No. 09-2778-cv

09-2779-cv; 09-2780-cv; 09-2781-cv; 09-2783-cv; 09-2785-cv; 09-2787-cv; 09-2792-cv; 09-2801-cv; 09-3037-cv

In the United States Court of Appeals for the Second Circuit

SAKWE BALINTULO, as personal representative of SABA BALINTULO, DENNIS VINCENT FREDERICK BRUTUS, MARK FRANSCH, as personal representative of ANTON FRANSCH, ELSIE GISHI, LESIBA KEKANA, ARCHINGTON MADONDO, as personal representative of MANDLA MADONDO, MPHO ALFRED MASEMOLA, MICHAEL MBELE, MAMOSADI CATHERINE MLANGENI, REUBEN MPHELA, THULANI NUNU, THANDIWE SHEZI, THOBILE SIKANI, LUNGISLIE NTSEBEZA, MANTOA DOROTHY MOLEFI, individually and on behalf of her deceased son, MNCEKELELI HENYN SIMANGENTLOKO, TOZAMILE BOTHA, MPUMELELO CILIBE, WILLIAM DANIEL PETERS, SAMUEL ZOYISILE MALI, MSITHELI WELLINGTON NONYUKELA, JAMES MICHAEL TAMBOER, NOTHINI BETTY DYONASHE, individually and on behalf of her deceased son, NONKULULEKO SYLVIA NGCAKA, individually and on behalf of her deceased son, HANS LANGFORD PHIRI, MIRRIAM MZAMO, individually and on behalf of her deceased son,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

GENERAL MOTORS CORPORATION, RHEINMETALL AG,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

(caption continued on inside cover)

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DISCLOSURE STATEMENT

Defendant General Motors Corporation (GM Corp.) filed for bankruptcy on June 1, 2009. The United States Department of the Treasury (U.S. Treasury) provided $30.1 billion under a debtor-in-possession (DIP) credit agreement to assist GM Corp. through the restructuring period. The new entity that emerged from bankruptcy, General Motors Company (GM), began operating on July 10, 2009, following its purchase of most of the assets of GM Corp. At that time, U.S. Treasury converted most of its loans to 60.8 percent of the common stock and $2.1 billion in preferred stock in the new entity. GM also assumed $7.1 billion of the DIP loans. GM currently has the following ownership: U.S. Treasury (60.8 percent), GM Voluntary Employee Benefit Association (17.5 percent), the Canadian Government (11.7 percent), and GM Corp.'s unsecured bondholders (10 percent). GM Corp., now known as Motors Liquidation Company, remains in bankruptcy and retains certain rights and liabilities that did not transfer to GM as part of the reorganization. GM is not a party to this suit; U.S. Treasury is a creditor of Motors Liquidation Company but has no ownership interest therein.

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09-2785-cv; 09-2787-cv; 09-2792-cv; 09-2801-cv; 09-3037-cv

Sakwe 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 FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

STATEMENT AND INTEREST OF THE UNITED STATES

The United States files this amicus brief in response to this Court's orders of September 10, 2009 and October 9, 2009 and pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a).

In this long-running case, defendants seek this Court's review of an interlocutory district court order denying in part their motion to dismiss plaintiffs' claims.

Defendants argued, among other things, that plaintiffs' claims present a nonjusticiable political question because of the suit's effect on the United States' foreign relations. As discussed below, in our view, when a defendant seeks dismissal of a suit predicated on the suit's interference with the United States' foreign relations, a district court's denial of the motion to dismiss is subject to interlocutory appeal under the collateral order doctrine only if the United States explicitly informed the court that the case should be dismissed on that ground. At no time in this litigation has the United States made such a representation to the courts. Because defendants' appeal therefore does not come within the limited reach of the collateral order doctrine, this Court should dismiss the appeal for lack of jurisdiction.[1]

1. Plaintiffs originally brought suit under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, "against approximately fifty corporate defendants and hundreds of 'corporate Does,'" alleging that the companies injured them and violated customary international law by aiding and abetting the South African government in maintaining the repressive apartheid regime. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 258 (2d Cir. 2007). The government of South Africa informed the district court that it opposed the litigation and believed that the suits interfered with its ability to resolve

