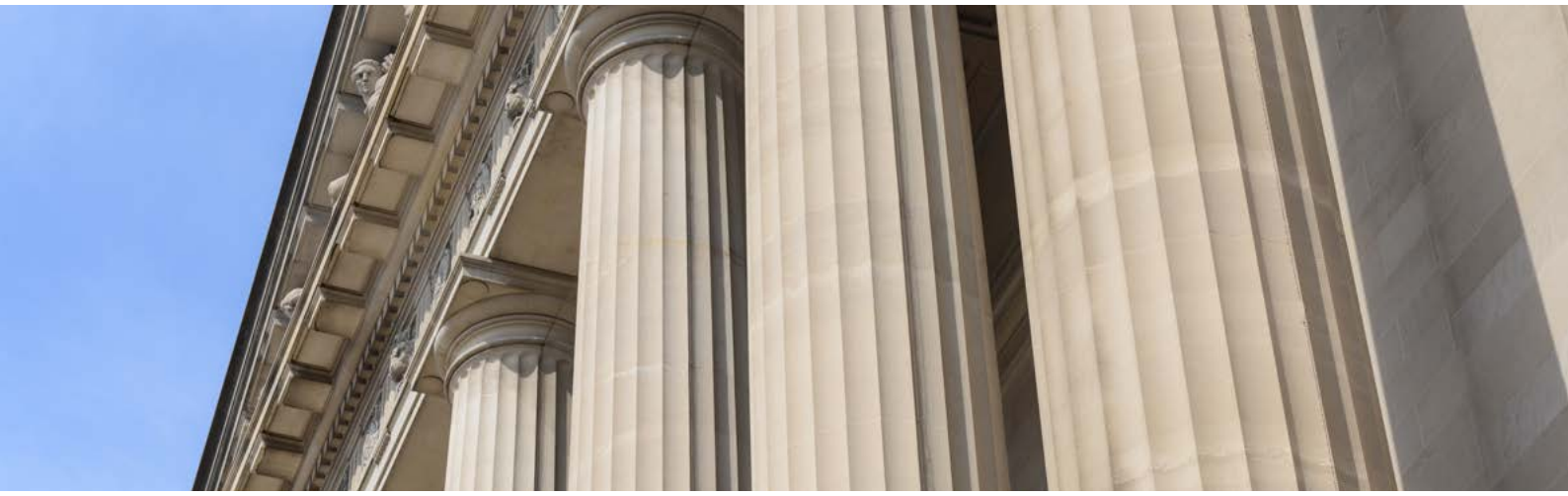
ALLEN & OVERY

Nestle USA v. Doe:

U.S. Supreme Court confirms Nestle and Cargill cannot be sued in the US for alleged aiding and abetting of forced labour overseas



The U.S. Supreme Court recently handed down its decision on the scope of the Alien Tort Statute (**ATS**), following an appeal by Nestle USA, Inc., the U.S. affiliate of Swiss-based Nestle (**Nestle USA**), and Cargill, Inc. (**Cargill**), the largest privately held company in the U.S.. The majority in the Court found in favour of Nestle USA and Cargill, holding that the plaintiffs had "*improperly* [sought] *the extraterritorial application of the ATS*" in their claim for alleged aiding and abetting of child slavery and forced labour in the Ivory Coast.

As we noted previously, the ATS is an 18th century U.S. statute that grants U.S. federal district courts jurisdiction to hear claims brought "*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*"). In the past two decades, plaintiffs have filed more than 150 ATS lawsuits against corporations in over 20 industry sectors that conduct business in approximately 60 countries. Such claims can present significant legal, financial, and reputational risk for companies operating in, or sourcing products from, jurisdictions in which human rights abuses are widespread or where adverse industrial and commercial impacts on the environment and human health often go unchecked.

The decision is a watershed moment for human rights litigation in the U.S., as the majority in the Court further narrowed the scope and application of the ATS. In particular, the majority clarified that, to succeed under the ATS, plaintiffs will need to establish that their claims have a sufficient U.S. nexus, beyond simply showing that general corporate decisions by the relevant defendant companies were made in the U.S. This may deter future attempts by plaintiffs to use the ATS to assert claims against U.S. companies for violations of international law, where the alleged offensive conduct predominantly took place outside the U.S., although a path for future claims remains in place under the ATS and other laws. The Court was, however, split on the question of whether plaintiffs may bring causes of action under the ATS beyond the violations of international law recognized in 1789: "*violation of safe conducts, infringement of the rights of ambassadors and piracy*". This issue remains to be settled and may lead to further ATS litigation against U.S. companies in the future.

