No. 10-1491

IN THE
Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, *et al.*,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae*.

The Chamber is the world's largest business federation, representing more than 300,000 direct members and an underlying membership of more than three million businesses and trade and professional

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket *amicus* consent letters.

organizations of every size, sector, and geographic region. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts, including this Court.

The Chamber has a direct and substantial interest in the issues presented in this case. Its members transact business around the world, and many of them—based on nothing more than doing business around the world—have been targeted by plaintiffs suing under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. In the past two decades, various plaintiffs have filed more than 150 ATS lawsuits against U.S. and foreign corporations doing business in two dozen industry sectors, including agriculture, financial services, manufacturing, and communications. *See* J. Drimmer & S. Lamoree, *Think Globally, Sue Locally: Trends & Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Int'l L. 456, 460-462 (2011). These lawsuits have maligned business activities in more than 60 countries as alleged human-rights abuses actionable in U.S. courts. *See id.* at 464. And they have had—and have the potential to create in the future—substantial adverse effects not just on the targeted businesses themselves, but on U.S. foreign policy and on the countries where the claims originate. In light of those adverse effects, the Chamber has filed *amicus* briefs in a host of ATS cases in this Court and the lower courts. *See* National Chamber Litigation Center, *Alien Tort Statute (ATS) Cases*.[2]

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[2] *Available at* http://www.chamberlitigation.com/cases/issue/foreign-affairs-international-commerce/alien-tort-statute-ats.

While the Chamber takes no position as to the validity of the factual allegations in the Complaint, it unequivocally condemns violations of human rights. But the question here is not whether such wrongs occurred. Rather, it is whether private plaintiffs can reach defendants who fall outside the scope of the relevant law. The Chamber has a substantial interest in encouraging this Court to hew to its own teaching in *Sosa*: The federal courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 728 (2004). The decision below should be affirmed.

SUMMARY OF ARGUMENT

As Respondents cogently explain, the notion that there is a customary international norm of corporate liability for alleged human-rights violations is not "debatable." *Sosa*, 542 U.S. at 728. There is no such norm. *See* Resp. Br. 27-48; *see also* Br. of Chamber of Commerce of the U.S. in Support of Defendants-Appellees 8-20, *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011) (No. 10-3675).[3] But even if the Court could somehow discern such an international norm, it would be inappropriate to apply it through the mechanism of the ATS. *Sosa* also taught, after all, that "[t]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to

[3] *Available at* http://www.chamberlitigation.com/sites/default/files/cases/files/2011/Flomo,%20et%20al.%20v.%20Firestone%20Natural%20Rubber%20Co.,%20et%20al.%20(NCLC%20Brief).pdf.

litigants in the federal courts." 542 U.S. at 732-733. Those "practical consequences" cut sharply against recognizing corporate ATS liability.

First, ATS suits against corporations are often based on nothing more than allegations that the corporations did business in countries where human rights abuses are known to occur. Such suits seek, in other words, to punish companies for—and thus deter them from—engaging in commerce with troubled nations. But there is a term for those sorts of deterrents: economic sanctions. And economic sanctions fall squarely within the purview of the political branches. The prospect of multitudes of private plaintiffs—hailing from other countries throughout the world—who attempt to shape American foreign policy through *ad hoc* ATS litigation is precisely the sort of "practical consequence" that counsels against extending ATS liability. *Id.*

Second, ATS lawsuits against corporations certainly threaten to harm corporations, but they also threaten to harm the countries where those corporations do business. Complaints asserting ATS claims impose a severe social stigma that may scuttle stock values or destroy debt ratings; they often require extraordinarily burdensome overseas discovery; they take many years to litigate; and they result in coerced settlements. These are harms that corporations will, naturally, take concrete steps to avoid. As a result, if this Court endorses corporate ATS litigation, corporations will divest from countries with tarnished human-rights records—a potentially catastrophic result for the countries that need that investment most. And once again U.S. foreign policy will suffer as well; for the federal government has aggressively promoted a policy of using commercial

engagement to help developing nations along the path to democracy.

Third, corporate ATS liability can harm the domestic economy, too, by tightening the spigot of foreign investment in the United States. After all, foreign companies in our global economy often have ties to the United States that suffice—at least in the view of some courts—to give the federal courts jurisdiction over alleged overseas ATS violations. Thus under plaintiffs' ATS theories, a foreign corporation can be brought into U.S. courts for alleged activity in a third country. The best—and in some cases the only—way for a foreign company to insulate itself from that risk is to avoid the U.S. market altogether, thus making it impossible for a federal court to assert *in personam* jurisdiction over it.

In short, we agree with Respondents that corporate ATS liability for the offenses alleged here does not comport with customary international law. But even if the question were close, the "practical consequences" of such a regime would counsel against its adoption. The decision below should be affirmed.

