

SYMPOSIUM ON INVESTOR RESPONSIBILITY: THE NEXT FRONTIER IN INTERNATIONAL INVESTMENT LAW

TRANSNATIONAL CORPORATE RESPONSIBILITY IN DOMESTIC COURTS: STILL OUT OF REACH?

*Andrew Sanger**

Despite some modest progress, corporate responsibility for human rights abuses in domestic courts remains elusive. In U.S. federal courts, Alien Tort Statute (ATS) litigation is now more precarious than ever before. While there have been some potentially important developments in English courts, judges are reluctant to extend responsibility to parent corporations for harm caused by the operations of foreign subsidiaries. Although U.S. and English courts have been concerned with distinct doctrinal issues, the overall picture appears to be one of deference to the corporation and its anatomized form, and to the goal of promoting investment abroad.

Responsibility for Breaches of International Norms: U.S. Federal Courts

Since 2004, the U.S. Supreme Court has progressively limited the circumstances in which plaintiffs may bring claims against local and foreign corporations for breaches of international norms. At present, both the Supreme Court Justices and the Court of Appeals remain deeply divided over (i) the circumstances in which a corporation may be a defendant in an ATS case (if at all); *and* (ii) whether all of the conduct giving rise to the violation of an international norm must take place in the United States. The answers to these questions carry significant implications for whether non-U.S. victims of corporate harm can obtain a remedy against a U.S. parent company.

The Supreme Court has never ruled straightforwardly on whether corporations may ever be defendants in ATS cases. In *Jesner v. Arab Bank*, it held that separation-of-power and foreign-policy concerns, as well as the historic purpose of the ATS, precluded *foreign* corporations from being defendants, leaving open the possibility that U.S. corporations could be defendants.¹ However, the majority was highly skeptical about the judicial power to recognize a private right of action in any ATS case. Writing for the majority, Justice Kennedy suggested that “there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS,”² even though this would appear to contradict the position he took as part of the majority in *Sosa v. Alvarez-Machain*. He also lent support to the Second Circuit’s *Kiobel* decision that international law does not impose liability on corporations for breaches of its norms and that consequently corporations cannot be defendants in ATS cases. Other justices that joined the majority were also decidedly critical of judicially-created causes of action, with Justice Gorsuch suggesting that such actions “invaded terrain that belongs to the people’s

* *University of Cambridge.*

¹ [Jesner v. Arab Bank](#), 584 U.S. ___, 18–26 (2018).

² *Id.* at 19.

representatives and should be promptly returned to them.”³ In *Al Shimari v. CACI Premier Technology*, CACI argued that, following *Jesner*, claimants now had to demonstrate that adjudicating their claim not only furthered the objectives of the ATS but also would not impermissibly interfere with the political branches.⁴ The district court hearing the case expressed “serious doubts” as to whether *Jesner* established such a test, but ruled that even if it had, the criteria would have been satisfied in that case.⁵

The Supreme Court had also previously narrowed the geographic reach of the ATS. In *Kiobel v. Royal Dutch Petroleum*, it held that the presumption against extraterritoriality applied to the ATS, adding 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.”⁶ The circuit courts have since been divided on how to operationalize this test. While the Second Circuit ruled that the relevant *domestic* conduct must itself give rise to a violation of international law,⁷ the Fourth,⁸ Ninth,⁹ and Eleventh¹⁰ circuits have required only a significant connection to U.S. territory. In 2016, in *RJR Nabisco v. European Community*, the Supreme Court explained that, in applying the presumption against extraterritoriality, a court should first identify whether the statute in question “gives a clear, affirmative indication that it applies extraterritorially.”¹¹ If the statute does not clearly indicate Congress’ intent to give it extraterritorial application, courts must ascertain the “focus” of the statute and apply the statute’s provisions only where the conduct relevant to this “focus” occurs within the United States.¹² Following this decision, the Fifth Circuit held that the focus of the ATS was on conduct that violates international law and that if *that conduct* took place abroad, then the ATS would not apply even if other related action occurred on U.S. territory.¹³ It remains to be seen whether other circuit courts will follow the Fifth Circuit’s approach, although *RJR Nabisco* gives them little room for maneuver.

