

EXTRATERRITORIAL JURISDICTION IN CIVIL, COMMERCIAL, AND INVESTMENT MATTERS

*Anibal Sabater**

I. INTRODUCTION	461
II. FIRST EXAMPLE: EXTRATERRITORIAL JURISDICTION IN A CIVIL MATTER	462
III. SECOND EXAMPLE: EXTRATERRITORIAL JURISDICTION IN A FOREIGN INVESTMENT MATTER	463
IV. THIRD EXAMPLE: EXTRATERRITORIAL JURISDICTION IN A COMMERCIAL MATTER	464

I. INTRODUCTION

Extraterritorial jurisdiction can be defined as a government's ability to adjudicate disputes involving individuals who are located and/or events that have taken place in another jurisdiction, including acts and omissions of foreign officials. Due to their sometimes extensive transnational ramifications, human rights¹ and mass tort cases² are particularly apt to give rise to extraterritorial jurisdiction issues. In fact, several modern legal theories and discussions on extraterritorial jurisdiction appear to be premised on the idea that those two are the most frequent, if not the only, relevant types of disputes with a bearing on the subject.³

However, as this paper intends to show, complex extraterritorial jurisdiction issues arise with increasing frequency in civil, commercial, and

* Anibal Sabater (asabater@fulbright.com) is an attorney with the international law firm of Fulbright & Jaworski, L.L.P. He is currently serving as a co-chair of the Extraterritorial Jurisdiction Committee of the American Branch of the International Law Association (ABILA). The opinions expressed in this article are exclusively those of the author and do not represent the opinions of other members of his firm. This article is based on the presentation given by the author at the 2007 International Law Weekend held by the ABILA in New York City in November 2007.

1. See, e.g., Emma Daly, *Spanish Judge Sends Argentine to Prison on Genocide Charge*, N.Y. TIMES, June 30, 2003, at A3 (reporting several decisions by a Spanish criminal court to try former Chilean and Argentinean officials, including Chile's Augusto Pinochet, for alleged human right violations that had taken place in those nations).

2. See, e.g., *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842, 844 (S.D.N.Y. 1986).

3. See, e.g., Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 AM. J. INT'L L. 280, 285 (1982).

foreign investment matters that do not involve (or, at least, do not substantially involve) alleged human rights violations or mass torts.

To prove that point, this paper shall briefly discuss three recent cases. The paper does not intend to draw conclusions or show a pattern other than the irreducible complexity of extraterritorial jurisdiction matters, in which it is hard to offer general or “one-size-fits-all” solutions. Two of the cases discussed in this paper were brought before common law jurisdictions and one before a civil law jurisdiction, something that does not appear to have had any discernable impact on the ultimate outcome of each of those cases.

In the first case discussed in this paper no decision on the merits of the dispute was ever issued. In the second case, *Occidental Exploration & Prod. Co. v. Ecuador*, the seized courts decided that they had jurisdiction to fully resolve the dispute, even if the dispute included extraterritorial elements. In the third case, *Agua Lenders Recovery Group, LLC v. Suez*, the issue of whether or not the court has jurisdiction has not been finally adjudicated.

The reasons why these three cases were brought in a jurisdiction with which they had a relatively vague connection vary. In the first example discussed in this paper, the case was brought before the courts of the jurisdiction where the plaintiff had been ultimately harmed, although the chain of harmful events had commenced and essentially took place somewhere else. In the second case, the law gave no option to the plaintiff but to bring its actions in the seized jurisdiction, even at the cost of giving rise to complex extra-territorial issues. In the third case, it is not entirely clear why the plaintiff chose one jurisdiction to the detriment of the other jurisdictions that might have been available to it. Plaintiffs sometimes appear to resort to the courts of the jurisdictions where they can maximize their recovery or the relief they can obtain (e.g., by seeking punitive damages), even if those courts have a less evident connection with the dispute than the courts of other jurisdictions. In the absence of a consistent set of international legal rules, it depends on each legal system to determine whether or not that is a permissible strategy.

