Legal Backgrounder

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WILL FEDERAL COURT'S *KIOBEL* RULING END SECOND WAVE OF ALIEN TORT STATUTE SUITS?

by
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Human rights lawsuits against multinational corporations in U.S. federal courts under the so-called "Alien Tort Statute" (ATS) may soon be coming to an end. In an important and unexpected decision in late September, a three-judge panel of the U.S. Court of Appeals for the Second Circuit ruled in *Kiobel v. Royal Dutch Petroleum* that corporations – in contrast to individuals – may not be held liable under the ATS for violations of international law.[1] The plaintiffs have sought en banc review by the Second Circuit, and the ruling is likely to be appealed in any event to the Supreme Court.[2] If the Supreme Court ultimately grants certiorari and upholds the Second Circuit's ruling (and there are good reasons to think it might), corporations themselves will no longer face the prospect of costly, protracted, and reputation-damaging ATS lawsuits. Future human rights plaintiffs, however, will continue to bring suits against foreign government officials and may shift their focus from corporations to individual corporate officers and directors.

The* Kiobel *Ruling. The *Kiobel* suit was brought against Royal Dutch Petroleum and related Shell oil companies in 2002 by a group of Nigerian villagers who alleged that Shell had aided and abetted acts of murder, rape, and looting by the Nigerian government. *Kiobel* at *5. In an opinion by Judge Jose Cabranes in which Chief Judge Dennis Jacobs joined, the Second Circuit dismissed the case, holding that "corporate liability is not a discernable – much less universally recognized – norm of international law that we may apply pursuant to the ATS." *Id.* at *24. Judge Pierre Leval concurred in dismissing the case, but strongly disagreed with what he called the majority's "creation of an unprecedented concept of international law that exempts juridical persons from compliance with its rules." *Id.* at *61 (Leval, J., concurring). Judge Leval went on to lament that the "majority's rule conflicts with two centuries of federal precedent on the ATS, and deals a blow to the efforts of international law to protect human rights." *Id*.

Notwithstanding Judge Leval's claim, although the ATS itself has been part of the U.S. Code for more than two hundred years, its application to corporations is of more recent vintage. The ATS itself was first enacted as part of the Judiciary Act of 1789, and its text has remained virtually unchanged since that time. It gives federal courts jurisdiction over "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." Alien Tort Statute, 28 U.S.C. § 1350 (2010). Although its legislative history is sparse, the ATS was apparently intended to allow the federal courts to hear violations of customary international law, such as piracy and assaults on foreign ambassadors that might have caused diplomatic tensions for the new American Republic if left unaddressed in state courts.

[1] No. 06-4800-cv, 06-4876-cv, 2010 WL 3611392, at *3 (2d Cir. Sept. 17, 2010).
[2] *See Kiobel*, Pet. for Rehearing/Rehearing *en banc*, No. 06-4800 (2d Cir. Oct. 15, 2010).

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For its first two hundred years, the ATS was virtually unused, providing jurisdiction in only one case. The "modern era" of the ATS began in 1980 with *Filartiga v. Pena-Irala*, when the Second Circuit allowed two Paraguayan nationals to sue a former Paraguayan official under the ATS for acts of torture and murder in violation of international law. 630 F.2d 876 (2d Cir. 1980). This landmark decision opened the door to more than 100 suits for human rights violations over the last thirty years.

The Two Waves of Modern ATS Litigation. Modern ATS litigation has come in two waves. The initial wave involved suits, like *Filartiga*, against foreign government officials (including Chinese, Israelis, and Bosnian Serbs) for alleged human rights abuses committed while in government. The second wave began in the mid-1990s, when plaintiffs began suing U.S. and foreign companies for allegedly "aiding and abetting" human rights violations by foreign governments in the countries in which the companies operated.

