April 25, 2018

# U.S. Supreme Court Forecloses Non-U.S. Corporate Liability Under the Alien Torts Statute

## Non-U.S. Corporations May Not Be Sued by Non-U.S. Plaintiffs Under the Alien Torts Statute for Alleged Violations of International Law

### SUMMARY

On April 24, 2018, the U.S. Supreme Court issued its decision in *Jesner* v. *Arab Bank*,[1] holding that non-U.S. corporations cannot be held liable under the Alien Torts Statute ("ATS"). In that case, non-U.S. victims of terrorist attacks abroad sued a non-U.S. bank under the ATS for allegedly processing U.S. dollar transactions that aided foreign terrorists through the bank's New York bank branch. The Court held that the non-U.S. bank could not be sued under the ATS, because the ATS did not expressly permit claims against non-U.S. corporations, and courts should be reluctant to expand a judicially created cause of action absent clear direction from Congress. The decision should prove to limit significantly ATS actions.

### BACKGROUND

As part of the 1789 Judiciary Act, Congress enacted the ATS, which provides: "The 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."[2]

Aspects of the Judiciary Act were a response to highly publicized diplomatic incidents in the 1780s, where foreign diplomats were victims of torts but lacked any means to obtain redress under the then-existing judicial system. Among other statutes, the ATS corrected this gap, providing a forum for aliens to sue over torts committed in violation of "the law of nations,"[3] which at the time included only violations of safe

conduct extended to aliens, interference with ambassadors, and piracy. The ATS, however, is "strictly jurisdictional" and does not define any causes of action.[4]

For almost 200 years, very few claims were brought under the ATS. In 1980, however, the U.S. Court of Appeals for the Second Circuit held that non-U.S. plaintiffs could sue non-U.S. defendants present in the United States for acts of torture committed abroad.[5] That decision ushered a wave of ATS litigation over the following decades.

The U.S. Supreme Court addressed the ATS's scope in *Sosa* v. *Alvarez-Machain*, holding that courts could recognize causes of action for violations "of a norm that is specific, universal, and obligatory" under international law.[6] Given the foreign policy implications of ATS suits, however, the *Sosa* Court held that even where an international norm exists, courts must consider whether caution requires that Congress expressly grant authority to extend ATS liability.[7] *Sosa* and later cases from the Supreme Court left undecided the proper subjects of an ATS lawsuit, and, in particular, whether corporations could be held liable for violations of international law, a question on which the federal Courts of Appeals disagreed.[8]

The question of corporate liability returned to the Supreme Court in *Jesner* v. *Arab Bank*. In *Jesner*, about 6,000 non-U.S. plaintiffs claimed that they or their family members were victims of terrorist attacks in the Middle East between 2004 and 2010, and filed an ATS suit against Arab Bank, a major Jordanian financial institution that allegedly provided banking services to non-U.S. terrorists or groups assisting them. Although nearly all of the alleged conduct occurred in the Middle East (and none of the attacks occurred in the United States), plaintiffs alleged that certain transactions to or from the non-U.S. terrorists were denominated in U.S. dollars, and so were cleared through Arab Bank's New York branch. The district court dismissed the case on the ground that Arab Bank, as a corporation, was not subject to liability under the ATS, and the Second Circuit affirmed. The Supreme Court granted *certiorari* on this question to resolve the disagreement among the Courts of Appeals.

## THE COURT'S DECISION

In a 5-4 decision, Justice Kennedy delivered the opinion of the Court, holding that the ATS does not permit non-U.S. plaintiffs to sue non-U.S. corporations in U.S. federal courts. Regardless of whether corporate liability was established under international law, the Court held that U.S. courts should not extend ATS liability to non-U.S. corporations without Congressional action.[9] The Court first noted its "general reluctance" to "extend or create private causes of action even in the realm of domestic law."[10] Given the "foreign-policy and separation-of-powers concerns inherent in ATS litigation," the Court held that caution was especially warranted.[11]

The Court's opinion reflected concern about the ATS's impact on foreign policy. Although "[t]he ATS was intended to promote harmony in international relations," the Court stated that "the opposite is occurring."[12] The Court observed that the litigation's primary nexus to the United States was that Arab Bank cleared

U.S. dollars through New York.[13] But such "clearance activity," the Court explained, quoting from the *amicus* brief for the Institute of International Bankers, "is an entirely mechanical function; it occurs without human intervention in the proverbial 'blink of an eye.'"[14] Because of this "relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States," the litigation has "caused significant diplomatic tensions" with Jordan, a "critical" U.S. ally, which sees the case as a "grave affront to its sovereignty."[15] The Court also made note of the numerous other foreign sovereigns that have appeared in the Supreme Court to object to ATS litigation.[16]

## IMPLICATIONS

The direct impact of the Court's decision is that non-U.S. corporations may not be sued by foreign nationals in U.S. courts for alleged violations of international law. But the Court's reasoning could signal potentially broader implications.

