, nearly all have a presence in the United States sufficient to support territorial jurisdiction over them. So, to human rights lawyers and environmental activists, the prospects of U.S. Alien Tort Claims Act cases against corporate behemoths have seemed a bonanza.\(^7\)

That is, until those activists file their complaints and first step through the courthouse doors. There they are quickly brought to earth, back to law school fundamentals.\(^8\) Few multinationals are so ill advised that they do business directly in far-flung foreign places. Instead, most multinationals are great-great grandparent corporations, or great grandparents, of the entity (subsidiary) doing business and committing the acts of which the plaintiffs complain. Interleaved between the great grandchild corporation and the household name multinational may be two or three layers of subsidiaries, corporations which we might term a parent, a grandparent, and a great grandparent.\(^9\)

The interposition of subsidiary corporations may be a problem for several reasons. The front line subsidiary may be a no-assets corporation, or have only a few assets that could

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5. Judging by federal appellate opinions, since 1980 there have been forty-five cases, and approximately seventy-five reported opinions, under the ATS which involved a multinational corporation as a principal defendant. Westlaw search, dated January 26, 2010 ("alien /s tort /s claim") (computation by the author). Defendants have included Bank of America, Barclay's Bank, Boeing, Caterpillar, Chevron, Coca-Cola, DaimlerChrysler, Del Monte, Deutsche Bank, Dresdner Bank, Drummond Coal, Freeport Moran, Exxon-Mobil, Pfizer, Raytheon, Rio Tinto, Royal Dutch, Texaco, and Union Carbide. Id.


7. Romero v. Drummond Coal, Inc., 552 F.3d 1303, 1315 (11th Cir. 2008) (turning back a defense contention that the Alien Tort Claims Act did not apply to corporations. ("The Alien Tort Statute provides no exceptions for corporations," although no other circuit has a holding squarely on point.))). According to Marco Simons, Legal Director, Earthrights International, the issue of whether corporations may be liable "under the law of nations" has recently again become a "live issue." Marco Simons, Legal Dir., Remarks at the University of Washington Law School Symposium of Business and Human Rights (Feb 12, 2010). One reflection of the potential bonanza effect is that since 1980, legal scholars have published 188 articles dealing with the Alien Tort Claims Act, Legal Trac Search dated January 25, 2010 (on file with the author), as opposed to only 176 published appellate court opinions over the same time period, Westlaw Search dated January 26, 2010 ("alien /s torts /s claims") (on file with the author).

8. Although humans can have only one Achilles heel, abstractions such as an ATS suit may have many. According to veteran ATS litigators, recently it has come to pass that issues which plaintiffs’ lawyers thought settled have found receptive ears among defense attorneys and even some judges. Whether corporations may be sued, whether ATS can provide a remedy for extraterritorial acts, heightened standards for aiding and abetting, and a new-found inquiry into exhaustion of remedies where the tort occurred are among the “live” questions with which ATS attorneys must now grapple. Judith Chomsky, Remarks at University of Washington School of Law Workshops on Corporations and Human Rights (Feb. 13, 2010). In the main, this article is an inquiry into one issue often forgotten, piercing the corporate veil and related issues.

9. Another taxonomy involves naming layers of corporations in a group as first level subsidiaries, second level subsidiaries, and so on. Another terminology sometimes used is to term first level subsidiaries as direct subsidiaries and all other entities on lower levels as “indirect” subsidiaries. See, e.g., ARTHUR PINTON & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 60–62 (3d ed. 2009).
be attached to satisfy any judgment that the plaintiffs might obtain. The same may be true of the parent and even grandparent corporations. Often most pressing of all, however, is the agenda of the counsel and the human rights or environmental group or non-governmental organization (NGO) that supports her. That agenda is to send a message as well as to obtain damages. To send a message, the Alien Tort Claims Act lawsuit must name and have a realistic prospect of obtaining a judgment against the household name (e.g., Royal Dutch Shell) multinational great or great-great grandparent company. The goal is to reach the top.\textsuperscript{10} Often little thought has been given as to how to get there.

I acted as the expert witness-consultant on these issues in the first Alien Tort Claims Act case against a multinational to play out, \textit{Doe I v. Unocal}\.\textsuperscript{11} Unocal involved the brutalization of ethnic Karens by the Myanmar army\.\textsuperscript{12} Unocal, along with its joint venture partner, Total S.A. of France, had retained the army to provide security for pipeline construction\.\textsuperscript{13} The 700 kilometer pipeline, 36 inches in diameter, and replete with compressor stations along the way, was to go from offshore natural gas wells in the Andaman Sea to electricity generating plants on the outskirts of Bangkok, Thailand. In providing security, the Myanmar soldiers impressed villagers into involuntary servitude, badly beat men, raped women, abused children, and in one instance threw a baby boy into an open fire where he suffered burns from which he later died\.\textsuperscript{14}

The attorneys who brought suit had no notion or idea that they would encounter any obstacles that corporate law might impose. In fact, the initial complaint named neither the subsidiary (Moattama Gas Transportation Company; hereinafter MGTC), nor the mezzanine level corporations (Unocal International Pipeline Corporation; Unocal International Co.; Union Oil of California) as defendants. Likely, counsel for the plaintiffs thought that they could file a complaint against the entity at the top of the chain, Unocal, a corporation with shares listed on the New York Stock Exchange, and be done with it. Or equally likely is that, focused on the merits as they were, the attorneys gave it no thought whatsoever\.\textsuperscript{15}

\begin{itemize}
  \item At the outset, the process may be inverted. That is, the question is whether the presence of the multinational parent within the United States is sufficient to obtain jurisdiction of the out-of-state (really out-of-the-country) subsidiaries. The question in turn depends upon whether the parent has intermingled its affairs and those of the subsidiary. For analogous domestic cases, see, for example, Empire Steel of Texas v. Superior Court, 56 Cal.2d 823 (1961); TACA Int'l Airlines v. Rolls Royce Ltd, 201 A.2d 97 (N.J. 1964). Or plaintiffs may contend that the parent corporation has acted as a principal and the subsidiary as an agent. See infra Part III.C.ii. So the same sorts of issues from the top down, which may arise at the commencement of a case, may also arise from the bottom up toward the end of the case, involving the assessment of fault and damages. A caveat is that "[j]ust because a litigant has been able to pierce the corporate veil for purposes of territorial jurisdiction ... does not mean that [a later] attempt will succeed to pierce the corporate veil 'on the merits.' " PINTO & BRANSON, \textit{supra} note 9, at 54.
  \item \textit{Doe I v. Unocal Corp.}, 395 F.3d 932 (9th Cir. 2002), \textit{rev'd on reh'g (en banc)}, 403 F.3d 708 (9th Cir. 2005).
  \item \textit{Id.} at 939-43.
  \item \textit{Id.} at 952.
  \item It was said that the first act of a Myanmar soldier was to impress at least two peasants into service to carry his kit and otherwise act as (mostly unpaid) servants. \textit{See Unocal Corp.}, 395 F.3d at 942. Total and Unocal utilized four battalions of infantry to provide security. \textit{Id.} at 938.
  \item The federal district court dismissed the ATS suit. \textit{Id.} at 943. The Ninth Circuit reversed, \textit{id.} at 932, but granted a motion for rehearing \textit{en banc}. \textit{Doe I v. Unocal Corp.}, 395 F.3d 978 (9th Cir. 2003).
\end{itemize}
This article, then, is about the corporate law aspects of the litigation alternative to holding multinational corporations accountable. Scores of—indeed almost 200—articles devote themselves to Alien Tort Claims Act issues. Those pieces, though, put the cart before the horse. The first questions plaintiffs are likely to encounter involve piercing the corporate veil, enterprise liability, joint venture, agency, and choice of law. The next question is whether corporations may be held liable under the ATS at all, criminally, civilly, as primary violators or under secondary liability concepts such as aiding and abetting or participation. According to a recent Court of Appeals decision in the Second Circuit, they cannot be.

