No. 10-56739

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN DOE I, JOHN DOE II, AND JOHN DOE III, INDIVIDUALLY AND ON BEHALF OF PROPOSED CLASS MEMBERS; AND GLOBAL EXCHANGE,
Plaintiffs-Appellants,

v.

NESTLÉ, U.S.A., INC.; ARCHER DANIELS MIDLAND COMPANY; AND CARGILL INCORPORATED,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, CASE NO. C-05-5133-SVW
THE HONORABLE STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FOREIGN TRADE COUNCIL IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

The National Foreign Trade Council is a nonprofit corporation organized under the laws of New York. It has no parent company and has issued no stock.

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IDENTITY, INTEREST AND SOURCE OF AUTHORITY [1]

Identity: The Chamber of Commerce of the United States of America ("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 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.

The National Foreign Trade Council ("NFTC") is the premier business organization advocating a rules-based world economy. Founded in 1914 by a group of American companies, NFTC and its affiliates now serve more than 250 member companies.

Interest: *Amici* have a direct and substantial interest in the issues presented by these cases. Their members transact business around the world. Numerous members have been – and may continue to be – defendants in suits predicated on liability under the Alien Tort Statute ("ATS"), 28 U.S.C. §1350. In the past two decades, various plaintiffs have filed more than 150 lawsuits against U.S. and

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that no party's counsel authored this brief in whole or in part. Furthermore, no one other than *amici* or their counsel contributed money for the preparation or submission of this brief.

foreign corporations in more than twenty industry sectors such as agriculture, financial services, manufacturing and communications. These lawsuits target business activities in over sixty countries. *See* Jonathan Drimmer, *Think Globally, Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases*, U.S. Chamber Institute for Legal Reform at 17 (June 2010). More than fifty percent of the companies listed on the Dow Jones Industrial Average have been named as defendants in ATS actions. *See* Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioners at 11 & n.5, *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919).

Although *amici* take no position on the factual allegations in this case, they unequivocally condemn forced labor practices. The question at bar is not, though, whether such wrongs occurred. Instead, it is whether private plaintiffs can stretch a U.S. statute beyond its explicit and intended scope. *Amici* can offer a unique and helpful perspective on that issue. They have participated as parties and *amici* in cases before the Supreme Court, this Circuit, and other federal courts of appeals in similar matters raising important implications for foreign trade and the legal environment in which American businesses operate, including several cases involving the Alien Tort Statute. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Doe v.*

Exxon Mobil Corp., 2011 WL 2652384 (D.C. Cir. 2011); *Sinaltrainal v. Coca Cola Co*., 578 F.3d 1252 (11th Cir. 2009).

Source of Authority: Federal Rule of Appellate Procedure 29(a) authorizes the filing of this brief. All parties have consented to the filing.

SUMMARY OF ARGUMENT

The Alien Tort Statute does not permit the exercise of jurisdiction over claims against corporations predicated on their commercial relationships with foreign companies. As Appellees explain, Appellants' argument rests on several doctrinal flaws concerning the extraterritorial application of the ATS, the acceptance of corporate liability and accessorial liability under international law, and the standards for such liability (even if it existed). *Amici* fully endorse Appellees' position on these points but, mindful of their obligation under this Circuit's Advisory Committee Note to Rule 29-1, do not retrod that ground in this brief.

Instead, this brief explains why the "practical consequences" of Appellants' proposed rule would be disastrous. Permitting liability under these circumstances discourages American economic engagement in the developing world. It harms the United States economy, both by placing American firms at a competitive disadvantage and by discouraging foreign direct investment in the United States. It subjects corporate defendants to costly, damaging campaigns more concerned

with extracting a settlement than proving the allegations. Finally, it also subjects companies – and the countries with which they do business – to costly, burdensome and diplomatically sensitive discovery. For these reasons, as well as those advanced by Appellees, the judgment of the district court should be affirmed.

