

Pursuing International Labour Rights in U.S. Courts New Uses for Old Tools

Faire reconnaître les droits internationaux du travail devant les cours de justice aux États-Unis : une nouvelle utilisation de vieux outils

Reclamación de derechos laborales en los tribunales de Estados Unidos: nuevos usos de viejos instrumentos

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[Aller au sommaire du numéro](#)

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Résumé de l'article

Cet article évalue les efforts déployés par les défenseurs des droits internationaux du travail devant les cours de justice des états et du gouvernement fédéral aux États-Unis dans le contexte de la mondialisation. L'introduction présente le contexte des discussions sur la place qu'occupent les poursuites judiciaires au sein de la variété des stratégies de promotion des droits du travail et elle signale les dangers inhérents à l'emploi de telles poursuites. La deuxième partie jette un regard sur la doctrine juridique américaine et examine la forte présomption à l'égard de l'effet extraterritorial de la législation américaine. La troisième partie passe en revue les cas qui renvoient aux théories des contrats et des dommages en droit commun anglais et la quatrième analyse des cas qui s'appuient sur de vieux textes de lois qu'on invoque d'une nouvelle façon pour permettre à la législation sur les droits de la personne de jouer un rôle. Dans la plupart de ces cas se fauillent des histoires qui méritent d'être dévoilées, puisqu'elles se situent au-delà des simples éléments de droit qu'on peut recueillir des documents officiels. Les anecdotes que nous retons ici cherchent à traduire des choix stratégiques au moment d'intenter des poursuites dans le domaine des droits des travailleurs. La conclusion évalue l'efficacité de l'emploi de telles poursuites comme stratégie pour faire valoir ces droits.

On retrouve maintenant des dispositions visant les droits des travailleurs dans des lois commerciales qui se traduisent dans des accords sur le commerce et sur le travail tel l'Accord nord-américain de coopération dans le domaine du travail (ANACT) et la Déclaration du Mercosur. L'Union européenne a aussi prévu des règles et procédures détaillées en matière de droits des travailleurs. En 1998, l'OIT a émis une déclaration sur les normes minimales du travail et, en 2000, l'OCDE metait à jour son guide pour les multinationales pour inclure les droits des travailleurs. En plus de ces initiatives nationales, régionales et intergouvernementales, plusieurs entreprises, syndicats et ONG font la promotion de codes privés de conduite eu égard aux droits des travailleurs. Ces derniers n'ont cependant pas été incorporés aux règles de l'Organisation mondiale du commerce, mais un mouvement significatif se dessine en appui à de telles mesures. Ces instruments créent un nouvel espace pour la promotion des droits des travailleurs et pour des efforts de solidarité internationale, mais ceux-ci peuvent être, de façon frustrante, inefficaces. La plupart du temps, ils n'incluent que des mesures « douces » qui créent une certaine pression par des plaintes, des enquêtes, des audits, des rapports, des recommandations, des exposés médiatiques, etc. On recourt rarement à des mécanismes qui ont les dents des accords commerciaux parce qu'ils visent le statut de bénéficiaire commercial d'un pays et non les entreprises qui abusent des travailleurs. Par contre, des poursuites judiciaires peuvent viser des « valeurs corporatives » des droits des travailleurs et ainsi permettre d'obtenir des jugements sévères à l'encontre des entreprises fautives et en faveur des travailleurs lésés. Les « malfeasances corporatives » peuvent aboutir à des procès dramatiques devant jury, à des dommages punitifs importants en plus des dommages réellement connus. De plus, le système américain laisse amplement de place pour des recours collectifs au nom d'un grand nombre de victimes de situations similaires.

Représenter des clients situés à des milliers de milles de distance pose de sérieux problèmes de logistique. Les barrières de langue et les différences culturelles rendent la préparation des témoins difficile. En plus, la décision de régler hors cour constitue un choix difficile souvent accompagné de tensions entre les avocats et leurs clients. Même après une victoire, retrouver les clients pour leur remettre leur dû peut être difficile lorsque ceux-ci vivent dans des villages éloignés ou dans des quartiers urbains pauvres.

Ce n'est pas une surprise de constater que les poursuites judiciaires en matière de droits des travailleurs sont tragiques, innovatrices et peu nombreuses. Cependant le petit nombre de cas importants se prêtent à une révision et à une réévaluation de cette stratégie émergente dans le droit du travail, ce qui est l'objectif de cet article.

On doit prendre pour acquis qu'en général la législation américaine n'a pas d'application extraterritoriale. Dans bien des cas types, la Cour suprême des États-Unis a soutenu de façon constante que la législation du travail s'applique uniquement aux travailleurs américains, en affirmant que la législation américaine s'intéresse au conflit industriel entre des employeurs américains et leurs salariés. Pour que cette législation ait une portée extraterritoriale, le Congrès doit affirmer de façon claire et forte que c'est sa son intention, ce qu'il a rarement fait. Les dirigeants d'entreprises américaines qui transigent avec des travailleurs de d'autres pays n'ont qu'à respecter les lois du travail des pays où ils opèrent, mais non la législation américaine. Quand la législation de ces pays est peu développée ou qu'elle est peu appliquée, les employeurs peuvent maltraiter les travailleurs sans grave conséquence juridique.

Cependant, là où la législation fait défaut, le droit commun peut venir à la rescousse. Des poursuites en matière de droit du travail contre des travailleurs exploités dans des pays en voie de développement sont non seulement possibles, mais elles ont été effectuées avec l'aide d'avocats inventifs en utilisant les cours américaines pour promouvoir les droits des travailleurs. Il faut se demander si une cour américaine peut obtenir compétence sur un défendeur « corporatif » américain et appliquer alors les droits et les correctifs qui découlent du droit commun. Dans des circonstances appropriées, des travailleurs étrangers qui se croient lésés dans leurs droits peuvent intenter une poursuite contre leur employeur dans une cour américaine en vertu des principes de droit commun qui gouvernent les poursuites en dommages et bris de contrat.

Nous avons analysé les cas suivants : celui des travailleurs coréens qui ont vu leur entreprise d'électronique fermer sans avertissement, une telle entreprise appartenant à des intérêts américains ; celui des travailleuses mexicaines maquiladoras qui ont obtenu plusieurs millions de dollars en dommages d'une entreprise dont la maison mère est aux États-Unis ; celui des travailleurs d'une plantation canarienne qui ont poursuivi l'entreprise Bow Chemical et Shell Oil ; celui des ouvriers d'une manufacture au Guatemala contre une entreprise basée en Floride. À la fin des années 1990 et au début de la décennie suivante, on a constaté un nouvel engouement pour des poursuites en droit du travail logées en vertu d'une législation oubliée jusque-là qui s'appelait l'Alien Tort Claims Act (1789). Cette loi confère aux cours américaines juridiction lorsque des citoyens étrangers prétendent à la violation de la « loi des nations », incluant celle des droits humains internationaux. Sous ce couvert légal, des travailleurs des Northern Marianas Islands et de Saipan, intèrèrent des poursuites contre des entreprises dont les marques sont fort connues (Calvin Klein, Liz Claiborne, Sears, Tommy Hilffger, J. Crew, Nordstrom et d'autres). Ils ont récupéré des centaines de milliers de dollars en arrièrage de salaires et ils ont mis sur pied un programme de surveillance de 8 millions de dollars en vue d'assurer la protection des droits des travailleurs sur leur territoire.

Des travailleurs du Burma logèrent une poursuite en vertu des droits humains internationaux dans des cours de l'État de la Californie et de la cour fédérale de ce même État contre l'entreprise Unocal Corp. Ils exigeaient des millions de dollars en dommages pour une complicité présumée de cette entreprise à l'endroit de pratiques de l'ordre des travaux forcés. Alors que le cas en cour fédérale cherche encore sa voie, celui de l'État va de l'avant dans un procès avec jury.

En 2001, des avocats ont déposé de nouvelles poursuites en matière de droits des travailleurs. Les ouvriers d'une plantation de bananes au Guatemala ont en effet déposé une nouvelle poursuite contre l'entreprise Del Monte pour des millions de dollars en dommages, en accusant la compagnie d'avoir fourni un support dans des cas d'enlèvement, de meurtres de mort, et de mutilation qui les a forcés à chercher asile aux États-Unis. Des travailleurs ont également poursuivi Coca-Cola et deux firmes d'investissement affiliées à cette dernière en Colombie, dans une cour du district fédéral de la Floride sur la base de l'assassinat continu de syndicalistes de ce pays.

