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Expert Analysis

The Alien Tort Statute: Still Raising Threshold Questions of First Impression

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The U.S. Supreme Court will soon decide the long-awaited issue of whether corporations can be liable under the Alien Tort Statute (ATS), a statute enacted by the First Congress more than 225 years ago. Earlier this year, the Supreme Court granted a petition for writ of certiorari in *Jesner v. Arab Bank*, 197 L. Ed. 2d 646 (2017) on whether a corporation—in that case, a leading Jordanian bank—can be subject to liability under the ATS for alleged violations of customary international law. The appeal will be fully briefed by September, and the Supreme Court likely will issue its decision next term.

There has been a circuit split on the issue since at least 2010. The Seventh, Ninth, and the D.C. Circuits have concluded that the ATS allows for corporate liability, while the Second Circuit has held that the statute does not allow for corporate liability. The Supreme Court's opinion in *Kiobel v. Royal Dutch Petro.*, 133 S. Ct. 1659 (2013) only further deepened the split. There, the U.S. Supreme Court initially granted certiorari on the issue of whether a corporation could be held civilly under the ATS, only to rule on another ground, namely, that the ATS claims in that particular case failed under the presumption against extraterritoriality of U.S. law. Since then, some lower courts and commentators have suggested that the Supreme Court implicitly suggested the existence of corporate liability under ATS, while others say the high court did no such thing.

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As the disparity between the two views has grown over the last several years, the Supreme Court's decision to take up the issue is timely. However, the Supreme Court's decision, if it diverges from the Second Circuit, likely would open the floodgates to lawsuits against corporations for alleged violations of customary international law, which would lead to profound and unintended consequences.

The Circuit Split

The ATS, sometimes referred to as the Alien Tort Claims Act, was enacted by the First Congress in 1789. The ATS is a laconic statute, consisting of a mere 33 words, yet it has generated its fair share of litigation regarding its meaning and scope. The ATS grants federal district courts jurisdiction over claims "by an alien for a tort only, committed in violation of the law of the nations or a treaty of the United States." 28 U.S.C. §1350.

In *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), the Court held that the ATS is a jurisdictional statute intended "to furnish jurisdiction for a relatively

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modest set of actions alleging violations of the law of nations." Id. at 2759. Yet, there is disagreement over whether a litigant can bring suit against corporations for those "modest set of actions."

There has been a circuit split on whether the ATS provides jurisdiction over claims against corporations. The split originated from circuit courts' different interpretation of the ATS's statutory language and legislative history.

The Ninth Circuit in *Sarei v. Rio Tinto*, 671 F.3d 736 (9th Cir. 2010), ruled that the ATS does not bar corporate liability. Specifically, the Ninth Circuit found that the statutory language and legislative history of the ATS does not "suggest that corporate liability was excluded and that only liability of natural persons was intended." Id. The Ninth Circuit also found support of corporate liability in *Sosa*, in which the Supreme Court noted that "a related consideration is 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 or individual." Id.

Similarly, the Eleventh Circuit allows claims against corporations under the ATS on the grounds that "[t]he text of the Alien Tort Statute provides no express exception for corporations." *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008).

By contrast, the Second Circuit in *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d. Cir 2010), known as *Kiobel I*, held that international law governs when determining jurisdiction over ATS claims, and international law does not recognize corporate liability. In particular, the Second Circuit in *Kiobel I* observed that, "No corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights." Id. at 148 (emphasis in original).

The issue of whether the ATS forecloses corporate liability was raised before the Supreme Court by way of a writ of certiorari in response to the Second Court's decision in *Kiobel I*. The Supreme Court granted certiorari on the issue of corporate liability under the ATS, yet it did not reach that issue. Instead, the Supreme Court affirmed the Second Circuit's decision on other grounds. In *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659 (2013), known as *Kiobel II*, the Supreme Court stated that "mere corporate presence" is insufficient to overcome the presumption against the extraterritoriality of U.S. laws. Although the Supreme Court did not further elaborate on that point, including, for example, clarifying how much involvement is necessary to overcome the presumption against extraterritoriality, several courts have perceived it as an indication that corporations can be held liable under the ATS.

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Yet, the Supreme Court's remark in *Kiobel II* deepened antagonism between the two views. To courts that uphold corporate liability under the ATS, Supreme Court's statement in *Kiobel II* just adds further support for that view. That is, the statement suggests that corporations "can be" subject to liability under the ATS upon showing sufficient to overcome the presumption against extraterritoriality. On the other hand, courts such as the Second Circuit assert that the Supreme Court's affirmance of *Kiobel I*, even though on different grounds, suggests that *Kiobel I* remains good law.

