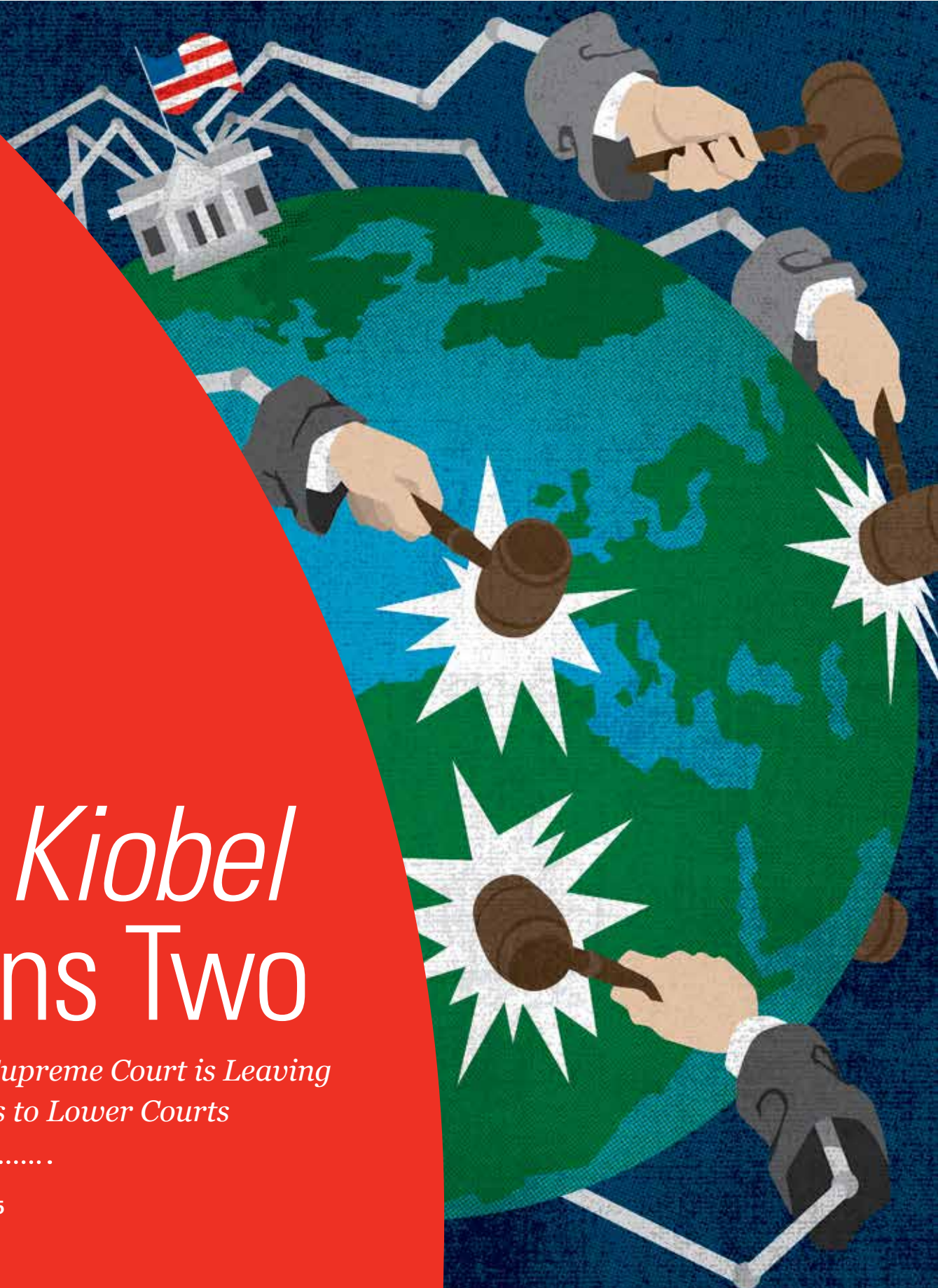




U.S. CHAMBER
Institute for Legal Reform



As Kiobel Turns Two

*How the Supreme Court is Leaving
the Details to Lower Courts*

.....
AUGUST 2015



U.S. CHAMBER
Institute for Legal Reform

An Affiliate of the U.S. Chamber of Commerce

© U.S. Chamber Institute for Legal Reform, August 2015. All rights reserved.

