Determining United States Jurisdiction over Transnational Litigation

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I. INTRODUCTION

Along with increased integration between the economic and political worlds has come global litigation that is exceeding the bounds of any single jurisdiction—whether because the matters in dispute are inherently transnational or as a result of conscious, strategic decisions by the litigants. This “globalization” of litigation is, in part, a natural incident of a world economy that is evermore interconnected. And while there is nothing inherently wrong with litigants making choices among available legal systems to maximize their odds of success, concerns arise when litigants manipulate the global litigation system to obtain an unfair advantage. Such abuse often manifests itself as a species of “global forum shopping.” Substantive and procedural mechanisms that liberalize the rules of law so as to tilt the playing field unfairly—coupled with litigants who improperly “play the system”—only exacerbate this practice in jurisdictions throughout the world.

The focus of this Article is the treatment of transnational litigation by the United States legal system, where forum shopping remains a genuine concern. As Lord Denning observed: “As a moth is drawn to the light, so is a litigant drawn to the United States.”¹ Plaintiffs from around the world seek the jurisdiction of the United States courts in an effort to obtain relief not otherwise available, or available in substantially lesser amounts, in other legal systems. Attractive features of the United States legal system include: (1) procedural constructs, including class actions, jury trials, and punitive damages; (2) economic advantages, such as contingent fees and the relative absence of “loser pays” fee-shifting risks; and (3) substantive law, driven by a bias toward domestic law, often viewed as more plaintiff-friendly (in that either claims are recognized by the United States and not in other jurisdictions, like strict liability, or are perceived to require lower levels of proof). These factors drive efforts by foreign claimants to come to the United States to litigate their disputes.²

2. Global forum shopping has a second component of lesser but rapidly growing significance: efforts to obtain judgments in foreign courts and then to enforce them in the United States. Whether because foreign courts have caught the “American Disease” of plaintiff-friendly procedures like class actions or
The trend towards global litigation shows no signs of subsiding. This Article focuses on one aspect of that globalization: The application of federal statutes to create causes of action by foreign claimants in the United States courts and potential limitations on that access. This assessment is descriptive, in that it attempts to capture a number of recent developments in the relevant law; cautionary, in that it will suggest that some recent “victories” may have more limited positive impact than general reactions would suggest; and prescriptive, in that it offers suggestions as to how the legal environment for these claims could be made fairer and more predictable.

There have been a number of recent decisions by the United States Supreme Court broadly viewed as having substantially limited access to the United States courts by either restricting the extraterritorial reach of its law or by imposing more rigorous standards for demonstrating personal jurisdiction over defendants. These follow longer-established doctrines from the Court increasing the utility of the doctrine of forum non conveniens to prudentially return foreign claimants from whence they came. The developments reflected in *Kiobel v. Royal Dutch Petroleum Co.*, Goodyear Dunlop Tires Ops., S.A. v. Brown, J. McIntyre Mach., Ltd. v. Nicastro, Daimler AG v. consolidations, the availability of third-party litigation funding, or, in some instances because legal standards have been rewritten to target certain defendants, or because of plain, old-fashioned corruption, there may be favored foreign jurisdictions which will reliably produce huge and unjustified judgments. This Article will address both of these phenomena in turn, although the primary emphasis will be on the former, that is, the efforts on the part of foreign plaintiffs to come to the courts of the United States to litigate their claims. The issues associated with the enforcement of foreign judgments have been comprehensively addressed elsewhere. See John B. Bellinger III & R. Reeves Anderson, *Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition*, 54 V.A. J. INT’L L. 501 (2014).

3. While reasonably comprehensive, this assessment will not be encyclopedic. There are areas of the law with substantial transnational significance (e.g., antitrust, trade, intellectual property Foreign Corrupt Practices Act) beyond the scope of this article, as is the entire subject of global criminal and regulatory enforcement.

Bauman, and Walden v. Fiore are important, but in reality the scope of their application is narrow. True, the ability of foreign plaintiffs to prosecute cases involving conduct external to the United States against foreign defendants under the Alien Tort Statute, the Federal Securities Laws, Racketeer Influenced and Corrupt Organizations Act (RICO), or other federal legislation may now be limited. The restrictions on the pursuit of defendants domiciled in the United States by foreign claimants for acts occurring primarily outside the territorial limits of the United States, however, are far from clear. Furthermore, historical efforts by the federal courts to stem the tide of transnational litigation have met limited success as litigants seek to circumvent legal ambiguities with increasingly creative pleading, and it remains to be seen whether more recent proclamations will be similarly diffused by future plaintiffs. As a result, the sometimes-euphoric assessment of these cases by defendants brings to mind Mark Twain’s famous statement that reports of his death had been “greatly exaggerated.”

This Article will start with an assessment of the current state of the law with respect to federal law claims made by foreign plaintiffs in the federal courts. This will involve an analysis of the Alien Tort Statute post-Kiobel, the scope of claims under the securities laws post-Morrison, claims under RICO, the special case of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and other environmental provisions, and a cautionary note of the impact of constricted access to federal courts on the propensity of plaintiffs to assert these claims in state courts. The discussion will next turn to the Supreme Court’s jurisprudence on personal jurisdiction, recognizing that the recent decisions in Fiore, Bauman, McIntyre, and Goodyear both clarify and restrict the grounds on which a defendant can be successfully haled into United States jurisdiction.

9. See, e.g., Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (limiting Alien Tort Statute to “historical paradigms familiar” when §1350 was enacted). While purporting to limit the nature of claims permitted under the Alien Tort Statute to a “narrow class” of violations of “international law norms,” the Supreme Court’s decision spurred a wave of pleadings replete with allegations of heinous and shocking conduct so as to be categorized as such.
Further, there will be a discussion throughout regarding the application of the heightened pleading standards of *Ashcroft v. Iqbal*\(^\text{12}\) and *Bell Atlantic Corp. v. Twombly*\(^\text{13}\) to issues relevant to both subject matter and personal jurisdiction. The essential conclusion is that while this concatenation of recent decisions will provide strong defenses in cases against non-United States defendants, the utility of those opinions with regard to United States defendants is limited as they fail to address the risk of global forum-shopping by foreign claimants against them.\(^\text{14}\)

Transnational litigation will likely continue. There remain major areas of uncertainty as to the application and scope of the Alien Tort Statute, and even less so as to other federal provisions. Efforts to constrict access to federal courts may have perverse consequences of encouraging more state and foreign court litigation. The extant body of law is far from clear or rational and requires substantial development if it is to promote legitimate policy goals.

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14. The issue of how the newly imposed limitations may provide incentives for foreign plaintiffs to access the U.S. litigation system via the state courts will next be touched upon, with an emphasis on the fact that as to subject matter jurisdiction, the limits on extraterritorial application of statutes which has animated much of the development of the law on the federal level has limited application as it relates to state common law. The primary state law limitations, and weak ones at that, stem from due process concerns. With respect to personal jurisdiction, the assessment is somewhat more positive given that at both the state and federal level the operative limitations arise out of an identically applicable set of common law limitations. Restricting access to federal courts may have the predictable effect of increasing efforts to litigate transnational litigation in the state courts. See Donald Earl Childress III, *Should State Law Rule the World?: A Call for Caution in Applying State Law to International Tort Cases*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Sept. 2013), http://www.instituteforlegalreform.com/uploads/sites/1/StateLawRuletheWorld.pdf.
II. THE ALIEN TORT STATUTE

A. United States as Court of Universal Jurisdiction: Filartiga v. Pena-Irala

In recent history, the Alien Tort Statute (ATS)\textsuperscript{15} has been an important, if not the most important, vehicle for foreign claimants to assert claims in the United States federal courts.\textsuperscript{16} The ATS, a part of the Judiciary Act of 1789, grants original jurisdiction to federal district courts to hear “any civil action [brought] by an alien, for tort only, committed in violation of the law of nations or a treaty of the United States.”\textsuperscript{17} For almost two centuries after its passage, it remained dormant and was rarely used.\textsuperscript{18} It was revived in 1978 by the Second Circuit in Filartiga v. Pena-Irala.\textsuperscript{19} Filartiga involved a suit against a former official of Paraguay for alleged murder and torture in violation of international law.\textsuperscript{20} It also operated from the premise that the United States courts should willingly provide a forum for disputes between and among aliens as to conduct external to the United States. Although both the plaintiff and defendant in Filartiga were physically present in the United States, that factor was of no moment to the Second Circuit, which allowed litigation of a purely extraterritorial dispute. Filartiga opened the floodgates for claims under the ATS, including murder and torture as in this case\textsuperscript{21} and also fraud, environmental damage, and other species of tort claims. The initial

\textsuperscript{16} The ATS is the only vehicle for suits by aliens against aliens in federal court. Of course, aliens may press suit against U.S. defendants under diversity jurisdiction. 28 U.S.C. § 1332 (2012).
\textsuperscript{17} 28 U.S.C. § 1350.
\textsuperscript{18} IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).
\textsuperscript{19} 630 F.2d 876 (2d Cir. 1980). As Judge Friendly observed, the ATS “is a kind of legal Lohengrin; although it has been with us since the First Judiciary Act § 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came.” IIT, 519 F.2d at 1015.
\textsuperscript{20} Filartiga, 630 F.2d at 878.
\textsuperscript{21} The Torture Victim Protection Act of 1991, Pub.L. No. 102-256, 106 Stat. 73 (1992), which applies to the extraterritorial conduct, addressed the underlying concerns that led to the expansive use of the ATS. The limits on extraterritorial application therefore are prudential limits regarding statutory interpretation imposed by courts. Congress can almost always legislate an extraterritorial effect subject only to due process limitations or sovereignty concerns.
wave of post-*Filartiga*, pre-*Sosa* cases involved a stunning array of actors and conduct. While the early ATS cases were typically against individual defendants, corporations, including non-United States multinationals and United States corporations, were increasingly targeted by the 1990’s.

