Team No. 36

Docket No. 18-000123

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

Petitioners,

v.

HEXONGLOBAL CORPORATION,

Respondent,

and

UNITED STATES OF AMERICA,

Respondent.

(Appeal From The United States District Court For New Union Island.)

BRIEF OF PETITIONERS, ORGANIZATION OF DISAPPEARING ISLAND NATIONS, APA MANA, and NOAH FLOOD

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants (hereinafter "Plaintiffs," "Mana," "Flood," and "ODIN") brought a civil suit against Defendant -Appellees (hereinafter "Defendants," "U.S. Government," and "HexonGlobal") in the United States District Court for the Twelfth District pursuant to 28 U.S.C. § 1350, for claims arising under the Alien Tort Statute ("ATS") and the Trail Smelter Principle of customary international law, *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1907 (1941). This matter was brought properly before the District Court pursuant to 28 U.S.C 1331 which provides "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Pursuant to 28 U.S.C. § 1291, this court has jurisdiction to consider the timely appeal of this final decision.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Can Mana bring an Alien Tort Statute, 28 U.S.C. § 1350 (ATS) 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 ATS?

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?

STATEMENT OF THE CASE

Factual Background

With help from the Organization for Disappearing Island Nations (ODIN), Plaintiffs Apa Mana, an alien national of the island nation of A'na Atu, and Noah Flood, a U.S. citizen resident of the U.S. possession New Union Islands, filed this case with the hopes of saving their homes from climate change induced sea level rise. R. at 3. Both Mana and Flood reside in communities situated less than one half meter below sea level rise. R. at 4. Neither plaintiff can move elsewhere on the island because the highest point on both islands is three meters above sea level rise and a half a meter rise in sea level would not only drive them from their homes, but would render the entirety of the islands they call home uninhabitable to due storm surge. R. at 4. For the past three years, both Mana and Flood suffered seawater damage to their homes during storms and suffer substantial costs to repair and prevent this damage. R. at 5. Additionally, both Mana and Flood have experienced seawater intrusion into their drinking water as a result of sea level rise. R. at 5. Finally, both Mana and Flood experience increasing temperatures that heighten their risk for heat stroke and mosquito-borne diseases, and threaten the seafood resources upon which they rely for a substantial portion of their diet. R. at 5. It is not a question that all of these damages, health risks, and threats are directly linked to anthropogenic climate change and sea level rise induced by human fossil fuel consumption. R. at 4-5. Additionally, it is not a question that limiting fossil fuel production and combustion would reduce these damages and risks and would ensure the habitability of Mana and Noah's communities. R. at 5.

Defendant HexonGlobal is the remaining corporation from the merger of all U.S. oil producers and is incorporated in New Jersey with their principal place of business in Texas. R. at 5. HexonGlobal operates refineries within U.S. jurisdiction, including in the territory of New Union Islands, and all over the globe. R. at 5. HexonGlobal and its predecessors' products are

responsible for 32% of U.S. fossil fuel greenhouse gas emissions and 9% of global fossil fuel greenhouse gas emissions. R. at 5. Based on their own scientific research, HexonGlobal and its predecessors have known since the 1970s, nearly fifty years ago, that the continued sale and combustion of fossil fuel products, including their own, would result in "substantial harmful climate change and sea level rise" but still chose to continue to engage in these activities, despite this knowledge. R. at 5.

Defendant United States Government (U.S. Government) also knew of and acknowledged the threat of climate change. R. at 5. In 1992, the U.S. Government signed and ratified the United Nations Framework Convention on Climate Change (UNFCCC), which acknowledged anthropogenic climate change and called for steps to be taken to stabilize greenhouse gas concentrations at a level which would prevent anthropogenic climate change. R. at 5. While to this day the U.S. Government has not passed any implementing legislation for this agreement, they have taken steps to regulate domestic greenhouse gas emissions. R. at 5. After a Supreme Court Case requiring carbon dioxide to be classified as a regulatable pollutant, the EPA made a finding (the "Endangerment Finding") stating greenhouse gas emissions and the resulting climate change could endanger the public health and welfare. R. at 5. The EPA then adopted regulations for fuel economy standards and emissions standards for certain car models in 2010 and extended them in 2012 to apply to future car models. R. at 5-6. Additionally, the EPA issued carbon dioxide emissions standards for new power plants and emissions controls for old power plants under the "Clean Power Plan." R. at 6. Then in 2015, the President of the United States signed the Paris Agreement, committing the U.S., along with other nations, to reducing their future greenhouse gas emissions. R. at 6.

For all of these measures adopted, U.S. emissions have only slightly decreased, while global emissions have increased, and the U.S. is historically the single largest national contributor of greenhouse gas pollution, contributing 20% of cumulative global anthropogenic greenhouse gas emissions to date. R. at 5-6, 7. Furthermore, the current administration has taken steps to reverse and freeze regulations of greenhouse gas emissions and President Trump announced his intention to pull the U.S. out of the Paris Agreement as early as legally possible. R. at 6.

