Should American Courts Hear Transnational Tort Claims Against Corporations?

As was recently reported on this blog, in September the United States Court of Appeals for the Second Circuit entered an important decision in *Kiobel v. Royal Dutch Petroleum* regarding whether corporations may be sued under the Alien Tort Statute. The upshot of that opinion was that corporations cannot be sued under the Alien Tort State for violations of customary international law because "the concept of corporate liability . . . has not achieved universal recognition or acceptance of a norm in the relations of States with each other." Slip op. at 49.

Today, the Second Circuit denied panel rehearing and rehearing en banc (splitting 5-5). One particularly interesting concurrence in the denial of rehearing was issued by Chief Judge Dennis Jacobs. There he makes the following important legal and policy arguments concerning the use of the Alien Tort Statute against corporations and, perhaps, the prospect of transnational tort litigation generally against similar actors.

> *All the cases of the class affected by this case involve transnational corporations, many of them foreign. Such foreign companies are creatures of other states. They are subject to corporate governance and government regulation at home. They are often engines of their national economies, sustaining employees, pensioners and creditors–and paying taxes. I cannot think that there is some 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. Such proceedings have the natural tendency to provoke international rivalry, divisive interests, competition, and grievance–the very opposite of the universal consensus that sustains customary international law.*
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> *The imposition of liability on corporations, moreover, raises vexed questions. What employee actions can be imputed to the corporation? What about piercing*

> *the corporate veil? Can these judgments be discharged in bankruptcy, and, if so, in the bankruptcy courts of what country? Punitive damages is a peculiar feature of American law; can they be exacted? These issues bear on the life and death of corporations, and are of supreme consequence to the nations in which the defendant corporations were created, make their headquarters, and pay their taxes. Is it clear that the nations of the earth would be complacent about having these matters decided in U.S. courts?*
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> *These policy considerations explain why no international consensus has arisen (or is likely to arise) supporting corporate liability. Is it plausible that customary international law supports proceedings that would harm other civilized nations and be opposed by them–or be tantamount to "judicial imperialism"?*

Besides such policy arguments, Chief Judge Jacobs explained the impact that this will have on litigation tactics.

> *The holding of this case matters nevertheless because, without it, plaintiffs would be able to plead around Talisman in a way that (notwithstanding Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, — U.S. 13 —, 129 S. Ct. 1937 (2009)) would delay dismissal of ATS suits against corporations; and the invasive discovery that ensues could coerce settlements that have no relation to the prospect of success on the ultimate merits. American discovery in such cases uncovers corporate strategy and planning, diverts resources and executive time, provokes bad public relations or boycotts, threatens exposure of dubious trade practices, and risks trade secrets. I cannot think that other nations rely with confidence on the tender mercies of American courts and the American tort bar. These coercive pressures, combined with pressure to remove contingent reserves from the corporate balance sheet, can easily coerce the payment of tens of millions of dollars in settlement, even where a plaintiff's likelihood of success on the merits is zero. Courts should take care that they do not become instruments of abuse and extortion. If there is a threshold ground for dismissal–and Kiobel is it—it should be considered and used.*

This is a candid appraisal of the policy and legal arguments at play in ATS and transnational tort cases that deserves closer scrutiny in both legal and public policy circles.