No. 11-649

IN THE
Supreme Court of the United States

RIO TINTO PLC AND RIO TINTO LIMITED,
Petitioners,

v.

ALEXIS HOLYWEEK SAREI, *et al*.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE GOVERNMENTS OF AUSTRALIA AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS ON CERTAIN QUESTIONS IN THEIR PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, the Governments of the United Kingdom of Great Britain and Northern Ireland and of Australia (jointly, "the Governments") move for leave to file the accompanying brief as *amici curiae* in support of the petition on two questions presented in their petition. Counsel for petitioners has consented to the filing of this brief, but counsel for the respondents has withheld consent.

The petition asks this Court to review two questions on which the Governments have maintained great interest over a long period of time, both before this Court and other U.S. Courts.[1] These questions (numbers 1 and 3 in the petition) ask the Court to (i) make clear the jurisdictional limits under international law that apply to a dispute among alien parties concerning non-U.S. activities under the Alien Tort

[1] These questions have been presented by Petitioners as follows:

> 1. Whether U.S. courts should recognize a federal common law claim under the ATS arising from conduct occurring entirely within the jurisdiction of a foreign sovereign, especially where the claim addresses the foreign sovereign's own conduct on its own soil toward its own citizens.
>
> 3. Whether a plaintiff asserting a federal common law claim under the ATS addressed to conduct occurring entirely within the jurisdiction of a foreign sovereign must seek to exhaust available remedies in the courts of that sovereign before filing suit in the United States, as international and domestic law require. *Petition for Writ of Certiorari* at i.

Statute, 28 U.S.C. §1350 ("ATS") and (ii) determine whether the international law doctrine of "exhaustion of local remedies" should be applied even where there would be sufficient factual nexus to sustain U.S. jurisdiction under international law.

The Governments have repeatedly made clear their opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for foreign activities that have allegedly caused foreign injury. The Governments previously expressed this concern (together with the Government of Switzerland) in the ATS context in their joint amicus brief to this Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) ("*Sosa*"); and each filed an amicus brief in this Court in *Morrison v. National Australian Bank Ltd.*,130 S.Ct. 2869 (2010) ("*Morrison*").[2] The Governments also twice submitted joint *amicus* briefs on the issue of extraterritorial jurisdiction during the five years in which the *Rio Tinto* case, the subject of the present

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[2] *Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioners, Sosa v. Alvarez—Machain*, 542 U.S. 692 (2004) (Brief filed January 23, 2004) (No. 03-339), 2004 U.S. S. Ct. Briefs LEXIS 910; *Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants-Appellees, Morrison v. National Australian Bank Ltd.,* 130 S.Ct. 2869 (2010) (Brief filed February 26, 2010) (No. 08-1191), 2010 U.S. S. Ct. Briefs LEXIS 172; and *Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents, Morrison v. National Australian Bank Ltd.,* 130 S.Ct. 2869 (2010) (Brief filed February 26, 2010) (No. 08-1191), 2010 U.S. S. Ct. Briefs LEXIS 174.

petition, was pending before the Court of Appeals for the Ninth Circuit.[3]

The Governments believe that they have the experience and perspective to clarify that principles of international law preclude U.S. courts from exercising jurisdiction in extraterritorial ATS cases, where non-resident aliens are making claims against foreign defendants concerning foreign activities. The essential question that the petition raises for the Court is whether the strong presumption against construing a U.S. statute to confer extraterritorial jurisdiction, which was emphasized in the Court's *Morrison* and earlier decisions, also applies to the "very limited category" of common law claims by alien plaintiffs under the ATS for overseas injuries contemplated by the Court's decision in *Sosa*. 542 U.S. at 712.

Because of the Governments' sustained interest and experience in these critical issues, their motion for leave to file the accompanying brief as *amici curiae* should be granted.

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[3] *Brief of the Government of the Commonwealth of Australia and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Defendants-Appellees'/Cross-Appellants' Motion for Rehearing En Banc, Sarei v. Rio Tinto, PLC,* 550 F. 3d 822 (9th Cir. 2008) (Brief filed May 24, 2007) (Nos. 02-56256, 02-56390); *Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Commonwealth of Australia as Amici Curiae in Support of the Defendants-Appellees/Cross-Appellants, Sarei v. Rio Tinto, PLC,* 2011 U.S. App. LEXIS 21515 (9th Cir. 2011) (Brief filed December 16, 2009) (Nos. 02-56256, 02-56390, 09-56381).

