No. 11-649

# In the Supreme Court of the United States

RIO TINTO PLC AND RIO TINTO LIMITED,

*Petitioners*,

v.

ALEXIS HOLYWEEK SAREI, ET AL.,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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# MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2(b), the Chamber of Commerce of the United States of America moves for leave to submit the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari filed by petitioners Rio Tinto plc and Rio Tinto Limited. Consent to the filing of this *amicus* brief was granted by counsel for petitioners but was denied by counsel for respondents.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber expresses the views of its members with respect to matters before Congress, the Executive Branch, and the courts. The Chamber regularly files amicus briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber has a direct and substantial interest in the issues presented by this case. Many of its members transact business around the world and have been named as defendants in litigation under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. ATS claims against businesses such as the claims at issue in this case have no basis in international law, impose unjustified—and very substantial—litigation costs, and threaten to deter cross-border business ac-

tivity that is beneficial both to Americans and to the citizens of other nations.

Respectfully submitted.

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DECEMBER 2011

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## BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

## INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber expresses the views of its members with respect to matters before Congress, the Executive Branch, and the courts. The Chamber regularly files amicus briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber has a direct and substantial interest in the issues presented by this case. Many of its members transact business around the world and have been named as defendants in litigation under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. ATS claims against businesses such as the claims at issue in this case have no basis in international law, impose unjustified—and very substantial—litigation costs, and threaten to deter cross-border business activity that is beneficial both to Americans and to the citizens of other nations.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief.

## SUMMARY OF ARGUMENT

To the extent that the Court reverses the judgment in *Kiobel* v. *Royal Dutch Petroleum Co.*, No. 10-1491, without addressing the first three questions presented in the petition in this case, it should grant review here with respect to those issues.

In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 729 (2004), this Court declined to "close the door" to judicial expansion of the class of claims that could be asserted under the Alien Tort Statute "on the understanding that the door is still ajar subject to vigilant doorkeeping." But *Sosa* has been read by plaintiffs as an invitation to file all manner of claims asserting novel violations of international law.

Thus, dozens of ATS claims are now pending in the lower courts and numerous companies have been subjected to such actions in recent years. Lawsuits have been filed against businesses in more than twenty different industrial sectors involving conduct in more than sixty countries around the world.

And these are no ordinary cases—they "present[] a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). A lawsuit accusing a company of "human rights violations" such as "slavery" or "torture" or "genocide" can inflict significant damage on a business's reputation, especially when—as is often the case—the filing of the lawsuit is aggressively publicized with the goal of affecting the business's customers.

Moreover, defending these lawsuits is extraordinarily burdensome. Litigation at the motion to dismiss stage often requires exploration of complex is-

sues of international law. Because the claims virtually always relate to conduct in remote parts of the world, moreover, discovery is extremely costly and challenging.

As a result, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the [ATS] plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Blue Chip Stamps*, 421 U.S. at 740.

These adverse consequences could be avoided, or at least minimized, if the lower courts were able to engage in "vigilant doorkeeping," but their ability to do so has been hamstrung by the sheer complexity of the legal issues and the lack of guidance from this Court regarding the standards to apply in resolving them. The unresolved questions presented in the certiorari petition in this case regarding extraterritoriality, secondary liability such as aiding and abetting, and exhaustion are key sources of unjustified ATS litigation in the lower courts. Resolution of those issues by the Court in this case is plainly warranted in the event that they are not addressed as alternative grounds for decision in *Kiobel*.

## ARGUMENT

### THE LOWER COURTS URGENTLY NEED THIS COURT'S GUIDANCE REGARDING THE QUESTIONS PRESENTED.

This Court's decision in *Kiobel* v. *Royal Dutch Petroleum Co.*, No. 10-1491, may well resolve this case. There, the Court granted review to determine whether legal entities are subject to liability under the ATS (the issue presented here as Question 4), and the *Kiobel* brief in opposition indicates that the respondent in that case could raise other legal issues presented here as alternative grounds in support of the judgment. See 10-1491 Br. in Opp. 31-35.

