Transnational Liability in U.S. Courts for Environmental Harms Abroad

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Modern energy and natural resource development has always been, at heart, a global enterprise. Energy companies and developers, by necessity, frequently work in far-flung locations scattered among nations with vastly different legal systems and environmental regulatory systems. If one of their operations causes spills or releases that injure the local environment, they can quickly find themselves facing legal actions to force them to pay for damages or to remediate the contamination. Those lawsuits can take place in the nation where the spill occurred under that nation's laws; alternatively, a liability claim can dog the developers back to their own countries and their domestic courts. With resolute tenacity, many foreign plaintiffs have also sought to enlist the U.S. domestic legal system to enforce foreign tort judgments based on the plaintiff's local laws to seek large payments or remediation commitments.

This type of border-jumping liability litigation has always had its own complex rules, and recent decisions in the United States have made these claims even more opaque. This paper explores recent developments in case law on the use of U.S. courts to impose transnational environmental liabilities, and it examines how courts in differing nations sort out the responsibilities imposed by competing jurisdictions. In particular, it focuses on two scenarios: collection lawsuits in the United States to enforce foreign environmental tort judgments obtained under the plaintiff's domestic laws, and lawsuits brought directly in the United States to hold defendants responsible for damages caused by their actions outside the United States.

I. **Basic Principles**.

Before updating the key recent judicial rulings on private party transnational environmental liability, it is worth briefly reviewing some of the foundational concepts that underlie the debate. In essence, the fundamentals of liability haven't changed, and they will continue to guide the latest developments. For clarity, this summary will focus on two categories of claims described above. Except when necessary to clarify a domestic law claim, I will not address the potential liability of private actors under public international law for violations of environmental norms or human rights obligations.

A. Direct lawsuits against developers in U.S. courts.

Foreign plaintiffs can typically bring their environmental damage claims directly against energy developers in U.S. courts (both federal and state), but they must navigate a daunting series of jurisdictional and procedural obstacles to succeed.[1]

[1] For an early and thorough review of the substantive and procedural hurdles to transnational environmental tort claims in U.S. courts, see Armin Rosencranz and Richard Campbell, "Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts," 18 *Stanford Environmental Law Review* 145 (1999). See also Michael Anderson, "Transnational Corporations and Environmental Damage: Is Tort Law the Answer?," 41 *Washburn Law Journal* 399 (2002); Harold Koh, "Transnational Public Law Litigation," 100 *Yale Law Journal* 2348 (1991).

As a fundamental principle, federal and state courts do not bar foreign plaintiffs from bringing their claims – even ones rooted in actions outside the United States, or that do not involve citizens of the United States - in the United States.[2] Unless the underlying substantive claims themselves require the plaintiffs to have U.S. citizenship or residency, foreign plaintiffs normally can invoke the courts' powers on the same par as any U.S. citizen. Exercising this power, however, requires the plaintiffs to surmount several key requirements. The most important include:

Substantive Jurisdiction. A federal court can only hear claims if it has the substantive jurisdiction to consider them. Typically a foreign plaintiff bringing an environmental tort action might allege either federal question jurisdiction, diversity jurisdiction, or – as discussed in greater detail below – jurisdiction under the Alien Tort Claims Act. A lawsuit with only foreign plaintiffs and foreign defendants, however, will not have complete diversity among the parties and would not support review by the court absent another ground for jurisdiction.[3]

Notably, the availability of substantive jurisdiction under U.S. law is a separate question from deciding which body of law should apply. Under conflicts of laws principles, a U.S. court may choose to exercise jurisdiction but still find itself constrained to apply the foreign law governing the actions where the occurred.[4]

Personal Jurisdiction. The court must also have the capacity to exercise personal jurisdiction over the defendants. While this requirement usually poses relatively little problem for U.S. defendants (assuming the plaintiff chooses a court based on the defendant's location, actions, or situs of incorporation), a court's personam jurisdiction over foreign defendants or domestic defendants outside the court's geographic range might face constitutional hurdles if the defendants lack sufficient contacts with the forum to satisfy minimal due process requirements.[5]

