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COMMENT

Sarei v. Rio Tinto: How an Exhaustion
Requirement for the Alien Tort Statute Will
Further Exhaust Remedies for Environmental
Injuries

CHERYL CORTEMEGLIA*

I. INTRODUCTION

Many new gold mines opened during the 1980s as gold prices increased after the deregulation of gold in 1971.¹ In the past decade, the global price of gold quadrupled, which has created an intensified demand for gold mining throughout the world in new locations.² This rapid increase in gold mining is adversely impacting humans and ecosystems.³ Most commercial gold mining occurs by open-pit mining, where mining companies blast rock and form large craters.⁴ Mining entities can extract gold by either agitation, amalgamation by adding mercury, or leaching the gold by pouring sodium cyanide over the crushed ore.⁵ Both mercury and cyanide are extremely harmful to humans and the environment.⁶

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1. HAROLD KIRKEMO ET AL., U.S. GEOLOGICAL SURVEY, GOLD 6, *available at* <http://pubs.usgs.gov/gip/gold/gold.pdf> (last visited Apr. 11, 2011).

2. Brook Larmer, *The Real Price of Gold: In Dollars and Suffering, It's Never Been Higher*, NAT'L GEOGRAPHIC, Jan. 2009, at 34, 42.

3. *See generally id.*

4. Christine R. Thompson, *A Multifaceted Approach to the Regulation of Cyanide in Gold Mining Operations*, 29 SUFFOLK TRANSNAT'L L. REV. 79, 84 (2005) (citation omitted).

5. KIRKEMO ET AL., *supra* note 1, at 8; Thompson, *supra* note 4, at 84 & n.26.

6. Larmer, *supra* note 2, at 60 (reporting that mercury causes severe damage to all major organs and the nervous system); Thompson, *supra* note 4, at 86–87 &

The gold mining industry is comprised of large multinational corporations that operate in developing and developed countries.⁷ The gold mining process has polluted the local waters in many countries.⁸ Many nations often do not effectively enforce or interpret their laws and regulations against transnational corporations because they do not want them to leave with jobs and money.⁹ As a result, some environmentally-injured plaintiffs have brought lawsuits in the defendants' home jurisdictions. One way U.S. federal courts can assert subject matter jurisdiction over foreign plaintiffs' tort suits is the Alien Tort Statute (ATS).¹⁰

In *Sarei v. Rio Tinto, PLC*,¹¹ an ATS suit against a gold mining company, the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, established a prudential exhaustion doctrine requiring the district court to apply a three-part test to determine if plaintiffs must exhaust local remedies before proceeding in U.S. courts.¹² In so holding, the plurality acted without explicit or unambiguous guidance from Congress, the U.S. Supreme Court, or international law,¹³ and imposed a redundant and less effective doctrine that will require further litigation.¹⁴ Despite the test's third part, this new requirement could expose parties to corruption, put suffering plaintiffs in danger, fail to conserve judicial resources, and impede justice.¹⁵ To

n.34 (noting that cyanide levels as low as one microgram per liter can be lethal in fish and, in humans, damages the thyroid gland and causes fetal malformations in pregnant women).

7. Thompson, *supra* note 4, at 79; Benjamin J. Richardson, *Protecting Indigenous Peoples Through Socially Responsible Investment*, 6 INDIGENOUS L.J. 205, 221 (2007); Larmer, *supra* note 2, at 50.

8. Larmer, *supra* note 2, at 60 (mentioning mercury contamination 100 miles away from a gold mine source).

9. Tracy M. Schmidt, Comment, *Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations' "Norms" Provide the Required Means?*, 36 CAL. W. INT'L L.J. 217, 218 (2005).

10. 28 U.S.C. § 1350 (2006); see *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 387–89 (S.D.N.Y. 2009).

11. 550 F.3d 822 (9th Cir. 2008) (en banc).

12. *Id.* at 824.

13. See *infra* Part V.C.1.

14. See *infra* Part V.A–B, D.

15. See *infra* Part V.C.2.

effectively prevent and reduce extreme environmental damage, the United States and other countries should maintain all avenues of deterrence and liability, e.g., the laws and jurisdiction of the affected state and the corporation's home state. If the Ninth Circuit had allowed the political branches to decide this issue with individual countries, the court would have more faithfully preserved separation of powers and foreign relations doctrines, reduced administrative costs, and maintained the statute's underlying policies. To ensure justice, courts should at least consider the gravity of the alleged tortious acts, stay U.S. suits, and apply equitable tolling.¹⁶

II. THE DISTRICT COURT AND NINTH CIRCUIT PANEL DECISIONS

In the 1960s, a British corporation and an Australian corporation (collectively "Rio Tinto"), as part of an international mining group headquartered in London, decided to build a copper and gold mine in Panguna village on Bougainville in Papua New Guinea (PNG).¹⁷ Rio Tinto established a PNG majority-owned subsidiary called Bougainville Copper Limited (BCL),¹⁸ which entered into a formal agreement with the PNG government to regulate mine waste pollution and disposal.¹⁹ While operating the mine, Rio Tinto allegedly destroyed large sections of rain forest and a river valley, produced more than one billion tons of waste rock, and polluted drinking and bathing water, a river, and a bay.²⁰ Local citizens protested the environmental degradation and blew up the mine's infrastructure and machinery.²¹ In response to BCL threats to withdraw investments, the PNG government sent in defense forces.²² Rio Tinto supplied vehicles, transported troops, and provided

16. *See infra* Part V.D.2.

17. *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1121 (C.D. Cal. 2002).

18. *Id.* at 1121.

19. *Id.* at 1121–22.

20. *Id.* at 1122–24, 1162. When the mine opened in 1972 it was about seven kilometers wide and one-half kilometer deep. *Id.* at 1122. The tailings and chemicals from the copper concentrator were dumped into the river. *Id.* at 1123. The chemicals from the concentrator contained aluminum, arsenic, cadmium, copper, lead, and mercury. *Id.* at 1123 n.31.

21. *Id.* at 1124–25.

22. *Id.* at 1126. The mine provided eighteen percent of PNG's total annual revenue and ten percent of its GDP. *Id.* at 1125–26 n.60.

economic assistance.²³ After the PNG army killed many civilians, a civil war ensued for ten years that killed more than ten thousand civilians.²⁴ PNG formalized a peace accord to end the war in 2002.²⁵ On November 2, 2000, Alexis Sarei, a California resident who lived on Bougainville between 1973 and 1987, and twenty-one PNG residents filed a class action in the U.S. District Court for the Central District of California asserting human rights and international environmental claims under the ATS.²⁶

The U.S. District Court held that the ATS did not have an exhaustion of local remedies prerequisite based on (1) the ATS's text and legislative history, (2) that domestic law does not impose the requirements of international law or other nations' laws, and (3) that Congress did not intend to impose an exhaustion requirement on ATS claims that fall outside the scope of the Torture Victim Protection Act (TVPA).²⁷ It held that it had subject matter jurisdiction as the United Nations Convention on the Law of the Sea (UNCLOS) represented the "law of nations" for ATS jurisdiction.²⁸ Plaintiffs asserted violations of UNCLOS Articles 194(2) and 207, which require States to take all measures and adopt laws and regulations to prevent and reduce marine pollution.²⁹ It represented the law of nations because the U.S. signed it, 166 nations have ratified it, and the Supreme Court stated the United States "has recognized that its baseline provisions

23. *Id.* at 1126.

24. *Id.* at 1126–27.

25. *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 825 (9th Cir. 2008) (en banc).

26. *Sarei*, 221 F. Supp. 2d at 1127; *Sarei*, 550 F.3d at 825–26. Courts also call the statute the Alien Tort Claims Act. 221 F. Supp. 2d at 1130 n.90.

27. *Sarei*, 221 F. Supp. 2d at 1135–39, 1162.

28. *Id.* at 1131, 1162.

29. *See id.* at 1161; U.N. Convention on the Law of the Sea, arts. 194(2), 207 *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3, 478–79, 481–82 [hereinafter UNCLOS] (entered into force Nov. 16, 1994), *available at* http://treaties.un.org/doc/Treaties/1994/11/19941116%2005-26%20AM/Ch_XXI_06p.pdf. PNG ratified it on Jan. 14, 1997. United Nations, *United Nations Convention on the Law of the Sea*, U.N. TREATY COLLECTION (Apr. 19, 2011), http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en.

reflect customary international law” and are binding on all signatory and non-signatory nations.³⁰

The district court declined to dismiss the case under the forum non conveniens doctrine because the case was brought under the ATS and alleges violations of international, not PNG, law and although PNG was an adequate forum because defendants were amenable to process, the claims were cognizable, contingency fees were available, lawyers were able to advance costs,³¹ and it deferred to the plaintiff’s forum selection as the U.S. Supreme Court has recommended,³² especially as the plaintiffs could face “grave harm” in PNG and might not be able to secure counsel nor compel the production of critical witnesses or documents in PNG.³³ The district court dismissed the UNCLOS claim on act of state grounds because if Rio Tinto was a state actor due to its connection with the government, it would have to adjudicate PNG’s official acts.³⁴ It dismissed all of the claims under the political question doctrine for the same reasons and because it might announce a view contrary to the Attorney General’s Statement of Interest and thus would “express a lack of respect” and cause “embarrassment from multifarious pronouncements.”³⁵ The Statement of Interest declared continued adjudication risked the PNG peace process and hence foreign relations.³⁶ The court dismissed the environmental claims under the international comity doctrine because of a threshold conflict between the ATS and PNG’s Compensation Act and the Statement of Interest shows that the U.S.’s interests are not inconsistent with PNG’s interest.³⁷

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit decided that U.S. courts had subject matter jurisdiction under the ATS,³⁸ after the Supreme Court decided *Sosa v. Alvarez-*

30. *Sarei*, 221 F. Supp. 2d at 1161.

31. *Id.* at 1165–66, 1169–70, 1175.

32. *Id.* at 1172.

33. *Id.* at 1173–74.

34. *Id.* at 1188.

35. *Id.* at 1181, 1196–99, 1208–09.

36. *Id.* at 1181.

37. *Id.* at 1201, 1204–07.

38. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1203 (9th Cir. 2007).

Machain.³⁹ The panel further held that the district court erred in dismissing all of the claims under the political question doctrine.⁴⁰ None of the *Baker* factors were implicated because resolution of ATS claims had been constitutionally entrusted to the judiciary, little U.S. involvement meant the claims “merely ‘touch[ed] foreign relations,’” the Executive Branch did not explicitly request dismissal, and subsequent PNG government letters suggested a different reality in PNG.⁴¹ The panel vacated to the district court for reconsideration of the dismissals of the UNCLOS claim under the act of state *Sabbatino* policies and international comity Restatement (Third) of Foreign Relations Law section 403(2) factors because the Statement of Interest did not implicate great foreign policy concerns.⁴² The panel affirmed the district court’s conclusion that no exhaustion requirement presently existed and deferred to Congress or the Supreme Court to impose one, if warranted.⁴³ The panel relied on the following reasons: The ATS’s text contained no explicit requirement, the legislative history of the ATS was silent, and a treaty signed six years after Congress enacted the ATS did require exhaustion;⁴⁴ Congress’s placement of an exhaustion requirement in the 1991 Torture Victim Protection Act (TVPA), but not altering or mentioning a similar requirement for the ATS suggests ambiguousness or that Congress did not intend an ATS exhaustion requirement;⁴⁵ Congress stated that the ATS should “remain ‘intact’ and ‘unchanged’” and the TVPA was a specific act unlike the general ATS.⁴⁶ The panel failed to prudentially require exhaustion for the following reasons: the Supreme Court has called for judicial caution; the ATS’s “law of nations” language applies to substantive, not procedural, international law; international law has only required exhaustion in international tribunals; rulings might encourage foreign countries to improve their legal systems; and exhaustion would

39. 542 U.S. 692 (2004).

40. *Sarei*, 487 F.3d at 1197.

41. *Id.* at 1204, 1207 & n.15.

42. *Id.* at 1197, 1210, 1213.

43. *Id.* at 1197.

44. *Id.* at 1214–15.

45. *Id.* at 1218.

