# 09-2778-CV

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09-2792-cv; 09-2801-cv; 09-3037-cv

In The

# United States Court of Appeals

For the Second Circuit

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

**BRIEF OF *AMICI* FEDERATION OF GERMAN INDUSTRIES, ASSOCIATION OF GERMAN CHAMBERS OF INDUSTRY AND COMMERCE, AND GERMAN AMERICAN CHAMBERS OF COMMERCE, IN SUPPORT OF DEFENDANTS-APPELLANTS**

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***Plaintiffs-Appellees*,**

*(caption continued on inside cover)*

v.

DAIMLER AG, FORD MOTOR COMPANY, INTERNATIONAL BUSINESS MACHINES CORPORATION,

***Defendants-Appellants*,**

GENERAL MOTORS CORPORATION, RHEINMETALL AG

***Defendants*.**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* Federation of German Industries and Association of German Chambers of Industry and Commerce are not corporations as understood by American law. The German American Chambers of Commerce are non-profit corporations. None of these *amici* has a parent corporation, and no publicly held corporation owns 10% or more of the stock in any of them.

**TABLE OF CONTENTS**

Page

TABLE OF AUTHORITIES ........................................................................ iv

STATEMENT OF *AMICI* INTEREST ..................................................................1

INTRODUCTION ........................................................................................5

SUMMARY OF THE ARGUMENT ........................................................................6

ARGUMENT ...............................................................................................9

I. THE COLLATERAL ORDER DOCTRINE IS DESIGNED TO ENSURE IMMEDIATE REVIEW OF SOCIETALLY IMPORTANT RULINGS THAT WILL CAUSE IRREVERSIBLE PREJUDICE IF ALLOWED TO STAND UNTIL FINAL JUDGMENT ..........................................................10

A. The Issue Before The Court Has Been Conclusively Determined ..........................................................11

B. The Issue Before The Court Is Distinct From The Merits Of The Action ..........................................................12

C. Immediate Review Is Necessary To Protect Important Public Interests..........................................................13

II. INTERLOCUTORY REVIEW IS INDISPENSABLE TO RESPECTING SEPARATION-OF-POWERS CONCERNS AT ISSUE HERE, BECAUSE THE U.S. EXECUTIVE BRANCH AND FOREIGN SOVEREIGNS HAVE EXPRESSLY OBJECTED TO THIS LITIGATION AS HARMING FOREIGN RELATIONS AND INFRINGING UPON SOVEREIGN INTERESTS ..........................................................16

A. The United States And Foreign Governments Often Explicitly Favor Policies Of Constructive Engagement To Economic Isolation...........................................................17

**TABLE OF CONTENTS—continued**

Page


i. This Case Exemplifies Governments' Dedication To Constructive Engagement ....... 17

ii. Economic Engagement Continues To Be A Viable And Much-Needed Tool In The Diplomatic Arsenal ....... 21

B. The Availability Of Prompt Appellate Review Is Critical To Businesses' Willingness To Engage In Diplomatically Desirable And Productive Investment In Politically Volatile Regions ....... 23

i. The Uncertainty Inherent In Prolonged Litigation Conflicts With Export Regimes And Conduct Guidelines Designed To Encourage Private Investment In Troubled Nations ....... 24

ii. Interlocutory Review Is Particularly Necessary In This Context Because District Courts Have Little Ability To Ensure Consistent And Predictable Outcomes ....... 26

C. When Multiple Sovereigns Agree That The Pendency Of Litigation Threatens Foreign Policy Goals, Collateral Order Review Is Warranted ....... 28

i. A District Judge's Disregard For The Views Of Multiple Sovereigns On The Impact Of A Pending Proceeding On Foreign Policy Gives Rise To An Issue Of Substantial Public Interest ....... 28

ii. A Clear Rule That Collateral Order Review Is Available When A District Judge Disregards A Sovereign's Request For Dismissal Of A Proceeding That Threatens Foreign Policy Goals Would Facilitate Economic Engagement, And Thus Respect Separation Of Powers ....... 31

CONCLUSION ....... 32

**TABLE OF CONTENTS—continued**

Page

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

Page(s)

**Cases**

*767 Third Ave. Assocs.* v. *Consulate Gen. of Socialist Fed. Republic of Yugoslavia,* 218 F.3d 152 (2d Cir. 2000) ............................................. 12, 14

*Abney* v. *United States*, 431 U.S. 651 (1977) ........................................... 11, 12, 14

*Behrens* v. *Pelletier*, 516 U.S. 299 (1996)..............................................................12

*Catlin* v. *United States*, 324 U.S. 229 (1945) .........................................................10

*Coopers & Lybrand* v. *Livesay,* 437 U.S. 463 (1978) .............................................11

*Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73 (1977) .....................14

*Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863 (1994) .......... 10, 13

*Ex Parte Republic of Peru*, 318 U.S. 578 (1943) ....................................................14

*Helstoski* v. *Meanor*, 442 U.S. 500 (1979) .............................................................13

*In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169 (2d Cir. 2008) .............12

*Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221 (1986).............15

*Mitchell* v. *Forsyth*, 472 U.S. 511 (1985)....................................................... 14, 30

*Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) ...................................................... 14, 30

*Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.,* 506 U.S. 139 (1993)......................................................................................... 11, 13

*Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996) .........................................12

*Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004) ..................................... 15, 30

*Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004) ................................................. 8, 29

*Will* v. *Hallock*, 546 U.S. 345 (2006) ........................................................... passim

**Statutes and Legislative History**

28 U.S.C. § 1291 .......................................................................................................10

