No. 06-15851-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SINALTRAINAL, *et al.*,

Plaintiffs-Appellants

v.

THE COCA-COLA COMPANY, *et al.*

Defendants-Appellees

On Appeal from the Decision and Final Order of the
United States District Court for the Southern District of Florida

Case No. 1:01-cv-03208 (lead case under which 02-cv-20258, 02-cv-20259, and 02-cv-20260 are consolidated)

The Honorable Jose E. Martinez

BRIEF *AMICI CURIAE* OF THE NATIONAL FOREIGN TRADE COUNCIL, USA*ENGAGE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE U.S. COUNCIL FOR INTERNATIONAL BUSINESS, THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT SUPPORTING AFFIRMANCE AND DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, *Amici* hereby submit their Certificate of Interested Persons, incorporating the Certificate of Interested Persons submitted by the Parties and adding the following:

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CORPORATE DISCLOSURE STATEMENT

The National Foreign Trade Council ("NFTC") is a nonprofit corporation organized under the laws of New York. It has no parent company. USA*Engage is a division of NFTC. Neither has issued any stock.

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

The United States Council for International Business is a nonprofit corporation organized under the laws of New York. It has no parent company and has issued no stock.

The National Association of Manufacturers is a nonprofit trade association organized under the laws of New York. It has no parent company and has issued no stock.

The Organization for International Investment is a nonprofit trade association organized under the laws of the State of Delaware. It has no parent company and has issued no stock.

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Amici's **Identity, Interest and Source of Authority**

Identity: *Amici* are the National Foreign Trade Council ("NFTC"), USA*Engage, the Chamber of Commerce of the United States of America ("Chamber"), the United States Council for International Business ("USCIB"), the National Association of Manufacturers ("NAM") and the Organization for International Investment ("OFII").

Interest: *Amici curiae* are business organizations that have substantial common interests in the creation and maintenance of clear, fair and predictable legal regimes affecting international trade and investment, and in policies that secure for their members and the nation the benefits of a global economy.

- The NFTC is the premier business organization advocating a rules-based world economy. The NFTC and its affiliates serve more than 300 member companies.
- USA*Engage is a broad-based coalition representing organizations, companies and individuals from all regions, sectors and segments of our society concerned about the proliferation of unilateral foreign policy sanctions at the federal, state and local level.
- The Chamber is the world's largest federation of business companies and associations. It represents an underlying membership of more than three million business, trade and professional organizations of every size, sector and

geographic region of the country. Chamber members transact business in all of the United States, as well as in large numbers of countries around the world.

- The USCIB is a business advocacy and policy development group representing 300 global companies, professional firms, and associations. It is the American affiliate of the International Chamber of Commerce and the International Organization of Employers.
- The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.
- The OFII is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States.

Many of *amici*'s members have been named as defendants in litigation arising under the Alien Tort Statute ("ATS") and predicated on various theories of third-party liability. While *amici* have previously condemned – and continue to condemn –

extrajudicial killings such as those alleged to have occurred in this appeal, they submit that the Alien Tort Statute was never intended to provide a basis for federal jurisdiction over claims against private corporations arising from alleged acts taking place in foreign countries. They also oppose the unprecedented extension of the ATS that Appellants seek here.

Source of Authority: Counsel for the parties have consented to the filing of this brief, and copies of their consent letters have been provided to the Clerk's Office.

STATEMENT OF THE ISSUES

Amici generally agree with the statement of the issues framed by Appellees. *Amici* focus this brief on their opposition to Appellants' unprecedented proposed extension of the ATS to punish private companies for the actions of paramilitary groups by imputing those actions first to the Colombian Government and then, through several layers of veil piercing, to the corporations themselves.

SUMMARY OF THE ARGUMENT

The district court's judgment should be affirmed in order to avoid three interrelated problems created by Appellants' claims.

First, these claims discourage investment and trade between United States companies and foreign countries and, thereby, interfere with the political branches' management of the nation's foreign economic affairs. ATS claims against private corporations compound the uncertainty of the legal environment and consequently

increase the risks of any investment. They also place American firms at a competitive disadvantage relative to their foreign counterparts (whose countries of incorporation would never exercise jurisdiction over activities taking place in foreign countries). They expose American companies to costly and protracted smear campaigns, as this appeal illustrates especially well: **in an interview about this very litigation, one of Appellants' counsel explained that they were "not in a hurry for the cases to be resolved, because *as long as they stay tied up in the courts they will continue to receive attention in the media*."** Malcolm Fairbrother, *Colombia, Human Rights and U.S. Courts: An Interview with Daniel Kovalik* (April 25, 2002), *available at* http://www.clas.berkeley.edu:7001/Events/spring2002/04-25-02-kovalik/index. html (emphasis added). Finally, unless rejected at the pleading stage, these suits tie up American companies in costly, complex and potentially futile discovery, merely increasing the pressures to settle. This case acutely illustrates all of these risks as it involves business relations with Colombia, the United States' fourth largest trading partner in Latin America and a signatory to a free trade agreement currently pending before Congress.