Les avocats et les analystes en matière de droits des travailleurs devraient garder un oeil ouvert sur les stratégies propres à un litige. Les poursuites en cette matière ne sont pas des armes magiques. Il faut un mélange correct de faits et de circonstances pour surmonter les embûches juridictionnelles et atteindre le stade de procès avec jury et des jugements (ou bien des règlements importants) au lieu d'accordements sommaires. En plus de ces précautions, le système judiciaire doit répondre aux exigences d'équité de la société et s'intéresser à de nouvelles réalités sociales. L'action politique et législative peut faciliter l'adoption de lois favorables aux plus démunis de la société et des juges et jurys indépendants d'esprit peuvent rendre des jugements favorables aux travailleurs.

Les défenseurs inventifs en matière de droits des travailleurs ont appris à bénéficier de ces ouvertures dans le système judiciaire. Des milliers de travailleurs dans le monde ont bénéficié des poursuites en matière de droits des travailleurs. D'autres, encore plus nombreux, ont profité du comportement attentif de certaines entreprises grâce à des dirigeants qui craignent d'être les suivants à se retrouver à la cour. Breviement, on peut conclure que ces poursuites en matière de droits des travailleurs ont créé un espace nouveau propice à une reconnaissance des droits des travailleurs dans l'économie mondiale.

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Pursuing International Labour Rights in U.S. Courts

New Uses for Old Tools

LANCE COMPA

Filing lawsuits in U.S. federal and state courts for workers' rights violations suffered by workers employed by American corporations abroad is one of several strategies for promoting labour rights. Other strategies include use of labour rights mechanisms in GSP laws, in regional trade agreements like NAFTA and Mercosur, in corporate codes of conduct, in the ILO and other venues. To succeed, such suits must first overcome the strong presumption against extraterritorial effect of U.S. law. Other jurisdictional hurdles like "inconvenient forum" also require caution in bringing suits. However, several cases using common law tort and contract theories as well as international human rights law have recovered substantial actual and punitive damages for workers of U.S. multinational companies in several developing countries. With the right strategic choices, labour rights litigation can be an effective means of advancing workers' rights in the global economy.

This essay reviews efforts by international labour rights advocates to use lawsuits in U.S. federal and state courts to advance workers' rights in the global economy. The introduction sets a context, discussing where lawsuits fit among a variety of strategies for promoting labour rights and signalling cautions in the use of such suits. The next part looks at American legal doctrine and the strong presumption against extraterritorial effect of U.S. law. The third part reviews cases using common law tort and contract theories, and the fourth part examines cases relying on old statutes invoked in new ways to allow human rights law to come into play. In most of these

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cases, there is a story to tell behind the bare legal bones that can be picked from official documents. Those stories are narrated here to convey strategic choices in bringing labour rights lawsuits. The conclusion evaluates the effectiveness of using lawsuits as a strategy for workers' rights.

Before looking at lawsuits, a review of several other forums that recently have taken shape to promote workers' rights sets a context. Provisions for labour rights are now found in trade laws like the U.S. Generalized System of Preferences (GSP) and the European Union's GSP regime (Tsogas 2000). They arise in trade-and-labour agreements like the North American Agreement on Labour Cooperation (NAALC) (Diamond 1996; Summers 1999) and the Mercosur's Social-Labour Declaration (Portella 2000). The European Union has developed detailed rules and procedures on labour rights matters (Muckenberger 2001).

In 1998, the International Labour Organization (ILO) issued a declaration of core labour standards (Bellace 2001), and in 2000 the Organization for Economic Cooperation and Development (OECD) updated its Guidelines for Multinational Corporations to address workers' rights (Crane 2000). In addition to these national, regional and intergovernmental initiatives, many companies, unions and NGOs are promoting private codes of conduct on labour rights (Hepple 1999; Yanz and Jeffcott 2001). Labour rights have not become part of World Trade Organization (WTO) disciplines, but a significant movement in support of such trade-linked measures has emerged (Howse 1999).

These instruments create new space for labour rights advocacy and cross-border solidarity efforts. But they can be frustratingly inconclusive. They contain mostly "soft law" measures that create pressure through complaints, investigations, hearings, reports, recommendations, media exposés and the like. Mechanisms that have the "teeth" of trade sanctions, like GSP laws, are rarely invoked because they target a country's beneficiary trade status, not corporations that abuse workers.

In contrast, lawsuits can target corporate violators of workers rights to yield "hard law" rulings that give direct redress from firms to injured workers. As one Canadian scholar notes, "[A] good part of global labour law is going to be created where domestic labour law is created today—in national legislatures, courts and tribunals. ... Goods move, work moves, sometimes even people move—but the law does not move. So there will be a temptation to deal with these issues... in the courts of the company's home jurisdiction" (Arthurs 2001).

Labour rights advocates in the United States are responding to the temptation. In the U.S. legal system in particular, corporate wrongdoing can result in dramatic trials before juries and large punitive damage awards, in

addition to recovery for actual damages (Curriden 2000; Segal 1999). Moreover, the U.S. system leaves ample room for “class action” lawsuits on behalf of large numbers of similarly situated victims. This creates an incentive for lawyers to invest in class action suits based on the “contingency fee” system. If they lose the case, plaintiffs do not have to pay them. But if they win the case for the plaintiffs, lawyers’ payment, usually 30 percent of the total recovery award, can itself be a huge sum.

Getting in front of a jury with evidence of a wealthy corporate defendant’s abuse of poor, weak victims is a plaintiff’s lawyer’s dream come true. That is why some labour rights advocates in the United States are supplementing new labour rights mechanisms and complaining the old-fashioned Anglo-Saxon way. They “sue the bastards.”¹

The results of cases described here should neither be underestimated nor exaggerated. A litigation strategy can be effective in calling labour rights violators to account, fixing guilt for abuses, and gaining recompense for victims. But these cases also show the hurdles faced by advocates bringing labour rights struggles into courtrooms.

Most companies can take advantage of intricate rules in U.S. corporate law to insulate themselves against liability for violations by their subsidiaries or subcontractors. They use mega-corporate law firms in New York, Washington, Chicago and Los Angeles that fight a war of motions for dismissal, summary judgment, transfer to another venue and other courtroom manoeuvres to wear down plaintiffs. These legal actions take years to resolve and often starve the meagre resources of labour rights NGOs and attorneys.

Getting past these barriers to a trial of evidence brings new challenges for labour rights advocates. Logistics of representing clients sometimes thousands of miles away are daunting. Language barriers and cultural differences make it difficult to prepare witnesses for testimony and to nurture them through the courtroom experience. Whether to settle a case before judgment is a delicate choice that is often fraught with tension between lawyers and clients. Even after a victory, finding clients to give them money they won can be hard when they live in remote villages or urban slums.

It is no surprise that labour rights lawsuits are dramatic, groundbreaking, and few. But the small number of significant cases lends itself to review and evaluation of this emerging labour rights strategy—the goal of this article.

1. The phrase is not meant to give offense. “Sue the bastards” is a common expression in the United States referring to aggrieved parties bringing lawsuits.

LABOUR LAW AND EXTRATERRITORIALITY

Labour rights lawsuits are a relatively new phenomenon, but they mostly use old legal tools like common law tort or contract suits. American judges are still more comfortable with such conventional causes of action. International human rights law is has more currency in national courts in Europe. Some of those courts address issues like genocide, torture and other crimes against humanity; witness recent cases involving Chile's ex-dictator Augusto Pinochet and his "Caravan of Death" colleagues, and even subpoenas directed at former U.S. secretary of state Henry Kissinger (Morrissey 2001; Graham 2001).

U.S. courts have countenanced uncontroversial labour cases like those involving Nazi slave labour (Doms 2001). But in general, American judges are hesitant to stride confidently in the unfamiliar terrain of international human rights law as it relates to workers' rights and global trade patterns. They are equally reluctant to take up foreign labour disputes that implicate foreign governments.

