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Kiobel v. Royal Dutch Petroleum: The United States Should File a Brief in the U.S. Supreme Court Arguing That The Alien Tort Statute Does Not Apply Extraterritorially

The Supreme Court initially granted review in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, to decide whether corporations are subject to liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, for three specific alleged human-rights violations.[1] The plaintiffs in *Kiobel* are Nigerian citizens who seek damages from European corporations on the theory that the corporations allegedly "aided and abetted the Nigerian government in commiting human rights abuses directed at plaintiffs" in Nigeria. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011). The United States filed an *amicus* brief in *Kiobel*, available at 2011 WL 6425363, arguing that corporations are subject to liability under the ATS. The United States addressed the question of corporate liability in the abstract, and did not address whether corporations might be subject to liability in some but not other situations.

On March 5, 2012, following oral argument, the Supreme Court ordered supplemental briefing on the question "[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Kiobel*, 2012 WL 687061. An *amicus* brief supporting the plaintiffs would be due on June 13, 2012; an *amicus* brief supporting the defendants would be due on August 8, 2012.

The U.S. Chamber respectfully submits that the United States should file an *amicus* brief reiterating its longstanding position that the ATS does not permit courts to recognize a cause of action for violations of international law that occur within the

[1] The ATS provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

REVIEW AUTHORITY: Robert Homme, Senior Reviewer

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territory of another sovereign. That settled view is supported by persuasive legal authority, as well as by weighty policy considerations:

- *First*, extending the ATS to claims based on conduct within another sovereign's territory causes diplomatic friction with other countries, complicates the ability of the Executive Branch to manage U.S. foreign relations, and inevitably will damage our country's relations with other nations, including key allies.
- *Second*, endorsing extraterritorial application of the ATS would prevent the U.S. Government from objecting when other countries allow their courts to exercise universal criminal or civil jurisdiction over U.S. Government officials or U.S. corporations for their activities in third countries. The U.S. would—and should—object strenuously if another country were to prosecute a U.S. official for military actions in Afghanistan or Pakistan, or were to allow civil suits against U.S. corporations that manufacture military equipment used in those countries. If the Administration supports extraterritorial application of the ATS, it will necessarily endorse legal principles that will harm U.S. national security interests.
- *Third*, applying the statute extraterritorially will harm global development—and reduce the growth of democracy—by deterring businesses from engaging commercially in developing economies, which often are the parts of the world in which violations of international law are most likely to occur. The U.S. Government should not press U.S. business to engage economically in developing or post-conflict countries and at the same time encourage lawsuits that are based on those very activities.[2]

[2] The U.S. Chamber of Commerce unequivocally condemns human rights abuses and—through its Business Civil Leadership Center—strongly advocates voluntary measures to strengthen corporate responsibility. But the Chamber believes strongly that extraterritorial litigation initiated by private parties harms, rather than enhances, efforts to create consistent and widespread standards of corporate social responsibility.

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I. The Administration Should Not Reverse The Longstanding U.S. Position That The ATS Does Not Apply To International Law Violations Occurring Within The Territory Of Another Nation.

The United States has consistently and repeatedly taken the position—in the Supreme Court and in the federal courts of appeals—that "[s]ection 1350 does not apply extraterritorially to claims based on alleged violations of international law occurring in a foreign country." Br. for the United States as Resp't Supporting Pet'r at 10, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 182581 (U.S. *Sosa* Br.). *See also* Br. for the United States as *Amicus Curiae* at 12-14, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919), 2008 WL 408389 (U.S. *Ntsebeza* Br.) ("The presumption against extraterritorial legislation was well-established at the time the ATS was adopted," and the concerns animating that presumption are "fully present" when "domestic courts purport to sit in judgment over the conduct of the foreign state itself, especially in its own territory.").[3]

The United States has described the application of the ATS to injuries arising within the territory of another sovereign as a "fundamental analytical error regarding the ATS" that is "contrary to the long-established presumption against extraterritorial application of a statute." U.S. *Unocal* Br. at 2-3; *See also id.* at 30 ("Congress enacted the ATS because it wanted to ensure a federal forum so that traditional international law offenses . . . *committed in this country* were subject to proper redress.") (emphasis added); U.S. *Ntsebeza* Br. at 5 (permitting claims against corporations based on their transactions with the South African government during apartheid would represent "a

