WAKE FOREST JOURNAL OF BUSINESS & INTELLECTUAL PROPERTY LAW

VOLUME 22 FALL 2021 NUMBER 1

SEMI-SWEET: HOW A 1789 STATUTE PROTECTS DOMESTIC "BIG CHOCOLATE" AGAINST CORPORATE LIABILITY IN INTERNATIONAL HUMAN RIGHTS CLAIMS

Jennifer J. Schaaf[†]

[†] J.D. Candidate, 2022, Wake Forest University School of Law. Thank you to the best support system—my parents, my brother, and David—who show me selfless love and grace every day. Thank you to the members of the *Wake Forest Journal of Business and Intellectual Property Law* for their time and their thoughtful spading and editing contributions.

I. INTRODUCTION

In 1975, Judge Friendly described the Alien Tort Statute ("ATS") as a once "old but little used section" of the Judiciary Act of 1789—proclaiming it was "a kind of legal Lohengrin . . . [from which] no one seems to know whence it came."[1] Lohengrin, a German knight of legend, rescued and married a woman in distress and requested that she never ask his name or origin.[2] When she asked him these questions, he left and she "[fell] lifeless to the ground."[3]

The Judiciary Act of 1789 broadly established the structure and jurisdiction of the federal court system, including the district courts.[4] The language now known as the ATS granted those courts "cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[5] In the short term, the ATS solidified national security by establishing national fora for dispute resolution, which attracted and pacified foreign investors and businesses.[6] In the long term, however, the ATS became "largely obscure," and practically disappeared from litigation for 190 years.[7]

Judge Friendly's quip came before the ATS re-emerged in the 1980s as an "avant-garde tool" used to vindicate victims of international human rights violations by providing district courts with jurisdiction over their claims.[8] Unfortunately, as in the tale of Lohengrin, the rescue promised by the ATS has not materialized, as the United States ("U.S.") Supreme Court has yet to rule in a plaintiff's favor on an ATS claim.[9]

---

[1] IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

[2] *Synopsis:* Lohengrin, METRO. OPERA, https://www.metopera.org/user-information/synopses-archive/lohengrin (last visited Oct. 5, 2021).

[3] *Id.*

[4] *Judiciary Act of 1789*, NAT'L. ARCHIVES FOUND., https://www.archivesfoundation.org/documents/judiciary-act-1789/ (last visited Oct. 5, 2021).

[5] Judiciary Act of 1789 § 9, 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350).

[6] Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645, 1646–47 (2014).

[7] Amy Howe, *Case Preview: When Can U.S. Companies be Sued for Alleged Violations of International Human Rights?*, SCOTUSBLOG, (Nov. 30, 2020, 10:21 AM), https://www.scotusblog.com/2020/11/case-preview-when-can-u-s-companies-be-sued-for-alleged-violations-of-international-human-rights/.

[8] *The Alien Tort Statute*, CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/#:~:text=An%20ancient%20law%2C%20an%20avant,in%20violation%20of%20international%20law (last visited Oct. 5, 2021).

[9] STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, THE ALIEN TORT

The historical, repeated constriction of the already-brief ATS compelled a finding against liability for domestic "Big Chocolate" companies like Nestlè in *Nestlé USA, Inc. v. Doe I* ("*Nestlé*") in 2021 and,[10] subsequently, provoked a realization that the ATS, like Lohengrin's bride, is slowly falling lifeless to the ground.

This Note examines the implications of the 231-year-old ATS in the context of *Nestlé*, the most recent ATS case to reach the Supreme Court.[11] On December 1, 2020, the Supreme Court heard oral argument in a pair of cases, *Nestlé* and *Cargill, Inc. v. Doe I* (collectively, "*Nestlé*"),[12] in which the Malian plaintiffs in this fifteen-year litigation were trafficked into Ivory Coast as child slaves to work on cocoa plantations.[13] The overseers of the plantations subjected the plaintiffs to horrific human rights abuses.[14] Notably, these overseers were *not* the defendants in this action because the ATS provides jurisdiction over claims against U.S.—not Ivorian defendants.[15] Instead, the defendants were Nestlé and Cargill, "Big Chocolate" corporations and members of the World Cocoa Foundation, whose companies "purchase, process, and sell cocoa" and comprise "80% of the industry."[16]

The plaintiffs alleged these corporations aided and abetted child slavery and forced labor in Ivory Coast in order to receive greater profits derived from "the flow of cheap cocoa."[17] Specifically, they alleged Nestlé's U.S. executives made major operational decisions regarding the "sourcing and supervision" of Nestlé's cocoa supply chain.[18] These operational decisions included providing Ivorian overseers with "(1) financial support, including advance payments and personal spending money, . . . (2) farming supplies, . . . and (3) training and capacity building."[19] The plaintiffs contended that the corporations "had economic leverage over the farms but failed to exercise it to eliminate

---

STATUTE (ATS): A PRIMER 21 (2018).

[10] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

[11] *Id.*

[12] Howe, *supra* note 7.

[13] *Nestlé USA, Inc.*, 141 S. Ct. at 1935.

[14] *See* Brief for Respondents at 3-4, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (Nos. 19–416, 19–453) ("Respondents were forced to work . . . for twelve to fourteen hours per day, at least six days per week . . . not paid . . . . given only scraps of food to eat . . . beaten with whips and tree branches . . . forced to sleep on dirt floors in small, locked shacks . . . tortured . . . forced to drink urine.").

[15] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1396–97 (2018).

[16] *Nestlé USA, Inc.,* 141 S. Ct. at 1931, 1935; Vivienne Walt, *Big Chocolate's Child-labor Problem Is Still Far From Fixed*, FORTUNE (Oct. 19, 2020, 10:40 AM), https://fortune.com/2020/10/19/chocolate-child-labor-west-africa-cocoa-farms/.

[17] Brief for Respondents, *supra* note 14, at 5.

[18] *Id.* at 4.

[19] *Id.* at 5.

child slavery."[20]

The defendants presented the Supreme Court with two questions.[21] First, the defendants challenged whether the allegations supporting the aiding and abetting claim overcame the ATS's bar against extraterritoriality such that the plaintiffs were entitled to relief.[22] Second, and more significantly, the defendants asked the Supreme Court to determine whether the judiciary has the authority under the ATS to impose liability on domestic corporations.[23] These questions, and the Supreme Court's holding, will be discussed in greater detail in later sections of this Note.

Before reaching that analysis, Part II of this Note will provide an overview of U.S. foreign relations and judicial remedies before 1789. Then, Part III will trace the development of ATS litigation, with a particular focus on the application of case holdings to the Supreme Court's opinion in *Nestlé*. Lastly, Part IV will discuss the precedent that the *Nestlé* opinion did and did not establish and will then offer insight into the probable and potential future consequences of the opinion.

II. "WHENCE IT CAME": THE ALIEN TORT STATUTE PRE-1789

Judge Friendly's comment about the mystery surrounding the ATS can be partially attributed to the statute's "poverty of drafting history," which prevents a "consensus understanding" of congressional intent.[24] Despite the "complete silence" in the ATS's *legislative* history, a general understanding of *American* history sheds some light on Congress' purpose in enacting the statute.[25] Before inception of the ATS, the Articles of Confederation governed the United States and created a weak central government that lacked a national forum to resolve disputes involving harm to foreign citizens.[26] With no established national court system, judicial power resided in state courts.[27]

Two incidents on American soil highlighted the foreign relations

[20] *Nestlé USA, Inc.*, 141 S. Ct. at 1935.

[21] Brief for Petitioner at i, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (Nos. 19–416, 19–453).

[22] *Id.*

[23] *Id.*

[24] Sosa v. Alvarez-Machain, 542 U.S. 692, 718–19 (2004).

[25] Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1091 (9th Cir. 2006).

[26] Ted Brackemyre, *America's First Failure at Government: The Articles of Confederation*, U.S. HIST. SCENE, https://ushistoryscene.com/article/articles-of-confederation/#:~:text=The%20Articles%20of%20Confederation%20offered,was%20dependent%20on%20the%20states (last visited Oct. 6, 2021).