Claims against Nestle USA and Cargill for aiding and abetting forced labour – key facts

The plaintiffs are six individuals from Mali who were allegedly trafficked into the Ivory Coast as child slaves to produce cocoa. Nestle USA and Cargill, the defendants, are companies that purchase, process and sell cocoa. Relying on the ATS, the plaintiffs argued that Nestle USA and Cargill should be held liable for aiding and abetting forced labour in the Ivory Coast. In particular, they argued that Nestle USA and Cargill, which had provided training, fertilizer, tools, and cash to the farms that allegedly enslaved the plaintiffs, "*knew or should have known*" that the farms exploited enslaved children. As they nevertheless continued to provide such farms with resources and did not exercise their economic leverage over the farms to eliminate child slavery, they should be held accountable for the modern slavery that allegedly occurred.

No basis for bringing a claim against Nestle USA and Cargill in the U.S. – Supreme Court's decision

The majority in the Court (Justice Alito dissenting) found in favour of Nestle USA and Cargill, holding that the individuals had "*improperly* [sought] *the extraterritorial application of the ATS*".

First, the majority observed that, as a starting point, a statute is presumed to only apply domestically, unless it "*gives a clear, affirmative indication*" which rebuts this presumption. It held that the ATS does not expressly seek to "*regulate conduct*", much less "*evince a 'clear indication of extraterritoriality'*". The Court, therefore, cannot give "*extraterritorial reach*" to any cause of action judicially created under the ATS.

Secondly, given that the statute does not apply extraterritorially, the burden was on the individuals to establish that "*the conduct relevant to the statute's focus occurred in the United States*", such that the case involves a "*permissible domestic application even if other conduct occurred abroad*". In this case, most of the conduct that allegedly constituted the aiding and abetting of forced labour occurred in the Ivory Coast. While the Ninth Circuit observed that "*every major operational decision by both companies is made in or approved in the U.S.*", the majority in *Nestle* opined that this factor alone is insufficient to establish domestic application of the ATS. Generic allegations of "*an activity common to most corporations*" would not suffice in establishing the required U.S. nexus; there must be "*more domestic conduct than general corporate activity*".

Thirdly, while the individuals urged the Court to create a cause of action in this case, penalising the aiding and abetting of forced labour, Justice Thomas (joined only by Justices Gorsuch and Kavanaugh in this portion of his opinion) argued that the Court "*cannot create a cause of action that would let them sue the petitioners. That job belongs to Congress, not the Federal Judiciary*". He reiterated the Court's view in Sosa v. Alvarez-Machain, 542 U. S. 692 (2004) that "*the ATS is a jurisdictional statute creating no new causes of action*", and added that the Court's authority to create causes of action for violations of international law is "*narrow*" (and has, in the years following Sosa, become "*narrower*"). The plaintiffs must: (i) establish that the defendants violated "*a norm that is specific, universal and obligatory under international law*", and (ii) show that the Court should exercise "*judicial discretion*" to create a cause of action rather than defer to Congress. With respect to the latter, Justice Thomas emphasised that the "*judicial creation of a cause of action is an extraordinary act that places great stress on the separation of powers*" and, therefore, the circumstances governing such discretion are "*extraordinarily strict*". The Court must not create a right of action if it can identify "*even one … sound reaso*[n] *to think Congress might doubt the efficacy or necessity of* [the new] *remedy*".

According to Justice Thomas, federal courts should not recognize private causes of actions for violations of international law beyond the three historical torts identified in Sosa ("*violation of safe conducts, infringement of the rights of ambassadors and piracy*"), as doing so would inherently raise foreign-policy concerns. For instance, this suit implicates a partnership between the Department of Labor, Nestle USA, Cargill and the Government of the Ivory Coast. It is pursuant to this partnership that the two companies provided the allegedly problematic support to the cocoa farms in the Ivory Coast. Companies, like Nestle USA and Cargill, would be less likely to engage in intergovernmental efforts of this kind if they fear that those activities would subject them to a private suit concerning forced labour. Justice Thomas also observed that the Court has limited institutional capacity to properly consider all factors relevant to creating such a cause of action.