Just getting through the courtroom door with an international labour rights lawsuit is not easy. In general, U.S. legislation is presumed not to have extraterritorial reach (Dodge 1998). In key cases, the Supreme Court has repeatedly held that U.S. labour law applies only to workers within the United States.² In *Benz*, the Supreme Court said bluntly that U.S. labour law "is concerned with industrial strife between American employers and employees," and refused to let foreign sailors on a foreign-owned ship in a U.S. port who wanted to be represented by a U.S. union avail themselves of the National Labor Relations Act (NLRA).³

More recently, the Ninth Circuit Court of Appeals relied on these precedents to deny legislated benefits to a Canadian citizen employed in Canada by the U.S.-based Burlington Northern railroad after its merger with the Northern Pacific line. U.S. legislation relaxed antitrust rules to allow the companies to merge. The legislation granted lifetime salary benefits to workers laid off as a result of the merger.

The law was silent on whether such benefits were to go only to U.S. employees laid off by Burlington, or both Americans and Canadians. On its face, the legislation appeared to cover all workers. However, the court ruled that without an explicit statement by Congress in the law itself (not

2. *Foley Bros. v. Filardo*, 336 U.S. 281, 282 (1949); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

3. 353 U.S. 138 (1957).

just in legislative debates), the presumption of non-extraterritorial effect in U.S. law precluded benefits for laid-off Canadian workers.⁴

Nothing here is meant to suggest that extraterritorial effect of U.S. labour law is always desirable. Many elements of the law are profoundly anti-labour. American trade unionists sighed with relief in 1995 when a federal appeals court cited the principle of non-extraterritoriality in overruling a National Labor Relations Board (NLRB) decision that would have sharply curtailed international solidarity efforts.

In that case, the International Longshoremen's Association (ILA), the major union of East Coast dockworkers, asked Japanese stevedoring unions to refuse to handle fruit shipped from a non-union port in Florida where employers resisted an ILA organizing campaign. In solidarity with the ILA, the Japanese union told fruit importing companies in Japan that it would not unload these shipments. The importers switched to ILA-represented exporters.

The NLRB (when most of its members were still appointed by presidents Reagan and Bush) found that the Japanese union's action was an unlawful secondary boycott under U.S. law, which strictly prohibits them in the domestic arena. The board ordered the ILA to pay millions of dollars in damages to the non-union exporting firms. The ILA appealed to the District of Columbia circuit court.

Reversing the NLRB, the appeals court said that "[A]ny unfair labor practice charge against the Japanese unions would have required a purely extraterritorial application of the NLRA—an application that we could condone only upon finding 'the affirmative intention of the Congress clearly expressed,'" citing the *Benz* case. Ruling in favour of the union, the court declared, "If the nation's increasingly global economy requires an expansion of federal labor law, it is for Congress—not the Board or the federal courts—to make the necessary changes."⁵

For U.S. legislation to have extraterritorial effect, Congress must say loudly and clearly that this is its intent. Congress has done this, but rarely. For example, Congress overturned a 1991 Supreme Court decision that a U.S. citizen working for a U.S. company overseas could not file a discrimination claim under the Civil Rights Act. Before Congress acted, the Court had ruled that since Congress did not clearly assign extraterritorial reach to the 1964 Civil Rights Act, its Title VII could not protect a citizen working outside the United States.⁶

4. *Van Blaricom v. Burlington Northern R.R. Co.*, 17 F. 3d 1224 (9th Cir., 1994).

5. *International Longshoremen's Association, AFL-CIO v. NLRB*, 56 F.3d 205 (D.C. Cir. 1995).

6. *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991).

In response, civil rights advocates launched a broad-based, successful movement pressuring Congress to change the law later the same year. Congress amended Title VII to say specifically that U.S. citizens employed by U.S. firms outside the country are covered by the law and can file anti-discrimination lawsuits.⁷

That was an exception, one for American citizens working for American companies abroad. Foreign workers still have no recourse to Title VII or most other U.S. laws when their U.S.-based employer violates their rights. American managers dealing with foreign workers in other countries just have to observe the labour laws of countries where they operate, not U.S. law. When those countries' laws are weak or weakly enforced, employers can mistreat workers with little legal consequence.

One analyst concluded, "Those workers who are most in need of the protections of U.S. labour standards and who are likely to benefit from extraterritoriality are the most exploited workers in the LDCs...It is inconceivable that these workers would have the resources or sophistication to vindicate their rights in a U.S. court" (Dodge 1998). But where statutes might fail, the common law can come to the rescue. This article shows that labour rights lawsuits for exploited developing country workers are not only conceivable. They have been put into practice by precisely such workers with help from creative advocates using U.S. courts to advance workers' rights.

GAINING JURISDICTION FOR TORT AND CONTRACT SUITS

In the common law arena, labour statutes do not apply. The key is whether an American court can get jurisdiction over a U.S. corporate defendant to apply common law rights and remedies. In the right circumstances, foreign workers whose rights are violated can sue their employer in an American court under common law principles governing tort and breach of contract lawsuits (Render 1998).

A tort lawsuit seeks damages for a defendant's wrongful act or, in case of negligence, a wrongful failure to act (the French word *tort* means "wrong"). A breach of contract lawsuit seeks damages when a defendant breaks a promise made in an enforceable contract. These concepts are pillars of the "rule of law" so often invoked as a necessary feature of a well-functioning global economy and demanded of its trading partners by the United States government (Scott 2001). Where better to put them to the test for workers than in U.S. civil courts, inheritors of centuries of development of Anglo-Saxon common law rules?

7. Pub. L. No. 102-166 (1991).

Korean Electronics Workers

A determined group of Korean workers tested common law arguments in a path breaking case in the early 1990s. They ultimately failed on a technicality after rejecting a favourable settlement offer. Still, their lawsuit carried important lessons for advocates. Here is how it happened:

A New York-based company named Pico Products, Inc. closed without warning an electronics factory near Seoul in 1989 after workers formed a union and gained a collective bargaining agreement. More than 300 workers, mostly women assemblers, were suddenly jobless. The company transferred their work to Taiwan, owing the Seoul employees back pay for work actually performed as well as severance pay. The company's actions violated both the collective agreement and Korean laws requiring advance notice and severance pay for workers affected by a plant closure.

Workers turned to help from the Korean-American community and labour rights advocates in New York. Frank Deale, an intense, creative human rights attorney at the Center for Constitutional Rights, headed a legal team that sued Pico Products in U.S. federal court near the company's headquarters in Syracuse, New York in July 1990. Korean workers sold souvenir pencils in the streets of Seoul to raise funds for union leaders to press their case in New York. Allies in Korean communities around the United States generated contributions to support the lawsuit. Korean-American law students worked with Deale as strategists, organizers and translators.

Alongside the legal filing, workers set up a vigil near Pico headquarters and rallied support for demonstrators there and at the home of company president Bernard Hitchcock. In one incident, Hitchcock turned a hose on demonstrators, calling them "communist agitators." The workers made some PR mistakes, too. One publicity event backfired when it featured an animal sacrifice, a chicken, common enough in Korea, but a turn-off for some potential American supporters. But workers mostly succeeded in raising wide support for their cause.

Public support was important, but the real prize was the lawsuit. The "theory of the case," as lawyers put it, had two parts grounded in classic common law claims. One charge accused Pico of breach of contract—the violation of the union's collective bargaining agreement. The other claimed tort—a wrongful act of intentional interference by top Pico management with the agreement between the workers and the Korean plant management.

Working with the union leaders who brought affidavits from coworkers back home, Deale and his legal team broke through the company's vigorous jurisdictional defence. Pico lawyers argued that the events took place

in Korea and all the plaintiffs were Korean. Under a common law legal doctrine called *forum non conveniens* (inconvenient forum), Pico argued that the case should be heard in Korean courts.

But federal judge Thomas McAvoy accepted workers' argument: the company is based in New York, company officials who ordered the closing are in New York, and Korean union leaders are in New York ready to testify about what happened. Judge McAvoy ordered a full-scale trial that took place in October 1991.