Virtually every major corporation doing business in conflict-torn regions has faced ATS litigation. The majority of suits have been brought against companies involved in extractive industries in countries with poor human rights records or oppressive governments, such as ExxonMobil in Indonesia, [3] Occidental in Colombia,[4] Talisman in Sudan,[5] Shell in Nigeria,[6] Unocal in Burma[7], and Rio Tinto in Papua New Guinea.[8] But many other corporations have been sued, including Caterpillar for selling bulldozers to Israel for use in Gaza;[9] Dow Chemical for manufacturing Agent Orange used in Vietnam;[10] Yahoo! for sharing subscriber data with the Chinese government;[11] Coca Cola for allegedly abusing trade unionists in Colombia;[12] Pfizer for allegedly conducting non-consensual medical experiments on children in Nigeria;[13] and Nestle, Cargill, and ArcherDaniels Midland for allegedly using child labor to work on cocoa plantations in the Ivory Coast.[14] The "granddaddy" of ATS litigation is a consolidated action brought in 2002 in the Southern District of New York against more than fifty U.S. and foreign companies (with Ford, Daimler, General Motors, and IBM as marquee defendants) that did business in South Africa during the Apartheid period; the Apartheid case is pending on appeal in the Second Circuit.[15]

No ATS suit has resulted in a monetary judgment against a major multinational corporation. However, several large companies, including Unocal, Yahoo!, and Shell have reached settlements,[16] presumably to avoid lengthy and embarrassing litigation. Many other cases have dragged on for years, including the Apartheid cases in New York and the case against Rio Tinto in California, both of which have bounced several times between district and appellate courts. *See supra*, notes 3, 7.

In 2004, the Supreme Court attempted to narrow the types of cases that may be brought under the ATS. In *Sosa v. Alvarez-Machain*, the Court dismissed an ATS suit for arbitrary detention filed by a Mexican national who had been abducted at the direction of the U.S. Government and brought back to the U.S. to face trial. 542 U.S. 692, 697-98 (2004). In an opinion by Justice David Souter in which all nine justices concurred, the Court held that federal courts should exercise "great caution" in allowing private plaintiffs to bring civil suits for violations of international law. *Id.* at 728. ATS suits, the Court said, should be limited to those violations of the law of nations recognized in 1789 – assaults against ambassadors, violations of safe conduct, and piracy – and a

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[3] *Doe v. ExxonMobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005).
[4] *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005).
[5] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.2d 244 (2d Cir. 2009), *cert. denied*, No. 09-1262 (2010).
[6] *Wiwa v. Royal Dutch Petroleum Co.* 226 F.3d 88 (2d Cir. 2000).
[7] *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted*, 395 F3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005).
[8] *Sarei v. Rio Tinto, PLC*, 65 F. Supp. 2d 1004 (C.D. Cal. 2009); *see also Sarei v. Rio Tinto, PLC*, No. 09-56381, 2010 WL 4190718 (9th Cir. Oct. 26, 2010).
[9] *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash 2005), *aff'd on other grounds, Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007).
[10] *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 123 (2d Cir. 2008).
[11] *Xiaoning v. Yahoo! Inc*, No. 04:2007-cv-02151 (N. D. Cal. filed Apr. 18, 2007).
[12] *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009).
[13] *Abdullahi v. Pfizer*, 562 F.3d 163 (2d Cir. 2009), *cert denied*, 130 S. Ct. 3541 (2010).
[14] *Doe. v. Nestle, et al*, No. CV 05-5133, 2010 WL 3969615, slip op. at 75 (C.D. Cal. Sept. 8, 2010).
[15] *Balintulo, et al v. Daimler AG, et al*, No. 09-2778-CV (2d Cir).
[16] *See* Unocal Settles Rights Suit in Myanmar, N.Y. TIMES, Dec. 14, 2004; Catherine Rampell, *Yahoo Settles With Chinese Families*, WASH. POST, Nov. 14, 2007, at D4; Jad Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. TIMES, Jun. 9, 2009, at B1.

