insights

Volume: 25 Issue: 12

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July 15, 2021

Looking Without and Looking Within: *Nestlé v. Doe* and the Legacy of the Alien Tort Statute

Introduction

Hotly anticipated in the world of corporate accountability, the U.S. Supreme Court's decision in *Nestlé USA Inc. v. Doe et al.* (together with *Cargill, Inc. v. Doe et al.*)[1] (hereinafter *Nestlé/Cargill*) was released on June 17, 2021. The case presented the third instance in which the issue of corporate liability for human rights violations under the Alien Tort Statue (ATS) was before the Court and, as in the previous instances, the Court did not definitively settle the question of whether corporations may be subject to ATS suits. In holding that there was no jurisdiction based on the facts alleged, the Court narrowed the ability for plaintiffs to sue U.S. companies for aiding and abetting human rights abuses abroad but did not close the door to litigating such abuses under the ATS. In an increasingly globalised world in which it is becoming harder to turn a blind eye to corporate human rights abuses, much remains to be determined surrounding the legacy and future of both the ATS and *Nestlé/Cargill.*

History of the ATS

The ATS[2] – originally included in the Judiciary Act of 1789 – is a brief statutory provision stating that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

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Little in the way of drafting history illuminates the intended meaning and scope of the ATS. The adoption of the ATS may have been partially motivated by several high-profile diplomatic incidents in the 1780s which prompted concern that the U.S. government was not equipped to provide judicial redress to non-Americans whose rights under the "law of nations" were violated.[3]

The ATS was very rarely invoked over the subsequent two centuries. It was only in 1980, with *Filártiga v. Peña-Irala*, that the ATS came to be viewed as an important tool for human rights litigation. In *Filártiga*, relatives of a seventeen-year-old boy who had been tortured and murdered in Paraguay successfully sued under the ATS the official who had allegedly perpetrated these acts--another Paraguayan citizen who was then living in the United States. The Court of Appeals for the Second Circuit ruled that the ATS provided federal courts with jurisdiction over torts committed in violation of the law of nations, whether committed in the U.S. or abroad. The Second Circuit concluded that torture violates universally accepted norms of human rights, memorably observing that "the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."[4]

The ATS Before the U.S. Supreme Court

The increasing frequency of ATS lawsuits after *Filártiga* prompted the U.S. Supreme Court to address the ATS for the first time in *Sosa v. Alvarez-Machaín* (2004). The Court held that the ATS allowed U.S. federal courts to recognize certain causes of action derived from international law. It considered that the ATS' drafters likely had in mind a "narrow set of violations of the law of nations" widely accepted in the 18th century: (1) violations of safe conducts, (2) infringements on the rights of ambassadors, and (3) piracy.[5] However, the majority concluded that courts could recognize other causes of action based on customary international law, so long as the international norms invoked were as specific and universally accepted as those three norms. The Supreme Court also held that "the practical consequences" of making a cause of action available to litigants in federal courts must be considered, including foreign policy implications.[6]

In 2013, in the first ATS case before the Supreme Court relating to corporate activity, the Court in *Kiobel v. Royal Dutch Petroleum Co*. held that a presumption against extraterritoriality applies to the ATS, meaning that plaintiffs seeking to bring ATS lawsuits would need to show that their claims "touch and concern the territory of the United States…with sufficient force".[7] In this case, involving alleged human rights abuses in Nigeria by a non-U.S. corporation, the Court considered that a "mere corporate presence"

in the United States was insufficient to allow a corporation to be sued in U.S. courts for injuries to non-U.S. citizens abroad.[8]

The Court considered the issue of corporate liability for human rights abuses a second time in [Jesner v. Arab Bank PLC](#) (2018), holding that foreign corporations are immune from suit under the ATS. The majority considered that, since lawsuits against foreign corporations in U.S. courts can create diplomatic tensions, the American judiciary should not create a cause of action under the ATS against foreign corporations. Rather, this should be left to Congress.[9]

Finally, in [RJR Nabisco Inc. v. European Community](#) (2016), which does not deal with the ATS, the Court established a two-step framework for analyzing extraterritoriality issues in general. In step one, the Court considers whether the presumption against extraterritoriality applies to a given statute. If so, the Court proceeds to step two—an analysis of the "focus" of the statute, and whether relevant conduct relating to that focus occurred in the U.S., thereby leading to a permissible domestic application of the statute in question.[10]

