Kiobel's Unintended Consequences: The Emergence of Transnational Litigation in State Court

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Kiobel’s Unintended Consequences: The Emergence of Transnational Litigation in State Court

Jordan Clark*

Kiobel v. Royal Dutch Petroleum sharply curtailed the scope of the Alien Tort Statute. This decision departs from recently established precedent and ignores the plight of foreign nationals whose claims implicate their home governments. But there is a silver lining to this decision. Kiobel will likely force foreign nationals into state court, where they are more likely to succeed than in federal court under the Alien Tort Statute. The emergence of transnational litigation in state court will also create a roadmap for environmental lawyers to litigate transnational pollution claims.

Introduction........................................................................................................................................244
I. Understanding and Critiquing Kiobel..........................................................................................246
   A. The Alien Tort Statute .............................................................................................................246
   B. The Kiobel Opinion ................................................................................................................249
   C. The Shortcomings of Kiobel ....................................................................................................251
II. Kiobel’s Attempt to Rein in the ATS Will Cause a New Wave of Transnational Litigation in State Court..........................................................253
   A. Foreign Nationals’ Three Post-Kiobel Options .................................................................253
      1. Distinguishing Kiobel ...........................................................................................................253
      2. Suing under the Federal Common Law .............................................................................254
      3. Filing Suit in State Court ...................................................................................................255
   B. Procedural Hurdles Awaiting Foreign Nationals in State Court ................................257
      1. Personal Jurisdiction ............................................................................................................257
      2. Forum Non Conveniens ........................................................................................................258
      3. Removal ...............................................................................................................................260
III. Implications for Environmental Tort Litigation Abroad ......................................................261
   A. Environmental Litigators’ Pre-Kiobel Track Record ..........................................................261
INTRODUCTION

In 1992, the Ogoni people began their attack on Royal Dutch Petroleum’s oil fields in Nigeria. The results of Royal Dutch Petroleum’s oil exploration had been disastrous for the southern Nigerian province the Ogoni people call home: Ogoniland. Leaking pipes destroyed farmland, oil spills polluted rivers and killed crops, and pumping stations polluted the air by burning natural gas twenty-four hours a day. At first, the Ogoni protests were peaceful. But as it became clear that the company had no intention of repairing the environmental damage or compensating the local people for the land degradation, the protests became more violent. Fearing for the viability of its operation, Royal Dutch Petroleum turned to the Nigerian government for help, which unleashed the notorious “mobile police” on the protestors. What followed was a “two-year war against the Ogoni that . . . involved repeated attacks on Ogoni hamlets, shootings of unarmed villagers, gang rapes of women, and burning of homes.” The Nigerian government also executed nine Ogoni leaders based on trumped-up murder charges.

Many years later, an Ogoni citizen named Esther Kiobel, who had received asylum in the United States, brought charges against Royal Dutch Petroleum on behalf of her late husband, a victim of the mobile police. She sued for violations of “the law of nations” under the Alien Tort Statute (ATS), but the U.S. Supreme Court never heard the merits of the case. Instead, the Court imposed a procedural limitation on the ATS that will make it difficult for future foreign nationals to seek relief in the United States.

In Kiobel v. Royal Dutch Petroleum Co., the Supreme Court curtailed foreign nationals’ ability to sue foreign corporations in the United States by applying the statutory presumption against extraterritoriality to the ATS. In the wake of this decision, foreign plaintiffs will bring suit in state courts to evade the new restrictions on the ATS and federal common law.

2. Id.
3. Id.
4. Id.
8. Id. at 1669.
9. Id. at 1660.
In this Note, I first argue that few foreign claims will survive under the ATS. *Kiobel* barred claims in which all of the relevant conduct took place outside the United States.\(^{10}\) There remains a dispute, however, as to the viability post-*Kiobel* of claims where some of the relevant conduct occurred within the United States. The Court noted that the relevant conduct must touch and concern the United States with “sufficient force to displace the presumption against extraterritorial application,”\(^{11}\) but it remains unclear what such a claim would entail. Given the narrowed scope of the ATS, I conclude that plaintiffs should avoid attempts to distinguish their claims from those in *Kiobel*, and instead file suit in state court.

Second, I argue that state court is an imperfect but necessary forum for transnational litigation. In an ideal world, federal courts could develop common law for trying international claims, thus providing consistency and predictability for the courts, defendants, and plaintiffs. However, the Court in *Kiobel* closed the door on federal courts’ ability to create common law in this area.\(^{12}\) While state courts cannot provide the consistency and predictability of federal courts, the state-court avenue is preferable to forcing foreign nationals to litigate their claims in nations whose governments are implicated by the suit. The United States has a responsibility to provide a forum in which to hold multinational corporations accountable when foreign states are incapable of adjudicating the dispute. This is particularly true when the United States directly benefits from those corporations’ profits, products, services, and jobs.

Third, I will discuss the procedural challenges that foreign plaintiffs will face in state court. This Note will focus primarily on the threat of removal and the *forum non conveniens* doctrine. I conclude that though procedurally difficult, foreign nationals are more likely to reach the merits of their claims in state court than in federal court.

Finally, I will discuss the impact human rights litigation in state courts will have on transnational environmental torts litigation. First, successful transnational litigation in state courts will have a deterrent effect on both corporations and sovereign governments that try to suppress protests against environmental degradation. Even more importantly, environmental litigators, who previously had failed to use the ATS to effectively combat foreign intrastate pollution, may be able to follow in the footsteps of human rights litigators. Environmental litigators might be able to use the collective knowledge of human rights litigators to better assess states’ *forum non conveniens* doctrines, identify which states develop common law to effectively combat torts committed abroad, and target judges who are willing to reach the merits of foreign tort claims.

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10. *Id.* at 1669.
11. *Id.*
12. See *id.*
I. UNDERSTANDING AND CRITIQUING KIOBEL

A. The Alien Tort Statute

In *Kiobel*, the Supreme Court held that “(1) [the] principles underlying the presumption against extraterritoriality constrain courts exercising their power under [the] ATS [and] (2) [the] ATS did not apply to violations of the law of nations occurring within the territory of a sovereign other than the United States.”

