09-2778-CV *et al.*

In the
United States Court of Appeals
For the Second Circuit

Balintulo, *et al.*

Plaintiffs-Appellees

v.

Daimler AG, *et al.*

Defendants-Appellants

On Appeal from the United States District Court
For the Southern District of New York

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

Robin S. Conrad
Amar D. Sarwal
National Chamber
Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Peter B. Rutledge
Counsel of Record
100 Herty Drive
Athens, GA 30602
(706) 542-1328

Counsel for Amicus Curiae The Chamber of Commerce of the United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America states that it is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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IDENTITY, INTEREST, AND SOURCE OF AUTHORITY

Identity: *Amicus Curiae* is the Chamber of Commerce of the United States of America ("Chamber"), the nation's largest federation of business companies and associations.

Interest: One of the Chamber's primary missions is to represent the interests of its members by filing briefs *amicus curiae* in cases involving issues of national importance to America's businesses. Cases brought under the Alien Tort Statute such as those at issue in this appeal fall in this category. Several of the Chamber's members have been named as defendants in these cases, and many more have been named as defendants in other ATS cases presenting the sorts of issues raised by this appeal. These lawsuits can irremediably harm the interests of America's business community in several interrelated ways – they attempt to shame American businesses based on scandalous (and often false) allegations about their activities; they interfere with the efforts of American businesses to pursue foreign markets; they undermine the critical role that American businesses play in pursuit of

America's foreign economic and political relations; and, unless dismissed at the pleading stage, these lawsuits force American businesses to endure complex, expensive, far-flung discovery that almost inevitably necessitates investigation into the past conduct of foreign governments.

To be clear, the Chamber unequivocally and repeatedly has condemned – and here again condemns – the institution of apartheid. *See e.g.,* Anthony Robinson, *U.S Business Hits at Apartheid*, Fin. Times (London), Apr. 21, 1985 at 4. Yet these cases are not about the appropriate remedy for that tragedy (a judgment that the democratically elected government of South Africa already has made). Rather, these cases concern whether private plaintiffs may rely on an obscure jurisdictional statute and a judicially created cause of action to sue private corporations in United States court for the alleged conduct of the former South African government even though

- the alleged conduct occurred entirely in South Africa;
- the current South African government repeatedly has protested the continuation of this litigation;

- the United States government has argued that this litigation interferes with America's foreign policy objectives;

- the named defendants themselves are not alleged to have done anything unlawful.

Under these circumstances, the Chamber believes that the Alien Tort Statute, as construed by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), does not support jurisdiction in these cases. In all events, numerous doctrines support their immediate dismissal.

Source of Authority: Federal Rule of Appellate Procedure 29(a) authorizes this brief. All parties have consented to its filing. (Plaintiffs have consented to this brief as a professional courtesy but without prejudice to their argument on jurisdiction.)

SUMMARY OF THE ARGUMENT

The Chamber fully supports Appellants' position that this Court has jurisdiction over this appeal, that the decision below should be reversed, and that the cases should be immediately dismissed. In addition to the reasons offered by Appellants, the Chamber offers three additional ones to support this outcome.

First, Sosa's doctrine of case-specific deference requires dismissal of these cases. Foreign economic policy represents a key component in the exercise of the political branches' control over foreign affairs and foreign commerce. The "constructive engagement" approach to relations with South Africa during the apartheid era provides a paradigmatic example. The success of that strategy depended critically on the willing cooperation of American companies to engage in foreign commercial activity with South Africa. Plaintiffs' lawsuits discourage future overseas investment by American businesses, aggravate the United States' relations with its trading partners, and undermine the foreign

commercial activity that lies at the heart of the United States' policy toward South Africa and other nations.

Second, the doctrine of comity requires dismissal of these cases. Under this Circuit's precedent, comity has two independent strands – (a) a presumption against the extraterritorial application of United States law and (b) a refusal to exercise jurisdiction where adjudication of the case would offend amicable working relationships between the United States and other nations. Both strands of the doctrine independently counsel against subject-matter jurisdiction over these cases.

Third, the District Court's exercise of jurisdiction rests on a confused and selective choice-of-law analysis that is incompatible with *Sosa*. Specifically, the District Court engaged in what can only be described as a selective cherry-picking of different laws to support its assertion of subject-matter jurisdiction over the corporate defendants. In particular, the District Court's reliance on agency principles to exercise jurisdiction over the defendants ignores the more careful limits

set by international law, observed by many countries and required by *Sosa*'s command of "vigilant doorkeeping."

ARGUMENT

The basis for Plaintiffs' assertion of jurisdiction against these defendants under the Alien Tort Statute ("ATS") is remarkably flimsy. Plaintiffs do not allege that the corporate defendants themselves violated the law of nations. Indeed, except for a very limited class of norms, which are not at issue in these cases, the law of nations does not directly regulate private conduct. *See Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447-48 (2d Cir. 2000). Nor do Plaintiffs allege that the corporate defendants *themselves* aided and abetted the alleged conduct of the former South African government. Instead, Plaintiffs' case rests principally on the theory that *related* foreign corporations (such as subsidiaries, indirect subsidiaries, or affiliates incorporated in South Africa) allegedly aided the former South African government and that the activities of these foreign corporations should be imputed to the corporate defendants.

