Team No. 41

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket No. 18-000123

ORGANIZATION OF DISAPPEARING ISLAND NATIONS,

Petitioner,

and

APA MANA,

Petitioner,

and

NOAH FLOOD,

Petitioner

- v. -

HEXONGLOBAL CORPORATION,

Respondent,

and

THE UNITED STATES OF AMERICA,

Respondent

Appeal from the District Court of New Union Island

BRIEF OF ORGANIZATION OF DISAPPEARING ISLAND NATIONS, APA MANA, AND NOAH FLOOD,
Petitioner

Oral Argument Requested

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STATEMENT OF JURISDICTION

Following the issuance of the Order of the District Court dated August 15, 2018, in Civ. 66-2018, the Organization of Disappearing Island Nations (ODIN), Ms. Apa Mana, and Mr. Noah Flood filed a Notice of Appeal in this Court. This court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether Ms. Mana can bring an Alien Tort Statute, 28 U.S.C. § 1350 (ATS) claim against a domestic corporation.

II. Whether the *Trail Smelter* Principle is 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, whether it imposes obligations enforceable against non-governmental actors.

IV. If otherwise enforceable, whether the Clean Air Act displaces the *Trail Smelter* Principle.

V. Whether there is 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. Whether Plaintiffs' law of nations claim under the Alien Tort Statute and public trust claim present a non-justiciable political question.

STATEMENT OF THE CASE

A. Procedural History

This is an appeal seeking judicial review of a ruling made by the District Court of New Union Island on the 15th of August, 2018. Specifically, the Organization of Disappearing Island

Nations ("ODIN") challenges the errant dismissal of two separate claims: one under the Alien Tort Statute ("ATS"), *28 U.S.C. §1350*, and a 5th Amendment Due Process violation under the Law of Nations and the Public Trust Doctrine.

The District Court of New Union Island granted defendants motion to dismiss without reaching most of the plaintiff's claims. R. 9. The Court did not reach the plaintiffs litany of difficult issues because it found that any action Ms. Mana might have under the ATS has been displaced by greenhouse gas regulation under the Clean Air Act ("CAA"). *Id*. We ask this Court to engage with these issues because greenhouse gas regulation is not the purpose of the CAA

The Court further did not address Mr. Flood's 5th Amendment Rights Violation because it refused to adopt the standard set by the District of Oregon in *Juliana v. United States* or the government-caused danger exception applied by the Ninth Circuit. R. 10. We ask the court to reconsider the government-caused danger exception issue because the Sherman Anti-Trust Act, *15 U.S.C §1*, should have prevented the merger of all oil and gas corporations into HexonGlobal.

B. Statement of the Facts

HexonGlobal is a major United States oil producer, incorporated in the State of New Jersey with its principal place of business in Texas, and the surviving corporation resulting from the merger of all of the United States oil producers. R. at 5. HexonGlobal operates refineries throughout the world, including one refinery located on New Union Island. R. at 4. The products sold by HexonGlobal contribute to and are responsible for a staggering 32 percent of United States cumulative fossil fuel-related greenhouse gas ("GHG") emissions and six percent of global historical emissions. R. at 5.

These GHG emissions directly correlate and contribute to the harmful effects of global climate change which results in subsequent sea level rise. *Id*. New Union Island and A'Na Atu

where the plaintiffs reside are low-lying islands with a maximum height above sea level of less than three meters. R. at 4. The communities on the island where the Appellants live have an elevation of less than one-half meter above sea level. R. at 4-5. If current global emissions of greenhouse gases continue, the islands will be completely uninhabitable in their lifetime. R. at 4.

While the islands are still currently habitable, both Appellants have faced immense hardships due to the change in climate due to global warming. R. at 5. Both Appellants have experienced seawater intrusion into wells causing their drinking water supply to be ruined. *Id*. Both Appellants rely on locally caught seafood as the main staple of their diet, which will no longer be possible as climate change induced ocean acidification, ocean warming, and loss of coastal wetlands will reduce ocean productivity and severely limit the availability of Appellants primary food source. *Id*. It is widely known that this damage would not have occurred in the absence of GHG-induced sea level rise. *Id*.

Based on their own scientific research, HexonGlobal, and its corporate predecessors, have been aware since the 1970s that continued global sales and combustion of fossil fuel products would result in substantial harmful global climate change and sea level rise. *Id*. HexonGlobal's extremely profitable activities have continued despite the knowledge of this critical problem. *Id*. Until recently, the U.S. government has ignored the idea of limiting fossil fuel production, distribution, or production. R at 6. In fact, through various agency policies and programs the federal government have promoted the production and use of fossil fuel. *Id*. These programs include tax subsidies for production and leasing public lands and seas under its jurisdiction for coal, oil, and gas production. R. at 6.

The United States acknowledged the threat of climate change by ratifying the United Nations Framework Convention on Climate Change ("UNFCCC") which recognized the

potential for dangerous anthropogenic climate change. *Id*. The UNFCCC, furthermore, committed developed nation parties to adopt national policies to mitigate climate change. *Id*. Sadly, no legislation implementing this commitment has been adopted in the United States. *Id*.

In the last decade, the United States has taken few but limited steps to retroactively solve a problem it has irresponsibly ignored. *Id*. However, these steps have only been toward regulating domestic GHG emissions. *Id*. Despite these preliminary regulatory actions over the past decade, United States GHG emissions have decreased only slightly, and global GHG emissions have increased. Even with all of this information, the Trump administration and the EPA have proposed to reverse these regulatory measures and commitments. R. at 7.

SUMMARY OF THE ARGUMENT

Ms. Mana can bring an ATS claim against a domestic corporation under current case law as well as the text, history, and purpose of the ATS. The text of the statute emphasizes *who* may bring an ATS claim, an alien, and it is silent on who the claim may be brought against. Additionally, HexonGlobal's claim of corporate immunity based on the recent *Jesner* decision is unfounded in the case itself and in reality. The *Jesner* Court held ATS could not be brought against foreign corporations due to foreign policy implications and concerns. This abrogates *Doe I*'s holding insofar as it relates to foreign corporations, but domestic corporations may still be held liable. The Court erred in dismissing the ATS claim on this basis.

Additionally, the *Trail Smelter* Principle ("TSP") is actionable as customary law under the ATS. Customary law is developed through clear and unambiguous rules that States abide by out of mutual and several concern. The TSP was adopted through International Court of Justice judicial decisions and is also represented through the adoption of the Rio and Stockholm Declarations. The TSP is actionable under the ATS because it is long-established customary law,

and Ms. Mana's claim that HexonGlobal's emissions sufficiently impacts the domestic concerns of the United States under *Kiobel's* "touches and concerns" test.

