As *Kiobel* Turns One, Its Effect Remains Unclear

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April 29, 2014

On April 17, 2013, the Supreme Court issued its decision in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), holding that the Alien Tort Statute—a federal law that allows aliens to bring civil suits in U.S. courts for international law violations—does not reach alleged misconduct that "took place outside the United States" in most cases. At the time, commentators predicted that the Court's decision would significantly curtail ATS litigation against businesses in the United States—in particular, limiting suits against multinational companies that operate in developing countries. But there also was concern that ambiguous language in the decision might leave the door open for plaintiffs to continue to file ATS suits, especially against U.S. companies, relating to acts in other countries if plaintiffs can allege a sufficient nexus with the United States.

This month marks the first anniversary of *Kiobel*. As expected, lower courts have tightened the reins on the Alien Tort Statute over the past year and have dismissed several high-profile ATS cases in light of *Kiobel*. These courts have agreed that *Kiobel* prevents plaintiffs from bringing so-called "foreign-cubed" cases in which *foreign* plaintiffs sue *foreign* defendants for torts committed in a *foreign* country. But some courts have allowed plaintiffs in existing suits against U.S. companies to amend their complaints to allege a possible nexus to the United States. *Kiobel* also seems to have dampened the enthusiasm of plaintiffs' lawyers to use the ATS to sue corporations for alleged violations of international law: It appears that no new ATS cases have been filed against U.S. companies since *Kiobel*. However, plaintiffs may simply be marshaling new arguments or waiting for appropriate fact patterns before they begin filing new lawsuits.

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The Supreme Court in *Kiobel* clarified that the ATS does not ordinarily supply jurisdiction when "all the relevant conduct took place outside the United States." The Court's opinion, authored by Chief Justice Roberts, explained that federal statutes are generally presumed not to apply to conduct outside the United States absent a clear statement by Congress, and that this "presumption against extraterritoriality" also applies to the ATS. Based on these principles, *Kiobel* was an easy case to decide. The claims in *Kiobel* were brought by Nigerian nationals against British, Dutch, and Nigerian corporations for allegedly aiding and abetting human rights violations committed by the Nigerian government in Nigeria. The case thus had no nexus to the United States, and all nine justices agreed that the ATS could not extend to cases in which the parties and relevant conduct lack sufficient ties to the United States.

The Court appeared to leave the door open, however, to ATS cases that have a greater connection to the United States. In a cryptic conclusion, Chief Justice Roberts stated 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." Although a corporation's "mere presence" in the United States is an insufficient basis upon which to predicate ATS jurisdiction, the Court did not explain what claims will "touch and concern" U.S. territory with sufficient force to overcome the presumption.

Litigants have hotly debated the meaning of *Kiobel*'s "touch and concern" caveat over the past year, with plaintiffs offering various theories on why their cases might have a sufficient nexus to the United States. Overall, lower courts have adhered to the Supreme Court's directive to dismiss cases in which plaintiffs could not plausibly plead allegations involving *substantial* unlawful activity on U.S. soil. For example, courts have held that the following U.S. contacts do not sufficiently "touch and concern" the United States for ATS jurisdiction: where plaintiffs are U.S. residents; where defendants have a substantial U.S. presence; where the case implicates important U.S. foreign policies; or where the United States occupied the territory in which the wrongful conduct occurred (e.g., Iraq).

In contrast, two courts have permitted ATS claims to proceed on the merits based on significant U.S. contacts, although neither case involved a corporate defendant. One case involved the bombing of an American embassy and included overt acts within the United States in furtherance of the attack.

Mwani v. Bin Laden, 947 F. Supp. 2d 1 (D.D.C. 2013). The other case similarly involved substantial conduct within the United States, in which the defendant worked for over a decade from Massachusetts to support the oppression of gays and lesbians in Uganda, including drafting legislation imposing the death penalty for homosexuality. *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013). One other court has stated in dicta that an ATS claim "arguably" may proceed where a U.S. corporation develops a product "predominantly, if not entirely, within the United States" with the specific intent that it will be used to commit violations of international law. *Du Daobin v. Cisco Systems, Inc.*, No. 11-cv-1538, 2014 WL 769095, at *9 (D. Md. Feb. 24, 2014).

In the middle are cases where plaintiffs have alleged that defendants engaged in some limited U.S. activity related to international law violations abroad. The Second Circuit held in *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013), that the supply of automotive equipment and computer systems to the former apartheid government in South Africa by Ford and IBM, respectively, was insufficient to invoke ATS jurisdiction because the actual alleged human rights violations occurred in South Africa. Similarly, a federal court in Alabama dismissed an ATS suit against U.S.-based Drummond Company for allegedly directing a paramilitary group in Colombia to commit war crimes to protect the company's Colombian operations. The court held that the ATS was "focus[ed]" on "violations of the law of nations," such as war crimes, and that the torts in the case occurred in Colombia, even though plaintiffs alleged that the defendant's decisions to provide support to the paramilitary group were made in the United States. *Giraldo v. Drummond Co.*, No. 09-cv-1041, 2013 WL 3873960, at *8 (N.D. Ala. July 25, 2013). These cases suggest that plaintiffs must allege, at a minimum, that U.S. defendants took substantial steps within the United States to execute the unlawful conduct overseas; mere U.S.-based activity that does not itself violate international law likely is insufficient.

