Chapter 4

International Petroleum

For the past half century, the United States has imported most of the petroleum than we consume. In the last year, though, US oil production has been boosted by fracking, and we now import less oil every year. Current petroleum imports are at their lowest levels since 1987.

Nonetheless, global petroleum markets are of great significance to our economy and abroad. This chapter explores the economic, social, and political forces that have shaped the relationship between the United States and foreign oil resources – in the past and going forward.

According to the EIA’s energy “sources/uses” chart (below), petroleum imports as of 2013 accounted for about one quarter of total U.S. energy input.

In this chapter, you will learn about:

- **The international petroleum industry’s evolution from an American-centric industry to one marked by international competition and decentralization.**
  - The international oil market’s inception in the early 20th century and the market turbulence of the 1970s.
  - Changes over the last half century in the international oil market as a result of political, economic and social forces.
  - The three major oil shocks: the Arab Oil Embargo, the Ayatollah, the Fall in Prices
  - The formation of the OPEC cartel and the current impact of OPEC on the international petroleum market.
  - The national energy security implications of relying on foreign oil sources.
  - The future of international and domestic oil production

- **The law of extraction with respect to ownership of mineral rights.**
  - The differences between the United States, Canada, and other nations around the world
  - Concession agreements and the three modern forms of petroleum agreements that countries use to grant operating rights to private investors.

- **The reasons why countries nationalize oil resources and the justifications given.**
  - The benefits and drawbacks of nationalization
  - Examples of recent attempts at oil nationalization: Venezuela.

- **Dispute resolution in international oil development and trade.**
  - The legal doctrines that arise in U.S. litigation involving international oil disputes: Sovereign immunity / Political question / Act of state doctrine / Forum non-conveniens
  - International dispute resolution mechanisms: The interests of petroleum investors and the nature of international commercial arbitration

- **The human rights abuses associated with international oil development and trade**
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Chapter 4 – International Petroleum

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4.1 Oil History and Politics

The U.S. economy -- like the economies of all developed nations and many developing economies -- has a voracious appetite for oil. As of the end of 2013, the United States still leads the world in oil consumption. According to the EIA, the United States consumes about 18.5 million barrels of oil per day. This is almost double that of China, the second largest consumer. Nonetheless, some estimates have China surpassing the United States in oil consumption by 2030. Today about 33% of the petroleum consumed and 50% of the petroleum refined in the United States comes from foreign nations.

This dependence on oil imports means that the United States is vulnerable to happenings in the international petroleum markets. U.S. dependence on foreign oil has resulted in geopolitical and economic conflicts that have shaped foreign policy.

The dominant force in global oil markets. At present, the single largest entity impacting the world's oil price, production, and consumption is the Organization of the Petroleum Exporting Countries (OPEC), a consortium of twelve countries formed in 1960. OPEC's objective is to coordinate petroleum policies among Member Countries to secure “fair and stable prices for petroleum producers; an efficient, economic and regular supply of petroleum to consuming nations; and a fair return on capital to those investing in the industry.”

OPEC membership provides a geographical spread from Latin America in the west to Southeast Asia in the east, including Africa and the Middle East. The total population of the OPEC members is nearly half a billion, with a rich diversity of cultures, religions and languages.
4.1.1 Geopolitical Events and Pricing of Oil

Although now heavily dependent on imports, oil was first discovered in the United States back in the 1800s. At that time, the United States was the primary producer of petroleum and exported oil all over the world. Since then, the oil industry has evolved significantly. Here’s a brief overview of how the oil industry developed over the past two centuries.

The rise, fall and legacy of Standard Oil. The first commercial oil well was drilled in the United States around 1859. In 1870 John Rockefeller established the ‘Standard Oil Company’ as an oil refinery corporation in Ohio. Although Standard Oil began in the refining business, it soon began to dominate the entire industry through highly effective (and ruthless) horizontal and vertical integration. In 1890, Standard Oil controlled 88% of the refined oil flows in the United States, and the company was able to out-produce and undersell almost all the competition. By 1904 Standard Oil controlled 91% of production and 85% of final sales in the nation. In addition, Standard Oil was the primary exporter of oil to all other countries and had almost complete control of the market.

In response, Congress enacted the Sherman Anti-Trust Act in 1890. In 1909, the US Department of Justice sued Standard Oil under this Act for sustaining a monopoly and restraining interstate commerce. In 1911 the US Supreme Court declared Standard Oil to be an unreasonable monopoly and ordered the company to be dissolved. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911). The dissolved constituents of Standard Oil became known as ‘The Seven Sisters’: Royal Dutch Shell, Exxon, Gulf, Texaco, BP, Mobil and Chevron. The Seven Sisters ultimately controlled around 85% of the world’s petroleum reserves. These companies were still vertically integrated and thus had the flexibility and market power to continue to dominate the world oil market.

From 1960 to 1970, the Seven Sisters began to encounter competition from the international petroleum market, notably from producers in Russia. And after the discovery of oil in Iran led to the formation of OPEC in 1960, a new era in the international petroleum market saw the dominance of the United States and its ‘Seven Sisters’ wane.

Shift to import dependence. Increased U.S. oil demand led to ever-increasing domestic production. But domestic production could not keep up with our growing thirst for oil. As a result, the United States began to seek oil from beyond its borders. By 1970, United States oil production had peaked at 11.3 million barrels of oil per day, leaving no spare production capacity in the United States. As a result, control over oil prices shifted to OPEC. In the 1970s, as U.S. oil production fell, domestic demand continued to rise. The U.S. economy explored for “new” oil or turned to imports from the world oil market. From 1967 to 1973, U.S. imports as a share of total U.S. oil consumption rose from 19% to 36%.

First oil shock: Arab Oil Embargo. On October 6, 1973, as a result of the Yom Kippur War when Syria and Egypt attacked Israel, OPEC got a glimpse of its influence over world oil prices. In retaliation for U.S. support of Israel in the war, the Arab nations declared an embargo on oil shipments to the United States, which lasted until March 1974. The resulting 400% increase in oil prices in only six months illustrated the extreme sensitivity of world oil prices to U.S. import
shortages. The United States put in a system of price controls in an attempt to counter the effect of the embargo. US oil prices were regulated at each stage of production, refining, wholesaling, and retailing. These controls, first administered by the now-defunct Federal Energy Administration and then the Department of Energy, were complex and frustrating for all members of the industry. President Reagan closed the program in 1981.

