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Kiobel v. Royal Dutch Petroleum: Beyond the Alien Tort Statute—Broadly Extending the Presumption Against the Extraterritorial Reach of US Law

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Since the Second Circuit decided *Filártiga v. Pena-Irala* in 1980, plaintiffs have deployed the Alien Tort Statute ("ATS") to great effect against multinational corporations. The statute—which had lain dormant since 1789—has for the past 30 years allowed non-US plaintiffs to hale non-US and US companies into federal court for alleged wrongs in violation of the "law of nations." Often involving claims of significant human rights violations, including torture and mass atrocities, these cases posed enormous financial and reputational risk to defendants. With the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*, those days now may be over—but with much broader ramifications than many would have imagined.

On April 17, 2013, the Court ruled unanimously that the *Kiobel* plaintiffs' claims fell beyond the scope of jurisdiction offered by the ATS. Those plaintiffs, twelve Nigerian citizens who allegedly suffered as a result of the Nigerian government's repression of anti-oil company protests, had sued Royal Dutch Shell under the ATS for helping the Nigerian government in its crackdown. There were no US defendants, and the conduct at issue occurred entirely abroad. The case arrived at the Supreme Court having been dismissed based on a holding that corporations could not be subject to claims under international law such that no claim could be made against them under the ATS. Although the Supreme Court initially heard argument on that question last year, the Court took the unusual step of ordering new briefing and reargument on a related issue: "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." The Court's decision focuses exclusively on that question, leaving the issue of corporate liability undecided.

Impact on Pending ATS Cases: The Search for "Domestic Content"

Though the Justices unanimously rejected the *Kiobel* claims, they split five to four in their reasoning. Chief Justice Roberts, joined by four other Justices, relied on the well-settled presumption against extraterritoriality that is used in interpreting the scope of substantive federal laws. The Court's recent decision in *Morrison v. National Australia Bank Ltd.*,[1] figured

1 130 S. Ct. 2869 (2010). As the Court noted in *Kiobel*, absent a clear congressional statement to the contrary, this doctrine "reflects the presumption that United States law governs domestically but does not rule the world." *Kiobel*, Slip Op. at 4 (citation omitted). In *Morrison*, the Court held that, based on a presumption against extraterritoriality, the Securities Exchange Act of 1934 did not apply to securities fraud claims relating to the shares of a non-US company traded on a non-US exchange with respect to allegedly false disclosures formulated outside the United States—even though the underlying wrongdoing affecting the company's financials occurred in the United States, where the Australian bank had substantial business, and the Australian bank made filings with the SEC in support of a US ADR program.

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prominently, reflecting the Court's continuing skepticism regarding extraterritorial application of US law. The Chief Justice found that nothing in the wording, logic or history of the ATS showed that Congress necessarily meant to sweep into US courts wholly non-US claims involving non-US parties.[2] Here, with non-US plaintiffs, defendants and conduct surrounding the claims, the Court found no basis for applying US law—with the Chief Justice echoing *Morrison* in finding that the "mere" US presence of defendants through a US office and US stock listing was not enough domestic content to support an ATS claim.[3]

Justice Breyer, however, in a concurrence joined by three others, rejected that the presumption against extraterritoriality applied to the ATS. Rather, Breyer advocated an analysis "guided in part by principles and practices of foreign relations law" to determine whether an ATS plaintiff's allegations involved "sufficient ties" to the United States to trigger jurisdiction. This analysis would have left open to US jurisdiction cases in which US interests, including our interest in not becoming a haven for international wrong-doers, were more pronounced—although Breyer admitted that no such interests were presented in this case.[4]

As we predicted in September 2012, by focusing on extraterritoriality the Court's ruling will have a significant limiting effect on ATS cases, but *will not* altogether eliminate these types of claims—which is what might have happened had the Court ruled that there was no corporate liability under international law. For example, some recent ATS decisions by US appellate courts involve claims where plaintiffs have attempted to allege some US nexus in their complaints. These and other ATS cases are now likely to be remanded for amended pleading to see if those plaintiffs can allege enough relevant US conduct to seat the claims here under the reasoning of *Morrison* and other decisions applying *Morrison* to other fact situations and federal laws. It also is interesting to note that by affirming the lower court decision, but on the limited basis of extraterritoriality, the Court left *open and undecided* the issue of corporate liability under international law—and the Circuit Court split on that issue.[5]

The Real Implications of *Kiobel:* Much Broader Limits on the Reach of US Law

Perhaps overlooked in the early ATS-related commentary on *Kiobel* is the broader effect the decision may have. As Chief Justice Roberts noted, the ATS is purely a jurisdictional statute.[6] Previous uses of the presumption against extraterritorial application of US law involved substantive federal laws as opposed to jurisdictional laws. Thus, *Kiobel* represents a new and significant extension of this doctrine. Moreover, because claims under the ATS are recognized as a matter of federal common (i.e., judge-made) law, *Kiobel* suggests that the presumption against extraterritoriality now may apply to this area of federal law as well—again a significant development. Based on *Kiobel*, non-US entities (and the non-US affiliates of US companies) now may be able to challenge the reach of federal law to their activities abroad in ways that did not before exist. For example, given that the Federal Rules of Civil Procedure are silent as to extraterritorial reach, *Kiobel* may open a new debate regarding the extraterritorial reach of subpoenas issued in US litigation, or the reach of pre- or post-judgment remedies against non-US parties under Federal Rules 64, 65 and 69. As such, the broader implication of *Kiobel* may be to usher in a whole new phase of federal litigation regarding the true reach of US law.

Indeed, in an interesting twist, *Kiobel* may already have caused its first non-ATS effect. Just this week, rather than remanding for new pleading, the Supreme Court granted review in a pending ATS case from California that raised issues regarding the reach of US jurisdiction over a foreign company with a significant US presence.[7] In *Bauman*, the Ninth Circuit reversed a lower court ruling and permitted ATS claims to proceed against a large German automaker where the alleged claims were premised on the actions of the company's Argentine subsidiary in Argentina—and US jurisdiction was premised solely on the German company's large US subsidiary doing business in California.[8] The fact that the Supreme Court accepted the case raises the significant issue of whether the *Kiobel* majority now will use the presumption against extraterritoriality to limit the reach of US personal jurisdiction in cases that lack a meaningful underlying substantive nexus to the United States.[9]

2 *Kiobel*, Slip Op. at 6-12. (A pdf copy of *Kiobel* is attached.)

3 The Court noted that in this case "all the relevant conduct took place outside the United States." *Kiobel*, Slip Op. at 14. But, the Court also said that "even where the claims touch and concern" 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." *Id.* (citations omitted).

4 *Kiobel*, Slip Op. (Breyer, J., concurring) at 1-2, 14-15.

5 The Second Circuit decision at issue involved a split decision, and the Seventh, Eleventh, Ninth and DC Circuits have held that companies may be sued for violating international law. It will be interesting to see if these Circuits become magnets for ATS claims.

6 *Kiobel*, Slip Op. at 5.

7 *Bauman v. DaimlerChrysler,* 644 F.3d 909 (9th Cir. 2011).

8 644 F.3d at 924, 930.

9 The certified question in *Bauman* (Case No. 11-965) is "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State."

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