Neither the ATS itself nor the Supreme Court's decision in *Sosa* authorizes this breathtaking assertion of jurisdiction. The ATS simply grants jurisdiction over certain actions by aliens for torts "in violation of the law of nations." 28 U.S.C. § 1350 (2006). *Sosa* held that, under this very narrow jurisdictional grant, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732. *Sosa* required "vigilant doorkeeping" in the exercise of this common-lawmaking power and based this requirement on several principles central to this appeal. *Id.* at 729. Those include, among others, separation of powers principles, considerations of international comity, and a restrained conception of the lawmaking by federal courts following *Erie v. Tompkins*. *Id.* at 729-33 & n.21.

Notwithstanding the lack of support in the ATS or Supreme Court precedent, the District Court relied upon this Court's prior split opinion

in *Khulumani v. Barclay Nat'l Bank Ltd.* to justify its assertion of jurisdiction over these cases. 504 F.3d 254 (2d Cir. 2007) (*per curiam*). *Amicus* respectfully submits that *Khulumani* was incorrectly decided, and the issue warrants *en banc* consideration. Nonetheless, even if *Khulumani* were correct, the District Court still incorrectly asserted jurisdiction in these cases.

I. These lawsuits discourage overseas investment activity by American businesses, interfere with the President's exercise of his Foreign Affairs power and, thus, warrant dismissal under *Sosa*'s doctrine of case-specific deference.

The doctrine of case-specific deference requires a federal court to refuse to entertain jurisdiction over certain cases arising under the ATS. *Sosa*, 542 U.S. at 733 n.21. This doctrine rests partly on the primacy of the political branches, especially the Executive Branch, in the conduct of the nation's foreign affairs. *Id.* at 727. As *Sosa* recognized by citing these very cases, lawsuits directed at corporations based on their overseas activities, just like lawsuits directed at foreign government officials themselves, can disrupt the political branches' exercise of their Foreign Affairs powers. *Id.* at 733 n.21.

A. This litigation interferes with the Executive Branch's control over foreign economic policy, which forms an indispensable component of the Foreign Affairs power.

Economic power, no less than military power, represents one of the most effective tools available to the political branches in the conduct of foreign affairs. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) ("Foreign commerce is pre-eminently a matter of national concern."); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1313 (11th Cir. 2001) ("The Constitution confers a vast amount of power upon the political branches of the federal government in the area of foreign policy—particularly foreign commerce."). In some circumstances, the political branches may promote a foreign policy interest by imposing trade restrictions or even cutting off access to the American market. In other circumstances, the political branches may deliberately cultivate economic relations in order to build influence with a region of the world. In either case, the political branches, especially the Executive Branch, exercise significant leverage over foreign

governments. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000) (The President's power to persuade foreign nations rests on his capacity "to bargain for the benefits of access to the entire national economy"); U.S. Dep't of State, *Supporting Human Rights and Democracy: The U.S. Record 2004-2005* ii-iii (2005) ("In implementing its human rights and democracy strategy, the United States employs a wide range of diplomatic, informational, and economic tools to advance its foreign policy objectives.").

The conduct of American business in South Africa during apartheid represents a paradigmatic example of how foreign economic activity can advance foreign policy goals. That economic activity occurred during a period of "constructive engagement." *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 4, 101, 100 Stat. 1089, 1099-1100; Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (Sept. 9, 1985). This approach reflected the political branches' judgment that the United States' long-term diplomatic leverage with South Africa would be stronger if the political branches facilitated the

development of economic relations rather than cutting them off entirely — a strategy that depended critically on the willing participation of the American business community. *See* Brief for the United States as Amicus Curiae in Support of Petitioners at 21, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (*mem.*) (No. 07-919); 22 U.S.C. § 5002 (repealed 1993) (purpose of Comprehensive Anti-Apartheid Act was "to guide efforts of the United States in helping to bring an end to apartheid in South Africa"). That judgment proved remarkably prescient, for this strategy helped to facilitate the process of peaceful democratic transition in South Africa. *See* Chester A. Crocker, *South Africa: Eight Years Later,* Foreign Aff., Fall 1989, at 144, 146-47

The success of such initiatives depends on the willingness of American businesses to engage in the overseas foreign investment and the economic activity necessary to fulfill the nation's foreign policy goals. That participation cannot, however, be taken for granted. It depends on clear standards by which businesses can assess the risks of an investment and the potential liability. *See Stoneridge Inv. Partners,*

LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 772 (2008); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188-89 (1994).

