IADC Committee Newsletter

# ENVIRONMENTAL, ENERGY AND MARITIME LAW

*February 2012*

## IN THIS ISSUE

*This article is available in the written materials for a Major CLE program at the 2012 IADC Midyear Meeting in Rancho Mirage, California, that may be of interest to our Committee members. Please join us on Monday, February 13, for the program "Defending Multi-National Corporations in the 21st Century: How to Succeed in an Increasingly International Legal Marketplace."*

# There is No Place Like Home: The Defense against Foreign Environmental Liability Claims in U.S. Court under the Alien Tort Statute

## ABOUT THE AUTHORS

**Eric G. Lasker** is a partner in the Washington, D.C. law firm, Hollingsworth LLP, where he specializes in toxic tort, environmental, pharmaceutical and Alien Tort Statute litigation. Mr. Lasker has represented clients in pharmaceutical products liability claims and in toxics/environmental matters. Mr. Lasker is currently defending a mass environmental common law and ATS complaint in U.S. district court, in which thousands of Ecuadorian farmers and their families allege personal injuries and property damages from claimed herbicide contamination. Mr. Lasker is Chair of the IADC Toxics & Hazardous Substances Litigation Committee. For more information on Mr. Lasker's practice and expertise, see http://www.hollingsworthllp.com/people.php?PeopleID=47

**Lori Farrelly** is an associate in the Washington, D.C. law firm, Hollingsworth LLP. Ms. Farrelly has defended matters in state and federal courts on behalf of medical device manufacturers and is experienced in multidistrict litigation. She currently focuses her practice on toxic torts, environmental, and Alien Tort Statute litigation. She serves with Mr. Lasker as a member of the litigation team defending against a mass environmental common law and ATS complaint alleging herbicide contamination in Ecuador. She can be reached at lfarrelly@hollingsworthllp.com.

## ABOUT THE COMMITTEE

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**William Ruskin**
**Vice Chair of Publications**
**Epstein Becker & Green, P.C.**
(212) 351-4740
wruskin@ebglaw.com

On August 16, 2002, counsel for Texaco raised a glass in celebration, as the U.S. Court of Appeals for the Second Circuit marked the seeming end of a nine-year legal battle by affirming dismissal on *forum non conveniens* grounds of a lawsuit brought by Ecuadorian plaintiffs for alleged damage caused by Texaco's historic oil exploration activities in northern Ecuador.[1] Historically, a *forum non conveniens* dismissal had meant the end of litigation, either in the U.S. or abroad,[2] and Texaco's counsel had reason to believe that their victory in the Second Circuit would be dispositive. But times had changed. Just as foreign plaintiffs had been looking increasingly to U.S. courts to prosecute their claims, so too had foreign countries become increasingly assertive in entertaining mass tort lawsuits in their own courts using more expansive U.S. rules of liability. Many countries had relaxed or shifted causation burdens, enacted case-specific laws enabling plaintiffs to more easily recover, or provided for damages to be calculated under the law of the foreign defendant's country.[3] Rather than marking the end of the litigation, Texaco's *forum non conveniens* win resulted in just such an expansion of Ecuadorian law. As a result, some 9 ½ years later, Texaco's successor-in-interest, Chevron, finds itself battling a multi-front war seeking to avoid enforcement of an $18 billion judgment, issued under very suspicious circumstances by a trial court in Lago Agrio, Ecuador. The extraordinary events leading up to this judgment have been well chronicled elsewhere,[4] and will not be revisited here. Our purpose in this article, instead, is to go down the road not traveled by Texaco and ask: What would have been the fate of the Chevron litigation had it been kept in the United States?