While international law does not typically provide enforceable obligations, the TSP does impose obligations against HexonGlobal because sources of domestic law are relied upon to define and enforce obligations against non-governmental actors. Namely, we look to domestic tort law as well as modern environmental statutes that have overlapping policy rationale with traditional tort law, like CERCLA and OPA, to determine enforceable obligations. It is important to note the narrow inquiry into these bodies of law to merely determine enforceable obligations and nothing more. Ms. Mana seeks the traditional tort remedies of civil compensatory damages and an injunction, in addition to damages incurred pursuant to certain environmental statutes like remediation of all damages and abatement of fossil fuel production by HexonGlobal.

The CAA does not displace the TSP because the plaintiff filed a claim under the ATS, which is not displaceable federal common law, and also because there is no specific congressional intent to apply the CAA internationally. Furthermore, *Spector* states, "act[s] of Congress ought to never be construed to violate the law of nations, if any other possible construction remains." Therefore, the CAA does not displace the applicability of the TSP because of the nature in which the TSP supplements a right under the ATS, which is not displaceable common law. The international nature of the TSP also provides support for foregoing displacement because the CAA lack the necessary "affirmative intention of Congress clearly expressed," to apply the CAA internationally and the TSP is a principle agreed upon by other international parties under the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development.

Appellants' claim under *42 U.S.C. §1983* is valid. To satisfy a §1983 claim it must be shown (1) the conduct harming the plaintiff was committed under the color of state law (i.e. state action) and (2) the conduct deprived the plaintiff of a constitutional right. HexonGlobal's actions satisfy the Supreme Court's three distinct tests to determine whether a private party is acting as the State. HexonGlobal serves the public function of oil and gas production, the State encouraged their actions by allowing HexonGlobal to violate the Sherman Anti-Trust Act, and HexonGlobal and the State are so intertwined as to constitute state action because HexonGlobal is the surviving member of a merger of all oil and gas production companies in the United States.

L.W. v. Grubbs established the Due Process Clause imposes an affirmative obligation on the government to protect citizens from third party harm where the government creates the danger. HexonGlobal and the United States created the danger to Appellants by deliberately ignoring valid scientific data showing harmful effects stem from unregulated greenhouse gas emissions.

Appellant's claims are justiciable and are not barred by the political question doctrine. The ATS has judicially manageable standards similar to any tort suit allowable in United States federal court. None of the factors determined in *Baker v. Carr* are inextricable from the case laid out before us. Furthermore, appellants Public Trust Doctrine claims are not barred because rights *already under* the doctrine have been violated by HexonGlobal and the United States. The lower court errantly dismissed all claims.

I. MS. MANA CAN BRING AN ALIEN TORT STATUTE CLAIM AGAINST A DOMESTIC CORPORATION.

Ms. Mana can bring an ATS claim against a domestic corporation.

The text, purpose, and history of the statute does not provide for the conclusion HexonGlobal asserts that corporations are immune from ATS liability. HexonGlobal's misinterprets the

holding and application of the recent *Jesner v. Arab Bank,* 138 S.Ct. 1386 (2018) decision which has no influence over Ms. Mana's claim.

A. ATS Text, Purpose, and Legislative History Do Not Support Corporate Immunity Under the Act.

The text, purpose, and legislative history of the ATS do not support corporate immunity. Therefore, it should extend to corporate defendants. The text of the ATS establishes jurisdiction of "any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." *28 U.S.C. § 1350*. The text limits who may bring an ATS suit, but it does not limit the types of parties who may be brought as defendants. "The text of the [ATS] provides no express exception for corporations." *Romero v. Drummond Co. Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

Additionally, the Court in *Doe VIII v. Exxon Mobile Corp.* explores the purpose of the ATS and states, given the law of the United States and "every civilized nation, it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents." *Doe VIII v. Exxon Mobile Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

The Court also analyzed and emphasized the ATS's historical significance in *Sarei v. Rio Tinto,* stating "the ATS contains no such language and has no such legislative history to suggest that corporate liability was excluded and that only liability of natural persons was intended" and "find[s] no basis for holding that there is any such statutory limitation." *Sarei v. Rio Tinto*, 671 F.3d 736 (9th Cir. 2011).

HexonGlobal's corporate immunity defense to Ms. Mana's claims is misplaced and improper in the analysis of the text, purpose, and legislative history of the statute and should be denied.

B. The Holding in *Jesner* does not Apply Here thus Domestic Corporations May be Held Liable for ATS Claims.

HexonGlobal relies on the recent *Jesner* decision as a basis for denying corporate ATS liability. This argument is misguided and unpersuasive. The *Jesner* Court declined to rule on the issue of whether ATS claims could be brought against U.S. corporations, leaving *Doe I. v. Nestle USA* as controlling on the issue of domestic corporate liability under the ATS. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014). HexonGlobal misapplied the holding in *Jesner* and can still be held liable for actions brought under the ATS.

In *Doe I v. Nestle, USA Inc.*, plaintiffs are three victims of child slavery forced to harvest cocoa in the Ivory Coast while subjected to severe punishment and beatings. *Nestle USA, Inc.* 766 F.3d at 1016. Plaintiffs filed suit against defendant, Nestle USA Inc. alleging that defendants aided and abetted child slavery by providing financial assistance to Ivorian farmers. *Id.* The Court reaffirmed *Sarei* and held corporations are liable under the ATS because rather than adopting blanket immunity for corporations, the courts must look to international law and determine whether corporations are subject to the norms underlying the claim. *Id*.

In *Jesner*, plaintiffs alleged that they were injured by terrorist attacks committed abroad and that those terrorist attacks were caused or facilitated by a foreign corporation, Arab Bank PLC. *Jesner* 138 S. Ct. at 1393. Plaintiffs sought to impose liability on the defendant for the conduct of its human agents where some of Arab Bank's officials allowed the Bank to be "used to transfer funds from terrorist groups in the Middle East" thereby causing the death or injuries of the plaintiffs for which they sought compensation. The Court held foreign corporations are not liable for actions under the ATS reasoning that the ATS was "intended to promote harmony in international relations," and judicial caution "guards against our courts triggering serious foreign policy consequences" and defers those decisions to the political branches. *Id*. at 1390. The Court declined to answer the split on no corporate liability under the ATS. The *Jesner* Court expressed

concerns over foreign policy and response to a U.S. court exercising jurisdiction over both an alien plaintiff and a foreign defendant. The Court re-emphasizes the importance that the "political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign policy concerns." *Id*. at 1403.

