UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TURKCELL İLETIŞIM HIZMETLERI A.Ş. AND EAST ASIAN CONSORTIUM B.V.,	)	
Plaintiffs,	)	Civil Action No. 12-00479 (RBW)
v.	)	
	)	**ORAL ARGUMENT REQUESTED**
MTN GROUP, LTD. AND MTN INTERNATIONAL (MAURITIUS) LTD.,	)	Filed under Seal in Part
Defendants.	)	

REPLY STATEMENT OF POINTS AND AUTHORITIES
IN FURTHER SUPPORT OF DEFENDANTS' MOTION
TO DISMISS THE COMPLAINT OR FOR A STAY

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Defendants MTN Group and MTNI[1] respectfully submit this statement of points and authorities in further support of their motion to dismiss the Complaint or for a stay of this action.

PRELIMINARY STATEMENT

No matter how complex Plaintiffs try to make their claims appear, this case is really only about one simple issue: whether a foreign corporation may use this Court to sue another foreign corporation for a commercial tort under the Alien Tort Statute. The answer to this question is equally simple: it may not.

This case does not belong before this Court because there is no jurisdiction under the ATS for claims based on bribery. Indeed, Plaintiffs have not cited a single case in which bribery formed the basis of a cognizable ATS claim, because there is none. To find otherwise would be unprecedented, would conflict with the Supreme Court's opinion in *Sosa v. Alvarez-Machain*, and would open the flood gates to similar commercial cases from all over the world.

Moreover, Plaintiffs do not need this Court to expand the reach of the ATS to seek justice. [redacted]

The bottom line is that, regardless of Plaintiffs' rhetoric, this Court cannot hear their claims because the Court lacks subject matter jurisdiction over the case and personal jurisdiction over the Defendants [redacted] time-barred, or otherwise blocked by the act of state doctrine. Moreover, the Court should not hear

[1] Defendants use defined terms with the meanings previously described in the Statement of Points and Authorities in Support of Defendants' Motion to Dismiss or for a Stay, dated July 2, 2012 (hereinafter, "Motion"). Plaintiffs' Opposition to Motion to Dismiss, dated August 1, 2012, is referred to herein as the "Opposition" and cited as "Opp."

their claims because Plaintiffs have failed to plead them adequately and because, in any event, the doctrine of forum non conveniens counsels dismissal in favor of South Africa, which, unlike this jurisdiction, has a nexus to and interest in this case.

The simple fact is that Plaintiffs cannot bring claims sounding in tort for bribery under the ATS, [redacted]. For this reason and the other reasons discussed in Defendants' Motion and in this Memorandum, Plaintiffs' claims should be dismissed with prejudice.

PLAINTIFFS' NEW ALLEGATIONS AND CLAIMS

Before reaching Plaintiffs' legal arguments, this Court should recognize that the Opposition is impermissibly littered with new allegations, new legal claims, and facts outside the pleadings all of which should be disregarded because Plaintiffs' injection of new facts and claims violates the rule that "a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Arbitraje Casa de Cambio, S.A. DE C.V., et al. v. United States Postal Service*, 297 F. Supp. 2d 165, 170 (D.D.C. 2003) (refusing to consider new allegations made in opposition to a motion to dismiss). Instead, the Court should see these new allegations for what they are: a concession that Plaintiffs' Complaint is inadequate.

First, this Court should not consider Plaintiffs' new and implausible allegation that "MTN's corruption procured the Irancell Act." Opp. at 14 n.12, 14-15, 19, 22-23. Plaintiffs' Complaint does not allege that Defendants (i) made any payments to Iranian or South African officials, (ii) promised or made any "sham loans" to their Iranian partners, (iii) changed South Africa's position in the IAEA, or (iv) paid for Iranian officials' trips, prior to May 16, 2005, when the Irancell Act was enacted. *See* Compl. ¶¶ 118-25, 133-54, 156-64; Statement of Claim ¶ 39. Plaintiffs use their added factual allegations to articulate a theory of backwards causation, essentially contending that Defendants brought about the Irancell Act through actions taken after

its enactment. *See* Opp. at 17. Such a theory is not plausible and should be disregarded even if it were properly before the Court. *See Bell Atl. v. Twombly*. 550 U.S. 544, 547, 127 S.Ct. 1955, 1960 (2007) (dismissing complaint based on implausible allegations).[2]

Next, Plaintiffs introduce new allegations that "*in 2004* [MTN] promised to deliver the South African government's vote in Iran's favor at the IAEA, which the Complaint explicitly states it did *three* times between 2005 and *2006*." Opp. at 1 (emphasis added). The Complaint never alleges that Defendants made any such promises in 2004, delivered votes at the IAEA three times, or did so in 2006. *See* Compl. ¶¶ 133-154. The Court should refuse to consider all of these new allegations. *See Arbitraje Case de Cambio*, 297 F. Supp. 2d at 170.

Plaintiffs also attempt to inject new legal claims against Defendants. *See* Opp. at 10 n.7, (claiming aiding and abetting violation of law of nations rather than treaties listed in Count II), 11 n.9 (claiming violation of U.N. Charter, not listed in Count II). Plaintiffs cannot do so, *see Richardson v. Capital One N.A.*, 839 F. Supp. 2d 197, 202-03 (D.D.C. 2012) ("Plaintiff is not permitted to advance a claim in his . . . Opposition that was not alleged in his Complaint"), and the Court should refuse to consider these new claims.

Finally, the Court should reject Plaintiffs' impermissible reliance on the Kilowan deposition which is largely based on hearsay.[3] S*ee Bazarian Int'l Fin. Associates, L.L.C. v. Desarrollos Aerohotelco, C.A.*, 793 F. Supp. 2d 124, 130 n. 3 (D.D.C. 2011) (improper to rely on

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[2] To the extent Plaintiffs' other allegations predate the Irancell Act, they are only that Defendants arranged meetings and meals. *See* Compl. ¶¶ 72, 84, 92, 113. These allegations amount only to a conspiracy to commit dinner and cannot plausibly imply that Defendants caused the Iranian Parliament to effect the Irancell Act, significant economic legislation. *See Twombly*, 550 U.S. at 547, 127 S.Ct. at 1960.

[3] For example, Plaintiffs rely on Kilowan's testimony concerning an alleged meeting between Irene Charnley and Minister Lekota, but Kilowan testified that he was not even in the country when that visit took place. *See* Harkness Decl., Exh. A at 107:4-17. Plaintiffs further rely on Kilowan's testimony regarding a letter written in Farsi, which he cannot read and which was never provided to MTN. *See id.* at 292:1-7, 557:12-16. Additionally, Plaintiffs rely on Mr. Kilowan's testimony regarding "the fish" (which they claim refers to defense cooperation), but in discussing "the fish," Mr. Kilowan testifies regarding what he was purportedly told by Ambassador Saloojee, who was recalling what he was purportedly told by Ms. Irene Charnley. *See id.* at 103:15-16.

materials outside the pleadings in an opposition to a motion to dismiss). If the Court does review the transcripts, it will see that Plaintiffs' cited deposition testimony directly contradicts Plaintiffs' claims. For example, the Kilowan testimony Plaintiffs cite to show that Defendants promised to deliver IAEA votes cite is directly to the contrary:

> Q: At that time, August/September 2004, did MTN make any promises to the Iranians that they could deliver the South Africa government on nuclear issues?
>
> A: No. They could not deliver a vote, but they could deliver access to the South African government.