Understanding this holding requires a preliminary exploration of the ATS.

The ATS is an anomaly in that no other country has such a statute. It reads, in full, “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The ATS is a jurisdictional statute—it creates no independent causes of action. Once jurisdiction has been established under the ATS, the causes of action are derived from federal common law. Passed as part of the Judiciary Act of 1789, the statute was likely enacted in order to give foreign ambassadors a way to sue U.S. citizens for torts occurring while the ambassador was in the United States.

Between 1789 and 1980, the ATS was a relatively dormant statute, used to confer jurisdiction only twice during that period. It was the Second Circuit’s decision in *Filartiga v. Pena-Irala* that changed the legal landscape for foreign plaintiffs. *Filartiga* concerned two Paraguayan nationals who, after failing to gain relief in Paraguayan courts, sued a Paraguayan police official in federal district court for their son’s torture and death in Paraguay. The district court dismissed the case for lack of subject matter jurisdiction, holding that the tort alleged was not a violation of the “law of nations.” The Second Circuit reversed, however, stating that “an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.” In his opinion, Judge Irving Kaufman stated that the basis for subject matter jurisdiction was “the law of nations.”

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13. *Id.* at 1665.
16. Flores v. S. Peru Copper Corp., 414 F.3d 233, 244–47 (2d Cir. 2003).
17. Two foreign ambassadors had been assaulted in the United States shortly before the statute was ratified. This occurred before 28 U.S.C. section 1332 created subject-matter jurisdiction, and it was thus unclear whether or not the foreign ambassadors could sue their assailants in U.S. courts. Scholars believe the ATS was passed to resolve this question. See *Kiobel*, 133 S. Ct. at 1663.
19. See 630 F.2d 876 (2d Cir. 1980).
21. *Filartiga*, 630 F.2d at 880; see also Childress, supra note 20, at 713.
22. *Id.*
nations, which has always been part of the federal common law.”\footnote{Filartiga, 630 F.2d at 885.} Federal common law is law developed by federal courts—either where Congress has authorized the court to develop the law or where a federal rule of decision is necessary to protect uniquely federal interests.\footnote{See Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).} Commenting on the decision, Judge William A. Fletcher noted that Filartiga accomplished two things.\footnote{William A. Fletcher, International Human Rights in American Courts, 93 VA. L. REV. 653, 657 (2007).} First, “it solved the problem of subject matter jurisdiction. If customary international law is federal common law, a suit to enforce a right under that law is a suit ‘arising under’ federal law within the meaning of Article III.”\footnote{Id.} Second, “it instructed American courts that established norms of international human rights under customary international law were binding on all American courts as federal common law—including the state courts under the Supremacy Clause.”\footnote{Id.}

The Filartiga decision opened the floodgates. By finding subject matter jurisdiction under the ATS for a tort that occurred abroad, the Second Circuit signaled that U.S. courts would be receptive to the claims of foreign nationals. Since Filartiga, there have been more than 170 judicial opinions concerning the ATS, with approximately six to ten ATS cases filed annually.\footnote{Childress, supra note 20, at 713.} Plaintiffs prefer to pursue human rights litigation under the ATS for a number of reasons. First, the ATS allows plaintiffs to “forum shop” in the United States.\footnote{“Forum shopping” refers to the practice of plaintiffs searching for sympathetic jurisdictions.} The ATS also gives plaintiffs access to U.S. courts’ liberal pre-trial discovery, jury trials in civil litigation, higher damage awards, and the class action litigation device. In cases brought against foreign governments, the ATS allows plaintiffs to avoid filing suit in a country whose government they are accusing of a crime. Finally, in suits against corporations, alleging human rights abuses in violation of the “law of nations” provides an effective attack against a corporation’s brand image.\footnote{Id. at 725.} Even still, very few ATS cases are successful—approximately seventeen have settled, while the remainder resulted in favorable rulings for defendants.\footnote{Id. at 713.} Professor Posner posits that the Supreme Court’s decision in Kiobel ended a “popular but unworkable idea that U.S. Courts can be used to police behavior around the world.”\footnote{Posner, supra note 14. He notes that “[i]n more than 30 years of litigation involving hundreds of cases, hardly any money went to the victims.” Id. He is also of the view that human rights groups often use the ATS to notch symbolic victories (against individual defendants) and to give the appearance that they are in serious fights with multinational corporations so that they can increase donations to their organizations. Id.}
was interrogated, tortured, and murdered in Mexico. DEA officials believed that Humberto Alvarez-Machain (Alvarez) was involved in the murder, so they encouraged a group of Mexican citizens to kidnap Alvarez and transport him to the United States. These Mexican citizens carried out the United States’ request, and U.S. officials arrested and charged Alvarez. Alvarez was acquitted of all crimes, and upon his return to Mexico, he brought a civil suit against the United States under the ATS.

In dismissing for lack of subject matter jurisdiction, the Supreme Court held in *Sosa* that the ATS does not confer subject-matter jurisdiction for “violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.” Justice Souter stated that the ATS was a bare grant of jurisdiction and did not give the courts broad discretion to create law. Instead, he noted that the “jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations.” The Court explained that the lower courts must act as gatekeepers to the ATS and only allow violations of “a narrow class of international norms” to establish subject-matter jurisdiction. These international norms must be “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized”—namely, piracy, infringement on the rights of ambassadors, and violations of “safe conduct.”

So what did we learn from *Sosa* about the ATS landscape? According to Judge Fletcher, there are two additional lessons to be discerned from this decision. First, we know that there is a federal common law of international rights, but we do not know the content of that law. Second, Fletcher noted that “the federal common law of customary international law is federal law in both the jurisdiction-conferring and the supremacy-clause sense.” Fletcher bases this inference off the fact that the only way the Court had jurisdiction (though the Court did not discuss this) was through the federal nature of the substantive claim.

