No. 10-1491

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In The

Supreme Court of the United States

ESTHER KIOBEL, et al.,
Petitioners,
v.

ROYAL DUTCH PETROLEUM CO., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF PROFESSORS OF CIVIL PROCEDURE AND FEDERAL COURTS AS *AMICI CURIAE* ON REARGUMENT IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae respectfully submit this brief in support of Petitioners, pursuant to Supreme Court Rule 37.[1] Amici (listed in the Appendix) are professors of civil procedure and federal courts who have an interest in federal litigation and the proper application of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350.

SUMMARY OF ARGUMENT

Federal and State courts routinely hear cases relating to injuries suffered in other jurisdictions, including, in particular, cases litigated pursuant to the Alien Tort Statute, 28 U.S.C. § 1350. Any of these cases may raise concerns about the proper assertion of personal jurisdiction, international comity, or the inconvenience of a U.S. forum. These issues, however, can and should be addressed without imposing territorial restrictions on the reach of the ATS. Existing rules of personal jurisdiction, along with prudential doctrines such as the political question doctrine and *forum non conveniens*, directly address the concerns raised by transnational litigation. Proper application of these doctrines will weed out problematic cases, without denying a forum to the cases that are properly litigated in U.S. courts.

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[1] Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and respondent have filed a letter of consent with the Clerk of the Court.

ARGUMENT

EXISTING DOCTRINES ARE ADEQUATE TO ADDRESS ANY CONCERNS RAISED BY TRANSNATIONAL ALIEN TORT STATUTE CASES

INTRODUCTION

The Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), has historically been interpreted to apply to conduct outside the United States. There is no need to limit the reach of the statute in order to respond to the constitutional or prudential issues that may arise when U.S. courts assert jurisdiction over ATS claims arising in the territory of foreign sovereigns.

Extraterritorial litigation may raise concerns about personal jurisdiction, foreign affairs, or efficiency. If the defendants and the claims have insufficient contacts with the United States, a U.S. assertion of jurisdiction will violate the Due Process Clause of the Constitution. Such litigation may also trespass on the foreign affairs powers of the U.S. Executive Branch. Foreign states may view adjudication of these claims as an interference with their domestic sovereignty. Finally, litigation of claims in the United States may be inefficient, if the facts and the parties have no connection to the United States.

Amici submit this brief to make only one narrow point: each of these concerns is properly addressed through case-by-case application of a

series of existing doctrines that allow the courts to dismiss claims at an early stage if litigation would constitute an excessive interference with U.S. foreign policy or with foreign sovereignty, or if the parties and the claims have insufficient ties to the United States. To the extent that these concerns underlie the question posed by this Court for reargument,[2] they can be resolved through application of these well-established doctrines and do not require that the Court develop new doctrines or otherwise limit the reach of the ATS.

By contrast, a blanket rejection of all ATS claims arising in the territory of a foreign state would be overbroad. First, it would reject claims against U.S. defendants, even though U.S. law and international law clearly permit states to assert jurisdiction over their own citizens and residents for claims arising in another state. If the United States does not permit litigation against its own citizens with respect to their tortious conduct overseas, such conduct will often escape any review. Second, a rejection of ATS claims arising in foreign states would unnecessarily deny a forum for cases that do not raise foreign policy concerns and in which there is no alternative forum in which to seek remedies. When U.S. courts have personal jurisdiction over a defendant; when neither the U.S. nor any foreign government objects; and when logistical obstacles can be overcome and there is no alternative forum,

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[2] This Court's Order requesting supplemental briefing asked whether the Alien Tort Statute, 28 U.S.C. § 1350, "allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

there is no reason to deny a hearing to a plaintiff alleging egregious harm.

Pre-existing doctrines directly address the potential problems triggered by extraterritorial ATS cases. These doctrines were designed to respond directly to the problems triggered by litigation arising in the territory of a foreign sovereign. U.S. courts routinely assert jurisdiction over claims arising out of events in a foreign state if the courts have personal jurisdiction over the defendants. *See Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 611 (1990), quoting Justice Story, Commentaries on the Conflict of Laws §§ 554, 543 (1846) ("[B]y the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found").[3] Our legal system addresses the difficulties presented by some of these extraterritorial claims through case-by-case application of principles that protect against interference with U.S. foreign policy or foreign

[3] Since the Founding, our courts have heard cases, in particular tort claims, relating to injuries suffered in other jurisdictions. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677, 685-86 & n.4 (2004); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Linder v. Portocarrero*, 963 F.2d 332, 336 (11th Cir. 1992); *see also Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984) (regulating activities of businesses incorporated within state is "one of the oldest and most established examples of prescriptive jurisdiction"). Moreover, there is no dispute that the United States has jurisdiction to regulate the conduct of its own citizens and residents, wherever located. *See, e.g.*, *Skiriotes v. State of Florida*, 313 U.S. 69, 73 (1941) (United States not debarred from governing conduct of its own citizens "upon the high seas or even in foreign countries"); *Blackmer v. United States*, 284 U.S. 421 (1932).

sovereignty while also furthering efficiency and convenience.