Alien Tort Statute, 28 U.S.C. § 1350 ........................................................................7

## TABLE OF AUTHORITIES—continued

Page(s)

**Filings in Other Cases**

*Am. Isuzu Motors, Inc.* v. *Lungisile Ntsebeza*, U.S. S. Ct. No. 07-919, Brief of United States as *Amicus Curiae* .......... 20

*Exxon Mobil Corp.* v. *Doe*, U.S. S. Ct. No. 07-81, Brief of the United States as *Amicus Curiae* .......... 29, 30

**Miscellaneous**

M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. INT'L L. 316 (2009) .......... 26

BT-Drucksache 8/1104 .......... 19

Brahma Chellaney, *The Right Path On Burma: Constructive Engagement*, DNA NEWSPAPER (Aug. 21, 2009) .......... 22

EPC Bull. 87/429 (Oct. 28, 1987) .......... 19

Financial Times article, available at http://www.unpo.org/content/view/9515/236 .......... 22

THE (SULLIVAN) STATEMENT OF PRINCIPLES (FOURTH AMPLIFICATION), Nov. 8, 1984, reproduced in SULLIVAN PRINCIPLES FOR U.S. CORPORATIONS OPERATING IN SOUTH AFRICA, 24 I.L.M. 1464 (1985) .......... 25

U.N. Docs. S/12309, S/12310, 123111, 12312 (U.N. Scor. Suppl. Jan-March 1977) .......... 18

U.N. Sec. Council Res. 181 (Aug. 7, 1963) .......... 18

U.N. Sec. Council Res. 191 (June 18, 1964) .......... 18

U.N. Sec. Council Res. 311 (Feb. 4, 1971) .......... 18

*US Lawmaker In Burma For Landmark Meeting*, BANGKOK POST (Aug. 14, 2009) .......... 22

CHARLES ALAN WRIGHT, *ET AL.*, 15A FED. PRAC. & PROC. JURIS. 2D .......... 28

## STATEMENT OF *AMICI* INTEREST

The Representative of German Industry and Trade ("RGIT") is the Washington, D.C.-based liaison office of Germany's leading business organizations: (1) the Federation of German Industries (Bundesverband der Deutschen Industrie, or "BDI"); and (2) the Association of German Chambers of Industry and Commerce (Deutscher Industrie-und Handelskammertag, or "DIHK").

BDI serves as the umbrella organization for industrial businesses and industry-related service providers in Germany. Representing 36 industrial-sector federations, BDI has 15 regional offices in Germany and is present abroad via representative offices in Belgium, the United Kingdom, Japan, and the United States. BDI is the voice of industry for more than 100,000 private enterprises employing approximately eight million people.

DIHK coordinates the regional Chambers of Industry and Commerce in Germany (Industrie und Handelskammern, or "IHKs"), as well as a network spanning more than 80 countries of German Chambers of Commerce abroad (Aussenhandelskammern, or "AHKs"), with 120 locations on five continents. The AHKs are deeply involved in the markets of their respective host countries. Nearly two-thirds of the more than 40,000 member companies of the AHKs are of local or regional rather than of German origin.

In the United States, the AHK network comprises three entities: the GACCNY (German American Chamber of Commerce, Inc., located in New York, with branch offices in San Francisco and Philadelphia); the GACCoM (German American Chamber of Commerce of the Midwest, Inc., located in Chicago); and the GACC South (German American Chamber of Commerce of the Southern United States, Inc., located in Atlanta, with its branch office in Houston) (hereafter, collectively the "GACC"). With 2,000 member companies, the combined GACC is one of the largest bilateral trade organizations in the world. The mission of the GACC is to further, promote, and assist in the expansion of bilateral trade and investment between Germany and the United States. GACC is an integral part of the network of German Chambers of Commerce Abroad.

German industry contributes substantially to the U.S. economy through investment and in commercial dealings with U.S. public companies. In 2006, the cumulative value of foreign direct investment in the U.S. was $1.874 trillion – equivalent to 15% of the U.S. gross domestic product. Direct investment capital inflows totaled $183.6 billion in 2006, $109.9 billion in 2005, and $133.2 billion in 2004. Investment by German business in the U.S. market exceeded $200 billion at the end of 2006, comprising over 11 percent of the aforementioned $1.8 trillion invested in the U.S. economy by foreign businesses. In addition, more than 3,000 German companies have investments in the American economy. Many of these

businesses are small and medium-sized global companies. German investment is highly sought after by state and local governments across the United States, which seek to create well-paid jobs for their citizens. German industry and investment is responsible for the creation of over 650,000 well-compensated positions throughout the United States.

Because the willingness of companies to invest abroad hinges critically on identifying, measuring, and limiting risk, German industry has a substantial interest in ensuring prompt and thorough appellate review of orders in which district courts allow claims to proceed against the stated wishes of sovereign governments in the United States and abroad. German companies have long operated pursuant to self-imposed good-governance guidelines and consistent with all domestic and international legal requirements governing their foreign investment and related business operations. Moreover, foreign investments often occur only in accord with the stated policies of the relevant sovereigns. If district courts remain free to disregard express statements by the U.S. Executive Branch and foreign sovereigns as to how the pendency of certain cases harms foreign relations and sovereign interests, the absence of assured interlocutory appeal may cause companies to avoid financially risky, but socially and economically productive, investments altogether.

*Amici* BDI, DIHK, and GACC respectfully submit this brief in support of Defendants-Appellants. All parties have consented to its filing.

