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Litigating Foreign Environmental Claims in U.S. Courts: The Impact of *Flores v. Southern Peru Copper Corporation*

by Sarah C. Rispin

I. Introduction

In its recent decision in *Flores v. Southern Peru Copper Corp.*,[1] the U.S. Court of Appeals for the Second Circuit dismissed claims brought under the Alien Tort Claims Act (ATCA)[2] by a group of Peruvian plaintiffs against a U.S. corporation for the environmental fallout of copper smelting operations in Peru. The *Flores* court dismissed the suit for failure to allege a violation of "clear and unambiguous" international law.[3] Specifically, they ruled that the plaintiffs had "failed to establish the existence of a customary international law 'right to life' or 'right to health'"[4] or "that intranational pollution violates customary international law."[5]

Coming from the circuit that in essence created the modern ATCA suit, this decision carries more weight than an average circuit opinion. The Second Circuit, in *Filartiga v. Pena-Irala*,[6] was the first circuit to allow foreign plaintiffs to use the ATCA to seek redress in U.S. courts for torts committed abroad in violation of international law. In the absence of a U.S. Supreme Court pronouncement on the issue, the *Filartiga* opinion remains the main authority for modern ATCA claims.[7] As a result, the *Flores* decision, which relied upon and applied the *Filartiga* framework,[8] has dampened hopeful predictions made by members of the environmental community about the utility of the ATCA for attaining redress for environmental torts committed abroad.[9] Looking beyond the environmental context, the *Flores* decision may limit the growth of progressive theories of international law for ATCA purposes in the federal courts.[10] *Filartiga* previously held that courts should look to evolving norms of international law.[11] However, the *Flores* court was willing only to look to very traditional sources of international law. Thus, the ability of courts to accept progressive theories of international law offered by human rights activists may be severely limited.

As this Article will demonstrate, however, with respect to the viability of environmental ATCA suits, the Second Circuit has merely confirmed the conclusion reached by several federal courts before it.[12] Further, this conclusion is arguably the right result from both an international law and environmental policy perspective: it imposes needed discipline on the types of international law claims brought under the ATCA, and curbs overreaching by U.S. judges into environmental policy areas best resolved by foreign governments. Nor does the *Flores* decision mark the end of international environmental claims in U.S. courts. As this Article will show below, it is still possible for such claims to proceed against U.S. corporations in various state courts in the United States. In fact, by limiting the availability of a typical defensive maneuver taken by U.S. corporations in defending against such suits in state courts, the Court's recent decision in *Dole Food Co. v. Patrickson*[13] has made it more possible for foreign plaintiffs to hold U.S. corporations to account for environmental damage inflicted abroad.

II. Overview of International Environmental Claims in U.S. Courts

Environmental disasters in developing nations caused by multinational corporations operating under lax legal regimes are an all too frequent phenomenon.[14] Characteristically, the burgeoning markets and inexpensive labor that make foreign direct investment into these nations attractive to multinationals are accompanied by underdeveloped legal regimes.[15] As a result, multinationals pursuing industrial,

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1. 343 F.3d 140 (2d Cir. 2003).
2. 28 U.S.C. §1350.
3. *Flores*, 343 F.3d at 160-62.
4. *Id*. at 161.
5. *Id*. at 172.
6. 630 F.2d 876 (2d Cir. 1980) (allowing a suit by Paraguayan plaintiffs seeking redress for acts of official torture against their family members to proceed under the ATCA).
7. The U.S. Supreme Court has never weighed in on whether the ATCA should be available to foreign plaintiffs seeking to bring international law claims in U.S. courts, devolving enduring authority to *Filartiga*. *See Flores*, 343 F.3d at 152 ("The [Supreme] Court has only once considered a claim, brought under the ATCA, in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), and, in that case, it dismissed the plaintiff's claims on sovereign immunity grounds . . . .").
8. *Flores*, 343 F.3d at 149-50.
9. *See infra* note 33 and accompanying text. The attraction of bringing these claims in U.S. courts is that justice is often either entirely or in practical terms unavailable in plaintiffs' home countries.
10. This is important to the path of the law, though something I will offer no opinion on.
11. *Filartiga*, 630 F.2d at 881 (urging that courts "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today").
12. *See infra* notes 54-58 and accompanying text.
13. 123 S. Ct. 1655 (2003).
14. Perhaps the most famous among these was the Union Carbide disaster in Bhopal, India, which was the subject of a suit in In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, in Dec. 1984, 809 F.2d 195, 17 ELR 20580 (2d Cir. 1987).
15. *See, e.g.*, Mary Elliott Rolle, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases*, 15 Geo. Int'l Envtl. L. Rev. 135, 138 (2003) ("[T]he places in which these corporations locate their plants, which are frequently developing states, often lack the legal resources needed to protect their citizens against large-scale industrial accidents."); John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International*

farming, and resource-extraction operations in developing countries are generally constrained only by the weakest of environmental standards. While some maintain similar environmental standards to those that they have in place in the United States or Europe, others impose massive environmental burdens that host country legal regimes cannot combat.

Victims of these disasters have, in recent years, turned to U.S. courts to seek redress. They have either brought their claims (i) in federal court, under the ATCA, or (ii) in state courts that have general jurisdiction over the offending corporation under state tort law. A series of ATCA cases handed down in the past two years—culminating in the Second Circuit's decision in *Flores*—indicate that the ATCA is not a fruitful route for foreign plaintiffs seeking redress for environmental harms that occur abroad: federal courts hearing the cases have dismissed all claims brought under that statute except those hinged on the violation of a specific international treaty, or for nonenvironmental, internationally recognized crimes attendant to the alleged environmental harm, such as torture. When they bring their claims under state-law theories in state courts, plaintiffs have an easier time making out a cause of action, but have had to contend with gamesmanship on the part of corporate defendants, who generally seek removal to, then dismissal from, federal courts. At least one move in this game—removing to federal court for the sake of more easily obtaining a dismissal on forum non conveniens grounds—has been removed, however, by the Court's recent decision in *Dole*.

A. The ATCA Route

This section will review, first, the modern use of the ATCA to litigate tort claims arising abroad, as well as the basic elements of a successful ATCA claim in federal courts. It will go on to explain the obstacles that foreign plaintiffs bringing suit for environmental harms that occur abroad face in obtaining redress through the ATCA. Finally, it will discuss the impact the *Flores* decision should have on the future viability of such claims in the federal courts.

1. Modern Use of the ATCA

The ATCA states: "The district courts will 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."[16] Though the U.S. Congress passed the ATCA over 200 years ago,[17] little is known of its origins, and it was not thought of as an avenue for foreign plaintiffs to seek redress for torts committed abroad until the Second Circuit handed down *Filartiga*[18] in 1980.

