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HARBORING PIRATES ON THE NEW YORK STOCK
EXCHANGE? A LOOK AT “MERE CORPORATE PRESENCE”
IN *KIOBEL*

KATHERINE L. CALDWELL[†]

INTRODUCTION

On April 17, 2013, the United States Supreme Court issued an opinion dismissing the complaint in *Kiobel v. Royal Dutch Petroleum Co.*,¹ thereby disappointing the plaintiffs and many human rights advocates and (presumably) eliciting sighs of relief from current and potential foreign alien corporate defendants. The Court had been faced with a Second Circuit decision that posed the question of whether corporations could be sued for violations of the law of nations.² The Court chose instead to answer the question of whether the statutory basis for the U.S. courts’ jurisdiction—the Alien Tort Statute (ATS)—provides jurisdiction for cases against foreign defendants where the alleged violations occurred in a country other than the United States, and held that it does not, applying a canon of statutory interpretation known as the presumption against extraterritoriality.³

A whirlwind of online commentary ensued and many law review pages will be filled in the years to come by advocates and scholars trying to discern what exactly the majority and concurring opinions indicate about how the Court will treat future ATS cases. Does the Court’s avoidance of the initial question presented indicate tacit approval of corporate liability for such violations? How intertwined with the U.S. does the defendant, the alleged violations, or both, need to be to overcome the presumption against extraterritoriality? The opinions in *Kiobel* give particularly little direction as to this latter question, because a clear point of agreement among all the Justices is that—in this case—the defendants and their alleged violations did not meet whatever standard for connection to the U.S. might be required because “mere corporate presence” does not suffice. This article suggests that this unanimous conclusion, presented without discussion, merited fuller consideration.

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1. 133 S. Ct. 1659 (2013).

2. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117 (2d Cir. 2010).

3. *Kiobel*, 133 S. Ct. at 1669.

KIOBEL IN BRIEF

Kiobel involved claims filed in the District Court for the Southern District of New York in 2002 against Dutch, British, and Nigerian corporations. The statutory basis for U.S. courts' jurisdiction in the suit—the ATS—provides that “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.”⁴ The plaintiffs, Nigerian legal resident aliens granted asylum in the U.S., had previously lived in Ogoniland in the Niger Delta in the early 1990s, where a Nigeria-incorporated joint subsidiary of the Royal Dutch Petroleum Company (Netherlands) and Shell Transport and Trading Company, p.l.c. (England) was engaged in oil exploration and production. The complaint alleges that between 1992 and 1995 these corporations violently suppressed popular protest regarding the environmental impact of these oil-related activities by aiding and abetting Nigerian government forces in the commission of innumerable atrocities in Ogoni villages, including: (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction. Defendant corporations allegedly provided the government forces committing these acts with compensation, food, transportation, and access to property from which to launch their attacks.⁵

On September 29, 2006, the District Court issued an order granting defendants' motion to dismiss a number of the claims on the grounds that the facts alleged did not give rise to violations of the law of nations, but denied the motion in regards to the allegations of crimes against humanity, torture, and arbitrary detention, and certified the order for interlocutory appeal.⁶ On September 17, 2010, the Second Circuit dismissed the complaint in its entirety on the grounds that law of nations—also referred to as customary international law—does not recognize corporate liability.⁷ The Supreme Court granted certiorari and heard oral arguments on the corporate liability question, but then directed the parties to file supplemental briefs and reargue the case focusing on the question the Court eventually addressed: “Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of

4. 28 U.S.C. § 1350 (1948).

5. Given the scope of this article, it by necessity gives short shrift to the events in Nigeria underlying the suit and the victims' stories, some of which are available on the websites of international human rights organizations and provide a sense of the human cost of the events at issue. See e.g., *Kiobel v. Shell: Light Dims on Human Rights Cases in U.S.*, THE CTR. FOR JUSTICE AND ACCOUNTABILITY, <http://cja.org/article.php?list=type&type=510> (last visited May 23, 2013).

6. *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 468 (S.D.N.Y. 2006).

7. *Kiobel*, 621 F.3d at 122.

nations occurring within the territory of a sovereign other than the United States.”⁸

THE SUPREME COURT OPINIONS

The majority opinion, authored by Chief Justice Roberts and joined by Justices Scalia, Kennedy, Thomas, and Alito, reasons that, although the presumption against extraterritoriality is usually applied to Congressional acts regulating conduct and not to jurisdictional statutes like the ATS, “[t]he principles underlying the presumption against extraterritoriality . . . constrain courts exercising their power under the ATS.”⁹ The defendants’ ties to the U.S. were insufficient to “displace” the presumption, according to the majority, because “[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”¹⁰ Justice Kennedy filed a concurring opinion, as did Justice Alito, joined by Justice Thomas.

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, filed an opinion, concurring in the judgment only, arguing that the presumption of extraterritoriality should not be applied to a statute so clearly addressing “foreign matters,” and that jurisdiction should be found under the ATS when:

(1) [T]he alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.¹¹

Breyer describes the ATS as legislation aimed at “pirates,” asks “[w]ho are today’s pirates?” and answers that among them are surely torturers and perpetrators of genocide, concluding that “today, like the pirates of old, they are ‘fair game’ where they are found.”¹²

However, Breyer agrees with the majority that, in this case, the alleged pirates were not “found” in the U.S. in such a way that would give U.S. courts jurisdiction: “[T]he parties and relevant conduct lack sufficient ties to the United States for the ATS to provide jurisdiction.”¹³ Why do the defendants lack sufficient ties to the U.S. to trigger jurisdiction under the ATS?

