Team #10

Docket No. 18-000123

# IN THE
# UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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ORGANIZATION OF DISAPPEARING ISLAND NATIONS, APA MANA, and NOAH FLOOD,
*Appellants,*

v.

HEXONGLOBAL,
*Appellee,*

And

THE UNITED STATES OF AMERICA,
*Appellee*.

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**BRIEF FOR APPELLEE**

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ON APPEAL FROM
UNITED STATES DISTRICT COURT,
DISTRICT OF NEW UNION ISLAND

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*Attorneys for Appellee,*
HEXONGLOBAL.

## QUESTIONS PRESENTED

I. Can Mana bring an Alien Tort Statute, 28 U.S.C. § 1350 claim against a domestic corporation?

II. Is the *Trail Smelter* Principle a recognized principle of customary international law enforceable as the "Law of Nations" under the Alien Tort Statute?

III. Assuming the *Trail Smelter* Principle is customary international law, does it impose obligations enforceable against non-governmental actors?

IV. If otherwise enforceable, is the *Trail Smelter* Principle displaced by the Clean Air Act?

V. Is there a cause of action against the United States Government, based on the Fifth Amendment substantive due process protections for life, liberty, and property, for failure to protect the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels?

VI. Do Plaintiffs' law of nations claim under the Alien Tort Statute and public trust claim present a non-justiciable political question?

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**BRIEF FOR APPELLEE**

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## OPINION BELOW

The opinion of the United States District Court, District of New Union Island is available at *Organization of Disappearing Island Nations, et al. v. HexonGlobal Corp. and The United States of America*, No. 66CV2018 (D. New Union Island 2018).

## JURISIDICTIONAL STATEMENT

This is an appeal from the final judgment of a United States district court; this court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court's final order, disposing of all claims in the case was entered on August 15, 2018. Plaintiffs filed a timely notice of appeal under 28 U.S.C. § 2107(b). Plaintiffs claim subject matter jurisdiction is fulfilled for issues one through

four under 28 U.S.C. § 1350. Subject matter jurisdiction is appropriately established for issues five and six under 5 U.S.C. § 8912.

## STANDARD OF REVIEW

This action arises under the Alien Tort Statute and the Fifth Amendment of the United States Constitution. The court reviews questions of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

## STATEMENT OF THE CASE

### Procedural History

This case comes before this court on appeal from the United States District Court, District of New Union Island NO. 66-CV-2018. R. 1. Plaintiffs Organization of Disappearing Island Nations ("ODIN"), Apa Mana, and Noah Flood brought action against defendants HexonGlobal Corporation and the United States. R. 3. Mana asserted a claim against HexonGlobal under the Alien Tort Statute ("ATS") alleging that its fossil fuel related business activities constituted a "violation of the Law of Nations." R. 3. Mana sought damages and injunctive relief. R. 3. Flood asserted a constitutional claim against the United States for violations of the public trust doctrine to protect the global climate system under the Due Process Clause of the Fifth Amendment to the Constitution. R. 3. On August 15, 2018, the District Court dismissed the plaintiffs' (here appellants') claims and submitted an order in favor of the defendants (here appellees). R. 11. Following the August 15 order, ODIN, Mana, and Flood appealed to the United States Court of Appeals for the Twelfth Circuit. R. 1.

### Statement of Facts

Organizational appellant ODIN is a not-for-profit membership organization that protects the interests of island nations threated by sea level rise. R. 3. Appellants Mana and Flood are

members of ODIN. R. 3. Defendant HexonGlobal is the surviving corporation resulting from the merger of all of the major United States oil producers. R. 5. HexonGlobal is only responsible for thirty two percent of United States cumulative fossil fuel-related greenhouse gas emissions and just six percent of global fossil fuel-related greenhouse gas emissions. R. 5. Its headquarters are in the state of New Jersey, and its principal place of business is in Texas. R. 5. A refinery owned by HexonGlobal operates on New Union Island, and has agreed to general personal jurisdiction in this territory. R. 5.

Global production of greenhouse gases is causing climate change and sea levels to rise around the world. R. 4. Mana and Flood own homes in communities threatened by this sea level rise. R. 4. Plaintiffs suffer a variety of other injuries caused by climate change and rising sea levels. R. 5. The United States, responsible for twenty percent of cumulative global anthropogenic climate change, oversees regulations that allow for the production and combustion of fossil fuels. R. 6. HexonGlobal operates under these regulations, receiving tax subsidies and public land leases from the United States for fossil fuel production. R. 6.

Congress passed the Clean Air Act and delegated implementation authority to the Environmental Protection Agency ("EPA"). 42 U.S.C. § 7521; R. 6. The United States Supreme Court held in *Massachusetts v. EPA* that greenhouse gases are "pollutants" that are subject to regulation under section 202(a)(1) of the Clean Air Act. 549 U.S. 497 (2007). Two years later, the EPA made a finding that emission of greenhouse gases has the potential to endanger the public health and welfare. R. 6. The EPA established a variety of regulations on greenhouse gas emissions, including a rule under the Clean Air Act requiring major new sources of greenhouse gas emissions to undergo review establishing emission limits. R. 7. The United States also signed the Paris Accords, committing to reduce their future greenhouse gas emissions twenty-six

to twenty-eight percent by 2025. R. 7. Risks associated with anthropogenic climate change are ongoing and are the basis of plaintiffs' claims. R. 5.

## SUMMARY OF ARGUMENT

A domestic corporation may not be the defendant in Mana's suit brought under the Alien Tort Statute because violations of the alleged tort does not extend liability to corporations or individuals. Only claims for violations of norms which are universal and apply to all actors give rise to individual liability and may be brought against a corporation. Here, the principle which Mana claims HexonGlobal violated applies only to States and therefore a domestic corporation may not be the defendant for her claim.

The *Trail Smelter* Principle cannot be considered a law of nations because it does not raise to the standard of other norms of international law. Therefore, Mana cannot bring an ATS claim against HexonGlobal using the *Trail Smelter* Principle because the ATS requires a claim to be brought under a "law of nations" and the *Trail Smelter* Principle cannot be considered as such.

The *Trail Smelter* Principle does not impose obligations enforceable against HexonGlobal because the corporation is a non-governmental actor. A plain language reading of the *Trail Smelter* Principle and subsequent interpretations shows it can only be appied to state actors. Courts have consistently applied *Trail Smelter* obligations to governmental actors. HexonGlobal is not a *de facto* state actor. Even if the court finds that the *Trail Smelter* Principle is applicable to HexonGlobal, the remedies provided by it are optional.