The *Filartiga* court allowed a suit by Paraguayan plaintiffs seeking redress for acts of official torture against their family members to proceed under the ATCA,[19] holding that the ATCA grants not only federal jurisdiction, but also a cause of action, for international law claims.[20] It further held that the plaintiffs had succeeded in making out such a claim, as acts of official torture violated customary international law (CIL).[21] In so doing, the *Filartiga* court self-consciously used the venerable but dormant ATCA to "open[ ] the federal courts for adjudication of . . . rights already recognized by international law."[22]

For the purposes of environmental claimants, the Second Circuit's subsequent decision in *Kadic v. Karadzic*[23] was also critical, because it recognized that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[24] This opened the door to ATCA claims against corporations as well as foreign governments. Today, foreign plaintiffs use the ATCA to bring a diverse group of claims for actions ranging from terrorism by non-state actors, to acts of torture by foreign governments.[25]

Among the diverse claimants seeking redress in U.S. courts under the ATCA, the *Flores* plaintiffs and others have built upon *Filartiga* and *Kadic* to bring suits against multinational corporations for environmental disasters that occur abroad. In *Beanal v. Freeport-McMoran, Inc.*,[26] for example, a group of Indonesian tribesmen brought suit for environmental damage stemming from the defendant corporation's open pit copper, gold, and silver mining operations in Irian Jaya, Indonesia. In *Aguinda v. Texaco, Inc. (Aguinda III)*,[27] a group of Ecuadoran plaintiffs brought suit under the ATCA for environmental damage caused by Texaco's oil drilling in the vicinity of Lago Agrio, Ecuador. In *Sarei v. Rio Tinto*,[28] a group of plaintiffs brought a class action for defendant's mining operations on the island of Bougainville in Papua New Guinea, which, they allege, "destroyed the island's environment, harmed the health of its people, and incited a ten-year civil war."[29] And in *Flores*,[30] a group of Pe-

Law, 25 COLUM. J. ENVTL. L. 283, 288 (2000) (discussing how the environmental laws of Ecuador, Nigeria, and the Russian Federation fail to provide adequate remedies for environmental damage); Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L.J. 261, 282 (1997) (quoting an observer of Nigerian environmental policies as saying: "Rarely enforced, the regulations are usually simply ignored.").

16. 28 U.S.C. §1350.

17. The language of 28 U.S.C. §1350 has changed very little from the time it was first issued as part of the Judiciary Act of 1789, ch. 20, §9(b), 1 Stat. 73, 76-77.

18. 630 F.2d at 876.

19. *Id*. at 889.

20. *Accord* Alvarez-Machain v. United States, 107 F.3d 696, 703 (9th Cir. 1996) (agreeing that the ATCA creates both jurisdiction and a cause of action). *But see* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798-823 (D.C. Cir. 1984) (Bork, J., concurring) (taking issue with the assumption that the ATCA created both).

21. *Filartiga*, 630 F.3d at 884.

22. *Id*. at 887.

23. 70 F.3d 232 (2d Cir. 1995).

24. *Id*. at 239. *But see* Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 384 (E.D. La. 1997) (holding that even if a right to a healthy environment were accepted as part of international law, only "members of the international community," not non-state actors such as corporations, could violate that right).

25. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) (suit over summary execution and arbitrary detention).

26. 197 F.3d 161, 30 ELR 20231 (5th Cir. 1999).

27. 303 F.3d 470, 33 ELR 20010 (2d Cir. 2002). This is a consolidation of two prior suits, both stemming from the same mining activity: Aguinda v. Texaco, 1994 U.S. Dist. LEXIS 5726 (which will become *Aguinda I* and *Aguinda II*), and Jota v. Texaco, Inc. (S.D.N.Y., filed 1994) (which at some stage becomes Jota v. Texaco, Inc., 157 F.3d 153, 29 ELR 20181 (2d Cir. 1998), but is later reabsorbed *sub nom. Aguinda*).

28. 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

29. *Id*. at 1120.

ruvian plaintiffs brought suit for environmental pollution from the defendant corporation's mining and refinery operations in and around Ilo, Peru.[31]

These suits have been accompanied by enthusiastic commentary by members of the environmental community urging foreign plaintiffs seeking redress for environmental damage to take courage in the expanding number of ATCA cases proceeding in U.S. courts. The president of Conservation International, Dr. Russell Mittermeier, for example, is of the opinion that "*Filartiga* and the increase in [ATCA] claims it has spawned suggest that in the future the [ATCA] may successfully be used by foreign plaintiffs desiring to redress environmental harms in U.S. courts."[32] Yet these claims have been largely rebuffed. Indeed, while the harms for which these plaintiffs seek redress are surely distressing, the enthusiasm for use of the ATCA for that purpose is arguably misplaced.

2. Necessary Elements of an ATCA Claim

Because the ATCA grants federal jurisdiction to tort claims that arise under "the law of nations or a treaty of the United States,"[33] foreign plaintiffs bringing environmental claims in U.S. courts may only proceed under the Act if they manage to make out a cause of action cognizable under some form of international law[34]—either treaty law, or CIL.

The "international law" category is more malleable than it may seem at first glance. Treaty law is readily ascertainable from positive sources of law. However, CIL is ascertained from custom and usage, and legal commentary thereon,[35] and can be rather capacious.[36] Indeed, while it is a core principle that a practice must be a "general and consistent practice of states followed by them from a sense of legal obligation,"[37] to rise to the level of CIL, many scholars focus on norms rather than practice in advocating the existence of a given CIL principle.[38] The *Filartiga* court attempted to cabin this tendency by holding that only CIL established through relatively traditional sources would be sufficient to establish an ATCA claim. Specifically, it urged that courts must, before accepting ATCA claims, attempt "to determine whether a [proposed] rule is well-established and universally recognized by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[39]

In the environmental context, it is extremely difficult to find such a cause of action. The mine run of claims being asserted by foreign plaintiffs in the environmental ATCA claims brought to date concern internal disasters beyond the purview of most international environmental law. How is this the case? Dealing as they do in areas that touch upon a core aspect of sovereignty—how a country uses its natural resources—environmental treaties tend to concern themselves uniquely with cross-border environmental effects, rather than internal environmental problems.[40] Lacking a reciprocal element, guarantees against internal environmental pollution have not developed as a matter of CIL.[41] Finally, while courts have begun to accept the protection of certain human rights as a principle of CIL,[42] rights such as the "right to a healthy environment" simply do not yet exist as a matter of CIL: the nations of the world have "fail[ed] to articulate a single, clear, international legal norm" as to what such rights would look like[43]; neither do most countries, in practice, recognize or implement such a right for their citizens.[44]

Yet, as reviewed above, many sets of plaintiffs have attempted to bring such claims under the ATCA. The first theory they have employed is that environmental pollution violates international law in some abstract way, without referring to any specific rights. In *Beanal*,[45] for example, the plaintiffs asserted as their claim that the mining company had committed "environmental torts" in violation of international law.[46] As support for the proposition that interna-

30. 343 F.3d at 140.

31. *Id*. at 143.

32. Cyril Kormos et al., *U.S. Participation in International Environmental Law and Policy*, 13 Geo. Int'l Envtl. L. Rev. 661, 673 (2001). *See also* John Lee, *The Right to a Healthy Environment as a Principle of Customary International Law*, 25 Colum. J. Envtl. L. 283 n.2 (2000); Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute*, 20 Suffolk Transnt'l L. Rev. 335 (1997).

33. *See* 28 U.S.C. §1350.

34. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980) (holding that, in order to make out an ATCA claim, a plaintiff must demonstrate that a defendant's alleged conduct violated "*well established*, *universally recognized* norms of international law") (emphasis added). *See also* In re Estate of Ferdinand E. Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) ("Section 1350 . . . mandates 'a violation of the law of nations' in order to create a cause of action.").

35. *See* Article 38, Statute of the International Court of Justice; Jennings & Watts, 1 Oppenheim's International Law 25-26 (9th ed. 1996).

36. Further, the *Filartiga* court urged that courts "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Filartiga*, 630 F.2d at 881.

37. Restatement (Third) of the Foreign Relations Law of the United States §102(2) (1987).

38. *See* Jack L. Goldsmith, *Scholars in the Construction and Critique of International Law*, 94 Am. Soc'y Int'l L. Proc. 317, 318 (2000) (noting that contemporary international law scholarship is "characterized by normative rather than positive argument, and by idealism and advocacy"); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. Chi. L. Rev. 1113 (1999).

39. *Filartiga*, 630 F.2d at 880 (citing United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).

40. *See* Barry E. Carter & Phillip R Trimble, International Law 1069-70 (West 3d ed. 1999) (discussing how international treaties developed to date tend to deal with "global commons" problems).