To the extent the Court rules in favor of the respondent in *Kiobel* on one of those grounds, that holding likely will lead the Court to grant this petition, vacate the judgment below, and remand for further proceedings consistent with its decision—a course of action that inevitably would require dismissal of the complaint in this action.

If, on the other hand, the Court rules in favor of the petitioners in *Kiobel*, it should grant plenary review in this case with respect to all of the questions presented in the petition not addressed in *Kiobel*. Litigation under the Alien Tort Statute is imposing very substantial burdens on legitimate businesses—burdens that are entirely unjustified because these claims virtually always are based on erroneous interpretations of that jurisdictional statute and of international law norms, as well as exercises of federal common law authority that significantly exceed the limits established by this Court in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004).

The legal issues raised in the petition here are precisely the ones that are driving this litigation in the lower courts (in addition to the corporate liability issue that the Court will address in *Kiobel*). Review of these issues by this Court is therefore plainly warranted in the event that they are not addressed as alternative grounds for decision in *Kiobel*.

### A. ATS Litigation Is Imposing Extremely Substantial, And Wholly Unjustified, Burdens On Legitimate Businesses—And Is Consuming A Disproportionate Share Of The Lower Courts' Resources As Well.

This Court in *Sosa* declined to "close the door to further independent judicial recognition [under the Alien Tort Statute] of actionable international norms * * * on the understanding that the door is still ajar subject to vigilant doorkeeping." 542 U.S. at 729. It set a "high bar to new private causes of action for violating international law." *Id.* at 727.

Pointing to "the potential implications for the foreign relations of the United States of recognizing such causes," *Sosa* cautioned that courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Ibid.* Absent a "congressional mandate to seek out and define new and debatable violations of the law of nations," courts must exercise "great caution in adapting the law of nations to private rights." *Id.* at 728.

Accordingly, this Court held that ATS claims must be based on international law norms that are "'specific, universal, and obligatory'"; courts may not "seek out and define new and debatable violations of

the law of nations." *Id*. at 732, 728 (internal quotation marks omitted). The 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 litigants in the federal courts." *Id*. at 732-33 (footnote omitted).

Notwithstanding *Sosa*'s statement that the courthouse door was merely "ajar," numerous plaintiffs have read *Sosa* as a broad invitation to file ATS actions. And far from engaging in "vigilant doorkeeping," the lower courts have found these cases extremely difficult to resolve, with even threshold rulings requiring lengthy briefing and argument. Even those defendants able to extricate themselves prior to discovery can do so only after years of litigation.

*First*, ATS litigation today is not the rare occurrence that *Sosa* contemplated:

- There are several dozen ATS actions now pending in the federal courts.[2]

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[2] See, *e.g.*, *Arias* v. *DynCorp.*, 517 F. Supp. 2d 221 (D.D.C. 2007) (Nos. 01-CV-01908 & 07-1042 (D.D.C.)); *Baloco* v. *Drummand Co.*, 631 F. 3d 1350 (11th Cir. 2011) (No. 7:09-CV-00557); *Bauman* v. *DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011) (No. 04-CV-00194 (N.D. Cal.)); *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) (No. C-05-5133-SVW (C.D. Cal.)); *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) (No. 06-CV-00627 (S.D. Ind.)); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), vac'd *sub nom. Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 551 U.S. 1160 (2007)

- 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 and communications. These lawsuits target business activities in over sixty countries—including countries that are close allies and trading partners of the United States.[3]
- More than fifty percent of the companies listed on the Dow Jones Industrial Average have been named as defendants in ATS actions.[4]