Harkness Decl., Exh. A at 115:10-16. The same is true with the allegations about arm sales:

> Q: And was MTN, at the time, promising to facilitate these arms sales?
>
> A: No. We were not promising to facilitate the arms sales. We were promising to get them in front of the right people for these arm sales.

Id. at 94:2-6.

ARGUMENT

I. PLAINTIFFS FAIL TO PLEAD A VIOLATION OF THE LAW OF NATIONS

Plaintiffs' Opposition does nothing to change the conclusion that their law of nations claim is not cognizable because it has "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Sosa*, 542 U.S. at 732, 124 S.Ct. at 2765. To succeed on their claim under § 1350, Plaintiffs must show that Defendants violated a "norm of customary international law." *Doe VIII*, 654 F.3d at 36 n.23 (*citing Sosa*, 542 U.S. at 712, 714-15, 729, 124 S.Ct. at 2754-57, 2764). Although Plaintiffs refer to various treaties and other materials relating to corruption and bribery, none of those authorities, individually or collectively, establishes that their claim is grounded on a norm of customary international law that is sufficiently specific, definite, and accepted to satisfy the "restrained

conception" of this Court's authority to recognize federal common law claims under § 1350. *See Sosa*, 542 U.S. at 725, 124 S.Ct. at 2761. Accordingly, Count I should be dismissed.

A. Plaintiffs' Claim Is Not Sufficiently Specific, Definite, And Accepted under *Sosa*

Plaintiffs' claim is neither specific nor definite as it must be under *Sosa*. In their Opposition, Plaintiffs fail to articulate how the conduct they allege in Count I would violate a specific and definite norm comparable to the historical paradigms recognized by the Supreme Court—piracy, violation of safe conducts, and infringement of the rights of ambassadors. *See Sosa*, 542 U.S. at 715, 124 S.Ct. at 2756 (*citing* 4 William Blackstone, Commentaries *68). Nor do they identify any textual basis for a comparably specific and definite norm. Instead, Plaintiffs use inflammatory descriptions of their claim—"corruption through bribery and trading in influence," Compl. ¶ 197, "corruption by fixing votes at the IAEA," Opp. at 3, and "exchanging political promises of weapons and defense support for commercial benefits," *id.*—and argue that their claim is cognizable under § 1350 because "the prohibition of corruption is an international norm," referring generally to various "anti-corruption agreements" and "anti-corruption conventions." Opp. at 5. Under *Sosa*, this simply is insufficient to establish an ATS claim.

However Plaintiffs' claim is characterized, Defendants' alleged conduct does not violate an accepted norm of customary international law. In fact, numerous federal courts have rejected bribery and corruption claims brought under § 1350. *See* Mot. at 13-14. Plaintiffs' effort to distinguish those cases is belied by the law review article on which they rely, which discusses them in a section explaining how the federal courts have held that "foreign bribery is not cognizable under the ATS."[4] Matt A. Vega, *Balancing Judicial Cognizance and Caution:*

[4] The only case Plaintiffs offer to support their law of nations claim, *Commonwealth v. Taraborelli*, 19 Pa. D. 235 (Pa. Quar. Sess. 1910) is no real support at all. It makes its "law of nations" pronouncement without the analysis *Sosa* demands, and it has never been cited by a single court, even those that have considered whether bribery can from the basis of a cognizable ATS claim. Even Professor Vega acknowledges that its reasoning has been rejected.

Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute, 31 Mich. J. Int'l L. 385, 429-33 (2010).[5]

While the reach of § 1350 is not limited to a "short list of atrocities of the sort recognized in 1789," Opp. at 4 (internal quotations omitted), Plaintiffs fail to identify a single case in which a claim of "corruption through bribery and trading in influence" has ever been recognized by any U.S. court. The case law under § 1350 deals primarily with atrocities, such as genocide, war crimes, and slavery. *See* Restatement (Third) of Foreign Relations Law of the United States § 702. Indeed, the Supreme Court has acknowledged that § 1350 has been limited to conduct subject to such universal condemnation that the perpetrator is considered to be *hostis humani generis*, the enemy of all mankind. *See Sosa* 542 U.S. at 732, 124 S.Ct. at 2766.[6] The conduct alleged in this case involved commercial transactions concerning a cellular telephone network, not acts of violence. Although Plaintiffs allege "promises" involving military equipment and influence over IAEA votes, *see, e.g.*, Compl. ¶¶ 107, 153, there is no allegation that any

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Cite to Vega, *supra* 5, at 394 n. 47 (citing *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995), *cert. denied*, 516 U.S. 1047, 116 S.Ct. 709 (1996)).

[5] Plaintiffs' citation to cases under U.S. common tort law shed little light on the contours of customary international law. Indeed, those cases do not involve bribery or tort claims under the ATS, nor do they concern claims arising under the law of nations. *See* Opp. at 7; *Oceanic Exploration Co. v. ConocoPhillips, Inc.*, No. 04-332, 2006 U.S. Dist. LEXIS 72231, at *70-72 (D.D.C. Sept. 21, 2006) (concerning claims of civil RICO, Robinson-Patman Act, Lanham Act violations, and torts of intentionally interfering with prospective economic advantage, unjust enrichment, and unfair competition); *Card Tech. Corp. v. DataCard Corp.*, Civ. No. 05-2546, 2006 U.S. Dist. LEXIS 31846 (D. Minn. May 16, 2006) (concerning counterclaims for patent infringement and tortious interference with prospective business advantage); *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937 (Cal. 2003) (concerning claims of conspiracy to interfere with prospective economic advantage, intentional interference with prospective economic advantage, and unfair competition under California's unfair competition law). Plaintiffs also cite cases showing that bribery is not a sufficient basis for a tort claim under federal law, which therefore undercut their assertion that they are entitled to the remedy they seek. *See, e.g.*, Opp. at 9-10 *citing Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1030 (6th Cir. 1990) (allowing an antitrust claim but denying private claim under the FCPA).

[6] Even murder and torture by private actors, which are universally prohibited under local law, do not violate customary international law. *See Ali Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1091 (D.C. Cir. 2011) (finding "no consensus" that "torture by private actors violates international law"); *Estate of Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1360 (11th Cir. 2010) ("murder committed by private actors in the course of an armed conflict [does not] give[ ] rise to subject matter jurisdiction under the ATS").

weapons were sold to, delivered to, or used by the Iranian government. Thus, the conduct at issue dramatically differs from that which has been held actionable under § 1350.[7]

The treaties on which Plaintiffs rely also do not establish a definite and universally accepted norm of conduct, but rather aspirational goals. For example, courts have held that the OECD Convention does not confer jurisdiction under § 1350. *See Mendonca v. Tidewater, Inc.*, 159 F. Supp. 2d 299, 302 (OECD Convention lacked "articulable or discernable standards and regulations" to establish an international tort); *see also RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d. 382, 397-98 (S.D.N.Y. 2009), *aff'd*, 387 F. App'x 72 (questioning whether Convention, "sufficiently demonstrates that bribery of a foreign public official is a 'violation of international law'" for ATS purposes). That is hardly surprising. The most recent report on enforcement of the Convention found that international acceptance was limited at best:

- Of the 38 parties to the Convention, 21 had little or no enforcement; nine had moderate enforcement; and only seven had active enforcement.
- The principal cause of "lagging enforcement is lack of political commitment by government leaders."
- A large portion of the international community, including China, India, Indonesia, Russia and Saudi Arabia, has not acceded to the Convention and does not have or enforce foreign anti-bribery laws.