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INTEREST OF *AMICI CURIAE*

The Government of the United Kingdom of Great Britain and Northern Ireland ("UK Government") and the Government of Australia (jointly, "the Governments") are committed to the international rule of law, including the promotion of, and protection against violations of, human rights.[1]

Also, the Governments have maintained over a long period of time their opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged foreign activities that caused injury. This position is not one that has been lightly adopted by the Governments. It is based on their concern that such exercises of jurisdiction are contrary to international law and create a substantial risk of jurisdictional conflicts. In this regard, the Governments each filed an amicus brief in this Court arguing against the exercise of U.S. extraterritorial jurisdiction in *Morrison v. National Australian Bank Ltd.*, 130 S.Ct. 2869 (2010) ("*Morrison*"), where the

[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae states that no counsel for a party authored this brief in whole or in part and that no person or entity other than Amici Curiae, its members, and its counsel contributed monetarily to the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief.

Court unanimously rejected U.S. jurisdiction over the foreign investor-plaintiffs, holding that the federal securities laws do not reach disputes involving only foreign issuers and investors.[2] In addition, the UK Government filed an amicus brief making a similar argument in *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004) ("*Empagran*"), in which the Supreme Court and, on remand, the D.C. Circuit, read the Foreign Trade Antitrust Improvements Act of 1982 as excluding most foreign purchasers' claims for foreign injuries. 417 F.3d 1267 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 1092 (2006).[3]

The Governments have repeatedly expressed their deep concern about the failure by U.S. courts to take account of constraints under international law when construing the Alien Tort Statute, 28 U.S.C. §1350 ("ATS"), which in turn has led those courts to entertain suits by foreign plaintiffs against foreign defendants for conduct that took place entirely within the territory of a foreign sovereign. The Governments first expressed this concern (together with the Government of Switzerland) in their joint amicus brief to

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[2] *Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants-Appellees, Morrison v. National Australian Bank Ltd.*, 130 S.Ct. 2869 (2010) (Brief filed February 26, 2010) (No. 08-1191), 2010 U.S. S. Ct. Briefs LEXIS 172, and *Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents, Morrison v. National Australian Bank Ltd.*, 130 S.Ct. 2869 (2010) (Brief filed February 26, 2010) (No. 08-1191), 2010 U.S. S. Ct. Briefs LEXIS 174.

[3] *Brief of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, F. Hoffman-La Roche v. Empagran, Ltd.*, 542 U.S. 155 (2004) (Brief filed February 3, 2004) (No. 03-724), 2004 U.S. S. Ct. Briefs LEXIS 104.

this Court in *Sosa v. Alvarez – Machain*, 542 U.S. 692, 712 (2004) ("*Sosa*"), in which this Court ruled that the ATS provided jurisdiction for a "very limited category" of claims by alien plaintiffs for injuries suffered outside of the United States.[4] Then the Governments submitted two more amicus briefs when the present *Rio Tinto* case was before the Ninth Circuit Court of Appeals. In 2007, the Governments filed an amicus brief in support of Rio Tinto's petition for en banc review by the Defendants ("2007 amicus brief"), urging that the Court of Appeals apply jurisdictional limitations recognized in international law and by this Court in *Sosa*.[5] Nineteen months later, the Governments filed another amicus brief expanding on the same arguments when the en banc Court of Appeals was considering the case for the second time.[6] The Governments' position was rejected by a 6-5 vote of the en banc Court of Appeals.

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[4] *Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioner, Sosa v. Alvarez – Machain*, 542 U.S. 692 (2004) (Brief filed January 23, 2004) (No. 03-339), 2004 U.S. S. Ct. Briefs LEXIS 910.

[5] *Brief of the Government of the United Kingdom of Great Britain and Northern Ireland and the Commonwealth of Australia as Amici Curiae in Support of the Defendants-Appellees'/Cross-Appellants' Motion for Rehearing En Banc, Sarei v. Rio Tinto, PLC*, 550 F. 3d 822 (9th Cir. 2008) (Brief filed May 24, 2007) (Nos. 02-56256, 02-56390).