ARGUMENT

I. CORPORATE ATS SUITS RISK DANGEROUS ALTERATIONS OF FOREIGN POLICY THROUGH LITIGATION.

1. The first two centuries of the ATS saw no recorded lawsuit against a corporate defendant. Now, however, there are scores of ATS actions pending or recently decided in the federal courts, the vast majority of which involve corporate defendants.[4] In many

[4] *See*, *e.g.*, *Arias* v. *DynCorp.*, 517 F. Supp. 2d 221 (D.D.C. 2007); *Baloco* v. *Drummand Co.*, 631 F. 3d 1350 (11th Cir.

of those cases, the plaintiffs' allegations boil down to this: The defendant corporation did business in a nation known to have a tarnished human-rights record—a category that unfortunately includes many developing countries throughout the world.[5] For example, in *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79 (2010), the plaintiffs alleged that an energy company "understood that the [Sudanese] Government had cleared and would continue to clear the land of the local population if oil companies were willing to come to the Sudan and explore for oil, and that understanding that to be so, [the company] should not have come." *Id.* at 261 (quoting district court opinion; alteration in original). As the court of appeals recognized, the actual corporate activities

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2011); *Bauman* v. *DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011); *In re Chiquita Brands Int'l Inc.*, No. 10-CV-80954 consolidated (S.D. Fla.) (six actions); *Doe* v. *Cisco Systems, Inc.*, No. 11-cv-2449 (N.D. Cal.); *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (No. 01-CV-01357 (D.D.C.)); *Doe* v. *Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010); *Daobin* v. *Cisco Systems, Inc.*, No. 11-cv-01538-PJM (D. Md.); *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); *Kiobel*, *supra*; *Mujica* v. *Occidental Petroleum Corp.*, 564 F.3d 1190 (9th Cir. 2009); *Obe* v. *Royal Dutch Shell PLC*, No. 2:11-cv-14572 (E.D. Mich.).

[5] Although many ATS suits are brought on an aiding-and-abetting or doing-business theory of liability, that is not always the case; in some suits, plaintiffs claim that a company directly engaged in human-rights violations overseas. *See, e.g.*, *Vietnam Ass'n for Victims of Agent Orange* v. *Dow Chem. Co.*, 517 F.3d 104, 112-114 (2d Cir. 2008) (alleging that a U.S. chemical company violated international norms in manufacturing Agent Orange). The practical consequences of ATS liability we discuss here—such as impact on U.S. foreign policy, *infra* at 8-11—are equally applicable to direct-action theories of ATS liability.

the plaintiffs identified in their complaint—for example, scouting out sites for their physical plant—"generally accompany any natural resource development business or the creation of any industry." *Id.*

Likewise, in *Khulumani* v. *Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom.*, *American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008), plaintiffs sued a host of manufacturing, financial, and other companies, arguing that by doing otherwise lawful business in apartheid-era South Africa they helped prolong apartheid. *See also Balintulo* v. *Daimler AG*, No. 09-2778-cv (2d. Cir.) (alleging that companies aided and abetted the apartheid-era South African government's human-rights abuses). In *Corrie* v. *Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007), plaintiffs argued that a manufacturer should be held liable under the ATS because its bulldozers were purchased by the Israel Defense Force and allegedly used to commit human rights violations. And in *Doe* v. *Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010), *appeal pending*, No. 10-56739 (9th Cir.), plaintiffs alleged that three multinational corporations should be held liable for providing "logistical support" to farming activities in Côte d'Ivoire, including agreeing to purchase cocoa from various farms and providing farming supplies. The plaintiffs claimed that those workaday business actions were enough to trigger ATS liability because the companies should have known that some Ivorian farmers might end up using child labor and involuntary labor on their farms. First Am. Compl., *Doe* v. *Nestle, S.A.*, No. 2:05-CV-05133 (C.D. Cal. July 22, 2009). The plaintiffs did not allege that the defendant companies

participated in any way in the alleged imprisonment or abuse; as the district court found, "the overwhelming conclusion" is that the companies were merely "purchasing cocoa and assisting the production of cocoa." *Doe*, 748 F. Supp. 2d at 1109.

2. These cases—and many others too numerous to recount here—are essentially bids to block corporations from investing in, or doing business in, countries with poor human-rights records. *See Talisman Energy*, 582 F.3d at 261 (plaintiffs' allegations "serve essentially as proxies for their contention that Talisman should not have made any investment in the Sudan") (quoting District Court opinion). Such efforts have a pair of interrelated adverse effects on foreign policy. First, as this Court has recognized, they may interfere with the domestic-policy prerogatives of foreign nations. *See Sosa*, 542 U.S. at 733 & n.21. Developing countries emerging from periods of human-rights turmoil often seek reconciliation through nonjudicial means. *See id.* at 733 n.21 (noting South Africa's objection that ATS litigation interfered with the work of its Truth and Reconciliation Commission). ATS lawsuits risk usurping those countries' considered decisions that a non-adversarial process is the best way to heal the wounds of past conflict.

Second, as the *Talisman Energy* court recognized, plaintiffs' efforts to block corporate investment in countries with tarnished human-rights records amount to an attempt "to impose embargos or international sanctions through civil actions in United States courts." 582 F.3d at 264. That is an inappropriate use of the federal judiciary.

To let federal courts—at the behest of ATS plaintiffs located half a world away—dictate *ad hoc* foreign policy would place federal courts well outside of their constitutional responsibilities. It is well settled that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918); *accord Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). That distribution of authority holds true with respect to economic sanctions just as with other aspects of foreign affairs: The Legislative branch typically authorizes sanctions, and the Executive then implements them according to the terms Congress has fashioned. *See*, *e.g.*, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 374 (2000) (discussing statute that gave the President "flexible and effective authority over economic sanctions against Burma"). The International Emergency Economic Powers Act, for example, authorizes the President to impose peacetime sanctions but "subject[s] the President's authority to a host of procedural limitations." *United States* v. *Amirnazmi*, 645 F.3d 564, 572 (3d Cir.), *cert. denied*, 132 S. Ct. 347 (2011). Those limitations exist "to ensure Congress would retain its essential legislative superiority in the formulation of sanctions regimes erected under the Act's delegation of emergency power." *Id.*; *see also* S. Maberry, *Overview of U.S. Economic Sanctions*, 17-WTR Currents: Int'l Trade L.J. 52, 52 (2008) (sanctions themselves "generally are imposed by the President through the issuance of an Executive Order," though Congress will sometimes "impose sanctions directly"); *Crosby*, 530 U.S. at 374.