[1] Because, in the view of the United States, this Court lacks jurisdiction to consider these appeals, the United States does not address the other issues raised by the parties and this Court.

apartheid-era claims in the manner chosen by the South African people. *In re S. African Apartheid Litig.*, 346 F. Supp.2d 538, 553 (S.D.N.Y. 2004). At the request of the district court, the United States filed a statement of interest in which it explained that the litigation risked adversely affecting the Nation's foreign relations, including its bilateral relations with South Africa. *Ibid.* The district court dismissed these suits for lack of jurisdiction, holding principally that aiding and abetting claims are not cognizable under the ATS under the standard announced by the Supreme Court's then-recent decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *In re S. African Apartheid Litig.*, 346 F. Supp.2d at 549–54; see *Sosa*, 542 U.S. at 724, 732. This Court reversed, holding "that in this Circuit, a plaintiff may plead a theory of aiding and abetting liability" under the ATS.[2] *Khulumani*, 504 F.3d at 260. Defendants petitioned for certiorari, but the Supreme Court lacked a quorum to consider the case, so this Court's judgment was summarily affirmed. *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008); *see* 28

[2] Although the Court's *per curiam* opinion held that aiding and abetting claims are cognizable under the ATS, a majority of the court did not agree on a rationale for this holding or on the standard governing aiding and abetting liability. *Compare Khulumani*, 504 F. 3d at 264 (Katzmann, J., concurring) *with id.* at 284 (Hall, J., concurring) *and id.* at 292 (Korman, J., concurring in part and dissenting in part). This Court subsequently held that "*Sosa* and our precedents send us to international law to find the standard for accessorial liability." *Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009). Interpreting international law, this Court held "that the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone." *Ibid.*

U.S.C. § 2109 (providing for nonprecedential affirmance when Supreme Court lacks a quorum). The United States filed amicus briefs supporting defendants in both this Court and the Supreme Court.

On remand, plaintiffs filed two amended, consolidated complaints (the *Khulumani* complaint and the *Ntsebeza* complaint). *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 245 (S.D.N.Y. 2009). The amended complaints named far fewer defendants and asserted narrower claims. *See id.* at 263–270 (discussing claims). Most of the remaining defendants filed a joint motion to dismiss, arguing in part that the pendency of the litigation interferes with the United States' foreign relations and so presents a nonjusticiable political question and offends principles of international comity. *See, e.g., id.* at 284–85.[3] Plaintiffs sought to have the district court re-solicit the United States' and South Africa's views, noting this Court's statement that, because plaintiffs explained that they intended to amend their complaints, and because the Court could not predict how plaintiffs' amendments "'will affect the positions of the

[3] Defendant Rheinmetall did not join the motion to dismiss. Rheinmetall contends that it was not properly served, and it contests the district court's personal jurisdiction. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 242 n.20. Plaintiffs were engaged in jurisdictional discovery when this Court stayed all district court proceedings pending resolution of these appeals. *See* Scheduling Order, Docket No. 206, No. 02-MD-01499 (S.D.N.Y.) (July 7, 2009); Order, No. 09-2778 (2d Cir.) (Sept. 10, 2009) (staying all proceedings in the district court).

United States and South Africa with respect to this litigation, the district court may wish to solicit anew the views of these governments.'" Mem. of Law, Docket No. 116, No. 02-MD-01499 (S.D.N.Y.) (Jan. 22, 2009) (quoting *Khulumani*, 504 F.3d at 263 n.13). Defendants (including appellants Ford, International Business Machines, and Daimler) opposed plaintiffs' motion. Mem. of Law, Docket No. 124, No. 02-MD-01499 (S.D.N.Y.) (Feb. 5, 2009).