[6] *Brief of the Government of the United Kingdom of Great Britain and Northern Ireland and the Commonwealth of Australia as Amici Curiae in Support of the Defendants-Appellees/Cross-Appellants*, *Sarei v. Rio Tinto, PLC*, 2011 U.S. App. LEXIS 21515 (9th Cir. 2011) (Brief filed December 16, 2009) (Nos. 02-56256, 02-56390, 09-56381).

The Governments are filing this amicus brief to reaffirm the position that they took jointly before this Court in *Sosa* and in their two Ninth Circuit amici briefs in *Rio Tinto*, and in separate amicus briefs to this Court in *Morrison*, and urge this Court to clarify that principles of international law preclude U.S. courts from exercising jurisdiction in extraterritorial ATS cases, i.e. those brought against foreign defendants concerning foreign activities.

SUMMARY OF ARGUMENT

The Petitioners seek to have this Court review four questions. The Governments urge the Court to grant certiorari to review two of these questions, while taking no position in this brief on the other two questions.[7] The two Questions Presented that the Governments urge this Court to review are numbers 1 and 3:

> 1. Whether U.S. courts should recognize a federal common law claim under the ATS arising from conduct occurring entirely within the jurisdiction of a foreign sovereign, especially where the claim addresses the foreign sovereign's own conduct on its own soil toward its own citizens.
>
> 3. Whether a plaintiff asserting a federal common law claim under the ATS addressed to conduct occurring entirely within the jurisdiction of a foreign sovereign must seek to exhaust available remedies in the courts of that sovereign

[7] Nor do the Governments take any position in this brief on any factual statements or allegations about the underlying dispute that may be made by Petitioners or any other party.

before filing suit in the United States, as international and domestic law require.[8]

These questions offer the Court an excellent opportunity to clarify and reinforce its *Sosa* decision and to make clear that the ATS as applied in accordance with international law does not permit U.S. courts to exercise extraterritorial civil jurisdiction to adjudicate claims with little or no connection to the United States. Such a decision should make clear that the principles of international law and comity recognized and applied in the Court's *Empagran* and *Morrison* decisions are fully applicable in the ATS area.

These questions are important to the Governments, committed as they are to promoting the rule of law, and to maintaining their own courts and judicial procedures to resolve civil disputes arising from events within their own territories, or which involve their own citizens and residents. And the questions are of immediate practical importance to foreign parties (like the Petitioners) that have been forced to engage in protracted and expensive litigation before U.S. courts to defend faraway conduct that is entirely remote from the United States.

International law imposes the "exhaustion of local remedies" requirement as condition precedent for states to espouse the claims of their nationals before international courts and tribunals; and the Governments submit that this requirement is appropriately applied where a foreign national seeks to bring claims before U.S. courts based on a violation of "the law of nations" which is alleged to have taken place in a foreign jurisdiction with a functioning judicial system. The Governments believe that the "exhaus-

[8] *Petition for Writ of Certiorari* at i.

tion of local remedies" requirement (i) is a prudential doctrine and (ii) should be stringently applied where the factual nexus between the claims and the United States is weak.

ARGUMENT

I. THERE IS A CLEAR AND URGENT NEED FOR THIS COURT TO RESOLVE THE JURISDICTIONAL UNCERTAINTY THAT CONTINUES TO BURDEN BOTH PARTIES AND JUDGES IN ATS CASES, DESPITE THIS COURT'S ATTEMPTED CLARIFICATION IN *SOSA*

Faced with a range of unresolved issues under a vague and long-dormant statute, this Court in *Sosa* focused on determining whether the plaintiff had been injured by "a tort…committed in violation of the law of nations." 542 U.S. at 698-99. Rejecting the plaintiff's broad view of such violations, the Court sustained dismissal of petitioner Sosa's case, while emphasizing that potential international conflicts "argue for great caution in adapting the law of nations to private rights." 542 U.S. at 728. It specifically questioned whether the U.S. courts could "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." 542 U.S. at 727. Clearly, the Court was counseling caution in the whole area of ATS litigation. However, as the D.C. Circuit recently explained, "The issue of extraterritoriality, although briefed, was not decided in *Sosa*, and it has yet to be decided by a circuit court of appeals." *John Doe VIII v. Exxon Mobil Corporation*, 654 F.3d 11, 18 (D.C. Cir. 2011) ("*Exxon*"). The result, according to the

dissent in *Exxon*, has been to create "the modern ATS litigation juggernaut [which] stems in large part from extension of the ATS to conduct occurring in foreign lands." 654 F.3d at 78 (Kavanaugh, J., dissenting).