Forum Non Conveniens. Even if the court has subject matter and personal jurisdiction over the defendants, it may choose not to exercise its authority if the foreign plaintiffs can bring their claims more effectively and conveniently in their own domestic courts. Under forum non conveniens doctrine, a federal court can decline to exercise jurisdiction when it believes that the case would be more appropriately or conveniently tried in a different jurisdiction. To do so, the court must first determine whether an adequate alternative forum exists to hear the claim, and then (if yes) whether several private and public interest factors make that forum more convenient. Importantly, the fact that the alternative forum's substantive law is less favorable to the plaintiffs does not weigh heavily in the court's assessment.[6] Because forum non conveniens is a common law doctrine, the Federal Rules of Civil Procedure do not govern its application and a court that finds another more convenient forum

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[2] Jonathan Drimmer and Sarah Lamoree, "Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions," 29 *Berkeley Journal of International Law* 456 (2011); David Fagan, "Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations," 76 *NYU Law Review* 626 (2001).

[3] Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A., 20 F.3d 987, 990–91 (9th Cir. 1994); Guan and Wong v. Bi, 2014 WL 953757 (N.D. Cal. 2014) (presence of foreign plaintiff alongside U.S. citizen plaintiff against wholly foreign defendants destroyed complete diversity and mandated dismissal of diversity action).

[4] Mary Elliott Rollé, "Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases," 15 *Georgetown International Environmental Law Review* 135, 184-187 (2003) (reviewing U.S. choice of law principles in international toxic tort actions, with comparison to choice of law rules in Australia, Canada, and England).

[5] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[6] Brooke Clagett, "Note: Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign Plaintiffs," 9 *Tulane Envt'l Law Journal* 513 (1996).

exists will typically dismiss the action without prejudice. It may condition its dismissal, however, on the defendant's willingness to agree to limitations on certain defenses or procedural advantages that would make the alternative forum a less fair and reasonable choice.[7]

Removal and Well-Pleaded Complaint Rule. Foreign plaintiffs will often bring their claims in state courts in the United States where they might enjoy favorable rules for establishing their standing and less demanding requirements for admitting expert testimony or standards of proof. In response, defendants will often seek to remove the claims to federal courts where, presumably, the standards would instead favor them. To obtain removal, defendants must show that the cause poses a federal question as provided on the face of the plaintiff's well-pleaded complaint (which allows plaintiffs to avoid federal jurisdiction by pleading solely state law claims). But if the plaintiff's complaint artfully pleads a federal cause of action in state law terms, or arises under federal common law because it implicates questions of foreign relations law, the federal court may still remove the action under the well-pleaded complaint rule.[8]

Comity. The principle of comity holds that courts should eschew conflict with the sovereignty of other states. While this factor alone is usually not dispositive, it has frequently served as a basis for federal courts to dismiss foreign plaintiffs' tort actions. Because principles of comity arise from judicial prudence, the doctrine reflects notions of permissive federal abstention and does not arise from mandatory constitutional principles.[9]

Act of State Doctrine. While it parallels the principles of comity, the Act of State doctrine arises from distinct grounds. It generally forbids a federal court from reviewing the legality of actions by a state within its own jurisdiction and within its own laws.[10] It too is a prudential doctrine that allows federal courts to abstain from hearing an action that attacks the legal sufficiency of the foreign sovereign's actions, but the court must also first determine that the sovereign's action was "valid" under international consensus (e.g., the Act of State doctrine does not bar a federal court from reviewing a

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[77] See, e.g., Delgado v. Shell Oil Co., 231 F.3d 165, 173 (5th Cir. 2000) (noting that the conditions precedent imposed by trial court for dismissal on forum non conveniens grounds with opportunity to re-file in foreign court included

> As conditions precedent to dismissal, the district court required Defendants (including third- and fourth-party defendants) to (1) waive all jurisdictional and certain limitation-based defenses, (2) permit the dismissed plaintiffs a reasonable period within which to conduct discovery before trial in their home countries, and (3) agree to satisfy those plaintiffs' concerns with respect to the enforceability of foreign judgments that might be rendered against Defendants. In addition, the district court permanently enjoined the dismissed plaintiffs from commencing or causing to be commenced in the United States any DBCP action and from intervening in *Rodriguez* and *Erazo*, the two remanded cases. Finally, the district court agreed that it would re-assume jurisdiction, on proper motion, if the highest court in any foreign country should affirm a dismissal for lack of jurisdiction over any action commenced by a dismissed plaintiff in his home country or his country of injury.