[27] *Id.*

problems threatened under this limited judicial system.[28] In 1784, a French adventurer assaulted François Barbé-Marbois, a French diplomat, in Philadelphia.[29] The Confederation Congress passed a resolution directing the Secretary of Foreign Affairs to apologize to the diplomat when it could not enforce appropriate redress at either the state or federal level.[30] Then, in 1787, a constable entered the Dutch Ambassador's home and arrested one of the Ambassador's servants.[31] Although the Ambassador believed his servant was entitled to diplomatic immunity, the Secretary of Foreign Affairs informed Congress that the federal government did not have the judicial competency to adjudicate the constable's actions.[32]

In response to these events and other flaws inherent in the Articles of Confederation, the Framers met in 1787 to draft the United States Constitution.[33] Subsequently, the First Congress passed the Judiciary Act of 1789, which authorized "federal jurisdiction over suits involving disputes between aliens and United States citizens."[34] The ATS, now codified at 28 U.S.C. § 1350, is part of this Act and provides: "[t]he 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."[35]

At a length of thirty-three words, the ATS far from established a congressional blueprint for applying its language to the arguments in *Nestlé* regarding extraterritoriality and domestic corporate liability. Even congressional edits made to the text in 1874, 1911, and 1948 lack an explanation of the statute's legislative history.[36] Judge Friendly's conclusion that no one seems to know where the ATS came from is supported by this combination of brevity and absence of legislative history. However, rather than heeding the dangers of deriving federal judicial common law from a jurisdictional statute with these qualities, courts have drawn increasingly narrow interpretations of the ATS and created questionable ATS common-law causes of action.[37] These common-law causes of action required rejection of the plaintiffs' ATS claim in *Nestlé*.[38]

---

[28] MULLIGAN, *supra* note 9, at 4.
[29] *Id.*
[30] *Id.* at 4–5.
[31] *Id.* at 5.
[32] *Id.*
[33] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1396 (2018).
[34] *Id.* at 1396–97.
[35] 28 U.S.C. § 1350.
[36] MULLIGAN, *supra* note 9, at 2.
[37] *See id.* at 10.
[38] *Id.*

III. "OLD BUT LITTLE USED:" THE ALIEN TORT STATUTE POST-1789

After 1789, the ATS remained in a state of hibernation, largely unmentioned and ignored in litigation.[39] But while the ATS laid dormant, the United States did not.[40] The United States grew from a young nation with a weak central government, to an "active international superpower, eager to assert its influence abroad."[41] American corporations also grew from small banking corporations in the 1790s to powerful entities that developed relatively without challenge during the decades following World War II.[42]

The Nuremberg trials from 1945-1949 demonstrated progress in global international law, as the increased recognition of acts that constitute crimes against humanity led courts to give redress for clear violations of human rights protections.[43] Specifically, international human rights law expanded from imposing duties on nation-states alone to individuals as well.[44] With this greater understanding of both crimes against humanity and the perpetrators of human rights abuses, the ATS arose as a tool to address claims involving those crimes and their offenders.[45] The modern uptick in ATS litigation began in 1980 with *Filártiga v. Peña-Irala* ("*Filártiga*"), five years after Judge Friendly had dismissed the ATS as "old but little used."[46]

A. *Filártiga v. Peña-Irala*

Like *Nestlé*, *Filártiga* involved a victim of human rights abuses that occurred abroad.[47] The defendant allegedly kidnapped and tortured the

---

[39] *See id.* at 5.

[40] *See id.* ("Between 1789 and 1980, litigants successfully invoked the ATS as a basis for jurisdiction in only two reported decisions.").

[41] Kedar S. Bhatia, Comment, *Reconsidering the Purely Jurisdictional View of the Alien Tort Statute*, 27 EMORY INT'L. L. REV. 447, 456 (2013).

[42] *What is the History of Corporations in America?*, INVESTOPEDIA (July 30, 2021), https://www.investopedia.com/ask/answers/041515/what-historycorporations-america.asp.

[43] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397 (2018); *Nuremberg Trials*, HISTORY (Jan. 29, 2010), https://www.history.com/topics/world-war-ii/nuremberg-trials.

[44] *Id.* at 1400.

[45] *The Alien Tort Statute: Holding Human Rights Abusers Accountable*, EARTHRIGHTS INT'L., https://earthrights.org/litigation-and-legal-advocacy/legal-strategies/alien-tort-statute/ (last visited Oct. 6, 2021).

[46] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

[47] Karen E. Holt, Filartiga v. Pena-Irala *After Ten Years: Major Breakthrough or Legal Oddity?*, 20 GA. J. INT'L. & COMP. L. 543, 543 (1990).

plaintiffs' family member several years prior when the parties lived in Paraguay.[48] The parties separately came to the United States in 1978, where the plaintiffs brought claims in a federal district court under several statutes, including the ATS.[49] Eventually, the case reached the Court of Appeals for the Second Circuit, where the court held that the torture violated established norms of the law of nations and fell within the jurisdiction of the ATS.[50]

The specific holding of *Filártiga* had limited relevance to the *Nestlé* decision since corporate liability for aiding and abetting—rather than individual liability for torture—was the violation claimed by the *Nestlé* plaintiffs.[51] However, the *Filártiga* decision sparked debate amongst the U.S. Courts of Appeals over whether the court correctly held that plaintiffs could bring "ATS actions based on modern human-rights laws absent an express cause of action created by an additional statute."[52]

This debate, which focuses on judicial deference to Congress in creating express ATS causes of action, endures in contemporary litigation. In the *Nestlé* oral arguments, forty years after *Filártiga,* the Court encountered this debate when counsel for the defendant responded to concerns raised by some of the Justices that "this Court [should not] be out in front" of creating new causes of action.[53] While the *Filártiga* court ultimately did not defer to Congress and chose to create a common-law cause of action under the ATS for claims of torture,[54] the *Nestlé* Court offered as dicta that courts should defer to Congress to create future, express ATS causes of action.[55]

B. *Tel-Oren v. Libyan Arab Republic*

The debate surrounding the creation of express ATS causes of action also occurred between the individual judges appointed to the federal appellate courts.[56] In 1984, in *Tel-Oren v. Libyan Arab Republic* ("*Tel-Oren*"), a panel of the Court of Appeals for the District of Columbia Circuit affirmed a district court's dismissal of a suit for, *inter alia*, lack of jurisdiction under the ATS.[57] However, each judge issued a separate

---

[48] *Id.* at 544.
[49] *Id.*
[50] *Id.* at 545.
[51] *Id.* at 549, 551–52.
[52] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1398 (2018).
[53] Transcript of Oral Argument at 85, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (Nos. 19–416, 19–453).
[54] Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980).
[55] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1936 (2021).
[56] *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring).
[57] *Id.*

concurring opinion analyzing whether the ATS vests federal courts with the power to create causes of action absent an express grant from Congress.[58] Judge Edwards confirmed the "sharp differences of viewpoint" among judges grappling with how to interpret and apply the ATS in his assertion that the language of the ATS "cries out for clarification by the Supreme Court."[59]

While Judge Edwards requested judicial clarification from the Supreme Court, Judge Bork found the language of the ATS clear in its prohibition on creating judicial common-law causes of action.[60] He argued the courts should not infer causes of action "not explicitly given," as separation-of-powers principles protect the political branches' conduct of foreign relations from judicial interference.[61] Judge Bork saw the *Filártiga* opinion, and Judge Edwards' concurrence, as incorrectly assuming that Congress' grant of jurisdiction to federal courts under the ATS also created an inherent right to create causes of action.[62]

Instead, Judge Bork explained that he viewed the ATS as "merely a jurisdiction-granting statute" that provides federal courts with authority to adjudicate causes of action "arising from other sources."[63] The debate over the true nature of the ATS (only jurisdictional or hybrid, meaning jurisdictional *and* providing authority to create causes of action) would not be answered by the Supreme Court until *Sosa v. Alvarez-Machain* ("*Sosa*") in 2004.[64] Still, the arguments raised by the *Tel-Oren* judges prevail today.[65] The positions of Judge Bork and Judge Edwards align with those of Justice Thomas and Justice Sotomayor in *Nestlé*, respectively, as Justice Thomas agreed that federal courts should defer to Congress's right to create ATS causes of action, while Justice Sotomayor viewed that right as vested in the federal courts.[66]

C. *Mohamad v. Palestinian Authority* and the Torture Victim Protection Act

As the courts debated the accuracy of the *Filártiga* holding, Congress enacted the Torture Victim Protection Act ("TVPA") in

[58] *Id.*
[59] *Id.*
[60] *Id.* at 799, 801 (Bork, J., concurring).
[61] *Id.* at 799.
[62] *Id.* at 801.
[63] *Id.* at 810–11.
[64] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[65] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).
[66] *See infra* Section IV.