Background of *Nestlé/Cargill*

The question of whether U.S.-based companies should be accountable for alleged child slavery in their supply chains was at the heart of *Nestlé/Cargill*. The case was brought by six persons from Mali alleging that they were trafficked into Côte d'Ivoire as children and enslaved to produce cocoa. There, the enslaved children allegedly suffered serious human rights abuses, including working without pay for twelve to fourteen hours a day, receiving minimal food and shelter, and being subjected to physical abuse. While Nestlé and Cargill did not own or operate farms in Côte d'Ivoire, they did buy cocoa from farms there—where the plaintiffs allege they were enslaved as children—and allegedly provided the farms with resources including training, fertilizer, tools and cash, in exchange for the exclusive rights to purchase their cocoa.[11]

The former enslaved children brought separate suits against the companies in 2005 alleging that the companies' behaviour had aided and abetted their enslavement. They argued that the companies knew or should have known that the farms were exploiting enslaved children yet continued to maintain their business relationships and supply the farms with resources. They also argued that the companies had economic leverage over the farms but failed to exercise it to eliminate child slavery. To support bringing suit in U.S. courts, the former enslaved children argued that, while the monetary and non-monetary

support and alleged human rights abuses occurred abroad, all major operational decisions were made from within the U.S.[12]

The U.S. District Court for the Central District of California dismissed the cases because the plaintiffs sought to apply the ATS extraterritorially. The cases were then appealed to the Ninth Circuit, which vacated the lower court's ruling, holding that ATS claims could be brought against domestic corporate actors and that the plaintiffs' complaint was sufficient to support a domestic application of the ATS because the companies' financing decisions originated in the U.S. In 2019, Nestlé USA and Cargill appealed their respective cases to the Supreme Court, which in July 2020 consolidated and agreed to hear the cases.[13]

The *Nestlé/Cargill* Judgment

By an 8-1 vote, the Court ruled that the plaintiffs' complaint impermissibly sought extraterritorial application of the ATS. In a majority opinion written by Justice Clarence Thomas, the Court applied the two-part extraterritoriality framework from *RJR Nabisco,* first noting that *Kiobel* established that the presumption against extraterritoriality applies to the ATS, and then concluding that the plaintiffs had not alleged sufficient conduct within the U.S. to support a domestic application of the ATS.[14]

The Court rejected the notion that "general corporate activity" such as the making of operational decisions constitutes sufficient U.S.-based conduct to establish domestic application of the ATS. Thus, plaintiffs' allegations that the companies had made the decision to supply training, fertilizer, tools and cash to cocoa farmers engaged in enslaving children from their headquarters in the U.S. did not suffice.[15]

In several respects, the majority opinion was narrow. The Court did not rule on what seemed to be the most high-profile legal issue: whether domestic U.S. corporations were immune from suit under the ATS. However, five Justices (Breyer, Alito, Sotomayor, Kagan, Gorsuch) indicated in separate opinions that they would not interpret the ATS to provide for such immunity. The Court also declined to adopt the rule proposed by Nestlé USA, Cargill, and the Trump administration (which filed an *amicus* brief in support of the companies) that the conduct relevant to the "focus" of the ATS is the conduct which directly causes the injury in question.[16] Such a rule, if adopted, would essentially have restricted ATS lawsuits to cases involving an injury that took place within the U.S., thereby precluding future suits in the *Filártiga* mold. Finally, the Court did not accept the Trump administration's argument that federal courts should not create an aiding-and-abetting cause of action under the ATS at all,[17] and therefore it remains at least theoretically

possible for plaintiffs to sue U.S. companies for aiding and abetting violations of international law taking place abroad.

As one prominent observer has noted, however, the Court's decision to apply the *RJR Nabisco* extraterritoriality framework to the ATS could have significant repercussions.[18] The Court in *Nestlé/Cargill* applied this framework in lieu of the vaguer "touch and concern" test established for the ATS in *Kiobel*, which did not necessarily require that any conduct take place in the U.S.

