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# 2019 Bench Memorandum

# THIRTY-FIRST ANNUAL JEFFREY G. MILLER PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPEITION

## 2019 Bench Memorandum*

C.A. No. 18-000123

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

HEXONGLOBAL CORPORATION,
*Appellee,*

-and-

UNITED STATES of America,
*Appellee*,

Appeal from the United States District Court for New Union Island.

* This memorandum has been reprinted in its original format. Please note that the Table of Contents and Appendices for this memorandum have been omitted.

## I. FACTUAL FRAMEWORK.

### *A. PARTIES.*

**Organization of Disappearing Island Nations** (**ODIN**), is a not-for-profit membership organization devoted to protecting the interests of island nations threatened by sea level rise. Apa Mana is an alien national of the island nation of A'Na Atu. Noah Flood is a U.S. citizen resident of the New Union Islands, a U.S. possession. Both individual plaintiffs are members of the organizational plaintiff, ODIN. Both A'Na Atu and the New Union Islands are located in the East Sea, and, according to the complaint, will be completely uninhabitable due to rising seas by the end of this century unless action is taken to limit emissions of greenhouse gases.

**HexonGlobal** is the surviving corporation resulting from the merger of all of the major United States oil producers. It is incorporated in the State of New Jersey, and it has its principle place of business in Texas. Historically, the greenhouse gas emissions from products sold by HexonGlobal (and its corporate predecessors) are responsible for 32% of United States cumulative fossil fuel-related greenhouse gas emissions, or six percent of global historical emissions. Cumulative worldwide sales of fossil fuels by HexonGlobal constitute nine percent of global fossil fuel related emissions.

**United States** is the alleged sovereign trustee of national natural resources, including air, water, sea, shores of the sea, and wildlife. In this sovereign capacity, the United States has control of our nation's air space and atmosphere, public lands, waters, and other natural resources, including fossil fuel reserves. Also, in its sovereign capacity, the United States controls articles of interstate and international commerce, including extraction, development, and conditions for the utilization of fossil fuels and their byproducts.

### *B. OVERVIEW OF APPLICABLE LEGAL AUTHORITY.*

Broadly, this case involves two claims: First, that **HexonGlobal** is in violation of the customary international law *Trail Smelter* Principle, which is enforceable as the Law of Nations, and as such triggers jurisdiction in federal district court under the Alien Tort Statute, 28 U.S.C. § 1350 (ATS); Second, the **United States** is violation of the Public Trust Doctrine for failure to protect the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels, and thus in violation of the Due Process Clause for depriving Flood of life, liberty, or property without due process of law. The first four issues the parties have been ordered to brief are related to the first claim, the fifth issue is related to the second claim, and the sixth issue considers broadly whether these claims present a non-justiciable political question.

#### *Alien Tort Statute*

Plaintiff Mana, a national of the nation of A'na Atu, asserts a claim under the ATS. The ATS provides, simply, "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." This statute provides only for jurisdiction in the District Court; it does not create a cause of action, which must be found in a treaty or the Law of Nations. *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). The Supreme Court has announced important limitations on the action contemplated by the ATS.

First, the alleged violation of international law must be one that is universally accepted and understood to give rise to individual liability, as in cases of kidnapping or piracy. *Sosa*, 542 U.S. at 731–32. In *Sosa* the petitioner argued that "there is no relief under the ATS because the statute does no more than vest federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action." *Id.* at 712. However,"[t]he *Sosa*

Court . . . held that in certain narrow circumstances courts may recognize a common-law cause of action for claims based on the present-day law of nations, in addition to the historical paradigms familiar when § 1350 was enacted." *Jesner v. Arab Bank, PLC*, ___ U.S. ___, 138 S. Ct. 1386, 1398 (2018). The *Sosa* Court then developed a two-part test in order to determine an ATS common-law action: 1) "whether a plaintiff can demonstrate that the alleged violation is of a norm that is specific, universal, and obligatory." *Id.* at 1390 (internal quotations omitted), and 2) "Assuming that such a norm can control, . . .whether allowing the case to proceed under the ATS is a proper exercise of judicial discretionFalse" *Id.* at 1390-1391.

Second, the activities alleged to give rise to the cause of action must have occurred principally within the jurisdiction of the United States; that is, the ATS does not create rules of extraterritorial application. *Kiobel v. Royal Dutch Petroleum*, 569 U.S. at 124. In *Kiobel* the Court recognized the canon of statutory interpretation known as the presumption against extraterritoriality, which provides "[w]hen a statute gives no clear indication of an extraterritorial application, it has none[.]" *Id.* at 115 (quoting Morrison v. National Australia Bank Ltd., 561 U.S. 247, 255 (2010)). The Court concluded that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption." *Id.* at 124.

And, finally, the defendant must not be a foreign corporation. *Jesner*, 138 S. Ct. at 1407. Relying on the second question of the *Sosa* test, the *Jesner* Court ruled that "judicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of government." *Id.* at 1408. With respect to the first question of the *Sosa* test, the Court did not make a determination on corporate liability. Whether or not an ATS claim can be brought against a domestic corporation is discussed below in Section III.A

Mana claims that **HexonGlobal**'s fossil fuel production and sales activities violate the *Trail Smelter* principle, which holds that emissions into the environment within the territory of one nation must not be allowed to cause substantial harms in the territory of other nations. This principle is reflected in the *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1965 (1941), in which an international

arbitral panel held that harms to agriculture interests in the United States caused by air pollution emissions from a smelter in Canada were a violation of international liability principles. Whether the *Trail Smelter* Principle is a recognized principle of customary international law enforceable as the law of nations under the ATS is discussed below in Section III.B. Whether the *Trail Smelter* Principle is enforceable against non-governmental actors is discussed in Section III.C.

The District Court did not reach determinations on the issues discussed above, because it found that any action Mana might have under the ATS has been displaced by greenhouse gas regulation under the Clean Air Act (CAA). The District Court reasoned that claims sounding in international tort must be considered claims arising under federal common law, and that the Supreme Court has already held that the Clean Air Act displaces the federal common law of air pollution. *American Electric Power v. Connecticut*, 564 U.S. 410 (2011). Other district courts hearing claims against oil producers have reached the same conclusion. See *City of Oakland v. B.P., PLC*, No. C17-06011 (N.D. Cal. Jun. 25, 2018); *City of New York v. B.P., PLC*, No. 18 Civ. 182 (S.D.N.Y. Jul. 19, 2018). Whether or not the *Trail Smelter* Principle is displaced by the CAA is discussed below in Section III.D.