*Sosa* created a challenge for the district courts. How is a court to determine if a plaintiff’s claims implicate international legal norms as definite

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33. *Id.*
34. *Id.* at 698–99.
35. *Id.* at 732.
36. *Id.* at 724.
37. *Id.*
38. *Id.* at 729.
39. *Id.* at 714, 725. Any cause of action under the ATS must be as well defined as these three violations were in 1789. Safe conduct means freedom of movement for foreign citizens in the host country.
41. *Id.*
42. *Id.*
and well accepted as those existing in 1789? Given this unwieldy doctrine, it is not surprising that the Supreme Court sought to further limit the ATS in Kiobel.

B. The Kiobel Opinion

The plaintiffs in Kiobel were former residents of Ogoniland in Nigeria who had relocated to the United States.\(^4^3\) The defendants, Royal Dutch Petroleum Company and Shell Transportation and Trading Company, PLC, owned a joint subsidiary, Shell Petroleum Development Company of Nigeria (SPDC).\(^4^4\) SPDC was engaged in oil exploration and production in Ogoniland.\(^4^5\) Residents of Ogoniland protested the environmental impacts of SPDC’s exploration, and the plaintiffs claimed that SPDC in turn encouraged the Nigerian government to violently suppress the demonstrations.\(^4^6\) Specifically, the plaintiffs alleged that the oil company aided and abetted the Nigerian government’s actions by “providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents’ property as a staging ground for attacks.”\(^4^7\)

After being granted political asylum in the United States, the plaintiffs filed suit in the district court for the Southern District of New York.\(^4^8\) They alleged jurisdiction under the ATS, and sought relief based upon “customary international law.”\(^4^9\) The district court dismissed four of the plaintiffs’ seven claims, but denied defendants’ motion to dismiss the remaining three claims.\(^5^0\) The district court granted an interlocutory appeal and the Second Circuit dismissed the entire complaint, holding that the “law of nations” does not recognize corporate liability.\(^5^1\) The Supreme Court granted certiorari and after oral argument, requested supplemental briefs on whether the ATS permits federal courts to recognize a cause of action for violations of the “law of nations” occurring outside the United States.\(^5^2\)

Chief Justice Roberts wrote the majority opinion,\(^5^3\) in which Justices Kennedy, Alito, Scalia, and Thomas joined. Justice Roberts began by explaining the presumption against the extraterritoriality of United States law.\(^5^4\) As he noted, numerous Supreme Court decisions have upheld the presumption in order to “protect against unintended clashes between [U.S.] laws and those


\(^{44}\) Id.

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) Id. at 1662–63.

\(^{48}\) Id. at 1663.

\(^{49}\) Id.

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) Id.

\(^{53}\) The Kiobel decision was 9–0, but five Justices concurred in the reasoning and judgment, while four Justices concurred in judgment only.

\(^{54}\) Kiobel, 133 S. Ct. at 1661.
of other nations which could result in international discord.”\textsuperscript{55} Congress can overcome the presumption only by writing a clear indication of extraterritorial application into the statute.\textsuperscript{56}

In order to determine whether the ATS contains such a “clear indication of extraterritorial application,” the Court analyzed both the plain language and the history of the statute. First, the Court held that “nothing in the text of the [ATS] suggests that Congress intended causes of action recognized under it to have extraterritorial reach.”\textsuperscript{57} While the statute speaks to actions by aliens and violations of the laws of nations, the Court explained that “such violations affecting aliens can occur either within or outside the United States.”\textsuperscript{58}

Similarly, the clause “any civil action” is insufficient to overcome the presumption against extraterritoriality because the Court has held in prior cases that generic terms such as “any” or “every” do not rebut the presumption.\textsuperscript{59}

Next, the Court further held that the ATS’s legislative history demonstrated that the statute was not meant to have extraterritorial application.\textsuperscript{60} The statute was intended to protect against three offenses of the laws of nations: violation of safe conduct, infringement of the rights of ambassadors, and piracy.\textsuperscript{61} The first two offenses, the Court explained, necessitate no extraterritorial application. In fact, the ATS was passed in the wake of two incidents involving foreign ambassadors who were in the United States.\textsuperscript{62} Piracy, on the other hand, often occurs outside the territorial jurisdiction of the United States. But even this proved insufficient to overcome the presumption. The Court explained that in 1789, “[p]irates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction.”\textsuperscript{63} Because pirates did not commit crimes in sovereign nations, the fact that the ATS was passed in part to stop piracy is not evidence that Congress intended the law to apply to acts occurring within other sovereign nations.\textsuperscript{64}

Finally, the Court concluded that the present case occurred entirely outside of the United States and was therefore not covered by the ATS. The Court also stated that even in cases where some of the alleged conduct happened in the United States, the conduct must be significant enough such that there is

\begin{itemize}
  \item \textsuperscript{57} \textit{Kiobel}, 133 S. Ct. at 1665.
  \item \textsuperscript{58} \textit{Id.}
  \item \textsuperscript{59} \textit{Id.}
  \item \textsuperscript{60} \textit{Id. at 1666.}
  \item \textsuperscript{61} \textit{Id.}
  \item \textsuperscript{62} Scholars believe the ATS was passed in the wake of the Marbois Affair of 1784. Mr. Marbois, a Frenchman, assaulted the French Minister to the United States. During the Constitutional Convention, Secretary John Jay complained that U.S. courts had no way to adjudicate the dispute because it involved two foreigners. The ATS resolved this dilemma. Sosa v. Alvarez-Machain, 542 U.S. 692, 717, 732 (2004).
  \item \textsuperscript{63} \textit{Kiobel}, 133 S. Ct. at 1667.
  \item \textsuperscript{64} \textit{Id.}
\end{itemize}
“sufficient force to displace the presumption against extraterritorial application.”65 Moreover, the Court stressed that corporate presence alone in the United States is insufficient to displace the presumption, as “[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”66

Justices Alito and Thomas concurred in the judgment and with the Chief Justice’s reasoning.67 They wrote a separate concurrence, however, to emphasize another hurdle facing ATS plaintiffs: the Court’s previous decision in Sosa. Justice Alito opined that the defendants’ conduct would fall within the scope of the presumption against extraterritoriality “unless the domestic conduct is sufficient to violate an international law norm that satisfies Sosa’s requirements of definiteness and acceptance among civilized nations.”68 According to Justices Alito and Thomas, not only must the alleged conduct touch and concern the United States with sufficient force to overcome the presumption against extraterritoriality, but the domestic conduct must also violate an international law norm that is as definite and accepted as were the original three offenses (violation of safe conduct, infringement of the rights of ambassadors, and piracy) when the ATS was enacted.69

Justices Breyer, Ginsburg, Sotomayor, and Kagan concurred in the judgment, but not with the Chief Justice’s reasoning. In a separate concurrence, they stated that they do not believe the presumption against extraterritoriality applies to the ATS.70 The four Justices would find jurisdiction under the statute when “(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 . . . .”71 Because these four Justices found that the plaintiffs’ allegations fell outside all three of these categories, they concurred in the judgment.

