**International Business Transactions**

**Fall 2023**

**Professor Mike Ramsey**

**Supplemental reading for Problem 10.5**

**Nestlé USA, Inc. v. Doe**

Supreme Court of the United States, 2021.

141 S.Ct. 1931.

Justice THOMAS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II \* \* \*

The Alien Tort Statute (ATS) gives federal courts jurisdiction to hear certain civil actions filed by aliens. 28 U.S.C. § 1350. Although this jurisdictional statute does not create a cause of action, our precedents have stated that courts may exercise common-law authority under this statute to create private rights of action in very limited circumstances. Respondents here seek a judicially created cause of action to recover damages from American corporations that allegedly aided and abetted slavery abroad. Although respondents’ injuries occurred entirely overseas, the Ninth Circuit held that respondents could sue in federal court because the defendant corporations allegedly made “major operational decisions” in the United States. The Ninth Circuit erred by allowing this suit to proceed.

**I**

According to the operative complaint, Ivory Coast—a West-African country also known as Côte d'Ivoire—is responsible for the majority of the global cocoa supply. Respondents are six individuals from Mali who allege that they were trafficked into Ivory Coast as child slaves to produce cocoa.

Petitioners Nestlé USA and Cargill are U.S.-based companies that purchase, process, and sell cocoa. They did not own or operate farms in Ivory Coast. But they did buy cocoa from farms located there. They also provided those farms with technical and financial resources—such as training, fertilizer, tools, and cash—in exchange for the exclusive right to purchase cocoa. Respondents allege that they were enslaved on some of those farms.

Respondents sued Nestlé, Cargill, and other entities, contending that this arrangement aided and abetted child slavery. Respondents argue that petitioners “knew or should have known” that the farms were exploiting enslaved children yet continued to provide those farms with resources. They further contend that petitioners had economic leverage over the farms but failed to exercise it to eliminate child slavery. And although the resource distribution and respondents’ injuries occurred outside the United States, respondents contend that they can sue in federal court because petitioners allegedly made all major operational decisions from within the United States.

The District Court dismissed this suit after we held that the ATS does not apply extraterritorially. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). It reasoned that respondents sought to apply the ATS extraterritorially because the only domestic conduct alleged was general corporate activity. While this suit was on appeal, we held that courts cannot create new causes of action against foreign corporations under the ATS.  *Jesner* v. *Arab Bank, PLC*, 138 S.Ct. 1386 (2018). The Ninth Circuit then reversed the District Court in part. Although the Ninth Circuit determined that [*Jesner*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044386943&originatingDoc=Ib1b12d82cf3b11ebaa829251c41d9359&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=1fa571de86fa42e4827bc89eebdc84d3&contextData=(sc.UserEnteredCitation)) compelled dismissal of all foreign corporate defendants, it concluded that the opinion did not foreclose judicial creation of causes of action against domestic corporations. The Ninth Circuit also held that respondents had pleaded a domestic application of the ATS, as required by *Kiobel*, because the “financing decisions ... originated” in the United States. We granted certiorari and now reverse.

**II**

Petitioners and the United States argue that respondents improperly seek extraterritorial application of the ATS. We agree.

Our precedents reflect a two-step framework for analyzing extraterritoriality issues.  First, we presume that a statute applies only domestically, and we ask whether the statute gives a clear, affirmative indication that rebuts this presumption.  For the ATS, *Kiobel* answered that question in the negative.  Although we have interpreted its purely jurisdictional text to implicitly enable courts to create causes of action, the ATS does not expressly “regulate conduct” at all, much less “evince a clear indication of extraterritoriality.” [[*Kiobel*], at 115–118](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030367986&pubNum=0000708&originatingDoc=Ib1b12d82cf3b11ebaa829251c41d9359&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=1fa571de86fa42e4827bc89eebdc84d3&contextData=(sc.UserEnteredCitation)). Courts thus cannot give “extraterritorial reach” to any cause of action judicially created under the ATS. [*Id.*, at 117–118](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030367986&pubNum=0000708&originatingDoc=Ib1b12d82cf3b11ebaa829251c41d9359&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=1fa571de86fa42e4827bc89eebdc84d3&contextData=(sc.UserEnteredCitation)). Second, where the statute, as here, does not apply extraterritorially, plaintiffs must establish that the conduct relevant to the statute's focus occurred in the United States. \* \* \*