[8] Rosencranz and Campbell, *supra* n.1, at 189-197.

[9] Concerns about comity have also led to arguments that foreign plaintiffs must first exhaust their claims in their local courts before they can bring certain substantive actions in the United States (such as Alien Tort Claims Act complaints). Emeka Duruigbo, Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection," 29 *Fordham International Law Journal* 1245 (2006).

[10] Comparelli v. Republica Bolivariana de Venezuela, --- F.3d ---, 2018 WL 2749717 (11th Cir. June 8, 2018); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). See also Restatement (Third) of Foreign Relations Law of the United States §§ 443-444 (1987).

sovereign government's attempt to assassinate someone outside of its borders, or to engage in slavery or torture).[11]

Foreign Affairs Concerns and Political Questions. Last, and more generally, the federal courts will decide to hear claims by foreign plaintiffs if they raise foreign affairs concerns that rise to the level of non-justiciable political questions.[12] While the well-known factors outlined in *Baker v. Carr* do not expressly include questions about the conduct of foreign affairs, the federal courts quickly marked foreign affairs disputes as one of the first areas of political questions where they would decline to hear cases on such prudential grounds.[13]

B. Enforcement in U.S. courts of local foreign judgments against developers.

In addition to suing energy developers in U.S. courts, foreign plaintiffs may also choose to file an action in their domestic court system or the courts with jurisdiction over the actions or region affected by the environmental tort. If the foreign plaintiffs prevail and obtain a judgment, their next step would likely involve an action in U.S. court to enforce the foreign judgment and satisfy its terms. This step can lead to the seizure or liquidation of assets held by the developer in the United States as necessary to meet the plaintiff's judgment.

The enforcement of foreign judgments in the United States raises an entirely different body of federal and state law. The seminal U.S. Supreme Court decision in *Hilton v. Guyot* found that federal courts should enforce foreign judgments

> where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh ....[14]

While federal common law governs the enforcement of foreign judgments in matters where the federal substantive law controls the action, the situation becomes much more complex when the court acts under its diversity jurisdiction or when state law otherwise governs the lawsuit. Under Federal Rule of Civil Procedure 69, "[t]he procedure on execution . . . must accord with the procedure of the state where the court is located."[15] State law courts as well turn to their own domestic laws to determine whether to enforce foreign judgments brought before them. As a result, foreign plaintiffs who seek to

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[11] For a review of the concerns raised when a foreign government itself is the plaintiff in environmental damage lawsuit in U.S. courts, see Hannah Buxbaum, "Foreign Governments as Plaintiffs in U.S. Courts and the Case Against 'Judicial Imperialism'," 73 *Washington & Lee Law Review* 653, 685 (2016).

[12] Michael Glennon, "Foreign Affairs and the Political Question Doctrine," 83 *American J. Int'l Law* 814 (1989).

[13] See, e.g., Oetjen v. Central Leather Co., 246 U.S. 297 (1918).

[14] Hilton v. Guyot, 159 U.S. 113, 202-03 (1895). This decision continues to govern recent actions to enforce foreign judgments in U.S. courts. See, e.g., Saskatchewan Mutual Insurance Co. v. CE Design, Ltd., 865 F.2d 537 (7th Cir. 2017); DRFP L.L.C. v. Republica Bolivarian de Venezuela, 706 Fed.App. 269 (6th Cir. 2017); Goldgroup Resources, Inc. v. Dynaresource de Mexico, S.A. de C.V., 2018 WL 1023147 (D. Colo. Feb. 13, 2018).

[15] Fed.R.Civ.P. 69; RESTATEMENT (SECOND) OF CONFLICTS § 99.

enforce their successful judgments from foreign courts may face a welter of differing complex state laws.