Since *Kiobel II*, the U.S. Supreme Court has denied petitions for writs of certiorari to address that issue in at least three different cases. This time, however, the U.S. Supreme Court decided to take up the issue.

The Arab Bank Litigation

The petitioners in *Jesner v. Arab Bank* are aliens who were injured or captured by terrorists overseas, or family and estate representatives of those who were injured, captured, or killed. They brought claims, including under the ATS, against defendant Arab Bank, a prominent Jordanian-based bank with a branch in New York, for allegedly financing and facilitating the activities of organizations that committed the attacks causing injuries to the petitioners or petitioners' family.

The U.S. District Court for the Eastern District of New York, citing the Second Circuit's decision in *Kiobel I*, dismissed plaintiffs' claims on the grounds that corporations are not subject to liability under the ATS. Plaintiffs appealed, arguing that the Supreme Court's decision in *Kiobel II* necessarily overruled *Kiobel I*.

The Second Circuit, while it acknowledged that the Supreme Court "might allow corporate liability," concluded that *Kiobel I* remains the law of the circuit and affirmed the district court's dismissal. The Second Circuit panel recommended

that the issue be reviewed en banc. However, in May of last year, eight of the 13 judges voted to deny the petition for rehearing en banc.

The majority wrote that it was unnecessary to rehear the case because the three-judge panel could have just remanded the case to the district court to determine whether the claims should have been dismissed under *Kiobel II*. The majority also stated that, although other circuits have ruled the other way, those cases were either decided pre-*Kiobel II* or that they could be resolved under *Kiobel II*. As such, the majority believed the circuit split was essentially nonexistent. In unusually harsh language, the majority wrote, "the panel's angst in having to follow *Kiobel I* was self-inflicted" because the "appeal could have been resolved under *Kiobel II*," while "[g]oing in banc on this would do nothing but supply catnip for law clerks looking to teach."

Plaintiffs petitioned to the Supreme Court, arguing that the issue is important and determinative. Plaintiffs' petition for writ of certiorari was granted by the Supreme Court.

Adverse Effects

The Supreme Court's decision has the potential to impact foreign banks that handle thousands of international transactions on a daily basis. In particular, if the Supreme Court reverses the Second Circuit's decision, foreign banks may be held liable in the United States for claims brought by foreign nationals regarding alleged tortious acts committed by foreign governments or foreign organizations outside the United States.

Corporations, especially foreign banks, likely will become targets of ATS suits for their deep pockets and the difficulty the plaintiffs have in pursuing claims against the actual wrongdoers. Corporations that conduct business in the United States will become subject to liability for ATS claims. Even more troubling, foreign banks that do not conduct business in the United States, but which maintain correspondent bank accounts in the United States for their dollar-clearing operations, can be haled into the U.S. courts for ATS claims. That is especially true as some U.S. courts have adopted an expansive view of specific jurisdiction over foreign banks simply by dint of maintaining a correspondent bank account. Lanier Saperstein, Dan W. Beebe, and Carol Lee, "Expansive Take on Specific Jurisdiction: *Gucci America v. Weixing Li*," NYLJ, March 28, 2016.

Arab Bank's only involvement on which the plaintiffs based their claims was the clearing of the dollar-denominated payments for its customers in the Middle East through the Clearing House Interbank System (CHIPS), an automated processing system. As a CHIPS participant, Arab Bank's branch received and sent dollar-denominated payment orders for fund transfers that originated and terminated overseas. This type of routine payment clearing operation in the United States is omnipresent among foreign banks. If the Supreme Court finds that such operation of processing wire transfers "touch and concern" the territory of the United States "with sufficient force" to permit application of the ATS, then all of the foreign banks that process wire transfers through this mechanism can expect to be sued in the United States by foreign nationals for injuries suffered on foreign soil.

Potentially subjecting foreign banks to liability under the ATS based on their attenuated connections to the United States, namely, the clearing of dollar-denominated payments through the U.S. payment systems, is not only bad policy but also inconsistent with Supreme Court's opinion in *Kiobel II*. The Supreme Court's opinion there seems to indicate that, even if it eventually decided that corporations can be subject to liability, the circumstances in which a corporation's conduct can be found liable will be restricted. In particular, a corporation's involvement in the wrongdoing must not be "mere corporate presence" but more than that. That said, in addition to making a decision on the issue, the Supreme Court should limit the scope in which corporations can be held liable for alleged violations of international norms.

Conclusion

Currently, the parties are preparing their briefs that will be submitted to the Supreme Court in the next few months. We should expect a decision from the court in the next term on the anticipated issue of whether the Alien Tort Statute categorically forecloses corporate liability.