46. *Id.*

necessitate “sensitive inquiries into the internal affairs of other countries.”⁴⁷

Judge Bybee dissented because he would have affirmed the district court’s dismissal of the suit, but on different grounds; he would have required plaintiffs exhaust local remedies before proceeding in U.S. courts.⁴⁸ He contended that Congress had not statutorily precluded exhaustion, international norms and law required exhaustion, and, alternatively, judicial discretion should require exhaustion to promote comity, preserve separation of powers in the realm of foreign affairs, allow foreign courts to apply their expertise and correct procedural errors, refine issues, develop the record, and prevent diplomatic and local tensions.⁴⁹ He said that if the exhaustion requirement in the TVPA was a new requirement, Congress would have commented on it.⁵⁰ He stated the *Sosa* Court urged caution only to prevent adverse foreign policy consequences and limitations on foreign government power over their own citizens.⁵¹

Before the district court reconsidered its UNCLOS claim dismissals under the act of state and international comity doctrines, the Ninth Circuit ordered the case be heard en banc.⁵²

III. LEGAL BACKGROUND

Courts have applied strenuous barriers to ATS suits in terms of subject matter jurisdiction⁵³ and justiciability doctrines.⁵⁴ U.S. courts have not previously used an exhaustion doctrine to dismiss an ATS suit.⁵⁵

47. *Id.* at 1219–23, 1222 n.33.

48. *Id.* at 1224–25, 1246 (Bybee, J., dissenting).

49. *Id.* at 1225–26, 1238–39.

50. *Id.* at 1228.

51. *Id.* at 1230 n.7.

52. *Sarei v. Rio Tinto, PLC*, 499 F.3d 923, 924 (9th Cir. 2007), *reh’g granted*, 550 F.3d 822, 826 (9th Cir. 2008) (en banc).

53. *See infra* Part III.A.

54. *See infra* Part III.B-C.

55. *See infra* Part III.D.

A. *Subject Matter Jurisdiction for the Alien Tort Requires Violation of a U.S. Treaty or the “Law of Nations”*

The Alien Tort Statute provides jurisdiction for tort suits brought by foreigners alleging violations of a U.S. treaty or the “law of nations.” The U.S. Constitution grants Congress the “Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations” and grants jurisdiction to federal courts over federal questions and over suits between a U.S. citizen or state and a foreign citizen or state.⁵⁶ Pursuant to these jurisdictional grants, in 1789, Congress enacted the Alien Tort Statute (ATS), which provides U.S. federal district courts with “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.”⁵⁷ A treaty must be self-executing and sufficiently specific unless Congress specifically creates a cause of action to bring an ATS suit.⁵⁸ Courts have debated if the “law of nations” is composed of “definable, obligatory (rather than hortatory) and universally condemned” torts or only *jus cogens* norms.⁵⁹ In 1980, in the often-cited *Filartiga v. Pena-Irala* opinion,⁶⁰ the Second Circuit concluded

56. U.S. CONST. art. I, § 8, cl. 10, art. III, § 2.

57. See 28 U.S.C. § 1350 (2006); *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

58. See 28 U.S.C. § 1331 (2006); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(3)–(4) (1987).

59. Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745, 764–67 (2004); *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000), *rev’d in part and remanded*, 395 F.3d 932, 945 & n.15 (9th Cir. 2002). *Jus cogens* norms are those that are “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1098 (N.D. Cal. 2008) (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (entered into force on Jan. 27, 1980))).

60. 630 F.2d 876 (2d Cir. 1980).

that courts must interpret customary international law as it has evolved and exists among the world's nations today.⁶¹

Since *Filartiga*, courts have found that international environmental agreements, U.S. domestic environmental law, the Restatement (Third), and non-intentional cultural genocide resulting from environmental damage do not constitute “the law of nations.” In 1991 in *Amlon Metals, Inc. v. FMC Corp.*,⁶² in a case between two U.S. corporations involving the shipment of toxic materials to a foreign country, the Southern District of New York concluded that Stockholm Declaration Principle 21 and Restatement (Third) section 602(2) do not constitute the law of nations because Principle 21 was only a general responsibility to avoid environmental harm outside a state's borders and the Restatement reflected U.S. views, not universal views, on environmental law.⁶³ Three years later in a suit by Ecuadoran plaintiffs against a U.S. oil company for oil contamination in their country, that court found that U.S. environmental statutes were only evidence of U.S. adherence to international commitments to control pollution.⁶⁴

In 1999, the Fifth Circuit in *Beanal v. Freeport-McMoran, Inc.*⁶⁵ concluded that cultural genocide from gold mine pollution of water and vegetation is not a violation of the law of nations because the plaintiff failed to allege purposeful destruction of the indigenous society, and cultural genocide is not a universally accepted norm.⁶⁶

61. *Id.* at 881. Customary international law is “defined as international norms that most States have adopted and recognized as mandatory legal obligations.” Bradford Mank, *Can Plaintiffs Use Multinational Environmental Treaties as Customary International Law to Sue Under the Alien Tort Statute?*, 2007 UTAH L. REV. 1085, 1090 (2007).

62. 775 F. Supp. 668 (S.D.N.Y. 1991).

63. *Id.* at 671, 669–71 & n.2; United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, princ. 2, A/CONF.151/26 (Vol.1) (June 14, 1992) [hereinafter *Rio Declaration*], available at <http://www.un-documents.net/rio-dec.htm>.

64. See *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (VLB), 1994 U.S. Dist. LEXIS 4718, at *23–25 (S.D.N.Y. Apr. 11, 1994), *dismissed*, 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001), *modified and aff'd*, 303 F.3d 470 (2d Cir. 2002).

65. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

66. *Id.* at 163–68.

That court also held that the polluter pays, precautionary, and proximity principles do not constitute the law of nations because they are only general responsibilities “devoid of articulable or discernible standards and regulations to identify practices that constitute international environmental abuses or torts.”⁶⁷ It alluded that it would have reached a different decision for transboundary harm.⁶⁸ In 2001 and 2003, in *Flores v. Southern Peru Copper Co.*,⁶⁹ in a suit against a copper mine company for Peruvians’ respiratory illnesses from intra-national pollution, the Southern District of New York and Second Circuit determined that the Rio Declaration Principle 1 failed to constitute the law of nations because it is also too vague to identify the prohibited conduct.⁷⁰ It further held that Rio Declaration Principle 2 recognizes that nations have the sovereign right to exploit their own resources and general statements of rights to life and health in three human rights international agreements are too vague.⁷¹

In 2004, the U.S. Supreme Court in *Sosa v. Alvarez-Machain*⁷² limited the ATS’s scope as a jurisdictional statute that created no new causes of action and as “based on the present-day law of nations [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 we have recognized.”⁷³ Those 18th century paradigms were offenses against ambassadors, violation of safe conducts, and piracy.⁷⁴ Justice Breyer mentioned that U.S. courts have recognized crimes against humanity, genocide, slavery, torture, and war crimes as rising to such a level.⁷⁵ Subsequent to *Sosa*, the Central District of California in *Sarei* followed *Amlon*

67. *Id.* at 167; see *Rio Declaration*, *supra* note 63, princs. 14, 15, 16 for definitions of the polluter pays, precautionary, and proximity principles.

68. *Beanal*, 197 F.3d at 167 & n.6.

69. *Flores v. S. Peru Copper Co.*, 253 F. Supp. 2d 510 (S.D.N.Y. 2002), *aff’d*, 414 F.3d 233 (2d Cir. 2003).

70. *Id.* at 519, 521–25, *aff’d*, 414 F.3d at 254–55. “Human beings are . . . entitled to a healthy and productive life in harmony with nature.” *Rio Declaration*, *supra* note 63, princ. 1.

71. *Flores*, 253 F. Supp. 2d at 519, 521–25, *aff’d*, 414 F.3d at 254–55.

72. 542 U.S. 692 (2004).

73. *Id.* at 725.

74. *Id.* at 715.

75. *Id.* at 762 (Breyer, J., concurring).

Metals and *Flores* to find that the Stockholm Declaration Principle 21 and the analogous Rio Declaration Principle 2 do not qualify as the law of nations.⁷⁶

B. *U.S. Courts have Dismissed ATS Claims, Including Environmental Claims, for Justiciability Reasons*

Courts have dismissed ATS cases for justiciability reasons, including the forum non conveniens, political question, act of state, and international comity doctrines.

Forum non conveniens is a conflict of law principle that permits a forum to cede jurisdiction to a more adequate forum that is both more convenient and will better ensure serving the goals of justice.⁷⁷ U.S. courts apply a two-part analysis in which they: (1) determine if an alternative forum is available, and (2) determine if the alternative forum is adequate.⁷⁸ Courts evaluate the private interests of the litigants and the public interests.⁷⁹ The private interests include the sources of proof, availability of compulsory process for witnesses, cost of obtaining willing witnesses, possibility to view relevant premises, and other practical problems that make trial expeditious, easy, and inexpensive.⁸⁰ The public interests include the administrative burden on alternative courts, burden of jury duty on a community not related to the litigation, the law to be applied, and the local interest in the case's outcome.⁸¹

U.S. courts dismissed the *Aguinda* Ecuadoran oil pollution and *Flores* Peruvian copper pollution ATS cases because of access to evidence and witnesses who speak many dialects and lower burdens on less-related jurors and courts and Peru allowed contingent fee arrangements, was not too corrupt, and Peruvian law likely would

76. *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1156–60 (C.D. Cal. 2002).

77. Simon Chesterman, *The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations—The Case of Norway's Sovereign Wealth Fund*, 23 AM. U. INT'L L. REV. 577, 597 (2008).

78. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 & n.22 (1981).

79. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

80. *Id.*

81. *Id.* at 508–09.

control.⁸² The Ninth Circuit failed to dismiss a non-ATS case alleging common law torts for oil byproduct water pollution because (1) Peru was not more convenient because of the substantive and procedural law, barriers confronting indigenous plaintiffs, possible lack of more than nominal damages, and dismissal of 126 corrupted judges in 2007 from widespread lobbying and improper favors, (2) a strong presumption for plaintiff's choice, (3) the district court abused its discretion in dismissing without imposing mitigating conditions, such as requiring waiver of statute of limitations and enforceability of Peruvian judgment defenses, and (4) the non-profit organization co-plaintiffs were headquartered in California and California was the location of business decisions.⁸³

Under the political question doctrine a court assesses if adjudication is appropriate or may interfere with the legislative or executive branches' constitutional or policy authority.⁸⁴ In *Baker v. Carr*,⁸⁵ the Supreme Court articulated six factors to consider: the textual constitutional commitment of an issue to a political department, lack of judicially discoverable and manageable standards to resolve the issue, requirement of an initial non-judicial policy determination, lack of respect to coordinate branches from adjudication, need to adhere to a political decision made, and embarrassment potential from various departments' pronouncements.⁸⁶ *Baker* cautioned against implying that all questions involving foreign relations are political questions.⁸⁷ In *Japan Whaling Ass'n v. American Cetacean Society*,⁸⁸ the Supreme

82. *Aguinda v. Texaco*, 303 F.3d 470, 473–80 (2d Cir. 2002); *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 526–44 (S.D.N.Y. 2002), *aff'd on other grounds*, 414 F.3d 233, 266 (2d Cir. 2003). Two other tort cases arising from environmental harm were dismissed on similar forum non conveniens grounds. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986), *modified*, 809 F.2d 195, 205–06 (2d Cir. 1987); *Torres v. S. Peru Copper Corp.*, 965 F. Supp. 899, 909 (S.D. Tex. 1996).

83. *Carijano v. Occidental Petroleum Corp.*, 548 F. Supp. 2d 823, 835 (C.D. Cal. 2008), *rev'd*, 626 F.3d 1137, 1147–48, 1151–52, 1153, 1157 (9th Cir. 2010).

84. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

85. 369 U.S. 186 (1962).

86. *Id.* at 217.

87. *Id.* at 211.

88. 478 U.S. 221 (1986).

Court held that despite the dominance of the Executive Branch over foreign relations matters, U.S. courts have the authority to interpret treaties and executive agreements.⁸⁹ In 2005, the Ninth Circuit in *Alperin v. Vatican Bank*⁹⁰ found this doctrine did not bar ATS claims because the suit implicated none of the *Baker* factors as courts often handle cases involving international elements.⁹¹ Some courts have dismissed ATS claims, however, for the lack of respect factor if the Executive has established agreements and alternative forums for compensation or if they are foreseeable.⁹²

The judicially-created act of state doctrine allows a court to respect foreign states by refusing to sit in judgment and declare invalid the acts of another state committed within its territory.⁹³ The U.S. Constitution and international law do not compel the doctrine, but it possesses constitutional underpinnings—separation of powers concerns of the Executive’s foreign relations authority.⁹⁴ In *Banco de Nacional De Cuba v. Sabbatino*,⁹⁵ the Court enunciated three factors courts should consider—the degree of codification or consensus of the particular area of international law, the importance for our foreign relations, and whether or not the perpetrating government still exists.⁹⁶ Most cases that proceeded without this doctrine precluding it involved former officials no longer in power.⁹⁷ The doctrine applies

89. *Id.* at 230 (holding that the political question doctrine did not prevent adjudication of whether the Secretary of Commerce could repudiate a whaling convention).

