ALERT MEMORANDUM

Supreme Court Rules Foreign Corporations Not Liable Under Alien Tort Statute

April 25, 2018

On April 24, 2018, the Supreme Court held in *Jesner et al. v. Arab Bank, PLC* that the Alien Tort Statue ("ATS"), which has been extensively used during recent decades by foreign plaintiffs to bring lawsuits in U.S. courts for alleged international human rights law violations, may not be used to impose liability on foreign corporations.

The plurality in the 5-4 decision concluded that the judiciary, without explicit authorization from Congress, does not have the authority to impose corporate liability in this arena, as to do so would implicate significant foreign policy concerns. Subject to the enactment of new legislation, this decision terminates the possibility of any viable ATS litigation against foreign corporations.

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The Alien Tort Statute

The ATS creates federal court jurisdiction for tort claims by aliens based on an alleged violation of a universally recognized norm of international law. While the ATS was enacted in 1789, it remained virtually unused for almost 200 years. In 1980, however, during the expanding international human rights movement, the Second Circuit essentially rediscovered the statute in in the *Filartiga* case, which was brought by a Paraguayan citizen who alleged that his son had been kidnapped and tortured by a Paraguayan official in retaliation for the plaintiff's human rights activities.[1] The Second Circuit held that the ATS allowed non-U.S. citizens to bring tort claims in federal court for such violations of "universally accepted norms of the international law of human rights."[2] Its decision ushered in the era of modern ATS litigation.

The "first wave" of ATS lawsuits, like *Filartiga*, primarily targeted foreign government officials. These defendants were generally judgment-proof, however, and eventually ATS claims began to be brought against non-state actors.[3] This laid the groundwork for ATS lawsuits against corporations, which in the early 2000s led to the beginning of a "second wave" of ATS litigation, in which plaintiffs increasingly invoked the ATS to bring claims against corporations for allegedly committing or aiding and abetting various human rights violations outside the United States.

Before the *Jesner* decision, the Supreme Court had never previously weighed in on whether corporations can be liable under the ATS. However, it had twice before considered—and substantially narrowed—the scope of the ATS. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Court cautioned against an over-expansive interpretation of the claims that could be asserted under the ATS, holding that, to be the subject of an ATS claim, the allegedly violated norm of international law must be "specific, universal, and obligatory."[4] In 2013, the Court further cabined the statute's reach in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) ("*Kiobel II*"). While the Court originally granted certiorari, and even heard oral arguments, on the issue of corporate liability in *Kiobel II*, it concluded that the statute's extraterritorial reach needed to be resolved first, and heard re-argument on that issue. The outcome was a decision barring claims based exclusively on conduct occurring abroad, in light of the presumption against the extraterritorial application of U.S. law. The Court left open only a narrow window for ATS cases where claims "touch and concern" the United States "with sufficient force" to displace that presumption.[5]

The question of corporate liability was left unanswered until the *Jesner* decision, which resolved a circuit split that had developed in the interim. Before the Supreme Court's decision, five circuits (the Fourth, Seventh, Ninth, Eleventh and D.C. Circuits) had explicitly held that corporations may be sued under the ATS,[6] and the Fifth Circuit had implicitly accepted that such a

[1] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).
[2] *Id.* at 878.
[3] *See, e.g., Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).
[4] *Id.* at 729 (requiring "vigilant doorkeeping" in recognizing new international norms).
[5] *Id.* at 1669.
[6] *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530-31 (4th Cir. 2014); *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014); *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), *vacated on other grounds*, 537 F. App'x 7 (D.C. Cir. 2013).

suit may be viable.[7] By contrast, only the Second Circuit had found that the ATS does not permit suits against corporations, on the basis that "[n]o corporation has ever been subject to *any* form of liability … under the customary international law of human rights."[8]

Background to the *Jesner* Case

Jesner v. Arab Bank, PLC involved claims by victims of terrorist attacks that took place between 1995 and 2005 in Israel, the West Bank, and Gaza. The plaintiffs claim that Jordan-based Arab Bank knowingly and intentionally provided material support for those attacks, including by processing financial transactions for groups (such as Hamas) that perpetrated the attacks, including through bank accounts in New York.