## INTRODUCTION

BDI, DIHK, and GACC share the serious concerns of Defendants-Appellants and other *amici* about the negative ramifications of the decision below if it is permitted to stand. Despite unambiguous and strongly worded requests from the United States and South African governments, along with objections lodged by Germany and other European countries – and an explicit admonishment by the United States Supreme Court – the district court has allowed this litigation to proceed. That decision threatens to impose potentially massive liability against not only U.S. companies, but also foreign companies, like those represented by the undersigned *amici*, that economically engage troubled countries in good faith and according to the stated wishes of their own governments, the United States, and multinational organizations such as the United Nations. The specter that German and other foreign companies might face massive liability in United States courts for actions approved by their own governments is deeply problematic. It also risks harm to foreign companies' willingness to do business in the United States. BDI, DIHK, and GACC thus fully subscribe to the arguments of Defendants-Appellants and the other *amici* that dismissal of this litigation is required on both case-specific deference and comity grounds.

Instead of repeating many of those arguments, however, this brief focuses on why the concerns of *amici* and the many sovereigns who have spoken here

demonstrate the need for prompt and meaningful appellate review of district court decisions like the one at issue here – decisions that can have an immediate adverse impact on foreign relations if not corrected. As we explain below, it is critically important to the international business community – and, thus, to the Executive Branch of the United States and to foreign governments, which depend on such businesses to effect foreign policy goals – that the decision of a single federal trial judge not indefinitely undermine the considered foreign relations concerns of the United States government in requesting that a case be dismissed on case-specific deference or comity grounds. Such immediate appellate review, *amici* submit, should be recognized by this Court under the collateral order doctrine.

## SUMMARY OF THE ARGUMENT

This is a truly exceptional case: Both the Executive Branch of the United States government, and the post-Apartheid government of South Africa – as well as the governments of Switzerland, the United Kingdom, and the Federal Republic of Germany – have explicitly declared that the very pendency of this litigation poses a substantial threat to their common objective of healing the wounds inflicted under Apartheid. Just as remarkably, the district court summarily rejected those sovereign proclamations as "speculative." Cases like this are precisely why the collateral order doctrine exists.

Sovereign industrialized nations with a significant presence in the global economy, as well as the United Nations, frequently pursue a doctrine of engaging, rather than isolating, troubled or controversial foreign regimes. Sometimes such engagement takes the form of direct governmental aid, but more often it contemplates that, by doing business according to explicit rules of conduct, private-sector corporations will immediately improve conditions on the ground and, over time, generate the economic activity necessary to achieve the desired social and economic reforms. In South Africa, for example, European companies abided by an official Code of Conduct pursuant to which, among other things, racially discriminatory hiring practices were rejected. Those salutary policies provided immediate and direct benefits to black South Africans. More broadly, maintaining economic ties with the larger international community gives troubled regimes an incentive to respond to pleas to improve human rights conditions. International businesses play a pivotal role in executing that diplomatic strategy.

If such a *de facto* joint venture between governments and businesses is to succeed, however, businesses must be able to identify and measure the risks they confront when accepting a government's invitation to invest in a troubled nation. In addition to the conventional challenges that all businesses contemplating foreign investment must overcome, such investments increasingly expose businesses to massive and burdensome lawsuits in the United States under the Alien Tort Statute,

28 U.S.C. § 1350 (note) ("ATS"). Indeed, under the aiding-and-abetting doctrine embraced by the district court in this case, businesses may be sued under the ATS not only for the direct commission of torts, but also for merely indirectly facilitating a foreign regime's own misconduct – even if no intent to provide assistance existed. It is thus possible for a company to invest according to its own government's invitation and in strict compliance with all rules set forth for that investment, only to become embroiled in burdensome and disruptive litigation and risk massive liability decades later in a United States court. Such uncertainty and unpredictability is anathema to both U.S. and foreign businesses alike.

The availability of a definitive, authoritative answer from a reviewing court early in litigation on whether maintenance of such litigation offends international comity or U.S. foreign policy interests can go far toward alleviating this harmful uncertainty. The "case-specific" approach to deference endorsed by the Supreme Court in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), highlights the fact that, even if a business receives the full and explicit backing of multiple sovereigns in defending against a lawsuit, it might nevertheless face years of massively expensive discovery, and perhaps even a politically heated trial, in order to vindicate its actions. Indeed, as this case shows, the opinion of a district judge may effectively trump the stated views of multiple sovereign governments and the considered warnings of the Supreme Court. In such circumstances, where the very

process of discovery and a trial would work untold damage to the sovereigns' aims by (among other things) discouraging businesses from investing in the first place, it is critical that the "case-specific" inquiry into justiciability be as considered and consistent as possible. Immediate interlocutory review under the collateral order doctrine provides an essential means of reducing this detrimental uncertainty and respecting separation-of-powers concerns in this context. The alternative – *i.e.*, allowing appellate correction only after discovery and trial and the entry of a final judgment – provides no comfort at all, because the harm to U.S. foreign policy interests and the massive burdens imposed on business defendants already have been inflicted.

## ARGUMENT

The essential purpose of the collateral order doctrine is to ensure that, when decisions implicating substantial public interests would be effectively unreviewable after discovery and trial, courts of appeals may exercise jurisdiction over an interlocutory appeal. The prospect that German and other foreign companies would be held to answer in United States courts for actions that their own governments approved – against the stated wishes of the United States and other sovereign nations – would dissuade foreign companies from pursuing the economic engagement that their respective sovereigns have advocated to promote social change in troubled regions. As the Supreme Court recently reaffirmed, the

"importance" of the underlying issues is the touchstone of the collateral order doctrine; the dire consequences for the Executive's foreign affairs power and for foreign nations' sovereign interests imposed by the pendency of this litigation thus plainly warrant immediate appellate review. *Amici* are confident that such considered appellate review would result in a reversal of the district court's ruling in this case.