1991.[67] Codified as a note following the ATS, the TVPA partially answered the debate concerning deference to Congress in creating ATS causes of action by establishing an express congressional ATS cause of action for torture or extrajudicial killing in violation of international law.[68] Congress specifically referenced Judge Bork's concurrence in the TVPA's legislative history, which states that the TVPA satisfies separation-of-powers principles by providing the congressional grant of an ATS private right of action that he suggested.[69]

However, the TVPA did not completely replace the ATS, but only established an "unambiguous and modern basis" for *one* cause of action that may be successfully maintained under the ATS.[70] The legislative history clarified that claims covered by the TVPA "do not exhaust the list of actions" that may fall under the scope of the ATS, so the ATS should work in concert with the TVPA to permit lawsuits based on these other norms.[71]

Two aspects of the TVPA are particularly important in light of the future of the ATS. First, the single cause of action provided by the TVPA demonstrates that Congress can choose to clarify the application of the ATS by creating other explicit causes of action in the future. Justice Thomas relied on this logic in the *Nestlé* opinion's dicta by calling on courts to defer to Congress for the creation of ATS causes of action.[72] Second, the TVPA allowed the cause of action "to be brought by and against 'individuals.'"[73] In contrast, the ATS allows suits brought only by aliens and does not specify against whom the suits may be brought.[74] In *Mohamad v. Palestinian Authority*, the Supreme Court held in 2012 that Congress intended "individuals" to encompass "only natural persons" and did not intend that the TVPA would "impose liability against organizations[,] . . . sovereign or not."[75] This holding demonstrates that Congress can draft language that refers to specific groups, namely natural persons versus corporations, and that it could choose to amend the ATS to exclude suits against the latter group, as it did for the TVPA.[76]

Since the ATS lacks this specificity, suits like *Nestlé*—which raised an ATS claim against domestic corporations—have been able to

---

[67] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat.73 (codified as a note to 28 U.S.C. § 1350).

[68] *Id.*

[69] H.R. REP. NO. 102-367, pt. 1, at 4 (1991).

[70] *Id.* at 3.

[71] *Id.* at 4.

[72] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021).

[73] MULLIGAN, *supra* note 9, at 8 (quoting 28 U.S.C. § 1350).

[74] 28 U.S.C. § 1350.

[75] Mohamad v. Palestinian Auth., 566 U.S. 447, 451–52, 461 (2012).

[76] MULLIGAN, *supra* note 9, at 8.

proceed. In the late 1990s, plaintiffs exploited this lack of specificity by bringing suits against corporations which were often based on the theory that the corporation had aided and abetted foreign governments committing violations of human rights (the same argument made by the plaintiffs in *Nestlé*).[77] In 2018, the Supreme Court held in *Jesner v. Arab Bank, PLC* ("*Jesner*") that foreign or non-sovereign corporations could not be sued under the ATS.[78] Ultimately, the question of domestic corporate liability was not resolved in *Nestlé*, so domestic corporations remain open to lawsuits raising ATS claims.[79]

D. *Sosa v. Alvarez-Machain*

Twenty years after Judge Bork's concurrence in *Tel-Oren*, the Supreme Court finally resolved in *Sosa* whether the ATS only provided federal courts with jurisdiction or also provided the authority to create causes of action for alleged violations of the law of nations.[80] The Court determined that the ATS is "strictly jurisdictional[,] . . . creating no new causes of action."[81] To make this determination, it looked to language from the Federalist Papers and the location of the ATS in the Judiciary Act, which solely addressed the jurisdiction of federal courts, as proof that the original text of the ATS "bespoke a grant of jurisdiction, not power to mold substantive law."[82]

The *Sosa* Court's conclusion regarding the jurisdictional nature of the ATS is consistent with Judge Bork's concurring argument. However, the Court departed from Judge Bork's line of reasoning by also concluding that the ATS was not a "stillborn . . . jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners."[83] Instead, it reasoned that Congress enacted the ATS "against the backdrop of the general common law" which recognized only a few torts in violation of the law of nations in 1789.[84]

The Court proposed that the torts the First Congress had in mind

---

[77] Curtis A. Bradley, *Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries*, AM. SOC'Y. OF INT'L. L. (Apr. 18, 2013), https://www.asil.org/insights/volume/17/issue/12/supreme-court-holds-alien-tort-statute-does-not-apply-conduct-foreign#_edn4.

[78] *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407–08 (2018).

[79] *Id.* at 1390.

[80] Sosa v. Alvarez-Machain, 542 U.S. 692, 697 (2004).

[81] *Id.* at 713, 724.

[82] *Id.* at 713.

[83] *Id.* at 694, 719.

[84] *Jesner*, 138 S. Ct. at 1389; *id.* at 720.

when it drafted the ATS were those enumerated by William Blackstone in his treatise first published in the 1760s.[85] Blackstone's treatise "transmitted the common law's traditional perception of the *law of nations* to American lawyers," including members of that First Congress.[86] In his treatise, Blackstone defined three offenses as violations of the law of nations: violation of safe conducts, infringement of the rights of ambassadors, and piracy.[87] In *Sosa*, the Court held that Congress intended the ATS to provide jurisdiction for these few actions.[88]

However, rather than limiting modern ATS causes of action to three violations, the Court instead held that federal courts may recognize a common-law cause of action based on our present-day law of nations.[89] The Court elaborated that a cause of action may be recognized if it rests on a "norm of international character accepted by the civilized world and defined with a specificity comparable to the features" of the "historical paradigms" available when the ATS was enacted.[90] This "narrow set" of causes of action could develop from judicial common law, as opposed to congressional statutory causes of actions.[91]

Although the Court in *Sosa* expanded the potential law of nations claims under the ATS, it was also "quite explicit" in subjecting future proposed ATS claims to "vigilant doorkeeping" to avoid implicating separation-of-powers and foreign relations concerns.[92] To ensure that potential claims meet the standard for judicially-developed ATS causes of action, the Court established a two-step framework. "First, courts must determine whether the claim is based on violation of an international law norm that is 'specific, universal, and obligatory.' Second, if step one is satisfied, courts should determine whether allowing the case to proceed is an 'appropriate' exercise of judicial discretion"[93] by considering "the practical consequences" of creating a judicial common-law cause of action, including separation-of-powers and foreign policy implications.[94]

---

[85] *Sosa*, 542 U.S. at 724; MARK WESTON JANIS, AMERICA AND THE LAW OF NATIONS 1776–1939 1 (2010).

[86] JANIS, *supra* note 85, at 1.

[87] *Sosa*, 542 U.S. at 724.

[88] *Id.* at 720.

[89] *Id.* at 725.

[90] *Id.* at 725, 732; *see also* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1935 (2021) ("Although this jurisdictional statute does not create a cause of action, our precedents have stated that courts may exercise common-law authority under this statute to create private rights of action in very limited circumstances.").

[91] *Sosa*, 542 U.S. at 721; MULLIGAN, *supra* note 9, at 10.

