

A Surprise Twist: U.S. Supreme Court Will Rehear Kiobel

March 5, 2012 by [Sarah A. Altschuller](#)



On March 5, [less than a week after oral arguments in *Kiobel v. Royal Dutch Petroleum*](#), the Supreme Court ordered the case "[restored to the calendar for reargument](#)." The Court's order directed the parties to file new briefs on a calendar running through June 29. The case will not be decided this term.

The Court's order directs the parties to focus their briefs on the following question:

"Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, 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."

Compare this question with [the questions that were before the Court](#) in its initial review of the case:

"Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time.

Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decisions provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held."

Leading up to last week's oral arguments, the attention of most observers had been focused on the question of whether companies are proper defendants in ATS cases. Now, the Court has refocused its review of the case on the issue of extraterritoriality. [As noted in our initial review of last week's arguments](#), several Justices focused on the extraterritoriality in their questions to petitioners' counsel.

As [several commentators](#) have observed, the Court's decision to rehear *Kiobel* comes immediately after its review of whether to grant a writ of certiorari in [Sarei v. Rio Tinto](#), a Ninth Circuit case in which questions of extraterritoriality have been a central issue. While the Court has not announced a decision on whether it will review *Sarei*, by issuing an order for rehearing in *Kiobel*, the Court has made clear that it will address the extraterritoriality issues at stake in ATS jurisprudence.

While the Ninth Circuit's most recent decision in *Sarei* was most notable in that it [upheld corporate liability under the ATS](#), court observers may remember the vigorous dissent by Judge Kleinfeld to the *en banc* Court's November 2010 order referring the case to mediation. In that dissent, Judge Kleinfeld stated that,

"We have not yet decided whether we have jurisdiction over this dispute. I very much doubt that we do. I suspect that we lack jurisdiction both because the case involves a political question and

because we lack subject matter jurisdiction on account of extraterritoriality. This case is entirely extraterritorial. The claims are by Papua New Guineans against a BritishAustralian company for wrongs committed in Papua New Guinea. Although Rio Tinto has operations in many countries, including the United States, and Sarei lived in the United States as a resident alien when the complaint was filed, nothing done by Americans or in America, is at issue."

Judge Kleinfeld then suggested that "[the point of the ATS was to keep us out of international disputes, not to inject us into them.](#)"

In last week's hearing, Justice Alito observed that *Kiobel* involved Nigerian plaintiffs alleging violations of international law in Nigeria. He then questioned, "What business does a case like that have in the courts of the United States?" Judge Kleinfeld's dissent takes on new relevance now that the Supreme Court's express intent in reviewing *Kiobel* has shifted.

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