
INTERNATIONAL LAW — ALIEN TORT STATUTE — SECOND CIRCUIT HOLDS THAT *KIOBEL* BARS COMMON LAW SUITS ALLEGING VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW BASED SOLELY ON CONDUCT OCCURRING ABROAD. — *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013).

Last Term in *Kiobel v. Royal Dutch Petroleum Co.*,¹ the Supreme Court ended a spate of Alien Tort Statute² (ATS) suits against foreign defendants for human rights violations that had occurred abroad.³ While the decision clearly limited the ATS’s future use, it left the exact scope of the new restrictions unsettled.⁴ Recently, in *Balintulo v. Daimler AG*,⁵ the Second Circuit held that *Kiobel* absolutely barred ATS suits based on conduct occurring abroad, even those against U.S. defendants.⁶ Although this result had been foreshadowed by other post-*Kiobel* lower court decisions, the Second Circuit read *Kiobel* more broadly than the Court’s language warranted. Nevertheless, the *Balintulo* panel ultimately reached the correct outcome in view of the overarching principles articulated by the *Kiobel* Court.

In the early 1980s, the Second Circuit resurrected a long-forgotten portion of the Judiciary Act of 1789⁷ and ushered in a wave of tort suits against alleged human rights violators. In *Filartiga v. Pena-Irala*,⁸ the court interpreted the ATS as providing a federal forum for the adjudication of aliens’ rights as recognized under international law.⁹ From the start, many legal issues surrounding the ATS remained murky, including even its origins — the statute was famously referred to as a “legal Lohengrin” because “no one seems to know whence it came.”¹⁰ Nevertheless, human rights activists forged ahead and in-

¹ 133 S. Ct. 1659 (2013).

² 28 U.S.C. § 1350 (2012).

³ *Kiobel*, 133 S. Ct. at 1669.

⁴ See *id.* (Kennedy, J., concurring) (“The opinion for the Court is careful to leave open a number of significant questions regarding the [statute’s] reach and interpretation”); *id.* (Alito, J., concurring) (“[The Court’s] formulation obviously leaves much unanswered”); *id.* at 1673 (Breyer, J., concurring in the judgment) (emphasizing that the majority opinion “leaves for another day the determination of just when the presumption against extraterritoriality might be ‘overcome’” (quoting *id.* at 1666 (majority opinion))).

⁵ 727 F.3d 174 (2d Cir. 2013).

⁶ *Id.* at 182.

⁷ Ch. 20, 1 Stat. 73. The ATS’s text reads in its entirety: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350.

⁸ 630 F.2d 876 (2d Cir. 1980).

⁹ *Id.* at 887.

¹⁰ *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

creasingly relied on the ATS to address human rights abuses that had occurred abroad.¹¹

As the wave of ATS suits reached its crest in the late 1990s, “massive classes” of South African plaintiffs brought claims against a bevy of multinational corporations for their alleged involvement in the crimes of apartheid South Africa.¹² The corporate defendants “represent[ed] a broad cross-section of the international economy” and included automotive companies, technology firms, energy companies, banking firms, and a weapons manufacturer.¹³ The plaintiffs asserted claims for direct and secondary tort liability against these defendants for violating customary international law in South Africa by supporting the apartheid regime, including through assistance to security forces in targeting, torturing, and murdering antiapartheid leaders.¹⁴ Despite their sprawling nature, the claims of all the plaintiffs rested largely on the ATS.¹⁵

For the next decade, this apartheid-related ATS litigation wound its way up and down the federal judicial system. In 2008, Judge Scheindlin of the United States District Court for the Southern District of New York denied the remaining defendants’ joint motion to dismiss.¹⁶ By then, the initial mass of corporate defendants had been whittled down to just three firms (Daimler AG, Ford Motor Company, and IBM Corporation), two of which were headquartered in the United States.¹⁷ These remaining defendants petitioned the Second Circuit for a writ of mandamus, seeking immediate review of Judge Scheindlin’s decision.¹⁸

But before the Second Circuit made its decision on the defendants’ petition, the Supreme Court decided *Kiobel*, an ATS case against foreign defendants involving alleged misconduct that had occurred abroad. Following up on the limitations that were first placed on the

¹¹ See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2368–69 (1991).