The district court granted defendants' motion to dismiss in part and denied it in part. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 296–97. The district court dismissed entirely plaintiffs' claims against the defendants that are financial institutions. *Id.* at 266, 269. As for the remaining defendants, the district court dismissed some claims (*see, e.g., id.* at 265–66) but upheld others, principally claims that defendants aided and abetted: the South African government's engagement in apartheid; torture; extrajudicial killing; and cruel, inhuman, or degrading treatment (*see, e.g., id.* at 263–70). While the district court dismissed some claims, it held that complete dismissal in deference to the Executive Branch's 2003 statement of its foreign policy views concerning this case was not appropriate. Analyzing that question under the political question doctrine, the district court determined that the United States' previously stated foreign policy concerns had been obviated by plaintiffs' narrowing amendments of their complaints. *Id.* at 276, 283–84, 286 n.259. The district court also

concluded that complete dismissal on international comity grounds was not merited. Viewing that question as turning principally on a conflict of laws inquiry (*id.* at 283), the district court concluded that this litigation does not conflict with South African law, which provided for amnesty only to those who participated in the official South African truth and reconciliation process, which the district court determined the defendants did not do (*id.* at 285–86). The district court denied plaintiffs' request to re-solicit the views of the United States and South Africa. The court explained that doing so was unnecessary in light of its "determination that the political question doctrine and international comity do not require dismissal." *Id.* at 286. Defendants then sought this Court's interlocutory review of the district court's order.[4]

On September 1, 2009, the current South African Justice Minister, J.T. Radebe, sent an unsolicited letter to the district court with a copy to this Court. Letter from J.T. Radebe, Minister of Justice and Constitutional Development, to Hon. Judge Shira A.

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[4] The district court dismissed some of the *Khulumani* plaintiffs' claims with leave to amend their complaint. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 275–76. After the *Khulumani* plaintiffs filed a second amended complaint, defendant Fujitsu again filed a motion to dismiss, which the district court granted, concluding that the *Khulumani* plaintiffs failed to adequately allege an agency relationship between Fujitsu and the company the *Khulumani* plaintiffs claimed had acted on Fujitsu's behalf. *See* Order, Docket No. 201, No. 02-MD-01499 (S.D.N.Y.) (June 26, 2009). After the district court dismissed the claims against Fujitsu, Fujitsu withdrew from the current appeal.

Scheindlin, U.S. District Court, Southern District of New York (Radebe Letter to Scheindlin) (Sept. 1, 2009). The Justice Minister observed that the suit no longer involved claims against corporations that had merely done business in South Africa and instead is limited to claims "based on aiding and abetting very serious crimes, such as torture, [and] extrajudicial killing committed in violation of international law by the apartheid regime." *Id.* at 1. The letter explained that "[t]he Court in dismissing the claims based solely on the fact that corporations merely did business with the apartheid government also addressed some of the concerns which the Government of the Republic of South Africa had." *Id.* at 2. The Justice Minister then informed the district court that "[t]he Government of the Republic of South Africa, having considered carefully the judgement of the United States District Court, Southern District of New York is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law."[5] *Ibid.*

On October 8, 2009, the Legal Adviser and Consul General of Germany's Embassy to the United States responded to this Court's invitation for his country's

[5] On November 25, the Republic of South Africa filed a notice with the Court stating that it had not determined at this time whether to make a further submission to this Court concerning this litigation, but asking the Court to consider any submission it might make in the future, even if the submission is filed after the November 30 deadline.

views on this litigation. Letter from Klaus Botzet, Legal Adviser and Consul General, Embassy of the Federal Republic of Germany, to the United States to Catherine O'Hagan Wolfe, Clerk of Court, U.S. Court of Appeals for the Second Circuit (Oct. 8, 2009). This letter explained Germany's opposition to a United States court adjudicating a case involving parties who have no relationship to the United States concerning activities that occurred outside the United States. *Ibid.* The letter concluded by asserting that "[a] substantive decision by a U.S. court would * * * unacceptably infringe on German state sovereignty and interfere in the jurisdiction of German courts, as well as in international trade." *Ibid.*

2. Suits, like this, in which foreign states take an interest, can have significant consequences for the Nation's foreign relations and thus directly implicate the interests of the United States. In this litigation, for example, South Africa previously informed the district court and this Court:

> In the South African government's view, the issues raised in these proceedings are essentially political in nature. They should be and are being resolved through South Africa's own democratic processes. We submit, with respect, that another country's courts should not determine how ongoing political processes in South Africa should be resolved.

