Whither the Alien Tort Statute?

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I am pleased to participate in this timely discussion of the ATS and to be joined by such distinguished panelists. We were asked to speculate on the future of the ATS in light of the Second Circuit's ruling in *Kiobel v. Royal Dutch Petroleum* that the ATS gives U.S. courts jurisdiction over alleged violations of international law by individuals, but not by corporations.

USCIB and other U.S. business organizations welcomed this decision and several other recent findings by federal courts throughout the U.S. I wish we could say that we have finally seen an end to these kinds of lawsuits, but I suspect that will not be the case. It will probably take another Supreme Court decision to establish once and for all the reach of this legislation, which we have long argued provided for jurisdiction only, not a private cause of action. We regret that the Court did not take that step when it had the chance in 2004 in the case of *Sosa v. Alvarez-Machain.* Consequently, for the near term at least, we will probably have to soldier on fighting these cases on an individual basis.

As I am not an attorney, I will not address all the legal arguments surrounding this statute. My other panelists are in a much better position than I to argue those points. I would like to focus instead on the broader concerns the U.S. business community has had with the legislation as it has been interpreted since the 1980 *Filartiga* decision.

USCIB has closely followed ATS litigation since the case load began to develop in 2001-2002. We filed our first amicus brief in February 2002 in the *Royal Dutch Shell* case. Subsequently, our then-President, Ambassador Thomas Niles, took the initiative in reaching out to US officials, drawing their attention to the impact these suits had on the operations of U.S. and foreign multinational companies with a U.S. presence. We urged the Executive Branch to intervene in on-going ATS cases to underline the adverse political, diplomatic, and economic effects of these suits.

In April 2003, USCIB joined five other business associations in filing an amicus brief in the case of *John Doe I v. UNOCAL Corporation* in the Ninth Circuit. We expressed our concern about the increasing number of claims under the ATS. We pointed out that global companies could find themselves entangled in litigation brought by non-U.S. plaintiffs alleging wrongs committed outside the U.S., not by

companies, but by the plaintiffs' own governments or agents of those governments, over which the companies have no control. We also stressed that this proliferation of claims resulted from a fundamental misinterpretation of the ATS itself, which, we argued, did not provide a legal basis for such suits. In the view of the U.S. business community, the ATS was never intended to provide a basis for federal jurisdiction over claims against private corporations from alleged acts taking place in foreign countries.

In calling for a reversal of a decision by the Ninth Circuit, USCIB and its fellow business organizations set forth three lines of argument:

- First, ATS litigation interferes with foreign investment and foreign relations.
- Second, the ATS provides for "jurisdiction" only and contains no private cause of action.
- Third, the ATS confers jurisdiction only where Congress has provided a cause of action by statute or treaty.

The rate and scope of ATS litigation has increased markedly since the *Filartiga* decision in 1980. While the ATS is occasionally invoked against individuals or officials accused of violating international law, the vast majority of recent cases have targeted private companies with deep pockets. Foreign plaintiffs and the lawyers and organizations supporting them have adopted the statute as a way to embarrass foreign governments, many of which the U.S. Government counts as friends and allies, while putting pressure on corporations to abandon operations in targeted countries. ATS suits invariably raise highly charged allegations of human rights abuses, generate considerable publicity, and involve enormous potential damages.

Another consideration is that it is often difficult, if not impossible, to join other parties, many of which are not subject to the jurisdiction of U.S. courts. That is particularly true with respect to sovereign governments whose acts are often challenged by plaintiffs, but who are protected by sovereign immunity and the act of state doctrine. Furthermore, evidence needed for the defense of ATS claims is often located abroad and may not be accessible to defendant corporations.

As a practical matter, ATS cases are brought mostly against corporate defendants, especially U.S. multinationals, for which personal jurisdiction is more likely obtainable and from which judgments are more likely collectible. In contrast, foreign companies without a U.S. presence need not fear ATS suits

and their associated costs. That means that U.S. companies (and foreign companies with a U.S. presence) are potentially at a significant competitive disadvantage.   The U.S. stands virtually alone in entertaining law suits over claims arising from conduct undertaken by a foreign sovereign in its own territory.

All these factors increase the risk, uncertainty, and cost of overseas operations and investment. The threat of ATS lawsuits can result in higher insurance costs, difficulties in accessing capital markets, and negative effects on shareholder confidence and stock prices.

In later amicus filings in *Sinaltrainal v. the Coca Cola Company* and the South African apartheid case, USCIB and other U.S. business associations reiterated these arguments, but also drew attention to how these claims discourage trade and investment between U.S. companies and foreigncountries and, thereby, interfere with the political branches' management of the nation's economic affairs.

They also expose American companies to costly and protracted smear campaigns. Our *Sinaltrainal* brief noted that plaintiffs filed the suits around the time of Coca Cola's first-quarter earnings meeting and consequently prompted some shareholders to dump the company's stock. That brief also quotes one of the plaintiffs' Counsel, who explained that they were "not in a hurry for the cases to be resolved, because as long as they stay tied up in courts they will continue to receive attention in the media."

ATS suits against corporations almost never lead to judgments, but still can form part of an orchestrated campaign to pressure the corporate defendants to abandon existing investment projects or decline to undertake new ones. Furthermore, unless rejected at the pleading stage, such litigation ties up American companies in costly, complex, and potentially futile discovery, increasing the pressures to settle.

Turning back to the question for this panel about "Whither the ATS," we in the business community have to ask ourselves what can we do to stop this harmful wave of litigation? As I said earlier, we hope that the Second Circuit's finding will put an end to these suits.   Most likely, the Supreme Court will have to take up the matter once again at some future date. We would hope on that occasion that the Court takes the opportunity to correct the errors arising from judicial overreach and return the ATS to its narrower, jurisdictional role. We believe the Court missed such an opportunity in *Sosa*and hope that the next time it will decide to provide clarification in an area of the law that cries out for clear guidance.