90. 410 F.3d 532 (9th Cir. 2005).

91. *Id.* at 554, 558.

92. See *Vietnam Ass’n for Victims of Agent Orange/Dioxin v. Dow Chem. Co. (In re Agent Orange Product Liab. Litig.)*, 373 F. Supp. 2d 7, 72–79 (E.D.N.Y. 2005), *aff’d*, 517 F.3d 104, 108 (2d Cir. 2008); *Alperin*, 410 F.3d at 554–58; *Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d 57, 73–74 (2d Cir. 2005) (similar dismissal for FSIA claim).

93. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 cmt. a (1987); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972).

94. *Banco de Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 cmt. a (1987).

95. 376 U.S. 398 (1964).

96. *Id.* at 428, 436–37; see *Doe I v. Qi*, 349 F. Supp. 2d 1258, 1295 (N.D. Cal. 2004).

97. *Qi*, 349 F. Supp. 2d at 1304.

only to *valid* acts of sovereign nations that do not violate the fundamental laws of the foreign sovereign.⁹⁸ The act of state doctrine was inapplicable to ATS claims for environmental violations at an Indonesian gold mine because the court did not need to decide the validity of Indonesian government acts.⁹⁹ In *Doe I v. Qi*,¹⁰⁰ the Northern District of California dismissed ATS damage and injunctive claims because the suit was against sitting officials, but failed to dismiss a declaratory claim because of minimal interference with the Executive Branch.¹⁰¹ Two U.S. courts failed to dismiss claims for violations of *jus cogens* norms when the State Department disapproved and sanctioned the acts, despite that the violating government still existed or was investigating the acts.¹⁰²

Similarly, the judicially-created international comity doctrine allows courts to defer to competent foreign adjudication.¹⁰³ In *Hilton v. Guyot*,¹⁰⁴ the U.S. Supreme Court clarified it is unavailable when its application is contrary to that nation's policy or prejudicial to its interests.¹⁰⁵ The Court said that fraud, prejudice, violating the principles of international law, or violating the United States's own comity are all reasons not to give foreign adjudication full credit and effect.¹⁰⁶ The Restatement (Third) section 403 describes factors that courts should consider, including the interests of each state and degree of conflict in each state's laws: (a) the location of the act and effects on the regulating state, (b) the connections between the regulating state and parties, (c) the importance of regulation to the regulating state, character of the regulated activity, extent other states regulate such activities, and general acceptance of such regulation,

98. *Id.* at 1292–93; Mank, *supra* note 61, at 1099; *see* *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980).

99. *Alomang v. Freeport-McMoran, Inc.*, No. 96 Civ. 2139, 1996 U.S. Dist. LEXIS 15908, at *2, 16–17 (E.D. La. Oct. 17, 1996).

100. 349 F. Supp. 2d 1258, 1306 (N.D. Cal. 2004).

101. *Id.* at 1264, 1306.

102. *E.g.*, *Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 334 n.1, 354 (C.D. Cal. 1997); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293, at *92–94 (S.D.N.Y. 2002).

103. *Hilton v. Guyot*, 159 U.S. 113, 163–64, 205–06 (1895).

104. 159 U.S. 113 (1895).

105. *Id.* at 165.

106. *Id.* at 206.

(d) the existence of justified expectations that might be protected or hurt, (e) the importance of the regulation to the international legal, political, or economic system, (f) the extent the regulation is consistent with international system traditions, (g) the extent another state may have interest in regulating, and (h) the likelihood of conflict with another state's regulation.¹⁰⁷ Justice Breyer suggested courts should apply the doctrine to limit ATS cases to universally condemned heinous crimes for which courts recognize universal jurisdiction.¹⁰⁸ The Court in *Hilton*, however, stated the doctrine's function is to promote justice between individuals and friendly interactions among sovereigns.¹⁰⁹

Two cases, including *Sequihua v. Texaco, Inc.*,¹¹⁰ were dismissed for international comity grounds when the parties were residents of a foreign state, the activity and harm occurred entirely in a foreign state, foreign enforcement of a U.S. judgment was questionable, the foreign State regulated the challenged conduct, U.S. litigation would have interfered with the foreign State's sovereign right to control its territory, and the foreign State objected to U.S. jurisdiction.¹¹¹ Two courts found U.S. companies' executive decisions in New York insufficient to overcome the *Sequihua* or Restatement (Third) section 403 factors.¹¹² Three courts determined that international comity may be required when a foreign state's law would apply and there would be a conflict between domestic and foreign law.¹¹³ The Southern District of New York stated that if true

107. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2) (1987).

108. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761–63 (2004) (Breyer, J., concurring).

109. *See Hilton*, 159 U.S. at 206.

110. 847 F. Supp. 61 (S.D. Tex. 1994).

111. *E.g., id.* at 63; *Jota v. Texaco, Inc.*, 157 F.3d 153, 160–61 (2d Cir. 1998), *vacated partly on these grounds*, *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 & n.4 (2d Cir. 2002).

112. *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627–28 (S.D.N.Y. 1996), *aff'd*, 303 F.3d 470 (2d Cir. 2002); *Torres v. S. Peru Copper Corp.*, 965 F. Supp. 899, 908–09 (S.D. Tex. 1996), *aff'd*, 113 F.3d 540, 542–44 (5th Cir. 1997).

113. *See Chavez v. Carranza*, 559 F.3d 486, 495 (6th Cir. 2009); *Marsoner v. United States (In re Grand Jury Proceedings)*, 40 F.3d 959, 964 (9th Cir. 1994) (noting the conflict must be that the foreign law would bar compliance with the U.S. court order); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 283 (S.D.N.Y. 2009).

conflict exists, the decision to dismiss depends on the degree of legitimate offense to the foreign State, steps the foreign sovereign took to address the issues, and the extent of the United States's interest in the issues.¹¹⁴ That court found the lack of conflict was dispositive to the decision not to dismiss for international comity.¹¹⁵ The Central District of California denied dismissal based on comity grounds when the United States had interests in adjudication, the foreign State's interest was low, and the alternative forum was inadequate.¹¹⁶

C. U.S. Courts Have Used the International Abstention Doctrine to Stay Suits When Foreign Suits are Actually Pending

The international abstention doctrine allows a court to stay or dismiss an action when *parallel* judicial proceedings are *actually* pending in a foreign court¹¹⁷ to protect the interests of foreign states and simplify issues while preserving rights and protecting parties. The international abstention doctrine is based on either the domestic *Colorado River*¹¹⁸ or *Landis*¹¹⁹ doctrines that consider judicial economy and fairness to parties.¹²⁰ Under *Colorado River*, abstention is the exception for exceptional circumstances, not the rule.¹²¹ The *Colorado River* factors that courts balance are: (1) whether either court has assumed jurisdiction over a *res*, (2) the relative convenience

114. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 283.

115. *Id.* at 285.

116. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1161–64 (C.D. Cal. 2005). Justice Breyer has stated that international comity concerns lessen when conduct involves a country's own nationals. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring).

117. *Mujica*, 381 F. Supp. 2d at 1157 (emphasis added).

118. *Id.* at 1157; *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1, 13–17, 19 (1983); *see also* *Ingersoll Milling Mach. Co. v. Granger*, 883 F.2d 680, 685 (7th Cir. 1987); *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898 (7th Cir. 1999); *Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459, 467 (6th Cir. 2009).

119. *Landis v. North Am. Co.*, 299 U.S. 248 (1936).

120. Jocelyn H. Bush, Comment, *To Abstain or Not to Abstain?: A New Framework for Application of the Abstention Doctrine in International Parallel Proceedings*, 58 AM. U.L. REV. 127, 130–31 & nn.15 & 17 (2008).

121. *Mujica*, 381 F. Supp. 2d at 1155, 1158 (citing *Colo. River Water Conservation Dist.*, 424 U.S. at 813).

of the forums, (3) the desirability of avoiding piecemeal litigation, (4) the order in which the forums obtained jurisdiction, (5) which law controls, (6) the adequacy of the parallel proceeding to protect the parties' rights, (7) the relative progress of the proceedings in each court, and (8) the vexatious or contrived nature of the federal claim.¹²² In *Landis*, abstention was appropriate to settle issues in the case, "simplify" the issues, and consider the length of the stay and hardship or inequality with going forward with the claim.¹²³

Several U.S. courts have failed to abstain under *Colorado River* while foreign suits were pending. In *Answers in Genesis of Kentucky, Inc. v. Creation Ministries International, Ltd.*,¹²⁴ the Sixth Circuit failed to abstain in a suit brought after an Australian defendant brought suit in Australian courts under *Colorado River*—the statute at issue did not clearly articulate policy against bifurcated litigation, both States were parties to the relevant international agreement, the Australian proceeding was in its initial stages of considering jurisdictional and venue defenses, witnesses resided in both States, the international law was unambiguous, and no sovereign was a party.¹²⁵ Similarly, in *General Motors Corp. v. Ignacio Lopez de Arriortua*,¹²⁶ the Eastern District of Michigan denied a stay of the U.S. proceeding under *Colorado River* while a German proceeding was pending because the claims were not identical as the German suit did not include Michigan common law or statutory claims and convenience and the parties' interests weighed in favor of the U.S. forum.¹²⁷ In *Johns Hopkins Health System Corp. v. Al Reem General Trading & Co.'s Representation Establishment*,¹²⁸ the court declined to dismiss U.S. jurisdiction because the U.S. forum was more convenient for the plaintiffs and not inconvenient for the defendants, no piecemeal litigation existed, the United Arab Emirates case had

122. See *id.* at 1158; *Finova Capital Corp.*, 180 F.3d at 898, 900 (citing *Colo. River Water Conservation Dist.*, 424 U.S. at 818; *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 23, 26; *Sverdup Corp. v. Edwardsville Cmty. Unit Sch. Dist. No. 7*, 125 F.3d 546, 549–50 (7th Cir. 1997)).

123. Bush, *supra* note 120, at 141–42.

124. 556 F.3d 459 (6th Cir. 2009).

125. *Id.* at 467–69.

126. 948 F. Supp. 656 (E.D. Mich. 1996).

127. *Id.* at 669.

128. 374 F. Supp. 2d 465, 474 (D. Md. 2005).

not progressed much, Washington D.C. contract law applied, and the United Arab Emirates proceedings were not adequate to protect the parties' rights.¹²⁹ The proceedings were inadequate to protect parties' rights because the court had not addressed a forgery issue, it spent almost two years assessing damages, and grammatical evidence of forgery might be overlooked in translation of documents to a second language.¹³⁰ In *Mujica v. Occidental Petroleum Co.*,¹³¹ the Central District of California failed to stay an ATS suit for deaths allegedly caused by Colombian military bombing performed to protect oil production facilities and pipelines because the foreign action would not resolve the U.S. suit.¹³²

D. *U.S. Courts Have Not Previously Required Exhaustion in an ATS Case*

The exhaustion doctrine governs the timing of federal-court jurisdiction, similar to abstention and ripeness.¹³³ U.S. administrative law often requires exhaustion of internal administrative remedies before plaintiffs seek judicial relief in courts.¹³⁴ The exhaustion doctrine is a common principle in international law¹³⁵ and requires a foreign plaintiff to first exhaust any remedies available in the foreign domestic legal system.¹³⁶ U.S. courts have not previously imposed an

129. *Id.* at 474–75.

130. *Id.* at 475.

131. 381 F. Supp. 2d 1134 (C.D. Cal. 2005).

132. *Id.* at 1134, 1138, 1158.

133. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992).

134. *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1136 n.104 (C.D. Cal. 2002); *Honig v. Doe*, 484 U.S. 305, 326–27 (1988); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938); *cf.* S. REP. NO. 102-249, at 9 (1991).

135. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422–23 (1964); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 703 cmt. d & reporters' note 6, 713 & cmts. b, f & reporters' note 5, 902 cmt. k (1987).

