Supreme Court Mulls Scope of Alien Tort Statute in *Nestle, Cargill*

Skadden

12 / 22 / 20

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

John H. Beisner
Partner / Washington, D.C.
202.371.7410
john.beisner@skadden.com

One Manhattan West
New York, NY 10001
212.735.3000

On December 1, 2020, the U.S. Supreme Court heard oral argument in a pair of related cases presenting questions about the scope of the Alien Tort Statute (ATS), a frequent topic of debate before the Court in recent years. In N*estle USA, Inc. v. Doe I* and *Cargill*, *Inc. v. Doe I*, the plaintiffs allege that they were the victims of abuses that the defendants aided and abetted by purchasing cocoa beans from farms located in the Ivory Coast despite knowing of widespread use of child labor and by providing Ivorian farmers with advance payments and personal spending money to maintain their loyalty as exclusive suppliers.

The ATS, a one-sentence provision of the Judiciary Act of 1789, affords federal courts jurisdiction over lawsuits filed by foreign nationals seeking redress for alleged torts committed in violation of international law. In the initial two centuries after its enactment, the ATS was invoked by claimants only a few times, perhaps because its terms — which are unaccompanied by legislative history — leave unclear the statute's core purpose.

However, in the early 1980s, plaintiffs' counsel began using the statute as a vehicle for non-U.S. citizens to assert international human rights claims against corporations in U.S. federal courts, in some situations targeting companies that arguably had no direct causative link to the alleged harms and events that had little or no connection to the United States. As an expanding number of cases have tested the limits of the statute's jurisdictional authorization, the Supreme Court has stepped in several times to narrow the applicability of ATS.

Most notably, in 2004, the Court held in *Sosa v. Alvarez-Machain* that the ATS did not create a federal cause of action but instead merely "furnishes jurisdiction for a relatively modest set of actions alleging violations of the law of nations." In its 2013 opinion in *Kiobel v. Royal Dutch Petroleum Co*., the Court concluded that the general presumption against extraterritorial application of U.S. laws extends to claims asserted under the ATS, thereby restricting ATS-based lawsuits alleging conduct occurring outside the United States. Days later, the Court granted *certiorari* in another ATS case — *Rio Tinto PLC v. Sarei* — which presented the question of whether ATS claims could be brought at all against corporate entities (as opposed to individuals). However, the Court passed on the opportunity to address that issue, instead immediately vacating the lower court decision and remanding the case for further consideration in light of the extraterritoriality principles set forth in *Kiobel*. Most recently, in *Jesner v. Arab Bank, PLC* (2018), the Court addressed part of that question, holding that the ATS does not afford federal jurisdiction over claims asserted against foreign corporations, but leaving unresolved the question of whether domestic corporations are similarly immune.

Both *Nestle* and *Cargill* involve domestic corporations (*Nestle* includes several connected international entities as well), and the petitioners seek resolution of two questions. First, referencing *Kiobel*, the companies are asking whether the plaintiffs have overcome the presumption against extraterritorial applicability of the ATS. They argue that the claim is based on allegations of general corporate activity in the United States and that plaintiffs cannot trace the alleged harms to any defendant directly. The companies are seeking dismissal of the claims because their alleged conduct is so far removed from the harms the plaintiffs suffered in that foreign country. Second, the petitioners are raising anew the question left unresolved by *Rio Tinto* and *Jesner*: Does the ATS afford federal court jurisdiction as to claims against domestic corporations?

Supreme Court Mulls Scope of Alien Tort Statute in *Nestle, Cargill*

The Court's ruling on the first question could provide important guidance about what a plaintiff must plead and prove to secure federal jurisdiction over an ATS-based claim. Often, ATS claimants are unable to allege that a U.S.-based defendant engaged in conduct directly related to the injuries they purportedly sustained in a foreign country. Thus, they make allegations that a U.S. defendant either knew of the alleged misconduct as it was occurring or that a defendant "should have known" or "could have known" of the purported wrongdoing. In short, the Court's determination about an ATS plaintiff's threshold pleading and proof burdens as to domestic defendants would address an issue that arises in a substantial portion of ATS cases.

Reaching a clear-cut decision on the second issue — the question whether U.S. corporations are subject to ATS-based claims at all — may be more difficult. As discussed above, the Court avoided directly addressing that issue in both *Rio Tinto* and *Jesner*. But in a portion of his majority opinion in *Jesner* that was joined by Chief Justice John G. Roberts, Jr. and Justice Clarence Thomas, Justice Anthony M. Kennedy described the ATS as providing "a federal remedy for a narrow category of international-law violations committed ***by individuals***," suggesting a view that all corporations are outside the statute's contemplation. On the other hand, Justices Sonia Sotomayor, Stephen G. Breyer and Elena Kagan all dissented from the majority holding in *Jesner*, so they presumably will maintain that domestic corporations can be sued under the statute. And in his concurring opinion in *Jesner*, Justice Samuel A. Alito, Jr. suggested that U.S. federal courts could hear ATS-type claims against domestic corporations under diversity jurisdiction principles, rendering ATS-based jurisdiction superfluous in such cases.

The positions of the other justices are less clear, although during oral argument on *Nestle* and *Cargill*, some justices, including Justices Neil M. Gorsuch and Brett M. Kavanaugh, appeared to expressed concern that making domestic corporations effectively immune to ATS-based claims would leave the statute with little purpose. That observation has merit, since ATS-based actions typically seek compensation from well-capitalized corporations; plaintiffs' counsel have shown little interest in suing individuals. As suggested by some of the justices' questioning during oral argument, the Court could resolve the first question in the defendants' favor, obviating the need to determine the second. That result would have a more limited impact on future ATS litigation, but would provide additional useful guidance about applying the extraterritoriality principles *Kiobel* announced.