## I. THE COLLATERAL ORDER DOCTRINE IS DESIGNED TO ENSURE IMMEDIATE REVIEW OF SOCIETALLY IMPORTANT RULINGS THAT WILL CAUSE IRREVERSIBLE PREJUDICE IF ALLOWED TO STAND UNTIL FINAL JUDGMENT

Under 28 U.S.C. § 1291, the courts of appeals have jurisdiction over "final decisions." Ordinarily, a decision is considered final if it "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)). Immediate appeal also is available under Section 1291, however, for "a 'small class' of rulings, not concluding the litigation, but conclusively resolving 'claims of right separable from, and collateral to, rights asserted in the action.'" *Will* v. *Hallock*, 546 U.S. 345, 349 (2006) (citation omitted). This jurisdiction, based on what has come to be known as the collateral order doctrine, is "best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Digital Equip.,* 511 U.S. at 867 (citation omitted).

To be immediately appealable under the collateral order doctrine, a decision must: "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.,* 506 U.S. 139, 144 (1993) (quoting *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 468 (1978)). Claims that meet all three prongs are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Will*, 546 U.S. at 349 (citation omitted). This case plainly meets those criteria.

**A. The Issue Before The Court Has Been Conclusively Determined**

A disputed question is considered "conclusively determine[d]" when there are "no further steps that can be taken in the District Court." *Abney* v. *United States*, 431 U.S. 651, 659 (1977). By holding that "resolution of this case" does not require the court to "pass judgment on the policy of constructive engagement or the United States' relationship with apartheid-era South Africa," SPA-113, and that "international comity does not require dismissal of this suit," SPA-115-16, the district court "conclusively determined" that neither case-specific deference concerns nor principles of international comity required dismissal. SPA-110-16. That (erroneous) ruling constituted "a complete, formal, and, in the trial court, final

rejection of" Defendants-Appellants' defenses. *Abney*, 431 U.S. at 659. Cf. *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 180 (2d Cir. 2008) ("A district court's determination that, on the facts as alleged by the plaintiff, the defendant is not immune conclusively determines the defendant's right to 'immunity from suit,' regardless of whether the plaintiff ultimately proves its factual allegations.").

### B. The Issue Before The Court Is Distinct From The Merits Of The Action

The "separability component asks whether the question to be resolved on appeal is conceptually distinct from the merits of the plaintiff's claim." *Behrens* v. *Pelletier*, 516 U.S. 299, 309 n.3 (1996) (quotation marks and citation omitted). Here, whether plaintiffs' claims are precluded by considerations of case-specific deference or international comity are "completely separate" questions from (and collateral to) whether the defendant companies aided and abetted the South African apartheid regime. See *767 Third Ave. Assocs.* v. *Consulate Gen. of Socialist Fed. Republic of Yugoslavia,* 218 F.3d 152, 159 (2d Cir. 2000) (a determination whether a case involves nonjusticiable questions "conclusively determines an issue that is separate from the merits") (quoting *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 714 (1996)).

### C. Immediate Review Is Necessary To Protect Important Public Interests

For purposes of the collateral order doctrine, a decision is "effectively unreviewable" on appeal from a final judgment if merely permitting the suit to go forward will have significant negative consequences for "some particular value of a high order." *Will*, 546 U.S. at 352-53. In those circumstances, the "compelling public ends" at issue would already have been "compromised by [the] fail[ure] to allow immediate appeal," and thus delayed review would effectively be meaningless. *Id* at 352. In this way, the collateral order doctrine requires an appellate court to make "a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Digital Equip.*, 511 U.S. at 878-79.

Examples of "compelling public ends" that may become "effectively unreviewable" by the time a final judgment is entered include "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, [and] respecting a State's dignitary interests." *Will*, 546 U.S. at 352-53; see also *Puerto Rico Aqueduct and Sewer Auth.*, 506 U.S. at 142-47 (immediate appeal necessary to protect right of non-consenting States under the Eleventh Amendment to be free from trial); *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979) (immediate appeal necessary to protect right of Member of Congress under the Speech or Debate Clause to be free from the burden of defending himself

in court). In such circumstances, only an immediate appeal can give "full protection" to the party's right "not to face trial at all." *Abney*, 431 U.S. at 662 & n.7.

The Supreme Court has repeatedly recognized a "substantial public interest" in circumstances similar to those presented here. In *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), for example, the denial of a claim of absolute Presidential immunity was held to be immediately appealable because failure to honor an assertion of that immunity, if meritorious, would have compromised the "compelling" public interest in preserving the "separation of powers." *Id*. at 749, 758; see also *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985) (permitting collateral order appeal to avoid interfering with the efficiency and initiative of the Executive Branch); *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 83-84 (1977) ("the nonjusticiability of a political question is primarily a function of the separation of powers") (citation omitted); *767 Third Ave. Assocs.*, 218 F.3d at 164 ("[T]he political question doctrine is essentially a constitutional limitation on the courts.").

Still other cases have recognized a substantial public interest in meritorious claims of foreign sovereign immunity. Because the denial of that defense (and resultant ongoing litigation) could interfere with U.S. foreign policy interests and relations with foreign states, it has long been considered an issue necessitating immediate review. See *Ex Parte Republic of Peru*, 318 U.S. 578, 587 (1943) ("[I]t

is of public importance that the action of the political arm of the Government" in recognizing a foreign state's claim of immunity "be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court"); cf. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 681 (2004).