Plaintiffs originally brought both ATS and Anti-Terrorism Act ("ATA") claims against Arab Bank. Only aliens can invoke the ATS, while the ATA allows U.S. nationals who are victims of terrorist attacks abroad to sue in U.S. courts. The claims were bifurcated, and in 2014, a jury found Arab Bank liable to the U.S. national under the ATA for providing material support to Hamas, leading to a settlement, though the judgment was ultimately vacated by the Second Circuit in 2018.[9] As for the foreign plaintiffs' ATS claims, Arab Bank moved for dismissal, arguing that corporations cannot be liable under the ATS, as the Second Circuit ruled in *Kiobel I*. The district court concluded that it was bound by that decision and dismissed the case, and the Second Circuit affirmed. While the unanimous Second Circuit panel concluded that it was powerless to disagree with *Kiobel I*, it nonetheless observed that the Supreme Court's reasoning in *Kiobel II* "appears to suggest that the ATS may indeed allow for corporate liability – a reading of the statute that several of our sister circuits have adopted."[10] The Second Circuit then denied rehearing *en banc*, with several judges suggesting that the issue would be more properly considered by the Supreme Court.[11] The Supreme Court subsequently granted *certiorari*.

Before the Supreme Court, the *Jesner* petitioners argued that nothing in the language, history, or purpose of the ATS suggests that it does not apply to corporations. The focus of the statute, they asserted, is on conduct violating the law of nations, regardless of who engages in that conduct. The petitioners also pointed out that corporate liability is often the only available avenue for meaningful relief for victims of human rights violations.[12] This sentiment was echoed by several *amici*, including a bipartisan group of U.S. Senators who stressed that foreclosing liability against banks who facilitate terrorist financing could create a "dangerous gap."[13] The U.S. government also provided qualified support to the petitioners, stating at oral argument that it saw no "sound reason to categorically exclude corporate liability."[14]

[7] *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999).
[8] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *aff'd on other grounds*, 569 U.S. 108 (2013) ("*Kiobel I*").
[9] *See Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018).
[10] *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 155 (2d Cir. 2015).
[11] *In re Arab Bank, PLC Alien Tort Statute Litig.*, 822 F.3d 34 (2d Cir. 2016).
[12] *See* Brief for Petitioners, *Jesner, et al. v. Arab Bank, PLC*, No. 16-499 (June 20, 2017).
[13] *See* Brief of *Amici Curiae* United States Senators Sheldon Whitehouse and Lindsey Graham in Support of Petitioners, *Jesner, et al. v. Arab Bank, PLC*, No. 16-499 (June 27, 2017).
[14] Oral Argument Transcript, *Jesner, et al. v. Arab Bank, PLC*, No. 16-499 (October 11, 2017) at 29. *See also* Brief for the United States as Amicus Curiae Supporting Neither Party, *Jesner, et al. v. Arab Bank, PLC*, No. 16-499 (June

Arab Bank countered that corporate liability is foreclosed under the ATS because there is no specific, broadly accepted norm of international law allowing corporations to be held liable for violations of human rights. It addressed practical concerns about combatting terrorism by pointing out the numerous other remedies available outside the ATS, including federal criminal law, regulations, and sanctions, all of which – unlike ATS litigation – permit the exercise of executive and legislative discretion "in an area fraught with foreign policy considerations."[15] The U.S. Chamber of Commerce and other business interests also weighed in to suggest that corporate ATS liability "imposes unwarranted costs on businesses operating abroad."[16]

The Supreme Court's Decision

In a splintered decision accompanied by three concurring opinions and a 34-page dissent, a 5-4 plurality of Justice Kennedy (who delivered the opinion), Chief Justice Roberts, Justice Thomas, Justice Alito, and Justice Gorsuch concluded that, in light of foreign-policy concerns best considered by the political branches, "absent further action from Congress, it would be inappropriate for courts to extend ATS liability to foreign corporations."[17] The plurality pointed out that the primary goal of the ATS at the time of its enactment was to avoid foreign relations tensions "by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable."[18] But the *Jesner* case and others against foreign corporations, the plurality found, actually created precisely the "significant diplomatic tensions" with key U.S. allies that the ATS was designed to avoid.[19] Therefore, because "foreign corporate defendants create unique problems" requiring policy judgments courts are not well-suited to make, the court refused to permit ATS litigation against those defendants.

Notably, the plurality's decision was not based on the same reasoning as *Kiobel I*, though Justice Kennedy, Chief Justice Roberts, and Justice Thomas separately expressed the view that the ATS does not permit suits against foreign corporations because there is no "specific, universal, and obligatory norm of corporate liability" under international law.[20] Instead, these justices grounded the decision squarely in judicial restraint. Indeed, in a statement that will undoubtedly be used by defendants in future ATS litigation even against individuals and U.S. corporations, Justice Kennedy noted that this judicial restraint could be extended even further to limit the scope of the ATS, recognizing that "there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS."[21] This argument was championed by Justice Gorsuch in his concurring opinion,[22] in which he also argued

27, 2017) (questioning whether the *Jesner* case should go forward in light of separate extraterritoriality concerns).