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[3] *See also* Br. for the United States as *Amicus Curiae* at 29, *Doe I v. Unocal Corp.*, No. 00-56603 (9th Cir. May 8, 2003) (U.S. *Unocal* Br.) ("No cause of action may be implied by the ATS for conduct occurring in other nations."), available at www.uscib.org/docs/unocal_us_amicus.pdf; Br. for the United States as *Amicus Curiae* at 7-8, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (*per curiam*) (U.S. *Khulumani* Br.) ("Nothing in the ATS, or in its contemporary history, suggests that Congress intended it to apply to conduct in foreign lands."), available at www.state.gov/documents/organization/87317.pdf; Br. for the United States as *Amicus Curiae* in Support of Rehearing at 10, *Sarei v. Rio Tinto, PLC*, No. 02-56256 (9th Cir. Sept. 28, 2006) (U.S. *Rio Tinto* Br.) ("The answer to th[e] question [whether federal courts could properly project federal common law extraterritorially to resolve disputes centered in foreign countries] should be 'no.'"), available at www.state.gov/documents/organization/98376.pdf.

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dramatic expansion of U.S. law that is inconsistent with well-established presumptions that Congress does not intend to . . . extend U.S. law extraterritorially").

The United States has explained that such lawsuits, whether asserted against present or former government officials or against private persons or entities, require federal courts to review claims "challenging the conduct of a foreign government against its own citizens and within its own territory"—and therefore infringe the sovereignty of other nations and interfere with United States foreign policy. Br. of the United States as *Amicus Curiae* at 16, *Mujica v. Occidental Petroleum Corp.*, 564 F.3d 1190 (9th Cir. 2006) (No. 05-56056), 2006 WL 6202351 (U.S. *Mujica* Br.)[4]; see also U.S. *Ntsebeza* Br. at 12 ("'[E]ndorsing aiding and abetting suits in which the primary conduct at issue is the foreign state's own conduct in its own territory'" "exacerbate[s] the risk of 'international discord'"); U.S. *Unocal* Br. at 4 (extraterritorial application of the ATS has "significant potential for serious interference with the important foreign policy interests of the United States").[5]

The United States virtually never reverses a well-considered position that it has taken consistently before the Supreme Court and in briefs filed in the courts of appeals that were authorized by the Solicitor General.[6] There certainly is no basis for such an extraordinary reversal of position here—the policy concerns that underlie the government's position remain fully applicable and, indeed, have become even stronger since that position was initially adopted.[7]

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[4] Also available at www.state.gov/documents/organization/98378.pdf .

[5] In addition, numerous foreign governments have argued against extraterritorial application of the ATS, both in diplomatic notes to the Department of State and in briefs filed in the Supreme Court and other federal courts. *See* Br. of BP America et. al. as *Amicus Curiae, Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Feb. 3, 2012), Appendix A: Foreign Government Submissions, available at http://www.courtappendix.com/kiobel/protests (compiling protests from Indonesia, China, South Africa, Australia, Switzerland, United Kingdom, Northern Ireland, Colombia, Canada, and Israel).

[6] Because the government's court of appeals filings occurred in *amicus* briefs, those submissions were required to be authorized by the Solicitor General. 28 C.F.R. 0.20(c).

[7] This memorandum focuses on the relevant policy considerations. The legal principles demonstrating that the ATS does not apply extraterritorially are discussed in multiple government briefs and court opinions. *See* U.S. *Sosa* Br. at 19-20; U.S. *Ntsebeza* Br. at 12-16; U.S. *Unocal* Br. at 29-31; *Sarei v. Rio Tinto*, 671 F.3d 736, 2011 WL 5041927 at *54-*68 (9th Cir.

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II. Encouraging Extraterritorial Application Of The ATS Harms U.S. Foreign Relations, Jeopardizes U.S. National Security Interests, And Deters U.S. Investment In Developing Countries.