In like manner, the case-specific deference principle identified in *Sosa* (a close cousin of the political question doctrine) and international comity concerns are intended to protect the Executive and Congress from interference with foreign policy. *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."). And, as with cases addressing foreign sovereign immunity and separation-of-powers issues, the very pendency of this case would implicate the ability of the Executive Branch to conduct foreign relations as it sees fit.

As explained below, failure immediately to review the district court's decision denying Defendants-Appellants' motion to dismiss would "imperil a substantial public interest" in a way that would "effectively" deny relief. *Will*, 546 U.S. at 353. Indeed, it would materially undermine the ability of the United States

and other sovereign governments to conduct foreign policy through economic engagement.

## II. INTERLOCUTORY REVIEW IS INDISPENSABLE TO RESPECTING SEPARATION-OF-POWERS CONCERNS AT ISSUE HERE, BECAUSE THE U.S. EXECUTIVE BRANCH AND FOREIGN SOVEREIGNS HAVE EXPRESSLY OBJECTED TO THIS LITIGATION AS HARMING FOREIGN RELATIONS AND INFRINGING UPON SOVEREIGN INTERESTS

Numerous foreign governments and international organizations have consistently advocated a doctrine of calibrated economic engagement with certain governmental regimes that fall short of ideal humanitarian standards. This often includes explicit guidelines to govern corporate conduct when pursuing that policy. Such engagement by private businesses is, indeed, often the primary means through which governments advance their foreign policy agendas in such regions. Government assurances and guidelines, however, mean little to businesses if they face the possibility that a single U.S. district judge may, in a "case-specific" decision, issue rulings on threshold issues that may not be appealed for years – perhaps not until after a lengthy discovery process and trial that inflicts irreversible damage on the company's operations and public image, and on the government's foreign policy goals. The collateral order doctrine exists precisely to limit the ramifications of such individualized decisions, and this Court should authorize interlocutory review when a district court disregards the stated views of multiple sovereigns that the pendency of a case is undermining foreign policy.

### A. The United States And Foreign Governments Often Explicitly Favor Policies Of Constructive Engagement To Economic Isolation.

#### i. This Case Exemplifies Governments' Dedication To Constructive Engagement

a. There can be little doubt that economic engagement was part-and-parcel of leading nations' efforts to *end* the Apartheid regime in South Africa. It is equally clear that the continued pendency of this litigation fundamentally conflicts with that foreign policy.

During the years at issue in this litigation – indeed, for the entire period of Apartheid rule in South Africa – many governments and international organizations, including the United States, Germany, the European Community, and the United Nations itself, embraced a thoroughly considered policy of economic engagement with South Africa, and explicitly rejected frequent calls for boycotts and isolation. The German government's approach – under which *amici's* members operated – is emblematic of this policy. Rudolf Dolzer, a professor of International Law, European Law, and Constitutional Law at the University of Bonn, has explained that "Germany's stated policy was that economic interaction with South Africa, in accordance with a Code of Conduct written to set race-neutral workplace standards, would help to bring about a peaceful end to Apartheid and to improve the condition of the oppressed majority in that country. Thus, the German government actively supported and encouraged such commerce within the

boundaries of these defined restrictions." Dolzer Decl., ¶ 3.[1] In so doing, "Germany's laws and policies . . . were consistent with those of other western governments, and with the policy decisions of the United Nations Security Council and the European Community." *Id.* ¶ 4.

During Apartheid, many nations, including Germany and the United States, participated in an arms and technology embargo of South Africa. *Ibid.* See also U.N. Sec. Council Res. 181 (Aug. 7, 1963), 191 (June 18, 1964), and 311 (Feb. 4, 1972) (calling upon member states to cease voluntarily the sale of arms and related materials to South Africa.) There is no allegation in any of the operative complaints that Ford or IBM violated any such U.S. export regulations, or that Daimler AG violated any such German regulations. These nations, however, also "considered and rejected an international prohibition against companies engaging in business, investment or financial transactions with South Africa or South African companies." Dolzer Decl. ¶ 4. The United Nations, too, refused such isolating measures despite the submission of multiple proposals calling for them. *Id.* ¶ 7 (citing U.N. Docs. S/12309, S/12310, 123111, 12312 (U.N. Scor. Suppl. Jan-March 1977)). As Professor Dolzer explains, "[a]t no time did the Security

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[1] The Declaration of Rudolf Dolzer was submitted to the district court (MDL Dkt. 108), and is part of the designated record on appeal.

Council, either in binding or non-binding format, call for disinvestment from or a cessation of trade with South Africa." *Id.* ¶ 10.

Perhaps the most nuanced approach to the question of whether, and how, to engage South Africa under Apartheid was crafted by the European Union (then known as the European Community) in 1977. It introduced a voluntary "Code of Conduct" for member-state companies operating in South Africa, which established workplace standards that included treating South African employees equally regardless of race. See *Id.* ¶ 14 (citing BT-Drucksache 8/1104). Although the Code, like the United Nations resolutions, "did not in any way limit investment or restrict commerce in or with South Africa," *ibid.*, it proved highly effective. Ten years after its introduction, the European Community stated that "as far as the continued presence of European companies in South Africa is concerned, the Twelve [Member States] believe the Code of Conduct for European companies with branches or subsidiaries in South Africa *plays an important role in helping to generate a process of reform in South Africa*, especially in the area of labor relations." *Id.* ¶ 19 (quoting EPC Bull. 87/429 (Oct. 28, 1987) (emphasis added)).

