

Chamber of Commerce of the United States of America  
Corporate Council on Africa  
National Association of Manufacturers  
National Foreign Trade Council  
Organization for International Investment  
U.S. Council for International Business  
USA\*Engage

December 10, 2007

The Honorable Condoleezza Rice  
Secretary of State  
United States Department of State  
2201 C Street, NW  
Washington, DC 20520

Dear Secretary Rice:

We are writing to urge you to recommend to the Solicitor General that the government file an amicus brief in support of the petition for certiorari to be filed with the U.S. Supreme Court in the matter of the consolidated South African apartheid cases brought under the Alien Tort Statute (*Khulumani v. Barclays National Bank and Ntsebeza v. Daimler Chrysler*, Nos. 05-2141 and 05-2326 [Second Circuit]). This case was dismissed in November 2004 by the U.S. District Court for the Southern District of New York and appealed to the Second Circuit Court of Appeals. On October 12 the Second Circuit vacated that dismissal in a decision that, among other things, wholly ignored the stated position of the U.S. government regarding the negative impact that the litigation would have on U.S.-South Africa relations. The defendants are petitioning the Supreme Court to grant certiorari, thus making possible a definitive ruling on the important issues raised in the case.

Given the importance of this case, and the urgency of prompt Supreme Court review, we hope you will recommend that the government not await an invitation from the Court to present its views, but rather submit its amicus brief in the ordinary course, thirty days after the filing of the certiorari petition.

There are compelling reasons for the Supreme Court to hear this case as quickly as possible:

- The apartheid cases are based on allegations that the corporate defendants, including many major U.S. companies, aided and abetted violations of international law by the former South African government by doing legal business in South Africa. The promiscuous use of the Alien Tort Statute by plaintiffs to bring before U.S. courts actions that occurred solely in other countries interferes with the conduct of foreign policy by the Executive Branch and impinges on the sovereignty of other nations. This is especially the case in South Africa where the government has made it clear on repeated occasions that, as President Mbeki in referring to the Second Circuit decision said on November 8 of this year, “it is completely unacceptable that matters that are central to the future of

our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country.”

- The Second Circuit decision leaves open the possibility that companies can be sued for aiding and abetting actions of the government of a country in which they are simply conducting lawful business. This potential exposure under the Alien Tort Statute poses a significant disincentive for commerce with countries whose governments may have or may in the future have poor human rights records. U.S. subsidiaries operating abroad have no control over the actions of their host governments, and they should not therefore be held liable for those actions. Moreover, because companies’ investments abroad are made on a long-term basis, the human rights record of the host government may well change over time – for the better or the worse. The record shows that even if they lack decisive influence, American companies’ presence has a positive effect on attitudes toward human rights. Finally, extractive industries have no choice about the location of their operations, whether they are mining minerals or oil. Given pervasive foreign availability of most products and world demand for energy, attempts to exclude U.S. companies from foreign markets often perversely hands those markets to companies from countries with a less energetic support for human rights.
- Third, corporate liability for aiding and abetting ultimately has the same effect as a unilateral economic sanction by signaling to the private sector in which countries they should conduct business and in which they should not. Such a liability would be a major disincentive to commerce with many countries that are closely allied to the United States. We are convinced that international trade and investment are important stimulants of economic growth which in turn is an important factor in improving respect for human rights.
- Finally, the very pendency of this litigation creates significant uncertainty surrounding commercial decisions and poses an immediate threat to U.S. relations with South Africa and other important allies, many of whom (including the UK and Canada) have expressed deep concern about such lawsuits brought under the Alien Tort Statute. These harms, which are occurring now in the form of business decisions not to engage commercially abroad and ongoing injury to U.S. foreign relations, create a singular urgency for the Supreme Court to rule on corporate liability for aiding and abetting.

Consequently, we urge you to support the certiorari petition to be filed by the defendants and to do so without waiting for an invitation from the Supreme Court.

Sincerely,

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December 10, 2007

The Honorable Carlos M. Gutierrez  
Secretary of Commerce  
United States Department of Commerce  
1401 Constitution Avenue, NW  
Washington, DC 20230

Dear Secretary Gutierrez:

We are writing to urge you to recommend to the Solicitor General that the government file an amicus brief in support of the petition for certiorari to be filed with the U.S. Supreme Court in the matter of the consolidated South African apartheid cases brought under the Alien Tort Statute (*Khulumani v. Barclays National Bank* and *Ntsebeza v. Daimler Chrysler*, Nos. 05-2141 and 05-2326 [Second Circuit]). This case was dismissed in November 2004 by the U.S. District Court for the Southern District of New York and appealed to the Second Circuit Court of Appeals. On October 12 the Second Circuit vacated that dismissal in a decision that, among other things, wholly ignored the stated position of the U.S. government regarding the negative impact that the litigation would have on U.S.-South Africa relations. The defendants are petitioning the Supreme Court to grant certiorari, thus making possible a definitive ruling on the important issues raised in the case.

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