Brief of Amicus Curiae Republic of South Africa in Support of Affirmance, *Khulumani v. Barclay Nat'l Bank*, app. ¶ 4 (Statement of Brigitte Sylvia Mabandla, Minister of Justice & Constitutional Development), No. 05-2141 (2d Cir. 2005); *see id.* app. ¶ 9(11)

(similar) (quoting Decl. by Penuell Mpapa Maduna, prior Minister of Justice & Constitutional Development, filed in the district court).

In light of South Africa's strong objections to this litigation, the United States filed a statement of interest in 2003, informing the district court that "continued adjudication of [these suits] risks potentially serious adverse consequences for significant interests of the United States." Letter from William H. Taft IV, Legal Adviser, to Shannen W. Coffin, Deputy Assistant Attorney General (Letter from Taft to Coffin), at 2 (Oct. 27, 2003). The statement of interest based that assessment primarily on the fact that, "on several occasions and at the highest levels, [the government of South Africa] made clear its view that these cases do not belong in U.S. courts and that they threaten to disrupt and contradict its own laws, policies and processes aimed at dealing with the aftermath of apartheid as an institution." *Ibid.* The statement further explained:

> Support for the South African government's efforts in this area is a cornerstone of U.S. policy towards that country. For that reason, we are sensitive to the views of the South African government that adjudication of the cases will interfere with its policy goals, especially in the areas of reparations and foreign investment, and we can reasonably anticipate that adjudication of these cases will be an irritant in U.S.-South African relations.

Ibid. The statement of interest also noted that "[t]o the extent" that this litigation deters investment in South Africa and other developing countries, "it will compromise a

valuable foreign policy tool and adversely affect U.S. economic interests as well as economic development in poor countries." *Id.* at 3. The statement of interest further acknowledged the profound concerns of governments whose banks, corporations, and other entities had been named as defendants. *Id.* at 3–4. Although the statement of interest identified these various foreign policy and foreign relations concerns, it did not ask the district court to dismiss these suits.

The United States reiterated its concerns about the foreign relations consequences of this litigation in its prior briefs to this Court and to the Supreme Court. *See* Brief for the United States as Amicus Curiae In Support of Affirmance, *Khulumani v. Barclay Nat'l Bank Ltd.* (U.S. *Khulumani* Br.), Nos. 05-2141-cv, 05-2326-cv (2d Cir. 2005); Brief for the United States as Amicus Curiae In Support of Petitioners, *Am. Isuzu Motors, Inc. v. Ntsebeza* (U.S. *Am. Isuzu* Br.), No. 07-919 (S. Ct. 2008). The United States' appellate briefs made legal arguments under the ATS, and the briefs supported dismissal on those bases. In making those legal arguments, the United States referenced the adverse foreign policy consequences of recognizing plaintiffs' claims. *See, e.g.*, U.S. *Khulumani* Br. 17–19; U.S. *Am. Isuzu* Br. at 12. Defendants separately argued that the suits should be dismissed in deference to the Executive Branch's case-specific foreign policy views. *See* Br. of Appellees 67–93, *Khulumani v. Barclay Nat'l Bank*, Nos.

05-2141, 05-2326 (2d Cir. 2005); Pet. for Certiorari 14–22, *Am. Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (S. Ct. 2008). The United States did not support those arguments, and at no time did the United States explicitly inform the courts that the case-specific impact these suits would have on the United States' foreign policy was a sufficient basis by itself for dismissal. Indeed, the United States' amicus brief in support of defendants' petition for certiorari recommended against granting certiorari on the question whether the suits should have been dismissed in case-specific deference to the foreign policy views of the Executive Branch, noting that this Court had not conclusively addressed that question. *See* U.S. *Am. Isuzu* Br. 16–18.

As we will explain below, when a defendant seeks appellate review of a district court's order denying a motion to dismiss a suit predicated on the adverse consequences on the Nation's foreign relations, the court of appeals has jurisdiction under the collateral order doctrine only if the district court denied defendant's motion despite the fact that the Executive Branch explicitly sought dismissal of the suit on that ground. The requirement of an *explicit* request for dismissal on foreign policy grounds by the Executive Branch is, in our view, critical. Although the Executive Branch informed the courts that these suits could harm the United States' foreign relations, at no time in this litigation did the United States seek dismissal on that basis.

