

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**

SUPPLEMENTAL BRIEF FOR PETITIONERS

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RULE 29.6 DISCLOSURE

Rio Tinto plc has no parent corporation. No publicly held company owns 10% or more of the stock of Rio Tinto plc.

Rio Tinto Limited has no parent corporation. No publicly held company owns 10% or more of the stock of Rio Tinto Limited

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners Rio Tinto plc and Rio Tinto Limited (collectively, Rio Tinto) respectfully submit this supplemental brief in support of their Petition for a Writ of Certiorari pursuant to this Court’s Rule 15.8.

Rio Tinto filed the petition on November 23, 2011, less than one month after the Ninth Circuit’s en banc decision in this case, which ruled on several questions of fundamental importance for the scope of the Alien Tort Statute (ATS), 28 U.S.C. § 1350. Since then, the United States—in an *amicus curiae* brief submitted in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491—has stated that the questions presented in Rio Tinto’s petition are “important” and “unanswered by this Court,” but are not properly presented in *Kiobel*. U.S. *Kiobel* Br. 12-13. Further, four *amicus curiae* briefs, including one from the Governments of the United Kingdom and Australia, were filed in this case, all urging this Court to grant the petition. Nevertheless, respondents notified this Court on the day before their brief in opposition was due that they would waive response.

In the ordinary course, this Court would call for a response before considering a potentially certworthy petition. That approach, however, would preclude consideration of the merits of this case this Term. As the petition explains (Pet. 35-36) and several *amici curiae* recognize, this Court should consider the questions presented in this case together with *Kiobel*. By doing so, the Court can fully consider and finally decide all the major unresolved questions concerning the scope of the ATS, most of which will remain outstanding no matter how the corporate li-

ability question presented in *Kiobel* is decided. Thus, Rio Tinto respectfully suggests that its petition be given full consideration at the January 13, 2011 Conference, as currently scheduled, and that the petition be granted and set for argument this Term.*

ARGUMENT

1. On October 25, 2011, the Ninth Circuit—issuing its second en banc opinion in this case—decided, among other things, four questions left open by this Court’s decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The appellate court held that (i) federal courts could recognize a federal common law action under the ATS for conduct occurring entirely within the jurisdiction of a foreign nation, even when the claim addresses a foreign sovereign’s own conduct on its own soil toward its own citizens; (ii) federal courts could recognize a federal common law action under the ATS for theories of secondary liability such as aiding and abetting; (iii) ATS plaintiffs are not required to exhaust local remedies before filing suit in U.S. courts; and (iv) federal courts could recognize an ATS action against corporations for violating international human rights norms like genocide and war crimes. Pet. 13.

Less than a month later, on November 23, Rio Tinto filed a petition for a writ of certiorari presenting those four questions. (The petition was docketed on November 28, with the response due December 28.) Rio Tinto noted that while the fourth question

* Alternatively, the Court could order respondents to provide their response on an expedited basis, permitting consideration of the petition at the January 20 Conference.

presented was already pending before the Court in *Kiobel*, this case also presents all the other major outstanding ATS questions not decided by the Second Circuit in *Kiobel*. Thus, Rio Tinto urged the Court to grant certiorari and consider this case this Term, along with *Kiobel*. Pet. 35-36.

2. On December 21, the United States filed an *amicus curiae* brief in *Kiobel*, in support of the petitioners in that case, arguing that corporations could be held liable under the ATS. The United States recognized that other similar cases present “a number of ... questions, unanswered by this Court,” concerning the scope of the ATS. U.S. *Kiobel* Br. 12. The first two “unanswered” questions the government highlighted are squarely presented in Rio Tinto’s petition: (i) “whether or when a cause of action should be recognized under U.S. common law based on acts occurring in a foreign country” (*id.* at 13 (citing *Sosa*, 542 U.S. at 727-28)); and (ii) “whether or when a cause of action should be recognized for theories of secondary liability such as aiding and abetting” (*id.* at 12-13). Pet. i (QP 1 & 2). The third question highlighted by the government—“whether or when congressional legislation such as the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, should be taken into account in determining the scope and content of common law claims to be recognized under the ATS” (U.S. *Kiobel* Br. 13)—is also implicated by Rio Tinto’s petition. The third Question Presented is whether exhaustion of local remedies is required, Pet. i, and the answer turns in part on the fact that the TVPA requires such exhaustion, *id.* at 33-34.