Second, these claims interfere with the prerogative of the political branches to manage the nation's diplomatic affairs. Due to the state action requirement in most ATS cases, including this one, litigation threatens to embarrass foreign countries and, unless rejected at the pleading stage, expose those countries to fishing expeditions into their activities. These suits also undermine principles of comity by effectively extending the territorial reach of United States laws and, thereby, second-guessing the

ability of foreign authorities to investigate activities taking place on their soil. Finally, they put the political branches of the United States in an intractable dilemma: take a position in the case (and risk claims that it is tolerating alleged violations of the law of nations) or decline to do so (and risk alienating an important ally). The risks of such diplomatic interference are especially grave in the case of relations with Colombia, which the President only recently described as "one of our closest allies in the Western Hemisphere" and whose military just last week secured the release of American hostages held by guerillas.

Third, these claims exceed the very narrow band of judicial authority to make federal common law for alleged violations of the law of nations. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Before an exercise of such power can even be contemplated, a norm must be one "of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms [such as piracy and offenses against ambassadors]." *Id.* at 725. In this case, two of the principles on which Appellants' unprecedented claims depend – accessorial liability and corporate veil piercing – have not achieved the required level of international acceptance. Nor do they find any support in the decisions of this Circuit or the other federal appellate courts.

ARGUMENT

I. THE ALIEN TORT STATUTE DOES NOT PROVIDE A BASIS FOR JURISDICTION OVER APPELLANTS' CLAIMS, WHICH INTERFERE WITH AMERICAN ECONOMIC POLICY, DISRUPT AMERICA'S DIPLOMATIC RELATIONS WITH COLOMBIA AND REST ON UNPRECEDENTED EXTENSIONS OF COMPLICITY AND VEIL-PIERCING PRINCIPLES.

At the outset, it is important to lay bare the unprecedented nature of Appellants' claims. Appellants do not allege that any of the defendants themselves engaged in the alleged tortious conduct at the root of this appeal. Nor do they allege that any official of the Colombian Government engaged in these acts. At bottom, they seek to impute the alleged acts of paramilitary groups to the Colombian Government and then further impute these non-sovereign acts through several independent corporations and, ultimately, back to Coca-Cola USA.

Appellants' argument rests on the Alien Tort Statute, which provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. 28 U.S.C. §1350.

In *Sosa v. Alvarez-Machain*, the Supreme Court held that this language merely granted jurisdiction but acknowledged that, in extremely rare instances, federal common law might supply a basis for a cause of action for violations of the law of nations. The Court hastened to add, however, that this power should be subject to "vigilant doorkeeping" and that "great caution" should be exercised when "adapting the law of nations to private rights." 542 U.S. at 728-29. *Sosa* recognized that misuse of the

ATS by private plaintiffs interferes with the political branches' management of the nation's economic affairs, undermines their development of American foreign policy and represents an unauthorized exercise of judicial power. *Id.* at 724-28. This case, involving an important trading partner and political ally of the United States, contains all of these warning flags and, unless the district court's judgment is affirmed, threatens to cause the very harms that the Supreme Court in *Sosa* sought to avoid.

A. This litigation undermines American investment and trade with Colombia and thereby frustrates American foreign economic policy.

Decisions about the management of American foreign economic policy belong to the political branches. The Constitution textually commits to Congress the power to "regulate commerce with foreign nations." Art. I, § 8, cl. 3. It divides among the political branches the power to make and to ratify treaties. Art. II, § 2, cl. 2. Accordingly, in a case involving a trade treaty, this Circuit recently recognized that "[t]he Constitution confers a vast amount of power upon the political branches of the federal government in the area of foreign policy-particularly foreign commerce." *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1313 (11th Cir. 2001). Consistent with these principles, federal courts have frowned upon efforts by other actors to interfere with the political branches' exercise of their prerogatives in this field. *See, e.g., Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *National Foreign Trade Council, Inc. v. Giannoulias*, 523 F.Supp.2d 731 (N.D. Ill. 2007).

