

POST-KIOBEL PROCEDURE: SUBJECT MATTER JURISDICTION OR PRESCRIPTIVE JURISDICTION?

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ABSTRACT

This Essay evaluates whether Alien Tort Statute (ATS) cases involving foreign elements raise questions of prescriptive jurisdiction or subject matter jurisdiction after the Supreme Court's decision in Kiobel v. Royal Dutch Petroleum. It concludes that the lower court trend treats Kiobel as going to subject matter jurisdiction, and that this trend is probably correct. It would have been helpful for the Supreme Court to clearly provide guidance on this question—which has major doctrinal and procedural consequences for the law and litigants. The procedural implications of viewing challenges based on Kiobel as going to judicial subject matter jurisdiction are that such challenges can be raised at any time during the course of litigation, including by the court sua sponte. The doctrinal implications are that when evaluating whether Kiobel's exception for "claims that touch and concern the territory of the United States, . . . with sufficient force to displace the presumption against extraterritorial application," courts should look not only to whether the conduct alleged touches and concerns the United States, but instead, as some lower courts have found, to "all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action."

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|--|----|
| INTRODUCTION | 50 |
| I. PRESCRIPTIVE JURISDICTION VERSUS SUBJECT MATTER JURISDICTION | 52 |
| II. LOWER COURT APPLICATION POST- <i>KIOBEL</i> | 56 |
| III. ANALYSIS AND IMPLICATIONS | 59 |
| CONCLUSION | 62 |

INTRODUCTION

This Essay evaluates how lower courts are presently viewing objections to Alien Tort Statute (ATS) claims involving foreign elements after the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*, which applied a species of presumption against extraterritoriality to ATS claims arising abroad.¹ More specifically, we ask whether challenges based on *Kiobel* go to a court's subject matter jurisdiction to entertain claims arising abroad or instead to US prescriptive jurisdiction to regulate the foreign conduct alleged, and thus the merits of the case. This is an issue that has largely been analytically ignored by courts and scholars, yet it has created a fractured lower-court jurisprudence and holds immense procedural and doctrinal consequences for litigants and the development of the law.

The legal concept of jurisdiction is not monolithic; rather, it is made up of different forms that describe different assertions and applications of legal power. Moreover, different legal doctrines attend different forms of jurisdiction, making identification of the correct form or forms of jurisdiction at issue in a dispute critical both doctrinally and procedurally to the resolution of that dispute. Of central importance to this Essay is the difference between what courts, including the US Supreme Court, refer to as "prescriptive jurisdiction," or jurisdiction to prescribe rules that regulate conduct, and adjudicative "subject matter jurisdiction," or the jurisdiction of courts to entertain certain claims.²

As the very articulation of this distinction should begin to make clear, how one answers the jurisdictional question can have profound effects on how one treats post-*Kiobel* cases that have foreign elements, in light of the Supreme Court's statement at the end of its opinion that: "On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do

¹ 133 S. Ct. 1659 (2013).

² *Morrison v. Nat'l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2875–77 (2010); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting).

so with sufficient force to displace the presumption against extraterritorial application.”³ On the one hand, if the relevant type of jurisdiction is prescriptive jurisdiction to regulate foreign conduct, the appropriate focus would seem to be on the location of the conduct underlying the suit—as suggested by the first sentence of the *Kiobel* quotation. As a procedural matter, the objection therefore must be raised early in the litigation or else it is waived.⁴ If, on the other hand, the relevant type of jurisdiction is the court’s subject matter jurisdiction over claims arising abroad, the appropriate focus would seem to be whether the claims “touch and concern the territory of the United States”—as suggested by the second sentence of the *Kiobel* quotation. This latter inquiry conceivably opens up the analysis to encompass not just the conduct at issue, but also other features of the claim that might touch the United States, including, for example, the nationality of the parties. As a procedural matter, this objection can be raised any time—indeed, it can be raised by the court *sua sponte* at any stage in the litigation—and is not subject to waiver. In short, whether courts treat *Kiobel* as going to prescriptive jurisdiction or subject matter jurisdiction can have major consequences for both the doctrinal development of the law and the procedures parties must use to litigate ATS claims.