136. *Sosa*, 542 U.S. at 733 n.21; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 713 cmt. f (1987) (“Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.”). *But see* note 216 and accompanying text.

exhaustion requirement in an ATS case.¹³⁷ Some U.S. courts have skirted the issue by finding exceptions to the doctrine.¹³⁸ In a footnote, the U.S. Supreme Court said they would “consider this requirement in an appropriate case.”¹³⁹

IV. THE EN BANC NINTH CIRCUIT COURT’S REASONING

In *Sarei v. Rio Tinto, PLC*,¹⁴⁰ a plurality of the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, held that a three-step prudential exhaustion analysis is required for cases arising under the Alien Tort Statute and remanded the case to the district court to perform that analysis.¹⁴¹ The first step is a threshold step.¹⁴² If a court determines that the “nexus” to the United States is weak, then the court should proceed to the next steps, especially if the claims do not involve matters of “universal concern” such as those offenses “for which a state has jurisdiction to punish without regard to the territoriality or the nationality of the offenders.”¹⁴³ In the second step, the court must determine if the plaintiffs had exhausted all of their local remedies, which involves “obtain[ing] a final decision of the highest court in the hierarchy of courts in the legal system at issue[.]”¹⁴⁴ The third step provides an exception to exhaustion when the local remedies are “ineffective, unobtainable, unduly prolonged,

137. *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 841 (9th Cir. 2008) (Reinhardt, J., dissenting); *Enahoro v. Abubakar*, 408 F.3d 877, 890 & n.8 (7th Cir. 2005) (Cudahy, J., dissenting in part); e.g., *Jama v. INS*, 22 F. Supp. 2d 353, 364 (D.N.J. 1998); *Kadic v. Karadzic*, 70 F.3d 232, 241–44 (2d Cir. 1995), *reh’g denied*, 74 F.3d 377, 378 (2d Cir. 1996), *cert. denied*, 518 U.S. 1005 (1996); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1096 (N.D. Cal. 2008) (“[T]he Ninth Circuit has previously upheld justiciability of ATS claims without requiring exhaustion . . .”).

138. E.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 343 n.44 (S.D.N.Y. 2003); *Bowoto*, 557 F. Supp. 2d at 1096–97; *In re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 595 (E.D. Va. 2009).

139. *Sosa*, 542 U.S. at 733 n.21.

140. 550 F.3d 822 (9th Cir. 2008) (en banc).

141. *Id.* at 824–25, 827, 832. The defendant bears the burden to plead and justify an exhaustion requirement; the plaintiffs can rebut with evidence necessitating exclusion under the third step, but the defendant bears the ultimate burden of persuasion. *Id.* at 832.

142. *Id.* at 824; *id.* at 833 n.1 (Bea, J., concurring).

143. *Id.* at 824 (plurality opinion) (citation omitted).

144. *Id.* at 831–32; *id.* at 833 n.1 (Bea, J., concurring).

inadequate, or obviously futile” and is a decisive factor itself.¹⁴⁵ The plurality provided factors for the third step: (1) circumstances surrounding the access to a remedy, (2) the ultimate utility of the remedy to the petitioner, (3) a favorable judicial decision has not been complied with, and (4) assessment of any delay in the delivery of a decision.¹⁴⁶

The plurality noted that a prudential principle of exhaustion renders unnecessary the analyses of whether or not the TVPA’s exhaustion requirement infers congressional intent for a similar requirement in the ATS and the substantive or procedural nature of the ATS.¹⁴⁷ The plurality stated that ATS cases present U.S. courts with two divergent impulses foundational to our adjudication of international affairs: (1) to respect the principle of comity, and (2) to uphold customary international law and adjudicate grave violations of international law.¹⁴⁸ The “nexus” inquiry allows courts to satisfy the international comity impulse. Yet, if only a weak nexus exists, then the second impulse may not be satisfied because under the plurality’s test, a weak nexus may be more significant than grave violations of international law or other horrendous acts. The plurality concluded that prudential exhaustion reconciles the competing concerns of Judge Bea who posited the *Sosa* Court contemplated mandatory exhaustion and Judge Reinhardt who argued the *Sosa* Court did not suggest exhaustion.¹⁴⁹

Judge Bea wrote a concurrence because he disagreed that the exhaustion analysis should include the first step based on the text of the ATS.¹⁵⁰ Bea also concluded the exhaustion requirement was statutorily-derived because he did not think trial courts should have discretion to consider the “nexus” or international comity involved, interfere with “ongoing international disputes,” and discourage “diplomatic, rather than judicial, solutions.”¹⁵¹

145. *See id.* at 832; *id.* at 833 n.1 (Bea, J., concurring).

146. *Id.* at 832 (plurality opinion).

147. *Id.* at 827–28.

148. *See id.* at 830–31.

149. *Id.* at 827 n.3.

150. *Id.* at 833 & n.1, 834 n.3 (Bea, J., concurring).

151. *Id.* at 834 n.3, 835, 837.

Judge Ikuta dissented because she would have affirmed the case's dismissal for lack of subject matter jurisdiction on other grounds and because a court need not consider exhaustion first.¹⁵² Based on language in *Sosa* of deference to the political branches, the historical context, and prior applications of the ATS, Ikuta concluded that the court lacked subject matter jurisdiction because the court exceeded the constitutional separation of powers and congressional authority to apply the ATS to a dispute not involving U.S. citizens or territory.¹⁵³

Although Judge Kleinfeld joined in Ikuta's dissent in full, he concurred so the court could provide a "clear direction to the district court."¹⁵⁴ Kleinfeld articulated that the exhaustion issue "arises only because the Alien Tort Statute has been stretched far beyond its purpose."¹⁵⁵ Kleinfeld implied that the ATS's purpose was to allow jurisdiction for violations of the "law of nations" as confined to those three types of offenses recognized by the enacting Congress.¹⁵⁶ He cited Blackstone for the idea that the purpose of the law of nations is to maintain "the peace of the world" and concluded that judicial discretion in interpreting the "law of nations" has undermined that purpose.¹⁵⁷

Because he would not impose an exhaustion requirement, Judge Reinhardt dissented based on his conclusions that the U.S. Supreme Court did not suggest the adoption of an exhaustion requirement, the case is not an "appropriate case" to consider such a requirement, and Congress did not explicitly include such a requirement in the ATS.¹⁵⁸ It was not an "appropriate case" because of the long war, plaintiffs' families would be in danger in PNG, plaintiffs might be unable to find counsel and compel production of critical witnesses and documents in PNG, and no domestic or international law requires

152. *Id.* at 837 (Ikuta, J., dissenting).

153. *Id.* at 838–40.

154. *Id.* at 840 (Kleinfeld, J., concurring).

155. *Id.*

156. *Id.*

157. *Id.* at 841 & n.3.

158. *Id.* at 841 (Reinhardt, J., dissenting).

plaintiffs alleging serious human rights violations to exhaust local remedies when they would risk their lives.¹⁵⁹

Even if this was an “appropriate case,” Reinhardt contended that courts should not apply an exhaustion analysis in ATS cases because international law and domestic courts enforcing international human rights norms do not always require exhaustion.¹⁶⁰ He explained that the exhaustion of local remedies prerequisite developed to protect state sovereignty at a period when international law recognized only the rights of states to protect their own citizens and not the subsequent interest of states in guaranteeing universal fundamental human rights.¹⁶¹ Reinhardt observed that exhaustion under international law governs the vertical relationship of international tribunals to domestic courts in contrast to the horizontal relationship of domestic courts at issue in litigating ATS claims.¹⁶² He noted that most courts of other nations have not imposed an exhaustion requirement before exercising universal jurisdiction and that the United States has always resolved competing jurisdiction issues with foreign courts through the *forum non conveniens* doctrine.¹⁶³ Reinhardt concluded that prudential considerations do not favor imposing an exhaustion requirement because of the policy reasons the plurality advanced and because the United States has an interest in punishing the heinous violations that the ATS applies to and the other justiciability doctrines adequately handle sovereignty and comity concerns, which are less pressing when the defendant is a corporation.¹⁶⁴ Reinhardt distinguished the TVPA’s exhaustion requirement from the ATS’s lack of one because only in the former must the defendant always have acted with state authority.¹⁶⁵

On remand, the district court concluded that it must impose the prudential exhaustion requirement on the ATS environmental claims because of the weak nexus between the claims and the United States

159. *Id.* at 841–43, 842 n.2.

160. *Id.* at 843–44.

161. *Id.* at 843.

162. *Id.* at 844.

163. *Id.*

164. *See id.* at 845.

165. *Id.* at 845 & n.5.

and the lack of “universal” norms for those claims.¹⁶⁶ If the plaintiffs faced “grave harm” in bringing the suit in PNG, then the exhaustion requirement likely will not preclude the ATS UNCLOS claim in this case.¹⁶⁷ Thus, the court did consider both the international comity consideration and the concern for grave violations of international law when applying the test, but the weak nexus prevented immediate adjudication of these allegedly serious injuries in U.S. courts.

V. ANALYSIS

U.S. courts should not require exhaustion for ATS environmental claims because only the most universally condemned acts can proceed under the act;¹⁶⁸ five other justiciability doctrines adequately account for separation of powers, sovereignty, and foreign relations concerns;¹⁶⁹ and exhaustion is contrary to the legislative intent and underlying policies of the ATS.¹⁷⁰ The international abstention doctrine would better protect judicial resources and parties’ and states’ interests.¹⁷¹ If U.S. courts do require exhaustion, they should explicitly consider the gravity of the alleged tortious acts, stay U.S. suits, and apply equitable tolling to ensure judicial relief.¹⁷²

A. *Many Environmental Claims Will Lack Subject Matter Jurisdiction Because They Do Not Involve a Violation of a Treaty or the Law of Nations*

The exhaustion doctrine is not needed because plaintiffs can only establish subject matter jurisdiction for articulable and discernible standards that are of a norm comparable to offenses against ambassadors, violation of safe conducts, and piracy.

166. *Sarei v. Rio Tinto, PLC*, 650 F. Supp. 2d 1004, 1026, 1031–32 (C.D. Cal. 2009). If the plaintiffs faced “grave harm” in bringing the suit in PNG, then the exhaustion requirement likely will not preclude the ATS UNCLOS claim in this case. *See* 550 F.3d at 842; *e.g.*, *Enahoro v. Abubakar*, 408 F.3d 877, 892 (7th Cir. 2005) (Cudahy, J., dissenting in part).

167. *See* 550 F.3d at 842; *e.g.*, *Enahoro*, 408 F.3d at 892.

168. *See infra* Part V.A.

169. *See infra* Part V.B.

170. *See infra* Part V.C.

171. *See infra* Part V.D.

172. *See infra* Part V.D.

Although many international environmental agreements are not sufficiently specific, some may meet that standard. For example, *Amlon*, *Flores*, and *Sarei* suggest that violations of the Rio and Stockholm Declarations do not constitute violations of the law of nations, however, some of their principles might be sufficiently specific and universal to constitute the law of nations. The sustainable development, inter-generational equity, freedom from oppression, prevention of marine pollution, and transboundary pollution principles contain actual *mandates* to protect the environment or declare that humans have a “fundamental right” to a quality environment.¹⁷³ Despite these provisions’ clear goals, a court might find them “devoid of articulable or discernible standards” like the *Beanal* court found for the polluter pays, precautionary, and proximity principles or not sufficient to meet the *Sosa* test.

Courts may find six subsequent international agreements comprise the law of nations as they are more specific and reinforce the universality of the Rio and Stockholm Declarations’ norms and meet the *Sosa* standard. Agenda 21, by itself, appears to lie on the line separating the law of nations from other agreements because it was only adopted by 178 nations, but similar to UNCLOS requires states to cooperate in establishing legal frameworks and liability to prevent deforestation and marine pollution through broad mining changes.¹⁷⁴ The Johannesburg Declaration on Sustainable Development reaffirms Agenda 21 and declares that companies have a “duty” of sustainable development and that the world needs actions

173. See United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, princs. 1, 2, 5, 7, A/CONF.48/14/Rev.1 [hereinafter *Stockholm Declaration*], available at <http://www.un-documents.net/unchedec.htm>; *Rio Declaration*, *supra* note 63, princs. 3, 8, 13, 14, 23.

174. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Earth Summit, Agenda 21: The U.N. Programme of Action from Rio*, chs. 11, 17, 18, 30, 39.1–39.2, 39.10, U.N. Doc. A.CONF.151/26/Rev.1 (Aug. 12, 1992), available at http://www.un.org/esa/dsd/agenda21/res_agenda21_00.shtml; U.N. DEP’T OF ECON. & SOC. AFF., DIVISION FOR SUSTAINABLE DEV., AGENDA 21, <http://www.un.org/esa/dsd/agenda21/> (last visited Apr. 18, 2011) (recommending that States employ the precautionary principle, polluter pays principle, and environmental assessments).

at all levels to foster sustainable mining practices.¹⁷⁵ Although sustainable mining and sustainable development can prevent grave environmental damage, courts may find they do not reach the *Sosa* level. As the *Sarei* district court and Ninth Circuit panel determined, UNCLOS may comprise the law of nations.¹⁷⁶

More similar to the specific demands and presence of specific liability provisions of UNCLOS, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes¹⁷⁷ and the Danube Convention¹⁷⁸ require all signatory States to prevent and reduce any transboundary impacts.¹⁷⁹ The Protocol on Civil Liability is the civil liability instrument for the Water Convention and holds operators strictly liable.¹⁸⁰ Interestingly, exhaustion is not required as claims for violations of either convention can be brought in courts where the damage occurred, the industrial accident occurred, or at the location of defendant's residence or principle

175. U.N. World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26–Sept. 4, 2002, *Report of the World Summit on Sustainable Development*, ¶¶ 15(b), 25(d)-(e), 26(a), 27, 46, 58, 139, U.N. Doc. A/CONF.199/20 [hereinafter Johannesburg Declaration].

176. See UNCLOS, *supra* note 29, arts. 2, 3, 139, 193, 194, 207, 213, 235, 1833 U.N.T.S. at 400, 447, 478, 481, 485, 494. *But see* Mank, *supra* note 61, at 1088. As a signatory, the United States is obligated to refrain from acts that would defeat the purpose or object of UNCLOS. Vienna Convention, *supra* note 59, art. 18, 1155 U.N.T.S. at 336.

177. Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 1936 U.N.T.S. 269 [hereinafter Water Convention] (entered into force Oct. 16, 1996), available at http://treaties.un.org/doc/Treaties/1992/03/19920317%2005-46%20AM/Ch_XXVII_05p.pdf.

178. Convention on Cooperation for the Protection and Sustainable Use of the Danube River, 1997 O.J. (L 342) 40 (EC) [hereinafter Danube Convention].

179. *Id.* arts. 2, 5; Water Convention, *supra* note 177, art. 2. Both the Water Convention and Danube Convention incorporate the precautionary, polluter pays, inter-generational, and sustainable development principles. Water Convention, *supra* note 177, art. 2; Danube Convention, *supra* note 178, art. 2.

180. Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents, May 21, 2003, U.N. Doc. ECE/MP.WAT/7/ECE/CP.TEIA/5 [hereinafter Protocol on Civil Liability], available at http://treaties.un.org/doc/Treaties/2003/05/20030521%2002-09%20PM/Ch_XXVII_16p.pdf.

place of business¹⁸¹ and disputes pursuant to both Conventions and Protocol may be settled by negotiation, the I.C.J., arbitration, or other means suitable to the disputing parties.¹⁸² As the transboundary water pollution that these conventions address has impacts as severe as piracy, these conventions should meet the *Sosa* standard.

Articles 5, 8, and 14 of the Convention on Biological Diversity (CBD) may comprise the law of nations as they require specific actions similar to UNCLOS. They require States to (1) conduct environmental impact assessments of projects that are likely to have significant adverse impacts on biological diversity, (2) cooperate with other parties for the “conservation and sustainable use of biological diversity,” (3) “[p]romote environmentally sound and sustainable development in areas adjacent to protected areas,” (4) “restore degraded ecosystems,” and (5) “develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species.”¹⁸³ The CBD may meet the *Sosa* standard as it has 193 parties and 168 signatories, including the signatory United States.¹⁸⁴ The preamble to the CBD, which states “the conservation and sustainable use of biological diversity will strengthen friendly relations among States and contribute to peace for humankind[,]”¹⁸⁵ and the Johannesburg Declaration’s reaffirmation of the CBD confirms that the CBD should satisfy the *Sosa* standard.¹⁸⁶

In addition, ATS environmental claims binding the environmental harm with human rights violations may comprise the law of nations.¹⁸⁷ Yet, if acts did not violate U.S. law, international

181. *Id.* art. 13.

182. Water Convention, *supra* note 177, art. 22; Danube Convention, *supra* note 178, art. 24; Protocol on Civil Liability, *supra* note 180, art. 26.

183. *See* Convention on Biological Diversity arts. 5, 8, 14, June 5, 1992, 1760 U.N.T.S. 79, 147, 148–49, 151–52 [hereinafter CBD], available at http://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXV_II_08p.pdf.

184. United Nations, *Convention on Biological Diversity*, U.N. TREATY COLLECTION., (Apr. 18, 2011), http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-8&chapter=27&lang=en.

185. CBD, *supra* note 183, pmbl.

186. Johannesburg Declaration, *supra* note 175, ¶¶ 32, 44.

187. *See* Royal Dutch Petroleum Co. v. Wiwa, 626 F. Supp. 2d 377, 384–85 (S.D.N.Y. 2009) (ATS cause of action against oil company for military’s heinous

consensus may not be capable of providing the basis for an ATS claim.¹⁸⁸ Therefore, until Congress enacts a statute similar to the TVPA to expressly provide recovery of damages for environmental harm by U.S. multinational corporations, the limited universe of the “law of nations” will limit environmental suits to those with significant universally-accepted norms.

B. An Exhaustion Doctrine Is Redundant Because Many Courts Have Dismissed Environmental ATS Claims Under Other Doctrines

Because the forum non conveniens, political question, act of state, international comity, and international abstention doctrines adequately address the separation of powers, sovereignty, foreign relations, and comity concerns that Judge Bybee and the en banc court raised, the Ninth Circuit should not have established an exhaustion doctrine for the ATS.

The political question and international comity doctrines adequately allocate the judicial, executive, and legislative branch authority. Under the political question doctrine, courts can interpret international treaties and executive agreements, but do dismiss cases if executive branch agreements and compensation systems exist or are foreseeable to avoid infringing on the Executive Branch. Thus, the political question doctrine likely will address cases characterized by torts sufficiently egregious to invoke Executive Branch action. The international comity doctrine covers the remaining torts that are of such a character to be actionable under the law of nations but that the Executive Branch has not addressed. It allows courts to actually assess each State’s legislative and executive interests and expectations so the exhaustion analysis is redundant.

acts); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1091–95 (N.D. Cal. 2008) (similar); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009) (holding ATS cause of action sufficient because of non-consensual medical experimentation on humans); Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 26A STAN. ENVTL. L. J. 3, 20–25 (2007). *But see Flores v. S. Peru Copper Co.*, 343 F.3d 140, 161–65 (2d Cir. 2003).

188. *Saleh v. Titan Corp.*, 580 F.3d 1, 15 (D.C. Cir. 2009) (context of combatant acts).

All five of these other doctrines consider the gamut of sovereignty, foreign relations, and comity concerns. The forum non conveniens and international abstention doctrines' considerations of comity in terms of cost, time, piecemeal litigation, and availability of witnesses and evidence on juror and court burdens negate the necessity of having an exhaustion doctrine to defer to local adjudication. By deferring to *definitive* Executive Branch policy decisions, the political question doctrine more narrowly (and appropriately) considers sovereignty and foreign relations concerns. The act of state and international comity doctrines' factors of determining if a perpetrating government still exists, the validity of the acts, and the interests of each State and the international abstention's deference to judicial proceedings pending at an advanced stage, adequately and more aptly address concerns for each State's sovereignty and foreign relations.

C. The ATS Does Not Require Exhaustion and the Court Should Not Prudentially Impose a New Requirement

Courts should not impose statutorily-derived or judicially-created exhaustion because exhaustion contradicts the ATS's text, history, legislative intent,¹⁸⁹ and underlying policies.¹⁹⁰

1. An Exhaustion Requirement Is Contrary to the ATS's Text and Legislative Intent and the Supreme Court's Resolution of a Related Statute

The establishment of an exhaustion requirement is contrary to the text, history, and legislative history of the ATS. The starting point of interpretation of a statute is its text.¹⁹¹ Further, because no record exists of any congressional debate of the ATS, commentators have focused on the text in interpreting its breadth.¹⁹² The first Congress enacted the Alien Tort Statute as part of Section 9 of the Judiciary

189. *See infra* Part V.C.1.

190. *See infra* Part V.C.2.

191. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 849 (4th ed. 2007).

192. *Sosa v. Alvarez-Machain*, 542 U.S. 713, 718 (2004); *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.)*, 978 F.2d 493, 498 (9th Cir. 1992).

Act of 1789.¹⁹³ The Judiciary Act is a statute exclusively concerned with federal court jurisdiction.¹⁹⁴ The original statute stated “[t]hat the district courts *shall have . . . (b) . . . cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes* where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”¹⁹⁵ The text clearly does not impose an exhaustion requirement. Congress used the mandatory language “shall” rather than “may” and provided explicit exceptions for non-torts and torts that do not violate a treaty or the law of nations; the *expressio unius* and mandatory canons indicate the courts must exercise jurisdiction for these claims.¹⁹⁶ The fact that Congress gave district courts concurrent jurisdiction with other courts over alien tort claims without mentioning exhaustion for any of the courts suggests no such requirement existed.¹⁹⁷ Because “[o]nly statutory exhaustion requirements containing ‘sweeping and direct’ language deprive a federal court of jurisdiction,”¹⁹⁸ U.S. courts should not impose a jurisdictional exhaustion requirement.

Employing the presumption of meaningful variation, the express inclusion of an exhaustion requirement in a treaty and three related jurisdictional statutes indicates that Congress did not intend an exhaustion requirement in the ATS.¹⁹⁹ As the Ninth Circuit briefly discusses, Congress explicitly required exhaustion in the Jay Treaty, which covers similar issues and was enacted within a few years of the

193. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789).

194. *Sosa*, 542 U.S. at 713.

195. 1 Stat. at 76, 77 (emphasis added). The word “cognizance” described here is equivalent to jurisdiction. *See id.* In Section 9(c), Congress also gave the courts “cognizance” over specific suits and then stated they “shall also have jurisdiction” for other specific suits. *Id.* Also persuasive in concluding the Judiciary Act did not require exhaustion is the fact that exactly next to the ATS in section 9(b) is the note “Concurrent jurisdiction.” *See id.*

196. *See* ESKRIDGE, FRICKEY & GARRETT, *supra* note 191, at 854–56, 859–60.

197. *See supra* note 195 and accompanying text.

198. *Ace Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp.*, 440 F.3d 992, 999 (8th Cir. 2006) (citations omitted).

199. *See* ESKRIDGE, FRICKEY & GARRETT, *supra* note 191, at 855–56, 866–67 (citing *Chan v. Korean Air Lines*, 490 U.S. 122 (1989)).

Alien Tort Statute.²⁰⁰ Congress added an explicit exhaustion requirement to the TVPA, which is contained in the ATS's historical notes, but not in the ATS's text.²⁰¹ An exhaustion requirement in the TVPA does not positively inform a similar requirement for the ATS because although they are co-extensive,²⁰² the TVPA's text and location suggests it was meant to expand, not restrict, remedies available under the ATS, as the House and Senate Committee Reports state.²⁰³ The main purposes of the TVPA—to strike a balance between providing redress, burdening U.S. courts when foreign courts where alleged torture or killing occurred can more appropriately handle cases, and encouraging meaningful remedies in other countries²⁰⁴—are not as applicable for ATS suits because the desire to encourage remedies in other countries is not as great for acts less severe than torture and killing. Also, courts should give effect to both acts because repeal of legislative text by implication is

200. *See Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1215 (9th Cir. 2007); Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., arts. VI, VII, Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty].

201. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(b), 106 Stat. 73, 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

202. *Enahoro v. Abubakar*, 408 F.3d 877, 888–89 (7th Cir. 2005) (Cudahy, J., dissenting in part) (citing *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 153 (2d Cir. 2003); *Beanal v. Freeport McMoran, Inc.*, 197 F.3d 161, 168–69 (5th Cir. 1999); discussing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728–29 (2004)). *But see Enahoro*, 408 F.3d at 884–85 (majority opinion).

203. *Enahoro*, 408 F.3d at 886–89 & n.2 (Cudahy, J., dissenting in part). The TVPA created *liability* for acts of torture and extrajudicial killing, whereas the ATS only refers to *jurisdiction*. *Id.* at 887 & n.3.

Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing. . . . That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

H.R. REP. NO. 102-367, pt. 1, at 3–4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86. “Section 1350 has other important uses and should not be replaced.” S. REP. NO. 102-249, at 4 (1991). Both reports also mention the reason for enacting the TVPA was to expressly provide a remedy to victims of torture because a D.C. Circuit judge questioned the existence of an implicit right of action under the ATS. H.R. REP. NO. 102-367, pt. 1, at 4, *reprinted in* 1992 U.S.C.C.A.N. 84, 86; S. REP. NO. 102-249, at 4–5.

204. H.R. REP. NO. 102-367, pt. 1, at 3–5, *reprinted in* 1992 U.S.C.C.A.N. 84, 85–88; S. REP. NO. 102-249, at 3–5; *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995).

disfavored absent clearly expressed congressional intent.²⁰⁵ The evolution of the Foreign Sovereign Immunities Act of 1976²⁰⁶ demonstrates that Congress can expressly provide an exhaustion-like requirement for a statute when it intends one for certain actions, amend the text to exclude certain suits, and except certain countries when the foreign policy implications of U.S. jurisdiction are too great.²⁰⁷

Finally, analysis of 42 U.S.C. § 1983 can shed light because of its close connection with the ATS and TVPA.²⁰⁸ The Supreme Court held that plaintiffs need not exhaust state administrative remedies before filing suit under 42 U.S.C. § 1983 based on the legislative history of § 1983 and its predecessor, Section 1 of the Civil Rights

205. *Enahoro*, 408 F.3d at 887 (citing *Branch v. Smith*, 538 U.S. 254, 273 (2003); *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

206. 28 U.S.C. § 1605 (2006), amended by 28 U.S.C. § 1605 (Supp. II 2008).

207. *Id.* (originally enacted as Foreign Sovereign Immunities Act, 94 Pub. L. No. 583, 90 Stat. 289, amended by Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241, 1243 (1996) (emphasis added)) (amended in 1996 by adding the exhaustion requirement of subsection (a)(7) to § 1605); Act of Apr. 25, 1997, Pub. L. No. 105-11, 111 Stat. 22 (retroactively amended the new subsection to clarify that a U.S. suit could not be maintained if neither the claimant nor the victim was a U.S. national); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-41 (2008) (codified as 28 U.S.C. § 1605A) (changing § 1605(a)(7) to section 1605A); H.R. DOC. NO. 110-88, at 5 (2008) (Presidential Veto Statement); 154 CONG. REC. H76-260 (daily ed. Jan. 16, 2008); 154 CONG. REC. S55-57 (daily ed. Jan. 22, 2008) (explaining that Congress gave the President authority to waive Iraq's liability and the President signed the amended National Defense Authorization Act of 2008 into law). But in *Cassirer v. Kingdom of Spain*, the Ninth Circuit determined that 1605(a)(7) only required arbitration, not exhaustion of local remedies. 616 F.3d 1019, 1034, 1037 (9th Cir. 2010) (en banc).

208. H.R. REP. NO. 102-367, pt. 1, at 5, reprinted in 1992 U.S.C.C.A.N. 84, 87; S. REP. NO. 102-249, at 8; *Papa v. United States*, 281 F.3d 1004, 1012 (9th Cir. 2002) (noting that before the passage of the TVPA, U.S. courts had held that the closest federal analogy to the ATS was 42 U.S.C. § 1983); *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 374-77 (E.D. La. 1997); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 207 (1987). The TVPA House and Senate Reports state that U.S. courts should look to 42 U.S.C. § 1983 to construe the TVPA's "color of law" requirement. H.R. REP. NO. 102-367, pt. 1, at 5, reprinted in 1992 U.S.C.C.A.N. 84, 87; S. REP. NO. 102-249, at 8. According to § 1983's legislative history, § 1983's reasons are similar to the ATS's, i.e., protection of fundamental individual rights that other courts might have inadequate factfinding or be unable or unwilling to protect and for which Congress provided concurrent jurisdiction. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 501-16 (1982).

Act of 1871.²⁰⁹ The Court evaluated the text and legislative history of 42 U.S.C. § 1997, recently passed for institutionalized persons with an express exhaustion requirement, to conclude that an ad hoc, judicially-imposed exhaustion requirement in other § 1983 suits would be inconsistent with Congress's "decision to adopt a detailed exhaustion scheme in 42 U.S.C. § 1997 and would usurp policy judgments."²¹⁰

Similar to the Court's conclusion regarding a § 1983 exhaustion requirement, the rules against absurdity and redundancy also suggest that Congress did not implicitly include an exhaustion requirement in the ATS.²¹¹ Congress would not have enacted a redundant provision in the TVPA if the ATS contained one.²¹² Because the ATS is only applicable to universally condemned acts, imposing an exhaustion requirement when judicial protection will likely be ineffective leads to an absurd result,²¹³ which Congress likely did not intend. As Judge Ikuta suggested, Congress intended for U.S. courts to hear ATS claims because the young nation wanted other nations to interact with it without fearing a lack of judicial recourse in its courts.²¹⁴ The Supreme Court concluded that Congress intended the immediate practical use of the ATS cause of action for the benefit of foreigners.²¹⁵ Imposing an exhaustion requirement would negate such

209. *Patsy*, 457 U.S. at 501–16.

210. *Id.* at 507–10, 512.

211. *See id.* at 507–12; *infra* note 219; ESKRIDGE, FRICKEY & GARRETT, *supra* note 191, at 860–61, 865.

212. *See infra* notes 219, 239 and accompanying text; ESKRIDGE, FRICKEY & GARRETT, *supra* note 191, at 865.

213. *See* S. REP. NO. 102-249, at 3–4. The TVPA Senate Report notes that
While nearly every nation now condemns torture and extrajudicial killing in principle, in practice more than one-third of the world's governments engage in, tolerate, or condone such acts [and] . . . [j]udicial protection against flagrant . . . violations is often least effective in those countries where such abuses are most prevalent Consequently, the . . . TVPA is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture committed abroad.

Id.

214. *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 838–39 (9th Cir. 2008) (Ikuta, J., dissenting); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716–17 (2004) (citations omitted).

215. *Sosa*, 542 U.S. at 719, 724.

an immediate effect. This analysis extends to torts not committed by U.S. citizens in U.S. territory because the ATS covers crimes committed on the high seas as piracy.²¹⁶

Congressional inaction also indicates the lack of an exhaustion requirement. Even though Congress had added an exhaustion requirement to a treaty in 1794, it never added an explicit exhaustion requirement into the ATS, even when it did alter some of the statute's text on three separate occasions.²¹⁷ This congressional inaction is persuasive because it occurred over a period of 200 years (the statute laid dormant over most of this period, but its language and punctuation was amended three times in this period), and even occurred subsequent to an increase in ATS suits after 1980²¹⁸ and after 1992 when Congress explicitly added an exhaustion requirement to the TVPA.²¹⁹

216. *See id.* at 719. *But see* Sarei v. Rio Tinto, PLC, 625 F.3d 561, 563–64 (9th Cir. 2010) (Kleinfeld, J., dissenting).

217. *See infra* note 219. Congress slightly modified the ATS in 1878 with the first codification of federal law. JENNIFER, K. ELSEA, CONG. RESEARCH SERV., RL32118, THE ALIEN TORT STATUTE: LEGISLATIVE HISTORY AND EXECUTIVE BRANCH VIEWS 5 (2003). Among other minor changes, the word “cognizance” was changed to “jurisdiction” and the word “only” was placed in quotation marks. *See id.* (“The district courts shall have jurisdiction . . . [o]f all suits brought by any alien for a tort ‘only’ in violation of the law of nations, or of a treaty of the United States.”). In 1911, Congress modified its punctuation when the laws of the Judicial Code were codified, revised, and amended. All Writs Act, ch. 231, Pub. L. No. 61-475, § 24, 36 Stat. 1087, 1091, 1093 (1911) (“The district courts shall have original jurisdiction as follows: . . . Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.”). Finally, in 1948, Congress added the word “committed” to the statute when the judiciary code was revised, codified, and enacted into law as title 28 of the United States Code. Judiciary and Judicial Procedure Rules of Decisions Act, ch. 646, Pub. L. No. 80-773, § 1350, 62 Stat. 869, 934 (1948) (“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.”).

218. *Cf.* ESKRIDGE, FRICKEY & GARRETT, *supra* note 191, at 1036–40 (citing *Montana Wilderness Ass’n v. U.S. Forest Serv.*, 655 F.2d 951, *cert. denied*, 455 U.S. 989 (9th Cir. 1981)).

219. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2, 106 Stat. 73, 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)). Section 2(b) of the TVPA is titled “Exhaustion of Remedies” and states “[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.” *Id.*

As the Supreme Court has explained, congressional intent is of “paramount importance” to any exhaustion inquiry,²²⁰ and legislative history, especially from committee reports, often provides a good record of congressional intent.²²¹ Although legislative history does not exist for the ATS,²²² the TVPA’s legislative history suggests a lack of exhaustion for the ATS. Although the House²²³ and Senate²²⁴ Committee Reports describe in detail the TVPA’s exhaustion requirement, neither report expressly mentions a similar requirement for the ATS. In the floor debate prior to House passage, Rep. Mazzoli, the floor manager, stated that a bipartisan amendment added to the bill in committee with the Subcommittee on International Law ranking member, kept the TVPA’s exhaustion requirement, but removed text that required the defendant to prove by “clear and convincing evidence” that the claimant had not exhausted local

220. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992).

221. *ESKRIDGE, FRICKEY & GARRETT*, *supra* note 191, at 981.

222. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718 (2004).

223. H.R. REP. NO. 102-367, pt. 1, at 4–5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86–88. The House describes the reasons as “[s]triking a balance between the desirability of providing redress for a victim and the fear of imposing additional burdens on U.S. courts,” “ensur[ing] that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred, . . . avoid[ing] exposing U.S. courts to unnecessary burdens, and . . . encourag[ing] the development of meaningful remedies in other countries.” *Id.*

224. S. REP. NO. 102-249, at 9–10 (1991).

A court may decline to exercise the TVPA’s grant of jurisdiction only if it appears that adequate and available remedies can be assured where the conduct complained of occurred, and that the plaintiff has not exhausted local remedies there. Cases involving torture abroad which have been filed under the Alien Tort Claims Act show that torture victims bring suits in the United States against their alleged torturers only as a last resort. Usually, the alleged torturer has more substantial assets outside the United States and the jurisdictional nexus is easier to prove outside the United States. Therefore, as a general matter, the committee recognizes that in most instances the initiation of litigation under this legislation will be virtually *prima facie* evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption . . . courts in the United States are equipped to deal with the intricacies of determining issues of foreign law and will have to undertake a case-by-case approach.

Id.

remedies.²²⁵ This suggests Congress carefully considered the specifics of the exhaustion requirement that would go into the historical notes of the ATS. Even the minority views in the Senate Committee Report do not mention that the ATS has an exhaustion requirement.²²⁶

Two other topics that Congress broached affirm this interpretation of the legislative history. The Senate Report specifically states that “the explicit reference in this legislation to principles of equitable tolling is in no way intended to suggest that such principles do not apply in other statutes . . . which do not explicitly contain equitable tolling clauses,” but it makes no similar pronouncement for exhaustion,²²⁷ and Congress likely did not think the ATS required exhaustion because of courts’ previous lack of requiring it.²²⁸ Also, the affirmation of universal jurisdiction indicates that Congress did not intend to require an exhaustion requirement in all circumstances.²²⁹ Thus, similar to *Darby v. Cisneros*,²³⁰ where the Court held that merely optional intra-agency appeals not mandated by statute or agency rule need not be exhausted before judicial review under the Administrative Procedure Act,²³¹ courts should not require exhaustion of merely optional foreign suits.

2. Public Policy Advises Against a Prudential Exhaustion Requirement

In addition, courts should not prudentially require exhaustion because public policy weighs against requiring exhaustion, and, even if public policy favored exhaustion, “policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent.”²³² The promotion of human

225. 137 CONG. REC. 34,785 (1991) (statement of Rep. Romano Mazzoli).

226. S. REP. NO. 102-249, at 13–15.

227. *Id.* at 11.

228. *Enahoro v. Abubakar*, 408 F.3d 877, 890–91 & nn.8–9 (7th Cir. 2005) (Cudahy, J., dissenting in part).

229. S. REP. NO. 102-249, at 4–5.

230. 509 U.S. 137 (1993).