This publication, or part thereof, may not be reproduced in any form without the written permission of the U.S. Chamber Institute for Legal Reform. Forward requests for permission to reprint to: Reprint Permission Office, U.S. Chamber Institute for Legal Reform, 1615 H Street, N.W., Washington, D.C. 20062-2000 (202.463.5724).

Table of Contents

Introduction 1

The *Kiobel* Decision 3

Relevance of U.S. Citizenship 7

Disagreement over Congressional “Focus” Test 8

Corporate Liability 10

The New Normal 11

Introduction

On April 17, 2013, the Supreme Court dealt what many legal observers predicted might be a fatal blow to human rights lawsuits against U.S. and foreign corporations when it held in *Kiobel v. Royal Dutch Petroleum* that the Alien Tort Statute (ATS) generally does not apply to torts that occur in the territory of other countries.²

As predicted, the *Kiobel* decision has had a significant effect on ATS lawsuits in lower courts. Of the 40 ATS lawsuits that were pending when *Kiobel* was decided, about 70% have been dismissed on extraterritoriality grounds, including long-running cases against Chiquita, Ford, and IBM; another 10% have been dismissed for other reasons.³ Courts have so far unanimously agreed that *Kiobel* prevents plaintiffs from bringing so-called “foreign-cubed” cases against corporations in which *foreign* plaintiffs sue *foreign* defendants for torts committed in a *foreign* country.⁴

Nonetheless, lower courts have struggled to determine whether *Kiobel* permits U.S. corporations to be sued under the ATS for alleged torts in foreign countries, where those torts have involved some corporate conduct inside the United States. As explained below, some courts have weighed the U.S. citizenship of the defendant, while others consider that factor irrelevant. The most pronounced division among the courts, however, has developed over whether significant contacts with the United States are sufficient to trigger ATS jurisdiction or whether the violation of the

“Of the 40 ATS lawsuits that were pending when *Kiobel* was decided, about 70% have been dismissed on extraterritoriality grounds.”

“law of nations” that is the subject matter of the ATS must itself take place within the United States. The Supreme Court recently refused to review the Eleventh Circuit’s dismissal of an ATS suit against Chiquita for making payments to paramilitary groups in Colombia, despite plaintiffs’ claims that

Chiquita had engaged in certain actions in the United States.⁵ The justices seem content to let lower courts work out the details, at least for the time-being. With the Supreme Court staying on the sidelines, this article takes stock of where ATS cases currently stand around the country.

The Kiobel Decision

Since the 1990s, plaintiffs have filed over 150 ATS cases against businesses in nearly every industry sector for claims arising all over the globe. The Supreme Court's 2013 decision in *Kiobel*, however, marked a turning point.

In *Kiobel*, the Supreme Court held that the ATS does not ordinarily supply jurisdiction when "all the relevant conduct took place outside the United States."⁶ The opinion of the Court, on behalf of five justices, explained that federal statutes are generally presumed not to apply to conduct outside the United States absent a clear statement by Congress, and that this "presumption against extraterritoriality" also applies to the ATS.

The Court appeared to leave the door open, however, to ATS cases that have a greater connection to the United States. At the end of the Court's opinion, Chief Justice Roberts stated that "where the claims *touch and concern* the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."⁷ The Court did not elaborate on what claims would "touch and concern" U.S. territory with sufficient force to overcome the presumption, but explained that "mere corporate presence" in the United States is not enough. Further underscoring the deliberate ambiguity in the Court's opinion, Justice Kennedy (the putative fifth vote) wrote in a separate, concurring opinion that "the proper implementation

of the presumption against extraterritorial application may require some further elaboration and explanation" in future cases.⁸

In a two-page concurrence, Justices Alito and Thomas joined the Court's opinion "as far as it goes." Noting that the "touch and concern" test was a "formulation [that] obviously leaves much unanswered," Justices Alito and Thomas "set out the broader standard" that they believe should govern ATS cases going forward.⁹ The Alito/Thomas opinion embraced the "focus" test used in *Morrison v. Australian National Bank*, which held that "a cause of action falls outside the scope of the presumption—and thus is not barred by the presumption—only if the event or relationship that was 'the "focus" of congressional concern' under the relevant statute takes place within the United States."¹⁰ The Alito/Thomas opinion reasoned that the "focus" of "congressional concern" when the ATS was enacted in 1789 was the "three principal offenses against the law of nations": "violation of safe conducts, infringement of the rights of ambassadors, and piracy," as well as offenses of similar "definiteness and acceptance among

civilized nations,” quoting the Court’s previous ATS holding in *Sosa v. Alvarez-Machain*.¹¹ Justices Alito and Thomas concluded, “As a result, a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*’s requirements of definiteness and acceptance among civilized nations.”¹² Although this opinion was not joined by the other seven justices, the argument has proven influential (and contentious) in the lower courts.