II. The Alien Tort Claims Act

First and second, Congress sought to give a forum in which aliens could seek judicial redress for violation (dishonor) of safe conduct passes held by those who were to pass though foreign lines or hostile territories, as well as to those who suffered at the hands of pirates on the high seas. Third, Congress sought to create jurisdiction for ambassadors against whom torts had been committed.

So, in the Judiciary Act of 1789 the drafters inserted a little noticed provision: "The district courts shall have original jurisdiction of a civil action by an alien in tort only, committed in violation of the law of nations or a treaty of the United States." As has been seen, the provision, and the broad grant of subject matter jurisdiction it gave to U.S. courts, lay dormant for 200 years.

Nonetheless, from the face of the statute, some points are clear. First, not every tort violates the law of nations. Whether a simple trespass or act of negligence violates domestic law (municipal law in international law parlance) may not always be clear, let alone

Meanwhile, the plaintiffs filed an assault, battery, and negligence suit in the California Superior Court. See Unocal Corp., 395 F.3d at 943. Over a number of months, the Superior Court held a series of mini-trials. After an eight-year history, the cases settled in 2005, reputedly for $35 million. The precipitating event was Chevron's pending acquisition of Unocal, during the pendency of which Chevron allegedly had directed Unocal to clean up its litigation exposure. Id.

16. A Legal Trac search under "alien /'s tort /'s claims," January 25, 2010, produced citations to 188 law review articles published since 1980 (search on file with the author). Since 1980 legal scholars have published 188 articles; federal appellate courts have published only 176 opinions over that time. Westlaw Search, supra note 7. Articles appearing in the last several years alone include John Cerone, The ATCA at the Intersection of International and U.S. Law, 42 NEW ENG. L. REV. 743 (2008); Kelsy Dye, Can Corporations Be Held Liable Under the Alien Tort Claims Act?, 94 KY. L.J. 649 (2006); Hugh King, Corporate Accountability Under the Alien Tort Claims Act, 9 MELB. U. L. REV. 472 (2008); Joel Slawotsky, Doing Business Around the World: Corporate Liability Under the Alien Tort Claims Act, 2005 MICH. ST. L. REV. 1065 (2005); Comment, Civil Procedure—Pleading Requirements—Eleventh Circuit Dismisses Alien Tort Statute Claims Against Coca-Cola Under Iqbal’s Plausibility Pleading Standard, 123 HARV. L. REV. 580 (2009). Then there are hosts of more delimited articles about ATS claims in specific areas of law (e.g., products liability, labor, environmental) or in certain geographical areas (e.g., Papua New Guinea; Iraq).


whether it violates the law of nations (generally it does not). Second, in the main, the law of nations applies to nations, but in cases of certain grave acts (involuntary servitude, genocide) the law of nations applies to individuals (jus cogens offenses). Third, though, if the primary actor is a sovereign state, liability of those who assist the state or state actors, or participate in their acts, may result in liability even if the primary violation is not a jus cogens offense. Although the standard (aiding and abetting? participation?) sometimes has been unclear, the import is not. Juridical persons who may not be liable may become liable again because of the acts of others (i.e., sovereign nations) and the persons’ involvement with it, liability by the backdoor, so to speak.

III. Recent Cases and Clarification of Issues

A. Pending Cases

Some cases have been quite celebrated. For example, in March 2007, the United States sought and received payment of a $25 million fine from Chiquita Brands. The allegations were that Chiquita had illicit ties with terrorist groups, namely, paramilitary forces in Colombia. The further allegations were that between 1997 and 2004 Chiquita had paid $1.7 million to the United Self-Defense Forces of Columbia (AUC), whose members provided security to workers on Chiquita’s banana plantations. Allegedly Chiquita made further payments for weapons and protection to the Revolutionary Armed Forces of Columbia (FARC) as well as to the National Liberation Army (ELN).

In 2007, International Rights Advocates brought suit on behalf of 173 members of families who claim that they were objects of AUC repression. They brought suit under the Alien Tort Claims Act, seeking a judgment that could put Chiquita out of business: “Terry Collingsworth, a lawyer . . . who is leading the multi-million dollar litigation, said: ‘This is a landmark case, maybe the biggest terrorism case in history. In terms of casualties, it’s the size of three World Trade Center attacks.’ ” The television program Sixty Minutes thought the case weighty enough that the program featured a segment on the Alien Tort Claims Act and the Chiquita litigation.

20. Similarly, to violate a treaty sufficient for Alien Tort Claims Act purposes, the prohibition in the treaty must be “specific, universal and obligatory.” In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994).
23. See sources cited supra note 22.
24. See sources cited supra note 22.
25. See Chiquita, supra note 22.
26. See id.
27. See 60 Minutes: The Price of Bananas (CBS television broadcast Aug. 9, 2009).
B. Clarification of Legal Standards

In a few instances, through their personnel, multinational corporations commit offenses which, even when committed by non-state actors, are against the law of nations. Usually, however, plaintiffs claim that ATS liability exists because the multinational became somehow involved in the acts of another (sometimes the State, sometimes in the act complained of which is a *jus cogens* offense by a non-state actor, or, most frequently, the offending activity was by a non-state actor but which involves state action). Recent decisions have made clear that a multinational may become liable on the basis of having aided and abetted the other actor's activity.\(^{28}\)

The acceptance of aiding and abetting as a basis for secondary liability is the good news. The not-so-good news is that the legal construct (aiding and abetting) may not be your mother or father's aiding and abetting anymore. Even worse is the news that a recent Second Circuit opinion rejects liability for corporations generally under the ATS, in any form, aiding and abetting or otherwise.\(^{29}\)

In the heyday of securities litigation, plaintiffs sought to hold liable collateral participants (lawyers, bankers, accountants, celebrity spokespersons, and so on) for having aided and abetted violations of the SEC general antifraud rule, Rule 10b-5. The secondary liability construct generally was agreed to have three elements:

- That the primary defendant had violated the law;
- The collateral participant had rendered substantial assistance to the primary violator; and
- That the collateral participant had been aware or, in the exercise of the slightest care should have been aware, that the primary violator was violating the law.\(^{30}\)

In *Central Bank of Denver v. First Interstate Bank of Denver*, the Supreme Court eliminated once and for all the common law concept of aiding and abetting under the securities laws, in the main because the Court found no basis for such liability in the securities statutes.\(^{31}\) In *Stoneridge Investment Partners, L.L.C. v. Scientific-Atlanta, Inc.*,\(^{32}\) the Court revi-

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28. See, e.g., Sinatrainal v. Coca-Cola Co., 578 F.3d 1252, 1258 & n.5 (11th Cir. 2009); Romero v. Drummond Co., Inc., 552 F.3d 1303, 1315 (11th Cir. 2008) ("[T]he law of this Circuit permits a plaintiff to plead a theory of aiding and abetting under the Alien Tort Statute and the Torture Act."); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 287–88 (2d Cir. 2007) (Hall, J. concurring) (per curiam) (agreeing to adoption of the Restatement (Second) Torts' definition of aiding and abetting for Alien Tort Claims Act).