Jesner did not eliminate all corporate liability under the ATS but only *foreign* corporate liability due to foreign policy concerns. This abrogates *Nestle*'s holding as it applies to foreign corporations. *See Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (holding where the reasoning or theory of a prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, the court should consider itself bound by the later and controlling authority and should reject the prior circuit opinion as being effectively overruled).

HexonGlobal's corporate immunity defense to Ms. Mana's ATS claim misapplies the holding in *Jesner* and should not be found persuasive. HexonGlobal is a major United States oil producer, incorporated in the State of New Jersey with its principal place of business in Texas. R. at 5. It is a domestic corporation, and none of the foreign policy implications of concern in *Jesner* are present here. Ms. Mana can bring an ATS claim against HexonGlobal.

II. THE TRAIL SMELTER PRINCIPLE IS A RECOGNIZED PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW ENFORCEABLE AS THE "LAW OF NATIONS" UNDER THE ALIEN TORT STATUTE.

Customary international law ("CIL") is developed when States universally abide by the custom, *usus*, and the belief that such practice is required as a matter of law and must be carried out in a way as to evidence a belief that this practice is rendered obligatory by the existence of a rule of law requiring it, *opinio juris sive necessitatis*. *ICJ Article 38(1)(b)*.

The TSP establishes the duty for a State to prevent transboundary harm, and establishes a "polluter pays" principle, where the polluting state should pay compensation for the transboundary harm is has caused. *Trail Smelter Arbitration* 3 U.N.R.I.A.A. 1965 (1941).

The TSP has long been incorporated into State law through treaties and domestic law application. Where a defendant's alleged conduct violates "well-established, universally recognized norms of international law, Federal jurisdiction exists." *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995).

A. The Trail Smelter Principle is Considered Customary International Law Because States Abide by it Out of Mutual and Several Concern.

CIL is established by those "clear and unambiguous rules by which states universally abide, or to which they accede to, out of a sense of legal obligation and mutual concern." *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003). Quoting Article 38 of the International Court of Justice ("ICJ") Statute,[1] the Court finds evidence of CIL using treaties as primary evidence of "rules expressly recognized by the contesting states." *Id*. at 251. It also establishes acceptable secondary sources as sources of customary international law, to include judicial decisions and works of the "most highly qualified publicists." *Id*. The Court emphasizes the importance of the rules being "clear and unambiguous" to which States accede to out of a sense of legal obligation and mutual concern in order for the rules to constitute the body of customary international law. *Id*.

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[1] The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists [*i.e.,* scholars or "jurists"] of the various nations, *as subsidiary means for the determination of rules of law.* ICJ Statute, June 26, 1945, art. 38, 59 Stat. 1055, 1060, U.S.T.S. 993.

1. *The Judicial Decision of the Trail Smelter Arbitration Requires a Duty for States to Limit Harm to Other States.*

In the *Trail Smelter* arbitration, a dispute between Canada and the United States arose where a smelter operating in Canada had caused damage to agricultural interests in the United States. *Trail Smelter Arbitration,* 3 U.N.R.I.A.A. 1965 (1941). The case went to arbitration where the tribunal held that Canada was responsible for the damage caused by the smelter and granted compensation to the U.S. reasoning that no state has the right to allow use of its territory "in such a manner as to cause injury by fumes in or to the territory of another or the properties of the persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence," and the polluter pays for its damage. *Id.* at 1908, 1965.

2. *The Trail Smelter Principle is Reproduced in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration.*

Both Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration establish the right for States to "have the sovereign right to exploit their own natural resources" with the duty "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."

These principles, adopted by several States, emphasize the importance of States' abilities to use their own resources at will but limits transboundary pollution and harm to other States by that sovereign use.

3. *The Trail Smelter Principle is Allied in Common Law with the Concept of Nuisance.*

As stated in Article 38 of the ICJ Statute, the Court looks to the general principles of law recognized by civilized nations as a source of customary international law. The TSP is similar to that of the common law doctrine of nuisance. Nuisance involves an unreasonable interference

with the use and enjoyment of another's land and the cause of action that can arise for said interference. *Urie v. Franconia Paper Corp.*, 218 A.2d 360, 361, 362 (N.H. 1966).

The existence and commonality of United States nuisance law is evidence that one party's use of their land should not interfere and burden someone else and the use of their land. This bolsters the international acceptance of the TSP because it is a domestic application of the same principle, one party's use of her land should not inhibit or hinder another's use of her land.

B. The Trail Smelter Principle is Actionable Under the Alien Tort Statute.

In *Kadic*, the Court held where a defendant's alleged conduct violates "well-established, universally recognized norms of international law," an actor may be held liable under the ATS. *Kadic*, 70 F.3d at 238-39. Additionally, defendants cannot be held liable where conduct occurs entirely within the territory of another sovereign. *Balintulo v. Daimler AG*, 727 F.3d 174, 188 (2d Cir. 2013). The presumption against extraterritorial application of the ATS requires the alleged actions must sufficiently "touch and concern" the territory of the United States and allow the state jurisdiction to prescribe punishment for certain offenses recognized by the community of nations as of universal concern. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 132 (2013). Courts must "consider all facts that give rise ATS claims, including the parties' identities and their relationship to the causes of action." *Al Shimari v. CACI Premier Tech*, 758 F.3d 516, 527 (4th Cir. 2014). Displacement of the presumption against extraterritoriality "touches and concerns" the United States and is warranted if "the claims have a U.S. focus and adequate relevant conduct occurs within the United States." *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 592 (11 Cir. 2015).

HexonGlobal's actions more than sufficiently "touch and concern" the United States and violate the customary TSP duty to prevent transboundary harm. The products created and sold by

HexonGlobal contribute to and are responsible for 32% of United States cumulative fossil fuel-related greenhouse gas emissions and six percent of global historical emissions. R. at 5. These GHG emissions directly correlate and contribute to the harmful global climate change. This climate change and the warming of the Earth by HexonGlobal's uninhibited emissions has directly contributed to the subsequent sea level rise and harm experienced by Ms. Mana and Mr. Flood. Both have experienced the direct ramifications of the global climate change through extensive seawater damage to their homes. Both appellants have also incurred substantial expenses to repair damage to their homes due to this harm directly contributed to by Appellees HexonGlobal and United States. Ms. Mana and Mr. Flood will see no continued redressability for the invasion of their homes if HexonGlobal is able to continue violating the customary international principle of preventing transboundary harm to their homes.