"modest number" of other offenses "on a norm of international character accepted by the civilized world" and defined with a similar "specificity." *Id*. at 693, 725. In Justice Souter's words, the door for recognition of new causes of action was "still ajar subject to vigilant doorkeeping" by federal judges. *Id.* at 729.

In addition to limiting new causes of action, the Supreme Court emphasized that federal courts should also consider other "limiting" factors, including "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation…" *id.* at 732 n.20; whether the claimant had exhausted local remedies available in the country where the alleged violation had occurred, *id.* at 733 n. 21; and whether the Executive branch had expressed a view about the impact of the litigation on U.S. foreign policy. *Id*.

Despite the Supreme Court's admonition to the lower courts, human rights plaintiffs have been largely undeterred post-*Sosa* in filing new ATS cases against both corporate and individual defendants, and many lower courts initially appeared to shun the vigilant doorkeeper role the Supreme Court intended for them. During the last year, however, there have been indications that the tide is turning, at least in the Second Circuit. In October 2009, the Second Circuit held, in the case against Talisman Energy, that to be liable for aiding and abetting human rights violations by the Government of Sudan, Talisman must have *intended* the human rights abuses, not merely had knowledge of them. *Talisman*, 582 F.2d at 259. And a different panel of the Second Circuit accepted an interlocutory appeal in the Apartheid case and asked the parties for briefing on whether corporations are subject to liability under the ATS; although the panel has not yet issued a ruling, the panel includes Judge Cabranes, who wrote the *Kiobel* decision, and would be bound by the resolution of the issue by the *Kiobel* panel.

ATS lawsuits have caused not only headaches and costly litigation for corporations but also considerable diplomatic friction between the U.S. and foreign governments whose corporations are sued. Foreign governments regularly complain to the Department of State not only that their corporations have been unfairly targeted but that the assertion by U.S. courts of extra-territorial jurisdiction over their officials and corporations, for acts committed outside the U.S. and with no nexus to the U.S., is a violation of customary international law principles governing extra-territorial jurisdiction. Australia, Germany, Switzerland, the United Kingdom, the European Union, and various foreign trade organizations have filed amicus briefs opposing extraterritorial application of the ATS to foreign corporations. Ironically, the modern era of ATS litigation has ended up causing the very diplomatic tensions that it was apparently intended to avoid.

In the *Kiobel* case, the plaintiffs have asked for *en banc* review by the Second Circuit. Given the sharply splintered opinions issued by Second Circuit panels in other ATS cases, it would not be surprising if the Second Circuit agrees to consider the case *en banc*, with a decision presumably issuing sometime next year. In the meantime, the *Kiobel* decision applies only in the Second Circuit, although at least one other district court outside the Second Circuit has already relied on *Kiobel* to dismiss an ATS suit.[17]

Whether or not the Second Circuit agrees to hear the case *en banc*, and whatever the result, the *Kiobel* decision will likely be appealed to the Supreme Court. Although the Supreme Court denied certiorari during the last year in two other ATS cases from the Second Circuit, *see supra*, notes 4, 12, there are good reasons to believe the Court might take the *Kiobel* case. First, there is now at least a mild circuit split between the Second and Eleventh Circuits on the question of whether corporations may be held liable under the ATS. (The Eleventh Circuit in *Sinaltrainal v. Coca-Cola* ruled, without much elaboration, that corporations may be held liable. *Sinaltrainal*, 578 F.3d at 1263.) Second, unlike *Talisman* and *Pfizer*, the *Kiobel* decision presents an important question of law, the definitive resolution of which may help guide the lower courts in deciding ATS cases at an earlier stage. Third, in *Sosa*, the Supreme Court specifically noted that in deciding ATS cases, federal courts must consider whether liability extends to private actors such as corporations. And finally, the Supreme Court previously expressed interest in accepting certiorari in an earlier iteration of the Apartheid case in 2008, but was unable to take the case because of financial conflicts among the justices.