The key point is that questions about whether and how to impose sanctions are to be decided by Congress and the President—not the Judiciary, and certainly not private alien plaintiffs pursing their own idiosyncratic agendas. The political branches can calibrate sanctions to the circumstances they are meant to address. And as we discuss *infra* at 28, they can use the threat of sanctions together with economic-engagement strategies to achieve maximum effect. Courts can do neither. Precisely because sanctions fall squarely within the "foreign affairs powers" of the political branches, *Chamber of Commerce of U.S.* v. *Whiting*, 131 S. Ct. 1968, 1983 (2011), this Court has rejected attempts to use the federal judiciary to interfere in decisions regarding when to—and when not to—impose sanctions. *See*, *e.g.*, *Regan* v. *Wald*, 468 U.S. 222, 242-243 (1984); *see also Diggs* v. *Shultz*, 470 F.2d 461, 465 (D.C. Cir. 1972). As the D.C. Circuit explained, the decision to discontinue sanctions against a foreign country "present[s] issues of political policy which courts do not inquire into." *Diggs*, 470 F.2d at 465.

Those precedents underscore the dangerous "practical consequences" of using the ATS to deter transnational business activities. *Sosa*, 542 U.S. at 732-733. The Executive branch has long maintained that "sanctions measures [must be] well conceived and coordinated, so that the United States is speaking with one voice," lest an uncoordinated effort "put the U.S. on the political defensive." *Crosby*, 530 U.S. at 382 n.16 (quoting *Testimony of Under Secretary of State Eizenstat before the Trade Subcommittee of the House Ways and Means Committee* (Oct. 23, 1997)). But ATS litigants regularly seek just such uncoordinated, *de facto* sanctions regimes: Litigant after

litigant has sought to make his or her own foreign policy by punishing corporations for investing in troubled nations and thus deterring other corporations from similar investments. That is "a direct challenge to U.S. foreign policy leadership." E. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 Colum. J. Transnat'l L. 153, 153 (2003). And even if that "direct challenge" does not render a particular ATS case non-justiciable, *cf. Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 88-89 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), the fact that conflicts arise again and again certainly amounts to an adverse "practical consequence" that undermines the coherence of U.S. foreign policy. *Sosa*, 542 U.S. at 732. This consequence weighs against any finding that the purported corporate-liability norm is "sufficiently definite to support a cause of action." *Id.*

3. The Solicitor General has decided to support the Petitioners in this particular case. His brief, however, ignores the problems that an *ad hoc* sanctions mechanism can create for United States foreign policy—a notable omission, given *Sosa*'s command that "practical consequences" are central to the ATS analysis. 542 U.S. at 732. It is unclear whether the Solicitor General sees no adverse practical consequences or has not considered them. But in any event, even if the Department of Justice were willing to accept the foreign-policy consequences that accompany corporate ATS liability, that would not mean *Congress* is similarly willing to do so. That is an important distinction, given that Congress shares in the constitutional authority to craft sanctions regimes. *See supra* at 9. And that Congressional prerogative takes on additional significance in light of the fact that the Office of the Solicitor General has

long insisted, in this Court and others, that the foreign-policy consequences of broad ATS liability are *not* acceptable.

In *Sosa*, for example, the Solicitor General told this Court that ATS suits "may frustrate if not displace the efforts of the political branches to address international events or foreign policy issues by speaking with *one* voice[.]" Br. for the United States as Respondent Supporting Petitioner at 43, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 182581. In *Enahoro* v. *Abubakar*, 408 F.3d 877 (7th Cir. 2005), the Justice Department emphasized that ATS litigation has "serious consequences for both the development and expression of the Nation's foreign policy." Br. for the United States as Amicus Curiae at *1, 2004 WL 5706063. In *Mujica* v. *Occidental Petroleum Corp.*, 564 F.3d 1190 (9th Cir. 2009), the Department of Justice explained that corporate ATS lawsuits brought under an aiding-and-abetting theory "could be the basis for a wide range of claims" that indirectly, and inappropriately, seek "to challenge the lawfulness of a foreign government's conduct." Br. of the United States as Amicus Curiae in Support of Affirmance, 2006 WL 6202351. And in *Ntsebeza*, the Solicitor General told this Court that ATS "[l]itigation such as this would also interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes whose policies the United States would like to influence." Br. for the United States as Amicus Curiae in Support of Petitioners at *21, 553 U.S. 1028 (2008) (No. 07-919), 2008 WL 408389 ("*Ntsebeza Brief*"). He offered this example:

> [I]n the 1980s, the United States supported economic ties with black-owned companies and urged companies to use their influence to press for change away from apartheid, while at the same time *using limited sanctions* to encourage the South African government to end apartheid. Such policies would be greatly undermined if the corporations that invest or operate in the foreign country are subjected to lawsuits under the ATS as a consequence. [*Id.* (emphasis added)].

Our point exactly. Corporate ATS liability has the effect of empowering *civil litigants*—aliens suing in U.S. courts—to curtail U.S. economic interactions with foreign nations. The Solicitor General has long recognized the potential for mischief that such a species of liability invites.[6] Under *Sosa*, and despite the Solicitor General's new views, those factors continue to militate against recognizing corporate ATS liability.