German companies, such as the members of *amici*, embraced the Code of Conduct in their business operations in South Africa (*Id.* ¶ 25). In so doing, they acted to further the belief of the German government – shared by both the United States and the United Nations – that "economic connections with South Africa

were useful in maintaining a critical dialogue with that government and in improving the situation of the black majority." *Id.* ¶ 27. As the German and UK governments complained to the U.S. Department of State, this litigation "calls into question decisions and laws made decades ago by the [German and UK] Governments, the United States and many other countries." *Am. Isuzu Motors, Inc.* v. *Lungisile Ntsebeza*, U.S. S. Ct. No. 07-919, Brief of United States as *Amicus Curiae* at 11a.

b. Penuell Mpapa Maduna, South Africa's Minister of Justice and Constitutional Development, has explained that this litigation conflicts with South Africa's chosen process of dealing with its apartheid legacy, which "deliberately avoided a 'victors' justice' approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill" (A-238 (¶ 3.2.1)). South Africa has further determined that the "continuation of these proceedings, which inevitably will include massive demands for documents and testimony from South Africans involved in various sides of the negotiated peace that ended apartheid, will intrude upon and disrupt our own efforts to achieve reconciliation and reconstruction" (*id.*), and therefore has officially urged that this litigation "should be dismissed" (A-237 (¶ 2)). Significantly, these protests have issued from the

post-Apartheid, democratically elected South African government, not the regime complicit in the misconduct alleged in this litigation.

The views of the United States Executive Branch were equally emphatic. It declared that "continued adjudication of [these] matters risks potentially serious adverse consequences for significant interests of the United States" (A-254), because "[s]upport for the South African government's [forward-looking reconciliation] efforts . . . is a cornerstone of U.S. policy towards that country" (A-254-55). Most important for present purposes, the United States was explicitly concerned that "adjudication of the apartheid cases may deter foreign investment where it is most needed," insofar as "the prospect of costly litigation and potential liability in U.S. courts for operating in a country whose government implements oppressive policies will discourage U.S. (and other foreign) corporations from investing in many areas of the developing world." A-255-56. That result, the Executive Branch has explained, would "compromise a valuable foreign policy tool." A-256. As we explain below (pp. 23-28), the United States could not be more right.

**ii. Economic Engagement Continues To Be A Viable And Much-Needed Tool In The Diplomatic Arsenal**

The policy of economic engagement toward politically troubled nations, executed in large part by governments' encouraging foreign corporations to trade with those nations, promises to be a tool of ever-growing importance. Throughout

South America, Africa, Asia, and the Middle East, examples abound of countries with troublesome records on civil rights and humanitarian issues that many foreign governments have determined are most effectively engaged through trade and growth.

This approach is increasingly common because experience shows that broad embargoes and the economic stagnation they cause often prove ineffective in bringing about reforms and better behavior by targeted foreign regimes. To take but one example, over the last twenty years, the United States has imposed a series of increasingly strict sanctions against Burma for its human rights record. As recently as February 2009, however, Secretary of State Clinton acknowledged that, "[c]learly, the path we have taken in imposing sanctions hasn't influenced the Burmese junta" (Financial Times article, available at http://www.unpo.org /content/view/9515/236). Not surprisingly, there are increasing calls for "constructive" economic engagement with Burma, both within the Obama administration and among commentators. See Brahma Chellaney, *The Right Path On Burma: Constructive Engagement*, DNA NEWSPAPER (Aug. 21, 2009); *US Lawmaker In Burma For Landmark Meeting*, BANGKOK POST (Aug. 14, 2009). Such examples are likely only to multiply in coming years as trade pacts proliferate and governments increasingly abandon sanctions as a means of promoting social progress.

### B. The Availability Of Prompt Appellate Review Is Critical To Businesses' Willingness To Engage In Diplomatically Desirable And Productive Investment In Politically Volatile Regions

Companies making foreign investments that comply with domestic law intended to advance stated foreign policy objectives consistent with those of the U.S. government reasonably do not expect to face massive liability in a U.S. court for violations of international law. Indeed, that simple bit of common sense animates legal principles such as case-specific deference and courts' respect for international comity. Questions of a truly international political character are simply beyond the ken and competence of traditional judicial fora. That is especially true where, as here, multiple sovereigns have explicitly represented that the very pendency of the litigation jeopardizes critical foreign policy goals, and have asked that the cases be dismissed. In such cases, no guesswork is required.

When a district court is permitted casually to disregard such statements as "speculative" (SPA-112 n.349), however, and where such a decision means years of expensive and highly damaging litigation before that threshold question can be evaluated by an appellate court, businesses will no doubt hesitate to cooperate with policies of economic engagement in troubled regimes. Interlocutory appellate review is essential to combat such crippling uncertainty, because it assures companies contemplating foreign investment that they will receive a definitive and

authoritative adjudication of these fundamental issues – particularly where the sovereigns involved have expressly opposed the litigation.

#### i. The Uncertainty Inherent In Prolonged Litigation Conflicts With Export Regimes And Conduct Guidelines Designed To Encourage Private Investment In Troubled Nations

In response to Defendants-Appellants' arguments that aiding-and-abetting liability is difficult to predict, the district court stated that "[i]t is (or should be) undisputed that simply doing business with a state or individual who violates the law of nations is insufficient to create liability." SPA-47. Such empty assurances, however, provide little comfort to businesses seeking some measure of certainty that, years (or even decades) later, they will not face burdensome and intrusive litigation, extortive settlement demands, and a public relations nightmare.