This litigation undercuts the careful economic policy choices made by the national political branches and impedes the government's ability to speak with one voice "[i]n international relations and with respect to foreign intercourse[.]" *Bd. of Trs. v. United States*, 289 U.S. 48, 59 (1933); *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003); *Crosby,* 530 U.S. 363 (2000). These lawsuits undermine the clear standards necessary to encourage business activity abroad because they put businesses at risk of costly litigation and liability whenever they operate in countries with poor human rights records, subject only to the requirement of artful pleading. The added uncertainty created by these lawsuits increases the cost of doing business overseas in a variety of ways. It can raise the cost of risk insurance premiums. It can increase the cost of obtaining bank financing. It forces companies to plan for the prospect of future

litigation. The specter of such after-the-fact litigation ultimately deters companies from participating in policies like constructive engagement and thereby exerts "a profoundly negative effect on this nation's economy and its ability to deal with other foreign powers." *Made in the USA Found.*, 242 F.3d at 1318.

The U.S. Statement of Interest in this case highlighted this deterrent effect, explaining that the "prospect of costly litigation" (A-255-56) in this and similar cases would undermine the foreign policy interests of the United States. The "prospect of costly litigation" highlighted by the United States is very real. ATS cases often constitute smear campaigns against corporations, and discovery can be exploited to drag them out. *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) (discussing "synergy between [ATS] litigation and other tactics" and how ATS lawsuits expand the "tactical repertoires of grassroots activists as well as those of litigators"); *Khulumani*, 504 F.3d

at 295 (Korman, J., dissenting) (concluding that complaints in these cases are "a vehicle to coerce a settlement"). Discovery can become unmanageable due to the complexities of obtaining evidence via letters rogatory. *See, e.g.*, Brief for Appellees/Cross-Appellants at 11, *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008) (Nos. 07-14090DD, 07-14356-D) (discovery sought via letter rogatory arrived four months after trial had ended). Ultimately, the expense, burdens, and delays associated with overseas discovery in a case of this magnitude "allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge*, 128 S. Ct. at 765. *See Shell, Nigerian Families Settle Suit for $15.5 Million*, Forbes, June 8, 2009 (discussing thirteen year long litigation in *Wiwa*); Duncan Campbell, *Energy Giant Agrees Settlement with Burmese Villagers*, The Guardian, Dec. 15, 2004 (announcing the multi-million dollar Unocal settlement and the potential for a flood of similar litigation). Only by cutting these cases off before discovery can this Court avert these costs and halt the inevitable detriment to corporate involvement in foreign commercial endeavors.

These cases present an especially strong case for dismissal on the basis of the separation-of-powers principles that underpin the doctrine of case-specific deference. These cases seek to hold defendants liable for their alleged sales of products to a sovereign nation that were subsequently used by that country allegedly to violate international law. The Executive Branch has taken the highly unusual step of filing an unsolicited brief explaining how litigation over business activity in South Africa undercuts the President's Foreign Affairs power. Brief of the United States as Amicus Curiae in Support of Petitioners, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (*mem.*) (No. 07-919). Deference to that view, through dismissal of these cases, best comports with separation-of-powers principles. *Cf. O'Reilly De Camara v. Brooke*, 209 U.S. 45, 52 (1908) ("[W]e think it plain that where, as here, the jurisdiction of the case depends upon the establishment of a tort only in violation of the law of nations . . . it is impossible for the courts to declare an act a tort of that kind when the Executive,

Congress, and the treaty-making power all have adopted the act." (quotation omitted)).

B. Immediate dismissal of the lawsuits underlying this appeal is necessary to avoid further interference with the Foreign Affairs power.

Unless promptly corrected, the District Court's refusal to defer to the Executive Branch's views will only worsen the damage to the President's Foreign Affairs power. The experience of American corporations in litigation under the Alien Tort Statute over the last two decades reveals that, unless halted at the pleading stage, the cases quickly descend into tangled affairs with politically messy and unmanageable discovery. *See Bell Atl. Corp. v Twombly*, 550 U.S. 544, 569 n.14 (2007) (stressing the importance of scrutiny at the pleading stage to minimize the risk of vexatious discovery); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-54 (2009) (extending *Twombly*).

The nature of ATS claims against corporations virtually ensures that discovery becomes a politically volatile matter. In these cases, the

claims make South Africa's conduct a centerpiece of the litigation (even though South Africa is not formally a party). *See Corrie v. Caterpillar, Inc.*, 503 F.3d. 974, 984 (9th Cir. 2007). The complaints contain several allegations about the activities of former South African government officials. SPA 7-10. If these cases are allowed to proceed beyond the pleading stage, those allegations almost certainly will be the subject of document requests and depositions. *See, e.g., Romero v. Drummond Co.*, 552 F.3d 1303, 1311 (11th Cir. 2008). Such requests can spark diplomatic protests from foreign sovereigns, which resent the intrusion into their own affairs. *See* Brief for the United States as Amicus Curiae in Support of Petitioners at app. 4a, 7a, 11a, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (*mem.*) (No. 07-919) (reproducing diplomatic notes from several countries). Indeed, South Africa already has objected to "the continuation of these proceedings" in part because they "inevitably will include massive demands for documents and testimony from South Africans involved in various sides of the negotiated peace that ended apartheid," and will thus "intrude upon and disrupt our own

actions to achieve reconciliation and reconstruction." A-244 (Maduna Declaration ¶ 11). Given the South African Government's strenuous opposition to the very maintenance of this lawsuit, inquiries into its conduct are bound to trigger further diplomatic protests if the Court does not defer to the Executive Branch in these cases.