The science behind human caused climate change and sea level rise as a result of fossil fuel greenhouse gas emissions is not questioned by this court and is an indisputable fact in the record. *See* R. at 3-7. Carbon dioxide and methane, which already exist in the atmosphere in trace amounts, are greenhouse gasses responsible for insulating the earth, creating a greenhouse effect that prevents heat from escaping into space. R. at 4. For earth's climate to remain hospitable, there must be a balance between solar radiation reaching earth then being reflected back onto earth's surface by greenhouse gasses in the atmosphere and heat escaping through the atmosphere. R. at 4. Greenhouse gasses are critical to maintaining this balance; too little greenhouse gas and the earth is too cold, but too much greenhouse gas traps more heat and the earth becomes too hot. R. at 4. The latter is what earth is experiencing today. R. at 4. Carbon dioxide and levels in the atmosphere are substantially increased by human processing, distributing, and burning fossil fuels. R. at 4. These emissions, combined with emissions from agriculture and industrial activity are causing climate change resulting in increasing temperatures, changing rainfall patterns, and rising sea levels. R. at 4. If these emissions continue at the current rate, global temperatures will rise by four degrees Celsius from pre-industrial global temperatures, resulting in sea level rise of one-half to one meter by the end of this century. R. at 4.

Given these facts, there is no doubt Defendants HexonGlobal and the U.S. Government have both caused and enabled the greenhouse gas pollution which has resulted in the anthropogenic climate change and sea level rise that now jeopardizes Plaintiffs Mana and Flood's ways of life.

Procedural Posture

This appeal arises from the issuance of an order from the United States District Court for New Union Island on August 15, 2018. R. at 1. ODIN, Apa Mana, and Noah Flood appeal the District Court's holding that the Trail Smelter Principle under the international Law of Nations is displaced by greenhouse gas regulation under the Clean Air Act. R. at 1. ODIN, Mana, and Flood also appeal the District Court's refusal to recognize a Due Process public trust right to governmental protection from atmospheric climate change. R. at 1.

STANDARD OF REVIEW

To withstand a motion to dismiss, a plaintiff need only allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). On review of a granted motion to dismiss, this Court accepts the complaint's well-pleaded allegations as true and reviews the district court's decision de novo. *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 169 (2d Cir. 2012).

SUMMARY OF ARGUMENT

Mana can bring a claim under the Alien Tort Statute (ATS). The ATS requires the plaintiff to be an alien resident bringing a claim for a violation the law of nations. Mana is an alien resident bringing a claim under the Trail Smelter Principle, which is the law of nations. Additionally, defendant HexonGlobal is a United States corporation whose activities, which gave rise to the claim, occurred principally within United States jurisdiction, therefore they can properly be brought into the U.S. District Court's jurisdiction under the ATS.

The Trail Smelter Principle is a recognized principle of customary international law enforceable as the "law of nations" under the alien tort statute. The principle is customary international law because it is a norm that is specific, universal, and obligatory. Additionally, the principle creates an independent cause of action for a violation of the law of nations because it is understood to give rise to individual liability.

Assuming that the Trail Smelter Principle is a customary international law, it has the ability to impose obligations upon the defendant. The courts look to whether the customary international law is narrow and specified in its targeting of an international norm. In this case, the claim arises under the Trail Smelter Principle which narrowly and specifically targets the actions of polluters that harm another state and has allowed corporate entities to have judgments imposed upon them. Therefore, HexonGlobal may have remedies adjudicated and imposed against it.

The Clean Air Act ("CAA") does not displace the claim brought by Plaintiffs because the CAA contains a citizen suit provision that further contains a savings clause that prevents displacement of federal common law claims. The Trail Smelter Principle customary international law is considered federal common law by US courts. As such, the CAA savings clause does not preclude federal common law claims from being brought.

The United States Government violated the Fifth Amendment substantive due process protections for life, liberty, and property, because it failed to protect the global atmospheric climate system from disruption and instead supported the production, sale, and burning of fossil fuels. The public trust doctrine is a fundamental right to a healthy climate because the public trust doctrine is deeply rooted in United States history and tradition. Further, the U.S. Government promoted and supported the production of fossil fuels which created a danger that harmed the Plaintiffs.

The Plaintiffs' alien tort statute and public trust claims are not non-justiciable political questions because they ask the court to exercise its authority to adjudicate claims of established international law and constitutional law. None of the *Baker* factors are "inextricable" from the Plaintiffs' claims and thus, there is not a non-justiciable political question.

ARGUMENT

I. MANA CAN BRING A CIVIL CLAIM AGAINST HEXONGLOBAL UNDER THE ALIEN TORT STATUTE BECAUSE SHE IS AN ALIEN RESIDENT BRINGING A CLAIM UNDER THE LAW OF NATIONS AND HEXONGLOBAL IS A UNITED STATES CORPORATION WHOSE ACTIVITIES, WHICH GAVE RISE TO THE CLAIM, OCCURRED PRINCIPALLY WITHIN UNITED STATES JURISDICTION.