41. In the absence of an international government, core CIL principles, such as diplomatic immunity, tend to develop and stay in place only in the face of an understanding that should one country break the rules, it will have an immediate reciprocal effect felt at home. *See, e.g.*, Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 Stan. L. Rev. 811, 834 (1990) ("Even when the rules do prevent a government from doing something that it otherwise wants to do, . . . it may decide to forego the short-term advantages derived from violating those rules because it has an overriding interest in maintaining the overall system.").

42. In enforcing, for example, humanitarian conventions (the Rwanda and Yugoslavia tribunals) or CIL against official torture. *See* Regina v. Bow St. Magistrate, Ex Parte Pinochet Ugarte (No. 3), [2000] 1 AC 147 (House of Lords 1999).

43. Jennifer A. Downs, *A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right*, 3 Duke J. Comp. & Int'l L. 351, 375-76 (1993).

44. Eaton, *supra* note 15, at 297. *See also Development: International Environmental Law*, 104 Harv. L. Rev. 1609, 1609 (1991) ("The body of customary norms and international agreements that comprise the public international legal system do not provide comprehensive environmental protection.").

45. 197 F.3d at 161.

46. *Id*. at 166.

tional law contemplated such a claim, the plaintiffs cited the Rio Declaration on Environment and Development,[47] and a book by Prof. Phillipe Sands.[48] The U.S. Court of Appeals for the Fifth Circuit rejected the theory, noting that "[t]he sources of international law cited by Beanal and the amici 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."[49] Similarly, during remand in *Aguinda v. Texaco, Inc. (Aguinda II)*,[50] the U.S. District Court for the Southern District of New York rejected the notion that the pollution caused by Texaco's drilling in Lago Agrio violated, as plaintiffs simply asserted, "evolving norms of customary international law," on the grounds that the assertion of the norm "lack[ed] any meaningful precedential support."[51]

The second tactic that has been tried to bring environmental claims under the umbrella of the ATCA has been to allege that environmental harms somehow violate a category of a plaintiff's human rights that can be loosely grouped together as the "right to a healthy environment." However, many rights that members of the international human rights community urge are human rights[52] do not, in fact, rise to the level of CIL. That is, they cannot be shown to be the "general and consistent practice of states followed by them from a sense of legal obligation."[53] This includes the "right to a healthy environment." That this is the case can be shown from the sources plaintiffs cite for the "right to a healthy environment." Generally, they are either merely hortatory in nature, or don't explicitly confer the right asserted. As such, these sources have been, and should be, rejected by U.S. courts as establishing CIL that gives rise to an ATCA claim.

In *Amlon Metals, Inc. v. FMC Corp.*,[54] for example—heard before and dismissed by the Southern District of New York—the plaintiffs relied upon the Stockholm Declaration on the Human Environment,[55] a nonbinding statement of principles promulgated at the U.N. Conference on the Human Environment in Stockholm, Sweden, in 1972 to establish rights to life and health.[56] In *Rio Tinto*[57]—heard before and dismissed by the U.S. District Court for the Central District of California—the plaintiffs asserted a right to life and health based on, inter alia, the International Covenant on Civil and Political Rights (ICCPR),[58] the Universal Declaration of Human Rights,[59] and the American Declaration of the Rights and Duties of Man.[60] While the hopes expressed by all these conventions—that man should, for example, have the right to life "in general, from the moment of conception"[61]—are admirable, it is hard to conclude, based on how nations actually behave, that these rights are observed as part of the "general and consistent practice of states followed by them from a sense of legal obligation,"[62] and thus rise to the level of CIL.

The *Rio Tinto* plaintiffs also asserted a "right to sustainable development" based on one scholar's reading of the United Nations Convention on the Law of the Sea (UNCLOS).[63] The difficulty there was that while UNCLOS, as a widely ratified treaty, does establish international law as to its actual provisions, no where in the document can such a right be found.

To date, only two allegations among those asserted in the international environmental tort cases brought under the ATCA have been accepted as giving rise to a cognizable ATCA claim. The first one is one of the allegations of the *Rio Tinto* plaintiffs—that effluents from the defendant mining corporation's operations polluted the surrounding international waters in violation of the UNCLOS.[64] Second, in *Wiwa v. Royal Dutch Petroleum*,[65] the Ogoni tribesman of Nigeria succeeded in moving forward with a suit for nonenvironmental human rights violations attendant to oil exploration in the Niger Delta by Royal Dutch Shell. What distinguishes these claims, and makes them fit squarely within the *Filartiga* framework, is that they are based on recognized sources of international law. The cross-border pollution at issue in *Rio Tinto* clearly violated specific provisions of UNCLOS, and the torture alleged in *Wiwa*, it is well established, violates CIL.[66] The fact that these claims hinge on recognized international law provides courts with positive sources of law that they can interpret according to recognized principles, and therefore upon which they can feel comfortable basing decisions

47. Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151/5/Rev. 1, 31 I.L.M. 874 (1992).

48. Principles of International Environmental Law I: Frameworks, Standards, and Implementation (Phillip Sands ed., 1995).

49. *Id*. at 167.

50. 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

51. *Id*. at 552.

52. Such as, for example, a right to healthcare.

53. Restatement (Third) of the Foreign Relations Law of the United States §102(2) (1987).

54. 775 F. Supp. 668, 22 ELR 20235 (S.D.N.Y. 1991).

55. Reprinted at 11 I.L.M. 1416.

56. *Amlon Metals*, 775 F. Supp. at 671.

57. 221 F. Supp. 2d at 1116.

58. 999 U.N.T.S. 171 (Dec. 19, 1966).

59. G.A. Res. 217A, U.N. GAOR, pt. 1, at 71, U.N. Doc. A/810 (1948).

60. O.A.S. Official Rec., OEA/Ser. L./V./II.23, doc. 21 rev. 6 (1948).

61. American Convention on Human Rights, ch. 3, art. 4.

62. Restatement (Third) of the Foreign Relations Law of the United States §102(2) (1987).

63. 221 F. Supp. 2d at 1160. This, like the rights to life and health, was rejected on the grounds that the plaintiffs "failed to articulate 'a specific, universal, and obligatory' norm of the type that will support a claim for violation of the law of nations." *Id*.

64. *See id.* at 1162 ("Because UNCLOS reflects customary international law [having been ratified by 166 countries], plaintiffs my base an ATCA claim upon it."). The idea that environmental pollution *of a certain magnitude* might rise to the level of an international crime was also floated by one district court judge. *See* Aguinda v. Texaco, Inc., 1994 U.S. Dist. LEXIS 5726, at *7 (positing that "misuse of hazardous waste of sufficient magnitude" might violate international law, based on the Rio Declaration on Environment and Development). This had been rejected by another district court in the same circuit earlier, however. *See* Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 670, 22 ELR 20235 (S.D.N.Y. 1991) (in the context of a contract dispute, rejecting the theory that the toxicity of a shipment could become so high that it "present[s] imminent and substantial danger to human health and the environment" and would thus be in abrogation of international law).

65. 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002) (unpublished opinion).

66. This was established in *Filartiga* itself, and famously confirmed by the House of Lords in Regina v. Bow St. Magistrate, Ex Parte Pinochet Ugarte (No. 3), [2000] 1 AC 147 (House of Lords 1999). *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 Mich. L. Rev. 2129 (1999).

3. The *Flores* Decision and Its Impact

In *Flores*, a group of Peruvian plaintiffs sued U.S.-based Southern Peru Copper Corporation (SPCC) under the ATCA for damages stemming from "pollution from SPCC's copper mining, refining, and smelting operations in and around Ilo," Peru.[67] While the *Flores* court analyzed this claim under the *Filartiga* framework,[68] it hewed to a traditional definition of and method of deriving customary international law that not only could not accommodate the specific claim, but is all but incapable of embracing the more progressive notions of international law being advanced in ATCA suits by members of the international human rights community—including the "right to a healthy environment."

