Skadden

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Julie Bédard
New York
212.735.3236
julie.bedard@skadden.com

Timothy G. Nelson
New York
212.735.2193
timothy.g.nelson@skadden.com

Susan L. Saltzstein
New York
212.735.4132
susan.saltzstein@skadden.com

Jennifer L. Spaziano
Washington, D.C.
202.371.7872
jen.spaziano@skadden.com

* * *

1440 New York Avenue, NW,
Washington, D.C. 20005
Telephone: 202.371.7000

Four Times Square, New York, NY 10036
Telephone: 212.735.3000

WWW.SKADDEN.COM

April 23, 2013

US Supreme Court Bars Extraterritorial Application of 'Alien Tort Statute'; Rejects Claims of Alleged Corporate Liability for Foreign State's Human Rights Violations

Last week, the U.S. Supreme Court issued its long-awaited opinion in *Kiobel v. Royal Dutch Petroleum*, No. 10–1491 (U.S. Apr. 17, 2013), a significant decision holding that the so-called "Alien Tort Claims Act" or "Alien Tort Statute" (ATS) is subject to the "presumption against extraterritoriality" and thus usually will not apply to claims involving alleged human rights abuses or other violations of international law alleged to have occurred in foreign countries. Besides marking the termination of claims in this particular case — involving Royal Dutch/Shell's alleged activities in Nigeria — the case will have an immediate and likely preclusive effect on numerous other claims pending in the U.S. courts involving corporate liability for alleged overseas international law violations.

Attempts to Use the Alien Tort Statute Against Corporations for Alleged International Law Violations Abroad

The ATS, enacted in 1789, provides that U.S. 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. The statute vested federal courts with jurisdiction to hear claims for wrongs understood to be a violation of international law — which, at the time, included only "violation of safe conducts, infringement of the rights of ambassadors, and piracy" on the high seas.[1] The statute had lain essentially dormant for two centuries but, in 1980, the U.S. Court of Appeals for the Second Circuit held that the ATS conferred jurisdiction on U.S. courts to hear certain claims by foreign citizens against defendants charged with violations of modern-day "customary international law," such as "war crimes" and "crimes against humanity."[2] Numerous complaints were filed in the ensuing years predicated on purported violations of the ATS, resulting in the adjudication by U.S. courts of claims relating to activity occurring in foreign countries.

Predictably, the increased reliance on the ATS as a means to redress alleged international law violations proved controversial. As the Second Circuit observed in 2010, such instances of alleged abuse often arose in countries experiencing "troubled or chaotic circumstances."[3] The "resulting complexity and uncertainty," combined with the threat of U.S. juries awarding "multibillion-dollar" verdicts, has pressured many defendants to settle prior to trial, thus curtailing the ability of U.S. appellate courts to review the proper scope of the ATS or otherwise pass on the propriety of ATS claims.[4] Despite one case that attempted to clarify the pleading standards in ATS claims dealing with alleged corporate "accessory" liability,[5] a significant number of ATS proceed-

---

1 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

2 *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

3 *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 116 (2d Cir. 2010) (*Kiobel 2d Cir. Panel Decision*).

4 *Id.* at 116-17.

5 *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (dismissing claim that corporation aided human rights abuses in the Sudan; holding plaintiff failed to plead liability with the requisite level of scienter, namely that the alleged offender acted with the "purpose" of violating international human rights norms).

ings have been pending against corporate defendants in the U.S. courts, including claims that the defendants aided and abetted human rights abuses or environmental wrongdoing by foreign states.

Almost a decade ago, in *Sosa v. Alvarez-Machain* (2004), the Supreme Court held that the ATS was intended to permit only claims for wrongs based on "a norm of international character accepted by the civilized world and defined with . … specificity."[6] In its decision in *Kiobel*, the Supreme Court has restricted the reach of the ATS even further.

The *Kiobel* Putative Class Action Concerning Shell Nigeria — and the Second Circuit's Holding on Corporate Liability

In *Kiobel*, a group of Nigerian citizens, on behalf of the Ogoni people of Nigeria, asserted claims for damages against Shell Petroleum Development Company of Nigeria, Ltd. (SPDC) and its parent entities claiming that these corporations had aided and abetted human rights abuses by the Nigerian government in connection with the government's suppression of protests against SPDC's activities in Nigeria.[7]

In September 2006, a judge of the U.S. District Court for the Southern District of New York dismissed four of the *Kiobel* plaintiffs' claims, but sustained claims for aiding and abetting (i) arbitrary arrest and detention; (ii) crimes against humanity; and (iii) torture or cruel, inhumane and degrading treatment, and certified the matter for an interlocutory appeal.[8]

This decision was reversed in 2010 by a three-judge panel of the Second Circuit, which held that the plaintiffs' claims failed as a matter of law. Two circuit judges held that "the principle of individual liability for violations of international law has been limited to natural persons — not 'juridical' persons such as corporations."[9] The other circuit judge strongly disagreed with this legal proposition, but held that plaintiffs had failed to state a viable claim against SPDC. A motion for panel rehearing was denied,[10] as was a motion seeking an en banc review (albeit with the circuit judges sharply divided).[11]

---

6 *Sosa*, 542 US. at 725.

