Nos. 19-416 & 19-453

IN THE
SUPREME COURT OF THE UNITED STATES

NESTLÉ USA, INC., *Petitioner*,
v.

JOHN DOE I, *et al.*, *Respondents.*

CARGILL, INC., *Petitioner*,
v.

JOHN DOE I, *et al.*, *Respondents*.

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

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BRIEF OF FOREIGN LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Tanya Sukhija-Cohen
Hadsell Stormer Renick
& Dai LLP
128 North Fair Oaks Ave.
Pasadena, CA 91103
(626) 585-9600
tanya@hadsellstormer.com

William J. Aceves
Counsel of Record
California Western School
of Law
225 Cedar Street
San Diego, CA 92101
(619) 515-1589
wja@cwsl.edu

Counsel for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*

This Brief of *Amici Curiae* is respectfully submitted in support of Respondents and pursuant to Supreme Court Rule 37(2).[1]

Amici are foreign lawyers with expertise in international litigation.[2] While they practice in different legal systems, they all share a deep commitment to the rule of law, respect for international law, and the principle of accountability for human rights violations.

As foreign lawyers, *Amici* take no position on the U.S. legal system or the intricacies of the Alien Tort Statute. Rather, *Amici* offer their expertise on international litigation as well as state jurisdiction over domestic corporations. *Amici* believe this submission will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

International law regulates state action in several ways. It establishes rules that regulate

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. Counsel for all parties consented to the filing of this brief.

[2] A list of the *Amici* appears in the Appendix.

inter-state behavior, as evidenced in numerous multilateral and regional treaties. In addition, international law regulates certain intra-state activity, such as a state's assertion of jurisdiction within its national legal system.

International law allows states to exercise jurisdiction over their citizens, including corporations, when they commit extraterritorial harms. The well-established active personality principle allows a state to assert jurisdiction over its citizens regardless of where they are located. Accordingly, states may assert jurisdiction over corporations for extraterritorial harms, including conduct they commit in their state of domicile but which results in injuries abroad. Indeed, numerous states have asserted jurisdiction over domestic corporations that allegedly committed extraterritorial human rights abuses or engaged in domestic conduct that caused injuries abroad.

When states properly assert jurisdiction over their nationals for wrongful conduct, they create an essential web of accountability that spans the globe. Conversely, when states fail to hold their nationals accountable, they facilitate violations of the rule of law, which could generate international conflict. Moreover, the active personality principle ensures that no state's nationals gain an unfair advantage because all states have the right and ability to hold their nationals accountable. Finally, state assertions of jurisdiction over their nationals offer a degree of certainty to individuals and corporations that allow them to predict the jurisdictional consequences of their activities.

Unlike other forms of jurisdiction, there are no surprises when states assert jurisdiction over their own nationals.

ARGUMENT

International law regulates the behavior of states, including assertions of national jurisdiction in legal proceedings.[3] Indeed, assertions of national jurisdiction, even for conduct committed abroad or domestic conduct that causes harm abroad, are both well-recognized by states and firmly accepted under international law. In such matters, the rules of international law offer no meaningful distinction between natural and legal persons, including corporations.

I. INTERNATIONAL LAW ALLOWS STATES TO EXERCISE JURISDICTION OVER THEIR CITIZENS, INCLUDING CORPORATIONS, REGARDLESS OF WHERE THEY OPERATE.

International law regulates state action in several ways. It establishes rules that regulate inter-state behavior, as evidenced in numerous multilateral and regional treaties. In addition, international law regulates certain intra-state activity, particularly when this activity implicates the rights of other states. One such area of intra-

[3] Of course, international law also regulates the behavior of non-state actors, including corporations.

state activity involves a state's assertion of jurisdiction within its national legal system. *See* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 6 (2d ed. 2015); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 15 (1964).

There are three forms of jurisdiction in national legal systems: jurisdiction to prescribe, adjudicate, and enforce. *See generally* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 440 (9th ed. 2019). While related, they each represent a distinct exercise of state power. Jurisdiction to prescribe involves a state's power to adopt legislation that regulates behavior or specific entities, including individuals and corporations. Jurisdiction to adjudicate involves the ability of a state's courts to assert their authority over parties and claims. Finally, jurisdiction to enforce allows a state to compel compliance with the law. *See* Cedric Ryngaert, *The Concept of Jurisdiction in International Law*, *in* RESEARCH HANDBOOK ON JURISDICTION AND IMMUNITIES IN INTERNATIONAL LAW 50 (Alexander Orakhelashvili ed., 2015).

The active personality principle is one of the oldest and most well-established forms of state jurisdiction.[4] It presumes that nationals traveling

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[4] *See* Research in International Law under the Auspices of the Faculty of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 519 (Supp. 1935) ("The competence of the State to prosecute and punish its nationals on the

or residing abroad remain under their home state's "personal authority." OPPENHEIM'S INTERNATIONAL LAW 462 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1996). As a result, states have long had the authority to assert jurisdiction over their nationals, even when their nationals travel or reside abroad. LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 281–82 (3d ed. 2015); MALCOM SHAW, INTERNATIONAL LAW 663–64 (6th ed. 2012). This principle exists within both civil law and common law legal systems. *See, e.g.*, LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS 761 (7th ed. 2019) (describing the exercise of the active personality principle by the United States, France, Germany, India, and the United Kingdom); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 410, rpt. nt. 1 (2018) (describing the exercise of the active personality principle in Estonia, Finland, Germany, Greece, Spain, and Sweden). It also applies to both civil and criminal proceedings. Jennings & Watts, *supra*, at 462–63. In sum, "[t]he right of a state to regulate all conduct of its citizens or nationals is, like territorial jurisdiction, usually noncontroversial." BARRY E. CARTER ET AL., INTERNATIONAL LAW 591 (7th ed. 2018).

