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The Alien Tort Statute and Human Rights Violations – U.S. Supreme Court Continues to Take a Narrow Read

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In June, the United States Supreme Court rendered its latest decision involving the Alien Tort Statute, in *Nestlé USA, Inc. v. Doe et al.* The Court continues to narrowly construe the ATS's applicability to alleged adverse human rights impacts of corporate actors' activities, especially overseas. In this most recent decision, the Court reversed a court of appeals decision allowing foreign plaintiffs to pursue claims under the Alien Tort Statute in U.S. federal court for the alleged aiding and abetting of child slavery on cocoa farms in the Ivory Coast.

In this Alert, we discuss the Supreme Court's decision in the *Nestlé* case and where that decision fits into the broader business and human rights litigation and enforcement landscape.

A Brief Overview of Prior Supreme Court Decisions Involving the ATS and Business and Human Rights

Part of the Judiciary Act of 1789, the ATS allows non-U.S. citizens to seek damages in U.S. courts for torts committed in violation of international law.[1] In recent years, plaintiff's attorneys have begun to invoke the statute as a means for asserting human rights claims against U.S. corporations in U.S. federal courts. Over the years, the U.S. Supreme Court has sought to narrow application of the ATS.

In 2004, in *Sosa v. Alvarez-Machain*, the Court indicated that, although "the ATS is a jurisdictional statute creating no new causes of action" the ATS does provide courts with the authority to create private rights of action under very limited circumstances such as the "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[2]

Nearly a decade later, the Court ruled in *Kiobel v. Royal Dutch Petroleum Co.* that the presumption against applying U.S. laws extraterritorially extends to ATS claims.[3] *Kiobel* effectively precluded ATS lawsuits based on conduct that occurred abroad.

In 2016, the Court extended *Kiobel*, holding that where a statute does not apply extraterritorially, like the ATS, plaintiffs must establish that, in order to proceed in U.S. courts, the "conduct relevant to the statute's focus occurred in the United States."[4] More recently, in 2018, the Court held in *Jesner v. Arab Bank, PLC*[5] that the ATS does not extend to claims against foreign corporations.

These cases left open the question of whether the ATS applies to *U.S.* corporations where the challenged conduct occurred primarily in the United States. This issue was addressed in the *Nestlé* case.

The June 2021 ATS Decision – *Nestlé USA, Inc. v. Doe et al.*

The plaintiffs in *Nestlé* originally filed their ATS-based lawsuit in federal court in California, alleging that the defendants were complicit in the use of child slave labor on cocoa farms in the Ivory Coast. Defendants were alleged to have provided technical and financial resources (*e.g.*, training, fertilizer, tools, and money) to cocoa farms in the Ivory Coast

[1] 28 U.S.C. § 1350.
[2] 542 U.S. 692, 723-24 (2004).
[3] 569 U.S. 108, 117 (2013).
[4] *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2101 (2016) (applying *Kiobel* to RICO).
[5] 138 S. Ct. 1386, 1406 (2018).

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in exchange for exclusive rights to purchase cocoa from those farms. The plaintiffs contended that this arrangement aided and abetted child slavery as the companies knew or should have known that the cocoa farms were exploiting enslaved children, yet they continued to provide resources.

The plaintiffs argued that they could proceed in federal court under the ATS because the companies made operational decisions from within the United States. The District Court dismissed the lawsuit, reasoning that the only domestic conduct alleged was general corporate activity.[6] The United States Court of Appeals for the Ninth Circuit reversed that decision, finding the plaintiffs could proceed in a U.S. federal court under the ATS because the alleged conduct reflected "major operational decisions," including "financing decisions," that originated in the United States.[7] The companies sought review in the United States Supreme Court.

The Supreme Court granted review on two questions presented by the defendants: (1) whether the plaintiffs pleaded facts sufficient to overcome the presumption against extraterritorial application of the ATS; and (2) whether U.S. federal courts could adjudicate ATS claims asserted against domestic corporations.