This case highlights the intractable uncertainties that confront businesses attempting to divine what they must do to avoid possible liability under the Alien Tort Statute. As explained above, most foreign companies that invested in South Africa during Apartheid did so in compliance with government policies and rules that regulated such investment. In Europe, for instance, companies operated according to an explicit Code of Conduct prescribed to ensure that they fostered positive social change. The Code suggested, among other things, that companies "encourage training programs for black employees." Dolzer Decl. ¶ 16.

Consequently, as stated above, foreign investment offered immediate and direct benefits to those suffering most under the Apartheid regime.

Europe was not alone in that effort. The "Sullivan Principles" were developed as a voluntary code of conduct for U.S. corporations operating in South Africa. Those principles required that signatory companies take affirmative steps toward "[i]mproving the quality of employees' lives outside the work environment in such areas as housing, transportation, schooling, recreation and health facilities." See THE (SULLIVAN) STATEMENT OF PRINCIPLES (FOURTH AMPLIFICATION), Nov. 8, 1984, reproduced in SULLIVAN PRINCIPLES FOR U.S. CORPORATIONS OPERATING IN SOUTH AFRICA, 24 I.L.M. 1464, 1496 (1985). Signatories also agreed to be politically proactive and to support "the rights of Blacks to form or belong" to unions, to "secure [the] rights of Black workers to the freedom of association," and to "[s]upport the ending of all apartheid laws." *Id.* at 1497-99.

These laws and principles are fundamentally inconsistent with the district court's belief that it is permissible, decades later, to examine whether a particular company's involvement with a troubled regime was inappropriate. Such a nebulous standard compounds the uncertainty, and many companies quite sensibly will conclude that they are better off abstaining altogether from investment in troubled areas, which in turn will deprive residents of those regions of the very real economic benefits that such initiatives offer. Even those companies that do invest

will recognize that complying with aspirational codes of conduct – measures that can bring *tangible* change to distressed people – provides little or no relief from the barrage of lawsuits that may follow years later. The mere specter of protracted and potentially ruinous litigation is sufficient to deter foreign investment that, in many nations' sovereign judgment, is the best way to combat a particular human rights problem.[2]

**ii. Interlocutory Review Is Particularly Necessary In This Context Because District Courts Have Little Ability To Ensure Consistent And Predictable Outcomes**

The decisions whether case-specific concerns merit deference to the Executive Branch's position, or whether respect for international comity requires dismissal, present unique challenges to district courts. While we submit that the unequivocal statements here by both the United States and South Africa, coupled with the concerns expressed by Germany and other European countries, leave no room for doubt, a judicial inquiry into the foreign relations implications of a

[2] It is particularly ironic that the Alien Tort Statute has become the means for *unraveling* mutual cooperation between the United States and foreign nations. After all, that statute was created to *improve* international relations by giving a forum to aliens *resident in the United States*, whose mistreatment *in the United States* had the potential of causing friction in the relations between countries. See generally M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. INT'L L. 316 (2009) (forthcoming). As deployed here – by plaintiffs *not* resident in the United States, claiming wrongs that occurred completely *outside* the United States, where the very existence of the litigation injures foreign relations – the ATS actually thwarts

particular suit is often *sui generis*: The relationship between the United States government and the post-Apartheid South African government would, for example, offer little guidance for a future district court considering the relationship between the United States and the junta in Burma. And, compared to Title VII, immigration law, and other contexts that district courts often confront and in which they quickly gain expertise, such threshold determinations involving international relations are rare. District courts are thus less able to develop consistent and predictable approaches that they may apply to the facts of each case. Too often, the result is decisions that appear to be little more than *ipse dixit*s, such as the district court's terse statement here that the Executive Branch's and post-Apartheid South African government's concerns about the litigation's effects on social progress were "speculative." Such conclusory decisions offer no guidance whatever to a foreign company – or indeed a *government* – attempting to discern whether a future dispute over constructive engagement will be held justiciable.

What is more, unlike in many cases, district courts have no privileged insight into these issues. Accordingly, the normal rationales that justify deference to a district court's management of trial proceedings (and its judgment regarding

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the purpose underlying the statute. The absence of interlocutory review would only exacerbate those problems.

proper timing of appeals) do not apply. See CHARLES ALAN WRIGHT, *ET AL.*, 15A FED. PRAC. & PROC. JURIS. 2D § 3911.5 ("[T]he considerations that cause appellate courts to confide in trial court discretion should affect the timing of appeal as well as the scope of review."). Moreover, when weighty considerations of foreign policy are at stake (as they are here), there is a pressing need for authoritative and definitive judicial decision-making. At a minimum, appellate review of such questions assures interested sovereign governments that these fundamental issues have been fully and finally examined by the legal system that adjudicates suits of such a uniquely international character.

### C. When Multiple Sovereigns Agree That The Pendency Of Litigation Threatens Foreign Policy Goals, Collateral Order Review Is Warranted

#### i. A District Judge's Disregard For The Views Of Multiple Sovereigns On The Impact Of A Pending Proceeding On Foreign Policy Gives Rise To An Issue Of Substantial Public Interest

In this case, two sovereign governments explicitly requested that the district court defer to their judgment that the pendency of this litigation would materially disrupt efforts to move past Apartheid in South Africa. Other governments, including the German government, expressed the same concerns to the U.S. State Department. In addition, the Supreme Court, *speaking of these very cases*, reasoned in *Sosa* that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign

policy." 542 U.S. at 733 n.21. As things stand, however, the unexplicated view of a single district judge has prevailed over the considered opinions of all of these sovereign states on a matter of foreign policy. This should be an easy case for collateral order review, and the Court should make clear that it will hear such interlocutory appeals in any case where a district court rejects the explicit views of the United States and foreign sovereigns on the impact of pending proceedings on a foreign policy matter.