Workers put in solid documentary evidence like the signed contract promising advance notice of layoffs and severance pay, wage rates for weeks of unpaid work, and copies of Korean labour laws. On the witness stand, they backed up documentation with dramatic accounts of plant gates chained shut from one day to the next, clandestine transfers of equipment, and bank accounts that suddenly had been emptied leaving nothing to pay wage claims.

As the trial advanced and evidence of management abuses mounted, Pico lawyers began making settlement offers to Deale and the CCR legal team totalling hundreds of thousands of dollars in back wages and severance pay. By the trial's end, the company's offer was amounted to practically all the financial paybacks that could be gained from a verdict in the workers' favour. But a settlement would also contain a "non-admission" clause allowing the company to say it was not guilty of any wrongdoing.

Deale and the advocacy team advised workers to take the settlement. They explained that while the evidence was favourable and the trial went well, technicalities in New York corporate law on "piercing the corporate veil" (making a parent corporation liable for the acts of a subsidiary) were potentially troublesome. Pico had argued that another California-based company subsidiary was really the parent company of Pico Korea. This technicality could undo the success of the trial.

Settling lawsuits through a combination of payment to the plaintiffs and non-admission clauses for defendants is a normal part of the American legal system. But Deale's advice provoked a cultural clash between American pragmatism and Korean honour. In an emotionally charged, all night decision-making meeting with Deale and the labour rights legal team, the Koreans revealed an unexpected bottom line. "We'd rather get no money and a final judgment that the company broke the law," they said, "than twice the money due us and this 'non-admission' clause."

Respecting their clients' wishes, the labour advocates rejected Pico's settlement offer, and held their breath for the judge's decision. Their fears were borne out. Although he found all the evidence in the workers' favour and concluded that Pico indeed violated their labour contract, the judge

cited an obscure corporate law technicality called the “Felsen Exception.” It allows a parent company to halt fulfillment of contracts by subsidiaries that would economically harm the parent.⁸ His decision was upheld on appeal.⁹

The workers could point to language in the judge’s decision confirming Pico’s wrongdoing even though they returned to Korea without monetary rewards. Despite their loss, Pico workers established a key legal principle for international labour rights advocates: that U.S. federal courts will entertain and move to trial contract and tort claims by foreign workers of a U.S.-based multinational company. In years that followed, other creative lawsuits following Deale’s example would win serious money from corporate defendants for worker’s rights violations.

Mexican Maquiladora Workers

The California-based owner of a maquiladora factory called EMOSA in Tijuana, Mexico felt the sting of a well-crafted labour rights lawsuit. At an employee picnic on company grounds in 1995, the owner ordered more than a hundred women workers to perform a bathing suit exhibition. He videotaped them, with zooming emphasis on certain areas of their bodies.

Maquiladora workers’ support groups in Tijuana told San Diego-based labour advocates what happened. Fred Kumetz, an experienced Los Angeles labour lawyer, filed a civil lawsuit in California state court charging the owner with sexual harassment under U.S. and Mexican law. Workers also alleged the common-law tort of “intentional infliction of emotional distress” because of the psychological pain and humiliation they endured.

The harassment claim was a legal stretch. As noted earlier, Title VII of the Civil Rights Act of 1964, as amended, does not apply to non-U.S. citizens working for an American company abroad. Mexican law had not developed legal liabilities and remedies for sexual harassment. Moreover, its code-based legal system, as distinct from common law, did not allow jury awards for punitive damages.

But the common law tort claim had force. It did not depend on extra-territorial application of a U.S. civil rights statute or on citizenship. As a U.S. citizen residing in California, EMOSA’s owner fell within the state court’s jurisdiction. A California jury could decide if a wrongful act

8. *Felsen v. Sol Cafe Mfg. Corp.*, 24 NY 2d 682 (1969).

9. *Labor Union of Pico Korea, Ltd. v. Pico Products, Inc.*, 968 F.2d 191 (2d Cir., 1992). On appeal, the legal team changed their argument to seek extraterritorial application of Section 301 of the NLRA, permitting breach of contract suits. But the appeals court cited the general rule against extraterritorial reach of U.S. labour law.

occurred, Kumetz told Superior Court Judge Valerie Baker. She agreed. The company's owner then asked the court to dismiss the case because events occurred in Mexico and the workers lived there. The case belongs to Mexican courts, he argued, citing the *forum non conveniens* rule. Judge Baker replied, "You're here, the events took place fifteen miles away, and the plaintiffs can easily come to give evidence. Let's have a trial."

Blanching at the thought of the videotape going to a jury, the company owner's attorneys quickly negotiated a settlement. The company paid thousands of dollars to each of the victims. Wide publicity about the lawsuit in the maquiladora industry had a ripple effect, too, dampening any temptations to treat workers in such a blatantly sexist fashion (*Border Lines* 1995; *Working Together* 1995).

Other tort suits for Mexican workers in U.S. courts involved more tragic circumstances. In one case, two employees of a U.S. company named Contico International, Alfonso Jurado and Lorena Mendoza, regularly drove large amounts of cash for wage payments to workers at Contico's maquiladora plant south of Ciudad Juarez, across the border from El Paso. In 1990 hijackers seized their car, stole the money, bound and gagged them, and burned them to death in the trunk.

With support from the San Antonio-based Coalition for Justice in the Maquiladoras, the victims' families sued Contico in 1993 for negligence and wrongful death. They filed suit in a state court in El Paso, where Contico kept an office overseeing its maquiladora operations. The families argued that management should have foreseen the danger of sending the pair on regularly scheduled drives carrying large amounts of cash on secluded two-lane Mexican highways. In its U.S. operations, Contico used armed guards and armoured trucks for cash deliveries.

Like EMOSA's owner, Contico countered that the case belonged in Mexican courts because the hijacking and murders occurred there. But Judge Jack Ferguson ruled in 1994 that Texas tort law applied. His court had jurisdiction over Contico's El Paso office, and the payroll delivery system was devised and administered in El Paso.

Contico fought at first. Refusing to settle, they forced the case to trial in 1997. But after seven days of dramatic testimony confirming its lax payroll delivery system and the lack of protection for Mexican workers compared with U.S. employees, the company caved. Contico settled the case for \$1.5 million (Herrick 1997).

In another tragedy-scarred case in 1997, a dozen Mexican maquiladora workers were burned to death when their old, rundown bus, provided by their Texas-based U.S. employer to take them to work, went off the road, rolled into a ditch, and burst into flames. Their families' tort suit against

the company in Texas state courts was settled before trial for \$30 million (Koenig 1999).

Costa Rican Plantation Workers

American lawyers turned to courts for 800 Central American plantation workers rendered sterile by an American-made pesticide. With bare hands and with no warning of its effects, workers since the late 1970s applied the pesticide DBCP in the banana groves of Costa Rica's flat coastal plains. Made in the U.S. by Dow Chemical and Shell Oil companies and known for its sterilizing effects, the chemical had been banned in the United States in 1977. But the companies continued shipping DBCP to Latin America (Siegel 1991).

I am sterile. I cannot have children. My wife will not sleep with me. I cannot find a wife. My wife is pregnant by another man. My wife has left me. My wife and I face a future alone, with no children. I am ridiculed in the village. They call me the Ox, a hard worker with no balls. Other men ask me if they can service my wife. I wanted to be old with my children. I want to die.

My husband is sterile. I love him and will stay with him, but I will never have children. He is ashamed to sleep with me. Other men offer to sleep with me. I wanted to be old with our children, but this cannot be. Maybe it is better to die.

These confessions filled the ears of Emily Yozell, an American environmental and human rights lawyer living in Costa Rica. A Dallas law firm specializing in "toxic tort" lawsuits, large-scale damage suits against chemical manufacturers, engaged Yozell to gather evidence in the case. She travelled to remote villages to interview workers and take affidavits from them and their wives.

In 1984, Attorneys Russell Budd and Charles Siegel filed a class action suit in a Texas state court in Houston, where Dow and Shell had regional headquarters facilities. They sought millions of dollars in damages for Costa Rican workers whose lives were ruined by DBCP.

As in the Mexican videotape case, Dow and Shell cited the *forum non conveniens* doctrine to argue that the case should be heard in Costa Rican courts, not in the United States. The Costa Rican legal system did not permit common law pain-and-suffering damages. Feeble penalties there would not dent company treasuries.