C. The Shortcomings of Kiobel

The Kiobel decision is unorthodox and unfortunate in four respects. First, the Supreme Court reversed its previous endorsement of the lower courts creating federal common law for foreign torts. Less than nine years earlier in Sosa, the Court instructed the lower courts to act as a gatekeeper to the ATS by creating common law to establish what sorts of actions constituted violations of the “law of nations.”72 While Sosa limited the scope of the ATS, the decision also left the door open to foreign nationals suing foreign corporations under the ATS for torts committed abroad. In Kiobel, however, the Court held that the

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65. Id. at 1669.
66. Id.
67. Id.
68. Id. at 1670.
69. See id.
70. Id.
71. Id. at 1671.
claim must “touch and concern” the United States with sufficient force to rebut the presumption against extraterritoriality.\textsuperscript{73} This added condition severely curtails the lower courts’ ability to craft common law for violations of the “law of nations.” By applying the presumption against extraterritoriality to federal common law claims brought under the ATS, the \textit{Kiobel} court effectively foreclosed the common law’s ability to reach foreign defendants for torts abroad.

Second, \textit{Kiobel} represented a departure from past jurisprudence in that the Court applied the statutory presumption against extraterritoriality to a \textit{jurisdictional} statute. Previously, the presumption against extraterritoriality had been applied only to \textit{substantive} statutes.\textsuperscript{74} For example, if a foreign national attempted to sue a foreign corporation in a U.S. court for violations of Title VII, the court would rightly use the presumption against extraterritoriality to hold that Title VII is not meant to apply abroad.\textsuperscript{75} But by applying the presumption to a jurisdictional statute, the Supreme Court has stated that the statutory presumption against extraterritoriality reaches the federal common law. Indeed, as Howard Wasserman writes, the \textit{Kiobel} decision “seemed rife with the mixing of jurisdiction and cause of action that I thought the Court had cleaned up fairly well over the past several years.”\textsuperscript{76}

Third, the Court’s addition of the “touch and concern” requirement is unnecessarily restrictive given the protective doctrines of personal jurisdiction and \textit{forum non conveniens}. Where a defendant has no contacts with the forum, the case will be dismissed for want of personal jurisdiction.\textsuperscript{77} Even where a plaintiff can serve the defendant in the United States, the doctrine of \textit{forum non conveniens} acts as a further safety valve for cases that should be litigated elsewhere. As the Center for Justice and Accountability (CJA)\textsuperscript{78} argued in its amicus brief in \textit{Kiobel}, the doctrine of \textit{forum non conveniens} “ensures that, even where there is general or specific jurisdiction over defendants, courts can decline to hear those cases that are impractical and inappropriate to try in the United States, while continuing to hear cases where the United States is the most appropriate forum for adjudication.”\textsuperscript{79} By categorically excluding cases that do not sufficiently “touch and concern” the United States, the Court

\textsuperscript{73}. \textit{Kiobel}, 133 S. Ct. at 1669.


\textsuperscript{75}. \textit{Id.}


\textsuperscript{77}. \textit{Kiobel}, 133 S. Ct. at 1669.


removed federal judges’ discretion to determine which cases involving foreign
torts are properly heard in the United States. This unduly limits the remedies
available to foreign plaintiffs, who often face significant challenges litigating in
the country where the tort occurred because the charges may implicate that
country’s own government.

Fourth and finally, Kiobel is short-sighted in that the categorical bar
against cases that do not “touch and concern” the United States will not make
these claims go away. In its amicus brief, CJA stated that “a categorical bar
would likely only push human rights litigation into state courts, impeding the
Government’s ability to monitor and intervene in human rights suits, creating a
patchwork of inconsistent laws . . . and [stopping] cases involving violations of
the law of nations [from being] heard in federal courts.”80 This patchwork, as
CJA explained, would provide little predictability for plaintiffs, defendants, and
the government given that human rights suits will vary from state to state.81
Moreover, the process of appealing these decisions would often require
intervention from the Supreme Court because the “only appellate forum with
the power to correct a state’s error and restore uniformity on some point of law
would be [the United States Supreme Court].”82 More concerning still, the
Supreme Court “might lack power to review [the state court’s] judgment at all”
in a case depending entirely on state law.83

CJA’s warnings were sound, but they went unheeded by the Supreme
Court. Now, human rights litigators must decide whether they can effectively
bring their claims in state court, and state court judges must decide whether
these claims are properly adjudicated under state law and in state court.

II. Kiobel’s Attempt to Rein in the ATS Will Cause a New Wave of
Transnational Litigation in State Court

A. Foreign Nationals’ Three Post-Kiobel Options

Foreign nationals hoping to sue corporations for torts abroad have three
options after Kiobel: to sue in federal court and attempt to distinguish their
claim from Kiobel, to bring a federal common law claim and assert subject-
matter jurisdiction under 28 U.S.C. section 1331, or to file suit in state court.
Foreign nationals hoping to reach the merits of their claims should forgo the
first two avenues and instead pursue their actions in state court.