**Second oil shock: The Ayatollah.** In 1979 and 1980, events in Iran led to another round of oil price increases when the Shah of Iran was ousted and replaced by a theocratic government headed by the Ayatollah Khomeini. In response, the United States prohibited imports of Iranian oil, which in turn caused the Iranian government to prohibit oil exports to the United States. This resulted in the loss of 2.0 to 2.5 million barrels per day of available oil supply between November 1978 and June 1979. As you’ll see in the chart below, this loss of production caused crude oil prices to more than double.

![Crude Oil Production Chart](image)

**Another oil shock; but this time a price drop.** The third oil shock originated with consumers switching from expensive oil to other fuels that offered either economic or environmental benefits. (You’ll notice in Figure 5 above the decrease in oil prices throughout most of the 1980s). In addition, the higher oil prices in the 1970s led to increased exploration worldwide, which increased global production thus lowering OPEC’s market share. This also coincided with the deregulation of domestic oil prices in the United States in the early 1980s. In the chart below, you can see the increase in U.S. oil production through the late 1980s and how OPEC production decreased.
OPEC’s reduction in production was an attempt to counter increased U.S. production and stabilize world oil prices. From 1982 to 1985, OPEC attempted to set production quotas low enough to stabilize prices. These attempts resulted in repeated failure however, as various members of OPEC produced beyond their quotas.

Saudi Arabia, acting by itself, has enough spare capacity to decrease production and increase world oil prices. However, by August 1985, Saudi Arabia became tired of being the only OPEC member to enforce the established quotas. At that time, Saudi Arabia linked their oil price to the spot market for crude and, by early 1986, increased production. World oil prices then plummeted, falling below $10 per barrel by mid-1986. Despite the fall in prices, Saudi revenue remained about the same, with higher volumes compensating for lower prices. It was almost three years before prices recovered. The lower prices did have a positive result for OPEC. It encouraged increased oil consumption and halted production increases outside of OPEC. By the end of the decade in the 1980s, OPEC and world prices seemed to have stabilized.

Modern day oil markets. In 1986, both OPEC and non-OPEC nations agreed to help regulate oil prices between $15 and $19 a barrel. In an attempt to ensure this agreement, then Vice President George H.W. Bush warned the Saudis that if prices fell again, the United States would place a tariff on imported oil. Regardless, the moderate pricing of this price accord did not last past 1987.

While world events often affect the price of oil, it was not until the aftermath of September 11, 2001 that prices reached a new high of $140 a barrel in July of 2008. Then, when the global financial crisis hit that September, oil prices dropped to as low as $33 a barrel in December, a staggering decline. At present, China’s attempt to stockpile 100 billion barrels of oil reserves has kept the price of oil around $100 since 2010. However, the price of oil in global markets is vulnerable to a multitude of factors – such as this increased demand for oil in China, a global economic upturn, hurricanes in the Gulf of Mexico, and even the “Arab Spring.” The price of oil is ever contingent on geopolitical and physical factors.
4.1.2 Energy Security and Peak Oil

What exactly is energy security? Energy security refers to protecting against a sovereign nation’s vulnerability to disruption of energy supplies and the rapid increase of prices, which threatens both economic and national security.

**Economic Security.** The threat to economic security is represented by the possibility of declining economic growth, increasing inflation, rising unemployment, and losing billions of dollars in investment. After the 1973 embargo, U.S. unemployment rose 4% in just a few months and inflation jumped to over 5%.

**National Security.** The threat to national security is represented by the inability of the U.S. government to exercise various foreign policy options, especially in regard to countries with substantial oil reserves. For example, the recent disruption of Venezuelan oil supplies may limit the U.S. policy options towards the Middle East.

So what factors contribute to U.S. energy security? Foremost among the factors affecting U.S. energy security is the availability of production capacity, dependence on oil imports, the stability of such imports and the IEA and SPR.

**Peak oil.** “Peak oil” represents when the maximum rate of cheap oil extraction has been reached, after which the rate of production is expected to enter terminal decline. Although U.S. oil production reached its peak in the 1970s, world oil has not yet (or so most believe).

The concept of “peak oil” came from a geophysicist, M. King Hubbert, who predicted in 1956 that U.S. oil production would peak sometime between 1965-1971. His model proved prescient about U.S. production -- at least, until the “fracking revolution” of the 2000s. Here is Hubbert’s model, which he explained in a short video clip in 1976:
Given the discovery of new oil fields, new production techniques, and unconventional supplies, the peak has been a moving target. Some critics believe the price surge in world oil from 2001-2008 proved the peak came in 2000 (see Figure 7). Other experts have argued that ‘Peak Oil’ occurred in 2010, when the world produced half of the total reserves that existed. Still others believe that oil supplies will peak in 2025 or 2030, which will give the world plenty of time to adapt to other energy sources. The U.S. Geologic Service puts the peak around 2040, depending on the success of conservation movements, the development of other energy sources, the actions of OPEC, and political and environmental constraints. The key question therefore is: when will the peak in cheap global oil (and particularly in Saudi output) occur?

Is the ‘Peak Oil’ idea a myth? The crux of the debate is about living without cheap oil in the future, not living without oil completely. Thus, many anti-Peak Oil proponents highlight that while the cost of extracting oil will slowly increase, new technologies and procedures will allow previously unreachable or un-refinable to be extracted and produced. A major reason for continuing growth in petroleum supplies is that oil previously regarded as inaccessible or uneconomical is now available, such as the “presalt” resources off the coast of Brazil, the vast oil sands of Canada, and the oil locked in shale and other rocks in the United States. In a typical oil field, only about 35% to 40% of the oil in place is produced using traditional methods. Meeting future demand will therefore require innovation, investment and the development of more challenging resources.

Additionally, some critics argue that Peak Oil theorists do not take into account the role of the government in restricting access to oil reserves (e.g., drilling in Alaska). Additionally, in stating that new oil discovery rates are decreasing, theorist’s fail to highlight that 86% of the world's supply is the result not of discoveries but of additions and extensions in existing fields. Furthermore, the impact of technology with the shale oil boom in 2010 has drastically changed domestic oil production as the graph shows below.
Thus, it is not necessarily Mother Nature creating the theoretical decreases or increases in oil supply.

**Dependence on imports.** According to the EIA, about 45% of oil consumed by the United States in 2011 about 60% of oil processed in U.S. refineries was imported.