Kiobel in Practice

After *Kiobel*, lower courts have dismissed nearly 70 percent of ATS cases on the basis that the alleged claims did not sufficiently “touch and concern” the territory of the United States. Several courts have allowed plaintiffs to file amended complaints to try to allege conduct that would touch and concern the United States with sufficient force to overcome the presumption against extraterritoriality. Only a small number of courts have found sufficient contacts with the United States to justify overcoming the presumption.

Cases Dismissed

Lower courts generally have interpreted *Kiobel* to require dismissal unless plaintiffs plead allegations involving *substantial* unlawful activity on U.S. soil. For example,

courts have held that the following U.S. contacts do not alone sufficiently “touch and concern” the United States for ATS jurisdiction: where plaintiffs are U.S. residents; where defendants have a substantial U.S. presence or even U.S. corporate headquarters; or where the case implicates important U.S. foreign policies.

In August 2014, Judge Scheindlin of the Southern District of New York dismissed a decade-old suit against Ford and IBM after the Second Circuit held in *Balintulo v. Daimler AG* that the companies’ supply of automotive equipment and computer systems to the former apartheid government in South Africa was insufficient to invoke ATS jurisdiction because the actual alleged human rights violations occurred in South Africa.¹³ Judge Scheindlin said, “That these plaintiffs are left without relief in an American court is regrettable. But I am bound to follow [*Kiobel*] and *Balintulo*, no matter what my personal view of the law may be. Even if accepted as true, the ‘relevant conduct’ alleged in plaintiffs’ proposed amended complaints all occurred abroad.”¹⁴

The Second Circuit later elaborated that *Kiobel* requires that conduct which “touches and concerns” the territory of the United States must itself violate international law; in so deciding, the Second Circuit essentially adopted the Alito/Thomas concurrence that employs the *Morrison* “focus” test.¹⁵ On this theory, the Second Circuit dismissed a

“ Lower courts generally have interpreted *Kiobel* to require dismissal unless plaintiffs plead allegations involving substantial unlawful activity on U.S. soil. ”

case against Chevron and BNP Paribas for allegedly abetting Saddam Hussein's Iraqi regime by unlawfully providing income under the United Nations' Oil-for-Food Program.¹⁶ Although the plaintiffs alleged "multiple domestic purchases and financing transactions" and that defendants used a New York escrow account to systematically facilitate payments to the regime,¹⁷ the court nevertheless dismissed the case because the plaintiffs did not allege that the conduct which touched and concerned the United States was itself a violation of international law or aided and abetted that violation.

The Eleventh Circuit adopted the same approach in dismissing long-running ATS suits against Chiquita and Drummond relating to their alleged support for paramilitary groups in Colombia. The Eleventh Circuit focused on the locus of the violation of international law abroad rather than on plaintiffs' allegations of U.S.-based conduct to support or condone the wrongful acts: "There is no allegation that any torture occurred on U.S. territory, or that any other act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force."¹⁸ On April 20, the Supreme Court denied certiorari in the Chiquita case, refusing to engage plaintiffs' arguments that the case "touches and concerns" the United States with "great force."¹⁹

Second-Chance Cases

After *Kiobel*, several courts have allowed plaintiffs to amend their complaints to try to allege a sufficient U.S. nexus. For example, Judge Scheindlin permitted plaintiffs to amend their complaints against Ford and IBM to allow them to allege conduct inside the United States sufficient to rebut the presumption against

extraterritoriality. Judge Lamberth, in the District of Columbia, allowed plaintiffs to amend their complaint against Exxon to include a U.S. nexus for allegations that Exxon's security forces were responsible for unlawful injuries and deaths while protecting a natural gas field in Indonesia.²⁰ The Ninth Circuit similarly permitted plaintiffs to amend their claims against a U.S. subsidiary of Nestlé to substantiate a U.S. nexus to allegations of child slavery in Côte d'Ivoire.²¹

“ After *Kiobel*, several courts have allowed plaintiffs to amend their complaints to try to allege a sufficient U.S. nexus. ”

Yet the opportunity to amend claims has not guaranteed success for ATS plaintiffs. In fact, of the five cases where courts gave plaintiffs leave to amend their ATS claims, three already have been dismissed (including the *Balintulo* suit against Ford and IBM), leaving only the cases against Nestlé and Exxon.²² The upshot is that while ATS plaintiffs face a high hurdle to keep their claims alive, some defendants have had to keep litigating through at least one more round of pleadings.