As a threshold matter, the *Flores* court held that "[CIL] is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[69] It laid down three rigid requirements for any proposed CIL rule: (1) that "States universally abide by it"[70]; (2) that "States accede to it out of a sense of legal obligation"[71]; and (3) that the "wrongs" addressed by such a rule be "'of *mutual*, and not merely *several*, concern' to States."[72] The *Flores* court also emphasized that only "concrete evidence of the customs and practices of States" would be considered evidence sufficient to establish CIL.[73] To be absolutely clear, the *Flores* court relegated "judicial decisions or the works of scholars" to a decidedly secondary status.[74] In doing so, it confronted head-on, and all but closed off, one of the more manipulable sources of CIL—academic commentary on the content of CIL, which has traditionally been identified as a source of CIL.[75] Further, the court urged that "conventions that set for broad principles without setting forth specific rules" have not been and should not be considered valid sources of binding international law.[76]

This is hardly a marked departure from the definition originally asserted by the *Filartiga* court.[77] However, the categorical manner in which the *Flores* court defined CIL, and the emphasis with which it did so,[78] signals that the Second Circuit will not accept for ATCA purposes international law principles that find their only support in academic commentary or hortatory international documents. Indeed, the *Flores* court stressed that international law principles relied upon by ATCA plaintiffs "must be more than merely professed or aspirational,"[79] or "adopted for moral or political reasons [without] a sense of legal obligation."[80]

The rights asserted by the *Flores* plaintiffs, and by almost all the environmental plaintiffs described above, fall squarely outside the international law boundaries established by the *Flores* court. In *Flores* itself, the plaintiffs made the case that they enjoyed a "right to life, health[,] and sustainable development,"[81] which the defendant corporation had violated by polluting the area in and around its copper smelting operations in Peru. They cited sources that can only show these rights to be aspirational—the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, the Rio Declaration on Environment and Development[82]—insofar as they are merely hortatory. In the words of the *Flores* court, the principles contained in these declarations "express virtuous goals, understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them."[83] The *Flores* plaintiffs also tried to assert a customary international law rule against intranational pollution.[84] Again, their main sources for this—nonbinding multinational declarations, and the opinions of academic commentators—had been specifically debunked by the *Flores* court, and were accordingly rejected.[85] In sum, the *Flores* court concluded that the Peruvian plaintiffs had "failed to submit evidence sufficient [within its framework] to establish that intranational pollution violates customary international law," and dismissed all claims.[86]

If it is not all but evident already, with the exception of the count of the *Rio Tinto* complaint alleging a specific violation of UNCLOS, and the torture allegations in *Wiwa*, none of the ATCA claims for environmental damages asserted in other federal courts would survive analysis under the *Flores* framework. Insofar as the theories advanced in those cases are: (1) based on hortatory, rather than binding, sources of law; (2) place a heavy reliance on academic commentary; or (3) concern subjects of several, rather than mutual, concern to the countries of the world, i.e., intranational pollution, they would all fail if examined by the *Flores* court. Because the Second Circuit provided the primary authority for ATCA suits to be entertained in the federal courts in the first place, in *Filartiga*, plaintiffs seeking to assert environmental ATCA suits in *any* federal circuit will be hard-pressed to at once rely on *Filartiga* and discount

67. 343 F.3d at 143.

68. *See id.* at 154.

69. *Id*.

70. *Id*.

71. *Id*.

72. *Id*. at 155 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980) (emphasis in original)).

73. *Id*. at 156.

74. *Id*. ("As we have recently stated, 'we look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practice of States.'") (quoting United States v. Yousef, 327 F.3d 56, 103 (2d Cir. 2003)); *id*. ("[T]he usage and practice of States—as opposed to judicial decisions or the works of scholars—constitute the primary sources of customary international law.").

75. *See, e.g.*, ICJ Statute, Article 38. Acknowledging its pedigree, the *Flores* court nonetheless noted that "[t]he practice of relying on international law scholars for summaries and evidence of customary international law . . . makes less sense today because much contemporary international law scholarship is 'characterized by normative rather than positive argument, and by idealism and advocacy.'" *Flores*, 343 F.3d at 157 n.26 (quoting Goldsmith, *supra* note 38, at 317, 318).

76. *See* 343 F.3d at 158 (noting their absence from the sources of international law referred to in Article 38 of the ICJ Statute).

77. *See supra* note 41 and accompanying text. *See also Filartiga*, 630 F.2d at 888.

78. *See Flores*, 343 F.3d at 154.

79. *Id*.

80. *Id*. at 154.

81. *Id*. at 143.

82. *Id*. at 161.

83. *Id*.

84. *Id*. at 161.

85. *Id*. ("[T]he voluminous documents and the affidavits of international law scholars submitted by plaintiffs fail to demonstrate the existence of any such norm of customary international law."); *id*. at *60-*90.

86. *Id*. at 172.

Flores. If the writing was on the wall after the decisions in *Aguinda*, *Rio Tinto*, *Beanal*, and the other cases cited above, it is crystal clear now that the ATCA is not and will not be, as some in the environmental community had hoped, a useful vehicle for obtaining redress for environmental harm imposed abroad. Rather, if such plaintiffs are to obtain redress in U.S. courts at all, they will have to proceed under state-law theories.

B. State-Law Claims

As an alternative to ATCA claims, foreign plaintiffs seeking redress for environmental harms that occur abroad may bring suit in the courts of individual U.S. states against U.S. corporations under state-law tort theories. Pursuing a claim in state court largely removes the largest hurdle these plaintiffs face in federal court: proving that the federal court has subject matter jurisdiction based on a cause of action under the ATCA. Because state courts are courts of general jurisdiction, it should be relatively easy for foreign plaintiffs to prove subject matter jurisdiction, as long as they can make out a violation of state law.[87]

The requirement that plaintiffs prove that the state court has personal jurisdiction over the defendant may prove a difficult hurdle to pass with respect to *foreign* corporations. However, where the claim is against a U.S. corporation, plaintiffs can always bring suit in a state where the defendant corporation is headquartered, incorporated, or has major operations, as those states' courts will have general jurisdiction over the corporation.[88]

But establishing initial jurisdiction over U.S. corporate defendants in state courts is just the beginning of the foreign plaintiff's task. Until recently, environmental claims brought by foreign plaintiffs in state courts have wandered a somewhat troubling path, led along by corporate defendants using various jurisdictional doctrines to evade parties with valid tort claims against them. Once the claim is brought in state court, corporate defendants generally seek removal to federal court on the basis of the Foreign Sovereign Immunities Act (FSIA)[89] or the federal common law of foreign relations (FCLFR) by impleading third-party defendants with ties to a foreign government.[90] The corporate defendants then move to have the case dismissed for forum non conveniens or other discretionary grounds[91]—motions to which federal courts are more receptive than state courts. If they succeed in so doing, they may go through with litigation in the host country, but then resist honoring any judgment levied abroad, on the grounds that the legal process in that country is somehow suspect or flawed.[92]

It is more possible today, however, for plaintiffs to succeed in overcoming removal actions, and subsequent evasive maneuvers on the part of defendant corporations. Plaintiffs can, of course, head off bids by defendants to remove the action to federal court under the diversity jurisdiction statute[93] by simply bringing suit where the defendant corporation is incorporated or headquartered.[94] More importantly, the recent Court decision in *Dole*[95] has made it harder for defendants to remove based on the FSIA or FCLFR. Under *Dole*, unless the foreign government has a direct interest in the project that gave rise to the environmental harm for which plaintiffs are suing, plaintiffs should succeed in defeating such removal actions. Finally, plaintiffs should succeed in surviving a motion to dismiss for forum non conveniens where they can show that the host country would not be able to provide an adequate forum for their claim—something which, though rare in general forum non conveniens analysis, is more probable with respect to many of the countries in which these environmental torts are being committed.

