

# 09-2778-cv(L)

09-2779-cv(con), 09-2780-cv(con), 09-2781-cv(con), 09-2783-cv(con),  
09-2785-cv(con), 09-2787-cv(con), 09-2792-cv(con), 09-2801-cv(con),  
09-3037-cv(con)

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IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

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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, MPHONGA 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 son, HANS LANGFORD PHIRI, MIRRIAM MZAMO, individually and on behalf of her son,

*Plaintiffs-Appellees,*

*(Caption continued on inside cover)*

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

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### REPLY BRIEF FOR DEFENDANT-APPELLANT DAIMLER AG

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—against—

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

*Defendants-Appellants,*

GENERAL MOTORS CORPORATION, RHEINMETALL AG,

*Defendants.*

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## INTRODUCTION

Daimler AG is a German *Aktiengesellschaft*, or public stock company, with its registered office in Stuttgart, Germany. The alleged facts that form the basis of the complaints against it purportedly occurred in Germany or in South Africa. The Plaintiffs are all South Africans, and the alleged harms occurred in South Africa. There is no connection whatever with the United States.

Germany has stated its strong opposition to the mere pendency of this action on several occasions. *See* A-360-61 (citing December 13, 2007 Joint Note Verbale with the United Kingdom); A-323-27 (January 30, 2008 Joint Objection with the United Kingdom); *see also* A-254-56 U.S. Statement of Interest (“SOI”) (recognizing these and other objections in asserting the United States’ own objection to the present cases); A-367 (Supreme Court *Amicus* Brief of the United States) (same).

Most recently, in response to this Court’s invitation, the German government submitted its view to this Court regarding Plaintiffs’ Amended Complaints in a letter dated October 8, 2009, reaffirming the opposition that the German government has consistently expressed. *See* Docket Entry 10/13/09 (Letter from Dr. Klaus Bozet, Legal Adviser and Consul General, to Catherine O’Hagan Wolfe, Clerk of Court (Oct. 8, 2009), attaching “German Government View on the *Balintulo et al. v. Daimler AG et al.* Litigation”) (the “10/8/2009 Ltr.”).

Daimler AG shares all of the concerns Ford and IBM raise in their reply brief, and Daimler AG adopts those arguments without repeating them here.

Germany's stated interests reinforce the arguments previously made in that reply brief and in Defendants' joint opening brief. Daimler AG submits this separate reply brief to explain how Germany's objections relate to Daimler AG. In sum, as detailed below, the litigation's mere pendency violates Germany's sovereignty, principles of international comity, and the act of state doctrine.

## ARGUMENT

### I. THIS COURT HAS APPELLATE JURISDICTION UNDER THE COLLATERAL ORDER DOCTRINE.

The collateral order doctrine is an exception to the final order rule that “allows an appellate court to review immediately a district court order affecting rights that will be irretrievably lost in the absence of an immediate appeal.” *Wabtec Corp. v. Faively Transport Malmo AB*, 525 F.3d 135, 138 (2d Cir. 2008) (quoting *United States v. Esposito*, 970 F.2d 1156, 1159 (2d Cir.1992)). “[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.” *Will v. Hallock*, 546 U.S. 346, 353 (2006). In this case, the motion to dismiss that is the subject of appeal was based on objections to the very pendency of this litigation as interfering with U.S. foreign policy and the interests of foreign allies.

In addition to Ford's and IBM's emphasis on the interference with U.S. foreign policy and South African sovereignty, it is equally important that the Federal Republic of Germany, too, has consistently objected, through submissions on the record at the time of the docketing of this appeal, to the very pendency of

this case as interfering with German sovereignty. Changes in the most recent Amended Complaints have not eliminated any of Germany's concerns. Indeed, the United States' SOI explicitly acknowledged that "[v]arious other foreign governments" have expressed through diplomatic channels "their profound concern" that their entities have been named as defendants, and that "we can anticipate possible, continuing tensions in our relations with these countries over the litigation." A-255. As Germany, concurring with the United Kingdom, stated in its January 30, 2008 letter to the U.S. Secretary of State, "[t]he very existence of this litigation infringes upon [Germany's] sovereign interests." A-326.

The interest in avoiding both interference with German sovereignty and tension in U.S.-German relations will be "irretrievably lost" if the litigation proceeds in the district court. Accordingly, this Court can – and should – review the district court's decision not to dismiss this case.