30. See, e.g., SEC v. Coffey, 493 F.2d 1304, 1316 (6th Cir. 1974); 2 A.L.I. FED. SEC. CODE § 1724(b) (1980); Landry v. FDIC, 486 F.2d 139, 162–63 (3d Cir. 1973); RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).


sited the issue, if only briefly, to reiterate its holding in *Central Bank: Aiding and abetting, including a particular version known as scheme liability, no longer exists under the federal securities laws.*

Common law aiding and abetting liability was not completely moribund, however. State courts had been holding, and continued to hold, that collateral participants to corporate transactions could become liable for aiding and abetting breaches of fiduciary duty by primary violators, with one difference: In addition to the existence of a primary violation, and the rendition of substantial assistance to it, the collateral participant has to be proven to have *known* that the primary violator was violating the law.33 Mere conscious disregard of the effects the primary violator's conduct would or might have on others would not do. So aiding and abetting lived on, albeit in its strong form, or as aiding and abetting plus.

The level of aiding and abetting that federal courts have found sufficient to hold collateral participants (multinationals here) liable in ATS may be termed not merely as aiding and abetting, or aiding and abetting plus, but aiding and abetting plus plus or aiding and abetting plus cubed (plus plus plus).

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the plaintiffs alleged that the Sudanese military had engaged in genocide, torture, war crimes, and crimes against humanity.34 The plaintiffs alleged that the multinational, a large Canadian energy company, had improved two airstrips that it owned.35 The Sudanese military used those airstrips to service bombers and helicopters used, *inter alia*, to clear all native population from buffer zones surrounding the areas in which Talisman and its joint venture partners searched for and produced oil.36 Many of the alleged atrocities took place during that process.37

The trial court, per Judge Denise Cote, found Talisman's activities to be "the activities which . . . accompany any natural resource development business."38 Companies improve transportation facilities such as airstrips to fly workers in and out.39 They create, or have created, buffer zones around compounds and production facilities for security reasons.40 The activities alleged did not measure up as the type of substantial assistance that could support an aiding and abetting claim.41

Mindful of the Supreme Court's admonitions that any legal constructs used to fill in the interstices of the ATS must come from an international law source and further one which "would obtain universal acceptance,"42 the Court of Appeals for the Second Circuit adopted an aiding and abetting definition from an international source, namely, the Treaty of Rome:

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34. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009).
35. Id. at 249.
36. See id.
37. Id.
38. Id. at 261.
39. See id. at 249.
40. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 249–50 (2d Cir. 2009).
41. Id. at 261.
[A] defendant may be held liable under international law for aiding and abetting a violation of that law by another where the defendant

[1] provides practical assistance to the principal,

[2] which has a substantial effect on the perpetration of the crime, and

[3] does so with the purpose of facilitating the commission of the crime.43

Thus the "mens rea standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone.... Only a purpose standard ... has the requisite acceptance among civilized nations."44

The ATS aiding and abetting standard requires not only a showing of intent but of motive as well. That defendant did what she is alleged to have done purposely demonstrates intent, ordinarily sufficient under U.S. law.45 That defendant also intended the end or objective connected with performance of the act is motive, often the clincher for showing intent but strictly speaking not usually required.46 To show that defendant knowingly traded the securities proves intent (and is easy to do—persons don’t usually trade by accident). To show that defendant did so while in possession of inside information and in order to reap large gains is icing on the cake—proof of motive (greed) is usually nice to have, with some exceptions (for example, to pay medical bills for a sick child). Nonetheless, U.S. courts require that plaintiffs make such showings, of both motive and intent, in ATS cases.

Neither will just garden variety "substantial assistance," if there is such a thing, do. The assistance plaintiff pinpoints must be "practical assistance" which the plaintiff shows had a "substantial effect on the perpetration of the crime." Plaintiff must show something resembling causation, that is, a causal link between the assistance and the crime alleged (genocide, torture, involuntary servitude, and so on).

C. Closing Off Corporate Liability Alltogether

Kiobel v. Royal Dutch Petroleum Co. not only "deals a substantial blow to international law and its undertaking to protect fundamental human rights[.]"47 it strikes a death knell. Formerly, there existed two paths toward narrowing the scope of ATS liability for multina-

43. Presbyterian Church of Sudan, 582 F.3d at 258 (quoting Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 332 (2d Cir. 2007) (Katzman, J., concurring) ("[A] defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.") (internal quotation marks omitted).
44. Id. at 259 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)).
45. WAYNE R. LAFAVE, CRIMINAL LAW § 5.3, at 272 (West 5th ed. 2010) ("A defendant’s motive ... is not relevant on the substantive side of criminal law."); see id. § 5.2, at 259 (explaining that it is intent to do the act and to intend the natural and probable consequences that are most relevant).
46. Id. § 5.3(a), at 272 ("Motive has been variously defined as ‘the desire coupled with the intention to bring about a certain consequence[,]’ as ‘a desire viewed in its relation to a particular action[,]’ and as ‘an ulterior intention—the intention with which an intentional act is done (or, more clearly, the intention with which an intentional consequence is brought about.
") (citations omitted).
Holding Multinational Corporations Accountable?

In the multinational context, the basis for reaching beyond the actor (the subsidiary which committed the crime or aided and abetted others who did) has traditionally been ownership. The plaintiff drafts add-on counts for her complaint (veil piercing allegations, enterprise liability theories) to reach the owner of all or a significant block of shares in the subsidiary corporation, and then perhaps to reach the assets of a grandfather corporation who owns all or most all the shares in the parent corporation. What about the case in which the bonds between the actor and the add-on defendant or defendants are not ownership but contract?

Sinaltrainal v. Coca-Cola Co. is such a case. Plaintiff labor leaders had allegedly been held against their will, tortured, and some murdered in revenge for past (and to discourage future) labor activism in Columbia. The bottlers (one was Bebidas y Alimentos do Urabá) collaborated with paramilitary groups. Since 1986, 4000 Columbian trade unionists had been killed.

