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"Supreme Court Limits ATS Litigation—But Door Remains Slightly Ajar"

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In *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), the United States Supreme Court addressed the applicability of the Alien Tort Statute ("ATS") to alleged violations of international law committed by multinational corporations overseas. Although the Supreme Court rejected the claims in *Kiobel* because of the presumption against the extraterritorial application of statutes such as the ATS, the Supreme Court did not completely slam the door shut on ATS litigation. What types of ATS cases survive *Kiobel* will certainly be the subject of continued litigation – and corporations remain likely targets.

The ATS was enacted as part of the first Judiciary Act of 1789 and granted district courts original jurisdiction for torts committed by aliens in violation of the law of nations or a treaty of the United States. In the past decades, plaintiffs have increasingly used the ATS to sue corporations for alleged international law and human rights violations for operations occurring mostly on foreign shores. In many cases, plaintiffs have accused corporations as varied as Unocal, IBM, Caterpillar and Coca Cola of aiding and abetting alleged international law violations including torture and crimes against humanity.

The Supreme Court originally granted certiorari in *Kiobel* to address whether corporations could be held liable for alleged violations of international law under the ATS. After oral argument on the corporate liability question, the Supreme Court ordered re-argument on whether a federal court may recognize a cause of action under the ATS for international law violations occurring in the territory of a sovereign nation other than the United States. It was on that broader question of the extraterritorial application of the ATS that the Supreme Court rejected the plaintiffs'claims in *Kiobel*. The claims were brought by 12 Nigerian nationals now residing in the United States against Dutch, British and Nigerian oil companies alleging that the companies aided and abetted the Nigerian government's violations of international law. The plaintiffs alleged that the government deployed its military forces to suppress resistance to oil drilling in the Ogoni region of the Niger Delta in Nigeria. The Supreme Court rejected those claims and held that the presumption against extraterritoriality applied to claims under the ATS, and that nothing in the text, history or purpose of the statute rebutted that presumption.

The Supreme Court's decision should slam the door shut on so-called "foreign-cubed" ATS cases such as *Kiobel* – that is, cases filed by foreign plaintiffs against foreign defendants for international law violations wholly occurring overseas. Although the Supreme Court's decision was undoubtedly a victory for corporations, the impact of the ruling on the viability of future ATS suits against corporations will continue to be tested by further litigation. Plaintiffs' lawyers will certainly read *Kiobel* narrowly and likely continue filing ATS suits albeit in a more restrained fashion, particularly against U.S. corporations. The language of the five-person majority opinion and the three concurring opinions provide fertile ground for parties to further probe the outer limits of the presumption against extraterritoriality in ATS cases.

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Creative plaintiffs' lawyers are likely to rely on the last paragraph of the majority opinion authored by Chief Justice Roberts to craft an ATS case that would survive a motion to dismiss in U.S. courts. In that paragraph, the majority held that "even where the [ATS] claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 133 S.Ct. at 1669. In Justice Kennedy's concurring opinion, he made clear that "a number of significant questions regarding the reach and interpretation" of the ATS remain and that the "proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation." *Id.* Even Justices Alito and Thomas recognize that the last paragraph in the majority opinion "leaves much unanswered" and expresses a "narrow approach." *Id.* at 1669-70. The four-justice concurring opinion by Justice Breyer observes that the Court had "[left] for another day the determination of just when the presumption against extraterritoriality might be 'overcome.'" *Id.* at 1673. The collective opinions thus caution against concluding that *Kiobel* is a resounding death knell for ATS suits against corporations – it may not have that immediate effect.

So how does *Kiobel* affect the viability of different types of ATS cases?

First, it is clear what does not remain: The ATS door should be shut for foreign-cubed cases where the plaintiffs, defendants and acts over which the claims arise are all foreign. Indeed, shortly after the Supreme Court released its decision, the District Court for the District of Columbia dismissed the ATS claims in *Turkcell İletişim Hizmetleri A.Ş. v. MTN Group, Ltd.*, another foreign-cubed case involving multinational corporations. Such dismissals of foreign-cubed ATS cases are likely to occur over the coming months.

On the other hand, ATS claims against U.S. corporations where some or all of the relevant acts giving rise to the claim are on U.S. soil – despite an injury alleged to have occurred abroad – are potentially likelier to withstand immediate dismissal challenges in light of *Kiobel*. Cases such as *Doe v. Cisco Systems, Inc.* in the Northern District of California or *Doe v. ExxonMobil Corp.* in the District of Columbia where U.S. corporations are accused of aiding and abetting purported international law violations from U.S. territory could possibly survive *Kiobel* – or at least, plaintiffs' lawyers will argue that they are distinguishable.

In *Cisco*, the plaintiffs are U.S. and Chinese citizen practitioners of Falun Gong who accused Cisco and certain of its corporate officers of designing and then supplying the Chinese government with "Golden Shield," a technology program that was purportedly used to monitor and then capture Falun Gong practitioners. The plaintiffs alleged that Cisco's operations in its San Jose, California headquarters were actively involved in the "Golden Shield" program.

As in *Cisco*, some of the acts giving rise to the ATS claims in *ExxonMobil* allegedly occurred in the United States. In that case, Indonesian plaintiffs accused ExxonMobil and its subsidiaries of aiding and abetting torture, killing and arbitrary detention committed by Indonesian security forces in the region of Aceh. The plaintiffs alleged that as part of ExxonMobil's centralized structure, decisions regarding the hiring and retention of Indonesian security forces in securing the company's natural gas fields in Aceh were made by corporate officials in the United States, who also purportedly formulated and disseminated communications regarding alleged human rights abuses by the security personnel.

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Plaintiffs will likely attempt to distinguish ATS cases such as *Cisco* and *Exxon* from *Kiobel* arguing that not all of the relevant conduct transpired overseas but rather through discovery might attempt to uncover U.S.-based conduct sufficient to displace the presumption against extraterritoriality. There is a stronger argument that the claims touch and concern the territory of the United States where at least some of the alleged acts (usually aiding and abetting) giving rise to the international law violation occurred on U.S. soil and were committed by a corporation headquartered and domiciled here. Defendants would attempt to show that all of the "relevant" conduct occurred outside the U.S. and raise the foreign policy concerns cited by the majority opinion in *Kiobel*. The majority opinion characterized the presumption against extraterritoriality as a principle that "'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Kiobel*, 133 S.Ct. at 1661(quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 249 (1991)).

How courts will approach ATS claims against U.S. corporations where all the relevant conduct occurred outside the United States will be less straightforward and more likely to be an uphill battle for plaintiffs. The question in those cases is whether there are circumstances under which a U.S. corporation, acting overseas, would touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritorial application. The Supreme Court cautioned that for foreign corporations, mere presence in the United States (i.e. simply having an office or listing in the stock exchange) is insufficient and in light of that, one might ask whether the mere fact that the defendant is a U.S. corporation would be sufficient to displace the extraterritorial presumption even where the claims arise over that corporation's activities on foreign territory.

The post-*Kiobel* terrain certainly presents narrower routes for plaintiffs seeking to litigate human rights claims against corporations. But that same terrain portends significant unresolved questions in ATS litigation such as the application of the presumption against extraterritoriality, corporate liability and the standard for aiding and abetting. The ATS door continues to be subject to vigilant door keeping by U.S. courts, but remains slightly ajar awaiting a push from plaintiffs who seek to explore the viability of a post-*Kiobel* ATS case.

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