In reversing the Ninth Circuit, the Supreme Court explained that, because the ATS does not apply extraterritorially, "plaintiffs must establish that conduct relevant to the statute's focus occurred in the United States" in order for the claims to move forward. The Court concluded that nearly all conduct that the plaintiffs challenged as aiding and abetting forced labor on the cocoa farms occurred in Ivory Coast, not the United States. Any alleged decision-making in the United States was merely "general corporate activity" that "cannot alone establish domestic application of the ATS" without more. Because the claims failed on the threshold extraterritoriality issue, the Court stopped short of deciding the question of whether plaintiffs can pursue ATS claims against U.S. companies.[8]

In addition to clarifying what constitutes "domestic" activity for purposes of the presumption against extraterritoriality, the Court also addressed the limits of judicial lawmaking under the ATS, in the process of rejecting the plaintiffs' assertion that courts should create a private right of action under the ATS for aiding and abetting forced labor oversees. While the Court has previously suggested that courts can, in very limited circumstances, create private rights of action under the ATS, in *Nestlé*, the Supreme Court stressed that "courts must refrain from creating a cause of action whenever there is even a single sound reason to defer to Congress." Before a court can create a cause of action under the ATS, the plaintiffs "must establish that the defendant violated a norm that is specific, universal, and obligatory under international law" and show that "courts should exercise judicial discretion to create a cause of action rather than defer to Congress." The Court found that regardless of whether the plaintiffs satisfied the first prong of this two-step test, "it is clear that they have not satisfied the second."

As for the second prong, the Court found it instructive that Congress has specifically acted to create certain private causes of action "that would enforce developments in international law beyond the three historical torts identified in *Sosa*[.]" For example, Congress passed the Trafficking Victims Protection Reauthorization Act (TVPRA), which imposes liability for offenses related to human trafficking. While the statute originally passed in 2000 as a statute imposing criminal liability for human trafficking, Congress added private rights of action in 2003 and in 2008, allowing plaintiffs to sue defendants who are involved both directly and indirectly with slavery. The Court expressed concern that the judiciary would create the private right of action for aiding and abetting forced labor oversees that the plaintiffs sought. "The judicial role is to resolve cases and controversies, which typically present only the perspectives of the

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[6] 2017 WL 6059134 (C.D. Cal. Mar. 2, 2017).
[7] *Doe v. Nestle, S.A.*, 929 F.3d 623, 635 (9th Cir. 2019) ("The panel majority concludes that Defendants making 'financing decisions' in the United States is conduct sufficient to displace the presumption against extraterritoriality.").
[8] *Nestlé USA, Inc. v. Doe et al.*, No. 19-453, 2021 WL 2459254 (2021).

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parties. The Judiciary does not have the institutional capacity to consider all factors relevant to creating a cause of action that will inherently affect foreign policy."[9]

Putting the *Nestlé* Decision in Context

The *Nestlé* decision reflects the Supreme Court's continued caution against turning the U.S. judicial system into a forum for international human rights claims in the absence of clear Congressional direction. When Congress has acted, such as when it created private rights of action under the TVPRA, it has generally done so with clear limits that reflect policy choices. The Court has clearly indicated that this is the proper course if the role of U.S. courts in international human rights cases is to be expanded. We can expect, however, that enterprising plaintiffs' attorneys will continue pushing the envelope to assert claims in U.S. courts under the ATS.

Notwithstanding the *Nestlé* decision, litigation and enforcement relating to human rights issues in supply chains will likely continue to increase, albeit perhaps under different banners. In the United States, cases are pending under the TVPRA involving both the cobalt and cocoa supply chains. Numerous claims also have been brought under state consumer protection statutes arising out of alleged deficiencies in disclosures to consumers relating to labor conditions in supply chains. There also has been a dramatic increase in the number of withhold release orders issued under Section 307 of the Tariff Act – which prohibits importing into the United States goods produced using forced labor – and related detentions. With increasing integration of ESG factors into investment decisions, it is inevitable there also will be more fraud claims brought under the U.S. federal securities laws, alleging material misstatements or omissions relating to human rights matters involving supply chains.

Human rights-related litigation and enforcement risks also are increasing outside of the United States. The potential impact of these developments is not limited to companies headquartered outside of the United States. Many of the developments also have the potential to impact U.S.-based companies or their local subsidiaries. For example, consumer protection claims arising out of inadequate forced labor disclosures have been brought in other countries against foreign-based multinationals. Parent company liability for adverse human rights impacts at overseas subsidiaries also has been tested in a number of jurisdictions. Furthermore, mandatory human rights due diligence legislation is pending or proposed in several jurisdictions that would impose liability for adverse human rights impacts in supply chains if a company is not able to demonstrate that it exercised due care.

These increasing litigation and enforcement risks underscore the importance of having in place appropriately robust human rights-related policies and procedures designed to mitigate the risk of adverse human rights impacts in supply chains and related disclosures, as well as to reinforce company values.

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[9] *Id.* at *5 (internal quotation marks and alterations omitted).

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