The active personality principle is premised on

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sole basis of their nationality is universally conceded.").

the strong connection between a state and its citizens.[5] *See generally* CHEN, *supra*, at 281 (The active personality principle "follows from a state's claim to control its own people as a base of power."); RYNGAERT, *supra*, at 106. It recognizes that citizens are members of a polity, with commensurate rights and obligations. This alone justifies the assertion of jurisdiction. There are, however, other reasons. For example, it prevents citizens from engaging in harmful activity abroad and then seeking *de facto* immunity in their home state. *Id*. It also protects "a State's reputation from being blemished by the conduct of its nationals abroad." *Id*. On some occasions, the active personality principle may alleviate international tension between the state where the harmful act was committed and the state

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[5] While recognized under customary international law, numerous treaties also recognize the active personality principle. *See, e.g.*, Convention against Transnational Organized Crime art. 15(2)(b), Sept. 29, 2003, 2225 U.N.T.S. 209; Convention for the Suppression of the Financing of Terrorism art. 7(1)(c), Apr. 10, 2002, 2178 U.N.T.S 197; Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment art. 5(1)(b), June 26, 1987, 1465 U.N.T.S. 85; Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. 6, Oct. 10, 1967, 610 U.N.T.S 205; Antarctic Treaty art. 8(1), June 23, 1961, 402 U.N.T.S. 71.

of nationality. "The territorial State might arguably welcome the exercise of jurisdiction by the State of nationality of the offender, as this may relieve it of the task of harnessing its resources to prosecute the offense." *Id*. at 106–07; *see also* Geoffrey Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41, 69–70 (1992).

The active personality principle extends to both natural and legal persons, including corporations.[6] Thus, states routinely "assert jurisdiction over legal persons whose principal place of business or registered office is located in their territories, without encountering objections assertedly based on international law." DAMROSCH & MURPHY, *supra*, at 762; CHEN, *supra*, at 282; RESTATEMENT (FOURTH), *supra*, at § 410 rpt. nt. 2 (describing relevant state practice in Australia, Netherlands, and United Kingdom).

International law recognizes that the nationality of a corporation can be established in several ways. RESTATEMENT (FOURTH), *supra*, at § 410 cmt. b ("The most common bases for recognizing the nationality of a corporation are (1) the state in which the corporation is incorporated and (2) the state where it has its seat

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[6] The active personality principle even extends to "legal persons organized or having their principal places of business abroad when these persons are owned or controlled by nationals." DAMROSCH & MURPHY, *supra*, at 762.

(*siège social*) or center of control."). Indeed, nationality has significant implications. *Cf. Case Concerning Barcelona Traction, Light and Power Co., Ltd.* (Belg. v. Spain), Preliminary Objections, 1970 I.C.J. Rep. 3, 42 (Feb. 5) ("The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments."). Highlighting the significance of nationality, the state that grants corporate personhood is the only state capable of providing it diplomatic protection under international law. *Case Concerning Ahmadou Sadio Diallo* (Guinea v. DRC), Preliminary Objections, 2007 I.C.J. Rep. 4, 27 (May 24) ("Conferring independent corporate personality on a company implies granting it rights over its own property, rights which it alone is capable of protecting. As a result, only the State of nationality may exercise diplomatic protection on behalf of the company when its rights are injured by a wrongful act of another State.").

In sum, it is firmly established that states may exercise jurisdiction over their own citizens, including corporations, when they commit harms abroad.[7] Indeed, there are pragmatic reasons for

[7] This Court has long recognized the application of the active personality principle. *See, e.g.*, *Skiriotes*

why international law has recognized the permissibility of such assertions of jurisdiction. It ensures that no individual or corporation can escape accountability. When jurisdiction is properly asserted by states, it creates a web of accountability that spans the globe. And, it minimizes international conflict by recognizing jurisdictional authority with the state that has the closest connection to the offending party.

II. FOREIGN STATES ROUTINELY ASSERT JURISDICTION OVER DOMESTIC CORPORATIONS REGARDLESS OF WHERE THEY OPERATE.

It is not surprising that states routinely assert jurisdiction over their own nationals, including domestic corporations, regardless of where they operate.[8]

A. Australia

Australian courts recognize jurisdiction over

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v. Florida, 313 U.S. 69, 73 (1941); *Blackmer v. United States*, 284 U.S. 421, 436–38 (1932).

[8] In *Daimler AG v. Bauman*, 571 U.S. 117, 141 (2014), this Court acknowledged that countries in the European Union allow for corporations to be sued in the place of their statutory seat, central administration, or principal place of business. For purposes of establishing jurisdiction, the locus of the harm is of no significance.

Australian corporations for extraterritorial harms. In fact, numerous scholars have noted that Australian private international law principles are advantageous to foreign plaintiffs seeking remedies against Australian corporations.[9] *See, e.g.*, Joanna Kyriakakis, *Freeport in West Papua: Bringing Corporations to Account for International Human Rights Abuses under Australian Criminal and Tort Law*, 31 MONASH U. L. REV. 95 (2005); Peter Prince, *Bhopal, Bougainville and OK Tedi: Why Australia's* Forum Non Conveniens *Approach is Better*, 47 INT'L & COMP. L.Q. 573 (1998); Gabrielle Holly, *Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights:* Kamasaee v Commonwealth, 19 MELBOURNE J. INT'L L. 52 (2018); Gabrielle Holly, *Challenges to Australia's Offshore Detention Regime and the Limits of Strategic Tort Litigation*,

[9] As it operates in Australian states and territories, the doctrine of *forum non conveniens* is favorable to plaintiffs. The discretion to stay proceedings will be exercised only where the Australian jurisdiction is a "clearly inappropriate forum." *Voth v Manildra Flour Mills*, [1990] 171 CLR 538 (Austl.); *Oceanic Sun Line v Fay* (1988) 165 CLR 197 (Austl.); *Regie Nationale de Usines Renault SA v Zhang*, [2002] 210 CLR 491 (Austl.). The defendant or respondent has the difficult onus of demonstrating that the proceedings in the forum are "oppressive, vexatious, or an abuse of process." *Voth*, 171 CLR at 564.