## **II. INTERNATIONAL COMITY REQUIRES DISMISSAL.**

International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 454 (2d Cir. 2001) (quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)). Comity, which leads "nation[s] to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement," provides an important limitation on the reach of the ATS "to ensure that ATS litigation does not undermine the very harmony that it was intended to promote." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring in part and in the judgment). In addition to the grounds IBM and Ford explain for

dismissal against all defendants, because the claims against foreign defendant Daimler AG interfere with German sovereignty, the claims against Daimler AG should be dismissed. *See Bigio*, 239 F.3d at 454.

**A. The German Government Continues to Oppose This Litigation, Which Lacks Any Nexus to the United States, Because It Interferes with Germany's Sovereignty.**

Germany's October 8, 2009 letter expands upon its earlier view that this lawsuit undermines international comity and interferes with foreign relations, especially because it involves foreign defendants being sued by foreign plaintiffs based on alleged actions and harms entirely outside of the United States. As this Court recognized in soliciting statements from nations in addition to South Africa and the United States, the district court's order here has implications for every country whose citizens might be forced into a U.S. courtroom to face allegations of human rights violations anywhere in the world.

Germany's letter makes clear that Germany studied the Amended Complaints and understands that "[t]he plaintiffs are claiming damages for an alleged participation by international companies, including companies headquartered in Germany, in human rights violations committed by the apartheid regime in South Africa from 1960 to 1993." 10/8/2009 Ltr. at 1. Based on principles of international comity and other considerations, the German government believes that the case should not proceed.

The German government's letter makes clear that Plaintiffs' amendments to their complaints have not addressed Germany's longstanding objections to this

litigation. As the letter explains, “the amended complaints do not take into account German state sovereignty or respect the primary jurisdiction of German courts in respect to the respondent German companies.” *Id.* That is because “[t]he plaintiffs are attempting to hold these German companies liable for alleged actions that occurred entirely outside the United States and that in no way affected U.S. citizens or U.S. companies.” *Id.*; *see also, e.g.*, SPA-20 & n.54 (district court recognized that Daimler AG’s alleged actions occurred outside of the United States).

At bottom, Germany objects that, the ATS notwithstanding, a U.S. court does not have legitimate authority to impose liability on a German citizen alleged to have engaged in conduct within Germany or South Africa that caused harm to South Africans in South Africa. Germany therefore concludes that “[a] substantive decision by a U.S. court would . . . unacceptably infringe on German state sovereignty . . . .” 10/8/2009 Ltr. at 3; *see Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir. 2008) (en banc) (plurality opinion) (lack of a significant “nexus” of litigation to the United States “stimulates the comity impulse”); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2)(a) (1987) (whether an activity has a “substantial, direct, and foreseeable effect” upon the regulating state is the first factor in determining whether jurisdiction is unreasonable). Without *any* of the traditional jurisdictional bases of nationality, territory, or effects within the United States, *see Rio Tinto*, 550 F.3d at 831, the claims against Daimler AG should not proceed in a U.S. court.

**B. Germany Has a Greater Interest Regarding the Conduct of German Citizens at Issue in This Litigation Than Does the United States.**

As explained in the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, when a U.S. court considers whether to prescribe conduct outside its borders, the court “has an obligation to evaluate . . . the other state’s interest in exercising jurisdiction [and] should defer to the other state if that state’s interest is clearly greater.” See § 403(3); *accord Bigio*, 239 F.3d at 454. With respect to Daimler AG, Germany has a clearly greater interest than the United States in addressing the claims against that defendant.

Whether allegations in complaints such as these are well-founded or not, and regardless how specific the allegations of wrongdoing may be, Germany has a paramount interest in supervising its own citizens’ conduct. Germany similarly has an interest in ensuring that its own citizens are not impermissibly or unjustly held liable or punished. And if a German citizen has violated a norm of international law, Germany has an interest superior to that of the United States in holding that citizen accountable, judged under German standards of evidence, liability, and remedy. It is *Germany* and not the United States that has the predominant interest. As Germany has made clear, this is not just a matter of preference or convenience; it is a matter of German sovereignty.

