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US Supreme Court Narrows Alien Tort Statute Exposure

The US Supreme Court significantly narrowed the reach of the Alien Tort Statute (ATS) in its April 17, 2013 ruling in *Kiobel v. Royal Dutch Petroleum*,[1] yet some uncertainty remains as to whether and under what circumstances companies may be held liable in the United States for alleged violations of international law that take place abroad. The Supreme Court ruled in *Kiobel* that the ATS is subject to a "presumption against extraterritoriality" and all nine justices agreed that a foreign corporation with a "mere presence" in the United States cannot be sued under the ATS for allegedly aiding and abetting violations of customary international law that take place overseas. But because the Court stopped short of exempting companies from ATS liability in all circumstances, companies that do business in countries with political risk — and particularly those that work closely with foreign governments — should remain attentive to potential ATS exposure, at least until the courts have had the chance to further develop the Supreme Court's pronouncements in *Kiobel*.

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The Alien Tort Statute

The ATS empowers US courts to hear civil tort claims based on violations of international law.[2] The ATS, adopted in the Judiciary Act of 1789, was rarely invoked until the 1980s, when plaintiffs began to use the statute to sue officials of foreign governments and others allegedly implicated in violations of international law. The US Supreme Court addressed the ATS for the first time in 2004, when it held in *Sosa v. Alvarez-Machain* that the statute conferred US jurisdiction over causes of actions derived from binding, well-defined, and universally-recognized principles of the "present-day law of nations."[3]

Many recent ATS lawsuits have been directed at companies doing business abroad, often (but not only) in the energy and extractive industry sectors. Approximately 150 such cases have been filed to date.[4] Plaintiffs often allege that the defendant company assisted or cooperated with police or military forces in a foreign nation that were violating international human rights principles. In that regard, *Kiobel* is a representative case.

Kiobel v. Royal Dutch Shell

The plaintiffs in *Kiobel* were residents of the Nigerian region of Ogoniland. They alleged that British, Dutch and Nigerian oil companies violated international law by aiding and abetting human rights violations by the

Nigerian military that were intended to suppress demonstrations against the activities of the oil companies.[5] The plaintiffs sued the oil companies in the Southern District of New York. The plaintiffs appealed the district court's dismissal of certain claims to the Second Circuit, which held that international law does not recognize corporate liability and proceeded to dismiss the entire complaint on those grounds.[6] The Supreme Court then granted certiorari. After oral argument on the question of corporate liability, the Court directed the parties to submit additional briefing as to whether the ATS applies to violations of international law that occur on foreign territory.

In an opinion written by Chief Justice John Roberts for a five-justice majority, the Court ruled that the ATS was subject to the presumption that US law does not govern conduct that occurs within the territory of a foreign sovereign absent a clear indication to the contrary — an interpretative canon known as the "presumption against extraterritoriality." The majority reviewed the negative foreign policy consequences that might stem from the application of the ATS to foreign conduct. The majority then analyzed the text and history of the statute and concluded that they did not rebut the presumption against extraterritoriality.[7] The Court only briefly addressed the particular allegations against the defendants, noting that "all the relevant conduct took place outside the United States" and that "it would reach too far to say that mere corporate presence [in the United States] suffices" to "displace the presumption against extraterritoriality."

Four justices wrote three concurring opinions. Justice Anthony Kennedy, who joined the majority opinion, wrote a paragraph-long concurrence emphasizing that the majority had been "careful to leave open a number of significant questions regarding the reach and interpretation of the [ATS]," such that "the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation."[8] Justices Samuel Alito and Clarence Thomas, both of whom also joined the majority, expressed the view that the ATS was properly applied only to domestic conduct that itself violates a well-established norm of international law.[9]

Justice Stephen Breyer, writing for the remaining four justices, concurred in the judgment but rejected the majority's reasoning. Rather than relying on the statutory presumption against extraterritoriality, he called for a less restrictive approach founded on the principles of extraterritorial jurisdiction set out in the Restatement (Third) of Foreign Relations Law of the United States. Justice Breyer's approach would permit ATS suits where the alleged tort occurred on American soil, the defendant was an American national, or the defendant's conduct substantially and adversely affected an important American national interest.[10]

Conclusions

As a result of the Court's decision in *Kiobel*, plaintiffs will have difficulty framing ATS lawsuits against foreign companies for violations of international law on foreign territory, which have typically rested on claims, as was the case in *Kiobel*, that the companies aided and abetted the actions of foreign governments.[11] However, the brevity of the majority's discussion of the facts of *Kiobel* and the concurring opinions of a majority of justices may encourage further litigation in the lower courts about the scope of the presumption against extraterritoriality. In particular, courts likely will be asked to decide whether *Kiobel's* logic applies with equal force to US companies accused of complicity in overseas human rights violations and to foreign conduct directed against US nationals or which threatens US interests.[12] Until those issues are resolved, companies doing business overseas should remain aware of potential ATS exposure. Latham & Watkins will provide further updates as this area of law continues to develop.

Endnotes

[1] No. 10-1491, 569 U.S. ___, 2013 U.S. LEXIS 3159 (U.S. Apr. 17, 2013).

[2] The ATS consists of a single sentence that provides, in its totality, that "[t]he district courts shall have original jurisdiction of 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.

[3] 542 U.S. 692, 725 (2004).

[4] *The Shell Game Ends*, The Economist, Apr. 20, 2013, at 34.

[5] *Kiobel*, slip. op. at 1-2.

[6] *Kiobel v. Royal Dutch Shell*, 621 F.3d 111 (2010). Several circuits, reaching the opposite conclusion, have concluded that corporations can be subject to ATS lawsuits. *See, e.g.*, *Flomo v. Firestone Natural Rubber Co.*, 634 F.3d 1013 (7th Cir. 2011) ; *Romero v. Drummond*, 552 F.3d 1303 (11th Cir. 2005).

[7] *Kiobel*, slip. op. at 13.

[8] *Kiobel*, slip. op. at 1 (Kennedy, J., concurring).

[9] *Kiobel*, slip op. at 2 (Alito, J., concurring).

[10] *Kiobel*, slip. op at 1-2 (Breyer, J., concurring).

[11] The Torture Victims Protection Act of 1991, 106 Stat. 73, note following 28 U.S.C. § 1350, is expressly directed at overseas conduct and is thus unaffected by *Kiobel*. However, it provides only for lawsuits against natural persons, rather than against corporations or other entities. *Mohamad v. Palestinian Authority*, 566 U.S. ____, 132 S. Ct. 1702 (2012); *see also* Latham & Watkins Client Alert: US Supreme Court Holds That Liability Under the Torture Victim Protection Act Extends Only to Natural Persons and Does Not Extend to Organizations, May 24, 2012.

[12] Several days after its ruling in *Kiobel*, the Supreme Court vacated the Ninth Circuit's decision in *Rio Tinto PLC v. Sarei*, an ATS claim involving similar allegations against a foreign corporation, and remanded the case for reconsideration in light of *Kiobel*. 671 F.3d 736 (9th Cir. 2011), *cert granted*, 2013 U.S. LEXIS 3271(U.S. Apr. 22, 2012) (No. 11-649). The Court also granted certiorari in another ATS case, *DaimlerChrysler AG v. Bauman*, involving a foreign defendant. 644 F.3d 909 (9th Cir. 2011), *cert. granted*, 2013 U.S. LEXIS 3163 (U.S. Apr. 22, 2013) (No. 11-965). *Bauman* involves a separate question related to US jurisdiction over foreign companies, but may also provide the court with an opportunity to further develop its ATS jurisprudence.

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