ATS suits such as Appellants' present even greater dangers of interference than the acts at issue in *Japan Line* and *Giannoulias*. Whereas the state and local governments in those cases were at least politically accountable, private plaintiffs such as Appellants (and their counsel) are not. Unless constrained by "vigilant doorkeeping," their unbridled adventures with the ATS threaten to co-opt the judiciary in Appellants' (and their counsels') efforts to pursue their own brand of foreign economic policy. *Sosa*, 542 U.S. at 728-29. Such litigation threatens to deter U.S.-based companies from investing in geostrategically important allies like Colombia.

This appeal illustrates the importance of maintaining harmonious foreign commercial relations with Colombia. As the recent debates over the U.S./Colombia Free Trade Agreement demonstrate, the economic relationship between the United States and Colombia is critical. America's trade with Colombia reached $18 billion in 2007, making Colombia not only the country's fourth largest trading partner in Latin America but also the largest export market for U.S. agricultural products in South America. U.S. Trade Rep., *Colombia FTA Briefing Materials* (2008), *available at* http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2008/asset_upload_file854_14604pdf. Colombia has also benefited greatly from its commercial relationship with the United States. In 2007, Secretary of State Condoleezza Rice called Colombia's transformation from a "failing state to thriving democracy [ ] one of the greatest victories for the cause of human rights in our world today." U.S. Dep't

of State, *Colombia: An Opportunity for Lasting Success* (Mar. 11, 2008) *available at* http://www.state.gov/r/pa/scp/2008/99858.htm. *See also* Peter F. Romero, Assistant Secretary of State for Western Hemisphere Affairs, *U.S. Priorities in the Western Hemisphere* (May 7, 2001), *available at* http://www.state.gov/p.wha.rls.rm/2001/3242.htm ("Higher [economic] growth in Latin America is not just desirable but imperative for consolidating democracy …. To achieve that higher growth, no one has a more important role to play than you, the investor[.]").

While Appellants complain about the labor standards in Colombia, it is precisely these improved economic relations that have enabled Colombia, with the support of United States companies, to strengthen those standards. U.S. Dep't of State, *Colombia: An Opportunity for Lasting Success*, available *at* http://www.state.gov/r/pa/scp/2008/99858.htm. American companies have been leaders in the partnerships that have improved labor conditions in Colombia. These measures have led to a dramatic decline in labor-related violence. U.S. Trade Rep., *Colombia Free Trade and Labor Unions: Myth vs. Fact* (2008), *available at* http://ustr.gov/trade_agreements/bilateral/Colombia_FTA/section_index.html.

Perhaps in recognition of the importance of American companies in achieving this progress, a remarkable array of labor unions, state officials and international actors have found no basis for the allegations underlying this appeal. Numerous labor organizations have praised Coca-Cola's efforts in pursuing constructive labor relations and publicly stated that there is no basis for the allegations here. *See, e.g.,*

Sinaltrainbec, National Managing Board, *Statement for the Public Opinion and the Local and International Union Movement*, *available at* www.cokefacts.com/Colombia_facts_co_keyfacts_sinal.pdf. Likewise, Colombian authorities have investigated complaints involving the treatment of the Sinaltrainal Union and concluded that there is no basis for a claim that Coca-Cola contributed to violating the union members' rights. *See* Decision by Circuit Criminal Court 10 (Colombia), Santafé Bogotá (Apr. 22, 1997) *available at* www.cokefacts.com/Colombia/facts_co_court_cc10.pdf. Finally, an internationally respected labor rights auditor assessed Coca-Cola bottling plants in Colombia and found no evidence of anti-union violence. *See* Cal Safety Compliance Corporation, *Workplace Assessments in Colombia* at 5-6 (2005), *available at* www.cokefacts.com/citizenship/cit_co_assessmentReport.pdf.

Lawsuits such as Appellants' threaten to scuttle this progress and "could also have a profoundly negative effect on this nation's economy and its ability to deal with other foreign powers" in four interrelated ways. *Made in the USA Foundation*, 242 F.3d at 1318. *First*, such suits sow uncertainty about an American company's liability risks. Certainty and predictability are essential conditions to fostering investment in any market. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994). Yet, the liability standards under ATS suits are amorphous and ill-defined. *See generally* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in the United States* 56 (4th ed. 2006) (discussing disagreements). Consequently, the mere prospect of such suits injects unfortunate uncertainty and unpredictability into the

legal rules governing American companies' overseas operations and relationships. This can raise the price of an investment, as insurance companies may charge higher premiums for risk insurance that lenders demand as a condition of financing an overseas investment. It places foreign companies at risk of ATS suits even if their investments were made with the permission of, or sometimes the active encouragement of, the United States Government. Here, for example, Appellants ultimately are asking an American company (Coca-Cola USA) to take responsibility for how paramilitary groups in Colombia treat organizers of a particular labor union in its relations with independent Colombian corporations – a requirement not imposed by Colombian or United States law. Consequently, ATS litigation may force U.S. companies to abandon existing investment projects or decline to undertake new ones.