1. Available State-Law Theories

Foreign plaintiffs seeking redress for environmental harms that occur abroad in state courts have a number of state-law theories available to them. The most straightforward are common-law theories such as negligence, strict liability, nuisance, and trespass—claims that are commonly brought in state courts for environmental accidents that occur in the United States.[96] This was a tactic taken, for example, by the plaintiffs in *Aguinda III*, who pleaded all of these torts in the alternative to their ATCA claim for environmental damage caused by oil drilling in Ecuador.[97]

Plaintiffs may also bring suits for "toxic torts," which require them to show that the defendant corporation was the source of a toxic substance, capable of causing the plaintiffs' injury or disease, to which the plaintiffs were exposed

87. *See, e.g.*, Alomang v. Freeport-McMoran, Inc., 718 So. 2d 971 (La. Ct. App. 4th Cir. 1998) (overturning lower court's dismissal of suit for alleged environmental crimes committed by Louisiana in Indonesia for lack of subject matter jurisdiction, on the grounds that the plea also sought personal injury damages that were subject to the trial court's subject matter jurisdiction).

88. International Shoe v. Washington, 326 U.S. 310 (1945).

89. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C.A. §§1330, 1391(f), 1441(d), 1602-1611 (West 1994 & Supp. 2003)).

90. Because many foreign governments have historically required major foreign investors to engage in joint ventures with local corporations, often with government ties.

91. *See, e.g.*, Martinez v. Dow Chem. Co., 219 F. Supp. 2d 719 (E.D. La. 2002) (forum non conveniens); Patrickson v. Dole Food Co., 251 F.3d 795, 798 (9th Cir. 2001), *aff'd sub nom.* Dole Food Co. v. Patrickson, 123 S. Ct. 1655 (2003) (FSIA).

92. *See* Brooke Masters, *Case in Ecuador Viewed as Key Pollution Fight*, WASH. POST, May 5, 2003, at E1:

> U.S.-based multinational corporations often try to get cases tried in developing countries, a tactic that can kill the case entirely because most American plaintiffs lawyers have neither the money nor the expertise to sue in Third World courts. Later if the corporations lose, they often argue that the overseas legal process was flawed or that their U.S. headquarters should not be held responsible for the errors of a subsidiary in the developing world.

93. 28 U.S.C. §1332.

94. *See, e.g.*, *Dole*, 251 F.3d at 798 n.1 ("Because Dole Food Company is a citizen of the forum state, defendants could not remove based on diversity of citizenship.").

95. 123 S. Ct. at 1655.

96. *See* Christopher J. McAuliffe, *Resurrecting an Old Cause of Action for a New Wrong: Battery as a Toxic Tort,* 20 B.C. ENVTL. AFF. L. REV. 265, 267 (1993) (collecting examples of domestic cases in which "plaintiffs have litigated toxic tort actions under the common law tort theories of trespass, nuisance, negligence, strict liability, and battery.").

97. *See, e.g.*, 303 F.3d at 473 ("The complaints sought money damages under theories of negligence, public and private nuisance, strict liability . . . [and] trespass."). Note that this suit was not originally brought in state court: because they included an ATCA claim in their pleadings from the beginning, the plaintiffs filed suit in federal district court.

through the fault of the defendant corporation.[98] This theory was used by a class of Costa Rican, Honduran, and Philippino plaintiffs in *Martinez v. Dow Chemical Co.*,[99] for example, to recover for sterility and birth defects allegedly caused by exposure to the pesticide dibromochloropropane (DBCP).[100]

In addition, plaintiffs may bring claims for harms stemming from abnormally dangerous or ultrahazardous activities[101]—a cause of action that may be particularly suited to suits for environmental effects of resource-extraction operations such as the *Rio Tinto* suit. This is because: (1) they are likely to impose a high degree of risk of great harm to people and land; (2) the delicate, previously unexploited land that is drilled or mined sustains disproportionate harm as a result of such activity; and (3) the benefits to the local community are often very limited as compared to the harm done.[102] Finally, where plaintiffs can trace the environmental effects of a corporation's activities to mortalities, as in *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, in Dec. 1984*,[103] plaintiffs may bring wrongful death claims, under either common law or statute.[104]

2. Subsequent Jurisdictional Jousting

Once a claim for environmental damage abroad has been brought in state court, corporate defendants generally try to get the case removed to federal court on one of three grounds: (1) diversity jurisdiction; (2) under the FSIA; or (3) under the more nebulous FCLFR. They do this because it is more likely that a federal court will dismiss the action on discretionary grounds that take into account the foreign element of the claim, by federal judges who may be reluctant to meddle with the foreign affairs prerogatives of the political branches. However, as mentioned above, plaintiffs can head off removal based on diversity jurisdiction by simply bringing the action in a defendant corporation's home state. Further, the Court's recent opinion in *Dole* may make it more difficult for defendants to gain removal based on tactics (2) or (3).

☐ *Foreign Sovereign Immunities Act*. Defendant corporations often try to implead a third party with some link to a foreign government so that the case can then be removed to federal court. Removal can be effected by either the original defendant itself, under the FSIA,[105] which grants federal jurisdiction over any action brought against "an agency or instrumentality of a foreign state,"[106] or by the third-party defendant under 28 U.S.C. §1441, which provides that a foreign state may remove any civil action brought against it in state court to a foreign court.[107] The reasoning behind these provisions is "to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns."[108]

Dole Food and Dow Chemical were initially successful in doing this in a series of cases brought against them by foreign banana workers for exposure to DBCP[109] by impleading a chemical manufacturer, Dead Sea Bromine, which was formerly owned in part by companies owned by Israel.[110] But under newly minted Court law, defendant corporations will only be able to succeed in using the FSIA where the third party is currently directly owned by a foreign government. In *Dole*,[111] Dole was ultimately rebuffed in its attempt to remove one of the DBCP-exposure cases brought in Hawaii state court to federal court on FSIA grounds by again impleading Dead Sea Bromine.[112] The Court ruled that only *direct* ownership satisfies the requirements of the FSIA.[113] Further, it ruled that *former* instrumentality status does not count for the purposes of the FSIA,[114] because, by definition, once a company is sold, state court rulings no longer pose a threat of "crippling the

98. *See* Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 Va. L. Rev. 845, 869 (1987) (describing what plaintiffs must demonstrate to successfully prosecute a toxic tort claim).

99. 219 F. Supp. 2d 719 (E.D. La. 2002).

100. *Id*. at 721. The pesticide has been banned for use in the United States.

101. Claims for ultrahazardous or abnormally dangerous activities have been recognized in state courts for several decades. *See, e.g.*, Spano v. Perini Corporate, 250 N.E.2d 31 (N.Y. 1969) (holding that "one who engages in blasting must assume responsibility, and be liable without fault, for any injury he causes to neighboring property"). *See also* Restatement (Second) of Torts §519 (1977) ("One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity [regardless of negligence].").

102. *See* Restatement (Second) of Torts §520 (1977):

> In determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on and; (f) extent to which its value to the community is outweighed by its dangerous activities.

103. 809 F.2d 195, 17 ELR 20580 (2d Cir. 1987). The methyl isocyanate gas leak in that case caused 2,000 deaths within the first few days. *See* Andreas F. Lowenfeld, International Litigation and Arbitration 266 (2002).

104. Where the cause of action for wrongful death is granted by statute, whether the remedy will be available to foreign plaintiffs depends on the statute. In Texas, at least, the state wrongful death statute applies to foreign plaintiffs, see Pittsburgh Corning Corp. v. Walters, 1 S.W.3d 759 (Tex. App. 1999), and so would be available to any foreign plaintiffs that can trace a death to environmentally harmful action on the part of a Texas corporation.

105. Pub. L. No. 94-583, 90 Stat. 2891, codified at 28 U.S.C. §§1330, 1332(a), 1391(f), and 1601-1611 (2000).

106. *Id*. at 1603(a). This is defined to include any company that is "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id*. at 1603(b)(2).