The relevant doctrines include personal jurisdiction, political question, act of state, comity, *forum non conveniens*, and exhaustion of domestic remedies. As a group, these principles are effective and generally non-controversial: cases that trigger genuine foreign policy problems, or in which there is no nexus to the United States and an alternative forum in the place where the damage was inflicted, can be dismissed at an early stage of litigation.

Sosa v. Alvarez-Machain, 542 U.S. 692, 733 (2004), recognized that application of these limiting doctrines would weed out some cases that triggered ATS jurisdiction. This Court in *Sosa* articulated a narrow standard for defining ATS claims, *id.* at 732, and then emphasized that the "requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this action." *Id.* at 733 n.21. *Sosa* proceeded to discuss, as examples, both the exhaustion of domestic remedies and the possibility of "case-specific deference to the political branches." *Id.*

In earlier amicus briefs to this Court, foreign states emphasized their concern about litigation in U.S. courts over "torts committed on foreign soil by foreign tortfeasors that injured foreign victims and have no nexus to the United States." Br. of the Federal Republic of Germany as Amicus Curiae in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, (reargument scheduled),

2012 WL 379578 at 13 (Feb. 2, 2012) ("F.R.G. Br. Amicus Curiae"). Note first that the foreign states object to U.S. assertions of jurisdiction over *foreign* tortfeasors, not over U.S. citizens and residents. If those foreign defendants have no minimum contacts with the United States, a claim will be dismissed for lack of personal jurisdiction. If the case triggers substantial foreign policy concerns, one of a group of prudential doctrines will point to dismissal. And, if the case itself has no nexus with the United States and the courts of a foreign state provide a more convenient and adequate alternative forum, the case may be dismissed on a *forum non conveniens* motion. As discussed below, our courts entertain transitory tort cases only where there is personal jurisdiction over the defendant, and dismiss such cases if foreign policy concerns so require or if there is an adequate alternative forum and the balance of public and private interests favors litigation in another state.

As with any area of the law, the difficulty arises in the application of the rules at the margins, to difficult cases where the litigants vociferously object to a court's decision to grant or deny a motion to dismiss the U.S. litigation. But the presence of a handful of hotly contested disputes is no reason to distort basic rules of U.S. jurisdiction. Most ATS cases are *not* controversial, because they involve local defendants, because neither the U.S. government nor a foreign government has objected to the litigation, or because there is no alternative forum available to litigate the claims. Most cases involving a foreign defendant and an objection from a foreign government or an adequate alternative forum are dismissed. That is, these well-developed doctrines effectively manage the problems triggered

by application of ATS claims arising in foreign states. As a result, there is no need to respond to these concerns by barring ATS jurisdiction over all such claims. To the extent that these doctrines have produced a small number of disputed results, the solution lies in proper application of the traditional doctrines, not in a major overhaul of the ATS jurisprudence.

In this brief, amici analyze each of these doctrines to demonstrate that they effectively weed out cases that do not belong in U.S. courts. Amici take no position on the application of these doctrines to the facts of this case, and no position on other issues pending in this case. We submit this brief only to urge the Court to rely on these pre-existing principles to address concerns about application of the ATS to cases arising in foreign states.

A. PERSONAL JURISDICTION

The Due Process Clause of the Constitution requires that a defendant have sufficient connection to an individual state or to the United States as a whole before a court may exercise jurisdiction over that defendant. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *J. McIntyre Mach., Ltd v. Nicastro*, 131 S. Ct. 2780 (2011); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945). Furthermore, the exercise of jurisdiction must be reasonable. *Shaffer v. Heitner,* 433 U.S. 186, 215 (1977); *Int'l Shoe*, 326 U.S. at 316. The requirement that a court must satisfy itself that each defendant is properly subject to personal jurisdiction can do much of the work necessary to ensure that only cases with a sufficient connection to the United

States are heard in our courts and to minimize foreign affairs friction.[4]

This Court has described two distinct categories of personal jurisdiction: specific jurisdiction[5] and general jurisdiction.[6] "[F]or an individual, the paradigmatic forum for the exercise of general jurisdiction is the individual's domicile; for a corporation it is an equivalent place, one in which the corporation is fairly regarded as at home." *Goodyear*, 131 S. Ct. 2846, 2853-54; *see also id.* at 2851. For both specific and general jurisdiction, a district court must determine that a defendant had minimum contacts with a state or the United States sufficient to satisfy "traditional notions of fair play

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[4] Amici understand that the Defendant did not challenge personal jurisdiction over Defendant Royal Dutch Petroleum in this case. Petitioners' Supplemental Opening Brief, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, at 4 (June 6, 2012). Amici take no position on whether the court would have properly asserted personal jurisdiction if Defendant had not waived its personal jurisdiction challenge.

[5] Specific jurisdiction is limited to cases in which a defendant has "'purposefully directed' his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal citations omitted); *see also Goodyear*, 131 S. Ct. at 2853.