1. Distinguishing Kiobel

While the Supreme Court did not completely shut the door on foreign
claims brought under the ATS, plaintiffs seeking to distinguish their claims

80. Id. at 4.
81. Id. at 30.
82. Id.
83. Id.
from those in *Kiobel* will have a tough row to hoe. Given that “mere corporate presence” does not suffice to rebut the presumption, foreign nationals attempting to distinguish their claims from *Kiobel* will likely point to some corporate activity in the United States that caused the tort abroad.\(^84\) For example, if a corporate executive in the United States instructed his counterparts in Nigeria to enlist the Nigerian government to violently suppress protestors, this conduct would arguably touch and concern the United States. But given that the recent trajectory of the Court’s jurisprudence has been to limit the ATS, it is unlikely that the Court would allow such claims to go forward. The Court would likely fear that as soon as it identified an activity sufficient to rebut the presumption against the extraterritorial application of the ATS, foreign nationals would claim that the defendants in their case engaged in that same activity in order to survive a motion to dismiss. If, for example, the Court deemed the hypothetical posed above sufficient to rebut the presumption against extraterritorial application, every foreign plaintiff could simply point to an order from a U.S. corporate executive.

Perhaps most importantly, the ATS has simply not been a successful way for foreign nationals to seek relief in the United States for alleged harms that occurred abroad. Of the more than 180 ATS disputes filed against corporate entities, there have been only two successful judgments on ATS grounds and thirteen settlements.\(^85\) Almost all of these claims are dismissed on jurisdictional grounds.\(^86\) The biggest impact of ATS litigation has been public relations damage and high legal fees for corporate defendants, not monetary relief or other remedies for foreign nationals.\(^87\) Given the ATS’s track record, foreign nationals should seek new avenues to adjudicate their claims.

2. **Suing under the Federal Common Law**

One question raised by *Kiobel* is whether foreign nationals need the ATS for subject-matter jurisdiction. Why not file a claim based on federal common law and claim subject-matter jurisdiction under the federal question jurisdiction statute, 28 U.S.C. section 1331?\(^88\) At oral argument in *Kiobel*, Justice Ginsburg asked whether Congress may have enacted the ATS simply because the federal question jurisdiction statute had not been enacted in 1789.\(^89\) Foreign nationals could arguably bring suit under the federal common law, but the Court has not yet ruled on whether such claims fall within the judiciary’s federal question jurisdiction. In *Kiobel*, however, the Court did hold that the presumption against extraterritoriality applies to the federal common law when subject-

\(^84\) *Kiobel*, 133 S. Ct. at 1669.


\(^86\) *Id.*

\(^87\) *Id.*


\(^89\) Wasserman, *supra* note 76.
matter jurisdiction is based upon the ATS. Thus, the Court seems unlikely to allow foreign nationals to bring the exact same claims merely by replacing the ATS with section 1331 as the asserted basis for jurisdiction. If Kiobel stands for anything, it is that the Court does not want U.S. law, be it statutory or common law, to apply extraterritorially.

3. Filing Suit in State Court

When assessing whether foreign nationals should instead file suit in state court, we must ask two separate questions: (1) are state courts an appropriate forum for cases between foreigners involving foreign torts?, and (2) why should any court in the United States hear cases involving foreign conduct?

Regarding the first question, state courts are an appropriate, if second best, forum for the adjudication of foreign torts. There are admittedly a number of drawbacks to having foreign disputes heard in state courts. First, federal courts are the preferable forum because they are able to develop a nationwide federal common law to facilitate consistent application of the law and prevent corporations from having to anticipate the laws of all fifty states. Corporations may also flee states where state court judges allow transnational claims to go forward. Moreover, federal judges, with their life tenure, may be more willing to rule against local corporations. State court judges, who must run for reelection, may be more vulnerable to pressure from powerful local corporations. These issues could have been avoided if Kiobel hadn’t foreclosed federal courts’ ability to create common law for transnational torts.

In his pre-Kiobel article, Professor Austen Parrish argued that “state court litigation will rarely be successful.” Besides the procedural hurdles, Parrish asserted that “[j]ust as federal courts have been reluctant to hear cases to which the United States has few connections, so too will state courts likely be reluctant.” He explained that state court judges are concerned that their decisions will lead to greater fragmentation of the developing human rights laws, and that this is an area where the United States needs to speak with one voice. He conceded that state court claims may serve a deterrent function, but contended that “these benefits are only on the margins, and do not rescue state court litigation from its more significant drawbacks.”

Prior to the decision in Kiobel, I might have agreed with Parrish’s assessment. But Kiobel placed a new responsibility on state courts. It is critically important that a viable forum in the United States be available to hold multinational corporations accountable where foreign states’ judicial systems

93. Id.
94. Id. at 42.
95. Id.
are incapable of holding a fair trial. Even if federal courts would have provided the most appropriate forum, state courts are a close second. Moreover, in a strong rejection of Parrish’s arguments, Paul Hoffman, lead counsel for the plaintiffs in \textit{Kiobel}, asserts that state court judges should not shy away from interpreting international law.\textsuperscript{96} He believes that a state court judge “inclined to invoke human rights law, should not in any way feel constrained by any notion that she or he is interfering with the White House’s assumption as to what international human rights law should be.”\textsuperscript{97} State court judges need not defer to federal courts or the federal government because “[t]he international legal system is not structured like our own system; there is no supreme tribunal to interpret and apply international human rights law.”\textsuperscript{98} State courts may interpret international human rights law as they see fit, and thereby help establish human rights norms.\textsuperscript{99} Indeed, prior to the Warren Court, state courts were the primary source of developing fundamental rights.\textsuperscript{100} Given that \textit{Kiobel} and \textit{Sosa} restricted federal courts’ ability to shape human rights law, the burden now falls to state courts to once again carry this mantle.

Even more importantly, state courts are not constrained by the Supreme Court’s extension of the presumption against extraterritoriality to the federal common law. State statutes and common law all recognize “aiding and abetting and civil conspiracy liability,” which are often causes of action in ATS claims.\textsuperscript{101} Overall, theories of liability in state court tort cases are likely to be more expansive and less contested than they have been in ATS litigation.\textsuperscript{102} Finally, the original controversy in \textit{Kiobel} (whether the “law of nations” recognizes corporate liability) has no bearing on state courts. Every state imposes tort liability on corporations.\textsuperscript{103}

Regarding the second question of why any court in the United States should hear cases involving foreign conduct, there is no clear line as to when state or federal courts should hear cases originating abroad. In making this decision, state court judges must avoid a policy of condescension toward foreign systems of jurisprudence. The fact that the conduct occurred in a developing country or that the allegations implicate the foreign government does not necessarily preclude a foreign court from effectively trying the case. This decision is largely discretionary within the parameters of each state’s \textit{forum non conveniens} doctrine.