21 GERMAN L.J. 549 (2020).

Personal jurisdiction over a defendant corporation arises where the corporation carries on business in the forum.[10] *National Commercial Bank v Wimborne*, [1979] 11 NSWLR 156 (Austl.). As noted by the Chief Justice of the Federal Court of Australia, the sole grounds for establishing a court's personal jurisdiction over a party at common law are the service of a writ upon that party within the court's territorial jurisdiction, or the party's voluntary appearance.[11] Justice James Allsop & Daniel Ward, *Incoherence in Australian Private International Laws*, FED. COURT OF AUSTRALIA: DIGITAL LAW LIBRARY (Apr. 10, 2013), https://www.fedcourt.gov.au/digital-law-

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[10] In addition to corporate liability, there are also avenues for holding directors of multinational corporations accountable for failing to prevent extraterritorial human rights violations through personal liability for breaches of directors' duties under Australia's Corporations Act 2001 (Cth).

[11] State and territory courts, as well as the federal courts, have long-arm rules permitting service of process upon defendants in a broader range of circumstances than at common law. *See Federal Court Rules 2011* (Cth) ch 2 pt 10 div 10.4 (Austl.); *Uniform Civil Procedure Rules 2005* (NSW) pts 10 &11 sch 6 (Austl.).

library/judges-speeches/chief-justice-allsop/allsop-cj-20130410.

Whether an Australian federal or state court has subject matter jurisdiction depends upon the conduct in question, the causes of action relied upon, and the applicable law. Where the cause of action is based on an Australian statute, it is clear that both the Commonwealth as well as state and territory Parliaments have constitutional power to enact legislation that has extraterritorial effect. Whether a particular statute has extraterritorial application may be clear from its wording.[12] In the absence of an express provision connecting the

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[12] For example, under section 5(1) of the Competition and Consumer Act 2010 (Cth), parts of the Act apply to conduct occurring outside Australia where the defendant is, *inter alia*, a foreign corporate body carrying on business in Australia or an entity incorporated in Australia. A number of cartel class actions brought in Australia have concerned Australian and multinational corporations, and these cases raised extraterritorial considerations given allegations of conduct occurring outside Australia. *See, e.g.*, *De Brett Seafood Pty. Ltd. v Qantas Airways Ltd. [No. 7]*, [2015] FCA 979 (Austl.); *Wright Rubber Products Pty. Ltd. v Bayer AG*, [2010] FCAFC 85 (Austl.); *Australian Competition and Consumer Commission v Bridgestone Corp.*, [2010] 186 FCR 214 (Austl.); *Darwalla Milling Co. Pty. Ltd. v F Hoffmann-La Roche Ltd.*, [2006] FCA 915 (Austl.).

statute to Australian jurisdiction, both federal and state statutory laws as well as the common law incorporate a rebuttable presumption that the legislation only applies domestically.

Where a statute is silent as to the sphere of its intended territorial application, the court's task is to identify the central focus or central conception of the legislation, and to consider its connection with Australian jurisdiction. *See DRJ v Commissioner of Victims' Rights [No. 2]*, [2020] NSWCA 242 (Austl.). This is done as a matter of statutory construction based on the subject matter and scope of the legislation, and with regard to internal indications in order to avoid improbable and absurd outcomes. The court considers the scope of the statute, the statutory purpose, and the need to avoid an unduly restrictive approach. As noted by the President of the New South Wales Court of Appeal, contrary legislative intention, sufficient to rebut or displace the operation of the statutory and common law presumptions of domestic application, may be evinced by express words, necessary implication, and reading the Act as a whole. *Id.* ¶ 10. Such an approach is warranted if the legislative purpose would otherwise be frustrated or if the contrary is indicated by "the object, subject matter or history of the enactment." *Id.*

In *Dagi v The Broken Hill Propriety Company Ltd [No. 2]*, [1997] 1 VR 428 (Austl.), individuals from Papua New Guinea brought a lawsuit against an Australian corporation in Australia arising out

of its overseas actions. [13] The court assessed whether Australian courts could assert jurisdiction and concluded that negligence claims arising from the plaintiffs' loss of amenity or enjoyment of land and waters in Papua New Guinea were justiciable. [14] *Id.* at 454–55. The proceedings eventually resulted in a substantial settlement in 1996 and agreement to remediation works. Subsequent proceedings were brought in Australia alleging that the agreed remediation work had not been carried out.

In *Kamasaee v Commonwealth*, [2017] VSC 537 (Austl.), a class action lawsuit was filed in Australia concerning extraterritorial harms, including claims in negligence and false imprisonment, against the Australian government, an Australian security company, and various contractors. The lawsuit stemmed from the detention of asylum applicants on Manus Island in Papua New Guinea. *Id.* ¶ 1. The class action was

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[13] The plaintiffs' claims included causes of action in trespass, nuisance, and negligence arising out of the discharge of by-products of copper mining into the local rivers.

[14] An idiosyncratic issue arose as to the jurisdiction of the Victorian Supreme Court to entertain actions with respect to foreign land (the so-called *Moçambique* rule, derived from the case *British South Africa Company v Companhia de Moçambique*, [1893] AC 602 (Austl.)).

settled before trial in 2017 for $70 million (AUD). The settlement was approved by the Victorian Supreme Court in *Kamasaee*.[15] *Id.* ¶ 47.