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(eleven actions, several of which include pending ATS claims, *e.g.* No. 1:05-cv-00329-PLF (D.D.C.)); *Kiobel*, *supra*; *Licea* v. *Curacao Drydock Co.*, No. 06-CV-22128 (S.D. Fla.); *Linde* v. *Arab Bank, PLC*, 353 F. Supp. 2d 327 (E.D.N.Y. 2004) (No. 04-CV-02799 (E.D.N.Y) (and eight related actions)); *Mohammadi* v. *Islamic Republic of Iran*, No. 09-CV-01289 (D.D.C.); *Mujica* v. *Occidental Petroleum*, 564 F.3d 1190 (9th Cir. 2009) (No. 03-CV-02860 (C.D. Cal.)); *Mwani* v. *bin Laden*, 417 F.3d 1 (D.C. Cir. 2005) (No. 99-CV-00125 (D.D.C.)); *Obe* v. *Royal Dutch Shell PLC*, No. 2:11-cv-14572 (E.D. Mich.); *"Sikhs For Justice"* v. *Nath*, No. 10-CV-02940-RWS (S.D.N.Y.); *In re Terrorist Attacks on September 11, 2001*, No. 03-MD-01570 (S.D.N.Y.); *Turkmen* v. *Ashcroft*, No. 02-CV-02307 (E.D.N.Y.).

[3] See Jonathan Drimmer, *Think Globally, Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases* 17 (U.S. Chamber Inst. for Legal Reform, June 2010), available at http://www.instituteforlegalreform.com/sites/default/files/thinkgloballysuelocally.pdf.

[4] See Chamber Amicus Br., *American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919), at 11 & n.5, available at http://www.chamberlitigation.com/american-isuzu-motors-inc-et-al-v-ntsebeza-et-al; see generally http://www.chamberlitigation.com/cases/issue/foreign-affairs-

Indeed, the fact that five courts of appeals rendered significant decisions on one or more of the questions presented by the petition *all within the last fifteen months* itself demonstrates the significance of these matters in the federal courts—as well as the need for this Court's intervention at this time. See *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011); *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); Pet. App. 1a-203a; *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 S. Ct. 472 (2011).[5]

*Second*, this Court has observed that private class actions under the federal securities laws "present[] a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). That observation is even more apt with respect to private claims under the Alien Tort Statute.

To begin with, the mere filing of one of these lawsuits can exact a significant reputational toll. In one case against Coca-Cola based on the alleged activities of its subsidiaries in Colombia, for example, the plaintiffs' lawyers timed the commencement of some lawsuits to coincide with the parent company's first-quarter earnings meeting. Joshua Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights*, World Pol'y J. 60, 63-64 (Spring 2004). This tactic prompted some sharehold-

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international-commerce/alien-tort-statute-ats (collecting Chamber *amicus* briefs in ATS cases).

[5] Additional cases are pending in the courts of appeals. See note 2, *supra*.

ers abruptly to dump the company's stock, *ibid.*, even though the case ultimately was dismissed, see *Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009).

Plaintiffs' lawyers employed a similar strategy against the Unocal Corporation based on its alleged activities in Burma. *Doe* v. *Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), rehearing *en banc* granted, appeal dismissed, and district court opinion vacated, 403 F.3d 708 (2005). The district court dismissed the ATS claims, a panel of the Ninth Circuit (Pregerson, Reinhardt, and Tashima, JJ.) reversed, and the court granted rehearing *en banc*. The case subsequently settled for undisclosed terms but not before the lawsuit damaged the company's "stock valuation and debt ratings." *Kurlantzick*, World Pol'y J. at 63; see also Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 Ariz. L. Rev. 805, 809-10 (2005) (discussing Unocal settlement). Similar tactics were used against the Royal Dutch Petroleum Corporation in the Second Circuit, again resulting in a settlement. See Jad Mouawad, *Shell Settles Human Rights Suit*, N.Y. Times, June 9, 2009, at B1.

Moreover, because the claims typically relate to conduct occurring in distant corners of the globe, the discovery process inevitably will be unusually expensive and burdensome. See Gary Hufbauer & Nicholas Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. Int'l Econ. L. 245, 252-53 (2004) (describing "massive costs" associated with ATS lawsuits). Pretrial and trial proceedings are generally protracted. See*, e.g.*, *Bowoto* v. *Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010) (jury verdict in corporate defendants' favor after 10 years of litigation).

