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2019 Competition Problem

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

2019 Competition Problem*

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 No. 66-CV-2018, Judge Romulus N. Remus.

* *Greyed out text denotes a change from the original Problem in response to official Competition Q&A period.*

ORDER

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. Appellants take issue with the District Court's holding that the *Trail Smelter* Principle under the international Law of Nations is displaced by greenhouse gas regulation under the Clean Air Act, and the District Court's refusal to recognize a Due Process-based public trust right to governmental protection from atmospheric climate change. The parties have not disputed standing, and no party raises the issue of standing on appeal.

Therefore, it is hereby ordered that the parties brief all of the following issues:

1. Can Mana bring an Alien Tort Statute, 28 U.S.C. § 1350 (ATS) claim against a domestic corporation? (Plaintiffs argue she can; the United States argues she can; and HexonGlobal argues she cannot.)

2. Is the *Trail Smelter* Principle a recognized principle of customary international law enforceable as the "Law of Nations" under the ATS? (Plaintiffs argue it is; the United States argues it is; and HexonGlobal argues it is not.)

3. Assuming the *Trail Smelter* Principle is customary international law, does it impose obligations enforceable against non-governmental actors? (Plaintiffs argue it does; the United States argues it does; and HexonGlobal argues it does not.)

4. If otherwise enforceable, is the *Trail Smelter* Principle displaced by the Clean Air Act? (Plaintiffs argue it is not; the United States argues it is; and HexonGlobal argues it is).

5. 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? (Plaintiffs argue there is; the United States argues there is not; and HexonGlobal argues there is not.)

6. Do Plaintiffs' law of nations claim under the Alien Tort Statute and public trust claim present a non-justiciable political question? (Plaintiffs argue the claims do not; the United States argues the claims do; and HexonGlobal argues the claims do not.)

SO ORDERED

Entered 1st day of September 2018

[NOTE: No decisions decided or documents dated after September 1, 2018 may be cited either in the briefs or in oral argument.]

C.A. No. 66CV2018 (RMN)

UNITED STATES DISTRICT COURT OF NEW UNION ISLAND

ORGANIZATION OF DISAPPEARING ISLAND NATIONS, APA MANA, AND NOAH FLOOD,
Plaintiffs,

v.

HEXONGLOBAL CORPORATION,
Defendant,

-and-

UNITED STATES of America,
Defendant,

Opinion and Order of United States District Court for New Union Island.

Plaintiffs Organization of Disappearing Island Nations (ODIN), Apa Mana, and Noah Flood bring this action against HexonGlobal Corporation and the United States. ODIN is a not-for- profit membership organization devoted to protecting the interests of island nations threatened by sea level rise. Mana asserts a claim against HexonGlobal under the Alien Tort Statute, 28 U.S.C. § 1350 (ATS), asserting that defendant's fossil fuel related business activities constitute a violation of the Law of Nations, and seeking damages and injunctive relief. Flood asserts a constitutional claim against the United States, asserting violations of public trust obligations to protect the global climate ecosystem incorporated through the Due Process Clause of the Fifth Amendment to the Constitution. 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 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. Despite the dramatic nature of plaintiffs' claimed harms, this Court grants both defendants' motions to dismiss for reasons explained below.

Factual Background

The following facts are taken from the complaint, and must be taken as true for the purposes of this 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" because like the windowed-walls of a greenhouse, these gases, even in small amounts, have an insulating effect which leads the Earth to retain heat. The current climate on Earth 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 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 which has already occurred. 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 six percent 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 by 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 twenty percent 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." United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 169 [hereinafter UNFCCC]. 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." UNFCCC, at 171. 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). *Massachusetts v. EPA*, 549 U.S. 497 (2007). Following this holding, in 2009, the United States Environmental Protection Administration 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. 74 Fed. Reg. 66,496 (Dec. 15, 2009). 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, 75 Fed. Reg. 25,324 (May 7, 2010) and these regulations were extended in 2012 to require increasingly stringent emissions limitations through model year 2025. 77 Fed. Reg. 62,623 (Oct. 15, 2012). 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.[1] 75 Fed.

[1] 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).

Reg. 31,514 (June 3, 2010). In 2015, the EPA issued regulations establishing carbon dioxide emissions standards for new power plants, 80 Fed. Reg. 64510 (Oct. 23, 2015) and requiring states to implement controls on greenhouse gas emissions from existing power plants, the so-called "Clean Power Plan." 80 Fed. Reg. 64662, (Oct. 23, 2015). 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 signatory nation. Paris Agreement to the United Nations Framework Convention on Climate Change, opened for signature Apr. 22, 2016, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015). The United States committed to reduce greenhouse gas emissions by 26-28% by 2025, compared to 2005 levels. *USA First NDC* (Sept. 3, 2016), http://www4.unfccc.int/ndcregistry/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf.