Parent Company Responsibility: Courts of England and Wales

Since there is no English common law power to develop new torts for breaches of international norms, recent litigation in English courts has focused on whether UK-based parent corporations owe a duty of care to victims in a foreign state in which their subsidiary operates. So far, this question has arisen at a preliminary stage, where the defendant has sought dismissal of the case for want of jurisdiction. The Civil Procedure Rules, applicable to all such cases in the English courts, permit a foreign subsidiary to be sued in England where there is a legitimate claim between the claimant and the UK-domiciled parent (the “anchor defendant”) to which the subsidiary is a necessary and proper party.¹⁴ Whether the parent owes a duty of care is therefore important not only in its own right but also because it is foundational for establishing adjudicative jurisdiction over the subsidiary. As victims of corporate harm may face insurmountable challenges in bringing an action against a subsidiary in host-state courts, the availability of the courts of the parent’s home state may be crucial for ensuring access to a remedy. As explained in

³ *Id.* at 3 (Gorsuch J., concurring).

⁴ *Al Shimari v. CACI*, Memorandum Opinion of District Judge Brinkema, 25 June 2018.

⁵ *Id.* at 4.

⁶ *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 124–25 (2013).

⁷ *Balintulo v. Daimler*, 727 F.3d 174, 192 (2nd Cir. 2013).

⁸ *Warfaa v. Ali*, 811 F.3d 653, 660 (4th Cir. 2016).

⁹ *Mujica v. AirScan*, 771 F.3d 580, 594 (9th Cir. 2014).

¹⁰ *Doe v. Drummond*, 782 F.3d 576, 592 (11th Cir. 2015).

¹¹ *RJR Nabisco v. EC*, 579 U.S. ____ (2016), 9.

¹² *Id.*

¹³ *Adhikari v. Kellogg Brown & Root*, 845 F.3d 184, 197 (5th Cir. 2017).

¹⁴ *UK Practice Direction 6B*, 3.1(3).

Lungowe v. Vedanta, the host state may not have lawyers with sufficient experience; claimants may not be able to fund long, complex, and often burdensome tort cases; or there may be a real risk that victims will not receive justice in local courts.¹⁵ In contrast, the United Kingdom not only has an abundance of legal expertise in this area, but it also allows for funding options such as the Conditional Fee Agreement that may open access to its courts. As these cases are being heard at a preliminary stage, (i) claimants need only to establish that they have a *good arguable case*; (ii) the necessary evidence to support a duty of care may not yet be available, making it difficult to demonstrate a good arguable case; and (iii) the legal analysis in these cases has proceeded on the basis that English law is the same as the applicable law at trial, which is typically the law of the state where the harm occurred (if/when the case reaches a full trial, the claimants will have to show that the applicable law imposes a duty of care).

There have been three recent UK decisions on parent-company responsibility. In *Lungowe v. Vedanta*, the Court of Appeal upheld the decision of the High Court that there was a good arguable case that Vedanta owed a duty of care to Zambian citizens alleged to have suffered personal injury; damage to property; and loss of income, amenity, and enjoyment of land due to pollution and environmental damage caused by toxic discharges from the Nchanga copper mine. In contrast, in *Okpabi v. Royal Dutch Shell*, both the High Court¹⁶ and the Court of Appeal¹⁷ rejected the claim that Royal Dutch Shell (RDS) owed a duty of care in respect of the pollution and environmental damage caused by oil spills emanating from the pipelines and infrastructure operated by its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Ltd (SPDC). Lord Justice Sales dissented, finding that the claimants had made a good arguable case that RDS had exercised a sufficient degree of control over SPDC's operations to give rise to a duty of care. Finally, in *AAA v. Unilever*, the Court of Appeal¹⁸ upheld the decision of the High Court that Unilever did not owe the claimants a duty of care to take effective steps to protect them from "serious inter-tribal violence" at the time of the 2007 presidential election in Kenya. According to Lord Justice Sales, the evidence showed that the foreign subsidiary did not receive relevant advice from the parent and that it "understood that it was responsible itself for devising its own risk management policy and for handling the severe crisis which arose in late 2007, and that it did so."¹⁹