Fortunately, most states have moved toward a consistent framework of laws in this area by adopting one of two uniform acts for the enforcement of foreign judgments or a set of parallel common law principles.[16] These uniform acts provide that courts should recognize and enforce judgments from foreign courts that are final, conclusive, and enforceable in their home jurisdictions. Defendants can overcome this presumption of enforceability, however, by showing that the judgment arose from one of several impermissible factors. These factors include that the judgment was "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law"; "the foreign court did not have personal jurisdiction over the Defendant"; or "the foreign court did not have jurisdiction over the subject matter" at issue. Notably, many state courts operating under common law principles for foreign judgment enforcement do not automatically accept the third principle.[17]

In addition to rejecting a foreign judgment outright, a court may also decline to enforce the judgment based on grounds raised in a collateral attack. As discussed below, defendants have successfully argued that a prior agreement to arbitrate a dispute may provide grounds to reject a foreign judgment obtained in contravention to that agreement.[18] U.S. defendants have also resisted enforcement of foreign judgment by arguing that the judgment resulted from corrupt actions by plaintiffs or judges or otherwise violated federal statutes against racketeering and organized criminal activities.[19]

II. Recent Developments.

a. *Lawsuits by Foreign Plaintiffs in U.S. Courts Against U.S. Defendants: Jesner v. Arab Bank*.

The most notable recent decision affecting foreign plaintiffs' actions in U.S. courts is the U.S. Supreme Court's ruling in *Jesner v Arab Bank*.[20] This opinion continued the Court's trend of narrowing the opportunities for foreign plaintiffs to bring actions against foreign defendants in U.S. courts under the Alien Tort Claims Act (ATCA). After *Jesner,* the ATCA effectively can no longer support a claim by foreign defendants against a foreign corporation that allegedly violated international norms in its operations abroad.

Jesner did not involve an environmental tort claim, but instead wrestled with claims under international law in a parallel field: human rights and the treatment of terrorism as an international crime with universal jurisdiction. The plaintiffs, all of whom claimed to be victims of international acts of terrorism committed abroad, sued Arab Bank, PLC, a bank sited in Jordan. They claimed that the bank, through its agents, had financed terrorism abroad through providing banking services to terrorist organizations.

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[16] Many courts follow the formulation of common law principles provided by section 481 of the Restatement (Third) of the Foreign Relations Law (1987). S.I. Strong, "Recognition of Foreign Judgments in U.S. Courts: Problems and Possibilities," 33 *Review of Litigation* 45, 69 (2014).

[17] Ronald Brand, "Recognition and Enforcement of Foreign Judgments," Federal Judicial Center International Litigation Guide at 4, 6-9 (2012).

[18] See discussion infra at n.38.

[19] See discussion infra at nn.39-40.

[20] --- U.S. ---, 138 S.Ct. 1386 (April 24, 2018).

Their complaint claimed that the bank's actions violated the public law of nations against terrorism, and that the U.S. courts had jurisdiction to hear the claim under the ATCA.[21]

The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[22] This brief statute, passed originally in the Judiciary Act of 1789, has spurred a cottage industry of litigation since 1979 by foreign plaintiffs who sought relief for damages they had suffered abroad.[23] While the initial actions focused on crimes of universal jurisdiction under international law (such as torture, piracy, and terrorism), the claims soon spread to include a variety of actions against U.S. and foreign corporations who allegedly violated the law of nations by polluting the plaintiff's environment.[24] While the cases typically yielded relatively few victories for the foreign plaintiffs,[25] they drew high levels of attention from public media as well as strong criticism from businesses as well as foreign governments affected by the lawsuits.

In response, the U.S. Supreme Court began to trim the scope of ATCA claims. In *Kiobel v. Royal Dutch Petroleum,* for example, the Court ruled that the ATCA did not apply to actions brought by foreign claimants against foreign corporations based on events that occurred outside the United States.[26] Rather than rely on any legislative history or policy analysis to find a narrower scope of the statute, the Court relied on the long-standing canon of statutory construction to interpret federal statutes not to have extraterritorial effect unless Congress makes clear its intent to give the statute that reach.[27] Justice Robert's majority opinion found that Congress' language in the ATCA failed to unambiguously state such a desire, and as a result the statute did not reach actions occurring wholly outside the United States with entirely foreign parties. The Court expressly left open, however, the question of whether the ATCA could apply to foreign corporations at all by its own terms.[28]

The Court's decision not to tackle whether the ATCA applied to corporations was not a casual one. The Second Circuit had grounded its ruling on an exhaustive analysis of the application of international legal norms to corporate entities.[29] By leaving the door open for potential claims against corporations,

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[21] 138 S.Ct. at 1393-1395.