Even if the *Trail Smelter* Principle is considered to be a law of nations, Mana cannot bring action against HexonGlobal because the 42 U.S.C. § 7521 ("Clean Air Act") displaces federal common law. Federal common law includes law of nations and actions for air pollution

transboundary harm. The EPA is the proper regulator for actions of air pollution, not the courts, and therefore federal common law is the improper means by which to bring her claim.

The Due Process Clause of the Fifth Amendment does not provide protections for the global atmospheric climate system. An unprecedented extension of the Fifth Amendment protections to the climate would violate the intent of the Due Process Clause. Due Process does not protect private parties from actions by other private parties; HexonGlobal's actions do not amount to a state action. Nor can the Due Process Clause be used to compel the government to take specific action. Flood's public trust doctrine claims fail because the doctrine only imposes obligations on state governments, not the federal government. The equal-footing doctrine is limited to tidal lands and does impose obligations on the federal government to protect the global atmosphere.

Mana's Alien Tort Statute claim and Flood's public trust claim do not constitute a political question and are therefore justiciable because the claims are within the power of the judiciary to resolve. Additionally, prudential considerations point toward resolution of both issues by the courts because they raise issues of liability and about a judicially created doctrine.

## ARGUMENT

### I. MANA CANNOT BRING A CLAIM UNDER THE ALIEN TORT STATUTE AGAINST A DOMESTIC CORPORATION BECAUSE INTERNATIONAL LAW DOES NOT EXTEND LIABILITY FOR GREENHOUSE GAS EMISSIONS TO PRIVATE ACTORS.

The Alien Tort Statute ("ATS") gives jurisdiction to district courts over civil actions brought by an alien for violations of the law of nations. 28 U.S.C. § 1350. The ATS provides district courts "jurisdiction to hear certain claims, but does not expressly provide any causes of action." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 109, 115 (2013). This grant of jurisdiction was "enacted on the understanding that the common law would provide a cause of

action for [a] modest number of international law violations with a potential for personal liability." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). Congress originally intended a narrow scope for the ATS, applying to just three claims: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.*

Violations of the law of nations that may be brought under the ATS are not limited to those enumerated offenses, but fewer violations may be brought against non-state actors than against state actors. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 789 (D.C. Cir. 1984). When the defendant is a non-state actor such as a corporation, this court must take into consideration "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued." *Sosa*, 542 U.S. at 732 n.20. The United States Supreme Court has stressed judicial caution when considering claims under the ATS due to extreme foreign policy concerns that accompany such claims and any potential remedies. *Id*. at 727-28.

The Second Circuit Court of Appeals concluded that corporations could not be held liable for any claim brought under the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 145 (2d Cir. 2010). The court based this holding on the fact that while liability has been extended to individuals on occasion, liability has never been extended to a corporation by an international tribunal. *Id.* at 120. The court reasoned that holding corporations liable for violations of customary international law has not attained "discernable, much less universal, acceptance among nations." *Id*. at 148. Therefore, claims against corporations should be dismissed for a lack of subject matter jurisdiction. *Id.*

The Ninth Circuit Court of Appeals concluded that international norms which "are 'universal and absolute,' or applicable to 'all actors' can provide the basis for an ATS claim against a corporation." *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014) (quoting

*Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 760 (9th Cir. 2011)). To determine whether an international norm is universal, this court must consider "whether it is 'limited to states' and whether its application depends on the identity of the perpetrator." *Doe I*, 766 F.3d at 1022 (quoting *Sarei*, 671 F.3d at 764-65). The *Doe I* court found that prohibitions on slavery are universal norms and therefore apply to all actors, including states, individuals, and corporations, and cited the earlier determination that genocide and war crimes are universal norms. *Doe I*, 766 F.3d at 1021 (citing *Sarei*, 671 F.3d at 760, 765). Those norms are focused on protecting the victims of the crimes, and therefore would not serve their purpose if an actor could "avoid liability merely by incorporating." *Doe I*, 766 F.3d at 1021 (quoting *Sarei*, 671 F.3d at 760).

Mana alleges a violation of the principle, which dictates that "States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, 5, U.N. Doc A/CONF.48/14/Rev. 1 (June 16, 1972). To determine whether Mana may bring this claim under the ATS against a domestic corporation, the principle must give rise to individual liability. This requirement has not been fulfilled, as the language of the principle specifically refers to and focuses on the States as the actors, rather than on those harmed by the activities. States are given the responsibility to ensure their activities do not damage the environment of areas beyond their jurisdiction. Because the principle that is the basis for Mana's claim under the ATS does not focus on the victims of the damage caused by emissions, but rather focuses on the States as the actors, Mana cannot bring a claim under the ATS against a domestic corporation.

It would be contrary to public policy and principles of equity to hold private domestic corporations like HexonGlobal liable, because they are not the sole cause of the damages and therefore should not be held responsible for the full damage caused by greenhouse gas emissions. HexonGlobal is responsible for just thirty-two percent of overall U.S. greenhouse gas emissions and six percent of global emissions. By extending liability for this damage to domestic corporations for violations of this international principle, every source of greenhouse gases could be held liable for any of the overall effects of anthropogenic climate change. For this reason, it makes sense to give each State the responsibility to regulate their own greenhouse gas emissions, rather than allow any private actor to be held liable under the ATS. Therefore, Mana cannot bring this claim against a domestic corporation because the principle focuses on the States as the actors rather than the victims, and it is not a universal norm that is applicable to all actors.

## II. THE *TRAIL SMELTER* PRINCIPLE IS NOT A RECOGNIZED PRINCIPLE OF INTERNATIONAL LAW AND THEREFORE CANNOT BE ENFORCED AS A LAW OF NATIONS UNDER THE ALIEN TORT STATUTE.