Budd and Siegel countered that workers would come to Texas to testify about lost chances for children, broken marriages, impotence from the psychological effects of sterility, shame in their communities, and other consequences of the companies' actions. Besides that, most of the

documentary evidence was in Texas, where key decisions were made (Barr 1991).

This jurisdictional dispute went to the Texas Supreme Court and took six years to resolve. In 1990 the court ruled in workers' favour, saying the case could go to trial before a Texas jury. Dissenting judges blasted the decision for "clogging the dockets with cases which have nothing to do with this state." But Judge Lloyd Doggett said, "Texas has a substantial interest in this case. Workers were employed by an American company on American-owned land growing bananas for export to American tables. DBCP shipped by an American company in the United States to another American company. Yet now Shell and Dow argue that the one part of this equation that should not be American is the legal consequences of their actions."¹⁰

After the Texas Supreme Court ruling, attorneys for the workers and the companies went through months of "discovery," a mandatory pre-trial stage where each side can examine the other's evidence and take statements from each other's witnesses to avoid surprises, and resulting delays, during the trial. Faced with the likelihood of large punitive damages if the case went to a jury, Dow and Shell settled the case for \$20 million in 1992. Up to \$15,000 went to each worker whose life was ruined by DBCP. The rest went to lawyers.

Workers (and lawyers, too) might have gotten more from a sympathetic jury. They had a strong case for huge punitive damage awards. Why did the attorneys settle, if they could get more by going to trial on such a compelling set of facts?

Behind the scenes, Emily Yozell knew they had problems. She lived in Costa Rica and spoke fluent Spanish. She spent days getting to know workers in their villages before they opened up to her about the pain and suffering they felt—just the kind of testimony that would be needed to win big damage awards. Her interviews were marked by long silences and quiet tears amid her own expressions of sympathy. How would workers fare under harsh cross-examination by corporate lawyers in a Texas courtroom full of strange people?

In a trial on the evidence, specific dates of employment and dates of using the chemical were critical. For workers who cannot read or write and do not keep records, time is a matter of seasons and events—*soon after the earthquake, when my uncle died, in the rainy season*—not days, months and years. Sharp cross-examination could blow up Baron and

10. *Dow Chemical and Shell Oil v. Castro Alfaro et al.*, 786 S.W.2d 674 (1990 Tex).

Budd's timeline in their case, not because they were wrong, but because dates were so hard to fix.

Many of the workers were not formally married, either. Texas law did not allow damages for loss of consortium without benefit of marriage. Even damages for sterility might be mitigated by an argument that the workers were not married.

Sheer nervousness was a factor, too. When the first small group of workers came to Houston to give depositions to company attorneys in the pre-trial discovery phase, when both sides are supposed to show their cards, they were put in a high-rise hotel. They had rarely seen a building taller than two stories, and their experience with those was that earthquakes tore them down. They huddled in terror all night fearing the building was going to topple, and they were tired and confused at the deposition.

Dow and Shell had the resources to string the litigation along for years more. Already several years had passed while the *forum non conveniens* and other jurisdictional matters were resolved. A trial would take at least months, and appeals years more. Some of the older workers had already died waiting for some recompense. Between the difficulties with their case, the fragility of their clients and the heft of their adversary, settling the case was perhaps the better part of valour.

Guatemalan Apparel Workers

U.S. labour rights advocates turned to another innovative legal strategy to help end one of the longest and bitterest labour disputes in Guatemala. The American owner of a shirt making plant called Inexport fired more than 100 union members after they formed a union in 1989 and sought bargaining. He claimed the unionists were communists and guerrilla sympathizers. He hired armed guards to patrol the factory, frightening other workers into submission. Fired workers who staged a protest at the factory gate were assaulted by guards (Petersen 1992).

The Inexport owner's actions violated Guatemalan law. In proceedings before Guatemalan courts, workers won judicial orders for reinstatement and back pay. But the owner never complied with court orders. The legal backup system was so rickety that no government officials took steps to enforce labour court rulings. Three years after their firings, the workers were still out of jobs and pay. Advocates cited the Inexport situation in GSP petitions, but the U.S. GSP committee argued that the dispute was still being fought in the courts—though the only “fight” was to have a court order enforced.

In 1992 labour rights advocates “brought the litigation home” to U.S. courts. Lawyers and organizers from the International Labor Rights Fund

(ILRF), the Center for Constitutional Rights, and the Guatemala Labour Education Project (GLEP, later the Labour Education in the Americas Project—LEAP) devised a plan to sue the Inexport owner in the United States. Kurt Petersen and Paul Sonn, two talented Yale law students, volunteered for work on the Inexport case. Petersen had already written a book on labour rights in Guatemala.

The “Inexport Team” traced the owner’s sales and distribution networks to find possible jurisdiction before an American court. They learned that the owner’s distribution headquarters were in Miami, with substantial funds in Florida banks. At first the legal team thought to file a lawsuit alleging violations of international human rights and labour rights. But Joan Tumson, a Yale law grad who practiced law in Miami, warned that Florida courts were not ready for “high-falutin” international human rights law theories of the case. She suggested a more prosaic cause of action, one that Florida courts often dealt with in international business and international divorce disputes: a lawsuit to enforce the judgment of the Guatemalan courts. Such a suit would be based on longstanding principles of “comity” among courts of different countries that agree to honour and enforce each other’s judgments against defendants in their jurisdiction.

A Florida court could not send federal marshals to Guatemala to enforce a reinstatement order, but it could seize Inexport’s assets in Florida banks to satisfy the Guatemalan courts’ back pay order. Petersen and Sonn travelled to Guatemala in March 1992 to get hold of certified judgment papers from the courts and to take affidavits from fired workers. Their efforts, backed by Coats and the GLEP network, provoked widespread publicity and consternation in Guatemalan business circles. American and Guatemalan company owners all had bank accounts in Miami, as well as homes and condominiums that could be targeted by legal action. “I’ll be next if you don’t settle this case,” Guatemala’s businessmen told Inexport’s owner.

At the end of March 1992 the Inexport Team had strong affidavits and a solid complaint with named plaintiffs ready for filing in Florida state court. But in early April the Guatemalan labour ministry stepped in, calling the owner and union representatives into intensive negotiations to resolve the dispute. The union saw a chance for progress, and asked the legal team to wait. In July a settlement was reached. Inexport’s owner reinstated all fired workers to their jobs, started regular monthly payments for all back wages, and recognized the union as workers’ representative.

Choice of Law Issues

An important legal concept that has not been tested in international labour rights litigation is the “choice of law” rule: whether a court will

apply the law of the forum where a suit is brought (the *lex fori* rule), or the law of the place where a tort occurred or where a contract was made (the *lex loci* rule). In the Pico case, for example, did Korean tort or contract law apply, or did New York tort or contract law apply? The federal court went as far as to find that the contract was violated and that tortious interference occurred. However, it did not make a decision on the choice of law issue because it applied New York *corporate* law in deciding the case before having to rule on choice of law in the contract and tort claims.

In the EMOSA, Dow and Shell, and Inexport cases, settlements before reaching a trial obviated the need for applying choice of law rules. The EMOSA court judge might have had to decide whether to apply California law on intentional infliction of emotional distress, or Mexican law on *daño moral* (moral damage) akin to tort. In Dow and Shell, the courts might have had to decide if the wrongful act, the tort, occurred in Costa Rica, where workers applied DBCP, or in Texas, where the corporations decided to export DBCP without proper warnings. Inexport presented less of a choice of law problem because it depended on principle of comity to enforce the judgment of a Guatemalan court.

Traditionally, U.S. courts applied the *lex loci* rule in a mechanistic way, mostly in cases involving choice of law between two states of the United States. In recent decades, however, courts have moved to a more flexible approach taking account of so-called connecting factors and applying the law having the “closest and most real connection” with the parties and transactions concerned, or the “most significant relationship” to the parties and the transaction, all with an eye toward a policy-driven outcome (Tetley 1999).