ARGUMENT

The ATS authorizes federal courts to exercise jurisdiction over "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." 28 U.S.C. §1350. This case does not implicate a "treaty of the United States," so Appellants' claim must fail unless they can demonstrate an actionable "violation of the law of nations." That term originally encompassed only three paradigmatic cases (violations of safe conduct, infringement of the rights of ambassadors and piracy). *Sosa*, 542 U.S. at 725. Beyond these cases, federal courts should not recognize further claims unless they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of [those paradigmatic cases]." *Id*.

Appellants are asking this Court to "recognize further claims" and hold Appellees liable for the alleged forced employment of Malian citizens in the cocoa farms of the Côte d'Ivoire, "the world's leading cocoa producer." Nicolas Cook,

CRS Report for Congress, *Côte d'Ivoire Post-Gbagbo: Crisis Recovery* at 1 (May 3, 2011). They base their claims entirely on allegations that Appellees purchased cocoa from these farms to make lawful products (like chocolate) and provided financial assistance to these farms. Appellants' argument seeks to expand ATS liability beyond state actors (indeed beyond primary tortfeasors) to include private companies that were simply doing business with foreign farmers. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2009) ("Recognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place."); *Sosa*, 542 U.S. at 732 n.20 ("A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.").

Amici share Appellees' view that Appellants' argument suffers from several doctrinal flaws. First, the Alien Tort Statute does not cover extraterritorial conduct. *See Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010); *F. Hoffmann-La Roche, Ltd. v. Empagran, S.A.*, 542 U.S. 155, 164-66 (2004). Second, as the District Court correctly found, corporations cannot violate the "law of nations." *See* Excerpts of Record ("ER") 72; *Kiobel v. Royal Dutch Petroleum, Co.*, 621 F.3d 111 (2d Cir. 2010), *petition for cert. filed* 79 U.S.L.W. 3728 (U.S.

June 6, 2011) (No. 10-1491). Third, accessorial liability is not an actionable theory under the Alien Tort Statute. *See Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994). Fourth, even if all of the foregoing were incorrect, the District Court properly found that Appellants' complaint did not state a claim for accessorial liability – both because economic assistance does not constitute the *actus reus* of aiding and abetting and because Appellees did not intend to further the alleged "tort … in violation of the law of nations." *See* ER 105; *Aziz v. Alcolac, Inc.*, No. 10–1908, 2011 WL 4349356 (4th Cir. Sept. 19, 2011); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

In this brief, *amici* demonstrate why affirmance – on any of the foregoing grounds – not only represents a sound doctrinal outcome but also heeds a separate command from *Sosa*. *Sosa* commanded that federal courts consider "the *practical consequences* of making [a cause of action] available to litigants in federal courts." 542 U.S. at 732-33 (emphasis added); *see also Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 737 (9th Cir. 2008) (considering the practical consequences to conclude that claim was not actionable under ATS). In this case, several practical consequences counsel against making available a cause of action against private corporations based on their commercial engagement in foreign countries.

A. Punishing United States companies for their mere commercial relationships with foreign partners discourages essential investment in developing countries.

Trade between the United States and developing countries advances several important goals. First, such investment facilitates economic growth in foreign countries. *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* ("*Joint Hearing*"), 111th Cong. (2009) (statement of Florizelle B. Liser, Assistant U.S. Trade Representative for Africa) ("*Liser Testimony"*). Second, that initial wave of investment promotes the development of stable political institutions in those countries; the existence of such stable political institutions in turn creates the conditions for further foreign investment. *See* Nat'l Security Council, *The National Security Strategy of the United States of America* 17 (2002). Third, those commercial relationships benefit the United States economy: developing countries supply an important source of raw materials (whether cocoa, oil, or rubber) and eventually serve as export markets for United States businesses. *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) ("*Behind Closed Doors*").

