U.S. Supreme Court requires more than "general corporate activity" in U.S. to bring Alien Tort Statute claims in U.S. courts

On 17 June 2021, the U.S. Supreme Court delivered its opinion in *Nestlé USA, Inc. v Doe*, 593 U.S. ___ (2021). The suit was brought by a group of citizens from Mali under the U.S. Alien Tort Statute ("**ATS**"), alleging that Nestlé and Cargill aided and abetted the perpetration of child slavery and forced labour at cocoa plantations in the Ivory Coast, where these individuals said they had been trafficked as child slaves to produce cocoa. The ATS is a U.S. federal law first adopted in 1789 that gives the U.S. federal courts jurisdiction to hear lawsuits filed by non-U.S. citizens for certain torts committed in violation of the law of nations or a U.S. treaty.

The district court initially dismissed the claim but the Court of Appeals for the Ninth Circuit reversed, holding that the suit could proceed on the basis that the plaintiffs pleaded that the corporate defendants had made or approved "every major operational decision" in the United States. Nestlé and Cargill successfully petitioned the U.S. Supreme Court for review.

Looking beyond "general corporate activity"

By an 8-1 majority on this point, the Court determined that the plaintiffs' complaint did not overcome the presumption against extraterritorial application of the ATS set forth in *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108 (2013) (a case where Quinn Emanuel represented Royal Dutch Petroleum in the Supreme Court). Since nearly all the corporate conduct that allegedly aided and abetted forced labour occurred overseas in the Ivory Coast, the plaintiffs were required to plead specific factual allegations of U.S.-based conduct that aided and abetted those alleged extraterritorial violations to overcome the presumption.

While the Ninth Circuit permitted the suit to proceed on the basis that the plaintiffs alleged that the defendants had made "operational decisions" in the United States, the Supreme Court held that "allegations of general corporate activity—like decision making—cannot alone establish domestic application of the ATS." Rather, as Justice Thomas wrote for the Court:

> *"To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity common to most corporations."*

The Court did not provide detail as to what sort of additional domestic U.S. conduct must be shown, but the Court's decision will undoubtedly have practical implications for plaintiffs and defendants alike in ATS cases. To survive a motion to dismiss, a plaintiff must now allege specific details of U.S.-based activity that "draw a specific connection" between the foreign violation and the domestic conduct, and not rely on "generic allegations" of "activity common to most corporations". Conversely, corporate defendants will have greater chances of dismissal in cases where ATS claims allege only generic corporate activity in the U.S.

In some respects, this approach departs from the more permissive trend seen in actions brought in other jurisdictions against companies for alleged violations of the law of nations. For instance, the U.K. Supreme Court refused various challenges to jurisdiction in *Lungowe v Vedanta Resources Plc*, [2019] UKSC 20 and *Okpabi v Royal Dutch Shell Plc*, [2021] UKSC 3, both of which involved claims brought against English-domiciled parent companies together with a foreign subsidiary. Those claims also involved alleged

harms that took place overseas, but which the respective claimants in both cases contended arose from the operational control exercised by the English parent company. Following the *Vedanta* and *Okpabi* decisions, a claim before the English courts could, for instance, be asserted on the basis of corporate activity such as the promulgation of group policies or management by a parent of the activities of its subsidiaries.

An unanswered question on claims against U.S. corporations

An open question since the U.S. Supreme Court's decision in *Jesner v Arab Bank*, 138 S. Ct. 1386 (2018), which held foreign corporations are not subject to ATS liability, is whether domestic corporations are equally immune from such claims. While the question of corporate liability under the ATS has now been presented to the Supreme Court on three occasions (and was squarely presented in *Nestlé*), the Court has yet to definitively rule on whether domestic corporations may be subject to ATS liability, each time resolving the case before it on narrower or alternative grounds. While several of the Justices in *Nestlé* expressed support for the position that domestic corporations could be subject to ATS liability, the Court has yet to directly rule on the question.

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If you have any questions about the issues addressed in this Client Alert, or if you would like a copy of any of the materials we reference, please do not hesitate to contact us:

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