107. 28 U.S.C. §1441(d).

108. *Dole*, 123 S. Ct. at 1663 (citing Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983)).

109. This is the litigation underlying *id*. at 1655, and Martinez v. Dow Chem. Co., 219 F. Supp. 2d 719 (E.D. La. 2002).

110. *See Martinez*, 219 F. Supp. 2d at 722 ("Following [a] Fifth Circuit [ ] decision . . . that Dead Sea [Bromine] is a 'foreign state' for the purposes of the Foreign Sovereign Immunities Act, defendants again removed the case to federal court . . . . The parties do not dispute jurisdiction.").

111. 123 S. Ct. at 1655.

112. Patrickson v. Dole Food Co., 251 F.3d 795, 805 (9th Cir. 2001).

113. *Dole*, 123 S. Ct. at 1659 (affirming the Ninth Circuit holding that "a subsidiary of an instrumentality is not itself entitled to instrumentality status," pointing out that the companies in question "were, at various times, separated from the State of Israel by one or more intermediate corporate tiers").

114. *Id*. at 1662.

proper and effective administration of foreign affairs" by a foreign government.[115]

The effect of the *Dole* ruling will be to make it relatively difficult for corporate defendants to remove to federal court based on the FSIA. Only where there *happens* to be a third party involved that is currently directly owned by a foreign government will they succeed. The most likely category of cases in which this would be possible would be resource-extraction cases, in which foreign instrumentalities are joint venture partners with the defendant U.S. corporation.[116] However, the fact that many such corporations were privatized during the 1990s may allow plaintiffs even in these cases to defeat removal under the FSIA.

☐ *FCLFR*. Another tactic taken by corporate defendants in these suits is to seek to have the case removed to federal court based on FCLFR, which, defendants urge, creates federal question jurisdiction. The theory is that under *Banco Nacional de Cuba v. Sabbatino*,[117] only federal (not state) courts are competent to apply international law, such as the act of state doctrine[118]—in other words, that international law becomes federal common law. This holding has been expanded upon in some circuits to justify removal of suits that implicate important federal foreign policy concerns, on the theory that state courts are not competent to consider such claims.[119]

Thus, the difficult cases for plaintiffs facing an FCLFR removal action are those in which foreign governments can be directly linked to the project that caused the alleged environmental damage. In *Torres v. Southern Peru Copper Corp.*,[120] for example, the Fifth Circuit affirmed the district court's assertion of federal question jurisdiction over a state tort action brought by Peruvian citizens against a U.S. company for injuries suffered from exposure to toxic gases during copper smelting and refining operations. Its reasoning was that the Peruvian government, though not a party, had participated substantially in the project because it owned the land that was mined.[121]

However, plaintiffs may succeed in overcoming motions to remove to federal court based on FCLFR where there is not such a concrete tie to a foreign government, by characterizing any link between the actions over which they brought suit and U.S. foreign policy concerns as speculative. The U.S. Court of Appeals for the Ninth Circuit, for example, rejected federal question jurisdiction for environmental torts committed abroad in *Patrickson v. Dole Food Co.* (*Dole Food Co. v. Patrickson*, as it was styled below).[122] It noted that "[t]he case—at least as framed by plaintiffs—does not require us to evaluate any act of state or apply any principle of international law," because the plaintiffs were merely seeking compensation for injuries sustained from exposure to the defendants' manufacture and use of DBCP.[123] Dole tried to argue, in response, that granting relief would both damage the host countries' banana industry which, it said, was critical to those countries, and also "cast doubt on the balance those governments have struck between agricultural development and labor safety."[124] But the Ninth Circuit dismissed this out of hand as too speculative to support granting federal question jurisdiction,[125] reasoning that if important foreign policy concerns were truly implicated, the political branches could weigh in on the controversy or pass legislation extending exclusive federal jurisdiction over such suits.[126]

☐ *Forum Non Conveniens*. As mentioned above, one of the reasons that defendant corporations seek removal to federal court is that federal courts tend to more easily grant motions to dismiss for forum non conveniens than do state courts. Most states have adopted the doctrine in some form, but a few have not.[127] Further, those states that have adopted the doctrine are not obliged to follow the federal test exactly.[128] This means that, in some states, application of the doctrine can be highly unstructured.[129] On the whole, state courts are often much less willing than federal courts to grant defendants' motions to dismiss for forum non conveniens.[130] It would be beyond the scope of this essay to survey the circumstances under which foreign plaintiffs will or will not be dismissed for forum non conveniens across all 50 states. Suffice to say, however, that foreign plaintiffs will have a better chance of surviving a forum non conveniens motion in state rather than in federal court.

When federal courts conduct forum non conveniens analysis, they must first determine if an alternate forum is available. If it is determined that such a forum is available, the

115. *Id*. (citing Spalding v. Villas, 161 U.S. 483, 498 (1896)).

116. As was Petroecuador, for example, in the mining at issue in the *Aguinda* litigation. *See* Kormos et al., *supra* note 32, at 678 n.21.

117. 376 U.S. 398 (1964).

118. *See id.* at 425-26. *See also* Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965) (holding that *Sabbatino* held that "all questions relating to an act of state are questions of federal law, to be determined ultimately, if need be, by the [Court]").

119. *See* Republic of Philippines v. Marcos, 806 F.2d 344, 353 (2d Cir. 1986) (concluding that "there is federal question jurisdiction over actions having important foreign policy implications").

120. 113 F.3d 540 (5th Cir. 1997).

121. *Id*. at 543.

122. 251 F.3d 795 (9th Cir. 2001). This part of the holding was not appealed to the Court.

123. *Id*. at 800.

124. *Id*.

125. *See id.* at 803 (emphasis added) (noting that "Congress has not . . . extend[ed] federal question jurisdiction to all suits where the FCLFR *might* arise as an issue," and declining to grant jurisdiction where FCLFR is not on face of the well pleaded complaint).

126. *Id*. at 803. *See also id.* at 804-05:

> If federal courts are so much better suited than state courts for handling cases that might raise foreign policy concerns, Congress will surely pass a statute giving us that jurisdiction. Because we see no evidence that Congress meant for the federal courts to assert jurisdiction over cases simply because foreign governments have an interest in them, we must part company with our sister circuits.

127. These include Montana, Rhode Island, and South Dakota. *See* Michael J. Jacobs, *Georgia on the Nonresident Plaintiff's Mind: Why the General Assembly Should Enact Statutory* Forum Non Conveniens, 36 GA. L. REV. 1109, 1109 (2002).

128. American Dredging Co. v. Miller, 510 U.S. 443, 457 (1994).

129. This is a complaint made about Louisiana courts. John W. Joyce, Forum Non Conveniens *in Louisiana*, 60 LA. L. REV. 293, 293 (1999):

> Louisiana, one of the first states to apply *forum non conveniens*, has been inconsistent in its treatment of the doctrine and does not seem to adhere to a reliable and workable scheme. In its most recent attempt to codify the doctrine, the Louisiana Legislature has written a somewhat loose statute.