***First***, the Court's opinion may ultimately prove a death knell for the recent wave of ATS litigation. In the aftermath of *Jesner*, plaintiffs seeking relief through the ATS may direct their lawsuits towards non-U.S. individuals, including perhaps corporate officers. Although the Court left open the possibility of suing individuals under the ATS, it expressed doubt that there could ever be "new causes of action under the ATS."[17] Given this direction, courts may be very cautious before extending ATS jurisdiction to anything but the most well-established violations of international norms. In particular, courts might be reticent to extending the ATS to include aiding and abetting, conspiracy or other forms of indirect liability that lack clear and well-established analogues in international law.

***Second***, the Court indicated its discomfort at the United States being a forum for entirely foreign disputes. Although the Court ultimately did not decide whether the lawsuit would have been barred by the presumption against extraterritoriality, it strongly suggested that the case's "relatively minor connection" to the United States was problematic. Accordingly, the decision will make more challenging attempts to use the ATS to invoke the jurisdiction of U.S. courts without a substantial nexus to the United States.

***Third***, the Court did not decide the broader question about whether corporations generally cannot be subject to ATS claims, and restricted its holding to non-U.S. corporations. In a concurring opinion, Justice Alito questioned whether the ATS would create jurisdiction against U.S. domestic corporations, given that other avenues of jurisdiction, like diversity jurisdiction, would be available in that situation.[18] However, it is possible that non-U.S. plaintiffs may seek to employ the ATS in order to sue U.S. corporations, or non-U.S. affiliates of U.S. corporations, for violations of international law that are not otherwise cognizable under domestic U.S. law.

***Fourth***, the decision may ease tensions with U.S. allies who have long resented ATS actions concerning their countries being heard in U.S. courts. Aside from Jordan, a "critical" U.S. ally in the Middle East, which described the *Jesner* litigation as a "grave affront to its sovereignty," previous ATS cases have

seen objections filed at the Court by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom.

* * *

## ENDNOTES

1 No. 16-499, 584 U.S. __ (2018).

2 28 U.S.C. § 1350.

3 *Jesner*, slip op. at 8 (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 714 (2004)).

4 *Id.* at 8.

5 *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

6 542 U.S. at 732 (quoting *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) (internal quotation marks omitted).

7 *Id.* at 727.

8 The Supreme Court granted *certiorari* to determine ATS corporate liability in *Kiobel* v. *Royal Dutch Petroleum Co.*, but ultimately decided the case on the alternative ground that the lawsuit was impermissibly extraterritorial. 569 U.S. 108, 124-25 (2013).

9 *Jesner*, slip op. at 18-19.

10 *Id.* at 18.

11 *Id.* at 19.

12 *Id.* at 25.

13 *Id.*

14 *Id.* at 4 (quoting Brief for Institute of International Bankers as *Amicus Curiae* at 12-13 & n.8).

15 *Id.* at 26 (internal quotation marks omitted).

16 *Id.* at 26.

17 *Id.* at 18.

18 *Id.* at 3 n.1 (Alito J., concurring).

## ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

## CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.

## CONTACTS


| | | |
|---|---|---|
| **New York** | | |
| Richard C. Pepperman II | +1-212-558-3493 | peppermanr@sullcrom.com |
| Matthew A. Schwartz | +1-212-558-4197 | schwartzmatthew@sullcrom.com |
| Michael T. Tomaino Jr. | +1-212-558-4715 | tomainom@sullcrom.com |
| David M.J. Rein | +1-212-558-3035 | reind@sullcrom.com |
| Jeffrey T. Scott | +1-212-558-3082 | scottj@sullcrom.com |
| Sharon L. Nelles | +1-212-558-4976 | nelless@sullcrom.com |
| Matthew J. Porpora | +1-212-558-4028 | porporam@sullcrom.com |
| Alexander J. Willscher | +1-212-558-4104 | willschera@sullcrom.com |
| Nicolas Bourtin | +1-212-558-3920 | bourtinn@sullcrom.com |
| **Washington, D.C.** | | |
| Daryl A. Libow | +1-202-956-7650 | libowd@sullcrom.com |