**Fifth Circuit Rejects International Environmental Claims**

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INTERNATIONAL ENVIRONMENTAL CLAIMS AGAINST MINING COMPANY OPERATING IN INDONESIA REJECTED BY FIFTH CIRCUIT

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A recent case from the Fifth Circuit, Beanal v. Freeport-McMoran, Inc., involved the question of whether an international tort action may be brought under the Alien Tort Statute, 28 U.S.C. § 1350, for claims of environmental damage resulting from the activities of an American mining company's subsidiary operating in the Pacific Rim. The Fifth Circuit held that the particular "violations" alleged did not give rise to environmental torts cognizable under the "law of nations" prerequisite in the Alien Tort Statute, which requires a violation of a universally accepted environmental standard or norm.

A resident of the Republic of Indonesia and leader of the Amunge Tribal Council, Tom Beanal, originally brought the action against Freeport-McMoran in 1996. The pleadings alleged, among other things, certain environmental abuses and injuries to the Amgume's environment and habitat resulting from the operation of Freeport-McMoran's "Grasberg Mine" on Jayawijaya Mountain in Irian Jaya, Indonesia. For example, Beanal's Third Amended Complaint alleged that the mining company "deposits approximately 100,000 tons of tailings per day in the Aghwagaon, Otomona and Akjwa Rivers," and that the tailings deposits have: (1) "diverted the natural flow of the rivers;" (2) rendered the rivers "unusable for traditional uses including bathing and drinking;" (3) affected the "body tissue of the aquatic life in said rivers;" (4) resulted in tailings overflows which have caused the destruction of "lowland rain forest vegetation;" and (5) "increas[ed] the likelihood of future flooding." The same pleading alleged that Freeport-McMoran "has or will cause . . . 3 billion tons of 'overburden' to be dumped into the Wanagon and Carstensz," which has created "the likely risk of massive landslides" and acid rock drainage "rendering the Lake Wanagon an 'acid lake' extremely high in copper concentrations."

Beanal's environmental tort claims were first addressed by the United States District Court for the Eastern District of Louisiana, after Freeport-McMoran challenged Beanal's standing and argued that his claims failed to state a claim upon which relief can be granted. The federal district court held that Beanal had standing to bring claims on his own behalf for the claims of environmental torts, but ultimately dismissed the claims under the Alien Tort Statute "because Freeport's alleged environmental practices do not appear to have violated the law of nations." Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 383 (E.D. La. 1997).

The environmental law principles relied on by Beanal included the "Polluter Pays Principle," the "Precautionary Principle" and the "Proximity Principle" derived from Phillipe Sands' Principles of Environmental Law I: Frameworks, Standards and Implementation (1995 ed.) ("Sands"). According to the district court, those principles "do not constitute international torts for which there is universal consensus in the international community as to their binding status and their content." 969 F. Supp. at 384. The court relied on Sands' statement that the only environmental principles substantive enough to give rise to an international remedy are the

obligation reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, namely, "that states have sovereignty over their natural resources and the responsibility not to cause environmental damage." Id., citing Sands at 183.

On appeal, the Fifth Circuit concluded that the district court did not err when it dismissed Beanal's pleadings for failure to state an international tort claim under the Alien Tort Statute. According to the Fifth Circuit, the sources of international law cited by Beanal and certain amici supporting Beanal "merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts." The court went on to note that "federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments."

The Alien Tort Statute at issue in Beanal was first passed in 1789. Through most of the intervening years the statute has largely been ignored, although more recently it has been used as a basis for international human rights litigation. The statute itself is short, and reads in its entirety:

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.

28 U.S.C. § 1350. Courts have found that this statute creates a private right of action and that three elements must be satisfied in order to state a claim. See, e.g., In re Estate of Ferdinand Marcos Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995); Kadic v. Karadzic, 70 F.3d 232 (2nd Cir. 1995). First, the suit must be brought by an alien to the United States. Second, the claim asserted must sound in tort. Third, the tort alleged must violate the "law of nations" or a "treaty of the United States." Kadic, 70 F.3d at 238, citing Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2nd Cir. 1987), rev'd on other grounds, 488 U.S. 428 (1989).

Certain claims under the statute, such as non-genocide related human rights violations, also require a showing of state action, that is, an "official action" (or inaction) by an "agent of a government or of any political subdivision, acting within the scope of such authority." See Restatement (Third) of Foreign Relations Law of the United States § 207 comment c. The federal district court in Beanal engaged in an extensive discussion of state action and concluded, by analogy to actions under 42 U.S.C.§ 1983, that a private corporation can be found to be a state actor under certain circumstances. 969 F. Supp. at 370-380. According to the court, a corporation might be a state actor where, for example, there is a sufficiently close "nexus" or "symbiotic relationship" between the State and the challenged action of the regulated entity or where the corporation willfully engages in joint activity with the State or carries out a function traditionally the exclusive prerogative of the State. Id. at 376-377, quoting Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1447 (10th Cir. 1995). The district court concluded that Beanal failed to sufficiently allege state action, but the Fifth Circuit ultimately concluded that it was not necessary to reach the state action question given the insufficiency of Beanal's pleadings in other respects under Fed. R. Civ. P. 12(b)(6).

Courts have noted that the "law of nations" element of the Alien Tort Statute is dynamic, rather than static. Thus, "courts must interpret international law not as it was in 1789, but as it has evolved and exists among nations of the world today." Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1988). In ascertaining the law of nations for purposes of the Alien Tort Statute, courts look to the customary sources for international law, including treaties and accords, the usage of nations, judicial opinions and the works of jurists. Id. According to the Fifth Circuit in Beanal, "[t]he law of nations is defined by customary usage and clearly articulated principles of the international community."

Because of the dynamic nature of the "law of nations" and the ever-evolving environmental agendas being played out on the world stage, natural resources development companies clearly should not view the Fifth Circuit's rejection of the claims against Freeport-McMoran as the end of the story in terms of the potential for exposure to international environmental torts under the Alien Tort Statute. Nor should environmental laxity on the part of a particular country or regime drive the environmental policies of subsidiaries operating internationally. Rather, prudent companies operating abroad should (and already do) hold themselves to stringent standards that are driven as much by domestic environmental standards (i.e., standards that would apply in the United States) and prevailing practices and technologies, as by the environmental framework which may be established, more or less, by a particular nation of interest abroad.

1. Beanal also alleged that Freeport-McMoran engaged in certain acts of genocide and "cultural genocide" and asserted claims for individual human rights violations both under the Alien Tort Statute and the Torture Victim Protection Act of 1991. The Fifth Circuit also upheld the dismissal of those claims. This article focuses on the environmental tort claims exclusively.