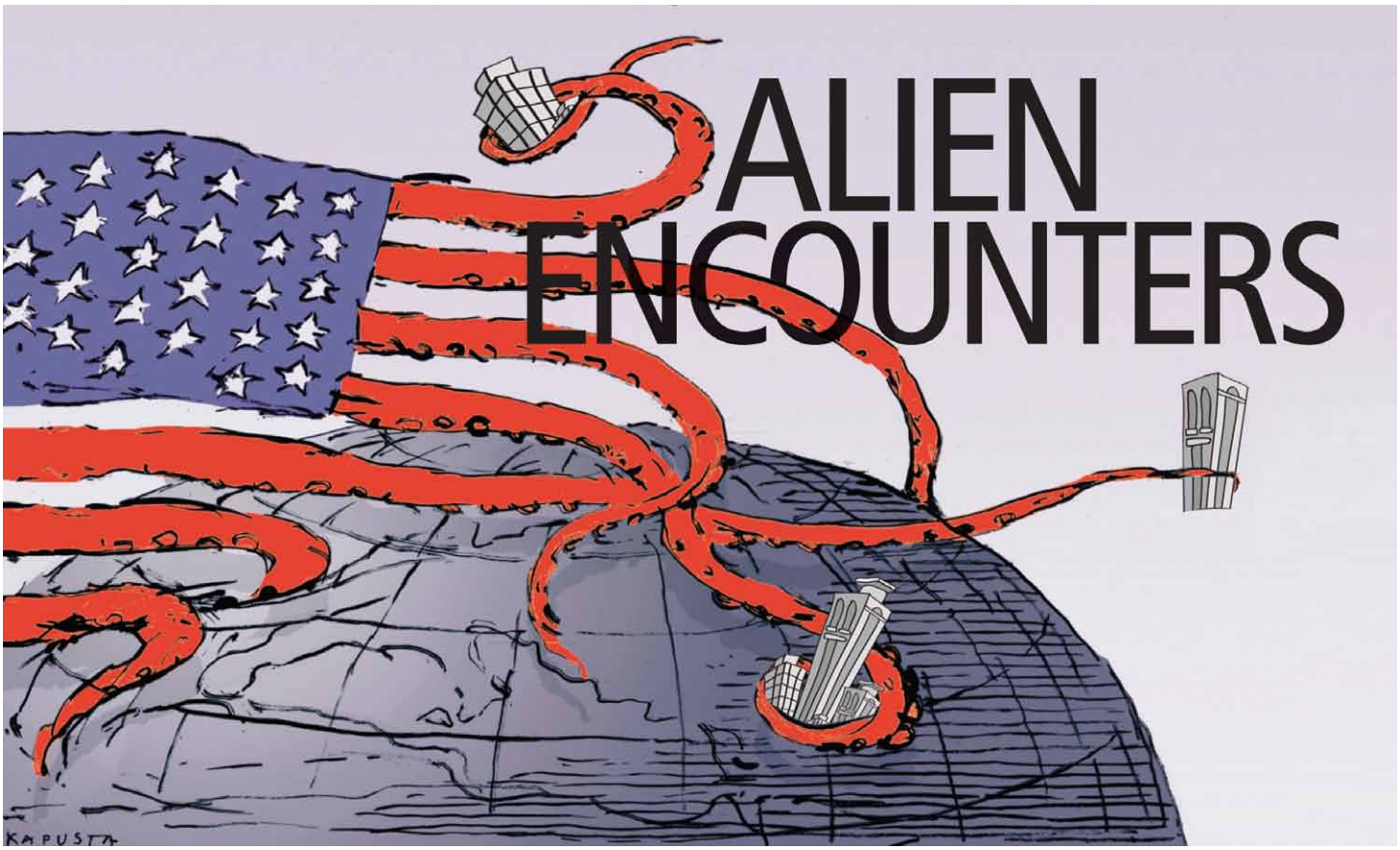
Legal Week
2 June 2011

Feature | Litigation and dispute resolution



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Gibson Dunn's Lee Dunst and Brian Lutz argue that global companies still need to be wary of the US' controversial Alien Tort Claims Act

In recent years, non-US plaintiffs have increasingly turned to American courts – and a rarely used statute called the Alien Tort Claims Act (ATCA) – in an attempt to hold multinational corporations liable for their alleged responsibility for conduct committed outside the US by others, including genocide, torture, war crimes and other human rights abuses.