Cases Allowed to Proceed on the Merits

Only a handful of courts have permitted ATS claims to proceed on the merits based on substantial U.S. contacts. One case involved the bombing of an American embassy and included overt acts within the United States allegedly in furtherance

of the attack.²³ Another case similarly involved substantial conduct within the United States, in which the defendant allegedly worked for over a decade from Massachusetts to support the oppression of gays and lesbians in Uganda, including drafting legislation to impose the death penalty for homosexuality.²⁴ A third case involved alleged U.S.-based meetings with operatives of a terrorist organization, as well as sizable donations and the creation of corporations to funnel money to that terrorist organization, all in the United States.²⁵ None of these cases, however, involved a suit against a U.S. corporation.²⁶

The most significant decision for U.S. companies is the Fourth Circuit's opinion in 2014 in *Al Shimari v. CACI Premier Technology, Inc.*, which allowed Iraqi nationals to pursue ATS claims against an American military contractor for alleged abuse and torture at Abu Ghraib prison in Iraq.²⁷ Reversing the district court, a panel of the Fourth Circuit held that the ATS claims sufficiently touched and concerned the territory of the United States where "extensive relevant conduct" was based on:

(1) CACI's status as a United States corporation; (2) the United States citizenship of CACI's employees, upon whose conduct the ATS claims are based; (3) the facts in the record showing that CACI's contract to perform interrogation services in Iraq was issued in the United States by the United States Department of the Interior, and that the contract required CACI's employees to obtain security clearances from the United States Department of Defense; [and] (4) the allegations that CACI's managers in the United States gave tacit approval to the acts of torture committed by CACI employees at the Abu Ghraib prison, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it.²⁸

The court concluded that these U.S. factors, collectively, were sufficient to displace the presumption against extraterritoriality. To date, this is the only case post-*Kiobel* in which a court has found a sufficient U.S. nexus to permit ATS claims to proceed against a U.S. company on the merits.

“ Only a handful of courts have permitted ATS claims to proceed on the merits based on substantial U.S. contacts. ”

Relevance of U.S. Citizenship

The lower courts are becoming increasingly divided over whether a defendant's American citizenship is relevant in determining whether ATS claims "touch and concern" the United States.

The Second Circuit in *Balintulo* rejected the plaintiffs' argument that ATS claims against Ford and IBM should survive *Kiobel* because the defendants are U.S. companies. The panel held that the defendants' nationalities were "irrelevant" because "if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*."²⁹ In subsequent decisions, the Second Circuit has reaffirmed its position that a defendant's citizenship is irrelevant.³⁰ The Eleventh Circuit seemed to concur in *Chiquita*, rejecting plaintiffs' "attempt to anchor ATS jurisdiction in the nature of the defendants as United States corporations."³¹ However, a later panel of the Eleventh Circuit stated that it had "not ruled out consideration of this factor altogether."³²

Other courts have held that a defendant's U.S. nationality is a relevant, but not necessarily a sufficient, consideration. In *CACI*, the Fourth Circuit noted that *Kiobel*'s "touch and concern" analysis applies to "'claims,' rather than the alleged tortious conduct"; accordingly, the court decided to consider all "facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action."³³ A number of district courts have reached the same conclusion, each listing the defendants' American citizenship as a relevant factor supporting ATS jurisdiction.³⁴ The federal courts thus have reached very different conclusions on this important issue.³⁵

Disagreement over Congressional “Focus” Test

The lower courts also are divided as to whether *Kiobel* incorporates the test articulated by the Supreme Court in *Morrison*—i.e., whether the conduct that was the “focus” of congressional concern in creating a cause of action takes place inside the United States—as the standard to determine whether a claim “touches and concerns” the United States.