Finally, in *Sanda v PTTEP Australasia (Ashmore Cartier) Pty. Ltd.*, NSD1245/2016 (Austl.), a group of Indonesian seaweed farmers brought a federal class action lawsuit against an Australian company for damages to their seaweed crop. *Id.* ¶¶ 83, 89–96. An oil spill traced to the company's offshore drilling operations resulted in a decline of seaweed production in Indonesian waters and ensuing economic damages. The defendants have not challenged Australian jurisdiction, and a judgment on liability is now pending in the Federal Court.

B. Canada

Canadian courts up to the highest level have

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[15] In addition, in November 2019, Wilson Security settled out of court with a plaintiff who alleged she had been raped at an offshore detention center in Nauru. *See JN v Wilson Security Pty. Ltd, Victorian Supreme Court*, Case No. S CI 2017 02933 (Austl.). The plaintiff alleged that Wilson Security knew its employees engaged in sexual misconduct and failed to address it. Miki Perkins, *Wilson Security Settles Alleged Rape Claim From Refugee on Nauru*, SYDNEY MORNING HERALD, Nov. 25, 2019, https://www.smh.com.au/national/wilson-security-settles-alleged-rape-claim-from-refugee-on-nauru-20191125-p53dzi.html.

permitted civil lawsuits to proceed against Canadian corporations for alleged human rights abuses connected to their overseas operations. Significantly, the Supreme Court of Canada has also allowed common law tort claims framed in customary international law to proceed against Canadian corporations. *Nevsun Resources Ltd. v. Araya*, [2020] SCC 5 (Can.).[16] Canadian courts have also permitted negligence claims, as well as intentional torts, to proceed against the parent companies based in Canada, alleging that the corporations owed a direct duty of care to local inhabitants or workers in the foreign countries where their projects are located. *See, e.g.*, *Choc v. Hudbay Minerals Inc.*, [2013] ONSC 1414 (Can.); *Garcia v. Tahoe Resources Inc.*, [2017] BCCA 39 (Can.).

In *Nevsun*, refugee plaintiffs alleged that a Canadian parent company was liable for their forced labor at the corporation's mine in Eritrea. *Nevsun*, ¶¶ 3–4. Although the harms occurred abroad, the plaintiffs claimed that the company's board of directors and senior management in Canada were responsible for decisions regarding the development of the mine and exercised

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[16] *See generally* Jason MacLean & Chris Tollefson, *Foreign Wrongs, Corporate Rights and the Arc of Transnational Law*, *in* CORPORATE CITIZEN: NEW PERSPECTIVES ON THE GLOBALIZED RULE OF LAW 31, 42–48 (Oonagh E. Fitzgerald ed., 2020) (reviewing the *Nevsun*, *Choc*, and *Garcia* decisions).

authority over the parastatal subcontractors for whom the plaintiffs were forced to work. The plaintiffs pleaded not only direct negligence by the Canadian company, but also common law torts based on the defendant's role in aiding and abetting violations of customary international law norms, including slavery and crimes against humanity.

The Supreme Court of Canada refused to strike the plaintiffs' customary international law claims. *Id.* ¶ 6. The court confirmed that Canada automatically adopts customary international law into domestic common law absent express derogation in legislation. *Id.* ¶¶ 90, 94. The court held that "[c]ustomary international law is part of Canadian law. Nevsun is a company bound by Canadian law." *Id.* ¶ 132. Thus, in Canada, a common law tort framed in customary international law is comparable to the Alien Tort Statute, which allows U.S. federal courts to "recognize a common-law cause of action for claims based on the present-day law of nations." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1398 (2018).

Presented with arguments similar to the ones raised by Petitioners in this case, the Supreme Court of Canada rejected the assertion that corporate liability for human rights violations is not recognized under customary international law, stating, "Nevsun's position, with respect, misconceives modern international law. As Professor William S. Dodge has observed, '[i]nternational law . . . does not contain general norms of liability or non-liability applicable to categories of actors.'" *Nevsun*, ¶ 105 (internal

citations omitted). [17] The court ruled that corporations may, in principle, be bound by customary international law through either "direct liability for violations of 'obligatory, definable, and universal norms of international law', or indirect liability for their involvement in what Professor Clapham calls 'complicity offenses.'" *Id.* ¶ 113 (internal citations omitted). The court cited approvingly to Professor Harold Koh's conclusion that it would not "'make sense to argue that international law may impose criminal liability on corporations, but not civil liability.'" *Id.* ¶ 112 (internal citations omitted).[18] Likewise, "'what legal

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[17] At the Supreme Court of Canada, the defendant cited to this Court's judgment in *Jesner* to argue that the court should recognize a general rule that corporations can never be liable for human rights violations under customary international law. Factum of the Appellant, *Nevsun Resources Ltd. v. Araya*, ¶ 69. At the court of first instance, the defendant had argued unsuccessfully that an analysis of state practice and *opinio juris* regarding corporate liability was required, relying in part on the Second Circuit's judgment in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). *See Araya v. Nevsun Resources Ltd.*, [2016] BCSC 1856, ¶¶ 425, 474 (Can.).

[18] The Supreme Court of Canada also rejected the argument that existing domestic torts can adequately address allegations of *jus cogens* violations like slavery and crimes against

sense would it make to let states and individuals immunize themselves from liability for gross violations through the mere artifice of corporate formation?'"[19] *Id.*

In allowing the customary international law claims to move forward, the court was unpersuaded by the argument of one intervener that "[t]he application of CIL [customary international law] to private companies would be a competitive-disadvantage for mining companies and businesses in Canada," and "businesses will have to re-examine their decisions to incorporate, raise capital, maintain offices, employ people and otherwise do business in Canada." Factum of the Intervener Mining Association of Canada, *Nevsun*

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humanity. *Nevsun*, ¶¶ 20, 60–69. The court considered those violations "inherently different" than garden variety torts, and to treat them as traditional torts "may undermine the court's ability to adequately address the heinous nature of the harm caused by this conduct." *Id.* ¶¶ 123–26.

