WHITE & CASE

Client**Alert**

Commercial Litigation

September 2012

The Alien Tort Statute at a Crossroads: The High Court Revisits Extraterritorial Jurisdiction in *Kiobel v. Royal Dutch Petroleum* in a Rare Reargument

Owen Pell
Partner, New York
+ 1 212 819 8891
opell@whitecase.com

Gregory Little
Partner, New York
+ 1 212 819 8237
glittle@whitecase.com

Nicole Erb
Partner, Washington, DC
+ 1 202 626 3694
nerb@whitecase.com

Kiobel v. Royal Dutch Petroleum, No. 10-1491, is among the most important business cases on the Supreme Court's docket. At issue is whether a non-US company's activities in Nigeria, which allegedly harmed Nigerians, may be the subject of a tort suit in US federal court, because the company's actions allegedly violated international law. The suit arises under the so-called Alien Tort Statute, 28 USC. § 1350 ("ATS"), which allows aliens to bring claims in US federal court for torts committed in violation of the "law of nations." A lower federal court dismissed the case, holding that only natural persons, and not corporations, could be subject to ATS claims under international law.

The Supreme Court first heard oral argument in *Kiobel* on February 28, 2012. The first questions from Justices Kennedy, Ginsburg and Alito, however, focused not on the status of corporations under international law, but on whether US courts could address claims that lacked any connection to the United States.[1] On March 5, 2012, the Court took the unusual step of scheduling the case for reargument on an additional question: "Whether and under what circumstances the Alien Tort Statute, 28 USC. § 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."

Reargument is set for October 1, 2012, the Supreme Court's first day in session for its new term. Media coverage of this development generally anticipates that the Court will curb the reach of the ATS *both* as to scope and who can be sued. This may not be the case, however, as a ruling on the extraterritorial reach of the ATS could be used by the Court to leave some ATS claims against companies untouched.

The Supreme Court's Recent Focus on Extraterritoriality

Led by Justice Scalia, the Supreme Court recently endorsed a relatively strict approach to the extraterritorial reach of federal laws. In *Morrison v. National Australia Bank Ltd.*,[2] the Court made clear that as to non-criminal laws there is a strong presumption that Congress did *not* intend for US law to reach alleged wrongs occurring abroad unless a statute otherwise makes that intention clear on its face. Thus, in *Morrison*, five Justices of the

ATTORNEY ADVERTISING. Prior results do not guarantee a similar outcome

1 The transcript of the Supreme Court oral argument is linked to this Alert. White & Case filed two *amicus curiae* briefs in *Kiobel* on behalf of the Cato Institute, addressing both corporate liability under the statute and its extraterritorial scope. Copies of those briefs are also linked to this Alert.

2 130 S. Ct. 2869 (2010).

New York

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
United States
+ 1 212 819 8200

Washington, DC

White & Case LLP
701 Thirteenth Street, NW
Washington, DC 20005
United States
+ 1 202 626 3600

current Court overturned decades of precedent in the lower federal courts by holding that the Securities Exchange Act of 1934 did not apply to securities fraud claims relating to the shares of a non-US company that were not traded on any US exchange.[3] Absent an extraterritorial mandate, a claim must involve sufficient US "domestic content" to fall within the reach of a US federal law. Based on *Morrison*, it would appear that a majority of the Court will begin any analysis skeptical of the ATS reaching claims that have no nexus with the United States at all, and might support a holding that both limits claims against companies and the overall reach of the ATS.

Justice Breyer's concurring opinion in *Sosa v. Alvarez-Machain*[4] — the only Supreme Court decision on ATS jurisdiction—also raised the issue of extraterritoriality. In *Sosa*, the Court held that the ATS did not reach a claim brought by a Mexican national who was kidnapped by US law enforcement officials and brought to the United States for prosecution in the murder of a DEA agent in Mexico—an offense of which he ultimately was acquitted. In dismissing ATS claims relating to the suspect's illegal detention, the Supreme Court ruled that these claims did not fall within the scope of the ATS because they did not "rest on a norm of international character accepted under classic definitions of international law.[5] The majority thus did not reach the question of extraterritoriality.

But in a concurring opinion, Justice Breyer focused on the potential for ATS claims to affect US relations with other nations. Breyer noted that these concerns, whose "consideration is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote," typically do not arise "if the conduct in question takes place in the country that provides the cause of action or if that conduct involves that country's own national," or in cases where universal "procedural consensus" exists as to a particular claim.[6] In *Sosa*, US government agents were responsible for the acts in question and some of those acts occurred on US soil. *Kiobel* involves no US conduct or connection. As such, the extraterritorial nature of this case may affect Justice Breyer's willingness to use the case as a vehicle to recognize claims for corporate liability.