***Due Process Protection for the Public Trust Doctrine***

The Fifth Amendment Due Process Clause provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Among the protected life, liberty, and property rights are fundamental rights that are unenumerated by the Constitution. *See Roe v. Wade*, 410 U.S. 113 (1973)(recognizing the unenumerated fundamental right to an abortion which was necessary to enable the exercise of another unenumerated fundamental right of privacy). The Ninth Amendment specifically allows for the recognition of unenumerated fundamental rights. U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

Flood asserts that the failure of the United States government to take effective action to control greenhouse gas emissions, together with its historical support for fossil fuel production,

violates its obligations under the public trust doctrine, as incorporated by the Fifth Amendment substantive due process guarantee against government action that deprives persons of their rights to life, liberty, and property. In essence, Flood claims a fundamental due process right to a healthy and stable climate system, and seeks to support this right by relying on public trust principles. Since the fundamental right of "a healthy and stable climate system" is not enumerated in the Constitution, Flood also relies on the Ninth Amendment.

The ancient Roman Code of Justinian declared "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.). Public trust principles have been incorporated into U.S. law by way of the common law of Great Britain. Flood asserts public trust principles are secured by the Constitution as fundamental rights. Flood asserts that the global climate system is a common property owned in trust by the United States that must be protected and administered for the benefit of current and future generations.

Flood's claim is that the United States government failed to prevent harms caused by private parties – the production, sale, and combustion of fossil fuels in the U.S. market. The Supreme Court has specifically rejected any fundamental Due Process right to government protection from allegedly wrongful acts by private parties. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.,* 489 U.S. 189, 196 (1989). Put another way, the "Due Process Clause does not impose on the government an affirmative obligation to act, even when 'such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'" *Juliana v. United States*, 217 F.Supp.3d at 1250 (D. Or. 2016)(quoting *DeShaney*).

Flood relies heavily on the Oregon District Court case *Juliana v. United States*, which recognized a Due Process-based public trust right to government protection from atmospheric climate change by applying the "danger creation" exception. *Id.* at 1251. The danger creation exception to *DeShaney,* applied by the Ninth Circuit, "permits a substantive due process claim when government conduct 'places a person in peril in deliberate indifference to their safety.'" *Id.* (quoting *Penila v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997); *See L. W. v.*

*Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). The *Juliana* court clarified the exception by forming a three prong test: "A plaintiff asserting the danger-creation exception due process claim must show (1) the government's acts created the danger to the plaintiff; (2) the government *knew* its acts caused the danger; and (3) the government with *deliberate indifference* failed to act to prevent the alleged harm." *Id.* at 1252.

The Parties here have been ordered to brief the question "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?" This question is discussed further in Section IV.

### *Political Question*

A federal court lacks subject matter jurisdiction to decide a political question: "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. 137, 170 (1803). In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court provided six criteria which help to identify a political question. Unless the question presented by the case at bar is "inextricable" from any of the following criteria "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; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217 (1962). The mere fact that a case presents the court with a politically charged issue does not make the case non-justiciable; political question doctrine "is one of 'political questions,' not one of 'political cases.'" *Id.* Whether either claim presents a non- justiciable political question is discussed in Section V below.

***List of Applicable Statutory and Constitutional Provisions:***

- Alien Tort Statute, 28 U.S.C. § 1350
- U.S. CONST., Amend. V
- U.S. CONST., Amend. IX

***List of International Law Principles:***

- Principle 21 of the Declaration of the 1972 Stockholm Conference on the Human Environment
- Principle 2 of the 1992 Rio Declaration on Environment and Development

### *C. SUMMARY OF FACTS.*

These following facts are pleaded in the complaint and will be taken as true for the purposes of review of a motion to dismiss.

Carbon dioxide and methane are trace atmospheric gases, constituting less than one-half of one percent of the composition of the atmosphere. Both of these gases are known as "greenhouse gases." Greenhouse gases cause an insulating effect which leads the Earth to retain heat. Earth's climate depends on the balance between the amount of solar radiation that reaches the Earth and the amount of heat that is radiated from Earth back into space. Greenhouse gases in the atmosphere play an important regulating role in this balance: too little greenhouse gas would result in colder global temperatures as more heat is radiated into space, and too much greenhouse gas would result in higher global temperatures as more heat is reflected back to Earth. Human burning of fossil fuels for energy production has substantially increased the concentrations of carbon dioxide in the atmosphere. Human production and distribution of fossil fuels, particularly natural gas, has also resulted in substantial increases in the concentration of methane in the atmosphere. These emissions, combined with emissions of greenhouse gases from agricultural and industrial

activity, are causing a change in the global climate, resulting in increasing temperatures, changing rainfall patterns, and rising sea levels. If global emissions of greenhouse gases continue at current rates, global temperatures will rise by over four degrees Celsius compared to pre-industrial global temperatures, and average sea level will likely rise by between one-half and one meter by the end of this century.

Both A'Na Atu and New Union Islands are low-lying islands with a maximum height above sea level of less than three meters. The populated areas of both islands are below one meter in elevation. Sea level rise of one-half meter to one meter would render both of these islands uninhabitable due to waves washing over the islands during storms.

Both Apa Mana and Noah Flood own homes, and reside, in communities with an elevation of less than one-half meter above sea level. Both individual plaintiffs have suffered seawater damage to their homes during several storms over the past three years. Such damage would not have occurred in the absence of the greenhouse gas induced sea level rise. Both individuals 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.

Both individuals have experienced seawater intrusion into their drinking water wells. Increasing temperatures will also put individual plaintiffs' health at risk by increasing their risk of heat stroke and mosquito borne diseases. 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. Limits on fossil fuel production and combustion would reduce further damage to plaintiffs' properties, reduce these health risks, and would maintain the habitability of plaintiffs' communities.

Defendant HexonGlobal is the surviving corporation resulting from the merger of all of the major United States oil producers. It is incorporated in the State of New Jersey, and it has its principle place of business in Texas. Historically, the greenhouse gas emissions from products sold by HexonGlobal (and its corporate predecessors) are responsible for 32% of United States cumulative fossil fuel-related greenhouse gas emissions, or 6% of global

historical emissions. Cumulative worldwide sales of fossil fuels by HexonGlobal constitute nine percent of global fossil fuel related emissions.

The heat-retention properties of carbon dioxide and methane have been established as scientific fact since the nineteenth century. Emission of substantial amounts of carbon dioxide is the expected and inevitable result of the normal combustion of petroleum products as a fuel. 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. HexonGlobal persisted in these profitable business activities despite this knowledge. HexonGlobal operates refineries throughout the world, including one refinery located on New Union Island. As a condition to doing business on New Union Island, HexonGlobal has consented to general personal jurisdiction in all courts in the Territory of New Union Islands.

The United States is, historically, the largest single national contributor to emissions of greenhouse gases. The United States has been responsible for 20% of cumulative global anthropogenic (human caused) greenhouse gas emissions to date. Until relatively recently, the government of the United States has not limited fossil fuel production, distribution, or combustion. Instead, the United States, through various agency policies and programs, has promoted the production and combustion of fossil fuels. These programs include tax subsidies for fossil fuel production, leasing of public lands and seas under its jurisdiction for coal, oil, and gas production, creation of the interstate highway system, and the development of fossil fuel power plants by public agencies such as the Tennessee Valley Authority.

Nonetheless, in more recent decades, the United States has acknowledged the threat of climate change. In 1992, the United States signed, and the Senate ratified, the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC acknowledged the potential for dangerous anthropogenic climate change and stated 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."[1] The UNFCCC also 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."[2] No legislation implementing this commitment has been adopted.