The second en banc decision in the *Rio Tinto* case (coming three months after *Exxon)* is a case in which "the issue of extraterritoriality" has been decided, but in an incorrect way, and it thus offers the Court an opportunity to clear away the post-*Sosa* jurisdictional uncertainty in ATS cases by clearly reemphasizing the international law and comity principles that it adopted in *Empagran* and *Morrison.*

The Governments consider it would be appropriate to mandate dismissal of the *Rio Tinto* case on a motion to dismiss because, as pleaded, the case lacks any jurisdictional link with the United States under international law, which itself forms part of U.S. law. *See, e.g., The Paquete Habana*, 175 U.S. 677, 700 (1900).

A. The Basic Psychological Problem

The typical post-*Sosa* ATS case involves claims that a large class of foreign citizens and residents has been mistreated in the territory of a foreign state – and that the plaintiffs should be compensated by a substantial damages award under Rule 23 for alleged violation of "the law of nations" against non-U.S. corporations that carried on business in the territory of that State.[9]

When the District Judge assigned such an ATS complaint has to rule on Rule 12(b)(1) motion, he or

[9] A few ATS cases have involved U.S. corporations or their subsidiaries, but this has been the exception. *See, e.g., John Doe VIII v. Exxon Mobil Corp.*, 654 F.3rd 11 (D.C. Cir. 2011).

she generally has to accept the pleaded description of the serious wrongs as true. Such claims quite often survive the initial motion and are permitted to proceed to the discovery stage, and thus give faraway victims some chance of relief. The human rights dimensions of these ATS cases seem to have resulted in more of a downplaying of the jurisdictional constraints of international law in comparison to the class action complaints that allege more traditional business wrongs committed internationally (as in the antitrust and securities areas).

The Governments strongly believe that such allegations of human rights violations should be dealt with in an appropriate forum, *in accordance with international law*. In relation to claims of a civil nature, the bases for the exercise of civil jurisdiction under international law are well-defined.[10] They have never included universal civil jurisdiction. For the United States to allow suits by foreign nationals against foreign nationals under a U.S. law for conduct abroad would interfere fundamentally with other nations' sovereignty, and does not fall within accepted bases of jurisdiction under international law. It could also serve to interfere and complicate efforts within the territorial state to bring about redress for civil wrongs before domestic courts.

B. The U.S. Litigation System Continues to Act as a Magnet for the Kinds of Extraterritorial Claims Involved in the *Rio Tinto* Case

The present case is one of many in which large classes of foreign plaintiffs (generally assembled by

[10] It is relevant to note that those bases are different to the recognized bases for criminal jurisdiction.

U.S. lawyers) seek to bring an essentially foreign dispute before U.S. courts, as they did in the cases giving rise to this Court's *Empagran* and *Morrison* decisions.[11] The attractiveness of the United States as a forum for foreign plaintiffs can in part be traced to decisions by the U.S. to accord private plaintiffs a set of advantages that most other countries have not accepted.

Those advantages are very familiar to this Court. *First*, the so-called "American rule" on litigation costs requires each side to bear its own costs – rather than requiring the losing plaintiff to reimburse some or all of the successful defendant's costs; and generally broader discovery available to plaintiffs in the United States will tend to drive up the non-reimbursable litigation costs that defendants will have to bear. *Secondly*, the right to a jury trial in a civil case, guaranteed by the Seventh Amendment to the U.S. Constitution, is generally not available elsewhere. *Thirdly*, the "opt out" class action system provided for in the United States under Rule 23 and its state law counterparts has not been accepted by most other countries.[12] *Fourthly*, punitive damages are available

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[11] In his decision for the unanimous Court in *Morrison*, Justice Scalia noted that, "While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." 130 S.Ct. at 2886

[12] Atypically, Australia is another jurisdiction that has adopted an "opt out" class action system (*Federal Court of Australia Act 1976* (Cth), §33J), but it has coupled this with a "loser pays" litigation cost rule (*Milne v Att'y Gen. (Tas)*, (1956) 95 CLR 460 (Austl.); *Oshlack v Richmond River Council* (1998) 193 CLR 72 (Austl.)) which can discourage counsel and parties from bringing

in the United States, but generally are not allowed elsewhere.