ATS litigation is not a rare occurrence. In the past two decades, various plaintiffs have filed more than 150 ATS lawsuits against U.S. and foreign corporations in more than twenty industry sectors, including agriculture, financial services, manufacturing, high technology, and communications. These lawsuits target business activities in over sixty countries—including countries that are close allies and trading partners of the United States, such as Israel, Colombia, Mexico and Indonesia.[8] More than fifty percent of the companies listed on the Dow Jones Industrial Average have been named as defendants in ATS actions.[9] There are now several dozen such actions pending in the federal courts.[10]

Every one of these lawsuits seeks damages for harm allegedly incurred by the plaintiffs in the territory of a foreign nation. As the United States has recognized in its prior court filings, permitting such claims to continue harms U.S. diplomatic relations and, in addition, deters investment and business activity in developing nations—because they are the places in which international law violations are most likely to occur—even though those are the very places in which the involvement of multinational businesses can do the most good, in terms of promoting the economic progress that is essential for the growth of democracy. And the endorsement of extraterritorial application of the ATS will undermine the ability of the U.S. Government to object to foreign courts' extraterritorial application of their nations'

2011) (en banc) (Kleinfeld J., dissenting), *petition for cert. filed*, 80 BNA U.S.L.W. 3335 (U.S. Nov. 23, 2011) (No. 11-649); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 74-81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). We would be happy to provide a memorandum addressing this issue in detail.

[8] See Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Int'l L. 456, 464 (2011).

[9] *See* Br. of the Chamber of Commerce as *Amicus Curiae* at 11 & n.5, *Ntsebeza*, 553 U.S. 1028 (No. 07-919), 2008 WL 437022; *see generally* http://www.chamberlitigation.com/cases/issue/foreign-affairs-international-commerce/alien-tort-statute-ats (collecting Chamber *amicus* briefs in ATS cases).

[10] *See* Br. of the Chamber of Commerce as *Amicus Curiae* in Support of Pet'rs at 6 n.2, *Rio Tinto PLC v. Sarei*, No. 11-649 (Dec. 2011), available at http://www.chamberlitigation.com/rio-tinto-v-sarei-et-al.

laws to United States citizens, government officials, and corporations—which could result in the imposition of monetary awards or criminal penalties for conduct authorized, or even compelled, by United States law.

A. Extraterritorial Application Of The ATS Will Interfere Significantly With The Executive Branch's Ability To Conduct Our Nation's Foreign Relations.

The United States has cited "conflict with federal policy" and "imped[ing] the federal government's ability to speak with one voice in foreign affairs" as key reasons why it opposes extraterritorial application of the ATS. U.S. *Mujica* Br. at 3; *see also* U.S. *Rio Tinto* Br. at 12 ("[R]ecognition of [extraterritorial] claims would directly conflict with Congress' purpose in enacting the ATS, which was to *reduce diplomatic conflicts*.") (emphasis added); U.S. *Ntsebeza* Br. at 12 (the presumption against extraterritoriality, as applied to the ATS, "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord") (quotation marks omitted). This interference can take a variety of different forms.

First, the filing in U.S. courts of lawsuits asserting that acts by foreign government officials violated international law—or that the acts of a private company or individuals aided and abetted such a violation—can be perceived by U.S. allies as an indication that "the U.S. Government does not recognize the legitimacy of [the allies'] judicial institutions," which may be harmful to diplomatic relations. Letter from Legal Adviser William H. Taft in *Mujica v. Occidental Petroleum Co.* (C.D. Cal. Dec. 3, 2004) (Noting that "Colombia is one of the United States' closest allies in this hemisphere, and our partner in the vital struggles against terrorism and narcotics trafficking.").

Many other countries have objected to U.S. judges usurping the role of their national courts. For example, in the South Africa apartheid litigation, a series of ATS lawsuits against more than fifty U.S. and foreign companies for allegedly aiding and abetting the apartheid regime in South Africa, the German government complained

that the exercise of extraterritorial jurisdiction over German companies by a U.S. court "would unacceptably infringe German state sovereignty and interfere with the jurisdiction of German courts...." Letter Brief of German Government at 3, *Balintulo v. Daimler A.G.*, No. 09-2778 (2d Cir. Oct. 8, 2009).