[6] General jurisdiction requires a defendant to have the kind of continuous and systematic general business contacts that justify suit on causes of action distinct from those activities. *Goodyear*, 131 S. Ct. at 2853; *Helicopteros Nacionales De Colom. v. Hall*, 466 U.S. 408,416 (1984). Even continuous activity "of some sorts" is not enough to support general jurisdiction. *Goodyear,* 131 S. Ct. at 2856 (citing *Int'l Shoe*, 326 U.S. at 318).

and substantial justice." *Int'l Shoe*, 326 U.S. at 316. In *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 115 (1987), a seven member majority of this Court explained that a court's inquiry into the reasonableness of asserting jurisdiction should take into account "[t]he procedural and substantive interests of other nations" and "the Federal Government's interest in its foreign relations policies." The Court cautioned that those interests are best served by "an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or forum State" and that "[g]reat care" should be exercised "when extending our notions of personal jurisdiction into the international field." *Id*. (citing *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

Many of the complaints about hypothetical ATS cases raised by foreign States, including the Federal Republic of Germany and the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands, address fact settings in which it is likely personal jurisdiction in the United States does not exist: "torts committed on foreign soil by foreign tortfeasors that injured foreign victims and have no nexus to the United States." F.R.G. Br. Amicus Curiae at 13. Where a defendant is not a U.S. citizen and has insufficient other contacts with the United States, the assertion of jurisdiction would be unconstitutional, and a motion to dismiss for lack of

personal jurisdiction will dispose of the case expeditiously.[7]

Most ATS claims, however, involve defendants who are citizens or residents of the United States. Personal jurisdiction in most cases is based on the physical presence of an individual defendant. The foreign states that have submitted briefs in ATS cases all agree there is no bar under international law to a State regulating conduct of its own citizens or residents, even if their conduct takes place elsewhere. F.R.G. Br. Amicus Curiae at 12; Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of the Netherlands as Amici Curiae in Support of the Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (reargument scheduled), 2012 WL 405480 at 30 (recognizing exercise of prescriptive jurisdiction in relation to conduct of own citizens, wherever located); *see also* Motion for Leave to File Brief as Amici Curiae and Brief of the Governments

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[7] Cases in which personal jurisdiction over an individual defendant is based on personal service while physically present in the forum case, *see Burnham*, 495 U.S. 604 (finding personal jurisdiction based on such "tag" or "transient" jurisdiction to be constitutional), can be litigated in a U.S. forum that has no other connections to the case. Tag jurisdiction, however, does not apply to a foreign corporation. Any assertion of personal jurisdiction over a corporation must satisfy the "at home" standard of general jurisdiction, *Goodyear*, 131 S. Ct. at 2853-54, and/or meet the relatedness standards of specific jurisdiction, *Nicastro*, 131 S. Ct. at 2787-88. Moreover, to the extent that tag jurisdiction may allow a court to exercise personal jurisdiction over a foreign, non-resident defendant, the doctrine of *forum non conveniens* provides an effective remedy to redress any abuse of this jurisdictional device. *See infra*, pages 20-27.

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 at 5 & 14, *Rio Tinto v. Sarei*, No. 11-649 (cert. pending), 2011 WL 6934726. For example, the Federal Republic of Germany explained that its legal system "allows plaintiffs to pursue violations of customary international law by German tortfeasors in German courts. . . . German nationals and nationals of other countries who are the victims of such torts are entitled to file an action." F.R.G. Br. Amicus Curiae at 11. The brief concludes: "[I]t is certainly reasonable and appropriate to require a victim of a tort committed in a third country by a German tortfeasor to go to Germany and utilize the legal system of the Federal Republic of Germany to seek legal satisfaction." *Id.* at 13.[8]

The standard rules of personal jurisdiction, properly applied as in other civil litigation, will weed out the cases that these foreign governments find most troublesome, those in which neither the parties nor the claims have any connection with the United States.

B. FOREIGN POLICY CONCERNS

The federal courts can rely on several pre-existing doctrines to respond to the concern that ATS claims interfere with the foreign affairs powers of the Executive Branch or with the domestic sovereignty of

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[8] In *Goodyear*, this Court observed that France permitted the exercise of jurisdiction based on a plaintiff's French nationality. *Goodyear*, 131 S. Ct at 2857 n.5.

foreign states, including the political question doctrine, the act of state doctrine, and comity.

1. POLITICAL QUESTION DOCTRINE

The political question doctrine "speaks to an amalgam of circumstances" in which a court may decline to adjudicate a particular suit. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1431 (2012) (Sotomayor, J., concurring). Courts undertake a case-by-case analysis to determine whether maintenance of a suit "accords appropriate respect to the other branches' exercise of their own constitutional powers." *Id.*; s*ee also Sosa v. Alvarez Machain*, 542 U.S. at 733 n.21 (suggesting application of "case-specific deference to the political branches" in the appropriate case); *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) (political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch").[9]

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[9] Cases may be dismissed on political question grounds where they involve:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment

Foremost among the cases found to pose a political question are those in the sphere of foreign relations. *Zivotofsky*, 132 S. Ct. at 1438 (Breyer, J., dissenting); *Baker*, 369 U.S. 186, 211 (1962) (citing cases); *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *United States v. Pink*, 315 U.S. 203, 242 (1942) ("In our dealings with the outside world, the United States speaks with one voice and acts as one . . . ."); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("[t]he conduct of the foreign relations of our government is committed by the Constitution to the Executive and Legislative -- 'the political' -- Departments of the Government"). For example, the Ninth Circuit easily and unanimously affirmed the district court's dismissal of ATS claims against Caterpillar Inc., for selling bulldozers to the Israeli Defense Forces. *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007). The District of Columbia Circuit similarly affirmed the lower court decision to dispense with claims by villagers against the United States and individual defendants arising out of their forcible removal from their homes in the Indian Ocean in order to construct a military base. *Bancoult v. McNamara*, 445 F.3d 427 (2006). *See also Alperin v. Franciscan Order*, 423 Fed. Appx. 678 (9th Cir. 2011) (dismissal on political question grounds); *El-Shifa Pharm. Indus. v. United States*, 607 F.3d 836 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 997 (2011) (same); *Carmichael v. Kellogg, Brown & Root Serv.*, 572 F.3d 1271, (11th Cir. 2009) (same);

> from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

Hereros v. Deutsche Afrika-Linien Gmblt & Co., 232 Fed. Appx. 90 (3d Cir. 2007) (same); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006) (same); *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005) (same); *Whiteman v. Republic of Austria*, 431 F.3d 57 (2d Cir. 2005) (same); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005) (same).

In other cases, courts have declined to dismiss a case on political question grounds, but in some of those cases the defendants have exaggerated the foreign policy effects or overstated the State Department's position. *See, e.g., Doe v. Exxon Mobil*, 473 F.3d 345, 354 (2007) (Sentelle, J.) ("We disagree with Exxon's contention that there is a conflict between the views of the State Department and those of the district court."); *see also* Brief for the United States as Amicus Curiae, No. 07-81, 2007 U.S. Briefs 81, 8-9 & 19 (May 16, 2008), *cert. denied*, *Exxon Mobil Corp. v. Doe*, 554 U.S. 909 (2008) (observing that the "court of appeals reasonably regarded" the appeal as "based on an assertion by private defendants, not by the Executive, that the litigation itself would have adverse consequences for the Nation's foreign policy interests" and noting that the opinion indicates that if the Court "had believed the circumstances of this case to be as petitioners paint them, petitioners would have been granted the relief they seek"); *cf. Sarei v. Rio Tinto*, 487 F.3d 1193, 1206-07 (9th Cir. 2007) (reversed on other grounds) (given "guarded nature" of U.S. Statement of Interest, "[w]hen we take the SOI into consideration and give it 'serious weight,' we still conclude that a political question is not presented"); *see also Sarei v. Rio Tinto*, 671 F.2d 736, 756 (9th Cir. 2011) (en banc) (U.S. government "has told this

court in its briefs that it no longer believes foreign policy concerns are material in this case and has expressly stated that it is not 'seeking dismissal of the litigation based on purely case-specific foreign policy concerns.' Thus, there is no longer any basis for a fear of interference by the courts in the conduct of foreign affairs.").

2. ACT OF STATE DOCTRINE

The basis of the act of state doctrine is the principle that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The doctrine is applicable "when a court *must decide* -- that is, when the outcome of the case turns upon -- the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.,* 493 U.S. 400, 406 (1991). Thus, when an ATS case challenges the "official action" of a foreign sovereign, the act of state doctrine may support dismissal of the claims.

According to *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964), a court considering the applicability of the act of state doctrine looks at several factors, including the "degree of codification or consensus concerning a particular area of international law," the importance of the "implications of an issue for our foreign relations" and whether "the government which perpetrated the challenged act of state" is still in existence. This prudential doctrine therefore serves as an effective tool to prevent ATS litigation from

intruding into the foreign affairs powers of the Executive Branch and to block the adjudication of claims that improperly intrude into the domestic sovereignty of foreign states.

Since the doctrine applies whenever a court "*must decide* -- that is, when the outcome of the case turns upon -- the effect of official action by a foreign sovereign," *W.S. Kirkpatrick*, 493 U.S. at 406, the doctrine may be invoked by private parties. *See, e.g., Clayco Petroleum Corp. v. Occidental Petroleum Corp.,* 712 F.2d 404, 408 (9th Cir. 1983).

ATS claims were dismissed, in part, under the act of state doctrine in *Doe v. Israel*, 400 F. Supp. 2d 86, 114 (D.D.C. 2005) ("'[t]o permit the validity of the acts of [Israel] to be reexamined and perhaps condemned by the courts of [the United States] would very certainly imperil the amicable relations between [those] governments and vex the peace of nations,'" quoting *Sabbatino,* 376 U.S. at 415. In *Doe v. Lui Qi,* 349 F. Supp. 2d 1258 (N.D. Cal. 2004), Falun Gong practitioners sued the mayor of Beijing and a deputy provincial governor alleging they were detained and tortured. The court found that the act of state doctrine applied to acts that are covertly authorized, and therefore "ratified," by the government, even if against domestic law.[10]

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[10] The act of state doctrine is not used more often in ATS cases because *Sosa* requires that ATS claims be based on international norms with "definite content and acceptance among civilized nations" equivalent to "the historical paradigms familiar when section 1350 was enacted." 542 U.S. at 732. As a result, foreign states rarely declare that the violations at issue are the public policy of that state.