Second, such lawsuits place American firms at a competitive disadvantage. The United States stands virtually alone in entertaining suits over claims arising from conduct undertaken by a foreign sovereign in its own territory. *See* Gary Hufbauer & Nicholas Mitrokostas, Awakening Monster: The Alien Tort Statute of 1789 46 (2003). Consequently, when a foreign country such as Colombia decides what foreign companies may transact business in its territory as part of an economic growth strategy, it can do business with a United States company (and later risk being dragged, at least indirectly, into an American court where its conduct will be on trial) or a non-American company (where the interactions will remain a matter for the

foreign sovereign's own courts). Faced with such a stark choice, a foreign country might well choose a non-U.S. partner.

Third, such suits ensnare corporate defendants in drawn-out smear campaigns. ATS suits against corporations are almost never tried to judgment but, instead, form part of a vast, carefully orchestrated campaign to pressure the corporate defendants to alter their behavior. The campaign begins by strategically timing the commencement of the lawsuit. In this case, for example, plaintiffs filed some of these suits around the time of Coca-Cola's first-quarter earnings meeting and consequently prompted some shareholders to dump the company's stock. Joshua Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights*, WORLD POL'Y J. 60, 64 (Spring 2004) (noting also that, during a similar campaign against Unocal, the company's "stock valuations and debt ratings" suffered).

These campaigns also drag on. *See* Hufbauer & Mitrokostas, Awakening Monster at 63-73 (describing long duration of ATS litigation against corporations). This case offers an exceptionally good insight into the reasons. As noted in the summary of the argument, one of Appellants' counsel admitted that they wanted the very cases underlying this appeal to stay "tied up in the courts" so that "they will continue to receive attention in the media." Malcolm Fairbrother, *Colombia, Human Rights and U.S. Courts: An Interview with Daniel Kovalik*, *available at* http://www.clas.berkeley.edu:7001/Events/spring2002/ 04-25-02-kovalik/index.html. The protracted nature of these smear campaigns presents a particularly high "danger of

vexatiousness," and thereby discourages United States companies from engaging in trade and investment with foreign nations. *Central Bank of Denver*, 511 U.S. at 189 (citation omitted). *See also Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1973 n. 14 (2007); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005).

Fourth, unless rejected at the pleading stage, such suits expose the corporate defendants to "extensive discovery" that can "take up the time of a number of people and [thereby] … represent[] an *in terrorem* increment of the settlement value." *Twombly*, 127 S.Ct. at 1966 (citation omitted); *Rivell v. Private Health Care Systems, Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008) (*per curiam*)(extending *Twombly* to tort claims); *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 974 n. 43 (11th Cir. 2008) ("We understand *Twombly* as a further articulation of the standard by which to evaluate the sufficiency of *all* claims brought pursuant to Rule 8(a)") (emphasis added). In ATS suits such as these, discovery will be even more burdensome than in garden-variety domestic litigation. Documents or witnesses may be located in Colombia, requiring the parties to resort to letters rogatory, a costly and time-consuming procedure. *See* Born & Rutledge, *International Civil Litigation in the United States* at 963. Other ATS litigation involving corporate defendants' activities in Colombia demonstrates that such discovery may not even arrive until after the trial already has ended. Brief for Appellees/Cross-Appellants in *Romero v. Drummond Co., Inc.*, Nos. 07-14090DD, 07-14356-D (U.S. Court of Appeals for the Eleventh Circuit) at 11. The prospect of

such burdensome, time-consuming and potentially futile discovery further discourages the investment and trade relationships at the heart of U.S./Colombian relations.

In sum, affirming the judgment below is necessary to ensure that Appellants do not chill foreign direct investment in Colombia and, thereby, undermine an economic relationship of great importance to the United States.

B. This litigation interferes with American diplomatic relations with Colombia, a nation whom the President recently described as "one of our closest allies in the Western Hemisphere."

Just as the political branches exercise responsibility for the nation's foreign economic policy, so too do they manage its diplomatic relations. *See, e.g., Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). Consequently the Supreme Court has frowned upon activities that interfere with this foreign affairs function. *See, e.g., American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). Consistent with this jurisprudence, this Court just recently declared that "[i]ssues related to foreign affairs often are beyond the competence of the federal courts to resolve because they require judicial intervention in policy areas reserved to the political branches or could express a lack of respect due the other branches." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235 (11th Cir. 2004). *See also Made in the USA Foundation*, 242 F.3d at 1313 (describing the "narrowly circumscribed role for the Judiciary" in matters of foreign affairs). ATS suits such as Appellants' "imping[e] on the discretion of the

Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727.

