

# The Alien Tort Statute's impact on the business community



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The Supreme Court currently has before it *Kiobel v. Royal Dutch Petroleum*, a civil lawsuit brought under the Alien Tort Statute (ATS), alleging that Shell aided and abetted the Nigerian government's human rights violations in the Niger Delta. The case and Court's impending decision, expected this summer, will have a significant impact on the business community both in the United States and potentially, around the world.

For those not familiar with the ATS, it is a single sentence in the US Judiciary Act of 1789, which reads: "the district courts shall have original jurisdiction of 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." Despite the absence of legislative history, it is clear that the ATS establishes US federal jurisdiction, but lacks specificity about causes of action.

The "law of nations" in 1789 did not envision a broad range of torts: to allow aliens to recover in US courts for acts of piracy, violations of safe conducts, and interference with the rights of ambassadors. The law was dormant for about 200 years until a Paraguayan national living in New York found himself in the same jurisdiction as the Paraguayan police official who had tortured and killed her brother in Paraguay.

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In *Filartiga v. Pena-Irala* the Second Circuit agreed with Ms Filartiga that torture, like piracy does violate the law of nation as currently understood and awarded more than \$10 million for the torture and wrongful death of her brother. The *Filartiga* ruling established that the ATS could be used to bring civil suits for torture and wrongful death of a non-US citizen that occurred outside the United States. By extension other torts such as arbitrary detention, extrajudicial killing, slavery and genocide, which are broadly accepted norms of customary international law.

After *Filartiga* plaintiffs initially targeted foreign officials for human rights violations, but by the 1990s the ATS was being

used to bring suits against multinational corporations for aiding and abetting human rights violations by governments of countries where they did business. Since then over 80 corporate ATS cases have been filed.

None have been won by plaintiffs and only two have been settled. Many of these cases have been class actions filed by NGOs representing groups of plaintiffs, sometimes in conjunction with members of the American trial bar. A major example is what is known as the apartheid suit, now known as *Balinjtulo v. Daimler et al.* This suit was originally brought in 2001 against more than 60 multinational corporations for aiding and abetting human rights violations by the South African apartheid regime. The suit asked \$5 billion and was filed by a South African NGO, the Khulumani Group, and American trial lawyers Ed Fagan and Michael Hausfeld. Eleven years later it remains in Federal District Court in New York. The *John Doe v. ExxonMobil* case involving Indonesia has been litigated the same length of time.

In 2004, in *Sosa v. Alvarez-Machain* the Supreme Court held that while the ATS does not create a private right of action, the courts could hear claims when a defendant has violated norms that are "universal, obligatory and specific." The Court went further and argued that causes of action should be limited to those with the "definite" content and acceptance among civilized nations "such as the 18<sup>th</sup> Century paradigm familiar when the law was enacted." The Court then cautioned the lower courts to take foreign policy consequences into consideration and not to freely recognize expansive claims under the ATS.

*Sosa* left unsettled the issue that came to the Court in *Kiobel*: does international law extend liability under the ATS to non-state actors like corporations? And secondarily, are non-state actors liable for aiding and abetting the acts of others, such as foreign governments in whose jurisdiction they are conduct business? In 2010, the Second Circuit ruled in *Kiobel* that ATS liability does not extend to corporations, putting them in conflict with the DC Circuit and the Ninth Circuit and laying the basis for Supreme Court consideration.

In an amicus brief supporting the defendant in the *Kiobel* case, the National Foreign Trade Council (NFTC) argued that while we believe the Second Circuit's ruling should be upheld, the fact that over 95 percent of corporate cases under the ATS involve allegations of aiding and abetting, the Court should rule on the standard for that charge, specifically that "aiding and abetting liability requires pleading

and proving purpose to facilitate the direct violator's unlawful conduct, not mere knowledge of that conduct." Our intent was to encourage the Court to adopt a "purpose to facilitate" standard for aiding and abetting that would rule out the most frivolous ATS cases.