During the past decade, the United States has taken several steps towards the regulation of domestic greenhouse gas emissions. In 2007, the United States Supreme Court held, in *Massachusetts v. EPA*, that greenhouse gases, including carbon dioxide, were "pollutants" that were potentially subject to regulation under section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521 (2018).[3] Following this holding, in 2009, the United States Environmental Protection Administration (EPA) made a finding (the "Endangerment Finding") that the emission of greenhouse gases and resulting climate change had the potential to endanger the public health and welfare, setting the regulatory predicate for regulation of greenhouse gas emissions under the Clean Air Act.[4] In 2010, EPA, jointly with the National Highway Transportation Agency, adopted a rule establishing both fuel economy standards and greenhouse gas emissions rates for passenger cars and light trucks for model years 2012-2016,[5] and these regulations were extended in 2012 to require increasingly stringent emissions limitations through model year 2025.[6] Also in 2010, EPA issued a rule under the Clean Air Act requiring major new sources of greenhouse gases to undergo review to establish technology based limits on greenhouse gas emissions.[7] In 2015, the EPA issued regulations establishing carbon dioxide emissions standards for new power plants,[8] and requiring states to implement controls on

1 United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 169 [hereinafter UNFCCC].
2 UNFCCC, at 171.
3 Massachusetts v. EPA, 549 U.S. 497 (2007).
4 74 Fed. Reg. 66,496 (Dec. 15, 2009).
5 75 Fed. Reg. 25,324 (May 7, 2010)
6 77 Fed. Reg. 62,623 (Oct. 15, 2012).
7 5 Fed. Reg. 31,514 (June 3, 2010). Application of this rule was subsequently limited by the Supreme Court to those new air pollutant sources that were already subject to review for non-greenhouse gas emissions. Utility Air Regulatory Group v. EPA, 573 U.S. ___, 134 S.Ct. 2427 (2014).
8 80 Fed. Reg. 64510 (Oct. 23, 2015)

greenhouse gas emissions from existing power plants, the so-called "Clean Power Plan."[9] Also in 2015, the President of the United States signed the Paris Agreement, an international executive agreement that committed the United States and other nations to reduce their future greenhouse gas emissions by an amount to be determined independently by each

**II. ISSUES.**

- Can Mana bring an Alien Tort Statute, 28 U.S.C. § 1350 (ATS) claim against a domestic corporation?
    - On appeal, **ODIN** and the **United States** will argue Mana can bring an ATS claim against a domestic corporation.
    - On appeal **HexonGlobal** will argue that Mana cannot bring an ATS claim against a domestic corporation.
- Is the *Trail Smelter* Principle a recognized principle of customary international law enforceable as the "Law of Nations" under the ATS?
    - On appeal, **ODIN** and the **United States** will argue the *Trail Smelter* Principle is customary international law enforceable as the "Law of Nations" under the ATS.
    - On appeal, **HexonGlobal** will argue the *Trail Smelter* Principle is not customary international law enforceable as the "Law of Nations" under the ATS.
- Assuming the *Trail Smelter* Principle is customary international law, does it impose obligations enforceable against non-governmental actors?
    - On appeal, **ODIN** and the **United States** will argue that the *Trail Smelter* Principle does impose obligations enforceable against non-governmental actors.
    - On appeal, and **HexonGlobal** will argue that the *Trail Smelter* Principle does not impose

9 80 Fed. Reg. 64662, (Oct. 23, 2015).

obligations enforceable against non-governmental actors.

- If otherwise enforceable, is the *Trail Smelter* Principle displaced by the Clean Air Act?
    - On appeal, the **United States** and **HexonGlobal** will argue that the Clean Air Act displaces the *Trail Smelter* Principle.
    - On appeal, ODIN will argue that the Clean Air Act does not displace the *Trail Smelter* Principle
- 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?.
    - On appeal, **ODIN** will argue there is a Fifth Amendment substantive due process cause of action against the United States Government for failure to protect the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels.
    - On appeal, the **United States** and **HexonGlobal** will argue there is not a Fifth Amendment substantive due process cause of action against the United States Government for failure to protect the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels.
- Do Plaintiffs' law of nations claim under the Alien Tort Statute and public trust claim present a non-justiciable political question?
    - On appeal, **ODIN** and **HexonGlobal** will argue the claims do not present a non-justiciable political question.
    - On appeal, the **United States** will argue the claims do present a non-justiciable political question.

## III. ALIEN TORT STATUTE CLAIM:

### *A. Can Mana bring an Alien Tort Statute, 28 U.S.C. § 1350 (ATS) claim against a domestic corporation?*

**ODIN** and the **United States** argue the Alien Tort Statute, 28 U.S.C § 1350 (ATS) allows Apa Mana, an alien citizen of the nation A'Na Atu, to bring a claim against **HexonGlobal**, a domestic corporation. **HexonGlobal** argues the ATS does not allow Ms. Mana to bring a claim against a domestic corporation

#### *ODIN and the United States*

**ODIN** and the **United States** will argue that the plain language of the ATS does not exclude domestic corporations as defendants. The statute reads, "[t]he 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." While the statute does limit the class of plaintiffs to "alien[s]", the text does not distinguish a particular class of defendants. **ODIN** and the **United States** will assert a domestic corporation in violation of the law of nations satisfies the plain language of the statute.

**ODIN** and the **United States** may try to distinguish this case from the holding of *Jesner*. In *Jesner* the Court held that "foreign corporations may not be defendants in suits brought under the ATS." *Jesner*, 138 S. Ct. at 1407. **ODIN** and the **United States** could argue first, that the mere fact that the Court specified "*foreign* corporations" are ineligible as defendants that *domestic* must be eligible; otherwise the Court would have simply held that *all* corporations are ineligible defendants.

**ODIN** and the **United States** could also distinguish domestic corporations from foreign corporations by pointing to the reasoning behind the *Jesner* Court's holding. The *Jesner* Court was keenly concerned with the possibility of a domestic corporation being hailed to a foreign court if the Court would allow foreign corporations to be hailed to our courts under the ATS. *See id.* at 1405-06 (citing *Kiobel*, 569 U.S. 108 (2013)); *See also Kiobel*, 569 U.S. 108 (2013)(expressing the presumption against extraterritoriality reflects the presumption that United States law

governs domestically but does not rule the world)(internal citations omitted). The *Jesner* Court found this type of foreign policy consequence raises questions that should be left to political branches to decide. **ODIN** and the **United States** may agree that domestic corporations should not be hailed to foreign courts to answer their violations of international law but will argue that domestic corporations should have to answer those violations in the United States; or else the purpose of the ATS would be frustrated. *See id.* at 1406 ("The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable.").

