ALLEN & OVERY

U.S. Supreme Court to consider scope of the Alien Tort Statute

There is an important business and human rights case on the docket of the U.S. Supreme Court, which begins its next term on 5 October 2020. The Court has agreed to determine the contested scope of the Alien Tort Statute (**ATS**) in the context of an appeal by Nestlé USA, Inc., the U.S. affiliate of Swiss-based Nestlé (**Nestlé USA**), and Cargill, Inc. (**Cargill**), the largest privately held company in the U.S.

Nestlé USA and Cargill, together with the Solicitor General, on behalf of the Trump administration, challenge the holding by the Court of Appeals for the Ninth Circuit (the **Ninth Circuit**) that U.S. corporations can be held liable under the ATS for aiding and abetting human rights violations abroad by virtue of their corporate conduct in the United States.

The Supreme Court's decision on the subject could be a watershed moment for human rights litigation in the United States, either closing the door on decades of plaintiff attempts to use the ATS to assert international law claims against companies or opening it further as a credible basis for such claims. Whatever the outcome, global corporations, especially those with international supply chains, should be alert to the consequences of the decision and the example it will set.

Liability in the U.S. for human rights abuses overseas – the current position

On 2 July 2020, the U.S. Supreme Court agreed to hear the case against Nestlé USA and Cargill under the ATS, relating to claims of international human rights violations in their supply chains. Nestlé USA and Cargill are accused of having aided and abetted forced labour, child slavery and torture from their headquarters in the United States through their commercial relationships with cocoa producers in Côte d'Ivoire.

The Alien Tort Statute

The ATS is an 18th century U.S. statute that grants U.S. federal district courts "*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 USC § 1350). The statute provides a basis for lawsuits filed by foreign nationals ("*aliens*") for torts committed in violation of international law ("*the law of nations*").

The statute saw little use for nearly two centuries following its enactment in 1789, but since 1980 plaintiffs have often attempted to use the ATS to sue both domestic U.S. corporations and foreign corporations for aiding and abetting alleged violations of international law outside the U.S. In the past two decades, plaintiffs have filed more than 150 ATS lawsuits against corporations in over 20 industry sectors for business activities in roughly 60 countries. These potential claims present significant financial and reputational risk for companies operating in, or sourcing products from, jurisdictions where human rights abuses are prevalent.

Narrowing application of the ATS over the last two decades

Sosa v. Alvarez-Machain, 542 U. S. 692 (2004), represented a landmark case in which the Supreme Court gave the green light to the ATS as a means of redress for certain human rights violations. The Supreme Court in *Sosa* concluded that for conduct to trigger liability under the ATS, it must "*rest on a norm of international character accepted by the civilized world*" and that such norms must be "*specific, universal, and obligatory*". On this basis, the Supreme Court found "*piracy*" as well as "*torture, genocide, crimes against humanity and war crimes*" to be covered by the ATS.

While plaintiffs were encouraged by the landmark judgment in *Sosa*, the U.S. Supreme Court has since clarified and narrowed the application of the ATS in the following cases:

- In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. 108 (2013), the Court concluded that a non-U.S. corporation could not be sued under the ATS for conduct occurring outside the U.S. due to the presumption against extraterritoriality. In order to overcome the presumption, a claim must "*touch and concern the territory of the United States…with sufficient force*". A "*mere corporate presence*" would not be sufficient to meet the "touch and concern" test.
- In *RJR Nabisco Inc. v. European Community*, 579 U. S. ____ (2016), the Supreme Court clarified that the "touch and concern" test established in *Kiobel* meant that, when determining whether a statute (such as the ATS) applies to conduct that took place both inside and outside the U.S., courts should examine where the conduct that was the "*focus*" of the statute occurred. If the conduct that was the focus of the statute occurred in a foreign country, then the case involves an impermissible extraterritorial application, regardless of any other conduct that occurred in U.S. territory. Since the "focus" of the ATS is torts "*committed in violation of the law of nations*", one should therefore look to where the purported violation of international law occurred.
- Most recently, in *Jesner v. Arab Bank, PLC*, 584 U. S. ____ (2018), the Supreme Court held that foreign corporations "*may not be defendants in suits brought under the ATS*" because of the foreign relations problems this could cause. The Supreme Court in *Jesner* had no need to decide "*whether an alien may sue a United States corporation under the ATS*".

Questions now before the Supreme Court

The key questions posed in the *Nestlé USA, Cargill* appeal are whether:

- U.S. corporations are subject to liability under the ATS (i.e. resolving the question left open in *Jesner*);
- "aiding and abetting" conduct can violate a "norm of international character" as described in *Sosa* and hence trigger liability under the ATS; and
- the presumption against extraterritorial application of U.S. law can be overcome by allegations of general corporate activity in the U.S. (i.e. whether the U.S. corporate conduct of Nestlé USA and Cargill meets the *Kiobel* "touch and concern" test) even though the plaintiffs suffered their injuries in Côte d'Ivoire.

Nestlé and Cargill: Supreme Court to determine liability for alleged aiding and abetting of overseas human rights violations from the U.S.

The plaintiffs in *Nestlé USA, Cargill*, three former child slaves, accuse the companies of aiding and abetting human rights violations, specifically forced labour, child slavery and torture. Since the inception of the suit in 2005, it has ping-ponged between the district court and the Ninth Circuit.

The district court first dismissed the case in 2010, and again in 2017, in each case applying the increasingly strict standards for ATS jurisdiction handed down by the Supreme Court in the judgments referred to above. Each time, the Ninth Circuit reinstated the case on appeal (first in 2014, and then again in 2018). In 2018, the Ninth Circuit found that the class action could proceed and remanded the case to give the plaintiffs a further chance to amend their pleadings to remove deficiencies.