In their original claims against Texaco, the Ecuadorian plaintiffs had claimed federal jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS").[5] The ATS, enacted as part of the Judiciary Act of 1789, provides that: "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." After lying dormant for nearly two centuries, the ATS was brought back to life by a Second Circuit decision in 1980, *Filartiga v. Pena-*

[1] Plaintiffs first brought suit against Texaco in 1993. The S.D.N.Y. granted *forum non conveniens* dismissal to Texaco in 1996. *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996). The Second Circuit reversed the district court for failing to condition the dismissal on Texaco's submission to jurisdiction in Ecuador. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (*Aguinda* appeal was consolidated with an appeal in another environmental ATS case against Texaco, *Jota v. Texaco*, brought by Peruvian plaintiffs). After Texaco agreed to stipulate to jurisdiction in Ecuador, the district court again dismissed on *forum non conveniens* grounds, *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), and the Second Circuit then upheld the dismissal. *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

[2] Robert V. Percival, *Liability for Environmental Harm and Emerging Global Environmental Law*, 25 Md. J. Int'l L. 37, 51 (2010) ("One study [completed in 1987] concluded that fewer than four percent of cases dismissed by American courts on [*forum non conveniens*] ground[s] ever are litigated in foreign courts.").

[3] Percival, *supra* note 2, at 43, 58, 60-61.

[4] *See, e.g.*, Paul M. Barrett, *Chevron Looks to Its Home Court for a Comeback Win*, BusinessWeek, July 14, 2011.

[5] Plaintiffs have also brought environmental claims against multinational corporations under traditional tort theories based on federal question and diversity jurisdiction. *See, e.g., Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216 (9th Cir. 2011) (reversing dismissal on *forum non conveniens* grounds of traditional tort action by indigenous Peruvian plaintiffs based on alleged environmental contamination and personal injury); *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 542-44 (5th Cir. 1997) (conducting federal question and diversity jurisdiction analysis and affirming dismissal of Peruvian citizens' state tort law action alleging harm from pollution on grounds of *forum non conveniens*).

*Irala*, in which the court held that violations of contemporary international norms, including violations of modern international human rights, were actionable under the ATS. 630 F.2d 876 (2d Cir. 1980). Since *Filartiga*, the number of ATS suits has increased dramatically as the contours of the statute have been explored by the circuits. In 2004, the U.S. Supreme Court appeared to signal that this growing expansive use of the ATS was inappropriate, explaining that the ATS sets "a high bar to new private causes of action for violating international law." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). However, the Court did not close the door entirely on ATS claims, and its ruling has served to inspire the plaintiffs' bar to continue pressing the boundaries of the statute's jurisdictional reach.[6]

In recent years, foreign judicial systems have become increasingly friendly to plaintiffs' environmental claims. But as this article details, no environmental ATS claim has ever been successful in U.S litigation, and no environmental ATS claim is likely to be successful under the law of nations or the treaties of the United States as they stand today. Consequently, *forum non conveniens* dismissal is a much less attractive option for corporations defending against international environmental claims than it has been in the past. In this article, we summarize the arguments asserted by plaintiffs in support of environmental ATS claims and review how these arguments have been received (and ultimately rejected) by U.S. courts.

## I. Plaintiffs' Common International Environmental Law Arguments

In *Sosa*, the Supreme Court clarified that the ATS provides jurisdiction: (1) for violations of "treaties of the United States" that are ratified and self-executing and that impose legal obligations enforceable by foreign plaintiffs in federal courts, *Sosa*, 542 U.S. at 735-36, and (2) for violations of "the law of nations" that have the "potential for personal liability." *Id.* at 724, 728. The Court explained that claims for violations of "the law of nations" are limited to claims that rest on "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" that recognized certain identified causes of actions back in 1789 when the ATS was enacted (offenses against ambassadors, violations of safe conduct, and piracy). *Id.* at 725 (internal citations omitted). Although the Supreme Court recognized the possibility of new claims based on "the present-day law of nations," *id.* at 725, it clearly directed lower courts to use "great caution" in permitting such new claims. *Id.* at 728. The Court instructed that in order for claims to meet the "high bar" for new causes of action, any such new claim must be accepted by the international community and "defined with [a high degree of] specificity." *Id.* at 725, 734. As the Ninth Circuit has held, in order to meet the standard set forth by *Sosa*, a norm must be "sufficiently specific, universally accepted, and obligatory." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009).

