

Ninth Circuit Latest to Permit Corporate Liability Under Alien Tort Statute; Supreme Court to Resolve Circuit Split in 2012

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In *Sarei v. Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011), the [United States Court of Appeals for the Ninth Circuit](#) became the latest Circuit to hold that corporations may be held liable under the Alien Tort Statute (“ATS”), [28 U.S.C. § 1350](#). As previously reported [here](#) and [here](#), the [Second Circuit](#) held last year in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), that the scope of liability under the ATS does *not* extend to corporations because imposing liability on corporations for violations of the law of nations has not achieved a sufficiently “specific, universal, and obligatory” character so as to be considered a norm of customary international law. In *Sarei*, the Ninth Circuit joined the [District of Columbia Circuit](#), the [Seventh Circuit](#) and the [Eleventh Circuit](#) in reaching the opposite conclusion. The current circuit split will be resolved by the United States Supreme Court, which [granted certiorari](#) to *Kiobel* on October 17, 2011.

Plaintiffs in *Rio Tinto* were a group of current and former residents of Bougainville, Papua New Guinea (“PNG”), where defendants Rio Tinto, PLC and Rio Tinto Ltd. (collectively, “Rio Tinto”) were engaged in mining operations. Plaintiffs alleged that beginning in the 1960s, Rio Tinto “displaced villages, razed massive tracts of rain forest, intensely polluted the land, rivers, and air . . . and systematically discriminated against its Bougainvillian workers, who lived in slave-like conditions.” In February 1990, Bougainville residents revolted and sabotaged the Bougainville mine. In the wake of the uprising, the country descended into civil war and the PNG government imposed a military blockade on the island that prevented medicine, clothing, and other necessities from reaching Bougainville residents. According to the complaint, Rio Tinto pressured the PNG government to engage in “aerial bombardment of civilian targets, wanton killing and acts of cruelty, village burning, rape, and pillage” that resulted in the deaths of an estimated 15,000 Bougainvillians.

Plaintiffs brought numerous claims against Rio Tinto under the ATS, which confers federal jurisdiction over tort actions brought by aliens for violations of the law of nations, or “customary international law.” Rio Tinto argued, among other things, that plaintiffs’ claims were nonjusticiable political questions and that plaintiffs could not file an ATS suit in federal court without first exhausting local remedies in Papua New Guinea. The district court found no such exhaustion requirement but agreed that plaintiffs’ claims were nonjusticiable political questions and dismissed all of them. Both sides appealed. On appeal, Rio Tinto argued that it could not be liable because the scope of liability under the ATS does not extend to corporations.

The Ninth Circuit rejected Rio Tinto’s argument that the ATS does not allow for corporate liability. Whereas Rio Tinto had argued that treaties establishing international tribunals for criminal trials have not explicitly provided for corporate liability, the Court concluded that the more appropriate inquiry was to look at the statute itself. Noting that the text of the ATS contains no express language limiting the scope of liability to individuals and that the legislative history of the statute contains nothing to suggest otherwise, the Court found no basis for holding that such a limitation on liability exists. In determining whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, the Court concluded that the proper inquiry is “not whether there is a specific precedent so holding, but whether international law extends its prohibitions to the perpetrators in question.” Thus, the Court attached little significance to the Second Circuit’s assertion in *Kiobel* that no international tribunal has ever held a corporation criminally liable, reasoning that this in itself would not prohibit any such tribunal from holding a corporation criminally liable under customary international law.

With *Rio Tinto*, the Second Circuit’s decision in *Kiobel* is increasingly becoming an outlier among ATS cases ruling on corporate liability. The District of Columbia Circuit, the Seventh Circuit, the Eleventh Circuit and federal district courts in Maryland and Virginia have all held that the ATS does not bar corporate liability. The circuit split will be resolved by the Supreme Court, which granted *certiorari* to *Kiobel* last month and will decide the case during its current 2011-2012 term. Petitioners’ brief is due December 14, 2011, and respondents’ brief is due January 27, 2012.

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