The parties dispute what conduct is relevant to the “focus” of the ATS. Respondents seek a judicially created cause of action to sue petitioners for aiding and abetting forced labor overseas. Arguing that aiding and abetting is not even a tort, but merely secondary liability for a tort, petitioners and the United States contend that “the conduct relevant to the [ATS's] focus” is the conduct that directly caused the injury. \* \* \* All of *that* alleged conduct occurred overseas in this suit. The United States also argues that the “focus” inquiry is beside the point; courts should not create an aiding-and-abetting cause of action under the ATS at all. See *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 182–183 (1994) (“[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant ..., there is no general presumption that the plaintiff may also sue aiders and abettors” because that would create a “vast expansion of federal law”). For their part, respondents argue that aiding and abetting is a freestanding tort and that courts may create a private right of action to enforce it under the ATS. They also contend that the “focus” of the ATS is conduct that violates international law, that aiding and abetting forced labor is a violation of international law, and that domestic conduct can aid and abet an injury that occurs overseas.

Even if we resolved all these disputes in respondents’ favor, their complaint would impermissibly seek extraterritorial application of the ATS. Nearly all the conduct that they say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast. The Ninth Circuit nonetheless let this suit proceed because respondents pleaded as a general matter that “every major operational decision by both companies is made in or approved in the U.S.” But allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS.

As we made clear in *Kiobel*, a plaintiff does not plead facts sufficient to support domestic application of the ATS simply by alleging “mere corporate presence” of a defendant. 569 U.S., at 125. Pleading general corporate activity is no better. Because making “operational decisions” is an activity common to most corporations, generic allegations of this sort do not draw a sufficient connection between the cause of action respondents seek—aiding and abetting forced labor overseas—and domestic conduct. \* \* \* To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity. The Ninth Circuit erred when it held otherwise.

*[In Part III of the opinion, Justice Thomas, joined only by Justices Gorsuch and Kavanaugh, argued that the Court should not recognize any additional ATS causes of action even if the alleged conduct occurred in the United States. Justice Gorsuch filed a concurring opinion joined in part by Justices*[*Alito*](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ib1b12d82cf3b11ebaa829251c41d9359&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=5b5694d49ed44ebb8f45ee29c27daf8c&contextData=(sc.UserEnteredCitation)&analyticGuid=Ib1b12d82cf3b11ebaa829251c41d9359)*and* [*Kavanaugh*](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=Ib1b12d82cf3b11ebaa829251c41d9359&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=5b5694d49ed44ebb8f45ee29c27daf8c&contextData=(sc.UserEnteredCitation)&analyticGuid=Ib1b12d82cf3b11ebaa829251c41d9359)*. Justice*[*Sotomayor*](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Ib1b12d82cf3b11ebaa829251c41d9359&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=5b5694d49ed44ebb8f45ee29c27daf8c&contextData=(sc.UserEnteredCitation)&analyticGuid=Ib1b12d82cf3b11ebaa829251c41d9359)*filed an opinion concurring in part and concurring in the judgment, in which Justices*[*Breyer*](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ib1b12d82cf3b11ebaa829251c41d9359&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=5b5694d49ed44ebb8f45ee29c27daf8c&contextData=(sc.UserEnteredCitation)&analyticGuid=Ib1b12d82cf3b11ebaa829251c41d9359)*and*[*Kagan*](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ib1b12d82cf3b11ebaa829251c41d9359&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=5b5694d49ed44ebb8f45ee29c27daf8c&contextData=(sc.UserEnteredCitation)&analyticGuid=Ib1b12d82cf3b11ebaa829251c41d9359)*joined. Justice*[*Alito*](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ib1b12d82cf3b11ebaa829251c41d9359&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=5b5694d49ed44ebb8f45ee29c27daf8c&contextData=(sc.UserEnteredCitation)&analyticGuid=Ib1b12d82cf3b11ebaa829251c41d9359)*filed a dissenting opinion, arguing for procedural reasons the Court should not reach the extraterritoriality question.]*

**Doe I v. Cisco Systems, Inc.**

United States Court of Appeals, Ninth Circuit, 2023.

73 F.4th 700.

Berson, Circuit Judge

Plaintiff-Appellants are practitioners of Falun Gong, a religion originating in China in the 1990s. They allege that they or family members are victims of human rights abuses committed by the Chinese Communist Party and Chinese government officials. The alleged abuses, Plaintiffs contend, were enabled by the technological assistance of Defendants, U.S. corporation Cisco Systems, Inc., and two Cisco executives, John Chambers and Fredy Cheung (collectively, “Cisco,” except where otherwise noted).

