

## Supreme Court and Appellate Alert

April 27, 2018

### Key Points

- The Supreme Court in *Jesner v. Arab Bank* ruled 5-4 that suits against foreign corporations under the ATS are barred, answering a question left unresolved in *Kiobel v. Royal Dutch Petroleum Co.*
- Although the decision does not foreclose the possibility of ATS suits being brought against U.S. corporations, its practical impact is to further restrict the reach and impact of a once-popular statutory tool of human-rights advocates and plaintiffs injured abroad.



## Supreme Court Forecloses Foreign Corporate Liability Under the Alien Tort Statute

### Background

Arab Bank is a Jordan-based financial institution. Petitioners sued the bank under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, alleging that the bank used its New York branch to clear dollar-denominated transactions and maintain bank accounts connected to terrorist activity, and that those acts of terrorism injured petitioners and their family members abroad.

After the 2nd Circuit dismissed petitioners' claims, the Supreme Court granted certiorari to answer whether foreign corporations may be liable under the ATS, a 1789 enactment that creates federal jurisdiction over "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." Passed by the First Congress to provide redress for a narrow category of injuries suffered by foreigners in the United States, the ATS sat largely dormant for two centuries. Then, beginning in the 1980s, it quickly became a popular tool by which foreign plaintiffs attempted to vindicate certain fundamental human rights, such as protection from torture, genocide and extrajudicial killing, in U.S. courts. Critics of the law believed that the courts went too far in allowing such suits, which are unmoored from the ATS's limited original purpose.

Seven years ago, the Supreme Court granted certiorari in *Kiobel v. Royal Dutch Petroleum Co.* to address the same question of foreign corporate liability under the ATS. Rather than answering that question, however, the Court set the case for re-argument on a broader question: To what extent does the ATS apply extraterritorially? *Kiobel* ultimately concluded that, to be cognizable, a claim under the ATS must "touch and concern" the U.S. with sufficient force to displace the presumption against extraterritoriality—thus leaving the question of foreign corporate liability for a future case.

Earlier this week, the Court answered that lingering question, **holding** by a 5-4 vote that foreign corporations may not be sued under the ATS.

### The Supreme Court's Decision

Justice Kennedy's majority opinion squarely "holds that foreign corporations may not be defendants in suits brought under the ATS." The portions of his opinion that garnered a majority emphasize "judicial caution," suggesting that the Court should defer to Congress to determine whether corporate defendants should be held liable for human-rights violations in light of the serious foreign-policy implications of broad ATS liability. Because the ATS was designed to **reduce** diplomatic tensions, Justice Kennedy reasoned, there is simply no reason to extend liability where doing so might have the opposite effect. Although other portions of Justice Kennedy's opinion offered additional rationales focusing on analogous laws and tribunals in both the domestic and international context, those portions did not garner a majority.

Concurring in part and in the judgment, Justice Alito offers another rationale: separation of powers. His opinion emphasizes that courts should reject the creation of any new cause of action that fails to "materially advance the ATS's objective of avoiding diplomatic strife," since separation-of-powers principles counsel against effectively determining policy through the ATS. Justice Gorsuch, also concurring in part and in the judgment, would go further still, in prohibiting a "suit by foreigners against a foreigner over the meaning of international norms." Finally, Justice Thomas wrote separately to note his agreement with both the majority and the two separate concurrences.

Joined by Justices Ginsburg, Breyer and Kagan, Justice Sotomayor dissented, writing that, by "categorically foreclos[ing] foreign corporate liability," the majority "absolves corporations from responsibility under the ATS for conscience-shocking behavior." In her view, the question before the Court is only whether there is any reason under international or U.S. law to distinguish between natural persons and corporations when there are allegations of grave violations of international law. By categorically foreclosing such claims, Justice Sotomayor writes, the majority makes the U.S. a "safe harbor for today's pirates," thus generating international friction in frustration of the ATS's purpose. Citing the Court's recent decisions in *Citizens United and Hobby Lobby*, Justice Sotomayor pointedly concludes by criticizing the majority for "allow[ing] [corporate] entities to take advantage of the significant benefits of the corporate form and enjoy fundamental rights without having to shoulder attendant fundamental responsibilities."

### Takeaways

The Supreme Court's answer in *Jesner* to the question on which the Court punted in *Kiobel*, though long-awaited, is unsurprising. It marks another milestone in the Supreme Court's efforts over the past 15 years to circumscribe the revitalized ATS in U.S. courts—first by narrowing the types of recognized claims in *Sosa v. Alvarez-Machain* in 2004, next by limiting the extraterritorial reach of the ATS in *Kiobel* in 2013, and now by barring liability against foreign corporate defendants altogether. Indeed, as the multiple opinions supporting the judgment make clear, at least three Justices are willing to go even further in restricting ATS claims.

It is true that the Court's decision in *Jesner* does not suggest that corporations can act with complete impunity: the decision leaves open whether U.S. corporations can face liability under the ATS, and notes that other laws, such as the Anti-Terrorism Act, provide criminal and civil penalties against both foreign and domestic corporations for certain offenses. In addition, individuals remain liable in appropriate cases. Nevertheless, given that the bulk of ATS suits involve claims against foreign corporations, this decision (along with *Kiobel's* extraterritoriality ruling) further restricts the reach and potential impact of a once-popular tool for human-rights advocates. In doing so, the Supreme Court has sent Congress a clear message: If federal courts are to be open to claims like these, the political branches, which are constitutionally endowed with foreign policy powers, must act.

## Contact Information

If you have any questions regarding this alert, please contact:

**James E. Tysse**

[jtysse@akingump.com](mailto:jtysse@akingump.com)

202.887.4571

Washington, D.C.

**Pratik A. Shah**

[pshah@akingump.com](mailto:pshah@akingump.com)

202.887.4210

Washington, D.C.

**Z.W. Julius Chen**

[chenj@akingump.com](mailto:chenj@akingump.com)

202.887.4475

Washington, D.C.

**Anne Kolker**

[akolker@akingump.com](mailto:akolker@akingump.com)

202.887.4507

Washington, D.C.