

## Supreme Court to weigh Shell's liability for alleged acts of torture in Nigeria

The US Supreme Court agreed last week to hear a case that will determine whether Shell can be held liable under US law for acts of torture and other human rights violations in Nigeria in the 1990s.

The court agreed to hear an appeal of a lawsuit brought by 12 Nigerian plaintiffs who argue that the oil major should be held responsible for violence against people in the Ogoni region of the Niger Delta who opposed oil exploration there.

A panel of three judges from the New York-based 2nd Circuit Court of Appeals ruled last year that corporations cannot be sued for such violations under the Alien Tort Statute, a 222-year-old US law. In recent years, a number of plaintiffs have tried to use the law to sue corporations for alleged human rights violations overseas.

But the Supreme Court said Monday that the 2nd Circuit's ruling is at odds with previous decisions handed down by other circuit courts on the issue of whether corporations are immune from prosecution under the Alien Tort Statute.

In agreeing to hear the case, *Kiobel v. Royal Dutch Petroleum*, the high court said the split in circuit court opinions creates "uncertainty for human rights victims and corporations alike concerning the future of ATS cases alleging serious human rights violations committed by corporate defendants."

Shell declined to comment, citing the pending court hearing. In 2009, Shell agreed to pay \$15.5 million to the plaintiffs of a separate lawsuit that accused the company with human rights violations. That case involved charges of complicity on Shell's part in the government's execution of Ken Saro-Wira and other Nigerian human rights activists in 1995. Shell described that settlement as a "humanitarian gesture to set up a trust fund to benefit the Ogoni people," the Nigerian ethnic group to which Saro-Wira and the others belonged.

The family of Barinem Kiobel, one of the Ogoni activists killed, did not participate in the 2009 settlement and pursued its case separately. The Supreme Court is expected to hear oral arguments in the case early next year.

— Gary Gentile

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## RENEWABLE ENERGY

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### Experts: state mandates, private sector will help clean tech survive Solyndra

While the political fallout from the collapse of solar-panel manufacturer Solyndra may chill federal support for clean-energy projects in the short-term, finance experts say the industry's long-term outlook remains solid, particularly as states implement their renewable portfolio standards.

California-based Solyndra filed for Chapter 11 bankruptcy

protection last month and laid off 1,100 workers, despite receiving a \$535 million taxpayer-backed loan guarantee from the Energy Department in 2009. The administration had repeatedly touted the company as a green-tech leader, with President Barack Obama personally touring its state-of-the-art manufacturing facility — built with the help of the loan guarantee — in May 2010.

Republicans have seized on the failure to criticize the breadth of the administration's clean-energy programs, but some analysts say the industry will outlast them.

"This is not the first time we've faced this kind of challenge with the lack of clarity in renewable-energy policy. There have been worse instances before, and we have pulled through," said Mohammad Alam, president of Massachusetts-based Alyra Renewable Energy Finance.

Alam acknowledged that the US solar-energy industry would likely struggle in the short term if Congress curtails federal subsidies in response to Solyndra's collapse. But he predicted that large electric utilities that have invested heavily in renewables would mount a fervent lobbying campaign that would "get some legislation passed in the future."

"The investment might sit there for a year or two, but they will get back to it," he said.

The so-called Section 1705 loan-guarantee program that Congress created as part of the 2009 economic stimulus bill recently came to a close, and Republicans are probing billions of dollars of renewable-energy loan guarantees that DOE finalized in the waning days and hours of the initiative (*IE*, 3 October, 1). Other federal incentives for renewable energy are also approaching their expiration dates, including the Treasury Department's popular "1603" program, which gives developers up-front cash grants in lieu of conventional after-the-fact tax credits.

But Alam said the possible lapsing of the 1603 program, as well as the production tax credit for solar energy, would present no more than "a little bit of a kink" to the industry. He said that even without federal support, state-level renewable portfolio standards may help drive momentum for the clean-energy industry. Though Congress has not produced any consensus on a federal RPS, 39 states have passed various forms of an RPS or have set goals for renewable electricity generation.

"Although the incentives are important, what is really important is for there to be some mechanism to create demand, which there is: you have RPS programs in several states," Alam said. "So there is a market for renewable energy. There is demand."

Mike Lorusso, managing director and group head for New Jersey-based CIT Energy, also said state-level renewable-energy mandates will be a key driver over the next few years for the industry. Given the country's current fiscal conditions, along with the political uproar over federal support for clean energy, he said developers and financiers are already preparing for federal incentive programs to be eliminated.

"As the political environment continues to move toward fiscal conservation, these programs will be under pressure to

be reduced or phased out," Lorusso said. "However, most states have specific requirements to achieve certain minimum renewable-energy supply levels."