**B. Sosa v. Alvarez-Machain: Narrowing the Class of Claims But Leaving Universal Jurisdiction Unfettered**

The proliferation of ATS claims led to concerns that the federal courts were becoming world courts of general jurisdiction, entertaining an ever-expanding range of claims against ever-expanding categories of defendants, and, in most cases, without any obvious connection with the United States or its national interests.


24. See generally GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (2003) (discussing how continued use of the ATS “could have profound consequences for the world economy”). As evidence of the concern raised by wide-ranging application of the ATS, consider the following hypothetical offered by the authors:

This one-sentence law—the Alien Tort Statute (ATS) of 1789—could plausibly culminate in a nightmare, more than 200 years after it was
The first chance for the United States Supreme Court to address the proper function of the federal courts in hearing ATS claims—and the scope of the claims that could be made under the statute—was *Sosa v. Alvarez–Machain.*

In *Sosa*, the plaintiff sued under the ATS to recover damages for unlawful detention and imprisonment. The Court first considered and rejected the contention that the ATS was purely jurisdictional. The Court held instead that there is no reason to suppose that Congress passed “the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress.” The statute was obviously “meant to have a practical effect.”

Nevertheless, the Court was sensitive to the threat of ATS claims intruding upon the functions of the political branches of government, as well as the risk of impinging on the rights of other sovereigns. While the Court acknowledged the authority of federal courts to hear “a very limited category” of claims under the ATS, it stressed that “the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant door-keeping, and thus open to a narrow class of international norms today.” Ultimately, the Court was “persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms enacted. Within the next decade, for example, 100,000 class action Chinese plaintiffs, organized by New York trial lawyers, could sue General Motors, Toyota, Volkswagen, General Electric, Mitsubishi, Siemens, Motorola, NTT, Nokia, and 20 other blue-chip corporations in a federal court for abetting China’s denial of political rights, for observing China’s restrictions on trade unions, and for impairing the Chinese environment. These plaintiffs might claim actual damages of $6 billion and punitive damages of $20 billion. To minimize their exposure to punitive damages, the corporations could settle for an intermediate amount, such as $10 billion.

*Id.* at 1. This “nightmare scenario” has not eventuated, but it does give some indication of the concern that the ballooning population of ATS claims was creating.

*Id.* at 2.

25. *542 U.S. 692 (2004).*
26. *Id.* at 712.
27. *Sosa*, *542 U.S.* at 719.
28. *Id.*
29. *Id.* at 729.
familiar when [the ATS] was enacted.” When measured by this standard, the plaintiff’s claims of unlawful detention were not held to violate a universally accepted norm of international law, so his ATS claim failed as a result.

While Sosa was viewed as a victory for proponents of limitations on ATS claims, it failed to address the fundamental question of the scope of jurisdiction under the ATS. Although it restricted the nature of the claims that would give rise to ATS jurisdiction, it implicitly accepted the idea of “universal jurisdiction”—that it was appropriate for an alien to sue another alien in United States courts over conduct occurring elsewhere in the world. With universal jurisdiction intact, the task for post-Sosa plaintiffs was to find ways to characterize defendants’ conduct in their cases as heinous and outrageous in an effort to fit them within the Sosa rubric. The task for courts was to assess the adequacy of these increasingly shrill allegations against the backdrop of Sosa.

C. Divining “Customary International Law” and Proper Defendants Post-Sosa

As noted, following Sosa, the threshold issue was the determination of whether the conduct at issue violated a clearly

30. Sosa, 542 U.S. at 732.
31. As one commenter has observed:

Indeed, the most profound effect of Sosa was quite possibly the opposite of what the Court may have intended. Sosa said that claims under the statute had to allege misconduct universally acknowledged as serious under international law. The result was to ratchet up the rhetorical nature of the claimed violations—plaintiffs had to charge defendants with extreme misconduct to keep an ATS claim going. In that case, however, everything becomes—well, genocide or something similar. What might have been thought to be serious and yet, for all that, ‘ordinary,’ labor or environmental misconduct was suddenly re-described using the language of genocide, crimes against humanity, war crimes, slavery and a few others. The most serious international crimes were cheapened into a rote pleading in order to get into federal court.

accepted international law norm. For example, in *Vietnam Association for Victims of Agent Orange v. Dow, et al.*,\(^{32}\) where a putative class of Vietnamese citizens claimed personal injury as a result of exposure to the herbicide known as Agent Orange, the core issue became whether the use of herbicides in the military theater of Vietnam constituted use of a “poisoned weapon” in violation of customary international law norms.\(^{33}\) In support of their claims, plaintiffs cited a number of international treaties or conventions, beginning with the 1907 Hague Convention, together with a variety of Army documents and letter opinions.\(^{34}\) Despite these extensive source materials, the Court decided that “[t]he sources of international law relied upon by [plaintiffs] do not support a universally-accepted norm prohibiting the wartime use of Agent Orange that is defined with the degree of specificity required by *Sosa*.\(^{35}\)

The other issue not addressed by *Sosa* was the question of who or what was an appropriate defendant under the ATS. The initial wave of defendants in the 1980’s and early 1990’s tended to be individuals, but aside from exceptional individuals such as former Philippine President Ferdinand Marcos,\(^{36}\) victories against individual defendants were economically symbolic rather than remunerative. Although claims against governmental entities created the potential for economically viable defendants, they raised potentially dispositive issues such as sovereign immunity and political questions.\(^{37}\) The obvious answer was to sue corporations, and, by the mid 1990’s, ATS cases against corporate defendants were gaining traction.\(^{38}\) In the years that followed, these became the dominant species of ATS claims. The inclusion of corporate entities as defendants highlighted the issue of accessorial liability. Unlike governmental entities, corporate defendants typically do not have armies, police forces, or

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32. 517 F.3d 104 (2d Cir. 2008).
33.  Id. at 114.
34.  Id. at 118–19.
35.  Id. at 119.
36.  *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994).
37.  *See, e.g.,* Charles N. Brower et al., *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AM. J. INT’L L. 200, 206–08 (1979) (explaining unresolved questions under the Act that have been identified by academics and practitioners).
38.  While ATS claims had been filed against corporations since the early 1990s, in 1997, *Unocal* became the first ATS claim against a corporate defendant to survive the motion to dismiss stage.  Doe v. *Unocal Corp.*, 395 F.3d 932, 943 (9th Cir. 2000).
the capacity to impose policies. As a result, plaintiffs increasingly brought aiding and abetting claims against corporations under the ATS.

As these issues arose, they required, in the first instance, an initial determination as to whether these questions should be resolved with reference to “customary international law” or domestic legal sources. Application of Sosa typically required extensive analysis of international law sources to determine whether the conduct at issue conformed to its requirements. This case-by-case process burdened courts and litigants, and the absence of a bright line made outcomes difficult to predict. Divining the definition of “customary” international law created inherent uncertainty, an uncertainty that would seem to create potentially substantial due process issues. As Judge Posner has observed:

> The concept of customary international law is disquieting in two respects. First, there is the problem of notice: a custom cannot be identified with the same confidence as a provision in a legally authoritative text, such as a statute or treaty. . . . Second, there is a problem of legitimacy—and for democratic countries it is a problem of democratic legitimacy. . . . Both problems are conspicuous in the Alien Tort Statute. . . .

Judge Posner cites these concerns as potentially having animated the Supreme Court’s decision in Sosa, concluding that they:

> [A]re serious enough to have persuaded the Supreme Court in Sosa to limit the statute’s scope to ‘the customs and usages of civilized nations’ that are ‘specific, universal and obligatory,’ and ‘accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century

39. Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1016 (7th Cir. 2011). Judge Posner also comments, however, that the absence of corporate liability in war crimes cases “doesn’t mean that corporations are exempt from that law.” Id. at 1019.
paradigms’ (that is, violation of safe conducts, infringement of the rights of ambassadors . . .).\textsuperscript{40} Judge Posner goes on, however, to note, “[t]he Court’s effort at definition illustrates rather than solves the problems of notice and legitimacy and is best understood as the statement of a mood—and the mood is one of caution.”\textsuperscript{41} Judge Posner’s analysis is no doubt correct—as far as it goes. While the ATS decisions often reflect reasoning preoccupied with an avoidance of interference with the foreign relations aspect of the political branches and the invasion of the legal sovereignty of other nations,\textsuperscript{42} they have historically given short shrift to the substantial due process concerns for defendants which arise from deficient notice and legitimacy.

In addition, these cases typically provoked litigation over a host of ancillary issues including, among others, political questions, acts of state, sovereign immunity, and exhaustion of remedies. While Sosa was a useful potential limitation on ATS cases, there seemed to be no shortage of plaintiffs who believed that they could demonstrate that the conduct at issue in their case violated a uniformly accepted international law norm. They were often wrong in that assessment, but the decision was made after a belabored case-by-case analysis.

D. Enter Kiobel: Closing the Door to Universal Jurisdiction

Although celebrated as a victory for defendants, and a legitimate one as it clearly forecloses any notion of continuing

\textsuperscript{40} Flomo, 643 F.3d at 1016 (citing Sosa v. Alvarez–Machain, 542 U.S. 692, 725, 732, 734 (citations omitted)).

\textsuperscript{41} Id.

