A Timely Analysis of Legal Developments

ASAP®

April 19, 2013

The Final Breaths of the Alien Tort Statute

By Philip Berkowitz, Michael Congiu, John Kloosterman, Eric Savage, and Morgan Matson

On April 17, 2013, the Supreme Court decided *Kiobel v. Royal Dutch Petroleum*. For all intents and purposes, the decision eliminates use of the federal Alien Tort Statute ("ATS") as an employment law weapon to be used against multinational companies for employment practices overseas.

History of the Alien Tort Statute

The ATS (also known as the Alien Tort Claims Act)—a creature of the first United States Congress and passed in 1789—is all of one sentence long. It reads in full: "The 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."

The ATS received little attention for over 180 years. Then, in 1980, a Paraguayan woman living in Washington, D.C. on a visitor's visa learned that a former official of the Paraguayan government (also a Paraguayan citizen), who had allegedly participated in the torture death of her 17-year-old brother, was living in Brooklyn, New York. She sued the official under the ATS. In *Filartiga v. Pena – Irala*,[1] the Second Circuit Court of Appeals held that the ATS permits aliens to file tort claims against violators of what is variably known as "the law of nations," or "customary international law," including war crimes and crimes against humanity.

Over the past 25 years, a limited number of federal courts have permitted foreign victims to sue under the ATS for violations of international law, such as summary executions, genocide, war crimes, crimes against humanity, and cruel, inhuman, or degrading treatment.[2]

Some of those lawsuits were brought against U.S.-headquartered multinational corporations for their alleged involvement with improper and abusive labor practices in developing countries that were said to constitute human rights violations.

Historically, there has been a split among federal appellate courts as to whether ATS cases may be successfully prosecuted against private corporations. In 2010, a federal district court and a federal appellate court held that corporate liability was unavailable under the ATS. In one such case,[3] a federal district court dismissed claims that a company was complicit in the forced labor

1 630 F.2d 876 (2d Cir. 1980).

2 *See e.g. Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.2d 1192 (D.C. Cir. 2004); *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008).

3 *Doe v. Nestle, S.A.*, _____, 2010 U.S. Dist. LEXIS 98991 (C.D. Cal. Sept. 8, 2010).

and torture of Malian field workers located in the Ivory Coast, finding insufficient support under international law to hold corporate entities accountable under the ATCA.

Similarly, in *Kiobel v. Royal Dutch Petroleum*[4]—the case which ultimately wound its way to the U.S. Supreme Court—the Second Circuit Court of Appeals held that the ATS does not provide a basis for corporate liability for alleged violations of international law.

In many cases, however, lower courts have recognized an "aiding and abetting" theory of corporate liability. Under this theory, a corporation that assists or supports governments in conduct that violates human rights can be held liable in the United States.[5] The aiding and abetting theory of corporate liability was one of the theories asserted by the plaintiffs in *Kiobel*.

Procedural History and Decision

Kiobel involved a group of Nigerian villagers who filed a federal court lawsuit in the Southern District of New York, claiming that several corporate entities aided and abetted the extrajudicial killing, rape and other human rights abuses committed by Nigerian military forces in connection with the corporations' oil exploration in Nigeria. During the early 1990's, the villagers were attacked by the Nigerian military and police forces.

The plaintiffs claimed that the corporate defendants aided and abetted the atrocities committed by providing the Nigerian military and police forces with food, transportation, and compensation. They also alleged that the corporate defendants permitted the Nigerian forces to use defendants' property as a staging ground to attack the Nigerian villagers. At the time the complaint was filed, the United States had granted political asylum to the villagers, all of whom were residing in the United States as legal residents.

The case found its way to the Second Circuit Court of Appeals where, in October 2010, a divided court determined that international law does not support claims for corporate liability under the ATS. The *Kiobel* majority held that international law (rather than domestic law) should determine whether the ATS should extend to corporations. The majority concluded that international law does not warrant the extension of ATS liability to corporate actors. In sum, the Second Circuit reasoned that customary international law has rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the laws of nations.

The villagers appealed to the United States Supreme Court, which agreed to hear the case. Initially, the Court was asked to determine (1) whether the issue of corporate liability under the ATS is a merits or jurisdictional question; and (2) whether corporate liability can be assessed under the ATS. Less than one week after oral argument, however, the Court issued an order requesting supplemental briefing on the additional issue of whether, and under what circumstances, the ATS can be used to address violations of the law of nations occurring outside the United States.[6]

The Opinion

On April 17, 2013, Chief Justice Roberts delivered the opinion of the Court, which unanimously upheld the Second Circuit's dismissal of the claims. While the outcome was unanimous, the Court did not unanimously agree on the rationale. The majority approach concluded that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption." The Court addressed only the question of the extraterritorial application of the ATS, not the question of corporate liability.