Accordingly, this Court does not have jurisdiction over defendants' appeal under the collateral order doctrine.

ARGUMENT

BECAUSE THE UNITED STATES DID NOT EXPLICITLY URGE DISMISSAL PREDICATED ON THE ADVERSE FOREIGN RELATIONS CONSEQUENCES OF THESE SUITS, THE COLLATERAL ORDER DOCTRINE DOES NOT PROVIDE JURISDICTION FOR THESE APPEALS.

If an order is not a "final decision" of a district court (28 U.S.C. § 1291) and if the courts have not authorized interlocutory appeal (*see* 28 U.S.C. § 1292(b)), a party generally may not obtain appellate review of the order until the conclusion of the suit in the district court. But appellate jurisdiction under Section 1291 encompasses "a narrow class of decisions that do not terminate the litigation, but are sufficiently important and collateral to the merits that they should nonetheless be treated as final." *Will v. Hallock*, 546 U.S. 345, 347 (2006) (quotation marks omitted). To qualify as a collateral order that is subject to immediate appeal, the order 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." *Id.* at 349 (quotation marks omitted). With regard to the third criterion, the Supreme Court explained that it is principally orders that would impair a right to avoid trial that are effectively unreviewable on appeal from a final judgment. *Id.* at

350–51. But not even all such orders satisfy the third criterion: "[I]t is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Id.* at 353.

1. There is no dispute among the parties that the first two requirements are met in these appeals. *Compare* Br. of Appellants 41–45 *with* Br. of Appellees 20–24. Defendants argue here that the third requirement is met because the United States and South Africa have informed the courts in this litigation that the very pendency of the suit harms their respective interests. Br. of Appellants 42–43. Because there is a public interest in preventing the impairment of the United States' foreign relations and South Africa's sovereignty interests, defendants argue that allowing the case to proceed would "'imperil a substantial public interest.'" *Id.* at 43 (quoting *Will*, 546 U.S. at 353). Accordingly, defendants contend, the district court's order would be effectively unreviewable on appeal from a final judgment. *Id.* at 43–44. In support of this argument, defendants rely on the United States' petition-stage filing in the Supreme Court in *Exxon Mobil Corporation v. Doe*: "[T]he U.S. explained that a collateral order appeal would lie where (as here) the U.S. and its allies object to the very pendency of the litigation, because in that situation 'the very import of the defense will be lost if the suit proceeds to discovery and trial.'" *Id.* at 45 (quoting Brief for the United States as

Amicus Curiae, *Exxon Mobil Corp. v. Doe* (U.S. *Exxon Mobil* Br.), at 14, No. 07-81 (S. Ct. 2008), *cert. denied* June 16, 2008).

In response, plaintiffs argue that the requirement that an order be effectively unreviewable is met only when the order denies a claimed right to avoid trial. Br. of Appellees 21 (*citing Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 350–51 (D.C. Cir. 2007)). Because, plaintiffs contend, a defendant's argument that a case presents a political question does not assert a right to avoid trial, a denial of a motion to dismiss on political question grounds cannot qualify as a collateral order. *Ibid.* Plaintiffs recognize that, in its *Exxon Mobil* brief, the United States proposed a "modest exception" to this limitation (*id.* at 23), but plaintiffs argue that the proposed exception is significantly narrower than defendants suggest: "The U.S. proposed that immediate interlocutory appeal from a denial of a motion to dismiss on political question grounds might be appropriate where the 'pendency' of an action threatens U.S. foreign policy interests, but only '[w]hen the Executive explicitly seeks dismissal' and the court denies the request" (*id.* at 22–23 (quoting U.S. *Exxon Mobil* Br. at 14)). Plaintiffs are correct.