Plaintiffs have employed various international instruments to argue the existence of customary international law norms prohibiting environmental pollution. The

[6] The Supreme Court will address the ATS for the second time this term, this time on the issue of whether corporations can be held liable under the ATS. However, even if the corporate defendants win this issue, plaintiffs may continue to press ATS claims against corporate entities by naming corporate officers as defendants. *See* Ben Kerschberg, *Corporate Executives: Get Ready for a Billion Dollar Lawsuit*, Huffington Post, Dec. 2, 2010, *available at* http://www.huffingtonpost.com/ben-kerschberg/corporate-executives-get-_b_791292.html.

most popular of these – the Stockholm Declaration, the Rio Declaration, and the Restatement (Third) of the Foreign Relations Law of the United States – are examined below. However, as defendants have successfully argued, the instruments on which plaintiffs have relied to date do not set forth norms that are "sufficiently specific, universally accepted, and obligatory" to state a claim enforceable under the ATS.

**a. Stockholm Declaration and Rio Declaration**

The Rio Declaration on Environment and Development[7] and its predecessor, the Stockholm Declaration on the Human Environment,[8] are statements of non-legally binding principles that were neither concluded as treaties nor as any other kind of legally-binding international agreements. Plaintiffs asserting environmental ATS claims have frequently cited principles of both the Rio Declaration and the Stockholm Declaration, claiming that they provide direct statements of customary international law. Plaintiffs point to Principle 1 of the Rio Declaration, which provides that: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." Plaintiffs also point to Principle 2 of the Rio Declaration, and the substantially identical Principle 21 of the Stockholm Declaration, which generally recognize that States must avoid causing harm to the environment of other States, while simultaneously recognizing that each State has a sovereign right to develop its natural resources in accordance with its own national policy. Principle 2 of the Rio Declaration 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 and developmental 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.[9]

However, these general principles do not prohibit specific actions and cannot provide the basis of an ATS claim. Indeed, as indicated in its preamble, the Rio Declaration's purpose was to promote the development of new treaties by "[w]orking towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system." The general values articulated in the Rio and Stockholm Declarations are not regarded as specific rules that govern on an operational level. One scholar has explained that "[o]n its own terms, [Principle 21 of the Stockholm

[7] U.N. Doc. A/CONF.151/5/Rev.1 (June 13, 1992), *reprinted at* 31 I.L.M. 874 (1992) ("Rio Declaration").
[8] U.N. Doc. A/CONF.48/14 (June 16, 1972), *reprinted at* 11 I.L.M. 1416 (1972) ("Stockholm Declaration").

[9] Similarly, Principle 21 of the Stockholm Declaration on the Human Environment provides:

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

Declaration] has not become state practice: States generally do not 'ensure that the activities within their jurisdiction do not cause damage' to the environment of others."[10] Other scholars have noted that the principles are "an inconclusive guide to the nature of responsibility for environmental damage."[11]

Courts confronted with the issue have uniformly rejected plaintiffs' reliance on the Rio Declaration and the Stockholm Declaration to support environmental ATS claims, recognizing that neither instrument is a "treaty of the United States" and that the aspirational goals for the protection of the environment set forth therein do not impose customary international law obligations. The court rulings are discussed more fully below.

**b. Restatement (Third) of the Foreign Relations Law of the United States**

Sections 601 and 602 of the Restatement (Third) of the Foreign Relations Law of the United States (1987) ("Restatement") address "the law of the environment"[12] and are also commonly cited by plaintiffs as a source of customary international environmental norms. However, the Restatement and treatises like it "are not primary sources of international law," and care must be taken "because the incorrect use of such sources can easily lead to an incorrect conclusion about the content of customary international law." *United States v. Yousef*, 327 F.3d 56, 99-100 (2d Cir. 2003) (reversing a district court conclusion that relied on the Restatement's listing of customary law violations). In order for the Restatement to be instructive of customary international law it must demonstrate that a specified norm exists that is sufficiently specific to meet the high *Sosa* standard. *Sosa*, 542 U.S. at 737, 738 ("[T]he Restatement's limits are only the beginning of the enquiry" because they did not help the Court "say which [arbitrary detention] policies cross that line with . . . certainty."). The Restatement fails to demonstrate the existence of any such environmental norms.