Part I of the Essay describes the twists and turns of a meandering Supreme Court jurisprudence on the difference between prescriptive jurisdiction and subject matter jurisdiction in cases with foreign elements—a jurisprudence that ends with *Kiobel*’s strange failure to say whether the defect before it was one of prescriptive or subject matter jurisdiction.

Part II assesses lower court case law since *Kiobel*. It explains that most courts have treated *Kiobel* as going to the court’s subject matter jurisdiction. Yet at least one court has explicitly held the opposite, viewing arguments based on *Kiobel* as going to the merits and therefore waived because they were not timely raised. Other courts have made oblique overtures in this direction as well. Perhaps the most noteworthy aspect of this lower court jurisprudence, however, is the remarkable failure of any court to provide sustained analysis of *why* it viewed the jurisdictional issue as one of either prescriptive or subject matter jurisdiction. Both sides of the issue appear to merely assume they are correct without analysis.

Part III of the Essay seeks to fill this gap and provide some analysis. It suggests that the lower court trend of treating the issue as one of subject

³ *Kiobel*, 133 S. Ct. at 1669 (2013) (internal citation omitted).

⁴ See *Ahmed v. Magan*, No. 2:10-cv-00342, 2013 WL 4479077, at *1–2 (S.D. Ohio Aug. 20, 2013).

matter jurisdiction is probably correct in light of the ATS's "strictly jurisdictional nature" and the notable absence of conduct-regulating rules in the statute, even if that interpretation renders the law incoherent in light of the Supreme Court's other recent extraterritoriality decision, *Morrison v. National Australia Bank*.⁵ Part III then continues by exploring the procedural and doctrinal implications of this classification. To wit, because subject matter jurisdiction inquiries may consider not only the conduct alleged but also all of the components comprising a claim—including the nationalities of the parties—the key post-*Kiobel* inquiry is whether "the claims touch and concern the territory of the United States, . . . with sufficient force to displace the presumption against extraterritorial application."⁶

I. PRESCRIPTIVE JURISDICTION VERSUS SUBJECT MATTER JURISDICTION

Judicial treatment of what type of jurisdiction the presumption against extraterritoriality operates on is messy and inconsistent. Confusion on this question can be traced to the Supreme Court's opinion in *Hartford Fire Insurance Co. v. California*, where the Court evaluated whether the Sherman Antitrust Act reached foreign conduct as a question of the district court's subject matter jurisdiction.⁷ Justice Scalia rejected this view in dissent, explaining that "the extraterritorial reach of the Sherman Act . . . has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct."⁸ Justice Scalia noted that "[t]here is, however, a type of 'jurisdiction' relevant to determining the extraterritorial reach of a statute; it is known as 'legislative jurisdiction,' or 'jurisdiction to prescribe.'"⁹ He clarified that prescriptive jurisdiction "refers to 'the authority of a state to make its law applicable to persons or activities,' and is quite a separate matter from 'jurisdiction to adjudicate.'"¹⁰ In Justice Scalia's view, the proper inquiry in *Hartford Fire* was not whether courts should decide to exercise subject matter jurisdiction over claims

⁵ 130 S. Ct. 2869 (2010).

⁶ *Kiobel*, 133 S. Ct. at 1669.

⁷ See *Hartford Fire*, 509 U.S. 764 at 798–99.

⁸ *Id.* at 813 (Scalia, J., dissenting).

⁹ *Id.* (internal citations omitted).

¹⁰ *Id.* (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, intro. note (1987)).

arising out of foreign conduct, but rather whether Congress intended the Sherman Act's substantive, conduct-regulating rules to reach that foreign conduct.¹¹ To resolve this question, Justice Scalia employed longstanding canons of statutory construction¹² to conclude that Congress did not so intend.