The Governments believe that adopting appropriate legal processes is a basic sovereign function on which reasonable sovereigns can differ (as the United States, Australia and the United Kingdom clearly do on some issues) and that the processes so adopted are equally capable of administering justice. Allowing foreign-focused ATS cases to continue to be brought in the United States to avoid the litigation rules adopted in other jurisdictions would encourage "forum shopping" by plaintiffs and be quite inconsistent with the concepts of international law and comity recognized by this Court in *Empagran, Sosa* and *Morrison.*

C. Jurisdictional Uncertainty in ATS Cases Leads to Unfairness for Foreign Defendants and Unnecessary Burdens for the U.S. Courts, and Does Not Respect the Principle of Comity Between States

The Ninth Circuit's implied cause of action under the ATS creates differences with other sovereigns whose courts exercise civil jurisdiction on the primary basis recognized by international law – that is, territorial jurisdiction – and which are politically and legally responsible for dealing with a particular situation.

Significantly, if the actions were brought in the territorial jurisdiction where the events occurred, then both public and private entities allegedly

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weak class actions. The United Kingdom has what is essentially an "opt in" system for collective actions, again combined with a "loser pays" litigation cost rule.

responsible for the offending conduct might be able to be sued in tort under domestic law, thus avoiding the issues of jurisdiction under international law that concern the Governments here.

The Court has granted certiorari in *Kiobel v. Royal Dutch Petroleum*, No. 10-1491, to deal with one issue arising out of the exercise of extraterritorial jurisdiction under the ATS – namely, whether corporations are subject to tort liability for violations of the law of nations in ATS. But the Rio Tinto petition raises broader and more fundamental jurisdictional questions which are essentially conditions precedent to the corporate liability questions that the Court has agreed hear in the *Kiobel* case.[13] Thus, questions 2 and 4 in the Rio Tinto petition will require resolution by the Court, however it decides *Kiobel;* and therefore, certiorari should definitely be granted here.

To allow U.S. civil litigation against private parties in these circumstances generates serious practical problems and potential unfairness to the private defendants in seeking to demonstrate that there was no "violation of the law of nations", or that the defendant corporation was not part of it, in circumstances where other actors involved are not amenable to discovery directed by a U.S. court. Finally, these

[13] The Governments would be concerned if the Court, in resolving the questions presented in *Kiobel*, were to do what the lower courts have sometimes done – namely, make jurisdictional assumptions that fail to give proper weight to limits that international law imposes on exercises of national jurisdiction over distant parties and situations. Such an opinion in *Kiobel* would necessarily have to be written without the kind of briefing on international law that a grant of certiorari on Rio Tinto's two jurisdictional questions would surely generate from the parties and interested amici (which may well include the Governments).

extraterritorial ATS cases are imposing serious burden on the U.S. courts, as the *Rio Tinto* case so clearly illustrates.[14] As Justice Stevens emphasized in *Morrison*, "United States courts 'cannot and should not expend [their] resources resolving cases that do not affect Americans or involve fraud emanating from America.'"[15]

II. INTERNATIONAL LAW AND THE DECISIONS OF THIS COURT DO NOT GENERALLY ALLOW A SOVEREIGN TO EXERCISE CIVIL JURISDICTION OVER CONFLICTS AND PARTIES HAVING NO SIGNIFICANT NEXUS TO THAT SOVEREIGN'S FORUM

In *Empagran* and *Morrison*, the Court enunciated a clear presumption against a cause of action created by a federal statute being construed to allow suit in the U.S. courts by foreign plaintiffs for injuries suffered. It emphasized the "longstanding principle of American law 'that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"

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[14] Still at the motion to dismiss stage, the *Rio Tinto* case has generated two opinions by the District Judge, two opinions by a normal three judge Court of Appeals panel, and numerous opinions by an 11 judge en banc sitting of the 9th Circuit. Thus, 15 federal judges have been required to generate the 734 pages of judicial opinions that appear in the Appendix. Nor is this an isolated example – similar opinion-intensive examples have also occurred in other Circuits, *e.g. Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2010) (total 85 pages); *John Doe v. Exxon Mobil Corp.*, 473 F.3rd 345 (D.C. Cir. 2007) and 654 F.3d 11 (D.C. Cir. 2011) (total 104 pages).