**ODIN** and **United States** may also try to dispel the argument that the court should follow the holding made in the Second Circuit case *Kiobel*; "[f]or now, and for the foreseeable future, the Alien Tort Statute does not provide subject matter jurisdiction over claims against corporations." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010), aff'd, 569 U.S. 108 (2013). They may argue that the Second Circuit holding pertained to human rights violations and not transboundary pollution. *Id.* at 147 ("We hold that corporate liability is not a norm that we can recognize and apply in actions under the ATS because the customary international law of human rights does not impose any form of liability on corporations (civil, criminal, or otherwise)."). They may also argue that the Supreme Court only granted certiorari on the issue of extraterritoriality, and thus the question of corporate liability is left open by the Supreme Court. *See Jesner* at 1402.

***HexonGlobal***

**HexonGlobal** may argue that no corporation domestic, or foreign, is able to have a claim brought against them under the ATS. They will follow the reasoning of the Second Circuit in *Kiobel* that used the first part of the *Sosa* test to determine that the law of nations does not recognize "corporate liability." **HexonGlobal** will argue that in this case the *Sosa* test must be applied to two questions: 1) Whether 'corporate liability' is a recognized "specific, universal, and obligatory" norm of international law?; and 2)Whether the '*Trail Smelter* Principle' is a recognized "specific,

universal, and obligatory" norm of international law? (The second question is addressed in Section III.B below).

**HexonGlobal** may argue that the court must analyze 'corporate liability' under the *Sosa* test by asserting that ATS was created with the understanding that the law of nations was "among civilized nations," and therefore any party seeking to extend the notions of liability beyond liability to a civilized nation must "demonstrate that international law extends the scope of liability for a violation of a given norm to the perpetrator being sued." *See Kiobel*, 621 F.3d 111, 146 (2d Cir. 2010), aff'd, 569 U.S. 108, 133 S. Ct. 1659 (2013)("Customary international law arises from the customs and practices among civilized nations gradually ripening into a rule of international law. Accordingly, the responsibility lies with those who seek to demonstrate that international law extends the scope of liability for a violation of a given norm to the perpetrator being sued.")(internal citations and quotations omitted).

**HexonGlobal** will argue that corporate liability is not a specific, universal, and obligatory norm of international law. Even though the violations at issue in *Kiobel* were human rights violations, the court nonetheless asserted that there is no norm of *any* corporate liability in customary international law. *See Id.* ("In any event, although it is not our burden, we have little trouble demonstrating the absence of a norm of corporate liability in customary international law").

Even if analysis of "corporate liability" under *Sosa*'s first question is in doubt, **HexonGlobal** may argue that under *Sosa*'s second question the judiciary must defer to Congress. **HexonGlobal** would claim that extending liability to domestic corporations would implicate the same foreign-policy concerns that the *Jesner* Court dealt with, and that "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Jesner*, 138 S. Ct. 1386, 1403 (2018).

### *B. Is the Trail Smelter Principle a recognized principle of customary international law enforceable as the "Law of Nations" under the ATS?*

**ODIN** and the **United States** argue that the *Trail Smelter* Principle is a recognized principle of customary international law

as the "Law of Nations." **HexonGlobal** argues that the *Trail Smelter* Principle is not a recognized principle of customary international law as the "Law of Nations."

Customary international law is the body of rules that nations in the international community universally abide by, or accede to, out of a sense of legal obligation and mutual concern." 44B Am. Jur. 2d International Law § 2. There are generally two components to customary international law: 1) the principle "should reflect wide acceptance among the states particularly involved in the relevant activity," and 2) "there must be a sense of legal obligation." *Id.*

***ODIN and the United States***

**ODIN** and the **United States** may argue that the *Trail Smelter* Principle was confirmed as customary international law as far back as 1949 when the International Court of Justice (ICJ) decided the *Corfu Channel Case* (*United Kingdom v. Albania*). The ICJ "confirmed the customary nature of [the *Trail Smelter* Principle] . . . referring to the existence of 'certain general and well- recognized principles, namely . . . every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.'" Pierre-Marie Dupuy & Jorge E. Vinuales, INTERNATIONAL ENVIRONMENTAL LAW 55-56 (Cambridge University Press 2015). **ODIN** and the **United States** may add that in 1996 the ICJ issued an advisory opinion that observed "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of the other States or of areas beyond national control is now a part of the corpus of international law relating to the environment." Legality of the Treaty or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J 226, para. 29. (July 8).

**ODIN** and the **United States** may also argue that the *Trail Smelter* Principle being adopted as Principle 21 of the Declaration of the 1972 Stockholm Conference on the Human Environment, and reaffirmed as Principle 2 of the 1992 Rio Declaration on Environment and Development concretely confirms the universal acceptance of this principle as customary international law. 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); *see also* Andrew Shoyer et al., *Chapter 14: Carbon Leakage and the Migration of Private CO2 Emitters to Other Jurisdictions*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 286, 375 (Cinnamon Carlarne et al. eds., Oxford University Press 2016)("Some of these principles have crystallized into customary international law, such as the 'no harm rule' laid down in the *Trail Smelter* case and embodied in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration."). **ODIN** and the **United States** will argue that clear language of the principle appearing in the UN declarations, the wide acceptance of these declarations, and the clear mandate set forth in the principle satisfy the "specific, universal, and obligatory" requirement of the first question of the *Sosa* test. They may add that even though the Declarations are not binding instruments of international law themselves, the *Trail Smelter* Principle's broad acceptance is strong evidence of broad consensus of its obligatory nature.

Finally **ODIN** and the **United States** may strengthen their argument that the Principle is universally endorsed by its repeated appearance in several binding international treaties: It appears as Article 3 of the Convention on Biological Diversity which was ratified by 196 countries; in the preamble to the UNFCCC which was ratified by 197 countries; and in the preamble to the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa which was ratified by 193 countries. Convention on Biological Diversity, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993); U.N. Framework Convention on Climate Change, *opened for signature* June 3, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994); U.N. Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, *opened for signature* Oct. 14-15, 1994, 1954 U.N.T.S. 3 (entered into force Dec. 26, 1993).

***HexonGlobal***

**HexonGlobal** may argue that the principle is not a norm that is "specific, universal, and obligatory" under the *Sosa* test. In *Sosa* the Court rejects Alvarez' argument that "arbitrary arrests," as defined by two well-known international agreements, are violations of customary international law. *Sosa*, 542 U.S. at 734-37 (2004) ("Alvarez cites two well-known international agreements that, despite their moral authority, have little utility under the standard set out in this opinion.") **HexonGlobal** will argue that 1972 Stockholm Conference on the Human Environment and 1992 Rio Declaration on Environment and Development, are analogous to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights Alvarez relied on in *Sosa* and do not impose binding obligations.

**HexonGlobal** may also argue that the *Trail Smelter* Principle is not applicable to greenhouse gas emissions, because the harms traditionally recognized by the *Trail Smelter* Principle are typically traceable to their source. *See* Roda Verheyen & Cathrin Zengerling, *Chapter 19: International Dispute Settlement*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 417, 438 (Cinnamon Carlarne et al. eds., Oxford University Press 2016)("However [the *Trail Smelter Arbitration*] involved one polluter, whereas climate change is multi-dimensional, which presents a much more complex interaction between cause and effect.").