The *Trail Smelter* Principle ("TSP") cannot be considered a custom of international law as it would be repugnant to more universal customs to consider it as such. The 1941 *Trail Smelter Arbitration* between the United States and Canada is considered to be a prime example of the difficulties presented by a lack of binding and reputable international environmental law in relation to transboundary harms. Laura S. Henry, Jasper Kim, & Dongho Lee, *From Smelter Fumes To Silk Road Winds: Exploring Legal Responses To Transboundary Air Pollution Over South Korea*, 11 WASH. U. GLOBAL STUD. L. REV. 565, 571-72 (2012). The *Trail Smelter Arbitral Tribunal Decision* ("*Trail Smelter Decision*") was one of the first to discuss transboundary harms and potential consequences of those harms. *Trail Smelter Decision*, (U.S. v. Can.), 3 U.N.R.I.A.A. 1905, 1907 (1935).

The factual backdrop of the *Trail Smelter* dispute defines the scope of the principle. The U.S. Government notified the Canadian Government that a smelter owned by Canadian-owned Consolidated Mining and Smelting Company ("Consolidated Mining"), at Trail, British Columbia was emitting sulfur dioxide fumes over the border into Stevens County in the State of Washington. *Trail Smelter Decision*, 3 U.N.R.I.A.A. at 1907. These fumes allegedly caused harm to businesses, agriculture, river health, and the economy as a whole. *Id.* at 1929-31. The International Joint Commission ("IJC") investigated the problems occurring at Trail and wrote a report detailing the emissions. *Id.* at 1907. The 1935 decision detailed past litigation in Stevens County regarding smoke and smoke easements purchased by Consolidated Mining to mitigate negative effects. *Id.* at 1915. Article II of the 1935 *Trail Smelter Decision* outlined that a Tribunal shall be held to determine the remaining questions, including "whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?" *Id.* at 1908. The 1941 *Trail Smelter Arbitration* resulted in this answer:

> [N]o State has the right to use or permit the use of its territory in such a manner as to cause injury... in or to the territory of another or of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

*Trail Smelter Arbitration*, (U.S. v. Can.), 3 U.N.R.I.A.A. 1938, 1965 (1941). However, the United Nations encased the *Trail Smelter Decision* in Principle Twenty One of the 1972 Stockholm Conference on the Human Environment. *Stockholm Declaration*. The principle states:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their

> jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, 5, U.N. Doc A/CONF.48/14/Rev.1 (June 16, 1972). This principle was reasserted in Principle 2 of the 1992 Rio Declaration on Environment and Development with identical language. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, 3, U.N. Doc. A/CONF.151/26/Rev.1(Vol. I) (June 3-14, 1992). The declarations from both conventions have explicit language that a State has a "sovereign right" to exploit their own resources. *Id.*; U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, 5, U.N. Doc A/CONF.48/14/Rev.1 (June 16, 1972).

Neither declaration contains enforcement mechanisms to ensure that states abide by the convention parameters. States "shall," or "should," take actions or "have" obligations, however both declarations lack an "or else" or any other form of binding consequence. This is in stark contrast to other international environmental treaties such as the Paris Accords or the Montreal Protocol. Both of which are treaties ratified by the United States and are established international environmental law due to widespread recognition, along with the presence of sanctions or enforcement mechanisms that bolster the agreements. Paris Agreement to the United Nations Framework Convention on Climate Change, opened for signature Apr. 22, 2016, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015); The Montreal Protocol on Substances that Deplete the Ozone Layer, (Sep. 16, 1987). Considering the background of the TSP, it is distinguishable from other customary international environmental laws, indicating it not a customary law of nations and therefore not enforceable under the ATS.

### A. The *Trail Smelter* Principle Is Distinguishable from Established Customary Norms of International Law and Therefore Cannot Be Considered a Law of Nations.

International environmental law is unique from other kinds of international law in that it lacks binding conventions that are applicable to every nation.

Many existing environmental treaties operate on a voluntary basis, and because of this, many of these treaties lack stringent enforcement mechanisms. DAVID HUNTER, ET AL., International Environmental Law and Policy 267-365 (5th ed. 2015). Therefore, the international community must rely on principles of customary environmental law to bring action against other parties for environmental "harms." *Id*. However, not all principles rise to the level of an international norm. Under the ATS, principles that are not considered laws of nations cannot be the basis for a cause of action. 28 U.S.C. § 1350. As an example, the 1972 Stockholm Conference on the Human Environment contains a principle that reflects the TSP, but is not considered to be a law of nations under the ATS. The goal of the conference was to promote "common outlook and . . . common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment." U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, 5, U.N. Doc A/CONF.48/14/Rev.1 (June 16, 1972). Language such as "inspire" and "guide" cannot be considered binding, even for those who voluntarily sign on to a conference's declaration.

The TSP has not yet been raised to the level of "customary" and is therefore not enforceable as a law of nations. When compared to hardened international agreements such as the Paris Accords or Montreal Protocol, the Stockholm and Rio Declarations that include the TSP are inadequate as laws of nations because they lack a proper enforcement mechanism.

Decisions in international tribunals are only binding on the respective parties; the decisions do not set common law precedent of laws like in the United States. DAVID HUNTER, ET AL. at 267-365. Rather, international law is enforceable if it is within a binding treaty or considered to be a norm of international law. Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under The U.N. Charter*, 3 SANTA CLARA J. INT'L L. 72, 73 (2005). "For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." *The Paquete Habana*, 175 U.S. 677, 700 (1900). To determine what the customs and usages of nations are, judicial tribunals rely on the works of jurists and commentators to determine "what the law really is." *Id*.

Bodansky, a prominent scholar on international environmental law, argues that there is no such thing as a customary international environmental law because there is no observable consistency between what countries are doing. Daniel Bodansky, *Customary (And Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 111 (1995). He even goes so far as to call reliance on customary principles of environmental law "malpractice." *Id.* In suggesting that a customary law must be observable, he means to say that one not familiar with international environmental law must, through observing the practices of multiple nations, recognize the customary international law as a similarity. *Id.*

The TSP clearly does not meet Bodansky's standard and therefore should not be recognizable as a uniformly applied standard as a law of nations. As explained in *Doe I*, international norms which "are 'universal and absolute,' or applicable to 'all actors' can provide the basis for an ATS claim against a corporation." *Doe I*, 766 F.3d at 1022 (quoting *Sarei*, 671

F.3d at 764-65). However, because the TSP is not considered a norm and consequentially is not a law of nations, the ATS does not apply.

B. The Trail Smelter Principle is not a Law of Nations, Therefore Mana's Claim Fails to Establish Jurisdiction Under the ATS.