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[6] The Solicitor General's brief in this case generally fails to acknowledge the striking degree to which its current position is at war with the one it took just a few years ago in *Ntsebeza*. The Solicitor General at that time told this Court that the ATS does not authorize aiding-and-abetting liability, *id.* at *8, and cannot be applied extraterritorially. *Id.* at *12. The Solicitor General also cited with approval the district court's conclusion that "[i]n a world where many countries may fall considerably short of ideal economic, political, and social conditions," the courts "must be extremely cautious in permitting suits * * * based upon a corporation's doing business in countries with less than stellar human rights records[.]" *Id.* at *3. Each of those positions counsels in favor of affirmance here.

II. CORPORATE ATS LIABILITY HARMS DEVELOPING COUNTRIES BY DETERRING CORPORATE INVESTMENT.

The long shadow of corporate ATS liability also has a second adverse "practical consequence[ ]": the extraordinary expenses and risks associated with such liability. These expenses and risks harm defendant corporations regardless of whether those corporations have done anything wrong. And those harms, in turn, create important secondary effects: They deter corporate investment in developing countries, retarding those countries' growth and further undercutting executive branch policies that encourage economic engagement abroad.

A. The Potential For ATS Liability Presents Extraordinary Risks For Corporations Considering Foreign Investment.

Petitioners downplay the extraordinary corporate risks engendered by ATS litigation, suggesting in a footnote that "a relatively small number of cases are pending" and that they "constitute an insignificant portion of the dockets of federal courts." Pet. Br. 57 n.55, 60; *see also* Amicus Br. of Joseph Stiglitz 5. Not so. Plaintiffs have filed more than 125 ATS cases against corporate defendants in the past 15 years alone,[7] dozens remain pending, and those suits have sought as much as *$400 billion* in damages. J. Auspitz, *Issues in Private ATS Litigation*, 9 Bus. L. Int'l 218, 220 (2008). But beyond those absolute values, petitioners ignore many other reasons why ATS litigation "presents a danger of vexatiousness different in degree and in kind from that which

[7] Drimmer, 29 Berkeley J. Int'l L. at 460.

accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). That danger is especially significant here given the need in the ATS context to examine the "practical consequences" of adopting a plaintiff's theory. *Sosa*, 542 U.S. at 732.

1. The mere filing of an ATS case can topple corporate stock values and debt ratings. *See* J. Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights*, 21 World Poly. J. 60, 63 (2004). To be sure, other litigation may carry some of that risk if a corporation faces an extraordinarily lurid accusation or an unusually sweeping class action. But here, of course, the Court has *required* an examination of the practical consequences of the rule plaintiffs seek. Moreover, the burden is particularly pronounced in ATS cases for several reasons. ATS cases tend to feature extreme allegations—genocide, torture, slavery—as a matter of course. Needless to say, those allegations can inflict significant damage on a business's reputation, regardless of whether the business has done anything wrong. And courts have permitted ATS lawsuits based on vague allegations of wrongdoing and have employed variable, unpredictable legal standards regarding third-party liability. *See* Chamber of Commerce Br. as Amicus Curiae in Support of Petitioners at *13-*17, *Rio Tinto PLC* v. *Sarei*, No. 11-649 (9th Cir. Dec. 28, 2011), 2011 WL 6859447. That uncertainty invites stigmatizing lawsuits that are hard to dismiss even when the allegations are dubious at best.

ATS plaintiffs themselves understand quite well that even vexatious lawsuits can taint corporations doing business abroad, damage corporate identities,

and chill foreign investment. *See* C. Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 Law & Soc'y Rev. 271, 290-91 (2009). Indeed, plaintiffs have exploited those dynamics as part of their overall litigation strategy. To take just two examples of many: In the *Doe* case, press releases and demonstrations just before Halloween and Valentine's Day urged parents and children to refuse to purchase chocolate candy from the defendant corporations because it was allegedly the product of "child slavery"—with the pending ATS action cited as support for that claim. *See*, *e.g.*, D. Orr, *Slave Chocolate?*, Forbes, Apr. 24, 2006;[8] A. Buffa, *Chocolate's Horror Show* (Oct. 31, 2006).[9] And in a case against Coca-Cola based on the alleged activities of its subsidiaries in Colombia, the plaintiffs and their lawyers launched protests at the company's shareholder meetings. *See* Drimmer, 29 Berkeley J. Int'l L. at 517. The news that the company was being accused of murder and torture prompted some shareholders to quickly dump Coca-Cola stock, even though the case ultimately was dismissed. Kurlantzick, 21 World Poly. J. at 63-64; *see Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009). That sort of reputational harm is different in kind from the publicity accompanying a run-of-the-mill commercial or tort suit.

2. Because ATS claims typically relate to conduct occurring in distant corners of the globe, the discovery process can be unusually expensive and burdensome. *See* G. Hufbauer & N. Mitrokostas, *Interna-*

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[8] *Available at* http://www.forbes.com/forbes/2006/0424/096.html.

[9] *Available at* http://www.tompaine.com/articles/2006/10/31/chocolates_horror_show.php.

tional Implications of the Alien Tort Statute, 7 J. Int'l Econ. L. 245, 253 (2004) ("*International Implications*") (describing "massive costs" associated with ATS lawsuits). As this Court has recognized, the costs involved in complex civil litigation like ATS cases give plaintiffs an "*in terrorem* increment of the settlement value." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007). The burdens can be greater than usual in ATS litigation for at least two reasons.