Despite these preliminary regulatory actions over the past decade, United States greenhouse gas emissions have decreased only slightly, and global greenhouse gas emissions have increased. The Trump administration has proposed to reverse these regulatory measures and commitments. President Trump has announced an intention to withdraw from the Paris Agreement at the earliest opportunity allowed by its terms, which would be effective in the year 2020. EPA has proposed regulations freezing emissions reductions under the greenhouse gas based fuel economy standards, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (proposed Aug. 24 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, 536, & 537, and 40 C.F.R. pts. 85-86) and repealing the Clean Power Plan. 83 Fed Reg 44746 (Aug. 31, 2018).

PLAINTIFFS' CLAIMS

Mana's Alien Tort Statute Claim

Mana, a national of the nation of A'na Atu, asserts a claim under the Alien Tort Statute, 28 U.S.C. § 1350 (ATS). This statute 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. 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. And, finally, the defendant must not be a foreign corporation. *Jesner v. Arab Bank, P.L.C.*, ___ U.S. ___, 138 S. Ct. 1386, 1407 (2018).

Mana claims that HexonGlobal's fossil fuel production and sales activities violate a principle of the law of nations, or customary international law, 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 State of Washington caused by air pollution emissions from a smelter in British Columbia were a violation of international liability principles. This principle was subsequently adopted by the Declaration of the 1972 Stockholm Conference on the Human Environment as Principle 21:

> 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). This principle was reasserted in Principle 2 of the 1992 Rio Declaration on Environment and Development, endorsed by 190 nations. U.N. Conference on Environment and Development, *June 3-14, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and Development*, 3, U.N. Doc. A/CONF.151/26/REV.1(VOL.I) (1992).

Mana's claim that HexonGlobal's greenhouse gas emissions induced by the sale of petroleum fuels within the United States constitutes an actionable violation of the law of nations raises several difficult issues, including 1) whether the *Trail Smelter* Principle is indeed a universally accepted principle of customary international law; 2) whether, the *Trail Smelter* Principle imposes actionable obligations on private parties, as opposed to national governments; 3) whether the Alien Tort Statute allows for a suit against a domestic corporation (a question left open by the Supreme Court in Arab Bank, but answered in the negative by the Second Circuit in *Kiobel*); and 4) whether Mana's claims are barred by the Political Question doctrine (see *Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd* 696 F.3d 849 (9th Cir. 2012)).

The court need not reach these difficult questions because the court finds that any action Mana might have under the ATS has been displaced by greenhouse gas regulation under the Clean Air Act. As the Supreme Court made clear in *Sosa*, *Kiobel*, and *Arab Bank*, the ATS does not create a cause of action, but rather created jurisdiction to hear torts claims based on the international law of nations. As claims sounding in international tort, these claims must of necessity be considered to be claims arising under federal common law. 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).

Accordingly, Mana's claims fail to state a claim for relief, and are dismissed.

Flood's Public Trust Claim Against the United States

Relying on the same background facts, Plaintiff 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.

The public trust doctrine has a long pedigree. 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 – although this incorporation at the federal level has generally followed the doctrine's application to navigable and tidal water, and not its broader statements. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988). Plaintiffs assert 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.

Despite the Public Trust doctrine's impressive pedigree, it cannot be the font of the Due Process right claimed by plaintiff here. In essence, plaintiff'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).

Plaintiffs rely heavily on an Oregon District Court case recognizing a Due Process-based public trust right to government protection from atmospheric climate change, and denying a motion to dismiss a very similar complaint. *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016). However, this court declines to follow the reasoning of *Juliana*, or to adopt the government-caused danger exception to *DeShaney* applied by the Ninth Circuit. See *Penila v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997); *L. W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). Even if such an exception were to apply, the majority of government actions complained of long predated any awareness of the potential dangers of human induced climate change.

This is not to denigrate the serious threat that our nation, and humanity, faces due to anthropogenic climate change. Not every threat to human well-being constitutes a violation of Due Process rights, however. This Court is compelled to dismiss Flood's claims for failure to state a claim for relief under the Fifth Amendment to the Constitution.

CONCLUSION

For the foregoing reasons, the Complaint in this action is dismissed.

IT IS SO ORDERED.

Dated this 15th Day of August, 2018

Romulus N. Remus

United States District Judge