Indeed, the prospect of lengthy and costly litigation, combined with the stigma associated with allegations of human rights violations, make ATS suits particularly effective vehicles to extract 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) (Korman, J., dissenting) (characterizing South Africa Apartheid litigation as "a vehicle to coerce a settlement"), aff'd for lack of quorum *sub nom. American Isuzu Motors, Inc.* v. *Ntsebeza*, 533 U.S. 1028 (2008).

*Third*, the complexity of the legal and factual issues presented in ATS actions is resulting in a significant burden on the lower courts. The claim in this case, for example, was the subject of a ruling by the district court, panel and *en banc* decisions by the court of appeals, a district court decision on remand, and another decision by the *en banc* court of appeals—all in connection with the motion to dismiss. See Pet. 8-14. The court below's latest ruling alone consumes 203 pages of the appendix to the petition. The D.C. Circuit's recent decision addressing similar issues takes up 80 pages of the Federal Reporter (see 654 F.3d at 11-90), and the Second Circuit's *Kiobel* ruling amounted to 81 pages (see 621 F.3d at 115-96).

These characteristics of ATS actions are well-illustrated by a case now pending before the Ninth Circuit—*Doe* v. *Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010), appeal pending, No. 10-56739 (9th Cir.). The plaintiffs are three individuals suing as

class representatives who allege that they were forced to act as slaves on cocoa farms in Côte d'Ivoire. The imprisonment and abuse allegedly was inflicted by Ivoirian cocoa farmers, who are claimed to have violated international law norms prohibiting slavery; forced labor; child labor; torture; and cruel, inhuman, or degrading treatment.

The plaintiffs did not seek damages under the ATS from the cocoa farmers. The defendants instead are three multinational companies that purchase cocoa from Côte d'Ivoire—Nestlé U.S.A.; Cargill, Inc.; and Archer Daniels Midland Co.—that are not alleged to have participated in any way in the alleged imprisonment or abuse.

Rather, the plaintiffs' theory is that the corporations aided and abetted the farmers' wrongdoing by purchasing Ivorian cocoa beans and providing various forms of "logistical support" to farming activities—such as agreeing to purchase their entire production, providing fertilizer and other farming supplies, and training in beneficial farming techniques and humane labor practices—allegedly with the knowledge that the use of child labor in that sector of the Ivoirian economy is "well-documented." First Am. Compl., *Doe* v. *Nestle, S.A.*, No. 2:05-CV-05133 (C.D. Cal. July 22, 2009).

The district court held that the plaintiffs' allegations failed to make out a claim of aiding and abetting: "the overwhelming conclusion is that Defendants were purchasing cocoa and assisting the production of cocoa. It is clear from the caselaw that ordinary commercial transactions do not lead to aiding and abetting liability." 748 F. Supp. 2d at 1109. The court further held that "Plaintiffs' allegations do not support the conclusion that Defendants intended and

desired to substantially assist the Ivorian farmers' acts of violence, intimidation, and deprivation" and, in addition, "fail[ed] to raise a plausible inference that Defendants knew or should have known that the general provision of money, training, tools, and tacit encouragement * * * helped to further the specific wrongful acts committed by the Ivorian farmers." *Id.* at 1111.

But that determination came only after multiple rounds of briefing (the case was filed in 2005, but not dismissed until 2010) in a decision consuming more than eighty printed pages. See 748 F. Supp. 2d at 1063-1145. And the plaintiffs have appealed the dismissal of the complaint, specifically contesting the district court's ruling on the aiding and abetting issue.[6]

If the *Doe* case had proceeded past the motion to dismiss stage, moreover, the lion's share of discovery would have had to take place in Côte d'Ivoire—which was in the midst of armed conflict for most of the period that the case was pending.[7] Needless to say,

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[6] The Ninth Circuit in the decision that is the subject of this certiorari petition, specifically reserved decision regarding the standard governing aiding-and-abetting claims under the ATS (Pet. App. 52a-53a), with Judges Pregerson and Rawlinson endorsing the broad aiding-and-abetting standard rejected by the district court in *Doe*. Pet. App. 68a-74a; see also *id.* at 65a-66a (Reinhardt, J.) (endorsing the same broad aiding-and-abetting standard as a matter of federal common law).