[92] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1398 (2018); *Sosa*, 542 U.S. at 729.

[93] *Sosa*, 542 U.S. at 738.

[94] *Id.* at 732–33, 733 n.21.

In *Sosa*, the requirements imposed by the Court were fatal to the plaintiff's claim,[95] just as the ATS has been to all other claims that have reached the Supreme Court.[96] The Court held that illegal detention of the plaintiff for less than a day, followed by the plaintiff's transfer of custody to lawful authorities and his "prompt arraignment," did not violate a norm of international law "so well defined as to support the creation of a federal remedy."[97] In *Nestlé*, the defendants argued the same result should occur because there was no specific, universal, and obligatory international law norm of corporate liability.[98] While the *Nestlé* opinion did not specifically address the existence of an international law norm of corporate liability,[99] the next section of this Note will discuss the perspectives on corporate liability provided by the Justices, including whether domestic corporate liability might bypass analysis under *Sosa* altogether.

E. *Kiobel v. Royal Dutch Petroleum Co.*

In 2013, the Supreme Court came close to deciding the issue of corporate liability as an ATS cause of action.[100] The plaintiffs in *Kiobel v. Royal Dutch Petroleum Co.* ("*Kiobel*") were Nigerian nationals residing in the United States who sued Dutch, British, and Nigerian corporations under the ATS, and alleged that they had aided and abetted the Nigerian government in human rights abuses.[101] The Court of Appeals for the Second Circuit dismissed the claim, holding that corporations cannot be liable under the ATS.[102]

Despite the Second Circuit's reasoning and decision, the question of ATS corporate liability presented a lingering circuit split in ATS litigation, since every other circuit court found ATS corporate liability available to plaintiffs.[103] Intending to resolve this split, the Supreme Court granted certiorari on the question of corporate liability but then requested additional briefing on the question of extraterritorial application of the ATS to the plaintiffs' claim and never answered the corporate liability question.[104] The Supreme Court would not take up the question of corporate liability again until *Jesner*, five years later.[105]

---

[95] *Id.* at 725.
[96] MULLIGAN, *supra* note 9, at 21.
[97] *Sosa*, 542 U.S. at 738.
[98] Brief for Petitioner, *supra* note 21, at 35–39.
[99] *See* Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1945 (2021).
[100] *See* Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 114 (2013).
[101] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1395 (2018).
[102] *Id.*
[103] MULLIGAN, *supra* note 9, at 17–18.
[104] *Id.* at 17.
[105] *Jesner*, 138 S. Ct. at 1399.

In between the two rounds of briefing, the U.S. executive branch, through the Department of Justice and Department of State as amicus curiae, changed arguments regarding corporate liability.[106] During the first round, the executive branch sided with the plaintiffs in favor of corporate liability in ATS claims.[107] In the second round of briefing, the executive branch sided with the defendants against corporate liability.[108] In *Nestlé*, the executive branch, again through the Department of Justice and Department of State as amicus curiae and in oral argument, sided with the defendants against domestic corporate liability under the ATS once more.[109]

After the second round of briefing and oral argument, the Court applied the presumption against extraterritoriality, which requires a clear indication of extraterritorial application in the language of a statute before courts will presume that the statute applies to claims arising in foreign territory.[110] Since the ATS does not contain this clear indication, the Court held that it does not apply to claims arising in foreign territory.[111] While this application of the presumption seems straightforward, the *Kiobel* Court expanded the standard with a "touch and concern test" for determining extraterritoriality which left room for grey areas.[112] The Court held that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[113] In other words, the ATS does not apply to conduct occurring entirely in foreign territory, and mere corporate presence does not satisfy the touch and concern test since corporations are present in many countries.[114]

Since *Kiobel*, the touch and concern test has resulted in another circuit split, as five circuit courts have considered the test and adopted different approaches—some bright-line and others open to a more flexible interpretation.[115] Yet, the *Kiobel* holding has "significantly limited" the ATS as a tool to provide redress for human rights abuses in U.S. courts since the Court's holding further narrows the types of claims

---

[106] Bradley, *supra* note 77.

[107] *Jesner*, 138 S. Ct. at 1386.

[108] *Id.*

[109] Lawrence Hurley, *U.S. Supreme Court Justices Question Human Rights Claims Against Nestle and Cargill*, REUTERS (Dec. 1, 2020, 12:40 PM), https://www.reuters.com/article/us-usa-court-slavery/u-s-supreme-court-justices-question-human-rights-claims-against-nestle-and-cargill-idUSKBN28B5X9.

[110] MULLIGAN, *supra* note 9, at 12.

[111] Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 124 (2013).

[112] *Id.*

[113] *Id.* at 124–25.

[114] *Id.* at 125.

[115] MULLIGAN, *supra* note 9, at 14.

that plaintiffs may bring under the statute.[116] In *Nestlé*, the defendants argued that this narrow application should preclude the plaintiffs' claim under the ATS since the plaintiffs did not "allege sufficient domestic conduct" to overcome the bar against extraterritoriality.[117]

Agreeing with this argument, the *Nestlé* Court tossed out the case on extraterritoriality grounds instead of resolving the more significant question of domestic corporate liability.[118] However, as the next section will discuss, the Supreme Court ignored *Kiobel*'s "touch and concern" test entirely, and instead applied a different "focus" test adopted in a case that altogether did not involve ATS claims.[119]

F. *Jesner v. Arab Bank, PLC*

The Supreme Court finally returned to the question of corporate liability in 2018, only this time in the context of foreign corporations.[120] The *Jesner* plaintiffs alleged that the defendant, a foreign corporation with a U.S. branch, aided and abetted human rights violations overseas.[121] These allegations were arguably extraterritorial such that the Court identified potentially "insufficient connections" to the United States.[122] However, the question of extraterritoriality—while the subject of a circuit split—had not divided the lower courts to the same degree as the question of corporate liability.[123] In fact, the Court argued the "relatively minor connection" between the injury claimed in *Jesner* and the alleged U.S. conduct simply illustrated the "perils" of allowing ATS liability for corporate defendants.[124]

The *Jesner* Court answered the question of foreign corporate liability by applying the *Sosa* test for recognizing judicial common-law actions under the ATS.[125] The Court held that foreign corporations may not be defendants in suits brought under the ATS because judicial deference requires that Congress decide whether to expand the scope of ATS liability.[126] Although the Court considered and doubted the legality of foreign corporate liability at step one of the *Sosa* test, the final blow to foreign corporate liability occurred at step two.[127]

---

[116] *Id.*
[117] Brief for Petitioner, *supra* note 21, at 11.
[118] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1936 (2021).
[119] *Id.*
[120] *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1393 (2018).
[121] *Id.* at 1393–95.
[122] *Id.* at 1398.
[123] *Id.* at 1399.
[124] *Id.* at 1390.
[125] *Id.* at 1399.
[126] *Id.* at 1407–08.
[127] *Id.* at 1400–03.

The *Jesner* Court followed the guidelines set by *Sosa*, which urged federal courts to exercise "great caution" before recognizing new forms of ATS liability due to separation-of-powers and foreign relations concerns.[128] The Court reasoned that the legislative branch is most capable of making these important policy decisions; therefore, absent further action from the legislature, courts should refrain from inappropriately extending ATS liability to foreign corporations.[129] To hold otherwise, the Court argued, would practically render *Sosa*'s "cautionary language . . . little more than empty rhetoric," as it would vest the courts with excessive power.[130] Additionally, the litigation in *Jesner* had caused diplomatic tensions with the country of Jordan, and Jordan's foreign sovereign went so far as to appear before the Court to object to ATS litigation, which provided further support for the Court's choice to defer to Congress.[131]

Since the Court only held that *foreign* corporations were not liable under the ATS, the case left the door open for *Nestlé* and other suits against *domestic* corporations, suits which have eventually avoided an equivalent holding against domestic liability.[132]

IV. "NO ONE SEEMS TO KNOW": CONSEQUENCES OF *NESTLÉ USA, INC. V. DOE*

The state of our country—and our courts—has changed significantly from the creation of the ATS in 1789 to the *Nestlé* opinion in 2021. The state of the ATS has also changed in that time. Specifically, within the last forty years, from the first modern ATS case in *Filártiga* to the most recent ATS case in *Nestlé*, the Supreme Court has "effectively rewritten" the ATS through "shadow amendments" that "substantively and permanently alter the text of the statute with new conditions."[133]

---

[128] Sosa v. Alvarez-Machain, 542 U.S. 692, 727–28 (2004).