The United States' *Kiobel* brief emphasized that the foregoing questions "are important, but they were not decided by the court of appeals in [*Kiobel*] ... and should not be answered" in that case. U.S. *Kiobel* Br. 13. Rather, they should be addressed, the government urged (if the Court were so inclined), "in a case where the issues have been decided by the court of appeals—and only after full briefing." *Id.* at 14 n.6.

3. On December 28, four separate briefs of *amici curiae* were filed in support of Rio Tinto's petition. Several of those briefs explained that the questions presented in this case will have to be decided no matter how *Kiobel* is resolved. The brief of the United Kingdom and Australia ("Governments") urged the Court to grant certiorari on the extraterritoriality and exhaustion questions (QP 1 and 3), and to reverse the court of appeals. UK/AUS Br. 4-6. Further, while the Governments noted that this Court has already granted certiorari in *Kiobel*, "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 to hear in the *Kiobel* case." *Id.* at 11. The Governments further argued that the extraterritoriality and exhaustion questions, at the least, "will require resolution by the Court, however it decides *Kiobel*; and therefore, certiorari should definitely be granted here." *Id.*

The brief filed by the Washington Legal Foundation explained that "while *Kiobel* addresses *who* may be sued under the ATS, it does not address the proper scope of ATS claims, and thus the Court's decision in that case is likely to have little impact on

the volume of ATS litigation in the federal courts.” WLF Br. 7. Thus, “[i]f the Court is able to act on the Petition soon enough to permit the case to be decided this Term, *amici* suggest that it be heard in conjunction with *Kiobel*.” *Id.* at 7-8. The brief filed by a group of law professors similarly explained “that, even if the Court rules for respondents in *Kiobel*, ATS actions will remain available against the employees of private corporations and other individual defendants. Accordingly, regardless of the outcome in *Kiobel*, at least the first two questions in the Petition will remain important ones that require resolution by this Court.” Law Professors’ Br. 2.

As the Chamber of Commerce’s *amicus curiae* brief rightly explains, affirmance in *Kiobel* will ultimately result in dismissal of the complaint in this case. Chamber Br. 4. But that is all the more reason to grant this petition alongside *Kiobel*, if the Court does not consider the first three questions presented here to be adequately presented in *Kiobel*. If the Court affirms in *Kiobel* on the ground that there is no corporate ATS liability, it will not have the opportunity for some time to accept a case raising all the other major outstanding ATS issues. Yet those issues will continue to be crucially important, in large part because plaintiffs will simply substitute corporate officers as defendants if *Kiobel* is affirmed. Pet. 36.

4. On December 27—one day before the brief in opposition was due—respondents notified the Court that they would waive their right to respond. In the ordinary course, this Court would not grant certiorari before calling for a response. Following that course here, however, would prevent the Court from

considering the merits of this case this Term. For the reasons explained in the petition and by several *amici curiae*, this Court would be well served to consider together all of the important and recurring issues concerning the scope of the ATS. Thus, if the Court agrees with the United States that the first three questions presented here are not properly presented in *Kiobel*, the Court should consider Rio Tinto's petition at the January 13 Conference (as scheduled), so that it has the opportunity to grant certiorari and set the case for argument this Term. There are no standing, jurisdictional, or vehicle problems with this case. To the contrary, this is precisely the type of case the United States described as an appropriate vehicle for resolving the remaining ATS issues, i.e., "a case where the issues have been decided by the court of appeals—and only after full briefing." U.S. *Kiobel* Br. 14 n.6. Each of the questions presented here was addressed by the en banc Ninth Circuit, with principal, concurring, and dissenting opinions thoroughly vetting the issues, after thorough briefing and argument on each of them.

Those issues are ripe for decision by this Court. Respondents' decision to waive—at the last possible moment—their opportunity to respond to this obviously meritorious petition for certiorari should not deprive this Court of the option to hear all the major questions concerning the scope of the ATS together this Term.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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