What will the Supreme Court do with the Alien Tort Statute?

What a strange day at the Supreme Court. If you didn't know you were before a court of law, you might have thought you were a fly on the wall at a legislative bill drafting commission. Indeed, as the oral argument in the *Kiobel* case developed, it was pretty clear that the Court was focused on two choices. First, it could hold that the ATS does not apply extraterritorially and thus encourage Congressional action—as the Court did in the *Morrison v. National Australia Bank* case. Second, it could undertake some saving construction of the ATS and thus encourage another several years of ATS litigation and academic commentary. Whatever the Court decides, it is likely to encourage what I am calling in a current work in process (which I hope to have done in the next month or so) a "brave new world of transnational litigation" where federal, state, and foreign courts compete through their courts and law to adjudicate transnational cases.

To me, one of the most intriguing aspects of the oral argument was the focus on the interest of the United States in adjudicating the case. In the first couple of minutes, Justice Kennedy asked: "What effects that commenced in the United States or that are closely related to the United States exist between what happened here and what happened in Nigeria?" Why did he ask this? Because he, and others, are concerned that allowing a U.S. court to hear a case where there is little or no nexus to this country potentially allows the courts of other countries to hear cases against U.S. corporations where they too have little nexus to the case at bar. So, one series of concerns is directed at reciprocity—if the Court permits U.S. courts to hear these cases against foreign corporations, then foreign courts may hear these cases against U.S. corporations. The question is how might the Court leave open the ATS without subjecting U.S. corporations to expansive jurisdiction in other countries?

Another concern is foreign affairs, and there were a series of questions directed at whether the State Department could sort out some of these issues by requesting dismissal. I have looked at this issue in some detail in the context of international comity. It is not clear to me, however, based on the oral argument that this approach can get a majority.

So, if the Court is not inclined to apply the presumption against extraterritoriality in a robust way but is concerned about a broad construction of the ATS, what might it do? Justice Sotomayor took up the suggestion of an amicus brief filed by the European Commission to lay the ground work for a compromise position. As it had in *Sosa*, the Commission argued that ATS cases should be permitted only where the plaintiff has exhausted local and international legal remedies, or demonstrates that such remedies are unavailable or futile. The Commission defines "local" as "those states with a traditional jurisdictional nexus to the conduct," which would mean, I think, those jurisdictions where the conduct or injury occurred and the home jurisdiction of the defendant. It might also include the home jurisdiction of the plaintiff, if the plaintiff were not a domiciliary of any of these other places.

The key for this exhaustion requirement, as explored by Justice Kagan, is that it not only requires exhaustion of local remedies at the place of conduct or injury, as does the Torture Victims Protection Act, but also other potential fora that may have a closer connection to the case. So, in this case, exhaustion of remedies in at least Nigeria, the Netherlands, and the U.K. would be required before a U.S. court could hear the case. Armed with such an exhaustion requirement, a defendant could argue for dismissal in favor of various foreign fora.

Note, however, that exhaustion of remedies is generally an affirmative defense. Thus, if a defendant forgets to plead it or makes the decision to waive it, then the U.S. court would hear the case, as many TVPA cases illustrate. A defendant might make this tactical decision to waive where it determines that the U.S. court has the best law and procedure to litigate the case. So, the Court may need a secondary fix for these cases—perhaps forum non conveniens? Furthermore, requiring exhaustion means that many ATS-like cases will be filed in foreign courts, proceed to judgment, and then return as enforcement actions in the United States. So, there is some potential that these cases will return to U.S. courts, albeit under a constrained standard of review, down the road. As I examine in a forthcoming piece in the *Virginia Journal of International Law*, if there is a strong likelihood that the foreign judgment will be enforced in the United States, why should the U.S. court dismiss the case outright and tie its hands when the later enforcement proceeding is brought?

At bottom, a rewrite of the ATS by the Court has the potential to open up a Pandora's box of new issues for courts and commentators to deal with. Here is

just a taste of what the future may bring.