Africa is an especially important region for this pathway of economic interdependence between the United States and the developing world. *See* Council on Foreign Relations, *More Than Humanitarianism: A Strategic U.S. Approach Toward Africa* 3 (2006) ("Africa has become of steadily greater importance to the United States and to global interests."); *An Overview of U.S. Policy in Africa: Hearing Before the Subcomm. on Africa and Global Health and the H. Comm. on Foreign Affairs*, 111th Cong. (2010) (statement of Johnnie Carson, Assistant Secretary, Bureau for African Affairs) (describing Africa as one of the United States' "top foreign policy priorities"). As multiple government trade officials recently explained, economic interdependence between Africa and the United States benefits the economies of both regions. It can "play a key role in increasing Africa's export revenue." *Joint Hearing* at 16 (statement of Holly Vineyard, Deputy Assistant Secretary for Africa, International Trade Administration). Such trade relationships also are a "vital element for stimulating the U.S. economy." *Id.* at 10 (statement of Leocadia L. Zak, Acting Director, U.S. Trade and Development Agency).

Over the past decade, a variety of initiatives have sought to facilitate economic development within the region. For example, the African Growth and Opportunity Act, Pub. L. 106-200, codified at 19 U.S.C. §3701 *et seq*., offers eligible countries a range of benefits, including duty-free treatment for certain

exports, technical assistance, trade-capacity building, political risk insurance, financing and investment funds. *See* Vivian C. Jones, CRS Report for Congress, *U.S. Trade and Investment Relationship with Sub-Saharan Africa: The African Growth and Opportunity Act*, at 10-24 (Feb. 4, 2010) ("*CRS Report*").[2] Additionally, the United States provides various forms of financial support to the region, including trade-building capacity, an initiative to promote trade and investment with the United States, export financing and financial aid through the Millennium Challenge Corporation. *Liser Testimony* at 5 ($1 billion spent on trade-capacity development in 2008 and $200 million to expand African trade and investment with the United States); Export-Import Bank of the United States, *Report to the U.S. Congress on Sub-Saharan Africa* 1-2 (2007) (export finance); *Millennium Challenge Corporation: Hearing Before the Subcomm. on Africa, Global Health, and Human Rights and the H. Comm. on Foreign Affairs*, 112th

[2] To qualify for the Act's benefits, the President must determine a country has satisfied, or is making progress toward satisfying, a host of criteria including, among others, progress toward a market-based economy, development of institutions embracing the rule of law, elimination of barriers to U.S. trade and investment, protection of intellectual property, reduction of poverty, increased availability of health care and educational opportunities and elimination of various labor practices. *See* Office of the United States Trade Representative, 2008 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act 146-48 (May 2008). Even where a country does not presently qualify for the Act's benefits, the promise of favorable trade treatment provides an incentive eventually to reform, and the United States remains committed to working with those currently ineligible countries to realize the Act's benefits. *Id.* at 16.

Cong. (2011) (testimony of Patrick C. Fine, Millennium Challenge Corporation) (describing compacts between African nations and the Millennium Challenge Corporation).

This strategy of commercial engagement has yielded great success over the past decade, though gains remain fragile. Between 2001 and 2008, two-way trade between the United States and Africa (exports plus imports) more than tripled to over $100 billion. *Liser Testimony* at 3. In 2008, United States imports from Sub-Saharan Africa totaled over $86 billion, with the Côte d'Ivoire being the eighth largest source of U.S. imports from the region. *CRS Report* at 6-7. Also in 2008, United States exports to the region topped $18 billion, with the Côte d'Ivoire being the tenth largest export market for United States goods. *Id.* at 8-9. In the immediate wake of the financial crisis, however, trade between the United States and Africa, in aggregate terms, shrank. *See* U.S. Dep't of Commerce, International Trade Administration, U.S.– Sub-Saharan African Trade Profile (2010). Such shrinkage dealt a harsh blow to economies in Sub-Saharan Africa, especially in countries like the Côte d'Ivoire whose economies depend heavily on commodity exports like cocoa. *See* World Bank, *Swimming Against The Tide: How Developing Countries Are Coping With The Global Crisis* 3-4 (2009) (noting that cocoa generates almost one-fifth of Côte d'Ivoire's revenue); Alexis Arieff *et al.*, CRS Report for Congress, *The Global Economic Crisis: Impact on Sub-Saharan*

Africa and Global Policy Responses at 6, 9 (Apr. 6, 2010) (describing the vulnerability of commodity-dependent economies in Africa to financial shocks).