The Court later reversed course in *Morrison v. National Australia Bank*, a case involving claims by foreign plaintiffs against foreign defendants for fraud in connection with stock purchased on a foreign exchange.¹³ At issue was if, and how, a statutory presumption against extraterritorial application attached to the US Securities Exchange Act.¹⁴ Justice Scalia began the Court's opinion in *Morrison* with a section devoted entirely to "correct[ing] a threshold error in the Second Circuit's analysis."¹⁵ According to the Court in *Morrison*, the lower court had mistakenly "considered the extraterritorial reach of § 10(b) [of the Exchange Act] to raise a question of subject-matter jurisdiction"¹⁶ The Court corrected this error: "But to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, 'refers to a tribunal's power to hear a case'"¹⁷ After distinguishing the extraterritorial reach of § 10(b)'s prescriptive conduct-regulating rule prohibiting fraud as "an issue quite separate" from the subject matter jurisdiction of US courts, the Court observed that as to the latter, under the Exchange Act "[t]he District Court here had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies to [the defendant's] conduct,"¹⁸ and quoted the relevant language of § 78aa, which provides:

The district courts of the United States . . . shall have exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law

¹¹ See *id.* at 813–21.

¹² See *id.* at 814–15.

¹³ 130 S. Ct. 2869, 2875–76 (2010).

¹⁴ See *id.* at 2877–78.

¹⁵ *Id.* at 2876–77.

¹⁶ *Id.* at 2877.

¹⁷ *Id.* (quoting *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81 (2009) (internal quotation marks omitted)).

¹⁸ *Id.* (footnote omitted).

brought to enforce any liability or duty created by [the Exchange Act] or the rules and regulations thereunder.¹⁹

Under *Morrison*, therefore, the extraterritorial reach of a statute is a question of prescriptive, not judicial subject matter, jurisdiction. It followed that whether and how a presumption against extraterritoriality applied concerned a statute's conduct-regulating rules, not its subject matter jurisdiction provisions for courts. Indeed, even where the plaintiff, the defendant, and the transaction were foreign, the Court stressed that judicial subject matter jurisdiction existed under the Exchange Act's jurisdictional provisions.

But then the course of the Court's jurisprudence seemed to change yet again, or at least became somewhat muddled, three years later in *Kiobel*.²⁰ At issue was "whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute [ATS], for violations of the law of nations occurring within the territory of a sovereign other than the United States."²¹ The ATS grants US district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations"²² As the statutory language indicates—and as the Court in *Kiobel* acknowledged—the ATS is "strictly jurisdictional." It does not directly regulate conduct or afford relief."²³

Kiobel involved ATS claims by Nigerian plaintiffs against British, Dutch, and Nigerian corporate defendants alleging harmful conduct in Nigeria.²⁴ Like *Morrison*, *Kiobel* therefore was a "foreign-cubed" case. Under *Morrison*, the result should have been clear: because the ATS is "strictly jurisdictional" and "does not directly regulate conduct,"²⁵ a presumption against extraterritoriality is inapplicable. That is, like §78aa of the Exchange Act, the ATS goes to the court's subject-matter jurisdiction; both §78aa and the ATS simply authorize US courts with "jurisdiction." Under the ATS, that "jurisdiction" encompasses "any civil action by an alien for a tort only, committed in violation of the law of nations"²⁶ If the

¹⁹ *Id.* at 2877 n.3 (alteration in original) (quoting 15 U.S.C. § 78aa).

²⁰ 133 S. Ct. 1659 (2013).

²¹ *Id.* at 1662.

²² 28 U.S.C. § 1350 (2012).

²³ 133 S. Ct. at 1664 (internal citation omitted) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

²⁴ *Id.* at 1662–63.

²⁵ *Id.* at 1664.

²⁶ 28 U.S.C. § 1350.

ATS does not sufficiently indicate extraterritorial application, certainly neither does § 78aa. And if the district court in *Morrison* “had jurisdiction under 15 U.S.C. § 78aa”²⁷ over claims involving extraterritorial activity—as the Supreme Court explicitly said it did—then the district court in *Kiobel* also should have had jurisdiction under the ATS over claims involving extraterritorial activity.

