Fordham International Law Journal

Volume 28, *Issue* 1 2004 *Article* 4

Citizens Cannot Stand for it Anymore: How the United States' Environmental Actions in Afghanistan and Iraq Go Unchecked by Individuals and Non-Governmental Organizations

Wynne P. Kelly*

*

Citizens Cannot Stand for it Anymore: How the United States' Environmental Actions in Afghanistan and Iraq Go Unchecked by Individuals and Non-Governmental Organizations

Wynne P. Kelly

Abstract

As the U.S. government's reach and responsibilities expand, it remains unclear exactly what, if any, input the general populations of Afghanistan, Iraq, or the United States have on government actions. The environmental needs of the two States have concerned the world enough that the United Nations Environment Program ("UNEP") has published a detailed post-conflict report on Afghanistan ("Afghanistan PCA") and a "Desk Study" of the environment in Iraq ("Iraq Desk Study"). There are four basic ways that citizens can attempt either to enjoin U.S. government environmental action abroad or compel the government to adhere to established regulations and agreements: (1) private citizen or NGO suit under U.S. federal law; (2) private citizen or NGO suit under international law or one seeking to compel compliance with a treaty or agreement that the United States is party to; (3) suit by a non-U.S. national against the United States under a recognized treaty or against a U.S. corporation under ATCA; or (4) a qui tam action alleging fraudulent or illegal action by a party that costs the United States financially.

COMMENT

CITIZENS CANNOT STAND FOR IT ANYMORE: HOW THE UNITED STATES' ENVIRONMENTAL ACTIONS IN AFGHANISTAN AND IRAQ GO UNCHECKED BY INDIVIDUALS AND NON-GOVERNMENTAL ORGANIZATIONS

*Wynne P. Kelly**

"This land is your land & this land is my land—sure—but the world is run by those that never listen to music anyway."[1]

INTRODUCTION

Recent developments in U.S. foreign policy[2] have resurrected issues not seen since the occupations of Germany and Japan immediately after World War II.[3] The role of occupier[4] is

* J.D. Candidate, 2005, Fordham University School of Law; *Fordham International Law Journal*, Editor-in-Chief, Vol. XXVIII; A.B., 2000, Georgetown University. The author would like to thank Honorable Joseph A. Greenaway, Jr., U.S.D.J., Professor Nicholas Johnson, and Professor Joseph C. Sweeney for their advice, knowledge, and mentorship. Special thanks also go to Dr. Josephine Liu, Neil Dennis, Dina Ehrenburg, and Michelle Totah for their editing and guidance. Most of all, thanks to my parents and brothers; and to Lauren for her infinite patience and support.

1. Bob Dylan, *Sacred Cracked Voice & the Jingle Jangle Morning* (1970).

2. *See, e.g.*, Colin L. Powell, *A Strategy of Partnerships*, 83 FOREIGN AFF., Jan./Feb., at 22 (2004) (describing status of U.S. foreign policy including situations in Afghanistan and Iraq); George Melloan, *Clash of Civilizations? It's Not That Simple*, WALL ST. J., Mar. 30, 2004, at A19 (noting difficulties of establishing democracy in both Afghanistan and Iraq due to complex issues present); Elisabeth Bumiller, *White House Letter; Planning the Budget for 2 Countries at Once*, N.Y. TIMES, Oct. 13, 2003, at A13 (noting need of United States to budget for operations in both Afghanistan and Iraq).

3. *See* Allen W. Dulles, *Flashback: "The Present Situation in Germany"*, 82 FOREIGN AFF., Nov./Dec., at 2 (2003) (describing situation in occupied Germany of 1945, which editors compare to current Iraqi occupation); *see also* Lt. Col. Mark Martins, USA, *No Small Change of Soldiering: The Commander's Emergency Response (CERP) in Iraq and Afghanistan*, 2004-FEB ARMY LAW. 1, 1 n.4 (2004) (noting Operation Iraqi Freedom is first time since occupations of Germany and Japan that United States has assumed role of occupying power); Suzanne Nossel, *Winning the Postwar*, 2003-JUN LEGAL AFF. 18, 19-21 (2003) (drawing lengthy comparison between occupations of Germany and Japan after World War II and applicable international law and current occupation of Iraq).

4. *See* David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 846 (2003) (highlighting United Kingdom's and United States's embracing of role of occupiers and accompanying occupational law); *see also* S.C. Res. 1483, U.N. SCOR, 4761st mtg. at 1, 11, U.N. Doc. S/RES/1483 (2003) [hereinafter S.C. Res. 1483] (clarifying status of

one that, while not novel in U.S. history, remains uncomfortable.[5] As the U.S. government's reach and responsibilities[6] expand, it remains unclear exactly what, if any, input the general populations of Afghanistan, Iraq, or the United States have on government actions.[7] One integral issue that has not dominated the discourse thus far is the protection of the environments[8] of Afghanistan and Iraq.

Part I of this Comment will discuss the history of international environmental legislation and treaty-making. Part I will also examine the particular environmental concerns present in Afghanistan and Iraq. Part II will recount the United States' response to international environmental actions, both in the diplomatic and domestic arenas, and the procedural bars to individuals and Non-Governmental Organizations ("NGOs") bringing actions to protect the environments of Afghanistan and Iraq. Part

---

Iraq and previous U.N. Security Council Resolutions and noting United Kingdom and United States as occupying forces); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Geneva II]; Geneva Convention Relative to Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Geneva IV] (noting rules for victorious Nations in occupied lands).

5. *See* Ian Fisher, *Iraqis Ambush a U.S. Convoy; G.I.'s Raid Cell*, N.Y. TIMES, Dec. 17, 2003, *available at* http://www.nytimes.com/2003/12/17/international/middleeast/17IRAQ.html (reporting that violence against U.S. forces still persists well after formal conflict has ceased); *see also* Carlotta Gall & Amy Waldman, *Afghanistan Faces a Test in Democracy*, N.Y. TIMES, Dec. 15, 2003, *available at* http://www.nytimes.com/2003/12/15/international/asia/15AFGH.html (highlighting difficulties confronting establishment of democracy in Afghanistan post-Taliban regime); Eric Lichtblau, *Demonstrators Demand U.S. Withdraw Troops from Iraq*, N.Y. TIMES, Oct. 27, 2003, at A18 (noting California demonstrations calling for withdrawal of military forces from Iraq).

6. *See* Scheffer, *supra* note 4, at 846 (stating increased responsibilities of United Kingdom and United States as occupying forces and further stating that other contributing Nations may be exempt from liability while United Kingdom and United States retain total responsibility); *see also* S.C. Res. 1483, *supra* note 4 (clarifying status of Iraq and previous U.N. Security Council Resolutions and declaring forces of United Kingdom and United States as occupying ones); Geneva II, *supra* note 4; Geneva IV, *supra* note 4.

7. *See, e.g.*, Madeleine Albright, *Bridges, Bombs, or Bluster?*, 82 FOREIGN AFF., Sept./Oct., at 2 (2003) (noting lack of citizen and international support for Bush's actions in Iraq and lack of stability in Afghanistan). *But see Japan Promises Cooperation in Environment Protection with Arabs*, JIJI PRESS ENG. NEWS SERV., Mar. 27, 2004, *available at* 2004 WL 56396358 (noting Japanese Environment Minister meeting with Arab environmental leaders to address environmental issues in region).

8. *See* BLACK'S LAW DICTIONARY 555 (7th ed. 1999) (defining "environmental effect" as "natural or artificial disturbance of the physical, chemical, or biological components that make up the environment").

II will specifically examine the judicial and executive responses in the United States to international environmental concerns affecting the United States and its government agencies abroad. Part III will discuss possible avenues for both private citizens and NGOs to attempt to watch over corporate and governmental actions affecting the environments in both Afghanistan and Iraq.

I. *HISTORICAL PERSPECTIVES ON THE ENVIRONMENTAL PLIGHTS OF AFGHANISTAN AND IRAQ, AND CITIZENS' INABILITY TO GAIN ACCESS TO U.S. COURTS FOR ENVIRONMENTAL HARM ABROAD*

A. *A Brief History of U.S. Involvement in International Environmental Regulation*

Until relatively recently, the responsibility of environmental regulation and protection rested with individual States.[9] As more factors[10] and indicators demonstrated the transnational impact of environmental issues, however, their importance in international diplomacy[11] and negotiation greatly increased.[12]

---

9. *See* Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65, 79-81 (2002) (discussing shift in viewing pollution and environmental harm as being State or Inter-State issue to global issue); *see also* Prasad Sharma, *Restoring Participatory Democracy: Why the United States Should Listen to Citizen Voices While Engaging in International Environmental Lawmaking*, 12 EMORY INT'L L. REV. 1215, 1217 n.4 (1998) (quoting Declaration of United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev.1 at 5 (1972)) (stating that at Stockholm Conference on Human Environment of 1972, participating States held that resources were held by individual Nations for their use and exploitation).

10. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 1033 (4th ed. 2003) (noting globalization of environmental problems is product of several factors like worldwide population growth, expanding scale of international economic activity, and knowledge of humankind's impact on earth's ecosystems); *see also* BHARAT H. DESAI, INSTITUTIONALIZING INTERNATIONAL ENVIRONMENTAL LAW 70-106 (2004) (discussing large increase in awareness of international environmental issues and Stockholm Conference on Human Environment as turning point in international cooperation that led to more multi-lateral agreements regarding environment); Richard A. Rinkema, *Environmental Agreements, Non-State Actors, and the Kyoto Protocol: A "Third Way" for International Climate Action?*, 24 U. PA. J. INT'L ECON. L. 729, 735-36 (2003) (noting growth in activity of international organizations, particularly United Nations, in regulation and attempted protection of the environment); Sharma, *supra* note 9, at 1215-19 (noting increase in international environmental legislation and reasons for heightened awareness of international environmental issues).

11. *See, e.g.*, Robin L. Juni, *The United Nations Compensation Commission as a Model for an International Environmental Court*, 7 ENVTL. LAW. 53 (2000) (noting importance of establishment of international tribunal for environmental claims and suggesting United

The number of regulations and treaties dealing primarily with the environment expanded exponentially.[13] Countries have also become more cognizant of the impact of war and military conflict on the environments of Nations embroiled in battle and sought to address the issue of how to limit the environmental destructiveness of battle.[14]

The United States, the world's largest generator of greenhouse gases,[15] exhibits a mixed record of participation in the drafting and enforcement of international environmental treaties.[16] The unpredictability and wavering reliability of the

---

Nations Compensation Commission that hears claims arising from First Persian Gulf conflict as model); Dan Meyer & Everett E. Volk, *"W" For War and Wedge? Environmental Enforcement and the Sacrifice of American Security – National and Environmental – to Complete the Emergence of a New "Beltway" Governing Elite*, 25 W. NEW ENG. L. REV. 41, 69-72 (2003) (suggesting U.S. domestic and foreign policy coupled with unclear public international law creates uncertainty as to U.S. role in environmental affairs); Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT'L & COMP. L. 561, 569, 581-82 (2003) (noting use of shaming and normative tactics to enjoin landmine usage seen as detrimental to both environment and human population by States that are non-parties to treaty banning landmines).

12. *See* PERCIVAL ET AL., *supra* note 10, at 1033 (noting rise in awareness of international environmental issues and agreements); *see also* Sharma, *supra* note 9, at 1222-24 (noting increase in international environmental agreements).

13. *See* Sharma, *supra* note 9, at 1223-26 (noting increase in international regulation particularly since 1945); *see also* Andrew Bove, *A Study of the Financial Mechanism of the Montreal Protocol On Substances That Deplete the Ozone Layer*, 9 ENVTL. LAW. 399 (2003) (noting relative success of Montreal Protocol which required funds from developed countries to go to developing countries to assist them in achieving compliance).

14. *See, e.g.*, Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 YALE J. INT'L L. 1, 9 (1997) (noting increased awareness of environmental effects of war after Vietnam Conflict); Ens. Florencio J. Yuzon, USN, *Deliberate Environmental Modification Through the Use of Chemical and Biological Weapons: "Greening" the International Laws of Armed Conflict to Establish an Environmentally Protective Regime*, 11 AM. U. J. INT'L L. & POL'Y 793, 796-97 (1996) (noting need for international law to directly address issues of destructive usage of environment for military strategical purposes); Lynn Berat, *Defending the Right to a Healthy Environment: Toward a Crime of Genocide in International Law*, 11 B.U. INT'L L.J. 327, 329-33 (1993) (noting international common law's developing recognition of Nations' common responsibility to protect environment).

15. *See, e.g.*, Laura Thoms, *A Comparative Analysis of International Regimes on Ozone and Climate Change with Implications for Regime Change*, 41 COLUM. J. TRANSNAT'L L. 795, 797 (2003) (noting significance of U.S. departure from Kyoto Protocol as United States is largest emitter of greenhouse gases); Eileen Claussen, *Climate Change: Present and Future*, 27 ECOL. L.Q. 1373, 1378 (2001) (noting United States responsible for 25% of greenhouse gases while making up less than 5% of global population).

16. *See* Richard D. Lazarus, *A Different Kind of "Republican Moment" in Environmental Law*, 87 MINN. L. REV. 999, 1000-02 (2003) (discussing Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 66 (1992) (noting that modern

United States in its support of such treaties leads to their ineffectiveness in both overall effect[17] and lack of enforcement authority.[18]

The administrations of Presidents Nixon[19] and Clinton,[20]

---

environmental concern in the United States came out of a spurt of public willingness to "undergo sacrifices to promote the public good"); *see also* James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 292 (1990). Professor Lazarus also notes the current Bush administration has taken steps similar to the Reagan administration which "undertook a series of widely publicized changes in the direction of national environmental policy that drew the condemnation of environmentalists, the protest of leaders in the opposing political party, and the attention of the national news media." Lazarus, *supra*, at 1006-07; *see also* Thoms, *supra* note 15, at 825-30 (noting combination of industrial lobbying, Congressional reticence to allow developing world an edge, and new Bush administration's ties to oil equaled drastic cutback in U.S. support for Kyoto Protocol).

17. *See* Joseph DiMento, *International Environmental Law: A Global Assessment*, [2003] 33 ENVTL. L. REP. (Envtl. L. Inst.) 10,387 (noting ineffectiveness of Basel Convention, Kyoto Protocol, and Montreal Protocol due to either lack of U.S. participation or failure to ratify domestically); *see also* DESAI, *supra* note 10, at 256-81 (advocating new vision of international environmental institutions as current views and implementation of agreements have not been effective enough). Further, by not participating in many international environmental agreements, the United States virtually renders moot many of these accords due to its accounting for such a huge percentage of the regulated wastes and pollution. *See* DiMento, *supra*, at 10,387 (discussing need for U.S. participation for achievement of environmental treaty goals); *see also* Anita Margrethe Halvorssen, *Climate Change Treaties – New Developments at the Bueons Aires Conference*, 1998 COLO. J. INT'L ENVTL. L. & POL'Y 1, 20-21 (1998) (opining that without U.S. participation in Kyoto Protocol, agreement will be ineffective due to large proportion of U.S. emissions).