The plaintiffs tried to reach the assets of Coca-Cola Columbia and its parent, Coca-Cola Co., the U.S. multinational. Coca Cola Columbia had contracts (no owner relationship) with the bottlers. The court found that the contracts gave the Coca-Colas only an ability to protect the trademark, not the day-to-day control which could cause ATS liability to reach up a

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48. The Convention Against Transnational Organized Crime and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions provide for corporate liability but only in the contexts to which those multi-national treaties address themselves. See id. at 138–39.
49. Sinaltrainal v. Coca-Cola, 578 F.3d 1252 (11th Cir. 2009).
50. Id. at 1258.
51. Id. at 1257.
52. Id. at 1265.
53. See id. at 1259.
corporate chain. The court also held that plaintiffs failed to produce any evidence of state action. "There is no suggestion that the Columbian Government was involved in, much less aware of, the murder and torture alleged in the complaint."

Mohamed v. Jeppesen Dataplan, Inc. is similar. The five plaintiffs had been suspected of terrorism, thus subject to rendition to countries such as Egypt in which security personnel subjected them to torture and long periods of confinement, bereft of judicial proceedings or other intervention. Defendant Jeppesen had provided fueling and flight guidance to the aircraft and crews that had transported the plaintiffs. In turn, Jeppesen was a subsidiary of a major multinational, Boeing Co. The district court dismissed the case after the U.S. Government intervened, raising the State Secret Doctrine. The Ninth Circuit found the doctrine not to apply, thus remanding the case to the district court for further proceedings. Nonetheless, the case is interesting because the link alleged, at least in the first instance, to the corporate actor is contract rather than ownership.

Although no case has decided the issue head on, the dictum of the Coca-Cola and the Jeppesen cases is that day-to-day control obtained through contract rather than through share ownership is sufficient for ATS purposes. Such a theoretical outcome has implications for the worldwide growth of franchising. The bond between the franchisor, usually a multinational, and a franchisee is not ownership but contract, namely, the franchise agreement. Courts have found overreaching by banks and other lenders (day-to-day control) sometimes sufficient to hold lenders liable for the acts of borrowers in the lender liability area. It is difficult to imagine a Burger King, A & W Root Beer, Subway, or McDonalds franchise engaged in war crimes or genocide or aiding and abetting a state actor who has committed those crimes. But the franchise world is almost a limitless one and the contract link may lead to the specter of ATS liability for a franchisor in businesses such as aircraft, security, air transport, and the like. The link sufficed to haul Boeing and Coca-Cola into court.

54. See id. (citing to the opinion below).
55. Sinaltrainal v. Coca-Cola, 578 F.3d 1252, 1259 (11th Cir. 2009)
56. Id. at 1266.
57. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010).
58. See id. at 1073–74.
59. See id. at 1075.
60. Mohammed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 949 (9th Cir. 2010), abrogated by 614 F.3d 1070 (9th Cir. 2010).
61. Mohammed, 614 F.3d at 1076.
IV. The Liability of Other Corporate Group Members

A. Relationships

The link which makes a corporation a member of a corporate group is ownership of shares. A parent corporation owns the shares of subsidiary corporations, which may be direct or indirect subsidiaries, according to one terminology sometimes used. Share ownership permits the parent to elect directors who in turn appoint the officers of the subsidiary. There may be several tiers of subsidiaries, in which case the first tier corporations are direct subsidiaries and the remainders are indirect. The subsidiary may be wholly owned, that is, by the parent, or partly owned, which means that the parent has control (or a measure of control) over the subsidiary (power to elect directors and to influence the affairs, policies, and direction of the subsidiary). Subsidiaries which have a common owner are brother or sister (sibling?) corporations. Transactions that flow from the parent to subsidiaries are often called “downstream” transactions. Transactions that flow upward, from subsidiary to parent, are “upstream” ones. Deals and transactions between or among sibling corporations are known as “cross stream.” The whole shebang, which might consist of a parent, three or four tiers of subsidiaries, and countless brother-sister patterns, is referred to as a corporate “group.”

B. Piercing the Corporate Veil A/K/A Corporate Disregard

1. Choice of Law

The whole of the veil piercing doctrine, which by and large remains a subject for case-by-case development, has been termed “mangled and muzzy.” Although the favorite corporate law doctrine of courts, with at least 15,188 reported cases by one count, courts have not even reached agreement on the proper law to apply, let alone parameters of the substantive doctrine. Defendant corporations may seek to have the court apply the internal

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64. See generally PHILLIP BLUMBERG ET AL., 1 THE LAW OF CORPORATE GROUPS 1-3 (1983) (explaining that although the usual relationship is by virtue of ownership, it may be by contract, as in the cases of franchises, dealerships, and other close contractual relationships: “Though the ‘ownership’ in the case of subsidiaries is lacking in these other affiliates, it is not ownership but ‘control’ that enables the parent to direct the management and operation of the various companies (subsidiaries and affiliates alike) that constitute the group.”).

65. See generally id. at 1-6 (explaining that another terminology used is familial. From the bottom up, a subsidiary may have a parent, a grandparent, and a great grandparent. The average among the 100 largest multinational corporations is 187 corporations in the group. The leader was HCA with 1976 subsidiaries, followed by Viacom (879), Bank of America (712), Wachovia (663), Morgan Stanley (629), and Pepsico (551)).

66. If a parent owns shares but has no ability to elect directors or direct policy, then the other corporation is no longer a subsidiary and the parent’s share block is nothing more than an investment.

67. BLUMBERG, supra note 64, at 1-3 (“[M]ultinational groups are typically complex, multilayered corporate structures with first-tier, second-tier, third-tier and even more junior tier subsidiaries.”).


69. Id. at 7.
affairs choice of law doctrine under which the law of the corporation's domicile (Delaware or Nevada, for example) would govern. Defendants would urge such a choice of law when the domicile state's laws are less conducive to veil piercing than are those of the forum state or the place of the wrong, which may well be a foreign jurisdiction.

Plaintiffs would respond that a suit for tort or breach of contract involves an external rather than internal affair, so that the law of the place of the wrong, or the law of the place designated the locus of contacts, should govern.70 Some commentators would split the baby in half, applying the internal affairs choice of law rule for voluntary creditors but traditional conflicts rules for involuntary ones, presumably which would include tort claimants.71 The better reasoned view seems to be that the court should apply the law of place where the wrong occurred, at least in cases of tort, which is our subject here.72

In Unocal, the trial judge ruled that the law of the place of the alleged wrong, Myanmar in this case, should govern the veil-piercing question.73 The defense law firms then, proving foreign law as fact (as the Federal Rules used to require, and still permit) hired an expatriate Burmese who had been a law professor in Yangon. The professor submitted a report, in the form of a lengthy affidavit, that Myanmar would not permit veil piercing in the case at bar. Judge Chaney rejected the attempt, finding the entire report to be conclusory and result oriented, in addition to being sloppy and otherwise ill-prepared. In the alternative, the judge ruled that Myanmar had for some time had no functioning court system and therefore no law she could apply, or that the professor really could opine on, for that matter.

The judge therefore decided she would look to the law of the parent corporation, in this case Unocal International Pipeline Corp., which was a Bermuda corporation. The defense firms, however, had made a tactical mistake. They had put all their eggs in the Myanmar choice of law basket. They had no expert on Bermudian law and no ready prospect of lining one up soon.

