

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

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Harms Abroad: Environmental Impacts From Global Energy Development



» Axiomatic that large-scale energy development and minerals operations will likely face claims that their actions in other nations caused environmental damages that must be halted or compensated.

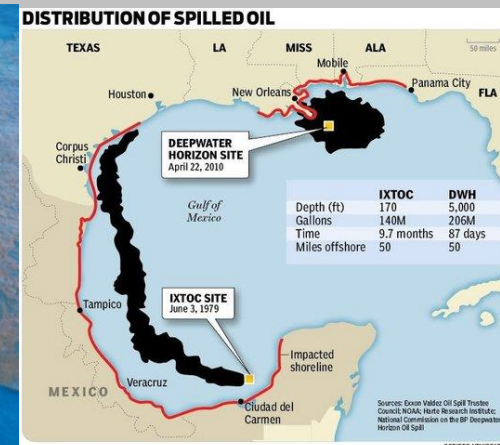
» These legal claims come in two flavors:

- » direct lawsuits in U.S. courts under international law, host country laws, or U.S. laws, or
- » actions to enforce foreign judgments in U.S. courts



What We're Not Talking About (1)

- Extraterritorial actions that result in environmental harms within the United States
- Result: U.S. environmental laws already provide basis for exercise of jurisdiction

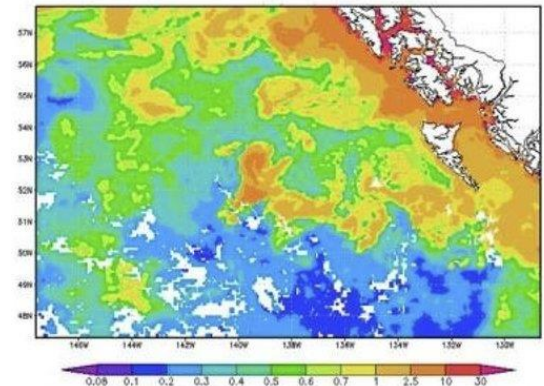


What We're Not Talking About (2)

- Extraterritorial actions by U.S. citizens or entities (such as flagged vessels) subject to U.S. laws and regulations
- U.S. law can apply based on nationality
 - But Congress must make clear its intent that the law applies extraterritorially



Chlorophyll during August 2012 during Russ George iron fertilization experiment



Direct actions in U.S. courts

- Starting point: foreign plaintiffs can use U.S. judicial fora just like anyone else
- But many hurdles:
 - Complete Diversity
 - Personal jurisdiction over defendants
 - *Forum non conveniens*
 - Removal to federal court
 - Comity
 - Act of State
 - Foreign affairs concerns and Political Question Doctrine





Enforcement of Foreign Judgments

- Essentially, sue abroad, collect at home
- Which law controls the collection action?
 - If federal substantive law applies, then federal common law governs enforcement of foreign judgment
 - *Hilton v. Guyot* (1895)
 - If state law governs, state laws will control enforcement of foreign judgment
 - Uniform Enforcement of Foreign Judgments Act
 - Uniform Foreign Money Judgments Recognition Act

Common factors to deny enforcement of foreign judgment

- » Federal common law, state statutes, and the Uniform Act share several general and specific factors that would lead a U.S. court to refuse enforcement
- » General factors –
 - » Judgment must result from “full and fair trial abroad before court of competent jurisdiction”
 - » Trial conducted under regular proceedings
 - » Proper jurisdiction over parties
 - » “System of jurisprudence likely to secure impartial administration of justice between citizens of its own country and those of other countries”

Common factors to deny enforcement of foreign judgment

- » Specific factors to attack foreign judgment
 - » Prejudice in the court or in the system of laws under which it was sitting
 - » Fraud in procuring the judgment
 - » Any other special reason why comity should not be extended
- » Collateral attacks: prior arbitration agreements; racketeering and organized criminal activities

Recent Developments: *Jesner*

- Direct actions in U.S. courts by foreign defendants:
Jesner v. Arab Bank (U.S. April 24, 2018)
- Attempt by victims of terrorism to sue Arab Bank, PLC in Jordan for allegedly financing terrorism



- Question: does the Alien Tort Claims Act of 1789 support actions against foreign corporations?
- Previous decisions had narrowed scope of Alien Tort Claims Act on other grounds
 - *Kiobel v. Shell*, 569 U.S. 108 (2013)
 - *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004)