In addition to \textit{forum non conveniens} considerations, state court judges should evaluate the following factors in deciding whether to hear a case that

\begin{itemize}
  \item \textsuperscript{97} Id. at 66.
  \item \textsuperscript{98} Id. at 67.
  \item \textsuperscript{99} Id.
  \item \textsuperscript{100} Id.
  \item \textsuperscript{101} Goldhaber, supra note 85, at 128.
  \item \textsuperscript{102} Hoffman & Stephens, supra note 91, at 19.
  \item \textsuperscript{103} Id.
\end{itemize}
originated abroad: (1) whether the plaintiff is an American citizen, (2) whether the defendant operates within the United States, (3) whether the United States benefits in some way from the defendant’s business,\(^\text{104}\) (4) whether any of the alleged conduct occurred within the United States, (5) whether the foreign government has an impartial system of justice,\(^\text{105}\) and (6) whether the foreign government is implicated by the plaintiff’s allegations. While imperfect, these six factors would help state courts evaluate whether they should hear a transnational claim while maintaining proper deference to foreign governments’ interest in resolving disputes that occur within their borders.

**B. Procedural Hurdles Awaiting Foreign Nationals in State Court**

Even if human rights litigators begin to bring their claims in state court, there remain a number of procedural hurdles to effectively pursuing these claims. The biggest challenges to such litigants are the doctrines of personal jurisdiction, *forum non conveniens*, and removal.

1. **Personal Jurisdiction**

Where the defendant is incorporated or has a principle place of business in the forum state, personal jurisdiction is generally not an issue.\(^\text{106}\) In cases like *Kiobel*, however, where the corporate defendant has no office in the United States, establishing personal jurisdiction is more complex. Foreign nationals have two options under these circumstances: track down a corporate official during a trip to the United States and serve him, or argue that the corporate defendant has sufficient minimum contacts with the forum state.\(^\text{107}\) Serving an official in-state presents the difficulty of finding the defendant quickly enough to serve him in the forum state.\(^\text{108}\) This approach requires plaintiffs to have a valid complaint on hand and the ability to anticipate and track down corporate officials in the United States. Under Rule 4(h)(1)(B) of the Federal Rules of Civil Procedure, a corporation may be served “by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment . . .”\(^\text{109}\) Most states courts have adopted similar rules.

Establishing that the defendant corporation has “minimum contacts” with

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\(^{104}\) On the facts of *Kiobel*, for example, a judge could decide that the United States benefits from Royal Dutch Petroleum’s oil exploration because increased production of oil lowers the commodity’s prices. This benefit arguably imposes a responsibility on U.S. courts to adjudicate claims involving collateral damage from the oil exploration.

\(^{105}\) This factor may be especially difficult to determine. However, this determination could involve identifying various similarities to the American system such as randomly selected, impartial juries and judges separated from the political process.


the forum state is not necessarily any easier. The minimum contacts test was first articulated by the Supreme Court in *International Shoe Co. v. Washington*, and was further developed in *Goodyear Dunlop Tire Operations, S.A. v. Brown*. Goodyear’s “essentially at home” test creates a high hurdle for foreign nationals.110 In cases where all of the relevant conduct took place abroad and was allegedly committed by a foreign corporation, foreign nationals will have a difficult time alleging that the foreign corporation is “essentially at home” in the United States. But there is still hope. Plaintiffs may be able to avoid the heightened Goodyear standard by showing that “related contacts” took place in the forum.111 If a plaintiff could prove that decisions made in the United States caused the torts abroad, this could provide a basis for personal jurisdiction.112 Additionally, plaintiffs would be wise to bring the action in the state where the corporate defendant has the most business contacts. Professor Patrick Borchers asserts that “[i]n many cases, as in the *Kiobel* cases, this will be New York, where the corporation’s stock is likely traded and may have its strongest U.S. corporate presence.”113

2. *Forum Non Conveniens*

The federal *forum non conveniens* doctrine was first articulated in *Gulf Oil Corp. v. Gilbert*.114 There, the Supreme Court instructed lower courts to examine a number or public and private factors in deciding whether the forum was appropriate.115 The Court also stated, however, that “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”116 The Supreme Court narrowed this holding in *Piper Aircraft Co. v. Reyno*, however.117 In *Piper*, the Court reiterated that “it is reasonable to assume that [plaintiff’s] choice is convenient,”118 but added that “[w]hen the plaintiff is foreign . . . this assumption is much less reasonable.”119 In addition, the Supreme Court stated that even if an unfavorable change in law would result from sending a plaintiff to a foreign jurisdiction, this is insufficient to bar dismissal based upon *forum non conveniens*.120 Accordingly, federal courts are to be less deferential to a foreign plaintiff’s choice of forum.

The federal doctrine of *forum non conveniens* has evolved from an “abuse-of-process” standard to a “most-suitable-forum” standard.121 The abuse-of-
process standard “did not permit dismissal unless the plaintiff’s forum choice was so egregiously inappropriate as to appear motivated by a desire to vex and harass the defendants.”

In the mid-1970s, however, the doctrine evolved to the new most-suitable-forum version, “under which the judge’s belief, for virtually any reason, that trial elsewhere would be more appropriate justifies a forum non conveniens dismissal.” This new standard has led to the dismissal of multiple foreign nationals’ suits in favor of trial in a foreign state. While foreign nationals could certainly argue that U.S. federal courts are the most appropriate forum when their country’s government is implicated by their claims, federal judges are often wary of hearing cases in which the plaintiffs and defendants are foreign citizens and all of the actionable conduct occurred abroad.