¹² *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 240 (S.D.N.Y. 2009).

¹³ *Balintulo*, 727 F.3d at 180 n.1.

¹⁴ *S. African Apartheid Litig.*, 617 F. Supp. 2d at 243.

¹⁵ *Id.* at 240.

¹⁶ *Balintulo*, 727 F.3d at 180–81.

¹⁷ See *id.* at 180 n.1.

¹⁸ Though the case was later remanded after the South African government reversed its stance on the issue of aiding-and-abetting liability, it ultimately came back before the Second Circuit in 2013. See *id.* at 184–85. Typically, parties cannot appeal before trial proceedings have concluded, but in this case, the defendants sought immediate review of Judge Scheindlin’s denial of the joint motion to dismiss. After the district court denied their motion to certify an interlocutory appeal, the corporate defendants sought review either through a writ of mandamus or under the “collateral order” doctrine. *Id.* at 181. The Second Circuit did not consider the validity of the collateral order doctrine in this case. *Id.* at 182.

ATS in *Sosa v. Alvarez-Machain*,¹⁹ the *Kiobel* Court addressed when courts may recognize a cause of action under the ATS “for violations of the law of nations occurring within the territory of a sovereign other than the United States.”²⁰ It held that the presumption against extraterritoriality applies to ATS claims.²¹ The Court next established a new test to determine whether a claim “displace[d] the presumption against extraterritorial application.”²² Under this test, the claim must “touch and concern the territory of the United States” with “sufficient force.”²³ The Court then clarified: “Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices [to displace the presumption].”²⁴ In *Kiobel*, the foreign defendant had only scant corporate presence in the United States,²⁵ so the Court affirmed dismissal of the plaintiffs’ ATS claims.²⁶

Relying on the *Kiobel* decision, the Second Circuit held that all remaining claims in the *Balintulo* case were barred.²⁷ Accordingly, the panel denied the defendants’ petition for a writ of mandamus, reasoning that the defendants could achieve dismissal of all claims through a motion for judgment on the pleadings.²⁸ Writing for the panel, Judge Cabranes²⁹ began by justifying the Second Circuit’s consideration of the defendants’ petition in the first instance.³⁰ The court then turned to the merits and explained that the case “ha[d] been overtaken by recent events.”³¹ For Judge Cabranes, *Kiobel*’s impact on the case was “unambiguous”³²: *Kiobel* ensured that “the defendants [would] . . . be able to obtain relief in the District Court by moving for judgment on the pleadings.”³³ To explain why, Judge Cabranes first dismissed the plaintiffs’ argument that corporate citizenship in the United States

¹⁹ 542 U.S. 692 (2004). In *Sosa*, the Court limited the ATS’s reach by holding 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 familiar when [the ATS] was enacted.” *Id.* at 732.

²⁰ *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1662 (2013).

²¹ *Id.* at 1669.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 1677–78 (Breyer, J., concurring in the judgment).

²⁶ *Id.* at 1663 (majority opinion).

²⁷ 727 F.3d at 182.

²⁸ *Id.* at 193–94.

²⁹ Judge Cabranes was joined by Judges Hall and Livingston.

³⁰ Although Judge Cabranes noted that the writ of mandamus is “one of ‘the most potent weapons in the judicial arsenal,’” *Balintulo*, 727 F.3d at 186 (quoting *Will v. United States*, 389 U.S. 90, 107 (1967)), he nevertheless argued for its more liberal application in ATS cases in order to police problems caused by judicial interference with foreign policy, *id.* at 187–88.

³¹ *Id.* at 181.

³² *Id.* at 182.

