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INTERNATIONAL LITIGATION CLIENT ALERT

KIOBEL: MAJOR U.S. JURISDICTIONAL LIMITATION FOR OVERSEAS ACTIONS

Much of the public has never heard of the Alien Tort Statute ("ATS," 28 U.S.C. § 1350), but this law, dating back to the founding of the country, recently has had enormous implications for multinational corporations and foreign sovereigns, as they have often been sued in United States courts for actions taken—or allegedly taken—overseas. The Supreme Court, on April 17, 2013, handed them an important victory by severely restricting the right to sue foreign defendants under the ATS in the United States for overseas acts.

The ATS is a jurisdictional statute allowing U.S. courts to hear "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." Although rarely invoked until recent decades, plaintiffs in the 1980s began frequent invocation to challenge overseas activities allegedly fitting into the ATS definition of a "tort . . . in violation of the law of nations or a treaty of the United States." The Supreme Court added both clarity and ambiguity to the ATS in 2004 when it decided *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), holding that U.S. courts have jurisdiction to consider an alien's federal common-law claim for violations of well-established and well-defined norms of international law of the type considered by Congress when it passed the ATS in 1789. The lower courts have varied in defining these norms, often allowing suits to proceed in cases alleging human rights violations.

The Supreme Court, last week, issued its eagerly awaited decision in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __ 2013 (slip op.), affirming the appellate court's decision and rejecting application of the ATS to actions occurring in the territory of a foreign sovereign. *Kiobel* was brought initially in the U.S. District Court for the Southern District of New York under the ATS by a group of Nigerian nationals residing in the United States. The plaintiffs alleged that Royal Dutch Petroleum Co., Shell Transport & Trading Co., and their joint Nigerian subsidiary enlisted the Nigerian government to suppress demonstrations against the companies' practices. Importantly for the *Kiobel* decision, the alleged wrongdoing all occurred within Nigeria. The plaintiffs alleged that the court had subject matter jurisdiction under the ATS on the theory that the defendant companies aided and abetted the Nigerian government's extrajudicial killings, crimes against humanity, torture, and other violations of international norms purportedly falling within the scope of the ATS. The District Court dismissed some claims, retained others, and allowed an immediate appeal. The Second Circuit Court of Appeals, however, dismissed the entire complaint on the ground that the "law of nations," and specifically in the *Kiobel* circumstance, human rights abuses in violation of customary international law, did not extend liability to corporations. *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 120 (2010).

The Supreme Court initially considered the issue of whether the law of nations recognizes corporate liability, but after full briefing and argument in 2012, it made the unusual request for supplemental briefing and a second argument on the issue of "whether and under what circumstances courts may recognize a cause of action under the [ATS] for violations of the law of nations occurring within the territory of a sovereign other than the United States." Following that unusual step, the Supreme Court on April 17 affirmed unanimously the appellate court's dismissal, expressed through four concurring opinions containing two distinctly reasoned bases.

A majority of five Justices based their opinion on a presumption against extraterritorial application of U.S. statutes, which the Justices found was necessary here to protect foreign relations between nations. Chief Justice Roberts, joined by Justices Scalia, Alito, Kennedy, and Thomas, explained that "[t]he presumption against extraterritoriality guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." Slip op. at 13. The presumption was deemed particularly warranted in the ATS context because of the danger of judicial infringement upon the discretion of the political branches of government, a danger heightened further where courts are called upon to consider actions carried out in the territory of a foreign sovereign. These Justices held that nothing in the ATS rebuts the presumption against extraterritorial application, and, even where there is a U.S. nexus, the claims must "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." Slip op. at 14.

The Court acknowledged the legislative branch's constitutional opportunity to pass a law allowing U.S. jurisdiction over alleged violations of international law committed outside the United States, but made clear that U.S. courts cannot hear such matters under the ATS. For example, the Court referenced "Congress's enactment of the Torture Victim Protection Act of 1991, 106 Stat. 73, note following 28 U.S.C. § 1350," slip op. at 6, as an exercise of the "'Legislative and Executive Branches in managing foreign affairs,'" slip op. at 5. The principle against extraterritoriality constrains the courts and appropriately leaves foreign policy management to Congress and the President. *Id.* at 13-14 ("If Congress were to determine otherwise [that an action displaces the presumption against extraterritorial application], a statute more specific than the ATS would be required."). Upon this reasoning the majority affirmed *Kiobel*, saying nothing about the merits of the underlying ATS claim. The decision, due to the nature of the ATS, was "'strictly jurisdictional.'" *Id.* at 5 (quoting *Sosa*, 542 U.S. at 713).