Second, and just as significant, the litigation may seek to impose damages liability for actions that were consistent with U.S. foreign policy. That too was the stated purpose and the inevitable result of the South Africa ATS litigation. As the United States explained, holding corporations liable for conduct in foreign nations that was consistent with U.S. foreign policy at the time "could prospectively restrict policy options for the United States around the world" and "undermine the ability of the Executive to employ . . . important tactic[s] of diplomacy and available tools for the political branches." U.S. *Khulumani* Br. at 16.

Other situations in which ATS lawsuits could seek to impose liability based on conduct consistent with U.S. policy include "permit[ting] ATS claims to be easily asserted against our allies in [the war against terrorism]" or "against the United States itself in connection with its efforts to combat terrorism." U.S. *Unocal* Br. at 3 (citing *Al Odah v. United States*, 321 F.3d 1134, 1144-45 (D.C. Cir. 2003) (ATS claims asserted by aliens detained at the U.S. Naval Base at Guantanamo Bay), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004)); *see also Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 347 (D.C. Cir. 2007) (quoting U.S. statement of interest to the district court that the litigation could "harm relations with Indonesia – a key ally in the war on terrorism."); *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (ATS claims based on disagreement with the United States' policy on the Israel-Palestine conflict; dismissed on political question grounds).[11]

[11] Although some courts in the past have dismissed ATS actions on political question grounds, the Supreme Court's recent decision in *Zivotofsky v. Clinton*, 2012 WL 986813 (U.S. Mar. 26, 2012), may be invoked to question the applicability of the political question doctrine to such actions.

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Third, as the Solicitor General also explained to the Supreme Court, extraterritorial application of the ATS "interfere[s] 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." U.S. *Ntsebeza* Br. at 21. ATS litigation involving conduct in foreign nations permits private litigants "to impose embargos or international sanctions through civil actions in the United States Courts"—and to do so retroactively. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 264 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79 (2010).

The South Africa litigation provides a powerful example. There, the United States government had determined that commercial engagement was the appropriate policy for challenging apartheid, but the plaintiffs' argument was that the more than fifty defendant companies had violated international law by their commercial dealings with the South African government. Similarly, in *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010), appeal pending, No. 10-56739 (9th Cir. filed Nov. 4, 2010), the plaintiffs argued that the defendants violated international law by purchasing cocoa from Cote d'Ivoire, notwithstanding the absence of any government embargo or sanctions. Although the district court dismissed the complaint—after five years of litigation—the plaintiffs have appealed.

The Executive Branch frequently crafts nuanced foreign policies for dealing with complex issues such as South African apartheid, the Israel-Palestine conflict, trade with China and Iran, and post-war engagement in Afghanistan. The U.S. government "may determine that limited commercial interaction is desirable in encouraging reform [in foreign nations] and pursuing other policy objectives." U.S. *Ntsebeza* Br. at 21.[12] Indeed, Secretary of State Hillary Clinton has explained that

[12] *See, e.g.*, U.S. Dep't of Defense Task Force for Business and Stability Operations, *Mineral Resource Team 2010 Activities Summary* 3 (Jan. 29, 2011), available at http://www./dtic.mil/cgi-bin/GetTRDoc?AD=ada545347.pdf&Location=U2&doc=GetTRDoc.pdf (calling on American businesses to assist in resource extraction efforts in Afghanistan to reinvigorate its economy): U.S. Dep't of Treasury, *OFAC Regulations for the Financial Community* (Jan. 24, 2012), available at http://www.treasury.gov/resource-

"security is shaped in boardrooms and on trading floors" and that America cannot "turn inward" but instead must engage with emerging economies around the world. Hillary Clinton, U.S. Sec'y of State, Remarks at the Economic Club of New York (Oct. 14, 2011), available at http://www.state.gov/secretary/rm/2011/10/175552.htm. *See also* Condoleezza Rice, U.S. Sec'y of State, Remarks at the Business Counsel at 2 (May 9, 2007), available at http://www.latradecoalition.org/files/2010/12/SecretaryRicesRemarksattheBusiness-Council.pdf ("Free trade is a critical tool" in the effort to "foster peace and stability between states" by "promot[ing] prosperity, good governance, and social justice within states.").