[15] *See* Brief for Respondent, *Jesner, et al. v. Arab Bank, PLC*, No. 16-499 (August 21, 2017).

[16] *See* Brief for the Chamber of Commerce of the United States of America, the National Foreign Trade Council, USA*Engage, the United States Council for International Business, and the American Petroleum Institute as *Amici Curiae* in Support of Neither Petitioner, *Jesner, et al. v. Arab Bank, PLC*, No. 16-499 (June 27, 2017).

[17] *Jesner, et al. v. Arab Bank, PLC*, No. 16-499, slip. op. (Opinion of Kennedy, J.) at 19.

[18] *Id.* at 25.

[19] *Id.* at 26.

[20] *Id.* at 16.

[21] *Id.* at 19.

[22] *Id.* at 3-5 ("A statute that creates no new causes of action … creates no new causes of action. To the extent *Sosa* continued on to claim for federal judges the discretionary power to create new forms of liability on their own, it

that ATS suits should not even be allowed against foreign individuals, but only against U.S. defendants, because "the original text of the ATS … likely would have been understood to contain such a requirement when adopted."[23]

In a lengthy dissent joined by Justices Ginsburg, Breyer, and Kagan, Justice Sotomayor stressed that the text, history, and purpose of the ATS all support the use of the statute to bring suits against corporations, and also that "nothing about the corporate form in itself raises foreign-policy concerns that require the Court … to immunize all foreign corporations from liability under the ATS."[24] Accusing the plurality of using "a sledgehammer to crack a nut,"[25] Justice Sotomayor pointed out several less extreme ways to address foreign-policy issues than a blanket prohibition on foreign corporate liability – including the presumption against extraterritoriality and an exhaustion of domestic remedies requirement. She also observed that the plurality's deference to the legislative and executive branches is undermined by the fact that both the U.S. Solicitor General and members of Congress urged the Supreme Court to find that corporations can be held liable under the ATS.[26] The dissent concluded that the *Jesner* decision ensures that foreign corporations will "remain immune from liability for human rights abuses, however egregious they may be."[27]

The Future of ATS Litigation

The Supreme Court's decision in *Jesner* should push the ATS a large step back into the obscurity it once enjoyed. Particularly given that most foreign individuals are able to avoid ATS judgments because U.S. courts have no personal jurisdiction over them or due to some form of official immunity, this leaves U.S. individuals and corporations as the most realistic defendants in ATS suits going forward. However, the international human rights abuses impacting foreign plaintiffs that are the subject of most ATS cases typically occur abroad, and are rarely alleged to have been perpetrated directly by U.S. individuals or corporations.[28] While plaintiffs have tried to pierce the corporate veil or use agency theory to establish liability over U.S. corporations based on actions of their foreign subsidiaries or business partners, these efforts have largely been unsuccessful.[29] In the rare case where an appropriate defendant can be found and the "touch and concern" test satisfied, the *Jesner* plurality suggests that claims may even be limited to the few violations of international norms[30] recognized at the time of the ATS's original passage. Post-*Jesner*, ATS litigation promises to significantly decrease.

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invaded terrain that belongs to the people's representatives and should be promptly returned to them.").

[23] *Jesner, et al. v. Arab Bank, PLC*, No. 16-499, slip. op. (Opinion of Gorsuch, J.) at 6-14.

[24] *Jesner, et al. v. Arab Bank, PLC*, No. 16-499, slip. op. (Sotomayor, J., dissenting) at 1.

[25] *Id.* at 23.

[26] *Id.* at 23-24.

[27] *Id.*at 33.

[28] When they are, it must still be considered whether the "touch and concern" requirement would be satisfied simply by having a U.S. defendant, or where additional connections with the United States would be required. *See Kiobel II*, 569 U.S. at 127 (Breyer, J., concurring).

[29] As one court in an ATS case explained, "[o]nly in unusual circumstances will the law permit a parent corporation to be held either directly or indirectly liable for the acts of its subsidiary." *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1234 (N.D. Cal. 2004).

[30] For example, violation of safe conducts, infringement of the rights of ambassadors, piracy. *See Jesner, et al. v. Arab Bank, PLC*, No. 16-499, slip. op. (Opinion of Kennedy, J.) at 8.