US Supreme Court Holds that the Alien Tort Statute Does Not Apply Extraterritorially

In a decision of substantial importance to any business that operates outside the United States, on April 17, 2013, the US Supreme Court held in Kiobel v. Royal Dutch Petroleum, No. 10-1491, that the Alien Tort Statute (ATS) does not apply extraterritorially in cases alleging violations of international law occurring within the territory of sovereigns outside the United States. The case is significant because it promises to eliminate the use of the ATS as a vehicle for unjustified class actions against businesses.

Background

The ATS grants federal-court jurisdiction over a tort claim brought by an alien (i.e., a non-US citizen) who alleges that the tort was “committed in violation of the law of nations or a treaty of the United States.” Enacted in 1789, the ATS was largely unused until human rights activists began using the statute in the 1970s to sue war criminals and other individuals who had violated international human rights. Starting in the 1990s, the plaintiffs’ bar began invoking the ATS more aggressively. In recent years, dozens of ATS class actions have been filed seeking damages for human rights abuses allegedly committed abroad in more than 60 countries by foreign governments. But what distinguishes this wave of ATS suits from earlier suits is the fact that virtually all of the recent cases target neither the foreign governments nor the foreign officials who allegedly were the perpetrators. Instead, they target large companies that happened to do business in the country in which the abuses occurred, or with the governments of those countries. The plaintiffs in these suits argue that the companies’ transactions somehow “aided and abetted” the foreign governments’ acts.

The Kiobel Decision

The Kiobel plaintiffs, who are Nigerians, sued Dutch, British and Nigerian corporations engaged in oil exploration in Nigeria under the ATS, alleging that those corporations had aided and abetted the Nigerian government in the commission of international human rights violations in Nigeria. The district court dismissed some of the claims on the theory that they did not allege violations of international law, as required to state a claim under the ATS. On appeal, the Second Circuit held that the entirety of the complaint should be dismissed because international law does not recognize corporate liability.

After hearing oral argument on the corporate liability question in February 2012, the Supreme Court ordered supplemental briefing and reargument on the additional question “[w]hether and under what circumstances the [ATS] 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 Supreme Court resolved the case on the basis of that
additional question, and did not address whether the ATS recognizes corporate liability.

Writing for the Court, and holding that the federal courts lacked jurisdiction over the case under the ATS, Chief Justice Roberts explained that “the presumption against extraterritoriality applies to claims under the ATS.” The Court stated that “nothing in the text of the [ATS] suggests that Congress intended causes of action recognized under it to have extraterritorial reach.” The Court also concluded that the historical context of the ATS did not support extraterritorial application.

The Court noted that, at the time of the ATS’s passage, offenses against the law of nations fell into three categories: violation of safe conduct, infringement of the rights of ambassadors and piracy. The Court explained that the first two categories “have no necessary extraterritorial application,” and that the “notorious episodes” in those categories that led to passage of the ATS involved offenses within the United States. The Court also reasoned that the third category, piracy, did not support extension of the ATS to offenses committed in the territory of other sovereigns because pirates “generally did not operate within any jurisdiction” and “may well be a category unto themselves.” The Court thus concluded that “there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.”

The Court stressed that construing the ATS to apply only when the relevant conduct occurred within the United States avoids adverse foreign-policy implications. The Court pointed out that although the ATS was enacted to avoid diplomatic strife, its extraterritorial application has the opposite effect, with Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom having recently objected to extraterritorial applications of the ATS.

Turning to the case at hand, the Court held that the claims should be dismissed because “all the relevant conduct took place outside the United States.” The Court noted that “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.” “Mere corporate presence,” the Court explained, is insufficient to displace the presumption.

Justice Kennedy joined the majority opinion, but also wrote a separate concurrence. He noted that the majority opinion was “careful to leave open a number of significant questions regarding the reach and interpretation of the [ATS]” and that “[o]ther cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the [Torture Victim Protection Act] nor by the reasoning and holding of today’s case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”

Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, concurred in the judgment but disagreed with the Court’s reasoning. Justice Breyer argued that the ATS should apply when “(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 (including a distinct interest in preventing the United States from becoming a safe harbor for a torturer or other common enemy of humanity).” He concluded that the conduct at issue in *Kiobel* did not meet any of those criteria.

**Analysis**

The *Kiobel* decision represents another example of the Court’s recent, and repeated, emphasis on limiting the extraterritorial application of US laws to those instances where Congress has clearly expressed a desire to regulate conduct...
abroad, especially where extraterritorial application of United States law draws the ire of America’s friends and allies. The decision, therefore, is likely to be important even outside of the ATS context in supporting arguments against extraterritorial application of federal laws.

With respect to ATS cases, the ruling erects a significant and important obstacle to continuing the practice of seeking class-action damages based on claims that multinational corporations aided and abetted “human rights violations” alleged to have occurred abroad. The majority’s opinion should finally close the door on lawsuits where the harm from the violation of international law is inflicted in a country other than the United States.