The Supreme Court nonetheless applied the presumption, or at least some variation thereof, for the Court did not appear to apply the presumption directly to the ATS proper. Rather, the Court seized upon the cause of action allowed by the ATS.²⁸ This was an odd choice since the presumption against extraterritoriality is a canon of *statutory* construction. Yet we have already seen that applying the presumption directly to the ATS itself would be awkward, because the ATS, like § 78aa of the Exchange Act, is a jurisdictional statute. And in fact, the Court did not quite do that; instead, it tried to stretch the presumption around, or perhaps through, the statute itself in order to reach the common law cause of action the statute implicitly authorized. Such a strained use of the presumption is odd. It is also not very convincing. For no matter what type of leapfrogging around the Court had in mind for the presumption, it was invariably mired in the text and context of the ATS. Thus, although the Court strained to cabin the presumption’s work “to claims under the ATS,” it invariably asked about the statute itself, concluding that “nothing in the [ATS] rebuts that presumption.”²⁹ And once that statutory inquiry is made, no principled distinction exists between gauging the presumption’s applicability to the ATS on the one hand, and its applicability to §78aa on the other. In this regard, *Kiobel* renders the law incoherent.

The pressing question for lower courts and litigants after *Kiobel* is whether the presumption against extraterritoriality, or at least its logic, applies to ATS cases as a matter of prescriptive or subject matter jurisdiction. There are some clues in *Kiobel* itself indicating that the question is one of subject matter jurisdiction. In addition to the Court acknowledging the ATS’s “strictly jurisdictional” nature,³⁰ Justice Kennedy raised the extraterritoriality issue *sua sponte* at oral argument³¹—a clear sign

²⁷ 130 S. Ct. 2869, 2877 (2010).

²⁸ *See id.* at 1664-65.

²⁹ *Id.* at 1669.

³⁰ *Id.* at 1664.

³¹ Transcript of Oral Argument at 4, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

of a subject-matter jurisdiction,³² as opposed to a merits-based, defect. As we will see in Part II, the lower court trend so far appears to be in favor of classifying the defect as going to subject matter jurisdiction, and indeed courts have felt free to raise it sua sponte for this reason.³³ There are, however, exceptions, with at least one court clearly viewing the presumption's operation on the ATS as a prescriptive, merits-based challenge that can be—and was—waived.³⁴

II. LOWER COURT APPLICATION POST-*KIOBEL*

As noted, most lower courts applying the presumption against extraterritoriality to the ATS in *Kiobel*'s wake have taken the Supreme Court's holding to require that such application be characterized and treated as a subject matter jurisdiction, rather than a prescriptive jurisdiction, question.³⁵ But not all courts have followed this trend; a minority of courts

³² See FED. R. CIV. P. 12(h)(3).

³³ See *Chen Gang v. Zhao Zhizhen*, No. 3:04CV1146 RNC, 2013 WL 5313411, at *4 (D. Conn. Sept. 20, 2013); *Kaplan v. Cent. Bank*, No. 10-483, 2013 WL 4427943, at *15-16 (D.D.C. Aug. 20, 2013); *Ahmed v. Comm'r for Educ. Lagos State*, No. 1:13-cv-00050-MP-GRJ, 2013 WL 4001194, at *2 (N.D. Fla. Aug. 6, 2013); *Ahmed-al-Khalifa v. Minister of Interior*, No. 5:13-cv-172-RS-GRJ, 2013 WL 3991961, at *2 (N.D. Fla. Aug. 2, 2013); *Chen v. Shi*, No. 09 Civ. 8920, 2013 WL 3963735, at *7 (S.D.N.Y. Aug. 1, 2013); *Ahmed-al-Khalifa v. Obama*, No. 1:13-cv-49-MW/GRJ, 2013 WL 3797287, at *1-2 (N.D. Fla. July 19, 2013); *Al Shimari v. Caci Int'l, Inc.*, 951 F. Supp. 2d 857, 857 (E.D. Va. 2013); *Mwangi v. Bush*, No. 5:12-373-KKC, 2013 WL 3155018, at *4 (E.D. Ky. June 18, 2013); *Ahmed-al-Khalifa v. Salvation Army*, No. 3:13cv289-WS, 2013 WL 2432947, at *2-3 (N.D. Fla. June 3, 2013); *Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 68-71 (D.D.C. 2013); *Mwani v. Bin Laden*, 947 F. Supp. 2d 1, _ (D.D.C. 2013); *Muntslag v. D'Ieteren, S.A.*, No. 12-cv-07038, 2013 WL 2150686, at *2 (S.D.N.Y. May 17, 2013).

