

## Lawsuits Against Corporations Under the Alien Tort Statute

Enacted in 1789 as part of the Judiciary Act, the Alien Tort Statute (ATS) provides federal jurisdiction over lawsuits brought by non-U.S. nationals for torts “committed in violation of the law of nations or a treaty of the United States.”<sup>1</sup> The law was intended to give federal courts of the new nation the power to resolve disputes arising from a very limited number of international law violations, such as piracy or assaults on ambassadors on U.S. soil, that might have caused diplomatic tension if left unaddressed by state courts. Despite its original intent, the ATS has served for the past two decades as the fountainhead of litigation against multinational companies for human rights violations allegedly committed in countries all over the world.

The ATS lay virtually dormant until the 1980s, when human rights advocates began to invoke the statute as a basis for lawsuits over human rights violations committed in third countries. Plaintiffs initially brought these suits against former foreign government officials. When those suits proved problematic or unprofitable, plaintiffs began to sue multinational corporations for aiding and abetting human rights abuses by the governments of the countries in which they operate. Over the last two decades, more than 150 ATS suits have been filed against companies in practically every industry sector for business activities in over sixty countries—from Unocal in Burma,<sup>2</sup> to Pfizer in Nigeria,<sup>3</sup> Coca-Cola in Colombia,<sup>4</sup> and Yahoo! in China.<sup>5</sup> The largest ATS suit to date was filed in 2002 against more than fifty companies, including Ford and IBM, for business dealings in South Africa during the apartheid era.<sup>6</sup> ATS suits typically are litigated for a decade or more, imposing substantial legal and reputational costs on corporations that operate in developing countries and chilling investment that benefits these countries.

During the ATS’s recent renaissance, plaintiffs and defendants have disagreed strongly about the statute’s scope. Disputes have included whether the ATS provides a substantive cause of action (it doesn’t);<sup>7</sup> which claims are actionable as violations of customary international law (very few);<sup>8</sup> whether the ATS supports aiding and abetting liability; whether legal entities like

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<sup>1</sup> The ATS provides in full, “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.” 28 U.S.C. § 1350.

<sup>2</sup> *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002).

<sup>3</sup> *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

<sup>4</sup> *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009).

<sup>5</sup> Second Amended Complaint for Tort Damages, *Xiaoning v. Yahoo!, Inc.*, No. C07-02151 (N.D. Cal. July 30, 2007).

<sup>6</sup> *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013).

<sup>7</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713–14 (2004).

<sup>8</sup> *Id.* at 724 (“The jurisdictional grant [in the ATS] is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”).

corporations are subject to liability;<sup>9</sup> and whether the ATS extends to conduct and claims that occur exclusively or predominantly outside the United States.

In April 2013, the Supreme Court ruled in *Kiobel v. Royal Dutch Petroleum* that the ATS is limited by the legal presumption that U.S. laws do not extend beyond U.S. borders unless Congress says otherwise. Accordingly, the ATS typically does not apply when “all the relevant conduct took place outside the United States.”<sup>10</sup> This decision ended the majority of ATS suits against U.S. and foreign companies, which had been sued for their overseas activities (or, more likely, the activities of their foreign affiliates). As the chart below shows, courts have dismissed about two-thirds of the ATS cases pending when *Kiobel* was decided because those cases involved foreign conduct.

The Supreme Court appeared to leave the door open, however, to a small set of ATS cases “where the claims *touch and concern* the territory of the United States” with “sufficient force.”<sup>11</sup> The Court did not elaborate on what claims would satisfy this new test, but explained that “mere corporate presence” in the United States is not enough. Since *Kiobel*, lower courts have reached different conclusions about how to apply the “touch and concern” test. Most courts have interpreted *Kiobel* to require that the international law violation must itself take place within the United States, while others have held that significant contacts with the United States may be sufficient, even if the violation occurred overseas.

Lower courts also remain divided over whether corporations can be sued under the ATS. The Second Circuit has held that the ATS does not apply to corporations,<sup>12</sup> whereas the Seventh, Ninth, Eleventh, and D.C. Circuits have held that corporations may be subject to ATS suits, in addition to the natural persons who engage in the wrongdoing.<sup>13</sup> Because the Supreme Court decided *Kiobel* without reaching the question of corporate liability—none of the justices’ opinions even mentioned the issue—the law remains divided among the circuit courts.