These developments provide ample room for labour rights advocates to seek choice of law rulings favourable to their clients. In international labour rights cases, tort claims in particular are susceptible to application of U.S. law rather than foreign law, since most foreign countries do not apply common law tort principles. However, cases posing squarely the choice of law problem have not yet emerged, so this issue is still largely unresolved.

FROM COMMON LAW TO STATUTE-BASED CLAIMS

The late 1990s and early 2000s saw a new surge of workers’ rights lawsuits based on laws going back many years, sometimes more than two centuries, but applied for the first time on behalf of foreign workers employed by U.S. companies. Some advocates turned to criminal statutes. Some used the 1938 Fair Labour Standards Act. The farthest-reaching cases

used a once-forgotten statute called the Alien Tort Claims Act. That law gave U.S. courts jurisdiction when foreign citizens claimed violation of “the law of nations” (Cleveland 1998).

Sweatshop Workers in Saipan

In 1999 trade unions and human rights groups sued two dozen brand name retailing companies that bought goods from apparel factories in Saipan, the main island of the Northern Marianas islands in the Western Pacific. Most of the 30,000 workers in this U.S. territory were leased to factory owners by the Chinese government. Workers were promised \$3 an hour wages, overtime pay and clean, safe working and living conditions. Except for a lower minimum wage, U.S. labour regulations are supposed to apply.

The reality did not meet the promises. Workers had to pay thousands of dollars in fees to come to Saipan. Pay deductions for barracks-style living quarters and food gobbled their pay checks. They worked 12-hour days without proper overtime pay. Any form of organized worker protest was banned. Individual workers who complained were harassed, beaten, and deported back to China to face arrest (Karet 2000).

Apparel factory owners, especially the Hong Kong-based textile mogul Willie Tan, had cultivated a powerful network of conservative activists, Washington lobbyists and key Republicans in Congress. House majority leader Tom DeLay of Texas kept federal funds flowing to the islands while torpedoing proposals for stronger federal regulations to protect workers. These right-wing ideologues saw the Northern Marianas as an entrepreneurs’ paradise, where workers shut up and do as they’re told. Saipan’s chief Washington-based lobbyist called labour protections “immoral laws designed to destroy the economic lives of a people” (Eilperin 2000).

With creative lawyering in courts that could not be lobbied or bought off, labour and human rights advocates cut through the political ties choking Saipan workers. They filed three different suits against U.S. clothing manufacturers and retailers producing goods in the Northern Marianas. One cited violation of California false advertising laws for labelling “Made in U.S.A” garments made under abusive labour conditions. Another sought millions of dollars in damages under the Racketeer Influenced and Corrupt Organizations Act (RICO) for the companies’ use of indentured labour in the Northern Marianas. The third laid claims for millions of dollars in back pay against 22 contractor firms in the territory for violations of federal laws on overtime pay and working conditions (Faison 1999).

In a U.S. territory subject to U.S. courts, an “inconvenient forum” defence was unavailable. No foreign country’s court was arguably more

convenient. In late 1999 and early 2000, several of the biggest brand name companies moved quickly to settle the first two cases—Calvin Klein, Liz Claiborne, Sears, Tommy Hilfiger, J. Crew, Nordstrom and others. Without admitting any liability, they agree to create an \$8 million fund to support an independent monitoring program to oversee a code of conduct, payments to workers, public education efforts and attorneys' fees. Michael Rubin, the California lawyer who handled the case, called the settlement "a landmark agreement... a model code of conduct and monitoring program that will be used as a model in cases all over the world" (Colliver 1999; BNA 2000).

In the third case for back pay against Saipan factories themselves, the companies demanded to know immediately the names of the workers seeking lost pay. A district court judge in Saipan granted their motion and ordered lawyers to reveal workers' names. On appeal, workers' attorneys said that surrendering their names would lead to harassment, dismissal, deportation and arrest back in China. The appeals court overturned the earlier ruling and let workers proceed anonymously with their claims, citing "the severity of threatened injury, the reasonableness of their fears, and vulnerability to retaliation"¹¹ (Herzfeld 2000).

The Alien Tort Claims Act and Forced Labour in Burma

In 1990 the ruling military junta in Burma, known as the SLORC, refused to accept the overwhelming popular vote for a democratic government headed by Aung San Suu Kyi. She was jailed along with dozens of newly elected members of parliament and thousands of supporters. Trade union leaders and organizers were killed, jailed, or fled into exile.

Burma was also the site of large natural gas deposits. Invited by the SLORC, California-based Unocal Corporation launched a massive extraction and pipeline project in 1992. The company needed tens of thousands of labourers, and it relied on the military dictatorship to supply them. Unocal went in with eyes open: a consultant's report advising the company on potential risks had said that, "throughout Burma the government habitually makes use of forced labour... there are credible reports of military attacks on civilians in the regions... the local community is already terrorized."¹²

Burmese soldiers forced peasants to abandon their farms and villages to clear the pipeline's path. Any who refused were arrested and beaten,

11. *Doe v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir., 2000).

12. Cited in decision of Judge Ronald Lew in *John Doe I v. Unocal Corp.*, 110 F. Supp 2d 1294 (C.D. Ca. 2000).

and their women family members were assaulted and raped. Any who fled had their homes and plots confiscated. By the end of the decade the United States imposed rules prohibiting new investment by U.S. firms, and the Burmese military government was universally condemned for its forced labour practices (Baker 1997; Olson 2001a).

But Unocal's pipeline project went forward. A labour rights coalition involving the ILRF and its general counsel Terry Collingsworth, CCR and staff attorney Jennifer Green, EarthRights International and co-director Katherine Redford, and a network of human rights lawyers in California, Pennsylvania, Massachusetts and Washington, D.C. responded by suing the company in 1996. They sought hundreds of millions of dollars in damages for Burmese workers and their families who suffered under the military's forced labour practices.

These advocates relied on an old law, the Alien Tort Claims Act. The first U.S. Congress enacted the ATCA in 1789 to combat piracy on the high seas. It gave federal courts jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations."¹³ The ATCA fell into disuse as piracy became less a concern for international law. By the mid-20th century it was all but forgotten. But international law experts revived the law in the famous *Filártiga* case of the late 1970s. It has become an important tool for human rights and labour rights advocates since then.¹⁴

Joelito Filártiga was the teenage son of a Paraguayan human rights activist. Because of the father's activity, the police kidnapped, tortured, and murdered Joelito, then summoned his sister to pick up his mutilated body. Peña-Irala, the chief of police, told Dolly Filártiga, "You're next if your father keeps it up."

The murder took place in 1976. In 1978 both Peña-Irala and Dolly Filártiga were in New York City. The ex-police chief had entered the United States illegally. Joelito's sister had come seeking political asylum after her brother's murder. When she learned that Peña-Irala was in New York, she turned to the Center for Constitutional Rights for help.

In a scenario worthy of cinematic cliché, lawyers and volunteer law students at CCR and at collaborating law schools dug their way through dusty old lawbooks for something, anything, that might give them a handle on Peña-Irala. Their shovel hit metal. The ATCA surfaced, and the lawyers were on their way. They sued Peña-Irala for millions of dollars in

13. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789), codified at 28 U.S.C. § 1350.

14. *Filártiga v. Peña-Arala*, 630 F.2d 876 (2d Cir., 1980).

damages for a tort—wrongful death—in violation of the law of nations; that is, international law’s rules against torture.

A district court judge first ruled against the family. A two-century-old law aimed at piracy was not enough for him to exercise jurisdiction in a modern torture case. But in a famous decision overturning his ruling, the court of appeals applied the plain meaning of the words of the old statute:

The First Congress established original district court jurisdiction over “all causes where an alien sues for a tort only in violation of the law of nations.” Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction.

Human rights lawyers have been using the *Filártiga* precedent ever since. Suing dictators and death squad leaders from Haiti, Guatemala, Argentina, the Philippines, Ethiopia and Serbia, they have rung the words of the appeals court that said, “for purposes of civil liability, the torturer has become like the pirate before him, an enemy of all mankind” (Miller and Haughey 2000).

Now in Burma and other countries notorious for workers’ rights violations, labour advocates are not just targeting foreign death squads. They are trying to extend the *Filártiga* principle to actions by U.S. multinational companies implicated in gross abuses of workers’ rights. When labour rights violations reach a level of threats, coercion, violence, and forced labour as they have in Burma, international law should come into play.