Even where the discovery is not sought directly from South Africa, discovery risks aggravating American foreign relations in other ways. Because many of the relevant witnesses and documents are located abroad, discovery invariably will necessitate constant judicial assistance by foreign governments. That judicial assistance typically comes in the form of a letter of request (sometimes referred to as a letter rogatory), often issued pursuant to The Hague Evidence Convention. Gary B. Born & Peter B. Rutledge, *International Civil Litigation in the United States* 963 (4th ed. 2006). Successful execution of these letters depends critically on the cooperation of the sovereign government receiving them. Yet there is no reason to suspect that the necessary cooperation will be forthcoming in these cases. Given South

Africa's express opposition to the maintenance of this suit, it is unlikely that the government even will execute any letters. Moreover, South Africa, like many nations, deposited a reservation when it ratified The Hague Evidence Convention declaring that it will not execute letters of request seeking information "for purposes of obtaining pre-trial discovery of documents." Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, The Hague Reservations, March 18, 1970, 847 U.N.T.S. 231. This creates a risk of constant flare-ups over the purpose of discovery whenever a letter of request is issued for evidence in South Africa. Thus, if these cases are allowed to proceed to the discovery stage, further conflicts with the South African government will be inevitable.

In sum, the very maintenance of these cases interferes with the Executive Branch's ability to carry out foreign economic policy, an essential component of its Foreign Affairs power. Unless dismissed now, that interference will only worsen during the discovery stage.

Thus, under *Sosa*'s doctrine of case-specific deference, the cases should be dismissed.

II. The doctrine of comity requires dismissal of these lawsuits both because the Alien Tort Statute does not apply to extraterritorial conduct and because the lawsuits antagonize the South African government.

The doctrine of comity requires federal courts to refrain from exercising jurisdiction when doing so would irritate America's relationship with foreign countries. *See Hilton v. Guyot*, 159 U.S. 113, 143 (1895). As this Circuit has recognized, the comity doctrine takes various forms. In one form, it supplies a basis to refuse to give extraterritorial effect to United States law absent a clear mandate from Congress. *See Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006). In a second independent form, comity also supplies a basis to refuse to exercise jurisdiction where "adjudication of th[e] case by a United States court would offend 'amicable working relationships' with" foreign nations. *Id.* (citing *JP Morgan Chase Bank v. Altos Hornos de Mex.,*

S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005); *In re Maxwell Comm. Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996)). These cases implicate both forms of the comity doctrine.

A. The ATS does not apply extraterritorially.

Under a longstanding principle of statutory interpretation, federal laws are presumed *not* to have extraterritorial effect. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), *superseded by statute on other grounds*, 42 U.S.C. § 5309 (2006); *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824). For a law to have extraterritorial effect, either Congress must expressly so provide in the text of the statute, or the intention to give the law extraterritorial effect must be evident from the legislative materials surrounding the statute's enactment. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). Appellants' brief explains why neither the text of the ATS nor the legislative materials surrounding its enactment overcome this presumption. *See* Appellants' Brief at 55-57.

Despite the absence of any evidence to overcome this traditional presumption, the District Court nonetheless gave the ATS full extraterritorial effect. The District Court appeared to argue that, because the ATS only "applies universal norms," it will not "generate conflicting legal obligations" and thus is less likely to "legitimately offend the sovereignty of foreign nations." SPA 21-22. This argument turns the presumption *against* extraterritoriality on its head and ignores the proper role of a "conflict" requirement in an extraterritoriality analysis. Courts apply a "conflict" requirement when Congress already has chosen to give a law extraterritorial effect and yet a particular application of that law might collide with foreign law regulating the same activity. *See, e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797 n.24 (1993). By contrast, there is no need to inquire into the existence of a "true conflict" when there is no evidence that Congress intended a law to apply extraterritorially. *See F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 166 (2004) ("Why is it reasonable to apply this law to conduct that is significantly

foreign insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim? We can find no good answer to the question.").

Moreover, even if the District Court requirement of a "true conflict" were correct, its analysis conflates the *existence* of a norm with the *remedies* for violations of that norm. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006). As these cases illustrate, states may well universally agree that apartheid offends the law of nations and yet strenuously disagree over whether monetary damages represent the appropriate remedy for a violation of that norm. They may also disagree on the identity of the parties that should be held responsible for the alleged violation of that norm. Such disagreements, which unquestionably exist in these cases, present a "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 542 U.S. at 165.