When ATS cases challenge acts that are the official acts of a foreign government, the act of state doctrine provides another means by which courts ensure that those cases do not trespass on the foreign affairs powers of the U.S. Executive Branch or interfere with the domestic sovereignty of foreign states.

3. COMITY

The comity doctrine responds directly to concerns about adjudication of claims that involve more than one sovereign state. "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.27 (1987). International comity guides the federal courts where "the issues to be resolved are entangled in international relations." *In re Maxwell Commc'n Corp.,* 93 F.3d 1036, 1047 (2d Cir.1996).[11]

Comity today is invoked when courts decline to assert jurisdiction in deference to "the interests of our government, the foreign government and the

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[11] The term "comity" is used to refer to multiple doctrines. *See generally* Michael D. Ramsey, *Escaping "International Comity,"* 83 Iowa L. Rev. 893, 897 (1998) (describing numerous strands of the comity doctrine). In the context of ATS claims, comity generally refers to limits on the reach of the U.S. courts, and authorizes courts to decline jurisdiction over matters more appropriately adjudicated in another forum.

international community in resolving the dispute in a foreign forum." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004). The doctrine thus addresses concerns expressed by foreign governments who suggest that their own courts provide a more appropriate forum for resolution of claims that involve foreign parties and facts that arise in a foreign state. As stated by the Federal Republic of Germany, in a brief submitted to this Court, "[i]t is reasonable to request that the United States courts exercise judicial restraint, under the principle of international comity, and take into account the availability of venues with a more significant nexus before applying the ATS to torts committed on foreign soil by foreign tortfeasors that injured foreign victims and have no nexus to the United States." F.R.G. Br. Amicus Curiae at 13.

In *Ungaro-Benages*, the Eleventh Circuit dismissed claims arising out of the seizure by the Nazi government of plaintiff's family's property. The court assessed the interests of the U.S. and German governments and the alternative forum offered as a result of a U.S.-German agreement to resolve Nazi-era compensation claims. 379 F.3d at 1239-40. By contrast, courts have declined to dismiss claims based on comity where a foreign State did not object to the litigation. In *Bigio v. Coca-Cola Company,* 448 F.3d 176, 178 (2d Cir. 2006), *aff'd*, 675 F.3d 163 (2d Cir. 2012) for example, the Second Circuit declined to dismiss on the basis of international comity when the foreign state expressed no objection to the adjudication of the controversy by United States courts. The *Bigio* court described international comity as "a discretionary act of deference by a national court to decline to exercise jurisdiction in a

case properly adjudicated in a foreign state." *Id.* (Quoting *In re Maxwell Comm. Corp.,* 93 F.3d 1036, 1047 (2d Cir. 1996)).

A dismissal based on comity would also be inappropriate where the proposed alternative forum is not capable of fairly resolving the claim. As the Federal Republic of Germany emphasized in its amicus brief, "it would certainly be inappropriate to require plaintiffs to exhaust their legal remedies in countries which have a proven record of human rights violations and no due process . . . ." F.R.G. Br. Amicus Curiae at 13. [12]

The comity doctrine serves as one means by which courts can decline adjudication of ATS litigation that infringes on the sovereignty of foreign States.

C. *FORUM NON CONVENIENS*

The doctrine of *forum non conveniens* directly addresses concerns about whether claims arising in the territory of a foreign state are properly litigated in the U.S. courts. Simply put, if a claim has no nexus to the United States, and there is an alternative, more convenient forum in which the claim can be litigated, the district court should grant

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[12] *Forum non conveniens* motions will be denied when the legal system of the state where the abuses took place does not offer the plaintiffs a fair hearing. However, as more legal systems develop the willingness to handle human rights cases in accordance with due process, fewer such claims will be litigated outside the forum in which the incidents occurred.

a *forum non conveniens* motion.[13] As this Court has noted, "The principle of *forum non convenience* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 507 (1947). Dismissal for *forum non conveniens* reflects a court's assessment of a "range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality." *Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp.,* 549 U.S. 422, 429-30 (2007) (quoting *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 723 (1996)). A federal court has discretion to dismiss a case on the ground of *forum non conveniens* when litigation in the U.S. court would impose a burden on the defendant out of proportion to the plaintiff's convenience. *Id.* A court may also grant a *forum non conveniens* motion when "the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems." *Id.* (internal quotations and additional citations omitted).

The *forum non conveniens* doctrine clearly applies to ATS cases. Thus a federal court presented with a claim under the ATS has the power to dismiss a case where that case would be more appropriately brought in a foreign court. Indeed, as detailed below,

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[13] Amici understand that Defendant in this case did not file a motion to dismiss for *forum non conveniens*. Petitioners' Supplemental Opening Brief, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, at 4 (June 6, 2012). Amici take no position on how a *forum non conveniens* analysis would have applied to the facts of this case.

courts have applied the doctrine to dismiss cases brought under the ATS. These decisions reflect the success of the doctrine in excluding from U.S. courts cases that are more properly litigated in a foreign forum.