[22] 28 U.S.C. § 1350.

[23] Kathleen Jawger, "Environmental Claims Under the Alien Tort Statute," 28 Berkeley Journal International Law 519 (2010); Logan Breed, "Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad," 42 *Virginia Journal of International Law* 1005 (2002); Jean Wu, "Pursuing International Environmental Tort Claims Under the ATCA: *Beanal v. Freeport-McMoran*, 28 *Ecology Law Quarterly* 487 (2001); John Alan Cohan, "Environmental Rights of Indigenous Peoples Under the Alien Tort Claims Act, the Public Trust Doctrine and Corporate Ethics, and Environmental Dispute Resolution," 20 UCLA Journal of Environmental Law & Policy 133 (2001).

[24] The environmental claims in ATCA actions, however, almost always included human rights violations allegations as well, so the court decisions addressing the status of the environmental damage claims under the law of nations remains unclear.

[25] Those victories, however, were notable, and several defendants also settled ATCA lawsuits for sizable sums rather than face a risky trial. Drimmer and Lamoree, *supra* n.2, at 465 ("[s]ince 2007, four corporate ATS cases have proceeded to trail, resulting in one verdict for palintiffs on ATS grounds. In addition, several corporate ATS cases have settled for well over ten million dollars. In 2008, two courts entered judgments against corporate ATS defendants, for 7.7 million dollars and eighty-million dollars respectively" (citations omitted)).

[26] Kiobel v. Royal Dutch Petroleum Co., 569 U.S.108 (2013). The U.S. Supreme Court had also limited the scope of the Alien Tort Claim Act previously in *Sosa v. Alvarez Machain,* 542 U.S. 692 (2004), but that decision did not focus on the extraterritorial application of the ATCA. James Goodwin and Armin Rosencranz, "Holding Oil Companies Liable for Human Rights Violations in a Post-Sosa World," 42 *New England Law Review* 701 (2008).

[27] 569 U.S.at 115-116.

[28] Id. at 114.

[29] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 118-121(2d Cir. 2010).

whether foreign or domestic, the Court allowed the possibility for future claims under the ATCA that did not fall prey to the limited interpretive boundaries allowed by *Kiobel's* deployment of the extraterritoriality canon.

Jensen conclusively answered the open question of corporate ATCA liability, however, with a resounding rejection of its plaintiffs' claims. Justice Kennedy, writing for a 5-4 splintered majority, concluded that the federal courts should not find a new action under federal common law to allow ATCA claims against foreign corporations. The ATCA lacked any specific definition or terms that would encompass corporations (as opposed to natural persons), and Congress had subsequently excluded corporations from the scope of its only statutory language designed to create a cause of action under the ATCA.[30] The court left open, again, the issue of whether the ATCA could apply to U.S. corporations, but it spoke with crystalline clarity that the statute could not support a claim against foreign corporations.

While creative plaintiffs will continue to search for viable claims under the ATCA, *Jensen* and *Kiobel* bring down the curtain on the possibility of ATCA claims by foreign claimants against foreign corporations for environmental damage caused entirely outside the United States. Absent the remaining unclarified scenarios where a U.S. corporation causes the harm, natural persons bear responsibility for the harm, or some of the actions or damages have a strong nexus with the United States (such as transboundary incursions of pollution), the risk of transnational liability for energy producers in U.S. courts under the ATCA seems substantially reduced.

b. *Enforcement of Foreign Judgments by Foreign Plaintiffs in U.S. Courts*: *the latest installment in Chevron's Ecuador Saga*.