Transparency International, Progress Report 2011: Enforcement of the OECD Anti-Bribery Convention 5-6 (2011) ("Transparency International Report"). Those findings show that the international community has not accepted the norm against foreign bribery—of which the OECD Convention is the leading proponent—as binding customary international law.[8]

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[7] The "[t]he work of international law scholars" on which Plaintiffs rely, Opp. at 6-7, is not to the contrary. Plaintiffs' only cited authority, a recent article by an Associate Professor, plainly recognizes that bribery claims have never been considered actionable under § 1350. *See* Vega, *supra* 6, at 429-35.

[8] The lack of acceptance establishes "a general and consistent practice of states followed by them from a sense of legal obligation." *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988), *quoting* Restatement (Third) of Foreign Relations Law of the United States § 102(2) (1987). Plaintiffs suggest that the D.C. Circuit has relied on the OECD Convention to establish bribery as a violation of customary international law. *See* Opp. at 5-6. Plaintiffs refer, however, to *Doe*, which cited the Convention for different the proposition that

B. The Court Should Decline to Recognize Plaintiffs' Law of Nations Claim

Even though they can point to no established norm of international law to support their claims, Plaintiffs nonetheless invite this Court to be the first to recognize an ATS claim for corruption. However, Plaintiffs' selective quotations from *Sosa* cannot obscure the fundamental lesson of that case: "[a] series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute." *Sosa*, 542 U.S. at 725, 124 S.Ct. at 2762. Those reasons bespeak particular caution in this case.

First, "the practical consequences of making [Plaintiffs' alleged] cause available to litigants in the federal courts," *Sosa*, 542 U.S. at 732-33, 124 S.Ct. at 2762, would be substantial. Although courts have uniformly rejected private FCPA claims, recognizing Plaintiffs' claim would open the door to such claims under § 1350. In the past decade, federal agencies have brought more than 200 FCPA cases. *See* Transparency International Report at 8. The six other countries actively enforcing bribery laws have brought over 200 more cases under their own laws. *See id*. Such activity could generate a substantial volume of claims under § 1350, were it interpreted to recognize bribery claims, as Plaintiffs advocate. *See, e.g.*, *Ali Shafi v. Palestinian Authority*, 642 F.3d 1088, 1094 (D.C. Cir. 2011) (rejecting ATS claim for torture by a private actor in part because it "could open the doors of the federal courts to claims against nonstate actors anywhere in the world alleged to have cruelly treated an alien"); *see also El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 855 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring) (denying ATS claim for property damage from bombing because courts would be "flooded" by claims "for allegedly mistaken property damage in every war").

"*amici* international law scholars point to numerous international treaties that explicitly state that judicial entities should be liable for violations of the law of nations." *Doe*, 645 F.3d at 48-49 n.35. *Doe*, which did not address bribery, simply does not support the argument that bribery violates the law of nations. *See id.*

Moreover, *Sosa* teaches that courts should consider the foreign relations implications of recognizing claims under § 1350, which often leads courts to rely on the doctrines of forum non conveniens and act of state. *See Sosa*, 542 U.S. at 272-78, 733 n.21, 124 S.Ct. at 2763, 2766 n.21; Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 22-26, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (S.Ct. *petition for cert. filed* June 6, 2011), 2012 WL 2161290, at *22-26 (June 11, 2012); *see infra* § VI. Those doctrines aside, Plaintiffs' claim raises an immediate foreign policy concern involving Iran, a nation with which the U.S. has significant tension. *See* Tom Cohen, *Obama Pledges to Stop an Iranian Nuclear Weapon*, CNN (Mar. 4, 2012), *available at* http://articles.cnn.com/2012-03-04/politics/politics_obama-aipac_1_nuclear-weapon-weapons-grade-uranium-obama-pledges. A judgment against Defendants in this case would necessarily implicate Iran in violations of the law of nations. The § 1350 jurisprudence counsels great caution in rendering such judgments:

> It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.

Sosa, 542 U.S. at 727, 124 S.Ct. at 2763.

Second, recognizing Plaintiffs' claim would be inconsistent with Congressional action concerning bribery and with the Supreme Court's tenet that "a decision to create a private right of action is one better left to the legislative judgment…." *Sosa*, 542 U.S. at 727, 124 S.Ct. at 2762-3 (encouraging courts "to look for legislative guidance before exercising innovative authority over substantive law"). The legislature chose not to create a private right of action for FCPA violations. *See Lamb v. Phillip Morris, Inc.*, 915 F.d at 1029 ("Because the [Senate] conference report makes no mention of a private right of action, we infer that Congress intended no such result."); *cf. Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012) (noting Congressional

inaction when refusing to recognize a *Bivens* claim against federal officials). Similarly, Congress made clear that the OECD Convention did not create any private rights of action. *See* Senate Foreign Relations Committee Report on OECD Convention, S. Rep. No. 105-8381, at 8381-82 (1998) (omitting mention of private right of action). In the absence of a "congressional mandate to seek out and define" new ATS claims, *Sosa*, 542 U.S. at 728, 124 S.Ct. at 2763, Defendants respectfully submit that this Court should decline Plaintiffs' invitation to do so.[9]

II. PLAINTIFFS' AIDING AND ABETTING CLAIM IS NOT COGNIZABLE

Section 1350 also confers jurisdiction over alien tort claims in violation of a U.S. treaty. Because the statute is jurisdictional and creates no substantive rights, Plaintiffs' treaty claim must arise under a treaty or some other provision of law. Plaintiffs have not established any such basis for their claim, and accordingly, Count II should be dismissed.

The Complaint fails to allege any treaty violation that is cognizable as a tort under § 1350. Although Plaintiffs assert that "the Iranian and South African government participation in corruption in the IAEA vote," violated U.S. treaties, Opp. at 11, *citing* Compl. ¶ 207, they fail to identify any provision of the materials cited in Court II that would give rise to a private right of action, much less a tort claim for aiding and abetting a violation by a treaty party.[10]

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[9] Plaintiffs quote the *Sosa* Court's statement that "a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision," Opp. at 4-5, as an invitation for courts to recognize new and different tort claims under § 1350. The Court's statement is far from a carte blanche to flex a court's federal common law muscles, but a cautionary observation about the nature of judicial lawmaking. As the Court explained, the "positivist" conception of the common law that was received wisdom at the time of the Founding viewed judges as finding or discovering pre-existing rules of common law. The post-Erie "realist" view is that judicial rulemaking, including in the context of federal common law, is essentially legislative. Thus, the Court's point is that judges should exercise their rulemaking authority cautiously. *Sosa*, 542 U.S. at 726-7, 124 S.Ct. at 2762-3. Indeed, the Court emphasized that, after *Erie*, judges should not "take a more aggressive role in exercising a jurisdiction [under § 1350] that remained largely in shadow for much of the prior two centuries." *Id.* at 726.

[10] Plaintiffs also fail to identify any authority supporting aiding and abetting a violation of a treaty, citing merely to *Doe VIII v. Exxon Mobil Corp.*, which deals instead with aiding and abetting "a violation of an international law norm." 654 F.3d at 30; *see* Opp. at 10.