In the *Nestlé* case, two judges on the Ninth Circuit panel rejected application of the more restrictive “focus” test, concluding that the Supreme Court in *Kiobel* “did not explicitly adopt *Morrison*’s focus test, and chose to use the phrase ‘touch and concern’ rather than the term ‘focus’ when articulating the legal standard it did adopt.”³⁶ The third judge on the panel dissented, asking rhetorically “Why else would the Supreme Court direct us to

Morrison precisely when it was discussing claims that allegedly ‘touch and concern’ the United States?”³⁷ The Ninth Circuit recently denied Nestlé’s petition for full *en banc* review over the dissent of at least nine judges. The dissenting judges recognized that the panel’s decision creates a circuit split with the Second and Eleventh Circuits, which both “agree that *Kiobel* simply directs application of the *Morrison* test.”³⁸ The Fourth Circuit, in contrast,

“ The dissenting judges recognized that the panel’s decision creates a circuit split with the Second and Eleventh Circuits, which both ‘agree that *Kiobel* simply directs application of the *Morrison* test.’ ”

neither adopted nor rejected *Morrison's* "focus" test in the *CACI* case, simply declining to articulate any standard for "touch and concern."

If the defendants in *Nestle* decide to seek Supreme Court review this fall, the justices would have another opportunity to resolve

the emerging disagreement among the lower courts on the proper application of *Kiobel's* "touch and concern" test. Yet, despite the growing circuit conflict, it remains to be seen whether the Supreme Court has the appetite for another ATS case so soon after *Kiobel*.

Corporate Liability

The Supreme Court originally agreed to hear the *Kiobel* case to resolve a split among lower courts on whether corporations can be sued under the ATS. The Second Circuit had held that the ATS does not apply to corporations,³⁹ whereas the Seventh, Ninth, Eleventh, and D.C. Circuits had held that corporations may be the subject of ATS suits.⁴⁰

Because the Supreme Court decided the case without reaching the question of corporate liability—none of the justices’ opinions even mentioned the issue—the law has remained unchanged in the circuit courts. If anything, the division has become even more entrenched.

“ Because the Supreme Court decided the case without reaching the question of corporate liability—none of the justices’ opinions even mentioned the issue—the law has remained unchanged in the circuit courts. ”

A Ninth Circuit panel in the *Nestlé* case recently affirmed that corporations may be held liable under the ATS,⁴¹ although eight judges dissented vigorously from that conclusion.⁴² And while some judges within the Second Circuit have expressed skepticism about the continuing force of Second Circuit’s precedent on this issue,⁴³ numerous panels of the Second Circuit have rejected the notion that the Supreme Court implicitly overruled the Second Circuit’s decision in *Kiobel* on corporate liability, stating that binding law in the circuit foreclosed suing a corporation under the ATS.⁴⁴ Other courts have avoided the question so far by resolving cases on other grounds.⁴⁵

The New Normal?

While circuit splits and dismissals of high-profile ATS cases may grab the headlines, perhaps *Kiobel's* most significant impact is that only one new ATS case has been filed against a U.S. company in the two years since *Kiobel*, and that case involves allegations of human trafficking and forced labor within the United States.⁴⁶

That number stands in stark contrast to the six to ten new corporate ATS cases filed annually before *Kiobel*.⁴⁷ The dearth of new filings may indicate that plaintiffs' lawyers are discouraged by *Kiobel* and are focusing their litigation strategies elsewhere.

On the other hand, lawyers who regularly represent ATS plaintiffs might simply be probing the limits of *Kiobel's* "touch and concern" requirement in pending suits, waiting to bring new cases that will survive a motion to dismiss. It remains to be

seen whether other courts will continue to accord *Kiobel* broad breadth, just as it remains to be seen whether the slow-down in ATS litigation is a temporary or permanent feature. Key cases are pending in the D.C. Circuit (against Exxon) and the Ninth Circuit (against Nestlé USA), and those courts will soon have to decide what level of domestic activity could be sufficient to "touch and concern" the United States under the ATS. The outcome of those cases may be bellwethers for the direction of ATS litigation in future years.

“ It remains to be seen whether other courts will continue to accord *Kiobel* broad breadth, just as it remains to be seen whether the slow-down in ATS litigation is a temporary or permanent feature.”