![Production and Dependence](image)

Historically, the United States has had a tendency to rely heavily on foreign oil, with dependency peaking at 60% in 2005. Dependency dropped to around 45% in 2011 for the first time since the post-1973 embargo period. The two factors led to this decline over that period was higher U.S. oil production and lower consumption, which was a result of consumer conservation, increased efficiency, and fuel switching. The hydraulic fracturing energy boom of the past three years has continued to drastically reduce oil and gas imports. Imports dropped again to 40% in 2012 and the EIA currently projects that oil imports will drop to as low as 25% by 2016 and the US will actually become a net natural gas exporter by 2018.

However, OPEC’s and China’s role in setting the price of oil will still be critical even as the United States emerges as a major player in world oil production. OPEC will still control approximately 50% of oil production in 2035. While those hoping for an energy-independent United States have reason to be optimistic, this new production capability is not without its costs. The new oil accessed by “fracking,” could impose additional environmental costs. See Chapter 5, Natural Gas.

**Stability of imports.** Petroleum imports to the U.S. currently originate disproportionately from countries that are so-called ‘fragile states.’ Because politics are faster than the change in the life of an oil field from exploration to depletion – oil takes time to produce and thus production and consumption are subject to changes in political climates. As such, it is difficult to ensure long-term stability of oil imports. However, stable import arrangements would reduce reliance on foreign imports and assist to the U.S. insulating itself from volatility in foreign countries prone to political unrest and hostility toward western governments. As the world’s oil production comes from ‘the same bathtub,’ each country’s contract to purchase oil (whether it is for secure or non-secure oil) does not increase the total amount of secure oil available. Thus, overall world energy security is not enhanced.
The IEA and SPR. The International Energy Agency (IEA) was formed to help prevent a disruption to trading partners within the ‘same bathtub’ of oil. Members of the IEA agree to share oil if an embargo is directed against them, so that the effect of an embargo is evenly spread amongst member-nations. Each IEA member therefore invests in oil storage for emergency supplies equal to 90 days worth of imports, reducing the possibility of such an embargo.

After the creation of the IEA in 1976, Congress created the Strategic Petroleum Reserve (SPR) to additionally store 90 days worth of oil. The SPR is an emergency fuel store of oil maintained by the Department of Energy. It is the largest emergency supply in the world, with the capacity to hold up to 727 million barrels of oil. As of September 2014, the inventory was 691 million barrels – or about 30 days of normal U.S. consumption. The oil is stored in salt domes and located along the Gulf Coast near existing refineries and pipelines. Only the U.S. President can authorize withdrawals from the SPR.

4.1.3 Future of Global Oil Market

Due to the advancement of oil extraction technology -- namely, unconventional extraction methods – the U.S. oil industry is able to produce vast reservoirs of previously inaccessible shale oil. According to a November 2012 report by the World Energy Outlook, by the year 2020 the United States will be the top oil producer in the world. The same report projects that by 2035 the United States will become almost self-sufficient in energy. A United States that is not beholden to politically to nations that happen to be large oil producers could radically transform its geopolitics and the world’s energy supplies.

However, OPEC’s role in setting the price of oil will still be critical even as the United States emerges as a major player in world oil production given that OPEC will still control approximately 50% of oil production in 2035. While the United States might become energy-independent, this new production capability is not without its costs. Much of the new oil is accessed by “fracking,” where large amounts of water, sand, and chemicals are pumped into rocks at high pressure in order to break up the shale rocks that contain the oil. This intensive use of water will increase competition for water resources and could impose additional environmental costs. See Chapter 5, Natural Gas.
4.2 Law of Oil Extraction

As discussed in the previous chapter, U.S. domestic oil rights are subject to the Rule of Capture and correlative rights. This means that subsurface rights to oil and gas go with the surface title, unless specifically separated. The rule of capture and the other common law and state law mechanisms that govern oil extraction in the United States are based on this system of rights ownership. However, in most other areas of the world subsurface rights are not owned by the surface rights owner; instead they are owned by the national government.

4.2.1 Country-by-Country Analysis

Consider oil rights in different countries:

**Mexico.** In Mexico, before 1911 landowners could own the mineral rights in fee simple, which meant the rights would be perpetual and irrevocable, even as the title to the surface rights changed hands. As a result, oil companies seized the opportunity and purchased huge tracts of mineral rights – with an accompanying large influx of foreign investment. After the 1911 Revolution in Mexico, the new Mexican constitution vested all ownership rights to oil in the state to the government.

In **August 2014**, Mexico undertook important reforms to its oil industry. The country opened some oil, gas, and electricity industries to foreign and private companies. The state-owned oil companies will still have “first dibs” and the opportunity to set aside some fields for themselves. With the reforms, the government hopes to increase output to 3 million barrels by 2018 and 3.5 million by 2025, by attracting private companies with the expertise and technology to exploit the country's vast shale and deep-water reserves.

**Canada.** In Canada, mineral rights are owned by the state. But this was not always the case. Prior to 1887, settlers were given subsurface rights to their land and retain them, selling them with their above ground rights over time. These freeholds still make up about 10% of the Canadian oil market. Additionally, lands owned by the federal instead of provincial governments, make up about another 10% of the market.

How does the Canadian government profit from holding subsurface mineral rights? Under the Canadian system, where mineral rights are vested in the government, the private energy sector pays about $26 billion in taxes and royalties to the government to exploit these resources. This revenue is raised in three different stages. First, exploration rights are sold to private oil and gas companies. Second, royalties are paid by the oil companies based on the amount of oil and gas produced. And finally, corporate taxes are collected on oil company income.

**Great Britain.** In **Great Britain**, the Petroleum Act of 1934 provides that ownership of oil and gas reserves automatically vest in the Crown, regardless of where they are found. Interestingly enough, in Great Britain only the subsurface rights to hydrocarbons, gold and silver vest in the Crown – not other minerals. Private exploration and development,
including for offshore oil under the Continental Shelf Act, requires a license from the government.

What about the Middle East and the other major oil-producing countries? It’s an interesting story.

### 4.2.2 Middle East Oil Concessions

The law governing oil exploration and extraction in the Middle East has been of particular interest to oil companies and the global marketplace. Many of the states in the region are monarchies and some are even dictatorships, and oil and gas rights are controlled by the government, not landowners. After the initial discovery of oil, but before such nations had the technological know-how, Middle Eastern leaders (as well as governments in Latin America) invited private oil companies to explore and produce oil reserves located in their lands. These arrangements took the form of concession agreements.