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

**ODIN** and the **United States** argue the *Trail Smelter* Principle, as customary international law, can impose obligations enforceable against non-governmental actors. **HexonGlobal** argue that the *Trail Smelter* Principle can only impose obligations on a nation state.

***ODIN and the United States***

**ODIN** and the **United States** cannot easily deny that the *Trail Smelter* Principle has historically been understood to set obligations on governmental actors. However, they will argue that private parties nonetheless can directly be obligated to refrain from causing transboundary damage under international.

**ODIN** and the **United States** will argue that the *Trail Smelter* Arbitration itself imposed obligations directly on the Trail Smelter. In its analysis, the Tribunal sought to answer the following question: "(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?" *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. pp. 1905-82, p.1938 (1941). Though the holding of the Tribunal sets unambiguous obligations on States, it directly answers the above question in reference to the conduct of the Trail Smelter. *Id.* at 1966. ("The Tribunal, therefore, answers Question No. 2 as follows: (2) So long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington;"). Therefore, **ODIN** and the **United States** will argue that a proper reading of the *Trail Smelter* Arbitration imposes obligations on private parties to refrain from causing transboundary harm.

Following this argument, they may argue that the ATS allows liability on any violation of the *Trail Smelter* Principle, regardless of the actor, because any party causing transboundary harm should be "required to refrain" from the harm they are causing on another State. This argument makes logical sense from a plain reading of the statute, because on its face the ATS does not limit defendants to a specific class, as discussed above in Section III.A.

**ODIN** and the **United States** might also argue that the *Trail Smelter* Principle really has two aspects: The *Trail Smelter* Principle 1) imposes a State with a responsibility not to use or allow the use of its territory to harm other States, and 2) grants parties outside of that State a right to be free from transboundary harm. **ODIN** and the **United States** might argue that those two aspects have become equally enforceable norms under the law of nations. They would then argue that under the second aspect of the

*Trial Smelter* Principle an alien could seek to enforce a violation of its right to be free from transboundary harm, under the ATS.

***HexonGlobal***

**HexonGlobal** will argue that even if a domestic corporation can be a defendant under the ATS, and the *Trail Smelter* Principle is customary international law enforceable as the Law of Nations under the ATS, the *Trail Smelter* Principle is only ever enforceable against nation states (referred to as 'States' by principles of international law) and not non-governmental entities. In the *Trail Smelter Arbitration* an international arbitral panel held that harms to agriculture interests in the United States caused by air pollution emissions from a smelter in Canada were a violation of international liability principles:

> no *State* has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

*Trail Smelter Arbitration*, 3 U.N.R.I.A.A. pp. 1905-82, p.1965 (1941)(emphasis added). In the *Corfu Channel Case* and the *Advisory Opinion on the Legality of Nuclear Weapons*, the ICJ reaffirmed that the principle pertains only to States. Corfu Channel Case, Judgment on merits, 1949 I.C.J. 4, p. 22 (April 9)("Such obligations are based, not on the Hague Convention of 1907, No. VTII, which is applicable in time of war, but on certain general . . . principles, namely . . . every *State*'s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other *States*.")(emphasis added); Legality of the Treaty or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J 226, para. 29. (July 8)("[t]he existence of the general obligation of *States* to ensure that activities within their jurisdiction and control respect the environment of the other *States* or of areas beyond national control is now a part of the corpus of international law relating to the environment.")(emphasis added).

**HexonGlobal** may add that the adopted language of the 1972 Stockholm Conference on the Human Environment and reaffirmed 1992 Rio Declaration on Environment and Development concretely

confirms the universal acceptance of this principle as customary international law also only implicate States:

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

U.N. Conference on the Human Environment, 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).

**HexonGlobal** may also argue that even if the *Sosa* test is applied only to the *Trail Smelter* Principle as **ODIN** and the **United States** suggest, the principle can only be considered a "universal[ly]" accepted norm when it applies to nation states, because it is not a normal practice to extend the obligations of the *Trail Smelter* Principle to corporations.

Finally, **HexonGlobal** may argue that the obligations under *Trail Smelter* Principle can never be squared with corporate liability, because the principle is inseparably tied to the notion of sovereignty which is a notion that is wholly tied to governing. *See Trail Smelter Arbitration*, 3 U.N.R.I.A.A. pp. 1905-82, pp.1962-65 (1941).

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

The **United States** and **HexonGlobal** argue even if the *Trail Smelter* Principle is otherwise enforceable, it is nevertheless displaced by the Clean Air Act (CAA). **ODIN** argues the *Trail Smelter* Principle is not displaced by the CAA.

***United States and HexonGlobal***

The **United States** and **HexonGlobal** will argue that the alleged tort claim under the ATS would be a federal common law claim pertaining to the emissions of greenhouse gases, and that these torts were directly displaced by the CAA.

Claims sounding in international tort are considered one of the narrow areas of federal common law still in existence post *Erie*. *See Sosa*, 542 U.S. at 729-32. However, the **United States** and **HexonGlobal** will assert that the Supreme Court held the Clean Air Act displaces the federal common law of air pollution. *Am. Elec. Power v. Connecticut*, 564 U.S. 410 (2011); *See also City of Oakland v. B.P., PLC*, No. C17-06011 (N.D. Cal. Jun. 25, 2018); *City of New York v. B.P., PLC*, No. 18 Civ. 182 (S.D.N.Y. Jul. 19, 2018).

In *AEP* the Supreme Court heard claims by "several States, the city of New York, and three private land trusts" asserting "federal common law public nuisance claims against carbon-dioxide emitters." *Am. Elec. Power Co.* 564 U.S. at 415. Similar to international tort claims, the *AEP* Court acknowledged that environmental protection is an area where the federal common law survives post-*Erie*. *Id.* at 421 (quoting *Illinois v. Milwaukee*, 406 U.S. 91, 103 (1972)(*Milwaukee I*): "When we deal with air and water in their ambient or interstate aspects, there is a federal common law."). However, the Court rejected the plaintiffs' contention that a line of cases recognizing federal common law claims to abate pollution emanating from other States gave them a federal public nuisance claim. *Id.* Instead, the Court cited *Milwaukee v. Illinois*, 451 U.S. 304, 305 (1981)(*Milwaukee II*) which held that the Clean Water Act displaced nuisance claims recognized in *Milwaukee I*. *Milwaukee v. Illinois*, 451 U.S. 304, 305 (1981)("when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."). The *AEP* Court ruled that "[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks directly to the question." *Am. Elec. Power Co.* 564 U.S. at 424 (internal citations omitted). The *AEP* Court went on to hold:

> "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide

> emissions from fossil-fuel fired power plants. *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. [*Massachusetts v. EPA*,] 549 U.S. [497], 528-529, 127 S.Ct. 1438 [(2007)]. And we think it equally plain that the Act "speaks directly" to emissions of carbon dioxide from the defendants' plants."

*Id.* The **United** and **HexonGlobal** will argue that the allegations made by **ODIN** are the same as the allegations made in *AEP*, and as such, are displaced by the CAA.