III. ALTHOUGH INTERNATIONAL LAW DOES NOT TYPICALLY PROVIDE ENFORCEABLE OBLIGATIONS, THE TRAIL SMELTER PRINCIPLE DOES IMPOSE OBLIGATIONS AGAINST HEXONGLOBAL BECAUSE SOURCES OF DOMESTIC LAW ARE RELIED UPON TO DEFINE AND ENFORCE OBLIGATIONS AGAINST NON-GOVERNMENTAL ACTORS.

Courts must look to customary international law to determine, "the nature and scope of the norm underlying the plaintiff's claim," because doing so requires understanding and agreement amongst various nations on the universal availability of a certain cause of action. *Nestle USA Inc.*, 766 F.3d at 1022. However, international law says little to nothing regarding enforcement of customary international law violations. This is practically understandable because an international consensus on enforceability would be virtually impossible given the diverse remedial schemes throughout the world. Rather, it leaves to individualized nations and their domestic law to determine whether and which obligations are to be enforced against international law violators. *Kiobel,* 621 F.3d at 152 (Leval, P., concurring); *Nestle USA Inc.*, 766

F.3d at 1022. The United States, through the ATS, has provided an avenue for alien nationals to "impose civil compensatory liability on violators and draws no distinction in its law between violators who are natural persons and corporations." *Kiobel*, 621 F.3d at 152. Indeed, two early cases brought pursuant to the ATS provided that international law permitted individual nations to establish appropriate civil remedies against private action by applying domestic law. See *Adra v. Clift*, 195 F.Supp. 857 (D.Md.1961); *Bolchos v. Darrel*, 3 F.Cas 810 (D.S.C. 1795) (No. 1,607). As mentioned earlier, this lack of distinction does not preclude liability for corporations.

Similarly, the lack of enforceable obligations in international law does not foreclose damages altogether. It is irrelevant whether the TSP provides enforceable obligations because we look to domestic law to answer that question. Pursuant to traditional, domestic tort law policy to remedy a harm that has already occurred, which overlaps with the policy of modern environmental statutes like the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) and the Oil Pollution Act (OPA), Ms. Mana seeks the traditional tort remedy of civil compensatory damages from injuries to property and person and an injunction, as well as damages incurred pursuant to certain environmental statutes like remediation of all damages and abatement of fossil fuel production by HexonGlobal, all of which are available under the ATS for violating the TSP.

A. Modern Environmental Statutes Have Overlapping Policy Rationale with Traditional Domestic Tort Law Which Provides a Base from Which to Determine Enforceable Obligations Against HexonGlobal.

While the modern set of rules governing environmental harms are statutes and regulations, for centuries tort law provided a principal means by which to remedy environmental injuries through the use of nuisance and negligence actions. Still today, toxic tort litigation is a prominent area of law that seeks to remedy environmental harms. While tort law's usefulness in

the environmental context does have its shortcomings when considering the nature and scope of liability and harm, it is important to clarify that this narrow examination of traditional tort law in conjunction with modern environmental statutes is to identify enforceable obligations against non-governmental actors due to the lack of enforceability language in international law and the historical relevance of tort law in remedying environmental injuries. In *Adra*, a Lebanese plaintiff contended that he was legally entitled to custody of his daughter, who was wrongfully being withheld from him in America by his former wife, and that the defendant wife concealed their daughter's name and nationality by falsifying a passport in violation of the law of nations. The court found the wife liable under a purely domestic tort—"[t]he unlawful taking or withholding of a minor child from the custody of the parent or parents entitled to such custody." *Adra*, 195 F.Supp. at 862. The misuse of the passport was found to constitute a violation of law of nations under the ATS while reference to domestic tort law established civil remedies for the plaintiff. Similarly, Ms. Mana can look to domestic tort law of nuisance and negligence in addition to toxic tort litigation to conclude that an injunction and compensatory damages be awarded in an amount determined by the court.

As the field of environmental law began to progress in America, environmental legislation passed by Congress provided another means by which to remedy environmental harms. Certain congressional statutes may also be used to define remedies and obligations because many of them have supplemented traditional tort law with novel legal remedies that tort law did not have the precedential force to reach. The most evident of these statutes is CERCLA, enacted in 1980 by Congress to establish a system for addressing releases or threatened releases of hazardous substances that may cause harm to individuals or the environment. *See 42 U.S.C. § 9601 et seq*. It specifically provides a national response and remediation authority in the event of

such a release. *See 42 U.S.C. § 9604*. Most importantly, CERCLA establishes an extensive and robust enforceability framework for responsible parties, which includes imposition of costs and limitations on the liable non-governmental parties. *See 42 U.S.C. § 9607(c)*. The court in *Western Properties v. Shell Oil Company*, 19 Trials Digest 4th 7 (2001), held Shell Oil Company jointly and severally liable for $5,002,903 in damages and $3,000,000 to $5,000,000 for future environmental response costs pursuant to CERCLA § 107(a) for dumping acid sludge on non-polluting landowner's property. *See In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico*, 21 F. Supp. 3d 657 (holding liability on operator to pay removal costs was warranted under the Oil Pollution Act). Similarly, pursuant to the TSP, Plaintiff Ms. Mana urges the court to determine damages for seawater damage to Ms. Mana's home, expenses to repair damage and prevent future damage and seawater intrusion into drinking water wells. R. 5. While CERCLA provides a framework for dealing with different types of hazardous waste, it is important to clarify the narrow scope of this inquiry to determine merely that there are areas of domestic law that can provide a basis for determining enforceable obligations and nothing more.

B. The CAA, Unlike CERCLA And OPA, Is Not Applicable In Determining Enforceable Obligations Against HexonGlobal Because It Does Not Improve Upon Traditional Tort Law Principles.

The CAA must be distinguished because it does not improve upon traditional tort law principles and does not provide the type of robust enforceable obligations available under CERCLA and OPA. Although it is a valuable and important piece of legislation in combatting national air pollution, the CAA is merely a regulatory statute that does not provide a relevant legislative complement to traditional tort law, but instead merely provides preventative measures without robust enforceable obligations. For example, § 112 of the CAA provides that the EPA shall establish standards for hazardous air pollutants with an eye toward public health, but this policy rationale does not fit well with tort law, which is to remedy harms that have already

occurred. *42 U.S.C. § 7412*. Environmental laws like the CAA implemented to minimize the adverse impacts associated with air pollution activities does not have overlapping policy rationale with tort law because it prospectively regulates conduct, mindful of minimizing harm to human health and the environment, while the tort system merely acts to remedy a harm that has already occurred in order to provide restitution to the injured party.

Therefore, even though the TSP does not provide enforceable obligations, obligations imposed by nuisance and negligence and modern environmental statutes that have overlapping policy rationale with traditional tort law, like CERCLA and OPA and unlike the CAA, should be relied upon to enforce obligations on HexonGlobal and compensate Ms. Mana for damages under the ATS.