Concessions agreements are arrangements whereby oil-rich countries contract with international oil companies to develop their reserves. Typically, a concession agreement will include provisions that provide for stock ownership in the local company undertaking the exploration, a bonus upon signing the agreement, an obligation on the part of the oil company to pay a royalty percentage to the government based up oil produced and the exclusivity / duration of the rights to develop the reserves.

What is an example of one of these early concession agreements? In 1933, the King of Saudi Arabia granted Standard Oil a 60-year concession to develop reserves in an area almost 500,000 square miles for only £50,000 – a minimal sum. In addition, these concession contracts -- unlike those in the United States -- did not obligate the oil company to produce oil and did not require the company to release the land if they were not developing it. Often times, international oil companies would also negotiate to not incur tax liabilities in the host countries.

During this same period of time in the United States, individuals who leased their land to oil companies to develop reserves typically enjoyed standard clauses that called for a fixed royalty of one-eighth of the amount of oil produced, as well as a fixed primary term during which the lease would terminate if no oil was produced. Over time, international petroleum agreements have come to share common attributes with domestic oil leases.

### 4.2.3 Characteristics of International Petroleum Agreements

At present, international petroleum agreements used by host governments to grant operating rights to private oil companies typically take one of the following three forms:

**Form contracts.** These agreements between the host government and an oil company are governed by detailed and rigid legal codes which may prescribe not only the conditions under which rights will be granted, but also the form any such rights. In such a system, the government does not have much latitude to customize individual contracts. Rigid agreements such as these are commonly used in the United States, Canada, Australia and
between international oil companies and the governments in Latin America and Western European nations.

What are the advantages and disadvantages of form contracts? This structure allows for the achievement of general policy objectives while imposing a standardized system that makes oversight and enforcement easier and more effective. However, as a disadvantage, it lacks flexibility and does not allow the host government to adjust the terms of its agreements over time.

**Ad hoc contracts.** This type of system authorizes a state commission or national oil company to negotiate and execute ad hoc agreements with individual foreign oil companies. For example, a national oil company may negotiate contacts with foreign companies for exploration and development and customize each individual contract to allow, for example, differences in duration, exclusivity and royalty rates.

What are the advantages and disadvantages of ad hoc contracts? An ad hoc mechanism gives a state agency considerable latitude in negotiations, allowing the country to structure more attractive proposals than they otherwise might be offered. On the other hand, it creates uncertainty among investors and results in highly complex agreements that may be hard to monitor, leaving open the possibility of corruption.

**Hybrid contracts.** These contracts are a combination of the hybrid approach that permits a degree of flexibility in formulating each transaction and from contracts. This method is beginning to be used in an increasing number of countries.

What are the advantages and disadvantages of hybrid contracts? A hybrid mechanism allows for flexibility and assures adherence to public policies through non-negotiable minimum conditions. But it would still contain some of the complexity of ad hoc contracts that can lead to enforcement difficulties.

What is the process for awarding international petroleum contracts? Typically, a host government will follow one of three types of procedure in awarding a private international oil company the right to develop oil reserves:

**Complete government discretion.** Under such a system, the host government retains complete discretion over the selection of a licensee or contractor to develop oil reserves. This procedure allows the government to select the best investor and adjust license terms.

**Public auctions.** A host government may also hold a public auction for the purpose of selecting the licensee. This procedure allows for competitive pricing and a pre-screening of bidders. This system also requires all terms other than those being bid on to be determined in advance.

**Open competition.** Finally, a host government may hold an open competition based on an announcement of general terms by the government. This procedure provides assurance that the winning bid maximizes the financial benefit that can be extracted by the
government for a license under the circumstances. However, this system is inherently inflexible except for the few terms being bid upon. It favors big firms that can make large bonus payments and, like public auctions, it requires state licensing boards to be experts on developing offers.

What is the typical structure of international petroleum investment contracts? Such contracts typically take one of three forms:

**Concession or license.** A concession is much like the system of federal land leases utilized in the United States. Such an agreement provides the oil company with an exclusive right to explore and produce and is further governed by work commitments that require government approval. The revenues flow to the host government in the traditional forms, which includes royalties, bonuses, rentals and taxes. In the concession or license agreement, the government does not bear any of the production or exploration risks.

**Production sharing agreement (PSA).** A PSA gives the oil company a specified area and uses a portion of the oil produced to pay for the oil company’s investment and operational costs. The remaining oil produced is shared between the host government and the foreign firm. Alternatively, the host government could require that the firms compensate them in cash. This can be accomplished through entering into a risk service agreement, which is effectively the same as a PSA, only that the payments are in cash as opposed to oil. Under a PSA arrangement, both the host country and the private oil company bear the risk of exploration and production.

**Technical service contract (TSC).** In a TSC the host country pays for an oil company to come in and provide services or technical assistance, paying them a flat fee for their help. The host country can pay them a portion of production, such as two dollars a barrel produced, but the oil company must also be paid for exploratory wells regardless of whether they produce oil. In this arrangement the host country bears the risk in exploration and shifts in market prices. However, once oil producing nation has in place the infrastructure and gains the knowledge to produce oil on their own, without the assistance of independent oil companies, host governments often no longer wish to be restrained by agreements such as TSCs. In such a circumstance, a host government could move to nationalization the oil production process.

### 4.3 Nationalization of Oil Assets

Nationalization -- the takeover of ownership and control complete industries by a national government -- serves as a source of pride for the citizens of the owner-country. The trend toward nationalization in the oil context involves the host country’s government seizing oil fields or the tools used to extract oil from oil companies. When the asset – in this case oil – is placed under state control, the government owns and manages the natural resource in the name of the ‘common good’. When it comes to nationalization, several benefits and drawbacks exist.

#### 4.3.1 Nationalization; Benefits & Drawbacks
Nationalization of oil has become a large component of national identity and independence among nations today, especially in the developing world. In 2004, between 77% and 90% of the world’s petroleum reserves were controlled by national governments. Most often, nationalization occurs as a reaction to the perception that foreign companies are “stealing” a host country’s resources.

What is the history and origin of nationalization? Prior to the wave of nationalizations, the oil industry was largely shaped by privately-owned companies (“POCs”). It was not until 1908 that the first national oil company was created in Austria-Hungary, when private producers of oil faced excess supplies of crude. Prior to 1970, only ten countries had nationalized oil production, including the Soviet Union in 1918, Bolivia in 1937 (and again in 1969), Mexico in 1938, Iran in 1951, Iraq in 1963, and Peru in 1968.