Courts generally have refused to distinguish between U.S. and foreign defendants in determining whether ATS claims "touch and concern" the United States, focusing instead on the location of the relevant foreign conduct. For example, the Second Circuit in *Balintulo* directed the trial court to dismiss claims against the four remaining corporate defendants—Daimler AG, Rheinmetall, Ford, and IBM—for allegedly aiding and abetting crimes of the former apartheid government in South Africa. The Second Circuit rejected the plaintiffs' argument that the ATS claims against Ford and IBM should survive *Kiobel* on the ground that those defendants are U.S. companies and their

activities thus "touch and concern the territory of the United States." The panel held that "if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*."

As a practical matter, though, U.S. companies may still have to continue defending ATS suits, at least for the time-being. Some courts have allowed plaintiffs an opportunity to amend their pleadings to attempt to allege a sufficient U.S. nexus. For example, the Ninth Circuit permitted plaintiffs to amend their complaint against a U.S. subsidiary of Nestlé to substantiate a U.S. nexus to allegations of child trafficking in Côte d'Ivoire, *Doe v. Nestlé USA, Inc.*, 738 F.3d 1048 (9th Cir. 2013); and a federal court in New York has indicated that it might allow the plaintiffs in *Balintulo* to amend their pleadings against Ford and IBM for the same purpose, *In re South African Apartheid Litigation*, No. 02 MDL 1499, 2013 WL 6813877 (S.D.N.Y. Dec. 26, 2013). Of course, these courts might still dismiss the cases after amendment if the new allegations do not sufficiently "touch and concern" the United States. The upshot is that plaintiffs face a high hurdle to keep their ATS claims alive, but the defendants in these cases will have to keep litigating through at least one more round of pleadings.

The Sound of Silence

While recent dismissals of high-profile ATS cases have grabbed headlines, *Kiobel*'s immediate impact on corporate ATS litigation has been subtler: no new ATS cases have been filed against U.S. companies over the past year. In that same period, plaintiffs have filed amended claims against U.S. companies only four times in cases that preceded *Kiobel*, one of which already has been dismissed. The relative scarcity of new filings perhaps indicates that plaintiffs' lawyers are discouraged by the Supreme Court's decisions limiting the scope of the ATS and may be focusing their litigation strategies elsewhere.

On the other hand, lawyers who regularly represent ATS plaintiffs might simply be probing the limits of *Kiobel*'s "touch and concern" requirement in pending suits, waiting to bring new cases that will survive a motion to dismiss. Should plaintiffs regroup and begin filing new ATS suits, they would still be required to articulate specific factual allegations of U.S.-based conduct sufficient to state a plausible claim for relief under the Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). As the Court explained in *Twombly*, bald allegations of wrongdoing "do[] not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."

Corporate Liability

The Supreme Court originally agreed to hear the *Kiobel* case to resolve a split among lower courts on the question whether corporations may be sued under the ATS. The Second Circuit had held that the ATS does not apply to corporations, whereas the Seventh, Ninth, Eleventh, and D.C. Circuits had held that corporations may be the subject of ATS suits. Because the Supreme Court decided the case without reaching the question of corporate liability—indeed, none of the justices' opinions even mentioned the issue—the law should remain unchanged in the circuit courts.

Dicta in the *Kiobel* decision might, however, influence lower courts' views on corporate liability going forward. In applying the presumption against extraterritoriality, the Supreme Court observed that "corporations are often present in many countries," but that "mere corporate presence" is insufficient to "displace the presumption against extraterritorial application" of the ATS. Citing that statement (and its implicit assumption that corporations might not be excluded *per se* from ATS liability), a Ninth Circuit panel in the Nestlé case recently reaffirmed circuit precedent that corporations may be held liable under the ATS. A panel of the Second Circuit also cited the Supreme Court's dicta in directing the parties to submit additional briefs on the question of corporate liability, indicating a willingness to reconsider the issue. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013). However, others panels of the Second Circuit have rejected the notion that *Kiobel* implicitly overruled Circuit precedent, stating that binding law in the circuit foreclosed suing a corporation under the ATS. *Balintulo*, 727 F.3d at 191 n.26; *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, No. 09-4483-cv, 2014 WL 503037, at *5 n.6 (2d Cir. Feb. 10, 2014).

On April 17, 2014, Judge Scheindlin in the *Apartheid Litigation* seized upon this uncertainty and held that corporations can be sued under the ATS, notwithstanding the Second Circuit's explicit statement to the contrary in *Balintulo*, which should have been binding both as Circuit precedent and as law of the case. *In re South African Apartheid Litigation*, No. 02 MDL 1499, 2014 WL 4569423 (S.D.N.Y. Apr. 17, 2014). Judge Scheindlin stated that the Supreme Court's decision to affirm *Kiobel* on the ground that the case was an improper exercise of extraterritorial jurisdiction "directly undermine[d]" the Second Circuit's prior holding that corporations were not proper defendants in ATS cases. The defendants, Ford and IBM, have asked the Second Circuit to overturn Judge Scheindlin's decision, which is not binding on any other

court—perhaps setting the stage for an *en banc* showdown to resolve the issue of corporate liability once and for all in the Second Circuit.

Aftershocks

One judge characterized *Kiobel* as "an earthquake that has shaken the very foundation" of the ATS, effecting a "seismic shift . . . on the legal landscape." Many prominent ATS cases have since fallen under *Kiobel*'s territoriality requirements. However, the aftershocks of *Kiobel* are not yet finished, and it remains to be seen whether other courts will continue to accord *Kiobel* broad breadth. Key cases are pending within the D.C. Circuit (against Exxon) and the Ninth Circuit (against Nestlé USA), and those courts will soon have to decide what level of domestic activity could be sufficient to "touch and concern" the United States under the ATS. The outcome of those cases may be bellwethers for the direction of ATS litigation in future years.