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U.S. Supreme Court Expands *Kiobel* to Determine Whether the Alien Tort Statute Applies Extraterritorially

Just days after hearing oral argument in *Kiobel v. Royal Dutch Petroleum Co.*, a case involving the question whether corporations can be liable for claims of human rights violations under the Alien Tort Statute ("ATS"), the U.S. Supreme Court ordered the parties to brief the broader question whether the ATS applies extraterritorially at all.

The ATS permits non-U.S. citizens to bring civil lawsuits in U.S. courts for violations of the law of nations, and in recent years foreign plaintiffs have brought numerous claims against corporations for allegedly aiding human rights violations by foreign officials and governments. During oral argument on February 28, 2012, several Justices' questions appeared to reflect concern regarding not only whether corporations could be civilly liable under the statute, but also whether the U.S. federal courts were an appropriate forum for adjudicating claims by foreign plaintiffs regarding conduct primarily committed by foreign actors in a foreign nation. In an order issued on March 5, the Court directed the parties to brief the question "whether and under what circumstances the Alien Tort Statute . . . allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

The Court's order for supplemental briefing and reargument in an argued case is rare, but not unprecedented. The order may reflect that no single view regarding the question of corporate liability garnered a majority of the Justices after argument. It also may reflect a view that the extraterritoriality question is antecedent to the question of corporate liability—because a holding that the ATS does not apply to conduct occurring within the territory of another sovereign would apply equally to, and eliminate most ATS claims against, both corporations and natural persons, and reduce application of the statute to violations of the law of nations occurring within the United States or on the high seas. The Court was scheduled to consider whether to accept for review another case presenting the question of extraterritoriality during its conference of Friday March 2, Petition for Writ of Certiorari, *Rio Tinto PLC v. Sarei*, No. 11-649 (Nov. 23, 2011); that case has now apparently been put on hold. Whatever the motivation, the Court's order positions *Kiobel* as even more of a blockbuster than it already was.

Petitioners' supplemental brief is due on May 3, 2012, and respondents' brief is due on June 4, 2012. The Court will schedule the case for reargument during its next Term, which begins on October 1, 2012.

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Background

Enacted in 1789, the ATS lay dormant for nearly 200 years after its passage, providing jurisdiction in only two cases. A new wave of ATS lawsuits emerged following a 1980 decision by the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), a suit brought by two Paraguayan citizens against the former Inspector General of Police in Paraguay for the alleged torture and murder of their family member in Paraguay. The Second Circuit concluded that whenever

an alleged torturer is found and served with process within the borders of the United States (where the former Inspector General then resided), the ATS provides jurisdiction over an alien's human rights claims. Since *Filartiga*, plaintiffs have extended their focus to lawsuits against corporations for allegedly assisting foreign officials in human rights violations and have extended their claims to a wide variety of alleged violations of customary international law.

In 2004, the Supreme Court addressed the scope of ATS liability for alleged violations of customary international law in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *Sosa* involved an ATS claim by a Mexican national against another Mexican national—acting under the direction of the Drug Enforcement Administration ("DEA")—for his alleged arbitrary detention in Mexico and abduction to the United States to stand trial for his role in the murder of a DEA agent. The Court concluded that he failed to state an actionable claim on the ground that an ATS claim must be based on a "specific, universal, and obligatory" norm of international law, and "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." *Id.* at 738. Although *Sosa* involved the application of the ATS to conduct occurring outside of the United States, the question of extraterritoriality was not addressed, leaving it open for consideration in *Kiobel*.

Kiobel and Corporate Liability

The U.S. Court of Appeals for the Second Circuit was the first court to address head-on corporate liability under the ATS in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), holding that corporations are not liable under the statute. *Kiobel* involved a lawsuit by 12 Nigerians alleging that Dutch, British, and Nigerian oil companies aided and abetted the Nigerian government in its efforts to stop protests against oil drilling in the Ogoni region of the Niger Delta, including through torture and murder. The court concluded there is no customary international law norm of corporate liability because "no international tribunal has ever held a corporation liable for a violation of the law of nations." *Id.* at 120. The Second Circuit did not address the extraterritorial application of the ATS.