18. *See generally* Markus Ehrmann, *Procedures of Compliance Control in International Environmental Treaties*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 377 (2002) (noting difficulty enforcing environmental agreements and forcing compliance, particularly without U.S. participation or when U.S. terms are not met). *But see* Randi E. Alarcon, *The Convention on International Trade in Enforcing CITES and the United States Solution to Hindering the Illegal Trade of Endangered Species*, 14 N.Y. INT'L L. REV. 105, 119-21 (2001) (noting sophisticated U.S. and international legislation and support implemented by United States to protect endangered species).

19. *See* J. BROOKS FLIPPEN, NIXON AND THE ENVIORNMENT 50-79 (2000)) (noting extensive environmental legislation passed during Nixon administration); *see also* Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 987 (2001) (noting Nixon administration's regulatory review program's focus on environmental regulatory issues); C.M. Cameron Lynch, *Environmental Awareness and the New Republican Party: The Re-Greening of the GOP?*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 215, 220-22 (2001) (noting Nixon's seemingly sincere concern about environmental issues and legislation passed during his tenure to attempt to preserve environment).

20. *See* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 866 (2003) (recalling Clinton White House's propensity towards supporting environmental regulation); *see also* Lazarus, *supra* note 16, at 1007-09 (explaining reversal by President George W. Bush of most Clinton administration

respectively, set the high-water marks for U.S. environmental regulation and activism. Nixon signed into law the most sweeping U.S. environmental legislation, including the creation of the Environmental Protection Agency ("EPA"), the Clean Air Act, and the National Environmental Policy Act ("NEPA").[21] President Clinton participated in the most aggressive international diplomacy relating to the environment, seeking environmental analysis of trade agreements and negotiating with other States to pass the Kyoto Protocol.[22]

The establishment of EPA during the Nixon administration led to a vast expansion of both federal regulation and enforcement powers regarding the U.S. environment,[23] but also resulted in uncertainty over what entity holds ultimate responsibility for the environment's protection.[24] While Congressional will con-

---

environmental regulations and restrictions); Ian A. Bowles & Cyril F. Kormos, *The International Conservation Mandate of the United States Government*, 11 N.Y.U. ENVTL. L.J. 372, 375-76 (2003) (noting sweeping environmental legislation signed by both Presidents Clinton and Nixon).

21. *See* Lazarus, *supra* note 16, at 1006-07, 1026-27 (noting both President Nixon's initial pro-environmental legislation, such as National Environmental Policy Act ("NEPA"), formation of Environmental Protection Agency ("EPA"), and Clean Air Act Amendments of 1970, and his backing away from environmental issues at end of presidency); *see also* Lynch, *supra* note 19, at 221 (noting Nixon's sincere concern for U.S. environmental issues).

22. *See* James Salzman, *Seattle's Legal Legacy and Environmental Reviews of Trade Agreements*, 31 ENVTL. L. 501, 503 (2001) (noting President Clinton's issuance of Executive Order 13,141 which committed United States to review trade agreements for environmental concerns); *see also* Lazarus, *supra* note 16, at 1006 (noting current administration's reversal of Clinton environmental agreements); David W. Floren, *Antarctic Mining Regimes: An Appreciation of the Attainable*, 16 J. ENVTL. L. & LITIG. 467, 500 n.209 (2001) (noting United States under President Clinton began to show sustained commitment to strengthening international environmental law, for example, by negotiating strenuously both in United States and abroad for Kyoto Protocol).

23. *See generally* M.R. (Vega Alta), Inc. v. Caribe General Elec. Products, Inc., 31 F. Supp. 2d 226, 227-29 (D.P.R. 1998) (noting obligation of EPA to enforce environmental regulations it promulgates). *See* Rebecca A. D'Arcy, *The Legacy of Dames & Moore v. Regan: The Twilight Zone of Concurrent Between the Executive and Congress and a Proposal for a Judicially Manageable Nondelegation Doctrine*, 79 NOTRE DAME L. REV. 291, 296 (2003) (discussing EPA's ability to promulgate environmental regulations but inability to amend Congressional environmental law).

24. *See* D'Arcy, *supra* note 23, at 296-98 (highlighting EPA's mandated role of enforcing environmental regulations but Congressional obligation to create effective legislation); *see also* Joseph D. Jacobson, *Safeguarding National Security Through Public Release of Environmental Information: Moving the Debate to the Next Level*, 9 ENVTL. LAW. 327, 381-83 (noting environmental hazard information controlled by EPA but access limited by Department of Defense and Attorney General); Joel Stroud, *Beyond Title Search: Attorneys Must Consider Environmental Regulations*, 25 N.C. CENT. L. J. 182, 187 (2003) (acknowl-

trols when Congress explicitly states its intentions in a body of law,[25] an agency (such as EPA) possesses more power when the enabling legislation is ambiguous and that agency's interpretation of the statute is given great deference.[26] This deference is not dispositive, though, and has recently been weakened in the environmental context.[27] Further, statutory interpretation and expansion in the international environmental context has been severely limited by *Lujan v. Defenders of Wildlife*,[28] where the U.S. Supreme Court held that individuals must demonstrate particularized harm to gain standing to enforce environmental statutes abroad.[29] EPA does, however, have bilateral cooperative programs with other national and regional environmental agencies to attempt to further common goals of environmental protection; it notably does not with Afghanistan or Iraq.[30]

---

edging EPA's role in administering environmental regulations but noting responsibilities it shares with Fish and Wildlife Service of the Department of the Interior, National Fisheries Service of the Department of Commerce, Army Corps of Engineers, and Department of Agriculture).

25. *See* Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (holding where Congress has clearly spoken on issue, court's review of agency's construction ends and Congressional intent controls); *see also* Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. CAL. L. REV. 975, 1021 (2004) (discussing U.S. courts' deference to agency interpretations after *Chevron*).

26. *See Chevron*, 467 U.S. at 843-44 (holding that gap in Congressional intent can and should be filled by agency to which promulgation and enforcement of regulations has been charged); *see also* Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 897 (2004) (discussing cases where *Chevron* deference deemed appropriate when Congress is silent and agency seeks to fill gap in legislation).

27. *See, e.g.*, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 172 (2001) (holding that where administrative interpretation stretches limits of Congressional power *Chevron* deference is not appropriate); FD & P Enterprises, Inc. v. U.S. Army Corps of Engineers, 239 F. Supp. 2d 509, 514-17 (D.N.J. 2003) (noting Supreme Court holding in *Solid Waste*'s limitation of Clean Water Act's application by EPA and decision to withhold *Chevron* deference to Army Corps of Engineers in that context).

28. 504 U.S. 555 (1992) (holding that neither individuals alone nor as Non-Government Organization ("NGO") have standing to bring claim to enforce Endangered Species Act, 16 U.S.C. § 1536 (2000) for actions done with U.S. funding abroad despite extremely elastic grant of rights of action in statute).

29. *See Lujan*, 504 U.S. at 558-62 (noting "someday intentions" of plaintiffs to revisit areas at issue did not constitute particularized harm satisfactory to establish standing); *see also* Hon. C. Ashley Royal, U.S.D.J., M.D. Ga., *Constitutional Civil Rights*, 55 MERCER L. REV. 1131, 1132 (2004) (discussing application of particularized and concrete harm requirement expressed in *Lujan* to lower court cases).

30. *See Countries and Regions*, Environmental Protection Agency, Office of International Affairs, Official Website, *available at* http://www.epa.gov/international/regions/index.html (last visited May 17, 2004) (detailing Nations and regions that United States

While historically a leader in conservation efforts,[31] the United States has been conspicuously absent from some of the most recent international environmental agreements.[32] This lack of participation, coupled with a U.S. trend of restricting citizen access to U.S. courts for international environmental concerns,[33] does not bode well for citizen oversight of the Afghan and Iraqi environments.[34]

B. *Environmental Concerns Particular to Afghanistan and Iraq That Must Be Addressed*

The arid Middle East region is particularly sensitive to dra-

---

has bilateral environmental agreements with, of which Afghanistan and Iraq are not part).

31. *See* Bowles & Kormos, *supra* note 20, at 373 (noting United States has long history of leadership in conserving world's natural resources including endangered biological diversity); *see also* Salzman, *supra* note 22, at 503 (noting commitment by United States to evaluate all international trade agreements for environmental ramifications).

32. *See generally* Robert F. Blomquist, *Ratification Resisted: Understanding America's Response to the Convention on Biological Diversity, 1989-2002*, 32 GOLDEN GATE U. L. REV. 493 (2002) (examining U.S. failures to ratify Biological Diversity Convention and both political and practical rationales offered for abandoning agreement); Louis Henkin, *How Are Nations Behaving?*, 96 AM. SOC'Y INT'L L. 205 (2002) (noting U.S. failure to join several treaties with environmental components, specifically mentioning Kyoto Protocol).

33. *See, e.g.*, *Lujan*, 504 U.S. at 555 (1992) (holding that private citizens without clear intent to revisit areas where species are endangered do not have standing despite general grant by Congress in Endangered Species Act, 16 U.S.C. § 1536 (2000)); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) (finding district court did not err in holding that non-U.S. plaintiffs lacked standing for actions by U.S. companies abroad detrimental to environment); Molly M. White, *Home Field Advantage: The Exploitation of Federal Forum Non Conveniens by United States Corporations and Its Effects on International Environmental Litigation*, 26 LOY. L.A. L. REV. 491 (1993) (noting use of *forum non conveniens* to avoid litigation in United States for environmental harm committed abroad); Michael Burger, *Bi-Polar and Polycentric Approaches to Human Rights and the Environment*, 28 COLUM. J. ENVTL. L. 371, 381 (2003) (noting international environmental law does not recognize individual right of action).

34. *See, e.g.*, *Afghanistan Is On Brink of Natural Disaster – UN Study*, IRISH TIMES (Dublin), Jan. 30, 2003, at P12 (noting U.N. report stating Afghanistan on verge of environmental catastrophe due to drought and effects of warfare); Babak Dehghanpisheh, *Fall of Eden; To Punish Rebels, Saddam Hussein Tried to Destroy Iraq's Southern Marshes. Will the Country Be Able To Rebuild Them In Time?*, NEWSWEEK INT'L, June 23, 2003, at 48 (noting destruction of Iraqi marshes could be worst environmental disaster of twentieth century); Peter H. Kostmayer, *The Coming Water Wars*, THE RECORD (Bergen County, NJ), Apr. 22, 2003, at L15 (reporting that coming shortage of water in Iraqi region could lead to environmental disaster). *But see* Ann Imse, *Seasoned Ecologist Heads to Iraq; Denverite to Help War-Torn Country Clean Up Hazards*, ROCKY MTN. NEWS (Denver), May 3, 2003, at 4A (noting that former regional administrator for EPA sent to Iraq to help with environmental issues there).

matic environmental fluctuations and water shortages.[35] In both Afghanistan[36] and Iraq,[37] regional and individual concerns exist. Iraq's need for water has forced it to trade oil (its most valuable resource) for water rights to the Euphrates and Tigris.[38] Afghanistan also suffers from water shortage issues.[39] The presence of

35. *See* John Alan Cohan, *Modes of Warfare and Evolving Standards of Environmental Protection Under the International Law of War*, 15 FLA. J. INT'L L. 481, 490 (2003) (noting widespread environmental harm done by both Afghan-Soviet War and recent Operation Enduring Freedom); *see also* Melanne Andromecca Civic, *A New Conceptual Framework for Jordan River Basin Management: A Proposal for a Trusteeship Commission*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 285, 286-89 (1998) (noting severe water shortage in Jordan River Basin and effect on countries near Afghanistan and Iraq); Ludwik A. Teclaff, *Fiat or Custom: The Checkered Development of International Water Law*, 31 NAT. RES. J. 45, 46 (1991) (noting long, contentious history of water rights in Mesopotamian region); *Afghanistan is On Brink of Natural Disaster – UN Study*, *supra* note 34, at P12 (reporting on pressing Afghan environmental issues); Dehghanpisheh, *supra* note 34, at 48 (reporting on Iraqi marshland destruction's environmental consequences).

36. *See* Ben Boer, *The Rise of Environmental Law in the Asian Region*, 32 U. RICH. L. REV. 1503, 1514-16 (1999) (noting Afghanistan's entry into South Asian Association for Regional Cooperation whose environmental wing, South Asian Cooperative Environment Program, addresses particularized issues); *see also Afghan Governor, French Official Discuss Green Issues*, B.B.C. MON. S. ASIA, Sept. 9, 2004 (reporting on meeting between former French environment minister and governor of Balkh Province in Afghanistan regarding environmental progress and remaining issues in region). *But see* Seymour M. Hersh, *ANNALS OF NATIONAL SECURITY: The Other War*, NEW YORKER, Apr. 12, 2004, at 40 (noting breakdown in political structure of Afghanistan and lack of centralized control that leads to violence, insecurity, and reticence of foreign aid agencies to invest and expand in Nation).

37. *See* David Shelby, *Iraqi Marsh Arabs Raise Their Voices Over Future of Wetlands Iraqi Marsh Arabs Discuss Future of Wetlands – Newly Formed Council Studies Issues Related to Re-flooding of Marshes*, ST. DEP'T PRESS RELEASES & DOC., Mar. 22, 2004, *available at* 2004 WL 59150914 (noting demands of Maysan Marsh Arab Council and quoting opinions that marshlands can be restored with diligent attention to environment); *see also* AL-BAWABA NEWS, Mar. 23, 2004, *available at* 2004 WL 64572992 (noting difficulties ahead for any plans to re-flood portions of marshland drained during regime of Saddam Hussein due to environmental, cultural, and health concerns); Joseph W. Dellapenna, *The Two Rivers and the Lands Between: Mesopotamia and the International Law of Transboundary Waters*, 10 B.Y.U. J. PUB. L. 213, 224-34 (1996) (discussing past conflicts among Iraq, Syria, and Turkey over water reserves and predicting future problems); Luan Low & David Hodgkinson, *Compensation For Wartime Environmental Damage: Challenges to International Law After the Gulf War*, 35 VA. J. INT'L L. 405, 409-12 (1995) (explaining long term effects of oil fires set by Iraqi Army in first Gulf War and their possible violations of international law).

38. *See* Yonatan Lupu, *International Law and the Waters of the Euphrates and Tigris*, 14 GEO. INT'L ENVTL. L. REV. 349, 366 (2001) (describing current water crisis in Iraq, Jordan, and Syria and plan to trade oil for water with Turkey); *see also* Eyal Benvenisti, *Water Conflicts During the Occupation of Iraq*, 97 AM. J. INT'L L. 860, 865-69 (2003) (noting specific obligations of occupying forces to ensure viable drinking water for people of Iraq).