Plaintiffs' only references to treaties are in a footnote discussing the Nuclear Non-Proliferation Treaty (the "NPT") and the U.N. Charter, but Plaintiffs cite no specific treaty provision that was violated nor do they explain how the NPT or U.N. Charter were violated. Opp. at 11 n.9. Plaintiffs' general allegations of treaty violations are mere legal conclusions and therefore need not be credited by this Court in assessing Count II. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S.Ct. 1937, 1949 (2009); *Partovi v. Matuszewski*, 647 F. Supp. 2d 13, 21 (D.D.C. 2009), *aff'd*, 2010 WL 3521597 (D.C. Cir. 2010) (dismissing treaty claim raised by plaintiff in response to motion to dismiss and complaint included no specific factual allegations concerning claim). Moreover, Plaintiffs do not even attempt to establish a legal basis for a private right of action under either the NPT or the U.N. Charter, much less a tort action for aiding and abetting a violation of either document. Nor could they, because no court has found either that the NPT or the U.N. Charter is self-executing or that Congress has authorized any private rights of action under either of them. *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 513-14, 128 S.Ct. 1346, 1361-63 (2008) (declining to find that Article 94 of the U.N. Charter enables private actors to seek direct enforcement of ICJ judgments in domestic courts); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 n.24 (2d Cir. 2003) ("although the Charter of the United Nations has been ratified by the United States, it is not self-executing"). *See generally* Mot. at 18-19 & n.13 and cases cited therein.

Here again, we respectfully submit that the Court should exercise caution in considering the potential foreign affairs implications of Plaintiffs' claims[11] because Iran's compliance with the NPT is presently the subject of extensive and complex diplomatic efforts and recent

[11] The sensitive nature of the U.S. relationship with Iran also underscores why this Court should dismiss this claim on Act of State grounds. *See infra* section V.

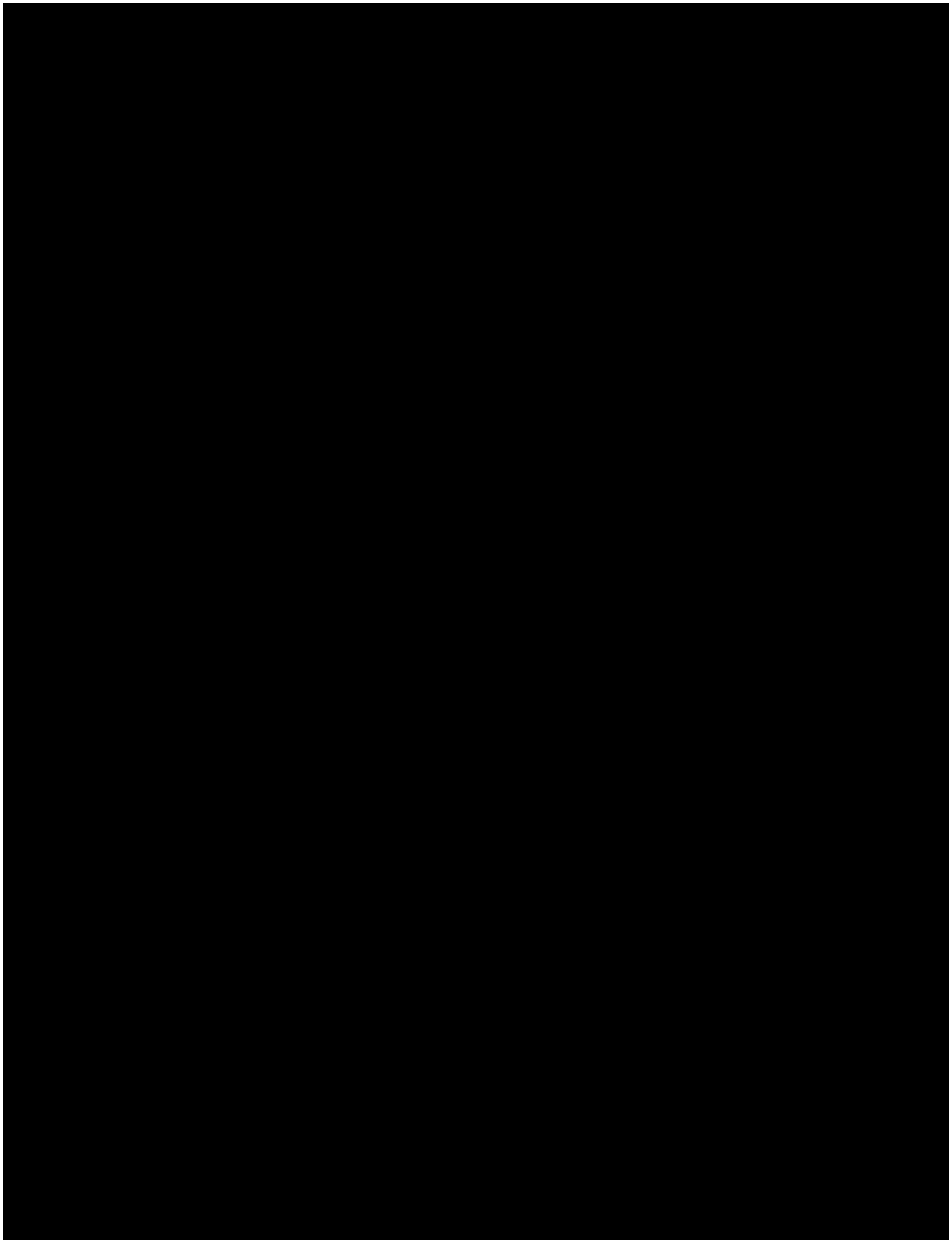
legislative activity, which implicate U.S. foreign relations with Iran, South Africa and other countries.[12]