[7] According to the State Department, "[i]n the last decade, Côte d'Ivoire has experienced several episodes of political unrest and violence." Côte D'Ivoire Country Specific Information: Country Description, available at http://travel.state.gov/travel/cis_pa_tw/cis/cis_1094.html#country; see also U.S. Dep't of State, Background Note: Côte d'Ivoire (discussing civil war and violence in

conducting discovery in that setting would have posed very significant challenges.

Finally, the pendency of the lawsuit alleging "human rights violations" was used to try to subject the *Doe* defendants to reputational and financial harm. For example, press releases and demonstrations just before Halloween and Valentine's Day urged parents and children to refuse to purchase chocolate candy because it was allegedly the product of "child slavery"—with the pending ATS action cited as support for that claim.[8]

*Doe* demonstrates how the current uncertainty in the lower courts regarding critical legal issues relating to ATS liability imposes real and substantial burdens on legitimate companies.[9] Defendants have

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country during 2000-2008 and renewed violence in 2010), available at http://www.state.gov/r/pa/ei/bgn/2846.htm.

[8] See, *e.g.*, Deborah Orr, *Slave Chocolate?*, Forbes (Apr. 24, 2006), available at http://www.forbes.com/forbes/2006/0424/096.html; Andrea Buffa, *Chocolate's Horror Show* (Oct. 31, 2006), available at http://www.tompaine.com/articles/2006/10/31/chocolates_horror_show.php; Margot Roosevelt, *Guilt-Free Valentines?*, Time (Feb. 5, 2006), available at http://www.time.com/time/magazine/article/0,9171,1156593,00.html; Jennifer O'Connor, *The Virtuous Valentine's Guide: How to be Good to Your Sweetie—and the Rest of the World—on February 14*, This Magazine (Jan. 1, 2007), available at http://www.laborrights.org/stop-child-labor/cocoa-campaign/news/10991.

[9] The claim in *Doe* is not unique in seeking to impose substantial monetary liability under the ATS on the basis of ordinary commercial transactions. See, *e.g.*, *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 260-61 (2d Cir. 2009) ("[t]he activities which the plaintiffs identify as assisting the Government in committing crimes against humanity and war crimes generally accompany any natural resource development business or the creation of any industry" and characte-

been forced to undergo discovery and to enter into unjustified settlements. Intervention by this Court is essential to resolve these issues, providing the guidance that will make clear to plaintiffs that such claims are an illegitimate use of the ATS and, if such suits continue to be brought, enable the lower courts to dispose of them quickly.

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rizing plaintiffs' arguments as "proxies for their contention that Talisman should not have made any investment in the Sudan") (internal quotation marks and citation omitted), cert. denied, 131 S. Ct. 79 (2010); *Khulumani* v. *Barclay Nat'l Bank Ltd.,* 504 F.3d 254 (2d Cir. 2007), aff'd for lack of quorum *sub nom. American Isuzu Motors, Inc.* v. *Ntsebeza,* 533 U.S. 1028 (2008) (plaintiffs sued numerous consumer, manufacturing, financial, mining and service companies for doing business in apartheid-era South Africa on grounds that their business activities facilitated violations of international law by prolonging apartheid); *Abagninin* v. *Amvac Chemical Corp.*, 545 F.3d 733 (9th Cir. 2008) (plaintiff alleged human rights violations against manufacturer of pesticide and agricultural company that purchased food produced with pesticide in the Ivory Coast); *Doe* v. *Wal-Mart Stores, Inc.*, No. CV-057307, 2007 WL 5975664 (C.D. Cal. Mar. 30, 2007), aff'd, 572 F.3d 677 (9th Cir. 2009) (workers at foreign factories supplying goods to U.S. retailer sued retailer for labor abuses at factories, alleging that retailer failed to monitor and prevent abuses); *In re "Agent Orange" Product Liability Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), aff'd *sub nom. Vietnam Ass'n for Victims of Agent Orange* v. *Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008) (plaintiffs sued manufacturer of defoliation agent used by American military in Vietnam); *Mastafa* v. *Australian Wheat Bd. Ltd.*, No. 07-CV-7955, 2008 WL 4378443 (S.D.N.Y. Sept. 25, 2008) (plaintiffs sued suppliers of foodstuffs to Iraq alleging that suppliers' business activities facilitated Saddam Hussein regime's human rights abuses); *Corrie* v. *Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005), aff'd, 503 F.3d 974 (9th Cir. 2007) (plaintiffs sued manufacturer of bulldozers allegedly used by Israel Defense Force to destroy homes in Palestine).