The federal court hearing the case in California rejected Unocal’s *forum non conveniens* argument, finding that there was no functioning judicial system in Burma that could adequately hear plaintiffs’ claims. He allowed the case to move to the discovery stage. Attorneys unearthed a trove of damaging documents. For example, a 1995 consultant’s letter to Unocal acknowledged that “egregious human rights violations” were occurring in the pipeline and called Unocal “at best naïve and at worst a willing partner in the situation.”¹⁵

Evidence developed in discovery was presented to the federal district court judge. He acknowledged that evidence indicated that “before joining the Project, Unocal knew that the military had a record of committing human rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to relocate for the benefit of the Project; that the military, while forcing

15. See *Lew* decision, *supra* note 7.

villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing, and would continue to commit these tortuous acts.”

The labour rights advocates cited “Nazi industrialist cases” involving I.G. Farben, Krupp steel works, and other companies that were found guilty of collaborating with Nazi atrocities during World War II. However, the judge granted summary judgment for the company because evidence did not show that Unocal “controlled” or “conspired with” the Burmese military, factors he considered necessary for the case to go forward to a full-scale trial.¹⁶

Attorneys appealed that decision to the 9th Circuit court, the same court that overruled another federal judge who ordered the names of Saipan workers turned over to their employers. The appeal is still pending at this writing (February 2002). But in the meantime, an alternative theory quietly pursued by labour rights advocates in California state court took a dramatic turn in workers’ favour. Here plaintiffs made common law tort claims rather than the federal claim grounded in the ATCA.

In August 2001, a California state judge ruled that Burmese workers’ tort claims against Unocal could be heard by a jury in state court. These claims included battery, kidnapping, slavery and other abuses that could yield hundreds of millions of dollars in damages. A trial would likely take place in late 2002 (Moberg 2000).

New ATCA Cases

In the wake of Burma labour rights case against Unocal, advocates launched new cases against new and even more prominent defendants. Aided by the ILRF, five exiled Guatemalan union leaders sued DelMonte corporation in 2001 for millions of dollars in damages. Under the ATCA, they charged the company with support for kidnapping, beating and death threats that forced them to seek asylum in the United States (ILRF 2001).

The ILRF and the United Steel Workers union sued Coca-Cola in 2001 in federal district court in Florida. Based on the ATCA, the lawsuit sought millions in damages from the company and two Florida-based investors in Coke affiliates in Colombia, the site of horrific human rights violations throughout the 1990s and into the new century. Colombians say it is more dangerous to join a union than a guerrilla group. Some 4000 trade union members have been killed in the past decade.

16. *Id.*

Lawyers argued that Coke affiliates in Colombia collaborated with paramilitary death squads in “a willful campaign of terror” against members and leaders of trade unions at company facilities. Five union leaders at Coca-Cola were assassinated and several others suffered kidnapping and torture, the lawsuit claimed. The workers said that Coke managers either ordered the violence directly or delegated abuses to death squads acting as company agents (Katel 2001; Werner 2001).

Use of the Alien Tort Claims Act for labour rights advocacy is still in early stages and cannot be fully evaluated for several years. The Ninth circuit court’s decision in the Unocal appeal will be an important marker; it could even go to the U.S. Supreme Court after that. In an exhaustive analysis, Canadian scholar Craig Forcese finds several grounds for an appeal to succeed:

While the decision on its face seems damning to plaintiffs intent on using the ATCA to hold companies accountable for alleged complicity with human rights abuses, a review of relevant principles of U.S. and international law suggest that much remains to be explored in the ATCA context. Specifically, the standards for complicitous guilt in international law, international state responsibility rules, and the U.S. colour of law doctrine all suggest a number of different avenues for capturing complicity as an actionable wrong. There is some basis for concluding that the Unocal court’s holding does not fully exhaust these areas of law, raising questions concerning its sustainability on appeal and its precedential impact on other, similar corporate complicity cases. In sum, while complicity arguments predicated on the ATCA’s uncertain substantive law are a clear Achilles heel in ATCA lawsuits, the Act may yet prove a means for plaintiffs to seek compensation from companies practicing an unabashed form of militarized commerce in joint ventures with human rights abusing regimes (Forcese 2001).

CONCLUSION

Labour rights advocates and analysts should have an eyes-open perspective on litigation strategies. Labour rights lawsuits are not magic bullets. They need a just-right combination of facts and circumstances to clear jurisdictional hurdles and reach jury trials and judgments (or meaningful settlements) instead of summary dismissals.

Litigation is best understood and used as one of many possible avenues to advance workers’ rights in the global economy. At times, a GSP or ILO complaint might be a better avenue where government behaviour rather than corporate abuse is at issue, since government, not companies, have obligations under those instruments. A NAALC complaint might be better suited to workers’ rights violations in connection with union organizing disputes in Mexico because NAFTA’s labour agreement focuses on such

issues. Taking action under a corporate code of conduct might be an effective way to take advantage of a company's public promise to respect workers' rights.

An OECD complaint could be best suited to a major multinational company dependent on good relations with host governments. Sometimes a consumer campaign exposing abusive treatment of workers can hit a company in its pocketbook and change its practices more quickly than a lawsuit. Choosing a strategy in any given case, advocates must carefully analyze complex relationships among multiple actors such as workers, unions, government officials, non-governmental organization activists, corporate managers, investors, and lawyers both in the United States and in the other country.

These mechanisms are often called "toothless" by critics who demand enforceable social clauses in regional and global trade agreements. However, opposition by powerful government and corporate interests (Olson 2001b), and even by some third world activists (Khor 1994), means that such binding measures are still a long way off. In the meantime, these "soft law" instruments promoting investigations, public hearings, reports and recommendations create ample space for advocates to educate the public, energize their constituencies, and achieve change (Trubek, Mosher and Rothstein 2000).

Advocates must keep in mind another important caution about using the legal system to win justice for workers. Anglo-Saxon common law and the U.S. legal system were set up to protect property and ownership rights. These are important protections for working people, too, who need security for their modest homes and assets. But the legal system starts stacked against efforts to make wealthy companies pay money to workers and poor people.

At the same time, the legal system must also respond to society's demand for fairness. A legal system that only preserved the status quo and did nothing to address new social realities and concerns would eventually lose society's confidence, jeopardizing property and ownership rights even more. Therefore, political and legislative action can win laws favourable to society's underdogs, and independent-minded judges and juries can make decisions favourable to workers.

Creative labour rights advocates have learned to take advantage of these openings in the legal system. Thousands of workers around the world have benefited from labour rights lawsuits. Many more have benefited from companies' more careful behaviour thanks to managers' concern that they might be next to be hauled into court. In short, "suing the bastards" opens cracks wider, making new space for honouring workers' rights in the global economy.

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RÉSUMÉ

Faire reconnaître les droits internationaux du travail devant les cours de justice aux États-Unis : une nouvelle utilisation de vieux outils

Cet article évalue les efforts déployés par les défenseurs des droits internationaux du travail devant les cours de justice des états et du gouver-

nement fédéral aux États-Unis dans le contexte de la mondialisation. L'introduction présente le contexte des discussions sur la place qu'occupent les poursuites juridiques au sein de la variété des stratégies de promotion des droits du travail et elle signale les dangers inhérents à l'emploi de telles poursuites. La deuxième partie jette un regard sur la doctrine juridique américaine et examine la forte présomption à l'égard de l'effet extraterritorial de la législation américaine.

La troisième partie passe en revue les cas qui renvoient aux théories des contrats et des dommages en droit commun anglais et la quatrième analyse des cas qui s'appuient sur de vieux textes de lois qu'on invoque d'une nouvelle façon pour permettre à la législation sur les droits de la personne de jouer un rôle. Dans la plupart de ces cas se faufilent des histoires qui méritent d'être dévoilées, puisqu'elles se situent au-delà des simples éléments de droit qu'on peut recueillir des documents officiels. Les anecdotes que nous retenons ici cherchent à traduire des choix stratégiques au moment d'intenter des poursuites dans le domaine des droits des travailleurs. La conclusion évalue l'efficacité de l'emploi de telles poursuites comme stratégie pour faire valoir ces droits.