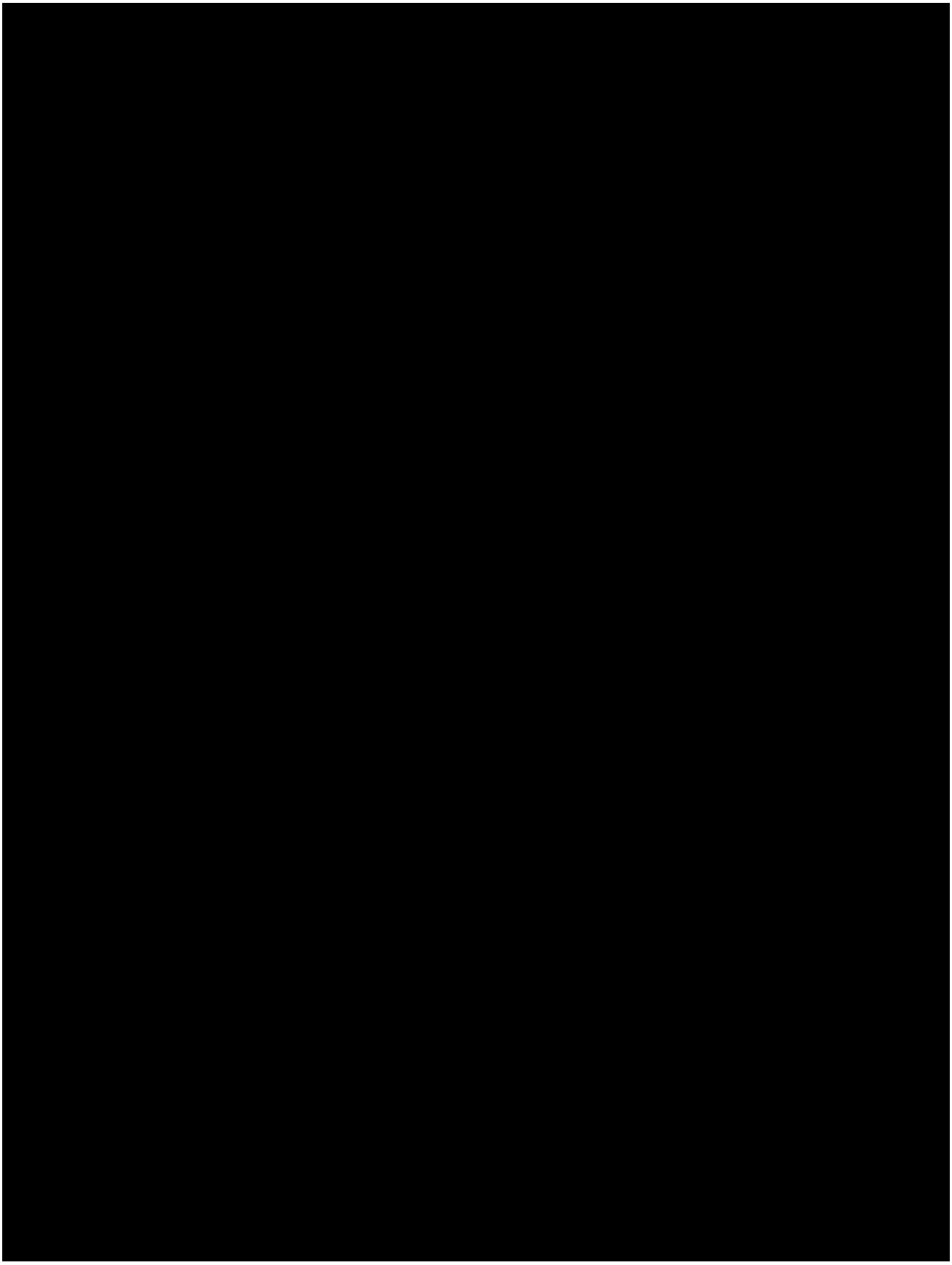
III. THE COURT LACKS SUPPLEMENTAL JURISDICTION

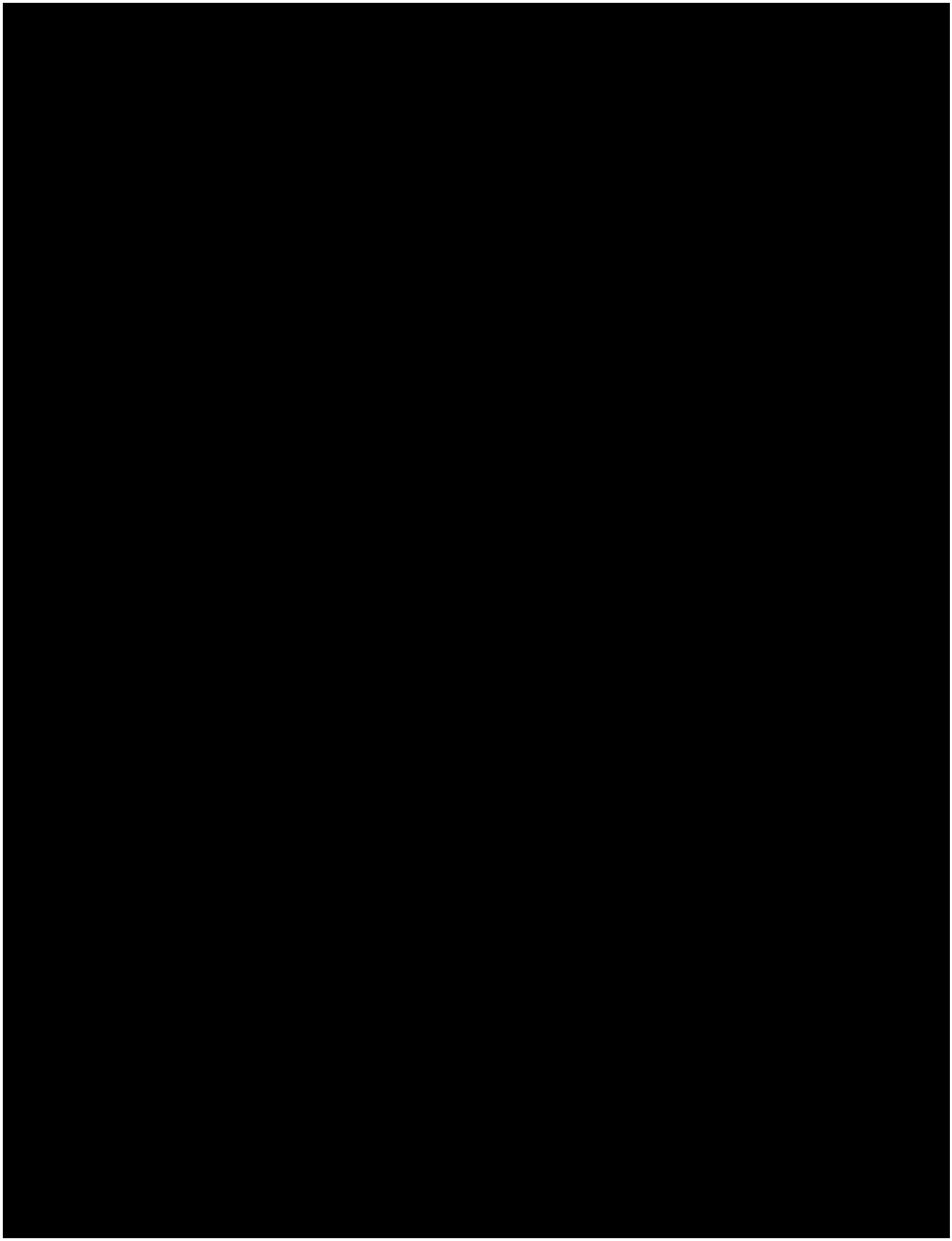
Because the Court lacks original subject matter jurisdiction over Plaintiffs' ATS claims, "there is no basis to exercise the Court's supplemental jurisdiction over Plaintiff's state-law common law claim under 28 U.S.C. § 1367." *See Alec L. v. Jackson*, ___ F. Supp. 2d ___, Civ. No. 1:11-cv-02235, 2012 WL 1951969, at *4 (D.D.C. May 31, 2012). To the extent they argue to the contrary, Plaintiffs misstate the law. *See Harris v. Secretary, U.S. Dep't of Veterans Affairs*, 126 F.3d 339 (D.C.Cir. 1997) (exercising supplemental jurisdiction after claim over which court had original jurisdiction was dismissed for non-jurisdictional reasons); *Heenan v. Leo*, 525 F. Supp. 2d 110 (D.D.C. 2007) (same).

