

# US DOJ SEEKS TO STOP HUMAN RIGHTS LAWSUITS AGAINST CORPORATIONS

03 June 2020 | United States of America

Legal Briefings – By **Amal Bouchenaki, Ben Guthrie and Antony Crockett**

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In a [May 26, 2020 filing](#), the U.S. Department of Justice (“DOJ”) has urged the U.S. Supreme Court to hold that domestic corporations cannot be sued in U.S. courts for alleged human rights violations under the Alien Tort Statute (“ATS”).

The request was made in the case *Cargill Inc. v. Doe* ([No. 19-453](#)), part of a long-running litigation involving allegations that the U.S.-based food companies Cargill, Nestlé, and ADM aided and abetted child slavery on cocoa farms in the Ivory Coast by purchasing cocoa and providing technical assistance to the farms.

Cargill asked the Supreme Court to review the case after the U.S. Court of Appeals for the Ninth Circuit held that plaintiffs’ claim under the ATS could proceed. The Ninth Circuit held that there is no universal rule regarding whether U.S. corporations can be sued under the ATS, and that the question depends on the particular international norm alleged to have been breached. It held that in this case, the prohibition of slavery is a “universal” norm applicable to all actors, including corporations, making the defendants susceptible to suit under the ATS. (See *Doe v. Nestlé, S.A.*, 906 F.3d 1120 (9<sup>th</sup> Cir. 2018), *amended* 929 F.3d 623 (9<sup>th</sup> Cir. 2019)).

The DOJ’s filing argues that the Supreme Court should grant Cargill’s request to review the Ninth Circuit’s decision, and should hold that corporations are categorically immune from suit under the ATS. It also asks the Court to hold that aiding-and-abetting liability is not recognized under the ATS, which would further limit the statute’s scope.

The DOJ’s argument is not dispositive of whether the Supreme Court will grant review, or how it will rule if it does, but the DOJ’s perspective will likely carry weight with the Court, as the Court specifically invited the DOJ to make the filing and express its views. The DOJ’s filing is also notable as it expresses the policy of the current U.S. administration.

Over the past several decades, the ATS has been used to bring civil lawsuits against both natural persons and corporations seeking damages for their alleged participation in human rights abuses. During that time, the question of whether corporations can be sued under the ATS has been a recurring theme.

The Supreme Court was presented with the question in *Kiobel v. Royal Dutch Petroleum*, but did not decide it, resolving the case on other grounds – namely that the ATS does not permit claims to be brought based on extraterritorial conduct that does not sufficiently “touch and concern” the territory of United States. The underlying decision of the U.S. Court of Appeals for the Second Circuit, holding that corporations may not be sued under the ATS, remains law in that circuit.

In 2017-18, five years after *Kiobel*, the Supreme Court was again faced with the question of whether corporations are subject to suit under the ATS in *Jesner v. Arab Bank, PLC*. The Court issued a narrow opinion, holding that foreign corporations cannot be sued under the ATS, but leaving the status of domestic (U.S.) corporations unaddressed.

The DOJ’s filing thus asks the Supreme Court to take another step in a process of restricting the scope of the ATS that stretches back a number of years, and to finally decide whether corporations may be liable under the ATS regardless of where they are based.

If the Court were to accept review and agree with the DOJ’s position, it would stand in contrast to recent events in the United States’ northern neighbour, where in February 2020 the Supreme Court of Canada held that a lawsuit by Eritrean miners alleging human rights abuses—including violation of the prohibitions against slavery and forced labour, the same allegations raised in *Doe*—could proceed against the Canadian mining company Nevsun, in the case [Nevsun Resources Ltd. v. Araya](#).

While the Supreme Court grants only a small number of the requests for review submitted to it, the DOJ’s support of review in *Cargill v. Doe* increases the likelihood that the request will be granted. The Court may also be motivated to grant review in order to create uniformity in U.S. law, in light of the disagreement between federal appellate courts regarding corporate liability. As noted above, the jurisprudence of the Ninth Circuit (covering California and a number of other western states) permits corporations to be defendants in ATS cases depending on the norm alleged to have been violated, while the Second Circuit (covering New York, Connecticut, and Vermont) categorically excludes corporations from being sued under the ATS.

Watch this space for further developments regarding the Supreme Court’s decision.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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