The District Court of New Union Island does not have subject-matter jurisdiction over Mana's claims because she fails to establish a cause of action cognizable under the ATS.[1] *See Sosa*, 542 U.S. at 713-14. Under the Federal Rules of Civil Procedure, "if the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). Without meeting the standards of the ATS, this court cannot hear Mana's claims, and should dismiss them on these grounds. *See Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 236 (2nd Cir. 2003) ("plaintiffs had failed to establish subject matter jurisdiction or to state a claim under the Alien Torts Claim Act because they had not alleged a violation of customary international law"); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2nd Cir. 1995) ("there is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations"); *see also Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2nd Cir. 1980) (Second Circuit reversed District Court's dismissal due to lack of jurisdiction where torture was an appropriate violation of the law of nations and the requirements of the ATS were fulfilled).

III. THE *TRAIL SMELTER* PRINCIPLE DOES NOT IMPOSE OBLIGATIONS AGAINST NON-STATE ACTORS AND IS THEREFORE UNENFORCEABLE AGAINST HEXONGLOBAL.

Assuming *arguendo* the TSP is a recognized principle of customary international law enforceable as a law of nations under the ATS, Mana's claims are dismissible on the grounds

[1] HexonGlobal consented to general personal jurisdiction in all courts in the Territory of New Union Islands, but not to subject matter jurisdiction and this defense is therefore permissible.

that the TSP is limited in application to governmental actors. The TSP is unenforceable against private corporations like HexonGlobal.

A. A Plain Language Reading of the Trail Smelter Arbitration Agreement, Principle Twenty-One of the 1972 Stockholm Declaration, and Principle Two of 1992 Rio Declaration Show that the Obligations are Only to be Imposed Against State Actors.

The original recitation of the TSP in the *United States v. Canada* arbitration decision and its later adoption in international agreements demonstrates a clear limitation to intergovernmental disputes. *Trail Smelter Arbitration,* 3 U.N.R.I.A.A. at 1963. The plain language of the arbitration decision strictly limits its application to "a controversy . . . between two governments involving damage occurring . . . in the territory of one of them." *Id.* at 1938. Mana's claim against HexonGlobal is clearly a controversy between two private parties, rather than between two governments, and is therefore inappropriately brough under the TSP. The principle arguably allows the nation of A'Na Atu to bring claims against the United States for alleged transboundary harms, however Mana's private claims against HexonGlobal are unenforceable through the TSP.

Application of the TSP to HexonGlobal would run contrary to the intent of the principle, which is the preservation of state sovereignty. The IJC (established purely to mediate disputes between the United States and Canada) held Canada liable for toxic discharges into the United States due to "the duty of a State to respect other States." DAVID HUNTER, ET AL. at 511 (citing to J. Read, *The Trail Smelter Dispute*, The Canadian Yearbook of Int'l Law, 213 (1963)); *Trail Smelter Arbitration,* 3 U.N.R.I.A.A at 1963. "A state owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." *Id.* (citing to Professor Eagleton, RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 80 (1928)). HexonGlobal is not a "State" and therefore does not owe a duty to protect other States. *Id.* The duty imposed by the

arbitration tribunal was clearly limited to state actors and derived from principles of state sovereignty. Application of TSP obligations to private, non-state actors would run contrary to the plain language and intent of the principle.

International interpretations and applications of the TSP have been similarly limited. The United Nations Conference on Human Environment, Stockholm Declaration of 1972 ("Stockholm Declaration") codified the TSP. Noah D. Hall, *Transboundary Pollution: Harmonizing International and Domestic Law*, 40 U. MICH. J. L. REFORM 681, 699 (2007). Principle Twenty-One of the Declaration provides:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

U.N. Conference on the Human Environment, Stockholm, June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, 5, U.N. Doc A/CONF.48/14/Rev. 1 (June 16, 1972). Principle Two of the Rio Declaration on Environment and Development uses precisely the same language. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, 3, U.N. Doc. A/CONF.151/26/Rev.1(Vol. I) (June 3-14, 1992). This language further elucidates the limits of the TSP. Only "States" have a responsibility to ensure that their resource utilization does not cause transboundary harm. Application of the TSP as alleged here by the plaintiff would violate the intent behind these international principles and the plaintiff's claims under the ATS should be dismissed on these grounds.

B. Courts Have Consistently Interpreted the *Trail Smelter* Principle and Law of Nations Claims to be Limited in Application to Non-State Actors.

Courts have repeatedly held that the TSP "do[es] not bind corporate entities." Tony Kupersmith, *Cutting to the Chase: Corporate Liability for Environmental Harm Under the Alien Tort Statute, Kiobel, and Congress*, 37 Wm. & Mary Envtl. L. & Pol'y Rev. 885, 907-08 (citing to *Beneal v. Freeport-McMoRan*, 969 F.Supp 362, 384 (E.D. La 1997)). Mana's reliance on the TSP "is misplaced" as the principles "do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of *nations*." *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 671 (S.D. New York, 1991) (emphasis added). The cases discussed here preclude the plaintiff's TSP claims against HexonGlobal.

In *Beanal v. Freeport-McMoran, Inc.*, an Indonesian citizen brought charges alleging violations of international law by Freeport-McMoran, a U.S. domestic corporation with mining operations abroad. 197 F.3d 161, 163 (5th Cir. 1999). Freeport-McMoran operated a copper, gold, and silver mine in the Jayawijaya Mountains of Indonesia. *Id.* Beanal accused the corporation of environmental harms, human rights violations, and other cultural atrocities associated with their mining operations. *Id.* The Fifth Circuit Court of Appeals held that the plaintiff failed to show the defendant's operations constituted a cognizable tort under international law. *Id.* Much like the claims brought by Mana here, Beanal's claims "merely refer[red] to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts." *Id.* at 167. The *Beanal* court relied heavily on the principles of sovereignty codified in the Stockholm Declaration and the Rio Declaration: "federal courts should exercise extreme caution when adjudicating environmental claims under international law to ensure that environmental policies of the United States do not displace

environmental policies of other governments." *Beanal*, 197 F.3d at 167. Accordingly, the Fifth Circuit upheld the District Court's dismissal of plaintiff's claims under the ATS. Here, Mana's claims against HexonGlobal are similarly "abstract" and cannot be applied against a non-state actor. *Id.* An "exercise [in] extreme caution" would find the provisions of the Stockholm and Rio Declarations only apply to state actors and claims cannot brought under the ATS and the TSP against corporations like Freeport-McMoran and HexonGlobal. *Id.*

The Second Circuit Court of Appeals found similarly in *Flores*, 414 F.3d at 233. There, citizens of Ilo, Peru brought personal injury claims under the ATS for severe lung disease problems allegedly caused by pollution from defendant's mining operations. *Id*. at 236. Plaintiffs specifically alleged law of nations violations. *Id.* The circuit court upheld the district court's dismissal because plaintiffs' claims could only be brought against private actors in very limited circumstances. *Id.* at 244 (where non-state actors commit traditional law of nations violations acts including piracy, slave trading, war crimes, and genocide).