39. *See, e.g.*, Ali Azimi & David McCauley, *Afghanistan's Environment in Transition*

foreign nationals in the two States[40] strains the already depleted resources of the environments[41] and highlights the lack of international environmental law applicable to military or peacekeeping forces.[42]

These military forces[43] and peacekeepers call international attention to the existing delicate environmental situation in these two countries, as armed conflict has been a nearly ever-present hardship for the past twenty years.[44] Afghanistan's people have experienced a constant state of war since the Soviet in-

---

(Asian Development Bank: South Asia Department, Dec. 2002) at 9 (noting water supply and management most crucial environmental issue in Afghanistan); Bryan Pearson, *Afghanistan's Environment Choked by War, Bombing, Drought*, AGENCE FRANCE-PRESSE, Jan. 24, 2002, *available at* http://www.reliefweb.int/w/rwb.nsf/480fa8736b88bbc3c12564f6004c8ad5/aadfb71b56fb7be0c1256b4b003d9ed4?OpenDocument (last visited Mar. 26, 2004) (noting environmental destruction linked to history of conflict in Afghanistan and water shortage but quoting local professor who believes retention and adequate management of water could alleviate problem).

40. *See, e.g.*, James P. Rubin, *Stumbling Into War*, 82 FOREIGN AFF., Sept./Oct., at 46 (2003) (noting diplomatic failures leading to U.S. military presence in Iraq); Marc Lynch, *Taking Arabs Seriously*, 82 FOREIGN AFF., Sept./Oct., at 81, 86 (2003) (noting difficulties facing U.S. personnel in both Afghanistan and Iraq).

41. *See* Shelby, *supra* note 37 (noting effects of past detrimental actions taken in Iraq on Iraqi people); *see also* Rudy S. Salo, *When the Logs Roll Over: The Need for an International Convention Criminalizing Involvement in the Illegal Timber Trade*, 16 GEO. INT'L ENVTL. L. REV. 127, 136-37 (2003) (noting destruction of Afghan forests for use by terrorist organizations, particularly Al Qaeda, to sell for profit)

42. *See, e.g.*, Carl Bruch & John Pendergrass, *Type II Partnerships, International Law, and the Commons*, 15 GEO. INT'L ENVTL. L. REV. 855 (2003) (noting need for international law to address environmental issues for corporations and Nations in both peace and war); Donald O. Mayer, *Corporate Governance in the Cause of Peace*, 35 VAND. J. TRANSNAT'L L. 585, 649 (2002) (noting effects of foreign incursions and civil wars on environments of Afghanistan, Iraq, and Kuwait); Salo, *supra* note 41, at 128-30 (noting lack of international environmental ban on illegal timber trade and its effects on various Nations).

43. *See, e.g.*, Lt. Col. Richard A. Phelps, USAF, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49 (1996) (noting differences between "environmental law" applicable to U.S. Air Force military installations abroad and U.S. regulation); Maj. Richard M. Whitaker, USA, *Environmental Aspects of Overseas Operations*, 1995-APR ARMY LAW. 27 (1995) (noting environmental law issues facing U.S. Army operations both in U.S. and abroad). However, these policies and their enforcement are beyond the purview of this Comment. In the case of U.S. military involvement in the conflicts, there are well-established environmental policies dictated by the several branches intended to govern military installations and actions. *See* Whitaker, *supra*, at 27 (alluding to various military regulations regarding environmental protection); *see also* Phelps, *supra*, at 49 (discussing military's environmental regulations' prospective application abroad).

44. *See* Paul Freedman, *International Intervention to Combat the Explosion of Refugees and Internally Displaced Persons*, 9 GEO. IMMIGR. L.J. 565, 580-83, 595-96 (1995) (noting displacement of large numbers of refugees from Afghanistan and Iraq due to extended armed conflict); *see also* Erika Feller, *The Evolution of the International Refugee Protection*

vasion of 1979[45] and civil war coupled with undeclared internal violence have affected the daily lives of Afghans for over two decades.[46]

Similarly, Iraqis suffered through the bloody Iran-Iraq War in the 1980s,[47] the first Persian Gulf War[48] in 1991, economic sanctions after that war in the 1990s,[49] and the most recent conflict with a U.S. and British-led force to oust Saddam Hussein in 2003.[50] In each of these conflicts affecting the two Nations, envi-

---

Regime, 5 WASH. U. J.L. & POL'Y 129, 134 (2001) (noting more than 2.5 million refugees have fled war-torn areas of both Afghanistan and Iraq as a result of recent conflicts).

45. *See* Jonathan Fowler, *New Anti-terror Operation Launched in Afghanistan as Government Loyalists Seek More Help Against Taliban*, ASSOC'D PRESS NEWSWIRES, Nov. 10, 2003 (noting that civil war raged in Afghanistan from immediately after conflict with U.S.S.R. until U.S.-led overthrow of Taliban); *see also* Kathy Gannon, *Afghanistan Unbound*, 83 FOREIGN AFF., May/June, at 35 (2004) (describing particularly brutal attacks between warlords' militias on each other and civilians in Afghanistan).

46. *See Country Profile: Afghanistan*, B.B.C. NEWS WORLD ED., Mar. 4, 2003, *available at* http://news.bbc.co.uk/2/hi/south_asia/country_profiles/1162668.stm (last visited Mar. 26, 2004) (noting continued civil wars after defeat of Soviet forces in 1989); *see also* Zalmay Khalilzad & Daniel Bynam, *Afghanistan: The Consolidation of a Rogue State*, WASH. Q., Winter 2000, at 66-67 (noting quick transformation of Afghanistan from U.S. foreign policy success during Cold War to dismal failure as civil war and rise of Islamic fundamentalist regime caused dire unrest in country).

47. *See* Andrea Cunning, *The Safeguarding of Cultural Property in Times of War & Peace*, 11 TULSA J. COMP. & INT'L L. 211, 227-28 (2003) (commenting on effects of Iran-Iraq war on Iraqi society and lamenting destruction of cultural heritage sites); *see also* Tikkun A. S. Gottschalk, *The Realpolitik of Empire*, 13 J. TRANSNAT'L L. & POL'Y 281, 295 (2003) (noting effects of Iran-Iraq War on citizenry including attacks on Iraqi citizens by their own government); Davis Brown, *Enforcing Arms Control Agreements by Military Force: Iraq and the 800-Pound Gorilla*, 26 HASTINGS INT'L & COMP. L. REV. 159, 202-04 (reporting use of chemical and biological weapons in Iran-Iraq War and their disturbing effects).

48. *See* James T. McClymonds, *The Human Right to a Healthy Environment: An International Legal Perspective*, 37 N.Y.L. SCH. L. REV. 583, 585 n.17, 586 (1992) (noting environmental impact of Persian Gulf War on Iraq due to weaponry used by both sides); *see also* Feller, *supra* note 44, at 133-34 (noting large exodus of Iraqis due to Persian Gulf War). *See generally* Margaret T. Okordudu-Fubara, *Oil in the Persian War: Legal Appraisal of an Environmental Warfare*, 23 ST. MARY'S L.J. 123 (1991) (lamenting usage of environmental warfare by Iraq during Persian Gulf War and detrimental effects of intentional oil spills and oil fires).

49. *See, e.g.*, Richard Garfield, *Health and Well-Being in Iraq: Sanctions and the Impact of the Oil-For-Food Program*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 277, 279-82 (2001) (acknowledging harsh impact of economic sanctions on Iraqi people); Timothy B. Mills, *Reconstructing Iraq: An Analysis of, and Proposed Solutions to, the Financing Challenges Facing Iraqi Small and Mid-Size Businesses*, GA. J. INT'L & COMP. L. 125, 128 (2004) (noting effects of U.N. sanctions on Iraqi private businesses).

50. *See* Shara Abraham, *Child Soldiers and the Capacity of the Optional Protocol to Protect Children in Conflict*, 10-SPG HUM. RTS. 15 (2003) (lamenting use of child soldiers and other issues as result of Iran-Iraq and Gulf War); *see also* George E. Bisharat, *Facing*

ronmental effects were, and continue to be, felt by both the lands and the people inhabiting them.[51]

The environmental needs of the two States have concerned the world enough that the United Nations Environment Program ("UNEP") has published a detailed post-conflict report on Afghanistan[52] ("Afghanistan PCA") and a "Desk Study" of the environment in Iraq ("Iraq Desk Study").[53] The Afghanistan PCA offers an overview of the Nation's ecology and topography and how these have been affected by both natural and human-created disturbances.[54] It also highlights the resources present in Afghanistan and those in need of protection.[55] Finally, the Afghanistan PCA details the various governing bodies with environ-

---

Tyranny with Justice: Alternatives to War in the Confrontation with Iraq, 7 J. GENDER RACE & JUST. 1, 11-40 (2003) (detailing effects of tyrannical regime, Iran-Iraq War, sanctions, and then-impending Second Gulf War war on Iraqi people).

51. *See* Andrew C.S. Efaw, *United States Refusal to Ban Landmines: The Intersection Between Tactics, Strategy, Policy, and International Law*, 159 MIL. L. REV. 87, 89-94 (1999) (noting severe effects of landmine usage on environments of Afghanistan and Iraq including destruction of endangered species); *see also* Cohan, *supra* note 35, at 481 (noting effects of war and weaponry on all aspects of environment); Bruch & Pendergrass, *supra* note 42, at 855 (noting need for specific laws protecting environment in peace and war). Mr. Cohan details the effects of such materiel as oil-burning ships sunk during World War II and uranium-depleted rounds used during both Gulf Wars and their effect on the citizenry after the cessation of armed conflict. *See* Cohan, *supra* note 35, at 481 (discussing harmful effects of various weaponry).

52. *See* U.N. Environment Programme, *Afghanistan: Post-Conflict Environmental Assessment* (2003) [hereinafter *Afghanistan PCA*], *available at* http://www.unep.org/Evaluation/PDF/afghanistanpcajanuary2003.pdf (last visited Mar. 27, 2004) (describing environmental history and present conditions of Afghanistan, noting dire need for environmental intervention, advocating course of action to prevent environmental catastrophe and also allow Afghan people to use natural resources of country); *see also* Azimi & McCauley, *supra* note 39, at 9-13 (noting need for environmental action to help develop infrastructure of Afghanistan and protect resources).

53. *See* U.N. Environment Programme, *Desk Study of the Environment in Iraq* (Apr. 24, 2003) [hereinafter *Iraq Desk Study*], *available at* http://postconflict.unep.ch/publications/Iraq_DS.pdf (last visited Mar. 27, 2004) (providing quick overview of environment in Iraq and its most imminent dangers and needs); *see also* Frances Williams, *UN Urges Report on Effects of DU*, FIN. TIMES (London), Apr. 8, 2003, at 6 (reporting on U.N. urging to perform environmental study as quickly as possible once hostilities cease).

54. *See Afghanistan PCA*, *supra* note 52, at 6-47 (outlining natural environment of Afghanistan, urban environmental issues and other human-made effects on environment); *see also* Azimi & McCauley, *supra* note 39, at 9-13 (outlining most imminent needs of Afghan environment due to lack of conservation and naturally occurring reduction of resources).

55. *See Afghanistan PCA*, *supra* note 52, at 48-73 (noting findings on status of Afghan natural resources, particularly water, wetlands, forest, and woodland areas in need of protection); *see also* Azimi & McCauley, *supra* note 39, at 9-13 (noting specific actions required to ensure safe and abundant drinking water and conservation of forests).

mental responsibilities in the country, applicable international law, and offers recommendations for how best to protect the Afghan environment.[56] The United States has no clear role or responsibilities specifically enumerated in the Afghanistan PCA, nor is it called upon to monitor its own government personnel, military, or corporate contractors in the country.[57]

The Iraq Desk Study is an attempt to identify and address environmental issues present in that State quickly, rather than wait for UNEP's full Post-Conflict Assessment that will detail specific concerns and recommendations in a similar fashion to the Afghanistan PCA.[58] While its scope and accuracy is limited by UNEP personnel's inability to be on the ground in Iraq during the most recent conflict,[59] it highlights how Iraq's recent surge in development coupled with ongoing military conflict have placed a large amount of stress on the environment and infrastructure.[60] Due to political uncertainty in Iraq,[61] it is also un-

56. *See Afghanistan PCA*, *supra* note 52, at 92-139 (detailing current bodies regulating Afghan government, status of applicable international law, and recommending detailed environmental management scheme); *see also* Carlotta Gall, *THREATS AND RESPONSES: KABUL; War-Scarred Afghanistan in Environmental Crisis*, N.Y. TIMES, Jan. 30, 2003, at A1 (reporting U.N. concern regarding Afghan environment and need for immediate support to stabilize and protect it).

57. *See Afghanistan PCA*, *supra* note 52, at 92-95, 99-100, 104-13 (noting status of Afghan environmental legislation, advocating international involvement, but not outlining specific instructions for foreign entities present in Afghanistan); *see also* Azimi & McCauley, *supra* note 39, at 11-16 (noting need for protection of water and other areas to safeguard Afghan environment).

58. *See Iraq Desk Study*, *supra* note 53, at 6-7 (noting past experience dictates quick response may be critical to preserving environment in post-conflict setting where early identification of heavily polluted areas can help in immediate clean-up and facilitate rehabilitation of infrastructure); *see generally Afghanistan PCA*, *supra* note 52, at 15-139 (providing detailed outline of Afghan history, topography, environmental needs, and advocating course of action to best conserve resources of country).

59. *See Iraq Desk Study*, *supra* note 53, at 6 (noting United Nations Environment Program's ("UNEP") inability to do field work due to recent conflict); *see also* Ian Fisher, *Iraqis Ambush a U.S. Convoy; G.I.'s Raid Cell*, N.Y. TIMES, Dec. 17, 2003, *available at* http://www.nytimes.com/2003/12/17/international/middleeast/17IRAQ.html (last visited Oct. 21, 2004) (noting violence against foreign entities present in Iraq has yet to cease).

60. *See Iraq Desk Study*, *supra* note 53, at 6-7, 13-15 (noting how population growth, urban expansion, and long history of military conflict have caused dire conditions in country); *see also* Ronald C. Santopadre, *Deterioration of Limits on the Use of Force and its Perils: A Rejection of the Kosovo Precedent*, 18 ST. JOHN'S J. LEGAL COMMENT. 369, 405 n.198 (2003) (lamenting detrimental effects of depleted uranium shells used in both Persian Gulf Wars).

61. *See, e.g.*, Robin Wright & Mike Allen, *Bush to Detail Transition Monday in First of Several Iraq Speeches*, WASH. POST, May 20, 2004, at A18 (quoting U.S. president attempt-

clear what role foreign Nations, particularly the United Kingdom and the United States, will be expected to play in the environmental context.[62] It is also uncertain how foreign entities present in the region might cause environmental damage that affects neighboring Nations (particularly when dealing with water issues) and cause greater diplomatic and environmental harm to Iraq.[63] What is certain, though, is that the Iraqi environment has suffered extreme strain from both international conflict and internal oppression.[64]

II. *JUDICIAL AND EXECUTIVE RESPONSES BY THE UNITED STATES TO CITIZEN SUITS IN RESPONSE TO GOVERNMENTAL ACTIONS DETRIMENTAL TO FOREIGN ENVIRONMENTS*

A. *Procedural and Statutory Bars to Environmental Suits Against the United States and Its Agencies*

1. The United States' Sovereign Immunity

It is well settled that the U.S. government is immune to suits for damages unless it explicitly waives its sovereign immunity.[65]

---

ing to address uncertainty facing Iraqi transition); Bob Deans, *G-8 Members Snub U.S. Appeal for Iraq Troops*, ATLANTA J. & CONST., May 15, 2004, at A3 (highlighting how uncertainty of political future of Iraq causing friction among most powerful countries); Robert Go, *Abuse "Sickening and Outrageous"*, STRAITS TIMES (Singapore), May 11, 2004 (quoting Islamic scholar noting that U.S. exit from Iraq seems undefined and unclear).

62. *See, e.g.*, Lori Fisler Damrosch & Bernard H. Oxman, *Agora (Continued): Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 803 (2003) (discussing uncertainty over whether U.N. Security Council Resolutions and actions of United Kingdom and United States triggered occupation law and its concurrent obligations); Scheffer, *supra* note 4, at 843 (detailing obligations placed on United Kingdom and United States if occupation law triggered by their actions as result of most recent conflict in Iraq).

63. *See generally* Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT'L L. 183, 237 (2003) (recalling that Turkey's attempt to build Ilisu Dam would possibly have caused water war between Iraq and Syria); Peggy Kozal, *Is the Continued Use of Sanctions as Implemented Against Iraq a Violation of International Human Rights*, 28 DENV. J. INT'L L & POL'Y 383, 391 (2000) (noting how over-pumping of wells causes oil spillage detrimental to environment).

64. *See Iraq Desk Study*, *supra* note 53, at 6-7, 92-100 (noting extreme pressures placed on Iraqi environment and infrastructure); *see also* Aaron Schwabach, *Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts*, 15 COLO. J. INT'L ENVTL. L. 1, 1-3 (2004) (highlighting that Iraq has suffered environmentally as much, if not more than, any other Nation in recent years due to both international conflicts and internal crackdowns by Saddam Hussein on southern marshland regions).

65. *See, e.g.*, Lane v. Pena, 518 U.S. 187, 192 (1996) (citing United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992) (holding that any waiver by federal government

Environmental legislation, however, has usually contained language indicating an explicit waiver of sovereign immunity in the context of coercive actions for monetary damages and an injunction for prospective behavior.[66] Some international law, including the U.N. Convention on the Law of the Sea, contains a possible waiver of individual States' sovereign immunity in very specific instances, such as damage caused by military aircraft.[67]

The general trend, however, in both the U.S. Congress and U.S. courts is to expand rather than contract the scope of sovereign immunity for both the U.S. government and non-U.S. governments.[68] Some scholars, however, have argued that sovereign

---

of its sovereign immunity must be stated in language of statute unequivocally); United States v. Williams, 514 U.S. 527, 531 (1995) (holding that waiver of sovereign immunity by federal government must be unambiguous and any ambiguity in language of statute interpreted in favor of sovereign); City of Jacksonville v. Dep't of the Navy, 348 F.3d 1307, 1314-15 (11th Cir. 2003) (holding that Clean Air Act's citizen suit provisions do not expose federal government to punitive damages as no explicit waiver of sovereign immunity made in that regard). *But see* Maj. Cotell, USA, 1999-JUN ARMY LAW. 40 (1999) (noting that U.S. States incorrectly assume they cannot regulate federal installations under Clean Air Act when sovereign immunity invoked and believe their only recourse is to withhold permits); Randall S. Abate & Carolyn H. Cogswell, *Sovereign Immunity and Citizen Enforcement of Federal Environmental Laws: A Proposal for a New Synthesis*, 15 VA. ENVTL. L.J. 1, 12-16 (construing United States Dept. of Energy v. Ohio, 503 U.S. 607 (1992)) (noting lower courts's reticence to apply *Ohio* Court's decision to prevent punitive damages under environmental actions due to sovereign immunity).

66. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1323(a) (1992) (granting citizens right of action against federal government to enforce violations including financial penalties); Clean Air Act, 42 U.S.C. § 7418(a) (1992) (granting citizens right to sue and waiving U.S. sovereign liability for civil penalties imposed by either State or federal court if found to be in violation); Crowley Marine Servs. v. FEDNAV, Ltd., 915 Supp. 218, 222-24 (1995) (noting 1992 amendments passed by Congress made sovereign immunity waiver in domestic environmental context even clearer in regards to coercive damages).

67. *See* U.N. Conv. on the Law of the Sea, U.N. Doc. A/CONF. 62/122, art. 263, *reprinted in* 21 I.L.M. 1261 (1982) (stating liability of Nations for environmental harm by military aircraft); *see also* Michel Bourbonniere & Louis Haeck, *Military Aircraft and International Law: Chicago Opus 3*, 66 J. AIR L. & COM. 885, 962-63 (2001) (noting Article 236 of U.N. Convention on the Law of the Sea's sovereign immunity provision does not preclude State liability from damage caused to marine environments even by military aircraft). *But see* Bernard H. Oxman, *Transit of Straits and Archipelagic Waters by Military Aircraft*, 4 SING. J. INT'L & COMP. L. 377, 410 (2000) (noting ability of states to enforce U.N. Convention on the Law of the Sea provisions limited to ships not protected by sovereign immunity).

68. *See, e.g.*, Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1604-1606 (2004) (granting immunity to all non-U.S. States, agencies, and officers); 18 U.S.C. § 2337 (1) & (2) (2002) (stating no action shall accrue against United States, its agencies or officers, or foreign States or its agencies and officers under its provisions); Macharia v. United States, 334 F.3d 61, 64 (D.C. Cir. 2003) (holding claims of violation of Kenyan Constitution barred due to sovereign immunity as no claim of violation of customary

immunity should be the exception rather than the rule, particularly in the international context.[69]

The Foreign Sovereign Immunities Act ("FSIA") contains specific carve-out exceptions that allow for suits for extraterritorial actions committed by non-U.S. States and their agents if those actions affect the United States.[70] The immunity granted by FSIA is usually not extended to corporations acting as State agents or to State actors under the Alien Tort Claims Act ("ATCA") or Alien Tort Statute ("ATS").[71]

2. The Presumption Against Extraterritorial Application of U.S. Law

The longstanding default rule in U.S. law is that federal statutes apply only to actions occurring in the United States and do not have extraterritorial application.[72] The U.S. Supreme Court

---

international law alleged); Rosner v. United States, 231 F. Supp. 2d 1202, 1204 (S.D. Fla. 2002) (holding claim of violation of international law violations against United States not valid as Congress has not explicitly waived sovereign immunity).

69. *See, e.g.*, Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 757 (2003) (arguing that sovereign immunity is exception to jurisdiction not vice-versa); Rosalyn Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 271 (1982) (advocating restrictive view of sovereign immunity); Scott Grosscup, *The Trial of Slobodan Milosevic: The Demise of Head of State Immunity and the Specter of Victor's Justice*, 32 DENV. J. INT'L L. & POL'Y 355, 364-65 (2004) (using case of criminal trial of Slobodan Milosevic to eliminate erosion of sovereign immunity in international context).

70. *See* 28 U.S.C. § 1605(a)(2) (2004) (providing specific exceptions for liability under its provisions including any commercial activity taken by U.S. State having direct effect on United States); *see also* McKesson HBOC, Inc. v. Islamic Republic of Iran, 271 F.3d 1101, 1105-07 (D.C. Cir. 2001) (highlighting exception granted in Foreign Sovereign Immunities Act ("FSIA") and holding exception grants federal jurisdiction); Brad J. Kisserman, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U.L. REV. 881, 908-09 (1999) (noting outlined exceptions granting jurisdiction over non-U.S. Nations and their agents under FSIA).

71. *See, e.g.*, United States v. Noriega, 746 F. Supp. 1506, 1519-20 (S.D. Fla. 1990) (finding no immunity when actions were taken by officials in government not recognized by United States); Hilao v. Marcos 25 F.3d 1467 (9th Cir. 1994) (granting jurisdiction when non-U.S. State waives immunity), *cert. denied* 513 U.S. 1126 (1995); Gregory G.A. Tzeutschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations*, 30 COLUM. HUMAN RIGHTS L. REV. 359, 374-76 (1999) (noting limitations on sovereign immunity granted to non-U.S. States and corporations when suit arises under Alien Tort Claims Act ("ATCA")).

72. *See, e.g.*, EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (noting that it is long-standing principle of U.S. law that Congressional legislation does not apply extraterritorially unless stated and purpose of this default interpretation is to prevent unintended conflicts with other Nations' laws (quoting McCulloch v. Sociedad Na-

has demonstrated a willingness to expand this doctrine (much like that of sovereign immunity) and restrict the prospective scope of U.S. law abroad.[73] These restrictions are also problematic with the ATCA, as one cannot sue the United States unless it has specifically waived sovereign immunity.[74]

The U.S. Supreme Court's recent decision in *Sosa v. Alvarez-Machain*[75] makes clear that any tort committed by the United States or its agents on non-U.S. soil is not actionable in a U.S. court.[76] The Court left open, however, the ability of Congress to

---

cional de Marineros de Honduras, 372 U.S. 10, 20-22 (1963))); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 85-88 (1998) (noting rise in application by U.S. Supreme Court of extraterritorial presumption, even to legislation Congress seemingly intended to have extraterritorial application).

73. *See* Federal Tort Claims Act, 28 U.S.C. § 2680(k) (stating explicit waiver of sovereign immunity does not apply to any claim stemming from actions that occurred abroad); *see also* Smith v. United States, 507 U.S. 197, 203-05 (1993) (holding Federal Tort Claims Act ("FTCA") does not have application for tort committed in Antarctica even though that continent is not sovereign Nation). The *Smith* holding is particularly instructive in the case of Iraq as it remains unclear at this point what law applies to that Nation and what body or bodies govern the country. *See, e.g.*, Richard Whittle, *20,000 Troops Given Extended Tour in Iraq: Some Have Already Left and Will Be Forced to Return at Least 90 days*, DALLAS MORNING NEWS, Apr. 16, 2004, at 22A (quoting U.S. Secretary of Defense Donald Rumsfeld as saying that road to democracy and security in Iraq is uncertain one); Tony Walker, *High Risks in Iraq*, AUSTL. FIN. REV., Mar. 31, 2004, at 61 (noting future of Iraqi government system, elections, and security remain uncertain); John F. Burns, *The Reach of War: The Occupation; Drawing From Its Past Wars, Britain Takes a Tempered Approach to Iraqi Insurgency*, N.Y. TIMES, Mar. 23, 2004, at A8 (noting uncertainty of Iraqi future and if functional government will exist in near future). *Compare* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1604-1606 (2000) (granting immunity to sovereign Nations, officers, and agents for actions within United States and elsewhere), *with* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433-37 (1989) (holding FSIA does not have extraterritorial application).

74. *See* Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) (granting right of action for non-U.S. citizens in U.S. courts for torts committed in violation of U.S. treaty or international law); *see also* Tzeutschler, *supra* note 71, at 376-77 (discussing ATCA's provisions effect on extraterritoriality concerns).

75. 124 S. Ct. 2739, 72 U.S.L.W. 4660 (U.S. June 29, 2004), *reversing* 331 F.3d 604 (9th Cir. 2003). *See* David L. Hudson, Jr., *"Door Ajar" for Foreigners' Human Rights Suits*, 3 No. 26 A.B.A. J. E-REPORT 3 (July 2, 2004) (analyzing Court's decision in *Sosa v. Alvarez-Machain* and discussing implications of decision on future plaintiffs).

76. *See* Federal Tort Claims Act, 28 U.S.C. § 2680(k) (2000) (stating waiver of sovereign immunity does not apply to actions arising in non-U.S. country); *see also Sosa*, 124 S. Ct. at 2748 (highlighting foreign soil exception specifically defined in FTCA); George Costello, *Supreme Court Update*, 51-AUG FED. LAW. 41, 55-56 (2004) (discussing Court's decision in *Sosa* and noting Court's citation of non-extraterritorial nature of waiver in FTCA); Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 8 (2003) (discussing service members' inability to sue U.S. government for actions arising on

confer a right of action upon non-U.S. citizens through appropriate legislation.[77] The decision weakens ATCA as Justice Souter's opinion confines the types of suits allowed under ATCA to piracy, assaults on diplomats or prevention of safe conduct, and torture.[78] The ability of a non-U.S. citizen to sue a U.S. corporation or to sue for egregious violations of international law remains unclear.[79]

Afghan and Iraqi citizens affected by U.S. government or corporate environmental malfeasance might also gain access to U.S. courts should the United States become party to an international environmental treaty by relying on the *Charming Betsy* doctrine.[80] *Murray v. The Schooner Charming Betsy*, decided in 1804, gave Justice Marshall the opportunity to establish that U.S. law should always be interpreted to conform to international law and treaties.[81] Thus, an international environmental treaty craft-

---

non-U.S. soil due to FTCA's explicit language deeming extraterritorial acts outside its waiver).

77. *See Sosa*, 124 S. Ct. at 1249-51 (discussing ATCA's nature as grant of jurisdiction not right of action and necessity of legislation granting such cause of action before non-U.S. citizens may bring extraterritorial case in U.S. courts); *see also* Patrick D. Curran, *Universalism, Relativism, and Private Enforcement of Customary International Law*, 5 CHI. J. INT'L L. 311, 314 (2004) (discussing U.S. cases where courts held ATCA as purely jurisdictional statute not granting cause of action).

78. *See Sosa*, 124 S. Ct. at 1250-54 (holding rights of action under ATCA limited to piracy, diplomatic infringement, and torture); *see also* Hudson, *supra* note 75, at 3 (analyzing holding of *Sosa* and commenting that holding restricted possibility of rights of action but left open torture and ability to sue U.S. corporations).

79. *See* Hudson, *supra* note 75, at 3 (discussing viability of suits against corporations unclear in wake of *Sosa* decision and potential for expansion of actionable offenses under Alien Tort Statute ("ATS")); *see also* Thomas M. Keck, *Supreme Court splits: Conservative Justices Often Disagree*, MILWAUKEE J. SENTINEL, Aug. 8, 2004, at J5 (commenting on *Sosa* decision and concurrences and noting Court's holding that Congressional enabling legislation not required for action under some violations of international law).

80. *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, J.) (stating that "Act of Congress ought never to be construed to violate . . . law of [N]ations if any other possible construction remains"); *see also* Harold Hongju Koh, *AGORA: THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW: International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44-46 (2004) (stating that *Charming Betsy* doctrine is one of earliest examples of internalization of international law into U.S. law); T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91, 99-100 (2004) (noting how doctrine of *Charming Betsy* informs courts to strike down U.S. federal legislation if it contravenes international law).

81. *See Charming Betsy*, 6 U.S. at 118 (holding that U.S. law should be interpreted to coalesce with international law if at all possible); *see also* Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 322-25 (2001) (noting long history of *Charming Betsy* doctrine, its application in various case law, and recent expan-

ing a private right of action for citizens might supercede any U.S. legal impediments to suing for environmental harm done by either the U.S. government or U.S. corporations.[82]

B. *Brief History of Environmental Legislation in the United States and Its Application Both Domestically and Internationally*

After the various comprehensive environmental legislation packages passed in the 1970's,[83] it remained unclear what role the private citizenry or NGOs[84] played in their enforcement.[85] Similarly, as the United States increased its participation in international environmental agreements, it was also not understood if any private right to sue or enforce existed.[86]

---

sion and contraction of its scope in U.S. case law); Ralph G. Steinhardt, *International Humanitarian Law in the Courts of the United States: Yamashita, Filartiga, and 9/11*, 36 GEO. WASH. INT'L L. REV. 1, 6-7 (2004) (discussing desire of U.S. executive and legislative branches to follow international law under *Charming Betsy* doctrine, but lamenting difficulty of applying international law successfully in U.S. courts).

82. *See* Koh, *supra* note 80, at 44-46 (discussing application of *Charming Betsy* doctrine in U.S. history as default rule acknowledging U.S. law should be interpreted as comporting to international law); *see also* Kevin P. Cummins, *Trade Secrets: How the Charming Betsy Canon May Do More to Weaken U.S. Environmental Laws Than the WTO's Trade Rules*, 12 FORDHAM ENVTL. L.J. 141, 195 n.232 (2000) (reviewing *Charming Betsy* doctrine's historical application and modification by courts and quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 114 (1987) which memorializes doctrine).

83. *See* Lazarus, *supra* note 16, at 1006-07, 1026-27 (detailing environmental legislation passed during Nixon administration); *see also* William H. Rodgers, Jr., *Executive Ordes and Presidential Commands: Presidents Riding to the Rescue of the Environment*, 21 J. LAND RESOURCES & ENVTL. L. 13, 21 (2001) (noting President Nixon's place in U.S. history as one of top environmental presidents for legislation passed and implemented during his administration).

84. *See* Marissa A. Pagnani, *Environmental NGOs and the Fate of the Traditional Nation-State*, 15 GEO. INT'L ENVTL. L. REV. 791, 800 (2003) (noting refusal by States to allow NGOs at bargaining table when discussing international environmental issues); *see also* Charles Qiong Wu, *A Unified Forum? The New Arbitration Rules for Environmental Disputes Under the Permanent Court of Arbitration*, 3 CHI. J. INT'L L. 263, 264 (2002) (noting importance of NGO involvement in international environmental controversies but long standing tenet of international law that only State actors can participate in process); Peggy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access By Non-State Entities*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 191, 195 (2001) (urging NGOs be given greater latitude to bring environmental suits).

85. *See* Friends of the Earth v. Laidlaw Envtl. Serv., 528 U.S. 167 (2000) (reversing appellate court decision not to allow standing for citizen group brought against violator of Clean Water Act). *But see* Atlantic States Legal Found. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1994) (holding that private group may not bring citizen suit under Clean Water Act).

86. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (holding plaintiffs lacked standing as private citizens under Endangered Species Act for U.S. government

Further, as discussed above,[87] the track record of U.S. diplomacy in the realm of international environmental affairs is spotty at best. There are four basic ways that citizens can attempt either to enjoin U.S. government environmental action abroad or compel the government to adhere to established regulations and agreements: (1) private citizen or NGO suit under U.S. federal law;[88] (2) private citizen or NGO suit under international law[89] or one seeking to compel compliance with a treaty[90] or agreement that the United States is party to; (3) suit by a non-U.S. national[91] against the United States under a recognized treaty or against a U.S. corporation under ATCA; or (4) a qui tam[92] action

---

actions and funding abroad even when harm is specific); *see also* Wu, *supra* note 84, at 264 (noting traditional bar of non-States, i.e., individuals or NGOs from bringing international environmental actions).

87. *See* Blomquist, *supra* note 32, at 495 (reciting U.S. failures to ratify or sign prominent international environmental legislation); *see also* Henkin, *supra* note 32, at 208 (highlighting U.S. absence from environmental treaties, notably Kyoto Protocol); Lazarus, *supra* note 16, at 1000 (calling to attention recent reversals in environmental policy by current Bush administration).

88. *See* Mary Elliott Rolle, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases*, 15 GEO. INT'L ENVTL. L. REV. 135, 138-42 (2003) (pointing out domestic legislation in place in most developed countries including United States and evidentiary and procedural barriers to successful claims); *see also* Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 185 (2003) (discussing that without valid citizen suits and implementing legislation there remains limited recourse for private citizens to ensure environmental protection).

89. *See* Kenneth F. McCallion, *International Environmental Justice: Rights and Remedies*, 26 HASTINGS INT'L & COMP. L. REV. 427, 433 (2003) (noting International Court of Justice's ("ICJ") jurisdiction over international environmental issues but inability for private citizens or NGOs to gain access or standing as only recognized States may bring actions in front of this tribunal); *see also* Blomquist, *supra* note 32, at 495 (noting U.S. failure to ratify international environmental treaties which might be basis for enforcement actions).

90. *See* Henry W. McGee, Jr. & Timothy W. Woolsey, *Transboundary Dispute Resolution as a Process and Access to Justice for Private Litigants: Commentaries on Cesare Romano's The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach (2000)*, 20 UCLA J. ENVTL. L. & POL'Y 109, 116 (2002) (discussing that while non-State parties are not often granted standing, number of international bodies that do give standing to non-State parties has increased). *But see* Ehrmann, *supra* note 18, at 378 (noting U.S. failure to join, sign, or enforce various environmental treaties).

91. *See* Kalas, *supra* note 84, at 195 (noting non-U.S. citizens have attempted to bring suit for international environmental issues but are usually denied standing); *see also* Rolle, *supra* note 88 at 138-40 (noting procedural and other non-substantive barriers used to block international environmental suits).

92. *See* False Claims Act, 31 U.S.C. § 3729 (1986) (granting standing and portion of recovered monies to any individual bringing claim that party defrauded U.S. government); *see also* Pamela H. Bucy, *Private Justice*, 76 SO. CAL. L. REV. 1, 77 (2002) (advocat-

alleging fraudulent or illegal action by a party that costs the United States financially.

1. Private Rights of Action Under Established U.S. Federal Law

Several pieces of environmental legislation seemingly grant wide-sweeping standing, including the Endangered Species Act and Clean Water Act.[93] In fact, Congress explicitly enumerated three types of rights of action available to private citizens under its environmental legislation: (1) "private attorney general"[94] suits; (2) "deadline suits"[95] mandating that officials perform their duties; and (3) judicial review suits which seek judgment on the legality of agency actions.[96]

In international actions brought by U.S. citizens, each method has been used, but none with any great degree of success at achieving the goal of environmental protection.[97] The

---

ing allowance of qui tam actions for environmental causes of action). The False Claims Act ("FCA") seems to grant a wide-sweeping class of potential plaintiffs a right of action, but contains specific substantive and procedural limitations. *See* 31 U.S.C. § 3729(a)(7)(A)-(C) (noting relator must satisfy specific obligations as far as government cooperation and timeliness of claim).

93. *See* Endangered Species Act § 11(g), 16 U.S.C. § 1536 (2000) (authorizing citizen suits against person in violation of Act and against Secretary of Interior for failure to perform nondiscretionary duty); *see also* Clean Water Act 33 U.S.C. § 1365(a)(1) & (2) (2000) (authorizing citizen suits against individuals, corporations, or governments, within scope of Eleventh Amendment, under its provisions provided that no independent government action has been taken against party).

94. *See* PERCIVAL ET AL., *supra* note 10, at 996 (explaining citizen's role in this context is to "supplement government enforcement"); *see also* David R. Hodas, *Standing and Climate Change: Can Anyone Complain About the Weather?*, 9 J. TRANSNAT'L L. & POL'Y 451, 460-62 (2000) (recalling rise in private attorney general suits during Reagan administration in response to reduction in environmental legislation and enforcement).

95. *See* PERCIVAL ET AL., *supra* note 10, at 996 (commenting that these types of suits "typically challenge an agency's failure to meet a statutory deadline to take some action"); *see also* David Schoenbrod, *Environmental Law and Growing Up*, 6 YALE J. ON REG. 357, 363 (1989) (reporting usage of deadline suits as easy way to call courts' attention to failures of EPA).

96. *See* PERCIVAL ET AL., *supra* note 10, at 997 (highlighting that these provisions intend to supplement Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000), which grants similar rights of action); *see also* Adam Babich, *The Wages of Sin: The Violator-Pays Rule for Environmental Citizen Suits*, 10 WIDENER L. REV. 219, 222-24 (2003) (noting judicial review of agency actions can have quick effects on environment and public health when brought by citizens).

97. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (holding citizen group bringing judicial review suit did not have standing as plaintiffs could not demonstrate particularized harm, traceability of defendant's action to that harm, and redressability of harm if decision favorable; and case was unripe); Public Citizen v. Office of U.S.

requirement of a particularized harm traceable to alleged action of defendant and redressability in response to a favorable decision strictly enumerated in *Lujan*,[98] makes these types of cases[99] unlikely to be favored by anyone seeking to protect the environments of Afghanistan and Iraq.[100]

Further, before the stringent standing requirements enumerated by *Lujan*, the Court had articulated in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation* that citizens must demonstrate that the harm caused was ongoing and not simply a past injury.[101] In that instance, however, the U.S. Congress had re-

---

Trade Rep., 782 F. Supp. 139 (D.D.C. 1992) (holding environmental organization lacked standing to compel Office of U.S. Trade Rep. to prepare environmental impact statements for proposed foreign trade agreements). It was precisely this type of review that President Clinton committed to in Executive Order 13,141: an order that has never been enforced. *See Salzman, supra* note 22, at 503 (noting much-heralded Executive Order 13,141 never actually enforced when trade agreements failed to contain environmental assessment). A case involving U.S. Naval actions in international waters that sought both prospective relief, to enjoin the use of sonar devices in a particular context, and clarification of the legality of the actions and the Navy's compliance efforts met with mixed results. *See* Nat. Resources Def. Council Inc. v. U.S. Dept. of Navy, 2002 WL 32095131, at *7-*16 (C.D. Cal. 2002) (order granting partial summary judgment). The Court held that plaintiffs did have standing, but that the program in question was subject to neither NEPA or EPA review. *See id.* at *7-*16, 23.

98. 504 U.S. at 573-75 (holding that neither claim of future harm or supposed procedural harm grant standing, show traceability and causation, or provide redressability). *See* Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 103 (1998) (citing Simon v. Eastern Ky. Welfare Rights Oranization, 426 U.S. 26, 41-42 (1976)) (noting redressability requirement outlined as part of Article III standing requirements in previous cases and holding that when only benefit for favorable ruling is satisfaction and monies paid to U.S. Treasury and not to plaintiff, no standing exists); *see also* Cassandra Stubbs, *Is the Environmental Citizen Suit Dead? An Examination of the Erosion of Standards of Justiciability for Environmental Citizen Suits*, 26 N.Y.U. REV. L. & SOC. CHANGE 77, 82-83 (2001) (noting erosion of citizen suits enforcing environmental regulations due to *Lujan* decision and its stringent standing requirements).

99. *See* Ekundayo B. George, *Whose Line in the Sand: Can Environmental Protection and National Security Coexist, and Should the Government Be Held Liable for Not Attaining This Goal?*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 651, 700-05 (2003) (noting difficulty balancing environmental obligations with national security in international context).

100. *See, e.g.*, Eric Schmitt, *Taking Supplies to the Troops, "Coming in High and Fast"*, N.Y. TIMES, Dec. 12, 2003, at A15 (noting that air travel to Iraq is still extremely dangerous, even for military aircraft); Carlotta Gall & John H. Cushman, Jr., *Coalition Strike in Afghanistan Kills 9 Children*, N.Y. TIMES, Dec. 7, 2003, at A1 (reporting accidental bombing of civilian children by coalition air forces).

101. *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49, 51 (1987) (vacating and remanding case as no good-faith allegation of ongoing harm alleged in proceedings below); *see also* Stubbs, *supra* note 98, at 84-86 (noting Court's decision in *Gwaltney* resulted in uncertainty over when an environmental injury was "ongoing" as opposed to "past" and ambiguity caused both sides to see holding as favorable).

sponded by altering the Clean Air Act to specifically give private citizens a right of action against any person, business, or government entity.[102]

A few academics have suggested a somewhat more novel approach at circumventing these bars to citizens gaining standing in environmental actions; they advocate interpreting the U.S. Constitution's equitable grants[103] of rights of action as providing current standing for harm done to future generations.[104] However, this strategy has met with little success.[105]

2. Private Rights of Action Seeking U.S. Government Mandated Compliance with International Agreements and Treaties

The Respondent in the seminal *Lujan* case unsuccessfully raised the question of whether a private citizen could seek enforcement of a treaty to which the United States is a party by U.S. officials,[106] but to no avail. The issue for any party seeking en-

---

102. *See* Clean Air Act Amendments of 1990, 42 U.S.C. § 7604(a) (1990) (granting general right of action to citizens for enforcement of Act); *see also* Roger A. Greenbaum & Anne S. Peterson, *The Clean Air Act Amendments of 1990: Citizen Suits and How They Work*, 2 FORDHAM ENVTL. L. REP. 79, 99-100 (1991) (noting how Clean Air Act Amendments of 1990 seemed to address issues raised by *Gwaltney* and sought to expand ability of citizens to bring suit).

103. *See* U.S. CONST. art. III, § 2 (providing that "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority. . .").

104. *See* John Edward Davidson, *Tomorrow's Standing Today: How the Equitable Jurisdiction Clause of Article III, Section 2 Confers Standing Upon Future Generations*, 28 COLUM. J. ENVTL. L. 185 (2003) (arguing for standing in equitable claims for material harm done to environment affecting unborn persons); *see also* Jeffrey M. Gaba, *Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights and Present Virtue*, 24 COLUM. J. ENVTL. L. 249 (1999) (advocating protection of environment for future generations as moral obligation that should be supported by law).

105. *See* Davidson, *supra* note 104, at 195 n.24 (citing Ted Allen, *The Philippine Children's Case: Recognizing Legal Standing for Future Generations*, 6 GEO. INT'L ENVTL. L. REV. 713, 732 (1994)) (noting proper procedural mechanism required for assertion of rights of future generations); *see also* Daniel B. Gatmaytan, *The Illusion of Intergenerational Equity: OPOSA v. Factoran as Pyrrhic Victory*, 15 GEO. INT'L ENVTL. L. REV. 457, 458-60 (2003) (noting case most relied upon for intergenerational equity as premise for standing only mentions future generations as dicta and other courts have held this premise invalid).

106. *See* Brief for Respondent at 3-4, 19-20, 24, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (No. 90-1424), *available at* 1991 WL 577004 (citing Convention on International Trade in Endangered Species of Wild Fauna and Flora and various Executive Orders to bolster claim that U.S. government can not promote actions that endanger species and that citizens had right to enjoin such actions).

forcement of an international environmental treaty is first whether it is self-effectuating,[107] and, if not, whether Congress has granted a specific right of action for private citizens under its terms.[108]

Thus, the standing issue becomes virtually identical to that discussed above. Namely, does Congress grant a specific right of action and does the instant plaintiff have the necessary particularized harm and injury-in-fact?[109] The only difference here is that the source of the law will have a broader scope as it is an instrument of international law and not U.S. law, making it more useful in the Afghan-Iraqi context. This distinction might prove useful in aiding a potential plaintiff in circumventing the sovereign immunity[110] and extraterritoriality issues.[111]

3. Suits by Non-U.S. Nationals for Actions Committed Abroad by U.S. Government Contractors and U.S. Corporations

Several avenues exist by which non-U.S. nationals could, at

---

107. *See* United States v. Rauschler, 119 U.S. 408, 418 (holding that treaties made by U.S. government are U.S. law but require legislative implementation); *see also* Elisabeth M. McOmber, *Problems in Enforcement of the Convention On International Trade in Endangered Species*, 27 BROOK. J. INT'L L. 673, 689-90 (2002) (noting difficulties of international environmental treaties caused by vagueness in drafting which leads to discrepancies in U.S. implementation, reducing overall efficacy of treaty).

108. *See Rauschler*, 119 U.S. at 418 (noting implications in U.S. of ratified treaties); *see also Lujan*, 504 U.S. at 555 (noting no private right of action created and particularized harm required under Endangered Species Act).

109. *See generally Laidlaw*, 528 U.S. at 167 (noting that when instant plaintiff has demonstrated injury that is traceable and redressable, Article III standing requirements are satisfied); *see also Lujan*, 504 U.S. at 555 (holding no standing for injury to environment when plaintiff herself has no demonstrable injury-in-fact).

110. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1323(a) (1992) (granting citizens right of action against federal government to enforce violations including financial penalties); Clean Air Act, 42 U.S.C. § 7418(a) (1992) (granting citizens right to sue and waiving U.S. sovereign liability for civil penalties imposed by either State or federal court if found to be in violation); Crowley Marine Servs. v. FEDNAV, Ltd., 915 Supp. 218, 222-24 (1995) (noting 1992 amendments passed by Congress made sovereign immunity waiver in U.S. environmental context even clearer in regards to coercive damages).

111. *See* EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (noting that it is long-standing principle of U.S. law that Congressional legislation does not apply outside of United States unless explicitly stated and purpose of this interpretation is to avoid unintended conflicts with other Nations' laws (quoting McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-22 (1963))); *see also* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 85-88 (1998) (noting rise in application by U.S. Supreme Court of extraterritoriality principle, even to legislation that Congress seemingly intended to have application outside of United States).

least theoretically, seek either an injunction or compensation for environmental damage done by U.S. government contractors or corporations in Afghanistan or Iraq.[112] The most promising method seems to be actions against U.S. corporations contracted by the government through ATCA.[113]

ATCA[114] has been an underutilized right of action that dates back to the Judiciary Act of 1789.[115] Plaintiffs must satisfy three elements for a successful ATCA claim: "(1) they are aliens, (2) they are suing for a tort, and (3) the tort violates the 'law of Nations.'"[116] The third element is what makes environmental claims under the ATCA most difficult as there is no clear international or customary law directly preserving the right to a healthy environment.[117]

---

112. *See* Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) (granting right of action for non-U.S. citizens in U.S. courts for torts committed in violation of U.S. treaty or international law); *see also* Kalas, *supra* note 84, at 195 (noting non-U.S. citizens have attempted to bring suit for international environmental issues but are usually denied standing).

113. *See generally* Natalie L. Bridgeman, *Human Rights Litigation Under ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1 (2003) (noting potential successful actions against U.S. corporations available under ATCA). *But see* Lucinda Saunders, *Rich and Rare Are the Gems They War: Holding De Beers Accountable for Trading Conflict Diamonds*, 24 FORDHAM INT'L L.J. 1402, 1451-53, 1453 n.248 (citing Laura Bowersett, *Doe v. Unocal: Tortuous Decision for Multinationals Doing Business in Politically Unstable Enviroments*, 11 TRANSNAT'L LAW. 361, 375-79 (1998)) (noting impediments for non-U.S. plaintiffs seeking to bring ATCA action including high factual standard and multi-national corporations' ability to invoke *forum non conveniens*).

114. *See* 28 U.S.C. § 1350 (2000) (providing that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of [N]ations or a treaty of the United States.")

115. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 878 (1980) (noting ATCA is "rarely invoked" provision); Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 211-14 (2004) (noting historical usages of ATCA and advocating its application to fair labor standards); Bridgeman, *supra* note 113, at 4 (relating history of ATCA and its only recent widespread usage).

116. *See* Bridgeman, *supra* note 113, at 5, n.21 (noting that Second, Fifth, Ninth Circuits have affirmed dual nature of ATCA as granting both jurisdiction and substantive cause of action); *see also* Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995) (holding 28 U.S.C. § 1350 grants federal subject matter jurisdiction when three elements: (1) alien sues; (2) for tort; and (3) committed in violation of law of Nations; are satisfied); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 366 (E.D. La. 1997) (noting current view of § 1350 is that it grants federal cause of action and federal forum), *aff'd* 197 F.3d 161 (5th Cir. 1999); In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1475-76 (9th Cir. 1994) (noting § 1350 does not require action "arise under" law of Nations but violation must be of norm that is specific, universal, and obligatory).

117. *See Beanal*, 969 F. Supp. at 383 (holding treaties cited by plaintiffs inadequate

The "right to a healthy environment,"[118] while recognized as important to human growth and development,[119] has not been codified by the United Nations nor has it been part of a treaty implemented by the United States.[120] Further, the few international environmental agreements[121] that have received any widespread support require each Nation to implement valid legislation, as the treaties and agreements are not self-executing.[122]

---

as demonstrations that alleged actions by defendant violated international law); *see also* Sarah C. Rispin, *Litigating Foreign Environmental Claims in U.S. Courts: The Impact of Flores v. Southern Peru Copper Corporation*, [2004] 34 ENVTL. L. REP. (Envtl. L. Inst.) 10,097 (noting difficulty for plaintiffs to find documented international law violated by corporations in environmental cases).

118. *See* John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283 (2000) (advocating healthy environment as "well-defined right"); *see also* Rispin, *supra* note 117, at 10,097 (noting difficulty of environmental claims under ATCA as no traditional right to healthy environment exists); Bridgeman, *supra* note 113, at 6 (noting that narrower view of international law to ATCA environmental claims is that no customary environmental law is seen as sufficient to be actionable).

119. *See Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev.1 (1992) [hereinafter Rio Declaration] (declaring that healthy environment is right that should be protected and memorialized in international law); *see also Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977, arts. 52(2), 57(2)(b), U.N. Doc. A/32/144, Annex I (1977), *reprinted in* 16 I.L.M. 1391, 1414, 1416 (1977) [hereinafter Protocol I] (expressing sentiment that even in times of warfare environment's protection should be priority); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (2004) (noting obligations of international law for warring Nations, including protection of environment and discussing recent conflicts in Afghanistan and Iraq); Christopher H. Lytton, *America's Borders and Civil Liberties in a Post-September 11th World*, 12 J. TRANSNAT'L L. & POL'Y 197, 214 n.82-83 (2003); Neil A.F. Popovic, *Humanitarian Law, Protection of the Environment, and Human Rights*, 8 GEO. INT'L ENVTL. L. REV. 67, 72 (1995) (citing *Hague Convention (II) with Respect to the Laws and Customs of War on Land*, 29 July 1899, 32 Stat. 1803 *and Hague Convention (IV) Respecting the Laws and Customs of War on Land*, 18 Oct. 1907, 36 Stat. 2227 [hereinafter Hague Conventions]) (noting Hague Conventions call for preservation of "human life," its culture, and "historical environment").

120. *See* Henkin, *supra* note 32, at 205 (noting U.S. decision not to ratify Kyoto and other environmental treaties). *But see* Nicholas A. Robinson, *Enforcing Environmental Norms: Diplomatic and Judicial Approaches*, 26 HASTINGS INT'L & COMP. L. REV. 387, 391-94 (2003) (noting U.N. Conferences on Earth, Development, and rising cognizance of global environmental issues).

121. *See* Robinson, *supra* note 120, at 397 (discussing some successful multilateral environmental agreements, e.g., U.N. Convention on Law of Sea); *see also* Bela A. Gary, Book Review, 18 MD. J. INT'L L. & TRADE 227, 230 (1994) (reviewing C. FORD RUNGE, FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS (Council on Foreign Relations, Inc., 1994)) (noting Montreal Protocol successful international agreement because of gradual implementation).

122. *See* Robinson, *supra* note 120, at 397 (noting that many environmental agreements require implementing legislation by individual Nations even after treaties with

In fact, one of the most frustrating aspects of international law is the uncertainty of what is widely accepted transnationally and what is not.[123] Thus, even if the premise that a healthy environment is a right guaranteed to all,[124] the question of how to implement protections of that right both nationally and internationally persists.[125]

Another hurdle the plaintiff must face is the political question issue.[126] The Supreme Court has held that if the issue

---

widespread effect signed); *see also* Irina O. Krasnova, *Post-Rio Treaties: Implementation Challenges*, 13 PACE ENVTL. L. REV. 97, 102 n.18 (1995) (construing *Intergovernmental Negotiating Committee for the Elaboration of an International Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, U.N. Doc. A/AC.241/15/Rev. 7 (1994), *reprinted in* 33 I.L.M. 1328 (1994)) (noting difficulties international environmental agreements face as they require both collaboration and implementation).

123. *See* Robert M. Augst, *Environmental Damage Resulting from Operation Enduring Freedom: Violations of International Law?*, [2003] 33 ENVTL. L. REP. (Envtl. L. Inst.) 10,668 (highlighting varied application of international law that specifically addresses questions about U.S. methods in its Afghan operations (Operation Enduring Freedom) and focusing on U.S. decision to use cluster bombs, depleted uranium munitions, and targeting potentially environmentally sensitive sites). The arguments gain some traction through a rigid application of the Geneva Conventions as they apply to the environment during warfare. *See* Protocol I, *supra* note 119 (detailing requirements of warring parties to attempt to preserve environment). Further, there is evidence that U.S. usage of unjustifiable environmentally-hazardous materiel is not the first time the Afghan ecosystem has had to endure this type of ordinance. *See* Timothy K. Gilman, *Search, Sentence, and (Don't) Sell: Combating the Threat of Biological Weapons Through Inspections, Criminalization, and Restrictions on Equipment*, 12 J. TRANSNAT'L L. & POL'Y 217, 225-26 (2003) (noting use by Soviet forces of biological weapons on Afghan soldiers during Soviet invasion of Afghanistan).

124. *See* Rio Declaration, *supra* note 119 (declaring that all share right to healthy environment); *see also* Protocol I, *supra* note 119 (noting obligations of occupying powers to ensure protection of local environment).

125. *See* Robinson, *supra* note 120, at 387-92 (noting U.N. Conferences dealing with international environmental issues but their lack of widespread enforcement on either international level through ICJ or national level through implementation of valid legislation); *see also* Krasnova, *supra* note 122, at 102 (calling to attention difficulty of national implementation of lofty ideals memorialized in many environmental treaties).

126. *See, e.g.*, Lyndsy Rutherford, *Redressing U.S. Corporate Environmental Harms Abroad Through Transnational Public Law Litigation: Generating a Global Discourse on the International Definition of Environmental Justice*, 14 GEO. INT'L ENVTL. L. REV. 807, 817-18 (2002) (noting U.S. courts must decide if issue at stake in litigation is best suited for another branch of government); Harold Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2386 (1991) (noting judges should ask if Constitution has committed another branch to resolving complaint presented in ATCA claim or if courts are best suited). However, most of the questions that arise in an ATCA claim are common law issues or issues of interpretation that are solely within the realm of the courts to decide. *See* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986) (holding that interpretation of ambiguities in both international treaties and Congressional stat-

before a court is a political one that is constitutionally committed to another branch, or is not justiciable because of potential embarrassment and lack of respect or deference given to another branch, that court does not have jurisdiction.[127] Further, if the issue is deemed one of foreign relations between the United States and another country, it is considered a political question reserved for the executive and legislative branches.[128] Commentators have argued that aspects of environmental law are political questions best left to the legislature and beyond the scope of judicial interpretation.[129]

The ATCA is commonly used as a basis for civil actions against U.S. companies for torts committed abroad.[130] It is not

---

utes is task for federal courts); *see also* Jones v. Meehan, 175 U.S. 1, 32 (1899) (holding interpretation of treaties solely within purview of courts unless issue is entirely political and Congress has no power to determine rights under treaties); Koh, *supra*, at 2387 (noting political question issue only is addressed when no international law exists to control case).

127. *See* Gilligan v. Morgan, 413 U.S. 1 (1973) (holding complaint alleging improper training given to National Guard is clear example of type of issue reserved for other branches of government than judiciary, as any decision would be political and advisory in nature); *see also* Vieth v. Jubelirer, No. 02-1580, 2004 U.S. LEXIS 3233, at *21-*22 (Apr. 28, 2004) (citing Baker v. Carr, 369 U.S. 186 (1962)) (enumerating *Baker* six-prong test for determination if issue is political one). The six-prong test is:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at *21-*22 (quoting *Baker*, 369 U.S. at 217).

128. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766 (1972) (quoting Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)) (holding that foreign relations of U.S. government is constitutionally solely within purview of legislature and executive and beyond scope of judicial review); *see also* Pearcy v. Strahan, 205 U.S. 257, 265 (1907) (holding determination of who is sovereign of non-U.S. Nation, either *de jure* or *de facto*, is for legislative and executive and beyond scope of judicial review).

129. *See, e.g.*, Jonathan Remy Nash, *Too Much Market? Conflict Between Tradable Pollution Allowances and the "Polluter Pays" Principle*, 24 HARV. ENVTL. L. REV. 465, 475 n.28 (2000) (noting rise in political question issues when dealing with pollution reduction standards); Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1353 (1985) (advocating that environmental law disputes are best settled by legislature as political question exists); Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 703 (1999) (noting some pollution reduction standards are politically motivated).

130. *See, e.g.*, Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1358-59 (S.D. Fla.

entirely settled, however, how close the corporation's allegedly tortious actions must be to a State's actions or program.[131][132] This case could determine what extraterritorial application ATCA has and what law must be broken for a valid suit against the U.S. government and its agents, an extremely relevant holding for suits in the international environmental context.[133]

C. *Using Qui Tam Actions To Gain Standing for Private Citizens or NGOs in the Environmental Context*

Whether a qui tam action satisfies the Article III[134] standing

---

2003) (holding suit against private corporation allowable under ATCA); National Coalition Government of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 346-48 (C.D. Cal. 1997) (holding ATCA suits against private corporations allowable, but in context of corporation as joint tortfeasor with government); Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 209-11 (2004) (noting rise in usage of ATCA claims against multinational corporations particularly by employees); Demian Betz, *Holding Multinational Corporations Responsible for Human Rights Abuses Committed by Security Forces in Conflict-Ridden Nations: An Argument Against Exporting Federal Jurisdiction for the Purpose of Regulating Corporate Behavior Abroad*, 14 DEPAUL BUS. L.J. 163, 187-88 (2001) (noting differences between multinational corporation ATCA suits and other types of multinational corporate suits, as it is much easier to establish jurisdiction over corporations under ATCA provisions than many other federal rights of actions).

131. *See Unocal*, 176 F.R.D. at 347 (holding ATCA suit permissible because corporation is alleged joint tortfeasor with government entity); *see also* Erin L. Borg, *Sharing the Blame for Septemer Eleventh: The Case for a New Law to Regulate the Activities of American Corporations Abroad*, 20 AM. J. INT'L & COMP. L. 607, 619-21 (2003) (noting malleability of ATCA and uncertainty of how judges will apply it to corporations as it relies on international law and not U.S. tort law); Sean D. Murphy, *Department of Justice Position in Unocal Case*, 97 AM. J. INT'L L. 703, 703-04 (2003) (noting contrasting decisions on extraterritorial applicability of ATCA, necessary nexus level required between corporate action and government, and level of control plaintiff must demonstrate corporation had over tortfeasor's actions).

132. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 72 U.S.L.W. 4660 (U.S. June 29, 2004), *reversing* 331 F.3d 604 (9th Cir. 2003); *see also* Linda Greenhouse, *Justices Hear Case About Foreigners' Use of Federal Courts*, N.Y. TIMES, Mar. 31, 2004, at A16 (describing oral arguments in *Alvarez-Machain* and speculating on Court's ruling).

133. *See Alvarez-Machain*, 331 F.3d at 612 (holding action under ATCA does not necessarily have to arise under law of Nations but must simply violate law of Nations); *see also* Luciana Reali, *Alvarez-Machain v. United States: How Should the Ninth Circuit Determine Which Torts Are Actionable Under the Alien Tort Claims Act*, 17 N.Y. INT'L L. REV. 51, 67-68 (2004) (noting expansive approach and application of ATCA taken by Ninth Circuit in *Alvarez*).

134. *See, e.g.*, Katherine M. Bailey, *Citizen Participation in Environmental Enforcement in Mexico and the United States: A Comparative Study*, 16 GEO. INT'L ENVTL. L. REV. 323, 351 (2004) (noting difficulty of U.S. plaintiffs to gain standing in environmental context after *Lujan* decision); David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 HARV. ENVTL. L. REV. 79, 79-80 (2004) (noting inconsis-

requirements for private citizens was once at issue in the courts, but is now settled after U.S. Supreme Court stated that standing was satisfied by FCA claims in *Vermont Agency of Natural Resources v. United States ex rel. Stevens.*[135] In fact, in *Lujan*, the Court took pains to differentiate the situation there[136] from the right of action granted to private citizens under FCA.[137] However, the plaintiff's grounds for standing changed from the previous rationale of the "bounty" being the concrete interest, to the plaintiff standing as an "assignee"[138] of the penalty collected by the gov-

---

tency of *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), which held that Article III standing requirement met in environmental context under environmental statute when individual plaintiff can demonstrate particularized harm, even if no actual injury to environment occurs); Todd B. Adams, *Is There a Legal Future for Sustainable Development in Global Warming? Justice, Economics, and Protecting the Environment*, 16 GEO. INT'L ENVTL. L. REV. 77, 92-96, 96 n.102 (2003) (addressing difficulty of plaintiffs in ensuring safe environment and sustainable development for future generations due to standing requirements).

135. *See* Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) (holding that private citizen bringing qui tam action, the "relator," under the FCA satisfies Article III standing requirements). *But see* Eric S. Askanase, *Qui Tam and the False Claims Act: Criminal Punishment in Civil Disguise*, 70 DEF. COUNS. J. 472, 473-74 (2003) (calling for reexamination of qui tam doctrine and outlining proposed rationale for why it fails to satisfy Article III requirements). There is also disagreement over whether the Article II Appointments Clause, *see* U.S. CONST. art. II, § 2, and the "Take Care" obligation of the Executive allow qui tam suits. *See id.* at § 3 (stating "he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed. . . ."). The Supreme Court of the United States left the issue open. *See Vermont Agency*, 529 U.S. at 778 n.8 (choosing not to decide issue of whether qui tam actions violate Article II provisions). *But see* United States ex rel. Stone v. Rockwell Int'l Corp, 282 F.3d 787, 804-07 (10th Cir. 2002) (holding FCA does not violate Article II); Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 752-53 (5th Cir. 2001) (holding that using same strain of analysis on Article II objections as used on Article III objections will find qui tam actions valid).

136. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 571-74 (1992) (holding plaintiffs did not have right of action because no concrete injury existed when hardship claimed was loss of endangered species that plaintiffs did not have immediate concrete intention of visiting again). Further, the plaintiffs were suing as both individuals and as an NGO. *See id.* at 556, 568-74 (denying both individual and associational standing).

137. *Lujan*, 504 U.S. at 572-73 (distinguishing plaintiffs' claims in instant action from qui tam case where Congress has provided not only right of action but also cash benefit and thus concrete interest).

138. *See Vermont Agency*, 529 U.S. at 773 (holding citizen relator in qui tam suit derives right of action under legal theory that assignee possesses same rights as principal); *see also* Robin Kundis Craig, *Will Separation of Powers Challenges "Take Care" of Environmental Citizen Suits? Article II, Injury-in-Fact, Private "Enforcers," and Lessons From Qui Tam Litigation*, 72 U. COLO. L. REV. 93, 146-48 (2001) (describing *Vermont Agency* Court's analogy of qui tam relator to assignee of claim and holding that relator did not have particularized harm but did have standing as assignee).

ernment under FCA.[139]

FCA expressly prohibits suits based upon knowledge publicly disclosed,[140] though this prohibition was softened with the 1986 Amendments to the Act.[141] As it became evident that more relators would be allowed standing to bring qui tam actions under FCA,[142] the number of suits brought drastically increased. As this threat gained momentum, valid qui tam actions were also used to force settlements with corporations,[143] a potentially use-

139. *See Vermont Agency*, 529 U.S. at 773 (noting that potential financial gain or "bounty" creates particularized, concrete interest for individual when Congress grants remuneration under FCA); *see also* Craig, *supra* note 138, at 147-55 (discussing nuanced holding of *Vermont Agency* in that qui tam relator is not deemed to have sufficient particularized harm for standing but injury to U.S. government is sufficient when relator is serving as assignee of United States).

140. *See* 31 U.S.C. § 3730(e)(4)(A)-(B) (2000) (holding no Court has subject matter jurisdiction over publicly disclosed allegations unless person bringing action is "original source"); *see also* United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh, 186 F.3d 376, 383 (3d Cir. 1999) (holding relator's claim barred as based upon information publicly disclosed); United States ex rel. Aflatooni v. Kitsap Physicians, 163 F.3d 516, 522-23 (9th Cir. 1999) (holding portions of qui tam relator's case that are public knowledge cannot be brought under FCA); Joel M. Androphy & Mark A. Correro, *Whistleblower and Federal Qui Tam Litigation—Suing the Corporation for Fraud*, 45 S. TEX. L. REV. 23, 55-58 (2003) (highlighting fact that published cases and public hearings can bar qui tam actions in future); Emily R. D. Pruisner, *The Extent of a Corporation's Ability to Constitute an Original Source Under the False Claims Act—Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 87 MINN. L. REV. 1247, 1257-59 (2003) (discussing historical bar on suits brought when information alleged has been publicized).

141. *See* 31 U.S.C. § 3730 (as amended 1986) (allowing for broader range of actions to be brought by private citizens); *see also* H.R. Rep. No. 99-660, at 17-18 (1986) (noting need for amendments to FCA to combat fraud in United States); Pruisner, *supra* note 140, at 1254-55 (recalling Congressional reaction to lack of FCA claims in wake of rise in fraud as impetus for Amendment to FCA relaxing "public disclosure" bar); Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 390 (2001) (examining how rise in government contract abuse, e.g., reports of government purchases of "$400 hammers and $600 toilet seats," was impetus for Congressional relaxation of FCA requirements).

142. *See* Bales, *supra* note 141, at 390 (noting large increase in number of qui tam actions brought under FCA after 1986 amendments to FCA); *see also* Sandra Sugawara, *Blowing the Whistle Gets Louder; Increase in Fraud Suits Stirs Legal Community*, WASH. POST, Mar. 19, 1999, at F1 (reporting rise in qui tam actions against corporations); Bill Rankin, *False Claims Act Encourages Whistle-blowers to Come Forward*, ATLANTA J. & CONST., July 11, 1998, at B2 (noting suit brought against hospital under FCA reflective of Congressional intent to encourage citizens to bring claims against those defrauding U.S. government).

143. *See, e.g.* John E. Clark, *Sharp, New Teeth for the State and Cash Rewards for Relators Exposing Wrongdoers*, 65 TX. B.J. 120, 124 (2002) (examining large settlements by both Bayer Corporation and TAP Pharmaceutical Products, Inc. when qui tam actions brought for fraudulent Medicaid practices); Jim Chen, *Webs of Life: Biodiversity Conservation as Aspecies of Information Policy*, 89 IOWA L. REV. 495, 535 n.271 (2004) (citing David

ful tool in the environmental context, as plaintiffs can press for environmental concessions in a settlement.[144]

Qui tam suits historically have been attempted in order to gain standing for enforcement of environmental regulations.[145] Most environmental laws, however, left superfluous the roundabout method of citizens using FCA to enforce them.[146] Further, if an environmental law provides for only criminal penalties and fines, it is unclear if a qui tam relator has standing in that context.[147]

One avenue for possible qui tam suits in Afghanistan and

A. Dana, *The New "Contractarian" Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35 (2000); Jamie A. Grodsky, *The Paradox of (Eco)pragmatism*, 87 MINN. L. REV. 1037 (2003)) (noting environmental law is process of negotiation and bargaining between interested parties and regulated entities).

144. *See, e.g.*, Richard R. W. Brooks, *Liability and Organizational Choice*, 45 J.L. & ECON. 91, 91 n.1 (2002) (noting large settlement in Exxon Valdez case for environmental harms); Sidney M. Wolf, *Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-To-Know Act*, 11 J. LAND USE & ENVTL. L. 217, 278 n.351 (1996) (citing *Settlement Reached in EPCRA Reporting Case*, [1993] 23 ENVTL. L. REP. (Envtl. L. Inst.) 2734 (noting company agreeing to settlement with citizen organization over environmental issues)).

145. *See, e.g.* Robert V. Percival & Joanna B. Goger, *Escaping the Common Law's Shadow: Standing in the Light of Laidlaw*, 12 DUKE ENVTL. L. & POL'Y F. 119, 121-22 (2001) (noting usage of qui tam suits by citizens against private parties for violating federal environmental regulations); Valerie R. Park, *The False Claims Act, Qui Tam Relators, and the Government: Which is the Real Party to the Action*, 43 STAN. L. REV. 1061, 1064 n.20 (1991) (citing Robert J. Kavin & Neil E. Needleman, *The Use of Qui Tam Actions to Protect the Environment*, 17 N.Y.L.F. 130 (1971); Allan W. May, *Qui Tam Actions and the Rivers and Harbors Act*, 23 CASE W. RES. L. REV. 173 (1971)) (noting rise in usage of qui tam suits to enforce environmental laws and commentators advocacy of this usage as appropriate); Bucy, *supra* note 92, at 76 (advocating qui tam actions as tool to enforce environmental law).

146. *See, e.g.*, David Ashley Bagwell, *Hazardous and Noxious Substances*, 62 TUL. L. REV. 433, 458 (1988) (describing historical usage of qui tam actions to enforce Rivers and Harbors Act of 1899 ("Refuse Act"), 33 U.S.C. § 407 (1982), but that Supreme Court of United States's decision in California v. Sierra Club, 451 U.S. 287 (1981), ended viability of this type of suit because Court held no implied right of action existed); Park, *supra* note 145, at 1064-65 (discussing reduction in usage of qui tam suits in environmental regulation context); Bucy, *supra* note 92, at 76 (reporting underutilization of qui tam suits in environmental context).

147. *See* Confiscation Cases, 74 U.S. (7 Wall.) 454, 19 L.Ed. 196 (1868) (holding no standing for private citizen as qui tam relator attempting to recover portion of fine); *see also* Bass Angler Sportsman Society v. United States Steel Corp., 324 F. Supp. 412, 415 (S.D. Ala. 1971) (holding claim of qui tam action to enforce environmental law carrying only criminal penalty not valid as there is no private right of standing either express or implied and citizen cannot share in monies collected as result of fine), *aff'd sub nom.* Bass Anglers Sportsman Soc. of America, Inc. v. Koppers Co., 447 F.2d 1304 (5th Cir. 1971).

Iraq that unfortunately has arisen is the alleged fraud committed by the Halliburton Company, a U.S. government contractor, in Iraq specifically.[148] The company has also received contracts for work in Afghanistan.[149] A qui tam suit alleging fraud by Halliburton against the U.S. government would be extremely difficult, due to the requirements that the relator have specific knowledge. It is also required that the knowledge come from published or public hearings[150] and if criminal charges are brought against the company, the qui tam action is withdrawn.[151]

---

148. *See, e.g.*, *THE STRUGGLE FOR IRAQ; Pentagon Withholds Halliburton Payment*, N.Y. TIMES, Mar. 18, 2004, at A16 (reporting Pentagon withholding payments from Halliburton Co. until allegations of fraud investigated); David Ivanovich & Michael Hedges, *Halliburton Faces Criminal Investigation / Pentagon Probing Alleged Overcharges for Iraq Fuel*, HOUS. CHRON., Feb. 24, 2004, *available at* 2004 WL 57810221 (reporting on alleged fraud committed by Halliburton Co. in Iraq); Russell Gold & Christopher Cooper, *Pentagon Weighs Criminal Charges of Halliburton Arm*, WALL ST. J., Feb. 24, 2004, *available at* 2004 WL-WSJ 56920882 (noting investigation into whether Halliburton subsidiary, Kellogg Brown & Root, fraudulently bilked U.S. government with fuel pricing).

149. *See* David Rohde, *G.I.'s in Afghanistan on Hunt, but Now for Hearts and Minds*, N.Y. TIMES, Mar. 30, 2004, at A6 (noting soldiers interviewed eat meals in "chow hall" operated by Halliburton Co.); *see also* Ernest Holsendolph, Editorial, *OUR OPINIONS: Halliburton's Welcome Worn Out*, ATLANTA J. & CONST., Feb. 18, 2004, at A12, *available at* 2004 WL 68884611 (noting Halliburton's reception of large government contracts in both Afghanistan and Iraq).

150. *See* 31 U.S.C. § 3730(e)(4)(A)-(B) (2000) (holding no Court has subject matter jurisdiction over publicly disclosed allegations unless person bringing action is "original source"); *see also* United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh, 186 F.3d 376, 383 (3d Cir. 1999) (holding relator's claim barred as based upon information publicly disclosed); United States ex rel. Aflatooni v. Kitsap Physicians, 163 F.3d 516, 522-23 (9th Cir. 1999) (holding portions of qui tam relator's case that are public knowledge cannot be brought under FCA); Androphy & Correro, *supra* note 140, at 55-58 (noting traditional bar against qui tam suits brought when allegations have been published or part of public hearings); Pruisner, *supra* note 140, at 1257-59 (noting historical prohibition against qui tam suits that contain any publicized facts or allegations).

151. *See Confiscation Cases*, 74 U.S. at 74 (holding no qui tam action available when alleged monies owed government are result of criminal penalties); *see also Bass Angler Sportsman Soc.*, 324 F. Supp. at 415 (holding qui tam action seeking remuneration for violation of environmental statue containing criminal fines invalid); Ivanovich & Hedges, *supra* note 148 (noting criminal investigation into Halliburton gasoline pricing); Gold & Cooper, *supra* note 148 (noting Pentagon investigation into possible criminal charges against Halliburton).

III. *CREATIVE METHODS TO GAIN STANDING IN THE INTERNATIONAL ENVIRONMENTAL SCENARIO*

A. *Possible Private Actions for Citizens and NGOs To Protect the Environment of Afghanistan*

1. U.S. Citizen and NGO Suits Brought Under Existing U.S. Law

The most difficult bar to U.S. citizens and NGOs bringing suits protecting the Afghan environment under existing U.S. law is the standing requirement laid out in *Lujan v. Defenders of Wildlife*.[152] The particularized harm, redressability, and traceability elements that must be satisfied for a private environmental suit to be valid make it difficult for a U.S. citizen to have standing for actions abroad.[153] Thus, it is difficult to imagine that even if Congress responded to calls for legislation granting citizen rights of action for environmental damage in Afghanistan,[154] a U.S. plaintiff could satisfy the threshold standing requirement.[155]

2. Suits by Afghan Nationals for Environmental Harms Committed by U.S. Government or Its Agencies Under ATCA

Suits by Afghan citizens against U.S. government entities or corporations under ATCA for environmental harm have a better chance of success than suits by U.S. nationals.[156] It is much more likely that such a plaintiff would satisfy the standing requirements that bar many suits brought by U.S. citizens and

---

152. *See supra* notes 97-100 and accompanying text (discussing difficulty for private citizen or NGO to satisfy standing requirements of *Lujan* that demand particularized harm for plaintiff).

153. *See supra* notes 97-100 and accompanying text (analyzing difficulty of satisfying three pronged requirements for standing when alleged harm is abroad).

154. *See supra* notes 95-99 and accompanying text (discussing Congressional response to *Gwaltney* case with Clean Air Act Amendments of 1990 which gave general grant of citizen suit to facilitate enforcement and holding of *Lujan* requires three-pronged standing requirement be met by plaintiff even in light of generalized Congressional grant of standing).

155. *See supra* notes 97-100 and accompanying text (noting difficulty of plaintiff to satisfy standing requirements for citizen suit as any plaintiff must satisfy three-pronged requirement of particularized harm or injury, traceability or causation inquiry, and redressability of harm by potential favorable ruling to have standing to sue even in light of generalized grant of citizen right of action by Congress).

156. *See supra* notes 108-17 and accompanying text (discussing both attempted and proposed usage of ATCA as litigation weapon for environmental harm caused by U.S. government, citizens, or corporations).

NGOs.[157] It is already apparent that environmental harm has been done in Afghanistan.[158] In fact, one commentator has suggested that U.S. military actions in the country have already violated existing international law and inordinately damaged the Afghan environment.[159] Should a U.S. court apply a liberal interpretation of the Geneva Protocols and Hague Conventions[160] (to both of which the United States is a party), they would be deemed existing international law and treaties to which the United States is a party, satisfying the third and most difficult prong of an ATCA claim.[161] The failure of such an action, however, is likely in the wake of the Supreme Court's decision in *Sosa v. Alvarez-Machain*.[162]

3. Use of Qui Tam Actions To Gain Standing for Afghan Environmental Actions

The use of qui tam actions in the environmental context is not without historical basis.[163] The standing inquiry is not as difficult as the one outlined in *Lujan*[164] as the Court there distinguished the qui tam relator's status from that of a plaintiff bring-

157. *See supra* notes 94-98 (discussing *Lujan* holding that any plaintiff must satisfy three-pronged requirement of particularized harm or injury, traceability or causation inquiry, and redressability of harm by potentially favorable ruling to have standing to sue even in light of generalized grant of citizen right of action by Congress).

158. *See supra* notes 34-35, 46, 52, 54-57 and accompanying text (discussing current environmental problems facing Afghanistan and how recent lengthy history of military conflict has exacerbated these issues).

159. *See supra* note 123 and accompanying text (denominating usage of cluster bombs, depleted uranium munitions, and the targeting of environmentally sensitive sites as violative of existing international law).

160. *See supra* note 119 and accompanying text (noting Geneva Conventions and Hague Conventions call for care to be given to environment even in times of war).

161. *See supra* notes 116-18 and accompanying text (noting ATCA's third element, that the tort be "committed in violation of law of nations or treaty of United States" is most difficult hurdle for plaintiff to satisfy to bring valid claim).

162. *See supra* notes 74-79 and accompanying text (acknowledging Supreme Court's decision in *Sosa* as limiting scope of ATCA to eighteenth centuries breaches of international customary law and torture, which seems to preclude right of action for environmental damage).

163. *See supra* notes 145-46 and accompanying text (noting historical usage of qui tam relator actions brought under FCA to enforce environmental statutes and discussing Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000), holding that private citizen bringing qui tam action under FCA satisfies Article III standing requirements).

164. *See supra* notes 97-100 and accompanying text (noting difficulty of plaintiff to satisfy standing requirements for citizen suit in wake of *Lujan* holding any plaintiff must satisfy three-pronged requirement of particularized harm or injury, traceability or cau-

ing right of action under generalized Congressional grant.[165] However, FCA's[166] grant of a right of action is limited to a narrow set of circumstances where the plaintiff has specific knowledge of fraudulent behavior by the defendant.[167]

The revelation of possible fraudulent transactions by the Halliburton Company and its subsidiaries[168] has at least raised the possibility of an FCA claim being brought by someone with knowledge of harm done to the Afghan environment. A successful claim would require a very narrow set of potential plaintiffs with specific knowledge.[169] Thus, the probability of both such a plaintiff existing and the claim being successful as to environmental harm[170] is extremely low.

B. *Potentially Valid Claims for Citizens and NGOs To Enforce Environmental Protection of Iraq or Attempt To Recoup Damages for Harm Done*

1. Existing U.S. Law As Basis for U.S. Citizen or NGO Suits

The same difficulties for establishing valid standing in an environmental suit under existing U.S. environmental law thwart potential U.S. citizen and NGO plaintiffs in the Iraqi context as the Afghan one.[171] The difference, however, is that the status of

---

sation inquiry, and redressability of harm by potential favorable ruling to have standing to sue even in light of generalized grant of citizen right of action by Congress).

165. *See supra* note 136 and accompanying text (noting Supreme Court's differentiation of qui tam action from standing analysis applied to plaintiffs in that case).

166. *See supra* notes 92, 138-41 and accompanying text (noting that FCA grants right of action to any person bringing suit alleging defrauding of U.S. government as long as certain substantive and procedural criteria are met).

167. *See supra* notes 150-51 and accompanying text (discussing that FCA claims are limited to individuals who have specific knowledge of fraud that has not been published and when criminal charges have not been brought against defendant by U.S. government).

168. *See supra* notes 148-49 and accompanying text (reporting allegations of fraud against Halliburton for actions specific to Iraq, but also noting Halliburton's presence in Afghanistan).

169. *See supra* notes 150-51 and accompanying text (stating that FCA claims are limited to those individuals who have specific knowledge of fraudulent activities that have not been published nor have criminal charges been brought against defendant by U.S. government).

170. *See supra* notes 145-46 and accompanying text (noting historical usage of qui tam relator actions brought under FCA to enforce environmental statutes but recent difficulty in bringing such claims).

171. *See* discussion *supra* Part III.A.1 (noting difficulties of plaintiffs to gain standing in international environmental suit, especially after *Lujan* decision).

U.S. forces as occupiers[172] brings with it certain responsibilities. Thus, U.S. citizens could sue to enforce these duties, as they presumably are actionable U.S. law.[173]

2. ATCA As Basis for Suit by Iraqi Citizens To Protect Environment

As discussed above,[174] ATCA is an attractive avenue for non-U.S. plaintiffs to bring suit in U.S. courts for harms committed abroad.[175] The recently rediscovered[176] grant of a right of action is difficult in the environmental context because of the requirement that the tort committed violate the law of Nations or treaty of the United States.[177]

The declaration of U.S. forces in Iraq as occupying ones, and the concurrent international law obligations that status carries,[178] could provide the necessary "law of Nations" critical for a successful ATCA claim.[179] The environmental duties that occupying forces must fulfill[180] create potentially actionable suits should they be transgressed. An Iraqi citizen would thus have a valid ATCA claim and would presumably have a particularized injury that would stand up to any standing scrutiny.

---

172. *See supra* notes 4, 38, 62, 124 and accompanying text (noting specific obligations of U.S. in Iraq after UN Security Council Res. 1483 that declared it an occupying force).

173. *See supra* notes 107-08 and accompanying text (noting that valid treaties implemented by legislation become part of U.S. law as well).

174. *See* discussion *supra* Part III.A.2 (outlining possible successful ATCA claim in environmental context brought by Afghan citizen).

175. *See supra* notes 113-32 and accompanying text (discussing possible applications of ATCA by non-U.S. citizens in U.S. courts to environmental torts committed abroad).

176. *See supra* note 115 and accompanying text (noting history of ATCA dates back to Judiciary Act of 1789 but only relatively recently has it come back into vogue as popular cause of action).

177. *See supra* notes 114-25 and accompanying text (discussing difficulty of environmental law claims under ATCA due to lack of widely held international environmental law and U.S. withdrawal from several environmental treaties).

178. *See supra* notes 4, 38, 62, 124 and accompanying text (noting specific obligations of U.S. in Iraq after UN Security Council Res. 1483 that declared it an occupying force).

179. *See supra* notes 114-25 and accompanying text (discussing difficulty of environmental law claims under ATCA due to third prong requirement of alleged tortious action violating law of Nations or U.S. treaty).

180. *See supra* notes 4, 38 and accompanying text (noting environmental obligations of occupying forces to occupied Nation including preservation of resources and protection of drinkable water).

3. Qui Tam Actions Potentially Brought by Citizens Containing Knowledge of Fraud

The FCA grant of rights of action requires a specific set of circumstances for the plaintiff to have standing to sue.[181] While the qui tam relator is able to withstand the standing inquiry called for in *Lujan*,[182] the limitations on the availability of the knowledge of the specific fraud and the prohibition of its publication or the commencement of a criminal action by the government make it persist as a difficult case to make.[183]

The possibility of extensive fraud by U.S. government contractors and agencies was highlighted by the allegations against the Halliburton Company.[184] The publication of these allegations and pursuit of criminal charges against the company basically prohibit a valid qui tam action arising out of the same facts.[185] A similar set of circumstances with either Halliburton or another contractor in Iraq might provide a viable FCA claim, or at least force a settlement in which the plaintiff could dictate favorable terms including restoration of any environmental damage.[186] Thus, a person with specific knowledge of fraudulent actions by a U.S. entity in Iraq with environmental ramifications could not only stop the harm, but recoup some of the monies of which the entity bilked the U.S. government.[187]

---

181. *See* discussion *supra* Part III.A.3 (outlining requisite knowledge plaintiff must possess and substantive and procedural guidelines that must be followed for successful FCA claim).

182. *See supra* notes 135-41 (noting specific right of action granted by FCA different than generalized grant provided in many U.S. statutes and that role of qui tam relator is one of "assignee" of potential recovery of financial recuperation and thus has particularized interest).

183. *See supra* notes 150-51 and accompanying text (discussing fact that FCA claims are limited to individuals who have specific knowledge of fraud that has not been published and when criminal charges have not been brought against the defendant by the U.S. government).

184. *See supra* notes 148-49 and accompanying text (noting allegations of fraud against Halliburton for actions specific to Iraq, but also noting Halliburton's presence in Afghanistan).

185. *See supra* notes 148-51 and accompanying text (noting prohibition against bringing FCA claim based upon facts published or part of public hearings and fact that allegations against Halliburton are widely known).

186. *See supra* notes 143-44 and accompanying text (recalling that some large settlements received from corporations when plaintiffs sued for environmental harm under FCA).

187. *See supra* notes 92-101 and accompanying text (advocating use of FCA in environmental context and discussing FCA's grant standing and portion of recovered monies to any individual bringing claim that party defrauded U.S. government).

CONCLUSION

The protection of the Afghan and Iraqi environments is an issue that has not received much attention in recent months, but one that is fundamental to the successful implementation of democracy, market economy, and a viable infrastructure. Unfortunately, the status of U.S. law allows actions by U.S. government agencies, contractors, and U.S. corporations to go unchecked by citizens and NGOs, unless very narrow exceptions are met. Hopefully, the Congress and U.S. courts will respond and allow watchful citizens to ensure respect for and protection of the environments of Afghanistan and Iraq.