Supreme Court Decision Limits the Application of the Alien Tort Statute

On April 17 the U.S. Supreme Court handed down a highly consequential ruling in *Kiobel v. Royal Dutch Petroleum,* a lawsuit brought by Nigerian nationals under the Alien Tort Statute (ATS). USA*Engage and the NFTC had organized business community *amicus* briefs in the case urging the outcome reached by the Court, albeit for different reasons.

The ATS was enacted in 1789 as a section of the Judiciary Act that established the Federal judiciary. Since the 1980's the law has been used to bring lawsuits against multinational corporations for aiding and abetting human rights abuses by governments of countries in which they do business. Plaintiffs have attempted to use the ATS to make U.S. courts available for lawsuits in which foreign plaintiffs can sue foreign defendants for actions that occurred on foreign soil. In *Kiobel* the Court has significantly narrowed plaintiffs'ability to successfully prosecute such lawsuits.

Since 1990, 79 ATS suits have been filed against U.S. and foreign companies. The NFTC and USA*Engage have organized and led 14 amicus briefs on behalf of defendant companies in ATS cases, primarily on behalf of NFTC members. In no case has a suit been decided in favor of the plaintiffs, but the mere fact of being sued has caused defendant companies significant reputational damage and substantial legal costs. For example, in 2001 a group of 85 multinationals, including many members of USA*Engage and the NFTC, were sued for $50 billion for aiding and abetting apartheid in South Africa. The case remains in Federal District Court in New York. In 2004 the Supreme Court did rule in *Sosa v. Alvarez Machain,* in which USA*Engage and the NFTC organized an *amicus* brief, that the causes of action in ATS cases should be confined to the narrow categories of the "laws of nations" envisioned in 1789 and not encompass the contemporary understanding of international human rights. In citing the "presumption against extraterritoriality," Justice Roberts wrote in his opinion that the ATS does not give a U.S. court "the authority to recognize a cause of action under U.S. law to enforce a norm of international law."

In the *Kiobel* case the litigants alleged that the company had aided and abetted the Nigerian government's human rights violations in the Niger Delta. The Court ruled that the ATS does not apply extraterritorially, and therefore plaintiffs could not bring cases involving actions committed by foreign parties on foreign soil. Justices Scalia, Kennedy, Thomas and Alito joined in Justice Roberts's conclusion that there is no evidence that "Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad."

The *Kiobel* decision does not, however, entirely close the door on ATS claims against U.S. companies. Justice Roberts suggested that it may still be possible for wrongdoing that occurs overseas to fall under the ATS if there is a demonstrable nexus to the U.S. He wrote that "where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application of U.S. law." This opens the possibility that even foreign corporations with an office in the U.S. could be sued under the ATS if plaintiffs could prove that company decisions that led to the alleged violations were made in the U.S. Liability may also extend to instances in which U.S. corporate officers sit on the boards of a local subsidiary.

Importantly the decision did not address the original claim that was appealed from the Second Circuit which had ruled that corporations were not liable under the ATS. Justice Kennedy wrote in his

concurrence that “the opinion of the court is careful to leave open a number of significant questions regarding the reach of the ATS.” Justice Breyer wrote a concurring opinion along with Justices Ginsburg, Sotomayor and Kagan that agreed “with the Court’s conclusion, but not with its reasoning.” Rejecting Justice Roberts focus on extraterritoriality, Breyer laid out three tests for jurisdiction under the ATS: (1) where the alleged tort occurs on American soil; (2) when the defendant is an American national and (3) when the defendant’s conduct substantially and adversely affects an important American national interest. Breyer included in his final category the U.S. interest in preventing the U.S. from becoming a safe harbor for a torturer “or other common enemy of mankind.” This Breyer finds analogous to pirates which was an original intent of the ATS, writing that in *Sosa* the Court “provided a framework …by setting down principles drawn from international norms and designed to limit the ATS claims to those that are similar in character and specificity to piracy.”

The concurring statements of these Justices clearly do not definitively close the door on future ATS lawsuits, either against corporations or against individuals, including corporate officials. USA*Engage and the NFTC will continue to monitor litigation under the ATS and file *amicus* briefs in support of defendants.