Finally, the District Court held that this Circuit's decision in *Wiwa v. Royal Dutch Petrol. Co.*, 228 F.3d 88 (2d Cir. 2000), could be

understood implicitly to resolve the matter. SPA-22. *Wiwa*, a pre-*Sosa* decision, held no such thing. Instead, *Wiwa* rejected a *forum non conveniens* defense in a case arising out of Royal Dutch Shell's alleged participation in human rights violations in Nigeria. *Wiwa*, 226 F.3d at 92. The District Court suggests that the reasoning underpinning *Wiwa*'s rejection of the *forum non conveniens* defense implies a willingness to entertain ATS jurisdiction on the basis of extraterritorial acts. SPA-22. This argument, however, ignores a critical feature of *Wiwa* – namely that the case involved a claim under the Torture Victim Protection Act ("TVPA"). That Act expressly creates a federal cause of action for torture by an individual acting "under actual or apparent authority or color of law, of any foreign nation." 28 U.S.C. § 1350 (statutory note). When this Circuit decided *Wiwa*, circuit precedent had established that the ATS, like the TVPA, was not simply jurisdictional but actually created a cause of action for violations of the law of nations. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980). *Sosa*, however, unanimously repudiated this view when it held that the ATS

was "a jurisdictional statute creating no new causes of action," thereby severing the critical analogy between the ATS and the TVPA on which *Wiwa* rested. 542 U.S. at 724. Thus, *Wiwa* did not expressly decide whether the ATS applied extraterritorially; to the extent some of its reasoning might implicitly support that view, *Sosa* squarely rejected that reasoning.

Ultimately, nothing in the ATS overcomes the presumption against the extraterritorial application of federal law, and none of the reasons given by the District Court support the result reached below.

B. Entertaining this suit offends South Africa's economic development strategy.

Under the second strand of the comity doctrine, a federal court should decline to exercise jurisdiction when doing so would upset "the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987). In *Jota v. Texaco, Inc.*, this Circuit described this strand of the doctrine to encompass cases "where a foreign

sovereign's interests [are] so legitimately affronted by the conduct of litigation in a United States forum that dismissal is warranted without regard to the defendant[s'] amenability to suit in an adequate foreign forum [.]" 157 F.3d 153, 160 (2d Cir. 1998). Here, the very existence of this litigation, as well as the looming specter of financial liability, disrespects South Africa's interest in pursuing a sustained economic development strategy in the post-apartheid era.

Particularly following a period of political transition, such as that endured by South Africa following the end of apartheid, nations often pursue a strategy of economic development. "Economic growth supported by free trade and free markets creates new jobs and higher incomes. It allows people to lift their lives out of poverty, spurs economic and legal reform, and the fight against corruption, and it reinforces the habits of liberty." Nat'l Security Council, *The National Security Strategy of the United States of America* 17 (2002). Direct investment by foreign corporations is often critical to helping a nation realize these economic and political goals. *See* William H. Meyer,

Human Rights and MNCs: Theory Versus Quantitative Analysis, 18 Hum. Rts. Q. 368, 392 (1996) (presence of foreign corporations positively correlated with economic development and civil liberties). Consequently, in an effort to attract such investment, foreign nations aim to create the conditions in which that investment can flourish.

Litigation in a foreign forum, even where the sovereign is not formally a party, threatens such strategic decisions taken by a sovereign government. Foreign companies cannot invest in the developing country with any confidence that the country's own laws will determine the scope and extent of the company's liability. Financial institutions may become less willing to finance those projects – or will only do so at a higher interest rate – either for fear that the institutions themselves will be liable or for fear that the threat of liability will enhance the risk of a project's failure. *See* Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. Davis J. Int'l L. & Pol'y 119, 134 (2007). Faced with this uncertainty and the greater difficulty in

obtaining financing, foreign corporations may opt not to make the investment at all, thereby depriving the country of the capital necessary to pursue a strategy of sustained economic development. *See* Steven J. Korbin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. Int'l L. & Pol. 425, 426 (2004) (noting that ATS suit eventually caused company to divest even though court ultimately dismissed the suit).

Here, the South African government has made clear how litigation against companies from the apartheid era offends its legitimate sovereign interest. Specifically, the lawsuits can "have a destabilizing effect on the South African economy as investment is not only a driver of growth but also of employment." *See* Petition for a Writ of Certiorari, at app. E at 308a. *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (*mem.*) (No. 07-919).

The District Court downplayed the impact on South Africa's interests and claimed that "[t]he absence of conflict" between the litigation and the Truth and Reconciliation process proves "fatal" to the comity argument. SPA-114. But this Circuit has never held that a

"conflict" is an indispensable requirement for the application of this strand of the comity doctrine. Rather, the critical fact has been whether the litigation interferes with the delicate judgments made by a foreign state about how to address matters taking place within its own territorial boundaries. *See In re Holocaust Litigation*, 250 F.3d 156, 159, 163-64 (2d Cir. 2001) (deferring to the Executive's determination that cases should be tried in accordance with an established treaty rather than in American courts); *Bi v. Union Carbide Chem. & Plastics Co.*, 984 F.2d 582, 585-86 (2d Cir. 1993) (holding that when a democratically elected government asserts exclusive jurisdiction over torts that occurred in that country, the court "will not pass judgment on that determination" and will defer to the foreign sovereign). Entertaining such litigation, just like sitting in judgment of an act of state taken within the sovereign's own territory, impermissibly intrudes on the foreign sovereign's prerogatives and offends principles of comity. *See Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 224 (2d Cir. 1985); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77-78 (2d Cir. 1977).

