April 18, 2013

Supreme Court Limits Tort Claims for Violating the Law of Nations

The Supreme Court ruled unanimously yesterday in *Kiobel v. Royal Dutch Petroleum*, No. 10-1491, 2013 U.S. LEXIS 3159 (Apr. 17, 2013), that a claim under the Alien Tort Statute (ATS), which relates to civil actions by foreign citizens for violations of the "law of nations," does not extend to conduct that occurred on foreign soil. This ruling upheld the U.S. Court of Appeals for the Second Circuit in its dismissal of an ATS suit originally filed in the Southern District of New York by Nigerian plaintiffs against Netherlands-based Royal Dutch Shell PLC (Shell Oil). The suit alleged complicity in human rights violations committed against Nigerian civilians in Nigeria's oil-rich Ogoni region. Specifically, the Supreme Court held that a canon of statutory interpretation?- the "presumption against extraterritoriality"?- applies to claims asserted under the ATS and that nothing in the statute's text, history or purpose rebuts that presumption.

The Court emphasized that a finding of extraterritorial ATS reach could constitute "unwarranted judicial interference in the conduct of foreign policy" and failed to find any indication the statute was passed to make the United States a forum to enforce international norms. The Court also noted that a finding of extraterritorial jurisdiction under the ATS could provide a reciprocal basis for other nations to hale U.S. citizens into their courts for conduct occurring anywhere in the world, including conduct occurring in the United States.

Chief Justice Roberts authored the majority opinion, which was joined by Justices Scalia, Kennedy, Thomas and Alito. Justices Kennedy and Alito filed concurring opinions noting the narrow scope of the Court's holding. Justice Thomas joined in Justice Alito's opinion. Justice Breyer filed an opinion concurring in the judgment but indicated he would not have relied upon the presumption of extraterritoriality. Justice Breyer also argued for a broader statutory interpretation that would allow for the protection of U.S. citizens and U.S. interests. Justices Ginsburg, Sotomayor and Kagan joined in Justice Breyer's concurrence.

The Court's opinion and the concurring opinions can be found here.

Background

Originally enacted as part of the Judiciary Act of 1789, the ATS allows foreign citizens to bring civil actions "committed in violation of the law of nations or a treaty of the United States" in U.S. district courts. The first significant ATS case was heard by the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In *Filartiga*, the court held that a foreign national could bring a suit against another foreign national living in the United States for torture that occurred abroad. In 2004, the Supreme Court determined in its first?- and until *Kiobel*, only?- ATS case that the ATS confers jurisdiction over lawsuits for certain limited, serious violations of international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Notably, the *Sosa* holding did not address whether the ATS applies if the violations of international law occur in another country.

In *Kiobel*, novel questions were raised regarding the proper interpretation of the ATS in the context of corporate tort liability and customary international law. The Southern District of New York had initially ruled in 2006 that customary international law did not define the violations claimed by the Nigerian plaintiffs with the particularity required by *Sosa*. On appeal, the Second Circuit found that corporations cannot be sued in the same manner as any other private-party defendant under the ATS.

The Supreme Court granted certiorari in October 2011 to consider certain questions related to whether the ATS applied to corporations. In March 2012, the Court ordered a rare second hearing and supplemental briefing to ponder the issue of whether and under what circumstances the ATS would allow courts to recognize a cause of action at all for violations of the law of nations that occur overseas. Reargument before the Court took place on October 1, 2012, and yesterday's decision has been much anticipated.

Looking Ahead

The Court's ruling in *Kiobel* has significant implications for U.S. corporations that do business on foreign soil. Mining companies, oil companies, pharmaceutical companies, manufacturers and financial institutions have all been the subject of ATS claims. Due to the nature of the allegations in a typical ATS case, the potential damages sought have historically been quite substantial. The determination that the ATS does not have extraterritorial reach indicates that, for the time being, corporations will not likely face the same level of potential liability from their overseas activities under this statute as they have in the recent past. However, the narrow holding, the issues raised in the concurring opinions and the submission of voluminous amicus briefs to the Court all suggest a strong likelihood of continued legal challenges regarding overseas violations of international law. U.S. individuals and companies that are considering initiating overseas operations or those already engaged in overseas operations would be well served to carefully monitor their overseas operations to be certain that they are not running afoul of other similar U.S. laws and that they are in compliance with any foreign laws that might subject them to the same sort of tort liability that, until yesterday, has been vigorously pursued in the United States under the ATS.