The continued success of this commercial engagement depends on the willingness and ability of American businesses to invest in developing regions like Sub-Saharan Africa. *See Joint Hearing* at 4 (Zak testimony); *see generally* U.S. Africa Policy Beyond the Bush Years 111-41 (Jennifer G. Cooke & J. Stephen Morrison, eds., Center for Strategic & International Studies 2009). Such investments are neither costless nor riskless. *See Talisman Energy*, 582 F.3d at 260-61. Risks include matters such as political instability and legal liability. *See Behind Closed Doors* at 6. Costs include the interest rate on funds borrowed to finance the investment and the premiums on risk insurance protecting such investment. *See* Overseas Private Investment Corporation, 2010 Annual Report at 3. Where the risks or costs are too high, the American business will not invest, and the capital essential for the above-described benefits from trade dries up – to the detriment of both Africa and the United States.

An awareness of the fragility – and importance – of this investment explains the careful approach taken by Congress to the issue of labor practices in the African cocoa industry. No law of the United States (or the Côte d'Ivoire) prohibits purchases of cocoa or the provision of assistance to African farmers, the only alleged conduct undertaken by Appellees. *See Int'l Labor Rights Fund v.*

United States, 391 F. Supp. 2d 1370, 1376 (Ct. Int'l Tr. 2005) (holding that federal law allows the import of Ivorian cocoa despite the continued existence of forced labor). Instead, since 2001, the prevailing approach, reflected in the Harkin-Engel Protocol ("*Protocol*"), is founded on a principle of industry self-regulation developed in consultation with various stakeholders. *See* Payson Center for International Development and Technology Transfer, Tulane University, *Oversight of Public and Private Initiatives to Eliminate the Worst Forms of Child Labor in the Cocoa Sector in Côte d'Ivoire and Ghana* app. 1 (2007) ("*Tulane Report*"). The Protocol, signed by the key members of Congress involved with the issue, non-governmental organizations, officers of the major international cocoa corporations and others, commits its signatories to the long-term goal of eliminating the worst forms of child labor in the cocoa industry and sets forth a plan for studying, evaluating and developing best practices to address the issue. *Id.* At its core, the Protocol opts for "credible, mutually acceptable, voluntary" self-regulation in lieu of more aggressive forms of regulation such as embargos, sanctions or labeling requirements.[3] *Id.* The careful approach reflected in the Protocol attempts to balance a regulatory interest in reforming certain longstanding

[3] Congress considered, but did not adopt, a proposal that would have funded a "no child slavery" label for cocoa products sold in the United States. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, H. Amdt 142 to H.R. 2330, 107th Cong. (2001).

labor practices in the African cocoa industry with a desire not to cause investment in the region to dry up.

Appellants' complaint appears to be rooted in either a disagreement with this self-regulatory course or impatience with the pace of the Protocol's implementation. While work remains to implement the Protocol fully, a 2007 independent report commissioned by the United States Department of Labor concluded that "since the signing of the Protocol, progress has been made by both governments and Industry to implement its requirements." *Tulane Report* at 25; *see also id.* at 29 (noting that initiatives such as the Harkin-Engel Protocol "appear to have had a positive impact on the scale and pace of Industry, government and other institutional efforts" to address labor practices in Côte d'Ivoire). Suits such as this one undermine that progress. Litigation predicated on nothing more than the purchase of commodities from global suppliers to make perfectly lawful products like chocolate increases the risks and costs of doing business in a strategically and economically important region. Moreover, the sheer specter of such liability discourages future investment altogether. Under Appellants' standard of accessorial liability, predicated simply on a business relationship, a company can reduce the risk of liability only by terminating that relationship altogether. *See* Aaron Schindel *et al.*, *Workers Abroad, Trouble at Home*, 14 Corporate Counsel 65 (2007); Mark E. Rosen, *The Alien Tort Statute: An*