III. The cases should be dismissed because the agency principles on which the District Court relied to assert jurisdiction over the defendants conflict with *Sosa*'s requirement of "vigilant doorkeeping."

In determining whether conduct satisfies the ATS's "law of nations" requirement, *Sosa* instructed federal courts to consult "'the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.'" 542 U.S. at 734 (quoting *The Paquette Habana*, 175 U.S. 677, 700 (1900)). The defendants in *Sosa* were the primary tortfeasors, so the case did not definitively resolve whether principles of third-party liability applied and, if so, what source of law gave content to those principles. *See id.* at 732 n.20; *id.* at 760 (Breyer, J., concurring). Among those jurisdictions that have recognized third-party liability, the courts have disagreed over the applicable law. Some have applied federal common law; others have applied international law. Born & Rutledge, *International Civil Litigation in the United States* at 56. Regardless of the proper answer to these open questions,

the choice-of-law methodology employed by the District Court is untenable.

Sosa demanded "vigilant doorkeeping" in the creation of any liability rules under the ATS. 542 U.S. at 729. Such vigilance was necessary in order not to subvert the principles of separation-of-powers, comity and judicial restraint implicated by the ATS. Not only did that vigilant doorkeeping apply to the creation of the norm itself, *Sosa* recognized that it also necessitated caution in a court's conflicts-of-law analysis:

> [A]lthough it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses. In any event, the label would never fit the reckless policeman who botches his warrant, even though that same officer might pay damages under municipal law. *Id.* at 737.

Thus, *Sosa* instructs both that any choice-of-law methodology must err on the side of the narrower, rather than broader, liability rule, and that any such liability should be more limited than what might be available under ordinary domestic remedies. *See also id.* (noting that plaintiff in

that case would need to establish "a rule broader still" if trying to prove that defendant was liable though not acting "on behalf of a government").

Rather than applying a conflicts-of-law analysis consistent with *Sosa*'s "vigilant doorkeeping," the District Court recklessly engaged in what can only be described as cherry-picking to guide its jurisdictional inquiry. With respect to some issues, such as the required mental state for a claim of accessorial liability, the District Court purported to apply international law. SPA-50-59. With respect to other issues, such as the general availability of corporate liability or the imputation of the foreign corporations' conduct to the American corporate defendants, the court purported to apply federal common law. SPA-39-40, 79-80.

The clearest example of this flawed methodology lies in the District Court's conclusion that actions of related companies could be imputed to Defendants, a finding central to its assertion of subject-matter jurisdiction. Here it is worth recalling that Defendants are not alleged to have violated the law of nations; nor are they even alleged to

have aided and abetted South Africa's alleged violations. Rather, the premise of Plaintiffs' suits is that related companies, such as subsidiaries, aided and abetted the violations and that their conduct should be imputed to the named defendants.

In addressing this question, the District Court declared it would apply federal common law (rather than international law). SPA-79-80. While concluding that the plaintiffs had failed adequately to plead facts sufficient to support a claim of corporate veil piercing, it nonetheless found that one set of plaintiffs had pleaded sufficient facts to support imputation on the basis of "agency" principles. SPA 85-90. This approach ignores the narrower limits on disregarding the corporate form set by international law and observed by other countries. It consequently reflects a conflict-of-law methodology unfaithful to *Sosa*'s requirement of "vigilant doorkeeping."

To decide whether a particular norm has achieved the international acceptance required by *Sosa*, this Circuit has required district courts to consult various sources. These sources include, among

others, practices of the International Court of Justice and the practices of nation-states generally. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174-75 (2d Cir. 2009); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 250-52 (2d Cir. 2003); *United States v. Yousef*, 327 F.3d 56, 99-103 (2d Cir. 2003). Here, both sources do not support the agency principles employed by the District Court.

The International Court of Justice has shown great reluctance to disregard the corporate form. In its seminal opinion in the *Barcelona Traction* case, the International Court of Justice *rejected* an effort to disregard a corporate form and treat a corporation, for jurisdictional purposes, as having the nationality of its shareholders. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 39-44 (Feb. 1970). Underpinning the court's conclusion was an affirmation of the importance of the corporate form to international commerce. While the court admitted that in a rare case disregard of the corporate form might be appropriate, it stated this was possible only where necessary "to prevent the misuse of the privileges of legal personality, as in certain

instances of fraud or malfeasance, to protect third persons such as creditors or purchasers, or to prevent the evasion of legal requirements or of obligations." *Id.*; *see also Tokelés v. Ukraine*, 11 ICSID Rep. 306, 326-27 at paras. 53-56 (2004) (refusing to disregard the corporate form under principles of international law as set forth in *Barcelona Traction*). Nowhere does the International Court of Justice hold — much less suggest — that mere indicia of control, the fulcrum of the District Court's "agency" theory, would suffice to disregard the corporate form. *See ADC Affiliate, Ltd. v. Hungary*, 2006 WL 4491469 at para. 358 (ICSID case No. ARB/03/16) (applying international law and refusing to disregard the corporate form on the mere basis of parent's "control" of related company); *Amco Asia Corp. v. Indonesia*, 1 ICSID Rep. 377, 392-401 (1984) (same).

