HUMAN RIGHTS IN BUSINESS

Training Session I
Donostia-San Sebastián

The following cases are to be consulted in preparation for the Panel sessions on February 19, 2015

Spanish corporate defendants in EU and US tribunals:
Case of The Prestige (Spain) & Amoco Cadiz (France)

EU corporate defendants in non-EU tribunals:
Case of Kiobel v. Royal Dutch Petroleum (Nigeria) & Daimler (Argentina)

Informal justice by Spanish corporations:
Case of Inditex (Brazil) & Rana Plaza (Bangladesh)

Spanish corporate defendants in EU and US tribunals: Amoco Cadiz (France)

On March 16, 1978, the Amoco Cadiz tanker ran aground 3 miles off the coast of Brittany, France, splitting apart and causing the largest oil spill and resulting loss of marine life to that date. The cause of the accident was a fault in the steering system, severe weather caused the complete splitting of the ship and resulted in the entire cargo of crude oil (1,619,048 barrels) to be spilled into the sea and to contaminate 320 km of coastline.

At the time of the accident, France and Liberia (the flag State of the vessel) were parties to the International Convention on Civil Liability for Oil Pollution (CLC). The CLC was adopted to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships. The 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND) was not yet in force. Therefore, under the international standards in force in France at the time, compensation could not exceed 77,371,875 francs. The assessment made by a Parliamentary Commission of the French Senate revealed that costs incurred by the State were 340 million French francs, a figure which did not include the compensation payable to victims of the oil spill (fishermen, tourism industry, etc.). The extent of the damage caused by the accident went far beyond the limits of liability under the applicable international rules.

This in turn led the plaintiffs (the Republic of France, local institutions, environmental organizations, and various professional associations) to bring a consolidated civil action against the parent company of the ship owner, Amoco International Oil Co. (a subsidiary of Standard Oil), in U.S. District Courts in New York and Chicago (the corporate domicile of the defendant). Since the U.S. was not a party to the CLC, the plaintiffs filed for full restitution damages seeking US$2.2 billion. AIOC in turn filed several civil claims in U.S. District Courts in Chicago and New York for exoneration from or limitation of liability under the U.S. Limitation of Liability Act of 1851 and also named Astilleros Españoles S.A., the ship's builder, as a defendant or third-party defendant, alleging negligent manufacture of the Amoco Cadiz. The Spanish company motioned to dismiss the case against it for lack of personal and subject matter jurisdiction and for *forum non convenien,* but this motion was denied. No proceedings were brought before French courts. As concerning the applicable law for damages suffered in French territorial waters, the plaintiffs alleged that U.S. law was applicable.

On April 18, 1984, the District Court of Illinois, which was charged with handling the consolidated claims, found the defendants and its subsidiaries jointly and severally liable. The Court held, *inter alia*, that: "[a]*s an integrated multinational corporation which is engaged through a system of subsidiaries in the exploration, production, refining, transportation and sale of petroleum products throughout the world, Standard is responsible for the tortious actos of its wholly owned subsidiaries and instrumentalities, AIOC and Transport*" (*In re oil spill by the Amoco Cadiz off the coast of France on March 16, 1978*, 1984 A.M.C. 2123 (N.D. Ill., 1984), at 2194). There was no limitation set on liability for any of the defendants. The trial on the damages lasted longer than the trial on the merits. On January 11, 1988, the plaintiffs were awarded US$85.2 million. A rectification decision in 1992, which revalued both damages and the late interest rate, raised the total amount to US$200 million or 1.25 billion Francs (192 million euros). No compensation was awarded for ecological damage. The decision of the lower court was finally upheld by the U.S. Court of Appeals 7th Circuit on June 14, 1992, fourteen years after the oil spill.

Issues for consideration:

- International jurisdiction and *forum non conveniens*
- Determination and sufficiency of the applicable law
- Damage assessment and financial coverage of damages
- Piercing the corporate veil

Spanish corporate defendants in EU and US tribunals: The Prestige (Spain)

The Prestige, a 26-year-old single-hull tanker, sank on November 19, 2002 pouring thousands of tons of fuel 124 miles off the Galician coast. The spill is considered Spain's largest environmental disaster to date. With 77,000 metric tons of fuel oil aboard, the tanker had set out from Lithuania and was heading to Gibraltar when it was ordered to change course at the direction of the ship-owner. The ship was owned by Mare Shipping Inc. (Liberia), officially registered in the Bahamas, operated by Universe Maritime Ltd. (Greece), classed by the American Bureau of Shipping (ABS), insured by the London Steam-Ship Owners' Mutual Insurance Association (London Club) and the cargo was owned by Crown Resources AG (Russia, UK, Switzerland), a company that chartered the tanker, owned in turn by a Russian conglomerate Alfa Group. The Prestige was built in compliance with the ABS 1973 "Rules for Building and Classing Steel Vessels." Since its construction, the Prestige was periodically surveyed/inspected to ensure it retained its ABS certification.