Section 601(1) of the Restatement states:

> A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control
>
> (a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and
>
> (b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.

[10] Oscar Schachter, *The Emergence of International Environmental Law*, 44 J. Int'l Aff. 457, 462 (1991).
[11] Patricia Birnie & Alan Boyle, *International Law and the Environment*, 186 (2d ed. 2002).
[12] Restatement sections 603 and 604 also address "the law of the environment" in the context of "marine pollution."

And section 602(2) provides:

> Where pollution originating in a state has caused significant injury to persons outside that state, or has created a significant risk of such injury, the state of origin is obligated to accord to the person injured or exposed to such risk access to the same judicial or administrative remedies as are available in similar circumstances to persons within the state.

Plaintiffs argue that §§ 601 and 602 set forth a customary international law norm against transboundary environmental harm. However, because these sections are so riddled with qualified and equivocal language, they actually demonstrate that the "specific, universal, and obligatory" norm necessary for environmental ATS claims does not exist.

## II. Environmental ATS Cases

- ***Amlon Metals, Inc. v. FMC Corp.***

Environmental claims brought under the ATS were addressed for the first time in 1991 in *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991). In *Amlon*, a United Kingdom corporation and its American agent brought an environmental ATS claim against a U.S. company. The plaintiffs claimed that the international deliveries of metal residues to a processing plant in England were deliberately mislabeled and contained impurities and toxic chemicals that could "present imminent and substantial danger to human health and to the environment." *Id.* at 670. Plaintiffs did not allege any treaty violation, and instead relied on Stockholm Principles (primarily, Principle 21) and Restatement § 602(2) to argue that the defendant's conduct had caused transboundary pollution and had violated the law of nations. *Id.* at 671. The district court held that "these invocations of international law do not establish a violation of such law" under the ATS. *Id.* The plaintiffs' reliance on the Stockholm Principles protecting the environment was "misplaced" because they "do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders." *Id.* Likewise, the Restatement does not "constitute a statement of universally recognized principles of international law," but instead, at most, "iterates the existing *U.S.* view of the law of nations regarding global environmental protection." *Id.*

- ***Beanal v. Freeport-McMoRan, Inc.***

In *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997), the plaintiff, an Indonesian citizen and leader of an Indonesian tribal counsel, brought torture, cultural genocide, and environmental ATS claims against U.S. corporations conducting open pit copper, gold, and silver mining activities in Indonesia. The plaintiff alleged that the defendants' mining operations and drainage practices had resulted in environment destruction and injury to the indigenous people. Relying on three environmental law principles proffered in a scholarly treatise[13] and the Rio Declaration,

[13] The three environmental principles on which plaintiff relied, as stated in *Principles of International Environmental Law I: Frameworks, Standards and Implementation*, 183 (1995) by Phillipe Sands, were: "(1) the Polluter Pays Principle; (2) the Precautionary Principle; and (3) the Proximity Principle." 197 F.3d 161, 167 & n.5 (5th Cir. 1999).

the plaintiff argued that the defendants' conduct violated the law of nations. 197 F.3d at 167. The district disagreed and dismissed plaintiff's environmental ATS claims for failure to state a claim. 969 F. Supp. at 382. The Fifth Circuit affirmed, holding that plaintiff "fail[ed] to show that these treaties and agreements enjoy universal acceptance in the international community," and that the cited instruments instead "merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts." 197 F.3d at 167. Moreover, the court held that the Rio Declaration actually "cut against" the plaintiff's ATS claim because the Declaration provides that states have a "sovereign right to exploit their own resources pursuant to their own environmental and developmental policies." *Id.* at 167 n.6 (quoting Rio Declaration Principle 2). The Fifth Circuit also warned that in adjudicating international environmental claims, U.S. federal courts should be wary of displacing the environmental policies of other sovereigns with U.S. policy, especially where, as in *Beanal*, the alleged environmental harm occurred within a state's borders and did not affect neighboring countries. *Id.* at 167.