This case is a far more compelling candidate for immediate review than *Exxon Mobil Corp.* v. *Doe*, U.S. S. Ct. No. 07-81, in which the United States, as *Amicus Curiae*, acknowledged that interlocutory review should be available in certain circumstances to review deference questions arising under the ATS. The United States ultimately concluded that review was not necessary there because the government's statement of interest contemplated that the litigation *could* be conducted in such a way to avoid the harmful foreign policy implications. No. 07-81 U.S. Br. 14. Here, by contrast, the post-Apartheid South African government has stated unequivocally that *any* attempt to pursue this litigation will offend its sovereign interests, and the statement by the United States is likewise emphatic.

As the Solicitor General observed in *Doe*, "[m]any of the instances in which the Court has recognized . . . a 'substantial public interest' [sufficient to justify collateral order review] are ones in which the litigation itself implicates concerns

relating to the 'separation of powers.'" No. 07-81 U.S. Br. 11 (citing *Will*, 546 U.S. at 352). Perhaps the clearest example of that principle is *Fitzgerald*, where the Supreme Court recognized that immediate appeal from a denial of presidential immunity is necessary to protect "compelling public ends" "rooted in . . . the separation of powers." 457 U.S. at 758, 749. The Supreme Court has likewise upheld immediate appeal when immunity is denied to low-level government officials whose prosecution may impair Executive Branch operations (*Mitchell*, 472 U.S. at 530), and when foreign sovereigns assert immunity from suit (*Altmann*, 541 U.S. at 681).

The United States rightly concluded in *Doe* that, in the foreign policy context, "substantial public interests would be frustrated if a defense based on the separation of powers was not vindicated at the very outset of the litigation." No. 07-81 U.S. Br. 12. Such frustration of a substantial public interest is, of course, the fundamental test for when collateral order review is appropriate. See *Will*, 546 U.S. at 352-53 (a decision is "effectively unreviewable" on appeal from a final judgment if merely permitting the suit to go forward will have significant negative consequences for "some particular value of a high order"). When multiple sovereigns agree that dismissal is warranted, the convergence of case-specific deference and comity doctrines virtually ensures that substantial public interests justify collateral order review.

### ii. A Clear Rule That Collateral Order Review Is Available When A District Judge Disregards A Sovereign's Request For Dismissal Of A Proceeding That Threatens Foreign Policy Goals Would Facilitate Economic Engagement, And Thus Respect Separation Of Powers

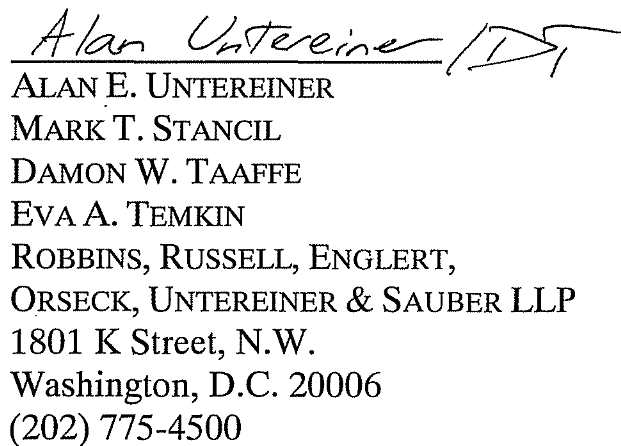
As discussed above, given the unambiguous positions expressed by the United States and post-Apartheid South African governments, along with the supporting views of Germany and other European countries, this litigation should present an easy case for interlocutory review. But this Court should specifically declare that collateral order review will generally be granted when a sovereign's explicit objection to the very pendency of a proceeding that threatens foreign policy goals is denied by a district court. Such a rule is fully consistent with the fundamental principles underlying the collateral order doctrine, and it would permit companies concerned about foreign investments to seek assurances *ex ante* from the relevant sovereigns that, should litigation occur, the sovereign would confirm that the investments were in accord with its foreign policy wishes. Although that type of *ex ante* arrangement might not guarantee dismissal – the judicial system may ultimately determine that dismissal on case-specific deference or comity grounds is not warranted – it would at least assure companies that appellate review will be available to ensure that the "right answer" is reached before invasive discovery and a trial ensue.

The point is not merely that such a rule would be desirable for businesses, but instead that, *without* such a rule, governments' abilities to conduct foreign policy by encouraging economic engagement will be seriously impaired.

## CONCLUSION

The Court should hold that interlocutory review under the collateral order doctrine is available in this case and should reverse the district court's denial of the motion to dismiss.

Respectfully submitted.



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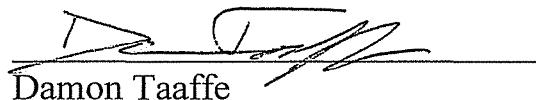
## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,797 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 Times New Roman 14-point font.

Dated: August 24, 2009



Damon Taaffe

## CERTIFICATE OF SERVICE

I, Damon Taaffe, hereby certify that on August 24, 2009, the attached Brief Of *Amici* Federation Of German Industries, Association Of German Chambers Of Industry And Commerce, And German American Chambers Of Commerce, In Support Of Defendants-Appellants, was served upon the following by electronic mail and FedEx:

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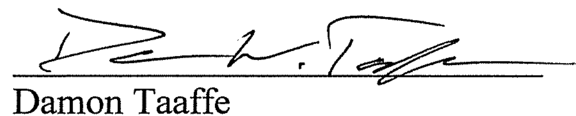

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