English judges have made it clear that there is no special doctrine of parent company responsibility. Equally, the fact that a corporation is a parent does not foreclose the possibility that it owes a duty of care to employees or to those affected by the activities of its foreign subsidiary. The starting point is the traditional three-part test for establishing a duty of care under the law of negligence: foreseeability, proximity, and reasonableness.²⁰ On the application of this test, two general points stand out in *Okpabi*, a case that centered on the proximity criterion. First, the court emphasized that a legal duty of care, as opposed to what it referred to as the "more abstract (although no less important) concepts of moral responsibility: for example, to reduce global warming and to protect the environment," must be owed to a person or concrete class of persons.²¹ Second, "[t]he corporate structure itself tends to militate against the requisite proximity,"²² meaning that judges will be slow to conclude that a parent company has assumed control or responsibility for the subsidiary's operations. As Sir Geoffrey Vos stated:

¹⁵ *Lungowe v. Vedanta*, [2017] EWCA Civ 1528 (UK).

¹⁶ *Okpabi v. Royal Dutch Shell*, [2017] EWHC 89 (UK).

¹⁷ *Okpabi v. Royal Dutch Shell*, [2018] EWCA Civ 191 (UK).

¹⁸ *AAA v. Unilever*, [2018] EWCA Civ 1532 (UK).

¹⁹ *Okpabi*, [2018] EWCA Civ 191 at 40 (UK).

²⁰ See *Caparo Industries Plc v. Dickman* [1990] UKHL 2 (UK).

²¹ *Okpabi*, [2018] EWCA Civ 191 at 88 (UK).

²² *Id.* at 196.

it would be surprising if a parent company were to go to the trouble of establishing a network of overseas subsidiaries with their own management structures if it intended itself to assume responsibility for the operations of each of those subsidiaries.²³

Thus, a parent must *itself* have disregarded the separate legal personality—and the presumption of separate responsibility—of a subsidiary.

The decisions in the above-mentioned cases suggest that there are at least two general circumstances in which a parent may owe a duty of care to those affected by the operations of a subsidiary. The first circumstance is where it controls or shares control of the material operations of the subsidiary. In the *Lungowe* case, not only did the evidence show that the parent had invested heavily in the subsidiary (arguably beyond a conventional parent-subsidiary relationship) but there was a good arguable case that it had substituted its own policies and management for those of the subsidiary. The second circumstance is where a parent has given advice to a subsidiary about how it should manage a specific risk. Crucially, this requires the parent to do more than provide mandatory instructions to the whole group as, in such a situation, the parent has not “taken control of the operations of a subsidiary (and, necessarily, every subsidiary), such as to give rise to a duty of care in favour of a person or class of persons affected by the policies.”²⁴ In *Okpabi*, the claimants were unable to show that RDS had assumed or taken joint responsibility for the effective management of the operation of the pipeline and facilities in Nigeria. Although its corporate literature (including Shell’s sustainability report) explained that the company was committed to environmental and social standards, the court considered these statements to be “best practices which are shared across a business operating internationally,” rather than evidence demonstrating that RDS had exercised material control over SPDC’s operations.²⁵ It is only where a parent gives *specific* and *relevant* instructions that a duty of care might arise—for example, where it required a subsidiary “to manufacture or fabricate a product in a particular way, and actively enforced that requirement, which turned out to be harmful.”²⁶

Judges have been reticent to express a view on when it is “reasonable” to impose a duty of care on the parent. In *Okpabi*, the claimants referred to (i) the importance of transnational corporations (TNCs) conducting themselves in accordance with international standards, particularly those concerning corporate social responsibility and oil production;²⁷ and (ii) the argument that the parent made “billions of pounds of profits” from the operations in which the subsidiary was involved so that “it is neither unreasonable nor unfair to require [it] to take reasonable care to mitigate the foreseeable risks of harm that arise from those operations to individuals affected by them.”²⁸ Lord Justice Simon gave short shrift to both points: the first was unobjectionable as an abstract principle but it was a “doubtful foundation for the imposition of a duty of care” (suggesting a distinction between a common-law duty of care and international standards);²⁹ and the second appeared to assume the issue of proximity in the claimants’ favor.³⁰

Judicial Reluctance to Extend Responsibility to Corporations?

The above discussion demonstrates that, from an access-to-remedy point of view, progress is at best incremental and slow. It remains difficult to secure the responsibility of a parent for harm caused by the operation of its

²³ *Id.*

²⁴ *Id.* at 89.

²⁵ *Id.* at 121.

²⁶ *Id.* at 196.