The first question the Twelfth Circuit asked can be broken down into two questions about parties. First, whether Mana can bring the claim, and second, whether Mana can sue a domestic corporation. The Alien Tort Statute (ATS) reads, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." In order for a plaintiff to bring a civil claim, he or she must first be an alien. 28 U.S.C. § 1350. The Supreme Court has held the ATS only provides the district courts with jurisdiction when the claim has an independent cause of action and the violation of the law of nations must be universally accepted and understood to give rise to individual liability. *Sosa v. Alvarez*, 542 U.S. 692, 713–14 (2004); *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 125 (2d Cir. 2010), aff'd 569 U.S. 108 (2013). Additionally, the activities alleged to give rise to the cause of action must have occurred principally within the jurisdiction of the United States and the defendants must not be a foreign corporation. *Kiobel*, 621 F.3d at 125; *Jesner v. Arab Bank, P.L.C.*, 138 S. Ct. 1386, 1407 (2018). Mana can bring the claim under the Trail Smelter Principle because she is an alien resident and the Trail Smelter Principle is a law of nations. Additionally, Mana can bring the claim against HexonGlobal because they are a United States

corporation and the activities giving rise to this cause of action occur principally within United States jurisdiction.

A. Mana Can Bring The Claim Under The Trail Smelter Principle Because She Is An Alien Resident And The Trail Smelter Principle Is The Law Of Nations.

The statute requires the plaintiff be an alien. 28 U.S.C. § 1350. Mana is an alien resident of A'Na Atu, so as an individual she qualifies to bring a claim under the statute. R. at 3; 28 U.S.C. § 1350. Mana also has an independent cause of action under the Trail Smelter Principle, which is a law of nations. "Actionable violations of international law must be of a norm that is specific, universal, and obligatory" or, in other words, they must be violations of customary international law that give rise to individual liability. *Hilao v. Marcos (In re Estate of Marcos)*, 25 F.3d 1467, 1475 (9th Cir. 1994); *See Customary International Law*, *Bouvier Law Dictionary* (desk ed. 2012). The Trail Smelter Principle is customary international law and a violation of the Principle gives rise to individual liability, as further addressed under question two below. Therefore, Mana can properly bring a claim under the ATS.

B. Mana Can Bring The Claim Against HexonGlobal Because They Are A United States Corporation And The Activities Giving Rise To This Cause Of Action Occur Principally Within United States Jurisdiction.

The Supreme Court held that defendants subject to an ATS claim must not be a foreign corporation. *Jesner*, 138 S. Ct. at 1407. HexonGlobal is a U.S. corporation incorporated in New Jersey with its principal place of business in Texas. R. at 5. Additionally, the Supreme Court ruled activities alleged to give rise to the cause of action must have occurred principally within the jurisdiction of the US. *Kiobel*, 621 F.3d at 125. Then in *Kiobel II*, the Supreme Court left open the question of whether or not corporations may or may not be brought under U.S. jurisdiction, clarifying any claim must "touch and concern the territory of the United States … with sufficient

force to displace the presumption against extraterritorial application" and mere corporate presence is not enough to do so. *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 125-26 (2013). The relevant conduct giving rise to the violation of customary international law must have occurred within the United States. *Balintulo v. Daimler AG*, 727 F.3d 174, 192 (2d Cir. 2013). The rulings of these cases implicitly hold corporations may be liable if the above requirements are met. *Ntsebeza v. Ford Motor Co. (In re S. African Apartheid Litig.)*, 15 F. Supp. 3d 454, 460-61 (S.D.N.Y. 2014). Both *Kiobel* and *Balintulo* involved cases where the relevant actions giving rise to the suit were committed entirely outside of U.S. jurisdiction. *See Balintulo*, 727 F.3d at 191-92. However, that is not the case with HexonGlobal.

HexonGlobal is a consolidation of all U.S. oil companies and submits to the jurisdiction of New Jersey, Texas, and New Union, which is a US possession, and while this is not enough to overcome the ATS's presumption against extraterritorial jurisdiction, this is not the end of HexonGlobal's ties to the US. R. at 3, 5; *Kiobel*, 569 U.S. at 125-26. The majority of HexonGlobal's activities happen within the U.S. and their impact is largest in the U.S. The U.S. is the single largest contributor of greenhouse gas emissions globally and HexonGlobal and its predecessors prior to consolidation are responsible for 32% of U.S. greenhouse gas pollution, or 6% global historical emissions. R. at 5-6. Not only is HexonGlobal present in the U.S., but a principal portion of the activities giving rise to the claim at hand occurred within the U.S., fulfilling the requirement set out in *Kiobel* and *Balintulo*. *See Kiobel*, 569 U.S. at 125-26.; *See Balintulo*, 727 F.3d at 192.

Additionally, even if this court does not agree with the implicit argument laid out in *Ntsebeza*, *Kioble I* still leaves the ATS's application to corporate defendants open because ruling says the scope of liability is determined by customary international law and the Trail Smelter

Principle is customary international law, as explained in the answer to question two below. *Ntsebeza*, 15 F. Supp. 3d at 460-61; *Kiobel*, 621 F.3d at 133.

II. THE TRAIL SMELTER PRINCIPLE IS A RECOGNIZED PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW ENFORCEABLE AS THE "LAW OF NATIONS" UNDER THE ALIEN TORT STATUTE BECAUSE THE PRINCIPLE IS CUSTOMARY INTERNATIONAL LAW AND ADDITIONALLY CREATES AN INDEPENDENT CAUSE OF ACTION FOR A VIOLATION OF THE LAW OF NATIONS.