[129] *Jesner*, 138 S. Ct. at 1403, 1406.

[130] *Id.* at 1407.

[131] *Id.* at 1406–07.

[132] *See* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1935 (2021) ("While this suit was on appeal, we held that courts cannot create new causes of action against foreign corporations under the ATS.").

[133] William J. Aceves, *Nestlé & Cargill v. Doe Series: Judicial Activism, Corporate Exceptionalism, and the Puzzlement of Nestlé v. Doe*, JUST SEC. (Dec. 11, 2020), https://www.justsecurity.org/73794/nestle-cargill-v-doe-series-judicial-activism-corporate-exceptionalism-and-the-puzzlement-of-nestle-v-doe/; *see also* Claire Bergeron et al., *Nestle USA Inc. v. Doe: Supreme Court Clarifies US Corporate Liability for Human Rights Violations Overseas*, JD SUPRA (June 25, 2021), https://www.jdsupra.com/legalnews/nestle-usa-inc-v-doe-supreme-court-7282305/ ("In a series of cases over the past two decades, the Court has gradually narrowed the ATS's scope without closing the door to claims altogether.").

William Aceves, an expert on international and human rights law and counsel of record on a *Nestlé* amicus brief, advanced the position that the amendments to the ATS expand the original text far beyond its thirty-three words to now read:

> [T]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of **[a specific, universal, and obligatory norm of]** the law of nations or a treaty of the United States **[but only when the tort touches and concerns the United States with sufficient force to overcome the presumption against extraterritoriality] [and not when the violation is committed by a foreign State] [or when the violation is committed by a foreign corporation]**.[134]

These amendments, though not literal, illustrate how quickly the decisions of the Supreme Court have transformed the original language and intent of the ATS over the last few decades. They also illustrate that the ATS has outgrown its original bounds with the addition of fictional clauses and limitations that Congress did not include in 1789.[135]

In *Nestlé*—the culmination of fifteen years of litigation by former Malian child slaves against domestic "Big Chocolate" corporations for aiding and abetting human rights abuses on Ivorian plantations—the Supreme Court was presented with the opportunity to add yet another amendment in the form of non-liability for domestic corporations. The *Nestlé* defendants argued the plaintiffs' claim should have failed for two reasons.[136] First, they argued that their aiding and abetting claim did not overcome the ATS's bar against extraterritoriality.[137] Second, they argued that the judiciary was not vested with the authority under the ATS to impose liability on domestic corporations because this authority lies with Congress.[138]

The Court granted certiorari to consider the question of domestic corporate liability for human rights violations under the ATS for the third time, but it decided to rest its decision on other grounds, dismissing the suit on the grounds of the first claim and adding a qualifying element

[134] Aceves, *supra* note 133.
[135] *Id.*
[136] Brief for Petitioner, *supra* note 21, at i.
[137] *Id.* at 4.
[138] *Id.* at 4–6.

to the question of extraterritoriality.[139] Therefore, while the Court narrowed the scope of the ATS and "further limited the ability of plaintiffs to seek redress in US courts for human rights abuses that occur overseas," the Court "did not go as far in restricting those suits as some had hoped."[140]

This Note proposes that the result in *Nestlé* was almost predestined, rooted in the design of the ATS as a jurisdictional statute that incorporates only a narrow class of causes of actions. The ATS is touted as a law "unlike any other in American law" and "unknown to any other legal system in the world."[141] Legal scholars have argued that jurisdictional statutes like the ATS are "subject to unique interpretive difficulties not encountered in the judicial construction of ordinary congressional legislation."[142] In particular, these statutes contain greater potential for separation-of-powers issues, which courts have previously identified in the ATS.[143] Since these interpretive difficulties may be present in a jurisdictional statute, federal courts should interpret their language with greater caution than that normally afforded to ordinary congressional legislation and should hesitate before deriving judicial common-law causes of action. However, despite these unique interpretive difficulties, the Supreme Court has continued to find exceptions and generate "unneeded complexity," and thereby moved the ATS "far beyond its original 33-word configuration and understanding." [144] Accordingly, "very few cases" now satisfy the Supreme Court's ATS jurisdiction requirements.[145]

As a consequence, the jurisdictional nature of the ATS continues to evade consensus, such that the same debate between Judge Edwards and Judge Bork in *Tel-Oren* is reflected in the language of the *Nestlé* opinion.[146] Writing for the majority, Justice Thomas expressed in dicta that the jurisdictional nature of the ATS requires plaintiffs asserting claims under the ATS to rely on legislative and executive remedies in

---

[139] William S. Dodge, *The Surprisingly Broad Implications of Nestlé USA, Inc. v. Doe for Human Rights Litigation and Extraterritoriality*, JUST SEC. (June 18, 2021), https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/; Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1940 (2021) (Gorsuch, J., concurring).

[140] Bergeron et al., *supra* note 133.

[141] Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 115 (2d Cir. 2010); MULLIGAN, *supra* note 9, at 1.

[142] Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 54 (2007).

[143] *Id.*

[144] Aceves, *supra* note 133; MULLIGAN, *supra* note 9, at 21.

[145] *Id.*

[146] *Nestlé USA, Inc.*, 141 S. Ct. at 1937, 1944.

order for federal district courts to have jurisdiction over ATS claims.[147] Alternatively, Justice Sotomayor argued in a concurring opinion that, even if the ATS is jurisdictional, the First Congress intended courts to "flesh out common-law causes of action for the violation of international law that could be brought" under the ATS.[148] These positions align with those adopted almost forty years earlier by Judges Bork and Edwards, respectively, in *Tel-Oren*.[149]

While the *Nestlé* Court did not add an additional shadow amendment in the form of precluded domestic corporate liability,[150] the opinion still sets forth important precedent while evading case law established by previous courts. Thus, the opinion raises a discussion of the established and avoided precedent of *Nestlé* as well as suggestions of what probably could and potentially should happen as a result of its holding.

A. Precedent *Nestlé* Established

"Joined by every member of the Court except Justice Alito," Part II of the *Nestlé* opinion held that the Court dismissed the plaintiffs' claims on extraterritorial grounds.[151] In doing so, the Court essentially "re-worked the extraterritoriality test," and effectively abandoned *Kiobel*'s "touch and concern" test for the "two-step framework for the presumption against extraterritoriality subsequently articulated" in *RJR Nabisco, Inc. v. European Community* ("*RJR Nabisco*").[152] The latter case, though not an example of ATS litigation, incorporates *Kiobel's* two steps while removing its "touch and concern" language and, therefore, was the most recent precedent regarding the presumption until *Nestlé*.[153]

The first step of the *RJR Nabisco* test asks "whether the statute gives a clear, affirmative indication" that the presumption against extraterritoriality is rebutted.[154] The second step requires plaintiffs to

[147] *Id.* at 1937.

[148] Bergeron et al., *supra* note 133.

[149] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777, 799 (D.C. Cir. 1984).

[150] *See Nestlé USA, Inc.*, 141 S. Ct. at 1939.

[151] Dodge, *supra* note 139 ("Justice Gorsuch (joined by Justice Kavanaugh), however, would have overruled *Sosa*, where Justice Alito would not have reached the extraterritoriality question before deciding other issues he thought should be preliminary.").