- ***Aguinda v. Texaco* and *Jota v. Texaco***

In *Aguinda v. Texaco*, Ecuadorian plaintiffs brought an ATS claim for violation of environmental norms of customary international law, alleging that Texaco's oil exploration and extraction activities in Ecuador's Oriente region caused environmental damage and personal injuries. Judge Broderick of the Southern District of New York reserved decision on defendant's motion to dismiss until further discovery was completed, but gave consideration to the viability of plaintiffs' environmental ATS claim based on Principle 2 of the Rio Declaration. The district court held: "The Rio Declaration may be declaratory of what it treated as pre-existing principles just as was the Declaration of Independence." *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527, 1994 WL 142006, at *7 (S.D.N.Y. Apr. 11, 1994). Judge Broderick further explained that U.S. domestic law restricts environmental damage and governs hazardous waste, which "tends to support the appropriateness of permitting suit under [the ATS] if there were established misuse of hazardous waste of sufficient magnitude to amount to a violation of international law." *Id.* However, following Judge Broderick's death, the case was reassigned to Judge Rakoff, who granted dismissal on the grounds of *forum non conveniens*, international comity, and failure to join indispensable parties. 945 F. Supp. 625, 627 (S.D.N.Y. 1996). In response to plaintiffs' argument that their environmental ATS claim precluded dismissal, Judge Rakoff held that plaintiffs' claim "lack[ed] any meaningful precedential support and appears extremely unlikely to survive a motion to dismiss." 142 F. Supp. 2d 534, 552 (S.D.N.Y. 2001) (citing *Beanal*, 197 F.3d at 166-67 and *Amlon*, 775 F. Supp. at 671). On appeal, *Aguinda* was consolidated with *Jota v. Texaco*, in which Peruvian plaintiffs living downstream of the Oriente region of Ecuador alleged similar injuries, and the Second Circuit ultimately affirmed dismissal on *forum non conveniens* grounds. 303 F.3d 470 (2d Cir. 2002). The Second Circuit noted that it "express[ed] no view on whether the plaintiffs have alleged conduct by Texaco that violates the law of nations." 157 F.3d 153, 159 n.6 (2d Cir. 1998). As noted above, after further proceedings in the United States leading to a final *forum non conveniens* dismissal, this case was refiled in Ecuador

and resulted in a still hotly-disputed $18 billion damages award against Chevron.

- ***Flores v. S. Peru Copper Corp.***

In *Flores v. S. Peru Copper Corp.*, Peruvian residents brought personal injury claims under the ATS, alleging that environmental pollution from the waste products of a multinational U.S. copper mining corporation's operations in Peru had caused the plaintiffs to experience asthma and severe lung disease. 253 F. Supp. 2d 510 (S.D.N.Y. 2002). Plaintiffs claimed that the defendant had violated their "right to life, right to health, and right to sustainable development" as recognized by customary international law and adopted by several international agreements.[14] The district court dismissed the plaintiffs' claims. As in *Beanal*, the *Flores* court held that Principles 1 and 2 of the Rio Declaration and Restatement § 601 actually undermined the plaintiffs' claims because they recognize that a State has the sovereign right to control pollution within its own borders. 253 F. Supp. 2d at 521-22. Furthermore, the district court found that the conventions and declarations cited by the plaintiffs stated "rights" but did not identify any relevant prohibited conduct and therefore could not serve as a basis on which to establish a customary international law violation. *Id.* at 519. The district court held that plaintiffs had not "demonstrated that high levels of environmental pollution, causing harm to human life, health, and sustainable development within a nation's borders, violate any well-established rules of customary international law." *Id.* The district court also held that dismissal was proper on the alternate grounds of *forum non conveniens*. *Id.* at 544.

