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# Litigation

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## SECOND CIRCUIT DENIES REHEARING IN *KIOBEL*: CONFIRMS THAT THE CIRCUIT DOES NOT RECOGNIZE CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

A September 22, 2010 Milbank Client Alert titled “Second Circuit Rejects Corporate Liability Under the Alien Tort Statute,” reported on the Second Circuit’s decision in *Kiobel v. Royal Dutch Petroleum Co.*<sup>1</sup> That decision held that the jurisdiction granted by the Alien Tort Statute (“ATS”)<sup>2</sup> extends only to civil actions against individuals, and not to actions against corporations.<sup>3</sup> On February 4, 2011, in a 2-1 vote, the panel that decided *Kiobel* denied the plaintiffs’ petition for a panel rehearing. Chief Judge Jacobs and Judge Cabranes each filed concurring opinions, with Judge Leval dissenting. On the same day, the active judges of the Second Circuit deadlocked, by a 5-5 vote, on whether to grant an *en banc* rehearing of the panel’s decision.<sup>4</sup> This tie has the effect of denying the petition.

The denial of both petitions means that the *Kiobel* decision stands. It also confirms a split on this issue between the Second Circuit and the Eleventh Circuit.<sup>5</sup>

### Background of the *Kiobel* Case

As discussed in the prior Client Alert, the plaintiffs alleged that corporate defendants Royal Dutch Petroleum Company, Shell Transport and Trading Company, and their subsidiary Shell Petroleum Development Company of Nigeria, Ltd. aided and abetted the Nigerian government in violently suppressing protests through rape, looting and extrajudicial killings. In the original decision, the majority held that under existing

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<sup>1</sup> 621 F.3d 111 (2d Cir. 2010).

<sup>2</sup> 28 U.S.C. § 1350.

<sup>3</sup> *Kiobel*, 621 F.3d at 149.

<sup>4</sup> *Kiobel v. Royal Dutch Petroleum Co.*, Nos. 06-4800-cv, 06-4876-cv, 2011 WL 338151 (2d Cir. Feb. 4, 2011) (“*Kiobel En Banc*”). Chief Judge Jacobs concurred in the denial, and Judges Lynch, Pooler, Katzmann and Chin all dissented. The votes of the other active Second Circuit judges were not disclosed.

<sup>5</sup> See *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (holding that the ATS grants jurisdiction for complaints alleging torture by corporate defendants). Just last week, the Eleventh Circuit reversed a Northern District of Alabama decision dismissing ATS claims, and reinstated those claims, including claims against two corporations. See *Baloco v. Drummond Co., Inc.*, \_\_\_ F.3d \_\_\_, No. 09-16216, 2011 WL 321646 (11th Cir. Feb. 3, 2011). The court did not revisit its earlier holding on corporate liability under the ATS.

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precedent it had to look to international law to determine whether “corporate liability for a ‘violation of the law of nations’” was sufficiently “accepted by the civilized world and defined with a specificity sufficient to provide a basis for jurisdiction under the ATS.”<sup>6</sup> After examining international law, the majority concluded that it was not.<sup>7</sup>

### The Denial of Rehearing by the Original Panel

Chief Judge Jacobs’s concurring opinion focused on the policy implications of having foreign “transnational” corporations, many of which are “creatures of other states” and are subject to regulation in their home countries, haled before United States courts.<sup>8</sup> Many of these corporations, Chief Judge Jacobs observed, are “engines of their national economies, sustaining employees [and] pensioners,” and paying taxes to those national governments.<sup>9</sup> And there is no “consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them – and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees.”<sup>10</sup> Because “no one would protect any enemy of all mankind,” Chief Judge Jacobs concluded, “it is telling that each and every country *does* protect and foster the companies that fuel its national economy . . . .”<sup>11</sup>

Finally, Chief Judge Jacobs noted that the effect of the *Kiobel* decision was minimized because corporate liability under the ATS was limited in any event in light of the Circuit’s decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*<sup>12</sup> *Talisman* held that there is no aiding and abetting liability under the ATS “unless the conduct is done with the positive *intention* of bringing about a violation of the Law of Nations,” meaning that unless a company has purposefully violated the Law of Nations by, for instance, committing genocide or piracy, “there can be no corporate liability under [the ATS] in this Circuit.”<sup>13</sup>