The trial judge made a finding that the applicable law, if unproven, could be taken to approximate the law of the forum state, in this case, California. This sequence of events was fortuitous for plaintiffs, as California courts are among those most frequently to uphold piercing the corporate veil (50.86% of the cases).74 Only a few states, such as North and South Dakota, have higher rates, 85.71% and 83.33% respectively, but they may be termed outliers, as the number of cases is small.75 Professor Henry Winthrop Ballantine, who taught corporate law at the University of California at Berkeley, Boalt Hall School of Law, repeatedly opined that courts should pierce the corporate veil in any case in which the court had found "the capital to be illusory or trifling, compared to the business to be done


74. Oh, supra note 68, at 34.

75. Id. at 33.
or the risks of loss.” 76 Although California courts do not pierce the veil on inadequacy of capital alone, they come close. 77 Ballantine’s “optimistic reading of the prior [California] cases” about the sufficiency of undercapitalization to pierce the corporate veil led to California’s “reputation as one of the states most likely to pierce the corporate veil.” 78

At the opposite end of the spectrum,


[155x590]n.10 (1986).

78. PRESSER, supra note 72, § 2:5, at 2-31.

79. Oh, supra note 68, at 32 (footnotes omitted).

80. Id.

81. A remedial implication of this is that plaintiffs’ attorneys should be prepared to explore and prove up foreign law. Two points may be made. Defense lawyers often believe that a resort to foreign law favors them, as they almost always have superior resources. Resort to foreign law may backfire, however, as, for example, many foreign jurisdictions have much longer statutes of limitation. Second, proof of foreign law may not take as much in the way of resources as it used to. Although the preferred method remains using a live witness to prove foreign law as fact, the Federal Rules of Evidence now permits introduction of a learned treatise and its commentary as well as live testimony by an expert witness, likely to be a much more expensive proposition. FED. R. EVID. 803(15).

2. The Doctrine As Applied to Unocal

Applying traditional veil piercing was difficult, even against the background of a pro-plaintiff body of substantive law, as in California. The reason, likely to be similar in a great many multinational corporation cases, was that plaintiffs would have to do it (pierce the veil) three or four times to get where they wanted to go. They would first have to pierce the veil between Moattama Gas Transportation Company (MGTC) and Unocal International Pipeline Corp (UPI) (Bermuda), then through another veil to Unocal International Corporation (UIC) (Nevada). Union Oil of California (California) owned 100% of the shares of UIC. In turn, Unocal (Delaware), the “big tuna,” if not to the plaintiffs then to the human rights lawyers who represented them, owned 100% of Union Oil of California’s shares.

A first obstacle was that UPI owned only 28.25% of MGTC, neither complete (100%)
nor numerical (51%) control. Although most of the cases involve complete or, to a lesser extent, numerical control, working control (less than numerical) will suffice. Two of the MGTC shareholders were, if not free riders, just along for the ride. The Petroleum Authority of Thailand Exploration and Production Co. (PTTEP) and the Myanmar Oil and Gas Enterprise (MOGE) owned 25.5% and 15%, respectively. They in no way could be thought of as players: They did not seek, let alone exert, control over the venture. Instead, Total S.A., the French multinational, owned 31.25% and was, by contract, the manager of the joint venture. Total, however, consulted Unocal on every significant decision and would proceed no further with an initiative if Unocal objected. Unocal had clear working, although not numerical, control.

Total and Unocal formed MGTC in Bermuda in 1994. Despite the business objective, construction of $1.2 billion pipeline, Unocal and Total contributed as equity a total of $17000. MGTC had few, if any, employees. Unocal sent Unocal employees from Texas and California to Myanmar who, while there, did the work of MGTC. The Unocal employees functioned as a borrowed servant under agency law, but the rub was not that this or that employee was borrowed, but that every employee was borrowed. Beyond an organizational meeting, the Board of Directors never met. All agreements and other documents provided notice be sent to Unocal headquarters in Los Angeles.82

MGTC was not a "no asset" corporation. It held 28.25% of a $1.2 billion hard asset, namely, a 700-kilometer pipeline. It may as well have been a no asset company, as no court system existed in Myanmar with which a foreign judgment could be registered. Even if Myanmar had a functioning court system, the ruling military junta would never permit an attachment of the pipeline, especially by peasants who were, for the most part, not even Burmese, but ethnic Karens.

A contention that defendants' lawyer made over and over was that if insurance existed, adequate in amount to cover most claims, then no court would permit the veil to be pierced. The whole doctrine was, according to the defense, about making plaintiffs whole, or at least partly so.

Plaintiffs made two responses. First was that the doctrine was not about collectability of judgments alone. The doctrine is also about setting up subsidiaries correctly in the first place, with capital adequate for the business to be done and the risks of loss. The doctrine is about giving subsidiaries functional independence (financial and governance independence) so they can react to the environment in which they operate. Had UPIC had functional independence, complaints that were made would have been heeded and UPIC managers would have directed the army to cease their harmful activities.

Second was that any insurance had was not really insurance. UPIC obtained a binder for $20 million in liability from Myanmar Insurance, an agency in Yangon. Myanmar attempted

82. From El Segundo, near Los Angeles, Unocal made all payments directly to MGTC's Singapore bank account, bypassing parent, grandparent and great grandparent corporations. Los Angeles staff set up and kept the books. The managerial accounting function for MGTC resided with a Unocal manager first in Trinidad and then in Sugarland, Texas. All pipeline cash flow was up streamed to Unocal, first as payment of loans and then as dividends.
Holding Multinational Corporations Accountable?

to re-insure the risks in the London market. No London syndicate would assume the risk unless London in turn could re-insure it, which they were able to do in the Bermuda market. An insurance company named Pickwick Insurance picked up the risk. Who owned Pickwick? Unocal did.

Insurance is the shifting and then spreading of a risk, or class of risks. The UPIC transaction involved no shifting, let alone spreading. Unocal merely transferred the risk from the left to the right pocket. Although liability insurance suffices as capital for purposes of the doctrine, there was no real insurance here. Based upon its demonstrated refusal even to talk settlement, let alone pay, either through itself or any of its subsidiaries, it was probable that Unocal would cause its Pickwick subsidiary to refuse as well. Plaintiffs had dug out the facts from a three-foot stack of documents. Subsequent to being called on their insurance charade, Unocal dropped the insurance argument.

Assuming that plaintiffs had been able to reach through the first veil, they would have been confronted with another corporate veil, that between UIPC and UIC. In theory, plaintiffs might well have been able to pierce that veil. UIV had capitalized UIPC for $1000. The UIPC Board of Directors never met. Instead, a sheath of unanimous written consents filled the corporate minute book. Unocal had twenty-eight or twenty-nine corporate officials at Unocal who were directors and assistant secretaries of various subsidiaries. This ensured that someone was always available at Unocal headquarters to sign documents. UIPC was, in the words of Professor Laty, "a subsidiary formed with nothing, having nothing, and intended to end its existence with nothing."^3

Assuming success in hurdling over, or crawling under, that corporate veil, plaintiffs would encounter yet a third corporate veil, that existing between UIPC and UIC. Here the attempt to pierce came to a complete stop. UIC was a real corporation whose board of directors held meetings. UIC held the shares of all Unocal's foreign holdings. Those holdings had a book value of $800 million and a probable market value much higher.