Plaintiffs initiated this lawsuit more than a decade ago, alleging that Cisco aided and abetted or conspired with Chinese officials in violation of the Alien Tort Statute, 28 U.S.C. § 1350, the Torture Victim Protection Act of 1991 (“TVPA”), 28 U.S.C. § 1350 note, and other federal and state laws. Specifically, Plaintiffs contend that Cisco, operating largely from its corporate headquarters in California, “designed, implemented and helped to maintain a surveillance and internal security network” for Chinese officials, greatly enhancing their capacity to identify Falun Gong practitioners and ensnare them in a system of physical and mental torture, forced labor, and prolonged and arbitrary detention.

\* \* \* [We] hold Plaintiffs’ allegations against corporate defendant Cisco sufficient to meet the applicable aiding and abetting standard. We also conclude that this case involves a permissible domestic application of the ATS against corporate defendant Cisco, because much of the corporation’s alleged conduct constituting aiding and abetting occurred in the United States. Finally, we reverse the district court’s dismissal of the claim under the TVPA against Chambers and Cheung, as the TVPA does provide a private right of action against those who aid and abet torture, and the allegations against Chambers and Cheung are sufficient to meet the aiding and abetting standard.

\* \* \*

\* \* \* [T]he Supreme Court in *Jesner* concluded that the First Congress of the United States enacted the ATS as part of the Judiciary Act of 1789 to “promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable.”

The precise contours of the ATS remained largely undefined for nearly two hundred years. Beginning with the seminal case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the ATS gained new relevance and, more recently, definition. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). Two developments in the fleshing out of the ATS are of particular relevance to this case.

First, in *Sosa*, the Supreme Court delineated a “high bar” for recognition of new causes of action under the ATS. \* \* \* At the time the ATS was enacted, the common law recognized only three such causes of action: “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Id*. at 715 (citing 4 William Blackstone, Commentaries \*68). *Sosa* concluded that under the ATS only claims that “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to” those causes of action may be recognized today. *Id*. at 725. *Sosa* additionally instructed that courts are to consider foreign policy consequences and separation-of-power concerns before recognizing a cause of action or allowing a particular case to proceed. *Id*. at 728, 732–33. These requirements have been interpreted as prescribing a two-part test for determining whether a new cause of action may be recognized under the ATS.

Second, *Kiobel* applied the general presumption against the extraterritorial application of U.S. statutes to the ATS and concluded that nothing in the ATS rebutted the presumption. Accordingly, the ATS “applies only domestically,” and plaintiffs bringing an ATS claim “must establish that ‘the conduct relevant to the statute’s focus occurred in the United States.’” *Nestlé*, 141 S. Ct. at 1936.

After *Sosa*, *Jesner*, and *Kiobel*, then, a foreign plaintiff may bring suit in federal court under the ATS for a tort committed in violation of the law of nations only if (1) the tort passes *Sosa*’s two-part test regarding the definition and specificity of the action and the practical and foreign policy implications of its recognition and (2) the conduct relevant to the statute’s focus occurred in the United States.

Here, the ATS Plaintiffs are Chinese nationals suing for international human rights violations including torture; forced labor; prolonged arbitrary detention; extrajudicial killing; disappearance; cruel, inhuman, or degrading treatment; and crimes against humanity. Plaintiffs do not contend that Cisco directly committed any of the alleged violations, but rather that it aided and abetted or entered into a conspiracy or joint criminal enterprise with the Chinese Communist Party and Public Security officers to perpetrate the torts. Thus, the suit may proceed under the ATS only so long as the international law violations Plaintiffs allege, including aiding and abetting, meet *Sosa*’s two-part test, and conduct with regard to the violations that meet that test occurred in the United States.

\* \* \*

Our Circuit has acknowledged several times the availability of aiding and abetting liability under the ATS. We now revisit the question and conclude again, in agreement with every circuit to have considered the issue, that aiding and abetting liability is a norm of customary international law with sufficient definition and universality to establish liability under the ATS. Because recognizing aiding and abetting liability does not raise separation-of-powers or foreign policy concerns under *Sosa* step two, we further decide, such liability is cognizable for the purposes of the ATS.

\* \* \*

The standard for accomplice liability is determined by customary international law. We join the Second, Fourth, and Eleventh Circuits in holding that the global consensus is that the actus reus of aiding and abetting liability requires assistance to the principal with substantial effect on an international law violation. Like the Eleventh Circuit, we additionally hold the mens rea for aiding and abetting liability under customary international law is knowing assistance. Applying this standard, we conclude that Plaintiffs plausibly alleged that corporate defendant Cisco provided assistance to the Party and to Chinese Public Security that had substantial effects on those entities’ violations of international law. We further hold that Plaintiffs plausibly alleged that corporate defendant Cisco knowingly provided such assistance.