***ODIN***

**ODIN** will argue that the present case raises a claim that is distinguishable from the public nuisance claim in *AEP*.

**ODIN** may argue that Clean Air Act does not "speak directly" to the question at issue. When considered broadly **ODIN** cannot deny that the Justice Ginsburg's catalogue of the CAA's and the EPA's authority to regulate carbon emissions is sound; the CAA "speaks directly to emissions of carbon dioxide." *Id.* However, **ODIN** could argue that CAA does not regulate air pollution for the purposes of protecting the citizens of A'Na Atu. 42 U.S.C.A. § 7401 ("The purposes of this subchapter are. . .(1) to protect and enhance the quality of the *Nation*'s air resources so as to promote the public health and welfare and the productive capacity of its population…"(emphasis added). Following this line of reasoning, **ODIN** would not argue that the CAA does not regulate carbon emissions, it does. They would argue that the CAA does not "speak directly" to the quality of *A'Na Atu*'s air resources so as to promote the public health and welfare and the productive capacity of *A'Na Atu*'s population, which **ODIN** would claim is painfully obvious from the fact that A'Na Atu's existence is now in peril.

Instead, **ODIN** would frame the question to include the specific issue of transboundary harm caused by carbon emissions: Does any act of Congress speak directly to the issue of carbon emission in United States effecting the public health and welfare of alien citizens? **ODIN** would argue there is no such act of Congress, and that this claim fits into the "small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory

authority." *Sosa*, 542 U.S. at 729. **ODIN** may add that the ATS is the only avenue available for plaintiffs like Mana to have their harms addressed, and that the ATS was "intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Jesner*, 138 S. Ct. at 1406 (2018). **ODIN** would argue that instead of intending to displace claims against transboundary harms from carbon emissions it was Congress' intent to allow these types of claims to be available to injured aliens.

Finally, **ODIN** may attempt to distinguish the *Trail Smelter* Principle from the CAA, and US environmental law in general, by arguing the *Trail Smelter* Principle's tie to sovereignty takes the issue out of the hands of displacement analysis. *See Juliana*, 217 F.Supp.3d at 1260 ("Public trust claims are unique because they concern inherent attributes of sovereignty. The public trust imposes on the government an obligation to protect the *res* of the trust. A defining feature of that obligation is that it cannot be legislated away, because of the nature of public trust claims, a displacement analysis simply does not apply.") **ODIN** would analogize the sovereignty obligations under the public trust doctrine to the sovereignty obligations under the *Trail Smelter* Principle. This argument would require a flexible view of who is obligated not to infringe on the sovereignty of another country, as discussed above in Section III.C.

## IV. PUBLIC TRUST DOCTRINE: 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 fuel?

The **United States** and **HexonGlobal** argue the Fifth Amendment due process protections for life, liberty, and property, do not create a cause of action against the United States Government for failure to protect the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels. **ODIN** argues 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.

***The United States and HexonGlobal***

The **United States** and **HexonGlobal** will argue that there is no fundamental right to "a healthy and stable climate system" entitling Flood to a cause of action under the Fifth Amendment. They may argue that the states, not the federal government, have public trust obligations; that public trust doctrine does not include the atmosphere as a public trust asset; and that even if federal public trust claims exist, they are federal common-law claims, and displaced by acts of Congress. The **United States** and **HexonGlobal** will further argue that even if the US government has a duty not to *directly* cause atmospheric greenhouse gases to reach a level so as to endanger the heath and stability of the climate, the Due Process Clause does not impose on the US government an affirmative duty to *prevent* private parties from endangering the climate.

The **United States** and **HexonGlobal** may argue that the public trust doctrine only applies to the states. Asserting this, they will rely on the Supreme Court case *PPL Montana, LLC v. Montana*. In *PPL Montana* the Court declares that "Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law," and that "the contours of [the] public trust do not depend upon the Constitution." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603, 604 (2012). The defendants may bolster this argument by citing the D.C. District Court case *Alec L. v. Jackson* which affirms the *PPL Montana* statement as binding and forecloses the possibility of a federal public trust claim. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15 (D.D.C. 2012), aff'd sub nom. Alec L. ex rel. Loorz v. McCarthy, 561 F. App'x 7 (D.C. Cir. 2014)("The Supreme Court's recent decision in PPL *Montana, LLC v. Montana*, appears to have foreclosed this argument.")

The **United States** and **HexonGlobal** may also argue that the atmosphere is not a recognized asset protected under the public trust doctrine. They will argue that, even if public trust doctrine

can be extended to federal claims, that "no cases . . . have expanded the doctrine to protect the atmosphereFalse" *Alec L.* 863 F. Supp. 2d at 13. They may argue further that the public trust doctrine "has traditionally been understood, [to apply] only to a specific and limited set of natural resources within a government's jurisdiction—most specifically, lands submerged beneath tidal and navigable waterways—and serves only to restrict the government's ability to transfer title in those resources or otherwise alienate them." Memorandum in Support of Intervenor-Defendants' Motion to Dismiss at 10, *Juliana v. United States*, 2015 WL 7587592 (D.Or.) (citing United States v. Mission Rock Co., 189 U.S. 391, 407 (1903); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 445-453 (1892).) Following this argument, they will try to distinguish the atmosphere from traditionally recognized public trust assets by arguing that the atmosphere is not a resource that can be transferred or alienated, and as such, is wholly outside the scope of the public trust doctrine.

Even if a federal public trust claim, including the atmosphere as an asset, exists, the **United States** and **HexonGlobal** may argue that the claim is displaced by the Clean Air Act. See above section III.D.

Finally, the **United States** and **HexonGlobal** will argue that even if the public trust doctrine imbeds into the constitution a fundamental right to "a healthy and stable climate system," the US government is not required to *prevent* private parties from endangering the climate. If such a fundamental right exists, the Defendants may emphasize that "*failure to protect* the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels," is wholly outside of the realm of protections provided by the Due Process Clause. The Supreme Court has specifically rejected any fundamental Due Process right to government protection from allegedly wrongful acts by private parties. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.,* 489 U.S. 189, 196 (1989).

The Defendants may argue that this court should follow the Circuits that have refused to adopt the danger-exception like the First Circuit. *See Monahan v. Dorchester Counseling Ctr., Inc*, 961 F.2d 987, 990–91 (1st Cir. 1992), as amended (Apr. 17, 1992), as amended (May 8, 1992) ("It follows from *DeShaney* that Monahan has failed to state a viable claim for denial of substantive due

process. Even if some or all of the defendants were found to have acted with 'deliberate indifference' to Monahan's needs in failing properly to treat and manage him, so as to render him vulnerable to being hit by a car, their misconduct violated no constitutional duty. Monahan's remedies, like those of most others in similar situations, lie in the arena of tort, not constitutional law."). The *Monahan* court argued that the government actions, may well give rise tort claims, but not constitutional violations, because "they did not involve the affirmative exercise of government power required to make out a constitutional violation." *Id.* at 994. Here, the Defendants will *not* argue that the claims **ODIN** presents are torts but the Defendants will agree with the *Monahan* court that a due process violation requires an "affirmative exercise of government power."