The District Court of the District of Columbia has created an exception to the bar on law of nations claims against private actors; the exception does not apply to the facts here. *Bao Ge v. Li Peng*, 201 F.Supp.2d 14, 20 (D.C. Cir. 2000). A private actor can be held liable for violations of the laws of nations where the corporation was acting "as an officer of the state or under color of state law." *Id.* However, private actors can only be treated as *de facto* state actors where the state and the corporation engage in a "joint venture." *Id.*; *see Doe v. Unocal Corp.*, 963 F.Supp. 880, 891-92 (C.D. Cal. 1997) (oil companies entered into a joint venture with Burmese government and paid Burmese military for slave labor, violating traditional law of nations principles); *see also Iwanowa v. Ford Motor Company*, 67 F.Supp.2d 424, 433 (N.D. N.J. 1999) (German subsidiary of Ford (Ford Werke) used prisoners from concentration camps who were

captured by the German military and sold to Ford Werke during World War II, thereby establishing a joint venture). Here, Mana fails to establish a joint venture between HexonGlobal and the United States that rises to the level required by *Bao Ge*, *Doe*, and *Iwanowa*.

C. Any Obligation Imposed on Non-State Actors Through the *Trail Smelter* Principle Leaves Remedies Optional.

The facts of the original *Trail Smelter* arbitration define the scope of any private party obligations under the TSP. The U.S. and Canadian governments volunteered to arbitrate the case before the IJC on behalf of the relevant parties. DAVID HUNTER, ET AL., at 511 (citing to J. Read, *The Trail Smelter Dispute*, The Canadian Yearbook of Int'l Law, 213 (1963)). Article 9 of the Boundary Waters Treaty of 1909 only established by Article Nine of the Boundary Waters Treaty of 1909 only the IJC to mediate disputes between the U.S. and Canada, and therefore it does not have authority over the U.S. and A'Na Atu. *Id.* This provision empowers the IJC to investigate and make recommendations, but not to make binding decisions. *Id.* The U.S. referred the issue to the IJC, and Canada consented to arbitration. *Id.* Participation by both countries was entirely voluntary; there is no legal mechanism that requires two nations to arbitrate issues of transboundary harm. *Id.* Therefore, any extension of TSP principles to non-governmental actors would only impose voluntary obligations. Neither HexonGlobal nor the United States consented to international arbitration with Mana or A'Na Atu. Thus, no tribunal has the authority to impose TSP obligations on any party in this dispute.

This lack of binding authority is not unique to the IJC. "[T]he jurisdiction of the International Court of Justice and other international tribunals is dependent upon the consent of nations." David D. Caron, *Liability for Transnational Pollution Arising from offshore Oil Development: A Methodological Approach*, 10 ECOLOGY L.Q. 641 (1982); *see also* S. Rosenne, 1 The Law and Practice of the International Court 313 (1965) ("there exists an uncontroverted

principle of general international law according to which no State is obliged to submit a dispute with another State to an international tribunal"). Even if the TSP is interpreted to impose obligations on private corporations, those obligations are voluntary courtesies to other states and do not require specific action by HexonGlobal.

## IV. EVEN IF THIS COURT FINDS THE *TRAIL SMELTER* PRINCIPLE TO BE A PRINCIPLE OF CUSTOMARY ENVIRONMENTAL LAW AND ENFORCEABLE UNDER THE ATS, IT IS DISPLACED BY THE CLEAN AIR ACT AND IS NOT DISPOSITIVE HERE.

The District Court correctly found that any action Mana may have under the ATS has been displaced by the Clean Air Act. Any claim under the ATS must be considered to be claims arising under the federal common law. *Sosa*, 542 U.S. at 732. If the Clean Air Act displaces federal common law, it thereby follows that an ATS claim cannot be brought under the Clean Air Act because it is not federal common law. Although laws of the United States recognize the law of nations, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [section] 1350 was enacted." *Sosa*, 542 U.S. at 729-32. As interpreted here, Mana cannot bring her private action under federal common law because the international law norm asserted, the TSP, was not considered more "familiar" than the laws encased in the Clean Air Act at its time of adoption. Therefore, this court cannot consider the TSP claim to be valid because it has been displaced by the Clean Air Act. This contention has been supported by the Supreme Court in *American Electric Power v. Connecticut*.

In *American Electric Power*, the plaintiffs, eight states, New York City, and nonprofit land trusts, brought a suit against five electric power companies for contributing to global warming through carbon dioxide emissions. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410,

418 (2011). The groups of plaintiffs brought action under federal common law for defendant's "substantial and unreasonable interference with public rights," due to carbon dioxide emissions. *Am. Elec. Power Co.*, 564 U.S. at 418. There, the defendant's activity constituted "25 percent of emissions from the domestic electric power sector, 10 percent of emissions from all domestic human activities." *Id.* The proper test for if congressional action, such as enacting the Clean Air Act, presupposes federal common law, such as bringing a nuisance claim for transboundary harm, is whether the federal statute "'speak[s] directly to [the] question' at issue." *Id.* at 424 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). In following this test, the Supreme Court held that the courts shall not take the place of legislature and ruled that in the interest of embracing the federal system and promoting democracy, the Clean Air Act displaces the federal common law. *Id.* at 424.

In doing so, the Court in *American Electric Power* distinguished cases in which states may sue other states over transboundary harm (*see Missouri v. Illinois*, 180 U.S. 208 (1901)) from instances where private citizens of a state may invoke federal common law to abate out-of-state pollution because the Court "h[as] not yet decided" the later issue. *Id.* at 422. Central to the Court's reasoning was that the Clean Air Act has multiple enforcement mechanisms in place to address harms. *Id.* at 425. If someone feels they are harmed by effects of fossil fuel emissions, they may bring suit in federal court under the Clean Air Act. *Id.* Furthermore, the court reasons that federal common law is not the proper avenue to prescribe liability for transboundary harms and that federal statute, such as the Clean Air Act as administered by the EPA, is more appropriate. *Id.* at 426. The EPA, and not the courts, is positioned to regulate under the Clean Air Act and is best suited to balance environmental benefit, the United States'

energy needs, economic disruption, and questions of national and international policy. *Am. Elec. Power Co.*, 564 U.S. at 427.