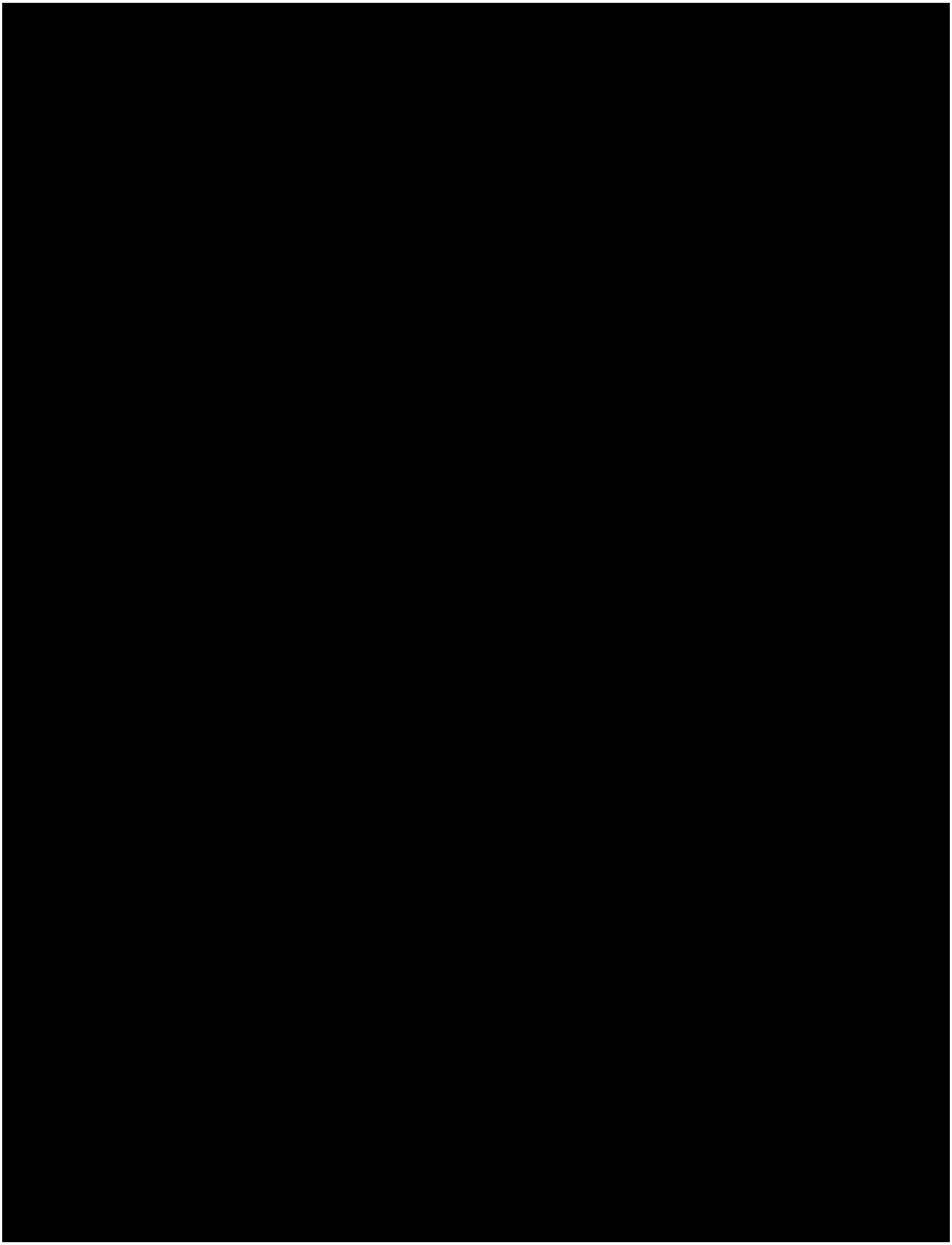
[redacted]

[12] Congress recently passed Iran sanctions legislation, granting a limited exemption for South Africa, which the Secretary of State has recognized as an ally in "stopping nuclear proliferation." *See* H.R. 1905, 112th Cong. (2012); Hillary Rodham Clinton, U.S. Sec'y of State, The United States – South Africa Partnership: Going Global (Aug. 8, 2012), *available at* http://www.state.gov/secretary/rm/2012/08/196184.htm and Regarding Significant Reductions of Iranian Crude Oil Purchases (June 11, 2012), *available at* http://www.state.gov/secretary/rm/2012/06/192078.htm.









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V. THE COURT LACKS PERSONAL JURISDICTION OVER DEFENDANTS

A. This Court Cannot Exercise General Jurisdiction Over Defendants

Plaintiffs have not established this Court's jurisdiction over Defendants,[21] as is their burden, *see Allen v. Russian Fed'n*, 522 F. Supp 2d 167, 181 (D.D.C. 2007), and cannot (i) rely on alleged contacts of MTN Group's subsidiaries; (ii) show that Defendants were "doing business" in D.C.; or (iii) show that jurisdiction would comply with due process. *See* Mot. at 31-37. Rather than refute these arguments, Plaintiffs misstate them, misstate the law, and rely on new allegations, but they do not show that this Court has jurisdiction over Defendants.[22]

1. Plaintiffs Cannot Rely on the Alleged Contacts of MTN Group's Subsidiaries

Defendants cannot be subject to jurisdiction based on the alter ego theory because Plaintiffs do not allege sufficient facts to show a unity of interest and ownership among MTN

[redacted]

[21] For the same reasons that the alleged contacts are insufficient to support general personal jurisdiction under D.C. law, they are also insufficient to support jurisdiction under Federal Rule of Civil Procedure 4(k)(2). *See* Mot. at 32 n.29, 37.

[22] By not denying the specific factual allegations in the Complaint, Defendants in no way concede the truth of *any* of them. *See* Motion at 4, n. 3.

Group and its subsidiaries.[23] *See* Mot. at 31-32. Indeed, the only relevant "facts" that Plaintiffs allege—that MTN Group "controls" its subsidiaries and that MTNI is a wholly-owned subsidiary whose decisions were "directed" by MTN Group, *see* Opp. at 30-32—do not show a unity of interest and ownership.[24] *See Khatib v. Alliance Bankshares Corp.*, Civil Action No. 12-00056 (CKK), 2012 U.S. Dist. LEXIS 27020, *35 (D.D.C. March 1, 2012) (refusing to impute wholly-owned subsidiary's jurisdictional contacts to parent). Moreover, Plaintiffs fail to address any other relevant facts and rely largely on out-of-context statements, *see* Opp. at 30-31, that do not show disregard for the corporate form.[25]

Plaintiffs also misstate the law by claiming that this Court applies tests other than the alter ego and agency tests for attributing the jurisdictional contacts of one entity to another. *See* Opp. at 31. In fact, in *Diamond Chemical Company, Inc. v. Atofina Chemicals, Inc.*, the case Plaintiffs rely on, the court explicitly rejected the application of tests other than the alter ego test for attribution of jurisdictional contacts. *See* 268 F. Supp. 2d 1, 14 (D.D.C. 2003) (applying other tests to successor liability rather than to attribution of jurisdictional contacts). Moreover, to the extent the agency test is applicable, Plaintiffs have failed to plead allegations sufficient to show an agency relationship. *See Khatib*, 2012 U.S. Dist. LEXIS 27020 at *39 (allegations of ownership and control cannot establish agency relationship).

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[23] Plaintiffs' Complaint also fails to adequately allege that treating MTN Group's subsidiaries' alleged wrongful acts as those of the subsidiaries would be inequitable, a required element for alter ego jurisdiction. *See* Mot. at 31-32.

[24] Plaintiffs' reliance on *I Mark Marketing Services, LLC. v. Geoplast, S.p.A.*, 733 F. Supp. 2d 141 (D.D.C. 2010) is misplaced. The *I Mark* court highlighted that the defendant's managing director was the subsidiary's president and sole director and found that these and other contacts established the defendant's common and "*complete* control" over its subsidiary. *Id.* at 152. Plaintiffs do not allege that MTN Group exercises the "complete" control that was found in *I Mark*¸ nor do they address the other factors raised in *I Mark. See id.*

[25] As in *Khatib*, where the court held that descriptions of the parent and subsidiary in collective terms in a Form 10-K were insufficient to infer that they operated as one enterprise, the quotes Plaintiff cites are similarly insufficient. *Khatib*, 2012 U.S. Dist. LEXIS 27020 at *36-37.