So after much heavy lifting, plaintiffs still would have been unable to reach the top, at least under a veil piercing theory. After a two day hearing, the trial judge dismissed the veil piercing claims against the parent corporation. Under no conceivable set of facts could plaintiffs have reached Unocal, at least under the veil piercing, or as it is called in California, the alter ego doctrine.

3. For the Plaintiffs

One of the best precedents in recent years, at least for plaintiffs in an ATS multinational case, is United States v. Bestfoods, which is not a veil piercing case at all.\(^4\) Instead, the case involves the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which holds other persons and corporations responsible for Superfund cleanup costs if they were either an "owner" of the site or an "operator" of the person who commit-

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83. ELVIN LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS: A STUDY IN STOCKHOLDERS' LIABILITY 138 (1936).
ted the offending acts. To determine who is an operator (a federal question) courts borrow veil piercing law from state law.

Corn Products International (CPI; Bestfood's predecessor name) owned Ott Chemical Co., of Muskegon, Michigan, from 1965 to 1972. Ott's plant site was declared a Superfund site. In 1989, the United States sued Bestfoods for tens of millions of dollars in cleanup costs. Mr. Justice Souter distilled the teachings of veil piercing law in order to flesh out when a parent corporation may become an operator of a subsidiary.

Mr. Justice Souter states that "[t]he question is not whether the parent operates the subsidiary, but rather whether it operates the facility [which the subsidiary owns]." The former is permissible and involves normal relationships between a parent and a subsidiary growing out of the parent's status as a shareholder. Many of the parent's actions are merely an exercise of its democracy rights. Those would involve electing directors, engaging in long run strategic planning, appointing principal officers, and having joint directors and officers ("directors and officers holding positions with a parent and its subsidiary can and do 'change hats,' " notes justice Souter).

Even some operation of the facility, rather than of the subsidiary, is permissible. "[A]ctivities that involve the [subsidiary] facility but which are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise" to veil piercing.

By contrast, when the parent sends its own employees to participate in the day-to-day or week-to-week operating decisions, or otherwise attempts to dictate or influence those decisions, the parent may lose its limited liability. CPI had sent its environmental and government affairs director, a Mr. G. D. Williams, on numerous trips to Muskegon. While there, Mr. Williams had "played a conspicuous part in dealing with the toxic risks emanating from the operation of the plant." CPI, under its successor name, Bestproducts, lost its limited liability.

So parents may operate their subsidiaries but not the facilities of their subsidiaries. Such a test comes close to establishing a bright line test for what parent corporations can do and what they should avoid in corporate group contexts. By the same token, Bestfoods can give ATS plaintiffs some inkling of when they may be able to pierce the corporate veil.

86. Bestfoods, 524 U.S. at 56-57.
87. See id. at 57.
88. Id.
89. Id. at 67-70.
90. Id. at 68.
91. Id. at 69.
93. See id. at 71.
94. Id.
95. Id.
4. For the Defense

On the other side of the ledger, corporations can and do segment their business precisely to prevent the assets of the parent from being at risk for claims of the higher risk segment of the business. For example, an asset-rich natural resource corporation may put its trucks and related assets into a separate transportation subsidiary. A petroleum exploration and production company may form a separate subsidiary for its drilling operations. Segmentation may also take place along geographical lines. The oil and gas company could have separate drilling companies for Central America, Venezuela, and the remainder of South America:

[S]ome corporations follow a segmentation strategy. They allocate their business to a number of related corporations so that liability of one does not impact the assets of several others... Pursued in moderation, and when each subsidiary has a measure of functional independence and adequate capital, a segmentation strategy may be legitimate.96

The magic words are “in moderation.” At trial, the Unocal corporate treasurer testified that at any given time Unocal had approximately 300 subsidiaries. The custom of the corporation was to form a new corporation for each and every new venture, even if only at the idea stage. Unocal seemed to have implemented a parody of the segmentation strategy.

One hallmark of function independence would be financial independence, including equity capital or insurance sufficient to stand for most, but not all, foreseeable risks. Unocal had in place a cash management system geared to ensure that the opposite would be true. At the end of each day, Unocal’s treasury called on all subsidiaries to “zero out,” or nearly so. Unocal left each subsidiary only with funds sufficient to meet working capital needs in the next few weeks. Every additional dollar was upstreamed to El Segundo in the form of loan repayments or dividends.

At least in those jurisdictions in which inadequacy of capital is a sufficient, or nearly sufficient, ground for piercing the corporate veil, such a cash management system would seem anathema. Nonetheless, in Fletcher v. Atex, Inc., a Second Circuit panel turned back a veil piercing claim grounded on Eastman Kodak’s centralized cash management system.97 “All funds transferred from the subsidiary accounts [to the parent] are recorded as credits to the subsidiary, and when a subsidiary is in need of funds, a transfer is made.”98 The court indicated that “without ‘considerably more,’ ” use of a centralized cash management system is insufficient to pierce the corporate veil based upon thin or inadequate capitalization.99

Fletcher seems to do great violence to the veil piercing doctrine, permitting a parent to set up a subsidiary without any financial independence, in utter disregard of Ballantine’s maxim that capital, even of a subsidiary, must be adequate given “the business to be done or the risks of loss.”100 Such cash management systems also seem to be dishonest book-

96. PINTO & BRANSON, supra note 9, at 60.
98. Id. at 1459.
99. Id.
100. BALLANTINE, supra note 76.
keeping, allowing the excess cash flow and profits to be up streamed to the parent corporation while the liabilities remain bottled up in the subsidiary.\footnote{Of course, centralized cash management systems do not leave subsidiaries without assets (inventory, plant, equipment, vehicles, and so on). Such systems merely deprive would-be judgment creditors of liquid assets which could be attached.}

\textbf{C. The Uncertain Promise of Veil Piercing}

From a doctrinal standpoint, at first blush, the objection seems to be that a plaintiff may well have to attempt it (veil piercing) over and over again, and then over again once more, as she attempts to reach up through the various layers of subsidiaries. Yet most corporations do not flaunt the rules as Unocal seems to have done. They do obtain real liability insurance. They capitalize subsidiaries adequately. They do not organize their front line operating entities on a shoestring.

So, in a good many cases, under a veil piercing doctrine, the outcome may be counterintuitive. The plaintiffs will encounter a subsidiary with insurance adequate for most risks. The parent will be careful to limit its involvement to exercise of its democracy rights, permitting the subsidiary, rather than the parent, to operate the facility of the subsidiary. The plaintiff will not have sufficient grounds to pierce the first corporate veil, let alone three or four. The ATS case begins and ends some distance away from the household name multinational company. Under either outcome, therefore, traditional veil piercing doctrines are not promising for plaintiffs in most ATS cases.