231. *Id.* at 153–54.

232. *Patsy v. Bd. of Regents*, 457 U.S. 496, 513 (1982). The policy reasons given for desiring to require exhaustion for § 1983 suits include lessening court burdens, furthering comity and government relations, and enlightening the Court’s decision

rights, discouragement of egregious acts, and guarantee of access to a competent and uncorrupt judicial system that enforces judgments outweigh the minimal burden of additional lawsuits in U.S. courts, especially for egregious acts.

First, the lack of an exhaustion requirement will not overburden U.S. courts with numerous ATS suits. Federal courts already operate with an effective jurisdictional scheme wherein defendants must have “minimum” contacts with the United States for the U.S. court to possess personal jurisdiction.²³³ The few ATS cases on the dockets attest to their minimal burden, and even though they will provide additional work “few cases on the dockets of Federal courts will be more important than those contemplated by this legislation.”²³⁴

The United States’s interests and foreign relations actually favor no exhaustion requirement. Exhaustion may preclude the United States’s promotion of human rights throughout the world, prevent effective domestic remedies, and allow U.S. safe havens for violators of egregious acts, which are against the emphatic statement of the Chair of the House Committee on Foreign Affairs.²³⁵ The presence of universal jurisdiction for certain crimes supports the legitimacy of the United States invoking jurisdiction.²³⁶ Adjudication of acts that

through more expert adjudication. *Id.* at 512. The *Sarei* en banc members gave similar reasons. See *supra* note 148 and accompanying text.

233. S. REP. NO. 102-249, at 7; *e.g.*, *Licci v. Am. Express Bank Ltd.*, 704 F. Supp. 2d 403, 407 (S.D.N.Y. 2010); *Kiobel v. Royal Dutch Petroleum Co.*, No. 02 Civ. 7618 (KMW) (HBP), 2010 WL 2507025, at *6 (S.D.N.Y. June 21, 2010) (finding shipments of oil to the United States, employees “cross-posted” or who otherwise visited the United States, and the recruitment of United States residents to work in Nigeria were insufficient contacts). *But see* *Pugh v. Socialist People’s Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54, 59–60 (D.D.C. 2003) (finding that the most important consideration for personal jurisdiction is “whether a defendant’s ‘conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.’”).

234. 135 CONG. REC. 22,715 (1989) (statement of Rep. Chris Smith).

235. *Id.* at 22,714–15 (statement of Rep. Faccell). This bill was jointly referred to this committee, but it gave up bill action without prejudice to expedite the bill’s consideration. *Id.*

236. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 & cmt. a (1987). Under universal jurisdiction, a State can apply its laws to punish offenses of universal concern as recognized by the community of nations, even if the state has no territorial links with the offense or nationality with parties. *Id.*

occurred in foreign states is not likely to adversely affect foreign relations more than unilateral “sanctions” prior to exhaustion of local remedies, which are currently allowed.²³⁷ Further, the imposition of an exhaustion requirement can impede justice by providing States the ability to delay suits.²³⁸ Even when plaintiffs are able to obtain a foreign judgment, they may not be able to enforce a judgment in the defendant’s home state.²³⁹

International law does not require exhaustion of local remedies for domestic suits and even suggests nations not impose one.²⁴⁰ It only expressly appears to suggest deferment of *international tribunals* prior to state adjudication.²⁴¹ As the Ninth Circuit noted,

237. See *id.* § 703 cmt. d. “The individual’s failure to exhaust remedies is not an obstacle to informal intercession by a state on behalf of an individual, to unilateral ‘sanctions’ by a state against another for human rights violations, or to multilateral measures against violators by United Nations bodies or international financial institutions.” *Id.* Such “‘sanctions’” include criticism or the alteration of “its trade, aid or *other national policies* so as to dissociate itself from the violating state or *to influence the state to discontinue the violations.*” *Id.* § 703 cmt. f. (emphasis added).

238. 154 CONG. REC. S55 (daily ed. Jan. 22, 2008) (statement of Sen. Frank Lautenberg). Senator Lautenberg, the author of the 2008 FSIA amendment, cited examples of foreign states, such as Libya, that have purposely delayed final resolution of suits. *Id.*

239. S. REP. NO. 102-249, at 10 (1991) (citing *Hilton v. Guyot*, 159 U.S. 113, 166–67 (1895); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 4[8]2 (1987)). U.S. courts can refuse to recognize foreign judgments when the outcome or procedures are unfair or the foreign court lacks competence and that “[c]ourts will not recognize or enforce foreign judgments contrary to public policy or fundamental notions of decency and justice.” *Id.* (emphasis added). A Florida court denied recognition of a Nicaraguan judgment against Dole Food Company for the lack of “due process of law.” *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1351–52 (S.D. Fla. 2009).

240. See Alison Lindsay Shinsato, *Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria*, 4 NW. U. J. INT’L HUM. RTS. 186, 204 (2005) (citations omitted). The Restatement (Third) section 402 advises that home states should or may impose domestic environmental law on foreign branches of its corporations and its nationals or conduct outside its territory that has substantial effect within its territory. *Id.*

241. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 713 cmt. f & reporters’ note 5 (1987). The I.C.J. stated “[t]he rule that local remedies must be exhausted *before international proceedings* may be instituted is a well-established rule of customary international law [and a State should have an opportunity to redress the violation within its own domestic legal system] . . . [b]efore resort may

Restatement (Third) section 713, on its face, only applies to claims by one State against another where interests of comity are most compelling.²⁴² The Ninth Circuit previously determined that “[i]nternational law ‘does not require any particular reaction to violations of law’” and domestic law can govern the nation’s responses to ATS violations.²⁴³ Restatement (Third) section 443, comment f suggests that United States courts can adjudicate foreign suits first.²⁴⁴ Finally, Congress and international tribunals require that courts resolve ambiguity on the adequacy of local remedies in favor of plaintiffs, suggesting a policy to ensure plaintiffs can obtain justice.²⁴⁵

Parties’ interests in obtaining justice strongly support not adding an exhaustion analysis. Both plaintiffs and defendants may face whims, undetected fraud or corruption, or incompetency of parties, attorneys, foreign courts, enforcement officials, or discovery procedures that might impede justice and the prevention of grave environmental harm. For example, Newmont Mining Corporation faced three years of lawsuits in Indonesia for the discharge of 5.5 million tons of gold mine waste and settled a \$543 million suit.²⁴⁶ Newmont settled the government’s civil suit by agreeing to monitor a bay for ten years and spend \$30 million on community projects.²⁴⁷ Newmont stated that Indonesia’s legal system was arbitrary and

be had to an *international court . . .*” *Id.* § 713 reporters’ note 5 (emphasis added).

242. *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1036 n.26 (9th Cir. 2010) (en banc).

243. *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litig.)*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) (citations omitted).

244. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 cmt. f (1987). A failure to adjudicate in the United States because of the act of state doctrine “would not preclude a challenge to the same act in the courts of the acting state, in the courts of a third state, or in an international adjudication . . .” *Id.*

245. *Enahoro v. Abubakar*, 408 F.3d 877, 892 (7th Cir. 2005) (Cudahy, J., dissenting in part) (citing S. REP. NO. 102-249 (1991)).

246. Larmer, *supra* note 2, at 50; Donald Greenlees, *Indonesian Court Acquits Newmont Mining*, N.Y. TIMES, Apr. 25, 2007, at A8; Transcript of Verdict, *Indon. Ministry of Env’t v. PT Newmont Minahasa Raya*, 284/Pid.B/2005/PN.MDO, at 124 (2007) [hereinafter *Indonesia Verdict*], available at http://www.buyatbayfacts.com/pdfs_docs/VERDICT.pdf.

247. *Indonesia Verdict*, *supra* note 246, at 437–38; Greenlees, *supra* note 246.

potentially unprepared for a criminal case complicated with environmental science.²⁴⁸ After a 21-month criminal trial, the Manado District Court acquitted Newmont in 2007 because the prosecution did not prove the mine tailings caused environmental pollution or health problems.²⁴⁹ Yet, the water and fish samples relied on might have been insufficient because the court exhibits only mention samples from four fish and forty-nine samples total of water, sediment, sludge, or tailings and Newmont collected some, or perhaps all, of its samples.²⁵⁰ A peer-reviewed scientific study found the tailings likely contaminated the bay with toxic levels of arsenic and possibly mercury.²⁵¹ Also, the Indonesian court might have been biased because Newmont said it might reconsider its investments²⁵² and Indonesia is lax on regulating environmental harm; less than one percent of environmental crimes are punished.²⁵³

Even more apparent, in 2009, a California court found that the plaintiffs and their U.S. and Nicaraguan counsel committed fraud by filing suits against Dole Food Co. that alleged sterility from exposure

248. Jane Perlez, *Pollution Trial of Mining Company to Begin in Indonesia*, N.Y. TIMES, Aug. 5, 2005, at A3. In response, the Indonesian Supreme Court requested that two judges who attended special environmental law courses replace two judges on the provincial court. *Id.*

249. Indonesia Verdict, *supra* note 246, at 456–57, 464, 484–85; Larmer, *supra* note 2, at 51; Greenlees, *supra* note 246. The Court sided with Newmont because a World Health Organization study showed metal exposure did not cause the illnesses, police improperly collected the water and fish tissue samples, subsequent government, university, and Australian studies did not find metals' levels that exceeded water quality standards, and Newmont had discharged its tailings below the thermocline. *See* Indonesia Verdict, *supra* note 246, at 204–05, 212–14, 244, 433–83.

250. Indonesia Verdict, *supra* note 246, at 5–19, 362, 449–52.

251. Evan N. Edinger, P. Raja Siregar & George M. Blackwood, *Heavy Metal Concentrations in Shallow Marine Sediments Affected by Submarine Tailings Disposal and Artisanal Gold Mining, Buyat-Ratototok District, North Sulawesi, Indonesia*, 52 ENVTL. GEOLOGY 701, 709–10 (2007).

252. *See Indonesian Court Clears U.S. Firm in Pollution Case*, N.Y. TIMES, Apr. 24, 2007, at A16. This case illustrates how intranational environmental harm might not truly be intranational. *See* Stuart G. Gross, Note, *Inordinate Chill: Bits, Non-NAFTA MITS, and Host-State Regulatory Freedom—An Indonesian Case Study*, 24 MICH. J. INT'L L. 893, 903 (2003). Indonesian forests currently are home to 10% of the world's flowering plant species, 12% of its mammal species, 17% of its bird species, and 16% of its reptile and amphibian species. *Id.*

253. Schmidt, *supra* note 9, at 221.

to a banana farm pesticide because most of the plaintiffs had never worked on such farms.²⁵⁴ Dole might have faced millions of dollars in court expenses from thousands of suits if a foreign court did not detect the fraud or allowed the fraud to continue.²⁵⁵ In such circumstances, an exhaustion requirement will not correct parties' errors or allow resolution by a more experienced court and compilation of an adequate record.²⁵⁶

Finally, because of the inhumanity of the torts within ATS jurisdiction, equity in providing for remedies and preventing egregious acts is more important than providing a similar exhaustion scheme among two statutes. Exhaustion might bring consistency between U.S. and foreign torture victims in the ATS and TVPA.²⁵⁷ The lack of one, however, would bring equity and consistency for similar universally condemned acts, e.g., the United States highly regulates gold mining to prevent unnecessary and undue degradation, has enjoined and held gold mining operators liable for polluting water and destroying land, requires remediation of degraded areas,²⁵⁸ and has sought to prevent incompetent enforcement of U.S. environmental laws.²⁵⁹ Courts should follow the cue of the U.S.

254. Order to Show Cause Re Terminating Sanction, *Mejia v. Dole Food Co.*, No. BC 340049, BC 379820, 2009 WL 1615826, at *6 (Cal. Super. Ct. Mar. 11, 2009); Findings of Fact and Conclusions of Law Supporting Order Terminating *Mejia* and *Rivera* Cases for Fraud on the Court, *Mejia v. Dole Food Co. (Dole Termination Order)*, Nos. BC340049, BC379820, at 1 (Cal. Super. Ct. June 17, 2009). Plaintiffs were coached to lie, and the law firms paid four Nicaraguan laboratories to fake results. *Dole Termination Order*, at 2–4, 38–39. The court sanctioned the plaintiffs and dismissed the claims entirely with prejudice. *Id.* at 58–60.

255. *See Dole Termination Order*, at 5–6.

