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Client Memorandum October 2012

U.S. Supreme Court Hears Argument Regarding Extraterritorial Application of the Alien Tort Statute

On October 1, 2012, the U.S. Supreme Court heard arguments for a second time in *Kiobel v. Royal Dutch Petroleum Co.* on the issue of "whether and under what circumstances the Alien Tort Statute ("ATS") ... 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." *Kiobel* involves a lawsuit by 12 Nigerians who allege that Dutch, British, and Nigerian oil companies aided and abetted the Nigerian government in committing human rights violations in connection with its efforts to stop protests against oil drilling in the Ogoni region of the Niger Delta.

The Court ordered reargument after it first heard arguments in February 2012 on the more specific issue of whether corporations can be sued under the ATS for alleged complicity in human rights violations. The question on reargument focused on the broader issue of whether the ATS provides a cause of action at all for claims of human rights violations committed abroad.

During the argument, several Justices asked questions that reflected concern over providing U.S. courts authority over cases involving the conduct of foreign governments in foreign countries relating to foreign nationals. Others appeared to want to ensure that a U.S. forum is open for victims of gross human rights violations to bring their claims. Although it appears likely that the Supreme Court will attempt to craft a limiting principle to the reach of the ATS—particularly where the parties all are foreign and the conduct occurred abroad—the ultimate position it will adopt remains unclear. The Court will issue its decision by the end of its term in June 2013.

Background

Enacted in 1789, the ATS provides U.S. courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The statute was little used until 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 of 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.

In 1994, the U.S. Court of Appeals for the Ninth Circuit concluded that the ATS creates a cause of action for violations of specific, universal, and obligatory international human

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rights standards. *Hilao v. Marcos*, 25 F.3d 1467 (9th Cir. 1994). In *Marcos*, victims and family members of victims of the former President of the Philippines sued the former President for torture, summary execution, and disappearances committed in the Philippines. Since *Filartiga* and *Marcos*, 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.

The Supreme Court's only decision addressing the ATS has been the 2004 opinion in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *Sosa* involved an ATS claim by a Mexican national against another Mexican national for his alleged arbitrary detention in Mexico and abduction to the United States to stand trial for his role in the murder of a federal agent. The Court concluded that his claim was not based on a "specific, universal, and obligatory" norm of international law, because "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 extraterritorial activity and cited *Filartiga* and *Marcos* favorably, it did not squarely address the underlying question whether the ATS properly applies to conduct occurring outside the United States.

Oral Argument

Arguments by Counsel

During oral argument in *Kiobel*, counsel for the plaintiff Nigerians contended that the ATS applies to extraterritorial conduct based on the lower courts' application of the statute in cases such as *Sosa*, *Filartiga*, and *Marcos* to violations of the law of nations without regard to where that conduct took place. Counsel attempted to address concerns over U.S. courts overstepping their bounds in deciding purely foreign disputes by highlighting threshold hurdles such as the need to establish personal jurisdiction over the defendant, and the myriad prudential doctrines that allow federal courts to dismiss claims implicating foreign relations or that are more appropriately addressed by another country's courts, such as the political question doctrine, the act of state doctrine, international comity, and *forum non conveniens*. Counsel for defendant Royal Dutch Petroleum responded that the general presumption against the extraterritorial application of U.S. statutes—which has seen a resurgence in recent Supreme Court decisions involving extraterritorial conduct such as *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010) (extraterritoriality of the Exchange Act)—necessarily bars application of the ATS to conduct occurring outside the United States, because the statute does not explicitly say it applies extraterritorially.

The Broad Extraterritoriality Argument

During argument, questions by Justices Scalia, Alito, and Kennedy appeared to reflect support for limiting the extraterritorial application of the ATS. Justice Scalia stated that he "believe[s] strongly in the presumption against extraterritorial application," while Justice Alito sought an explanation "why ... this case belong[s] in the courts of the United States ... when it has nothing to do with the United States other than the fact that a subsidiary of the defendant has a big operation here." These Justices also expressed concern about the reciprocal risk of "giv[ing] national courts elsewhere the power to determine whether a United States corporation in the United States has violated a norm of international law," with Justice Kennedy noting that under the plaintiffs' view U.S. corporations could "be sued in any country in any court in the world," and Justice Alito stating that this could "have a very deleterious effect on U.S. foreign policy and on the welfare of ... U.S. citizens abroad."

Justices Kagan, Breyer, Sotomayor, and Ginsburg, on the other hand, expressed concern over limiting the scope of the ATS and noted that the *Filartiga* case—cited with approval in *Sosa*—involved conduct occurring abroad. Justice Sotomayor rebuked counsel for defendant by saying, "you're asking us to overturn our precedents.... You're ... basically saying *Filartiga* and *Marcos*, *Sosa*, they were all wrong." Some referred to the historical likelihood that one of the targets of the original ATS was 18th-Century piracy, which occurred outside U.S. territory. Justice Breyer pushed the rationale for extraterritorial application of the ATS further, suggesting that today the ATS rightly targets violators of international law abroad: "who are today's pirates. And if Hitler isn't a pirate, who is? And if, in fact, an equivalent torturer or dictator who wants to destroy an entire race in his own country is not the equivalent of today's pirate, who is?" Notably, Justices Kennedy and Roberts, who might be expected to have a restrictive view of the ATS, also questioned whether the Court's decision in *Sosa* took the issue of extraterritorial application of the ATS off the table. As Chief Justice Roberts questioned, "we've crossed that bridge already, didn't we, in *Sosa*?"

Other Solutions to the Extraterritoriality Problem

Some Justices explored the possibility that requiring plaintiffs to exhaust judicial remedies in other courts before bringing an ATS claim in the United States would help to ensure that claims were first addressed in the most appropriate forum. Justices Ginsburg and Kagan noted, for example, that Nigeria, the UK, and the Netherlands all might be other potential forums for this lawsuit. They also noted that an exhaustion requirement would address the problem of forum shopping while preserving the U.S. courts as a "forum by necessity" when no other court can provide relief. Justice Sotomayor favorably cited the European Commission's position in a "friend of the court" brief, which advocated allowing exercise of jurisdiction over extraterritorial conduct where (1) the defendant is a national of the country seeking to exercise jurisdiction; (2) the conduct endangers the security of the country seeking to exercise jurisdiction; or (3) there is universal jurisdiction based on the "sheer reprehensibility of certain crimes" and the plaintiff has exhausted domestic and international avenues of relief.

The U.S. Solicitor General, who presented the U.S. government's position, urged the Court to reject a cause of action in the circumstances here—involving "the extraterritorial conduct of a foreign corporation when the allegation is that the defendant aided and abetted a foreign sovereign"—while preserving the possibility that the ATS may apply to other extraterritorial conduct in a future case. This argument appeared to gain little traction, as both Chief Justice Roberts and Justice Scalia noted that it represented a change in the government's position from that of previous administrations that had opposed extraterritorial application of the statute altogether.

Implications

Although questions during oral argument are an imperfect predictor of results, the Justices appear to be prepared to narrow the ATS at least in certain circumstances. Just how far they will go remains uncertain. While Justices Scalia and Alito may be prepared to eliminate extraterritoriality altogether, other Justices appeared to be staking out narrower positions in an effort to preserve the possibility that foreign ATS plaintiffs might bring claims in U.S. courts where some ties to the United States exist or where there is no other forum to consider their claims. The Court will issue its decision before the end of its Term in June 2013.

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