But without federal incentives, ratepayers can expect to pay more, as developers and utilities may seek to pass through their costs to their customers, he said.

Republicans on the House Energy and Commerce Committee, which has held several hearings on Solyndra since it filed for bankruptcy on September 6, have called the company's loan guarantee "a bad bet." They have also called into question the wisdom of the other 27 loan guarantees that DOE issued from the stimulus-funded 1705 program.

Solyndra is also being investigated by the FBI for possible fraud, as well as DOE's Office of Inspector General, the Treasury Department and the House Oversight and Government Reform Committee.

The Obama administration has defended the Solyndra deal, saying its collapse, while unfortunate, should not be an indictment of the entire loan-guarantee program, which was created to help clean-energy projects get off the ground during a period when credit markets were tight after the 2008 financial crisis.

Thomas Amis, a Washington-based attorney who leads law firm Cooley LLP's clean energy and technologies practice, said he feels the Solyndra uproar is "overblown," and that overall investor sentiment for clean energy remains very positive.

"The focus on it really reflects more of a political agenda against clean energy, rather than any sort of substantive critique," Amis said. "There is no question that the withdrawal of federal support, which in the worst case will only be partial and is by no means a foregone conclusion, would have an impact, but this sector continues to have momentum."

## Looking to the private sector

In fact, some companies that were conditionally offered loan guarantees by DOE walked away from their awards because they found private financing markets more attractive. Others whose conditional offers were later withdrawn by DOE have also said they plan to press ahead with their projects by using private financing.

One such company is Solar City, which had a \$344 million conditional loan guarantee canceled by DOE because the agency said it would not be able to finalize the deal by the 1705 program's statutory September 30 deadline. Solar City intended to use the loan guarantee to help finance a project in which it would install solar panels on houses on 124 military bases around the US, and it subsequently announced it would still move forward on the installations.

Solar City spokesman Jonathan Bass said he could not discuss in detail what financing arrangements it has set up, but the company has raised more than \$1.4 billion in project financing from several sources, including Google, US Bank, Citi, National Bank of Arizona and PG&E Corporation.

"We sought the loan guarantee because it would have allowed us to build projects in more states, but we believe we can finance many of the projects without the loan guar-

antee," he said.

Experts said that clean-energy financing from the private sector remains somewhat challenging, particularly with recent economic crises in Europe constricting some lending activity, but it is available.

Cooley LLP's Amis said he is seeing more strategic investments, with large companies "that realize that energy transformation is inevitable, and they need exposure in the space." He said those deals can come in various forms, including joint ventures, as well as direct investment.

"By taking the volatility of the debt markets out of the equation, these relationships can create a more predictable path to growth," he said.

Alam, of Alyra Renewable Energy Finance, said "tried and true" renewable technologies, such as wind, solar photovoltaics and geothermal, should have few issues in finding financing through banks or the institutional market, which includes insurance companies and pension funds. Newer technologies, such as solar thermal, will be judged by financiers on a case-by-case basis, he said.

In fact, a recent report from analysts at Bloomberg New Energy Finance found a "surge" in global investment in renewables in the third quarter, even as Europe faced an economic crisis.

"The industry has swung between being a buyer's market and a seller's market a few times in recent years: right now, you would love to be a developer with access to funding, but not a supplier," said Michael Liebreich, the company's CEO. "Eventually things will come back into balance. Of course the furor in the US over the failure of Solyndra hasn't helped clean energy share prices."

In addition, General Electric recently announced plans to build what it calls the largest solar manufacturing facility in the US. The factory, to be built in Aurora, Colorado, is expected to begin shipping solar panels in 2013 and will produce enough panels annually to power 80,000 homes, the company said.

## More loan guarantees?

Though the 1705 loan guarantee program sunset on September 30, DOE does have another loan guarantee program, the 1703, that it can use to finance some clean-energy projects. DOE received some funding in the fiscal 2011 budget to support the credit subsidy fees for about \$1.2 billion in 1703-program clean-energy loan guarantees, though that amount is a far cry from the approximately \$15 billion in stimulus-funded 1705 loan guarantees that DOE was able to offer.

DOE declined to say whether it will use that 1703 program funding to revive applications for 1705 loan guarantees that it had tabled due to the expiry deadline, or whether it would issue a new solicitation for applications.

"The program is still assessing and developing a provision for implementing it," said DOE spokesman Bill Gibbons.

The fallout from Solyndra may also broadly hinder debate over support for federal support for clean-energy deployment, even as many of the tax incentives and loan guarantee pro-

grams near expiration.