### B. The Unresolved Questions Regarding Aiding And Abetting, Extraterritoriality, And Exhaustion Are Key Drivers Of Unjustified ATS Litigation.

The legal issues encompassed within the first three questions presented in the petition—whether the ATS applies extraterritorially, whether aiding-and-abetting claims are cognizable under the ATS (and if so, the liability standard that applies), and whether a plaintiff must exhaust remedies in the country in which the alleged misconduct occurred before asserting a claim in the courts of the United States—are key sources of unjustified ATS litigation in the lower courts. The Chamber agrees with petitioners' discussion of the conflicts among the lower courts and other reasons why these issues warrant review. See Pet. 15-35.

The absence of authoritative standards with respect to these issues prevents the lower courts from performing the "vigilant doorkeeping" that *Sosa* requires. Resolution of that uncertainty by this Court will provide the guidance that lower courts need to weed out unjustified claims.

*Aiding-and-abetting liability.* International law principles traditionally have applied only to state actors, not to private parties. See*, e.g.*, *Sosa*, 542 U.S. at 720; *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 488-89 (1983). And responsible corporations almost never can even be alleged to have engaged in the sort of reprehensible conduct that is prohibited by well-established international norms—slavery, genocide, or torture. ATS claims against corporations therefore generally rest on an aiding and abetting theory: that the corporation is liable on the ground that it somehow aided and abetted a

state actor's, or other party's, violation of international law.

Whether claims for damages on secondary liability theories such as aiding and abetting may be asserted under the ATS, and, if so, which standard governs such liability, has been the subject of considerable litigation in the lower courts—with conflicting results. Some have concluded that aiding-and-abetting claims are not available,[10] pointing in particular to the legal principles and practical consequences of aiding-and-abetting claims underlying this Court's determination in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

A number of courts have held that liability is permissible only if a defendant acts with the *purpose* of facilitating the underlying wrong. *Aziz*, 658 F.3d at 400-01; *Presbyterian Church of Sudan*, 582 F.3d at 259; see also Pet. App. 110a n.8 (McKeown, J., concurring in part and dissenting in part). The District of Columbia Circuit, on the other hand, has held that mere "knowledge" of the underlying violation is sufficient. *Exxon Mobil*, 654 F.3d at 39.

As explained above, aiding and abetting claims today are premised on nothing more than ordinary business dealings in countries with blemished human rights records, a category that unfortunately includes many developing countries throughout the world. Unless such expansive applications of the ATS are foreclosed, "all companies whose supply chains or distribution markets reach into developing countries

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[10] *Khulumani*, 504 F.3d at 319-23, 330-33 (Korman, J., concurring and dissenting).

are suspect." Elliott J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 Colum. J. Transnat'l L. 153, 159 (2003).

Indeed, the U.S. Government—in a brief urging this Court to grant review with respect to the aiding-and-abetting issue—warned that 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." U.S. Amicus Br., *American Isuzu Motors, Inc.* v. *Ntsebeza*, *supra*, at 20, available at http://www.justice.gov/osg/briefs/2007/2pet/5ami/2007-0919.pet.ami.pdf.

Review by this Court is essential to resolve the lower courts' disagreement with respect to secondary liability under the ATS, a legal issue that arises in the vast majority of ATS actions—and that is the principal argument used to justify attempts to extend ATS liability to private parties.