IV. THE CAA DOES NOT DISPLACE THE TSP BECAUSE THE PLAINTIFF FILED A CLAIM UNDER THE ATS, WHICH IS NOT DISPLACEABLE FEDERAL COMMON LAW, AND ALSO BECAUSE THERE IS NO SPECIFIC CONGRESSIONAL INTENT TO APPLY THE CAA INTERNATIONALLY.

In 2011, the Supreme Court held, inter alia, that the CAA and EPA actions it authorizes displace any federal common law of air pollution. *American Electric Power Company, Inc. v. Connecticut*, 131 S.Ct. 2527, 2529 (2011). Although the district court held the TSP is displaced by the CAA because it is considered federal common law, that is not the dispositive inquiry nor outcome. R. 10. Instead, Ms. Mana filed a claim under the ATS, which is not federal common law but one of the first congressional statutes enacted by the First Continental Congress in 1789 and later rejuvenated in 1980 in *Filartiga*. *Filartiga*, 630 F.2d 876, 878. While the TSP provides the CIL to determine a cause of action, the TSP itself does not provide jurisdiction to seek damages or abatement of carbon dioxide emission from fossil-fuel fired power plants.

Furthermore, various federal courts have stated that, "an act of Congress ought never to be construed to violate the law of nations, if any *other possible construction* (emphasis added)

remains*." Spector* 545 U.S. 119, 127 (2005); *See also Naoum v. Attorney General of U.S.*, 300 F.Supp 2d 521 (N.D. Ohio 2004) (holding Congress is normally presumed not to have acted in violation of customary international law); *Murray v. Schoomer Charming Betsey, The*, 6 U.S. 64 (1804) (this interpretation is commonly referred to as the "Charming Betsey Canon"). In addition, "specific congressional intent" must be present in order to apply domestic statutes against foreign entities. *Spector,* 545 U.S.119, 125. By stating that the CAA displaces the TSP, the district court deems the TSP inapplicable and effectively states that the TSP violates the CAA. However, the applicability and suitability of the TSP in conjunction with the ATS' jurisdictional relevance provides the "*other possible construction*" to which the court in *Spector* references. *Id*. at 119. Therefore, CAA does not displace the applicability of the TSP because of the nature in which the TSP supplements a right under the ATS, which is not displaceable federal common law.

In *Spector*, the Supreme Court refused to apply specific provisions of the Americans with Disabilities Act (ADA) to a foreign-flag cruise ship because it would bring the vessel into noncompliance with the International Convention for the Safety of Life at Sea (SOLAS), an international maritime treaty. *Spector*, 549 U.S. at 137; SOLAS Convention Nov. 1, 1974. T.I.A.S. No. 9700 (May 25, 1980). Similarly, displacing the TSP, an international agreement, for the CAA, a domestic statute, would effectively limit and potentially eliminate Ms. Mana's options for recovery. This is especially troubling given that the TSP is universally-accepted law under the Declaration of 1972 Stockholm Conference on the Human Environment and the 1992 Rio Declaration on Environment and Development, which can and should be applied to Ms. Mana's injuries in a foreign locale.

A. CAA Has No Specific Congressional Intent of International Application.

By displacing the TSP with the CAA, the district court places an international agreement effecting citizens in other countries at the mercy of American law that Congress did not specifically intend to accomplish. Congress' attempt to extend the coverage of the Seaman's Act is exemplary of the hesitancy to apply congressional statutes extraterritorially without specific congressional intent to do so. A "storm of diplomatic protests" from major countries like Great Britain, Italy, Canada and Germany erupted, effectively killing a bill in Congress that would have expanded application of the Seaman's Act to foreign vessels. *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 146 (1957). (holding that there was no specific congressional intent to extend the Labor Relations Management Act of 1947 to a dispute between a foreign ship and its foreign crew). Similarly, the CAA does not provide "specific congressional intent" for application in the international context where another applicable law, the TSP, exists. The maritime nature of these cases fits well into the international nature of the environmental pollution at issue here because they both involve the interplay of domestic and international law in determining liability and obligations for harms outside of domestic territorial bounds.

B. The International Nature of the TSP Provides Support for No Displacement.

The international aspect of the TSP cuts against the district court's holding, relying on *American* and a few other cases, that the CAA displaces the TSP because claims, "sounding in international tort . . . must of necessity be considered to be claims arising under federal common law." R. 10. Unlike in *American Electric*, where eight states, New York City, and three domestic land trusts sued seeking abatement of defendant electric power corporations' "ongoing contribution to public nuisance of global warming," in this case, Ms. Mana is a foreigner suing

under the ATS, which provides Ms. Mana with jurisdiction to sue under the TSP, which is CIL, not federal common law. Unlike most federal common law, the TSP was adopted by the Declaration of 1972 Stockholm Conference on the Human Environment and reasserted in Principle 2 of the 1992 Rio Declaration on Environment and Development, which is endorsed by 190 nations. 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); 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). This international validation and geographical reach of the TSP distinguishes it from the CAA, which does not have jurisdiction to remedy damages occurring in foreign areas like A'Na Atu. Indeed, the Supreme Court has on several occasions concluded that extraterritorial application of any statute is impermissible absent "affirmative intention of the Congress clearly expressed," which is lacking under the CAA. *Benz,* 353 U.S. 138 at 147 (holding that Labor Management Relations Act of 1947 was not intended to cover dispute between foreign ships and its foreign crew); *See also E.E.O.C. v. Arabian Am. Oil Co*., 499 U.S. 244 at 248 (1991); *Smith v. United States*, 507 U.S. 197, 204 n. 5 (1993).

Therefore, the CAA in no way displaces the applicability of the TSP under the ATS. The TSP is not federal common law, Congress did not intend for the CAA to remedy harms against Ms. Mana, a non-citizen living in a foreign locale, and the international nature and universal acceptance of the TSP provides ample support to prevent the displacement of the TSP, which if displaced would effectively deem the TSP inapplicable and irrelevant.

V. The Lower Court Erred in Ruling A Valid 42 U.S.C.S § 1983 Claim Did Not Exist

42 U.S.C.S §1983 gives remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position. *Monroe v. Pape*, 365 U.S. 167 (1961). To state a valid §1983 claim, the plaintiff must satisfy two essential elements: (1) the conduct that harms the plaintiff must be committed under color of state law (i.e. state action), and (2) the conduct must deprive the plaintiff of a constitutional right. *L.W. v. Grubbs*, 974 F. 2d 119. The purposes of the statute are " . . . [to give] a right of action against a person who, under color of state law, custom, or usage, subjects another to the deprivation of any rights, privileges, or immunities secured by the Federal Constitution,[and] has several purposes: (1) it overrides certain kinds of state laws; (2) it provides a remedy where state law is inadequate; and (3) it provides a federal remedy where the state remedy, though adequate in theory, is not available in practice." *Monroe*, 365 U.S. at 168 (1961).