Accordingly, Mana, as an individual, cannot bring action under federal common law of transboundary tort nuisance and instead must bring action under the Clean Air Act. As established in *American Electric Power*, the Clean Air Act displaces the federal common law on transboundary pollution because it addresses the same issue. Rooted in the United States Constitution, the separation of powers supports the contention that the EPA is more properly situated to regulate greenhouse gas emissions from fossil fuel burning than the federal courts. The EPA has applicable expertise and scientific information available to them that the courts do not have. As previously stated, part of the balancing test is to consider international harms and clearly the EPA had no problem with HexonGlobal's business operations. Furthermore, in *American Electric Power*, the Supreme Court still found that a federal common law nuisance claim could not be brought, despite the fact that ten percent of emissions from all domestic human activities were traced to the companies. Surely this court should rule in a similar way considering that HexonGlobal contributes only six percent of emissions. R. 5. Instead of bringing a claim under the TSP, Mana should have brought a claim under the Clean Air Act because it is a more appropriate modern mechanism in United States Law. Her TSP claim is inappropriate here and cannot pass muster in this court.

In *City of Oakland v. B.P., PLC*, the Northern District of California granted defendant's motion to dismiss "global warming" actions for failure to state a claim. 325 F. Supp. 3d 1017, 1019 (N.D. Cal. 2018). Defendants Chevron Corporation, Exxon Mobil Corporation, BP p.l.c., Royal Dutch Shell plc, and ConocoPhillips are the five largest producers of fossil fuels in the world, and accordingly are responsible for eleven percent of greenhouse gas emissions since the

Industrial Revolution. *City of Oakland*, 325 F. Supp. 3d at 1021. The plaintiffs, the City of Oakland and the City of San Francisco under federal common law alleged "defendants' sale of fossil fuels leads to their eventual combustion, which leads to more carbon dioxide in the atmosphere, which leads to more global warming and consequent ocean rise," thereby threatening the cities precariously balanced on the California coastline with encroaching navigable waters of the United States. *Id.* at 1022. The court recognized that the decisions in *American Electrical Power* and *Kivalina* are controlling in the case at bar; however, the court qualifies that unlike the controlling cases, the issue at hand is more international is scope; the emissions contribute to a rising sea level nuisance outside of the United States. *Id.* at 1024. Still yet, the court concluded that the claim could not be brought under federal common law because it was the role of the EPA to regulate greenhouse gases and not the role of the courts. *Id.*

The court in *City of Oakland* also based their decision in part on public policy concerns. To allow the City of Oakland to bring suit would create dangerous precedent that could hold any fossil fuel producer in the world liable, even retroactively, if they had knowledge that they were emitting greenhouse gases and contributing to global warming. *Id.* at 1022. The court decided that to place this kind of sweeping liability would be improper. *Id.* Furthermore, to allow this kind of claim would interfere significantly with the balance of powers and foreign policy in the United States. *Id.* at 1026. The court importantly recognizes that "'[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.'" *Id.* at 1025-25 (quoting *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018)). "A single jury in California," the court states, should not impose liability for overseas actions. *City of Oakland*, 325 F. Supp. 3d at 1026.

In *Native Village of Kivalina v. ExxonMobil Corp.*, a group of native people living in a seaside village and city in Alaska brought suit against multiple energy producers. *Native Vill. Of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012). The plaintiffs alleged that greenhouse gas emissions from the named energy producers induced global warming and raised sea levels, thereby eroding the land that supported their village. *Id.* The court began by determining if federal common law controlled the claim. *Id.* at 855. The court opined that "[p]ost-Erie, federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution." *Id.* at 855; *see also Illinois v. City of Milwaukee ("Milwaukee I")*, 406 U.S. 91, 103 (1973) (federal common law is invoked when dealing with ambient or interstate water and air). Therefore, transboundary pollutant harm invokes common law. *Native Vill. Of* Kivalina, 696 F.3d at 855. However, the court qualified that although use of federal common law was proper for the subject matter, the issue had already been spoken to by federal statute, and therefore federal common law was no longer the controlling authority despite the presence of a damages claim. *Id.* at 857-58.

Here, Mana cannot bring such a sweeping claim against HexonGlobal for similar reasons as stated in *City of Oakland* and *Native Village of Kivalina*. It would be repugnant to public policy and foreign relations to allow such a claim in this court. HexonGlobal should not be held liable retroactively for the emissions of its corporate predecessors nor should this suit be used to control foreign policy. It is the role of the EPA and its regulations to control the emission of fossil fuels in the United States. This is evidenced by the EPA's regulations such as the including a rule under the Clean Air Act requiring major new sources of greenhouse gas emissions to undergo review establishing emission limits. R. 7. Clearly, the EPA has precedent

here in its regulation and as a matter of public policy and under the Clean Air Act should be the controlling body here, not the courts.

## V. THE DUE PROCESS CLAUSE DOES NOT PROTECT THE RIGHT TO A CLEAN GLOBAL ATMOSPHERIC CLIMATE SYSTEM.

Fifth Amendment substantive due process protections for climate health are entirely unprecedented. *Juliana v. United States*, 217 F.Supp.3d 1224, 1262 (D. Oregon, 2016). This alone is sufficient to uphold the District Court's dismissal of the plaintiff's claims. However, a "long line of cases" has narrowly defined the scope of substantive due process and precludes the plaintiff's claims here. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The Court must "exercise the utmost care" when considering new due process claims "lest the liberty protected by the Due Process Clause be subtly transformed." *Id.* The recognition of a fundamental right to a clean global atmospheric system would have national and even global implications that exceed the provisions of the Due Process Clause. The Fifth Amendment does not require the United States to take protective actions against the oil and gas industry.

The Plaintiffs claims rely heavily on the denial of a motion to dismiss in *Juliana* to establish the right to a clean climate system. 217 F.Supp.3d 1224. However, that case has not yet been decided on the merits. Nor are the holdings of the District of Oregon binding on this court. Their reliance on that case is misplaced.