The second question the Twelfth Circuit asked can be broken down into two parts. First, is the Trail Smelter Principle customary international law, and second, does the Principle create an independent cause of action for a violation of the law of nations. The Supreme Court has held for the ATS to apply, the plaintiff must have an independent cause of action for a violation of a United States treaty or the law of nations. *Sosa*, 542 U.S. at 713–14. Additionally, for the claim to come under the jurisdiction of the ATS, the claim must be based a violation that is universally accepted and understood to give rise to individual liability. *Sosa*, 542 U.S. at 713–14; *Kiobel*, 621 F.3d at 125. Mana has an independent cause of action against the law of nations under the Trail Smelter Principle because the Principle is customary international law because it is specific, universal, and obligatory. *Hilao*, 25 F.3d at 1475. Additionally, the Principle creates an independent cause of action for a violation of the law of nations because it is understood to give rise to individual liability.

A. The Trail Smelter Principle Is Customary International Law Because It Is A Norm That Is Specific, Universal, and Obligatory.

The Trail Smelter Principle is a norm of international liability that states shall not cause environmental harms to another state via trans-boundary pollution. R. at 8. The Supreme Court in *Sosa* interpreted the "law of nations" requirement of the ATS to mean "any claim based on the present-day law of nations" must "rest on a norm of international character accepted by the

civilized world." *Sosa,* 542 U.S. at 725. Bouvier Law Dictionary defines customary international law as

> Practices of states that amount to obligations of future behavior. Customary international law is the law among states arising from the patterns of behavior among states that other states recognize gives rise to expectations and reliance, from which a law is recognized. Customary international law includes the most fundamental notions of international law, such as the custom that treaties shall be honored by their parties. Customary international law also includes countless individual forms of state behavior that have been accepted as required by the officials of other states.

Customary International Law, *Bouvier Law Dictionary* (desk ed. 2012). The Ninth Circuit further refined that definition saying "Actionable violations of international law must be of a norm that is specific, universal, and obligatory." *Hilao*, 25 F.3d at 1475. In other words, the Ninth Circuit's holding is that for a violation to be actionable, it must be a violation of customary international law. *See Hilao*, 25 F.3d at 1475; *See Customary International Law*, *Bouvier Law Dictionary* (desk ed. 2012).

While the Trail Smelter Principle was initially just the outcome of a single arbitration agreement, it is now customary international law because it was adopted as an international liability principle in Principle 21 of the Declaration of the 1972 Stockholm Conference on the Human Environment.

> 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). Additionally, the Principle was reasserted in Principle 2 of the 1992 Rio Declaration on Environment and Development, which was endorsed by 190 nations. U.N. Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and Development, 3, U.N. Doc. A/CONF.151/26/REV.1(VOL.I) (1992). The convention has been entered into force, as it met the fifty states ratification requirement in 1994. *Status of Ratification of the Convention*, United Nations Climate Change, https://unfccc.int/process/the-convention/what-is-the-convention/status-of-ratification-of-the-convention (Last visited November 24, 18).

As the Trail Smelter Principle has been defined and codified in international conventions as an international liability principle, it is specific and universal. *See* 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); *See* U.N. Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and Development, 3, U.N. Doc. A/CONF.151/26/REV.1(VOL.I) (1992). Additionally, the principle is obligatory because it provides a basis for injunctive action and it creates obligations for signatories to the Rio Declaration. *See Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1965 (1941); *See* U.N. Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and Development, 3, U.N. Doc. A/CONF.151/26/REV.1(VOL.I) (1992). Since the Trail Smelter Principle is specifically defined, universally accepted, and imposes obligations on state actors, it is customary international law.

B. The Trail Smelter Creates An Independent Cause Of Action For A Violation Of The Law Of Nations Because It Is Understood To Give Rise To Individual Liability.

For customary law to be considered the "law of nations" under the ATS, it requires a further step. That step is that a violation of the customary law is understood to give rise to individual liability. *See Sosa*, 542 U.S. at 732–33. "[T]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id*. at 733. The Trail Smelter Principle creates a cause of action for a violation of the law of nations because it provides the basis for liability with a specific cause of action for injunctive relief and monetary damages against perpetrators of trans-boundary pollution. *See Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1965 (1941). As the Trail Smelter Principle is customary law that provides a specific cause of action for a violation, it is a recognized principle of customary international law enforceable as the "law of nations" under the ATS.

III. THE TRAIL SMELTER PRINCIPLE IMPOSES OBLIGATIONS THAT ARE ENFORCEABLE AGAINST NON-GOVERNMENTAL ACTORS BECAUSE CLAIMS ADJUDICATED UNDER CUSTOMARY INTERNATIONAL LAW THAT ARE NARROW AND SPECIFIC ENOUGH MAY TARGET CORPORATE ENTITIES.