The long-running legal saga of Chevron's struggles with environmental tort claims brought in the Ecuadorian courts has lasted for decades and climbed to the top of several other national court systems. The entire case deserves its own book and movie – and has already gotten them.[31] Given the case's notoriety and long provenance, this article will only briefly summarize the background of the case, review its current status, and focus on recent developments arising from attempts to enforce the foreign judgment obtained in Ecuador in various domestic court systems (including, notably, the United States).[32]

The claims against Chevron arose from oil and gas production operations in Ecuador that began in the 1950s. These operations allegedly caused widespread oil and chemical contamination in the Amazonian jungle by a subsidiary of Texaco, Inc., Chevron's corporate predecessor, in conjunction with the Ecuadorian government. After its franchise expired, Texaco ceased operations, remediated contamination to levels acceptable to the government for some of the sites (and left the remainder under the responsibility of PetroEcuador), and withdrew from the jungle. The cleanups, however, allegedly left substantial contamination behind that injured the indigenous peoples living in the area, and petroleum contamination remains in place today at the sites.[33]

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[30] Torture Victim Protection Act of 1991, 106 Stat. 73.

[31] Paul M. Barrett, *Law of the Jungle* (2014); *Crude: The Real Price of Oil* (2009, dir. Joe Berlinger).

[32] For more background on the Lago Agrio litigation, see Stephen Kass, "Foreign Environmental Claims in U.S. Federal Courts," *New York Law Journal* (May 1, 2-013); Caroline Simson, "A Cheat Sheet to Ecuador's Epic Feud with Chevron," *Environmental Law360* (June 14, 2016), available at https://www.law360.com/articles/805987/a-cheat-sheet-to-chevron-s-epic-feud-with-ecuador .

[33] The dispute's early history is summarized in Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 386-391 (S.D.N.Y. 2014).

The indigenous tribal members brought an environmental and personal injury tort lawsuit against Chevron in courts in the United States. After the district court rejected the initial lawsuit on grounds of forum non conveniens,[34] it dismissed the case without prejudice with the suggestion that plaintiffs could re-file their action in Ecuadorian court. As part of granting the defendant's motion to dismiss, the court relied on Chevron's representation that it would not object to the jurisdiction of the Ecuadorian court to hear the lawsuit.[35]

After years of hotly contested litigation, multiple appeals, and revisions to Ecuadorian law to bolster the lawsuit, the plaintiffs eventually won an $18 billion verdict against Chevron in a local Ecuadorian court. The appellate courts in Ecuador ultimately trimmed the award to $8.65 billion.[36] At the same time, Chevron opened multiple parallel actions to challenge the lawsuit in different fora. For example, it brought a declaratory judgment action in the Southern District of New York federal court to brand the Ecuadorian court action and judgment as corrupt and obtained through illegal influence and coercion.[37] Chevron also moved to enforce a commitment by Ecuador that any claims against Chevron would first undergo arbitration in the Hague.[38]

This story, so far, is well known. The interesting coda is how the Republic of Ecuador's attempts to collect on its $9.5 billion domestic judgment have fared in other courts. As noted above, Chevron struck an early blow against collection efforts by successfully obtaining a federal district court order that branded the Ecuadorian judgment as the product of fraud and corrupt practices, including bribery, false testimony, and corrupt influence over the presiding judge at the trial.[39] The order took the startling step of enjoining Ecuador from attempting to collect on the judgment in any other U.S. forum.[40] Little effort to enforce the judgment in the United States has, understandably, taken place since the federal court ruling.

Undeterred, the plaintiffs sought to collect on their judgment in Argentina, Brazil, and Canada where Chevron or its subsidiaries had significant operating assets. Each of these countries shares similar standards as the United States on the recognition and enforcement of foreign judgments. Notably, every one of them has so far rejected Ecuador's efforts to enforce its judgment. In October 2017, an Argentine civil court refused to enforce the Ecuadorian judgment because it lacked jurisdiction over Chevron Corporation itself. Chevron's subsidiary in Argentina – Chevron Argentina SRL – was not a party to the original Ecuadorian lawsuit, and Chevron Corporation itself did not have significant assets or

[34] Clagettt, *supra* n.6, at 517-525.
[35] Chevron Corp. v. Donziger, *supra* n.33, 974 F. Supp. 2d at 389.
[36] Id. at 539 (Ecuador's National Court of Justice struck punitive damages and reduced award to $8.646 billion).
[37] See discussion infra at n.39.
[38] Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 342 (S.D.N.Y. 2005) (seeking stay of arbitration because Ecuador purportedly never agreed to arbitrate the dispute).
[39] Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014).
[40] The district court initially enjoined the plaintiffs from enforcing the judgment in any other court outside of Ecuador. The Second Circuit subsequent vacated the preliminary injunction, and on remand the district court limited the injunction's scope to enforcement actions in U.S. courts. Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir. 2012).

