The Kiobel Judgment of the US Supreme Court and the Future of Human Rights Litigation – Seminar at the MPI Luxembourg

On July 4th, 2013, the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law invited experts from the USA and Europe to a colloquium to discuss the consequences of the US Supreme Court's decision in the proceedings *Kiobel v. Royal Dutch Shell Petroleum Co.* The seminar aimed at a broad perspective: Subject of the discussion were the consequences of the judgment with regard to public international law, procedural law and private international law – from the viewpoint of Europe and the United States respectively.

Dr. *Clemens Feinäugle* (MPI Luxembourg) started by presenting how the reasoning of the judgment relates to the general principles of jurisdiction in public international law. He emphasized that *Kiobel* can hardly be qualified as a suitable leading case as far as the limits of exercising state jurisdiction in the international context are concerned. In this regard, the judgment (or at least the reasoning of the majority) follows too strictly the decision in *Morrison v. National Australia Bank, Ltd.* on presumption against territoriality which, on its part, is strongly oriented at the prerequisites of US constitutional law. In terms of legal policy, the US Supreme Court passed the buck to the Congress: If US courts were to adjudicate substantially human rights claims against civil actors, this should be authorized by the Congress – just as it had done it in 1997 in the *Torture Victims Protection Act* (in a rather questionable manner). The fact that *Kiobel* is to be read primarily from the viewpoint of the domestic discussion within the US on the role of International Law as "federal common law" was made clear by Prof. *David Steward* (Georgetown University Law Center). He presented the *Alien Tort Claims Act* (ATCA) in the context of the longstanding discussion on the legal role of international treaties, particularly the question of whether the constitutional separation of powers limits the authority of the federal state with regard to foreign affairs. A further perspective was taken by the following presentations:

Prof. *Horatia Muir Watt* brought up the question of the regulatory approach of the US Supreme Court and criticized the unclear notion of "extraterritoriality" in the *Kiobel* judgment. Prof. *Patrick Kinsch* (Luxembourg), on the other hand, noted from an international private and procedural law perspective that the ATCA can hardly be qualified as a suitable and effective instrument for the domestic implementation of international human rights protection: The Act regulates only the subject matter jurisdiction of US federal courts as opposed to state courts rather than the international jurisdiction (personal jurisdiction). From this observation Prof. *Kinsch* derived the forecast that future human rights claims in the USA would be brought increasingly before state courts.

In the second part of the seminar, a round table chaired by Professor B. Hess raised the issue of the practical consequences of the *Kiobel* judgment. Prof. *Jägers* (Tilburg) started with presenting the Dutch parallel judgment to *Kiobel*. On January 30th, 2013, The Hague District Court rejected a damage claim brought by Nigerian victims against Shell as a parent company but upheld the action against the subsidiary. The Dutch court based its judgment on Nigerian tort law – the claim against the parent company was dismissed for lack of evidence. Nevertheless, *Jäger* pointed out the general readiness of Dutch courts to deal with such disputes. Prof. *Catherine Kessedjian* (Paris) referred to the Sofia Declaration of ILA on International Civil Litigation and the Public Interest. It also stipulates the jurisdiction of the courts at the seat of the defendant company – particularly when no effective judicial protection can be obtained at the place of the human rights violations. Dr. *Anke Sessler*, Siemens AG, München, described from the perspective of an internationally operating company that a lawsuit in the USA is connected with substantial workload, time consumption and costs and at the same time is characterized by structural advantages for the plaintiff. Prof. *Trey Childress* (Pepperdine University) reported on the practical consequences of the *Kiobel* judgment: Overall, the last decade was marked by the increasingly restrictive attitude of US courts towards F-cubed litigation. US federal courts have strengthened the requirements with regard to pleading, general jurisdiction, class certification – also discovery has its limits. *Kiobel*, in particular, has already had a sustainable impact on the 25 currently pending ATCA lawsuits in the USA. Six of them have already been rejected, only one is still admissible: it concerns the bomb attack at the US embassy in Nairobi. In this case, the Federal Court affirmed the prevailing interest of the USA in continuing the proceedings. All things considered, *Childress* could hardly see increasing chances for ATCA claims

in the US. This, however, does not mark the end of human rights litigation – the plaintiffs are rather expected to resort to alternative grounds in order to support their claim (such as federal common law or the respective conflict of law rules of the states). This would naturally lead to different defense strategies on the part of the respondent, e.g. removal from state to federal courts and invoking the *forum non conveniens* objection which some federal courts have granted even before examining the personal jurisdiction.

Two rounds of discussions elaborated on and expanded the arguments of the speakers. It became clear that human rights litigation remains a controversial subject. Some discussants assessed *Kiobel* – in line with the judgment of the ICJ in *Germany v. Italy, Greece Intervening* from February 3rd, 2012 – as a "missed opportunity", whereas others welcomed the decision as a politically balanced reflection of the stand of current legal developments. The lively discussion showed that the research profile of the MPI Luxembourg, combining public international law, international litigation and questions of transnational regulation, can give a strong impetus towards understanding important issues of legal policy.