The Second Circuit affirmed, holding that the rights to life and health are "insufficiently definite to constitute rules of customary international law." 414 F.3d 233, 254 (2d Cir. 2003).[15] The Second Circuit explained that the international agreements relied on by the plaintiffs were "boundless," "indeterminate," and drafted with the "level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them." *Id.* at 255. As an example, the court cited Principle 1 of the Rio Declaration, holding that it "utterly fails to specify what conduct would fall within or outside of the law." *Id.* The court explained that Principle 1 of the Rio Declaration does not provide a basis for an environmental ATS claim because it sets forth "aspirational principles" and includes "no language indicating that the States joining in the Declaration intended to be legally bound by it." *Id.* at 263. The Second Circuit also rejected an alternative theory for plaintiffs' claims based on "a more narrowly-defined customary international law rule against intra national pollution." *Id.* at 255. The court considered a multitude of documents plaintiffs submitted to support this alternate environmental claim,[16] none of which established that intra-national pollution violates customary international law. *Id.* at 266. The Second Circuit agreed with the district court that the Rio Declaration "may actually undermine plaintiffs' assertion that

[14] Plaintiffs cited as support the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Rio Declaration.

[15] The plaintiffs did not appeal the district court's ruling on the right to sustainable development. 414 F.3d at 238 n.3.

[16] The court considered: i) treaties, conventions, covenants; ii) non-binding declaration of the United Nations General Assembly; iii) other non-binding multinational declarations of principles; iv) decisions of multinational tribunals; and v) affidavits of international law scholars. *Id.* at 256.

the Declaration establishes a right to life and a right to health" because nations have the right to control environmental exploitation within their own borders. *Id.* at 263 n.41 (citing *Flores*, 253 F. Supp. 2d at 521 and *Beanal*, 197 F.3d at 167 n.6).

- ***Viera v. Eli Lilly***

In *Viera*, Brazilian plaintiffs brought ATS claims against six U.S. corporations for alleged injuries resulting from environmental pollution and contamination emanating from defendants' manufacturing sites in Brazil. *Viera v. Eli Lilly & Co.*, No. 1:09-cv-0495, 2010 WL 3893791 (S.D. Ind. Sept. 30, 2010). The Southern District of Indiana rejected plaintiffs' claims that defendants intentionally violated "recognized health and safety standards in disposing of certain chemicals at manufacturing facilities in two Brazilian cities." *Id.* at *3. The court held that the plaintiffs' citations to "aspirational conventions," not ratified by the United States, could not support their claims and that the plaintiffs' claims did not rise to the level of an enforceable international norm under the ATS. *Id.* The court explained that "recognized health and environmental standards differ within the States of this country, let alone between the countries of the world." *Id.*

- ***Sarei v. Rio Tinto***

In *Sarei v. Rio Tinto*, current and former residents of Papua New Guinea brought an ATS action against copper mine operators, claiming that the defendants' mining operations defoliated the rain forest in Papua New Guinea, harmed the health of people living near the mining operations, and caused thousands of deaths by providing support to the Papua New Guinea government troops. 221 F. Supp. 2d 1116 (C.D. Cal. 2002). Plaintiffs alleged that the defendants had violated customary international law norms prohibiting war crimes, crimes against humanity, racial discrimination, and environmental harm. The district court held that neither the "rights to life and health" nor the conduct that would violate the rights was defined under international law. 221 F. Supp. 2d at 1158. Accordingly, the court held that plaintiffs had failed to demonstrate that the claimed rights were "sufficiently 'specific' that their alleged violation states a claim under the [ATS], or that nations universally recognize they can be violated by perpetrating environmental harm."[17] *Id.* at 1158. As to plaintiffs' claim for environmental harm under the ATS based on the principle of "sustainable development," the district court concluded that because it "cannot identify the parameters of the right created by the principle of sustainable development, [the principle] . . . cannot form the basis for a claim under the [ATS]." *Id.* at 1160-61.

Plaintiffs brought a separate environmental ATS claim based on the defendants' alleged violation of customary international law as purportedly set forth in two provisions of the United Nations Convention on the Law of the Sea ("UNCLOS").[18] The court held that

[17] The district court also noted, citing *Beanal*, that plaintiffs' reliance on the Rio and Stockholm Declarations "undermine their claim that defendants' conduct violates recognized international law" because plaintiffs alleged intrastate pollution only and states have the sovereign right to exploit their own resources pursuant to their own policies. *Id.* at 1159.