Forum non conveniens requires a two-step inquiry into whether an adequate alternative forum exists and, if so, whether private and public interest factors, in balance, favor dismissing the case. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 255-56 (1981). Ordinarily, the requirement that an adequate alternative forum exists is satisfied when the defendant is amenable to process in the foreign jurisdiction. *Gilbert,* 330 U.S. at 506-507. The defendant thus has the ability to meet the requirement of availability by agreeing to submit to the jurisdiction of the foreign forum. *See, e.g., Aguinda v. Texaco, Inc.*, 303 F.3d 470, 475-76 (2d Cir. 2002) (upholding FNC dismissal after defendant consented to Ecuadorian jurisdiction); *Barboza v. Drummond Co.,* No. 06-61527, slip op. at 6 (S.D. Fla. July 17, 2007) (in a case brought by Colombian plaintiffs for injuries incurred in Columbia, Colombian courts deemed "available" because of defendants voluntary submission to the Colombian court's jurisdiction).

U.S. courts generally assume that the courts of a foreign state are adequate and available to resolve claims arising in their territory. *Gilbert,* 330 U.S. at 506-07. Thus, our courts routinely reject claims that foreign courts are inadequate because of corruption or administrative problems. In *Turedi v. Coca Cola Co.*, 343 Fed. Appx. 623 (2d Cir. 2009), for example, the Second Circuit upheld the district

court's finding that Turkey was an adequate forum, relying on the uncontradicted declarations of three Turkish law experts who concluded that Turkish law contained procedural and substantive provisions providing the plaintiffs with adequate remedies. *Id.*[14]

In some cases involving allegations of human rights violations, the courts of the state where the abuses occurred may not offer an adequate alternative forum because of the potential danger to the plaintiffs. *Cf. Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983) (denying motion for FNC dismissal because, "if the plaintiffs returned to Iran to prosecute this claim, they would probably be shot."). Plaintiffs' allegations that they would be in danger, however, do not automatically require dismissal of a *forum non conveniens* motion. In *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283 (11th Cir. 2009), for example, the Eleventh Circuit went so far as to affirm a *forum non conveniens* dismissal of claims arising out of alleged human rights abuses in Guatemala, despite plaintiffs' claim that Guatemala was not safe for them. The Eleventh Circuit found that a proviso that the dismissal would be reconsidered if there were any indication that the plaintiffs would be required to return to Guatemala to prosecute their

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[14] Each defendant had agreed that, if plaintiffs "commence litigation in Turkey arising out of the circumstances and general claims asserted" in this case, it will (a) accept service of process and the Turkish court's exercise of personal jurisdiction; (b) not assert statute of limitations defenses in Turkey that would be unavailable here; and (c) satisfy any final judgment issued by a Turkish court. *Id.* at 626.

suit was sufficient to meet the plaintiffs' concerns. *Id.* at 1291.

The *forum non conveniens* doctrine permits the courts to deny dismissal of claims in the small number of cases that involve events in foreign states but are properly litigated in U.S. courts because there is no alternative forum, as when ongoing human rights violations render the proposed forum dangerous. For example, in *Licea v. Curacao Drydock Co.*, 537 F. Supp. 2d 1270, 1274 (S.D. Fla. 2008), the plaintiffs, Cuban nationals, filed suit after they had escaped from Curacao and obtained political asylum. The plaintiffs alleged that the Cuban government and the defendants, with the support of the Curacao government, had conspired to traffic them to Curacao where they were detained in slave-like conditions and forced to work, without pay, for the defendant.[15] The court denied a *forum non conveniens* motion after finding that plaintiffs had a reasonable fear for their safety if they returned to Curacao, a country to which they went only under force, and where they were detained, abused, and allegedly pursued when they sought to escape, by both Cuban government agents and a private security firm hired by the defendant. *Id.* at 1275. With neither Curacao nor Cuba providing an adequate alternative forum, U.S. courts offered the only possible remedy for these plaintiffs, who were, at the time the lawsuit was filed, living in the United States. *See also Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F. Supp. 2d 289, 335-36

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[15] Defendants admitted that they had paid part of the plaintiffs' earnings to the government of Cuba. *Id.* at 1272. Plaintiffs alleged that the forced labor regime was designed, in part, to evade U.S. sanctions on the government of Cuba. *Id.*

(S.D.N.Y. 2003), *dismissed on other grounds*, 582 F.3d 244 (2d Cir. 2009) (finding that Sudan was not an adequate alternative forum because of allegations that the government of Sudan was involved in a genocidal campaign against the plaintiffs). In such cases, the U.S. court is an appropriate forum precisely because the foreign state denies the plaintiffs a forum in which they can raise their claims.

Although a plaintiff's decision to file in the United States receives substantial deference when the plaintiff is a citizen or resident of the United States, foreign plaintiffs do not receive the same degree of deference. *Piper,* 454 U.S. at 255-56, 256 n.23. In this way, the *forum non conveniens* doctrine again responds directly to the concerns triggered by claims by foreign plaintiffs based on events that take place in a foreign state.