Recent decisions limiting the ATS have rebuffed plaintiffs’ efforts to use the ATS to bring lawsuits with little or no connection to the United States—a proposition that would have been unthinkable to the law’s framers in 1789. Thomas J. Donohue, president and CEO of the U.S. Chamber, has applauded judicial limits on the ATS that “ensure that trial lawyers cannot continue to use the American judicial system to expose global businesses to frivolous and costly lawsuits.” To help restore the ATS to its original purpose, the U.S. Chamber Institute for Legal Reform (ILR) and the National Chamber Litigation Center (NCLC) have advised and

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<sup>9</sup> Compare *Kiobel v. Royal Dutch Petro. Co.*, 621 F.3d 111, 145 (2d Cir. 2010) (no corporate liability), with *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011) (corporations are subject to suit under the ATS).

<sup>10</sup> *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1669 (2013).

<sup>11</sup> *Id.* (emphasis added).

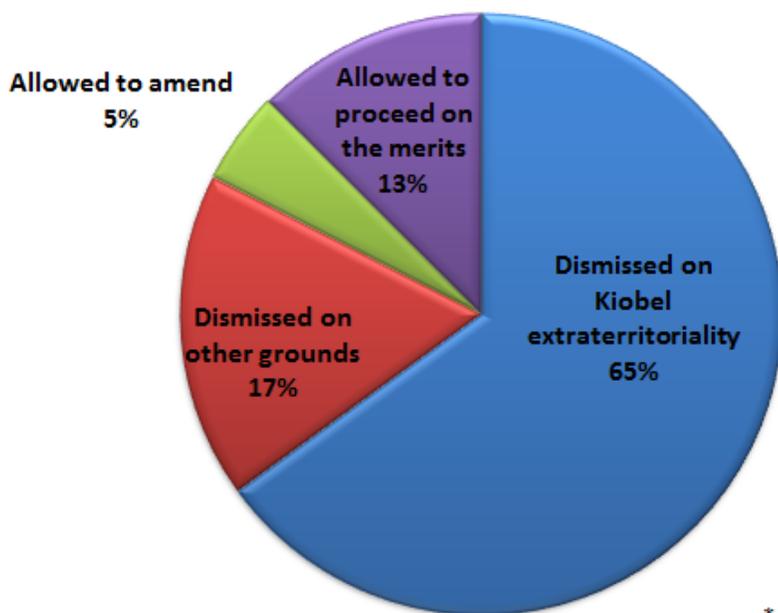
<sup>12</sup> *Kiobel*, 621 F.3d at 145.

<sup>13</sup> See *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 748 (9th Cir. 2011); *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).

represented U.S. companies in ATS litigation for over a decade. NCLC has filed dozens of briefs in the Supreme Court and the federal courts of appeals urging dismissal of ATS suits that exceed the law's intended scope. ILR likewise monitors developments in ATS cases, publishes research, and advocates policies that would restore the ATS to its original purpose.

This site is intended to track the status of ATS litigation against U.S. companies after the Supreme Court's *Kiobel* decision.<sup>14</sup> Despite the substantial number of cases dismissed in *Kiobel*'s aftermath, a few high-profile corporate ATS suits remain. For example, Exxon Mobil still faces claims in the District of Columbia that its security forces were responsible for unlawful injuries and deaths while protecting a natural gas field in Indonesia.<sup>15</sup> The Ninth Circuit similarly has permitted plaintiffs to amend their claims against three American companies (Nestlé USA, Archer-Daniels-Midland, and Cargill) to show a possible U.S. nexus to allegations of child slavery in Côte d'Ivoire.<sup>16</sup> This site will be periodically updated with developments in key ATS cases across the country.

### Disposition of the 40 ATS cases that were pending at the time of *Kiobel* decision\*



\* as of February 2016

<sup>14</sup> *Id.* at 1669.

<sup>15</sup> *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 94–97 (D.D.C. 2014).

<sup>16</sup> *Doe v. Nestlé USA, Inc.*, 766 F.3d 1013, 1027–29 (9th Cir. 2014).