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U.S. Supreme Court Holds Presumption Against Extraterritorial Application Bars Claims Under the Alien Tort Statute

On April 17, 2013, the U.S. Supreme Court issued its long-anticipated ruling in *Kiobel v. Royal Dutch Petroleum Co.* regarding whether the Alien Tort Statue ("ATS") allows plaintiffs to sue multinational corporations for allegations of human rights violations committed outside the United States. In a majority decision authored by Chief Justice Roberts, the Court held that the "presumption against extraterritoriality" applies to the ATS and that petitioners failed to overcome the presumption where "all the relevant conduct took place outside the United States." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. __ (2013) (slip op., at 13-14). The Court did not address the additional question presented, whether corporations are liable under the ATS.

The *Kiobel* decision effectively ends the trend of ATS cases in which plaintiffs have attempted to hold multinational corporations liable in U.S. federal courts for alleged human rights violations committed by foreign governments, on the theory that the corporation "aided and abetted" the activity by providing assistance to or conducting business with that government. This is a significant victory for multinationals that have faced the threat to reputation and millions of dollars in potential claims posed by these suits. The Court did preserve some ambiguity in its decision, signaling that some ATS claims under different facts involving more significant ties to the United States may be available. Going forward, the question will be what circumstances, however limited, would be sufficient to rebut the presumption against extraterritoriality.

Background

Kiobel involved a lawsuit by twelve Nigerians who alleged 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. In a decision that garnered national attention, the U.S. Court of Appeals for the Second Circuit held that the ATS did not apply to human rights claims against corporations. The Supreme Court granted review to consider that question in 2011.

During oral argument, questions from the Justices signaled that they were concerned with a threshold issue – whether the ATS applied to conduct occurring outside the United States at all.

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Immediately after oral argument, the Court ordered the parties to brief that question and set the case for re-argument during the following Term.

The Decision

In this recent decision, the Justices agreed 9-0 to affirm the Second Circuit's judgment that petitioners' ATS claim could not be sustained under the facts presented. The unanimity in judgment does not reflect agreement on the Court on a rationale for dismissing the claim. A majority of the Court relied on the presumption against extraterritoriality in a decision that is binding on the lower courts. In concurring opinions, several Justices provided their views on the rationale, with Justice Kennedy (while agreeing with and joining the majority) stating that further cases may present facts requiring elaboration on the presumption.

Chief Justice Roberts, with Justices Scalia, Alito, Thomas, and Kennedy joining in his opinion, concluded that the canon of interpretation, the "presumption against extraterritoriality," required the Court to interpret the ATS as not having extraterritorial application. This continues a trend in the Court of skeptical review of the extraterritorial application of U.S. federal law, which started with the *Morrison* case rejecting the extraterritorial application of the securities laws. *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010). The majority reasoned that "nothing in the text" of the ATS "nor . . . the historical background" suggested that Congress intended the ATS to apply extraterritorially, and that "all the relevant conduct took place outside the United States." At the end of the opinion, the majority left room for some cases to be brought if they had a sufficient connection to the United States, but held that for those claims that do "touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." Significantly for multinational corporations, the Court held that because "[c]orporations are often present in many countries . . . it would reach too far to say that mere corporate presence suffices."

While joining the majority, Justice Kennedy also wrote separately to emphasize his belief that some scenarios could overcome the presumption against extraterritoriality. Justice Kennedy observed that the Court was "careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute," and noted that "[o]ther cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the [Torture Victims Protection Act] nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation."

Justice Alito also wrote a concurring opinion, joined by Justice Thomas, stating that he would apply a stricter bar than the majority, allowing an ATS cause of action only where "domestic conduct is sufficient to violate an international law norm that satisfies *Sosa's* requirements of definiteness and acceptance among civilized nations" (referring to *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)).

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, concurred in the judgment only and challenged the presumption against extraterritoriality as an appropriate limiting principle for the ATS. However, even the minority rationale would substantially limit suits for conduct occurring outside the United States, as Justice Breyer stated that he would limit jurisdiction to claims where "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest." Justice Breyer principally appeared motivated by an interest in not making the United States a "safe harbor" for individuals who commit crimes against the laws of nations.

Looking Ahead

Multinational corporations can be relieved that the threat of high profile and high stakes ATS litigation has been greatly reduced by the Court's *Kiobel* decision. Multinationals with offices in the United States in particular can take heart in the Court's holding that "it would reach too far to say that mere corporate presence suffices" to overcome the presumption against extraterritoriality. The open question remains what it will mean for claims to "touch and concern the territory" of the United States.

Many other obstacles remain even if plaintiffs overcome the presumption to successfully pursue ATS claims. The Court did not reach the question for which *Kiobel* was first granted certiorari: whether corporations can be sued under the ATS. That corporations cannot be sued under the ATS remains the rule in the Second Circuit (which includes New York), although the Seventh, Ninth, and D.C. Circuits have held corporations can be liable. Other stumbling blocks include the appropriate *mens rea* and *actus reus* standards for aiding and abetting liability, on which lower courts have disagreed. *Compare Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (holding that liability for aiding and abetting human rights violations committed by others under the ATS requires (1) practical assistance having a substantial effect on the perpetration of the crime, and (2) the provision of such assistance with the purpose of facilitating the crime); *Doe v. Exxon Mobil*, 654 F.3d 11 (D.C. Cir. 2011) (holding a defendant can be liable for aiding and abetting human rights violations if it acted with knowledge that its actions would assist the perpetrator in the commission of the crime).

As the impact of *Kiobel* is felt in pending cases in the lower courts, and given the other likely barriers to bring ATS claims, plaintiffs will continue to seek alternatives to pursue their causes, including U.S. state courts and state tort law. Even so, it is unquestionable that *Kiobel* has greatly reduced potential liabilities for multinational corporations under the ATS.

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