Like this case, *Exxon Mobil* involved a suit against a corporation for its alleged participation in human rights violations committed by a foreign government, there Indonesia. The United States filed a statement of interest advising the district court

that the litigation "'would in fact risk a potentially serious adverse impact on significant interests of the United States'" and could "harm relations with Indonesia — a key ally in the war on terrorism — and that it would discourage foreign investment in Indonesia." *Exxon Mobil*, 473 F.3d at 347 (quoting statement of interest). The United States qualified its assessment, explaining that "these potential effects on U.S.-Indonesian relations 'cannot be determined with certainty.'" *Ibid.* (quoting statement of interest). It noted, in particular, that much depended upon factors such as "'the nature, extent, and intrusiveness of discovery [and] the degree to which the case might directly implicate matters of great sensitivity to the Government of Indonesia.'" *Ibid.* (quoting statement of interest).

Largely in response to these foreign relations concerns, the district court in *Exxon Mobil* dismissed plaintiffs' claims under the ATS and the Torture Victim Protection Act, and dismissed all claims against a state instrumentality of Indonesia. *Id.* at 347. The district court declined to dismiss the remaining common-law tort claims. But the district court warned the parties to "'tread cautiously' and conduct discovery 'in such a manner so as to avoid intrusion into Indonesian sovereignty,'" and the court emphasized that it would exercise "'firm control'" over the discovery process. *Id.* at 347–48 (quoting *Doe v. Exxon Mobil Corp.*, 393 F. Supp.2d 20, 29 (D.D.C. 2005)). After

the defendant corporation appealed from the order, the D.C. Circuit dismissed the appeal, holding that the order did not come within the collateral order doctrine. *Id.* at 357.

The corporation then filed a petition for certiorari, and the Supreme Court sought the United States' views. In its amicus brief, the United States observed that "the Court applies 'stringent' conditions on the collateral order doctrine so that it does not 'overpower the substantial finality interests [28 U.S.C.] § 1291 is meant to further.'" U.S. *Exxon Mobil* Br. 10 (quoting *Will*, 546 U.S. at 349–350). The brief canvassed the various circumstances in which the Supreme Court has recognized a right to interlocutory appeal, all involving claims of immunity from suit. *Id.* at 10–12. The United States acknowledged that the Supreme Court has not addressed the availability of collateral order review outside those contexts, but it explained that other cases involving separation-of-powers concerns demonstrate the Court's awareness "in cases not involving claims of 'immunity,' that 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." *Id.* at 12 (discussing *Totten v. United States*, 92 U.S. 105 (1875) (state secrets)); *see id.* at 13 (discussing *Cheney v. United States District Court for D.C.*, 542 U.S. 367 (2004) (public disclosure of presidential communications); *Sosa*, 542 U.S. at 733

n.21 (case-specific deference to Executive Branch); *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004) (same)). In that context, the United States argued that:

> [w]hen the Executive explicitly seeks dismissal because the pendency of the litigation will adversely affect foreign relations, a district court's refusal to defer to that determination would satisfy the third prong of the collateral order doctrine. For, in that situation, "a trial * * * would imperil a substantial public interest," such that delaying appellate review until after such a trial would "effectively" deny relief, *Will*, 546 U.S. at 353. In that case, but not in all cases in which a political question defense is raised, the very import of the defense will be lost if the suit proceeds to discovery and trial.

Id. at 14. Applying that standard, the United States urged the Court to deny the petition for certiorari: "In a case like this, when the United States identifies the manner in which further proceedings in the district court will interfere with foreign policy interests, an order designed to limit proceedings to that extent, but not going further, need not be automatically appealable." *Id.* at 14.

As suggested by the United States' Supreme Court filing in *Exxon Mobil*, we believe that an explicit request for dismissal from the United States (as opposed to a request from a private party or another country) is a necessary condition for collateral order appeal in this context. That requirement respects the separation of powers under the Constitution and the primary responsibility of the Executive Branch in the conduct of the Nation's foreign affairs. Requiring an explicit request for dismissal by the United States ensures that the Executive Branch has determined that continued

adjudication of the particular case will cause a separation-of-powers injury of a magnitude sufficient to merit immediate appeal, should the district court deny defendants' motion to dismiss. This rule thus furthers the ability of the United States to speak with one voice on such matters. And as plaintiffs here note (Br. of Appellees 23 & n.4), the requirement also provides litigants and the courts with a bright-line rule, making it relatively easy to determine when the requirements for collateral order appeal are satisfied and avoiding disputes about whether the United States' statement "necessarily implies that the case should be dismissed" (Reply Br. of Ford Motor Co. and International Business Machines (Reply Br. of Ford and IBM) 7).