[15] *Morrison*, 130 S.Ct. at 2869 (concurring), quoting *Morrison v. National Australia Bank Ltd*, 547 F.3d 167, 175 (2d Cir. 2008).

Morrison, 130 S.Ct. at 2877, quoting *EEOC v. Arabian Oil Company*, 499 U.S. 244, 248 (1991). In *Sosa*, the Court held that the ATS only created jurisdiction in the Federal Courts, "having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." 542 U.S. at 724. The opinion then added, "we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.*

Thus, the significant question that the Court can definitively dispose of by accepting the Petition and deciding the *Rio Tinto* case is whether the same presumption against exercise of extraterritorial jurisdiction on statutory claims applies equally to common law claims for "the modest number of international law violations with a potential for personal liability . . ." *Id*. The Governments urge that the answer is "clearly yes". There is no reason to assume that federal judges making common law decisions would be less concerned about the jurisdictional limits imposed by international law than the Congress has been, or that judges should be less anxious "to avoid interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164. *See also The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) ("No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another.").

The primary basis for jurisdiction under international law is territorial. Each state may regulate activity that occurs in its own territory (the "territorial principle"). It may also exercise prescriptive jurisdiction in relation to the conduct of its citizens, wherever located (the "nationality principle").[16] These "are parts of a single broad principle according to which the right to exercise jurisdiction depends on there being *between the subject matter and the state exercising jurisdiction a sufficiently close connection* to justify that state in regulating the matter and perhaps also to override any competing rights of other states."[17] This Court has also allowed for exercise of U.S. extraterritorial jurisdiction under the sometimes controversial "effects doctrine", where overseas activities have had or were intended to have substantial effect within the United States. *See Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796 (1993).[18]

These principles do not apply in the *Rio Tinto* case. The alleged wrongs occurred entirely within a foreign territory, involved only foreign governments and nationals, and had no effect on the United States.

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[16] Restatement (Third) of Foreign Relations Law of the United States (hereinafter, "Restatement") § 402(1) (1987).

[17] Sir Robert Jennings & Sir Arthur Watts, eds., *Oppenheim's International Law*, at 457-8 (9th ed. 1992) (emphasis added).

[18] The Court relied on, among other things, Restatement § 403(2) (jurisdiction based on "the extent to which the activity…has substantial, direct, effect upon or in the territory"). The U.K. Government opposed the exercise of "effects doctrine" jurisdiction in the *Hartford Fire* case. *Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners, Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993) (Brief filed November 19, 1992) (Nos. 91-1111, 91-1128), 1992 U.S. S. Ct. Briefs LEXIS 774.

Because international law has never recognized universal civil jurisdiction, there would be no legal basis for U.S. courts to create a common law cause of action for damage recoveries by aliens against other aliens, wherever domiciled, for activities on foreign territories that have no effects within the United States. That Congress and the early courts probably contemplated piracy claims for wrongs committed on the high seas does not change this analysis.

Thus, the *Rio Tinto* case is a particularly good vehicle for this Court to reaffirm the jurisdictional principles of international law espoused in *Empagran* and *Morrison* in a common law context where – at this point in time – the lower courts have not applied adequately the very real constraints of those principles.

III. THE COURT COULD FURTHER REDUCE THE RISKS OF JURISDICTIONAL OVERREACHING IN ATS CASES BY REQUIRING THAT U.S. COURTS GIVE EFFECT TO THE INTERNATIONAL LAW RULE REQUIRING EXHAUSTION OF LOCAL REMEDIES

The Petitioners have also asked this Court to determine "[w]hether a plaintiff asserting a federal common law claim under the ATS addressed to conduct occurring entirely within the jurisdiction of a foreign sovereign must seek to exhaust available remedies in the courts of that sovereign before filing suit in the United States."[19] This case offers an opportunity for this Court to reaffirm the applicability of this principle of international law by resolving

[19] *Petition for Writ of Certiorari* at i.

the "exhaustion of local remedies" issue, because Papua New Guinea ("PNG"), where all the alleged wrongs in the current case occurred, has an active judicial system and a judiciary whose independence is guaranteed by the PNG Constitution.[20] The Plaintiffs and their counsel have made no known effort to invoke PNG jurisdiction.