Pursuant to their constitutional prerogative, the political branches place great importance on diplomatic relations with Colombia. President Bush stressed the importance of this relationship in a speech earlier this year:

> Colombia is one of our closest allies in the Western Hemisphere. Under the leadership of President Uribe, Colombia has been a strong and capable partner, a strong and effective partner in fighting drugs and crime and terror. Colombia has also strengthened its democracy, reformed its economy. It has spoken out against anti-Americanism. This government has made hard choices that deserve the admiration and the gratitude of the United States.

White House Press Release, *President Bush Meets with U.S. Hispanic Chamber of Commerce* (Mar. 12, 2008), *available at* http://www.whitehouse.gov/infocus/ internationaltrade. Echoing these same sentiments in the specific context of ATS litigation, the Justice Department and the State Department have declared unequivocally that "Colombia is one of the United States' closest allies in this hemisphere, and our partner in the vital struggles against terrorism and narcotics trafficking." Supplemental Statement of Interest of the United States, *quoted in Mujica v. Occidental Petroleum Corp.*, 381 F.Supp.2d 1164, 1188 (C.D. Cal. 2005).

These consistent comments highlight just three of the many respects in which Colombia's relationship with the United States has been critical: fighting terrorism, eradicating drugs and combating organized crime. As to terrorism, Colombia has

been a steadfast partner in combating regional terror groups. U.S. Trade Rep., *Colombia FTA Briefing Materials* (2008), *available at* http://www.ustr.gov/assets/ Document_Library/ Fact_Sheets/2008/asset_upload_file854_14604.pdf. ***Indeed, just last week, the Colombian military secured the release of fifteen hostages, including three Americans, held by a Colombian rebel group.*** *See Betancourt, U.S. Contractors rescued from FARC*, *available at* http://www.cnn.com/2008/WORLD/ americas/07/02/betancourt.colombia/index.html. As to narcotics enforcement, Colombia has been a central ally in stemming the flow of illegal narcotics into the United States. The White House, Press Release *Fact Sheet: U.S.-Colombia Free Trade Agreement Essential to Our National Security* (Mar. 12, 2008) *available at* http://www.whitehouse.govnews/ releases/2008/03. According to one recent State Department report, seizures of cocaine bound for the United States have more than doubled in recent years. U.S. Dept. of State, *Colombia: An Opportunity for Lasting Success* (Mar. 11, 2008) *available at* http://www.state. gov/r/pa/scp/ 2008/99858.htm. As to organized crime, Colombia has extradited nearly 700 criminals – mostly drug traffickers – to the United States to face criminal charges. *Id.* Just recently, Colombia extradited to the United States fourteen suspected warlords of a group believed to have shipped large quantities of cocaine to the United States. *See* David Luhnow, *Colombia Extradites 14 Warlords to U.S.*, WALL ST. J. (May 14, 2008).

ATS suits such as Appellants' threaten to undermine these foreign policy initiatives of the political branches in four interrelated ways. *First*, the very existence

of a lawsuit thrusts allies such as Colombia into an uncomfortable spotlight. As the United States Government recently explained, ATS litigation brought against private corporations and predicated on accessorial liability "will inevitably give rise to tension in relations between the United States and the country whose conduct is at issue." Brief for the United States as *Amicus Curiae* in support of Petitioners, in *American Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (United States Supreme Court) at 19. Even if sovereign immunity principles enable the sovereign to avoid direct liability, the nature of suits such as Appellants' ensures that the sovereign will nonetheless become ensnared. Due to the "state action" requirement in almost all ATS cases, *see Aldana v. Del Monte Fresh Produce N.A., Inc.*, 416 F.3d 1242, 1249 (11th Cir. 2005), the sovereign's conduct will be the centerpiece of any argument over whether the plaintiff has proven a "tort … in violation of the law of nations." 28 U.S.C. §1350.

Second, discovery in ATS cases predicated on accessorial liability embarrasses the foreign sovereign. Unless stopped at the pleading stage, plaintiffs inevitably seek to probe a foreign sovereign government's relationships with other parties in order to test whether the requisite "substantial assistance" has been proven. In this case, for example, discovery would allow plaintiffs to embark on a fishing expedition into the relationship between Colombia and the paramilitaries in an effort to demonstrate the necessary nexus to establish state action. In effect, the suit requires this Court to pass judgment on the legitimacy of the Colombian Government and the role of the paramilitary organizations in that society. Even if that inquiry eventually proves the

groundlessness of Appellants' claims, the very act of subjecting a foreign sovereign government to such scrutiny by private plaintiffs and a foreign court has already wrought the diplomatic damage. Understandably, therefore, these sorts of suits often spark diplomatic protests by the affected nations. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 292 (Korman, J., concurring in part and dissenting in part), *aff'd per* 28 U.S.C. § 2109 *sub nom. American Isuzu Motors, Inc. v. Ntsebeza*, 128 S.Ct. 2424 (2008); *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 363 (D.C. Cir. 2007) (Kavanaugh, J., dissenting).