The actual practice among "civilized nations" likewise has not embraced the broad approach to disregarding the corporate form employed by the District Court. Some countries take a very narrow view of the circumstances in which it is appropriate to disregard the

corporate form; like the International Court of Justice, they require proof of intentional acts of deception or efforts to avoid a legal duty. *See* Sandra K. Miller, *Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.*, 36 Am. Bus. L.J. 73, 81-82 (1998) (describing English approach). Critically, unlike the District Court's agency theory, this approach does not allow mere allegations of "control" to supply the basis for disregarding the corporate form. Admittedly, other nations do show a greater solicitude toward disregarding the corporate form on the basis of allegations about control. Yet *Sosa* demands not simply *some* international analogue but a true "universal" acceptance of the norm. *See Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 119-20 (2d Cir. 2008). That necessary consensus simply is lacking in this area. As one commentator concluded in an exhaustive survey of approaches around the world, "it can be said fairly confidently that not one of the judicial systems in the countries considered has certain and settled rules regarding the doctrine." Steven B. Presser, *Piercing the Corporate*

Veil § 5:1 (rev. ed. 2009). *See also id.* ("[D]espite efforts by commentators to establish a clear set of standards for the piercing doctrine, perhaps as a result of the inherently uncertain nature of equitable concepts, courts in civil law countries seem to invoke the doctrine of the same unpredictable manner as do the courts of common law countries."). This diversity of national practice and the unsettled nature of the rules make clear that the principles of disregarding the corporate form relied upon by the District Court simply have not achieved the necessary acceptance and, thus, under *Sosa*'s "vigilant doorkeeping" should be rejected.

The District Court justified its reliance on the federal common law of agency on the ground that "the international law of agency has not developed precise standards for this Court to apply in the civil context." SPA-80. That argument is flawed. The lack of precise standards at international law does not justify turning to some other source to fill the gap. Instead, it requires a conclusion that the relevant norm, defined at the proper level of specificity, simply has not achieved the universal

acceptance demanded by *Sosa* and, thus, cannot supply a basis for the assertion of jurisdiction under the Alien Tort Statute. *See Mora v. New York*, 524 F.3d 183, 187, 208-09 (2d Cir. 2008) (denying universal norm recognition for right to consular notification and access); *Flores*, 414 F.3d at, 254-55 (holding "right to life" and "right to health" insufficiently determinate to constitute a universal norm under the ATS).

The District Court also cited the doctrine of "command responsibility" as a basis for holding a principal liable for the acts of its agent. SPA-80. This argument, however, stretches the doctrine of command responsibility far beyond its intended contours and, therefore, flouts *Sosa*'s command that any norm be defined at a high level of specificity. 542 U.S. at 725. The doctrine of command responsibility, as the District Court admitted, is a doctrine employed in the system of military criminal justice. SPA-80. Under that doctrine, senior military officials can be responsible for the acts of inferior officers carried out pursuant to their orders. *Yamashita v. Styer*, 327 U.S. 1, 36-37 (1946). Yet the District Court could point to no source of law extending this

doctrine to the wholly different context of a corporation's relationship to its subsidiaries or related corporations. This is unsurprising, for the relationship between corporations bears no resemblance to the relationship between military officers. In all events, stretching a doctrine developed in the context of military criminal justice to the separate field of inter-corporate civil liability defies *Sosa*'s command to define a liability-producing norm at a high level of specificity.

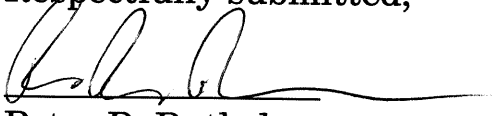
Ultimately, this Circuit need not decide precisely what source of law should determine these questions. It is sufficient to conclude that the patchwork of laws relied upon by the District Court was untenable. Its cherry-picking of different sources of law is inconsistent with *Sosa*'s more cautious approach. Its reliance on agency principles to impute the conduct of foreign corporations to the named corporate defendants neglects careful limits on disregard of the corporate form developed by sources of international law that this Circuit previously has deemed to be highly relevant. Under an approach more consistent with *Sosa*'s "vigilant doorkeeping," Plaintiffs have simply failed to establish that

these defendants – who neither committed nor aided any alleged violation of the law of nations – are subject to jurisdiction under the ATS.

CONCLUSION

For the foregoing reasons, the decision below should be reversed, and the cases should be remanded with instructions to dismiss them.

Respectfully submitted,



Peter B. Rutledge

Robin S. Conrad
Amar D. Sarwal
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

Peter B. Rutledge
Counsel of Record
100 Herty Drive
Athens, GA 30602
(706) 542-1328

Counsel for Amicus Curiae The Chamber of Commerce of the United States of America

August 2009

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,746 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Century Schoolbook 14-point font.