[19] Lower courts, in dismissing the defendant's *forum non conveniens* motion (which was not at issue before the Supreme Court of Canada), found that there was a real risk of an unfair trial in Eritrea. *Araya v. Nevsun Resources Ltd.*, [2017] BCCA 401, ¶ 118 (Can.). Had Canadian courts refused to assert jurisdiction, there would have been no judicial means for the plaintiffs to seek accountability against the Canadian company.

Resources Ltd. v. Araya, ¶ 27.

Lower Canadian courts have upheld jurisdiction in similar lawsuits. The Ontario Superior Court allowed a human rights case to proceed based on a claim of direct negligence of a Canadian mining company for "its own actions and omissions in another country." *Choc v. Hudbay Minerals Inc.*, [2013] ONSC 1414, ¶ 50 (Can.). The negligence allegedly resulted in abuses by security personnel working for the defendant's Guatemalan subsidiary, including gang rapes and murder. *Caal Caal v. Hudbay Minerals Inc.*, [2020] ONSC 415 (Can.) (upheld on appeal but appellate judgment not yet reported, Case No. CV-11-423077, Sept. 30, 2020) (Can.)).[20] The court held that the pleadings alleged sufficient facts such that a trial court could find proximity and, therefore, a duty of care between the Canadian parent and the Guatemalan plaintiffs. *Choc*, ¶ 70.

Finally, the Québec Superior Court, applying civil law, found it could adjudicate an allegation that Canadian corporate defendants knowingly assisted a foreign state in committing war crimes,

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[20] Plaintiffs in *Garcia v. Tahoe* made similar allegations to those in *Choc*, arguing that security personnel for the Guatemalan subsidiary of a different Canadian company shot them while they were protesting outside a mine. The British Columbia Court of Appeal found that jurisdiction was proper in Canada. *Garcia v. Tahoe Resources Inc.*, [2017] BCCA 39 (Can.).

and that such a claim would be recognizable as a civil fault (tort). *See Bil'in (Village Council) v. Green Park Ltd.*, [2009] QCCS 4151, ¶¶ 188, 204–06 (Can.) (dismissing the lawsuit on *forum non conveniens* grounds) ("Knowingly participating in such breach would constitute a civil fault, as would an intentional participation to a war crime.").

C. England & Wales

It is an unremarkable feature of the substantive and procedural law of the United Kingdom that corporations can be held liable for harm arising from their operations abroad.[21] Long established rules and precedent governing jurisdiction, choice of law, and the joinder of foreign entities have been applied to hold corporations accountable in the

[21] This section refers to the law of England & Wales ("England"). Scotland and Northern Ireland (the other constituent parts of the United Kingdom) each have separate legal regimes. However, they are all governed by the jurisdictional rules of the European Union ("EU"), which are of uniform application, and any future jurisdictional framework is likely to be applied across the United Kingdom. However, the House of Lords has held that where an English domiciled company is sued for injuries arising overseas, the United Kingdom would be the appropriate jurisdiction. In October 2009, the Supreme Court replaced the Appellate Committee of the House of Lords as the highest court in the United Kingdom.

United Kingdom for harms caused by their own acts and by those of their foreign subsidiaries.

Many of these principles were recently considered by the Supreme Court of the United Kingdom in *Lungowe & Others v Vedanta & Another*, [2019] UKSC 20 (Eng.). In this case, several thousand inhabitants of a town in Zambia brought a claim for environmental harm against a local copper mine and its English domiciled parent company. *Id.* ¶¶ 1–3. This case is the latest and most authoritative treatment of the relevant principles regarding jurisdiction in the United Kingdom.

As to jurisdiction, the *Vedanta* decision identifies the law of the European Union as the governing regime for tort claims. *Id.* ¶ 16. Specifically, the U.K. Supreme Court affirmed the relevance of EU Regulation No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, also known as the Brussels I Regulation (recast). [22] According to Article 4,

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[22] Regulation (EU) No. 1215/2012 replaced Regulation (EC) No. 44/2001 of 22 December 2000 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2012 O.J. (L 351); and the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels, 27

"persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State" and "[p]ersons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State." A corporation is considered a legal person for purposes of the Regulation.[23]

In 2005, the European Court of Justice confirmed that Article 4 (formerly Article 2) precluded any possibility of a company domiciled in the United Kingdom resorting to domestic law arguments of *forum non conveniens* when facing a claim concerning extraterritorial torts. Case C-

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September 1968, 1972 O.J. (L 299) 32 (EC). *See generally* CHRISTOPH SCHMON, THE INTERCONNECTION OF THE EU REGULATIONS BRUSSELS I RECAST AND ROME I: JURISDICTION AND LAW (2020) (describing the jurisdictional rules of EU regulations).

[23] Pursuant to Article 63 (formerly Article 60) of the Brussels I Regulation (recast), a corporation is domiciled in the place of its statutory seat, its central administration, or its principal place of business. The place of central administration is the location where the company, through its relevant organs, makes the decisions that are essential for the company's operations. *Young v. Anglo American South Africa Limited & Ors*, [2014] EWCA Civ 1130 [45] (Eng.).

281/02, *Owusu v Jackson*, 2005 E.C.R. I-1383, 1462. This includes torts committed outside the European Union. *Id.* ¶ 31. Repeated attempts by defendants to fashion exceptions to the rule have been unsuccessful.

Over the past 25 years, there have been numerous cases where English domiciled companies have been sued "as of right" before the English courts for the impact of their overseas acts. *See, e.g.*, *Guerrero & Others v. Monterrico Metals PLC*, [2009] EWHC 247 (Eng.) (alleged corporate complicity with state security in the torture and unlawful detention of 33 indigenous environmental protesters at a copper mine in Peru); *Kesabo v. African Barrick Gold PLC & NMGML*, [2013] EWHC 4045 (Eng.) (alleged corporate complicity with state security in the shooting and killings of 12 villagers at a gold mine in Tanzania).