\textsuperscript{42} See, e.g., Equal Opportunity Emp’t Comm’n v. Arabian Am. Oil Co., 499 U.S. 244, 259 (1991) (barring Title VII of the Civil Rights Act claim for lack of statutory authorization to apply outside of the United States); Kiobel II, 133 S. Ct. 1659, 1664 (2013) (cautioning against the “danger of unwarranted judicial interference in the conduct of foreign policy”); Morrison v. Nat’l Austl. Bank. Ltd., 561 U.S. 247, 280 (2010) (barring extraterritorial 10(b) claim, in part, to avoid “interference with foreign securities regulation”); see also Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 216 (2d Cir. 2014) (barring claim brought under SEC as extraterritorial because “the application of § 10(b) to the defendants would so obviously implicate the incompatibility of U.S. and foreign laws that Congress could not have intended it sub silentio”).
universal jurisdiction over all the world’s woes, the Supreme Court’s
decision in *Kiobel II* is in many ways emblematic of the Court’s
refusal to address several fundamental issues that attach to claims
made under the ATS,\(^\text{43}\) even under the “restrictive” guidance of
*Sosa*.\(^\text{44}\) As *Sosa* shifted the analytic approach to customary and
uniformly accepted international legal standards, questions arose not
only as to what precise causes of action might be available, but also
who or what might be an appropriate party. Although the initial ATS
cases were directed at individuals,\(^\text{45}\) corporations quickly joined the
ranks of ATS defendants. In the first generation of cases, these claims
against corporations often proceeded without analysis.\(^\text{46}\) As the
sources of law were indeterminate, and as corporations are obviously
amenable to suit as a matter of domestic law and practice, this was not
an issue. *Sosa*’s specification of international law as the standard
focused attention on this issue, which was ultimately squarely
presented in the Second Circuit decision in *Kiobel I*.\(^\text{47}\)

In a plurality over a strident dissent from Judge Leval, the
Court in *Kiobel I* held that, as a matter of customary international law,
there was no basis for corporate liability.\(^\text{48}\) After examining a number
of treaties and other international legal sources, the majority found
that the species of claims which would meet *Sosa*’s rigorous test were
not available against defendants other than natural persons.\(^\text{49}\) The

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\(^{43}\) See *Kiobel II*, 133 S. Ct. at 1669 (dissmissing ATS claim on basis of a
presumption against extraterritoriality while not addressing corporate liability or
liability for aiding and abetting).

\(^{44}\) This observation is made with full recognition of the Court’s long-standing
practice of evading constitutional issues if other adequate grounds for decision exist.
See, e.g., *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) (stating
that generally, courts should not “pass on questions of constitutionality . . . unless
such adjudication is unavoidable”). While this approach is legally appropriate, it is
nonetheless frustrating from a policy perspective.

\(^{45}\) See, e.g., *Filartiga*, 630 F.2d 876, 878 (2nd Cir. 1980) (applying ATS-
provided federal jurisdiction against an individual).

\(^{46}\) See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000)
(affirming dismissal of ATS case against a corporate defendant on forum non
conveniens grounds and assuming ATS applied to the corporation); *Aguinda v.
Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (affirming dismissal for forum non
conveniens and failing to analyze ATS liability).

\(^{47}\) *Kiobel v. Royal Dutch Petroleum Co. (Kiobel I)*, 621 F.3d 111 (2d Cir.
2010).

\(^{48}\) *Id.* at 148.

\(^{49}\) *Kiobel I*, 621 F.3d at 148.
procedural history of the Kiobel case is complicated but relevant to a full understanding of what ultimately was—and was not—decided by the Supreme Court.

1. **Kiobel I: The Path to the Supreme Court**

*Kiobel I* was an action by Nigerian nationals, residing in the United States, against Dutch, British, and Nigerian companies. The corporate defendants were alleged to have aided and abetted the Nigerian government’s violations of the law of nations in Nigeria. The factual background of the litigation was as follows. The plaintiffs were residents of the Ogoniland region of Nigeria. The Nigerian subsidiary of Royal Dutch Petroleum Company and Shell Transport and Trading Company, Shell Petroleum Development Company of Nigeria, Ltd., was engaged in exploration activity in Ogoniland, which, in turn, triggered environmental protests. The Nigerian subsidiary was alleged to have enlisted the assistance of the military and police forces to suppress the demonstration. These forces were alleged to have engaged in a variety of misconduct, including assault, rape, murder, arrest, and looting. The defendants were alleged to have aided and abetted these acts by providing staging areas for the forces on company property and providing food, transportation, and compensation. The complaint alleged a number of violations of the law of nations. The district court dismissed some, but not all of the claims which did not give rise to a violation of the law of nations under *Sosa*. The motion to dismiss was denied, but the district court certified the matter for interlocutory appeal pursuant to §1292(b) and the Second Circuit took the case.

The Second Circuit dismissed the entire case on the grounds that, as a matter of customary international law, only natural persons and not judicial entities, such as corporations, could be liable under the ATS, and, therefore, there was a lack of subject matter jurisdiction. While the majority found that customary international law precluded civil liability against corporations, Judge Leval found no such preclusion. See *Kiobel II*, 133 S. Ct. at 1663 (dismissing claims for extrajudicial killings, forced exile, property destruction, and violations of the right to life, liberty, security, and association).

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50. *See Kiobel II*, 133 S. Ct. at 1663 (dismissing claims for extrajudicial killings, forced exile, property destruction, and violations of the right to life, liberty, security, and association).

51. *Kiobel I*, 621 F.3d at 148–49. While the majority found that customary international law precluded civil liability against corporations, Judge Leval found no such preclusion. *See id.* at 168 (Leval, J., concurring) (“As for civil liability of
split on the issue of corporate liability under the ATS, with the Second Circuit rejecting it contrary to the decisions in the D.C., Seventh, and Ninth Circuits. To address the split, the Supreme Court granted certiorari on the corporate liability question.

Although the United States Supreme Court granted certiorari on the issue of corporate liability under the ATS (and the issue was fully briefed, including the submission of more than 30 amicus briefs), the fact that Kiobel I involved claims by foreign plaintiffs against foreign defendants regarding conduct occurring outside the United States became a topic of substantial conversation during oral argument. The Court then requested briefing on the issue of the extraterritorial application of the ATS in view of the accepted presumption that federal statutes are not deemed to have extraterritorial effect absent a clear textual expression of that intent. The end result was the Court’s 2013 decision (Kiobel II) that the ATS did not have extraterritorial application, while not clarifying the issue of corporate liability.

2. Kiobel II: The Presumption Against Extraterritoriality and the “Touch and Concern” Paradigm

Justice Roberts, writing for the Court, applied the canon of statutory construction “known as the presumption against extraterritorial application” and cited Morrison for the proposition that “[w]hen a statute gives no clear indication of an extraterritorial

both natural and judicial persons, the answer given by the law nations . . . is that each state is free to decide that question for itself.”).

52. See Sarei v. Rio Tinto, 671 F.3d 736, 747–48 (9th Cir. 2011) (holding that ATS was basis for civil liability against Rio Tinto), rev’d, 133 S. Ct. 1995 (2013); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1019 (7th Cir. 2011) (holding that ATS was a basis for civil liability against Firestone); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 57 (D.C. Cir. 2011) (holding that Exxon could be held liable for agents’ actions under ATS), rev’d, 527 Fed. App’x 7 (2013)(mem.). As a result, Kiobel I was a “stark outlier.” In re South African Apartheid Litig., 15 F. Supp. 3d 454, 461 (S.D.N.Y. 2014).

application, it has none.” The purpose of the presumption was to “protect against unintended clashes between our laws and those of other nations which could result in international discord.” The Court went on to stress that the risk of “unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do.” The Court also rejected the notion that Sosa’s restriction to those claims which were “specific, universal and obligatory” would suffice to avoid potential foreign policy interference. The Court determined that “the presumption against extraterritoriality applies to claims under the ATS, and nothing in the statute rebuts that presumption,” concluding that “[o]n these facts, all the relevant conduct took place outside the United States. And 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.” The Court clearly rejected the idea of universal jurisdiction.

The uniform extraterritoriality of Kiobel II provided no need to articulate the precise contours of what the “touch and concern” analysis would require in order to support displacement of the presumption against territoriality. The opinion notes, however, that “[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.” That reference, in an opinion not addressing the issue of corporate liability under the ATS though certiorari was originally granted on that issue, has been read by some as confirmation of corporate liability. The Court’s

55. Id. (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).
56. Kiobel II, 133 S. Ct. at 1664.
57. Id. at 1665 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (internal quotations omitted)).
58. Id. at 1669.
59. Id.
60. Id. Although the defendants were clearly foreign and the conduct occurred entirely outside the United States, the plaintiffs were living in the United States. The Court appeared to place no significance on that fact. Id.
61. Id. at 1669.
62. See, e.g., Anupam Chander, Unshackling Foreign Corporations: Kiobel’s Unexpected Legacy, 107 AM. J. INT’L L. 829, 830 (2013) (“Chief Justice John Roberts’s opinion for the Court did not bar the application of the ATS in cases
decision to make only passing—and partial—mention of the issue (which had been fully briefed) suggests its uncertainty regarding the future treatment of those claims.

The case generated the following opinions: the majority written by Justice Roberts; a concurrence written by Justice Kennedy; a second concurrence written by Justice Alito and joined by Thomas; a concurrence in the judgment written by Justice Breyer and joined by Justices Ginsburg, Sotomayor and Kagan. Justice Kennedy wrote with the apparent purpose of putting a marker down to the effect that this is, in his view, a work in progress. That may be significant given the bare majority that concurred in the opinion. Justice Alito observed that the touch and concern formulation “leaves much unanswered” and formulated a broader standard that would have provided clarity.

Justice Alito believed that an ATS claim should be barred as impermissibly extraterritorial unless “the domestic conduct is sufficient to violate an international law norm that satisfies Sosa’s requirements of definiteness and acceptance among civilized nations.”

Justice Breyer’s concurrence in the judgment introduced additional prospective uncertainty about the precise contours of the decision. He would not have invoked the presumption against extraterritoriality. He described the conditions under which he (and presumably Justices Ginsburg, Sotomayor, and Kagan) would find jurisdiction proper under the ATS, where:

(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the

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63. *Kiobel II*, 133 S. Ct. at 1669 (Kennedy, J. concurring) (noting that “[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition . . . the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”).