³⁴ See *Ahmed v. Magan*, No. 2:10-cv-00342, 2013 WL 4479077, at *1-2 (S.D. Ohio Aug. 20, 2013).

³⁵ See, e.g., *Mohammadi v. Islamic Rep. of Iran*, 947 F. Supp. 2d 48, 70-71 (D.D.C. 2013), *reconsideration denied* (July 12, 2013); *Muntslag*, 2013 WL 2150686, at *2 v.; *Ahmed-Al-Khalifa v. Salvation Army*, No. 3:13cv28913CV289-WS, 2013 WL 2432947, at *3 (N.D. Fla. June 3, 2013), *appeal dismissed* (Dec. 13, 2013); see also *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530 (4th Cir. 2014) (vacating the district court's dismissal for lack of subject matter jurisdiction after finding "that the plaintiffs' Alien Tort Statute (ATS) claims 'touch and concern' the territory of the United States with sufficient force to displace the presumption"); *Ben-Haim v. Neeman*, 543 F. App'x 152, 154-55 (3d Cir. 2013) (holding that "the conduct that formed the basis of the ATS claim took place [abroad], and thus subject matter jurisdiction . . . is lacking in the federal courts"); *Mwani v. Laden*, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (finding that the presumption was displaced and that "[s]ubject matter jurisdiction [was] therefore proper").

appears to have treated the application of the presumption to the ATS as a merits question, thereby indicating that it goes to prescriptive jurisdiction.³⁶

While most courts have treated the application of the presumption to the ATS as a subject matter jurisdiction question, there is remarkably little, if any, discussion as to the rationale for such treatment. Indeed, many courts have simply assumed that *Kiobel*'s presumption goes to the court's subject matter jurisdiction rather than to the jurisdiction to prescribe and regulate foreign conduct.³⁷ For instance, *Muntslag v. D'Ieteren*—the first case to apply the presumption to the ATS after *Kiobel*—simply noted that “the Supreme Court recently . . . held that the ATS does not provide the federal courts of the United States with subject matter jurisdiction over torts that occur outside of the United States.”³⁸ Thus, because the conduct alleged “clearly occurred overseas,” the court found it was “not necessary to address the questionable proposition that the conduct [the plaintiff] allege[d] violated the ‘law of nations or a treaty of the United States.’”³⁹ Other courts have followed *Muntslag*'s lead, or at least have made a similar assumption. For instance, in *Al Shimari v. CACI Premier Tech., Inc.*, the Fourth Circuit framed the ATS question before it in light of *Kiobel* as “whether a federal district court has subject matter jurisdiction to consider certain civil claims seeking damages against an American corporation for the torture and mistreatment of foreign nationals at the Abu Ghraib prison in Iraq.”⁴⁰ Another court remarked, “the Supreme Court appears to have set a very high bar for plaintiffs asserting jurisdiction under the ATS for claims arising out of conduct occurring entirely abroad.”⁴¹ Similarly, in *Ahmed-Al-Khalifa v. Salvation Army*, the court explicitly treated *Kiobel* as going to the court's subject matter jurisdiction:

In light of *Kiobel*, the ATS cannot confer subject matter jurisdiction upon Plaintiff's claims, because the relevant conduct and alleged

³⁶ See, e.g., *Adhikari v. Daoud & Partners*, No. 09-cv-1237, 2013 WL 4511354, at *6-7 (S.D. Tex. Aug. 23, 2013) *on reconsideration*, 994 F. Supp. 2d 831 (S.D. Tex. 2014); *Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077, at * (S.D. Ohio Aug. 20, 2013) *report and recommendation adopted*, No. 2:10-CV-00342, 2013 WL 5493032 (S.D. Ohio Oct. 2, 2013); *Giraldo v. Drummond Co.*, No. 2:09-cv-1041-RDP, 2013 WL 3873960, at *8 (N.D. Ala. July 25, 2013).