These 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." U.S. *Ntsebeza* Br. at 21. The threat of ATS suits, notwithstanding a company's compliance with the laws of its own nation and the nation in which it did business, may make companies unwilling to transact business with or in these foreign nations, thwarting U.S. foreign policy goals. *See also* pp. 9-12, *infra*.[13]

Fourth, as demonstrated by the numerous *amicus* briefs submitted by the United States in ATS cases, these lawsuits force the Executive Branch to devote significant time and resources to determining whether and how to involve itself in suits in our courts involving conduct that occurred elsewhere. This process is not just

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center/sanctions/Documents/facbk.pdf; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 (2000) (discussing statute that gave the President "flexible and effective authority over economic sanctions against Burma").

[13] Plaintiffs often seek to use ATS suits as a tool to alter the government's foreign policy regarding trade with nations with questionable human rights records. *See, e.g.*, Kashmir Hill, *How similar is the lawsuit against Nokia Siemens to* Wang Xiaoning v. Yahoo?, Forbes.com at 2 (Sept. 20, 2010), available at http://www.forbes.com/sites/kashmirhill/2010/08/20/how-similar-is-the-lawsuit-against-nokia-siemens-to-wang-xiaoning-v-yahoo/ (plaintiff's lawyers in *Saharkhiz v. Nokia Siemens Corp.*, No. 10-cv-00912 (E.D. Va. filed Aug 16, 2010, dismissed Nov. 10, 2010) explained: "Our main goal is to seek restitution for Mr. Saharkhiz and his suffering in Iran. But our second goal is to help establish a certain standard for telecommunication companies doing business in other countries, to require that there be an export of human rights standards along with the export of technology."); Sui-Lee Wee, *Insight: Cisco suits on China rights abuses to test legal reach*, Reuters.com (Sept. 8, 2011), available at http://www.reuters.com/article/2011/09/09/us-china-cisco-idUSTRE78809E20110909 (The lead plaintiff in *Doe v. Cisco*, No. 11-02449 (N.D. Cal.., filed May 19, 2011), explained that the case was "not only for myself, but also for the freedom of every individual in China, to put an end forever to China's 'literary jail.'").

burdensome; it also carries the risk of undermining executive authority by making the government appear inconsistent (because of the varying positions taken with respect to claims involving different countries) or, if the courts do not adopt the position urged by the Justice Department, impotent.

Again, the South Africa apartheid litigation is representative. In 2003, at the request of the district court, the Executive Branch opined that "continued adjudication of [these suits] risks potentially serious adverse consequences for significant interests of the United States." Letter from William H. Taft IV, Legal Adviser, to Shannen W. Coffin, Deputy Assistant Attorney General at 2 (Oct. 27, 2003).[14] The United States reiterated concerns about the adverse effects of the litigation on U.S. foreign policy when the district court's dismissal of the cases was appealed to the Second Circuit. See U.S. *Khulumani* Br. at 17-19. When the Second Circuit reversed, in disregard of the stated views of the Executive Branch, the U.S. again advocated for dismissal in an *amicus* brief supporting certiorari. See U.S. *Ntsebeza* Br. at 12.[15] The suit remains pending against some defendants today.

The burden on the Executive Branch and the problems that result when courts do not adhere to its policies provide additional reasons why the statute should be construed to exclude conduct occurring in the territory of other nations.

B. Endorsement By The United States Of Extraterritorial Application Of The ATS Will Expose U.S. Citizens, Government Officials And Corporations To Unjustified Extraterritorial Prosecutions And Civil Lawsuits In Foreign Nations' Courts.