*[The court extensively analyzed international law authorities.]*

\* \* \*

The knowledge mens rea standard is satisfied when a defendant acts with knowledge that the defendant’s actions will assist in the commission of a crime or with awareness of a substantial likelihood that [the defendant’s] acts would assist the commission of a crime. It is not necessary that the aider or abettor know the precise crime that was intended and was in fact committed—if the accused is aware that one of a number of crimes will probably be committed, and one of those crimes is committed, the standard is satisfied. An accused’s statements regarding the purposes and goals of the project for which they are providing assistance can establish awareness that crimes are likely to be committed. And when ongoing abuses are common knowledge, knowing action may be imputed to the defendant.

Plaintiffs allege Cisco acted with actual and constructive knowledge of the intended uses of the Golden Shield project, particularly its use in the douzheng of Falun Gong, which involved a substantial likelihood of human rights abuses. The complaint alleges that during the bidding process, Chinese authorities communicated to Cisco and other corporations that they “were primarily concerned with whether the technology could eliminate Falun Gong adherents and activity.” Cisco’s marketing materials and internal reports reflect this goal, repeatedly mentioning the connection between Cisco’s technological assistance and the crackdown on, or “douzheng” of, Falun Gong adherents. Plaintiffs refer to douzheng “the term of art used to describe persecutory campaigns comprising persecution and torture.” They allege that Cisco understood the meaning of douzheng and used it intentionally: “[i]nvoking the Party’s use of douzheng and similar rhetoric has been central to Cisco’s intent to curry favor with Communist Party leaders by displaying the ideological orthodoxy needed to maintain insider status in Party dealings.” One Cisco PowerPoint presentation noted that the key purpose of the Golden Shield project included douzheng, and other Cisco reports referred to “Strike Hard” campaigns against “evil cults.” A Cisco software engineer allegedly described douzheng as a “major purpose” of the software. And Cisco’s website discusses the ability of Cisco’s network design features to enhance “social stability,” a term Plaintiffs allege Cisco knew was a code word for the elimination of dissident groups, including the “douzheng of Falun Gong.” A Cisco training session available online in 2012 described Falun Gong practitioners as “viruses” and “pestilence,” mirroring Party propaganda.

Plaintiffs also allege that Cisco internal files contain references to the Chinese authorities’ douzheng goals in building and improving the Golden Shield, including mention of Office 610 (an entity focused specifically on the targeting of Falun Gong practitioners) and of detention centers, hospitals, psychiatric facilities, and re-education through labor camps. \* \* \*

In the United States and Europe, both independent news media and government entities reported on the widespread abuses taking place in China against the Falun Gong movement. The U.S. State Department issued reports on the situation, documenting the use of detention and torture as early as 1999 and every year since. \* \* \* Other groups also published concerns with the violations of international law committed during China’s crackdown on Falun Gong, including the U.S. Commission on International Religious Freedom (2012 Report), the United Nations Human Rights Council’s Special Rapporteur, and the European Parliament. Finally, the New York Times, Associated Press, Wall Street Journal, and other news outlets widely reported on the torture, including torture resulting in death, and detention of Falun Gong adherents in China.

In sum, the complaint alleges facts demonstrating that Cisco was aware of the Party and Chinese authorities’ goal to use Golden Shield technology to target Falun Gong adherents and that it was widely known that the authorities’ efforts involved significant and ongoing violations of international law, especially torture and arbitrary detention.

\* \* \*

Cisco maintains that Plaintiffs have failed to plead facts sufficient to overcome the presumption against extraterritoriality articulated in *Kiobel*, and *Nestlé*. Specifically, Cisco contends that the complaint fails to connect the illegal acts of Chinese security on Chinese soil to Cisco’s corporate conduct in San Jose, California. According to Cisco, Plaintiffs have pleaded only domestic conduct amounting to general corporate activity, which is not actionable under the ATS. We disagree \* \* \*.