64. *Id.* (Alito, J., concurring).

65. *Id.* at 1670 (emphasis added). Justice Alito cited *Morrison*’s admonition that “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.” *Id.* at 1670 (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010)).
defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.66

Justice Breyer concurred in the judgment on the ground that it “would be farfetched to believe, based solely upon the defendants’ minimal and indirect American presence, that this legal action helps vindicate a distinct American interest.”67

It is impossible to discern a bright line standard for what “touches and concerns” the United States sufficiently to displace the presumption against extraterritorial application of the ATS. As a result, the Court has multiplied rather than reduced the number of fact-specific inquiries that courts will need to perform in assessing whether they have jurisdiction over an ATS case. The one exception, in all likelihood, will apply to truly foreign cases where an alien sues an alien over foreign conduct. The post-Sosa experience suggests that plaintiffs will be both aggressive and creative in naming domestic actors and alleging domestic conduct.68

E. Post-Kiobel II: An Uncertain Way Forward

In the brief period that has elapsed since Kiobel II, a number of decisions illustrate its limitations, explicitly and otherwise. While Kiobel II may have clearly ended the practice of United States courts being courts of universal jurisdiction over ATS claims, it left a large number of issues unaddressed or ambiguous. The application of the

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68. Another approach, sometimes forgotten in the furor over the ATS, is for plaintiffs to proceed per other statutes or by diversity. The latter approach is illustrated by Ogala v. Chevron, No. 14-cv-173, 2014 WL2089901 (May 19, 2014). In all respects Ogala looked like an ATS case. Jurisdiction was predicated, however, on diversity, in all likelihood in an effort to avoid the analytical complications of Kiobel II. This provides further illustration of the unhappy fact that while Kiobel II may preclude the litigation of true “foreign-cubed” cases—those involving alien plaintiffs, a course of conduct outside the United States, and alien defendants—the case and its reasoning provide scant reason for cheer among those defendants with a substantial presence in the United States.
presumption to cases involving domestic defendants is, at best, controversial—the concurrence made clear that a probable majority of the justices would have no problem with ATS claims being advanced by foreign claimants against domestic defendants for conduct extending outside the United States—particularly if important United States interests were implicated.69 Further, Kiobel II avoided the issues of corporate and aiding and abetting liability.

In the time since the Second Circuit ruled in Kiobel I, a number of other circuits have concluded that the ATS appropriately provides jurisdiction for claims against corporate defendants.70 A spirited debate arose as to whether Kiobel I’s holding that there may be no corporate liability is still binding precedent in the Second Circuit,71 with the court recently commenting that, while still technically binding, “Kiobel I now appears to swim alone against the tide.”72 Circuit courts have applied the “touch and concern” standard to permit cases against domestic defendants by foreign claimants on the basis of conduct occurring outside the United States, albeit in arguably unique circumstances.

69. See Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 323–24 (D. Mass. 2013) (permitting ATS claims to proceed against an American whose conduct in the U.S. had significant effect abroad and violated international norms such that the presumption against extraterritoriality did not apply).

70. See, e.g., Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 57 (D.C. Cir. 2011) (“[I]t would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for shockingly egregious violations of universally recognized principles of international law.”) (quoting Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983)), vacated on other grounds, Doe III v. Exxon Mobil Corp., 527 Fed. App’x 7 (D.C. Cir. 2013); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013 (7th Cir. 2011); and Sarei v. Rio Tinto, 671 F.3d 736 (9th Cir. 2011).

71. Compare Balintulo v. Daimler AG, 727 F.3d 174, 182 (2d Cir. 2013) (“The opinion of the Supreme Court in Kiobel plainly bars common law suits … based solely on conduct occurring abroad.”), with In re South African Apartheid Litig., 15 F. Supp. 3d 454, 460 (S.D.N.Y. 2014) (“The Supreme Court's opinions in Kiobel II and Daimler . . . explicitly recognize that corporate presence alone is insufficient to overcome the presumption against extraterritoriality or to permit a court to exercise personal jurisdiction over a defendant in an ATS case, respectively. By necessity, that recognition implies that corporate presence plus additional factors can suffice under either holding.”).

72. In re Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 151 (2d Cir. 2015).
1. *Balintulo v. Daimler AG*: A Cautionary Tale

The post-*Kiobel II* course of the Apartheid litigation demonstrates the dispositive nature of claims involving foreign conduct and alien plaintiffs against United States corporations and underscores the continuing significance of analyzing corporate liability under the ATS. The litigation, pending for more than a decade, involves claims that a number of corporations provided a variety of commercial products to the prior regime in South Africa which aided that government’s “innumerable race-based depredations and injustices, including rape, torture and extrajudicial killings.”

The case was stayed in the district court when *Kiobel II* was decided. The defendants then sought a writ of mandamus to dismiss the case. The Second Circuit, in an opinion written by Judge Cabranes, determined that the writ was unnecessary “[b]ecause of that unambiguous holding” in *Kiobel II* that “plainly bars common-law suits, like this one, alleging violations of customary international law based solely on conduct occurring abroad.” Accordingly, the defendants could obtain dismissal of all claims “without resort to a writ of mandamus.”

The case was remanded to the district court, but the procedural process there did not follow the course clearly anticipated by Judge Cabranes. On remand, the plaintiffs persuaded Judge Scheindlin that, because their complaint had been drafted without the benefit of *Kiobel II*’s direction on extraterritoriality, they should be allowed to replead so as to allege facts which would demonstrate that the conduct of the defendants “touch[es] and concern[s]” the United States with “sufficient force” to overcome the presumption against extraterritorial application of the ATS. It is telling that the district court indicated that its expectations regarding these new pleadings were that “some” of the alleged wrongful conduct might “touch and concern” the United States, a lower hurdle than either the Supreme Court or the Second Circuit would have expected. Having rejected the procedural disposition of the cases suggested by Judge Cabranes, the district court then turned its attention to the issue of corporate liability.

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73. *Balintulo*, 727 F.3d at 180.
74. *Id.* at 182.
75. *Id.*
76. *In re* South African Apartheid Litig., 15 F. Supp. 3d at 456–57.
The district court determined that corporations are proper defendants under the ATS, citing, among other things: (1) the reference in Kiobel II to the fact that “[c]orporations are often present in many countries, [and] . . . it would reach too far to say that mere corporate presence suffices” to overcome the presumption; 77 (2) the fact that the Court decided an issue of personal jurisdiction in an ATS case over Daimler in Bauman 78 and said nothing about corporate liability; and (3) the holdings of a number of Courts of Appeals. 79

When presented with the plaintiffs’ amended pleadings, which were “substantially more detailed and specific” than the originals, the district court nonetheless found them insufficient to overcome Kiobel II’s presumption against extraterritoriality, and the Second Circuit upheld its decision. 80 Although the circuit court based its decision on other jurisdictional grounds, it made clear that its holding that corporations may not be found liable under the ATS remains good law and further barred plaintiffs’ claims. 81 While a number of ATS cases have been dismissed post-Kiobel II, 82 the fact-based standards highlighted here mean that ATS litigation of uncertain contours will likely continue into the future.

2. Al Shimari: Corporate Conduct Held to “Touch and Concern” the United States

In Al Shimari, et al., v. CACI Premier Technology, Inc., the Fourth Circuit allowed detainees from the infamous Abu Ghraib

81. Balintulo, 796 F.3d at 166 n.28 (“We need not delve deeply into the corporate liability question here to note the obvious error of the District Court in its holding that the Supreme Court in Kiobel II overturned our Court’s holding in Kiobel I.”).
82. See, e.g., Mastafa v. Chevron Corp., 770 F.3d 170, 195 (2d Cir. 2014) (dismissing the ATS case).
prison in Iraq to proceed with ATS claims, holding: “Upon applying the fact-based inquiry articulated by the Supreme Court in Kiobel, we hold that the plaintiffs’ claims ‘touch and concern’ the territory of the United States with sufficient force to displace the presumption against extraterritorial application of the Alien Tort Statute.”

As noted by the circuit court, the facts of Al Shimari drove the decision. The case arose out of the government’s decision to utilize private contractors, in this case CACI and its affiliates and employees, to assist in interrogations in Iraq. CACI was a corporation domiciled in Virginia, as was its parent CACI International, Inc. The plaintiffs were foreign nationals who claimed that they had been subjected to severe mistreatment during interrogations at Abu Ghraib including being beaten, shot, sexually assaulted, and threatened with mock executions. Uniquely, there was little dispute about either the conduct or its egregious nature. By the time the Fourth Circuit addressed this case, the events at Abu Ghraib had been condemned by an internal Army investigation, the President of the United States, and both Houses of Congress.

CACI provided its services pursuant to a contract awarded by the Department of the Interior and collected in excess of $19 million in the United States. The district court denied the defendant’s motion to dismiss on political question grounds, but found that it lacked jurisdiction over claims of violation of international law, torture, and cruel, inhumane, and degrading treatment “because of the novelty of asserting such claims against private parties as opposed to state actors” under the ATS. There followed an appeal and an en banc proceeding. The initial en banc determination was that the Circuit Court lacked appellate jurisdiction under the collateral order doctrine. The case then returned to the district court where, on remand, the court reinstated the ATS claims on the basis that “a growing body of law . . . suggests that plaintiffs’ claims . . . are within the purview of

83. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 520 (4th Cir. 2014) (citing Kiobel II, 133 S. Ct. 1659, 1669 (2013)). While determining that the ATS claims could proceed, the Al Shimari court also stated that it was “unable to determine from the present record whether the claims before us present nonjusticiable political questions.” Id.
84. Id. at 521.
85. Id.
86. Al Shimari, 758 F.3d at 521.
87. Id. at 523.
international law.” While the case was pending in the district court, the Supreme Court decided Kiobel II. Based on Kiobel II’s ruling, the district court dismissed the ATS claims, holding that it “lack[ed] ATS jurisdiction over Plaintiffs’ claims because the acts giving rise to their tort claims occurred exclusively in Iraq, a foreign sovereign.”