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[14] This assessment was based on the position of the South African government at the time that "these cases do not belong in U.S. courts and that they threaten to disrupt and contradict its own laws, policies and processes aimed at dealing with the aftermath of apartheid as an institution." Oct. 27, 2003 Taft Letter at 2. The letter explained that "[s]upport for the South African government's efforts in this area is a cornerstone of the U.S. policy towards that country and we can reasonably anticipate that adjudication of these cases will be an irritant in U.S.-South African relations." *Id.*

[15] The Supreme Court lacked a quorum to consider the case so the judgment was summarily affirmed. *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

The United States has consistently—and strenuously—objected to the exercise by foreign courts of extraterritorial jurisdiction over U.S. officials for their actions in third countries. For example, the U.S. Government objected to efforts by Spanish and German prosecutors to prosecute U.S. civilian and military officials for their actions in Iraq and Guantanamo Bay, Cuba.[16] And the U.S. Government objected to the Belgian universal jurisdiction law that would have allowed criminal prosecution of U.S. officials. *See U.S. Attacks Belgium War Crimes Law*, BBC News (June 12, 2003), available at http://news.bbc.co.uk-/2/hi/europe/2985744.stm.[17] If the Administration were now to support extraterritorial application of the ATS, it would seriously undermine the ability of the United States to object if other countries attempt to prosecute U.S. officials, or to enact legislation allowing lawsuits against U.S. officials or corporations, for their actions in other countries.

Moreover, U.S. Government support for extraterritorial application of the ATS is likely to encourage other countries to use or enact similar laws with universal jurisdiction or extraterritorial application, which could ultimately harm U.S. national security interests. As the Governments of Australia and the United Kingdom have informed the U.S. Supreme Court in friend of the court briefs, extraterritorial application of the ATS by the United States could result in "[o]ther nations [following] its lead, to the detriment of the U.S. and the general detriment of international law and order." Br. of Australia and United Kingdom, *et. al.*, as *Amici*

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[16] *See* Letter from Mary Ellen Warlow, U.S. Dep't of Justice, to Paula Mongé Royo, Subdirectora General de Cooperación Juridica Internacional (Mar. 1, 2011), http://ccrjustice.org/files/US%20Letters%20Rogatory%20-Response%20March%201,%202011%20-%20ENG.pdf; Patrick Donahue, "German Prosecutor Won't Set Rumsfeld Probe Following Complaint," (Apr. 27, 2007), http://www.bloomberg.com/apps/news?pid=newsarchive-&sid=a3Z18u1WUHVo&refer=germany.

[17] *See also* http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=2742 ("By passing this law, Belgium has turned its legal system into a platform for divisive, politicized lawsuits against her NATO Allies. . . . Belgium needs to realize that there are consequences to its actions. This law calls into serious question whether NATO can continue to hold meetings in Belgium and whether senior U.S. officials, military and civilian, will be able to continue to visit international organizations in Belgium.").

Curiae at 22, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004) (Jan. 23, 2004) (No. 03-339) (citing Joseph Story, *Commentaries on the Conflict of Laws* 32-35 (2d ed. 1841)).

The Administration should not endorse legal principles that would be used to justify the improper extraterritorial application of other countries' laws against U.S. officials and corporations, especially for their military activities in third countries.

C. Extraterritorial Application Of The ATS Harms Businesses And Deters Investment In Developing Nations - The Very Places Where Businesses' Involvement Is Needed Most.

The United States has also recognized in its previous ATS briefs that permitting ATS litigation based on conduct occurring in the territory of another country "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." U.S. *Ntsebeza* Br. at 20. *See also* U.S. *Mujica* Br. at 6 (ATS lawsuit based on events in Colombia could "deter[] present and future U.S. investment in Colombia" and "damage the stability of Colombia") (quotation marks omitted); Letter from Soemadi Djoko M. Brotodiningrat, Ambassador, Embassy of the Republic of Indonesia, to Richard L. Armitage, Deputy Secretary, U.S. Department of State, in response to *Doe v. Exxon Mobil Corp* (July 15, 2002), available at http://www.courtappendix.com/kiobel/protests/ ("While allegation of abuses of human rights by the Indonesian military . . . is at best questionable, its adjudication in the United States courts will definitely compromise the serious efforts of the Indonesian government to guarantee the safety of foreign investments, including in particular those from the United States, and thus will adversely affect Indonesia's struggle to secure economic recovery, a struggle which is supported by the United States.").

These countries, moreover, are the very places in which investment and business activity by multinational companies can promote the economic development

that leads to the growth of democracy. *See e.g.*, Hillary Clinton, *America's Pacific Century*, Foreign Policy Magazine (Nov. 2011), available at http://www.foreignpolicy.com/articles/2011/10/11/americas_pacific_century (In order to "put ourselves in the best position to sustain our leadership, secure our interests *and advance our values*[,] . . . [o]ne of the most important tasks of American statecraft over the next decade will . . . be to lock in a substantially increased investment . . . [including] economic . . . in the [emerging] Asia-Pacific region.").