II. FIRST EXAMPLE: EXTRATERRITORIAL JURISDICTION IN A CIVIL MATTER⁴

In May 2000, a Spanish criminal judge, Ms. J., issued an international arrest warrant against a foreign citizen, Mr. F., who was charged with abduction of minors.⁵ Pursuant to that international warrant, the foreign citizen was arrested in Switzerland, where he spent several months in prison.⁶

4. Although not reported, the cases addressed in this section are extensively discussed in Christian Dominicé, *Acte de l'Organ, Acte de l'État, et le Dilemme Immunité de Jurisdiction ou Incompétence*, in *EL DERECHO INTERNACIONAL: NORMAS, HECHOS Y VALORES. LIBER AMICORUM JOSÉ ANTONIO PASTOR RIDRUEJO* 325, 326–34 (Comité Organizador, et. al. eds. 2006).

5. *Id.* at 326.

6. *Id.*

Based on Spanish law and some other decisions issued in the abduction matter, Mr. F. reached the conclusion that the international arrest warrant against him was unlawful and groundless.⁷ He then decided to bring civil actions in Switzerland against Ms. J. seeking damages for the time spent in the Swiss prison.⁸

On November 7, 2002, a Geneva First Instance Court asserted its jurisdiction to entertain Mr. F.'s complaint.⁹ On May 16, 2003, however, a Swiss Court of Appeals reversed that decision and asserted that Swiss courts lacked extraterritorial jurisdiction over actions that entailed the review of rulings and opinions issued by foreign courts.¹⁰ According to the Swiss Court of Appeals, foreign judges' rules and opinions are generally immune and cannot be reviewed by Swiss national courts for purposes of determining the liability of the judge who issued them.¹¹

Interestingly, the Swiss Court of Appeals does not appear to have been troubled by the fact that the case presented so many extraterritorial elements (e.g., an arrest warrant issued *abroad*; a criminal case pending *abroad*, etc.). Instead, its chief concern (and the reason that ultimately led to the dismissal of the case) appears to have been that the plaintiff was requesting the declaration that a foreign sovereign act was unlawful; something that the Swiss Court of Appeals found went beyond the scope of its jurisdiction.

III. SECOND EXAMPLE: EXTRATERRITORIAL JURISDICTION IN A FOREIGN INVESTMENT MATTER

On July 1, 2004, Occidental Exploration and Production Company (Occidental), a company incorporated in and under the laws of California, obtained a favorable award against the Republic of Ecuador in arbitration under the United Nations Commission on International Trade Law's (UNCITRAL) Arbitration Rules and the United States-Ecuador Bilateral Investment Treaty (BIT).¹²

Under the 1996 English Arbitration Act, Ecuador brought an action to set aside the award before the courts of London, the seat of arbitration.¹³ Among

7. *Id.*

8. *Id.*

9. Dominicié, *supra* note 5, at 327.

10. *Id.*

11. *Id.*

12. See Occidental Exploration & Prod. Co. v. Ecuador, 72-75, available at <http://www.investmentclaims.com/decisions/Occidental-Ecuador-FinalAward-1Jul2004.pdf> (last visited Mar. 9, 2008).

13. Ecuador v. Occidental Exploration & Prod. Co. [2005] EWHC (Comm) 774, 2005 2 Lloyd's Rep. 240 (Eng.) [hereinafter Ecuador]. As recognized by Article V(1)(e) of 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it is generally understood that arbitral awards can be challenged before the courts of the jurisdiction where they have been rendered. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(e), *opened for signature* June 10, 1958,

other things, Ecuador argued that the arbitral tribunal had failed to interpret correctly the substantive provisions contained in the BIT.¹⁴ Occidental opposed that challenge of the award, arguing, among other things, that the English courts lacked jurisdiction to decide how the BIT, a sovereign act by two foreign nations, should be interpreted.¹⁵ Additionally, Occidental noted that the dispute, which involved Ecuador's alleged failure to reimburse to Occidental certain taxes in connection with Occidental's gas exploration and production activities in Ecuador, lacked any substantive ties with England but for the fact that it had been resolved there.¹⁶ Accordingly, Occidental asserted that English courts were not in the best position to review the merits of the award and determine whether or not the arbitrators had resolved the dispute appropriately.¹⁷

The English courts found that they had jurisdiction to resolve the set-aside action brought by Ecuador and, in particular, to interpret and apply the BIT.¹⁸ However, the English courts dismissed Ecuador's set-aside action after finding that the arbitral tribunal had properly applied the BIT.¹⁹

It may seem that, in contrast with the Swiss Court of Appeals mentioned in the first example, English courts in the *Occidental* case had no objection to examining foreign sovereign acts, such as the BIT. However, the decision of the Swiss Court of Appeals in the first case and the decision of the English courts in the second case are not at odds in this respect. English courts were not called on to review the validity of a foreign sovereign act, which was taken for granted, but rather to interpret and apply that act. Swiss courts, however, were called on to determine whether a certain foreign act, the international arrest warrant, was valid. For the Swiss Court of Appeals, this last type of analysis was what the court was precluded from conducting.