On appeal, the Fourth Circuit cabined its decision in an interesting way. The court stressed the jurisdictional nature of its inquiry and disclaimed its decision on two important questions: 1) “whether the plaintiffs sufficiently have stated or established claims under the ATS alleging violations of international law;” and 2) “the question whether a corporation can be held liable for the tortious conduct of its employees constituting international law violations under the ATS.”

Having thus circumscribed its analysis, the Circuit Court then proceeded to address the application of Kiobel II to Al Shimari. The court recognized that Kiobel II had applied the presumption against extraterritorial application, that Congress failed to provide a clear indication that the ATS was intended to have extraterritorial reach and that, therefore, the “petitioners’ case seeking relief for violations of the law of nations occurring outside the United States is barred.”

Kiobel II, however, restricted its holding to the facts presented and allowed for an exception under the ATS 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.” The Circuit Court also placed emphasis on the use of “claims” in that statement rather than the alleged corporate conduct.

Recognizing that Kiobel II posits a fact-based inquiry, the Fourth Circuit cited the somewhat simpler formulation appearing in Justice Breyer’s concurrence in Kiobel II (joined by Justices Ginsburg,

88. Al Shimari, 758 F.3d at 524.
89. Id.
90. Id. at 525.
91. Id. at 525 n.5.
92. Al Shimari, 758 F.3d at 525–27 (citing Kiobel II, 133 S. Ct. 1659, 1669 (2013) (internal quotations omitted)).
93. Al Shimari, 758 F.3d at 527 (citing Kiobel II, 133 S. Ct. at 1669 (internal quotations omitted)).
94. Id.
Sotomayor, and Kagan) which would allow ATS-based jurisdiction where: “(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest.” The Fourth Circuit rejected a “mechanical[ ]” application of the presumption and assessed how allowing this case to proceed would not interfere with important international policy issues. The court recognized the existence of jurisdiction under the ATS based upon its assessment of a number of factors: (1) The defendant is a United States corporation and its employees are United States citizens; (2) the contract to provide interrogation services was issued in the United States; (3) allegations that the misconduct was tacitly approved by United States-based management; and, somewhat strangely, (4) the fact that another statute, the Torture Victims Protection Act, expressed a congressional intent to provide remedies to victims of torture. While providing plaintiffs with at least a preliminary victory on the ATS claim, the court did, as noted, remand for the development of a more complete record as to political questions.

_**Al Shimari**_ demonstrates that the ATS has survived _Kiobel II_ and may still be applied with some vigor to these cases involving parties or claims which “touch and concern” the United States. It illuminates the complexity of the “touch and concern” test and, critically, leaves open the issue of corporate liability.

3. **Mastafa: Corporate Liability Revisited**

In _Mastafa v. Chevron Corp._, the Second Circuit was presented with an opportunity to react to the Supreme Court’s gloss on corporate liability in _Kiobel II_. _Mustafa_ involved ATS claims brought by five Iraqi women for torture committed by agents of the Saddam Hussein regime against defendant corporations alleged to have aided and abetted that regime. Plaintiffs claimed that the corporations provided kickbacks and other payments, which enabled the perpetration of these abuses by “financ[ing] the torture” and

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95. _Al Shimari_, 758 F.3d at 527 (quoting _Kiobel II_, 133 S. Ct. at 1674 (Breyer, J., concurring in judgment)).
96. _Id._ at 529.
97. _Id._ at 530–31.
98. _Id._ at 520.
99. 770 F.3d 170, 170 (2d Cir. 2014).
providing illegal surcharges on oil sold pursuant to the United Nations’ Oil for Food Programme. The district court had dismissed the plaintiffs’ ATS claims, holding, inter alia, that they were barred by the Second Circuit’s decision in Kiobel I, holding the court lacked jurisdiction under the ATS for claims alleging violations of the “law of nations” against corporate defendants.

The Second Circuit held that “[i]n light of the ‘connections’ to U.S. territory asserted in the complaint, the presumption against extraterritorial application [was] not ‘self-evidently dispositive’” and required further analysis. The court followed Justice Alito’s concurring opinion in Kiobel II and focused its inquiry on the defendant’s domestic conduct. The first step to determine whether the presumption is displaced is whether the conduct sufficiently “touches and concerns” the United States territory. The second step focuses on whether the same conduct is based on plausible allegations in accord with the Twombly/Iqbal pleading standard. “By ‘glimpsing’ at the merits at the jurisdictional stage,” the Court reasoned, “the district court ensures that the conduct alleged in a complaint may properly be relied upon by the court in conducting its extraterritoriality analysis.”

While the Mastafa court attempted to remain faithful to its Kiobel I holding regarding the unavailability of ATS claims against corporate defendants, noting that the Supreme Court “did not address, much less question or modify, the holding on corporate liability under the ATS that had formed the central conclusion in the Second Circuit's Kiobel [I] opinion,” there are signs it is wavering. The Second Circuit echoed the Supreme Court’s pronouncement in Kiobel II that “mere corporate presence” in the United States is not enough to displace the presumption of extraterritoriality and found that “precedents make clear that neither the U.S. citizenship of defendants,

100. Mastafa, 770 F.3d. at 176 (quoting Plaintiff’s complaint).
101. Id.
102. Id. at 183.
103. Id.
104. Id. at 186.
105. Mastafa, 770 F.3d. at 186.
106. Id.
107. Id. at 177.
108. Id. at 179 n.5 (internal quotations omitted).
nor their presence in the United States, is of relevance for jurisdictional purposes.” The court cited *Cardona v. Chiquita Brands International, Inc.*, wherein the Eleventh Circuit denied plaintiffs’ “attempt to anchor ATS jurisdiction in the nature of the defendants as United States corporations.” Ultimately, the Second Circuit reasoned, a defendant’s United States citizenship is irrelevant to determining jurisdiction under the ATS.

Focusing on the alleged conduct, rather than citizenship or corporate presence, the court ultimately found “[t]his particular combination of conduct in the United States—on the part of Chevron, multiple domestic purchases and financing transactions; on the part of BNP, numerous New York-based payments and ‘financing agreements’ conducted exclusively through a New York bank account— is both specific and domestic” and “‘touch[ ] and concern[ ]’ the United States with sufficient force to displace the presumption against ‘extraterritoriality.’” Step one of the analysis was satisfied, and given that Chevron and BNP are corporate defendants, the Second Circuit appears to have left the door ajar for corporate liability.

However, the *Mastafa* court found that the allegations failed to satisfy step two—a “preliminary determination” that the conduct

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109. *Mastafa*, 770 F.3d at 189. The Court acknowledged the Fourth Circuit’s decision in *Al Shimari* in which the defendant’s U.S. citizenship was weighed as one of many factors in determining jurisdiction under the ATS. *Id.* (citing *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530 (4th Cir. 2014)); *see also* Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 331 (D. Mass. 2013) (considering defendant’s U.S. citizenship as one factor among several).

110. *Mastafa*, 770 F.3d at 189 (citing *Cardona v. Chiquita Brands Int’l, Inc.*, 760 F.3d 1183, 1189 (11th Cir. 2014)).

111. *See* Ellul v. Congregation of Christian Bros., 774 F.3d 791, 798 (2d Cir. 2014) (noting the Court has “explicitly held since *Kiobel II* that even the citizenship of the defendant is irrelevant to jurisdiction to hear claims under the ATS” and finding “substantial presence” and “significant operations” of corporations within the U.S. insufficient to bestow jurisdiction under the ATS).

112. *Mastafa*, 770 F.3d at 191.

113. Potential corporate liability in the Second Circuit is further hinted by the Second Circuit in *Arab Bank*, where a three-judge panel “conclude[d] that *Kiobel I* is and remains the law of [the] Circuit,” despite its acknowledgment that “*Kiobel II* suggests that the ATS may allow for corporate liability” and that such an interpretation has been adopted by several other circuits. *In re Arab Bank*, 808 F.3d at 151. Such precedent must remain, however, until reversed *en banc* or by the Supreme Court.
aided and abetted a violation of the law of nations. The court held that Plaintiffs failed to plausibly plead the mens rea required for an aiding and abetting claim.

Plaintiffs’ allegations that defendants intentionally flouted the sanctions regime for profit, or that they knew their actions were in violation of United Nations Security Council resolutions, or “international law,” or U.S. policy are irrelevant to the mens rea inquiry; rather, our analysis necessarily focuses on allegations that defendants intended to aid and abet violations of customary international law carried out by the Saddam Hussein regime—a contention that is unsupported by the facts alleged in the complaint.

Ultimately, “plaintiffs assert that defendants acted purposefully in violating the OFP, but merely knowingly in aiding and abetting the underlying violations of the law of nations.” Plaintiffs failed to plead that the corporations “intend[ed] – and [took] deliberate steps with the purpose of assisting—the Saddam Hussein regime’s torture and abuse of Iraqi persons.”