First, "obtain[ing] discovery from foreign sources" almost invariably is an "expensive, cumbersome, and difficult" process—one that often renders the litigation as whole "prohibitively expensive and resource-consuming." M. Chalos, *Successfully Suing Foreign Manufacturers*, Trial, 44-NOV Trial 32 (Nov. 2008). Second, the usual difficulties of overseas discovery are magnified in ATS cases. "Witnesses and documents are overseas, typically in remote locations and developing countries." Auspitz, 9 Bus. L. Int'l at 221. "[S]uits often involve dozens of defendants, their interactions with each other and government agencies, claims going back dozens of years, documents in foreign languages, and similar logistical hurdles." *Id.* Discovery is therefore "vastly expensive." *Id.* Courts and commentators have recognized as much, observing that discovery in ATS cases is "costly and time-consuming," A. Nichols, Note, *Alien Tort Statute Accomplice Liability Cases*: *Should Courts Apply the Plausibility Pleading Standard of Bell Atlantic v. Twombly?*, 76 Fordham L. Rev. 2177, 2208 (2008), and imposes "financial hardships" and "significant delays" on parties and courts alike. *Turedi* v. *Coca Cola Co.*, 460 F. Supp. 2d 507, 526 (S.D.N.Y. 2006), *aff'd*, 343 F. App'x 623 (2d Cir. 2009); *accord Mujica* v. *Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134,

1152 (C.D. Cal. 2005) ("significant cost and delays" caused by need for translation of foreign documents).

A few examples illustrate the problem. Chiquita Brands International, in defending against an ATS suit, recovered over $8 million for defense costs from just one of its five insurers. Chiquita Brands Int'l, Inc., Quarterly Report (Form 10-Q), at 23 (Nov. 7, 2011). And in the Unocal ATS litigation, the company's legal bill ran to $15 million—and that case was not even a class action. Auspitz, 9 Bus. L. Int'l at 221. As one commentator observed: "Where plaintiffs and defendants are more numerous than in *Unocal*, and the challenged conduct more complex, the costs of litigation might make the $15 million Unocal reportedly spent look like a bargain." *Id.*

These sorts of expenses can accompany ATS litigation even in developed countries where formal methods of obtaining discovery for use in the United States—for example, the Hague Convention procedures—are available. *See* P.J. Youngblood & J.J. Welsh, *Obtaining Evidence Abroad*: *A Model for Defining & Resolving the Choice of Law Between the Federal Rules of Civil Procedure & the Hague Convention*, 10 U. Pa. J. Int'l Bus. L. 1, 46-47 (1988) (cost of complying with Hague Convention formalities is "exceedingly high"). And with respect to undeveloped countries—from where virtually all ATS cases take root—those nations are often not signatories to the conventions. Parties accordingly are stuck with relying on letters of request from U.S. courts to foreign ones—requests that often go unheeded due to unequipped, or even corrupt, judiciaries. *See* L.J. Dhooge, *A Close Shave in Burma*, 24 N.C. J. Int'l L. & Com. Reg. 1, 53-54 (1998) (discussing difficulties in obtaining evidence from Burma in ATS cases); U.S.

Dep't of State, *Preparation of Letters Rogatory* (warning that execution of a letter of request may take "a year or more worldwide").[10] That means "delays, increased costs, a narrower scope of discovery, and loss of control of the process, all of which may prove prejudicial to [d]efendants." Dhooge, 24 N.C. J. Int'l L. & Com. Reg. at 54. Meanwhile, the specter of large amounts of monetary liability (and negative publicity) will hang over a company for years.

3. ATS cases also inevitably take years to litigate, even just to the point of a ruling on dismissal motions. One reason, of course, is that litigation at the motion-to-dismiss stage often requires the court and the parties to explore complex issues of international law. And ATS plaintiffs have been creative in identifying novel "norms" for the courts to consider. "[R]ecognizing the elasticity of the term 'law of nations,' " plaintiffs "have brought suits alleging that the following acts violate the 'law of nations': * * * environmental harms; violations of cultural, social, and political rights; breach of a duty to provide the best proven diagnostic and therapeutic treatment; and breach of a duty to treat with dignity." *International Implications*, 7 J. Int'l Econ. L. at 249. No doubt many of these claims are meritless. But they may not be " 'frivolous' in the legal sense because of the expansive reading courts have given the ATS." *Id.* They therefore drag on, with the parties conducting preliminary discovery and enlisting the assistance of experts and *amici* even before the case has survived a motion to dismiss.

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[10] *Available at* http://travel.state.gov/law/judicial/judicial_683.html.

The result is massive briefing and extensive delays. In *Bowoto* v. *Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010), for example, a jury verdict came after 10 years of litigation. And in the *Doe* case involving Côte d'Ivoire chocolate, it took five-plus years and multiple rounds of briefing before the district court even ruled on the motion to dismiss. *See* 748 F. Supp. 2d 1063. That decision is now up on appeal—an appeal that has already drawn a passel of *amicus* briefs and that could take years to resolve in its own right. As one commentator has put it: "Multinational corporations will spend millions of dollars moving these cases through motions and procedures and changing forums[.]" R. O'Gara, *Procedural Dismissals Under the Alien Tort Statute*, 52 Ariz. L. Rev. 797, 820-821 (2010).