If a foreign state offers an adequate alternative forum, a court will grant a *forum non conveniens* motion if the private and public factors weigh in favor of dismissal. This Court has directed the district courts to consider private interest factors including the degree to which the plaintiff or the lawsuit has a bona fide connection to the United States and to the forum of choice, and the degree to which considerations of convenience favor the conduct of the lawsuit in the United States. *Id.* The public interest factors include lessening congestion in the courts, having local controversies decided locally, not imposing jury duty on people in a community that has no interest in the litigation, and avoiding the difficulty of applying foreign law. *Gilbert,* 330 U.S. at 508-09. These same factors are analyzed in

ATS cases.

Aldana, for example, analyzed the *Gilbert* factors and concluded that the balance weighed in favor of dismissal. The Court approved a district court's findings pointing to the ease of access to sources of proof, including the fact that the alleged misconduct occurred in Guatemala and significant expense would be incurred in transporting evidence to the United States from Guatemala. The court also considered additional practical and logistical difficulties, including, for example, the fact that few of the witnesses were able to speak English.

As to the public interest facts, the *Aldana* court noted that the dispute was "quintessentially Guatemalan," involving "one of Guatemala's largest private employers in one of Guatemala's most important economic sectors" and "one of Guatemala's most influential labor unions." The district court concluded that while "there is a strong public interest in favoring the receptivity of United States courts to [torture] claims under 28 U.S.C § 1350, there is a greater policy interest in preventing forum shopping, as well as in protecting comity between the United States and other nations and other such interests." 578 F. 3d at 1299, 1305. On appeal, the Eleventh Circuit affirmed the *forum non conveniens* dismissal, concluding: "Since the underlying events took place in Guatemala, all of the individuals involved were (at least at the time) Guatemalan citizens, and Guatemalan political and economic tensions form the essential backdrop to the entire dispute, we are hard-pressed to say that the district court abused its discretion in reaching this conclusion . . . ." *Id.* at 1299-1300.

By contrast, in a case involving a U.S. corporation, with the key witnesses and evidence in the United States, the Second Circuit denied a *forum non conveniens* motion. *Bigio v. Coca Cola Co.*, 448 F.3d at 179-80. In that case, in addition to the location of witnesses and evidence, the plaintiffs informed the court that they had been unsuccessful in a prior attempt to litigate in Egypt. *Id.* In looking to the public interest, the court concluded that the U.S had a significant interest in whether a U.S. company should be held liable for the confiscation of plaintiffs' property. Moreover, Egypt raised no objection to the U.S. court deciding this case.

Proper application of the *forum non conveniens* doctrine to ATS claims will prevent the inappropriate use of U.S. courts. In cases that involve foreign plaintiffs, foreign defendants, and foreign claims, and have no nexus to the United States, *forum non conveniens* motions will generally be granted, except for the rare cases in which the courts of the state where the abuses took place do not satisfy the *forum non conveniens* doctrine's adequate alternative forum requirement.[16] As in any area of the law, difficult cases inevitably foster controversy about the proper application of the doctrine. Those exceptional cases, however, should not lead to creation of a new rule that would reject all ATS claims arising in foreign states.

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[16] In cases in which there is no adequate alternative forum, dismissal of a case filed in a U.S. court would deny the plaintiffs of any remedy at all. But even such cases will be heard in our courts only if none of the other doctrines discussed in this brief require dismissal.

D. EXHAUSTION OF DOMESTIC REMEDIES

Some courts have responded to concerns about asserting jurisdiction over claims that arise in foreign States by imposing a requirement that the plaintiff exhaust domestic remedies before attempting to sue in this country.[17] As applied to U.S. human rights litigation, the doctrine may call for dismissal if the claimant has not attempted to obtain redress through adequate, available remedies in the place where the injuries occurred.

The international law doctrine of exhaustion of domestic remedies originated in the requirement that a citizen of one state who is injured in a foreign state must exhaust remedies in the state where the injury occurred before asking his or her own

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[17] In this and related cases, representatives of foreign governments have suggested to this Court that imposition of an exhaustion requirement would respond to concerns about U.S. assertions of jurisdiction over claims that arise in other States. *See, e.g.,* Brief of *Amicus Curiae* the European Commission in Support of Neither Party, *Sosa v. Alvarez-Machain*, No. 03-339, 2004 WL 177036 at *24 (U.S.) (Appellate Brief) (Jan. 23, 2004) (urging imposition of an exhaustion requirement and stating that "an exercise of universal civil jurisdiction should be predicated on a showing that there was no reasonable prospect of redress in either a State exercising jurisdiction on a traditional basis or through an international mechanism."). *See also* F.R.G. Br. *Amicus Curiae* at 13-15 (exhaustion of domestic remedies should be required in ATS cases); 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 Raised in the Petition for Certiorari, *Rio Tinto PLC v. Alexis Holyweek Sarei* No. 11-649, 2011 U.S. Briefs 649 (Dec. 28, 2011) (same).