**F. ATS Jurisprudence: A Call for Clarity**

Ultimately, the transnational litigation system needs clear and predictable standards. The sometimes vague sources of international law and the substantial, concomitant issues of notice and, hence, due process to defendants would suggest the more clearly stated the better. In this respect, the Supreme Court’s decision in *Kiobel II*, subject to some level of celebration among defendants who rightly saw it as a victory, albeit a partial one, was a substantial missed opportunity. It was a missed opportunity in two respects: 1) it failed to address the issue of corporate liability violations of customary

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114. *Mastafa*, 770 F.3d at 194.
115. *Id.*
116. *Id.* at 193.
117. *Id.* at 192.
118. *Id.* at 192–94.
international law; and 2) having avoided deciding the corporate liability question, the Court rendered a collection of concurring opinions which by the Court’s own terms will require additional development and elucidation. The history of the decision and its eventual text suggest an inability to form a consensus around these issues—an inability that will likely have consequences into the future unless and until the Court addresses these issues or Congress acts. The variant outcomes in post-

**III. **OTHER APPLICATIONS OF THE PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION OF FEDERAL STATUTES

A. Federal Securities Laws

*Kiobel II* was in many respects a logical application of the Supreme Court’s 2010 decision in *Morrison v. National Australia Bank*. 120 *Morrison* involved alleged violations of § 10(b) and § 20(a) of the Securities Exchange Act of 1934121 and SEC Rule 10b-5122 by an Australian Bank, the shares of which were not registered on any United States exchange.123 The plaintiffs were also Australian. The facts were somewhat complicated due to the fact that the source of the alleged misstatement was the acquisition of a Florida mortgage service.124 A series of write-downs of the value of that investment allegedly led to a decline in the value of the bank’s stock.125 The Court declined to overcome the proscription against territoriality with a stated objective of avoiding the United States courts becoming “the Shangri-la of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.”126 Criticizing the existing approach of the Second Circuit, which had developed a standard for extraterritorial application of the securities laws based upon (1) an “effects” test or (2) a “conduct” case,127 Justice Scalia,

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120. 561 U.S. 247 (2010).
121. 15 U.S.C. §§ 78j(b), 78(a) (2012).
124. *Id.* at 247.
125. *Id.* at 252–53.
126. *Id.* at 270.
127. *Id.* at 259, 270–73.
writing for the Court, applied a “textual” analysis to address whether the statute was explicitly intended to address foreign policies and conduct. The Court concluded,

The results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.\textsuperscript{128}

As noted, there were substantial arguments—under the prior “effects” and “conduct” tests—that the involvement of a United States entity (a subsidiary of the bank) precluded application of the presumption. This argument was rejected, “[f]or it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic entity is involved in the case.”\textsuperscript{129} This affirmative statement should be compared with the flexibility of the “touch and concern” test of Kiobel II.\textsuperscript{130}

In any event, Morrison has effectively ended foreign-cubed securities cases.\textsuperscript{131} Again, however, its impact on United States defendants or non-United States defendants with United States exchange-registered stock is \textit{de minimis}.\textsuperscript{132} While some might have pushed further for an even more restrictive limit on extraterritorial application on the context of the securities laws, Morrison has a virtue missing in the ATS context: clarity. Unlike the aftermath of Kiobel

\textsuperscript{128} Morrison, 561 U.S. at 261.
\textsuperscript{129} Id. at 266.
\textsuperscript{130} Kiobel II, 133 S. Ct. 1659, 1669 (2013).
\textsuperscript{131} Morrison, 561 U.S. at 283 n.11 (Stevens, J., concurring).
\textsuperscript{132} See also City of Pontiac Policemen’s and Firemen’s Ret. Sys. v. UBS AG, 752 F.3d 173, 176 (2d Cir. 2014) (holding Morrison precluded claim brought under Exchange Act by purchasers of shares of foreign issuer on foreign exchange, even if those share were cross-listed on a U.S. exchange).
II in the ATS context, courts have been able to apply the unambiguous holding of *Morrison* in a predictable way.\(^{133}\)

**B. RICO**

The Supreme Court has not specifically addressed the issue of the extraterritorial application of RICO.\(^{134}\) The lower courts that have, however, almost uniformly found that there was no congressional intent to have the statute apply extraterritorially. Since the Supreme Court’s decision in *Morrison*, several courts have routinely refused to apply RICO to conduct outside the United States. However, the complexity of the statute and the ability of plaintiffs to characterize their claims as having some nexus with the United States suggest that there will continue to be efforts to assert transnational claims under RICO, even in those jurisdictions who have looked at the issue.

Although initially enacted as a vehicle to pursue organized crime, the statute was soon put to other, broader uses.\(^{135}\) RICO requires that defendants engage in “racketeering activity” which includes enumerated “predicate acts,” including mail and wire fraud.\(^{136}\) That “racketeering activity” must be conducted through an “enterprise.”\(^{137}\) Under the strictures of *Morrison*, RICO statutes can have no extraterritorial application because the statute is silent as to its extraterritorial application.\(^{138}\) However, determining that the RICO statute has no extraterritorial application is a necessary but not

\(^{133}\) See, e.g., Loginovskaya v. Batratchenko, 764 F.3d 266, 272 (2d Cir. 2014) (discussing the extraterritorial reach of *Morrison*); *In re Icenhower*, 757 F.3d 1044, 1050–51 (9th Cir. 2014) (applying *Morrison*’s “two-part test for deciding extraterritoriality questions”); Hoogerheide v. IRS, 637 F.3d 634 (6th Cir. 2011) (citing to *Morrison* but failing to discuss its extraterritorial reach holding); SEC v. Spencer Pharm., Inc., 57 F. Supp. 3d 127, 135 (D. Mass. 2014) (discussing the extraterritorial reach of *Morrison*).


\(^{135}\) See, e.g., Reves v. Ernst & Young, 507 U.S. 170, 185 (1993) (describing how subsection (c) of § 1962 does not limit the application of subsections (a) and (b) to outsiders).


\(^{137}\) *Id.*

\(^{138}\) See United States v. Chao Fan Xu, 706 F.3d 965, 974–75 (9th Cir. 2013) (declining to apply RICO “because § 10(b) contained no ‘affirmative indication’ of extraterritorial effect, [so] it could not be applied extraterritorially.”).
sufficient predicate for disposing of RICO claims involving foreign actors and activity. Plaintiffs have strived to plead contacts with the United States sufficient to take their cases outside the forbidden extraterritorial zone. As in so many other contexts involving foreign players and conduct, the courts must embark on a case-by-case, fact-specific inquiry, to determine whether the particular RICO claims at issue are, on balance, extraterritorial.

Prior to the Supreme Court’s decision in *Morrison*, the federal courts followed various iterations of the “conduct” and/or “effects” test traditionally employed in the securities law context when assessing RICO claims. With the advent of *Morrison*’s clear admonition that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none,” RICO’s equally clear absence of any textual reference to extraterritorial application would seem to settle the matter. In *Morrison*, the Supreme Court was able to devise a fairly straightforward test for extraterritoriality. By focusing on the location of purchases and sales of securities at issue, the Court was able to conclude that § 10b-5 claims are available only as to domestic transactions or securities listed on domestic exchanges. However, what qualifies as extraterritorial in the broader context of RICO is not so apparent.

Left without any RICO-specific guidance from the Supreme Court similar to that provided to § 10b-5 claims in the securities context, the lower courts have devolved upon a fact-intensive assessment that, from certain perspectives, bears more than a little resemblance to the traditional “effect” and “conduct” RICO analysis. In assessing extraterritoriality under RICO, cases after *Morrison* and *Kiobel II* have typically focused on the site of either or a combination

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139. See *Al Shimari*, 758 F.3d at 528-529 (deeming plaintiff’s claims that he was tortured by U.S. citizens who were employed by a U.S. corporation sufficient to overcome the presumption against extraterritorial application).


141. *Id.* at 248. As in other contexts addressed here, the primacy of the factual allegations made by plaintiffs to establish domestic context and avoid forbidden extraterritorial application is tantamount. See *Al Shimari*, 758 F.3d at 528-529 (where plaintiff’s claims that he was tortured by U.S. citizens who were employed by a U.S. corporation were necessary to overcome the presumption against extraterritorial application).
of (1) the “enterprise” and the “racketeering activity,” or (2) the “predicate acts.”

Because an enterprise can operate in multiple locations, examination of the location of the enterprise is complicated and often requires a second order consideration of the location of the “brains” of the enterprise. An alternative approach courts have taken is to look to the places where the enterprise acted, or the “brawn” of the enterprise. As with all foreign claims, courts and defendants must scrutinize allegations of modest domestic activity for attempts to mask the truly extraterritorial nature and activity of an enterprise.

In United States v. Chao Fan Xu, the Ninth Circuit held that in order to state a valid domestic RICO claim, a plaintiff must sufficiently allege that the “brains” of the enterprise was domestic, or that the “brawn” of the enterprise—the pattern of racketeering conduct—was domestic. Where a plaintiff alleged conduct that was clearly masterminded from abroad, it failed the “brains” test for a domestic RICO enterprise, as other courts have found under similar circumstances. The location of the “brawn” can be equally determinative, however, and RICO simply does not apply to such extraterritorial conduct. While plaintiffs may inject some level of

142. See, e.g., Chao Fan Xu, 706 F.3d at 976; European Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189 (E.D.N.Y. 2011), overruled by 764 F.3d 129 (2d Cir. 2014).


144. Chao Fan Xu, 706 F.3d at 976–77; see also Life Bliss Found. v. Sun TV Network, EDCV 13-00393-VAP (SPx), 2015 U.S. Dist. LEXIS 4009, at *29 (C.D. Cal. Jan. 12, 2015) (finding where “the bulk of the extortion occurred in India” and “the criminal enterprise was centered in India, this counsels in favor of declining to extend RICO extraterritorially”).

145. See Tymoshenko v. Firtash, No. 11-CV-2794, 2013 U.S. Dist. LEXIS 42754, at *38 (S.D.N.Y. Mar. 26, 2013) (finding enterprise was foreign where it “was conceived and orchestrated by Ukrainian officials in Ukraine” to “wrongfully bribe Ukrainian officials” and “engage in politically-motivated trials and incarceration of Plaintiffs”); see also European Cmty. v. RJR Nabisco, Inc., No. 02-CV–5771 (NGG)(VVP), 2011 WL 843957, at *7 (E.D.N.Y. Mar. 8, 2011) (finding enterprise was foreign where the “overall corporate policy” in furtherance of the alleged drug smuggling enterprise “originates with organized criminal organizations in Europe and South America”), vacated, 764 F.3d 129 (2d Cir. 2014), cert. granted, 136 S. Ct. 28 (U.S. Oct. 1, 2015) (No. 15-138).