7 In 2004, a magistrate judge recommended that the putative class not be certified because the "class proposed by plaintiffs here – all persons 'in or from Ogoni' who suffered various types of enumerated injuries, between October 1990 and May 1999, by 'Nigerian military, police or security services acting in support of [defendants'] operations' – [was] not ascertainable" and that plaintiffs had failed also to prove a "commonality" of legal questions. *See Kiobel v. Royal Dutch Petroleum Co.*, 02 Civ. 7618 (KMW) (HBP), 2004 U.S. Dist. LEXIS 28812, at *16-17, 43-44 (S.D.N.Y. Mar. 31, 2004). The subsequent dismissal of the claim rendered this issue moot. *See Kiobel v. Royal Dutch Petroleum Co.*, 02 Civ. 7618 (KMW) (HBP), 2011 U.S. Dist. LEXIS 112295, at *2 (S.D.N.Y. Sept. 30, 2011). Additionally, at one stage, there existed a separate group of tort claims by a number of individuals (including the family of the deceased political figure Ken Wiwa) who alleged they were injured in the mid-1990s in retaliation for their political protests. These were settled separately in July 2009, shortly prior to trial. *See Judicial & Similar Proceedings: Wiwa v. Shell Petroleum Dev. Co. of Nigeria Ltd., Summary Order, Settlement and other documents,* in Am. Soc'y of Int'l Law, *Int'l Law in Brief* (June 12, 2009), *available at* http://www.asil.org/files/ilib0906012pdf.pdf.

8 *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 465-67 (S.D.N.Y. 2006).

9 *Kiobel 2d Cir. Panel Decision*, 621 F.3d at 119.

10 *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268 (2010).

11 *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379 (2011).

The US Supreme Court Broadens the Inquiry to Determine the Extraterritorial Reach of the ATS

In 2011, the U.S. Supreme Court granted certiorari and, in February 2012, heard argument on the legal issue as originally presented by the Second Circuit's decision, *i.e.,* whether the ATS permitted corporations (as opposed to individuals) to be held liable for aiding and abetting international human rights abuses or other violations of international law. But in March 2012, the U.S. Supreme Court took the case in a different direction, directing the parties to re-brief and re-argue the broader question of "[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, 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 Supreme Court's concerns about extraterritoriality bore strong echoes of another recent Supreme Court decision, *Morrison v. National Australia Bank*, 561 U.S. ___ (2010), in which the Court held that United States statutes (in that case, federal securities laws) were subject to a "presumption against extraterritoriality." See *U.S. Supreme Court Greatly Restricts Extraterritorial Application of Civil Securities Fraud Actions*. In briefing and in oral argument, this presumption, and its relevance to the ATS, was the subject of extensive debate.

The US Supreme Court Holds that the ATS is Presumed Not to Apply to Conduct in Foreign Countries

By a 9-0 decision delivered on April 17, 2013, the U.S. Supreme Court affirmed the Second Circuit's decision. Although the result was unanimous, the justices differed in their reasons for affirming the dismissal of the *Kiobel* plaintiffs' claims.

Writing for the Court and a majority of five justices,[12] Chief Justice John Roberts began by recalling the Court's holding in *Sosa* that, although the ATS purports only to confer federal jurisdiction to hear aliens' claims for violation of the laws of nations, "the First Congress did not intend the provision to be 'stillborn,'" meaning that the ATS is "'best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations.'"[13] Turning to the issue before the Court of whether the ATS could reach conduct occurring in the territory of a foreign sovereign, the majority first considered whether the "presumption against extraterritoriality," the "canon" of statutory interpretation recently applied in *Morrison* to federal securities laws, informs the scope of the "causes of action" available under the ATS. The Court held that the presumption against extraterritoriality indeed applies to ATS claims, observing that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS," particularly given the foreign policy implications of allowing new international law "causes of action" to be brought in U.S. courts. It added that the need for "judicial action" is all the more "pressing" when the subject dispute involves "conduct within the territory of another sovereign."[14]

The Court then focused on whether the presumption against extraterritoriality should be rebutted based on the ATS itself and its legislative context. When the ATS was enacted in 1789, the Court held, there was no indication that Congress intended the United States to become "a uniquely hospitable forum for the enforcement of international norms."[15] On the contrary, the ATS appeared to have

---

12 Joining in the Chief Justice's majority opinion were Justices Kennedy, Scalia, Thomas and Alito. Justices Kennedy and Alito also delivered separate concurring opinions, described further below.

13 *Kiobel v. Royal Dutch Petroleum Co.* No. 10–1491, Opinion of the Court, slip op. at 3 (U.S. Apr. 17, 2013) (quoting *Sosa*, 542 U. S. at 714).

14 *Id.* at 4-5.