³⁷ See, e.g., *Mohammadi*, 947 F. Supp. 2d at 70-71; *Muntslag*, 2013 WL 2150686, at *2; *Ahmed-Al-Khalifa*, 2013 WL 2432947, at *3.

³⁸ *Muntslag*, 2013 WL 2150686, at *2.

³⁹ *Id.*

⁴⁰ *Al Shimari v. CACI Premier Tech.*, 758 F.3d at 522.

⁴¹ *Mohammadi*, 947 F. Supp. 2d at 70 (emphasis added).

violations occurred outside the United States, and the allegedly unlawful [conduct] does not 'touch' or concern' the United States in such a way that would overcome the ATS's presumption against extraterritoriality.⁴²

The Second Circuit seems to have adopted a subject matter view of the issue as well. In *Balintulo v. Daimler AG*, the Second Circuit read *Kiobel* as holding that "federal courts may not, under the ATS, recognize common-law causes of action for conduct occurring in the territory of another sovereign."⁴³

Yet not all courts have made this assumption. A minority of courts has, or has seemingly, treated the issue as a merits question—which indicates, in line with *Morrison*, that the extraterritorial scope of the statute goes to prescriptive jurisdiction rather than subject matter jurisdiction. However, as with courts that have treated the issue as one of subject matter jurisdiction, analysis is lacking: courts treating the application of the presumption to the ATS as a merits question seem to merely assume such treatment is proper. In *Ahmed v. Magan*, for example, the plaintiff argued that *Kiobel* was "not a decision about subject matter jurisdiction but about what types of claims may be pleaded under the statute."⁴⁴ The court, apparently in agreement, found that because the "[d]efendant did not move to dismiss for failure to state a claim . . . [or] oppose summary judgment[,] . . . [a]ny merits argument he might have had [was] waived."⁴⁵ Unfortunately for coherency's sake, the *Magan* court did not delve deeper.⁴⁶

Although *Magan* appears to be the only court so far to explicitly find waiver in line with a prescriptive jurisdiction view of the issue, a few other courts have alluded to this view but have stopped short of actually discussing waiver. In *Adhikari v. Daoud & Partners*, for example, the court granted summary judgment for defendant on plaintiffs' ATS claims rather than dismissing them for want of jurisdiction—possibly suggesting, but not

⁴² *Ahmed-Al-Khalifa*, 2013 WL 2432947, at *3.

⁴³ 727 F.3d 174, 184 (2d Cir. 2013).

⁴⁴ *Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077, at *1 (S.D. Ohio Aug. 20, 2013), *report and recommendation adopted*, 2013 WL 5493032 (S.D. Ohio Oct. 2, 2013).

⁴⁵ *Id.*

⁴⁶ After finding "that defendant ha[d] waived any merits argument he may have raised based on the *Kiobel* decision," the court also noted that, regardless, "the presumption against extraterritoriality has been overcome in this case." Thus, although the court did find waiver, evidencing that it treated the issue as a merits question, it also provided an alternate holding—that the presumption had been overcome—to ensure that jurisdiction was proper nonetheless. *See id.* at *2.

openly confirming, that the court was treating the issue as a merits question.⁴⁷ Likewise, the court in *Giraldo v. Drummond Co.* found that, after excluding inadmissible Rule 56 evidence, there was nothing left to support plaintiffs' ATS claims and thus granted defendants' motion for summary judgment.⁴⁸ While these decisions do not clearly decide the issue one way or another, their failure to frame, let alone even mention, the issue of subject matter jurisdiction at least evinces an unawareness of the different jurisdictional analyses at play.