2. Defendants' Alleged U.S. Contacts Cannot Establish Jurisdiction

Defendants cannot be subject to jurisdiction based on their alleged individual contacts with the forum. *See* Mot. at 32-35. First, the existence of www.mtntopup.com cannot confer jurisdiction because it is operated by Sochitel, a distributor. *See* Harkness Decl. ¶ 5, Exh. D; *Formica v. Cascade Candle Co.*, 125 F. Supp. 2d 552, 555 (D.D.C. 2001) (citing *Asahi Metal Industry Co., Ltd. v. Superior Ct. of Cal.*, 480 U.S. 102, 112, 107 S.Ct. 1026 (1987)) (finding no purposeful availment or jurisdiction where defendants' product was distributed by nationwide distributor).[26] Second, Plaintiffs' speculative allegation concerning Defendants' use of Intelset's satellites is insufficient to establish jurisdiction. *See* Mot. at 33-34 (contracts with U.S. companies do not establish jurisdiction). Third, Plaintiffs' new allegations regarding Western Union do not establish jurisdiction because (i) the exhibit post-dates the Complaint and cannot support jurisdiction, *see Allen*, 522 F. Supp. 2d at 193 (jurisdiction considered as of date of complaint); and (ii) Western Union customers send money to Defendants' customers abroad, resulting in no contact between Defendants and the U.S. *See* Opp. Exh. 7.[27]

The insignificant contacts alleged in the Complaint are also insufficient to establish jurisdiction in the aggregate. In *Allen v. Russian Federation*, 522 F. Supp. 2d 167, 194-196 (D.D.C. 2007), this Court declined to exercise general jurisdiction over a foreign defendant despite allegations that, *inter alia*, (i) defendant's non-sponsored ADRs were actively traded on U.S. securities markets; (ii) defendant "sponsored Level-I ADRs" in the U.S., using a New York bank; (iii) defendant shipped natural gas to the U.S.; and (iv) defendant entered into agreements

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[26] Because Plaintiffs cannot use this contact to establish general jurisdiction over Defendants, their reliance on *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506 (D.C. Cir. 2002) is misplaced. That case is entirely irrelevant here, as Defendants do not operate a consumer-driven website in the U.S.

[27] Because alleged "contact" could not support jurisdiction over Defendants, the Court should deny Plaintiffs' discovery request. *See Roz Trading Ltd. v. Zeromax Group, Inc.*, 517 F. Supp. 2d 377, 388 (D.D.C. 2007).

with U.S. companies *Id.* at 194-96. That court held that these contacts were "too sporadic to constitute the 'continuous and systematic' contacts necessary . . . to impose general jurisdiction on a foreign defendant" and the same result should apply here.[28]

B. This Court Cannot Exercise Specific Jurisdiction Over Defendants

Plaintiffs do not dispute, and therefore concede, that: (i) there is no jurisdiction as to the defamation claim; (ii) jurisdiction over the breach of contract claim would not provide jurisdiction over the remaining claims; and (iii) D.C. Code §§ 13-423(a)(3) and (4) do not provide a basis for jurisdiction over the breach of contract and defamation claims. *See* Mot. at 37-40. Additionally, the Court lacks jurisdiction over the breach of contract claim because Plaintiffs have not established Defendants' minimum contacts with D.C. or that the exercise of jurisdiction would amount to "fair play and substantial justice." *Nat'l Resident Matching Program v. Elec. Residency LLC*, 720 F. Supp. 2d 92, 98 (D.D.C. 2010); *see* Mot. at 37-40.

C. Exercising Jurisdiction Would Be Inconsistent with Due Process

The Court's assertion of general or specific personal jurisdiction over Defendants would be unreasonable and inconsistent with due process. *See* Mot. at 36-37, 40. Neither the allegations in the Complaint nor Plaintiffs' Opposition compels a different result.

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[28] The additional contacts that the *Allen* court considered included (i) defendant "revealed plans to issue $500 million in bonds using U.S. investment banks"; (ii) defendant had a U.S.-based subsidiary; (iii) defendant used U.S. investment banks to manage a $1 billion bond issue; (iv) a representative of defendant met with U.S. officials; and (v) the defendant's Vice Chairman visited Houston.

This Court also declined to exercise jurisdiction over a foreign defendant in *Telcordia Tech., Inc. v. Telkom SA, Ltd.*, Civil Action No. 02-1990 (JR), 2003 U.S. Dist. LEXIS 23726 (D.D.C. July 20, 2003) despite allegations that (i) contract payments were to be sent to plaintiff's U.S. bank account; (ii) defendant made four visits to the U.S. in connection with the contract; (iii) defendant "listed an initial public offering on the New York Stock Exchange"; (iv) defendant retained services from a California company and contracted with a Connecticut company. *Id.* at *11-12. The court held that these contacts "were not and are not the 'systematic and continuous' contacts that are necessary for general personal jurisdiction." *Id. at *12.*

VI. THE FORUM NON CONVENIENS DOCTRINE COUNSELS DISMISSAL

This case should be dismissed on the grounds of forum non conveniens, which even Professor Vega believes supports dismissal of ATS cases based on bribery abroad.[29] *See* Vega, *supra* 6, at 445. South Africa's courts provide adequate remedies, have a greater interest in, and are competent to hear this case, and the relevant public and private factors point to South Africa as the more convenient forum for this case.[30] *See* Mot. at 40-42; Kriegler Decl. ¶¶ 6-7.5.

Notwithstanding their demands for deference, Plaintiffs have not articulated any reason for filing suit here and cannot do so: no parties or witnesses to this case are D.C. residents; Defendants are not subject to personal jurisdiction in D.C.; and none of the underlying events occurred here.[31] *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509-10, 67 S.Ct. 839, 843 (1947). In short, D.C. is not convenient for Plaintiffs or Defendants.

South Africa, on the other hand, is convenient for both parties, offers an adequate alternative forum, and has a nexus to this case. Plaintiffs have conceded that "[t]here would be of course jurisdiction available in the South African courts" over the Defendants in this action.

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[29] In the *Kiobel* litigation, the U.S. has argued that exhaustion of remedies and forum non conveniens should have "special force" in ATS cases, rendering U.S. courts a "last resort, if available at all" where the underlying events occurred overseas. Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 22, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (S.Ct. *petition for cert. filed* June 6, 2011) 2012 WL 2161290, at *22 (June 11, 2012).

[30] This Court should dismiss this case because Plaintiffs have failed to exhaust the remedies available in South Africa. *See Sosa*, 542 U.S. at 733 n.21, 124 S.Ct. at 2766 n.21 (offering to consider exhaustion of remedies argument "in an appropriate case."). International law typically requires exhaustion unless local remedies are clearly a sham, inadequate, or their application is unreasonably prolonged. *See Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 829-30 (9th Cir. 2008) (*en banc*). Even the D.C. Circuit in *Doe VIII*, upon which Plaintiffs rely, has agreed that exhaustion of remedies is appropriate absent futility. *See Doe VIII*, 654 F.3d 11 (on remand, district court could require exhaustion of remedies). In addition, Plaintiffs' accusation that Defendants rely on "new facts" to support this argument should be disregarded because Plaintiffs have not distilled them for the Court. *See* Opp. at 39 n.39.

[31] Plaintiffs rely on *Lans v. Adduci Mastriani & Schaumberg, L.L.P.*, a case against defendants working in D.C., where the events occurred and witnesses were easily available. *See* 786 F. Supp. 2d 240, 293-295 (D.D.C. 2011). *Lans* does not apply here, where Defendants do not reside or do business in the U.S., none of the alleged events occurred in the U.S., and 19 out of 23 individuals identified in Plaintiffs' "Cast of Characters" are located outside of the U.S., cannot be subpoenaed, but may be subject to compulsory process in South Africa. *See* Mot. at 41-42.