³³ *Id.* at 193.

would sufficiently “touch and concern” the United States to displace the *Kiobel* presumption.³⁴ Instead, the *Kiobel* Court “expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States.”³⁵ Because the plaintiffs had not alleged any conduct within the United States, their case was essentially barred by *Kiobel*.

The *Balintulo* panel similarly rejected the plaintiffs’ contention that the *Kiobel* presumption could be displaced by the strength of American interests in combating apartheid. “These case-specific policy arguments miss the mark,” wrote Judge Cabranes, because “the presumption against extraterritoriality applies to the *statute*” rather than to individual cases.³⁶ Thus, the court had no occasion to reach the question of American interests because the alleged conduct failed to surmount the *Kiobel* threshold. Finally, the *Balintulo* panel dismissed the plaintiffs’ argument that there *was* domestic conduct because the corporate defendants had taken affirmative steps in the United States itself to subvert the sanctions regime on South Africa. Even if accurate, the panel noted, this conduct was not “relevant” because it was not “tie[d] [to] the relevant human rights violations.”³⁷

The Second Circuit’s broad interpretation of *Kiobel*’s reach represents a significant blow to both pending and future ATS litigation. Prior to *Balintulo*, some scholars and human rights activists had hoped that the ATS could still provide a jurisdictional hook in cases where the defendant was a U.S. national but where the alleged tort had occurred abroad. But *Balintulo* is one of many lower court responses to *Kiobel* that have eliminated the possibility of such suits. More such decisions are likely, given the *Kiobel* Court’s clear discomfort with ATS suits based on extraterritorial conduct. However, the Second Circuit reached too far in claiming that its decision was compelled by *Kiobel*’s holding. The Supreme Court undoubtedly barred cases against foreign defendants over foreign conduct, but the *Kiobel* decision’s language and the nature of its concurrences indicate that the Court never resolved the issue of the ATS’s applicability to overseas conduct by U.S. defendants. Nevertheless, the *Balintulo* panel likely reached the correct outcome in light of the principles invoked by the *Kiobel* Court, especially those developed through the Court’s focus on the foreign policy implications of ATS cases.

Writing in the immediate aftermath of *Kiobel*, many activists expressed cautious optimism about the continued vitality of the ATS for targeting extraterritorial torts. Scholars suggested that while *Kiobel*

³⁴ *Id.* at 189–91.

³⁵ *Id.* at 189.

³⁶ *Id.* at 191.

³⁷ *Id.* at 192.

had effectively dismembered the potential for “foreign-cubed” cases — cases where foreign plaintiffs sued foreign defendants for conduct that occurred on foreign soil — it had not affirmatively blocked cases where either the conduct occurred on U.S. soil or (more relevantly for *Balintulo*) the plaintiff or defendant was a U.S. citizen.³⁸

Yet these “foreign-squared” dreams have largely been dashed by a stream of lower court cases since the decision, including *Balintulo*.³⁹ Although these cases represent only the first forays of lower courts into the brave new world of the ATS post-*Kiobel*, they suggest that the Court’s decision is unlikely to be read narrowly in future litigation. This aversion is unsurprising. As Judge Cabranes stressed, *Kiobel* is littered with references to the importance of the conduct’s location, and the Court explicitly framed the question before it in those terms.⁴⁰ As a result, the *Balintulo* panel’s decision was “not unexpected.”⁴¹

Nevertheless, as a matter of textual interpretation, the Court’s language in *Kiobel* cannot bear the heavy weight placed upon it by *Balintulo*. Critically, even though the issue was squarely presented to it, the Court never *explicitly* barred all ATS suits where the violations of human rights occurred exclusively abroad.⁴² Moreover, contrary to *Balintulo*, some of the Court’s language suggests that corporate citizenship may be relevant to the “touch and concern” test.⁴³ In articulating the test, the *Kiobel* Court noted that the claims must “touch and concern” American territory “with sufficient force” to overcome the

³⁸ See, e.g., Oona Hathaway, *Kiobel Commentary: The Door Remains Open to “Foreign Squared” Cases*, SCOTUSBLOG (Apr. 18, 2013, 4:27 PM), <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases>; Marty Lederman, *Kiobel Insta-Symposium: What Remains of the ATS?*, OPINIO JURIS (Apr. 18, 2013, 6:40 PM), <http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-what-remains-of-the-ats>.