The new, most appropriate forum version of the forum non conveniens doctrine in federal courts has led foreign nationals to increasingly seek out state courts to adjudicate their claims. While there have been discussions about universalizing the forum non conveniens doctrine across state courts, the state courts have generally continued to apply the abuse-of-process standard. This means that as long as foreign nationals have a plausible argument as to why their case should be heard in the United States, a state court should not dismiss the suit. However, “[b]ecause human rights cases . . . inevitably involve this deadly combination of foreign plaintiffs and events, the likelihood of facing a serious motion to dismiss is high.” Yet the burden remains on the defendant “to show that the plaintiff has an adequate alternative forum in which to pursue the case.” This could be a hard burden for the defendants to meet because many human rights plaintiffs are bringing suit against their home nation’s government officials.

Given the decision in Kiobel, which effectively forced foreign nationals out of federal court, state courts should be wary of dismissing foreign nationals’ cases based upon forum non conveniens. For domestic plaintiffs, there is always at least one court that can hear their claims, but not so for foreign plaintiffs. A successful forum non conveniens defense often means the end of the case for foreign plaintiffs. Professor Donald Childress explains

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122. Id.
123. Id.
124. Id.
125. There is an interesting question of federalism wrapped up in the forum non conveniens doctrine. Hoffman argues that “forcing state courts to follow federal forum non conveniens law is fundamentally inconsistent with general but deeply held tenets of federalism. The principles of Erie leave federal courts in diversity cases free to follow their own notions of forum non conveniens.” Id. at 950.
126. Usually this argument will be that the plaintiff’s home country cannot be trusted to fairly adjudicate the trial given that its government is implicated by the suit.
128. Id. at 60.
129. Id.
that “as empirically documented in the late-1980s, the result of a successful forum non conveniens motion was that plaintiffs generally did not refile their suits in foreign courts . . . instead, they tended to settle on terms favorable to the defendants or abandon their suits altogether.”

Thus, state court judges should treat forum non conveniens motions as dispositive in certain cases involving foreign nationals, and should thereby apply closer scrutiny before dismissing the case on these grounds.

3. Removal

Removal is a problem for foreign nationals because a case properly removed to federal court will be subject to the federal forum non conveniens doctrine. However, where the defendant is headquartered or has its principal place of business in-state, removal is impermissible. Removal becomes an issue where defendants are out-of-state. The circuits are split as to whether international disputes provide federal subject-matter jurisdiction that can form the basis for removal to federal court. For example, in Torres v. Southern Peru Copper Corp., the Fifth Circuit found that the foreign policy concerns of the plaintiffs’ claims created federal question jurisdiction. The Eleventh Circuit in Pacheco de Perez v. AT&T Co. then used the Fifth Circuit’s framework to evaluate whether the federal common law was triggered by state-law tort claims involving injuries suffered from pipeline explosions in Venezuela. While the court contemplated the possibility of federal question jurisdiction, the Eleventh Circuit ultimately held in Pacheco that “the evidence regarding Venezuela’s interests in the action was too tenuous” to establish federal jurisdiction over the case and that removal was therefore improper. The Second Circuit also used the framework established by Torres in Republic of the Philippines v. Marcos, where it considered federal question jurisdiction in a case in which the Philippine government tried to enjoin former President Marcos from selling his property in New York. There, the Second Circuit held found that removal was appropriate because the plaintiff’s claim directly affected American foreign relations.

The Ninth Circuit is the outlier in this pattern. In Patrickson v. Dole Food Co., the court denied any connection between questions of foreign relations and federal question jurisdiction. The Ninth Circuit ruled that a class action brought by Latin American banana workers who were allegedly exposed to

131. Id. (internal quotations omitted).
133. 113 F.3d 540, 543 (5th Cir. 1997).
134. 139 F.3d 1368, 1377 (11th Cir. 1998).
135. Id. at 1378.
136. Id. at 1378.
137. 806 F.2d 344, 348–49, 352 (2d Cir. 1986).
138. Id.
139. Id.
140. 251 F.3d 795, 803 (9th Cir. 2001).
toxic pesticides by multinational fruit and chemical companies failed to raise a federal question and therefore had to be remanded to state court.\footnote{141}{Id. at 808–09.}

The simple lesson from these cases, then, is that foreign nationals should file suit in the defendants’ state of incorporation or principal place of business, where there would clearly be personal jurisdiction over the corporation. If this is impossible because the defendant is a foreign corporation, foreign nationals should sue in a state encompassed by the Ninth Circuit. Given the confusion between the circuits as to what constitutes federal question jurisdiction in international claims, one might expect the Supreme Court to grant certiorari in the future in order to establish a unified framework for the circuits to follow. Not only would this provide consistency across the country, but it would also allow the Supreme Court to strengthen the principle it established in Kiobel. If the Supreme Court wants to prevent federal common law or U.S. statutes from applying extraterritorially, we can assume the Court would extend this principle to state common law and state statutes.

III. IMPLICATIONS FOR ENVIRONMENTAL TORT LITIGATION ABROAD

Notwithstanding the procedural challenges outlined above, a shift to state courts could have important and promising implications for transnational environmental tort litigation. While human rights litigators won and successfully settled a handful of cases, no foreign, intrastate pollution claim has ever been successful under the ATS.\footnote{142}{Goldhaber, supra note 85, at 138–49.} Accordingly, the post-Kobel landscape may provide environmental litigators with an opportunity to follow in the footsteps of their human rights counterparts.

A. Environmental Litigators’ Pre-Kiobel Track Record

Environmental litigators tried for many years to use the ATS to sue foreign corporations and governments for “intrastate” or “intranational” pollution—pollution occurring solely within one foreign country. In numerous cases, environmental litigators attempted to argue that violations of the “rights to health and life” and intranational pollution were violations of the law of nations and thereby reachable by U.S. courts under the ATS.

While the Supreme Court has never directly addressed these arguments, the appellate cases on point have all rejected such environmental claims. In Beanal v. Freeport-McMoran, Inc., for instance, the Fifth Circuit rejected the plaintiffs’ argument that damage to human health and the environment violated customary international law.\footnote{143}{197 F.3d 161, 165 (5th Cir. 1999).} In support of their argument, the plaintiffs submitted several United Nations resolutions, an affidavit of an international law professor, and the Rio Declaration on Environment and Development.\footnote{144}{Id. at 167.}

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\begin{itemize}
\item 141. Id. at 808–09.
\item 142. Goldhaber, supra note 85, at 138–49.
\item 143. 197 F.3d 161, 165 (5th Cir. 1999).
\item 144. Id. at 167.
\end{itemize}
The Fifth Circuit held that these sources of international law “merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts.”