Recent US court decisions, including an important ruling by a federal appellate court in New York, have signalled what may be a sharp restriction on the ability of plaintiffs to stretch the ATCA to cover alleged violations of international law by corporate defendants. These decisions, however, are far from uniform in their treatment of corporate defendants, strongly suggesting that corporations remain at substantial risk of being hauled to the US courts for alleged human rights abuses committed by others outside the US.

The ATCA, as one appellate court has noted, is "unlike any other kind in American law and of a kind apparently unknown to any other legal system in the world" in that it requires US courts to look to international law to ascertain the scope of liability under US law. The statute grants US federal courts jurisdiction over claims "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".

To answer the threshold question of whether conduct violates the law of nations, US courts must determine whether the conduct in question violates "customary international law" meaning, as one court put it, that the legal principle is among the "specific and universally accepted rules that the nations of the world treat as binding in their dealings with one another". And while there is little question that human rights violations such as genocide or torture violate accepted principles of international law, what is less clear is whether, as a matter of customary international law, corporations, rather than individuals, may be held liable for similar human rights violations.

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For years, US courts assumed that the jurisdictional reach of the ATCA extended to cover corporations. Accordingly, courts permitted lawsuits brought under the ATCA to proceed, for example, against oil companies accused of aiding and abetting the Nigerian Government's crackdown on environmental activists; against food companies accused of aiding and abetting crimes committed by paramilitary organisations; against a drug company for allegedly performing testing on humans without their consent; and against various companies accused of aiding and abetting South African apartheid.

In late 2010, however, a federal appeals court in New York issued a landmark decision holding that the ATCA did not confer federal court jurisdiction over corporate defendants because corporate liability was not an accepted principle of international law. In *Kiobel v Royal Dutch Shell Petroleum*, Nigerian residents sought to hold oil companies liable for aiding and abetting human rights violations committed by the Nigerian Government.

The court, after conducting a review of various international tribunals (the Nuremberg Tribunal and criminal tribunals held for the former Yugoslavia and Rwanda), international treaties and works of international legal scholars, found that, while corporation could be held liable for violations of the law of the various nations in which they operated, as a matter of international law, only individuals – not corporations – are subject to liability for human rights violations. Thus, the court concluded, "corporate liability has not attained a discernible, much less universal, acceptance among nations of the world in their relations inter se, and it cannot, as a result, form the basis of a suit under the [ATCA]".

The *Kiobel* decision marks an important turning point in ATCA jurisprudence and a significant setback for plaintiffs, but it is by no means the last word on the issue. Indeed, in its wake, other US courts have reached different conclusions as to the jurisdictional reach of the ATCA. A federal appeals court, for example, recently ignored Kiobel altogether and reinstated an ATCA lawsuit against a mining company concerning its alleged responsibility for the murder of the union leaders in Columbia. (*See Baloco v Drummond.*)

Another federal appeals court also recently reinstated a lawsuit against a car manufacturer for its alleged responsibility for acts committed during Argentina's Dirty War in the 1970s. (*See Bauman v DaimlerChrysler Corp.*) And a federal district court in California recently concluded that the Archdiocese of Los Angeles may be subject to jurisdiction under the ATCA for failure to prevent sexual abuse by a priest. (*See Doe v Mahony.*)

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Lee Dunst, Gibson Dunn & Crutcher

At the same time, the New York federal courts continue to follow Kiobel in concluding that they lacked subject matter jurisdiction to hear an ATCA claim against a corporate defendant. (*See Shan v China Constr Bank Corp; In re Motors Liquidation Co.*)

As these divergent opinions demonstrate, Kiobel's impact on other US courts remains to be seen. For the time being, though, some US courts remain sympathetic to claims brought against corporations under the ATCA. The US Supreme Court ultimately may need to resolve this split in authority on the jurisdictional reach of the ATCA. The issue is unlikely to be resolved in the near term, however, leaving multinational corporations and institutions still vulnerable to lawsuits in US courts over their alleged complicity in international human rights violations occurring far beyond US borders.

Lee Dunst is a partner and Brian Lutz is an associate at Gibson Dunn & Crutcher.