Due to Brexit, the United Kingdom has now left the European Union. As a result, the relevant EU Regulations will cease to have legal effect as of December 31, 2020 unless the United Kingdom reaches an agreement with the European Union. The United Kingdom has indicated it will become a party to the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2007 O.J. (L 339) 3 (EC). The Lugano Convention replicates the mandatory jurisdiction provided by the Brussels I Regulation (recast). Accordingly, the United Kingdom would be bound by the same jurisdictional principles it currently recognizes.

If the United Kingdom does not accede to the Lugano Convention, then jurisdiction will revert to domestic law rules, and each case would turn on its individual facts. Nevertheless, the House of Lords has held that where an English domiciled company is sued for injuries arising overseas, the United Kingdom would be the "appropriate jurisdiction." *Connelly v. RTZ Corp. PLC*, [1998] AC 854, 873 (Eng.).

Even where England is not the natural or most convenient forum for a claim against a non-domiciled party, a court will still maintain jurisdiction over the case if it concludes that there is a real risk the claimants would not obtain substantial justice in the foreign court. In *Vedanta*, for example, the court retained jurisdiction because it determined that the complexity and cost of the case made it unlikely that the plaintiffs could obtain justice in Zambia.[24] *Vedanta*, ¶ 88.

D. France

French courts exercise jurisdiction in tort cases, even when there is a dispute over jurisdiction, as long as one of the defendants is domiciled in

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[24] U.K. courts have retained claims for a variety of reasons, including the risk of corruption in foreign courts and the inability of foreign courts to keep highly sensitive information confidential. *See, e.g.*, *AAA & Others v. Unilever*, [2017] EWHC 371 (Eng.); *Lubbe & Others v. Cape PLC concerning South Africa*, [2000] 1 WLR 1545 (Eng.).

France.[25] As with other EU member states, the assertion of jurisdiction in France is governed by the Brussels I Regulation (recast). Therefore, French courts are unlikely to decline jurisdiction over defendants domiciled in France absent fraud or similar facts.

This principle is also explicitly set forth in Article 42 of the French Code of Civil Procedure, which states "[u]nless otherwise provided, the court with territorial jurisdiction is that of the place where the defendant resides." CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROC. CODE] art. 42 (2020) (Fr.). Article 42 adds that "[i]f there are several defendants, the plaintiff shall, at his/her option, bring proceedings in the court of the place where one of them resides." *Id*. These procedural rules apply equally to individuals as well as corporations.

Significantly, French law, as set forth in the 2017 Law on the Duty of Vigilance, requires large corporations to establish, publicize, and implement a vigilance plan which applies to their domestic and

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[25] French criminal law also allows for jurisdiction by French courts over French nationals who have committed extraterritorial harms. *See generally* CODE DE PROCÉDURE PÉNALE [C. PR. PÉN] [CRIM. PROC. CODE] art. 113-6 (2020) (Fr.). Under this authority, French courts may assert jurisdiction over parent companies incorporated in France, as well as French managers of foreign subsidiaries.

overseas actions.[26] *See* French Law on the Duty of Vigilance of Parent and Instructing Companies, Law No. 2017-399 (Mar. 27, 2017). Vigilance plans must include reasonable measures to identify risks and prevent serious violations of human and environmental rights resulting from the activities of the company and those entities it controls, as well as from the activities of subcontractors or suppliers with which it has an established business relationship. *Id*. art. 1. The failure to comply with this obligation triggers the liability of the French corporation and requires that it provide compensation for damages. *Id*. art. 2.

French law thus includes a dedicated cause of action providing that French corporations will be held accountable for breaching their duty of vigilance even for actions committed abroad. According to its legislative history, the purpose of the law is "to make transnational corporations accountable in order to prevent the occurrence of tragedies in France and abroad and to obtain compensation for victims in the event of damage to human rights and the environment." French National Assembly, Proposed Law on the Duty of

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[26] For a translation of the French Law on the Duty of Vigilance of Parent and Instructing Companies, *see* SHERPA, VIGILANCE PLANS REFERENCE GUIDANCE 80 (2019), https://www.asso-sherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-ilovepdf-compressed.pdf.

Vigilance of Parent Companies and Ordering Companies (Nov. 6, 2013), *available at* http://www.assemblee-nationale.fr/14/propositions/pion1519.asp#:~:text=La%20proposition%20de%20loi%20propose,portant%20atteinte%20aux%20droits%20fondamentaux. The extraterritorial reach of the duty of vigilance was acknowledged throughout French parliamentary debates.[27]

E. Germany

German courts may exercise jurisdiction in tort-based proceedings regarding human rights abuses abroad when the corporate defendants are domiciled in Germany.

In the case of complaints against companies domiciled in Germany, jurisdiction is based on the

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[27] *See* French National Assembly, Report Made on Behalf of the Committee on Constitutional Laws, Legislation, and the General Administration of the Republic on the Proposal of Law (No. 1519) Relating to the Duty of Vigilance of Parent Companies and Ordering Companies (Jan. 21, 2015), *available at* http://www.assemblee-nationale.fr/14/rapports/r2504.asp ("In the absence of a mechanism for the legal responsibility of transnational corporations for human rights violations committed by their subsidiaries and subcontractors—particularly outside national borders—it is difficult for victims to obtain compensation for the damages suffered.").

Brussels I Regulation (recast). Therefore, German courts can exercise jurisdiction over cases filed against parent or buying companies involved in overseas human rights abuses that have their statutory seat, central administration, or principal place of business in Germany.