If the Supreme Court were to take the *Kiobel* case, there are also good reasons to believe that the Court

[17] *Viera v. Eli Lilly*, 2010 WL 3893791 (S.D. Ind. Sept. 30, 2010) (dismissing ATS action against Eli Lilly for injuries caused by environmental pollution in Brazil).

would affirm the panel decision that corporations may not be held liable under the ATS. In *Sosa*, all nine justices – including Justices Kennedy, Breyer, and Ginsberg, all of whom remain on the Court – agreed that federal courts should exercise "great caution" in recognizing new causes of action. Two justices – Scalia and Thomas, both of whom remain on the Court – believe that the ATS should provide jurisdiction only for the causes of action that existed in 1789 (piracy, violations of safe passage, and assaults on ambassadors); it is reasonable to expect that they would be joined in this view by Chief Justice Roberts and Justice Alito. Remarkably, Justice Breyer went even further than the Court's opinion in urging caution; in a concurrence, he urged that in considering whether to exercise jurisdiction over ATS suits, federal courts also consider "notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement." *Sosa*, 542 U.S. at 761 (Breyer, J., concurring). "Such consideration," Breyer said, "is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote." *Id*.

In short, at least seven justices are likely to be skeptical about expanding the scope of ATS litigation as a general matter; among these, there may be at least five votes concluding that corporations are not subject to civil liability under the ATS. And there is no evidence to indicate that the two newest justices, Elena Kagan and Sonia Sotomayor, will be any less vigilant about opening the door to more ATS suits than Justices Breyer and Ginsberg.

Although the Second Circuit's *Kiobel* decision may portend an end to ATS lawsuits against corporations, it will not end ATS suits against individuals. ATS suits against foreign government officials are likely to continue unabated. Indeed, they may increase in the short run, after the Supreme Court's decision earlier this year in *Samantar v. Yousuf*, in which the Court held that foreign government officials do not enjoy statutory immunity from ATS suits under the Foreign Sovereign Immunities Act. 130 S. Ct. 2278, 2282 (2010). In *Samantar*, the Supreme Court recognized that foreign government officials may still enjoy common law immunity derived from customary international law, *id*. at 2292, but until the scope of these immunities is clarified through more judicial decisions, ATS suits against foreign government officials may increase, as plaintiffs and human rights groups test the limits of official immunity.[18]

More significant for corporations, the Second Circuit panel in *Kiobel* specifically held that, even if corporations are not subject to liability under the ATS, corporate officers, directors, and managers may still be sued in their individual capacities if they commit, or purposefully aid or abet, a violation of international law. *Kiobel*, 2010 WL 3611392, at *4. Plaintiffs, therefore, may simply shift the targets of their ATS actions from corporations to individual corporate officials. Although it may be quite difficult for plaintiffs to prove that individual corporate officials had knowledge of, or intent to cause, human rights abuses by foreign governments, this may not prevent plaintiffs from filing suits, resulting in the same costly and protracted (and perhaps even more reputation-damaging) litigation that has vexed multinational corporations.

The past decade of ATS litigation, coupled with a greater overall sensitivity to corporate social responsibility and sustainability, has left most major multinational corporations more sensitive to the impact of their activities on local populations in less-developed countries, especially those suffering from governance gaps. Several international, multi-stakeholder initiatives, including efforts undertaken by the OECD, the International Organization for Standardization, and UN Special Rapporteur on Business and Human Rights, John Ruggie, are preparing detailed guidelines of good human rights practices for corporations engaged in international business. These guidelines, coupled with the specter of continued ATS litigation against their officers and directors, should spur multinational corporations to continue to conduct due diligence in their activities in conflict-affected regions and in countries with weak governance and to establish internal rules to ensure respect for human rights.

[18] *See* John B. Bellinger, III, *Ruling Burdens State Department*, NAT. LAW J. June 28, 2010 (discussing potential increase in ATS cases against foreign government officials after *Samantar* decision).