Third, these lawsuits undermine principles of comity. Comity principles recognize that certain types of litigation in the United States can aggravate foreign alliances. *See W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990); *Daewoo Motor America, Inc. v. General Motors Corp.*, 459 F.3d 1249, 1257-58 (11th Cir. 2006). The risks of such aggravation are especially acute when United States courts apply federal law extraterritorially in an attempt to regulate conduct taking place entirely on foreign soil. *See F. Hoffmann-LaRoche, Ltd. v. Empagran, S.A.*, 542 U.S. 155, 164-66 (2004) ("Why is it reasonable to apply this law to conduct that is significantly foreign insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim? We can find no good answer to the question."). As noted above, Colombian authorities already have investigated some of the incidents underlying this appeal, and Appellants have presented no compelling reason why a federal court needs to second-guess that

work. Exercising jurisdiction under such circumstances risks sending a message that "the U.S. Government does not recognize the legitimacy of Colombian judicial institutions." U.S. Supplemental Statement of Interest, *quoted in Mujica*, 301 F.Supp.2d at 1188.

Finally, not only do these suits create international friction, they also create an intractable dilemma for the United States. The Government can defend the foreign sovereign against untested allegations about torts in violation of the law of nations (and risk international criticism). Alternatively, it can decline to defend the sovereign and risk alienating an important political and economic ally. This sort of litigation thus "represent[s] a direct challenge to U.S. foreign policy leadership" and, unless checked, enables private parties – with no obligation to consider the national interest – to force the United States Government to take positions on sensitive diplomatic matters. Elliott J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM J. TRANSNAT'L L. 153 (2003).

In sum, affirming the judgment below is necessary to prevent private plaintiffs (and the interest groups behind them) from co-opting the federal courts in an effort to interfere with the political branches' decision to place strategic importance on relations between the United States and Colombia.

C. There is no authority for Appellants' unprecedented expansion of ATS jurisdiction premised on principles of complicity and veil piercing.

Under *Sosa*, before a court can even contemplate the exercise of its very narrow power to make federal common law, a norm must be one "of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms [such as piracy and offenses against ambassadors]." 542 U.S. at 725. Even if the claim lies against the primary tortfeasor, the liability of alleged private participants does not automatically follow; instead a court also must consider "whether international law *extends* the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual." *Id.* at 732 n. 20 (emphasis added). In this case, irrespective of whether the alleged conduct of the paramilitary forces violates the law of nations, Appellants' unprecedented effort to impute that non-sovereign conduct to private corporations has no explicit authorization, cannot survive the "vigilant doorkeeping" mandated by *Sosa*, *id.* at 729, and finds no support in the precedent of this or other circuits.

1. There is no express authority for Appellants' theory.

The ATS does not explicitly authorize claims predicated on third-party liability. *See* Curtis A. Bradley *et al.*, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 929 (2007) ("Whether corporations should be liable

for aiding and abetting violations of customary international law is an issue that will need to be addressed in the first instance by the political branches."). Nor has Congress enacted a general statute embracing aiding-and-abetting principles in civil cases. *See Central Bank of Denver*, 511 U.S. at 182. In *Central Bank of Denver*, the Supreme Court made clear that civil causes of action do not enjoy a background presumption of accessorial liability:

> Congress has not enacted a general civil aiding and abetting statute … for suits by private parties. Thus, when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, *there is no general presumption that the plaintiff may also sue aiders and abettors*.

Id. (emphasis added).

In ATS cases, of course, the presumption against accessorial liability is even stronger. *See Sosa*, 542 U.S. at 728 ("We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.") Whereas rights of action traceable to statutes at least have some patina of legislative legitimacy, rights traceable to judicially created theories of relief such as those at issue here do not, a principle that the Supreme Court has repeatedly and recently reaffirmed. *See Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S.Ct. 761, 770-74 (2008); *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 67 n. 3 (2001); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

2. Appellants' theory has not achieved the requisite level of international acceptance required by *Sosa*.

Lacking any express authority for their theory, Appellants rely on the implied power to make federal common law under *Sosa*. But *Sosa* makes clear that, in order to survive the vigilant doorkeeping, any claim must be analyzed at a high level of specificity and must have achieved a high degree of international acceptance. *See Sosa*, 542 U.S. at 725, 736, 738 (rejecting plaintiffs' broad characterization of a norm against "arbitrary detention" and analyzing plaintiffs' proposed norm as "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment"). In four independent respects, Appellants' claims rest on principles that have not achieved this necessary level of acceptance.