Applying these rules, German courts accepted jurisdiction in *Jabir et al. v. KiK Textilien und Non-Food GmbH*, LG Dortmund (Regional Court Dortmund), 2016 (Case No. 7 O 95/19) (Ger.) as well as *Lliuya v. RWE AG*, LG Essen, 2015 (Case No. 2 O 285/15) (Ger.). In both cases, the defendant companies were headquartered in Germany and committed human rights abuses or environmental damage in another country.

Jabir involved a 2012 fire at the Ali Enterprise ("AE") textile factory in Karachi, Pakistan, in which 259 workers died and 32 were heavily injured. *See generally* Philippe Wesche & Miriam Saage-Maaß, *Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers Before German Civil Courts: Lessons from* Jabir and Other v. Kik, 16 HUM. RTS. L. REV. 370 (2016). The most notable customer of the factory was the German textile company KiK Textilien und Non-Food GmbH ("KiK"). According to its own statements, KiK purchased at least 70% of the production output of AE over a period of five years. In *Jabir*, the court stated that jurisdiction arose both from Article 4(1) and Article 63(1) of the Brussels I Regulation (recast) as well as from Sections 12 and 17 of the German Code of Civil Procedure. ZIVILPROZESSORDNUNG [ZPO]

[CODE OF CIVIL PROCEDURE], §§ 12, 17 (citing Bundesgerichtshof [BGH] [Federal Court of Justice] May 5, 2011, IX ZR 176/10) (Ger.)).

In *Lliuya*, the plaintiff was a Peruvian farmer who owned property located below a glacial lake at the foot of the Andes. *Lliuya v. RWE AG*, LG Essen, 2015 (Case No. 2 O 285/15) (Ger.). The defendant RWE AG was a German registered company and was the parent company of RWE, an energy group that owned various companies in the field of coal-based power generation. The plaintiff claimed that his home was threatened by flooding because the glacial lake could break at any time as a consequence of anthropogenic climate change. The plaintiff further claimed that the defendant was jointly responsible because it released large quantities of greenhouse gases throughout Europe, particularly through its subsidiaries, which were active in the field of coal-fired power generation. Therefore, the plaintiff sought a declaration that the defendant should bear the costs of protective measures against a glacial flood of the plaintiff's property in proportion to its contribution of allegedly 0.45% of global greenhouse gas emissions.

Both the first instance court and the court of appeal followed Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations 2007 O.J. (L 199) (EC) ("Rome II") and applied German law. Article 7 of Rome II provides an exception to the *lex loci damni* rule in cases arising from environmental damage. In such cases, claimants can choose to base their claims on the

law of the country in which the conduct giving rise to the damage occurred. The court of appeal allowed the case to proceed to discovery, and ordered expert opinions on the question of causation and attribution. *See Lliuya v. RWE*, OLG Hamm (Higher Regional Court Hamm), Nov. 30, 2017, I-5 U 15/17 (Ger.).

In lawsuits against subsidiaries and suppliers domiciled outside the European Union, the German laws on civil jurisdiction apply in accordance with Article 6 of the Brussels I Regulation (recast).

According to Section 17 of the German Code of Civil Procedure, which regulates jurisdiction over judicial persons, German courts have jurisdiction over companies seated in Germany. The decisive factor in determining where a company is seated is its actual center of administration, meaning the place where fundamental management decisions are taken and implemented. *See* BGH, Mar. 21, 1986, V ZR 10/85 (Ger.). Consequently, the German rules generally do not provide the courts with jurisdiction over non-European Union subsidiaries or suppliers. However, there is some case law where German courts exercised jurisdiction over companies incorporated outside the European Union on the basis that their administration was actually carried out in Germany. *See, e.g.*, BGH, Mar. 15, 2010, II ZR 27/09 (Ger.); OLG Köln (Higher Regional Court Köln), Jan. 31, 2006, Case No. 22 U 109/05 (Ger.).

In addition, Section 32 of the German Code of Civil Procedure provides jurisdiction over tortious acts and omissions committed in Germany,

irrespective of where the harmful event occurred. Under German law, the contribution of each tortfeasor to a jointly committed tort is attributable to the other tortfeasors, not only in terms of damages, but also in terms of establishing jurisdiction under Section 32. *See* BGH, July 12, 1995, XII ZR 109/94 (Ger.). On this basis, the Federal Court of Justice has exercised jurisdiction over non-EU companies that were allegedly involved in torts committed jointly with German nationals on German territory. *See* BGH, June 29, 2010, VI ZR 122/09 (Ger.). To establish jurisdiction, it is sufficient that the claimants present the court with conclusive facts substantiating their claim. *See* BGH, Mar. 9, 2010, XI ZR 93/09 (Ger.).

F. Netherlands

Dutch law allows civil courts to exercise jurisdiction over the foreign activities of legal persons domiciled in the Netherlands, and over tort lawsuits concerning harmful acts carried out in the course of those activities. Courts can also exercise jurisdiction over the tortious conduct of subsidiaries of Dutch corporations domiciled outside of the Netherlands. This principle is established in both statutory and case law.

Jurisdiction over civil lawsuits in the Netherlands is partially governed by the Brussels I Regulation (recast). The Regulation is binding on the Netherlands, is directly applicable in the domestic legal order, and has primacy over domestic law. It applies to all civil suits against persons domiciled in an EU member state, and

exhaustively harmonizes rules on jurisdiction for cases that fall within its scope. It is reflected in Article 2 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) (Art. 2:1 ¶ 1 BW). In *Stichting Victimes des Dechets Toxiques Cote d'Ivoire v. Trafigura*, a case concerning the dumping of toxic material in Ivory Coast, the court exercised jurisdiction over Trafigura Beheer Ltd., a corporation registered in the Netherlands, for damage caused to Ivorian plaintiffs. *See* District Court Amsterdam, Apr. 18, 2018, ECLI:NL:RBAMS:2018:2476 (Neth.), *affirmed in* Court of Appeal Amsterdam, Apr. 14, 2020, ECLI:NL:GHAMS:2020:1157 (Neth.).