8. *Kiobel*, 133 S. Ct. at 1663 (alteration in original).

9. *Id.* at 1665.

10. *Id.* at 1669.

11. *Id.* at 1671 (Breyer, J., concurring in the judgment).

12. *Id.* at 1671–72.

13. *Id.* at 1671.

The defendants are two foreign corporations. Their shares, like those of many foreign corporations, are traded on the New York Stock Exchange. Their only presence in the United States consists of an office in New York City (actually owned by a separate but affiliated company) that helps to explain their business to potential investors. . . .

Under these circumstances, even if the New York office were a sufficient basis for asserting general jurisdiction, it would be farfetched to believe, based solely upon the defendants' minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest, such as in not providing a safe harbor for an "enemy of all mankind."¹⁴

So, while Breyer defends "a distinct American interest" in "not providing a safe harbor for an 'enemy of all mankind,'" he agrees with the majority that "here it would 'reach too far to say' that such 'mere corporate presence suffices'" and his measurement of defendants' corporate presence in the U.S. relies primarily on their NYC office.¹⁵ He mentions—but does not seem to give much, if any, weight to—their listings on the New York Stock Exchange (NYSE), seemingly because such listings by foreign corporations are so common.

HARBORING PIRATES ON THE NEW YORK STOCK EXCHANGE?

None of the *Kiobel* opinions offers an explanation as to why defendant corporations' listings on the NYSE do not provide—or at least contribute significantly to the measurement of—sufficient ties to the U.S. This failure to attribute any significance to a foreign corporation's listing on a U.S. exchange is striking because the majority relies heavily for its application of the presumption against extraterritoriality on *Morrison v. National Australia Bank Ltd.*, in which the Court applied this presumption to hold that Section 10(b) of the Securities and Exchange Act of 1934 does not provide a cause of action to foreign plaintiffs regarding misconduct in connection with securities traded on foreign exchanges.¹⁶ The complaint in *Morrison* was dismissed because it "involve[d] no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States."¹⁷ The *Morrison* Court concludes that "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."¹⁸ Of course, nothing in *Morrison* suggests that foreign corporations trading securities on U.S. exchanges should be pro-

14. *Id.* at 1678 (internal citation omitted).

15. *Id.*

16. 130 S. Ct. 2869 (2010).

17. *Id.* at 2888.

18. *Id.*

tected from liability. Indeed, there is no question that the *Kiobel* defendants would face potential liability, both civil and criminal, for any violations of the reporting and other requirements of U.S. securities laws on the basis of their listings on the NYSE.

Foreign corporations listing on the NYSE must comply with Securities and Exchange Commission (SEC) reporting requirements and open themselves up to the treble damages that the SEC can seek for insider trading violations, as well as civil penalties imposed by the SEC in administrative proceedings. They also face potential private securities litigation in the U.S. These reporting requirements and potential litigation threats require foreign corporations listing on U.S. exchanges to hire teams of U.S.-trained attorneys to advise on and prepare their filings with a careful eye to reducing potential U.S. domestic legal liability, in particular the expense and potential liability related to securities class action lawsuits, and the potential individual civil and criminal liability of corporate officers, which can include prison terms.¹⁹ Also, any company required to file reports under the Exchange Act, as is any foreign corporation listed on the NYSE, is potentially liable under the Foreign Corrupt Practices Act (FCPA) for bribing foreign government officials, and Department of Justice and SEC investigations and enforcement proceedings under the FCPA can lead to fines for companies as well as jail time for individuals.²⁰

The Court's opinions in *Kiobel* provide no indication of why listing on the NYSE should bring with it this intense level of regulation and potential liability in U.S. courts in these other contexts and yet not be given greater weight in the determination of a corporation's ties to the U.S. in regards to ATS jurisdiction. One justification for the distinction could be that the risks and requirements imposed on foreign corporations listing on U.S. exchanges by U.S. securities laws are directly related to their participation in the U.S. securities market in a way that ATS claims are not. However, the FCPA requirements attached to listing on the NYSE suggest that other U.S. priorities in regulating foreign business practices beyond simply protecting the domestic securities market can be pursued through placing conditions on access to U.S. exchanges. The type of corporate "piracy" alleged in *Kiobel*—the aiding and abetting of foreign government forces in horrific deeds for corporate gain—would seem to present precisely the kind of corporate misbehavior that foreign corporations could rightfully be required to face liability for in the U.S. in order to list on a U.S. exchange. Why shouldn't their presence in the

19. For a sense of the magnitude of these risks and requirements, see, e.g., *U.S. Securities and NYSE Regulation: A Compliance Manual for Non-U.S. Companies*, Shearman & Sterling, 26–27 (November 2012), <http://www.shearman.com/files/Publication/fded1b3c-e50e-4650-8943-d9e4bf51f41c/Presentation/PublicationAttachment/d936525d-1e0c-4fa5-9ac8-3bfe069f37c1/SEC-Compliance-Manuals-for-NYSE-Listed-Non-US-Companies-CM-112012.pdf>.

20. 15 U.S.C. § 78dd-1 (1998).

U.S. securities market allow them to be “found” in the U.S. for the purposes of ATS litigation, or at least be measured more significantly as ties to the U.S. that might constitute more than “mere corporate presence”?