

SUPREME COURT LIMITS SCOPE OF ALIEN TORT STATUTE

On April 17, 2013, the Supreme Court issued an important decision in *Kiobel v. Royal Dutch Petroleum Co.*, limiting the scope of human rights claims that can be filed under the Alien Tort Statute (the “ATS”). In an opinion by Chief Justice John Roberts, the Court held that the ATS does not apply extraterritorially and rejected claims against Shell and its affiliates alleging human rights violations in Nigeria.

Background

In *Kiobel*, plaintiffs were Nigerian citizens and residents of Ogoniland, an area located in the Niger delta area of Nigeria. Defendants Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c., were foreign holding companies incorporated in the Netherlands and England, respectively; their joint subsidiary, Shell Petroleum Development Company of Nigeria, Ltd. (“SPDC”), was incorporated in Nigeria and engaged in oil exploration and production in Nigeria.

According to the complaint, after Ogoniland residents began protesting SPDC’s environmental practices, SPDC began working with the Nigerian government to suppress the demonstrations—including via alleged human rights violations. The defendants allegedly aided and abetted human rights violations by, among other things, providing Nigerian forces with food, transportation, and compensation and allowing the Nigerian military to use company property as a staging ground for attacks. After the alleged activities, the plaintiffs filed the suit in the Southern District of New York alleging jurisdiction under the ATS for human rights violations.

The ATS, which dates back to 1789, gives federal district courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The ATS remained obscure for almost 200 years. In the 1980s and 1990s, however, foreign plaintiffs began filing claims arguing that U.S. courts had jurisdiction under the ATS over human rights violations committed anywhere in the world; these plaintiffs claimed that human rights abuses violated the “law of nations” (international law) and that federal courts had original jurisdiction over the claims, regardless of where they occurred. Plaintiffs, such as the Nigerian residents in *Kiobel*, have increasingly filed suits against multinational corporations for alleged complicity in human rights violations abroad.

The question originally before the Supreme Court in *Kiobel* was whether corporations could be sued under the ATS for violations of the law of nations or whether such claims could be brought only against individuals. After oral argument, however, the Court *sua sponte* ordered a second round of briefing on the jurisdictional question of whether 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 Court's Opinion

The specific issue considered by the Court was whether the “presumption against extraterritoriality” applies to the ATS and thereby barred plaintiffs’ claims, which took place entirely abroad. The presumption against extraterritoriality is a canon of statutory construction providing that “[w]hen a statute gives no clear indication of extraterritorial application, it has none.” *Kiobel*, No. 10-1491, slip op. at 4 (Apr. 17, 2013) (quoting *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010)). Courts have applied this canon in many other cases, including *Morrison v. National Australia Bank*, where the Supreme Court restricted the extraterritorial scope of Section 10(b) of the Securities Exchange Act of 1934. If the presumption applies, “some domestic activity” is not enough to allow the claims to proceed. *Morrison*, 130 S. Ct. at 2884 (“[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.”) (emphasis in original). Instead, courts seek to determine the “focus” of the statute in question; in *Morrison*, the Court held that the “focus on the Exchange Act is not upon the place where the deception originated, but upon the purchases and sales of securities in the United States.” *Id.* Thus, *Morrison* held that Section 10(b) applies only when “the purchase or sale is made in the United States, or involves a security listed on a domestic exchange.” *Id.* at 2886.

In *Kiobel*, the Court held that the presumption against extraterritoriality applies to claims asserted under the ATS, and the Court thus rejected plaintiffs’ claims. According to the complaint, “all the relevant conduct took place outside of the United States.” *Kiobel*, slip op. at 14. Moreover, citing *Morrison*, 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.” *Id.* (citing *Morrison*, 561 U.S. at 2883-88). Although Royal Dutch Shell had shares traded on the New York Stock Exchange and a corporate affiliate had an office in New York, the Court noted that “[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.” *Kiobel*, slip op. at 14.

In a concurring opinion, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, agreed that the claims should have been rejected, but disagreed significantly with the majority’s reasoning. The four Justices asserted that the presumption against extraterritoriality should not apply to ATS claims; instead, based in part on “principles and practices of foreign relations law,” they would have allowed ATS claims to be filed where (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 (which includes “a distinct interest in preventing the United States from becoming a safe harbor for a torturer or other common enemy of mankind”). *Kiobel*, slip op. at 1-2 (Breyer, J., concurring). Given the limited connections of the foreign corporate defendants to the United States, the concurring justices agreed with the rejection of the precise claims at issue, but they would have opened the door to many other types of extraterritorial ATS claims under different circumstances.

Given the absence of jurisdiction, the Supreme Court never considered the initial question before it—*i.e.*, whether corporations could be liable at all under the ATS.

Impact

Many multinational companies, including Coca-Cola, Ford, Chevron, and Pfizer, have been sued for alleged human rights abuses under the ATS. The Court's opinion in *Kiobel* will make such lawsuits more difficult to bring in the future.

However, liability risks remain, and companies must be vigilant to guard against these risks. If conduct occurs in the United States, companies potentially still could face liability risks for ATS claims. In addition, plaintiffs still may seek to file claims in the United States under ordinary tort law for human rights abuses based on diversity jurisdiction. Where there is diversity jurisdiction and the conduct alleged occurred entirely abroad, such claims in federal court typically would be governed by the substantive tort law of the place where the conduct took place (*e.g.*, the foreign tort equivalent of claims like assault, battery, false imprisonment, and wrongful death). Finally, plaintiffs could also potentially bring other statutory claims in the United States where the statute in question has extraterritorial application; for example, the Torture Victim Protection Act allows civil suits in the United States under certain circumstances against individuals who, under actual or apparent authority or color of law of any foreign nation, subject an individual to torture or extrajudicial killing.

Plaintiffs may face jurisdictional and other hurdles, such as *forum non conveniens* defenses, in prosecuting such claims, but some lower courts have demonstrated a strong willingness to provide a forum for such claims. Caution and careful deliberation in structuring a company's interactions with foreign governments on security and other areas of potential human rights risk can help avoid legal liability and the reputational harm that can come with the mere filing of allegations of complicity in human rights abuses.

* * * * *

If you have any questions, please contact Martin Weinstein (202-303-1122, mweinstein@willkie.com), Robert Meyer (202-303-1123, rmeyer@willkie.com), Jeffrey Clark (202-303-1139, jdclark@willkie.com), or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Paris, London, Milan, Rome, Frankfurt and Brussels. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com.

April 19, 2013

Copyright © 2013 Willkie Farr & Gallagher LLP.