Six days before the Prestige sank, the ship's hull had cracked during a storm and its oil cargo began to spill into the sea, 23.5 nautical miles off the Spanish coast, causing the ship to list and nearly to capsize. A distress message was sent to the port authorities, which instructed the crew to sail away from the coast. On November 15, 2002, Spanish judicial authorities commenced criminal proceedings and criminal charges for offences against the environment were later brought against the captain, the chief engineer and the first officer. No criminal charges were brought against Mare Shipping Inc., Universe Maritime Ltd. or Crown Resources AG, as it was not until December 2010 that legal persons could be held criminally liable in Spain. On November 13, 2013, more than ten years after the commencement of the proceedings, the Criminal Provincial Court of A Coruna acquitted all the defendants of liability. The consequence of the acquittal was that no direct or subsidiary civil liability could arise since there was no criminal offence proven.

The acquittal in the criminal proceeding did not however bar affected individuals, companies and public administrators from bringing civil actions in separate civil proceedings against the ship owner, the ship operator or other liable companies. In May 2003, the government of Spain ("Spain"), on its own behalf, filed a civil action in in the U.S. Southern District Court of New York against the American Bureau of Shipping for $700 million for negligently classifying the Prestige as capable to carry fuel cargoes. Spain argued that ABS was liable under the International Convention on Civil Liability for Oil Pollution Damage (CLC) for reckless conduct. In 2008, the Court ruled that it lacked jurisdiction to hear the case since the U.S. is not a contracting state to the CLC. The U.S. Court of Appeals vacated the lower court's judgment. On remand in 2010, the district court again did not find liability for ABS, holding that U.S. tort law did not impose on ABS the claimed duty of care towards Spain. On a second appeal in 2012, the Court held that Spain did not establish a genuine dispute of material fact as to whether ABS recklessly breached any duty. Neither the Spanish or French administrators have been compensated for the costs of the cleanup nor have the victims of the oil spill received compensation for damages.

Issues for consideration:

- Civil vs. criminal proceedings for cases involving environmental damage
- Civil liability of supervisory or certification agencies
- Plurality of nationality of interested parties and jurisdiction
- Interaction, overlap and failure of regulatory measures at the national, EU and international level
- Contractual (economic impacts) and non-contractual considerations (environmental impacts)

EU corporate defendants in non-EU tribunals: Kiobel v. Royal Dutch Petroleum (Nigeria)[1]

In response to ongoing opposition by local activists against the environmental degradation caused by oil extraction activities in the Ogoniland region of the Niger Delta, the Nigerian military government in 1994-95 cracked down hard on the protestors. A number of the activist leaders were arrested and hanged, after having been convicted of murder by a special military tribunal in a procedure that was widely perceived as violating international fair trial standards.

These events resulted not only in international outrage, but also in a number of civil claims being pursued by the victims or their next of kin against Netherlands-based Royal Dutch Petroleum Company and UK-based Shell Transport and Trading Company (Royal Dutch/Shell). In these claims it was alleged that these two holding companies had, through their Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC), aided and abetted the Nigerian government in committing human rights abuses directed at the plaintiffs by, *inter alia*, providing the Nigerian military forces with logistical support, weapons, food and monetary compensation.

Between 1996 and 2004, a number of related actions seeking damages and relief in relation to the alleged human rights violations perpetrated against residents of the Ogoni region in the 1990s were brought before US federal courts by two different groups of plaintiffs. In June 2009, Shell agreed to an out-of-court settlement with respect to the claims filed by one of these groups, led by Ken Wiwa, son of the late Ogoni activist and author/producer Ken Saro-Wiwa. The settlement sum of $15.5 million was meant to provide the ten plaintiffs involved with compensation and to cover a portion of their legal costs; in addition, a trust was established that is intended to benefit the Ogoni people.