The Narrow, Case-Specific Approach: *Mohamad v. Palestinian Authority*

The Supreme Court's focus on extraterritoriality also raises a key point about how the Court usually works. Generally, the Court seeks to limit the scope of its rulings and tries not to issue multiple rulings to decide any one case. The disposition of *Kiobel's* companion case, *Mohamad v. Palestinian Authority*,[7] demonstrates this principle in action.

Mohamad stemmed from a lower federal court's interpretation of the Torture Victim Protection Act ("TVPA"). The Supreme Court decided to consider *Kiobel* and *Mohamad* together. But, while *Kiobel* was set for reargument, the Court decided *Mohamad* last April.

Mohamad arose from the Palestinian Authority's alleged arrest, torture and murder of naturalized US citizen, Azzam Rahim, during Rahim's visit to the West Bank. Rahim's relatives sued defendants including the Palestinian Authority and the Palestine Liberation Organization. The DC Circuit ultimately affirmed the trial court's decision, dismissing the case on the ground that the TVPA does not authorize suits against organizations. In an opinion written by Justice Sotomayor, the Supreme Court unanimously affirmed, holding that the TVPA's reference to potential defendants as "individuals" denotes only natural persons.

Justice Sotomayor focused her opinion on the plain meaning of "individual," concluding that the text of the statute "authorizes liability solely against natural persons."[8] She recognized that the Court did not need to examine the statute's legislative history given its unambiguous language, but noted in dicta that the TVPA's legislative background also weighed against a broad interpretation of "individual." In a footnote, the Court also declined to consider international agreements to construe the TVPA, as nothing in the record suggested that Congress intended to import any "specialized usage" from international sources.[9] Significantly, oral argument in *Mohamad* had involved some discussion of the future of the ATS and the possibility that divergent outcomes in *Mohamad* and *Kiobel* might lead to absurd results. For example, Rahim's counsel had suggested that it would be an "absurdity"

3 Justice Kagan was not yet on the Court, and Justice Sotomayor took no part in the *Morrison* decision.

4 542 US 692 (2010).

5 *Id.* at 725.

6 *Id.* at 761.

7 132 S. Ct. 1702 (2012).

8 *Id.* at 1708.

9 *Id.* at 1709 n.4.

to permit aliens a cause of action against organizations under the ATS while denying US citizens similar rights under the TVPA.[10]

Nonetheless, the Court decided *Mohamad* on a narrow ground focused strictly on the terms of the TVPA, rather than on the decision's potential implications on the broader framework of federal remedies for victims of torture or other such crimes occurring abroad. Indeed, the Court directed complaints on that front to Congress, noting that it was not the province of the judiciary to extend the TVPA beyond the clear language of the statute.[11]

Using Morrison to Preserve Some ATS Claims

In *Morrison*, Justices Breyer and Ginsburg concurred in the dismissal of that particular securities case, but did not join the Court's broader holding on how the presumption against extraterritoriality should be applied in all securities fraud cases.[12] In *Kiobel*, this approach could yield a narrower holding, specific to *Kiobel's* facts, which could preserve other ATS claims.

The Court's new question presented may thus signal that a group of Justices is considering whether *Kiobel* may be limited to its facts, which are wholly extraterritorial to the United States. Limiting the case in this way could preserve for another day the question of whether the ATS allows claims against corporations, and leave untouched recent circuit court decisions allowing international law claims to proceed against companies.

For example, deciding *Kiobel* solely on the question of extraterritoriality might only affect *Kiobel* itself and the Ninth Circuit's recent decision in *Sarei v. Rio Tinto*.[13] In *Rio Tinto*, the Ninth Circuit held that claims could be asserted against a non-US company under the ATS for the company's alleged role in wholly non-US torts. Indeed, the Ninth Circuit expressly held "that the ATS is not limited to conduct occurring within the United States or to conduct committed by United States citizens."[14]

As opposed to *Kiobel* and *Rio Tinto*, there are other pending ATS cases in which plaintiffs appear to have alleged a stronger US nexus. If the debate becomes how the presumption against extraterritoriality should be applied to different fact patterns involving US companies, then it could be some time before the issue of corporate liability itself might be reached again. For example, limiting *Kiobel* to its facts might not necessarily disturb the Seventh Circuit's decision in *Flomo v. Firestone*[15] Natural Rubber Co., the DC Circuit's decision in *Doe v. Exxon*,[16] or the Ninth Circuit's decision in *Bauman v. DaimlerChrysler*,[17] all of which permitted ATS claims to proceed against corporations, and all of which involve (or could involve) some alleged US nexus. A ruling in *Kiobel* limited to this issue could require these cases to be remanded to allow for amendments to the complaints and the lower courts to test the facts pled against a new standard of "domestic content" based on *Morrison*.[18]