146. See Cedeno v. Castillo, 457 Fed. App’x 35, 37–38 (2d Cir. 2012) (dismissing RICO claim where the alleged conduct was “almost exclusively
domestic conduct in an attempt to avoid a designation of the activity as extraterritorial, “isolated domestic conduct does not permit RICO to apply to what is essentially foreign activity.” Indeed, and as the Supreme Court has explained, “it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States.” Instead, plaintiffs’ burden is to allege domestic conduct that “establish[es] a connection between the United States and the alleged racketeering activity that is sufficient to support a RICO claim.”

Notably, even cases with a substantial nexus to the United States have been found extraterritorial. For example, Norex Petroleum Ltd. v. Access Industries, Inc. involved allegations of a massive racketeering and money-laundering scheme pursuant to which the defendants consolidated the Russian oil industry and illegally seized plaintiff’s business. Plaintiff named several United States business entities and citizens as defendants, and alleged that the scheme was directed from the United States through United States banks which were used to conceal diverted oil revenues from Russian companies and wire bribes to Russian officials. Additionally, the Norex board chair was allegedly threatened by members of the enterprise while located in San Francisco. Despite these multiple instances of domestic conduct, the Second Circuit focused more broadly upon the entire pattern of relevant conduct, finding that “the

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150. 631 F.3d 29, 30–31 (2d Cir. 2010).

151. Id.

152. Id.
slim contacts with the United States alleged by [plaintiffs] are insufficient" to support a valid RICO claim.  

However, the Second Circuit made a marked break from the “brains” and “brawn” and “pattern of racketeering” analyses taken by other courts and to which it had previously adhered. In European Community v. RJR Nabisco, the Second Circuit held that “RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate,” finding the district court erred “in interpreting our Norex decision as holding that RICO can never apply extraterritorially.” As a result, the Second Circuit held that while RICO “has no extraterritorial application independent of its predicate statutes,” those statutes serve as the conduit for asserting RICO liability when extraterritorial violations of their proscribed conduct arise. This interpretation runs counter to Norex and nearly all other courts that have spoken on the subject. Indeed, the very reasoning behind RJR Nabisco, was rejected by Judge Rakoff in the Southern District of New York in

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153. Norex, 631 F.3d at 33 (emphasis added). There are also RICO cases born of a transnational dispute which are clearly of a domestic nature that do not trigger extraterritoriality concerns. For example, Chevron’s RICO claims against the lead counsel and others’ alleged attempts to force collection or settlement involving a $9 billion Ecuadorian judgment is an excellent example. The overarching dispute is unquestionably international, but the RICO claims were clearly not. The federal district court noted that the scheme at issue:

(1) allegedly was conceived and orchestrated in and from the United States (2) in order wrongfully to obtain money from a company organized under the laws of and headquartered in the United States, and to cover up unlawful and improper activities, and (3) acts in its furtherance were committed here by Americans and in Ecuador by both Americans and Ecuadorians. . . . Applying the statute to that pattern would not be extraterritorial.


155. RJR Nabisco, Inc., 764 F.3d at 139.

156. See also European Cmty. v. RJR Nabisco, Inc., 783 F.3d 123 (2d Cir. 2015) (denying rehearing en banc) (Jacobs, C.J., dissenting) (panel opinion “in taut tension” with opinion in Norex) (Cabranes, J., dissenting) (panel opinion “will have a significant and long-term adverse impact on activities abroad that we have heretofore assumed were governed primarily by the laws of the territories where those activities occurred”), cert. granted, 136 S. Ct. 28 (U.S. Oct. 1, 2015) (No. 15-138).


*Cedeno v. Intech, Inc.*\(^{157}\) Clearly such an approach, should it be adopted elsewhere, will encourage plaintiffs to seek extraterritorial application of RICO. Even in those jurisdictions that have held there is no extraterritorial application of RICO, plaintiffs will still try to cabin the enterprise or pattern of racketeering activity as sufficiently domestic to allow transnational claims to squeak through. A strict application of the *Iqbal/Twombly* pleading standards may help to stem this tactic, but this clearly is an area that begs further guidance from congress or the Supreme Court.\(^{158}\) Until that happens, however, courts should eye RICO claims alleging mixed foreign and domestic activity with caution.

### C. Environmental Law

Claims of environmental law violations from foreign defendants and activity present an obvious tension in the context of extraterritoriality. Global concerns over environmental policy are widespread and controversial, making this an inherently political exercise in foreign relations. There are two bodies of law available, statutory provisions, such as the Clean Air Act or CERCLA, and common law claims, like nuisance.\(^{159}\) The latter will be governed by due process limitations, but the federal statutory framework is fully subject to the presumption against extraterritoriality. Congress can and does enact environmental legislation with explicit extraterritorial effect. The Oil Pollution Act (OPA),\(^{160}\) for example, is specifically designed to address oil spills occurring outside the territorial limits of the United States.

Other provisions raise extraterritoriality questions. They also create opportunities for courts to interpret statues to evade the presumption. One example of this approach is the Ninth Circuit’s decision in *Pakootas*.\(^{161}\) At issue in that litigation were alleged emissions from a Canadian-based smelter, owned by a Canadian

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\(^{158}\) The Supreme Court has granted certiorari in *RJR Nabisco*, so such guidance may be nigh. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 28 (2015).

\(^{159}\) This section, subject to the principle efforts of federal law, will also have dual statutory and common law systems of enforcement.


\(^{161}\) *Pakootas v. Teck Cominco Metals*, Ltd., 452 F.3d 1066 (9th Cir. 2006).
corporation and operating under Canadian regulatory supervision. The smelter was alleged to have discharged substantial amounts of pollution, in Canada, into the Columbia River. As early as the 1920s, joint United States–Canada borders were established to address the problems inhering in cross-border pollution. In 2003, the EPA cited the operator of the facility for environmental impact on the Columbia River within the United States. Substances allegedly discharged into the river in Canada had come downstream into the United States and were deemed to be releasing pollutants from their location in the Columbia River. The EPA never attempted to enforce its order, however, perhaps recognizing the tension.

Thereafter a number of individuals brought suit under the private litigant provisions of CERCLA. The district court struggled with the extraterritorial issues, refusing to engage in what it called the application of a “legal fiction” that, under CERCLA, the prohibited “release” was actually occurring in the Columbia River within United States territory. The Ninth Circuit, however, fully embraced the “legal fiction,” claiming that the case was appropriate under CERCLA and that it was not even necessary to assess the presumption as the case involved no extraterritorial application of United States law. Pakootas was decided before Morrison or Kiobel II, but if the Circuit’s stated analysis is maintained, these cases would simply be incident.

In view of the obvious risk of political conflict between and among neighboring countries, the approval included in Pakootas seems clearly outside the “modern” approach to extraterritoriality. Application of the district court’s reading of CERCLA opens a potentially vast field of transnational litigation, although in these cases the plaintiffs would be in the United States. We know that as a matter of fact, Chinese power generators burn high sulfur coal, which releases a tremendous amount of harmful particulate matter into the atmosphere. Given prevailing airflows, that matter will make its way to the United States. Under Pakootas, California plaintiffs could claim a “release” of matter in California under CERCLA. Limitations on personal jurisdiction may preclude certain of these cases, but there seems an unwise enabling of transnational litigation, carrying a substantial risk of creating foreign state conflicts.

162. Pakootas, 452 F.3d at 1070.
163. Id. at 1079.
164. Id.
IV. PERSONAL JURISDICTION

Thus far, the discussion has focused on the subject matter jurisdiction of the United States courts. Personal jurisdiction is also a precondition for suit in the United States. In parallel with the legal standards for the extraterritorial application of United States laws, there have been developments in the law of personal jurisdiction, which are arguably protective of non-United States defendants in that they create heightened standards to assert personal jurisdiction over these entities. Broadly speaking, there are two paths to the assertion of personal jurisdiction—general and specific. The former depends upon the demonstration of a presence in the jurisdiction that is regular and systematic, but independent of the conduct that forms the basis for a putative complaint. Specific jurisdiction supports the assertion of jurisdiction by the court over a defendant on the basis that its conduct related to the subject matter of the complaint makes it appropriate—from a due process perspective—to assert jurisdiction.

Personal jurisdiction in the federal courts was at one time largely focused on territorial limitations—was the defendant physically present in the jurisdiction, or not? Since the Supreme Court’s seminal decision in *International Shoe*, the focus has shifted to due process, which at the end remains a question of “is it fair” to hale a defendant into a particular court. In the context of global litigation, a number of doctrines evolved which facilitated the assertion of jurisdiction over non-United States defendants.

The Supreme Court’s active consideration of issues of personal jurisdiction intersected with its ATS jurisprudence in *Daimler AG v Bauman*. In *Bauman*, a group of Argentine nationals claimed that during Argentina’s so-called “dirty war,” the Argentine subsidiary of the German corporation, Daimler AG, had collaborated with state security forces to kidnap, detain, torture, and kill certain employees of the Argentine subsidiary. The plaintiffs brought suit under the ATS in federal court and claimed a basis for personal jurisdiction.