Now, it appears that ATS plaintiffs will have to allege some form of "conduct" in the U.S., although it is not clear what kinds of conduct will suffice. The Court failed to clarify the "focus" of the ATS, declining to adopt either the companies' argument that conduct relating to the statute's focus is the conduct directly causing the injury or the plaintiffs' argument that the relevant conduct is that which violates international law.

Kiobel and *Nestlé/Cargill* establish that "mere corporate presence" and "general corporate activity" in the U.S. are not sufficient forms of conduct. However, where the defendant is an individual—e.g., a former state official implicated in human rights abuses—the defendant's mere travel to or residence in the United States is arguably "conduct" relevant to the ATS' focus, which could be interpreted to include the objective of denying a safe harbor in the U.S. to a "common enemy of mankind" or others guilty of violating the law of nations, as suggested by Justice Breyer in his *Kiobel* concurrence.[19] Given the prevailing view that the ATS allows lawsuits relating to piracy and its enactment in the wake of high-profile violations of the law of nations on U.S. soil, this interpretation of the ATS' focus may be plausible. Were this approach to be taken by U.S. courts, the *Filártiga* model of ATS lawsuits might persevere.

Even in the context of corporate defendants, uncertainty as to the focus of the ATS means that plaintiffs may still be able to allege a wide variety of U.S.-based conduct to overcome the bar on extraterritoriality. It remains to be seen, for instance, how the Court would react to allegations that a corporation deliberately availed itself of U.S. laws to shield itself from liability for acts that it intentionally or knowingly committed abroad.

Looking Forward

The world into which *Nestlé/Cargill* was released is different than that of *Sosa* or *Kiobel*. With recent cases such as *Vedanta v Lungowe*[20] in the United Kingdom holding parent companies liable for human rights abuses committed abroad and the proliferation of proposals to implement laws focusing on human rights due diligence and disclosures

(including in several European countries and at the EU level), the trend is towards corporate accountability. While the facts sufficient to establish jurisdiction under the ATS remain ambiguous, it should be noted that other U.S. laws within the sphere of corporate governance allow for a broad global reach (such as the Foreign Corrupt Practices Act[21]) or require minimal contacts (as in *United States v. BNP Paribas S.A.*,[22] in which the Department of Justice famously imposed a $8.9736 billion fine on the French bank for violations of U.S. sanctions, considering that dollar-denominated transactions established U.S. jurisdiction). In light of this debate and given the possibility of the *Nestlé/Cargill* claimants amending their complaints, much remains to be determined for the present claimants and future ATS litigants.

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The views expressed in this Insight are personal to the authors and do not necessarily reflect those of the International Court of Justice or the Danish Institute for Human Rights.

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[1] *Nestlé U.S.A. v. Doe*, 593 U.S. __ (2021) (slip op).
[2] 28 U.S.C. § 1350.
[3] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 716-17 (2004).
[4] *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).
[5] *Sosa*, *supra* note 3, at 715.
[6] *Id.* at 732-33.
[7] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013).
[8] *Id.* at 125.
[9] *See Jesner v. Arab Bank, PLC*, 584 U.S. __, 138 S. Ct. 1386 (2018).
[10] *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 337 (2016).
[11] *See Nestlé U.S.A. v. Doe*, No. 19-416, Respondents' Br. 3-5.
[12] *Nestlé U.S.A. v. Doe*, 593 U.S. __, ___ (2021) (slip op., at 2).
[13] *Id.* at 2-3.
[14] *Id.* at 3-5.

[15] *Id.* at 5.
[16] *Id.* at 4.
[17] *Id.*
[18] William S. Dodge, *The Surprisingly Broad Implications of Nestlé USA, Inc. v. Doe for Human Rights Litigation and Extraterritoriality*, JUST SECURITY (June 18, 2021), https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/.
[19] *Kiobel*, *supra* note 7, at 131 (Breyer, J., concurring in judgment).
[20] *Vedanta Resources PLC v. Lungowe*, [2019] UKSC 20.
[21] 15 U.S.C. § 78dd-1 *et seq*.
[22] Press Release, U.S. Dep't of Justice, BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (June 30, 2014), https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial.