

## **CHAPTER ELEVEN UPDATE**

### **The Montreal Protocol (pages 1089-1094)**

#### **MILLER/ZAEELKE/ANDERSON BOOK**

Based on lessons derived from implementation of the Montreal Protocol, Alan Miller, Durwood Zaelke & Stephen Anderson have just published a book, *Cut Super Pollutants Now!: The Ozone Treaty's Urgent Lessons for Speeding Up Climate Action (Resetting Our Future)* (2021) that advocates for swift action focused on slashing emissions of those greenhouse gases like nitrous oxide and methane that have the greatest potential to exacerbate the climate crisis.

### ***JAM v. International Finance Corporation* (pages 1151-1155)**

As noted in the casebook, despite their victory in the U.S. Supreme Court, the plaintiffs in the *Jam* case had their complaint dismissed on remand on the grounds that they had not alleged sufficient acts in the U.S. that caused them harm. On April 26, 2021, their appeal was argued in the D.C. Circuit, but from the tenor of oral argument it seems likely that the district court's dismissal will be affirmed.

### **The Alien Tort Statute, *Kiobel* and the *Nestle* Decision (pages 1142-1148)**

In *Nestle, USA, Inc. v. Doe*, 141 S.Ct. 1931 (2021), the U.S. Supreme Court again addressed when the Alien Tort Statute can be used to try to hold U.S. corporations accountable for human rights abuses in other countries. involved the question whether the Alien Tort Statute (ATS), which permits lawsuits by foreigners for actions that violate the "law of nations," can be used by children who alleged that they were kidnapped and held as slaves in West Africa to harvest cacao that was sold to Nestle and Cargill. The 9<sup>th</sup> Circuit had permitted the lawsuit to go forward, but the Supreme Court reversed by a vote of 8-1, finding that the plaintiffs had improperly sought extraterritorial application of the ATS because they had not alleged enough of a connection between the slavery and acts by the corporations that occurred in the U.S. The Justices in the majority held that because the ATS does not apply extraterritorially, plaintiffs must establish that "the conduct relevant to the statute's focus occurred in the United States." Because nearly all the conduct that the plaintiffs alleged constituted aiding and abetting forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast, the Court held that plaintiffs did not plead sufficient facts to support domestic application of the ATS.

Three Justices (Thomas, Gorsuch, and Kavanaugh) would have effectively wiped out all ATS liability for harm that occurred abroad by finding that Congress has not created a cause of action for torts that go beyond three international law torts - piracy, infringement of the rights of ambassadors, and violation of safe conducts - recognized in 1789 when the ATS was adopted. They argued that only Congress, and not courts could "create" such causes of action. In his dissent Justice Alito expressed some sympathy for this position, but argued that it was not necessary for the Court to reach it in this case. Concurring Justices Breyer, Sotomayor and Kagan expressed the view that the ATS can be used to redress violation of any international

norm that is specific, universal and obligatory. Chief Justice Roberts and Justice Barrett took no position on that issue.

However, it is interesting that a majority of the Justices appeared to reject the companies' primary defense in the court below – the claim that corporations cannot be sued under the ATS because the “law of nations” only applies to governments and individuals and not to corporations. Justice Alito premised his dissent on rejecting this conclusion. Justice Gorsuch, joined by Justice Kavanaugh in a separate concurring opinion, agreed. In a footnote to her concurring opinion Justice Sotomayor also expressed agreement with this view.

## **HFCs and the American Innovation and Manufacturing Act (Note 6, page 1094)**

### **EPA Uses New Authority to Phase Down HFCs**

On May 3, 2021, EPA proposed to issue its first rule under the American Innovation and Manufacturing (AIM) Act of 2020 to phase down the production and consumption of hydrofluorocarbons (HFCs), highly potent greenhouse gases commonly used in refrigerators, air conditioners, and many other applications. A remarkable bipartisan consensus resulting in the AIM Act being included in must-sign budget legislation Congress passed, and President Trump signed into law in late December 2020. The law directs EPA to sharply reduce production and consumption of HFCs by using an allowance allocation and trading program. This phasedown will decrease the production and import of HFCs in the United States by 85% over the next 15 years. A global HFC phasedown is expected to avoid up to 0.5 °C of global warming by 2100.

EPA Administrator Michael S. Regan stated: “With this proposal, EPA is taking another significant step under President Biden’s ambitious agenda to address the climate crisis. By phasing down HFCs, which can be hundreds to thousands of times more powerful than carbon dioxide at warming the planet, EPA is taking a major action to help keep global temperature rise in check. The phasedown of HFCs is also widely supported by the business community, as it will help promote American leadership in innovation and manufacturing of new climate-safe products. Put simply, this action is good for our planet and our economy.”

EPA estimated that the present value of the cumulative benefits of this action is \$283.9 billion from 2022 through 2050, and that the proposal will yield cumulative compliance savings for industry. In 2036 alone, the year the final reduction step is made, this rule is expected to prevent the equivalent of 187 million metric tons of carbon dioxide (CO<sub>2</sub>) emissions – roughly equal to the annual greenhouse gas emissions from one out of every seven vehicles registered in the United States. The total emission reductions of the proposal from 2022 to 2050 are projected to amount to the equivalent of 4.7 billion metric tons of CO<sub>2</sub> – nearly equal to three years of U.S. power sector emissions at 2019 levels.