

Kiobel v. Royal Dutch Petroleum: Supreme Court Issues Murky Opinion That May Ironically Clear Some Waters

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The U.S. Supreme Court's long anticipated decision in *Kiobel v Royal Dutch Petroleum* addressed federal court jurisdiction over corporate liability for human rights violations committed overseas. It appears, however, that the ruling may be somewhat contradictory in its impact.

On April 17, 2013, the Supreme Court issued what many view as an ambiguous and incomplete decision that does not definitively resolve the issues presented by the case. On the other hand, with *Kiobel* decided, multinational businesses and governmental entities may now be able to focus more attention on other pressing questions surrounding business obligations and potential liabilities with respect to human rights.

Background

The *Kiobel* case is an important legal milestone in a long history of conflict over allegations of human rights abuses in Nigeria's Ogoniland in the Niger Delta. The Royal Dutch Shell Company began oil exploration in the region in 1958. In the 1990s, the Ogoni people began a movement to oppose the exploration efforts on environmental grounds. There is little dispute that the Nigerian government engaged in brutal attacks on the Ogoni in response to this opposition, including beatings, property seizure and extrajudicial killings. The controversy revolves around the question of whether Royal Dutch Shell was complicit in this conduct.

In 2002, Esther Kiobel filed a federal class action lawsuit alleging that Royal Dutch Shell had "aided and abetted" the attacks on Ogoni civilians by providing vehicles, food, transportation, compensation and staging areas for attacks. Her legal basis was the Alien Tort Statue, or ATS - also known as the Alien Tort Claims Act - a law enacted in 1789 granting jurisdiction to federal courts for "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."

The U.S. District Court in the Southern District of New York dismissed several of Kiobel's claims on the grounds that they did not constitute violations of the law of nations. The Second Circuit Court of Appeals dismissed Kiobel's entire case on the grounds that the law of nations did not recognize corporate liability.

When the Supreme Court agreed to hear Kiobel's appeal, the case garnered significant attention. More than 100 amicus curiae (friend of the court) briefs were filed by business groups, human rights organizations, foreign governments and academics, most focusing on the corporate liability issue which the court had agreed to decide. However, after oral argument last spring the Court directed the parties to

brief the issue of whether the ATS granted U.S. courts jurisdiction to hear matters arising out of conduct occurring in a foreign jurisdiction. The problem was labeled a “foreign cubed” issue because the conduct occurred abroad and neither the plaintiffs nor the defendant corporation was domestic.

Supreme Court Opinion

Last week, the Court ruled unanimously that federal courts lack jurisdiction to hear the so-called foreign cubed cases. However, Chief Justice Roberts’ opinion for the majority is not a picture of clarity, and relies on an interpretive canon known as “the presumption against extraterritoriality,” which is at best an awkward fit.

While clearly ruling against foreign cubed cases, he seems in his final paragraph to leave open the possibility for ATS jurisdiction in “foreign squared” cases (for example, where foreign conduct might “touch and concern the territory of the United States... with sufficient force...”). This could be interpreted to mean that the involvement of an American plaintiff, or perhaps even an American corporate defendant, would give the Court jurisdiction over conduct committed abroad.

Chief Justice Robert’s opinion makes but a single mention of the question of corporate liability for violations of the law of nations, the issue that brought the case to the Court initially. The final paragraph states, in an apparent reference to Royal Dutch Petroleum’s nominal presence in the U.S., that “Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”

Adding further inscrutability to the Court’s decision, Justice Kennedy’s concurrence notes that “The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute.”

Implications and Analysis

The initial question of possible corporate liability for human rights violations remains largely where it was before the Supreme Court decided to hear *Kiobel*, and for that reason we are undoubtedly in store for future litigation on the scope of ATS and the broader implications of the presumption against extraterritoriality in other contexts.

With *Kiobel* no longer a dominating focus for discussing corporate human rights obligations, it is hoped that more broad-based discussions of issues at the intersection of business and human rights concerns will be forthcoming, and that multinationals will broaden their commitment to developing and implementing human rights due diligence policies with full “C-level” support.

Much of this discussion in recent years has centered on supply chain issues. Although there is imaginative work underway in this area, compliance efforts are still in a formative phase, and federal litigation is

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pending in which industry organizations and others have challenged the implementation of SEC Regulations handed down to comply with the Conflict Minerals provisions of Dodd-Frank.

Although supply chain issues are critical, it is also important to be aware of an increased focus on the human rights implications of mergers and acquisitions, licensing and franchising, and a host of other areas including the impact of child and sex trafficking on the travel and entertainment industries. Corporations which can successfully navigate the rapidly evolving universe of human rights obligations and concerns through proactive and preventative action will be best positioned to avoid future litigation.