Under the assumption that the court finds the Trail Smelter Principle to be customary international law, the resulting adjudication would be enforceable against HexonGlobal. As discussed above in argument II, the way to apply the customary international law of the Trail Smelter Principle is using the Alien Tort Statute. Once the claim is in the judicial system, the arbitration becomes enforceable against the perpetrator of the violation. Most indications in case law and even the Trail Smelter Arbitration itself pin the actual damages on the nation state where the perpetrator resides, leaving it up to the nation to collect the reparations from the offender. *See Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1907, 1918 (1941), *Kiobel*, 621 F.3d at 173 n.30. The

Kiobel case found that the international law of nations was not enough to show that there is corporate liability in the cases of international law. *Kiobel*, 621 F.3d at 173. The court held that the plaintiff's claims did not fall under the special context of a narrow and specialized treaty. *Id*. at 141. Such a narrow and specialized form of international law can be found in the form or the Trail Smelter Arbitration.

The Trail Smelter Arbitration ended with an award of $350,000 going to the aggrieved parties. *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1918 (1941). This award was paid by Canada, but required the cessation of the plants' harm to the State of Washington. *Id*. at 1967. The tribunal determined that there should be a two year time period where the smelter would be monitored to determine the amount of damage that was caused to the Washington. *See Id*. at 1967-68. This decision that the tribunal held to reach out and affect the individual corporation that was in charge of the smelter gives this court the basis to follow in the footsteps of the Trail Smelter Arbitration. As such, the court in *Kiobel* would likely be satisfied that the Trail Smelter Arbitration is narrow and specialized enough to apply to a corporation because the arbitration lays out the steps that the two nations took to determine the damages and steps to take to mitigate. *Id*. at 1913-19.

Additionally, the arbitration remedy reached out and imposed obligations on the smelter in question. The smelter was prohibited from further harming Washington state and imposed a two year monitoring period to gather more data to better analyze the harms the smelter was doing. *Id*. at 141. Now that the *Trail Smelter Arbitration* has become the Trail Smelter Principle of customary international law that prevents the injury of one state by another, the methods that it used to remedy have become the way to adjudicate claims that fall under its requirements. As such, HexonGlobal is the cause of harms emanating from the United States that are affecting the island nation of A'

Na' Atu and the Trail Smelter Principle should allow the court to impose a remedy on the activities HexonGlobal.

IV. THE TRAIL SMELTER PRINCIPLE IS NOT DISPLACED BY THE CLEAN AIR ACT BECAUSE THE TRAIL SMELTER PRINCIPLE IS CONSIDERED FEDERAL COMMON LAW WHICH THE CLEAN AIR ACT SAVINGS CLAUSE PROTECTS FROM DISPLACEMENT.

The fourth question the Twelfth Circuit asked can be answered in two steps. First, the Trail Smelter Principle is customary international law and is therefore treated a Federal common law. Second, the CAA citizen suit provision prevents the CAA from displacing the Trail Smelter Principle. *See* 42 U.S.C. § 7604(e). Customary international law has long been introduced and adjudicated within the federal courts. This practice has led to questions of international law being decided as if they were federal common law. Federal common law allows the courts of the nation to hear claims from foreign parties. In addition, the courts have noted that the CAA has a citizen suit provision that preserves the rights of people to bring suits outside of the bounds of the CAA within other statutes and common laws.

A. The Trail Smelter Principle Is Federal Common Law Because Customary International Law Is Considered To Be Federal Common Law.

As discussed in argument II of this brief, the Trail Smelter Principle is part of customary international law. The Trail Smelter Principle is a norm of international liability that states shall not cause environmental harms to another state via trans-boundary pollution. R. at 8. Since the Trail Smelter Principle is specifically defined, universally accepted, and imposes obligations on state actors, it is customary international law. As such it is afforded the same weight as Federal common law.

The Supreme Court has held, in *Sosa v. Alvarez*, that there are specific carve-outs in customary international law that are afforded the protection and attention of Federal common law.

See Sosa, 542 U.S. at 730-31. The applicable carve-out that is discussed in this case is the comment regarding international disputes implicating relations with foreign nations. The court stated, "'international disputes implicating… our relations with foreign nations' are one of the 'narrow areas' in which 'federal common law' continues to exist." *Sosa*, 542 U.S. at 730-31, (quoting *Texas Industries, Inc. v. Radcliff Material, Inc*, 451 U.S. 630, 641 (1981)). The court then goes on to say that a position would likely fail where the courts must "avert their gaze entirely from any international norm intended to protect individuals" because Congress and the courts have consistently considered issues that brought international norms into judicial decisions. By allowing federal courts to consider and rule on questions involving international norms, the judiciary has created a space where the customary international laws are brought in and become federal common law that the judicial system can rule on.

The Court in *Sosa* held that the claim brought before them did not violate a specific international norm or specific customary international law that was "so well defined as to support the creation of a federal remedy." *Sosa*, 542 U.S. at 738. However, the claim brought before this court is specific in its support as the actions of HexonGlobal clearly violate the principle set out in Trail Smelter which is a specific and well established portion of customary international law. As such, this court should find that the Trail Smelter Principle, as an established customary international law, be treated as federal common law.

B. The CAA Does Not Displace The Trail Smelter Principle Because The Citizen Suit Provision Savings Clause Of The CAA Protects Claims Brought Under Federal Common Law.