The Court made it clear that it will not act as "the Supreme Court of the World." The fear expressed in the opinion was that if the ATS applied extraterritorially without express permission from Congress, the Court would run the risk of adopting an interpretation of the law that carried "foreign policy consequences not clearly intended by the political branches."[7] The Court stated that the ATS is a "strictly jurisdictional" statute and does not provide for an independent cause of action. Rather, the ATS "allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law."

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

5 *See, e.g., Almog v. Arab Bank.*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

6 The *Kiobel* case drew wide interest from a variety of domestic and international parties, attracting approximately 70 *amicus* briefs. http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/

7 *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

The Court was not willing, however, to completely relinquish power over conduct occurring on foreign soil. The opinion concludes:

> "On these facts, all the relevant conduct took place outside the United States. *And 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." (internal citations omitted) (emphasis added)

The Court therefore suggested that with the right set of facts that "touch and concern the territory of the United States," the ATS may be the vehicle for aliens to prosecute conduct that occurred on foreign soil in U.S. courts. Justices Alito and Thomas, writing separately in their concurrence, noted that this "formulation obviously leaves much unanswered."[8] Although the majority rather dramatically narrowed the scope of the ATS, future courts will undoubtedly grapple with the extent to which plaintiffs might be able to assert a viable claim under the ATS.

Breyer Concurrence

Justice Breyer, together with Justices Ginsburg, Sotomayor and Kagan, joined in the Court's conclusion to dismiss the *Kiobel* claims, but did not adopt the majority's reasoning. The Breyer concurrence operates on the basis that the ATS "was enacted with 'foreign matters' in mind,"[9] and that jurisdiction under the ATS is appropriate 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...."[10] Justice Breyer referred to previous ATS cases in which the alleged ATS violators were residing in the United States, and suggested that this could be one example where a "distinct" and "important" American interest might overcome the strong presumption against extraterritorial application.

Justice Breyer did not ignore the majority's concern that the extraterritorial application of the ATS would infringe on the sovereignty of other nations. He simply did not put as much stock in this fear. Justice Breyer highlighted in his concurrence the safeguards that are already available, such as exhaustion of remedies, *forum non conveniens*, and comity.

The Implications

Kiobel establishes that in an unstable world, multinational enterprises may not be held responsible under the ATS in U.S. courts for foreign government or other third party atrocities that may occur overseas and over which they have no control. Of course, notwithstanding this decision, multinational enterprises must remain concerned about overseas business practices. Global companies cannot ignore allegedly unfair employment practices, regardless of where they occur, particularly in today's world of instantaneous communication. The elimination of the ATS as a weapon against global enterprises does not diminish the importance of addressing legitimate complaints, regardless of where they originate.

It is also uncertain how the Court's strong reluctance against imposing domestic law extraterritorially will apply in other contexts. For example, the *Kiobel* decision reinforces the Court's reluctance in an earlier decision[11] to apply domestic law extraterritorially, which may lend further clarity to the possible extraterritorial application of Section 806 of the Sarbanes-Oxley Act of 2002.

In addition, the Court's ruling could affect the viability of other claims brought under U.S. law that arise from overseas conduct. For example, a recent trend has developed in which plaintiffs have sought to hold U.S.-based multinational enterprises liable for violations of local labor laws committed by their suppliers who disregard the companies' codes of conduct. For example, the Ninth Circuit Court of Appeals has held[12] that

---

8 Justices Alito and Thomas also reinforced the principles of *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004), that any further ATS claim that theoretically falls within the confines of the majority's holding must nonetheless satisfy "*Sosa's* requirements of definiteness and acceptance among civilized nations."

9 *Morrison v. National Australia Bank Ltd.*, 561 U.S. ___, _____ (2010) (slip op., at 5-6), 130 S. Ct. 2869, 2884 (2010).

10 *See* Restatement (Third) of Foreign Relations Law § 402

11 *Morrison*, 561 U.S. _____, 130 S. Ct. 2869 (2010).

12 *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009).

a U.S. company's good faith requirement, contained in its code of conduct, that foreign suppliers follow ethical labor standards did not allow a supplier's employees to sue the U.S. company when their employer failed to follow the standards. It will be interesting to see what effect, if any, the *Kiobel* decision will have on this trend.

Philip Berkowitz is a Shareholder in Littler Mendelson's New York office and U.S. Co-Chair of Littler's International Employment Law Practice Group; Michael Congiu is a Shareholder in the Chicago office; John Kloosterman is a Shareholder in the San Francisco office; Eric Savage is a Shareholder in the New York and Newark offices; and Morgan Matson is an Associate in the Pittsburgh office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Berkowitz at pberkowitz@littler.com, Mr. Congiu at mcongiu@littler.com, Mr. Kloosterman at jkloosterman@littler.com, Mr. Savage at savage@littler.com, or Ms. Matson at mmatson@littler.com.