ADJUDICATING TRANSNATIONAL CORPORATE CRIMES IN FOREIGN COURTS: IMPERIALISM OR ASSERTION OF FUNCTIONAL JURISDICTION?

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I. INTRODUCTION

It is imperialistic.\(^1\) It creates conflict of sovereignty.\(^2\) It amounts to an unjustified incursion into foreign policy that damages diplomatic relations.\(^3\) As one scholar puts it, “[a]sking courts to settle our political differences for us is rarely a good idea, and asking foreign courts to do so is even worse.”\(^4\) “Neither force nor authority”, he maintains, “can take the place of meaningful political debate, and every attempt to settle political disputes judicially is almost

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automatically suspect.”\(^5\) For not only do we think that such actions amount to attempts to use the courts to circumvent established political and economic structures,\(^6\) we also think that such actions would be “impractical” and are “slightly frivolous examples of forum-shopping.”\(^7\) They are ineffective to bring any real socio-political change.\(^8\) They are illegitimate,\(^9\) anti-democratic\(^10\) and “counterproductive”,\(^11\) and they offer “hollow hope” to plaintiffs who had better deploy their energy politically.\(^12\)

Since the *Doe v Unocal*\(^13\) litigation in the US, the above criticisms have been advanced against the use of the Alien Tort Statute (ATS)\(^14\) to assert jurisdiction over foreign corporations in the US for abuses committed outside US territory. The suits are brought under the 1789 Act granting Federal District Courts original jurisdiction to hear and determine “any civil action [brought] by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.\(^15\) Oil multinationals Shell and Chevron, and pharmaceutical giant Pfizer, have, for instance, been haled to US courts via this statute for violations allegedly committed in the course of their operations in Nigeria.\(^16\) A similar case is also pending against Shell in the

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7 Klabbers, *supra* note 4, p. 553.
13 395 F 3d 932 at 936 (9th Cir., 2002).
14 Alien Tort Claims Act, 28 USC Section 1350 (1988).
15 Ibid.