15 *Id.* at 12.

been motivated by concerns about two discrete scenarios, namely, injuries to diplomats on U.S. soil and/or piracy on the high seas.[16] But "[n]othing about this historical context suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign."[17]

Applying that analysis, the Court concluded that dismissal of the *Kiobel* plaintiffs' claims was appropriate because "[a]ll the relevant conduct took place outside the United States."[18] The Court further stated that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. … Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required."[19]

In a concurrence, Justice Samuel Alito indicated that a cause of action falls outside the scope of the presumption only if the event or relationship that was the focus of congressional concern under the relevant statute takes place within the United States.[20] Justice Alito stated that a putative ATS cause of action — even if based in part on alleged domestic conduct — will therefore be barred "unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations."[21]

For his part, Justice Anthony Kennedy, while joining the majority, noted that the Court's opinion "le[ft] open a number of significant questions regarding the reach and interpretation of the [ATS]."[22] He added that Congress addressed concerns with respect to human rights abuses committed abroad in statutes such as the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, which may call for further discussion of the "proper implementation of the presumption against extraterritorial application."[23]

The remaining four justices joined in an opinion written by Justice Stephen Breyer that departs from the majority's analysis. In their view, the majority was wrong to exclude ATS claims involving extraterritorial conduct. Justice Breyer wrote that:

> we should treat this Nation's interest in not becoming a safe harbor for violators of the most fundamental international norms as an important jurisdiction-related interest justifying application of the ATS in light of the statute's basic purposes — in particular that of compensating those who have suffered harm at the hands of, *e.g.*, torturers or other modern pirates. Nothing in the statute or its history suggests that our courts should turn a blind eye to the plight of victims in that "handful of heinous actions."[24]

The minority, however, still supported dismissal of the *Kiobel* plaintiffs' claims, on the grounds that the RDC/Shell defendants lacked sufficient links with the United States to make them properly subject to ATS jurisdiction.

---

16 *Id.* at 8-13.

17 *Id.* at 13.

18 *Id.* at 14.

19 *Id.* at 14.

20 *Kiobel v. Royal Dutch Petroleum Co.* No. 10–1491 (Alito J., concurring), slip op. at 1 (U.S. Apr. 17, 2013).

21 *Id.* at 2.

22 *Kiobel v. Royal Dutch Petroleum Co.* No. 10–1491 (Kennedy J., concurring), slip op. at 1 (U.S. Apr. 17, 2013).

23 *Id.*

24 *Kiobel v. Royal Dutch Petroleum Co.* No. 10–1491 (Breyer J., concurring), slip op. at 7-8 (U.S. Apr. 17, 2013) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) and citing Pierre Leval, *The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court*, 92 Foreign Affairs 16 (Mar./Apr. 2013)). Justices Ginsburg, Sotomayor and Kagan joined in this opinion.

Implications of *Kiobel*

The Supreme Court's application of the "presumption against extraterritoriality" in *Kiobel* will have immediate and likely preclusive effects on a number of ATS claims pending in U.S. courts, particularly in cases involving corporate defendants accused of complicity in international law violations occurring overseas. Indeed, this week the Supreme Court issued a summary order in another large ATS case, *Rio Tinto plc v. Sarei*, No. 11-649, a claim for alleged corporate responsibility for human rights abuses in Bouganville, Papua New Guinea. The U.S. Court of Appeals for the Ninth Circuit had held in 2011 that these were viable claims under the ATS.[25] On Monday April 22, 2013, however, the Supreme Court granted Rio Tinto's certiorari petition and vacated the Ninth Circuit's 2011 decision, remanding the case to the Ninth Circuit "for further consideration in light of *Kiobel*…"[26]

The *Kiobel* case did not address (or purport to address) other questions affecting corporations in international law. For example, the Second Circuit explicitly recognized in *Kiobel* that international treaties may impose liability on corporations as to particular subject matters, such as the prevention of bribery or organized crime, and the Supreme Court's opinion did not address these specific policy areas. The *Kiobel* court also was not called upon to analyze potential international law claims that might be made in U.S. courts in cases of expropriation by foreign governments.[27] Moreover, the decision likely will not deter current initiatives by international bodies and NGOs aimed at modifying corporate conduct in countries with troubled human rights records.

In sum, the *Kiobel* decision represents a highly significant development in ATS jurisprudence. The decision may have far-reaching implications for corporations facing claims for damages based on accusations that they violated international law in foreign countries and may lead to the dismissal of numerous such claims presently pending in the U.S. courts.

---

25 *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (2011)

26 On the same day, the Supreme Court granted certiorari in *DaimlerChrysler AG v. Bauman, et al.* (docket 11-965), another appeal from the Ninth Circuit in a case involving alleged ATS violations – this time in connection with alleged complicity in human rights violations in Argentina during the 1980s.

27 *See* 28 U.S.C. § 1605(a)(3) (permitting claims to be brought against foreign states in certain cases "in which rights in property taken in violation of international law are in issue"); *see, e.g.*, *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660, 663 (W.D. Mich. 1985) (permitting company to bring expropriation claim against foreign sovereign). The right of corporate or individual investors to bring direct claims for expropriation or unfair treatment also subsists in numerous free trade agreements and bilateral investment treaties to which the United States is party.