[152] Beth Van Schaack, *Nestlé & Cargill v. Doe: What's Not in the Supreme Court's Opinions*, JUST SEC. (June 30, 2021), https://www.justsecurity.org/77120/ nestle-cargill-v-doe-whats-not-in-the-supreme-courts-opinions/; Dodge, *supra* note 139.

[153] RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2101 (2016).

[154] *Id.*

establish that "the conduct relevant to the statute's focus occurred in the United States," which would allow a "permissible domestic application" of the statute, here the ATS.[155] If the conduct relevant to the statute's focus "occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory."[156] Significantly, since the *Kiobel* "touch and concern" test "did not necessarily require that any conduct take place in the U.S.," the *Nestlé* Court consequently imposed a stricter standard on evaluations of extraterritoriality for ATS claims.[157] Even more unusual, the language that the Supreme Court relied on from *RJR Nabisco*—the "conduct relevant to the statute's focus"—was mere dictum in that case and creates consequences "both for ATS cases and for the Court's approach to extraterritoriality more generally."[158]

Regarding the first step of the *RJR Nabisco* test, the Supreme Court held that *Kiobel* "answered that question in the negative," so the presumption against extraterritoriality applied to the *Nestlé* plaintiffs' ATS claim.[159] The Court's analysis of the second step of the test could not be resolved by precedent alone.

The defendants argued that, for the second step, the conduct relevant to the focus of the ATS is conduct that directly caused the injury, which would be the violence and slavery that occurred entirely overseas.[160] However, the Court declined to adopt this rule, and instead held that the relevant conduct was the U.S.-based conduct of the corporations that allegedly aided and abetted forced labor.[161] According to the plaintiffs, this conduct included making "operational decisions" from U.S. offices to provide "training, fertilizer, tools, and cash to overseas farms."[162]

The Court held that these "allegations of general corporate activity—like decision-making—"did not confer jurisdiction in the federal district courts over the plaintiffs' ATS claims.[163] Specifically, the Court reasoned that making those kinds of operational decisions is an activity "common to most corporations," and the "presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity [was]

---

[155] *Id.* (quoting *RJR Nabisco, Inc.*, 136 S. Ct. at 2101) (internal quotations omitted).

[156] *RJR Nabisco, Inc.*, 136 S. Ct. at 2101.

[157] Kayla Winarsky Green & Timothy McKenzie, *Looking Without and Looking Within: Nestlé v. Doe and the Legacy of the Alien Tort Statute*, AM. SOC'Y. OF INT'L. L., July 5, 2021, at 1, 5.

[158] Dodge, *supra* note 139; *see infra* Section IV.C.

[159] *Nestlé USA, Inc.*, 141 S. Ct. at 1936.

[160] *Id.*

[161] Bergeron et al., *supra* note 133.

[162] *Nestlé USA, Inc.*, 141 S. Ct. at 1937.

[163] *Id.*

involved in the case."[164] If generic allegations like those alleged by the *Nestlé* plaintiffs could "draw a sufficient connection between" aiding and abetting forced labor overseas and domestic conduct, that precedent would "render every [U.S.] corporation subject to suit for overseas injuries."[165]

Therefore, *Nestlé* established as precedent that *RJR Nabisco*'s test, and not *Kiobel*'s "touch and concern" test, supplies the test for extraterritoriality in ATS claims.[166] The opinion also clarified that allegations of general corporate activity alone do not overcome the presumption against extraterritoriality.[167] Still, it is not clear what kind of conduct will satisfy *Nestlé*'s requirement that the conduct relevant to the statute's focus occurred in the United States if something more than corporate decision-making must be alleged.[168]

B. Precedent *Nestlé* Avoided

Since the Supreme Court dismissed the plaintiffs' claims on extraterritoriality grounds, the *Nestlé* opinion failed to resolve the question of domestic corporate liability under the ATS.[169] At oral argument, some Justices expressed reservations about being the Court to "effectively immunize" corporations from liability under the ATS—at least regarding aiding and abetting forced child labor.[170] Specifically, several Justices were concerned about how this decision might appear to other nations, and Justice Kagan considered that many countries "do hold their own corporations civilly liable for the kinds of actions at issue [in Nestle]."[171] Their concern was that a decision against domestic corporate liability would signal a failure to hold nationals accountable and leave foreign victims without redress.[172] Such a result would directly contradict the purpose of the ATS as an "accountability mechanism . . . when foreign nationals are harmed by U.S. nationals in the United States."[173]

The Justices successfully avoided these controversial questions by choosing not to resolve the "high-profile legal issue" of whether

[164] *Id.* (quoting Morrison v. National Australia Bank Ltd., 561 U. S. 247, 266 (2010)) (internal quotations omitted).
[165] *Nestlé USA, Inc.,* 141 S. Ct. at 1937; Bergeron et al., *supra* note 133, at 3.
[166] *Nestlé USA, Inc.*, 141 S. Ct. at 1933.
[167] *Id.* at 1937.
[168] Green & McKenzie, *supra* note 157, at 5.
[169] Dodge, *supra* note 139.
[170] Transcript of Oral Argument, *supra* note 53, at 39–43.
[171] *Id.* at 44–45.
[172] Aceves, *supra* note 133.
[173] *Id.*

domestic corporate liability is actionable under the ATS.[174] The Supreme Court has now granted certiorari on this issue three times—in *Kiobel*, *Jesner*, and *Nestlé*.[175] Each time, the Supreme Court has failed to resolve this issue, dodging the opportunity through an easier path to dismissal. Since the Court has never held that the ATS bars suits against domestic corporations, future plaintiffs should be "able to proceed against U.S. corporations under the ATS so long as they can show tortious conduct happening in the United States."[176] Therefore, domestic corporations, including the "Big Chocolate" counterparts in other industries, remain open to liability if the litigation stars align in the plaintiff's favor.

Although the Justices did not reach a conclusion regarding domestic corporate liability, five of the Justices "saw no reason to distinguish between corporations and natural persons as defendants" and found corporations subject to suit under the ATS.[177] Justice Alito reasoned that "corporate status does not justify special immunity" from liability under the ATS.[178] In addition, Justice Gorsuch considered early American and British history, which placed "corporations and individuals on equal footing," and determined that the ATS "has never distinguished between defendants" or "supplie[d] corporations with special protections against suit."[179] The fact that a majority of the Justices did not find an exception for domestic corporate liability under the ATS suggests that, at some point, a case might be brought before the Court that cannot be dismissed on extraterritorial grounds. As a result, domestic corporations could finally be held liable for aiding and abetting human rights violations overseas.

While the *Nestlé* opinion did not establish immunity for domestic corporations under the ATS, it did stop short of overruling *Sosa*.[180] Specifically, the Court did not make Part III of its opinion binding, where Justice Thomas proposed that the ATS cause of action should be "limited to the three historical paradigms that the First Congress had in mind."[181] Part III, which comprises "over half of the opinion," is dicta because only Justices Gorsuch and Kavanaugh joined Justice Thomas in arguing that "*Sosa* [invited] courts to 'invent' new causes of action[,] . . . thus running afoul of the separation of powers" doctrine.[182]

---

[174] Green & McKenzie, *supra* note 157, at 4.
[175] *Id.* at 1–3.
[176] Bergeron, *supra* note 133; Van Schaack, *supra* note 152.
[177] Dodge, *supra* note 139; Van Schaack, *supra* note 152.
[178] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1950 (2021) (Alito, J., dissenting).
[179] *Id.* at 1941–42 (Gorsuch, J., concurring).
[180] *See id.* at 1939 (majority opinion).
[181] Dodge, *supra* note 139.
[182] Van Schaack, *supra* note 152.