²⁷ *Id.* at 130.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 131.

subsidiaries. Victims who cannot obtain justice in their home state are often unable successfully to bring claims against the TNC in the state of the parent company. Judges have invoked domestic law (rules of statutory construction, constitutional principles, tort law, principles of corporate law) to shield corporations from liability but have seldom referred to—or placed weight on—international standards, norms, and guidelines that counsel in favor of such responsibility. In *Jesner*, the legal representative for the U.S. government urged the U.S. Supreme Court to reach the opposite conclusion, noting that corporate impunity might result in the kind of international strife that the ATS was designed to avoid.³¹

Although it is extremely difficult to ascribe motivations to a court other than those explicitly stated in a judgment, the overarching pattern appears to be one in which judges are reluctant to extend responsibility to parent corporations. Instead, there is an apparent deference to the general goal of promoting investment abroad, anxiety over imposing burdensome liability on local corporations, and adherence to the view of a TNC as a disaggregated and decentralized entity. For example, in *Jesner*, Justice Kennedy (with whom Chief Justice Roberts and Justice Thomas agreed) considered that holding foreign corporations liable under the ATS “would imply that other nations, also applying the law of nations, could hale our [corporations] into their courts”—meaning that this judicially-mandated doctrine could “subject American corporations to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world, all as determined in foreign courts.”³² A judicial preference for the territorial application of law is hardly a recent phenomenon. However, not only does this approach protect corporations at the expense of individuals, but it also overlooks the fact that weaker states are unlikely to confront powerful foreign investors and their states. In a stunning admission—and one that diverges sharply from most domestic understandings of rights—Justice Kennedy cautioned that allowing suits against foreign corporations could

establish a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations, or where judicial systems might lack the safeguards of United States courts. And, in consequence, that often might deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights.³³

Yet, as ATS and English parent-company liability cases demonstrate, foreign victims are routinely shut out from the “safeguards” of courts in the states of parent corporations.

Like their U.S. counterparts, English judges appear equally anxious to ensure tort law does not extend too far or result in indeterminate liability to an indeterminate class of persons. They have made it clear that while a parent may owe a duty of care under traditional tort principles (i.e., where it has exercised control or has assumed a responsibility), there is no special doctrine of parent responsibility, and they have shown deference to the atomized structure of TNCs. In *Okpabi* and *Unilever*, judges thought it would be “surprising” if a parent corporation were to go to the trouble of establishing a network of subsidiaries only to assume responsibility for their operations. This approach to responsibility as between members of corporate groups stands in stark contrast to other areas of corporate regulation. For example, in EU competition law, where the parent has exercised decisive influence over the conduct of its subsidiary, the two entities are treated as a “single undertaking”—an autonomous EU designation that is applied regardless of the legal person’s characterization in domestic law.³⁴ The parent is presumed to have exercised decisive influence over wholly-owned subsidiaries, save where it can show that the

³¹ *Jesner v. Arab Bank*, Transcript of Oral Argument 29 (Oct. 11, 2017).

³² *Jesner*, 584 U.S. ___, 24 (2018) (Kennedy J).

³³ *Id.*

³⁴ Case C-97/08, *Akzo Nobel v. Comm’n* (2009).

subsidiary acted “autonomously on the market.”³⁵ The single economic “undertaking” is held responsible for any infringement of competition law (without having to show that the parent was personally involved) and where enforcement in domestic law requires the identification of an entity with legal personality, the parent and subsidiary are held jointly and severally liable.³⁶

Conclusion

Despite the proliferation of international standards, norms, and principles for business and human rights, judicial adherence to formal concepts of territoriality and personality remain significant obstacles to corporate accountability in domestic courts. There are some signs of progress outside of courts, notably the recently-enacted French duty of vigilance,³⁷ which disregards formal legal structures between members of a corporate group, and the promise of a Business and Human Rights treaty that would require states to extend responsibility to parent corporations for transnational business-related human rights abuse.³⁸ Next year, the UK Supreme Court will hear the *Lungowe* case, and possibly also *Okpabi*. In the meantime, there remains a striking disjuncture between the theoretical possibility of liability and the disappointing reality.

³⁵ *Id.* at 62.

³⁶ *Id.* at 61–62, 77.

³⁷ *French Duty of Vigilance Law – English Translation*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE.

³⁸ Human Rights Council, [Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises – Zero Draft](#) (July 16, 2018).