Justice Kennedy's concurring paragraph clarified what the majority opinion did not say. The majority opinion hinged on the facts of the *Kiobel* case, which squarely fit within the "foreign cubed" framework of a foreign plaintiff, a foreign defendant, and a foreign action. Justice Kennedy noted that "other cases may arise" that do not fit so simply within this scheme. Kennedy Concurrence at 1. His opinion seems to indicate that the door to ATS is not fully shut by the principle of extraterritoriality. Notably, the majority opinion did not answer the question of whether corporations may be held liable for human rights abuses. Further, the opinion left open the ability of Congress to pass legislation addressing human rights abuses committed abroad, such as it did in limited fashion through the TVPA. We have yet to see where "cases covered neither by the TVPA nor by the reasoning and holding of today's case" might be headed in the future. *Id.*

In contrast to Justice Kennedy's "door might still be cracked open" Concurrence, Justice Alito's Concurrence, joined by Justice Thomas, pined for a "broader standard" that might push the door closer towards shut. Alito Concurrence at 1. He found that ATS actions should "be barred" unless the underlying cause of action is both domestic (and hence does not trigger the presumption against extraterritoriality) and is of the same specific and universal nature as the 18th Century violations of international law required for ATS claims as stated in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723-724 (2004). *Id.* Quoting the language from *Morrison v. National Australia Bank Ltd.*, Justice Alito reminded the public that "the 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." *Id.*, *quoting Morrison*, 561 U.S. __ (2010) (slip op.,

at 17). The Alito Concurrence seems aimed at limiting the broader application of the ATS proposed by Justice Breyer in his concurring opinion. It seeks to definitively limit the ATS to universal, specific, and obligatory violations of the law of nations remarked upon by the *Sosa v. Alvarez-Machain* opinion, 542 U.S. 692, 723-724 (2004), which are (1) violation of safe conducts,[1] (2) infringement of the rights of ambassadors, and (3) piracy. "[A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations." Alito Concurrence at 2.

A minority of four concurring Justices—Breyer, Ginsburg, Sotomayor, and Kagan—rejected the invocation of the presumption against extraterritoriality. Even these concurring Justices, however, agreed that there were real limits on the extraterritorial application of the ATS, allowing such application only where "distinct American interests are at issue," such as where the alleged tort occurred in the United States or the defendant is a U.S. national. Justice Breyer specifically identified three instances where he believed ATS could apply: (1) where the claim arises from actions done in the United States, (2) where the defendant is a United States national, or (3) where the "defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." Breyer Concurrence at 1-2. This minority would also encourage the courts' invocation of other doctrines that might limit extraterritorial application of the ATS, such as comity among nations and the requirement that local remedies be exhausted. *Id.* at 7.

The *Kiobel* decision stands as a significant barrier to U.S. jurisdiction under the ATS, particularly where the alleged acts occurred in the territory of a foreign sovereign or where such acts merely "touch" the United States. So say all nine Justices. But, the Court split on the underlying rationale may breathe life into future ATS cases, though undoubtedly in a narrowed legal landscape. The decision may also lead to additional Congressional action along the lines of the TVPA or the Foreign Corrupt Practices Act, to explicitly extend the U.S. courts' jurisdiction beyond U.S. territorial boundaries.

[1] A note on "safe conducts." The notion of "safe conducts" is the idea of protecting foreign nationals, or "aliens," who are present in the United States from tortious harm committed by U.S. nationals. This concept is expressed, for example, in the Magna Carta, at clause 41: "All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs. . . . [except] in time of war . . . [where] any such merchants found in our country at the outbreak of war shall be detained without injury to their persons or property, until we or our chief justice have discovered how our own merchants are being treated in the country at war with us. If our own merchants are safe they shall be safe too." Translated by Fordham University and *available at* www.fordham.edu/halsall/source/magnacarta.asp (last visited April 23, 2013).