On retrouve maintenant des dispositions visant les droits des travailleurs dans des lois commerciales qui se traduisent dans des accords sur le commerce et sur le travail tel l'Accord nord-américain de coopération dans le domaine du travail (ANACT) et la Déclaration du Mercosur. L'Union européenne a aussi prévu des règles et procédures détaillées en matière de droits des travailleurs. En 1998, l'OIT a émis une déclaration sur les normes minimales du travail et, en 2000, l'OCDE mettait à jour son guide pour les multinationales pour inclure les droits des travailleurs. En plus de ces initiatives nationales, régionales et intergouvernementales, plusieurs entreprises, syndicats et ONG font la promotion de codes privés de conduite eu égard aux droits des travailleurs. Ces derniers n'ont cependant pas été incorporés aux règles de l'Organisation mondiale du commerce, mais un mouvement significatif se dessine en appui à de telles mesures.

Ces instruments créent un nouvel espace pour la promotion des droits des travailleurs et pour des efforts de solidarité internationale, mais ceux-ci peuvent être, de façon frustrante, inefficaces. La plupart du temps, ils n'incluent que des mesures « douces » qui créent une certaine pression par des plaintes, des enquêtes, des auditions, des rapports, des recommandations, des exposés médiatiques, etc. On recourt rarement à des mécanismes qui ont les dents des accords commerciaux parce qu'ils visent le statut de bénéficiaire commercial d'un pays et non les entreprises qui abusent des travailleurs. Par contre, des poursuites judiciaires peuvent viser des « violeurs corporatifs » des droits des travailleurs et ainsi permettre d'obtenir

des jugements sévères à l'encontre des entreprises fautives et en faveur des travailleurs lésés. Les « malfaçons corporatives » peuvent aboutir à des procès dramatiques devant jury, à des dommages punitifs importants en plus des dommages réellement connus. De plus, le système américain laisse amplement de place pour des recours collectifs au nom d'un grand nombre de victimes de situations similaires.

Représenter des clients situés à des milliers de milles de distance pose de sérieux problèmes de logistique. Les barrières de langue et les différences culturelles rendent la préparation des témoins difficile. En plus, la décision de régler hors cour constitue un choix difficile souvent accompagné de tensions entre les avocats et leurs clients. Même après une victoire, retrouver les clients pour leur remettre leur dû peut être difficile lorsque ceux-ci vivent dans des villages éloignés ou dans des quartiers urbains pauvres.

Ce n'est pas une surprise de constater que les poursuites judiciaires en matière de droits des travailleurs sont tragiques, innovatrices et peu nombreuses. Cependant le petit nombre de cas importants se prêtent à une révision et à une réévaluation de cette stratégie émergente dans le droit du travail, ce qui est l'objectif de cet article.

On doit prendre pour acquis qu'en général la législation américaine n'a pas d'application extraterritoriale. Dans bien des cas types, la Cour suprême des États-Unis a soutenu de façon constante que la législation du travail s'applique uniquement aux travailleurs américains, en affirmant que la législation américaine s'intéresse au conflit industriel entre des employeurs américains et leurs salariés. Pour que cette législation ait une portée extraterritoriale, le Congrès doit affirmer de façon claire et forte que c'est là son intention, ce qu'il a rarement fait. Les dirigeants d'entreprises américains qui transigent avec des travailleurs de d'autres pays n'ont qu'à respecter les lois du travail des pays où ils opèrent, mais non la législation américaine. Quand la législation de ces pays est peu développée ou qu'elle est peu appliquée, les employeurs peuvent maltraiter les travailleurs sans grave conséquence juridique.

Cependant, là où la législation fait défaut, le droit commun peut venir à la rescousse. Des poursuites en matière de droit du travail contre des travailleurs exploités dans des pays en voie de développement sont non seulement possibles, mais elles ont été effectuées avec l'aide d'avocats inventifs en utilisant les cours américaines pour promouvoir les droits des travailleurs. Il faut se demander si une cour américaine peut obtenir compétence sur un défendeur « corporatif » américain et appliquer alors les droits et les correctifs qui découlent du droit commun. Dans des circonstances appropriées, des travailleurs étrangers qui se croient lésés dans leurs droits peuvent tenter une poursuite contre leur employeur dans une cour américaine en vertu des principes de droit commun qui gouvernent les poursuites en dommages et bris de contrat.

Nous avons analysé les cas suivants : celui des travailleurs coréens qui ont vu leur entreprise d'électronique fermer sans avertissement, une telle entreprise appartenant à des intérêts américains ; celui des travailleuses mexicaines maquiladora qui ont obtenu plusieurs millions de dollars en dommages d'une entreprise dont la maison mère est aux États-Unis ; celui des travailleurs d'une plantation costaricaine qui ont poursuivi les entreprises Dow Chemical et Shell Oil ; celui des ouvriers d'une manufacture au Guatemala contre une entreprise basée en Floride.

À la fin des années 1990 et au début de la décennie suivante, on a constaté un nouvel engouement pour des poursuites en droit du travail logées en vertu d'une législation oubliée jusque-là qui s'appelait l'Alien Tort Claims Act (1789). Cette loi confère aux cours américaines juridiction lorsque des citoyens étrangers prétendent à la violation de la « loi des nations », incluant celle des droits humains internationaux. Sous ce couvert légal, des travailleurs des Northern Marianas Islands et de Saipan, intentèrent des poursuites contre des entreprises dont les marques sont fort connues (Calvin Klein, Liz Claiborne, Sears, Tommy Hilfiger, J. Crew, Nordstrom et d'autres). Ils ont récupéré des centaines de milliers de dollars en arrièrage de salaires et ils ont mis sur pied un programme de surveillance de 8 millions de dollars en vue d'assurer la protection des droits des travailleurs sur leur territoire.

Des travailleurs du Burma logèrent une poursuite en vertu des droits humains internationaux dans des cours de l'État de la Californie et de la cour fédérale de ce même État contre l'entreprise Unocal Corp. Ils exigeaient des millions de dollars en dommages pour une complicité présumée de cette entreprise à l'endroit de pratiques de l'ordre des travaux forcés. Alors que le cas en cour fédérale cherche encore sa voie, celui de l'État va de l'avant dans un procès avec jury.

En 2001, des avocats ont déposé de nouvelles poursuites en matière de droits des travailleurs. Les ouvriers d'une plantation de bananes au Guatemala ont en effet déposé une nouvelle poursuite contre l'entreprise Del Monte pour des millions de dollars en dommages, en accusant la compagnie d'avoir fourni un support dans un cas d'enlèvement, de menaces de mort, une situation qui les a forcés à chercher asile aux États-Unis. Des travailleurs ont également poursuivi Coca-Cola et deux firmes d'investissement affiliées à cette dernière en Colombie, dans une cour du district fédéral de la Floride sur la base de l'assassinat continu de syndicalistes de ce pays.

Les avocats et les analystes en matière de droits des travailleurs devraient garder un œil ouvert sur les stratégies propres à un litige. Les poursuites en cette matière ne sont pas des armes magiques. Il faut un mélange correct de faits et de circonstances pour surmonter les embûches juridictionnelles et atteindre le stade de procès avec jury et des jugements (ou bien des règlements importants) au lieu d'acquittements sommaires.

En plus de ces précautions, le système judiciaire doit répondre aux exigences d'équité de la société et s'intéresser à de nouvelles réalités sociales. L'action politique et législative peut faciliter l'adoption de lois favorables aux plus démunis de la société et des juges et jurys indépendants d'esprit peuvent rendre des jugements favorables aux travailleurs.

Les défenseurs inventifs en matière de droits des travailleurs ont appris à bénéficier de ces ouvertures dans le système judiciaire. Des milliers de travailleurs dans le monde ont bénéficié des poursuites en matière de droits des travailleurs. D'autres, encore plus nombreux, ont profité du comportement attentif de certaines entreprises grâce à des dirigeants qui craignent d'être les suivants à se retrouver à la cour. Brièvement, on peut conclure que ces poursuites en matière de droits des travailleurs ont créé un espace nouveau propice à une reconnaissance des droits des travailleurs dans l'économie mondiale.