³⁹ See *Chen Gang v. Zhao Zhizhen*, No. 3:04CV1146 RNC, 2013 WL 5313411, at *3 (D. Conn. Sept. 20, 2013) (listing cases). *But see* *Sexual Minorities Uganda v. Lively*, No. 12-cv-30051-MAP, 2013 WL 4130756, at *2 (D. Mass. Aug. 14, 2013) (factoring the defendants’ citizenship into the *Kiobel* “touch and concern” analysis).

⁴⁰ See *Balintulo*, 727 F.3d at 189 (“The majority framed the question presented in these terms no fewer than three times; it repeated the same language, focusing solely on the location of the relevant ‘conduct’ or ‘violation,’ at least eight more times in other parts of its eight-page opinion” (citations omitted)).

⁴¹ John Bellinger, *Second Circuit Holds Remaining ATS Claims in Apartheid Litigation Barred by Kiobel*, LAWFARE (Aug. 21, 2013, 8:03 PM), <http://www.lawfareblog.com/2013/08/second-circuit-holds-remaining-ats-claims-in-apartheid-litigation-barred-by-kiobel>.

⁴² As Judge Cabranes noted, the Court “framed the question presented in these terms no fewer than three times.” *Balintulo*, 727 F.3d at 189; *see also id.* at 189 n.22. But however the issue may have been framed, *Kiobel* answered a *different* question — one involving foreign defendants.

⁴³ In other contexts, the Supreme Court has stated that, at minimum, a corporation is a citizen and a national of the state or foreign state under the laws of which it is organized. *See, e.g., JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91–92 (2002). For the purposes of federal diversity jurisdiction, a corporation is also a citizen “of the State or foreign state where it has its principal place of business.” 28 U.S.C. § 1332(c)(1) (2012).

presumption of extraterritoriality.⁴⁴ Immediately thereafter, the Court clarified that “mere corporate presence” does not “suffice[]” to displace the presumption because “[c]orporations are often present in many countries.”⁴⁵ The Court chose not to say that “corporate presence” was *irrelevant* in determining whether a claim “touched and concerned” the territory of the United States, as it presumably would have if the “touch and concern” test were predicated solely on the location of the defendant’s conduct. Instead, the Court’s use of the term “suffice” indicates that a corporation’s location enters into the “touch and concern” calculus; while “mere corporate presence” might not suffice, more than that — for example, corporate citizenship — might.⁴⁶ Of course, the Court did not say that U.S. citizenship *would* be enough to displace the presumption — it simply did not address the issue, contrary to the *Balintulo* panel’s interpretation.⁴⁷ In short, the Court’s language signifies that corporate presence is an issue of weight rather than relevance for the purposes of the “touch and concern” test, thereby leaving the door open for corporate nationality to displace the presumption.

This interpretation is bolstered by the nature of *Kiobel*’s concurrences. Although Justice Kennedy signed onto the Chief Justice’s opinion, he nevertheless elected to author a separate concurrence to briefly stress that the majority opinion “is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute.”⁴⁸ It is unclear what other *significant* issues

⁴⁴ *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1669 (2013). Arguably, in writing this sentence, Chief Justice Roberts could not have been referring to the need for claims to “literally ‘touch’ U.S. soil, for then extraterritoriality would clearly not be at issue. ‘[T]ouch and concern’ therefore appears to leave open the possibility of ATS claims involving U.S. plaintiffs or defendants abroad.” Hathaway, *supra* note 38 (alteration in original).

⁴⁵ *Kiobel*, 133 S. Ct. at 1669 (emphasis added).