Only three of these pre-1970 nationalizations occurred in countries that were major oil producers – Mexico, Iraq and Iran. The remaining seven nationalized countries accounted only for a total of 8% of 1970 international oil production. Thus, it’s been observed that there’s no clear link between a country’s status as an oil producer and its decision to nationalize its assets. *Stephen J. Kobrin, Diffusion as an Explanation of Oil Nationalization, 29 JOURNAL OF CONFLICT RESOLUTION 3-32 (1985).*

What then causes a country to nationalize petroleum operations? The primary motivation behind the post-1970 nationalizations was the need (and desire) of countries to exert strategic control over oil production and pricing. Following World War II, the petroleum industry underwent rapid expansion with the entry of a large number of new companies into the market. While the international petroleum market in the 1950s had been dominated by seven international oil companies, more than 300 private firms had entered the market by 1972. This influx of companies opened new and unchartered areas up to exploration and development, with host countries often granting concession agreements to private international companies.

However, these private oil companies were backed by foreign governments, and it didn’t take long for host countries to perceive these foreign companies as ‘stealing’ their oil and resources. If national sovereignty over resources was to be restored, host nations realized that domestic companies would need to be created. Thus, nationalization was a direct attempt to restore national sovereignty over natural resources, foster a sense of national mission, and create a symbol of independence. Furthermore, nationalizations were largely political in nature, and both economic and environmental concerns contributed to a country’s decision to nationalize its resources.

What other factors contributed to the nationalization movement? Conservation was also a motivating factor among government when shifting to a nationalized model. Private oil companies were perceived as operating on too short of a horizon, and were criticized as exploiting resources too quickly. Private oil companies were not concerned with the depletion of oil reserves but instead operated solely to maximize short-term revenues.
In some instances, social interests also contributed to nationalization efforts. Private oil companies – typically foreign companies with few ties to the host nation – often failed to provide benefits to the nation’s citizens. The oil companies had no incentive to invest in the host nation’s infrastructure or human population. When nationalized, however, the host government can, theoretically, redirect a larger portion of oil revenues to flow into state welfare and assistance programs, thus benefiting the public at large. National oil companies, therefore, are created with the intention to address certain socio-economic goals, including employment for local citizens, creation of infrastructure, and development of a country’s technical capacity.

Although a country’s motivations for nationalizing may appear admirable and environmentally advantageous, a country’s national oil companies nonetheless possess substantial drawbacks. Private oil companies are better positioned to bear exploration risks than national oil companies, and a country on its own may not be able to find or create new infrastructure to support increased exploration. Additionally, low-level government corruption and mismanagement can result in a lack of bureaucratic accountability to the public as well as a lack of control by the public over the spending of government money. In fact, nationalized oil companies are typically poorly managed and are only 65% as efficient as private companies.

**4.3.2 Reactions to Nationalization**

Typically, oil companies found it expedient to acquiesce to the demands of the host countries in the face of a threatened nationalization. This was partially because the country did not always kick the company out of country -- in many cases, they simply sought majority ownership and control of the oil assets to ensure control and increased revenues. In other cases, the home country of the ousted company responded by forcing the host country to accept the oil company or by simply overthrowing the regime responsible for the nationalization. This is the exact type of dispute that was litigated in the LIAMCO arbitral tribunal.

**LIAMCO v. the Libyan Arab Republic.** In this case an American oil company facing nationalization in Libya in the 1970s challenged the Libyan government’s authority to nationalize. This led to a legal back-and-forth and an arbitration boycotted by the Libyan government. The arbitrator analyzed (1) the Libyan laws on oil concessions, (2) LIAMCO’s concession agreements, and (3) the nationalization decrees that ate away at LIAMCO’s ownership of its oil fields and rigs. In addition, the arbitrator consulted LIAMCO’s contract, UN resolutions, and Islamic law, engaging in a significant choice of law analysis to determine that the controlling law was Libyan domestic law, Islamic law, custom, and international law. In the end, the arbitrator determined that nationalization itself was legal because property within a country could be used to benefit the people and society of a nation.

The arbitrator then decided that the impetus for nationalization was not political or discriminatory per se, two qualifications which would have made nationalization improper. However, the arbitrator did determine that Libya had broken its contract with LIAMCO and was therefore liable. Nonetheless, the arbitrator deemed it impossible to force restitution or restoration of LIAMCO’s concessions because such actions would violate Libya’s sovereignty by forcing the country to act. The arbitrator settled on damages of approximately $80 million plus 5% interest, well below the $194 million and 12% interest sought by LIAMCO.
The results of this decision were mixed. Few other arbitration settlements have adopted the U.S. position that adequate compensation had to include full compensation for lost profits. For Libya, in the decades after the Libyan nationalizations in the 1970s and the imposition of U.S. sanctions starting in 1986, Libya’s oil industry declined from the fourth largest producer in the world in 1970 (at about 3 million barrels per day) to 13th (about 1.3 million barrels/day). This reflects the inefficiencies and the ostracizing that come with nationalization.

4.3.3 Recent Examples of Nationalization

**Venezuela:** Although Venezuela began oil nationalization projects as early as 1975, a new wave of nationalization (or as some call it, “re-nationalization”) began in 2007 when Hugo Chavez gave oil companies the choice of accepting minority ownership of the means of production or leaving the country. On January 8, 2007, Chavez announced that all oil projects that had refused to comply with onerous industry regulations would be nationalized. Known as the Nationalization Decree, Chavez’s order called for oil associations to transform into mixed national companies approved by the National Assembly. By 2010, however, Venezuela began seizing oil rights outright. See Reuters, [Venezuela to nationalize US firm’s oil rigs](http://www.reuters.com/article/2010/01/09/us-venezuela-nationalization-idUSTRE6070U220100109).

**Bolivia:** In 2006, on his one-hundredth day in office, Bolivian President Evo Morales used troops to seize oil and gas fields in an attempt to nationalize the hydrocarbon industry. Ordering the military to forcefully occupy oil and gas reserves, Morales decreed that foreign investors had only six months to comply with demands to nationalize oil or exit the country. Foreign investors in Brazil, Spain, and Argentina protested, creating tension within the region and international community.