IV. THIRD EXAMPLE: EXTRATERRITORIAL JURISDICTION IN A COMMERCIAL MATTER

The dispute between the parties in this third case broadly arose out of loans in excess of \$100 million made by the members of Aguas Lenders Recovery Group (ALRG), a limited liability company, to Aguas Argentinas

330 U.N.T.S. 38.

14. Ecuador, [2005] EWHC at [26]. Under Sections 67 and following of the 1996 English Arbitration Act, it is sometimes permissible to challenge an award and have its merits reviewed on certain grounds. Arbitration Act, 1996, c. 23, § 67 (Eng.).

15. Ecuador, [2005] EWHC at [2].

16. *Id.* at [35].

17. *Id.* at [33].

18. *Id.* at [71].

19. See *Ecuador v. Occidental Exploration & Prod. Co.* [2005] EWCA (Civ Div) 1116, 2006 Q.B. 432, 467; *Ecuador v. Occidental Exploration & Prod. Co. (No 2)* [2006] EWHC (Comm) 345, 2006 1 Lloyd's Rep. 773, 796.

(AA), an Argentinean water supply company.²⁰ AA's shareholders included Suez S.A. (Suez), a French public utility company, and its Spanish affiliate, Sociedad General de Aguas de Barcelona S.A. (Agbar).²¹

Following last decade's Argentinean crisis, AA became insolvent and failed to repay the loans made by ALRGs members.²² AA's bankruptcy proceedings were then initiated in Argentina.²³

Sometime later, ALRG was established as a pool of financial entities.²⁴ Only a few of ALRGs members were U.S. companies.²⁵ Shortly after its incorporation, ALRG was assigned the credits that its members held against AA and brought action in New York federal court against Suez, Agbar, and AA's successor in interest, Aguas y Saneamientos Argentinos S.A., seeking repayment of the loans made by ALRG's members to AA, along with punitive damages and attorneys' fees under an alter ego theory.²⁶

The three co-respondents submitted motions to dismiss arguing that, among other things, the New York federal court case was aimed at circumventing the bankruptcy proceedings still pending in Argentina.²⁷ Specifically, the three co-respondents argued that ALRG's actions constituted an impermissible attempt to have U.S. courts exercise extraterritorial jurisdiction, review the decisions issued by the Argentinean bankruptcy courts, and resolve a dispute with no relevant connection with the United States.²⁸

Prior to any court decision on the motions to dismiss, in October 2007, a stipulation was entered into providing for the dismissal with prejudice of ALRG's claims against Suez and Agbar.²⁹

20. Complaint: Demand for Jury Trial at ¶ 1, *Aguas Lenders Recovery Group, LLC v. Suez, S.A.*, No. 06-cv-07873 (S.D.N.Y. Sept. 29, 2006) ("dismissed") [hereinafter *Aguas Complaint*].

21. *Id.* ¶ 2.

22. *Id.* ¶¶ 5–7.

23. *Id.*

24. *Id.* ¶¶ 13 & 45.

25. *Aguas Complaint*, ¶¶ 13 & 50.

26. *Id.* ¶ 112.

27. Notice of Motion (*Aguas*), *Aguas Lenders Recovery Group, LLC v. Suez, S.A.*, No. 06-cv-07873 (S.D.N.Y. June 22, 2007); Notice of Motion (*Suez*), *Aguas Lenders Recovery Group, LLC v. Suez, S.A.*, No. 06-cv-07873 (S.D.N.Y. July 3, 2007); Notice of Motion (*Sociedad*), *Aguas Lenders Recovery Group, LLC v. Suez, S.A.*, No. 06-cv-07873 (S.D.N.Y. July 3, 2007).

28. Memorandum of Law in Support of Motion of Defendant *Suez S.A.* to Dismiss the Complaint at 19–22, *Aguas Lenders Recovery Group, LLC v. Suez, S.A.*, No. 06-cv-07873 (S.D.N.Y. Sept. 29, 2006).

29. Stipulation of Dismissal, *Aguas Lenders Recovery Group, LLC v. Suez S.A.*, No. 06-cv-07873 (S.D.N.Y. Oct. 24, 2007).