### A. The Due Process Clause Does Not Extend Protections to Actions by Private Actors or Compel the Government to take Specific Action.

Extension of Due Process protections to the plaintiffs claims here would fly in the face of the intent of the Fifth Amendment. "The touchstone of due process is protection of the individual against arbitrary action of *government*." *Wolff v. McDonnell*, 418 U.S. 539, 558

(1974), *emphasis added*. Here, there was no "action of government" and the plaintiff's claims are inappropriate under the Fifth Amendment. *Wolff*, 418 U.S. at 558.

The Supreme Court has specifically rejected substantive Due Process protections from private actions. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). In *DeShaney*, the Court dismissed a mother's claims against Winnebago County Department of Social Services alleging Due Process violations for failure to intervene before her son suffered severe beatings by his father. *Id.* at 189. Though recognizing the tragic nature of these claims, the court held "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by *private actors*. *Id.* at 195. In other words, Due Process protects "people from the state" not "[people] from each other." *Id.* at 196. Flood has alleged losses of life, liberty, and property including salt water intrusion into his drinking water well, property damages due to sea level rise, and reduction in available food source; neither defendant is entirely unsympathetic to these claims. R. 5. However, these damages are the result of a variety of causes, none of which are state actions as recognized under the Due Process Clause. R. 5.

The government promotion of production and combustion of fossil fuels does not amount to a state action. Government subsidies amount to a state action in only very narrow circumstances. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) ("private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it"). The government subsidy exception only applies where the Equal Protection Clause of the Fourteenth Amendment is also implicated. *See Shelly v. Kraemer*, 334 U.S. 1 (1948).; *see also Civil Rights Cases*, 109 U.S. 3 (1883). The Supreme Court has specifically

refused to apply the exception where a state issues a permit to a public utility provider. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 359 (1974). In *Jackson*, the Pennsylvania Public Utilities Commission heavily regulated and issued a certificate of public convenience to privately-owned Metropolitan Edison Co. *Id.* at 346. In a procedural due process claim against Metropolitan Edison, the court found no "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id.* at 350. Despite "extensive state regulation" the state's actions there did not establish the required nexus. *Id.* Here, the regulations imposed on the oil industry are no more extensive than those in *Jackson*. Tax subsidies, leases of public lands, and the other regulations here do not amount to a state action.

The Due Process Clause does not compel the government to act and "confer[s] no affirmative right to governmental aid." *DeShaney*, 489 U.S. at 196 citing to *Harris v. McRae*, 448 U.S. 297, 317-318 (1980) (government has no obligation to fund medical services) ("liberty protected by the Due Process Clause . . . does not confer an entitlement to such [governmental aid]); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (government has no obligation to provide adequate housing). Here, Flood has no affirmative right to government aid. The Due Process clause does not compel the United States to fight against climate change.

B. The Government Caused Danger Exception Does Not Apply to Flood's Claims.

The district court appropriately declined to adopt the government-caused danger exception to *DeShaney* applied by the Ninth Circuit. R. 11. Under this exception, "conduct creates a constitutional claim" when "a state officer's conduct places a person in peril in deliberate indifference to their safety. *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997) citing to *DeShaney*, 489 U.S. at 197. The Ninth Circuit has applied this exception

exclusively to situations where state officers have placed women in dangerous situations, causing them to be raped. *See L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992) and *Wood v. Ostrander*, 879 U.S. 583 (9th Cir. 1989). In *Grubbs*, a nurse employed by the State of Oregon was raped and terrorized by a known, violent sex offender while on duty at a custodial institution for young male offenders. *Grubbs*, 974 F.2d at 120. The court upheld her Fourteenth Amendment claims on the grounds that the facility had intentionally placed her in a position of danger in unguarded proximity to an inmate known to have committed violent attacks on women. *Id.* In *Wood*, a Washington State Trooper asked passenger Wood to get out of the car during a traffic stop then drove away, leaving her stranded in a notoriously unsafe area of Pierce County; she was subsequently abducted and raped. *Wood*, 879 U.S. at 586.

The facts alleged by plaintiff here are entirely dissimilar from those of *Grubbs* and *Wood*. Though the U.S. has taken some actions to encourage the oil and gas industry (subsidies, leasing of public lands, and the development of power plants), the causal link between those actions and the harms suffered by the plaintiffs here is too attenuated. Those actions did not intentionally cause climate change and sea level rise and instead were aimed at increasing transportation efficiency and stimulating the U.S. economy. The U.S. government did not intentionally cause the dangers associated with climate change and sea level rise and therefore had no affirmative obligation to intervene.

Even if this Court determines that the U.S. had intentionally caused climate change, the U.S. has not entirely failed to mitigate the impacts. The U.S. acknowledges the threat of climate change and has made international commitments to adopt policies reducing greenhouse gases. R. 6. The Clean Air Act regulates greenhouse gases as pollutants subject to section 202(a)(1). 42 U.S.C. § 7521 (2018). The U.S. EPA regulates fuel economy and greenhouse gas emission

rates for passenger vehicles and light trucks. R. 7. The U.S. has not failed to intervene to a level that would invoke the government-caused danger exception. This exception is only applicable to situations of intentional government intervention and sexual assault and is inappropriate here.

C. The Public Trust Doctrine Only Applies to State Property Rights, Not Federal.

Flood alleges a failure by the U.S. to control greenhouse gas emissions and therefore violates its obligations under the public trust doctrine. However, this doctrine does not impose obligations on the federal government to protect the atmospheric climate system. The public trust doctrine is rooted in Roman Code and has been incorporated into U.S. law through common law disputes regarding navigable and tidal waters. *See Phillips Petroleum Co. V. Mississippi*, 484 U.S. 469 (1988); *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). However, "the public trust doctrine remains a matter of state law." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012). The Supreme Court's decision in *PPL Montana* "foreclosed" the argument that it is not exclusively a state law doctrine. *Alec L. v. Jackson*, 863 F.Supp.2d 11, 15 (D.C. Cir. 2012). The "contours of that public trust do not depend upon the Constitution" and the federal government has no obligations under it. *PPL Montana*, 565 U.S. at 604. The *PPL Montana* Court imposed obligations on the federal government under the equal-footing doctrine (a federal, constitutional issue), however this doctrine only applies to lands beneath navigable waters and is inapplicable to the atmospheric system. *Id.* at 593.

