

Corporate liability under Alien Tort Statute: Don't elevate form over substance

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A number of recent appellate decisions have reached conflicting outcomes on whether liability under the Alien Tort Statute, 28 U.S.C. 1350 — which increasingly has been asserted against alleged human rights violations by businesses operating in foreign countries — extends to corporate entities. While the resolution of this judicial conflict will likely turn on particulars of statutory interpretation, the courts should consider in these analyses a principle often noted elsewhere: that the courts should avoid having liability turn on artificial distinctions that look to the form of an enterprise's structure but ignore its reality. To do so, as the U.S. Supreme Court has noted, artificially distorts the market by dissuading companies from choosing those structures for their operations they consider most advantageous. Whatever the merits might be of expansive Alien Tort Statute liability in the international business context, no good purpose is served by construing that statute so that it ends up governing which business structures are used to conduct foreign operations.

The ATS authorizes "an alien" to sue "for a tort...committed in violation of the law of nations or a treaty of the United States," and applies to business practices in



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foreign countries that are alleged to constitute or assist human rights violations. Starting with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and as recognized by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720, 724-25 (2004), the ATS is no longer limited to the historical offenses of violations of safe conducts, infringement of the rights of ambassadors and piracy. Rather, today it is used to address a wide range of claimed human

rights violations. Recently, however, circuits have split on whether corporate entities can be subject to liability under the ATS.

THE CIRCUIT SPLIT

While there had been a few decisions by the U.S. Court of Appeals for the 11th Circuit in recent years that had rather summarily accepted the notion of corporate ATS liability — see *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Aldana v. DelMonte Fresh Produce N.A.*, 416 F.3d 1242, 1253 (11th Cir. 2005) — the 2d Circuit's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), petition for cert. filed, No. 10-1491 (June 6, 2011), was the first federal appellate decision to hold expressly that there is no corporate liability under the ATS. In a split decision, the 2d Circuit held that liability under the ATS for violations of the "law of nations" is governed by international law and that with respect to corporate liability "customary international law has not achieved universal recognition or acceptance as a norm in the relations of States with each other." *Id.* at 149. ATS liability, it held, "is limited to those cases alleging a violation of an international norm that is 'specific, universal, and obligatory.'" *Id.* at 148 (citing *Sosa*, 542 U.S. at 732). Noting that corporations have not been

subject to liability under customary international law (which has in fact explicitly rejected corporate liability on several occasions), the 2d Circuit held that the ATS does not provide for corporate liability. *Id.* at 148-49. Indeed, citing the reasoning of the Nuremberg tribunal, the court also noted that claims of international law violations have been limited to natural persons because the “moral responsibility for a crime so heinous and unbounded as to rise to the level of an ‘international crime’ has rested solely with the individual men and women who have perpetrated it.” *Id.* at 119. An evenly divided full bench of the 2d Circuit later declined to rehear the case en banc.

This year, however, two other courts of appeal took the opposite view, declining to follow *Kiobel* and holding that corporations could be liable under the ATS. *Doe v. Exxon Mobil Corp.*, 2011 WL 2652384 (D.C. Cir. July 8, 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011).

The D.C. Circuit in *Exxon* held, in contrast to *Kiobel*, that domestic law — federal common law — governs corporate liability under the ATS. 2011 WL 2652384, at *35. Noting that U.S. law, as well as the law of “every civilized nation,” provides for corporate tort liability, the D.C. Circuit stated that “it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for ‘shockingly egregious violations of universally recognized principles of international law.’” *Id.* The court criticized *Kiobel* for “overlooking the distinction between norms and technical accouterments in searching for an international law norm of corporate liability in customary international law,” as well as for “misinterpreting *Sosa* in several ways, and selectively ignoring relevant customary international law.” *Id.*

The 7th Circuit in *Flomo* similarly characterized *Kiobel* as an “outlier,” and indeed asserted that its reasoning was based upon a factually incorrect premise, because, after World War II, corporations that had aided the Nazi war effort were indeed punished. 643 F.3d at 1017. But even if no corporation had ever been punished for violating customary international law, it said, “[t]here is always a first time for litigation to enforce a norm,” and suggested that corporate prosecutions for violations of customary international law had been rare because of a desire to confine such liability to truly “abhorrent conduct — the kind of conduct that invites criminal sanctions.” *Id.* at 1017-18.

THE TASK FOR THE SUPREME COURT

With the circuit split and the pending certiorari petition, the question of corporate liability under the ATS looks likely to get resolved by the Supreme Court. While the Court’s determination will no doubt largely be guided by the ATS’s unique statutory and historical framework, its analysis also should follow another principle the Court has embraced in other business settings — that business liability outcomes should not be driven entirely by formalistic details of enterprise structure but rather functional realities, such as how the parties involved in the conduct at issue actually operate. For example, the Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), rejected the notion of an intracorporate antitrust conspiracy, reasoning that whether conduct is actionable under the antitrust laws should not turn on whether a corporation for functional reasons was organized into formal legal subsidiaries versus mere internal divisions. See *id.* at 769-71. Correspondingly, in *American Needle,*

Inc. v. NFL, 130 S. Ct. 2201 (2010), the Court held that separate National Football League teams could not avoid liability for unlawful concerted action in regard to developing and marketing team logo merchandise simply by collectively operating an unincorporated association, NFL Properties, as the vehicle for their conduct. “[C]ompetitive reality,” rather than organizational form, should determine if liability is warranted. *Id.* at 2212.

ATS liability likewise should not turn on whether the challenged conduct was committed through the instrumentality of a corporate entity, as opposed to a sole proprietorship, a partnership, an LLC or any number of entities that might be used under foreign laws for business enterprises. Creating incentives to conduct sensitive foreign operations through particular enterprise forms in order to avoid ATS liability could, as the Supreme Court noted in *Copperweld*, artificially distort businesses and their markets by dissuading companies from choosing more advantageous structures for their operations. Whatever the merits might be of applying expansive ATS liability to business operations in foreign lands, no logical purpose is served by making that statute a driver of which business structures are used to conduct foreign operations. The Supreme Court should not fall into the trap of taking such an approach under the ATS.

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