[18] One of the UNCLOS provisions on which the *Sarei* plaintiffs relied requires that "'states take all measures . . . necessary to prevent, reduce and control pollution of the marine environment that involve hazards to human health, living resources and marine life through the introduction of substances into the marine environment.'" The other UNCLOS provision cited by plaintiffs mandates that states "'adopt laws and regulations to prevent, reduce, and control pollution of the marine environment caused by land-based

UNCLOS – ratified by 166 nations, including Papua New Guinea, and signed but not ratified by the United States – reflected customary international law and was a proper basis for plaintiffs' environmental ATS claim. *Id.* at 1161-62. However, because defendants' actions were closely tied to those of the government of Papua New Guinea, the district court dismissed plaintiffs' claims on the grounds that they presented nonjusticiable political questions, *id.* at 1198-99, and alternatively declined to exercise jurisdiction over plaintiffs' environmental ATS claim based on the act of state doctrine and international comity. *Id.* at 1193, 1207. On appeal to the Ninth Circuit, a divided three-judge panel agreed with the district court that UNCLOS "codifies norms of customary international law" and served as a proper basis for plaintiffs' environmental ATS claim. 456 F.3d 1069, 1086 (9th Cir. 2006). The court noted, however, that the UNCLOS norms are not *jus cogens* norms (meaning "compelling law" that must be followed by all countries), which "form the least controversial core of modern day [ATS] jurisdiction." *Id.* at 1078. On rehearing, a three-judge panel withdrew the previous panel opinion and issued a superseding opinion that did not address the question whether an ATS claim for a violation of the law of nations could be based on norms codified in UNCLOS. 487 F.3d 1193 (9th Cir. 2007).[19]

## III. Conclusion

Plaintiffs continue to push for the expansion of the Alien Tort Statute to encompass claims against multinational corporations in U.S. courts for alleged environmental damages abroad.[20] Despite these ongoing efforts, however, the case law on environmental ATS claims is decidedly in the favor of defendants and the experience of Chevron in the Amazonian jungle in Ecuador provides a stark warning for environmental ATS defendants tempted to seek a *forum non conveniens* dismissal. In defending international environmental litigation today, it may be that the lessons of our childhood still point us in the proper direction: There's no place like home.

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sources.'" *Id.* at 1161 (quoting plaintiffs' opposition brief).

[19] On rehearing en banc, the Ninth Circuit remanded to the district court for the limited purpose of determining whether to impose an exhaustion requirement on each of plaintiffs' claims. 550 F.3d 822, 832 (9th Cir. 2008). On remand, the district court concluded that it would be inappropriate to impose a prudential exhaustion requirement with respect to those claims of "universal concern" but the claims that were not of "universal concern" may proceed only if they survive exhaustion analysis. 650 F. Supp. 2d 1004, 1020-21 (C.D. Cal. 2009). The district court held that plaintiffs' claims of international environmental violations, including those based on UNCLOS, "involve norms 'where aspiration has not yet ripened into obligation'" and thus were not matters of "universal concern." *Id.* at 1026 (quoting *Alvarez-Machain v. United States*, 331 F.3d 604, 620 (9th Cir. 2003)). The district court also stated that plaintiffs could either withdraw their claims requiring prudential exhaustion or submit those claims to the court for an exhaustion analysis. 650 F. Supp. 2d at 1032. Plaintiffs opted to withdraw their environmental ATS claims.

[20] *See, e.g.*, *Obe v. Royal Dutch Shell, PLC*, No. 11-14572 (E.D. Mich.) (filed Oct. 18, 2011) (alleging that Shell violated the Nigerian plaintiffs' "right to clean water, clean environment adequate for their health and well being, minimum enjoyment of life and right to life, enjoyment of the best attainable state of physical and mental health, healthy and productive life in harmony with nature and right to a general satisfactory environment favorable to their development as guaranteed by the Customary International Law and other treaties of the United Nations").