As with the statement of interest in *Exxon Mobil*, the statement of interest and appellate filings the United States submitted in this case did not *explicitly* ask that the suits be dismissed because of their impact on the United States' foreign policy. *Cf.* Reply Br. of Ford and IBM 7 (asserting the contrary). Indeed, as the district court here recognized, the Government's statement of interest in this case principally expressed reservation about this suit "'[t]o the extent that'" the litigation might impair the United States' foreign relations and its ability to use economic engagement as a foreign policy tool. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 276 (quoting Letter from Taft to Coffin 2) (emphasis omitted). The United States' previous filings in this case undoubtedly expressed concern about the impact this case would have on the United

States' foreign policy and foreign relations. *See, e.g.*, U.S. *Am. Isuzu* Br. 5. But as discussed above, the United States referenced these policy concerns in making legal arguments that plaintiffs' claims are not cognizable under the ATS. At no time has the United States informed the courts that the foreign policy consequences of this litigation are so grave as to call for dismissal on that basis, even if the suit were otherwise proper as a substantive matter, and the United States does not make that representation now. The fact that the United States did not explicitly request that the case be dismissed predicated on the suit's impact on foreign policy, and that the district court did not deny defendants' motion to dismiss despite such a request, means that the district court's order does not satisfy the third prong of the collateral order doctrine under the standards articulated in the United States' *Exxon Mobil* brief.

Also like *Exxon Mobil*, this suit has significantly changed over the course of the litigation. Although Germany and some other countries continue to raise concerns, most of the defendants have been dismissed voluntarily by plaintiffs, others have been dismissed by the district court, and the claims against the remaining defendants have been narrowed. Moreover, as plaintiffs note (*see* Br. of Appellees 44), defendants will be free on remand to renew their motion to dismiss in the district court based on this

Court's decision in *Talisman*, and plaintiffs will be free to request the opportunity to amend their complaint again in light of the *Talisman* decision.[6]

The United States previously informed the courts that, in light of South Africa's strong objections, "continued adjudication of [these suits] risks potentially serious adverse consequences for significant interests of the United States." Letter from Taft to Coffin 2. However, the South African Justice Minister recently informed the district court that, by dismissing claims based solely on doing business with the apartheid regime, the district court "addressed some of the concerns which the Government of the Republic of South Africa had." Radebe Letter to Scheindlin 2. The Justice Minister further reported that "[t]he Government of the Republic of South Africa, having considered carefully the judgement of the United States District Court, Southern District of New York is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international

[6] *See In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 262 ("I conclude that customary international law requires that an aider and abettor know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations."), *and Talisman*, 582 F.3d at 259 ("[T]he *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone.").

law." *Ibid.* The United States takes at face value these formal statements from a high-level South African government official.[7]

When this case was previously on appeal, this Court advised that the district court "may wish to solicit anew" the United States' views concerning the case in light of plaintiffs' proposed amended complaints, which were expected to significantly narrow the scope of the litigation. *Khulumani*, 504 F.3d at 263 n.13. Because of the United States' prior statement indicating significant foreign policy concerns, this Court's guidance was salutary. But considering defendants' objection to plaintiffs' request that the district court re-solicit the United States' views, defendants properly cannot complain that the district court decided not to rely on policy concerns raised six years ago, when these suits were significantly broader.[8]

2. Defendants also argue that this Court has collateral order jurisdiction because the district court declined to dismiss these suits on international comity grounds,

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[7] As noted, *see supra* note 5, the Republic of South Africa has stated that it may make an additional submission to this Court.