contacts in Argentina.[41] Similarly, the Superior Court of Justice in Brazil ruled that same month that it would not recognize or enforce the Ecuadorian judgment as well.[42]

The latest verdict recently arrived from Canada.[43] On May 23, 2018, Ontario's highest court affirmed that the Ecuadorean plaintiffs could not enforce the original judgment against Chevron's Canadian subsidiary. According to the court, Chevron Corporation does not own any assets in Canada, and its subsidiary Chevron Canada Ltd. was not a party to the underlying case. While the court acknowledged that the plaintiffs' "frustration in obtaining justice is understandable," it ruled nonetheless that enforcing the judgment would constitute an "end-run around the United States court order" by disregarding long-standing principles of Canadian corporate law.[44]

The Ontario court's ruling is especially noteworthy given recent developments on transnational liability under Canadian law. In a trio of high-profile cases, Canada's courts have begun to entertain claims that corporate conduct abroad (especially by extractive industries) may create tort liability if that conduct violates norms of conduct established under public international norms or accepted international standards for the use of private security personnel.[45] Each of these cases has addressed the potential liability of corporate parents under Canadian and international law for the conduct of their subsidiaries. The future development of this line of cases in Canada – particularly its imposition of tort liability based on the incorporation into common law of standards of conduct from international legal norms – may make Canada an active forum for future transnational liability litigation even in light of the Ontario court's Chevron decision.[46]

Chevron's Ecuadorean litigation saga will no doubt continue. For now, it offers key insights for energy producers operating abroad who may incur liability for local contamination caused by their operations. First, while they may face lawsuits by foreign plaintiffs in U.S. courts, the availability of key defensive

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[41] Opinion, Maria Aguinda Salazar et al. v. Chevron Corp., No. 97260/2012, in Civil Court 61 (Argentina, Oct. 31, 2017).

[42] The Brazilian Superior Court of Justice recently affirmed its decision on May 16, 2017 by confirming that its denial was on the merits of the case. The underlying decision had found that Brazil lacked jurisdiction over Chevron Corporation and that prior evidence of fraud and corruption would render enforcement of the decision a violation of public policy.

[43] This decision may be the latest ruling on the enforceability of the Ecuadorian judgment, but the overall battle continues to spawn other threads of cases. For example, the Supreme Court of Gibraltar issued a judgment on May 26, 2018, that granted a default judgment against individuals who served as directors of Amazonia Recovery Ltd., a Gibraltar-based company created to disburse funds obtained through the Ecuador litigation. The Supreme Court of Gibraltar had previously ruled that Amazonia Recovery Ltd had engaged in a conspiracy to procure and enforce a fraudulent judgment, and it both issued an injunction against the individuals and company to prevent them from assisting the case. The court also granted $38 million in damages to Chevron. Svilen Petrov, "Gibraltar Court Rules in Favour of Chevron in Litigation With Ecuador," *The Maritime Herald* (May 28, 2018), available at http://www.maritimeherald.com/2018/gibraltar-court-rules-in-favour-of-chevron-in-litigation-with-ecuador/.

[44] Keith Goldberg, "Chevron Escapes $9.5B Ecuadorean Award Bid in Canada," Environmental Law360 (May 24, 2018), available at https://www.law360.com/articles/1047007/print?section=energy .

[45] Choc v. Hudbay Minerals Inc., 2013 ONSC 1414 (allowing claims to proceed to trial alleging parent corporation bears responsibility for allowing its subsidiary to use security forces that violated human rights at Guatemalan mining site); Garcia v. Tahoe Resources Inc., 2017 BCCA 39 (reversing lower court dismissal on forum non conveniens ground and allowing claim to proceed in Canadian court for damages related to crimes by security personnel); Araya v. Nevsun Resources Ltd., 2017 BCCA 401 (allowing lawsuit to proceed in Canadian courts over forced labor in Eritrea).