4. All of these factors—the stigma of human-rights allegations, the unique burdens of overseas discovery, and the prospect of lengthy litigation—make ATS suits particularly effective vehicles to coerce settlements from corporate "deep pockets," even in meritless actions. *See* Holzmeyer, 43 Law & Soc'y Rev. at 291; *Khulumani*, 504 F.3d at 295 (Korman, J., dissenting) (characterizing ATS litigation in that case as "a vehicle to coerce a settlement").

As this Court has recognized, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value * * * out of any proportion to its prospect of success at trial so long as [the plaintiff] may prevent the suit from being resolved against him by dismissal or summary judgment." *Blue Chip Stamps*, 421 U.S. at 740. Indeed, "cost and delay, or threats of cost and delay, can themselves force parties to settle underly-

ing disputes." *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting). Given the stigma that can attach to even a baseless ATS complaint, *see supra* at 15-16, it is all the more likely that a business might make the rational—but costly—decision to settle a claim just to avoid years of expense and burden. Myriad members of the Chamber have had the misfortune of being targeted—often repeatedly—by such lawsuits. Faced with the prospect of a "decade or more litigating, extensive world-wide discovery and seemingly endless procedural motions, coupled with the likely prospect of negative and graphic publicity campaigns," some companies choose to settle even dubious ATS claims. J. Cowman, *The Alien Tort Statute—Corporate Social Responsibility Takes On A New Meaning*, Metro Corp. Couns., July 1, 2009.[11]

In the last few years alone, several corporate ATS cases have settled for well over $10 million. Unocal, for example, reportedly settled its ATS case for $30 million. *See* P. Magnusson, *A Milestone for Human Rights*, Bus. Wk., Jan. 24, 2005.[12] Shell settled an ATS case against it for $15.5 million. *See* J. Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. Times, June 9, 2009.[13] And various American clothing manufacturers settled an ATS case involving labor conditions in Saipan for $20

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[11] *Available at* http://www.metrocorpcounsel.com/articles/11491/alien-tort-statute-corporate-social-responsibility-takes-new-meaning.

[12] *Available at* http://www.businessweek.com/magazine/content/05_04/b3917113_mz017.htm.

[13] *Available at* http://www.nytimes.com/2009/06/09/business/global/09shell.html.

million. J. Strasburg, *Saipan Lawsuit Terms OK'd: Garment Workers to Get $20 Million*, S.F. Chron., Apr. 25, 2003, at B1.[14] These examples, of course, are only the settlements that have managed to become public. Yet they suggest a cause of action sufficiently vague, broad, and burdensome that ATS plaintiffs are able to force corporations to pay millions of dollars to short-circuit cases rather than launch long fights to seek vindication. These risks and expenses to U.S. businesses—and the jobs and communities they support—are alone a sufficient "practical consequence[ ]" to reject expanded ATS liability. *Sosa*, 542 U.S. at 732.

B. The Risks Of Being Sued Under The ATS Can Chill Investment And Damage Developing Countries.

For the reasons set forth above, some U.S. corporations faced with the pall of ATS liability will withdraw from developing markets. And that will inevitably disrupt the U.S. economy in ways Congress never could have envisioned or intended. In the global marketplace, developing countries supply an important source of raw materials and eventually serve as export markets for U.S. business. *See* U.S. Chamber of Commerce, *Africa Business Initiative, A Conversation Behind Closed Doors: Inside the Boardroom: How Corporate America Really Views Africa* 5 (May 2009).[15] Without these sources of raw materials, U.S. businesses will find their supply chains

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[14] *Available at* http://articles.sfgate.com/2003-04-25/business/17486250_1_san-francisco-s-levi-strauss-saipan-rubin-factory-workers.

[15] *Available at* http://www.uschamber.com/sites/default/files/international/africa/files/abi_ceo_suvey.pdf.

snarled, their costs increased, and their ability to employ American workers jeopardized.

But corporate withdrawal from developing markets also produces a second, closely related adverse effect: The loss of direct foreign investment can severely harm developing nations themselves. Many rely on foreign investment to provide the income and political stability they need to develop democratic institutions and economic self-sufficiency; without that investment, their progress may be stopped or reversed. That is just the sort of unintended cross-border effect that led this Court in *Sosa* to counsel "caution," "restraint," and "vigilance" when asked to expand the ATS's scope. 542 U.S. at 726-729.

1. It is no exaggeration to say that any corporation that sets foot in a developing country—and some that do not—risk being sued under the ATS. "Since human rights, political and economic freedoms, and absence of corruption are highly correlated with per capita income, it is not surprising that target countries [for ATS litigation] are by and large poor countries." G. Hufbauer & N. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789*, at 15-16 (2003) ("Hufbauer"). Given the theories of liability advanced by ATS plaintiffs—including theories in which business presence, with little more, suffices to trigger multi-million-dollar claims—any corporation that actually sets up operations in such a country surely is at risk. *See id.*

But the risk runs deeper still. That is because "all companies whose supply chains or distribution markets reach into developing countries are suspect" under plaintiffs' ATS theories. Schrage, 42 Colum. J. Transnat'l L. at 159. Foreign direct investment by

corporations likewise can trigger ATS liability under these theories. And "private lenders, particularly international banks, are surely at risk," given that they could be accused of lending to foreign businesses or regimes with knowledge that those regimes engage in some activity that can be packaged and branded as a violation of international law. *Id.* at 17. As one study noted: "The total public debt of target countries is now $1,229 billion; more than half represents credit extended by private creditors. It is no exaggeration to say that every major international bank is exposed to ATS liability." *Id.*