This settlement did not pertain to the lawsuit brought by the Kiobel group of plaintiffs against the same defendant companies as the Wiwa-lawsuit for their alleged complicity in the commission of torture, extrajudicial killing and other violations. The claims in this suit were filed brought before a New York District Court in 2002 by Esther Kiobel, wife of the late Ogoni activist Dr. Barinem Kiobel, and eleven other Nigerians. Like the Wiwa-claims, they were based on the Alien Tort Statute (ATS), a somewhat obscure 1789 US statute that essentially allows US (federal) district courts to exercise subject-matter jurisdiction over civil claims brought by non-US citizens for violations of the law of nations perpetrated abroad.

This statute, which lay dormant for nearly two centuries following its enactment, was 'rediscovered' in the 1980s as providing a way to address and obtain redress for international human rights violations perpetrated anywhere in the world through the US federal judicial system. It has been hailed by human rights activists as a much-needed accountability mechanism for corporate human rights violations perpetrated in developing countries where victims' chances of obtaining (enforceable) remedies may be compromised by poorly functioning legal systems, corruption and/or favouritism. Although initially the ATS primarily generated tort claims aimed at (foreign) public officials as human rights violators, it soon became a basis also for tort claims against corporate actors for their alleged involvement in international human rights violations. Since the late 1990s, dozens of ATS-based civil claims have been brought against a score of multinational corporations that have found themselves subject to the exercise of personal jurisdiction by US federal courts.

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[1] This description is based on: L.F.H. Enneking, 'Multinational corporations, human rights violations and a 1789 statute – A brief exploration of the case of *Kiobel v. Shell*', 2012(3) *Nederlands Internationaal Privaatrecht* 396; L.F.H. Enneking, 'The future of foreign direct liability? – Exploring the international relevance of the Dutch Shell Nigeria case', 2014(1) *Utrecht Law Review* 44.

In September 2006, the New York District Court seized of the Kiobel-case partly granted and partly denied a motion to dismiss all claims brought by the defendants, holding that (only) a number of the plaintiffs' claims were actionable under the ATS. Apart from the issue of subject-matter jurisdiction under the ATS, the Court also considered the issue of personal jurisdiction (in separate judgments). In March 2008, it dismissed the claims against the Nigeria-based defendant Shell Petroleum Development Company of Nigeria (SPDC) for lack of personal jurisdiction. This dismissal was confirmed in June 2010, as the court held that the plaintiffs had not shown the requisite 'direct business relationship' to exist between this Nigerian Shell subsidiary and the US. The Court's personal jurisdiction over the holding companies Royal Dutch/Shell (based in the Netherlands and the UK, respectively) remained undisputed in the Kiobel-case. The Second Circuit Court of Appeals had in 2000 already held in the Wiwa-case that personal jurisdiction could be assumed over these two companies since they could be said to be 'doing business' in New York through the New York-based investor relation office of one of their subsidiaries that acted as their agent.

Both parties in the Kiobel-case appealed against the New York District Court's 2006 decision. This led to a decision by the Second Circuit Court of Appeals in September 2010 that turned out to be highly significant for the future of ATS-based civil claims against corporate actors for international human rights violations perpetrated in third countries, as it directly addressed, for the first time, the issue of corporate liability under the ATS. In a majority opinion, the Court of Appeals held that corporate actors cannot be held liable at all under the ATS for their involvement in international human rights violations, as "[…] *corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations inter se, and it cannot, as a result, form the basis of a suit under the ATS*".

The plaintiffs in the Kiobel-case petitioned the US Supreme Court, which in October 2011 announced that it would consider the appeal against the Second Circuit Court of Appeals' decision on the issue of corporate liability under the ATS. In an unexpected and somewhat unusual turn of events, the Supreme Court in March 2012 instructed the parties to the Kiobel-case to file supplemental briefs on a second question, namely whether the ATS allows US federal courts to hear lawsuits alleging international human rights violations that occur outside of the territory of the US. This particular question relating to the issue of extraterritoriality had not specifically been addressed in the Kiobel-case before, but is highly relevant in this particular case due to its so-called 'foreign cubed' nature, meaning that it involves foreign claimants, foreign defendants and conduct occurring outside the US.