The CAA has a citizen suit provision contains a savings clause that protects claims brought under statutes or common law:

> "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

42 U.S.C. § 7604(e). The Third Circuit has examined the savings clause of the Clean Air Act and found that the clause allows claims under common law to be brought. *Bell v. Cheswick Generating Station,* 734 F.3d 188, 191 (3d Cir. 2013). The Third Circuit found that the state common law claims brought against a polluter were not precluded within the state that the polluter resided in. *Id*. at 198. The common law claim was not preempted because the claim was "brought by Pennsylvania residents under Pennsylvania law against a source of pollution located in Pennsylvania […]." *Id*. at 197. Using this same logic, this Court should find that Mana's claim is not precluded as Mana is an international resident bringing an international common law claim against a party residing in an area bound by that law.

Additionally, the Sixth Circuit has ruled similarly to the Third Circuit. The Sixth Circuit has ruled that the state common law claims not be preempted by the CAA. *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 695 (6th Cir. 2015). In doing so, the court partially upon a report from the Senate Committee of Public Works that "explained that the citizen suit provision of the Clean Air Act "would specifically preserve any rights or remedies under any other law[,]" and that "'if damages could be shown, other remedies would remain available. Compliance with standards under this Act would not be a defense to a common law action for pollution damages.'" *Id*. at 693 (Citing) S. Rep. No. 91-1196, at 38 (1970). This reasoning from Congress clearly shows that the intent behind creating the CAA was not meant to preclude any other damages incurred by parties, but to better protect the environment. Mana is simply using another of the laws that Congress did not preclude to seek a remedy to the disastrous plight faced by A' Na' Atu. Since the Trail smelter

Principle is customary international law and equivalent to a Federal common law, it is protected by the citizen suit provision within the CAA and therefore the principle is not displaced by the CAA.

V. THE UNITED STATES GOVERNMENT VIOLATED THE FIFTH AMENDMENT SUBSTANTIVE DUE PROCESS PROTECTIONS FOR LIFE, LIBERTY, AND PROPERTY, BECAUSE IT FAILED TO PROTECT THE GLOBAL ATMOSPHERIC CLIMATE SYSTEM FROM DISRUPTION AND INSTEAD SUPPORTED THE PRODUCTION, SALE, AND BURNING OF FOSSIL FUELS.

The Fifth Amendment provides "No person shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. Amd. 5. Liberty within the Due Process Clause means, "not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; [and] to pursue any livelihood or avocation." *Allgeyer v. State of Louisiana.*, 165 U.S. 578, 589, 17 S. Ct. 427, 431, 41 L. Ed. 832 (1897). This liberty is not "a series of isolated points" but rather, "a rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). The definition of liberty within the Due Process Clause continues to adapt "as we learn its meaning." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

A. The United States Government Violated The Fifth Amendment Substantive Due Process Guarantee Because The Public Trust Doctrine Protects a Fundamental Right To A Healthy And Stable Climate.

The public trust doctrine protects a fundamental right to a healthy climate because the doctrine is deeply rooted in United States history and tradition, and is fundamental to our survival. It is up to the courts to identify and protect fundamental rights as part of their duty to interpret the Constitution. *Obergefell*, 135 S. Ct. at 2598. Fundamental rights include rights and liberties which

are either "deeply rooted in this Nation's history and tradition" or "fundamental to the Nation's scheme of ordered liberty." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010). In *Loving v. Virginia*, 388 U.S. 1, 12 (1967), the court reasoned that marriage is "fundamental to our very existence and survival" and therefore to deny such a fundamental freedom deprives citizens of "liberty without due process of law." Here, the public trust doctrine protects a fundamental right that is deeply rooted in the Nation's history, and fundamental to our survival.

The public trust doctrine is deeply rooted in the Nation's history. The public trust doctrine originated from ancient Roman law which stated, "the following things are by natural law common to all – the air, running water, the sea, and consequently the seashore." J. Inst. 2.1.1 (J.B. Moyle trans.). This doctrine then became incorporated into United States law through the English common law. *See generally Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892); *see* also *Shively v. Bowlby*, 152 U.S. 1 (1894). In *Illinois Central Railroad Company*, the state tried to convey tidal lands to a private company but the Court held that the "the state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." 146 U.S. at 453. The Court reasoned that the harbor carried "immense value" for the people of Illinois and therefore the legislature could not "deprive the state of control over the [harbor's] bed and waters, and place the same in the hands of a private corporation." *Id*. at 454. Furthermore, in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988), the Supreme Court discussed the vast use of public trust tidelands for shell-fishing, floating fish, and urban expansion to reason why public trust tidelands include more than just lands under navigable waters. The public trust doctrine has long existed in the United States as a traditional trust to protect citizens' interests in natural resources. Therefore, the public trust doctrine protects

a fundamental right to a safe climate because it is deeply rooted in United States history and tradition.