Kiobel Supplemental Briefing: The United States Changes Course

Meanwhile, Petitioners and Respondents in *Kiobel* have submitted merits-length supplemental briefs in anticipation of reargument. Petitioners' supplemental brief attempts to cast *Kiobel* as intertwined with *Sosa* and *Filartiga*, suggesting that the Court would have to overturn accepted precedent to find in the ATS a "categorical territorial limitation on ATS jurisdiction."[19] Petitioners also suggested that existing doctrines for limiting the reach of US law, such as personal jurisdiction, forum non conveniens, and comity provide a sufficient check to extraterritorial

10 *Id.* at 51:19-52:7.

11 132 S. Ct. at 1710-11.

12 *See* 130 S. Ct. at 2888-95 (Breyer, Ginsburg and Stevens, JJ., concurring in the judgment).

13 671 F.3d 738 (9th Cir. 2011) (en banc).

14 *Id.* at 747.

15 643 F.3d 1013 (7th Cir. 2011).

16 654 F.3d 11 (DC Cir. 2011).

17 644 F.3d 909 (9th Cir. 2011).

18 For example, in *Flomo* and *Doe*, there are allegations that the corporate defendants had knowledge or made decisions in the United States that were relevant to the non-US injuries alleged. *See Flomo*, 634 F.3d at 1024; *Doe*, 654 F.3d at 15. *Bauman* presents its own peculiar issues because the company sued, the US subsidiary of a German company is not alleged to have had any connection to the torts allegedly committed by DaimlerChrysler's Argentinean subsidiary. 644 F.3d at 926. There, the Ninth Circuit concluded that DaimlerChrysler "was subject to personal jurisdiction in California through the contacts of its subsidiary Mercedes-Benz USA." *Id.* at 912.

19 Pet'rs' Supplemental Opening Br. 7.

ATS.[20] Respondents argue the presumption against extraterritoriality inherent in US federal law, as applied in *Morrison*, and observed that the text of the ATS does not explicitly anticipate extraterritorial application of the statute.[21] Respondents also argue that allowing international law to be supplemented in ATS cases by claims derived from federal common law (i.e., judge-made law) with respect to non-US conduct occurring in another nation would violate international law, which limits a state's authority to prescribe beyond its borders.[22]

The United States first filed an amicus brief in support of petitioners, supporting the idea of corporate liability under the ATS.[23] In the second round of briefing, however, the United States filed a brief in support of neither party, *and* in "partial support of affirmance."[24] In this brief—which, unlike its predecessor, was not signed by any State Department officials—the US concedes that if "the Court addresses the recognition of a federal cause of action under the ATS based on actions occurring within the territory of a foreign sovereign, the judgment of the court of appeals should be affirmed."[25] Most significantly, the US brief is a plea that the Court limit *Kiobel* to its facts, which may appeal to some part of the Court that may be looking for a way to postpone consideration of the question of corporate liability.

Implications on Reargument

The reargument of *Kiobel*, scheduled for October 1, may not bring an end to ATS litigation. Rather, if a majority coalesces around the question of the extraterritorial reach of the statute, the focus may shift from whether corporations may be sued at all to the level of US connections that must be alleged to bring a case within the ambit of US jurisdiction. While it would be a victory for multinational businesses to have the ATS restrained in this way, this would *not* eliminate exposure to ATS litigation, and would simply preserve for the future (and perhaps a different Supreme Court) the question of whether companies may be sued for alleged violations of international law.

20 *See id.* at 53-57.

21 Supplemental Br. for Resp'ts 20-23.

22 *See id.* at 37-40.

23 Br. for the United States as Amicus Curiae Supporting Pet'rs.

24 Supplemental Br. for the United States as Amicus Curiae in Partial Supp. of Affirmance.

25 *Id.* at 27.

This Client Alert is provided for your convenience and does not constitute legal advice. It is prepared for the general information of our clients and other interested persons. This Client Alert should not be acted upon in any specific situation without appropriate legal advice and it may include links to websites other than the White & Case website.

White & Case has no responsibility for any websites other than its own and does not endorse the information, content, presentation or accuracy, or make any warranty, express or implied, regarding any other website.

This Client Alert is protected by copyright. Material appearing herein may be reproduced or translated with appropriate credit.

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.
NY0912/CL/A/08217_2