Emerging Threat to National Security, 16 St. Thomas L. Rev. 627, 665 (2004). The effects of this lost investment are ultimately borne by developing economies, which suffer a reduction in foreign investment, and by developed ones, which suffer a loss of access to raw materials as well as potential export markets.

Put simply, Appellants' theory upsets the entire strategy of constructive engagement that has marked the economic relationship between the United States and many parts of the world, including Africa. If Appellants' theory were correct, then any economic relationship – no matter how lawful that relationship is under U.S. law or supportive of United States long-term political and economic objectives – could be second-guessed so long as a plaintiff could allege that, somehow or somewhere, a recipient of that economic assistance committed a "tort in violation of the law of nations." Efforts ranging from constructive engagement with South Africa, rebuilding in Afghanistan or trade with China would all be subject to second-guessing by private plaintiffs' lawyers dissatisfied with the pace of change.[4] *See Talisman Energy*, 582 F.3d at 264 ("[I]f ATS liability could be

[4] The need for commercial engagement as a strategy for growth is not limited to Africa. For example, last summer, the United States announced the discovery of massive, untapped mineral deposits in Afghanistan valued at between US$ 1 trillion and US$ 3 trillion. The deposits could "fundamentally alter the Afghan economy and perhaps the Afghan war itself." James Risen, *U.S. Identifies Vast Mineral Riches in Afghanistan*, N.Y. Times, June 14, 2010 at A1. Mining and extraction efforts would "help drive economic growth and reduce unemployment." Eltaf Najafizada, *U.S., Afghan Study Finds Mineral Deposits Worth $3 Trillion*,

established by knowledge of those abuses coupled only with such commercial activities as resource development, the statute would act as a vehicle for private parties to impose embargos or international sanctions through civil actions in United States courts."). These "practical consequences" of Appellants' theory simply are too much for the ATS to bear.

B. Punishing United States companies for their foreign commercial relationships places those companies at a competitive disadvantage.

In the global marketplace, judicially crafted rules can materially harm the competitiveness of American businesses. For example, the Court trimmed back expansive interpretations of the nation's securities laws due in part to a concern that they "may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets." *See Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008).

Bloomberg, Jan. 29, 2011. As a result, United States government officials have publicly called on American businesses to assist in extraction and development efforts. U.S. Dep't of Defense Task Force for Business and Stability Operations, Mineral Resource Team 2010 Activities Summary, Jan. 29, 2011, p. 3. American businesses must weigh the requests against the risks, including the risk of ATS lawsuits brought by plaintiffs that will scrutinize the terms of commercial engagement. The prospect may well deter American corporations from investing in post-conflict societies like Afghanistan even when those investments are actively encouraged by the United States Government. If ATS suits discourage such investment, other countries may well fill the void. *See* Zhou Xin, *China Seeks Profit, Shuns Politics, in Afghanistan* Reuters Wire Service (Oct. 4, 2011).

Just as expansive interpretation of the nation's securities laws could shift activity away from American capital markets, aggressive applications of the Alien Tort Statute places American companies at a severe disadvantage relative to their foreign competitors. No other country in the world has a statute like the ATS. *See Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1020 (7th Cir. 2011); *Kiobel*, 621 F.3d at 115; *see generally* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789* 46 (2003). Because ATS claims almost inevitably relate to a defendant's overseas contacts, plaintiffs typically must rely on theories of general jurisdiction, which is far easier to establish over American companies than their overseas counterparts *Compare Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (limiting the theory of general jurisdiction over a foreign corporation based on its "continuous and systematic contacts" with the forum state); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984) (describing the bases for establishing general jurisdiction over a United States corporation).