Bolivia’s nationalization plan required foreign investors, which had supplied and invested more than $4 billion in Bolivia’s oil industry since the late 1990s, to turn over majority control to the nationally-owned oil company within 180 days. As a result of this nationalization, the private oil companies were expected to absorb a 32% hike in royalties and taxes while the Bolivian government expected to see an increase in revenue from $320 million to $780 million. This [nationalization announcement](http://example.com) fulfilled a campaign pledge by Morales, which helped Morales win the governmental election back in 2005.

**Russia.** Since Vladmir Putin’s rise to power, Russia has conducted a “slow nationalization” by replacing oil company board members, changing laws, buying ownership, and forcing other companies into the state oil companies. Since 2005, the Russian oil industry has been merging several small companies to comprise a few, much larger companies with the goal of maintaining at least a 51% control in the oil industry. Between 2003 and 2005, two Russian state oil companies purchased main production units from Yukos Oil Company and Sibneft. The sale of Yukos was viewed primarily as a political vendetta against its founder, who had been Russia’s richest man. In 2005, the Russian government controlled roughly 30% of oil production in the country, though [denied a plan of nationalization](http://example.com). However, in 2012 Russia [purchased TNK-BP](http://example.com) for $56 billion to increase production to 4.5 million barrels per day.
4.4 Dispute Resolution – International Oil Agreements

International petroleum operations require substantial capital investment, which in many circumstances comes from foreign sources. This is especially true in cases where significant petroleum reserves are located in less developed nations, which are prone to political instability and under-developed legal systems. In addition, the international oil firms capable of deploying the magnitude of capital necessary to finance international petroleum operations have worldwide operations and are increasingly independent of any one state’s governmental control. This independence of state control combined with complex contractual arrangements has resulted in developing nations facing significant difficulties in resolving disputes with oil companies operating within their borders.

4.4.1 Barriers to Litigating in U.S. Court

So why is it so difficult to litigate disputes over international petroleum investments in U.S. courts? A variety of complex legal issues serve as barriers to the litigation of disputes in United States courts. These barriers include: sovereign immunity, the political question doctrine, the act of state doctrine, and the doctrine of forum non-conveniens.

Sovereign immunity. Stemming from the ancient English legal principle that the monarch can “do no wrong,” the doctrine of sovereign immunity prevents a sovereign nation from being sued without its consent. United States’ courts have historically used this doctrine to deny suits brought against the United States, individual states within the U.S., and foreign governments. This doctrine, which prevents suits against foreign governments, was codified in the Foreign Sovereign Immunity Act (“FSIA”), which grants federal jurisdiction over another nation only if the action falls within one of FSIA’s exceptions. 28 USC §§ 1330, 1602-1611. These exceptions include, but are not limited to:

- Waiver of immunity, either explicitly or by implication, by the foreign state. 28 U.S.C. § 1605(a)(1).
- Action based upon a commercial activity carried on in the United States directly or indirectly by a foreign nation, or where the foreign nation’s commercial activity has a direct effect in the United States. 28 U.S.C. § 1605(a)(2).
- Action that involves rights in property taken in violation of international law and some property involved is present in the United States in connection with a commercial activity carried on in the United States by the foreign nation, or where the property is owned or operated by an agency or instrumentality of the foreign state engaged in commercial activity in the United States. 28 U.S.C. § 1605(a)(3).
- Action for personal injury or death against the foreign state or for damage or loss of property caused by the tortious act of a foreign state occurring in the United States unless that act was within the discretionary functions of the foreign nation. 28 U.S.C. § 1605(a)(5).
- Action to enforce a maritime lien against a vessel or cargo of the foreign state based on a commercial activity of the foreign state. 28 U.S.C. § 1605(b).
**Political question.** Even if an action falls within one of the FSIA exceptions, the political question doctrine may prevent the action if the primary issue in the case is one which the Constitution has made the sole responsibility of another branch of government. For example, the Supreme Court has held that conduct of foreign relations is the sole responsibility of the executive branch, and therefore any action challenging those decisions is a political question. *Baker v. Carr*, 369 U.S. 186 (1962). If the court deems an issue a political question, this means that the courts will not regard it as a “case or controversy” as defined by Article III of the constitution. This idea originated in the historic case of *Marbury v. Madison*, 5 U.S. 137 (1803), which gives meaning to the separation of powers doctrine in the Constitution. For example, the Constitution provides that the House has the sole power of impeachment and the Senate has the sole power to try all impeachments. Accordingly, an action concerning an impeachment may be a political question outside the jurisdiction of the U.S. courts. Likewise, the resolution of a territorial dispute between sovereigns is a political question, which the courts are powerless to decide.

**Act of state doctrine.** Like the political question doctrine, the act of state doctrine may keep an action outside the court even if the action falls within the exceptions in the FSIA. The act of state doctrine provides that “the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory,” and requires a showing that (a) the public acts occurred and (b) that the acts took place in the foreign country. *Underhill v. Hernandez*, 168 U.S. 250 (1897). In the case of *International Association of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354 (9th Cir. 1981), the International Association of Machinists (IAM) alleged that OPEC was price-fixing in violation of the Sherman Act, the U.S. antitrust legislation. The court found that the act of state doctrine applied and would not proceed to a determination on the merits. In making this decision, the court noted the Supreme Court’s language concerning the constitutional underpinnings of the act of state doctrine: it “arises out of the basic relationships between branches of government in a system of separation of powers” which suggests that “passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

So, while sovereign immunity is based on the jurisdictional power of the court, the act of state doctrine is a prudential doctrine. For example, US courts have consistently found a foreign state’s act of nationalization to be the classic example of an act of state. “Expropriations of the property of an alien within the boundaries of the sovereign state are traditionally considered to be public acts of the sovereign removed from judicial scrutiny by application of the act of state rubric.” *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1978).

**Doctrine of forum non-conveniens.** Forum non-conveniens is a judicially created doctrine meant to protect defendants from being forced to litigate in an extremely inconvenient court. In these situations, a court may have personal and subject matter jurisdiction, but decline to decide the case because another court is more suited to hear such case. In determining whether another court would be better suited to hear the case, courts consider several factors: (1) the residence of the parties; (2) the location of witnesses and evidence; (3) public policy; (4) the relative burdens
on the respective court systems where the case could be brought; (5) the plaintiff’s choice of forum; and (6) how the change in forum would affect each party’s case. Regardless of these factors, however, if there is no other forum that could hear the case, or the only other available forum is within a judicial system considered to be “grossly inadequate,” courts will not dismiss a case for *forum non conveniens*.