Judge Cabranes filed a short concurring opinion in which he stressed that “fidelity to the law, not a ‘policy agenda,’ dictated” the result in the original *Kiobel* decision.<sup>14</sup> Judge Cabranes summarized that reasoning as follows: “Because corporate liability is not a discernible, much less universal, norm of customary international law, it cannot form the basis of a suit under the ATS.”<sup>15</sup>

In his dissent, Judge Leval agreed that “not . . . *all* of Judge Jacobs’s policy consideration are frivolous.”<sup>16</sup> He took issue, however, with Chief Judge Jacobs’s approach, calling it “substantial overkill.”<sup>17</sup> For example, when the courts of a foreign nation “can be expected to conduct a fair proceeding” with respect to claims alleged against that nation’s own corporations, Judge Leval proposed that United States courts could abstain from exercising ATS jurisdiction in favor of those foreign tribunals.<sup>18</sup> This would alleviate Chief Judge Jacobs’s concern that exercising ATS jurisdiction over foreign corporations amounts to “judicial imperialism.”<sup>19</sup> Judge Leval’s bottom-line was that

<sup>6</sup> *Kiobel*, 621 F.3d at 130 (quotation marks omitted).

<sup>7</sup> *Id.* at 131-45.

<sup>8</sup> *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ F.3d \_\_\_, 2011 WL 338048, at \*2 (2d Cir. Feb. 4, 2011) (“*Kiobel Panel*”).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at \*3 (emphasis in original).

<sup>12</sup> 582 F.3d 244, 259 (2d Cir. 2009).

<sup>13</sup> *Kiobel Panel*, 2011 WL 338048, at \*3 (emphasis in original).

<sup>14</sup> *Id.* at \*9.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at \*4 (emphasis in original).

<sup>17</sup> *Id.* at \*5.

<sup>18</sup> *Id.* at \*7. There is precedent for so-called “comity of the courts.” See *Royal and Sun Alliance Insurance Co. of Canada v. Century Int’l Arm, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006).

<sup>19</sup> *Kiobel Panel*, 2011 WL 338048, at \*7.

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the “law of nations specifies a few norms of conduct, asserting a prohibition of a narrow range of heinous acts that command virtually world-wide disapproval, and in most instances leaves to individual nations how to enforce these prohibitions. On the question whether nations should impose *civil, compensatory* liability for violation of those norms, it provides little guidance.”<sup>20</sup> And, as Judge Leval stated in his opinion in the original *Kiobel* decision, the ATS “draws no distinction . . . between violators who are natural persons and corporations.”<sup>21</sup>

### The Denial of Rehearing *En Banc*

Chief Judge Jacobs concurred in the decision to deny rehearing *en banc*, relying on his concurring opinion in the panel’s decision to deny rehearing.<sup>22</sup>

Judge Lynch dissented because, in his opinion, the case presented significant issues and created a circuit split, and because “the panel majority opinion is very likely incorrect . . . .”<sup>23</sup>

Judge Katzmman also dissented, in part, to respond to an argument that his concurring opinion in *Khulumani v. Barclay National Bank, Ltd.*<sup>24</sup> led to the conclusion that corporations could *not* be liable under the ATS.<sup>25</sup> In that opinion, Judge Katzmman concluded that courts should “determine whether the alleged tort was in fact committed in violation of the law of nations, and whether this law would recognize the defendants’ responsibility for that violation.”<sup>26</sup> Judge Katzmman stated that there is “no inconsistency” between the reasoning of his opinion in *Khulumani* and Judge Leval’s conclusion that corporations may be liable under the ATS.<sup>27</sup>

<sup>20</sup> *Id.* at \*9 (emphasis in original).

<sup>21</sup> 621 F.3d at 152 (Leval, J., concurring in judgment).

<sup>22</sup> *Kiobel En Banc*, 2011 WL 338151, at \*1.

<sup>23</sup> *Id.*

<sup>24</sup> 504 F.3d 254 (2d Cir. 2007). The *Khulumani* decision was discussed in an October 24, 2007 Milbank Client Alert titled “Second Circuit Recognizes Claim for Aiding and Abetting Violations of International Law.”

<sup>25</sup> *Kiobel En Banc*, 2011 WL 338151, at \*1

<sup>26</sup> 504 F.3d at 720 (Katzmann, J., concurring).

<sup>27</sup> *Kiobel En Banc*, 2011 WL 338151, at \*1.

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