If a defendant is not domiciled in an EU member state, jurisdiction is determined according to the domestic law of the state where the suit is filed. Under Dutch law, it is possible to sue defendants not domiciled in the Netherlands, including corporate defendants. Under Article 7(1) of the Dutch Code of Civil Procedure, courts can exercise jurisdiction over multiple defendants if they have jurisdiction over at least one of the defendants, and the claims are so related that it would be in the interests of expediency to hear them together. *See* Art. 7:1 ¶ 1 BW. Dutch courts also consider whether bringing claims separately before different courts would create the risk of irreconcilable judgments. This includes defendants that would otherwise be outside the jurisdiction of the court.

Dutch courts have also relied on these provisions to exercise jurisdiction over lawsuits

against Dutch corporations and their subsidiaries for extraterritorial harms that arise out of their conduct overseas. In *Akpan & Stichting Milieudefensie v. Shell*, Nigerian plaintiffs sued Royal Dutch Shell ("RDS"), a company incorporated in the Netherlands, and its Nigerian subsidiary Shell Petroleum Development Company of Nigeria ("SPDC") for damage caused to farmlands and fishing grounds by oil spills in the Niger Delta. *See* Court of Appeal The Hague, Dec. 18, 2015, ECLI:NL:GHDHA:2015:3587 (Neth.). In 2015, the Court of Appeal ruled that it could exercise jurisdiction over RDS pursuant to its domicile in the Netherlands according to Article 4(1) of the Brussels I Regulation (recast), and over SPDC pursuant to the claims being sufficiently connected according to Article 7(1) of the Dutch Code of Civil Procedure. *Id.* ¶¶ 2.3–2.4, 28. The court explicitly rejected the defendants' arguments that RDS was only sued as an anchor defendant to bring SPDC within the court's jurisdiction. *Id.* ¶¶ 2.5–2.7.

Similarly, in *Kiobel v. Shell*, Nigerian plaintiffs sued RDS and SPDC for complicity in the torture and extrajudicial executions of their family members. *See* District Court The Hague, May 1, 2019, ECLI:NL:RBDHA:2019:4233 (Neth.) In an interlocutory decision, the court found that it could exercise jurisdiction over both defendants based on the same grounds under Article 4(1) of the Brussels I Regulation (recast) and Article 7(1) of the Dutch Code of Civil Procedure. *Id.* ¶¶ 4.23–4.28.

Additionally, under Article 9 of the Dutch Code of Civil Procedure, courts can exercise residual

jurisdiction as a form of *forum necessitatis* if the case has a connection with the Netherlands and if it would be impossible for the plaintiff to bring the case in their home forum or unreasonable to require the plaintiff to do so. The court can then assert jurisdiction to prevent the plaintiff from facing a denial of justice. *Forum necessitatis* is generally considered to be a last resort, but it has been relied on in practice. *See* Lucas Roorda & Cedric Ryngaert, *Business and Human Rights Litigation in Europe: The Promises of Forum of Necessity Jurisdiction*, 80 RABEL J. COMP. & INT'L PRIV. L. 784 (2016). Dutch courts have exercised necessity jurisdiction in commercial disputes between corporations, and in *El Houjouj v. Unnamed Libyan Officials*, the court accepted necessity jurisdiction in a tort case filed by a refugee in the Netherlands against Libyan officials concerning acts of torture in Libya. *See* District Court The Hague, Mar. 21, 2012, ECLI:NL:RBSGR:2012:BV9748 (Neth.).[28]

In conclusion, there are ample grounds for Dutch courts to exercise civil jurisdiction over corporations for extraterritorial harms.

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[28] *See also* Court of Appeals Amsterdam, July 23, 2019, ECLI:NL:GHAMS:2019:2682 (Neth.); Court of Appeals The Hague, Nov. 30, 2011, ECLI:NL:GHSGR:2010:BO6529 (Neth.).

CONCLUSION

There is ample precedent for courts to exercise jurisdiction over domestic corporations for their conduct that causes injury abroad. Accordingly, this Court should affirm the decision of the Ninth Circuit.

Respectfully submitted, October 21, 2020

William J. Aceves
Counsel of Record
California Western School of Law
225 Cedar Street
San Diego, CA 92101
(619) 515-1589
wja@cwsl.edu

Tanya Sukhija-Cohen
Hadsell Stormer Renick & Dai LLP
128 North Fair Oaks Avenue
Pasadena, CA 91103
(626) 585-9600
tanya@hadsellstormer.com

Counsel for *Amici Curiae*

APPENDIX:
LIST OF *AMICI CURIAE*[29]

Camp Fiorante Matthews Mogerman LLP, Vancouver, British Columbia, Canada.

Peter Cashman, Barrister, 3 Wentworth Chambers, Sydney, Australia.

Sandra Cossart, Sherpa, Paris, France.

Laura Bourgeois, Sherpa, Paris, France.

Richard Hermer, QC, Matrix, Griffin Building, Gray's Inn, London, United Kingdom.

Klippensteins, Barristers & Solicitors, Toronto, Ontario, Canada.

Richard Meeran, Leigh Day Priory House, London, United Kingdom.

Tamara Morgenthau, Toronto, Ontario, Canada.

Waddell Phillips PC, Toronto, Ontario, Canada.

Michiel Pestman, Amsterdam, The Netherlands.

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[1] Affiliations provided for informational purposes only.

Lucas Roorda, Universiteit Utrecht, Utrecht, The Netherlands.

Miriam Saage-Maaß, Berlin, Germany.

Amelia Simpson, Solicitor, Sydney, Australia.

Siskinds LLP, London, Ontario, Canada.

James Yap, Toronto, Ontario, Canada.