Endnotes

- 1 John Bellinger is a partner and Reeves Anderson is an associate at Arnold & Porter LLP. Mr. Bellinger served as The Legal Adviser for the Department of State from 2005 to 2009.
- 2 133 S. Ct. 1659 (2013).
- 3 In contrast, only 15% of all pre-*Kiobel* ATS cases have been allowed to go forward on the merits, while 5% await decision on whether the allegations involve sufficient contacts with the United States to trigger ATS jurisdiction. These totals exclude ATS claims brought against the United States or its officers and generally do not include *pro se* claims.
- 4 See, e.g., *Ben-Haim v. Neeman*, 543 F. App'x 152, 155 (3d Cir. 2013) (dismissing ATS claims against Israeli defendants where "the conduct that formed the basis of the ATS claims took place in Israel"); *Kaplan v. Central Bank of Islamic Rep. of Iran*, 961 F. Supp. 2d 185, 205 (D.D.C. 2013) (dismissing claims under *Kiobel* because "the attacks were allegedly funded by Iran, launched from Lebanon, and targeted Israel"); *Chen Gang v. Zhao Zhizhen*, 04-cv-1146, 2013 WL 5313411, at *3 (D. Conn. Sept. 20, 2013) (dismissing "paradigmatic 'foreign cubed' case" involving "foreign defendant, foreign plaintiff, and exclusively foreign conduct," because all parties and conduct were in China).
- 5 *Cardona v. Chiquita Brands Int'l, Inc.*, 135 S. Ct. 1842 (2015).
- 6 133 S. Ct. at 1669.
- 7 *Id.* (emphasis added).
- 8 *Id.* (Kennedy, J., concurring). One court called the Court's "touch and concern" framework "textually curious," *Al Shimari v. CACI Int'l, Inc.*, 951 F. Supp. 2d 857, 867 (E.D. Va. 2013), while another observed, "What then is 'enough' such that the conduct in Colombia touches and concerns the United States with sufficient force? *Kiobel* has not given courts a road map for answering this question." *Giraldo v. Drummond Co., Inc.*, 09-cv-1041, 2013 WL 3873960, at *5 (N.D. Ala. July 25, 2013).
- 9 *Id.* at 1670 (Alito, Thomas, JJ., concurring).
- 10 *Id.*
- 11 *Id.*
- 12 *Id.*
- 13 727 F.3d 174 (2d Cir. 2013).
- 14 *In re South African Apartheid Litig.*, 56 F. Supp. 3d 331, 338 (S.D.N.Y. 2014).
- 15 *Mastafa v. Chevron Corp.*, 770 F.3d 170, 195 (2d Cir. 2014).
- 16 *Id.*
- 17 *Id.* at 190–91.
- 18 *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1191 (11th Cir. 2014); see also *Baloco v. Drummond Company*, 767 F.3d 1229, 1237–38 (11th Cir. 2014).
- 19 *Cardona*, 135 S. Ct. 1842.
- 20 *Doe v. Exxon Mobil Corp.*, ___ F. Supp. 3d ___, 2014 WL 4746256, at *12–14 (D.D.C. Sept. 23, 2014).
- 21 *Doe v. Nestlé USA, Inc.*, 766 F.3d 1013, 1027–29 (9th Cir. 2014).
- 22 See *In re South African Apartheid Litig.*, 15 F. Supp. 3d 454 (S.D.N.Y. 2014) (granting leave to move to amend); *In re South African Apartheid Litig.*, 2014 WL 4290444 (dismissing case under *Kiobel*); *Licci v. Lebanese Canadian Bank*, 08-cv-7253 (S.D.N.Y. Apr. 14, 2015) (same) (ECF 84); *Jara v. Nunez*, 13-cv-1426, 2014 WL 6608924 (M.D. Fla. Nov. 20, 2014) (same); but see *Doe v. Nestlé USA, Inc.*, 766 F.3d 1013 (granting leave to amend); *Doe v. Exxon*, 2014 WL 4746256 (same).
- 23 *Mwani v. Bin Laden*, 947 F. Supp. 2d 1 (D.D.C. 2013).
- 24 *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013).
- 25 *Krishanti v. Rajaratnam*, 09-cv-5395, 2014 WL 1669873 (D.N.J. Apr. 28, 2014).
- 26 Another court stated in dicta that an ATS claim "arguably" may proceed where a U.S. corporation develops a product "predominantly, if not entirely, within the United States" with the specific intent that it will be used to commit violations of international law. *Du Daobin v. Cisco Sys., Inc.*, 2 F. Supp. 3d 717, 727–28 (D. Md. 2014). But the court ultimately dismissed the case on other grounds. Also, the Ninth Circuit has recognized that an ATS claim for piracy,