In sum, most courts have treated the application of the presumption to the ATS as an issue of subject matter jurisdiction, while a few courts seem to have treated it as a merits question of prescriptive jurisdiction. However, nearly every court to address the issue has failed to articulate in any detail its reason for treating the issue as either a prescriptive jurisdiction or a subject matter jurisdiction question. Despite *Kiobel's* opacity on this point, and the apparent split in application, courts appear to simply assume that the question is not really in dispute. In turn, reasoned opinions—ones that can guide litigants and courts going forward—are notably absent.

III. ANALYSIS AND IMPLICATIONS

The most persuasive argument in favor of subject matter jurisdiction is that the ATS is a “jurisdictional” statute; it contains no conduct-regulating rules. As the Supreme Court explained in *Kiobel*, the ATS is “‘strictly jurisdictional.’ It does not directly regulate conduct or afford relief.”⁴⁹ Indeed, invoking subject matter jurisdiction language, the Court previously explained in *Sosa v. Alvarez-Machain* that the ATS is a statute that addresses “the power of the courts to entertain cases concerned with a certain subject,” and does not authorize the courts to “mold substantive law.”⁵⁰ If prescriptive jurisdiction is the jurisdiction to make and apply conduct-regulating rules, and the ATS does not contain any conduct-regulating rules but only provides jurisdiction for courts, it follows that a challenge to the exercise of jurisdiction under the ATS challenges the only jurisdiction the

⁴⁷ *Adhikari v. Daoud & Partners*, No. 09-cv-1237, 2013 WL 4511354, at *6-7 (S.D. Tex. Aug. 23, 2013), *on reconsideration*, 994 F. Supp. 2d 831 (S.D. Tex. 2014).

⁴⁸ *Giraldo v. Drummond Co.*, No. 2:09-cv-1041-RDP, 2013 WL 3873960, at *8 (N.D. Ala. July 25, 2013).

⁴⁹ 133 S. Ct. at 1664 (internal citation omitted) (quoting *Sosa*, 542 U.S. at 732).

⁵⁰ 542 U.S. at 713-14; *see also id.* at 712 (stating that “the statute is in terms only jurisdictional”); *id.* at 717 (comparing the ATS to other grants of original jurisdiction in the Constitution and the Judiciary Act of 1789).

statute creates—judicial subject matter jurisdiction.

Compounding this view is that the conduct-regulating rules used in ATS cases come from international, not national, law. As *Kiobel* explained, the ATS “allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law.”⁵¹ Accordingly, the relevant question is “whether the court has authority to recognize a cause of action under U.S. law *to enforce a norm of international law*.”⁵² In short, the cause of action comes from US law and the conduct-regulating norm comes from international law. And because the conduct-regulating rule comes from international law, it is already applicable in the foreign territory where the conduct underlying the claim occurred (that is the whole point of international law). In turn, there is no actual extraterritorial extension of US law in the way there is an extraterritorial extension of, for example, US securities or antitrust laws in foreign territories. Consequently, the entire idea of a presumption against extraterritoriality regarding conduct-regulating rules breaks down.

What does this mean for ATS cases going forward? The procedural implications are fairly straightforward. As noted throughout the Essay, judicial subject matter defects can be raised at any point during the course of litigation, and may even be raised by courts *sua sponte*.⁵³ Unlike prescriptive jurisdiction challenges that go to the merits, they are not subject to waiver if not timely raised.⁵⁴

The doctrinal implications are somewhat more difficult to tease out. A helpful way to illustrate them is by contrasting two post-*Kiobel* approaches to the Court’s exception to the presumption against extraterritoriality for ATS “claims [that] touch and concern the territory of the United States, . . . with sufficient force to displace the presumption against extraterritorial application.”⁵⁵ The Second Circuit in *Balintulo* held that because all of the conduct underlying the claims before it took place abroad, there was no chance at all that the claims could touch and concern US territory so as to qualify under the exception.⁵⁶ That the defendants were US citizens simply had nothing to do with the exception because it dealt only with conduct,

⁵¹ 133 S. Ct. at 1664.

⁵² *Id.* at 1666 (emphasis added).

⁵³ See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

⁵⁴ See *id.*

⁵⁵ *Kiobel*, 133 S. Ct. at 1669.