Oil companies sued in the United States for their international actions often move to dismiss an action for *forum non conveniens*. A defendant may have various reasons for not wanting to litigate in the United States, such as the likelihood that the case will settle for much less if the laws of another country are applied. An illustrative case is *Jota v. Texaco Inc.*, 157 F.3d 153 (2d Cir. 1998). In the *Jota* case, claims were brought for extremely harmful effects from the oil exploration activities of Texaco Petroleum Company (TexPet) and PetroEcuador. TexPet was a fourth-level subsidiary of Texaco and by 1992 had given all control over to PetroEcuador. The district court dismissed the suit on grounds of *forum non conveniens*, comity, and failure to join an indispensable party. On appeal, the Second Circuit held that *forum non conveniens* was not appropriate, unless made conditional on Texaco’s submission to the jurisdiction of the Ecuadorian court.

On remand, Texaco argued that the courts of Ecuador were the proper forum to try this case, and submitted to the jurisdiction of the courts there. The Southern District of New York again dismissed the action for *forum non conveniens*, and plaintiffs again appealed to the Second Circuit. The Second Circuit affirmed the dismissal of the action, and conditioned the dismissal on Texaco’s waiver of personal jurisdiction and the tolling of any statute of limitations defense for one year following the dismissal of the present action. *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).


### 4.4.2 International Arbitration and Alternative Dispute Resolution
A common way to decrease the likelihood that a court will determine an oil company’s liability arising from international activities, and thus make the information as to their liability publicly available, is to incorporate an arbitration clause within their contractual agreements with developing nations. *Peter D. Cameron, International Energy Investment Law: The Pursuit of Stability, 32.* In this private method of international commerce dispute settlement, rules are determined by the parties, rather than a court system. Its growing popularity has resulted in the development of a global adjudication system, through which binding arbitration is used to settle commercial disputes as limited by statutory and common law. Further, the New York Convention was adopted, which made awards received through international arbitration enforceable through the courts of the 143 countries that are bound by its provisions. However, the New York Convention has been limited in recent years by some countries, particularly in disputes arising in the natural resources sector.

What must two parties agree upon prior to ensure arbitration is enforceable? The process of arbitration is rooted in the agreement between the parties, making the fundamental document giving the arbitral tribunal jurisdiction over the dispute. Within that document, the parties agree to: (1) the kinds of disputes that will be subject to arbitration; (2) the scope of the tribunal’s authority; (3) the applicable law; (4) the language in which arbitration will be conducted; and (5) the location where arbitration will be held. The applicable law of the country in which the arbitration is conducted serves a gap-filling function, entering only to supply that which is missing from the agreement at the discretion of the arbitrator. *Cameron, 33.* Parties also may designate their own rules regarding the proceeding, or may adopt a pre-existing set of rules, such as the ones promulgated by the United Nations Commission on International Trade Law (UNCITRAL). Arbitration conducted pursuant to the rules of UNCITRAL is subject to enforcement through national courts.

Procedurally, arbitration is generally conducted in two stages – the jurisdictional stage and the merits stage. In the jurisdictional stage, the jurisdiction of the relevant treaty is determined, and the tribunal’s competence to hear the dispute is often challenged. When this stage is complete, the arbitration enters the merits stage. This stage proceeds in two parts: (1) a determination of liability; and (2) assessment of damages. While these stages make arbitral procedure seem similar to litigation, there are practical differences between the two, such as the confidential nature of arbitration, and a lack of precedent to guide the tribunal’s decision. It is not uncommon for two cases with almost identical facts to be resolved very differently because of the lack of precedent.

Is there alternative to the arbitration process described above? Another method of alternative dispute resolution used to resolve disputes in the context of international petroleum is mediation. This is often prescribed, like arbitration, in the parties’ contract. Mediation is often included as part of a stepped or tiered approach to dispute resolution. First, parties will negotiate between senior executives to achieve a resolution. Then, if negotiations fail, they will mediate. If no settlement has been reached after mediation, the parties will allow a third party to render a binding decision, often through arbitration.

Expert determination is another popular method for resolving disputes arising from international petroleum contracts. In this method, the parties agree to instruct a third party expert to find a
solution to a specific issue in dispute. It is generally applied to a narrow range of issues, which are usually technical matters in the oil and gas industry, and which often involve matters of valuation. In expert determination, unlike arbitration, there are no statutory guidelines by which the expert is bound, the parties may not be allowed to present evidence, and enforcement of any decision is limited to a contract action for breach. Expert determinations are not bound by the enforceability principles set forth in the New York Convention.

4.5 Human Rights and Oil Companies

In the context of international petroleum where multinational corporations regularly operate within developing nations, there exists an imbalance between the resources possessed by those nations and the corporations. Multinational corporations often prefer to operate within developing nations, and exercise public powers there that would normally be exercised by the governments of those nations. Even where they do not exercise public powers within a State, the States in which multinational corporations operate are often weaker than the corporation in their economic and legal capacity. Fifty-one of the one-hundred largest economic organizations in the world are multinational corporations, whereas only forty-nine are states. In light of the realities of the modern corporate world, the power wielded by multinational corporations is equal to, and even surpasses, that of many States. While the power of multinational corporations has steadily increased in recent years, that of some national governments has decreased.

Voluntary Principles on Security and Human Rights. In December 2000, five leading oil companies—Chevron, Texaco, Conoco, Royal Dutch Shell, and BP—signed the Voluntary Principles on Security and Human Rights, a new code of conduct pledging to discourage police and private security forces from abusing people living near oil projects. The Voluntary Principles is a “multi-stakeholder initiative” (MSI), involving governments, companies and non-governmental organizations. Specifically, the Voluntary Principles guide companies in conducting a comprehensive human rights risk assessment in their engagement with public and private security providers to ensure human rights are respected in the protection of company facilities and premises. Participants include Canada, the Netherlands, Norway, the Republic of Colombia, Switzerland, the United Kingdom, and the United States. In regards to companies, joining the original five oil companies are ExxonMobil and Marathon Oil, among others.
Despite their purported good intentions, each year more and more claims are filed alleging corporate involvement in human rights abuses abroad. Multinational corporations exert considerable influence over the governments of developing nations in which they operate because they possess the power to make or break their economy, and may force those governments to enact the policies the corporation wants for it to maintain operations there, such as the elimination of environmental regulations or turning a blind-eye to human right abuses committed by private security contracted to protect corporate interests.