The specter of ATS lawsuits inevitably will lead corporations to conclude that partial or complete withdrawal from those regions is the best course of action. That is because the very significant stigma associated with allegations of human rights abuses, combined with prospect of lengthy and costly litigation,[18] make ATS suits particularly effective vehicles for extracting settlements from corporate "deep pockets," even in meritless actions. *See* Cheryl 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); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 295 (2d Cir. 2007) (*per curiam*) (Korman, J., concurring in part, dissenting in part) (characterizing South Africa Apartheid litigation as "a vehicle to coerce a settlement"), *aff'd sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

Under the theories advanced by ATS plaintiffs, moreover, no corporation is immune—merely engaging in ordinary commercial relationships in a foreign nation whose government has a poor human rights record is sufficient to trigger a claim of aiding and abetting. Elliott J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 Colum. J. Transnat'l L. 153, 159 (2003) (By permitting claims against corporate entities premised on secondary liability, "all companies whose supply chains or distribution markets reach into developing countries are suspect."); *see also* Br. of

[18] ATS claims relate to conduct occurring in far corners of the globe, and the discovery process is therefore unusually expensive and burdensome. Br. of the Chamber of Commerce as *Amicus Curiae* at 16-20, *Kiobel v. Royal Dutch Petroleum Co.* at 16-17, No. 10-1491, 2012 WL 392540 (U.S. Feb. 3, 2012).

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the Chamber of Commerce as *Amicus Curiae* at 5-8, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2012 WL 392540 (U.S. Feb. 3, 2012) (discussing cases in which the ATS claim rests entirely on allegations that the defendant corporation legally conducted "business in a nation known to have a tarnished human-rights record").

The only way for a company to reduce the possibility of becoming an ATS defendant, with all of the attendant brand damage, litigation cost and management distraction, is not to do business in the parts of the world where such claims are most likely to arise. Of course, those are the very parts of the world in which economic development is most urgently needed.

Withdrawal of corporations from developing countries is not merely hypothetical. Talisman Energy's withdrawal from the Sudan is a prime example of the ability of ATS litigation to drive private corporations out of troubled areas, even when the business opportunities are significant. Talisman had been attempting to comply with its own voluntary adoption of the International Code of Ethics for Canadian Businesses, and it engaged in other efforts targeted at development in the Sudan. Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. Int'l L. & Pol. 425, 444 (2004). When it withdrew, it took that investment with it. *Id.* at 426. The result was not the elimination of human rights abuses associated with oil excavation. Rather, China, with its policy of noninterference, filled the void. Council on Foreign Relations, Independent Task Force, *More Than Humanitarianism: A Strategic U.S. Approach Toward Africa* 43 (2006).

Moreover, the extraterritorial application of the ATS—if it is permitted to continue—inevitably will harm the United States economy by deterring foreign investment in this country. *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) (foreign investment is critical to the long-term health of the economy).

Foreign companies invest in the United States by establishing a business presence here. That step subjects a company's investment in the U.S. to the jurisdiction of U.S courts—including to ATS claims arising out of conduct occurring elsewhere. Companies choosing *not* to invest in the United States, on the other hand, do not expose themselves to that risk. Given the significant stakes of ATS litigation, extraterritorial application of the statute necessarily will deter foreign companies from investing here.

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 State . . . if one of the consequences would be exposure to the Alien Tort Statute." Letter from ICC Sec'y Gen. Maria Livanos Cattaui to Romano Prodi, President, European Commission (Oct. 22, 2003), available at http://www.iccwbo.org/icccbhc/index.html.

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Given the clearly expressed view of the United States in its long series of prior amicus briefs in ATS cases that the ATS does not apply to conduct occurring within another nation's territory, and the very significant policy reasons that support that view, the government should file an *amicus* brief in *Kiobel* urging the Supreme Court to adopt that position. A departure from its longstanding position would be both extraordinary and contrary to important legal and policy interests of the United States.