In April 2013, the US Supreme Court came with a ruling in the Kiobel case which seemed to express a preference for a more restrictive approach to the ATS. In a judgment that addressed only the extraterritoriality issue, the court dismissed the case on the basis of the US presumption against extraterritoriality, arguing that since those drafting the Alien Tort Statute in 1789 did not explicitly provide that its reach should extend beyond US territory, it should be assumed that the statute only applies to norm violations perpetrated within the US (or on the high seas). But although the court was unanimous in holding that the case should be dismissed, it split 5-4 on the rationale for doing so, with the five Republican justices adopting a significantly more restrictive approach than the four Democratic justices.

The majority opinion seemed to be largely motivated by concerns over the potential foreign policy consequences of allowing ATS-based claims that have only few connecting factors with the US legal order, like the Kiobel-case (which involved foreign plaintiffs, foreign defendants and conduct occurring outside the US), to be dealt with by US federal courts. Still, it did seem to leave some room for manoeuvre, as it also indicated that the presumption against extraterritorial application may be displaced where the claims "[…] *touch and concern the territory of the United States* […] *with sufficient force*"; under what circumstances this would be the case remained unclear, however.

The minority opinion, which concurred in the judgment but not in the majority's reasoning, seemed much less restrictive, as it did not invoke the presumption against extraterritoriality but rather argued that US federal courts should have jurisdiction under the ATS where: "*(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States form becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind*".

Issues for consideration:

- U.S. Alien Tort Claims Act and its interpretation by the U.S. Supreme Court
- Issues of extraterritoriality in transnational civil liability claims against corporate actors for harm caused in third countries
- Responsibilities of corporate actors under international human rights law
- Non-US alternatives for ATS-based lawsuits

EU corporate defendants in non-EU tribunals: Daimler (Argentina)

In 2004, 23 Argentinian citizens filed a complaint against Daimler Chrysler AG (now Daimler) in a U.S. federal court in California under the Alien Tort Statute and the Torture Victims Protection Act. They alleged that one of Daimler's subsidiaries, Mercedes Benz Argentina, had collaborated with state security forces to kidnap, detain, torture and kill the plaintiffs or their close relatives, who were employees of Mercedes Benz Argentina, during Argentina's military dictatorship, which ruled from 1976-1983.

In 2005, Daimler filed a motion to dismiss the case for lack of personal jurisdiction in California. Daimler, headquartered in Germany, argued that it could not be sued in California solely based on the fact that its subsidiary, Mercedes Benz USA, had two offices in the state. On November 22, 2005, the Court granted Daimler's motion to dismiss the case for lack of personal jurisdiction, finding that Daimler did not have "continuous and systematic contacts" with Mercedes Benz USA. The plaintiffs appealed, and the appeals court reversed the lower court's decision on May 18, 2011, arguing that Daimler was subject to personal jurisdiction in California. In addition, it argued that Argentinian courts would conclude the plaintiffs waited too long to sue, and that it was unclear whether German courts would consider the plaintiffs' claims. The case was remanded to the federal court for further proceedings.

In February 2012, Daimler appealed to the U.S. Supreme Court. On April 19, 2013, the Supreme Court agreed to hear the appeal. On January 14, 2014, the Supreme Court reversed the federal appeals court decision, and ruled that Daimler did not have enough ties with California for courts to hear the case.

Issues for consideration:

- Extraterritorial jurisdiction
- Minimum contacts as the basis for the establishment of personal jurisdiction
- The future for human rights litigation after *Kiobel*

Informal justice by Spanish corporations: Inditex (Brazil)

In 2011, the Zara parent company Inditex (Industria de Diseño Textil S.A.) went under investigation by the Brazil Ministry of Labour after a contractor in Sao Paolo was allegedly found to be implementing dangerous and unhealthy labour conditions in an unlicensed factory where clothes carrying the Zara label were being produced.

The Brazilian government listed 52 charges against the clothing company after it removed 15 workers from a factory sub-contracted by AHA, the company responsible for 90% of Zara's Brazilian production. Fourteen of the workers were Bolivian and one was from Peru. One of the workers was 14 years old. Investigators reported that the immigrant workers worked long shifts in "dangerous conditions" for less than the legally required minimum wage.