In *Sosa*, this Court anticipated the issue in the ATS context when it discussed the "basic principles of international law requir[ing] that . . . the claimant must have exhausted any remedies available in the domestic legal system," and confirmed that it "would certainly consider this requirement in an appropriate case." 542 U.S. at 733, n.21. *Rio Tinto* is an appropriate case.

The principle of "exhaustion of local remedies" in international law, like the presumption against extraterritorial effects, is based on respect for the different choices that different sovereigns may make on how to resolve disputes within their own jurisdiction. The International Court of Justice has emphasized that "[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law." *Switzerland v. U.S.*, 1959 ICJ Rep. 6, 27 (Mar. 21); *see also* RESTATEMENT §703 cmt. d (1987). The Governments' basic position is that, if the U.S. courts are to be permitted, as a matter of domestic common law, to create substantive liability based on some infringements of the "law of nations", then U.S. law ought to require compliance with the procedural preconditions mandated by international

[20] Constitution of the Independent State of Papua New Guinea, section 157, (1975).

law before adjudicating the question of whether a "law of nations" violation has occurred.

The Governments submit that the application of the "exhaustion of local remedies" principle becomes relevant (as an additional requirement) in an ATS case where the District Court has found that the ATS claims both (i) have sufficient factual nexus to the United States to satisfy the minimum public international law limits on the exercise of domestic jurisdiction by U.S. courts and (ii) fall within the narrow class of international wrongs foreseen by this Court in *Sosa*.

Although the present case does not satisfy the "sufficient U.S. nexus" requirement, the Governments submit that the case still presents an appropriate opportunity for the Court to clarify how the principle of "exhaustion of local remedies" should be applied in ATS cases. Such further clarification would be entirely appropriate, because misunderstandings and errors on how to apply the "exhaustion" requirement abound in the record in this case.[21]

A prudential exhaustion of local remedies inquiry should focus primarily on the availability and effectiveness of the local remedies in question – but it

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[21] When the en banc Ninth Circuit court remanded the case for consideration of the "exhaustion" issue in it first decision, App. 262a (9th Cir. 2008), the District Court clearly found the en banc court's multi-opinion mandate to be confusing. As a consequence, the District Court's decision on remand decision treated the "exhaustion of local remedies" inquiry as being based on the nature of the claims themselves, rather than the availability and adequacy of the forum in the jurisdiction where the alleged breaches of international norms took place. App. 204a (C.D. Cal. 2009). The Governments believe that the District Court fundamentally erred in this analysis.

could also take into account factors such as the strength of the nexus between the claims and the United States. The Governments believe that the "exhaustion" principle should be applied more stringently when there is little or no factual nexus between the claims and the United States. Taking such an approach would further reduce the risk of jurisdictional overreaching in ATS cases, while implementing this Court's broader concerns about comity and international law in *Empagran, Sosa* and *Morrison.*

CONCLUSION

This case offers this Court an important opportunity to clarify that U.S. courts should not be exercising jurisdiction over cases with little or no connection with the U.S., and that such claims should be more appropriately litigated in another state. Much greater adherence to the core jurisdictional limitations imposed by international law is needed than has thus far been demonstrated by the lower courts in ruling on Rule 12(b)(1) motions in post-*Sosa* ATS cases. As this Court held in the *The Paquete Habana*: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." 175 U.S. 677 at 700. Over a century later in *Sosa*, this Court reaffirmed the importance of this decision and warned that there may be other "principle[s] limiting the availability of relief in the federal courts for violations of customary international law" under the ATS. 542 U.S. at 733, n.21.

The protracted and inconsistent history of the present case makes clear why the Court should

accept absence of a factual nexus between the parties and wrongs with the United States as a controlling legal barrier in ATS cases, and why the "exhaustion of local remedies" requirement should be accepted as a further limiting principle.

For the United States to allow suits by foreign nationals against foreign nationals under a U.S. law for conduct abroad would interfere fundamentally with other nations' sovereignty. It could also serve to complicate efforts to deal with the aftermath of breakdowns of civil order in other nations, such as processes of reconciliation.

For the foregoing reasons, the Governments urge the Court to grant Rio Tinto's petition for certiorari and then to make clear the appropriate constraints on jurisdiction under international law that any lower court should apply before deciding whether to exercise jurisdiction in an ATS claim.

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