[46] H. Scott Fairley and Anastasija Sumakova, "Emerging Liability at Home for Alleged Wrongs Abroad: The Evolving Phenomenon of Transnational Torts," 2015 Int'l Mining and Oil & Gas Law, Development, and Investment Conf., Rocky Mountain Mineral Law Foundation (2015); and H. Scott Fairley and Anastasija Sumakova, "Tort Liability at Home for Alleged Wrongs Abroad: The Common Law Goes Extraterritorial?", available at http://www.mondaq.com/canada/x/357576/international+trade+investment/Tort+Liability+At+Home+For+Alleged+Wrongs+Abroad+The+Common+Law+Goes+Extraterritorial .

doctrines such as forum non conveniens may provide a ready way to dismiss those actions. Success on such a dismissal motion, however, may prove a pyrrhic victory if the action then proceeds nonetheless in a local court where the contamination occurred. While local jurisdictions may typically provide lower recoveries and procedural rules that can favor corporate defendants, they can also serve as a platform for large verdicts rooted in local laws that give domestic plaintiffs the advantage. Third, Chevron's success in resisting the Ecuadorean verdict rests on the flaws infecting the original verdict by alleged overreach, fraud, coercion, and corruption. These bad-faith acts allowed Chevron to obtain a U.S. injunction that deemed the overall decision illegitimate and proved an invaluable tool to resist enforcement of the judgment in other jurisdictions. If a foreign trial court reaches a similar verdict through conventional means and without the taint of corrupt activities, Chevron's litigative successes may not persuasively control future efforts to enforce large foreign judgments for environmental damages in U.S. courts.[47]

III. **Conclusions**.

At heart, the complex interplay of liability for foreign acts and enforcement litigation in domestic courts yields a set of straightforward principles. First, local environmental laws and regulations will provide the primary basis for liability, and – logically – local domestic courts will likely serve as the primary forum to resolve disputed claims. If foreign plaintiffs instead wish to either directly sue U.S. or foreign defendants in U.S. courts, several fundamental principles for the enforcement of foreign judgments can help guide and constrain the application of unfair or oppressive domestic laws.

Despite this comfortably familiar framework, environmental claims will likely grow in scale, scope, and complexity as technology allows improved attribution of harms and the infliction of long-term environmental disruption and injury becomes increasingly apparent. Energy developers can best protect themselves from these burgeoning claims with several legal strategies and best practices. For example, the underlying contractual allocations of liability and indemnifications for the energy project should, where possible, cover transnational liabilities. This straightforward tactic can include insistence on arbitration and indemnification provisions with sovereign governments that would provide protection against local environmental tort claims, where possible, by individual plaintiffs within its jurisdiction. Contracts can also help lay the groundwork to favor choosing favorable applicable laws that might apply to any prospective transnational claims in a foreign court.

From a practical perspective, companies who find themselves the target of a foreign environmental tort lawsuit that may ripen into a foreign judgment should carefully note any and all practices by the foreign tribunal that pertain to the fairness and due process underlying the litigation. This step should include assuring compliance with fundamental principles of fairness and due process if you wish a favorable local resolution process or judgments to withstand attack and to prevent the filing of transnational claims.

The outlook from a larger perspective is more complicated. The ultimate transnational environmental tort liability likely to face energy developers will be climate change damage lawsuits. These actions, already underway in the United States, the Netherlands, Germany, the Philippines, and other fora, seek

[47] This conclusion focuses on the general common law governing the enforcement of foreign judgments. Chevron's parallel tactic of invoking prior arbitration commitments by Ecuador to preclude an environmental tort action, however, may provide a valuable precedent that could apply to future collection efforts even in the absence of corruption, bribery, or coercion.

to hold transnational energy corporations liable under local domestic laws for climate change damages caused within the local jurisdiction through their actions locally and abroad.[48] If some of these plaintiffs seek relief in U.S. courts, or if they obtain favorable foreign judgments that they wish to enforce in U.S. courts, all of the doctrines and procedural safeguards tested in prior litigation will receive their most trying challenge yet.

[48] See, e.g., Eric Posner, "Climate Change and International Human Rights Litigation: A Critical Appraisal," 155 *U. Pa. Law Review* 195 (2007); Philippe Cullet, "Liability and Redress for Human-Induced Global Warming: Towards an International Regime," 26 *Stanford Environmental Law Journal* 99, 109-115 (2007).