The lead investigator Renato Bignami reported that: "They work 16 or even 18 hours a day. It is extremely exhausting work, from Monday to Saturday, sometimes even Sunday depending on demand. I've seen workers who have taken home R$150-250 (£57-94) at the end of the month – after paying off housing debt, food debt, telephone card debt, debt [to people traffickers] for the journey here. Many have to work for three or four months to pay off the "coyotes" that have smuggled them into the country. These are classic cases of immigrant sweatshops. Workers often face threats, coercion, and physical violence. All this to increase productivity."

In a statement by Inditex, the parent company stated that it could not be held responsible for "unauthorised outsourcing" but would compensate the workers because AHA had violated Inditex's Code of Conduct for External Manufacturers and Workshops. They also countered that all factories responsible for unauthorized outsourcing have been asked to regularize immediately the situation of the workers involved. The Brazilian Ministry of Labour countered the position of Inditex. "AHA is a logistical extension of its main client, Zara Brasil," said the prosecutor, Giuliana Cassiano Orlandi. "The company is responsible for its employees. Its raison d'être is making clothes and it follows that it must know who is producing its garments."

Inditex settled with the Brazilian government, agreeing to make a voluntary compensation payment of US$1.8 million (1.4 million euros) instead of the original Brazilian claim of $10.7 million.

Inditex is a multinational clothing company headquartered in Arteixo, Galicia. About 50% of the clothes and accessories sold by Zara are manufactured in Spain, while 26% are produced in the rest of Europe and 24% in Asian and African countries. Inditex has approximately 50 suppliers in Brazil, which employ more than 7,000 workers.

Issues for consideration:

- Effectiveness of negotiated settlements vs. right to due process
- Worker compensation
- Piercing the corporate veil
- Role of Codes of Conduct
- Responsibility and liability in global supply chains

Informal justice by Spanish corporations: Rana Plaza (Bangladesh)

Bangladesh is the world's second largest clothing manufacturer. On April 24, 2013, the Rana Plaza garment factory outside of Dacca, Bangladesh, collapsed. In a building that housed 4,600 employees of textile workshops, 1,138 persons died and 2,000 were left injured.

In a spirit of solidarity and compassion, the Rana Plaza Donors Fund was created to collect voluntary contributions to the victims and their families. The International Labour Organization (ILO), the sole trustee, manages the Fund under the instructions of a Coordination Committee. Initial estimates suggested that US$40 million (29 million euros) was needed to compensate the injured parties. Among contributors are the Spanish companies that had operated in Rana Plaza: El Corte Inglés, Inditex, and Mango. The Fund, established in January 2014, was created as a humanitarian effort and is not intended to suggest or imply legal responsibility by any of the named, or unnamed, contributing entities. Furthermore, a confidentiality agreement was accorded surrounding the amounts contributors appropriated to the fund.

In order to allow for equitable distribution according to the needs and losses suffered of the victims, their dependents and their families, independent commissioners recommend amounts for payments from the Fund, following a claims process. The funds, which operate in U.S. dollars, are transferred into a Bangladesh bank that in turn deposits the specified amounts into the victims' own bank accounts. The Fund also covers the costs incurred for the administration of the Fund.

Since the Rana Plaza collapse, more than 150 brands have signed the Bangladesh Accord on Fire and Building Safety, a legally binding instrument to promote factory safety and employs engineers to check the structural integrity of more than 1,600 factories. Another consortium, the Alliance for Bangladesh Worker Safety, is inspecting more than 700 factories. Some of the inspections under the Accord have resulted in the temporary closing of factories for structural improvements. Among issues revealed from the inspection reports were locked fire exits, dangerous electric cabling and overladen buildings.

Eighteen months after the Rana Plaza building collapse, there are two major questions that remain unanswered. The first is whether, considering their vast numbers, it is realistic to assume all (or even most) of the Bangladeshi factories and facilities that produce for the export market will be inspected, either by the Accord and Alliance initiatives or by the Bangladeshi government for those facilities that fall outside those two initiatives. The second is how factory upgrades or relocation following such inspections should be financed. The inspections by the Accord and Alliance initiatives have so far identified thousands of deficiencies in the factories that fall within their inspection programs. To date, however, none of the major brans or retailers has made a public commitment to fund the upgrades and repairs that are needed. Concerns over costs have some factory owners to request soft loans from the brands that use their facilities. Concerns over costs have some factory owners to request soft loans from the brands that use their facilities.

Issues for consideration:

- Effectiveness of a voluntary fund for human rights violations
- Responsibility and liability in global supply chains

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