Lower court findings

In respect of the issues that are now subject to appeal in the Supreme Court, the Ninth Circuit held in 2018 that:

- *Jesner* did not eliminate all corporate liability and thus ATS liability could extend to domestic U.S. corporations;
- "aiding and abetting" conduct comes within the "focus" of the ATS and hence can trigger liability; and

- the presumption against extraterritorial application of the ATS established in *Kiobel* can be overcome by allegations relating to domestic corporate conduct because the "focus" test requires the court to look broadly at conduct amounting to aiding and abetting and not just the "*principle offences*" or the "*location the injury occurred*".

The Ninth Circuit found that Nestle USA and Cargill aided and abetted the violation of norms of an international character because:

- the "*exclusive buyer/supplier relationships*" that the companies have with suppliers in West Africa, and the financial and technical support provided to cocoa farmers in the region, mean that the companies "*effectively control cocoa production in the Ivory Coast*"; and
- the companies had attempted to purchase the "*the cheapest source of cocoa*" even if it meant "*perpetuating a system built on child slavery*".

The Ninth Circuit also found that the presumption against extraterritorial application of U.S. law was overcome by the US corporate conduct of Nestlé USA and Cargill, even though the plaintiffs suffered their injuries in Côte d'Ivoire. The companies' conduct met the *Kiobel* "touch and concern" test because:

- they regularly had employees "*from their United States headquarters*" inspect operations in Côte d'Ivoire and report back to U.S. offices where the "*financing arrangements*" originated; and
- by providing financial and technical support while knowing that such support would facilitate child slavery, the companies "*orchestrated*" a slave-based supply chain "*from headquarters in the United States*".

The Court found that such conduct was not "*ordinary business conduct*". It was, instead, conduct that took place in the U.S. and aided and abetted the violation by its overseas suppliers of international norms.

Next steps

In 2019, Nestlé USA and Cargill petitioned the U.S. Supreme Court to prevent the case proceeding further and in May 2020 they received the support of the former Solicitor General, Noel Francisco, on behalf of the Trump administration. The Solicitor General argued that "aiding and abetting" is not a type of conduct that breaches a norm of international character and hence cannot trigger application of the ATS. Mr Francisco also argued that ATS claims against U.S. corporations, as well as natural persons, should not be allowed. This represents a change in position for the Trump administration that, three years ago, in *Jesner*, argued that claims against U.S. corporations should be allowed.

The Supreme Court will have to decide whether to uphold the Ninth Court finding that corporate liability is justiciable under the ATS and, if so, whether conduct of the type referred to in this case (i.e. general oversight and financing) is sufficient to overcome the presumption against extraterritoriality articulated in *Kiobel* and *RJR Nabisco*. To do that, the Court will need to decide whether the companies' conduct in the U.S. is the true focus of the alleged violations of international law. It also may clarify whether "aiding and abetting" conduct amounts to a violation of a "norm of international character" that is "specific, universal, and obligatory".

Comment

The U.S. Supreme Court's ruling in *Nestle USA, Cargill* is likely to have significant consequences for human rights litigation both in the U.S. and globally. If the Supreme Court finds that corporate liability is justiciable under the ATS and that domestic corporate activity in the U.S. to "aid and abet" human rights violations is sufficient to overcome the presumption against extraterritoriality, litigants will be sure to attempt more such claims in the future.

If the Supreme Court in *Nestlé USA, Cargill* finds in favour of the corporations, this may shift plaintiffs' attempts to assert customary international law claims against global corporations to jurisdictions that are more favourable to such claims. As we reported here, earlier this year, the Canadian Supreme Court became the first supreme court to hold that violations of customary international law may give rise to a private cause of action against a corporation. If corporate conduct or "aiding and abetting conduct" cannot amount to a violation of the law of nations under the ATS, plaintiffs

also are more likely to seek redress regarding such conduct under domestic tort law as an alternative. As we reported here, in 2019, the UK Supreme Court held that parent companies may be held liable in connection with their subsidiaries' involvement in adverse human rights and environmental impacts overseas under common law tort principles.

Regardless of the outcome of the appeal, corporations will continue to face significant legal risks whenever they are involved in human rights impacts through their own or their suppliers' operations. Litigation under the common law is not the only risk. Governments around the world are starting to adopt mandatory human rights reporting and due diligence legislation with respect to overseas operations and supply chains. Some of this legislation provides for a private cause of action against a non-compliant company where that non-compliance has caused foreseeable harm.

Bipartisan support for legislation imposing legal obligations with respect to human rights issues arising in supply chains also appears to be growing in the U.S. In July of this year, Republican Senator Josh Hawley of Missouri introduced the Slave-Free Business Certification Act ("the Act"). If passed, the Act would require covered companies to audit and report on instances of forced labour in their supply chains. Companies that deliberately violate the Act could be liable for civil damages of up to USD100 million, and punitive damages of up to USD500m. Congressional committees have also discussed a proposed Business Supply Chain Transparency on Trafficking and Slavery Act of 2020 (H.R. 6279), and a Uyghur Forced Labor Prevention Act (S. 3471).

The direction of travel globally is towards requiring companies to engage in ongoing due diligence on their supply chains, report findings to regulators and the public, and – significantly – certify the absence of or even prevent human rights impacts in their supply chains. Given the prevalence of human rights abuses around the world, these requirements mean that responsible sourcing compliance programmes and processes are becoming business-critical issues and boards and general counsels should be taking notice. Now is the time to assess the efficacy of current responsible sourcing compliance programmes (onboarding, auditing, and responses to issues that arise) and build out a risk-based supply chain compliance programme to address and mitigate the liability risk of these developing legal obligations.

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