Additionally, the public trust doctrine is fundamental to our survival. Under the public trust doctrine, the U.S. government has an obligation to protect the interests of the general public, which traditionally included navigation, fishing, and commerce, but has since expanded to include recreation, environmental protection, research, and preservation of scenic beauty and cultural heritage. U.S. Commission on Oceans Policy, *Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades* (2004) at page 12, available at: http://oceancommission.gov/documents/full_color_rpt/append_6.pdf. As the record shows, an unstable climate system can adversely affect many profound extensions of liberty, including food, shelter, drinking water, and residence. R. at 5. Both Mana and Flood suffered seawater damage to their homes during several storms over the past three years. Record at 5. Mana and Flood also suffered from seawater intrusion in their drinking water wells. R. at 5. Furthermore, Mana and Flood rely on locally caught seafood as an important part of their diet, and climate change induced ocean acidification, warming, and loss of coastal wetlands will reduce ocean productivity and reduce the availability of this food source. R. at 5. Because the public trust doctrine requires the government to protect the interests of the public in fishing, environmental protection, and preservation, it is fundamental to survival and therefore a fundamental right as determined by the Court in *Loving v. Virginia*.

Furthermore, the United States government has long recognized a link between human rights and climate change. In 1968, Congress declared that the policy of the United States is the Federal Government has an obligation to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." 42 U.S.C. § 4331(b)(1). And that "Congress

recognizes that each person should enjoy a healthful environment." 42 U.S.C. § 4331(c). At the 1972 United Nations Conference on the Human Environment, the United States and 112 other countries endorsed the link between environmental protection and the fulfillment of human rights, including the right to life. 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). The United States recognized a duty to protect the environment for present and future generations. *Id*. Lastly, in 2015 in the Paris Agreement on Climate Change, the United States and 195 other nations, acknowledged that governments should respect, promote, and consider human rights when taking actions to address climate change. Paris Agreement pmbl. para. 11, Dec. 15, 2015, T.I.A.S No. 16-1104. Therefore, the public's interest is a healthy environment is one that has been long recognized by the United States and is a fundamental right deeply rooted in this Nation's history.

B. The United States Government Violated Plaintiffs' Due Process Rights Because It Failed To Prevent Known Harms Caused By The Production, Sale, And Combustion Of Fossil Fuels In The U.S. Market.

The language of the Due Process Clause itself does not require the State to protect the life, liberty, and property of its citizens against invasion by private actors. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs*., 489 U.S. 189, 195 (1989). However, in certain limited circumstances the Constitution does impose affirmative duties of care on the government. *Id*. at 198-201. The government has an affirmative duty of care where it takes a person into custody, confining the person against his or her will, and creates the danger or renders a person more vulnerable to an existing danger. *Id.* However, the state-created danger doctrine has since been superseded by the Supreme Court in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992), where the Court held that "conduct by a government actor will rise to the level of a due process violation only if

the act can be characterized as arbitrary or conscience shocking in a constitutional sense." *Waddell v. Hemerson*, 329 F.3d 1300, 1305 (11th Cir. 2003). A government action is conscience shocking when the conduct is deliberately intended to injure in some way that is unjustifiable by any government interest. *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Even when an action does not deliberately intend to injure in some way, a deliberate indifference is enough to state a due process violation. *See City of Revere v. Massachusetts Gen. Hospital*, 463 U.S. 239, 244 (1983). The measure of what is conscience shocking is not a "calibrated yard stick" but it does "point the way." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998), (quoting *Johnson v. Glick*, 414 U.S. 1033 (1973)).

Here, the United States government has knowingly created a danger because it has known about the harmful effects of climate change but supported and promoted the production of fossil fuels. The U.S. government has long known about the dangerous consequences of human caused climate change. In 1992, the United States signed the United Nations Framework convention on Climate changes which acknowledged the potential for dangerous human caused climate change. R. at 6. Furthermore, the heat-retention properties of carbon dioxide and methane have been established by scientific fact since the nineteenth century. R. at 5. Additionally, HexonGlobal's own scientific research made the company aware—since the 1970s—that continued global sales and combustion of fossil fuel produce would result in substantial harmful global climate change and sea level rise. R. at 5. In 2007 the Supreme Court ruled that "the harms associated with climate change are serious and well recognized." *Massachusetts v. EPA*, 549 U.S. 497, 499 (2007). Following the Supreme Court's rule in *Mass. v. EPA*, the EPA made a finding that the emission of greenhouse gases and resulting climate change had the potential to endanger the public health and welfare. R. at 6. Yet, the U.S. government is the largest single national contributor to emissions of

greenhouse gases and responsible for twenty percent of cumulative global human caused greenhouse gas emissions. R. at 5-6. Moreover, the U.S. has promoted the production and combustion of fossil fuels through programs such as tax subsidies for fossil fuel production, leasing of public lands and seas under its jurisdictions for coal, oil, and gas production, creation of the interstate highway system, and the development of fossil fuel power plants by public agencies. R. at 6. The combustion of fossil fuels releases greenhouse gases into the atmosphere which then traps heat in the atmosphere and has resulted in a change in the global climate. R. at 4. This change in the global climate has increased temperatures, changed rainfall patterns, and caused the sea level to rise which in turn has affected Mana and Flood causing seawater damage to their homes and drinking water. R. at 4-5. The United States government created the dangers faced by Mana and Flood because it promoted the use of fossil fuels knowing the dangers of human caused climate change.