- a historical violation of the law of nations, could be made against an environmental NGO. *Inst. of Cetacean Res. v. Sea Shepherd Conservation Soc’y*, 588 F. App’x 701, 702 (9th Cir. 2014).
- 27 758 F.3d 516 (4th Cir. 2014).
- 28 *Id.* at 530–31.
- 29 *Balintulo*, 727 F.3d at 190; *id.* at 190 n.24 (“Nothing in the Court’s reasoning in *Kiobel* suggests that the rule of law it applied somehow depends on a defendant’s citizenship.”).
- 30 *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 798 (2d Cir. 2014) (“we have explicitly held since *Kiobel* that even the citizenship of the defendant is irrelevant to jurisdiction to hear claims under the ATS”); *Mastafa*, 770 F.3d at 188.
- 31 *Chiquita*, 760 F.3d at 1189; *see also Mastafa*, 770 F.3d at 188 (stating that “the Eleventh Circuit reached the same conclusion” as the Second Circuit in *Balintulo*).
- 32 *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 595 (11th Cir. 2015).
- 33 *CACI*, 758 F.3d at 527.
- 34 *Lively*, 960 F. Supp. 2d at 321 (citing U.S. citizenship as one factor supporting ATS jurisdiction); *Cisco Sys.*, 2 F. Supp. 3d at 728 (same, in *dicta*).
- 35 One court suggested that a defendant’s U.S. residency or citizenship could itself be sufficient to overcome the presumption against extraterritoriality but did not squarely decide the issue. *Ahmed v. Magan*, 10-cv-342, 2013 WL 4479077, at *2 (S.D. Ohio Aug. 20, 2013). Every other court to have considered the issue has rejected that approach. *See, e.g., Mujica v. AirScan Inc.*, 771 F.3d 580, 594 & n.11 (9th Cir. 2014).
- 36 766 F.3d at 1028.
- 37 *Id.* at 1035 (Rawlinson, J., concurring in part and dissenting in part).
- 38 *Doe v. Nestlé USA, Inc.*, No. 10-56739, 2015 WL 3407226, at *6 (9th Cir. May 6, 2015). The opinion dissenting from rehearing *en banc* further criticized the panel for (1) creating “a circuit split on the proper *mens rea* element for aiding and abetting liability under customary international law,” and (2) incorrectly siding with those courts that found “the ATS’s grant of jurisdiction extends to claims against corporations.” *Id.* at *4, 6 n.19.
- 39 *Kiobel*, 621 F.3d at 145.
- 40 *See Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 748 (9th Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011).
- 41 *Nestlé USA*, 766 F.3d at 1021–23.
- 42 *Nestlé USA*, 2015 WL 3407226, at *6–7 (criticizing the panel for incorrectly siding with those courts that found “the ATS’s grant of jurisdiction extends to claims against corporations”).
- 43 *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 174 (2d Cir. 2013) (directing the parties to rebrief the issue); *In re South African Apartheid Litig.*, 2014 WL 1569423, at *5–6 (holding that the Supreme Court’s decision in *Kiobel* “directly undermine[d]” the Second Circuit’s prior holding that corporations were not proper defendants in ATS cases).
- 44 *Balintulo*, 727 F.3d at 191 n.26; *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 49 n.6 (2d Cir. 2014); *Mastafa*, 770 F.3d at 177.
- 45 *CACI*, 758 F.3d at 525 n.5 (reserving corporate liability question); *Du Daobin*, 2014 WL 769095, at *8 (expressing “doubt that corporations are immune under the ATS” but reserving the question).
- 46 Complaint, *Doe v. Pure Forest LLC*, No. 14-cv-879 (E.D. Cal. Apr. 8, 2014).
- 47 Jonathan Drimmer, U.S. Chamber Inst. for Legal Reform, *Think Globally Sue Locally*, at 5 (June 2010), available at <http://www.instituteforlegalreform.com/uploads/sites/1/thinkgloballysuelocally.pdf>.



U.S. CHAMBER

Institute for Legal Reform

202.463.5724 main
202.463.5302 fax

1615 H Street, NW
Washington, DC 20062

instituteforlegalreform.com