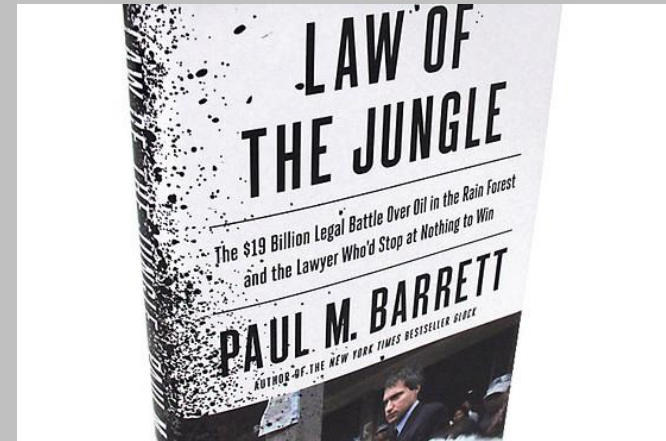
Recent Developments: *Jesner*



- Ruling: Court rejected creation of federal common law rule to allow actions against foreign corporations
 - Remember: Alien Tort Claims Act only provides jurisdiction; substantive claim must come from international law
 - Prior international law for crimes of universal jurisdiction (piracy, terrorism) applied only to individuals, not corporate entities
 - Congress had excluded corporations from analogous statutes
 - Note – opinion rests on a splintered 5-4 majority written by, yes, Justice Kennedy
- *Jesner* expressly did not decide whether the Alien Tort Claims Act could apply to U.S. corporations

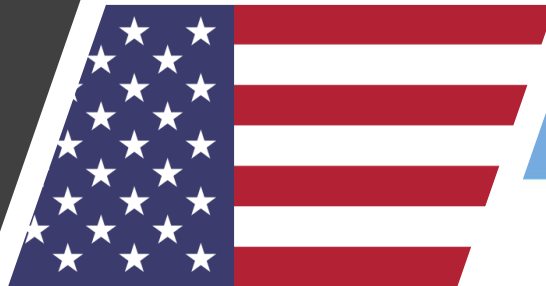
Recent Developments: Ecuadorean claims against Chevron

- Long-running saga of claims by Ecuadorian indigenous plaintiffs allegedly injured by contamination left by Texaco operations in the Amazonian jungle in the 1950s and 1960s
- Prior milestones:
 - Lawsuit in U.S. court dismissed for *forum non conveniens*
 - Trial in Ecuador resulted in \$8.65 billion judgment under Ecuadorian law
 - Judgment branded as corrupt by S.D.N.Y. and enjoined from enforcement in United States. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014)
 - Move to enforce arbitration treaty commitments by Ecuador in the Hague. *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334 (S.D.N.Y. 2005)



Recent Developments: Enforcement of Ecuadorean Judgment Against Chevron

- Most recent actions -- enforcing Ecuadorean judgment in other national court systems
 - Collection actions brought in Canada, Brazil, and Argentina
 - Argentinian and Brazilian courts each rejected the enforcement actions on relatively narrow grounds
 - Corporate veil defenses
 - Lack of assets or operations in country
 - Latest news from Canada: Ontario's highest court rejected on May 23, 2018 on similar grounds
 - But note three other cases where Canadian courts have opened door to human rights challenges to corporate conduct in other nations: *Choc v. Hudbay Minerals Inc.*, *Garcia v. Tahoe Resources Inv.*, *Araya v. Nevsun Resources Ltd.*



Looking ahead

- » Lessons learned:
 - » Likely to see more suits against U.S. corporations in U.S. courts for conduct abroad, and to enforce foreign judgments in U.S. courts for environmental damage abroad
 - » Long-standing principles for enforcement of foreign judgments offer limited protection
 - » Outcome of Ecuadorean enforcement action if no underlying fraud?
 - » Increasing importance of contractual and treaty protections
 - » Prepare for “appeal” by carefully noting procedural and substantive issues in underlying legal actions tried abroad

Warming up



The ultimate test case is on the horizon:
climate liability litigation

- » Already actively in play in U.S. federal and state courts
- » Multiple lawsuits in other national court systems, including actions by foreign plaintiffs directly in national courts against resident defendants
- » Enforcement of foreign climate liability judgment in U.S. court seems likely, if not probable, in the future
- » Efforts to cabin U.S. court jurisdiction over climate liability claims may need to step up to the transnational level

Application to Climate Intervention

- » Litigation in remote jurisdictions to halt SRM or large-scale CDR – fate of *forum non conveniens* and comity?
- » Passage of domestic laws to authorize litigation challenging climate intervention research, demonstration, or deployment
- » State laws in U.S. to restrict, promote, or prohibit climate intervention lawsuit enforcement (albeit unintentionally)
- » Remediation, restitution, and mitigation of damages



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