Dated: August 24, 2009

Peter B. Rutledge

CERTIFICATE OF SERVICE

I, _____, hereby certify that on August 24, 2009, the attached Brief *Amicus Curiae* of the Chamber of Commerce of the United States of America in support of Appellants and Reversal was served upon the following by electronic mail and overnight mail:

Jay J. Rice
Nagel, Rice & Mazie, LLP,
103 Eisenhower Parkway
Roseland, NJ 07068
(973) 618-0400
jrice@nagelrice.com

Paul L. Hoffman
Schonbrun, Desimone, Seplow, Harris & Hoffman
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731
Hoffpaul@aol.com
Attorneys for Ntsebeza Plaintiffs

Steig Olson
Hausfeld, LLP
11 Broadway, Suite 615
New York, NY 10004
(212) 830-9850
solson@hausfeldllp.com

CERTIFICATE OF SERVICE (cont'd)

Matt Schultz
Attorney at Law
Levin Papantonio Thomas Mitchell Echsner & Proctor, PA
316 S. Baylen St., Suite 600
Pensacola, FL 32502
(850) 435-7140
mschultz@levinlaw.com
Attorneys for Balintulo Plaintiffs

Sri Srinivasan
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300
ssrinivasan@omm.com
Attorneys for Ford Motor Company

Jerome S. Hirsch
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036
(212) 735-3000
jerome.hirsch@skadden.com
Attorneys for Daimler AG

Keith R. Hummel
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
khummel@cravath.com
Attorneys for IBM Corporation

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Peter B. Rutledge

Peter B. Rutledge
Associate Professor of Law

The University of Georgia®
School of Law

August 24, 2009

United States Court of Appeals for the Second Circuit
Office of the Clerk
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: No. 09-2778-CV *et al.* (*Balintulo et al. v. Daimler AG et al.*)

Dear Sir or Madam:

Enclosed please find ten copies of a brief *anmicus curiae* in the above-captioned case. All parties have consented to the filing of this brief,

An electronic copy has been filed with the Court, and the required number of copies have been served, both by paper and electronically, on all parties.

From previous contact with the Clerk's office, I understand that it was not necessary to be a member of the Court in order to file this brief provided that I was not arguing. I nonetheless submitted an application along with the required filing fee and certificate of good standing last week.

Thank you in advance for filing this brief. If you have any questions, please call me at (706) 542-1328.

Sincerely,

Peter Bowman Rutledge

Enclosures

Athens, Georgia 30602-6012 • Telephone 706-542-1328 • Telefax 706-542-5556 • borut@uga.edu

Peter B. Rutledge
100 Herty Drive
Athens, GA 30602
August 12, 2009

Mr. Sri Srinivasan
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, D.C. 20006-4001

Re: **No. 09-2778-CV *et al.* (*Balintulo et al.* v. *Daimler AG et al.*)**

Dear Mr. Srinivasan:

I have been retained by the Chamber of Commerce of the United States of America to file a brief *amicus curiae* in support of the Appellants in the above-captioned cases. I understand that you are the designated contact for the Appellants for purposes of consent requests.

Pursuant to Federal Rule of Appellate Procedure 29(a), I respectfully request your consent to file this *amicus* brief. If you consent to this request, please sign the bottom portion of this letter and fax it to me at (706) 542-5556 at your earliest convenience.

Sincerely,

Peter B. Rutledge

Counsel for the Chamber of Commerce of the United States of America

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On behalf of Appellants in the above-captioned case, I consent to the filing of a brief *amicus curiae*.

Sri Srinivasan

August 13, 2009

(Date) (Signature)

Peter B. Rutledge
100 Herty Drive
Athens, GA 30602
August 12, 2009

Mr. Paul Hoffman
Schonbrun, Desimone, Seplow, Harris & Hoffman
723 Ocean Front Walk
Venice, CA 90291

Re: **No. 09-2778-CV *et al.* (*Balintulo et al.* v. *Daimler AG et al.*)**

Dear Mr. Hoffman:

I have been retained by the Chamber of Commerce of the United States of America to file a brief *amicus curiae* in support of the Appellants in the above-captioned cases. I understand that you are the designated contact for the Appellees for purposes of consent requests.

Pursuant to Federal Rule of Appellate Procedure 29(a), I respectfully request your consent to file this *amicus* brief. I understand that you object to the Second Circuit's appellate jurisdiction in this case. I have consequently phrased the consent request to make clear that, by consenting, you are in no way compromising your argument against appellate jurisdiction.

Thank you, in advance, for your consideration of this request. If you consent to this request, please sign the bottom portion of this letter and fax it to me at (706) 542-5556 at your earliest convenience.

Sincerely,

Peter B. Rutledge

Counsel for the Chamber of Commerce of the United States of America

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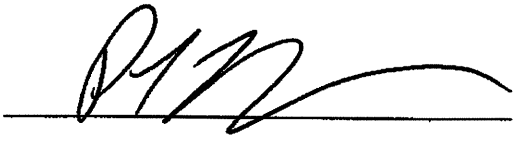
On behalf of Appellees in the above-captioned case, I consent to the filing of a brief *amicus curiae*. While consenting to this brief as a professional courtesy, Appellees continue to maintain that the Court lacks jurisdiction over this appeal.

8/20/09

(Date)



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