A. HexonGlobal was Acting Under the Color of State Law.

When private persons or organizations are responsible for the deprivation of a victim's federal rights, such a victim may still assert claims under § 1983 in some narrowly defined circumstances. *Blum & Urbonya*, *Section 1983 Litigation*, *supra* note 45, at 7-11. The court must determine on a case-by-case basis whether sufficient state action is present from a non-state actor to sustain a §1983 claim. *Bailey v. McCann*, 550 F.2d 1016, 1018 (5th Cir. 1997) (affirming summary judgment for appellee horse racing association in appellant harness racing driver's civil rights because appellee was a private association that was not a person acting under color of state law.) The three primary tests the Supreme Court has used to determine whether state action exists are: (1) the public function test; (2) the state compulsion test; and (3) the nexus/joint action test. *Willis v. University Health Servs.*, 993 F.2d 837, 839 (11th Cir. 1993)

(holding that appellant former employee failed to show that state action existed based on the relationship between appellee and the public hospital authority.)

The public function test limits state action to instances where private actors are performing "traditionally the exclusive prerogative of the state." *Willis*, 993 F.2d at 840. The 10th Circuit has held the power to regulate gas produced and sold intrastate is a "traditional state function." *Okla. by Derryberry v. Fed. Energy Regulatory Com.*, 661 F.2d 832, 836 (10th Cir. 1981)(finding that the power to regulate gas production was a traditional state function Congress can interfere with under National League of Cities where Congress created the NGPA because it did not violate the 10th Amendment.)

The state compulsion test limits state action to instances where the government has "coerced or at least significantly encouraged the action alleged to violate the constitution." *Willis*, 993 F.2d at 840. The Sherman Antitrust Act states that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C.S §1*.

The nexus/joint action test applies where "the state has so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the enterprise." *Willis*, 993 F.2d at 840. To charge a private party with state action under this standard, the governmental body and private party must be intertwined in a "symbiotic relationship." *Nat'l Broad. Co. v. Commc'ns Workers of Am.*, 860 F.2d 1022, 1027 (11th Cir. 1988) (holding that the exclusion of plaintiff did not constitute state action under the public function or the state-compulsion test where defendant news corporation excluded plaintiff from a news convention but not other media members.) All three primary tests apply in cases where a party seeks to hold a private actor liable under the state action doctrine. *Id.* at 1026.

HexonGlobal's production and regulation of gas is performing a traditional state function "traditionally in the exclusive prerogative of the state." The production and regulation of oil and gas in *Oklahoma*, is the same kind of oil and gas production and regulation that makes up HexonGlobal's corporate practice. In *Oklahoma*, the 10th Circuit found that this was a traditional state function that Congress could interfere with and regulate. Here, we ask the Court to follow the same standard and hold that HexonGlobal's activities satisfy the "traditional public function test."

The State has coerced or encouraged the actions of HexonGlobal by allowing the corporation to violate the Sherman Anti-Trust Act. The Sherman Act was created by Congress in order to stop corporations from monopolizing an industry, restraining the free market, and therefore allowing them to ignore regulations. *15 U.S.C.S §1.* HexonGlobal is the surviving corporation resulting from the merger of all of the United States oil producers. *R. at 5.* Unlike in *Willis* where the Court found that the county was not sufficiently connected with the hospital's activities, the United States government had to approve the merging of all of the oil and gas production companies in the country. The State may not have coerced HexonGlobal, but it certainly encouraged the corporation's uninhibited GHG emissions by allowing such a merger.

HexonGlobal and the State have become significantly intertwined in the process of the production and regulation of oil and gas. In *Juliana*, the Court stated that the EPA has a duty to regulate CO_2 emissions for the benefit of public health. While the Trump administration has publicly announced it would like to remove itself from environmental regulation, the EPA still has that duty even though the agency has proposed freezing regulations. R. at 7. This duty is comparable to the supervisory authority in *Willis*. The combination of the duty to regulate and the merger of oil and gas corporations show the State and HexonGlobal are significantly and

necessarily intertwined. The satisfaction of all three tests show HexonGlobal is acting under the color of state law.

B. The Lower Court erred in Ruling There Was No 5th Amendment Substantive Due Process Rights

The Fifth Amendment provides in part that "no person shall . . . be deprived of life, liberty, or property, without due process of law." *U.S. Const. amend. V*. Generally, the Due Process Clause limits the government's power to act but does not guarantee certain minimum levels of safety and security. *Deshaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195 (1989) (holding a child who was beaten into mental retardation by his father was not guaranteed safety under the 5th Amendment even though child protective services had been made aware of the abuse because the government did not play a part in the creation of the dangerous situation.) The language of the Due Process Clause does not impose an affirmative obligation on the government to ensure that citizens do not come to harm through other means. *Id.*

However, there is an exception where government creates the danger. *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992)(holding employer violated a nurses due process rights after placing nurse in danger by leaving her alone with an inmate who raped her). In such cases, deliberate indifference may suffice to establish a due process violation. *L.W. v. Grubbs*, 92 F.3d 894, 896 (9th Cir. 1996) (affirming that the lower court's ruling the employer created the dangerous situation and was deliberately indifferent because they had particularized knowledge of the inmates tendencies of violence towards women.)

Deliberate indifference requires creation of a dangerous situation with actual knowledge or willful ignorance of impending harm. *L.W.,* 92 F.3d at 900. Plaintiffs need only plead government action, or failure to act where it has a duty to do so, which creates a threat of

imminent harm, and the government's deliberate indifference to that threat of harm. *Juliana v. United States*, 217 F. Supp. 3d at 1271 (holding that the government had violated plaintiffs due process rights because the State had created the danger to the plaintiff by implementing subsidies and regulations that were contrary to slowing climate change). HexonGlobal and the State have violated Appellants' 5th Amendment due process rights by ignoring scientific data showing the harmful effects of GHG emissions and failing to properly regulate those emissions.