### **The impact on the US business community**

US business has been frustrated, at least since the Court's 2005 decision in *Sosa* by the prospect that lengthy and expensive lawsuits may be lodged against corporations on an ill-defined universe of grounds. Lawsuits under the ATS have significant tangible and intangible costs to corporate defendants. Some of these costs, such as legal fees, are easily quantified while others, such as reputational damage are less easily quantified. Second-order costs, such as opportunity costs to developing economies, are simply not quantifiable, but no less real.

Any real assessment of the costs of ATS lawsuits would also assess the benefits. Who gains when a company is sued under the ATS? Does the threat of ATS lawsuits affect corporate behaviour? Does the possibility of being sued increase corporate sensitivity to human rights or does it disincline them to invest in countries whose governments have poor human rights records? Is the impact of the ATS exclusively at the level of the firm or are there macro-economic consequences?

The most obviously quantifiable cost of defending against an ATS claim is the substantial legal fees for outside counsel incurred. This is especially true because of the length of these suits. The South Africa apartheid case was filed in 2001 and is still in Federal District Court 11 years later. *Doe v. ExxonMobil* has been in court the same amount of time. Given the quality of legal representation in these cases, the cost is in well into the hundreds of thousands of dollars. One must add to the cost of outside counsel the time of in-house counsel and government affairs and other executives in preparing the defence to arrive at a full accounting of the monetary cost.

There have been efforts, notably several years ago by the Peterson Institute for International Economics, to quantify the macro-economic effect of a proliferation of ATS lawsuits. The Institute estimated that a further proliferation of ATS suits would in fact result in US companies divesting from targeted countries. The result could be the loss of as much as \$55 billion of foreign direct investment. Beyond the loss of profit from the divestment, also lost would be the exports entailed by those investments. The Institute estimated that it could cost the US economy roughly \$10 billion with the potential dislocation of 400,000 jobs<sup>1</sup>.

This may be a hypothetical worst-case scenario, but in an increasingly competitive globalized economy and given the domestic imperative for job-creation, seemingly cost-free impediments to foreign investment and commerce such as the ATS necessarily warrant close, quantitative scrutiny.

### **Reputational cost**

Less easily quantified, but equally costly is the damage to brands of companies accused of committing or aiding and abetting crimes against humanity. This is obviously

a greater cost for consumer products companies than extractive industries. We take it as an article of faith that being seen to be a good corporate citizen has a positive value in the marketplace. That is certainly true for companies in highly competitive consumer markets. As with individual persons, once a consumer products company has suffered reputational damage, it is difficult and costly to recoup.

There is also potential cost in equity markets where there is risk of divestment. This is especially true given the proliferation of US state and local statutes mandating divestment by public pension funds and other government assets from companies with a commercial connection to a targeted country. The template of these laws and proposed legislation is to identify "scrutinized companies" that have such a connection and to divest their equities. Companies so identified have an increased risk of becoming defendants in ATS cases and of being the target of a consumer boycott.

### **The cost to host countries**

There is clearly a potential impact of ATS cases on foreign direct investment (FDI) in developing countries where the US government may have an interest in increasing FDI. There are also cases where there is no official US policy to increase foreign investment, but the absence or departure of investors may have negative political consequences.

Take Ecuador as an example. One year ago, Chevron was found guilty by an Ecuadorian court of despoiling the environment and damaging the human rights of indigenous populations. The court fined Chevron \$18 billion. The case began as an ATS suit in the United States and was transferred to Ecuador under the *forum nonconveniens* doctrine. The verdict confirms Ecuador's reputation as a poor FDI destination. The country ranks 130<sup>th</sup> in the world for ease of doing business and the World Economic Forum ranks Ecuador 105<sup>th</sup> out of 139 countries on competitiveness.

But Ecuador's petroleum reserves and fragile democracy constitute a US national interest, one which would be well served by economic stability. The lawsuit against Chevron, and especially the Ecuadorian court's judgment, militates further against the country's long-term prospects to the detriment of regional stability.