## VI. VIOLATIONS OF THE *TRAIL SMELTER* PRINCIPLE AND THE PUBLIC TRUST DOCTRINE ARE NOT POLITICAL QUESTIONS AND ARE WELL-SUITED FOR THE COURTS TO RESOLVE.

Violations of the TSP and the public trust doctrine are not political questions and are well-suited to be settled by the judiciary because they require interpretation of liability and judicially-created doctrine. In *Baker v. Carr*, the Supreme Court set forth six independent

factors which, if "[p]rominent on the surface" of the case, demonstrate the presence of a non-justiciable political question. 369 U.S. 186, 217 (1962). The six factors are:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* Those six factors are incorporated into three inquiries: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005) (citing *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring)). The first inquiry considers the first *Baker* factor, the second inquiry considers the second and third *Baker* factors, and the third inquiry considers *Baker* factors four through six. *Wang*, 416 F.3d at 996. Unless one of the *Baker* factors is "inextricable from the case at bar, there should be no dismissal for non-justiciability" on the grounds that the case presents a political question. *Baker*, 369 U.S. at 217.

It is important to note that "not every matter touching on politics is a political question" and therefore, some claims which touch on politics may be justiciable. *Japanese Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 229 (1986) (citing *Baker*, 369 U.S. at 209). The political question doctrine only excludes claims which are based around "policy choices and value determinations constitutionally committed for resolution" to Congress or the Executive

Branch. *Japanese Whaling*, 478 U.S. at 230. The courts have the authority to construe treaties and executive agreements, and to interpret congressional legislation, which embody the policy choices and value determinations constitutionally committed to Congress and the Executive Branch. *Id.*

A. Mana's Alien Tort Statute Claim Is not a Political Question Because None of the *Baker* Factors Are Inextricable from the Case.

Here, Mana's claim that HexonGlobal violated the TSP is not a political question and is therefore justiciable. Although the claim involves relations with a foreign nation, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Though Mana's claim may have political dimensions and ramifications, the court may decide that the case is justiciable because none of the *Baker* factors are inextricable from the case. *Id*. at 209.

Turning to the first question, the Constitution does not clearly reference environmental regulations, atmospheric emissions, or climate change. These issues are the basis of Mana's claim, and they are not textually committed to the executive or legislative branches. For this reason, the first *Baker* factor is not present in this case.

The second and third *Baker* factors determine whether the claim involves decision making that is beyond the courts' competence or power to resolve. In this case, Mana's claim rests on whether HexonGlobal may be held liable for violation of the TSP. This question is well-suited for the courts to answer, as the claim asks the court to interpret an international principle to determine whether domestic corporations may be held liable for violations of that principle. The courts have the power to determine this issue, as well as award damages for those violations if HexonGlobal may be held liable.

The fourth through sixth *Baker* factors ask whether prudential considerations warrant judicial intervention. In this case, they do. The issue of whether a domestic corporation may be held liable by foreign nationals under the ATS has far reaching implications and may only be determined through interpretation of the ATS and the TSP. As climate change worsens due to greenhouse gas emissions, more and more claims like Mana's will arise and the judiciary will need to answer the question of liability raised in this case. The six *Baker* factors are not inextricable from this case, therefore Mana's claim does not raise a political question and may be decided by the judiciary.

B. Flood's Public Trust Claim Is not a Political Question Because None of the *Baker* Factors Are Inextricable from the Case.

Here, Flood's public trust claim falls squarely in the purview of the courts, as it is drawn from interpretation of the Constitution, which guarantees that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Supreme Court has found that public lands belong to the states in which they are found, and the lands must be used "without substantial impairment of the interest of the public." *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 435 (1892). The courts created this doctrine, and for that reason the claims that arise from it are justiciable, and are not political questions.

As to the first *Baker* factor, the Constitution does not explicitly commit public trust doctrine issues to either of the political branches. The Court first incorporated the doctrine into the United States common law in *Illinois Cent. R. Co.* in 1892. As judicially created common law, the doctrine is not textually given to one of the other branches by the Constitution. *Illinois Cent. R. Co*, 146 U.S. at 435. For that reason, the first *Baker* factor is not present here.

The second and third *Baker* factors determine if the claim asserted requires the courts to rule on issues beyond the area of judicial expertise. Here, the courts are asked to resolve issues

relating to the public trust doctrine. These issues are within the area of judicial expertise because the Supreme Court brought the public trust doctrine into the common law. Therefore, the courts have the power to determine what constitutes a violation of the public trust doctrine, and the second and third *Baker* factors are not present here.

Finally, the fourth through sixth *Baker* factors are not present in this case because prudential considerations do not counsel against judicial intervention to determine whether there was a violation of the public trust doctrine. Because the Supreme Court brought the public trust doctrine into the United States common law, prudential considerations point toward judicial interpretation of the doctrine, including whether the facts of this case constitute a violation. For these reasons, Flood's public trust claim does not constitute a political question, and the claim is therefore justiciable.

## CONCLUSION

The United States District Court for New Union Island correctly dismissed plaintiffs' claims against HexonGlobal. Mana cannot bring a claim under the ATS against a domestic corporation because the alleged claim does not give rise to individual liability, and therefore must be brought against a State. Without individual liability stemming from applicability to all actors, the domestic corporation cannot be the defendant of the claim. The *Trail Smelter* Principle is not a law of nations because it does not raise to the same level of norm as other principles of international law. Therefore, the ATS cannot be used to bring a claim against HexonGlobal. Regardless, the *Trail Smelter* Principle does not impose obligations enforceable against non-state actors. Even if the *Trail Smelter* Principle is considered to be a law of nations, the Clean Air Act displaces the federal common law that is used in transboundary pollution cases and the EPA, not the courts, is best suited to hear this issue. The Due Process Clause does not

provide protections for the global atmospheric climate system or impose obligations on the United States to protect individuals against private action. The public trust doctrine only imposes obligations on state governments to protect tidal waters, not on the federal government to protect the atmosphere. Mana and Flood's claims do not raise political questions because neither claim contains a *Baker* factor that is inextricable from the case. Neither claim is textually committed to another branch of government, the judiciary would not be required to rule on an issue beyond its expertise, and prudential considerations point to judicial resolution. Questions of liability and of the public trust doctrine are well-suited for the judiciary to answer and are justiciable.