CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

THOMAS J. DONOHUE
PRESIDENT AND
CHIEF EXECUTIVE OFFICER

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000

November 30, 2011

The Honorable William M. Daley
Chief of Staff to the President
The Honorable Kathryn Ruemmler
Counsel to the President
The White House
Washington, DC 20500

Dear Secretary Daley and Ms. Ruemmler:

As you may know, the United States Supreme Court recently agreed to hear *Kiobel v. Royal Dutch Petroleum*, a case that raises the issue whether American courts have the authority under the Alien Tort Statute (ATS) to hear claims asserted by foreign plaintiffs against corporations for conduct outside the United States that plaintiffs allege violates the "law of nations." Although the United States is not a party to *Kiobel*, the case presents a question of such importance to the Executive Branch that the administration may choose to file a "friend of the court" brief with the Supreme Court, expressing the view of the United States. We understand that the Solicitor General has already reached out to several agencies for their views on this case; we believe the issue is sufficiently important that the Executive Office of the President should be engaged.

If the administration files a brief, the Solicitor General should support the opinion of the court of appeals in *Kiobel*, and call for its affirmance by the Supreme Court. The Second Circuit in *Kiobel* properly held that the ATS does not confer U.S. jurisdiction over suits against corporations alleged to have violated the law of nations. This position is not only supported by Supreme Court precedent and international law, but a contrary conclusion would harm the global business community and improperly burden constructive economic engagement between the United States and other countries. Partly for these reasons, the Executive Branch has opposed the expansion of U.S. jurisdiction in its filings in other ATS cases.

As the Second Circuit recognized in *Kiobel*, the Supreme Court has spoken previously on the scope of the ATS in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) – a case in which the United States opposed ATS jurisdiction over the alleged mistreatment of a foreign national in a foreign country. In *Sosa*, the Court explained that lower courts must proceed with "great caution" under the ATS because such suits, by their nature, typically involve allegations of serious international law violations in foreign countries. Intervention by United States courts in these suits, the Court observed, can "imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs," and wreak serious damage on our nation's foreign relations. As the Court explained, "[i]t is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." Thus, the Court in *Sosa* set a "high bar" for the expansion of ATS liability.

Ignoring the Supreme Court's call for "great caution," foreign plaintiffs have filed more than 150 ATS suits against corporations in federal court in the last two decades. ATS litigation has touched nearly every major industry sector – resource extraction, financial services, food and beverage, transportation, manufacturing, communications – and foreign plaintiffs have targeted international business activities in more than 60 countries. Seemingly no business operation abroad is beyond the specter of an ATS lawsuit in the United States.

These lawsuits hurt business in the United States and globally in three distinct ways. First, mere allegations of human rights violations in ATS suits inflict great financial and reputational damage to corporate defendants. Second, these costs, in turn, deter business activity abroad. Third, the willingness of American courts to assume jurisdiction over these claims undermines the United States government's strategy of constructive engagement that has marked our economic relationship with much of the world for decades.

Once underway, ATS lawsuits trigger expensive and burdensome international discovery, complicated by the fact that liability often depends on relationships among multiple corporate entities throughout the globe, as well as those firms' connections

with a foreign government. ATS suits drag on for many years; it is not uncommon to take a decade or longer to resolve threshold legal issues. As a result, corporations sometimes elect to settle even dubious ATS lawsuits rather than wage long fights in the courts and in the court of public opinion.

Modern business is increasingly global. The United States government recognizes the particular importance of business activity in developing or post-conflict countries, like Iraq and Afghanistan, and actively encourages it. Potential ATS exposure, however, poses a significant disincentive for corporations to conduct business in countries with governments that have, or may in the future have, questionable human rights records. If foreign plaintiffs can extract substantial settlements from companies by alleging in U.S. courts complicity in human rights violations, the inevitable result will be a shift of business opportunities from those countries. Ultimately, corporate liability under the ATS has the same effect as unilateral economic sanctions by signaling to the international business community in which countries they should conduct business and in which they should not.

In addition, a decision to expand the ATS to corporations would discourage foreign investment in the United States. The former Secretary General of the International Chamber of Commerce explained in 2003 that "the practice of suing [European Union] companies in the U.S. 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 [greater] exposure to the Alien Tort Statute."

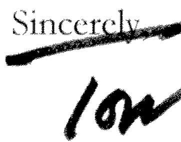
No other country in the world has a statute like the ATS, and for good reason. To hold corporations liable for alleged violations of international law in foreign countries would allow U.S. courts to "exercise jurisdiction over all the earth, on whatever matters we decide are so important that all civilized people should agree with us." *Sarei v. Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927, at *54 (9th Cir. Oct. 25, 2011) (Kleinfeld, J., dissenting).

The U.S. Chamber of Commerce unequivocally condemns human rights abuses and strongly advocates voluntary measures to strengthen international corporate

responsibility. The Chamber's Business Civic Leadership Center, founded in 2000, coordinates the Chamber's efforts to enhance corporate social responsibility and improve long-term social and economic conditions internationally.

While the Chamber takes no position on the factual allegations in *Kiobel*, we believe, for all of the reasons above, that the Administration should oppose liability for corporations under the ATS. Given the importance of this case to the business community, we request the opportunity to meet with senior White House officials to discuss this matter.

Sincerely,



Thomas J. Donohue