256. *See supra* text accompanying note 49; *Bowen v. City of New York*, 476 U.S. 467, 484 (1986).

257. *Enahoro v. Abubakar*, 408 F.3d 877, 890 (7th Cir. 2005) (Cudahy, J., dissenting in part).

258. *E.g.*, *California v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1154, 1159–60 (Cal. 1884); *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 370, 373–74 (10th Cir. 1979); *see United States v. Homestake Mining Co.*, 595 F.2d 421, 422 (8th Cir. 1979); *Sierra Club v. Cripple Creek and Victory Gold Mining Co.*, No. 00 Civ. 02325, 2006 WL 2882491, at *6–15 (D.Colo. 2006).

259. *E.g.*, *Trustees for Alaska*, 749 F.2d at 561 (holding EPA erred in failing to require an effluent limitation for gold mining turbidity). *But see Coeur Alaska v.*

Supreme Court, which declined to impose a prudential exhaustion requirement for § 1983 suits because the policy considerations did not point in one direction and “vehement disagreement over the validity of the assumptions underlying many of them” suggests legislative action is preferable to judicial resolution.²⁶⁰

D. *U.S. Courts Should Use International Abstention Instead or Modify the Sarei Exhaustion Analysis*

Instead of requiring exhaustion analysis, U.S. courts should (1) rely on existing doctrines like the international abstention doctrine to defer suit to only *pending* foreign litigation,²⁶¹ or (2) modify the *Sarei* exhaustion doctrine to ensure adequate judicial review for very grave acts.²⁶²

1. U.S. Courts Should Defer to the Legislative Branch and Rely on Existing Doctrines, Such as Intentional Abstention

The international abstention doctrine can perform the same goals as exhaustion in deferring to local courts that may have more expertise on sensitive legal issues while simultaneously better preserving issues and ensuring adequate judicial relief. International abstention is more appropriate because it guarantees access to justice as several courts have stayed rather than dismiss a U.S. suit.²⁶³ A stay is a more appropriate resolution of a parallel suit because U.S. courts can maintain “ample authority . . . to protect [the parties].”²⁶⁴ For

Se. Alaska Conservation Council, 129 S. Ct. 2458, 2468–69 (2009) (holding gold mine tailings are “fill” that can receive just fill permit); *Friends of Santa Fe Cnty. v. Lac Minerals, Inc.*, 892 F. Supp. 1333, 1342 (D.N.M. 1995) (holding gold mine overburden discharging toxic metals exempt from RCRA Subtitle C regulation).

260. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 513 (1982).

261. See *infra* Part V.D.1.

262. See *infra* Part V.D.2.

263. *Royal & Sun Alliance Ins. Co. of Can. v. Century Int’l Arms, Inc.*, 466 F.3d 88, 96 (2d Cir. 2006); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1155 n.10 (citing *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1523 (11th Cir. 1994)); see *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 685 (7th Cir. 1987); *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 901 (7th Cir. 1999).

264. See *Harrison v. NAACP*, 360 U.S. 167, 179 (1959) (involving *Pullman* abstention). A stay may be required if a suit involves damages. *Bush*, *supra* note

example, the court in *Johns Hopkins Health System Corp.* retained jurisdiction because the foreign court proceeding was slow and missed an issue.²⁶⁵ Also, the court in *Dole Food Co., Inc. v. Gutierrez*²⁶⁶ retained jurisdiction because of likely false accusations of pesticide use injuries to banana workers.²⁶⁷ Under exhaustion, if the U.S. court were to make a determination of an adequate foreign court before all facts were uncovered, then it may inadvertently require exhaustion in a corrupt or otherwise inadequate judicial system. Stays are also crucial because U.S. courts may possibly dismiss ATS claims for res judicata or collateral estoppel if a foreign court reached a judgment or settled the facts or issues.²⁶⁸ Because the Supreme Court found that collateral estoppel applies to § 1983 suits,²⁶⁹ it might apply res judicata and collateral estoppel principles to ATS suits. Yet, the Court mentioned an exception to res judicata and collateral estoppel when a court did not allow fair procedures for constitutional claims.²⁷⁰ Abstention is also superior to exhaustion because it even allows a U.S. court to issue a foreign anti-suit injunction²⁷¹ if (1) a policy of the forum issuing the injunction would

120, at 142–43 (discussing possible application of *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) to international abstention cases).

265. 374 F. Supp. 2d 465, 475 (D. Md. 2005).

266. No. CV039416(PJWX), 2004 WL 3737123, at *6 (C.D. Cal. July 13, 2004).

267. *Id.*

268. *See* Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 366 (8th Cir. 2007) (citing *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 939 (D.C. Cir. 1984)); *Gen. Motors Corp. v. Ignacio Lopez de Arriortua*, 948 F. Supp. 656, 669 (E.D. Mich. 1996) (citing *Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1352 (6th Cir. 1992)); *cf.* Gordon G. Young, *Federal Court Abstention and State Administrative Law from Burford to Ankenbrandt: Fifty Years of Judicial Federalism Under Burford v. Sun Oil Co. and Kindred Doctrines*, 42 DEPAUL L. REV. 859, 917–18 & nn.324–30 (1993).

269. *Allen v. McCurry*, 449 U.S. 90, 105 (1980).

270. *Id.* at 101.

271. *E.g.*, *Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459, 471–72 (2009) (upholding denial of a foreign anti-suit injunction because defendant was not trying to evade an important public policy of the U.S. forum and the parties had agreed to suspend the Australian proceedings); *Albemarle Corp. v. AstraZeneca UK Ltd.*, No. 5:08-1085-MBS, 2009 WL 902348, at *6–8 (D.S.C. Mar. 31, 2009) (noting the Fifth, Seventh, and Ninth Circuits generally grant foreign anti-suit injunctions while the First, Second, Sixth, and D.C. Circuits generally allow concurrent jurisdiction, unless possibly foreign action threatens the U.S. jurisdiction or important public policies of the forum suggest otherwise).

be frustrated, (2) the litigation would be vexatious or oppressive, (3) the issuing courts *in rem* or *quasi in rem* jurisdiction would be threatened, or (4) other equitable considerations would be prejudiced.²⁷²

Similar to U.S. courts' use of abstention instead of exhaustion for § 1983 suits, U.S. courts should at least use international abstention instead of exhaustion for ATS suits in which the foreign State is the defendant or benefited by the defendant's actions as those suits are most akin to the avoidance of state court resolution of § 1983 suits where a state official is the defendant.²⁷³

2. If U.S. Courts Require Exhaustion for ATS Suits, the Doctrine Should Be Modified to Explicitly Consider the Gravity of Harm and Allow Stays and Equitable Tolling

If U.S. courts apply a prudential exhaustion analysis to ATS suits, they should modify the *Sarei* test to clearly incorporate three facets. First, U.S. courts should clearly add a gravity part to the three-part *Sarei* exhaustion analysis instead of the implicit consideration in the nexus part of the *Sarei* test or the obviously futile local remedies part of the *Sarei* test.²⁷⁴ Courts can use the gravity factor that the Ninth Circuit panel used when it temporarily established a prudential exhaustion requirement for FSIA claims.²⁷⁵ Second, U.S. courts

272. *Albemarle Corp.*, 2009 WL 902348, at *6–8 (citing *In re Unterweser Reederei GmbH*, 428 F.2d 888, 890 (5th Cir. 1970), *rev'd on other grounds*, 407 U.S. 1, 92 (1972) (granting anti-suit injunction that enjoined defendant from filing similar suit in English court)); *see also* *SEC v. Pension Fund of Am., L.C.*, 613 F. Supp. 2d 1341, 1346–47 (S.D. Fla. 2009) (granting anti-suit injunction of later-filed Costa Rican suits to prevent interference with and evasion of the S.D. Fla proceedings).

273. *Allen*, 449 U.S. at 101, 105.

274. *See supra* notes 143–146, 164 and accompanying text.

275. *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1063–64 (9th Cir. 2009), *rev'd*, 616 F.3d 1019, 1037 (9th Cir. 2010) (reversed as not needing to reach the issue of a prudential exhaustion requirement). The fourth part of the panel's test was:

Finally, the court may, in its sound discretion, impose or waive exhaustion after assessing the availability, effectiveness, and possible futility of any unexhausted remedies in light of various prudential factors, including but not limited to: (1) the need to safeguard and respect the principles of comity and sovereignty, (2) the existence or lack of a significant United

should stay proceedings pending exhaustion instead of dismissing them. U.S. courts have stayed proceedings under the international abstention doctrine,²⁷⁶ the international comity doctrine,²⁷⁷ the *Pullman*²⁷⁸ abstention doctrine, and Professor Young has stated that the U.S. Supreme Court suggested it may be appropriate in some circumstances under the *Burford*²⁷⁹ abstention doctrine.²⁸⁰ U.S. courts have allowed stays in abstention of domestic environmental cases.²⁸¹ With a stay, a federal court can resolve issues if the other court did not decide the exact issue as presented.²⁸² The Ninth Circuit's order of mediation in this case while the court's jurisdiction is being litigated provides an analogous example of how a stay may allow litigation to be peacefully resolved.²⁸³ Third, a U.S. court should apply equitable tolling if the ten-year statute of limitations would bar

States 'nexus,' (3) the nature of the allegations and *the gravity of the potential violations of international law*, and (4) whether the allegations implicate matters of 'universal concern' for which a state has jurisdiction to adjudicate the claims without regard to territoriality or the nationality of the parties.

Id. (emphasis added).

276. See sources cited *supra* note 263.

277. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004) (citing *Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1514 (11th Cir. 1994)).

278. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941).

279. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

280. Young, *supra* note 268, at 871 & n.61 (citing *Ankenbrandt v. Richards*, 401 U.S. 37, 41 (1992)).

281. *E.g.*, *Holder v. Gold Fields Mining Corp.*, 506 F. Supp. 2d 792, 804–05 (N.D. Okla. 2007) (finding state law claims might be stayed until an *ongoing* CERCLA investigation and remedial plan is completed to prevent conflict).

282. See Young, *supra* note 268, at 870.

283. See *Sarei v. Rio Tinto, PLC*, 625 F.3d 561, 562 (9th Cir. 2010) (en banc) ("This case is referred to Judge Edward Leavy to explore the possibility of mediation. Judge Leavy is requested to report to the en banc court within twenty-eight (28) days as to whether mediation should proceed or whether this case should be returned to the en banc court."). Judge Reinhardt stated,

While we are properly exercising our jurisdiction to decide, among other issues, whether we have jurisdiction here, we may take any non-dispositive action we deem prudent or necessary If the mediation succeeds, we will simply have helped to resolve a complex legal dispute of great importance to the various litigants by means of a peaceful settlement rather than through extended litigation.

Id. at 567, 568.

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U.S. suit, especially for the time that an abusive government remains in power.²⁸⁴

VI. CONCLUSION

Before Congress, the Executive Branch, or international law clearly stated that nations, or the United States, should require exhaustion, a federal circuit court failed to yield to the policymaking branches in matters that have far-reaching and foreign policy implications. For the first time since 1789, plaintiffs bringing suit under the Alien Tort Statute face a requirement that they may have to first exhaust local remedies in the location where the tort occurred. The court's complex three-part rule will greatly add to the duration and expense of litigation. Few acts qualify as violations of the "law of nations." Five other foreign policy justiciability doctrines have adequately balanced the need to respect comity and to uphold customary international law and adjudicate grave violations of international law. By impeding adjudication of grave violations without clearly providing for equitable tolling and without opportunities for adequate adjudication prior to when *res judicata* and collateral estoppel might apply, the *Sarei* decision may actually obstruct any hope of recovery for low-income plaintiffs and unnecessarily cost defendants millions of dollars.

In the meantime, U.S. courts should either rely on existing justiciability doctrines and let the politically accountable branches clearly establish an exhaustion requirement or modify the exhaustion analysis. To modify the exhaustion analysis, the courts should import a dispositive element for the gravity of the potential international law violations, stay U.S. proceedings to prevent foreign adjudications from precluding U.S. suits and to maintain equitable powers to ensure adequate judicial resolution, and import equitable tolling into the ATS to provide clear guidance that judicial relief will remain available for egregious acts. Without these modifications and clarifications, the exhaustion requirement may lead to greater world strife instead of achieving the statute's purpose to maintain "the peace of the world," as seen in Papua New Guinea's long civil war

284. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 286, 288 (S.D.N.Y. 2009); *see* text accompanying note 227.

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arising from unremedied large-scale gold mining environmental damage.