Just recently, the Solicitor General warned that an ATS regime featuring corporate and aiding-and-abetting liability would "have a deterrent effect on the free flow of trade and investment, because it would create uncertainty for those operating in countries where abuses might occur." *Ntsebeza Brief*, 2008 WL 408389, at *20. That remains true today. And the effect of that deterrent is clear enough: At the margins, it will dissuade corporations from "investing in countries with a poor human rights record." D. Diskin, Note, *The Historical & Modern Foundations for Aiding & Abetting Liability Under the Alien Tort Statute*, 47 Ariz. L. Rev. 805, 809 (2005). Indeed, "[e]ven the unstated threat of future ATS suits might dissuade some corporations from doing business in ATS magnet countries," *International Implications*, 7 J. Int'l Econ. L. at 249-250, while actual adverse ATS decisions would likely "prompt firms to disinvest en masse." Hufbauer, *supra*, at 40.[16]

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[16] The *amicus* brief of Joseph Stiglitz calls these concerns "little more than hyperbole," Br. 5, but the arguments it offers to

2. Corporate ATS liability does not simply deal a severe blow to businesses expanding into new markets; it also deals a severe blow to the target country itself. "Since the Second World War, trade has been an engine of world growth." *Id.* at 42. And trade between the United States and developing nations, and U.S. investment in those nations, is a major factor in facilitating the economic growth of developing nations. *See U.S.-Africa Trade Relations: Creating a Platform for Economic Growth: Joint Hearing Before the H. Comm. on Energy and Commerce and the H. Comm. on Foreign Affairs*, 111th Cong. (2009) (statement of Florizelle B. Liser, Assistant U.S. Trade Representative for Africa). That growth promotes the development of stable political institutions. And stable political institutions, in turn, create the conditions for further foreign investment. *See* Nat'l Security Council, *The National Security Strategy of the United States of America* 17 (2002).

ATS suits against corporations can destroy that cycle. Such suits, and the threat of them, tend to

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support that assertion are insubstantial. Professor Stiglitz argues that "the risk of liability" is "just one among many considerations that drive investment decisions," *id.*, but that does not answer our point—that at the margins, firms that might otherwise have invested in a country will be dissuaded by potential ATS claims. And he argues that "although corporations have faced the specter of ATS liability for more than a decade, there is little empirical evidence that it has had any impact on foreign direct investment." *Id.* at 5-6. But that ignores the fact that the frequency of ATS suits has grown exponentially in recent years, *see supra* at 5, and no doubt would explode if this Court were to confirm that corporate liability is available. That adverse effects have thus far been difficult to measure does not mean they would remain so in a world where the risk of ATS liability is impossible to ignore.

curtail trade and investment for the reasons just discussed. *See* Letter from William H. Taft, Legal Adviser, U.S. Dep't of State, to Daniel Meron, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice (Dec. 3, 2004) (corporate ATS lawsuit in Colombia could "deter[ ] present and future U.S. investment in Colombia" and "damage the stability of Colombia").[17] But they can also mean "access denied to international credit markets" because "[c]ountries on the losing side of ATS cases will find that bank credit and bond placements are more difficult." Hufbauer, *supra*, at 43. ATS suits, in short, "will damage target countries[.]" *Id.* at 42. As the Department of Justice has explained, that disincentive "adversely affect[s] U.S. economic interests as well as economic development in poor countries." Br. for the United States as Amicus Curiae Supporting Appellees at *9-*10, *Balintulo* v. *Barclay Nat'l Bank Ltd.*, No. 09-2778-cv (2d Cir. Nov. 30, 2009), 2009 WL 7768609. The consequences are stark. As the Solicitor General emphasized in the past, deterring foreign investment due to ATS litigation " 'could have significant, if not disastrous, effects on international commerce.' " *Ntsebeza Brief*, 2008 WL 408389 at *3 (quoting district court opinion).

Worst of all, after companies abandon developing countries in response to ATS risks, the human-rights situation in the country is unlikely to improve. Talisman Energy's withdrawal from the Sudan in response to ATS pressure is a chilling example. While Talisman was in the country, it hired Price-Waterhouse Coopers to help verify compliance with

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[17] *Available at* http://www.state.gov/s/l/2004/78089.htm. This letter was filed in the docket in *Mujica*, 381 F. Supp. 2d 1164.

its voluntary adoption of the International Code of Ethics for Canadian Businesses. S.J. Korbin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. Int'l L. & Pol. 425, 444 (2004). It also "engaged in extensive community development efforts, including building hospitals, clinics, schools and wells" where it operated. *Id.* Yet in the wake of continuing pressure—including an ATS suit—it finally sold its assets and left Sudan. *Id.* at 426. For the activists who orchestrated a massive campaign against Talisman, this should have been a tremendous victory. The reality was much bleaker. The vacuum produced by Talisman's departure has been filled by Chinese companies that take an official policy of "noninterference in domestic affairs"—a polite way of saying China will not interfere with local regimes' oppression of their populations. *See* S. Hanson, Council on Foreign Relations, *Backgrounder: China, Africa, and Oil* (Jun. 6, 2008);[18] *see also* Council on Foreign Relations, *More Than Humanitarianism: A Strategic U.S. Approach Towards Africa* 43 (2006) (describing how "China * * * quickly filled the gap" after Talisman and other Western companies departed the Sudan).