130. *See, e.g.*, Holmes v. Syntex Laboratories, 156 Cal. App. 3d 372 (Cal. Ct. App. 1984) (reversing lower court dismissal of suit by British plaintiffs). *See also Annotation:* Forum Non Conveniens *in Product Liability Cases*, 76 ALR 22 (1990) (collecting cases in which state courts refuse to dismiss for forum non conveniens).

federal court may move on to balance the private and public interests in having the suit litigated in the court in question as opposed to that alternative forum.[131]

It is at the first stage of the analysis that foreign plaintiffs bringing environmental claims have the best chances of overcoming a motion for dismissal for forum non conveniens. Under *Piper Aircraft v. Reyno*,[132] it is ordinarily sufficient for defendants to show that there is another forum that permits litigation of the matter in dispute. In certain very rare circumstances, the alternate forum may not, however, be deemed adequate.[133]

Obviously, if, for some reason, the courts of the host country (that is, the country where the environmental damage took place) are not functioning, those courts are not available as an alternate forum. Further, if the defendant corporation is not subject to the general jurisdiction of the host country, that would, in practice, make the forum unavailable. Courts often cope with this by conditioning dismissal on an agreement on the part of the corporate defendant to submit to suit in the host country.[134]

More interestingly, if the host country is a civil-law country that automatically dismisses suits already brought in other countries, the plaintiff can meet its burden of showing that the court is not, in effect, available, because it does not permit litigation of the matter in dispute. In *Martinez*, for example, the district court denied the motion to dismiss the portion of the suit brought by Costa Rican plaintiffs because, under a provision of the Costa Rican *Code of Civil Procedure* typical of civil-law jurisdictions, Costa Rican courts do not hear cases once suit has been filed in the United States.[135] The *Martinez* court made the same finding with respect to those claims brought in the case by Philippino plaintiffs.[136]

As mentioned above, in some rare instances, courts will declare the alternate forum inadequate. Foreign plaintiffs generally are rarely able to make this showing to overcome federal forum non conveniens motions. But if the host country courts are technically open, yet poorly funded, corrupt, or otherwise unable to produce a reliable result—something that is often the case in countries where these disasters occur[137]—they may succeed. In *Martinez*, for example, the motion to dismiss the portion of the suit brought by the Honduran plaintiffs was denied because, the court found, "the judiciary is poorly staffed and equipped, often ineffective, and subject to outside influence," and "[w]hile the Government respects constitutional provisions in principle, implementation has been weak and uneven in practice."[138] The *Martinez* court also made the same finding with respect to those claims brought by Philippino plaintiffs.[139] Perhaps more damning with respect to the Philippines was the finding that the system was corrupt, systematically favoring corporate litigants.[140] However, other, lesser failings of the legal system in the country where the environmental incident took place, such as unavailability of the class action mechanism, will not be considered to render the alternate forum inadequate.[141]

Many foreign plaintiffs suing for environmental damage abroad lose, however, if and when the forum non conveniens analysis proceeds to balancing the private and public interest factors laid out by the Court in *Gilbert v. Gulf Oil*.[142] This is due to the fact that most witnesses and sources of proof are located abroad—though plaintiffs may counter this with a showing that, for example, much of the planning for the project occurred at the corporate defendant's headquarters in the United States.[143] In *Aguinda III*, for example, the court decided to dismiss, ruling that "the relative ease of access to sources of proof," the residency of the plaintiffs, the location of the injury, medical, and property records, as well as the records of the decisionmakers (all in Ecuador or

131. *See* Piper Aircraft v. Reyno, 454 U.S. 235, 254 (1981).

132. 454 U.S. 235, 255 n.22 (1981). For an example of how this has been applied in the environmental litigation context, see, e.g., Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1166 (C.D. Cal. 2002) (accepting defendant mining companies' claim that Papua New Guinea is available as an alternate forum based on expert testimony from a former colonial judge in the territory).

133. 454 U.S. at 255 n.22.

134. *See, e.g.*, Jota v. Texaco, Inc., 157 F.3d 153, 159, 29 ELR 20181 (2d Cir. 1998) (because Texaco was not subject to the jurisdiction of Ecuadoran courts, noting that "dismissal for *forum non conveniens* is not appropriate, at least absent a commitment by Texaco to submit to the jurisdiction of the Ecuadoran courts for purposes of this action"). *See also* In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, in Dec. 1984, 809 F.2d 195, 203-04, 17 ELR 20580 (2d Cir. 1987) (affirming dismissal for forum non conveniens conditioned upon Union Carbide's consent to personal jurisdiction in India, noting that such conditions "are not unusual and have been imposed in numerous cases where the foreign court would not provide an adequate alternative in the absence of such a condition").

135. *See* 219 F. Supp. 2d at 734.

136. *Id*. at 739 ("Based on this evidence, it appears to this Court that there is indeed a preemptive jurisdiction bar to plaintiffs filing suit in the Philippines on the claims herein, since they were first filed here.").

137. *See supra* note 15.

138. *Martinez*, 219 F. Supp. 2d at 737 (citing U.S. Department of State, Country Report on Human Rights Practices, Honduras 7 (2001)).

139. *Id*. at 740 ("[T]he judicial system suffers from corruption and inefficiency. Personal ties undermine the commitment of some government employees to ensuring due process and equal justice, resulting in impunity for wealthy and influential offenders.") (citing U.S. Department of State, Country Report on Human Rights Practices, Philippines 5 (2001)).

140. *Id*. ("Legal experts inside and outside the justice system criticize personal and professional relationships between some judges and individual or corporate litigants. Some lawyers act as 'case fixers,' gaining the favor of judges and other court officials and allegedly bribing some witnesses.").

141. In *Rio Tinto*, for example, the district court declined to find Papua New Guinea to be an inadequate forum, despite the "unavailability of class actions and contingency fee counsel, . . . as well as constraints on discovery." Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1170 (C.D. Cal. 2002) (collecting cases in support of this proposition from the Second, Fifth, and Eleventh Circuits).

142. The private interest factors include: (1) difficulty of obtaining sources of proof; (2) availability of witnesses; and (3) possibility of impleading third parties, as well as any other practical factors bearing on where it would be most convenient to the parties to conduct the litigation. *See* Piper Aircraft v. Reyno, 454 U.S. 235, 241 n.6, 259 (1981) (citing Gulf Oil v. Gilbert, 330 U.S. 501, 508-09 (1947)). The public factors to be considered include: (1) the extent to which the litigation clogs up U.S. courts; (2) the "local interest in having localized controversies decided at home"; (3) the interest in conducting the trial in a forum familiar with the law governing the action; (4) the extent to which moving the trial can avoid unnecessary conflict of laws problems or problems applying foreign law; and (5) the burden imposed on citizens of the forum in the form of jury duty. *Id*.

143. The plaintiffs in *Aguinda* failed to make this showing; had they, the analysis might have turned out differently. *See* Aguinda v. Texaco, Inc., 303 F.3d 470, 479, 33 ELR 20010 (2d Cir. 2002) ("[P]laintiffs have failed to establish that the parent Texaco made decisions regarding oil operation in Ecuador or that evidence of any such decisions is located in the [United States]."). Plaintiffs might have a higher chance of making this showing with respect to, for example, turnkey projects such as nuclear power plants, where the design of the entire project—not to mention training of personnel and so forth—often take place entirely in the United States.

Peru) outweighed any information that might have been located in Texaco headquarters.[144] Further, under *Piper*, federal courts may not consider those private factors that might point most strongly toward a U.S. venue for this sort of litigation. They may not weigh the possibility of a change in law unfavorable to the plaintiff,[145] and are to give little deference to the plaintiffs' choice of forum.[146] The public interest factors also tend to point toward adjudicating the dispute in the host country's courts. Defendants are able to cite toward the host country's interest in having localized controversies decided at home, as well as the fact that, given that choice of law analysis generally points toward the host country,[147] trying the case in the United States would force the judge to apply unfamiliar law.