**C. This Litigation Undermines Legitimate International Trade and Foreign Governments’ Pursuit of Legitimate Political Objectives.**

Germany also points out that lawsuits of this type in U.S. courts undermine legitimate international trade not only for U.S. companies but also for foreign

companies such as Daimler AG. Companies from many nations engage in international trade and business, including with nations that might have weak human rights protections. Companies engaging in this trade do so subject to the rules and approval of their own governments, which might seek to use their trade policies to further legitimate political objectives. That a German company in particular, supervised by its own sovereign, engages in such trade in a country other than the United States is not something that a U.S. court should be evaluating. Referencing similar concerns raised by the U.S. Attorney General, Germany points out the “risk that civil lawsuits in cases of alleged human rights violations could be misused as an instrument against multinational companies, thereby harming international trade.” 10/8/2009 Ltr. at 2. In addition, Germany expresses its particular concern that a U.S. court, under the banner of “international law,” threatens to create new law that is “unpredictable, in particular, to companies outside the United States.” *Id.*

**D. This Litigation Also Will Require the District Court to Evaluate German Policies and Law, Contrary to International Comity and the Act of State Doctrine.**

Many of the allegations in the Amended Complaints continue to implicate the sale of goods. Germany, like the United States, maintained official governmental policies and export controls governing companies that engaged in business with the South African apartheid regime. Like the United States, Germany imposed the UN-mandated arms embargo on apartheid South Africa but also supported a policy of constructive engagement. *See* Declaration of Rudolf

Dolzer.<sup>1</sup> As a result, Germany monitored the compliance of German companies, including Daimler AG, with its export controls and other laws implementing Germany's foreign policy toward South Africa. *Id.* There are no allegations in the Amended Complaints that Daimler AG violated any such German laws.

The German government emphasized its export control law and its policies toward South Africa when the German government stated in its December 13, 2007 submission to the U.S. Department of State that this lawsuit calls into question decisions and laws made decades ago by Germany, the United States, and many other countries. A-360-61. In fact, the United States followed similar policies together with its allies such as Germany. It is highly problematic for a U.S. court now to sit in judgment of the propriety of Germany's decisions on permissible trade and other subjects, as well as Germany's supervision of its citizens' conduct. It is plain from Germany's continued objection that the Amended Complaints have not resolved these concerns.

Indeed, a U.S. court's evaluation of a foreign country's laws not only undermines international comity and threatens foreign relations, but also violates the act of state doctrine. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990) (act of state doctrine applicable when "the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within" its boundaries); *see also World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296

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<sup>1</sup> The Declaration of Rudolf Dolzer was submitted to the district court (MDL Dkt. 108) and is part of the record on appeal.

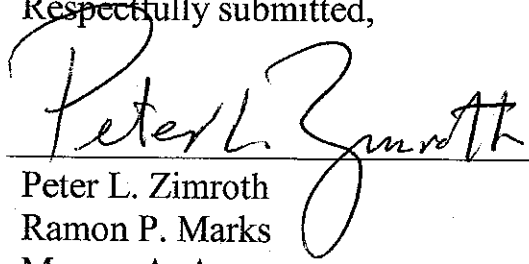
F.3d 1154, 1165 (D.C. Cir. 2002) (“Because the relief sought here would require us to question the ‘legality’ of Kazakhstan’s denial of the export license by ruling that denial a breach of contract, the act of state doctrine applies . . . . [Q]uestioning the export control policies of a foreign state would both disrupt international comity and interfere with the conduct of foreign relations by the Executive Branch.”). This is especially so where the evaluation involves the laws of a democratic country that enjoys most-favored-nation status with the United States. *See Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998) (dismissal particularly appropriate where democratically elected government has been “legitimately affronted by the conduct of litigation in a United States forum”). Germany rightfully considers such an examination of its laws and their enforcement an affront to its sovereignty.

### CONCLUSION

For the foregoing reasons, those stated in Ford’s and IBM’s reply brief, and those stated in Appellants’ joint opening brief, the district court’s denial of dismissal should be REVERSED, and the cases REMANDED with instructions to dismiss the complaints as to all defendants, including Daimler AG.

Date: October 28, 2009

Respectfully submitted,

A handwritten signature in black ink that reads "Peter L. Zimroth". The signature is written in a cursive style and is positioned above a horizontal line.

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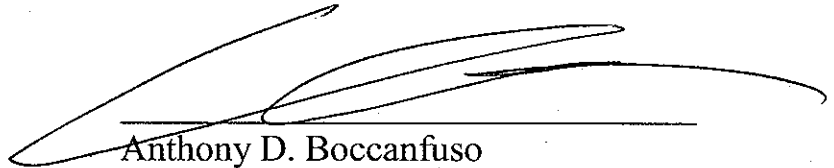
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 2,245 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: New York, New York  
October 28, 2009



Anthony D. Boccanfuso