First, as a general matter, civil accessorial liability for corporations is not widely accepted. Virtually no historical evidence suggests that civil aiding-and-abetting principles were widespread at the time of the ATS's enactment. *See Central Bank of Denver*, 511 U.S. at 181 (noting that "[t]he doctrine of [civil accessorial liability] has been at best uncertain in application" and that its common-law antecedents were "'largely confined to isolated acts of adolescents in rural societies'") (*quoting Halberstam v. Welch*, 705 F.2d 472, 489 (D.C. Cir. 1983)). Principles of third-party liability did not enter the international legal discourse meaningfully until the end of World War II and were confined to criminal, not civil, liability. *See The Nurnberg Trial (United States v. Goering)*, 6 F.R.D. 69 (Int'l Military Tribunal at Nurnberg 1946).

Moreover, that criminal liability extended only to individuals and virtually never to corporations, a limit recently confirmed when the drafters of the treaty for the International Criminal Court rejected attempts to include corporate liability within its jurisdiction. *See* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons*, *in* Liability of Multinational Corporations Under International Law 139, 141-58 (Menno T. Kamminga & Saman Zia Zarifi, eds. 2000). *Cf.* Torture Victim Protection Act, 28 U.S.C. §1350 (statutory note) (liability extends only to "individuals"). Thus, accessorial liability has not achieved the required level of international acceptance.

Second, even if accessorial liability *generally* were accepted, that norm must be analyzed *at a high degree of specificity*. *See* 542 U.S. at 725. In this case, Appellants must prove that international law has extended principles of accessorial liability such that private corporations can be liable for the acts of paramilitaries which are attributed to sovereign governments and then back to the corporations. Unsurprisingly, Appellants point to no source of international law or domestic precedent supporting this specific proposition.

Third, even if accessorial liability, defined at this proper level of specificity, had achieved the international acceptance required by *Sosa*, the concept of veil piercing, also central to Appellants' claims, has not. Respect for the independent corporate form is a bedrock principle of law, both here and abroad. *See United States v. Bestfoods*, 542 U.S. 51, 61 (1998); *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,*

462 U.S. 611, 623 (1983). In the seminal case on corporate veil piercing under international law, the International Court of Justice *rejected* a request to disregard a corporate entity and recognized that, at best, corporate veil piercing might be possible only in extremely rare cases (such as preventing fraud or protecting a creditor) which Appellants do not allege here. *See Case Concerning the Barcelona Traction, Light and Power Co. Ltd.*, 1970 WL (I.C.J.) 1, 39 (1970). Thus, no international legal consensus has formed around veil-piercing principles.

The consensus is no better among the "civilized nations" to which *Sosa* directs this Court. 542 U.S. at 728-29. Following an extensive survey of veil-piercing principles from nations around the world, one authoritative commentator recently declared: "it can be said fairly confidently that not one of the judicial systems in the countries considered has certain and settled rules regarding the doctrine." Stephen B. Presser, *Piercing the Corporate Veil* §5:01 (Rev. ed. 2008). *See also* Claudia M. Pardinas, *The Enigma of the Legal Liability of Transnational Corporations*, 14 SUFFOLK TRANSNAT'L L. J. 405, 432 (1990-91) (noting the lack of consensus about veil piercing at the international level). Many foreign nations only recognize the doctrine in far rarer circumstances than the United States or, sometimes, not at all. *See generally* Presser, *Piercing the Corporate Veil* §5:1 ("[P]erhaps as a result of the inherently uncertain nature of equitable concepts, courts in civil law countries seem to invoke the doctrine in the same unpredictable manner as do the courts of common law countries."). Thus,

whatever the contours of corporate veil piercing under American law, the concept has not achieved the level of acceptance required by *Sosa*. 542 U.S. at 725.

Fourth, even if veil piercing *generally* had achieved the requisite acceptance, it certainly has not embraced the *specific* type of veil piercing that Appellants seek here – piercing not on the basis of an ownership relationship but, instead, on the basis of contractual relationships between wholly independent businesses. Pardinas, 14 SUFFOLK TRANSNAT'L L. J. at 408 ("The doctrine applies primarily to closely held corporations."). Appellants do not cite – and cannot cite – any authority supporting such an unprecedented expansion of veil-piercing principles.