\textbf{1. Enterprise Liability}

Courts and commentators sometimes refer to cases of horizontal veil piercing (from one sister subsidiary to its brothers and sisters), as in the taxi cab cases, as enterprise liability.\footnote{For a leading taxi cab case, see Walkovszky v. Carlton, 18 N.Y.2d 414 (1966). In Walkovszky, Carlton, the owner, divided his twenty cab taxi fleet among ten corporations. \textit{Id.} at 416. Each corporation held only two cabs and a liability insurance policy sufficient to meet the New York Financial Responsibility law, then $10000. \textit{Id.} An issue in the case was whether all ten entities could be regarded as one enterprise. \textit{Id.}} Over the last twenty-five years or so, this doctrinal offshoot of veil piercing has taken on additional dimensions.\footnote{See, e.g., Phillip I. Blumberg, Accountability of Multinational Corporations: the Barriers Presented by Concepts of Corporate Judicial Entity, 24 HASTINGS INT’L & COMP. L. REV. 297 (2001); Phillip I. Blumberg, The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Liabilities, 28 CONN. L. REV. 295 (1996).} When entities of a corporate group (brother and sister corporations, parents, and grandparents) are under common control, and they contribute to a collective endeavor, a court may hold them all to be one single enterprise. The court then disregards multiple corporate veils. Such cases usually involve use of the same corporate logo, interchange of corporate personnel, operation out of common offices, and similar factors.

An example of an enterprise liability holding is \textit{In re Oil Spill by the Amoco Cadiz}.\footnote{In \textit{re Oil Spill by the Amoco Cadiz}, 954 F.2d 1279 (7th Cir. 1992).} The Court of Appeals held the ship’s owner, Amoco Tankers, Inc., Amoco International Oil Co. (a
sister), Amoco Transportation (parent), Amoco (grandparent), and Standard Oil of Indiana (great grandparent) all to be one entity, responsible for cleanup costs occasioned by the tanker’s grounding and the ensuing oil spill. The court held the various corporations to be elements of an integrated international enterprise.

In its defense in Unocal, Unocal produced an expert witness who testified that courts had limited the enterprise liability doctrine to cases of horizontal veil piercing only, as in the taxi cases. Even California had precedent contrary to what the law professor expert witness stated. California courts had held a subsidiary real estate development corporation, its parent, and its grandparent to be one enterprise. Nonetheless, the applicable precedent seems to have been lost in the shuffle. The trial judge specifically stated she understood the theory but that the question of adopting and applying the enterprise liability doctrine to the case at bar was one for an appellate court.

So far, application of the enterprise liability doctrine is limited to what may be termed outliers here and there. Given the realities of globalization, however, advocates of the theory espouse as essential that courts move from an entity-by-entity approach (traditional veil piercing) to an enterprise liability doctrine. That time seems not yet to have arrived. By and large, multinational corporations may continue to bring home cash flow and profits while keeping liabilities bottled up in a distant subsidiary somewhere in a foreign land.

2. Agency Theories

That is, if they mind their businesses correctly, multinationals may continue to upstream profits while not becoming liable. Often multinationals do not. They become overinvolved in the businesses of the subsidiary and liability of the parent, or grandparent, may result.

Many courts use principal-agent analogies to uphold veil piercing allegations. When a court finds that a subsidiary corporation exists solely to carry out the owner’s agenda, having no independent reason for its own existence, then the corporation is found to have been the mere agent or instrumentality of the owner. The corporation is disregarded and the human owner or parent corporation is held liable.

To invoke the theory, “[t]here must be such domination of finances, policies, and practices that the controlled corporation has, so to speak, no separate mind, will, or existence of its own and is but a business con-

105. See id. at 1304.
106. Cf. Gardemal v. Westin Hotel Co., 186 F.3d 588 (5th Cir. 1999) (recognizing the “single business doctrine” but refusing to hold Hotel Westin Mexico and Westin to be so integrated as to support application of that theory (plaintiff's decedent had been drowned by a rogue wave at Westin’s Cancun resort)). Id. at 591, 595.
108. Blumberg, supra note 103.
110. See PİNTO & BRANSON, supra note 9, at 49–50.
duit for its principal."\textsuperscript{111}

That is agency by analogy, used as an adjunct to or extension of veil piercing arguments. There exists an entire separate field of play for agency law other than for use in making analogies, what we might call agency in fact. According to veteran ATS litigators, actual agency has become the legal construct they use most frequently to argue that the grandparent or great grandparent has become answerable, as principal, for the acts of the subsidiary.

In \textit{Doe v. Unocal}, the subsidiaries MGTC and UIPC had no employees of their own. Unocal engineers, still paid by Unocal paychecks, physically participated in every phase of pipeline construction: choosing a route, planning, safety, and operation. Unocal, not MGTC or UIPC, had an office in Yangon which used Unocal stationery, invoices, and other paperwork, staffed with Unocal managers. Unocal financial personnel in Sugarland, Texas did the accounting for the venture. Along with Total employees, Unocal employees who frequently flew to Yangon to do the subsidiaries' work had an expedited pathway through Myanmar immigration, customs, and security marked "Total and Unocal Employees Only." There existed ample evidence to demonstrate that, on the ground, so to speak, the parent corporation had used and the subsidiaries actually had become agents in fact of the U.S.-based parent.

\textit{Bauman v. Daimler Chrysler Corp.}, a recent ATS opinion by the Ninth Circuit Court of Appeals, elucidated what kind of evidence may indicate an agent in fact.\textsuperscript{112} Plaintiffs, 23 Argentine citizens, sought to establish personal jurisdiction in a California federal court based upon the presence in California of two Mercedes Benz marketing offices, offices of Mercedes Benz USA (MB USA), a Delaware Limited Liability Company (LLC).\textsuperscript{113} They alleged that they, or their next-of-kin, had been brutalized, tortured, or murdered by the Argentine military, which had ruled the country from 1976–83. They further alleged that Mercedes Benz Argentina had aided and abetted the military.\textsuperscript{114} These were the links to Daimler Chrysler AG (DC AG), the German parent corporation: Argentina to California to Germany, with the lawsuit to be filed and tried in California.

The court began with what parent corporations may do, noting "[a]ppropriate parental involvement includes: monitoring the subsidiary's performance; supervision of the subsidiary's finances and capital budget decisions; and articulation of general policies and procedures... [I]t is entirely appropriate for directors of a parent corporation to serve as directors of a subsidiary."\textsuperscript{115}

To determine whether a parent has strayed over the line, and the subsidiary becomes the agent in fact of the parent, a two-step test is necessary.\textsuperscript{116}

\textsuperscript{112} See Bauman v. DaimlerChrysler Corp., 579 F.3d 1088 (9th Cir. 2009), vacated by 603 F.3d 1141 (9th Cir. 2010).
\textsuperscript{113} Id. at 1091.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 1095 (quoting Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001)).
\textsuperscript{116} Id.
Holding Multinational Corporations Accountable?