Consequently, foreign companies and countries, choosing among business partners, face a stark choice. They can partner with an American company, at a higher cost (due to the increased liability risk), and later risk being dragged, directly or indirectly, into an American court where their conduct will be put on trial. *See Doe v. Exxon Mobil Corp.*, No. 09-7125 *et al.*, 2011 WL 2652384 at *51

(D.C. Cir. July 8, 2011) (Kavanaugh, J., dissenting) (cataloguing instances of foreign sovereign protests over extraterritorial application of the Alien Tort Statute). Alternatively, they may do business with the foreign company where their commercial interactions will remain a matter for the foreign sovereign's own courts. This asymmetry harms United States competitiveness and may reduce global economic welfare too. "If plaintiffs can extract substantial amounts from U.S. defendants by alleging their complicity in such acts and persuading (or threatening to persuade) a jury that the U.S. defendant was somehow involved, the result may simply be a shift of business opportunities from U.S. firms to their less efficient competitors with little effect on the level of objectionable behavior." Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. Legal Stud. 339, 372 (2008).

Such risks of competitive disadvantage are especially acute in Sub-Saharan Africa. In terms of both import and export trade, other countries are aggressively competing for business in the region. With respect to exports, the European Union ranks as Africa's highest export trading partner ($99 billion), nearly fifteen percent higher than the United States market. *CRS Report* at 10. On the import side, Europe also ranks as the most important trading partner ($85.3 billion), and China recently has surpassed the United States to become the second most important trading partner ($34.5 billion), nearly twice as large as the United States' share of

the market. *CRS Report* at 10. Expansive interpretation of the ATS to encompass constructive economic engagement gives the region's countries and their domestic businesses good reason to develop their commercial relationships with non-American partners. *See* Council on Foreign Relations, *U.S.-China Relations: An Affirmative Agenda, A Responsible Course* 45 (2007) (explaining how China filled the gap caused by American divestment from the Sudan).

In a recent decision, the Seventh Circuit suggested that the competitive disadvantage wrought by the exceptional nature of the ATS should be irrelevant. *See Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011). This line of argument is incorrect. For one thing, the argument ignores the central teachings of *Stoneridge* and *Sosa*, which instruct federal courts to consider the practical consequences – including the competitive effects – of their rules. For another thing, the argument overlooks the unrecoverable costs and substantial burdens borne by companies that are wrongfully accused of violating the law of nations. *See* Part D, *infra*. For these reasons, such costs to American businesses are highly relevant to the questions whether – and to what extent – corporations can be liable under the ATS.

C. Expansive assertions of jurisdiction under the Alien Tort Statute discourage foreign investment in the United States.

Foreign investment is critical to the long-term health of the United States 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 at 2 (2008). It is achieved when large multinational companies establish a business presence in the United States, often through one or more United States-based subsidiaries, and through that business purchase or manufacture goods in the United States. Mindful of its importance, the Supreme Court routinely has rejected doctrines discouraging such investment. *See Goodyear*, 131 S. Ct. at 2855-56: *Helicopteros*, 466 U.S. 418.

Much like expansive doctrines of personal jurisdiction, ATS liability predicated on the sort of theory advanced by Appellants here can deter foreign companies from investing in the United States. While foreign companies limiting their activities to overseas operations escape that net (and enjoy the competitive advantage discussed above), foreign companies doing business in the United States are punished for their investment. 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), *available at* http://www.iccwbo.org/policy/environment/icccbhc/index.html.