In Justice Thomas's "alternative path to [the] disposition" of *Nestlé*, as cleverly criticized by Justice Sotomayor, he looked to several sources (Supreme Court precedent, the history of deference to Congress, potential foreign policy concerns, and existing ATS legislative remedies) to argue that the judiciary should never create a new common-law cause of action under the ATS.[183] He saw *Sosa* as establishing a test that was "narrow at the outset," but was made even narrower through recent precedents "stressing that judicial creation of a cause of action is an extraordinary act that places great stress on the separation of powers."[184] At the outset, *Sosa* indicated that courts could use common-law authority under the ATS to create private rights of action past the three historical violations of international law—violation of safe conducts, infringement of the rights of ambassadors, and piracy.[185] Precedents since *Sosa*, however, "have clarified that courts must refrain from creating a cause of action whenever there is even a single sound reason to defer to Congress."[186] In his reasoning, Justice Thomas noted that the Court must have found at least some reason to defer to Congress in every subsequent case—it has never created a cause of action under the ATS.[187]

Justice Thomas also suggested that the "single sound reason" in most ATS cases is the "tension" between the separation of legislative and judicial power, including the foreign-policy concerns inherent in "creating a cause of action to enforce international law beyond three historical torts."[188] He contended that courts lack the "institutional capacity" to consider all of the "factors relevant to creating a cause of action."[189] Therefore, given that the legislature has "the responsibility and institutional capacity to weigh foreign-policy concerns," there would always be a sound reason to defer to Congress.[190]

As applied to *Nestlé*, the plaintiffs' allegations implicated the Harkin-Engel Protocol and other agreements between the U.S. government and the Ivory Coast government.[191] Since those agreements allow corporations to provide materials and training to cocoa farmers in Ivory Coast—"the same kinds of activity that respondents contend make petitioners liable for violations of international law"—creating a cause of action based on claims resulting

[183] *Nestlé USA, Inc.*, 141 S. Ct. at 1944 (Sotomayor, J., concurring).
[184] *Id.* at 1938 (majority opinion).
[185] *Id.* at 1937.
[186] *Id.*
[187] *Id.*
[188] *Id.* at 1938–39.
[189] *Id.* at 1940.
[190] *Id.* at 1939 (quoting Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018)).
[191] *Id.*

from those kinds of activities could discourage investment abroad and undermine intergovernmental efforts.[192] In Justice Thomas's view, this tradeoff would best be resolved by Congress.[193]

Finally, Justice Thomas looked to the existence of the TVPA, a legislative remedy and private right of action under the ATS, as proof that Congress can and should be the governmental body to create additional private rights of action.[194] Thus, Justice Thomas refused to create the precedent that the judiciary is the proper branch to be tasked with developing causes of action under the ATS.[195]

In his concurring opinion to Part II, Justice Gorsuch stated that nowhere does the ATS "deputize[] the Judiciary to create new causes of action" and so "[n]ow would be an exceedingly strange time to start" doing so.[196] Instead, he would have the Court "avoid the false modesty of adhering to a precedent that seized power [it does] not possess" by overturning *Sosa*'s holding, which cracked open a door to judicial common law causes of action under the ATS "subject to vigilant doorkeeping," or close monitoring, that should have only been opened by "the people's elected representatives."[197]

Although Justice Thomas did not call for the overruling of *Sosa* as explicitly as Justice Gorsuch did, Justice Sotomayor viewed his dicta as an attempt to "overrule *Sosa v. Alvarez-Machain* . . . in all but name."[198] Unlike Justice Thomas, Justice Sotomayor believed the ATS was "a statute born of necessity."[199] According to this belief, the First Congress intended federal courts "to identify actionable torts under international law and to provide injured plaintiffs with a forum to seek redress," in order to avoid historical problems with foreign entanglements stemming from a failure to provide judicial remedies.[200]

Justice Sotomayor advanced international law as providing "the substantive contours of actionable torts," while domestic law "answers subsidiary questions around the scope of liability."[201] Accordingly, Congress—whose duty it is to consider foreign policy implications when questions of international law arise—need not create a cause of action to hold domestic corporations liable as a matter of law.[202]

---

[192] *Id.*

[193] *Id.* at 1944 (Sotomayor, J., concurring).

[194] *Id.* at 1937–38.

[195] *See id.*

[196] *Id.* at 1942–43 (Gorsuch, J., concurring).

[197] *Id.* at 1943 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004)) (internal quotations omitted).

[198] *Id.* at 1944 (Sotomayor, J., concurring).

[199] *Id.* at 1945.

[200] *Id.* at 1945–46.

[201] *Id.* at 1946.

[202] *Id.* at 1947; Van Schaack, *supra* note 152.

Moreover, even if there *are* foreign policy concerns, Justice Sotomayor found those concerns "manageable (and largely hypothetical)."[203] She reasoned they would only be exacerbated by "[c]losing the courthouse doors" to citizens of foreign nations requesting redress for torts committed by U.S. nationals in the United States.[204] Finally, she concluded that there is no reason that courts, who are "tasked with, and particularly capable of, interpreting and applying laws," lack the institutional capacity to determine the types of torts that require judicial common-law causes of action under the ATS.[205]

In *Nestlé*, the Supreme Court established precedent in the realm of extraterritoriality and the tests used to overcome the presumption against extraterritoriality in the context of the ATS.[206] Following the adoption of this test, which was based in part on a line of dicta from an earlier case, the Supreme Court dismissed the Malian plaintiffs' claims.[207] Unfortunately, sharp differences of opinion between the Justices on the topics of corporate liability and the judicial creation of causes of action prevented those topics from attaining majority support or reaching resolution after thrice being granted certiorari by this Court, even though the analysis of those topics comprised most of the written opinion.[208]

C. Consequences of *Nestlé's* Established and Avoided Precedent

The deliberate choices regarding precedent established and avoided in *Nestlé* present questions ripe for analysis regarding what probably could and potentially should happen in the litigation of *Nestlé* on remand in future ATS-related legislation, and in ATS litigation more generally.

1. Consequences in the Litigation of Nestlé on Remand

First, regarding the litigation of *Nestlé* on remand, the Supreme Court reversed the Ninth Circuit on the issue of extraterritoriality "and remanded the case to the district court, where the plaintiffs will now have to move for leave to amend their complaint."[209] If the plaintiffs' motion is granted, they will be required to allege U.S. conduct that is

[203] *Nestlé USA, Inc.*, 141 S. Ct. at 1948 (Sotomayor, J., concurring).
[204] *Id.*
[205] *Id.*
[206] *See id.* at 1936 (majority opinion).
[207] *Id.* at 1940.
[208] *See generally id.* (reaching different conclusions with respect to corporate liability and judicial creation of causes of action).
[209] Van Schaack, *supra* note 152.

relevant to the focus of the ATS and sufficient to overcome the presumption against extraterritoriality.[210] This level of allegation presents a high bar to success, particularly since the plaintiffs have already had a chance to raise their most serious allegations before the highest court in the United States and could only muster general allegations of corporate decision-making. If the plaintiffs manage to allege the necessary level of conduct, domestic corporations could be held liable since at least five Justices were in favor of ATS domestic corporate liability in *Nestlé*.[211]

It is also worth noting that the *Nestlé* opinion was decided by a conservative-leaning Supreme Court, with two conservative Justices agreeing that domestic corporations should be liable under the ATS—a position somewhat inapposite with conservatives' traditional pro-business stance.[212] Specifically, this decision leaves open the possibility that American corporations can be liable under a 1789 statute, a possibility that could negatively impact American business in future litigation or legislation. Future Courts composed of different Justices and ideologies could change the outcome of subsequent ATS cases brought to the nation's highest court. Not only could a future Court definitively hold that domestic corporations are liable under the ATS, but it could also choose to shun Justice Thomas's cautionary dicta about not creating new causes of action and instead embrace the power to create judicial private rights of action under the ATS. Therefore, while some consequences will be apparent upon remand regarding the litigation of *Nestlé*, other consequences stemming from that litigation may not be apparent for several years or decades, when the composition of the Court has changed and an ATS case with more plaintiff-friendly facts is granted certiorari.