Given the significant limitations on ATS actions imposed by the Court’s opinion, it is not surprising that the plaintiffs’ bar, just hours after issuance of the decision, advanced two separate lines of argument claiming that the Supreme Court’s holding is narrow and leaves room for continued filing of these lawsuits.

First, the plaintiffs’ bar contends that Kiobel’s holding is limited to claims against foreign corporations, leaving businesses domiciled in the United States subject to suit for ATS claims based on conduct alleged to have occurred anywhere in the world. But that view gained support from only the four Justices who signed Justice Breyer’s opinion.

The majority’s focus on the site of the “violation of the law of nations” precludes imposing liability on US companies for violations occurring in other countries. Indeed, the majority framed the question before the Court as whether the ATS permits lawsuits “for violations of the law of nations occurring within the territory of a sovereign other than the United States,” and it answered that question “no.” Nothing in Justice Kennedy’s concurrence indicates the slightest bit of support for Justice Breyer’s approach.

Even if Justice Kennedy’s concurrence could be read as a limitation on the scope of the majority opinion, which it expressly is not (Justice Kennedy expressly limited his concurrence to cases not resolved “by the reasoning and holding of today’s case”), it would not open the door for continuation of aiding-and-abetting claims against US businesses. Justice Kennedy refers to cases with “allegations of serious violations of international law principles”—and aiding-and-abetting claims against companies, which are not even permitted under international law, plainly do not fall within that category.

An exception for claims against US companies also would make no sense. In our globalized economy, companies may locate in any of a number of different countries; if the price of a domicile in the United States were subjecting the business to numerous ATS class actions, any reasonable chief executive would have to consider relocating to another country. That would hardly be a sensible or beneficial result for the US economy.

Second, the plaintiffs’ bar is claiming that if the conduct giving rise to the ATS claim is somehow tied to the United States—such as through an allegation that the company’s US-based executives approved or tolerated the conduct—then there is a sufficient connection with the United States to allow the claim to go forward. The flaw in that argument is that the claim against the company will, in virtually every case, be a claim for aiding and abetting the primary wrongdoing of agents of a foreign government (because virtually all international law norms apply only to government actors). The international law violation, therefore, will have occurred outside the United States, and the fact that there is alleged to be some tie between the United States and the aiding-and-abetting conduct will be insufficient to permit an ATS claim.

Indeed, this argument by the plaintiffs’ bar is very similar to one rejected by the Court in Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010), in which the Court held that
federal securities laws do not apply extraterritorially. There, the plaintiffs contended that because some of the conduct underlying the alleged securities fraud occurred in Florida, permitting those who purchased the securities outside the United States to invoke federal law did not constitute the extraterritorial application of that law. The Court rejected that argument, holding that because the “focus of congressional concern” in enacting the statute in question, Section 10(b) of the Securities Exchange Act, was fraud in connection with the purchase and sale of securities rather than “deceptive conduct” in the abstract, the purchase and sale must occur within the United States. Here, where the focus of the ATS is violation of international law principles, the international law violation must occur within the United States. Indeed, it is no coincidence that Chief Justice Roberts cited Morrison in explaining that “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.” The effort by plaintiffs’ lawyers to bootstrap an ATS claim on the basis of peripheral conduct in the United States is doomed to failure.

But it is likely that another few rounds of litigation in the lower courts, and perhaps even in the Supreme Court, may be necessary to put these spurious arguments to rest. Defendants should brace themselves for a fight about the meaning of Kiobel in the lower courts.

Finally, there are likely to be loud complaints in the coming days about the Court’s supposed “judicial activism” in applying the presumption against extraterritoriality and limiting the statute’s reach to the conduct within the United States. But this is a statute that was enacted in 1789 and not invoked until it was revived in 1980 by a federal court of appeals as a vehicle for the pursuit of alleged human rights violators from anywhere in the world. The activism here was the creation of this new form of liability in the first place, without any clear direction from Congress about how liability should be configured, and without any supervising role for the Executive Branch, despite the obvious diplomatic tensions that result from a broad cause of action under which US courts would adjudicate the “legality” under vague international law standards of actions by governments and private parties throughout the world.

Those who believe such a cause of action is needed—in addition to the one Congress created in 1991 by enacting the Torture Victim Protection Act, which provides a remedy for victims of torture—would be well-advised to go to Congress. That body—because it acts holistically and does not proceed on an issue-by-issue basis as do the courts—is far better equipped to balance all of the relevant policy concerns and, if the case for new liability is made, construct a cause of action that provides appropriate roles for the US courts, the Executive Branch, and the courts and governments of other countries. Continuing to try to convince the US courts to take on that role makes no sense as a policy matter and is doomed as a matter of legal principle.

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