This Circuit's recent decision in *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011), illustrates the risk. That suit involved an ATS claim against German-based Daimler AG predicated on allegations about its various Argentinean-based subsidiaries. Despite the lack of any connection between the alleged conduct, the alleged tortfeasor and the United States, this Circuit upheld personal jurisdiction over Daimler AG based on its alleged relationship with its California-based subsidiary. 644 F.3d at 921-24, *petition for rehearing en banc filed* (9th Cir. July 1, 2011). Thus, not only does ATS liability offer many foreign corporations a comparative advantage over their United States competitors, the specter of such liability – through jurisdictional veil piercing – can discourage foreign companies from establishing a domestic presence in the United States at all, sapping the United States economy of essential foreign investment.

D. Allowing ATS suits directed at corporations based on their lawful commercial activities overseas ensnares them in costly and damaging attacks on their reputations.

Relaxed legal standards, whether substantive or procedural, can encourage vexatious lawsuits. Concerns about such vexatiousness prompted the Supreme

Court to rule out accessorial liability under the nation's securities laws. *Central Bank v. First Interstate Bank*, 511 U.S. 164, 189-192 (1994). More recently, similar concerns about vexatiousness prompted the Court to tighten pleading standards under the Federal Rules of Civil Procedure. *See Bell Atl. Co. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

ATS cases predicated on the overseas lawful commercial activities of corporations carry many of the same risks of vexatiousness. Recent cases predicated on theories similar to those advanced here illustrate how plaintiffs' lawyers can use these cases to attack a company's reputation, damage its share value and drag it to the settlement table. In one case against Coca-Cola based on the alleged activities of its subsidiaries in Colombia, 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 shareholders abruptly to dump the company's stock, *id.*, even though the case ultimately was dismissed, *see Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009). In this Circuit, 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 and appeal dismissed*, 403 F.3d 708 (2005). 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). Plaintiffs' lawyers pursued similar tactics 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. As the experiences of Unocal and Royal Dutch Petroleum vividly illustrate, "[t]he resulting complexity and uncertainty – combined with the fact that juries hearing ATS claims are capable of awarding multibillion-dollar verdicts – has led many defendants to settle ATS claims prior to trial." *Kiobel*, 621 F.3d at 116 (footnotes omitted).

Until settled, these attacks on a company's reputation can drag on for years. *See generally* Hufbauer & Mitrokostas, *Awakening Monster* at 63-73 (providing filing date for earliest ATS suits). The above-mentioned suits against Unocal and Royal Dutch Petroleum lasted eight and ten years respectively before they settled. Litigation against companies that allegedly did business, lawfully, in South Africa during the apartheid era has been dragging on in various forms for nearly a decade.

Some evidence suggests that these protracted lawsuits may represent part of a deliberate strategy. In litigation against the Talisman Energy Company, shortly

before the company moved for summary judgment, the plaintiffs filed a third amended complaint *three years* after the deadline for amendment in the district court's scheduling order. *See Talisman Energy*, 582 F.3d at 267. Litigation against the Drummond Company, based on its alleged activities in Colombia, involved a similar ploy: long after discovery had closed, the plaintiffs' lawyers identified eight new witnesses, prompting the District Judge to complain that he was becoming "frustrated at being given misinformation about these late discovered witnesses" who presented "a moving target for the court and certainly for the defense." Brief for Appellees/Cross Appellants at 14, *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008) (Nos. 07-14090DD, 07-14356D) ("Drummond Brief"). Remarkably, the lawyers in the Drummond case were not sheepish about their tactics, admitting that they were "not in a hurry for the cases to be resolved, *because as long as they stay tied up in the courts they will continue to receive attention in the media*." *Drummond Brief* at 30 (quoting interview with plaintiffs' lawyers) (emphasis added). Examples such as these illustrate the potential, irremediable harm to corporations if suits predicated on their lawful business activities are not shut down promptly.

E. ATS suits predicated on the overseas commercial engagement of United States companies can expose those companies – and the countries themselves – to abusive, burdensome and diplomatically sensitive discovery.

The foregoing "practical considerations" have all supplied reasons to dismiss cases such as this one as swiftly as possible. It is worth considering the consequences if that does not occur. Recent experience under ATS cases illustrates how discovery quickly can become abusive, burdensome and diplomatically sensitive.