Even if this Court finds that the U.S. government did not create a danger, its actions shock the conscience because it acted with deliberate indifference. If this Court finds that the U.S. government did not create the danger from climate change, the U.S. government's deliberate indifference to the dangerous consequences of human caused climate change are actions that shock the conscience. The government, knowing the effects of fossil fuel combustion, promoted the use and production of fossil fuels to such an extent that the United States is the largest single national contributor to the emission of greenhouse gases. R. at 5. Therefore, the U.S. government violated plaintiffs' due process rights because it knew about the harms of human caused climate change and encouraged the use of fossil fuels rather than preventing such use.

VI. THE PLAINTIFFS' ALIEN TORT STATUTE AND PUBLIC TRUST CLAIMS ARE NOT NON-JUSTICIABLE POLITICAL QUESTIONS BECAUSE THEY ASK THE COURT TO EXERCISE ITS AUTHORITY TO ADJUDICATE CLAIMS OF ESTABLISHED INTERNATIONAL LAW AND CONSTITUTIONAL LAW.

The political question doctrine holds that unless one of the following factors is "inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence": (1) a "textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing the lack of respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) the potential of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962). The *Baker* factors "are probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality op.). Furthermore, only in "rare" cases will the final *Baker* factors "alone render a case nonjusticiable." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 203 (2012). The Plaintiffs' Alien Tort Statute and Public Trust claims ask this court to find that the Defendants violated the Trail Smelter Principle and Fifth Amendment Due Process Clause when they contributed to climate change. These claims do not make any of the factors from *Baker* "inextricable" from the case and therefore there is not a non-justiciable political question.

There is not a textually demonstrable constitutional commitment of Plaintiff's claims to a coordinate political department. There is no express provision of the Constitution or provision from which it can be inferred that the power to make the final determination regarding global warming has been vested in either the executive or legislative branch of the government. *Native*

Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 873 (N.D. Cal. 2009), aff'd, 696 F.3d 849 (9th Cir. 2012). Therefore this case does not meet the first *Baker* factor for a non-justiciable political question.

There is not a "lack of judicially discoverable and manageable standards for resolving" climate change. The focus of the second *Baker* factor is "not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint," but whether courts "have the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" *Native Vill. of Kivalina*, 663 F. Supp. 2d at 873–74, (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 552, 55 (9th Cir. 2005)).410 F.3d at 552. Therefore, "instead of focusing on the logistical obstacles, the relevant inquiry is whether the judiciary is granting relief in a reasoned fashion versus allowing the claims to proceed such that they merely provide hope without a substantive legal basis for a ruling." *Id*. (internal quotations omitted). Here, the Trail Smelter Principle has manageable standards as it provides a basis for injunctive action and it creates obligations for signatories to the Rio Declaration. *See Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1965 (1941). Additionally, there are manageable standards for courts to assess Due Process Clause violations. *See generally Waddell*, 329 F.3d 1300; *see also Obergefell*, 135 S. Ct. 2584. Therefore there is not a non-justiciable political question under the second *Baker* factor.

There is not an impossibility of deciding these claims without an initial policy determination of a kind clearly for non-judicial discretion. Under this third *Baker* factor, if the court must "make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis," then a political question exists. *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir.2005). However, Plaintiffs are not asking the court to make a policy judgment, they are simply asking the court to rule on the legal claims of a violation of the

Trail Smelter Principle and the Due Process Clause. Therefore, this court does not have to make any policy determinations and there is not a political question under the third *Baker* factor.

The fourth *Baker* factor states that a case presents a non-justiciable political question if there is "the impossibility of a court's undertaking independent resolution without expressing the lack of respect due coordinate branches of government." Here, Plaintiffs only seek for this Court to exercise its duty to protect the fundamental rights under the Due Process Clause and adjudicate under the Trail Smelter Principle. While the U.S. Government has made commitments to climate change such as the Paris Agreement, "there is no contradiction between promising other nations the United States will reduce carbon emissions and a judicial order directing the United States to go beyond its international commitments to more aggressively reduce carbon emissions." *Juliana v. United State*s, 217 F. Supp. 3d 1224, 1240 (D. Or. 2016). Therefore, Plaintiffs' claims do not present a non-justiciable political question under the fourth *Baker* factor.

Lastly, there is not an "unusual need for unquestioning adherence to a political decision already made" or a "potential of embarrassment from multifarious pronouncements by various departments on one question" because no such political decision on Plaintiffs' claims exists and the U.S. Government has already recognized the Trail Smelter Principle and the Due Process Clause of the Fifth Amendment. Therefore, none of the *Baker* factors are "inextricable" from the Plaintiffs' claims and thus, there is not a non-justiciable political question.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully ask this court to find that: (1) Mana can bring an Alien Tort Statute claim against a domestic corporation; (2) the Trail Smelter Principle is a recognized principle of customary international law that is enforceable as the "Law of Nations" under the Alien Tort Statute; (3) the Trail Smelter Principle imposes obligations enforceable

against non-governmental actors; (4) the Trail Smelter Principle is not displaced by the Clean Air Act; (5) there is a cause of action against the U.S. government based on Fifth Amendment substantive due process protections for failure to protect the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels; and (6) Plaintiffs' law of nations claim under the Alien Tort Statute and public trust claim do not present a non-justiciable political question.

Dated: November 28, 2018

Respectfully Submitted,
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