3. The deterrent effect ATS litigation has on foreign investment also underscores a second and related way in which corporate ATS liability impinges on U.S. foreign policy: It impedes the political branches' informed choice to encourage investment in certain strategically important nations.

The business community plays a central role in the effective execution of U.S. foreign policy. As this Court has explained, the President's power to per-

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[18] *Available at* http://www.cfr.org/china/china-africa-oil/p9557.

suade other nations rests on his capacity "to bargain for the benefits of access to the entire national economy." *Crosby*, 530 U.S. at 381. When the political branches decide to promote trade with another nation, American businesses can and frequently do export their goods. And when the political branches decide to permit investment in a country with a problematic human rights record, as a means of advancing U.S. interests or helping that country along the road toward stability, American businesses can and frequently do make the investment.

Petitioners' theories of corporate ATS liability fly in the face of that constructive-engagement strategy. If their theories were correct, then private plaintiffs—alien plaintiffs who may have no connection at all to the United States—could pull the rug out from under the United States' efforts to bolster trade with carefully selected foreign nations. As the Solicitor General recently told this Court: "[I]n certain circumstances, the U.S. government may determine that * * * limited commercial interaction is desirable in encouraging reform [in foreign nations] and pursuing other policy objectives. * * * Such policies would be greatly undermined if the corporations that invest or operate in the foreign country are subjected to lawsuits under the ATS as a consequence." *Ntsebeza Brief*, 2008 WL 408389, at *21.

The Solicitor General's point underscores the absurdity of permitting ATS claims in this circumstance: How can it be that an American corporation is subjected to suit for doing what the political branches asked it to do? And yet that is exactly what has happened in the past. For example, the South African ATS lawsuits discussed above, *see supra* at 7,

named as defendants companies that responded to President Reagan's call for constructive engagement to help end apartheid in that country. And the same dynamic threatens to rear its head again in the future. If ATS corporate liability is endorsed by this Court, efforts ranging from rebuilding in Afghanistan to trade with China would be subjected to second-guessing by alien plaintiffs dissatisfied with the pace of change. *See* U.S. Dep't of Defense Task Force for Business and Stability Operations, *Mineral Resource Team 2010 Activities Summary* 3 (Jan. 29, 2011) (calling on American businesses to assist in resource extraction efforts in Afghanistan to reinvigorate its economy).[19]

For this reason, too, the threat of corporate ATS liability has "potential implications for the foreign relations of the United States" that "should make courts particularly wary" of expanding the ATS beyond the limits of well-established international law. *Sosa*, 532 U.S. at 727.

III. CORPORATE ATS LIABILITY HARMS FOREIGN COMPANIES AND THREATENS FOREIGN INVESTMENT IN THE UNITED STATES.

For all of these reasons, corporate ATS liability can damage corporate reputations and financial health, torpedo U.S. businesses' foreign operations, and damage the economies of developing countries. But it also has another effect closer to home: It discourages foreign investment in the United States, potentially costing the domestic economy jobs.

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[19] *Available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ada545347.pdf&Location=U2&doc=GetTRDoc.pdf.

Foreign investment is critical to the long-term health of the U.S. economy. *See* U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty* 2 (2008). Mindful of its importance, this Court has routinely rejected doctrines discouraging such investment. *See*, *e.g.*, *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2855-56 (2011); *Stoneridge Inv. Partners LLC* v. *Scientific-Atlanta*, *Inc.*, 552 U.S. 148, 163-164 (2008). In *Stoneridge*, for example, the Court concluded that the "practical consequences" of expanding securities liability "provide[d] a further reason to reject petitioner's approach." 552 U.S. at 163-164. Specifically, "[o]verseas firms with no other exposure to our securities laws could be deterred from doing business here" if securities liability were broadened in the way the petitioner suggested, and that deterrent "in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets." *Id.* at 164.

Corporate ATS liability has the same discouraging effect. Foreign companies often invest in the United States by establishing a business presence here. But that step may subject a company, and its assets, to the jurisdiction of U.S courts—including to ATS claims arising out of conduct occurring elsewhere. *See Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 415 (1984) ("continuous and systematic" general business contacts can suffice to subject foreign companies to the general jurisdiction of U.S. courts). The most obvious way for those companies to avoid ATS litigation is to invest their resources outside the United States. A letter by the

former Secretary General of the International Chamber of Commerce made precisely this point: "[T]he practice of suing EU companies in the US for alleged events occurring in third countries could have the effect of reducing investment by EU companies in the United States * * * if one of the consequences would be exposure to the Alien Tort Statute." Letter from Maria Livanos Cattaui to Roman Prodi, President, European Commission (Oct. 22, 2003).[20]

Of course, many foreign companies will decide that access to the U.S. market outweighs the risk of ATS litigation. Those foreign corporations that decide to forge ahead will face all the risks of potential ATS liability recounted above, *see supra* at 15-22, and their decisions on where in the world to invest will be affected not only by their home country's foreign policy directives but also by private ATS plaintiffs who sue in U.S. courts. But not all foreign companies will accept that risk; "[a]t the margin, some * * * may simply decide to avoid the United States in order to avoid ATS liability." Hufbauer, *supra*, at 42. "That decision will deprive the US economy of the benefits that come from inward foreign investment." *Id.*

[20] *Available at* http://www.iccwbo.org/policy/environment/icccbhc/index.html.

CONCLUSION

Even if a norm of corporate liability could be teased out of the law of nations—which it cannot—numerous "practical consequences" would counsel against incorporating that norm through the ATS. This Court should affirm the decision below.

Respectfully submitted,

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