*Kiobel* held that the ATS does not apply extraterritorially. When plaintiffs seek to apply a statute that “does not apply extraterritorially, [they] must establish that the conduct relevant to the statute’s focus occurred in the United States.” *Nestlé*, 141 S. Ct. at 1936; see Morrison v. Nat’l Austl. Bank Ltd., 561 U.S. 247, 266 (2010). If so, “the case involves a permissible domestic application even if other conduct occurred abroad.” *Id*. *Kiobel* and *Nestlé* held that “mere corporate presence,” and “allegations of general corporate activity,” including corporate decision-making, are insufficient to show domestic conduct warranting application of the ATS. \* \* \*

As we have established, Plaintiffs have plausibly alleged that Cisco took actions that satisfied the actus reus and mens rea of aiding and abetting liability. We now consider whether those alleged actions took place in the United States. \* \* \*

 As discussed, Cisco is alleged to have supplied significant software, hardware, and ongoing support to the Party and Chinese authorities, thereby providing assistance with substantial effect on the commission of international law violations. Specifically, the complaint alleges that the Golden Shield apparatus was “designed and developed by Defendants in San Jose,” and that “[a]ll of the high level designs provided by Cisco to its Chinese customers were developed by engineers with corporate management in San Jose, the sole location where Cisco cutting edge integrated systems and components were researched and developed.”

The complaint also alleges corporate decision-making and oversight in San Jose of actions taken in China to build and integrate Golden Shield technology provided by Cisco. But the complaint further notes that “[i]n addition [to general decision-making], the Defendants, from their San Jose headquarters, handled all aspects of the high-level design phases including those enabling the douzheng of Falun Gong.” During the request for proposal and design phases, for example, “the Defendants in San Jose described sophisticated technical specification linked to the . . . functions of the Golden Shield, including . . . who can access information, how the information is transmitted, transmission speeds, [and] data storage location and capacity.”

The complaint additionally alleges “[f]or technologically advanced important overseas projects like the Golden Shield, [Cisco] operating out of San Jose routinely assigns its own engineering resources to design and implement the project in its entirety and in particular through its Advanced Services Team[,] . . . a specialized service offered by San Jose Defendants that employs experts and engineers in network technology for large-scale overseas projects or important clients.” For the Golden Shield technology, specifically, the “operation and optimization phases” were “orchestrated” from San Jose, and system practices were “carefully analyzed and made more efficient as well as increased in scope by Cisco engineers in San Jose.”

Additionally, the “post-product maintenance, testing and verification, [and] training and support” that “Cisco provided to Public Security” “required intensive and ongoing involvement by Cisco employees in San Jose.” Finally, “San Jose manufactured key components of the Golden Shield in the United States, such as Integrated circuit chips that function in the same manner as the Central Processing Unit of a computer.” Additionally, Plaintiffs have plausibly alleged that Cisco’s domestic activities satisfied the mens rea for aiding and abetting liability. For example, the “anti-Falun Gong objectives communicated to Cisco were . . . outlined in Cisco internal reports and files . . . kept in San Jose.” Cisco materials using the term douzheng to describe the purpose of the Golden Shield, and referring to “Strike Hard” campaigns against “evil cults,” “were identified as emanating from Cisco San Jose.” And, as discussed above, U.S. government entities and news media widely reported on the torture and detention of Falun Gong adherents in China.

In sum, Plaintiffs allege that Cisco designed, developed, and optimized important aspects of the Golden Shield surveillance system in California; that Cisco manufactured hardware for the Golden Shield in California; that Cisco employees in California provided ongoing maintenance and support; and that Cisco in California acted with knowledge of the likelihood of the alleged violations of international law and with the purpose of facilitating them.

Contrary to Cisco’s arguments, the corporation’s domestic actions, as plausibly alleged in the complaint, well exceeded “mere corporate presence” or simple corporate oversight and direction. Rather, the design and optimization of integrated databases and other software, the manufacture of specialized hardware, and ongoing technological support all took place in California. Unlike in *Kiobel* and *Nestlé*, in which all or nearly all the actions that constituted assistance to the principal occurred abroad, the domestic activities alleged here constituted essential, direct, and substantial assistance for which aiding and abetting liability can attach. \* \* \*

We conclude that Plaintiffs’ case against Cisco “involves a permissible domestic application [of the ATS] even if other conduct occurred abroad.” *Nestlé*, 141 S. Ct. at 1936.

*[The court dismissed the ATS claims against the individual defendants as entirely extraterritorial, but allowed TVPA claims against the individuals to proceed.]*

CHRISTEN, Circuit Judge, concurring in part and dissenting in part.