1. The Danger to Appellants was Created by the United States and HexonGlobal.

To state a prima-facie case, the plaintiff must show that his or her danger-creation claim for due-process violations meets a five-part test: (i) the state and individual actors must have created the danger or increased plaintiff's vulnerability to the danger in some way; (ii) the plaintiff must be a member of a limited and specifically definable group; (iii) the defendant's conduct must put the plaintiff at substantial risk of serious, immediate, and proximate harm; (iv) the risk must be obvious and known; (v) and the defendant must have acted recklessly in conscious disregard of that risk. *A.M. v. N.M. Dep't of Health*, 65 F. Supp. 3d 1206, 1242 (D.N.M. 2014) (holding the individual department of health defendants violated an involuntarily committed individual's Fourteenth Amendment substantive due process rights to reasonable care and safety when they transferred her and other similarly situated developmentally disabled individuals who defendants knew were unable to care for themselves, to unlicensed, untrained, inexperienced, private third parties and abandoned them.) The defendant must recognize the unreasonableness of the risk of the conduct and act "with an intent to place a person unreasonably at risk." *Medina v. City & Cty. of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992) (holding a bystander did not establish by adequate evidence the city exhibited deliberate indifference in training where two police officers recklessly pursued a felon.) The intent to place

a person unreasonably at risk is present where the defendant "is aware of a known or obvious risk" creating a high probability that serious harm will follow, and the defendant nonetheless proceeds with a "conscious and unreasonable disregard of the consequences." *Id.* For purposes of § 1983, it is not adequate to show that the defendant merely acted recklessly in disregard of a known risk to the public at large. *Martinez v. California*, 444 U.S. 277, 285 (1980) (holding that decedent's death was too remote a consequence of the parole officers' action to hold them responsible under federal and civil rights law).

However, given the fact that reckless intent involves an unreasonable disregard of a known great risk rather than intent to cause a particularized harm, the defendant's reckless conduct may be considered to be directed toward the plaintiff if the plaintiff is closely and immediately tied to the perceived substantial risk. *Medina*, 960 F.2d at 1496 (10th Cir. 1992).

The State has increased Mr. Flood's vulnerability to the danger of global warming by allowing all oil and gas companies to merge into HexonGlobal. In *L.W.*, the court found the employer of the nurse created the danger because they knew an inmate had a tendency to be violent towards women when left alone with them, increasing the victim-nurse's vulnerability to the danger. Similarly, this Court should find the United States government increased the vulnerability of Mr. Flood to global warming by allowing all domestic oil and gas companies to merge into HexonGlobal and failing to enforce emissions regulations.

Both Mr. Flood and Ms. Mana are part of a clearly definable and limited group. In *N.M. Dept. of Health*, the plaintiffs were a group of disabled individuals, which the court ruled made them part of a clearly defined group. All appellants are members of island nations that will be affected by sea level rise caused by global warming and have joined ODIN. *R. at 3-5*. Both A'Na Atu and the New Union Islands located in the East Sea will be completely uninhabitable unless

action is taken to limit emissions of greenhouse gases. R. at 4. Both Appellants rely on locally caught seafood as an important part of their diet, and climate change induced acidification, warming and loss of coastal wetlands will reduce ocean productivity and reduce the availability of this food source. R at 5.

The risks of global warming caused by greenhouse gas emissions are both obvious and known. In recent decades, the United States has acknowledged the threat of climate change. R. at 6. In 1992, the United States signed and the Senate ratified, the United Nations Framework Convention on Climate Change (UNFCCC). *Id.* The UNFCCC acknowledged the potential for dangerous anthropogenic climate change and state an objective "to achieve . . . stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." *Id.* The EPA made a finding that the emission of GHG had the potential to endanger the public health and welfare. *Id.* These facts show the United States and HexonGlobal knew of the danger.

HexonGlobal has already admitted they knew of the substantial harm the GHG emissions create. Based on their own scientific research, HexonGlobal and its corporate predecessors have been aware since the 1970s that continued global sales and combustion of fossil fuel products would result in substantial harmful global climate change and sea level rise. R. at 5.

Generally, in order to state a valid §1983 claim the plaintiff must show that the harm was directed at them. However, *Medina* gives an exception for when the defendant's reckless conduct may be considered to be directed toward the plaintiff, if the plaintiff is closely and immediately tied to the perceived substantial risk. Members of island nations are immediately tied to the perceived risk. Both Ms. Mana and Mr. Flood have incurred, and will continue to incur,

substantial expenses to repair past damage and prevent future damage to their homes due to sea level rise. R at 5.

The State and HexonGlobal created the danger to appellants making deliberate indifference to the harm a due process violation. In *Deshaney*, the court found that while the State was aware of the dangers they did not create the dangerous situation. This is distinguished from our case because the U.S. is historically the largest single-nation contributor to emissions of GHGs. In *Juliana*, the government took action through subsidies and regulations that created massive carbon-dioxide emissions. This is comparable to the Trump administration proposing to reverse regulatory measures and commitments, proposing to withdraw from the Paris Agreement, and the EPA proposing to free emissions reductions under the greenhouse-gas-based fuel economy standards. R. at 7.

Based on the facts it is clear HexonGlobal is acting under the color of state law. HexonGlobal provides a traditional state function. The State has encouraged their actions by allowing the HexonGlobal to monopolize the oil and gas industry, and the State and HexonGlobal have become significantly intertwined now that the corporation is the only power provider in the country. The State and HexonGlobal created the danger to Appellants by failing to increase regulations of greenhouse gases and were blatantly and deliberately indifferent to scientific evidence they admitted showed a threat.

IV. THE LOWER COURT ERRED IN RULING A LAW OF NATIONS CLAIM UNDER THE ALIEN TORT STATUTE PRESENT A NON-JUSTICIABLE QUESTION

Drawing exact boundaries between the political and the justiciable is not possible, but we come as close as we can by applying the test announced by the Supreme Court in *Baker v. Carr*. *Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1096 (Alaska 2014) (holding that six minors

claims for a declaratory judgment on the nature of the public trust doctrine did not present political questions because the *Baker* factors for identifying non-justiciable issues do not apply to judicial constitutional interpretation)

Prominent on the surface of any case held to involve a political question is found a (1) textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) or a lack of judicially discoverable and manageable standards for resolving it; (3) or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; (5) or an unusual need for unquestioning adherence to a political decision already made; (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Baker v. Carr*, 369 U.S. 86, 217.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability. *Id.* While courts cannot intervene to assert "better" policy, [. . .] they can address constitutional violations by government agencies and provide equitable relief. *Juliana v. United States*, 217 F. Supp. 3d at 1269.

The third *Baker* factor is not at issue here because as the case appears to be an ordinary tort suit, there is no "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217.