The Defendants may also argue that the "danger creation" exception **ODIN** relies on is not applicable. They may argue that the danger exception only applies when a government body "has control over a particular individual's person and places him or her in imminent peril." *See, e.g., Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997) (holding that a cause of action for due process violation arose where officers "took affirmative actions that significantly increased the risk facing Penilla: they cancelled the 9-1-1 call to the paramedics; they dragged Penilla from his porch, where he was in public view, into an empty house; then they locked the door and left him there alone . . . after they had examined him and found him to be in serious medical need"); *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989) (due process cause of action arose where officer arrested a female driver, impounded the car, and left driver by the side of the road at night in a high-crime area). They would distinguish the particular, imminent, and personal harms historically recognized under the danger exception from the broad, historic, and global harms alleged here.

The Defendants may also argue that if the exception applies, the three requirements of the exception are not met. They would argue that 1) many parties' actions across the globe, not just the US government's actions, created the dangers complained of; 2) majority of government actions complained of long predated any awareness of the potential dangers of human induced climate change; 3) the fact that US government has joined the UNFCCC, enacted the CAA, and made findings of endangerment dispels any

broad claim that the US has historically acted with deliberate indifference to climate change.

***ODIN***

**ODIN** asserts Flood claims a fundamental due process right to a healthy and stable climate system and seeks to support this right by relying on public trust principles. **ODIN** will argue the property rights protected by the public trust doctrine are secured by the Constitution as fundamental rights. Under the public trust doctrine, **ODIN** asserts the global climate system is a common property owned in trust by the United States that must be protected and administered for the benefit of current and future generations. **ODIN** will argue that, though these property rights are unenumerated, the rights are nonetheless fundamental rights protected by the Due Process Clause of the Fifth Amendment. **ODIN** will argue further that the fundamental right to a healthy and stable climate system confers on the US Government the obligation to protect the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels. Finally, **ODIN** will argue that any "victim[] of a constitution violation by a federal agent [has] a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson v. Green*, 446 U.S. 14, 18 (1980).

**ODIN** will argue that the fundamental right to a healthy and stable climate system was an inalienable right held by every citizen prior to the adoption of the Constitution, and that the Constitution's Fifth Amendment Due Process Clause was the vehicle by which the founding fathers secured the right. Since the fundamental right of "a healthy and stable climate system" is not enumerated in the Constitution, **ODIN** will provide the court with evidence that the right is (1) "deeply rooted in this Nation's history and tradition" or (2) "fundamental to our scheme of ordered liberty." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

**ODIN** may argue that the public trust doctrine is 'deeply rooted in this Nation's history and tradition' by way of the common law passed to us through Great Britain and the ancient Romans from natural law. The ancient Roman Code of Justinian declared "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 declaration developed into the "fundamental understanding that no government can legitimately abdicate its core sovereign powers." *Juliana*, 217 F.Supp.3d at 1254. In other words, a government holds its powers of sovereignty in trust for future generations, and as trustee has an obligation not to give any of these powers away. In holding that the State of Illinois could not give up its title to lands submerged beneath navigable waters, the Supreme Court announced that "[t]he state can no more abdicate its trust over property in which the whole people are interested. . .than it can abdicate its police powers in the administration of government and the preservation of peace." *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387, 453 (1892). **ODIN** may also argue that in addition to the deep roots of the public trust doctrine in our Nation's history and tradition, that a healthy and stable climate is "fundamental to our scheme of ordered liberty," because underlying the concepts of life, liberty and property is a precondition of a healthy and stable climate.

**ODIN** may specifically argue that the atmosphere is held in the public trust assets by citing that the ancient Romans included "the air" in the assets common to all. **ODIN** may also set the issue of the atmosphere as an asset itself aside, and argue, as the *Juliana* court did, that the public trust doctrine is implicated through the alleged harms to the territorial sea. *Juliana*, 217 F.Supp.3d at 1255. ("I conclude that it is not necessary at this stage to determine whether the atmosphere is a public trust asset because plaintiffs have alleged violations of the public trust doctrine in connection with the territorial sea."). **ODIN** would argue that even if the atmosphere is not a recognized public trust asset, a healthy and stable climate system is affected by violations of the public trust doctrine in connection with the territorial sea. **ODIN** alleged violations of the public trust doctrine in connection with the territorial sea, such as a reduction of the availability of locally caught sea food source from "the climate change induced ocean acidification, warming, and loss of coastal wetlands[.]" Since the territorial sea is a part of a healthy and stable climate the Due Process claim would still be valid.

Beyond tracing the public trust back to the natural law by way of Great Britain and ancient Rome, **ODIN** may bolster their argument by asserting that the fundamental right of a healthy and

stable climate system is a "necessary condition to exercising other rights to life, liberty, and property." *Juliana*, 217 F.Supp.3d at 1250 (D. Or. 2016). As the court in *Juliana* reasoned, this argument could be bolstered by following the Supreme Court's reasoning when it recognized that the right to same-sex marriage is necessary in enforcing the right to privacy. *Id.*; *See Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)("[I]t would be contradictory to recognize a right to privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is at the foundation of the family our society."). The *Juliana* court reasoned that "[j]ust as marriage is the foundation of the family, a stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress." *Juliana*, 217 F.Supp.3d at 1250 (D. Or. 2016)(citation and quotation marks omitted).

Once **ODIN** has established that the public trust doctrine creates a fundamental right to a healthy and stable climate, they will argue that the Due Process Clause confers on the US Government the obligation *to protect* the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels. While the Supreme Court has specifically rejected any fundamental Due Process right to government protection from allegedly wrongful acts by private parties, **ODIN** will argue the "danger creation" exception to *DeShaney* applies and imposes the obligation. *DeShaney,* 489 U.S. at 196 (1989); *Juliana*, 217 F.Supp.3d at 1251 (D. Or. 2016).

Following the three prong test the *Juliana* court created to clarify the exception, **ODIN** will make the following arguments: (1) the government's acts, such as tax subsidies for fossil fuel production, leasing of public lands and seas under its jurisdiction for coal, oil, and gas production, creation of the interstate highway system, and the development of fossil fuel power plants by public agencies such as the Tennessee Valley Authority, etc. created a danger to the Mr. Flood; (2) the US government has formally acknowledged the existence of the dangers of climate change since 1992 when it signed and ratified the United Nations Framework Convention on Climate Change; and (3) despite the government's formal acknowledgement of the harms of climate change, the government's nominal and largely ineffective actions, together with the current administration's efforts to reverse those actions,

amount to deliberate indifference. **ODIN** may add that, while the Defendants may point to cases of particular, imminent, and personal harms, no case in the Ninth Circuit's jurisprudence specifically limits the danger exception to those types of claims. *See Id.* at 1252.

