

Supreme Court Broadens Its Review of Alien Tort Statute – May Limit Corporate Liability in Human Rights Lawsuits

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On March 5, 2012, only days after hearing oral argument in *Kiobel v. Royal Dutch Petroleum Co.*, the U.S. Supreme Court ordered additional briefings to be filed and for the case to be reargued. This somewhat unusual move suggests that the Court (or a majority of its Justices) are interested in exploring the overall role of the Alien Tort Claims Act, or Alien Torts Statute (ATS) — including whether it can or should be used as a vehicle for litigating alleged wrongdoing occurring in foreign countries. The outcome may have a significant impact on corporations doing business in politically volatile regions, including determining their liability in human rights lawsuits or other claims of international law violations.

Background

Enacted in 1789, ATS vests U.S. federal courts with jurisdiction to hear claims by aliens for torts “committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The statute lay dormant for nearly two centuries until 1980, when 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 U.S.-based defendants charged with violations of modern-day “customary international law,” such as torture (and potentially war crimes and crimes against humanity). *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

Since the Second Circuit’s decisions, numerous ATS claims have been brought in federal courts. Among these was *Kiobel*, filed in 1998 in the U.S. District Court for the Southern District of New York, in which various members of the Ongoni people of Nigeria sought damages against Royal Dutch Petroleum and Shell Petroleum Development Company (SPDC) for allegedly aiding and abetting human rights abuses by the Nigerian government.

In September 2006, a U.S. district judge held that the *Kiobel* plaintiffs sufficiently had alleged claims under the ATS 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 in order to proceed to trial on the merits. This decision, however, 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.” The other circuit judge strongly disagreed with this legal proposition, but held that plaintiffs had failed to state a viable claim against SPDC. Motions for an *en banc* review and panel rehearing were denied.

Kiobel and the U.S. Supreme Court

In 2011, the U.S. Supreme Court granted *certiorari* and agreed to hear the case. This marked the first occasion since *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that the Court has considered the Alien Tort Claims Act, and the first time it would address the issue of corporate liability (*Sosa* involved a case of allegedly illegal prisoner rendition

by U.S. officials from Mexico into the United States, and thus did not address corporate liability). On February 28, 2012, oral argument was held before the Supreme Court on the legal issue as originally presented in the *Kiobel* plaintiffs' petition, *i.e.*, whether the Alien Tort Claims Act permitted corporations (as opposed to individuals) to be held liable for aiding and abetting international human rights abuses or other violations of international law.

However, on March 5, the Supreme Court ordered that *Kiobel* would be "restored to the calendar for reargument" after the parties had submitted briefs on "[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."

Potential Impact

Needless to say, a decision denying extraterritorial scope to the ATS will result in a sharp curtailment (perhaps even an elimination) of lawsuits brought against corporations based on alleged international law violations occurring in foreign countries. Even if such claims are not eliminated entirely, the broadening of the Court's inquiry, and the possibility of further briefing, may enable the Court to engage in a more wide-ranging discussion of the Alien Tort Statute's role in civil litigation than would have been possible under the question as originally presented in *Kiobel*.

Briefing under the revised order is due to be completed in June 2012, with oral argument and a final decision likely to occur in the next Supreme Court term.