\* \* \* I agree with my colleagues that Plaintiffs’ complaint states a claim under the Torture Victim Protection Act [against the individual defendants]. \* \* \* I conclude that recognizing liability for aiding and abetting alleged human rights violations, committed in China and against Chinese nationals by the Chinese Communist Party and the Chinese government’s Ministry of Public Security, is inconsistent with the purpose of the Alien Tort Statute. I would affirm the dismissal of Plaintiffs’ Alien Tort Statute claims on this basis, and go no further.

\* \* \*

I see several sound reasons to decline to recognize a cause of action for aiding and abetting the acts alleged in Plaintiffs’ complaint, and I am deeply concerned about the practical consequences of allowing Plaintiffs’ claims to go forward without input from the political branches. The Supreme Court has explained that “[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.” *Jesner*, 138 S. Ct. at 1403. Under the Constitution, “matters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” *Haig v. Agee*, 453 U.S. 280, 292 (1981). We are ill-equipped to serve as instruments of foreign policy, an arena in which it is particularly important for the United States to speak “with one voice.” *United States v. Pink*, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring).

Federal courts were not designed to play a leading role in our nation’s international affairs. Holding Cisco liable in this case would not directly impose liability on the Chinese government for its conduct with respect to its own nationals, but a finding of liability in this case would necessarily require a showing that the Chinese Communist Party and Ministry of Public Security violated international law with respect to the Chinese-national Plaintiffs. Such a finding could have serious ramifications for Sino-American relations, fraught as they already are. The concerns the Court expressed in *Jesner* about holding a foreign corporation liable apply tenfold to a case that hinges on whether a foreign government’s treatment of its own nationals violated international law. I see no way to reconcile the majority’s decision to allow Plaintiffs’ claims to proceed with the ATS’s aim “to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable.” *Jesner*, 138 S. Ct. at 1406. Plaintiffs’ claims and the ATS are at cross-purposes: the availability of the remedy Plaintiffs seek is far more likely to provoke a foreign nation than the absence of such a remedy.

\* \* \*

The foreign policy consequences that will result from this suit could be very significant. I do not downplay the seriousness of the Plaintiffs’ allegations or the gravity of the harms their complaint describes, but proving that Cisco aided and abetted the terrible human rights violations alleged in the complaint requires proving that the Chinese Communist Party and the Chinese Ministry of Public Security committed those violations in the first place. As such, allowing this case to move forward is inconsistent with our obligation to exercise “great caution in adapting the law of nations to private rights.” *Sosa*, 542 U.S. at 728. Because I would not reach the merits, I respectfully dissent from the majority’s decision to allow plaintiffs’ ATS claims to proceed.

Questions and Comments

1. What does *Nestlé* add to the analysis? Does it expand or cut back on *Kiobel* and *Jesner*? How did the plaintiffs in *Nestlé* attempt to distinguish *Kiobel* and *Jesner*? What are the implications for DGI?

2. How worrisome a case is *Cisco* for DGI? How is it similar, and how might it be distinguished? What additional facts do you need to know?

3. Is *Cisco* consistent with the previous Supreme Court decisions in *Kiobel*, *Jesner* and *Nestlé*? How does the court of appeals distinguish them? Are those distinctions likely to be persuasive to the Supreme Court? Are the distinctions helpful to DGI?

4. Judge Christen’s dissent focuses on the aiding and abetting issue, which the Supreme Court has not addressed. What is her principal concern? Is that helpful to DGI? The *Cisco* case remains pending (as of 2023). Are its core holdings likely to survive further review? How does that affect counsel’s ability to advise OPM?

5. In light of all of these developments, how do you advise DGI—can DGI (or any of its related corporations) be held liable for the acts of the Indonesian government? What will plaintiffs need to show? What would be especially bad facts for DGI? What would be good facts? How sure are you of the legal standard? In particular, what are the specific legal obstacles plaintiffs will need to overcome? Are there ways you can advise DGI as to future conduct to reduce the risk of ATS liability, either on this investment or future ones? ATS compliance has become an important role for lawyers advising corporations with foreign operations. Are there ethical concerns in how one might advise corporations to reduce ATS liability?

6. In addition to the ATS, might the plaintiffs have other options? Is the TVPA a potential concern to DGI? Consider the TVPA claim in *Cisco*. Further as to federal law, the Trafficking Victims Protection Reauthorization Act (TVPRA), 18 U.S.C. § 1581, provides a cause of action for victims of forced labor. In *Doe v. Apple, Inc.,* 2021 WL 5774224 (D.D.C. 2021), a case involving forced labor in China, the court held that the TVPRA is not extraterritorial (an appeal is pending). If no federal claim is available, could the plaintiffs sue under state law? Or Indonesian law?