Finally, **ODIN** will conclude that the failure to protect the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels amounted to a failure to protect Flood's fundamental right to a healthy and stable climate system, which is a violation of the Due Process clause of the Constitution, and as such, grants Flood a cause of action in federal court. *McDonald*, 561 U.S. at 767.

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

**ODIN** and **HexonGlobal** argue the law of nations claim under the Alien Tort Statute and public trust claim do not present a non-justiciable political question. The **United States** argues the law of nations claim under the Alien Tort Statute and public trust claim present non-justiciable political questions.

A federal court lacks subject matter jurisdiction to decide a political question: "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. 137, 170 (1803). In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court provides six factors which help to identify a political question. Unless the question presented by the case at bar is "inextricable" from any of the *Baker* factors "there should be no dismissal for non-justiciability on the ground of a political question's presence." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Analysis under the *Baker* factors should also be considered with the understanding that the factors "'often collapse[e] into one another,'" and that the "'common underlying inquiry' is whether 'the question is one that can properly be decided by the judiciary.'" *Juliana*, 217 F.Supp.3d at 1236 (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005).

***ODIN and HexonGlobal***

**ODIN** and **HexonGlobal** argue that these claims present questions that can properly be decided by the judiciary.

**(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department**

**ODIN** and **HexonGlobal** will argue that nothing in the text of the Constitution commits the issue of environmental policy, including atmospheric emissions and transboundary environmental harm, to a coordinate political department. The Constitution did not delegate a single branch of government exclusive power over climate change issues. *See Juliana*, 217 F.Supp.3d at 1237.

**ODIN** and **HexonGlobal** may try to dispel the notion that climate change policy is inextricably connected to foreign relations which is traditionally understood to be textually committed to the Executive Branch. They may assert, that while "climate change policy has global implications," it "is not inherently, or even primarily, a foreign policy decision." *Id.* at 1238. Even if the **United States** argues that claims under the ATS clearly implicates foreign policy, the *Baker* Court warned that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. **ODIN** and **HexonGlobal** may add that ATS specifically grants jurisdiction to the federal courts, so the mere fact that a claim under the ATS implicates questions of foreign policy would not render the question non- justiciable.

**(2) a lack of judicially discoverable and manageable standards for resolving it, and (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion**

"The second and third *Baker* factors reflect circumstances in which a dispute calls for decision making beyond courts' competence." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 203 (2012)(Sotomayor, J., concurring). **ODIN** and **HexonGlobal**

will argue that the second and third *Baker* factors are not applicable here, because both the *Trail Smelter* Principle and the public trust doctrine have judicially discoverable and manageable standards.

Whether or not to recognize the *Trail Smelter* Principle under the ATS and whether the public trust doctrine applies to climate change are complex questions that require the court to consider a complex set of legal standards, but **ODIN** and **HexonGlobal** will argue that the legal framework, as complicated as it may be, is there for the court to make a determination. They may add that even though these claims are not bound up in statutory or regulatory provisions that a court would typically use to resolve an environmental claim, constitutional law and international law nonetheless have manageable standards which courts apply to new sets of facts every day. *Juliana*, 217 F.Supp.3d at 1239.

**(4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government**, **(5) an unusual need for unquestioning adherence to a political decision already made**, and **(6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question**

The fourth through sixth *Baker* factors "address circumstances in which prudence may counsel a court's resolution of an issue presented." *Zivotofsky*, 566 U.S. at 204 (Sotomayor, J., concurring).

Regarding the *Trail Smelter* Principle under the ATS, **ODIN** and **HexonGlobal** will argue the political branches have not made political decisions in this area, and that there is no possibility of a court expressing a lack of respect or causing embarrassment from multifarious pronouncements on this particular topic.

With respect to a public trust based fundamental right to a healthy and stable environment, **ODIN** and **HexonGlobal** will argue that the constitutional analysis of Mr. Flood's due process rights is a wholly different issue than the political branches' disposition on climate change. While it may be argued that President Trump's pronouncements on climate change policy have the potential to cause embarrassment and inconsistencies

throughout various departments on what will be done about climate change, **ODIN** and **HexonGlobal** will argue that whether a fundamental right exists and is protected by the Constitution is properly decided by the judiciary.

***United States***

The **United States** will argue the nation was founded with a keen objective to separate the powers of government in order to defend against tyranny. *Loving v. United States*, 517 U.S. 748, 756-757 (1996)("[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another."). Broadly, the **United States** will argue that the powers left to Congress and Executive Branch would be intruded upon if these questions were decided by the court.

**(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department**

The **United States** will argue that climate change is inherently a foreign relations issue, and that the foreign policy implications presented by each of the questions presented by these claims should be left to the Executive Branch to answer. The **United States** may cite several sources from the Constitution, and cases interpreting the Constitution, to establish that foreign relations is textually demonstrable to be inextricably committed to the Executive Branch. *See* U.S. Const. art. II, § 2, cl. 2 ("shall have Power . . . to make Treaties, . . . shall nominate . . . Ambassadors . . . ."); *See also Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2084-86 (2015).

The **United States** may argue that the foreign relations aspect of climate change policy, is particularly relevant to the analysis of the questions presented under the ATS. In *Sosa* and *Jesner* the Supreme Court has announced its caution in recognizing new private rights of action. *See Sosa*, 542 U.S at 727 ("[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases"); *Jesner*, 138 S. Ct. at 1402

("the Legislature is in a better position to consider if the public interest would be served by imposing a new substantive legal liability")(quoting *Ziglar v. Abbasi*, 582 U.S.__,__, 137 S.Ct. 1843,1857 (2017)). By recognizing a new private right for an alien to sue a domestic corporation for international tort the court would be infringing on a determination better left to Congress.

Regarding the public trust claim, the **United States** might also cite the Constitution text to assert that "Congress has power to dispose of and make all needful rules and regulations regarding federal land. U.S. Const. art. IV, § 3, cl. 2. The **United States** might argue this prevents the judiciary from recognizing new obligations related to federal land.

**(2) a lack of judicially discoverable and manageable standards for resolving it, and**
**(3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion**

The **United States** will also argue that the court would have insufficient standards to resolve these questions without making an initial policy determination "about how to weigh competing economic and environmental concerns." *Juliana*, 217 F.Supp.3d at 1238. The **United States** will argue that the levels of carbon emissions that would provide a citizen with a healthy and stable climate system cannot be determined by the existing law or legal framework, and that a court should not be the entity to decide.

**(4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government**, **(5) an unusual need for unquestioning adherence to a political decision already made**, and **(6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question**

Finally, the **United States** may argue that President Trump's clear policy stance to leave the Paris Agreement, and denounce the notion of international responsibility to reduce carbon, would be undermined and not given its proper respect if a court recognized

an alien's ATS claim under the *Trail Smelter* Principle. The **United States** might also argue these foreign relations questions would cause embarrassment from multifarious pronouncements on this issue specifically, and on climate change policy generally.

*This is not intended to be an exhaustive analysis of the problem, merely an indicative list of issues to be discussed in teams' written submissions and oral arguments. One should appreciate reasoned and reasonable creativity and ideas beyond those in this limited analysis.*