2. Consequences in Future ATS-Related Legislation

Second, regarding the future of ATS legislation, the *Nestlé* opinion has—like other cases—left the ball in Congress's court to clarify continuing issues by passing or amending legislation. In several ATS cases, including *Nestlé*, claims have been dismissed by courts because the allegations were deemed extraterritorial.[213] To resolve this continuing issue, Congress could indicate, "in legislative text or perhaps even a resolution announcing the sense of Congress[] that the ATS applies to torts committed *anywhere* in violation of the law of

[210] *See Nestlé USA, Inc.*, 141 S. Ct. at 1936 (discussing the presumption of extraterritoriality).

[211] Five Supreme Court Justices held in favor of domestic liability. *See id.*

[212] *Id.* at 1935.

[213] *Id.* at 1935–36.

nations."[214] The first step of the *RJR Nabisco* test adopted by the *Nestlé* Court looks for a "clear, affirmative indication" in the text of the statute that rebuts the presumption against extraterritoriality.[215] It is within Congress's power to add this clear, affirmative indication to the text of the ATS. Such a choice could protect the legacy of *Filártiga* and other cases that would not survive under the strict extraterritorial *RJR Nabisco* test applied by *Nestlé*.[216]

Congress could also create new and additional causes of action, including a specific establishment of domestic corporate liability under the ATS.[217] Currently, the TVPA is the only ATS cause of action created by Congress rather than the federal courts.[218] The TVPA illustrates Congress' awareness of the "necessity of clarifying the proper scope of liability under the ATS in a timely way."[219] The statute also specifies who may be liable, includes an exhaustion requirement, and establishes a limitations period, decisions that reflect Congress' "considered judgment of the proper structure for an ATS right of action."[220] Just as Congress created the TVPA to serve as an express ATS cause of action,[221] Congress can—and should—specify in amendments or separate statutes exactly which causes of action are covered under the ATS and against which categories of defendants liability applies.

Congress could also address domestic corporate liability under the ATS in two ways—by broadly establishing liability, or by establishing liability subject to limitations. As one option, Congress could broadly establish domestic corporate liability under the ATS. This option would ensure that corporations know that compensating victims of human rights abuses is a cost of doing business.[222] However, large corporations might offer counterarguments and assert that this policy could discourage investment by U.S. corporations abroad, especially in countries where the government has a "history of alleged human-rights violations[] or where judicial systems might lack the safeguards" present in U.S. courts.[223] The *Jesner* Court also discussed the argument made by corporations that this decision could encourage plaintiffs to

[214] Van Schaack, *supra* note 152.

[215] RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2102 (2016).

[216] *See infra* Part C.

[217] *Nestlé USA, Inc.*, 141 S. Ct. at 1940 ("Congress may well decide to create a cause of action against one category of defendants but not another. . . [o]r it might make distinctions—as it did in the TVPRA—between direct and indirect liability.").

[218] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1391 (2018).

[219] *Id.* at 1406.

[220] *Id.* at 1403.

[221] *Id.* at 1391.

[222] *Id.*

[223] *Id.* at 1406.

ignore human perpetrators of human rights abuses entirely and concentrate ATS litigation on the deeper pockets of corporate entities.[224]

In the alternative, since foreign judicial safeguards may be lacking and Congress may want to avoid discouraging investment abroad, Congress could subject corporate liability under the ATS to some limitations or preconditions, as opposed to establishing broad liability.[225] For example, the *Jesner* Court suggested that Congress could limit corporate liability under the ATS to cases "where a corporation's management was actively complicit in the crime."[226] This choice intersects with another ATS circuit split involving the appropriate mens rea for corporate aiding and abetting liability, therefore allowing Congress to also address the requisite mens rea in such a provision.[227]

3. Consequences in ATS Litigation

Third, regarding ATS litigation more generally, the *Nestlé* Court did not totally remove the possibility of aiding and abetting liability under the ATS.[228] With the door open for liability, it remains possible that plaintiffs can "sue U.S. companies for aiding and abetting violations of international law taking place abroad" and premise claims on "forms of secondary liability (which would include complicity, conspiracy, and superior responsibility allegations among others)."[229] Thus, corporations will not be able to hide behind the excuse that they did not directly commit the human rights violation that injured the plaintiffs, so long as the plaintiffs can allege sufficient U.S. activities to successfully assert aiding and abetting liability under the ATS.[230]

Additionally, the decision to replace the *Kiobel* test with the test from *RJR Nabisco* may create significant consequences in the legacy of *Filártiga* and other cases alleging extraterritorial conduct. *Filártiga*, the first modern ATS case, involved conduct that occurred entirely outside of the United States.[231] Under *Kiobel*'s "touch and concern" test, specific U.S. conduct was not required to overcome the presumption

[224] *Id.* at 1405.
[225] *Id.* at 1408.
[226] *Id.*
[227] Srish Khakurel, *The Circuit Split on Mens Rea for Aiding and Abetting Liability Under the Alien Tort Statute*, 59 B.C. L. REV. 2953, 2955–56 (2018) (discussing whether knowledge or purpose is the appropriate mens rea required of a defendant to be held liable for aiding and abetting under the ATS).
[228] Green & McKenzie, *supra* note 157, at 4.
[229] *Id.* at 5; Van Schaack, *supra* note 152.
[230] Van Schaack, *supra* note 152.
[231] Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

against extraterritoriality, as long as the claim touched and concerned the United States.[232] Under the *RJR Nabisco* standard adopted by the *Nestlé* Court, cases like *Filártiga* could not overcome the presumption against extraterritoriality without alleging a certain level of U.S.-based activity.[233]

More generally, "almost everyone seems to agree that piracy was within the First Congress's contemplation when it passed the ATS, but piracy does not involve conduct in the United States and so would not be actionable under *Nestlé*."[234] By adopting a new, stricter test for extraterritoriality, the Court may have unintentionally restricted the ability to raise claims of the types originally covered by the statute. Justice Thomas suggested that piracy in addition to the other two historical torts should be the only causes of action covered by the ATS, but Part II of his opinion would preclude those claims.[235] Congress, or the Court, should provide further direction in the future to safeguard the ability of plaintiffs to raise claims under the ATS and clarify the full scope of both its extraterritoriality requirement and the authority to create new causes of action.

V. CONCLUSION

The ATS is a result of a time in American history where the United States could not provide remedies for injuries to foreign officials on American soil.[236] Following a long period of dormancy, the ATS reemerged as an avant-garde human rights litigation tool, allowing international plaintiffs to raise claims against individuals and corporations alike.[237] In the years since this renewed litigation, the Supreme Court has constricted and rewritten the original text such that it has now been used to protect domestic "Big Chocolate" against corporate liability in *Nestlé*.[238] With the Supreme Court's recent opinion in *Nestlé*, the ATS, unlike Lohengrin's bride, has not completely fallen lifeless to the ground.

The recent *Nestlé* opinion adopts as precedent a new test for extraterritoriality that raises the bar regarding the allegations plaintiffs must make to hold a domestic corporation liable under the ATS.[239] The

[232] Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1669 (2013).
[233] Van Schaack, *supra* note 152.
[234] Dodge, *supra* note 139.
[235] *See id.*
[236] *See* Brackemyre, *supra* note 26.
[237] *The Alien Tort Statute: Holding Human Rights Abusers Accountable*, *supra* note 45.
[238] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).
[239] *Id.* at 1936.

opinion also illustrates the dangers of deriving federal judicial common law from a jurisdictional statute, as Justices saw the role of the judiciary in creating common-law causes of action as either nonexistent or, alternatively, required by law.[240] Following this opinion, Congress should clarify, either in amendments to the ATS or entirely new statutes, the scope of liability and categories of causes of action that fall under the ATS. Additionally, courts should prepare for challenges to the holding of *Nestlé* from traditional plaintiffs and defendants alike, particularly respecting its adoption of the "focus" test and the continued allowance of aiding and abetting claims.[241] Only with further judicial and legislative reflection and action can this once-lifeless, 231-year-old statute redeem its status as an innovative tool to vindicate victims of international human rights violations.

[240] *Id.*
[241] *Id.*