⁴⁶ Judge Cabranes addressed this issue in a footnote, stating that “the [Court’s] reference to corporate presence indicates that mere corporate presence in the United States is not ‘relevant conduct’ when deciding whether an ATS claim avoids the presumption against extraterritoriality.” *Balintulo*, 727 F.3d at 191 n.25. But this interpretation is at odds with the Court’s use of the word “suffices.” See Hathaway, *supra* note 38 (“[T]he Chief Justice’s acknowledgment that ‘mere corporate presence’ does not suffice to subject that corporation to liability in U.S. courts seems to imply that corporations with more than mere presence *can* be subject to that same liability.”).

⁴⁷ See *Balintulo*, 727 F.3d at 189 & n.23. The *Balintulo* panel suggested that *Kiobel* barred cases based exclusively on foreign conduct through the Court’s analysis of the ATS’s historical context, see *id.*, which indicated that “provid[ing] a cause of action for conduct occurring in the territory of another sovereign” could have generated “diplomatic strife,” *Kiobel*, 133 S. Ct. at 1669. But immediately afterwards, the Court clarified that allowing such cases “would imply that other nations . . . could hale *our citizens* into their courts.” *Id.* (emphasis added). Accordingly, the *Kiobel* Court’s concern about the historical context of the ATS was predicated on the notion that a broader view of extraterritorial application would imply U.S. citizens’ reciprocal subjugation to foreign jurisdiction. However, this concern is not raised where the ATS applies extraterritorially only to U.S. citizens, so the issue was not resolved as Judge Cabranes asserted.

⁴⁸ *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

would “require some further elaboration and explanation” if the bar against foreign conduct were as absolute as Judge Cabranes understood it to be.⁴⁹ Accordingly, Justice Kennedy’s concurrence may indicate a discomfort with a broader ruling and hints at the limits of *Kiobel*’s holding insofar as he provided the crucial fifth vote for the majority.⁵⁰

In contrast to Justice Kennedy, Justice Alito not only accepted the majority’s approach but also would have agreed to go further, an extension that *Balintulo* seems to have misunderstood as the opinion of the Court. In penning his own concurrence, Justice Alito noted the Court’s “narrow approach” and expressed comfort with a broader holding that “a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality — and will therefore be barred — unless the domestic conduct is sufficient to violate an international law norm.”⁵¹ Under Justice Alito’s proposed rule, *Kiobel* would have barred all extraterritorial ATS cases. Yet his concurrence was joined by only one other Justice, and therefore did not win the support of the majority of the Court.⁵² Nevertheless, *Balintulo* adopted a strikingly similar rule.⁵³

⁴⁹ *Id.* Some scholars have argued that Justice Kennedy was referring to the question of what type of domestic conduct would be necessary to displace the *Kiobel* presumption. See, e.g., Roger Alford, *Kiobel Insta-Symposium: Interpreting “Touch and Concern,”* OPINIO JURIS (Apr. 19, 2013, 9:59 AM), <http://opiniojuris.org/2013/04/19/kiobel-insta-symposium-interpreting-touch-and-concern>. However, this interpretation seems implausible for two reasons: First, this question is not particularly significant because it is unlikely to determine the fate of much, if any, future ATS litigation. Second, the Court would not have been “careful to leave [*this matter*] open,” *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring), because the question itself was far beyond the scope of the issues presented to the Court. On the other hand, the “foreign-squared” question meets both standards: the Court could have addressed the issue but took care to avoid expressly ruling on it, and it will affect the fate of much extant ATS litigation.

⁵⁰ Justice Kennedy’s concurrence is a particularly authoritative guide to the Court’s intended interpretation of *Kiobel* because it sets forth how a Justice crucial to the majority coalition understood ambiguities in the majority opinion when he signed onto it. *Kiobel* should be interpreted in line with Justice Kennedy’s understanding of it in order to guarantee that the interpretation will command a majority in the future. Cf. Sonja R. West, Essay, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1960 (2006) (“[I]n the cases in which a necessary member of the ‘majority’ writes an opinion that in substance diverges from the reasoning of the Court . . . [w]e should . . . engage in the more difficult and time-consuming practice of opinion-by-opinion analysis . . .”). By comparison, Justice Alito’s concurrence did not purport to comment on the majority opinion; rather, it “set out the broader standard” that informed Justice Alito’s acceptance of the majority’s “narrow approach.” *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring).