⁵⁶ *Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013) (“if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*”).

which allegedly occurred in foreign territory.⁵⁷ By contrast, the Fourth Circuit in *Al Shimari* looked beyond the conduct to the “claims” terminology in the Supreme Court’s opinion in *Kiobel* and found that the terminology embraced more than just conduct and included, inter alia: that the defendant was as a US corporation, as were its employees who were alleged to have committed the violations against the law of nations under the ATS; that the contract by which the defendant performed the acts abroad was issued in the United States by the Department of the Interior and that the contract required defendants’ employees to obtain security clearances from the US Department of Defense; and that managers in the United States gave tacit approval to the acts committed abroad, attempted to “cover up” the misconduct, and “implicitly, if not expressly, encouraged” it.⁵⁸ According to the Fourth Circuit,

the Supreme Court [in *Kiobel*] used the phrase “relevant conduct” to frame its “touch and concern” inquiry, but never defined that term. Under the facts presented, there was no need to do so because all the conduct underlying the petitioners’ claims occurred outside United States territory. We also note that the Court broadly stated that the “claims,” rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force, suggesting that courts must consider all the facts that give rise to ATS claims, including the parties’ identities and their relationship to the causes of action.⁵⁹

In this connection, the Fourth Circuit also quoted Black’s Law Dictionary, which defines “claim” as the “aggregate of operative facts giving rise to a right enforceable by a court.”⁶⁰

In our view, because *Kiobel* is really about subject matter jurisdiction, the Fourth Circuit has the better approach. If *Kiobel* were about prescriptive jurisdiction to regulate conduct, focusing exclusively on the conduct at issue—as the Second Circuit did—would make sense. But *Kiobel* is about the court’s subject matter jurisdiction to entertain certain claims, and it therefore makes more sense to evaluate “all the facts that give rise to ATS claims, including the parties’ identities and their relationship to the causes of action.”⁶¹ As one of us has argued elsewhere, to determine whether a case

⁵⁷ See *id.* at 190-91.

⁵⁸ *Al Shimari v. CACI Premier Tech.*, 758 F.3d 516, 528-29 (4th Cir. 2014)

⁵⁹ *Id.* at 527-28.

⁶⁰ *Id.* (citing *Black’s Law Dictionary* 281 (9th ed. 2009)).

⁶¹ See *id.*

involving foreign elements qualifies for *Kiobel*'s exception:

[the] inquiry does not ask only about conduct but instead asks whether the *claims* touch and concern the United States. . . . This makes sense because, once again, the ATS is a *jurisdictional statute*; as such, it addresses claims, not conduct. And it would be consistent with the lower court trend reading *Kiobel*'s use of the presumption as a subject-matter jurisdiction inquiry, not as a gauge for measuring the reach of conduct-regulating rules. In other words, because subject-matter jurisdiction deals with the viability of claims, it makes sense to talk about the relationship of claims, not just conduct, to the United States.⁶²

CONCLUSION

This Essay evaluated whether ATS cases involving foreign elements raise questions of prescriptive jurisdiction or subject matter jurisdiction after the Supreme Court's decision in *Kiobel*. It concluded that the lower court trend treats *Kiobel* as going to subject matter jurisdiction, and that this trend is probably correct. It would have been helpful for the Supreme Court to clearly provide guidance on this question—which has major doctrinal and procedural consequences for the law and litigants. The procedural implications of viewing challenges based on *Kiobel* as going to judicial subject matter jurisdiction are that such challenges can be raised at any time during the course of litigation, including by the court sua sponte. The doctrinal implications are that when evaluating whether *Kiobel*'s exception for “claims that touch and concern the territory of the United States, . . . with sufficient force to displace the presumption against extraterritorial application,”⁶³ courts should look not only to whether the conduct alleged touches and concerns the United States, but instead to “all the facts that give rise to ATS claims, including the parties’ identities and their relationship to the causes of action.”⁶⁴

⁶² Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. __, __ (2014) (forthcoming) (on file with the Author) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363695.

⁶³ *Kiobel*, 133 S. Ct. at 1669.

⁶⁴ *Al Shimari*, 758 F.3d at 527-28.