First, the parent must exert control that is so pervasive and continual that the subsidiary may be considered an agent or instrumentality of the parent, notwithstanding the maintenance of corporate formalities. Control must be over and above that to be expected as an incident of ownership. Second, the agent-subsidiary must also be sufficiently important to the parent corporation that if it did not have a representative, the parent corporation would undertake to perform substantially similar services.117

The court found control to be the sine qua non for a finding of agency.118 MB USA, LLC had no power of control over Mercedes Benz Argentina.119 MB USA could neither be the conduit back to DC AG in Germany nor the basis for establishing personal jurisdiction in the U.S. over the Argentine company.120

A great advantage of the agent in fact theory is that it bypasses the layers of intermediate corporations. The theory may make the great grandparent household name corporation answer for acts done by the great grandchild subsidiary.

3. Joint Venture

This theory is similar. Along with agency, joint venture also adds to the mix issues of fact which may enable plaintiffs to escape a motion for summary judgment. In the Unocal case, while the trial judge dismissed claims alleging vertical entity-by-entity veil piercing and enterprise liability, she kept agency and joint venture claims in the case. Further, because those claims involved issues of fact, she held that a trial would be necessary to resolve them. While her holding dismissing two of plaintiff’s theories allowed defense counsel to claim a significant victory, her retention of two other species of claims against the parent corporation would lead to a trial and ultimately to a settlement.

"There are three basic elements of a joint venture: the members must have joint control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the members must each have an ownership interest in the venture," according to California courts.121 Other jurisdictions’ laws are the same,122 or quite similar.123 Joint venture is not a legal form of entity; it must take on a form of entity, such as a limited

117. Id. (citing Harris Rusky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1135 (2003)).
118. Bauman v. DaimlerChrysler Corp., 579 F.3d 1088, 1096 (9th Cir. 2009), vacated by 603 F.3d 1141 (9th Cir. 2010) ("A relationship is not one of agency ... unless the principal has the right ... to control the agent's acts." (quoting the RESTATEMENT (THIRD) OF AGENCY § 101, cmt. c (2006))).
119. Id.
120. See id. at 1098.
122. See, e.g., Daniels v. Corrigan, 886 N.E.2d 1193, 1208 (Ill. App. 2008) (alleging that taxi companies were joint venturers because they coordinated activities); Basel v. Westward Trawlers, Inc., 869 P.2d 1185, 1189 (Alaska 1994) (alleging that essential elements of a joint venture, sharing of profits or losses and joint or shared control, were missing).
123. See, e.g., Jackson-Shaw Co. v. Jacksonville Aviation Auth., 8 So. 3d 1076, 1089 (Fla. 2008) (quoting Kislak v. Kreedian, 95 So. 2d 510, 515 (Fla. 1957) ("A joint venture 'is created when two or more persons combine their property or time or a combination thereof in conducting some particular line of trade or some particular business deal.'").
liability company, or as in the Unocal case, a corporation (e.g., MGTC). If the parties do nothing, a business joint venture is a partnership.\footnote{124. UNIF. P'SHIP ACT § 101(6) (1997) (" 'Partnership' means an association of two or more persons to carry on as co-owners a business for profit").}

When the evidence is in dispute, the existence or non existence of a joint venture is a question for the jury.\footnote{125. See, e.g., April Enters., Inc. v. KTTV, 147 Cal. App. 3d 805, 820 (1983).} If the jury finds a joint venture, then the wrongful acts of one joint venture if committed within the scope of the joint venture are imputed to the other joint venturers, the same as the acts of one partner imputes to others in a general partnership.\footnote{126. See, e.g., Unruh-Haxton, 76 Cal. App. 4th at 371.}

MGTC, the operator of the pipeline, had four owners, or joint venturers: Total S.A. (a French multinational), Myanmar Oil and Gas Enterprise (MOGE), the Thai Electrical Authority, and Unocal International Pipeline Corporation (UIPC). The allegation was that by its actions on the ground in Myanmar, the great grandparent Unocal became a fifth member of the joint venture. Unocal sent employees to Myanmar, it opened and staffed an office there, Unocal employees made all the decisions, major and minor alike (UIPC had no employees), and represented Unocal in all joint venture dealings. Thus, prevailing legal concepts would impute to Unocal the wrongful acts of its joint venturer, Total S.A., who acted as general manager of the enterprise, who had hired the Myanmar army to provide security, and who carried out no apparent supervision, let alone restrain, of the Myanmar troops.

V. Conclusion

The inevitable question asked by plaintiffs lawyers is "which theory is better?" Only partial answers are possible. One seems to be that a traditional veil piercing attempt may be arduous and bear little fruit, at least in the case in which multiple layers of subsidiaries exist, which is most of the time. An advantage of agency and joint venture allegations is that the theories, along with some evidence to support them, help introduce additional issues of fact into a case. Issues of fact enable plaintiffs possibly to avoid a summary judgment or other pretrial dispositive resolution, enabling them to hold over, or hold on, for a full airing of plaintiffs' claims.

For corporations, two words are key: Functional independence. Exercise democracy rights in subsidiaries, to be sure, but capitalize them adequately. Obtain liability insurance (real insurance) for risks that could eventuate. Operate the subsidiary and not the facility of the subsidiary. The latter line drawing will permit corporations to avoid agency and joint venture theories which will allow ATS plaintiffs to reach the top in one fell swoop. Follow a segmentation strategy but not a parody of one as Unocal did.

Another teaching of this exposition is that knowledge of the ins and outs of ATS is only a starter. These cases require a thorough grounding in the procedural, evidence and similar issues that frequently arise. This article has touched on several of them: choice of law questions, secondary liability, and corporate law issues. The number of ancillary issues which are likely to arise, and may be dispositive of a given case, has grown exponentially since

\footnote{124. UNIF. P'SHIP ACT § 101(6) (1997) (" 'Partnership' means an association of two or more persons to carry on as co-owners a business for profit").}
\footnote{125. See, e.g., April Enters., Inc. v. KTTV, 147 Cal. App. 3d 805, 820 (1983).}
\footnote{126. See, e.g., Unruh-Haxton, 76 Cal. App. 4th at 371.}
multinational corporations, and the large resourceful law firms likely to represent them, have arrived on the scene.

Of course, all the putative law advice to corporate actors may be mere puffery if the recent Second Circuit decision, *Kiobel v. Royal Dutch Petroleum Co.*,127 achieves wide currency. If all ATS corporate liability ceases, as *Kiobel* holds it must, corporations have open to them a much larger field of play in how they organize and structure their international business affairs and in turning a blind eye toward human rights violations by their joint venturers, partners and subcontractors. Rogue actors will note and utilize at least some of the latitude so afforded them.

The last jeremiad is thus purely advisory but perhaps the most valuable one of all. Plaintiffs' attorneys should re-focus their sights. The ultimate value of ATS lawsuits, or some of them, is not to hold the multinational parent liable, or to force the multinational to undergo a long and complicated trial. The ultimate objective should be to send a message to corporate boardrooms and to obtain a recovery for persons who have suffered very real harms. *Unocal, Wiwa* and *Blackwater*, among others, have done those things. With or without ATS suits against them, many corporations have adopted codes of conduct, supplier codes of conduct, and programs for auditing compliance with those codes.128 ATS suits thus have already served one of the highest and best purposes they could possibly have.

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