In a concurring judgment, Justice Gorsuch added that "*nothing in the statute's terse terms obviously authorizes federal courts to invent new causes of action of their own*". Under the Constitution, "*the power to enact a new law that assigns new rights and new legally enforceable duties*" resides with Congress.

Dissents and disagreements

Notably, while Justices Thomas and Gorsuch opined that federal courts should not recognize private rights of action for violations of international law beyond the three historical torts, Justice Sotomayor (joined by Justices Breyer and Kagan) disagreed on the basis that such an approach would contravene the Court's express holding in *Sosa*, as well as the text and history of the ATS. Justice Sotomayor noted that Congress enacted the ATS on the expectation that "*federal courts* [would] *identify actionable torts under international law and provide injured plaintiffs with a forum to seek redress*". Furthermore, the Court in Sosa refused to "*close the door*" to the "*judicial recognition of actionable international norms" and was open to recognizing claims "based on the present-day law of nations*", so long as such claims "*rest*[ed] *on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the* [historical torts]". Federal courts, therefore, remain obliged to recognize violations of specific, universal and obligatory norms of international law, even if they extend beyond the three historical torts.

Justice Alito dissented on the basis that the primary question in this case, as presented in the *certiorari* petitions filed, is whether domestic corporations are immune from liability under the ATS. To that end, he opined that a company's "[c]*orporate status does not justify immunity*" from the ATS (a view also shared by Justice Gorsuch, who observed that "[n]*othing in the ATS supplies corporations with special protections against suit*"). However, Justice Alito then noted that the Court "*should not decide*" the question of whether the respondents' complaint seeks extraterritorial application of the ATS "*at this juncture*" – instead, the case should be remanded for further proceedings in the District Court.

Authors

Suzanne Spears
Partner – London
Tel +44 20 3088 2490
suzanne.spears@allenovery.com

Ken Rivlin
Partner – New York
Tel +1 212 610 6460
ken.rivlin@allenovery.com

Guled Yusuf
Counsel – London
Tel +44 20 3088 3502
guled.yusuf@allenovery.com

Comment

As we noted previously, in recent years, the Court has been clarifying and narrowing the application of the ATS, as seen in cases such as *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. 108 (2013), *RJR Nabisco Inc. v. European Community*, 579 U. S. ____ (2016) and *Jesner v. Arab Bank, PLC*, 584 U. S. _____ (2018).

The majority's decision in Nestle *USA v. Doe* is in line with this trend, as it seeks to set further limits on the scope of the ATS, rejecting the possibility of plaintiffs relying on the ATS to pursue claims against U.S. companies involving only limited conduct within the U.S. While Justices Alito and Gorsuch opined that U.S. companies do not, by virtue of their corporate status, have absolute immunity from claims made under the ATS, the majority made clear that plaintiffs will nonetheless need to clearly identify relevant domestic conduct to demonstrate a sufficient U.S. nexus, and that it will be insufficient to simply show that the relevant defendant companies exercised general corporate oversight within the U.S..

The Court was split on the question of whether it should create (or recognize) new causes of action pursuant to the ATS, beyond the three historical torts identified in *Sosa*. As mentioned, Justice Thomas took the view that the judicial creation of causes of action pursuant to the ATS inevitably involved foreign-policy concerns and would likely exceed the institutional capacity of the Court. The judicial divide on this question is unlikely to be resolved in the near future; the only definitive resolution of the matter likely rests in the hands of Congress, as indicated by several Justices. Moving forward, it may be difficult to bring claims against U.S. companies for violations beyond "*violation of safe conducts, infringement of the rights of ambassadors and piracy*". However, the position asserted by the minority, led by Justice Sotomayor, indicates that the door (to identifying causes of action beyond the historical torts), while narrow, is not completely shut. Following *Sosa* and Justice Sotomayor's reasoning, the Court may still recognize new causes of action for the violations of specific, universal and obligatory norms of international law.

It remains to be seen whether, in practice, courts will recognize causes of action beyond the historical torts, and if so, which causes of action would satisfy the test. Given this uncertainty, the decision is unlikely to dissuade plaintiffs from bringing claims under the ATS; U.S. companies will have to continue to be conscious of the possibility of ATS claims in the future.