government to take up the dispute with the foreign government. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 422-23 ("the usual method for an individual to seek relief" for a wrong occurring in a foreign state, "is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal."); *Mavrommatis Palestine Concessions* case, P.C.I.J. (1924), Series A, No. 2, at 12 (noting that a State is entitled to espouse the claims of its citizens for injuries inflicted by another State only if the citizens "have been unable to obtain satisfaction through the ordinary channels."); Restatement (Third) of Foreign Relations Law of the United States § 703 cmt. d (1987) (same). Several international treaties require that petitioners exhaust remedies in the place where the injury occurred before filing complaints with human rights tribunals. *See, e.g.,* International Covenant on Civil and Political Rights, art. 41(1)(c), opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (requiring exhaustion of domestic remedies); Organization of American States, American Convention on Human Rights, art. 46, Nov. 22, 1969, 1144 U.N.T.S. 123 (same); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35(1), Nov. 4, 1950, 213 U.N.T.S. 221 (same).

As incorporated into the Torture Victim Protection Act, 28 U.S.C. § 1350 (note), the exhaustion doctrine instructs the courts to dismiss a claim "if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." *Id.* at § 2(b). The TVPA requirement that such remedies be

both "adequate" and "available" tracks the identical requirement in international law. *See* Restatement (Third) § 703 cmt. d (noting international law requirement that claimant exhaust "available" remedies).

Although the Alien Tort Statute does not specify that domestic remedies must be exhausted, this Court in *Sosa* stated that it would "certainly consider" an exhaustion requirement "in an appropriate case." 542 U.S. at 733 n.21. In response, the Ninth Circuit imposed a requirement of "prudential exhaustion" that led to the dismissal of several ATS claims. *Sarei v. Rio Tinto plc*, 550 F.3d 822 (9th Cir. 2008) (en banc), *on remand*, 650 F. Supp. 2d 1004 (C.D. Cal. 2009), *aff'd in part, rev'd in part*, 671 F.3d 736 (9th Cir. 2011), *pet. for cert. filed*, 80 BNA U.S.L.W. 3335 (Nov 23, 2011) (No. 11-649).[18] *Sarei* explained that "prudential exhaustion" may require exhaustion of domestic remedies where the nexus to the United States is weak and the claims do not involve human rights violations of universal concern. *Id.* at 831. On remand, the district court held that exhaustion would be required for several claims. *Sarei*, 650 F. Supp. 2d at 1031. On appeal, the Ninth Circuit affirmed the district court's application of the exhaustion doctrine. *Sarei*, 671 F.3d at 754-55.

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[18] The D.C. Circuit noted the possibility of an exhaustion requirement in *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 26-27 (D.C. Cir. 2011), but declined to dismiss claims on appeal in light of the District Court's "unchallenged" finding that efforts to litigate the claims in the home country would be "futile." *Id.*; *but see Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005) (stating, without further discussion, "[T]he exhaustion requirement does not apply to the AT[S]").

The exhaustion of domestic remedies doctrine responds directly to the concerns over efficient dispute resolution and respect for the sovereignty of foreign States that are central to the debate about over extraterritorial ATS claims.[19] As one commentator noted, by imposing a prudential exhaustion requirement, the Ninth Circuit has "significantly constrained the most aggressive extraterritorial applications of the ATS." *Developments in the Law---Extraterritoriality*, 124 Harv. L. Rev. 1226, 1245 (2011).

CONCLUSION

Through application of the well-established doctrines discussed in this brief, the courts can effectively respond to the concerns raised by ATS claims arising in the territory of foreign sovereigns. It is not necessary to preclude litigation of all such claims in order to avoid interfering with the powers of the Executive Branch or infringing on the

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[19] U.S. domestic law imposes exhaustion of remedies requirements that respond to the same concerns as the international doctrine. Exhaustion of administrative or local remedies promotes efficiency by encouraging a local fact-finding body to resolve the controversy. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), *superseded by statute as stated in Booth v. Churner*, 532 U.S. 731, 732 (2001). Exhaustion also promotes comity, by affording respect to the decision-making authority of a local tribunal. *See, e.g., Castille v. Peoples*, 489 U.S. 346, 349 (1989) (noting that exhaustion requirement is "grounded in principles of comity."); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) (explaining that tribal court exhaustion reflects the fact that Indian tribes retain attributes of sovereignty). Exhaustion also serves to avoid "unnecessary conflict" between separate judicial systems. *Ex Parte Royall*, 117 U.S. 241, 251 (1886).

sovereignty of foreign states, or to ensure that claims are dismissed in favor of litigation in a more convenient forum.

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APPENDIX

The Amici Curiae joining this Brief include:

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Allan Ides is the Christopher N. May Professor of Law at Loyola Law School Los Angeles. He has published extensively in the areas of constitutional law and federal procedure. *See, e.g., A Critical Appraisal of the Supreme Court's Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 Loy. L.A. L. Rev. 341 (2012); *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The Shady Grove Debate between Justices Scalia and Stevens*, 86 Notre Dame Law Review 1041 (2011). His civil procedure casebook, co-authored with Christopher N. May—*Civil Procedure: Cases and Problems* (Aspen 2012)—is in its fourth edition.

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