"I don't think it is a tempest in a teapot, but I think that Solyndra's main effect may be to darken the atmosphere around a needed discussion the country needs to have anyway about how it is going to address the well-documented 'deployment valley of death,'" said Mark Muro, a senior fellow and policy director for the Metropolitan Policy Program at the Brookings Institution.

"We don't have a balanced array of the elements of a full policy environment for clean-tech deployment. We don't have appropriate pricing on carbon, we don't have universal clean-energy standard to drive demand, our government procurement efforts are weak," Muro said. "So we are not doing anything on the demand side significantly. And meanwhile we have the tax programs, various programs, beginning to sunset."

Of immediate concern for the clean-energy industry is the looming expiration at the end of the year of Treasury Department's 1603 program, which offers developers up-front cash grant in lieu of conventional tax breaks.

The Solar Energy Industries Association has called on Congress to extend the program, issuing a report that said a one-year extension would result in the solar industry adding 37,394 jobs in 2012. The trade group said that financial markets "are still woefully inadequate to meet demand for renewable-energy projects."

"More than 100,000 Americans work in the solar industry, double the number in 2009. Solar is a proven job creator at a time when the unemployment rate for the country remains stubbornly high," SEIA President and CEO Rhone Resch said in a statement. "The 1603 Treasury Program has been the single most effective policy driving renewable-energy growth during the past two years."

But industry observers said they highly doubt that Congress will extend the program, in these highly charged times.

"I don't see within today's political climate how the 1603 cash grant can be extended," said Wim Goethals, chief operation officer of solar PV developer Enfinity.

Another incentive, the production tax credit for wind power, is set to expire on December 31, 2012. It gives wind farm operators a 2.2 cent/kWh tax credit on electricity produced in the first ten years, as long as the project is completed by the end of 2012.

— *Herman Wang, Derek Sands*

## US seeks to close loophole allowing foreign solar panels on military bases

When lawmakers passed a major defense bill last year to fund Pentagon-related operations, they thought they had required all solar panels installed at military bases to be US-made.

They were wrong.

The fiscal 2011 defense authorization bill said solar-energy projects at military bases must comply with the Buy American Act, which requires at least 50% of a project's components to be American made. The act does allow several exceptions, includ-

ing when the cost of US products is substantially higher than foreign ones, or when a comparable US product is not available.

But a spokesman for Representative Buck McKeon of California, the Republican chairman of the House Armed Services Committee, said the bill inadvertently exempted the Buy American provision in cases where the Pentagon signs power-purchase agreements with private developers who install solar panels on military property.

"The major issue was that DOD was not complying with intent of Congress to buy American PV by entering in to long-term leases for the panels," McKeon spokesman Dustin Walker said in an email. "[Armed Services Committee staff] did not believe it was intentional effort to circumvent the law — it was just an added side-benefit. At the end of the day they didn't 'own them,' so therefore the Buy America provision for PV didn't apply."

So now the House is again pushing to require US solar panels at military installations, through a provision tucked into a bill setting US defense policy for 2012.

The provision in the National Defense Authorization Act (H.R. 1540), would impose Buy American Act requirements on all solar photovoltaic panels installed at military facilities, plugging a gap in the bill that exempted a popular solar financing mechanism from the requirement.

The new provision would plug a hole in the current PV procurement rules, said Mike Morosi, spokesman for Representative Maurice Hinchey, a New York Democrat who inserted the original Buy American Act language in the 2011 defense authorization bill.

"Congressman Hinchey is strongly supportive of the language. In the status quo, DOD can use power-purchasing agreements to purchase solar energy not generated by American-made photovoltaic devices, even if the devices are installed on DOD property," Morosi said. "This provision will clarify the meaning of 'ownership,' so that all photovoltaic devices on a DOD property would need to meet the Buy American standards as set forth by Hinchey's amendment in last year's bill."

Air Force Lt. Col. Melinda Morgan, a spokeswoman for the Pentagon, said PPAs can provide an attractive way for the military to finance solar projects. She reiterated that the military had no intention to avoid BAA requirements.

"We enter into third-party PPA agreements because the private companies can accept longer payback periods than the government, or because they can take advantage of incentives not available to the government," Morgan said in an email. "As the staffer said, it is not to avoid BAA."

Morgan said she could not provide a list of PPAs the military signed over the past year, or of solar panels that would comply with BAA requirements. She also declined to discuss the impact of tightening BAA requirements for military PV purchases.

"It would be purely speculative to discuss hypothetical changes to the BAA and any subsequent regulations and interpretation," Morgan said.

A review of DOD contracts announced over the past year on