Since *Kiobel*, the Seventh, Ninth, and D.C. Circuits held that corporations can be liable under the ATS, creating a Circuit split that led to the Supreme Court's review. *Sarei v. Rio Tinto, PLC*, Nos. 02–56256, 02–56390, 09–56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011) (*en banc*); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011). On October 17, the Court granted a petition for writ of certiorari in *Kiobel* to resolve (1) whether corporate civil tort liability under the ATS is a merits question or an issue of subject matter jurisdiction and (2) whether corporations can be liable under the statute. The Court also granted a petition for writ of certiorari in *Mohamad v. Palestinian Authority* to consider corporate liability under the Torture Victim Protection Act of 1991 ("TVPA"), a supplemental statute to the ATS, which creates a private right of action for U.S. and non-U.S. citizens for torture and extrajudicial killing committed by "[a]n individual" acting under color of foreign law. 28 U.S.C. § 1350 note.

February 28 Oral Argument

The Supreme Court heard arguments in *Kiobel* and *Mohamad* on February 28, 2012. Although the Justices pressed the advocates on the doctrinal question of corporate liability presented by the petitions, some of the Justices' questions in *Kiobel* focused on the broader issue of the application of a U.S. statute to circumstances in which the parties are foreign and the conduct occurred abroad.

The Justices began with questions emphasizing that the ATS would be unique in the world if it provides U.S. jurisdiction over alleged human rights violations to which there is no U.S. connection. After just a few short sentences of petitioners' argument, Justice Kennedy (considered to be a key vote in this case) interjected, quoting an *amicus* brief stating that "[n]o other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection." When petitioners could not point to another country that has a similar law permitting the exercise of civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection, Chief Justice Roberts questioned whether allowing such a suit within the United States itself contravenes international law.

Justice Alito stressed that that "there's no particular connection between the events here and the United States." Quoting the first sentence in petitioners' brief that "[t]his case was filed by 12 Nigerian Plaintiffs who alleged that Respondents aided and abetted the human rights violations committed against them by the Abacha dictatorship in Nigeria between 1992 and 1995," Justice Alito went on to ask, "what business does a case like that have in the courts of the United States?" Justice Kennedy

appeared to distinguish *Filartiga* on the factual basis that that case had some nexus to the United States—specifically, the defendant's presence in the United States—and because the plaintiff had no other forum in which to bring the suit.

In discussing the ramifications of extraterritorial application of the ATS, Justice Alito invoked the purpose of the statute, which he described as to prevent international tension, and stated that "this kind of lawsuit only creates international tension." Justice Kennedy observed that under the view presented by the government in support of petitioners a U.S. corporation accused of committing human rights violations in the United States could be sued in any country in the world.

Counsel for petitioners attempted to draw the Court away from the extraterritoriality issue as something that "ought to be briefed on its own." On March 5 the Court directed the parties do just that. The Court's order makes no mention of *Mohamad*, indicating that the Court likely will decide this Term whether corporations can be liable under the TVPA—a statute that limits liability to "[a]n individual."

Implications

The Supreme Court's focus on the extraterritorial application of U.S. law may reflect a trend. The Court recently expressed skepticism regarding the extraterritorial application of U.S. law in other circumstances. In a 2010 decision, *Morrison v. National Australian Bank Ltd*., 130 S. Ct. 2869 (2010), the Court held that the Securities Exchange Act of 1934 (the "Exchange Act") did not permit securities fraud suits in U.S. court by foreign investors who purchased shares of a foreign company on a foreign exchange. In examining whether the Exchange Act should apply extraterritorially, the Court invoked a "presumption against extraterritoriality." *Id.* at 2881. According to the Court, "when a statute gives no clear indication of extraterritorial application, it has none." *Id.* at 2878. Lower courts have applied this presumption to bar extraterritorial claims not only under the Exchange Act, but also under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-1968. *See Norex Petroleum Ltd.* v. *Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010). Dissenting opinions in the courts of appeals in *Sarei* and in *Exxon* expressed the view that the presumption of extraterritoriality barred such claims under the ATS.

The Court did not provide a reason for ordering reargument in *Kiobel*, leaving the advocates and the public to guess at its motivation. The question of extraterritoriality was clearly on the minds of several Justices, and the Court may have concluded that it was more significant than the question of corporate liability. Indeed, a holding that the ATS does not apply to conduct that occurred within the territory of another sovereign could eliminate the need to decide the question of corporate liability at all. Limiting the scope of the ATS to conduct within the United States and on the high seas, for example, would leave only a limited universe of potential claims, such as claims involving assaults on ambassadors or claims involving piracy, which some have argued reflect Congress' original intent in enacting the ATS and which would significantly reduce the volume of international human rights litigation in U.S. courts.

The order for reargument positions *Kiobel* as a potential landmark case in the 2013 Term. Oral argument will occur soon after October 1, and a decision will issue before the end of the Term in June 2013.

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