The need to discourage ATS lawsuits to be able to attract foreign investment was on dramatic display in the early stages of the apartheid ATS suit at a time when the newly-elected South African government hoped to attract major foreign investments to create jobs in a country with a real unemployment rate of about 35 percent. Then-South African President Thabo Mbeki said of the lawsuits:

*"In the recent past the issue of litigation and civil suits against corporations that benefitted from the apartheid system has sharply arisen. In this regard, we wish to reiterate that the South African government is not and will not be a party to such litigation.*

*We consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility*

*for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation<sup>2</sup>."*

Because so many developing countries have a significant and often compelling appetite for direct investment by multinational corporations, the deterrent effect of the ATS on FDI, combined with the sovereignty sensitivities of recipient countries, makes an authoritative ruling by the Supreme Court all the more important.

While developing countries may vie for foreign investment, we must take account of those who regard the role of multinational corporations in developing countries to be ipso facto nefarious. For example, Terry Collingsworth, an advocate of vigorous use of the ATS, has cited the NFTC among others as having *"unleashed an aggressive campaign to immunize trans-national corporations from the reach of the ATS ... Despite their embrace of codes of conduct, and their espousal of the rhetoric of 'corporate responsibility,' in the sole instance where there is the prospect of a binding legal standard, the corporate community is absolutely adamant that something must be done to relieve them from the application of the ATS."* Mr Collingsworth goes on to cite corporations' *"powerful resistance to introducing the rule of law to the global economy."*<sup>3</sup>

Collingsworth is of course wrong. The business community does require certainty about the rules of the road as it performs the highly useful function of investing in and trading with developing countries. The ATS as currently construed, and as dramatically illustrated by the division in its interpretation by Federal Circuit Courts, is a major source of uncertainty, which has the potential of retarding the very development of the rule of law in the global economy.

### **Status of the *Kiobel* case**

On March 5, 2012, 10 days after hearing oral argument, the Court ordered the case reargued, this time on extraterritorial application: *"whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the US"* This was a key issue during oral argument. In his first question, Justice Kennedy said *"no other nation in the world permits its courts to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection."* Justice Ginsburg

reiterated Kennedy's question, and Justice Alito said *"there's no particular connection between the events here and the US,"* and Chief Justice Roberts followed by asking *"If there is no other country where this suit could have been brought, isn't it a legitimate concern that allowing the suit itself contravenes international law?"*

Finally Justice Alito summarized the facts of the case and asked *"what business does a case like that have in the courts of the United States? ... There's no connection to the United States whatsoever."* Justice Kennedy contrasted *Kiobel* to *Sosa* where plaintiff and defendant were both *"walking the streets of New York."* Oral argument largely bypassed the question of aiding and abetting liability, although in one exchange counselor Sullivan answered Justice Kagan by saying *"you can't just find an act out there are fan out to anyone in the entire world, including consumers pumping gas in Ohio and say there's been an act of international law violation."* There ensued a brief exchange between Justice Kennedy and Ms Sullivan about the knowledge standard vis-à-vis a purpose standard.

Numerous amicus briefs were filed in both sides in the Court's February session on *Kiobel*. Two of the United States' most important allies, the UK and the Netherlands said in their brief: *"There is no international norm applicable to corporations for violations of the human rights offenses here."* As defence counsel, Kathleen Sullivan argued, *"A corporation involves many stakeholders beyond the perpetrators. It was established at Nuremberg that it is individuals who are liable for human rights offenses."*

In questioning about corporate liability, the defence argued that international conventions apply to governments and natural persons, but not to corporations. This led to a discussion of whether corporations are natural persons with the defence arguing that human rights conventions and the Torture Victims Protection Act are careful to speak about *"natural person,"* thereby excluding corporations.

We cannot know what issue the Court will rule on let alone how it will rule. Should it uphold *Kiobel*, however, it most likely follows that corporate officials would be sued as individuals. So, having moved on from the original question of corporate liability, the Court became seized of extraterritoriality and ordered a rehearing on that issue, setting a briefing schedule through the end of June. ■

1. Hufbauer, Gary Clyde and Mitrokostas, Nicholas K, "Awakening Monster: The Alien Tort Statute of 1789," Institute for International Economics, Washington, DC, 2003.

2. May 16, 2002 letter from the South African foreign minister, Nkosazana Zuma to Secretary Colin Powell, in which President Mbeki was quoted.

3. Collingsworth, Terry, "Beyond Public Relations: Bringing the Rule of Law to the Global Economy," Fordham Law Review, Fall, 2005.