The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited where such contradiction would seriously interfere with important governmental interests. *Kadic* 70 F.2d at 249 (holding two groups of victims from Bosnia-Herzegovina claims were not barred by

the political question doctrine in an ATS claim because the issue of torts is constitutionally committed to the judiciary and under the common law of torts there are judicially manageable standards.) Judicial resolution of this case would not interfere with governmental interests. In fact, it would give the EPA a more definite standard for what they must do to protect the public health and welfare. For this reason, the fourth through sixth Baker factors need not be discussed presently.

This case presents a justiciable question because torts are an area of law committed to the courts with judicially manageable standards and because the Public Trust Doctrine is subject to judicial review.

A. Torts have been Constitutionally Committed to the Courts and Have Judicially Manageable Standards.

"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." *Filartiga*, 630 F.2d 876, 880 (2d Cir. 1980) (holding whenever an alleged torturer was found and served with process by an alien within the borders of the United States, federal jurisdiction was appropriate.) The ATS requires that plaintiffs plead a "violation of the law of nations" at the jurisdictional threshold. This statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible "arising under" formula of § 1331. See *Filartiga*, 630 F. 2d at 887-88. Thus, it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. *Kadic*, 70 F. 3d at 232.

In our case, because the common law of tort provides clear and well-settled rules on which the district court can easily rely, this case does not require the court to render a decision in the absence of "judicially discoverable and manageable standards." *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, etc.*, 937 F.2d 44, 49 (2d Cir. 1991) (The court agreed with the district

court that appellant was not immune from suit and that the case did not present a non-justiciable political question).

The first two elements of the test for jurisdiction are clearly satisfied in our case. Both appellants are aliens, suing for a constitutional tort. Therefore, we need only analyze whether this tort was in violation of the law nations or a treaty of the United States.

The continued emissions by HexonGlobal and failure to regulate by the United States government is in violation of the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCC committed developed nation parties to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. R at 6. No such legislation implementing this commitment has been adopted. *Id.*

B. Public Trust Claims are Justiciable and Appellants Contend the Public Trust Doctrine Requires Expansion under Current International Norms

The public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use, "and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary." *Kanuk* 335 P.3d at 1099-100. Specifically, the State must ensure the public's right "of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters." *Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wash. 2d 249, 275 (2018) (holding the Washington Supreme Court's decision citing *Wilbour v. Gallagher* in 1969 put fishing rights under the Public Trust Doctrine.) "[T]he public trust doctrine remains a matter of state law," the contours of which are determined by the states, not by the United States Constitution. *Juliana*, 217 F. Supp. 3d at 1274.

Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary. *Ariz. Ctr. for Law in Pub. Interest v. Hassell*, P.2d 158, 169 (Ct. App. 1991) (holding that when a court reviewed a dispensation of the public trust property, public purpose and fair consideration must be shown, and the statute violated the public trust doctrine and gift clause because the statute failed to provide a mechanism for particularized assessment of the validity of the equal footing claims that it relinquished)

The Supreme Court's decisions in *The Genesee Chief* and *Barney v. Keokuk* extended admiralty jurisdiction and public trust doctrine to navigable freshwaters and the lands beneath them. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482 (1987) (affirming the Mississippi Supreme Courts determination that all land beneath waters subject to the tide's influence became property of the State upon admission to the Union.) Cases which have discussed the State's public trust interest in these lands have described uses of them not related to navigability, such as bathing, swimming, recreation, fishing, and mineral development. *Id.*

Our case is justiciable because it will decide whether appellants public trust rights already covered by the doctrine were violated, which does not interfere with political decisions or government interests. Furthermore, it does not require the doctrine to be expanded to cover the atmosphere, the question many courts have declined to answer in the past. In *Chelan Basin Conservatory*, the court held that fishing rights were covered under the public trust. Both plaintiffs 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. It has been conceded that limitation on fossil fuel production and combustion would reduce further damage to Mr. Flood's

and Ms. Mana's property, reduce health risks, and would maintain the habitability of plaintiffs' communities. *Id.*

Having shown the requisite precedent for Public Trust claims to be justiciable, Mr. Flood asks the Court to expand the Public Trust Doctrine to cover the atmosphere. The link between what is already covered by doctrine and the atmosphere is not as attenuated as GHG emitters would have the public believe. The current effects being felt by the islanders such as loss of coastal wetlands and the reduction of food supply in navigable waters will soon be felt by other regions if ocean acidification continues. As *Phillips* aptly states "For in the end, all tidewaters are connected to the sea . . ." With the creation of the UNFCCC and Paris Agreements it is clear the world is aware of the imminent danger of global warming and GHG emissions. The Legislative Branch, by creating the CAA and the Executive Branch, by admitting it has a duty to protect the public welfare by regulating emissions, have both acknowledged the problem of air pollution. The judiciary must expand the Public Trust Doctrine to create an atmospheric trust for future generations in order to bring its views in line with the other coordinate political branches.

CONCLUSION

The trial court erred in dismissing Ms. Mana and Mr. Flood's claims. The ATS allows aliens to bring claims in violations of the law of nations, and it does not textually or historically limit who those claims may be brought against. Additionally, a violation of the *Trail Smelter* Principle, a CIL, is actionable as a violation of the law of nations because the claim "touches and concerns" the territory of the United States and is sufficiently definite enough to bring action under the ATS. More so, the TSP creates obligations on non-governmental actors because domestic sources of law are relied upon to determine enforceable obligations, and HexonGlobal remains bound by domestic tort law in remediation for the severe damage caused by

HexonGlobal's uninhibited pollution. Like the issue of corporate liability under the ATS, it would be unreasonable for non-governmental actors to have blanket immunity from any international law claims.

Additionally, the CAA does not displace the TSP because the ATS is not displaceable federal law and there is no congressional intent to apply the CAA internationally and acts of Congress should never be construed to violate the law of nations. HexonGlobal acted under the color of state law because their actions satisfy the Supreme Court's three distinct tests to determine whether a private party is acting as the State. HexonGlobal serves a major public function of producing oil and gas. The State knowingly encouraged their actions by allowing HexonGlobal to violate the Sherman Act, and HexonGlobal and the State are so intertwined as to constitute state action because HexonGlobal is the surviving member of a merger of all oil and gas production companies in the United States. The lower court erred in dismissing this claim as well as the dismissal on non-justiciability grounds. Ms. Mana and Mr. Flood's claims are justiciable and are not barred by the political question doctrine. The ATS has judicially manageable standards as evidenced by the repeated application of the statute in courts to violations of international law by aliens.

Ms. Mana and Mr. Flood's islands and homes are being flooded not only by water, but by the lack of due care by HexonGlobal and the United States. Their claims are right and just and should be redressed because failure to do so would result in the loss of their homes, the islands themselves, and the future security of all coastal areas.