See Coleman Decl., Exh. I.[32] Moreover, Plaintiffs' objections to the Kriegler Declaration should be dismissed as nothing more than unsupported speculation and innuendo. *See* Opp. at 35-36. Their allegations of "political interference" show an unwarranted lack of respect for the South African judiciary, and this Court has dismissed similar arguments supported with more evidence than presented here. *See id.*; *MBI Grp., Inc. v. Credit Foncier du Cameron*, 558 F. Supp. 2d 21, 298-30 (D.D.C 2008), *aff'd*, 616 F.3d 568 (D.C. Cir. 2010) ("[A] foreign forum is not inadequate merely because of general allegations of corruption in the judicial system.").

The private factors favor South Africa. For instance, South African witnesses should testify in South Africa, where they are likely subject to subpoena.[33] *See, e.g., Stromberg v. Marriott Int'l, Inc.*, 474 F. Supp. 2d 57, 63 (D.D.C. 2007) (dismissing case where witnesses and evidence were in Mexico). Although Plaintiffs suggest that testimony could be presented in D.C. by video, *see* Opp. at 40, the Supreme Court has discouraged this approach, noting that it may be unsatisfactory to litigants, courts, and juries. *See Gulf Oil*, 330 U.S. at 511, 67 S.Ct. at 844.

The public factors also favor South Africa because this case will unnecessarily burden this Court and a U.S. jury and because the U.S, unlike South Africa, lacks an interest in this case. *See Gulf Oil*, 330 U.S. at 508-09, 67 S.Ct. at 843; *see* Mot. at 42.

VII. THE ACT OF STATE DOCTRINE COUNSELS DISMISSAL

The claims for aiding and abetting breach of a treaty (Count II), tortious interference with contract (Count III), conversion (Count IV), and conspiracy (Count VI as it relates to Counts III

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[32] Defendants will waive objections under South African law based on personal jurisdiction if required by the Court upon conditional dismissal in favor of South Africa. Even *Lans* concedes that dismissal would have been appropriate if defendants in that case had made a similar concession. *See* 786 F. Supp. 2d at 293.

[33] Plaintiffs' claim that South Africa is unsafe for Mr. Kilowan is not credible. During his deposition, Mr. Kilowan refused to give the names of his business associates who he claimed were intimidated, explicitly stated that these associates did not claim that Defendants intimidated them, and cites an as an example of intimidation that a person called his ex-wife to have coffee. *See* Harkness Decl., Exh. A at 838:9-17, 837:22-838:1-5, 840:1-3, 845:8-11.

and IV) must be dismissed under the act of state doctrine because they require adjudication of a foreign sovereign's acts within its own territory:

- Plaintiffs' aiding and abetting claim depends on the Court's determination that South Africa and/or Iran breached a treaty with the United States;
- Plaintiffs' claims for tortious interference with contract, conversion, and conspiracy depend on the Court's determination that the Iranian legislation at issue—which voided any contract rights Plaintiffs may have had, *see* Award ¶¶ 135-41, 227-30—was illegitimate.
- Plaintiffs' claim for conspiracy depends in part on the Court's determination that Plaintiffs have established successful claims for tortious interference and conversion. *See Wilson v. U.S. DOT*, 759 F. Supp. 2d 55, 64-5 (D.D.C. 2011) (civil conspiracy "under D.C. law is . . . only a means for establishing vicarious liability for an underlying tort").

Plaintiffs simply ignore this issue, directing the Court to consider *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*, a Supreme Court case involving a dispute between two private parties over a contract issued by a foreign sovereign. *See* 493 U.S. 400, 101 S.Ct. 701 (1990). Unlike this case, *W.S. Kirkpatrick* involved no claims that required a foreign government to breach a treaty, illegitimately avoid contractual rights, or engage in a conspiracy with a party to the case. *See id.* at 402 (concerning violations of statutory prohibitions, none of which required judgment over a foreign sovereign's activities). In fact, the Supreme Court acknowledged that the act of state doctrine did not apply because it applies only where "the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." 493 U.S. at 405, 101 S.Ct. at 704; *see also Oceanic Exploration Co. v. ConocoPhillips, Inc.*, No. 04332, 2006 U.S. Dist. LEXIS 72231 (D.D.C. Sept. 21, 2006) (claims did not require judgment about foreign sovereign act). Plaintiffs' claims, however, put sovereign Iranian and South African acts squarely in question. Therefore, the Court should dismiss Counts II, III, IV, and VI (as it relates to Counts III and IV) of the Complaint based on the act of state doctrine.

VIII. PLAINTIFFS' NON-FEDERAL CLAIMS ARE TIME BARRED

The discovery rule cannot save Plaintiffs' time-barred claims because they had accrued by April 2008, if not in 2005, when Plaintiffs knew or should have known of their claims. *See Knight v. Furlow*, 553 A.2d 1232, 1234 (D.C. 1989) (setting forth the relevant test); Mot. at 43-44. Plaintiffs certainly had reason to suspect Defendants alleged wrongdoing by no later than April 2008, when Plaintiffs accused IEDC of "covert negotiations with MTN." *See* Statement of Claim ¶ 3.28. Plaintiffs' unsupported contention that Defendants hid their alleged wrongdoing, *see* Opp. at 43, should be disregarded because they allege no facts to support this accusation in their Complaint, as they must to benefit from the discovery rule. *William J. Davis, Inc. v. Young*, 412 A.2d 1187, 1191-92 (D.C. 1980) (requiring affirmative effort to hide facts). Because Plaintiffs have made no such allegations, their principal non-federal claims are time-barred.

IX. PLAINTIFFS HAVE NOT ALLEGED BREACH OF CONTRACT OR DEFAMATION

The Court should dismiss Plaintiffs' breach of contract claim because Plaintiffs have failed to plead *any* facts concerning their request for damages, beyond merely stating that the alleged breach affected their share price. *See Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009) (prohibiting monetary recovery absent harm shown); Mot. at 44. Plaintiffs argue that this Court should accept their conclusory allegations because their Complaint is not "wholly incomprehensible," Opp. at 44, and refer to two irrelevant cases for support. *See* Opp. at p. 44; *Freeland v. Iridium World Commc'ns, Ltd.*, 233 F.R.D. 40, 47 (D.D.C. 2006) (concerning pleading requirements for loss causation in Rule 10b-5 claim); *Klayman v. Judicial Watch, Inc.*, 628 F. Supp. 2d 112, 131 (D.D.C. 2009) (concerning adequacy of proof after plaintiffs offered sufficient allegations of damages). Although not "wholly incomprehensible," Plaintiffs' pleadings do not demonstrate damages suffered, and consequently, this claim must be dismissed.

The Court should also dismiss the defamation claim because Plaintiffs failed to include factual allegations of Defendants' knowledge or reckless disregard in making the disputed statements, which they must as public figures. *See OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 48-49 (D.D.C. 2005). *Parsi v. Daioleslam* makes it clear that Plaintiffs are limited public figures. In *Parsi v. Daioleslam*, the court found that the plaintiff was a limited public figure because the case involved: (i) "a public controversy" (Iranian-U.S. relations); (ii) plaintiffs who discussed the controversy with the press; and (iii) statements concerning plaintiffs' "relationship" with Iran. 595 F. Supp. 2d 99, 105-06 (D.D.C 2009); s*ee also Tavoulareas v. Piro*, 817 F.2d 762, 772-73, 789-90 (D.C. Cir. 1987) (setting aside defamation verdict because the plaintiff was a public figure and no actual malice was shown). Those factors apply equally to Plaintiffs, and consequently, their claim should be dismissed. *See id.*; Mot. at 44.

CONCLUSION

For the foregoing reasons and those presented in Defendants' opening statement of points and authorities, Defendants respectfully request that the Court enter an order dismissing the Complaint and granting Defendants such additional relief as the Court may deem just and proper.

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Respectfully submitted,

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