This is not unanimous, however. In *Rio Tinto*, the district court decided to retain jurisdiction rather than dismiss the suit, finding that "the private interests favor retaining jurisdiction, and the public interests are neutral."[148] First, it found that because the defendant corporation did not specify specific witnesses that would be made unavailable if litigation proceeded in the United States, its argument that that private interest factor pointed toward dismissal was unavailing.[149] Further, it found the fact that many plaintiffs would not be able to attend trial in the United States unpersuasive, on the grounds that most of them would not be able to attend trial in Papua New Guinea's capital, either.[150] Further, it found that while the public interest factors of local interest in the controversy and avoiding imposing jury duty on residents of a jurisdiction having little relation to the controversy pointed toward dismissal,[151] the remaining public interest factors pointed toward retaining jurisdiction. Specifically, it found evidence that Papua New Guinea's courts were just as congested as U.S. courts.[152]

III. Conclusion

As discussed above, what a series of recent cases by and large rebuffing plaintiffs seeking redress under the ATCA for environmental harms has indicated was more than confirmed in *Flores*—the ATCA has not been, and will not be a fruitful route for such plaintiffs. However, with respect to state-law claims, examining the case law motion by motion yields the conclusion that foreign plaintiffs bringing environmental suits against U.S. corporations in state courts can, with vigilance, succeed in obtaining redress. This, I believe, is the right result. Until and unless CIL norms evolve to contemplate specific, intranational environmental torts or crimes, the pattern of rejection of ATCA claims for environmental harms that occur abroad is likely to continue, and in my view, should continue.

While our federal courts do, of course, routinely accept novel claims under U.S. federal or constitutional law, both their competency and, more importantly, legitimacy in doing so is greatly diminished in the international context. Creating novel claims for environmental damage within countries' borders would fly in the face of the principle of sovereignty integral to international law. The fact that this would be done by a *U.S.* judge—rather than, say, a judge sitting on an international tribunal—would be a further affront. As the *Filartiga* court warned in laying down "[t]he requirement that a rule command the 'general assent of civilized nations'" to give rise to an ATCA claim: "Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law."[153]

To make this more concrete, environmental protection and use of natural resources is an area considered to be within states' core police powers.[154] A nation's right to exploit its natural resources as it sees fit, in fact, became a major point of contention during the post-colonial era.[155] True, when a multinational corporation pollutes or otherwise harms a host country's environment, the immediate decision to pollute or to be so negligent as to risk polluting belongs to the corporation. But the choice to bring in the multinational corporation, and on what terms, belongs to the host country. As the district court noted in *Flores*, "nations generally agree that the appropriate balance between economic development and environmental protection is a matter that may be determined by each nation with respect to the land within its borders."[156]

If U.S. courts began to accept and flesh out the contours of a "right to a healthy environment," they would become freelance regulators, second-guessing what other countries should and should not allow to be done to their environment.[157] Thus, except in instances in which the host country

144. *Id*. at 479. *See also* Delgado v. Shell Oil Co., 231 F.3d 165, 169 (5th Cir. 2000) (DBCP suit dismissed for forum non conveniens); Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1216 (11th Cir. 1985) (same).

145. 454 U.S. at 256.

146. *Id*.

147. *See supra* Part II.B.

148. Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1175 (C.D. Cal. 2002).

149. *Id*. at 1173.

150. *Id*.

151. *Id*. at 1174.

152. *Id*. at 1175.

153. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).

154. *See* Rio Declaration, Principle 2:

> States have, in accordance with . . . 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.

Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, princ. 2, U.N. Doc. A/CONF.151/5/Rev. 1, 31 I.L.M. 874 (1992). *See also* Black's Law Dictionary 1178 (7th ed. 1999) (defining police powers as the inherent power of sovereigns to make all laws necessary to preserve public security, order, health, morality, and justice); Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 277, 7 ELR 20442 (1977) (noting that conservation and environmental protection measures fall within state police powers); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.").

155. This was evidenced by several efforts by developing nations in the 1960s to assert an absolute right of ownership over their natural resources. *See, e.g.*, U.N. Resolution on Permanent Sovereignty Over Natural Resources, 2 I.L.M. 223 (1963); U.N. Charter of Economic Rights and Duties of States, 14 I.L.M. 251 (1975).

156. 253 F. Supp. 2d at 521.

157. *Accord* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167, 30 ELR 20231 (5th Cir. 1999) (*Beanal II*) ("[F]ederal courts should exercise extreme caution when adjudicating environmental claims under international law to [e]nsure that environmental policies of the United States do not displace environmental policies of other governments.").

government participates in a suit in U.S. courts for environmental torts,[158] it might be seen as an impermissible invasion of sovereignty for a U.S. judge to impose higher standards of environmental law under some novel international law theory than the host country sees fit to impose itself. Only where the environmental impact of an alleged crime or tort is of mutual concern to the community of nations—that is, where it has some sort of external effect—should it rise to the level of something of which international law should take cognizance.[159]

Because there is no solid international law governing the extent of environmental damage that an individual actor may inflict, to allow these plaintiffs to proceed under the ATCA would put federal judges in the position of judging, ad hoc, how foreign governments should implement environmental regulation. Allowing claims against U.S. corporations to proceed in state courts, however, would simply involve applying the tort law of either the corporation's home state or the host country. The former situation would be a legitimate regulatory exercise on the part of the corporation's home state of its own corporations' activities. While, in the latter situation, one might be a bit trepidatious about the prospect of a U.S. judge applying foreign law, this is no different than something U.S. judges are asked to do in, for example, deciding disputes arising in many complex commercial transactions. Furthermore, because under current forum non conveniens doctrine, such suits would usually only proceed where the plaintiffs could succeed in showing that the courts of their own states are functionally inadequate, this would do justice where justice would otherwise not be done. This also makes sense from a distributional standpoint: U.S. corporations that commit environmental torts abroad should be held accountable where possible to ensure that they are not free-riding off of weak regulatory and legal structures abroad.

I offer two provisos to this conclusion: First, the fact that much of this litigation follows excessively tortuous routes ties up courts' energies far more than simply trying the case in the first place.[160] Second, defendants often seek dismissal for forum non conveniens not because they truly believe that an alternate forum would be more convenient to the parties involved, but because it may allow them to avoid going to trial or paying damages altogether.[161] State and federal courts made party to the jurisdictional jousting and other gamesmanship that ensues once state-law claims are brought in state court should develop a systematic way of coping with the manipulation to dispense with needlessly expensive multistep litigation, and to ensure that they are not used to help U.S. corporations avoid being held accountable. At the removal stage, federal courts should take the Court's cue in *Dole* and more rigorously examine whether there is truly any foreign government or foreign governmental interest involved in the litigation. This would deter corporate defendants from impleading third parties simply to be able to make foreign relations claims that matter to them *only* insofar as those claims get them into federal court. Further, at the forum non conveniens stage, state courts—which, remember, are not bound to apply the stricter federal doctrine[162]—should be alert to the prospect that corporations in their own states may be using the doctrine as a method of shirking accountability for environmental torts they commit abroad. In addition to stipulating that defendant corporations submit to the jurisdiction of foreign courts as a condition of gaining dismissal for forum non conveniens,[163] courts could, for instance, condition dismissal on waiver of any subsequent claim, absent especially compelling circumstances such as regime change, that the forum in the host country was inadequate, and the judgment should therefore not be honored by U.S. courts. This would force defendant corporations to make an honest choice as to which forum they would rather face trial in, rather than sequentially argue, in essence, that no court should hear the case against them.

158. This was, for example, the case in the *Aguinda* litigation, in which Ecuador filed a motion to intervene on behalf of the plaintiffs, submitting an affidavit stating that it sought "to protect the interests of the indigenous citizens of the Ecuadorian Amazon who were seriously affected by the environmental contamination attributed to the defendant company." Jota v. Texaco, Inc., 157 F.3d 153, 158, 29 ELR 20181 (2d Cir. 1998).

159. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980) ("It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute.").

160. Take, for an example of this, the *Aguinda* litigation. Some of its twists and turns are discussed *supra* notes 27 and 143.

161. *See supra* note 52. *See also* Andreas F. Lowenfeld, International Litigation and Arbitration 270 (2002) (noting that "nearly a decade after the decision of the [Court in Piper v. Reyno], plaintiff's application for legal aid in order to pursue their claims in Scotland was still pending and no progress had been made in the litigation").

162. *See supra* note 124 and accompanying text.

163. *See supra* note 130 and accompanying text.