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167. See Daimler AG v. Bauman, 134 S. Ct. 746, 762 (2014) (holding that general jurisdiction requires more than slim contacts with the forum states).
168. Id. at 748.
jurisdiction over Daimler AG, which itself had no presence in the relevant state, California, by virtue of the presence in that state of a second Daimler AG subsidiary, MBUSA.\textsuperscript{169} The Court determined that there was no basis for the exercise of personal jurisdiction consistent with the requirements of due process and dismissed the action without reaching the merits of the ATS claims.\textsuperscript{170} The precise question addressed in \textit{Daimler} is “whether, consistent with the Due Process Clause of the Fourteenth Amendment, Daimler is amenable to suit in California courts for claims involving only foreign plaintiffs and conduct occurring entirely abroad.”\textsuperscript{171}

The Court determined that the only relevant question was whether “general jurisdiction” could be asserted over Daimler.\textsuperscript{172} The Court had recently articulated a formulation of the required basis for an exercise of general jurisdiction as being “so constant and pervasive as to render [it] essentially at home in the forum [s]tate.”\textsuperscript{173} Plaintiffs conceded that there was no basis to assert general jurisdiction directly over Daimler, but asserted that such jurisdiction was appropriate because Daimler’s indirect United States subsidiary was “at home” in California and its presence could be attributed to Daimler under an agency theory.\textsuperscript{174} The Court determined that the agency theory could not be applied consistent with due process and that, therefore, there was no basis for the exercise of personal jurisdiction over Daimler.

The Court noted that \textit{Kiobel II} had rendered the plaintiffs’ ATS claims “infirm,”\textsuperscript{176} and went on to observe that the Ninth Circuit “paid little heed to the risks to international comity its expansive view of general jurisdiction posed.”\textsuperscript{177} In this context the Court concluded that “considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of

\begin{footnotes}
\footnotetext{169}{\textit{Daimler}, 134 S. Ct. at 748.}
\footnotetext{170}{\textit{Id.}}
\footnotetext{171}{\textit{Id.} at 753.}
\footnotetext{172}{\textit{Id.} at 758.}
\footnotetext{174}{\textit{Id.}}
\footnotetext{175}{\textit{Id.} at 753.}
\footnotetext{176}{\textit{Daimler}, 134 S. Ct. at 753.}
\footnotetext{177}{\textit{Id.} at 763.}
\end{footnotes}
courts in California would not accord with the ‘fair play and substantial justice’ due process demands.” 178

The decision and reasoning of *Daimler* are consistent with *Kiobel II* and reinforce the determination that United States courts should exercise caution in bringing international disputes and actors into the United States. The *Daimler* opinion is explicitly useful only to those defendants foreign to the United States where the direct assertion of either general or specific jurisdiction is unlikely. There is a consideration for the realities of corporate legal structure—the relationship of parent and subsidiary—which, although arising in a case with a developed factual record in this regard, may prove useful to any defendant who finds itself in litigation solely because of a corporate affiliation with another entity. The Court has in recent years, independent of the ATS, issued more restrictive rulings regarding the necessary foundation for the exercise of personal jurisdiction over foreign defendants. 179 The notion of sufficient contact to be said to be “at home” in a given jurisdiction 180 is obviously protective of non-United States defendants. This is also true of much of the Court’s recent jurisprudence regarding foreign entities selling products in the United States. 181 In sum, it is another source of protection for non-United States defendants, albeit one which is likely unavailable to United States-based defendants.

The effect of this limitation on personal jurisdiction is again protective—in many cases, highly protective—of the interests of foreign corporations. 182 These cases, much like those applying the presumption against extraterritorial application, do very little to protect United States-based individuals and entities.

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180. *Id.* at 2851.


182. *See Daimler*, 134 S. Ct. at 763 (holding that a foreign corporation is not subject to personal jurisdiction in the U.S. for injuries allegedly caused by its Argentinian subsidiaries outside of the U.S.).
V. A Note on Pleading Standards

Another filter for transnational litigation involves the appropriate application of the Supreme Court’s decisions in Twombly and Iqbal as to sufficiency of pleadings. This is an area when firmly closing the door on conclusory pleadings that merely recite the elements of a claim is of critical importance.

In the Second Circuit’s opinion in Kiobel I, for example, while Judge Leval somewhat stridently dissented from the majority’s conclusions regarding corporate liability, he did, nonetheless, concur in the judgment.183 He would have dismissed the case under the rigorous pleading standards of Twombly and Iqbal.184

In general, the Twombly/Iqbal standard requires a court to assess the plausibility of the factual allegations of plaintiffs’ complaints.185 Bare recitals of the required elements of relevant causes of action are no longer allowed.186 Fact-driven preliminary torts, such as “touch and concern,” invite courts to apply rigorous scrutiny to the allegations proffered to demonstrate domestic impact.187 Judge Leval’s analysis of the pleading deficiencies of Kiobel I is instructive in this regard. Kiobel I proceeded on an aiding and abetting theory. While Judge Leval believed that corporations were amenable to suit under customary international law, he assessed the adequacy of the pleadings as to aiding and abetting under Twombly and Iqbal and found them wanting.188 Under the governing standard for accessorial liability reflected in Talisman,189 plaintiffs must show not only that defendants provided assistance to actors engaged in primary violations of customary international law, but also that it was the defendants’ purpose to aid in the conduct of such violations.190

184. Id. at 153–54..
185. Id.
187. Id.
188. Kiobel I, 621 F.3d at 153–54. See also Balintulo v. Ford Motor Co., 796 F.3d 160, 170 (2d Cir. 2015) (finding pleadings insufficient to trigger jurisdiction under the ATS where they are conclusory and “fail plausibly to plead that any U.S.-based conduct on the part of [the defendants] aided and abetted South Africa’s asserted violations of the law of nations”).
189. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 277 (2d Cir. 2009).
190. Kiobel I, 621 F.3d at 154 (Leval, J., concurring).
While plaintiffs could offer detailed factual allegations regarding the first element, aid, they failed to offer plausible factual allegations of purpose. They could offer nothing beyond a recital of this element, recast as a factual allegation.

Fortunately, in the context of accessorial liability, such as aiding and abetting, the courts have imposed the stringent pleading requirement of *Iqbal* and *Twombly*. *Lui Bo Shan v. China Construction Bank Corp.*, an ATS case involving claims that the bank had acted “jointly” with the Chinese police to arrest and detain the plaintiff before he could expose fraud at the bank, was dismissed both in adherence to the Second Circuit’s *Kiobel I* ruling regarding corporate liability under the ATS, but also because the plaintiff failed to make allegations to support his accessorial liability claim. To make that claim he was required to allege facts adequate to demonstrate that the defendant: (1) offered substantial assistance to the primary perpetrators; and (2) that the defendant acted with the purpose of facilitating the alleged offenses rather than mere knowledge. The plaintiff failed to allege such facts.

VI. PRACTICE SUGGESTIONS AS TO THE DEFENSE OF TRANSNATIONAL CLAIMS IN U. S. COURTS

The obvious consequence of uncertain legal standards is a need to preserve all the options. That means, in the first instance, to litigate and preserve all the potential issues. The tide may be against challenges to corporate or accessorial liability under the ATS, but unless and until the Supreme Court clarifies the issue, it appears prudent to process these issues. Further, to the extent that the Supreme

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192. 421 F. App’x 89, 93 (2d Cir. 2011).
193. *Id.* at 95.
194. *Id.* (citing Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 277 (2d Cir. 2009)).
195. *Id.* (“[Absent] any factual allegation demonstrating personal participation or willful direction, however, the mere assertion that the [b]ank acted ‘jointly’ with the Chinese police is insufficient to establish direct liability for the alleged abuses.”). *See also Aziz v. Alcolac*, 658 F.3d 388, 401 (4th Cir. 2011) (“Such a cursory allegation, however, untethered to any supporting facts, constitutes a legal conclusion that neither binds us, nor is ‘entitled to the assumption of truth’”) (internal citations omitted)).
Court has, whether intentionally or not, created standards for substantive liability under Sosa or extraterritorial application in *Kiobel II*, which are both heavily fact-driven, these opinions should lead to a broader license to distinguish adverse authority to the extent that it exists. In addition, *Bauman* and, to a lesser extent, *Kiobel II*, evidence a respect for formal legal structures relating to corporate form. Plaintiffs can be artfully vague in pleading corporate structures and relationships, as well as which precise entity was involved in particular conduct. Vigilance as to corporate structure is necessary to assess how United States-related the conduct may be and also to determine important threshold issues of personal jurisdiction.

Enforcement of pleading standards is critical in these cases. Defendants are entitled to clear and precise statements of what the precise conduct violating customary international law was, who actively engaged in that conduct, and the basis, if any, to attribute any aspect of that conduct to entities in the United States. These claims can involve proof that may be impossible to provide. The prevailing standard for “aiding and abetting,” for example, is not satisfied by mere knowledge, there must be an affirmative purpose to advance the violation of international law.\(^{196}\) The pleading burden this standard will require is immense. These suggestions apply in the context of other catalogues of cases involving federal statutes that create federal jurisdiction. Diversity jurisdiction will not support alien versus alien cases, but defendants should be vigilant about domestic defendants added to create, rather than defeat, diversity.

VII. CONCLUSION

Transnational litigation and, less positively, “global forum shopping,” are an expected outgrowth of an increasingly integrated global economy. The efforts of the United States courts to deal with forum shopping of international disputes into the United States courts must, at this time, be viewed as a work in progress. Strict application of the presumption against extraterritorial application of federal statutes and heightened concerns about due process in the context of assertions of personal jurisdiction in transnational litigation are useful first steps in stemming the flow of “imported” cases. These developing doctrines are useful primarily in precluding litigation by

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196. *Talisman*, 582 F.3d at 277.
foreigners against foreigners over conduct occurring elsewhere. Prospective development as to corporate liability under United States law, aggressive application of the *forum non conveniens* doctrine, and rigorous application of United States policy standards, together with careful maintenance of the distinction that identification of a foreign court as adequate for *forum non conveniens* purposes does not amount to an admission that all resultant judgments from those courts are presumptively enforceable, are all necessary to maintain balance. It would be patently unfair to protect foreign defendants from the tender mercies of United States courts while allowing the entire burden of transnational claims to fall on United States defendants.