*Extraterritoriality*. The court below divided sharply with respect to the extraterritorial application of the Alien Tort Statute. Compare Pet. App. 7a-13a (majority opinion) with *id*. at 125a-170a (Kleinfeld, J., joined by Bea and Ikuta, JJ., dissenting). The same is true of the District of Columbia Circuit. Compare *Exxon Mobil*, 654 F.3d at 20-28, with *id*. at 74-81 (Kavanaugh, J., dissenting); see also *Kiobel*, 621 F.3d at 142 n.44 (reserving decision on extraterritoriality issue).

Virtually every ATS lawsuit today seeks to require a United States court to adjudicate claims by plaintiffs who are not U.S. residents—indeed, with no connection to the United States—that arise from events occurring within the jurisdiction of another

nation. As Judges Kleinfeld and Kavanaugh explained in their thorough opinions, this construction of the statute is inconsistent with this Court's jurisprudence, and inevitably intrudes on the sovereignty of other nations and embroils the courts in sensitive foreign policy matters. The United States made the same points in explaining to this Court why the statute should not apply extraterritorially. See U.S. Amicus Br., *Ntsebeza*, at 12-16.

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.[11] 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, extra-

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[11] Indeed, the Ninth Circuit recent held in the context of an ATS action that a company's decision to do business in the United States through a separate subsidiary can nonetheless subject the entire corporation to the jurisdiction of the federal courts. See *Bauman* v. *DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011), reh'g and reh'g *en banc* denied, 2011 WL 5402020 (9th Cir. Nov. 9, 2011). Although the Chamber believes that case is wrongly decided, it illustrates the risks that corporations may face by deciding to do business in this country.

territorial 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 States * * * if one of the consequences would be exposure to the Alien Tort Statute." Letter from Maria Livanos Cattaui to Romano Prodi, President, European Commission (Oct. 22, 2003), available at http://www.iccwbo.org/policy/environment/icccbhc/index.html.

This Court's intervention is needed to address this critical question regarding the scope of the ATS.

*Exhaustion*. The intrusion on the sovereignty of other nations resulting from the extraterritorial application of the ATS is compounded when United States courts refuse even to require non-U.S. plaintiffs to exhaust remedies in the country in which the claim arises before bringing suit here.

This Court has already recognized the need to consider whether an exhaustion requirement is appropriate. *Sosa*, 542 U.S. at 733 n.21; see also *id*. at 760-61 (Breyer, J., concurring). As this case illustrates, uncertainty about the existence and contours of an exhaustion requirement inflicts significant costs on litigants and the courts. Compare Pet. App. 28a-30a with *id*. at 115a-124a (Bea, J., joined by Kleinfeld, Callahan, and Ikuta (in part), JJ., dissenting in relevant part); see also 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, 466 n.70

(2011) ("[e]xhaustion of local remedies is yet another area that has not yielded clear judicial guidance").

Indeed, it is significant that Congress expressly required exhaustion when it enacted the Torture Victim Protection Act—a statute designed to implement the United States' international-law obligation to provide a civil remedy for victims of torture. See 28 U.S.C. § 1350 note, § 2(b). The legislative determination should guide courts' law-making under the ATS. See *Central Bank*, 511 U.S. at 180 (observing that it would be "anomalous" for a judicially-crafted cause of action to sweep "beyond the bounds [Congress] delineated for comparable express causes of action"). That is especially true in light of the United States' support for an exhaustion requirement. See Pet. 34.

Again, a definitive resolution of the question by this Court will reduce the burden on the lower courts, and on litigants, by providing the lower courts with a clear legal standard to apply in these complex lawsuits.

## CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Kiobel* v. *Royal Dutch Petroleum Co.*, No. 10-1491, and granted with respect to Questions 1-3 in the event the Court reverses the judgment in *Kiobel* and does not address Questions 1-3 in the course of its decision in *Kiobel*.

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DECEMBER 2011