⁵¹ *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring).

⁵² The majority of the Court was also unwilling to go to the opposite extreme represented by Justice Breyer’s concurrence, where the defendant’s nationality was not only relevant but also determinative. *Id.* at 1671 (Breyer, J., concurring in the judgment). The fact that the majority endorsed neither Justice Alito’s nor Justice Breyer’s position suggests that *Kiobel*’s holding was ultimately a narrow one, silent on foreign-squared cases.

⁵³ See *Balintulo*, 727 F.3d at 192. Judge Cabranes seemingly fell prey to a criticism similar to the one he leveled against the *Balintulo* plaintiffs: he chastised them for an “interpretation of

Rather than attempting to stretch *Kiobel* past its natural limits, the Second Circuit should have relied on the principles *Kiobel* invoked to reach the same outcome in this case. In particular, Judge Cabranes could have tied his conclusion to the desire to avoid judicial interference in foreign policy, the same anchor used by the *Kiobel* Court. The Supreme Court decided to apply the presumption against extraterritoriality, in part, because it “guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.”⁵⁴ The *Balintulo* panel could have relied on this underlying principle — the avoidance of foreign policy consequences — to reach the same conclusion.⁵⁵ For instance, Judge Cabranes could have noted that, far from being solely a domestic matter, the plaintiffs’ claims had already caught significant foreign attention (and ire), as well as the condemnation of the executive branch.⁵⁶

Accordingly, the *Balintulo* panel could have reached the same outcome in this case by relying on *Kiobel*’s core concerns. This approach would have been consistent with *Kiobel*’s language and the nature of its concurrences, and would have avoided the need to stretch the holding in order to address questions that the Court left unresolved. Under this approach, *Balintulo* would have set out a clear path for future ATS litigation: although the *Kiobel* Court may have left the door theoretically open to ATS cases against U.S. defendants, courts on the whole would be wise to avoid going through it.

Kiobel [that] arrives at precisely the conclusion reached by Justice Breyer” and a minority of the Court. *Id.* at 189.

⁵⁴ *Kiobel*, 133 S. Ct. at 1669. This concern reflected an unease that had already haunted the Court in *Sosa*. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727–28 (2004).

⁵⁵ See Lederman, *supra* note 38 (“If the risk of such foreign policy concerns is the basis for the presumption against extraterritorial application of the ATS in the first instance, then presumably such risk also ought to inform the Court’s judgment — and that of lower courts, as well — in deciding when, if ever, the presumption should be ‘displaced’ . . .” (emphasis added)).

⁵⁶ As the *Sosa* Court noted in dictum about the pending apartheid cases, the South African government initially opposed the suits because they “interfere[d] with the policy embodied by its Truth and Reconciliation Commission, which ‘deliberately avoided a victors’ justice approach to the crimes of apartheid.” 542 U.S. at 733 n.21 (quoting Declaration of Penuell Mpapa Maduna, Minister of Justice and Constitutional Dev., Republic of S. Afr.). Similarly, the State Department’s Legal Advisor warned in 2003 “that continued adjudication of the [case] risks potentially serious adverse consequences for significant interests of the United States.” *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 276 (S.D.N.Y. 2009) (quoting Statement of Interest of the United States 1 (Oct. 30, 2003)) (internal quotation marks omitted). While some commentators have argued that cases with U.S. defendants are especially likely to accord with U.S. foreign policy objectives because “the U.S. [would be taking] responsibility for harm caused by our own nationals,” Lederman, *supra* note 38, the initial positions staked out by South Africa and the United States suggest otherwise. Indeed, practically all foreign-squared cases are likely to interfere with American foreign policy in ways that run afoul of the concerns invoked by the *Kiobel* Court.