Reliance on corporate self-regulation or the ability of each individual State that allows multinational corporations to operate on its soil to impose liability has proven insufficient to prevent human rights abuses enabled by corporations. Multinational corporations possess great power and resources, and many developing nations may be either unable or unwilling to control corporate actions. Even if a State decides to impose regulations on corporate activities, the corporation can simply relocate their activities to another nation. Given this difficult environment for seeking redress for human rights abuses, people have increasingly sought help from U.S. courts.

Because international law does not impose civil liability on corporations, and many nations lack the resources to do so, U.S. courts are the only current way for victims of human rights abuses committed by corporate entities to obtain redress. Furthermore, many multinational corporations are headquartered within the United States, which increases the probability that their actions could adversely affect the foreign relations of the United States. The imposition of civil liability for violations of the law of nations through the ATCA is the only existing deterrent which can be used to encourage large corporations to refrain from turning a blind eye to, or participating in, the commission of egregious violations of human rights.

### 4.5.1 Alien Tort Claims Act

In dealing with claims of human rights abuses brought against oil companies arising from their international operations, United States’ Courts have asserted jurisdiction through the Alien Tort Claims Act or ATCA. The ATCA provides “original” jurisdiction to federal district courts for “tort actions,” brought by aliens,” which violate “the law of nations.” When the First Congress passed the Judiciary Act of 1789, the ATCA was included. With this statute, non-citizens can bring suit in the United States against actors whom they allege have violated international law. 28 U.S.C. § 1350. In passing the ATCA, the First Congress demonstrated its concern that the United States would be drawn into foreign entanglements by those who violated international law. Generally, cognizable violations under the ATCA have included “war crimes and crimes against humanity” where the guilty party is considered to be “an enemy of all mankind.” *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111 (2d Cir. 2010).

Why was the ATCA unused for so long? Until 1980, the ATCA provided jurisdiction in only one case during the more than 170 years it has been in existence. With little guidance from the statutory language and precedent to guide them, federal courts initially had difficulty discerning what exactly the law of nations encompassed, and what torts would be egregious enough to constitute a violation of that law. The Supreme Court answered this question in 204. In looking to the intent of the First Congress in enacting this statute, the Supreme Court stated that a
consensus as to their intent “has proven elusive.” The First Congress understood that causes of action for a “modest number of international law violations with a potential for personal liability” would have existed in the common law of the time. Three primary offenses against the law of nations were then recognized by England’s criminal law, “violation of safe conduct, infringement of the rights of ambassadors, and piracy.” The Supreme Court determined that future claims brought under the ATS should be based on norms of international law that are both “accepted by the civilized world” and are “defined with a specificity comparable” to the three offenses then recognized. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

In *Sosa*, the court did not rule on whether corporate entities may be held liable for violating the law of nations. The law of nations during the early years of the United States was comprised of two principal elements: First, the “general norms governing the behavior of national states with each other,” and second, the common law regulating individual conduct when a person was “situated outside domestic boundaries.” While state actors are the primary concern of the law of nations, individual persons may also be liable for some offenses. Under the domestic law of most nations, corporations, like individuals, may be held liable for violations of some international norms. For other violations of international norms, state action, or a “symbiotic relationship between a private actor and the government that involves the conduct that is the subject of the complaint” must be proven for a private, nongovernmental actor to be held liable. However, there is no requirement of state action to prove a violation of the law of nations in the text of the ATCA. *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th 2008).

4.5.2 The ATCA and the Supreme Court . . . Round Two

On October 17, 2011, the Supreme Court granted certiorari in the case *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013). In *Kiobel*, Nigerian residents alleged that oil companies were responsible for aiding and abetting the Nigerian government in committing violations of the law of nations. Although the Second Circuit had previously held that individuals may be liable for violations of the law of nations including, “war crimes, crimes against humanity (such as genocide), and torture” under the ATCA, the court declined to extend such liability to corporations. This holding created a disagreement among the circuits regarding the imposition of corporate liability. Therefore, the question presented to the Supreme Court was whether, like individuals, corporate entities may be held responsible for the torts committed by its agents in violation of the law of nations.

What is so significant about this case? The plaintiffs in *Kiobel* brought actions only against corporate entities. Allegations against these corporations include “aiding and abetting the Nigerian government” in violating the law of nations through “(1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhuman, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction.” The Second Circuit noted that international tribunals have not previously held corporations liable for committing international crimes. Based on this, they reasoned that “. . . imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world.” Therefore, the court concluded that because the claims presented were only brought against corporations, they did not fall within the jurisdiction of the ATCA.
In 2009, the D.C. Circuit held that corporations are not immune to suit under the ATCA, rejecting the reasoning of the Second Circuit in Kiobel. In Doe VIII v. ExxonMobil Corp., 658 F. Supp. 2d 131 (D.D.C. 2009), plaintiffs alleged that Exxon, who operated a natural gas extraction and processing facility pursuant to a contract with the Indonesian government, retained members of the Indonesian military as security forces whom they were aware may have previously committed human rights abuses, and knew that human rights abuses would likely result from the performance of the security contract. Alleged abuses in that case included “genocide, extrajudicial killing, torture, crimes against humanity, sexual violence, and kidnapping.” The plaintiffs claimed these actions were committed by a unit of the Indonesian military that was dedicated to the Exxon facility, and Exxon possessed sole authority “to control and direct” the soldiers’ actions.

The D.C. Circuit in Doe VIII rejected the reasoning of the Second Circuit in Kiobel, holding that corporations may be held liable for violations of the law of nations under the ATCA. The court cited a number of problems with the Second Circuit’s analysis in Kiobel. There is no basis for the conclusion that the First Congress would not have been concerned that “formal legal associations of individuals,” such as corporations, would have presented the same types of risks to foreign relations as individuals would if they violated international law, the court reasoned. Also, the D.C. Circuit stated that the sources consulted by the Kiobel majority in its analysis of international law were flawed. Thus, the court held, corporate liability is consistent with both international law and the purpose of the ATCA. In April 2013, the Supreme Court dealt a crushing blow to the ATS. In Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013), the Court held that the ATS applies only to conduct within the United States or on the high seas. This decision, though not a formal death knell for ATS litigation, greatly decreases its usefulness to potential plaintiffs.