In *Flores v. Southern Peru Copper Corp.*, moreover, the Second Circuit rejected similar claims. *Flores* involved residents of Ilo, Peru who represented a number of deceased Ilo residents. The plaintiffs alleged that Southern Peru Copper Corporation (SPCC) caused the deceased to suffer severe lung damage as a result of pollution from copper mining, refining, and smelting. They filed suit under the ATS claiming that “this ‘egregious and deadly’ local pollution constitutes a customary international law offense because it violates the ‘right to life,’ ‘right to health,’ and right to ‘sustainable development.’”

The district court in *Flores* held that the plaintiffs had not “demonstrated that high levels of environmental pollution within a nation’s borders, causing harm to human life, health, and development, violate well-established, universally recognized norms of international law.” Even if the plaintiffs had alleged a violation of customary international law, the trial court stated that the cases would have been dismissed on *forum non conveniens* grounds because Peru was a satisfactory forum.

Before affirming the district court’s holding, the Second Circuit surveyed the legal landscape of the ATS and foreign environmental torts. In *Aguinda v. Texaco, Inc.*, for instance, citizens of Peru sued Texaco based upon nearly identical allegations to those at issue in *Flores*. Before dismissing the case on *forum non conveniens* grounds, the trial court there noted that “the specific claim plaintiffs purport to bring under the [ATS]—that the Consortium’s oil extraction activities violated evolving environmental norms of customary international law . . . lacks any meaningful precedential support and appears extremely unlikely to survive a motion to dismiss.” Several years earlier, another district court in *Amlon Metals, Inc. v. FMC Corporation* dismissed out-of-hand the notion that environmental torts can violate customary international law. Having surveyed this jurisprudence, the *Flores* court determined that the trial court’s rejection of the plaintiffs’ claims was based upon well-established legal precedent that the right to human life, health, and

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145. *Id.*
146. 414 F.3d 233, 254 (2d Cir. 2003).
147. *Id.* at 236.
148. *Id.* at 237.
149. *Id.* at 237–38.
151. *Id.* at 544.
153. *Id.* at 552.
155. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 239–40 (2d Cir. 2003).
development is not customary international law.\textsuperscript{156}

The Second Circuit also articulated how courts define offenses of “customary international law” and why the plaintiffs’ allegations fell short.\textsuperscript{157} The court explained that making this determination is difficult for courts because “customary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas . . . [and] the relevant evidence . . . is widely dispersed and generally unfamiliar to lawyers and judges.”\textsuperscript{158} Despite these difficulties, the Second Circuit provided three elements that must be present in order for a law to be a customary international law: (1) “[s]tates must universally abide by it,” (2) “[s]tates accede to it out of a sense of legal obligation,” and (3) the law must address “only those ‘wrong[s]’ that are ‘of mutual, and not merely several concern’ to States.”\textsuperscript{159} While the “right to life” and “right to health” arguably satisfy each of these elements, the Second Circuit stated that these concepts are “boundless and indeterminate” and “express virtuous goals understandably expressed at a level of abstraction needed to secure adherence of States that disagree on many of the particulars regarding how to actually achieve them.”\textsuperscript{160} As to intrastate pollution, the Second Circuit found that plaintiffs’ affidavits and scholarly articles failed to demonstrate that foreign nations universally bar intrastate pollution.\textsuperscript{161}

\section*{B. Post-Kiobel Possibilities for Environmental Litigants}

Based on the appellate cases reviewed above, the concept of redressing intrastate pollution or violations of the rights to “health” and “life” through the ATS seemed dead even before \textit{Kiobel}. Given the new categorical bar against claims that do not sufficiently “touch and concern” the United States, it is unlikely that any foreign environmental tort claim will be successful under the ATS. Human rights litigators’ potential shift towards state court, however, presents a critical opportunity for environmental advocates.

Admittedly, environmental litigators could have brought claims in state courts even before \textit{Kiobel}, but they would have been venturing out into uncharted territory. First, state court cases for foreign claims are very difficult to track down. Moreover, the relatively small group of environmental litigators inclined to bring foreign suits would be faced with the enormous tasks of finding state court judges willing to hear foreign claims, identifying appropriate state laws under which to bring such claims, and understanding the distinct procedural hurdles posed by fifty state court systems.

In the wake of \textit{Kiobel}, there is likely to be a surge of foreign human rights claims filed in state courts, allowing environmental advocates to follow in the

\textsuperscript{156} \textit{Id.} at 254.

\textsuperscript{157} \textit{Id.} at 247.

\textsuperscript{158} \textit{Id.} at 247–48.

\textsuperscript{159} \textit{Id.} at 249.

\textsuperscript{160} \textit{Id.} at 255.

\textsuperscript{161} \textit{Id.}
footsteps of human rights litigators. As foreign claims in state court become a more common occurrence, there is a good chance that state court judges will be more comfortable hearing the merits of these cases. Accordingly, the post-
Kiobel shift to state courts will likely help environmental advocates develop a viable litigation strategy to combat intrastate pollution abroad.

CONCLUSION

Kiobel was a misguided decision. Not only was it a departure from very recently established precedent in Sosa, but it also sharply curtailed foreign nationals’ ability to have their claims heard by a neutral arbiter. State court is the best option for such plaintiffs in the wake of Kiobel. Such a move to state courts could have a silver lining for communities seeking to resist the impacts of corporate activities abroad. If human rights litigators can accumulate some defining victories in state court against multinational corporations, it will have a deterrent effect on corporations’ attempts to suppress local environmental protests. Not only would a company like Royal Dutch Shell be more likely to refrain from conspiring with foreign governments, the corporation might even go out of its way to ensure the safety of local protesters to avoid the appearance of conspiracy. In this way, local protestors could benefit from one of Kiobel’s albeit indirect consequences: a move toward more robust human rights and environmental adjudication in state courts.

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.