Discovery in ATS cases against corporations easily can become abusive. The above-reference *Drummond* case illustrates the risk. During that case, one plaintiff's witness admitted that he "wasn't speaking the truth at his deposition," was "lying to defense counsel," and "chang[ed] [his] version for trial." *Drummond Brief* at 6 (quoting trial transcript). Another witness admitted that he had lied during his deposition, and two others submitted false documents to the Colombian Government. *Id.* at 6-7. Several witnesses admitted that plaintiffs' counsel had provided assistance, including one who received $1500 per month for work as an "intern" with a group affiliated with the plaintiffs' counsel. *Id.* at 7.

Such discovery also can be burdensome. ATS cases predicated on aiding and abetting liability turn on questions about the acts of the corporate defendant and its intention when engaging in those acts. Proof of such elements easily can

require extensive discovery "tak[ing] up the time of a number of people and … representing an *in terrorem* increment of the settlement value." *Twombly*, 550 U.S. at 558. In the *Unocal* case, described above, the plaintiffs' lawyers deposed the company's President, Chief Executive Officer, and Vice President, among others; they also engaged in extensive electronic discovery of the company's emails. *See Doe*, 395 F.3d at 938-42 & n.10; *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F.Supp.2d 633 (S.D.N.Y. 2006) (discussing the extensive discovery and numerous depositions conducted in that case). Such costs are almost always unrecoverable, even if the company eventually prevails in the litigation.

Finally, discovery can tread into diplomatically sensitive territory. The focus on a corporate defendant's relationship with a sovereign – an essential piece of many claims against corporations predicated on accessorial liability – makes the sovereign's activities a centerpiece of the case (even if the sovereign is not formally a defendant in the litigation). This forces both parties to seek discovery from and about the sovereign, typically in the form of a letter rogatory. The primary tortfeasor in an aiding and abetting case may be difficult to locate, complicating efforts at obtaining discovery. At best, the sovereign's response may come (if at all) only months or even after years of waiting. *See* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 1024-26

(5th ed. 2011) (describing the letter rogatory process and its attendant delays). For example, in the *Drummond* case, the Colombian Government responded to letters rogatory more than four months *after* trial had ended. *Drummond Brief* at 14. Such letters also can spark diplomatic protests from foreign sovereigns which resent the intrusions into their internal affairs. *See Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 363 (D.C. Cir. 2007) (Kavanaugh, J. dissenting) (describing diplomatic protests in ATS cases); *see generally* Born & Rutledge, *International Civil Litigation in United States Courts* at 969-77 (cataloguing the history of diplomatic protests against United States discovery). Prompt dismissal avoids this abusive, burdensome and diplomatically sensitive discovery.

CONCLUSION

Numerous "practical consequences" counsel against "making [a cause of action] available" under Appellants' theory that overseas commercial engagement supports accessorial liability over corporations. Weighing those consequences is a matter better left to Congress, which has not seen fit to punish corporations either on the basis of general accessorial liability principles or in the specific context of lawful purchases of commodities from cocoa farms of the Côte d'Ivoire. *Sosa*, 542 U.S. at 694-95; *See Kiobel*, 621 F.3d at 122, 149. Unilateral judicial acceptance of Appellants' theory flouts the careful approach to self-regulation reflected in the

Harkin-Engel Protocol and deters American overseas investment – to the detriment of both the American economy and the developing world. Consistent with "great caution" demanded by the Supreme Court in this area of the law, the judgment of the district court should be affirmed.

Respectfully submitted,

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October 7, 2011

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October 7, 2011 s/ Peter B. Rutledge

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I, Peter B. Rutledge, certify that on October 7, 2011 the attached *BRIEF AMICI CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FOREIGN TRADE COUNCIL IN SUPPORT OF APPELLEES AND AFFIRMANCE* was filed electronically with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

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