[8] Private parties represent their own interests and not those of the United States. If the United States raises concerns about the foreign relations implications of a suit, and if the district court believes that changes in the litigation may have obviated those stated concerns, the better course ordinarily is for the district court to ask the United States for its views on the changed litigation. Such a course would be especially advisable in any case, unlike this one, in which the United States explicitly informed the district court that the case should be dismissed because of the adverse effect of the litigation on the United States' foreign relations.

notwithstanding the foreign policy concerns expressed by the United States and the South African Government. Br. of Appellants 43–44; Reply Br. for Daimler 4 (noting objection of Federal Republic of Germany to adjudication by U.S. courts of claims against German nationals for conduct in a third country). But orders denying motions to dismiss on international comity grounds are ordinarily not subject to collateral order appeal. *See Pan Eastern Exploration Co. v. Hufo Oils*, 798 F.2d 837, 843 (5th Cir. 1986). And the approach the United States proposed in its *Exxon Mobil* Supreme Court filing turns on the separation-of-powers harm that would follow from denial of immediate appellate review of a district court order denying a motion to dismiss in a case in which the United States explicitly informed the district court that the case-specific injury to the Nation's foreign policy interests was a sufficient basis for dismissal. In the absence of such an express request for dismissal by the United States, it is our view that a foreign government's policy interests do not implicate the separation of powers in a manner that triggers an immediate right of review under the collateral order doctrine under the United States' *Exxon Mobil* approach.[9] Accordingly, the district court's denial

[9] To the extent that a foreign government's policies are relevant to a district court's determination concerning dismissal on international comity grounds (*see, e.g., Pravin Banker Associates, Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854–55 (2d Cir. 1997)), courts in almost all situations should look to expressions of those policy views made by a foreign government or by the United States but not to any representations about a foreign government's policies made by private parties. Absent extraordinary

of defendants' motion to dismiss on international comity grounds does not provide a basis for this court's interlocutory review.

3. The parties dispute whether defendants' motion for certification of an interlocutory appeal under 28 U.S.C. § 1292(b) can be deemed a valid notice of appeal. *Compare* Br. of Appellees 24–28 *with* Reply Br. of Ford and IBM 2–6. This is an issue the Court need not resolve. If the district court's order denying defendants' motion to dismiss does not qualify as an appealable collateral order, there is no need for the Court to address the timeliness of plaintiffs' notice of appeal. By contrast, if the order is appealable under the collateral order doctrine, then defendants' June 25, 2009 notice of appeal was timely, regardless of the status of the earlier motion to certify interlocutory appeal. Federal Rule of Appellate Procedure 4 requires filing a notice of appeal within 30 days of the "judgment" appealed from. This Court has explained that "[a] 'judgment,' for purposes of the Civil Rules, is defined to 'include[] a decree and any order from which an appeal lies.'" *Lichtenberg v. Besicorp Group Inc.*, 204 F.3d 397, 400 (2d Cir. 2000) (citing Fed. R. Civ. P. 54(a)) (discussing timeliness of appeal). If the district court's April 8 order is an appealable collateral order, it is therefore a "judgment" within the meaning of the Civil Rules. Defendants filed a motion for reconsideration on April 22, within the ten-day time period required for filing a motion

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circumstances, governments should speak for themselves.

to alter or amend a judgment. *See* Fed. R. Civ. P. 59; *see also id.* 6(a)(2) (excluding weekends for periods of less than 11 days). A motion to alter or amend the judgment tolls the time required for filing a notice of appeal (Fed. R. App. P. 4(a)(4)(A)(iv)), which must be filed within 30 days "from the entry of the order disposing" of the motion (*id.* 4(a)(4)(A)). The district court denied defendants' reconsideration motion on May 27, and defendants filed their notice of appeal on June 25, within thirty days of the district court's reconsideration order. Accordingly, if defendant's appeal comes within the collateral order doctrine, the June 25 notice of appeal was timely in its own right.

CONCLUSION

For the foregoing reasons, the Court should dismiss these appeals for lack of jurisdiction.

Respectfully submitted,

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November 30, 2009

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief uses proportionately spaced font and contains 5,780 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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November 30, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2009, I caused an original and ten copies of the foregoing Brief for the United States as Amicus Curiae Supporting Appellees to be filed with the Court by overnight delivery and via electronic mail, and served one copy upon the following counsel by electronic mail and firstclass U.S. mail:

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CERTIFICATION OF VIRUS PROTECTION

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November 30, 2009