3. Precedent does not support Appellants' theory.

In an effort to overcome these manifold deficiencies in their legal theory, Appellants place much weight on two prior decisions of this Circuit. *See* Appellants' Brief at 33 (citing *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (*per curiam*) and *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005) (*per curiam*)). Neither those decisions nor the decisions of other circuits support Appellants' unprecedented theory.

Cabello concerned a survivors' claim against a former Chilean military officer (Fernandez) who allegedly had formed part of a general's death squad and had participated in the execution of a Chilean economist. Most of this Circuit's *per curiam* opinion involved questions unrelated to the interpretation of the ATS. The only

arguably relevant portion of the opinion is Section II.B.1 (which, curiously, does not even cite the Supreme Court's decision in *Sosa* even though it had been handed down two months earlier). 402 F.3d at 1156-58. There, the Court observed that the ATS "permit[s] claims based on … indirect theories of liability." 402 F.3d at 1158.[1] But "judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced." *Watts v. BellSouth Telecomms., Inc.*, 316 F.3d 1203, 1207 (11th Cir. 2003). *See also United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000) (*per curiam*) ("[T]he holdings of a prior decision can reach only as far as the facts and circumstances presented to the Court in the case which produced that decision.") (citation and internal marks omitted). Read in context, *Cabello*'s statement about "indirect theories of liability" related to its rejection of Fernandez's argument that he could not be liable because he did not personally execute the economist and because he was not a higher-ranking military officer. At most, *Cabello* stands for the proposition that a former military officer who participated in a death squad and was

[1] In that same section, *Cabello* cites two pre-*Sosa* decisions for the following proposition: "[t]he courts that have addressed the issue have held that the [ATS] reaches conspiracies and accomplice liability." 402 F.3d at 1157. Respectfully, *Cabello* misreads those decisions. The Ninth Circuit's decision in *Hilao v. Estate of Marcos* concerned the doctrine of military command responsibility, not civil accessorial liability. 103 F.3d 767, 776-77 (1996). The Fifth Circuit's decision in *Carmichael v. United Technologies Corp.* "only assume[d]" that the ATS reached private aiders-and-abettors to torts but did not decide the matter, instead dismissing the case on other grounds. 835 F.2d 109, 113-14 (1988).

present at an assassination can be liable under a complicity theory even if he did not personally participate in the killing.

Aldana also does not support Appellants and, in fact, strongly supports Appellees' and *amici*'s position in this case. *Aldana* involved various allegations against a private company and sought to hold the company liable under a complicity theory under the ATS. In all but one respect, the *Aldana* Court found that the plaintiffs' complaint failed adequately to plead facts sufficient to survive a motion to dismiss. 416 F.3d at 1253. *Aldana* did credit one allegation that a government official (a local mayor) had acted as an armed aggressor in the underlying tort, an allegation that the court concluded satisfied the "state action" requirement. *Id.* at 1249. But that holding merely addressed the issue of state action. It did not address the core questions in this appeal such as the sufficiency of allegations to establish (1) a relationship between paramilitaries and a foreign sovereign, (2) a private corporation's "assistance" to a foreign sovereign or (3) companies' relations for veil-piercing purposes.

Nor do the decisions of other appellate courts endorsing accessorial liability support Appellants' unprecedented theory. Those cases can be classified into three main groups. The first group involves claims against former foreign political or military leaders for acts carried out under their command. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). The second involves claims against corporations for allegedly assisting in allegedly unlawful acts undertaken by a foreign sovereign or its officials. *See, e.g., Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *rehearing en banc granted and*

appeal dismissed, 403 F.3d 708 (9th Cir. 2005). The third involves claims against corporations for allegedly doing business with a foreign sovereign, where the subject of those business relations (such as the sale of military equipment or other hardware) is eventually used to commit an allegedly unlawful act. *See, e.g., Khulumani*, 504 F.3d 254.

Amici do not agree with these decisions and categorically oppose accessorial liability under the ATS. But even accepting these decisions, they do not support Appellants' unprecedented expansion of the statute. First, unlike those prior decisions, the alleged primary tortfeasors in this appeal are not current or former sovereign actors. Second, also unlike those prior cases, none of the corporate defendants in this appeal is alleged to have provided any assistance to the primary tortfeasors. Rather, Appellants are attempting to impute the alleged conduct of non-state paramilitary groups back to these companies through multiple steps of veil piercing.

Thus, Appellants' novel theory of accessorial liability lacks any express authorization, has not achieved the level of international acceptance to be cognizable under the ATS and finds no support in the precedent of this court or other courts.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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July 10, 2008
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