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Recommended Citation

Robert V. Percival, *Liability for Environmental Harm and Emerging Global Environmental Law*, 25 Md. J. Int'l L. 37 (2010).

Available at: <https://digitalcommons.law.umaryland.edu/mjil/vol25/iss1/5>

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Liability for Environmental Harm and Emerging Global Environmental Law

ROBERT V. PERCIVAL[†]

Globalization is affecting law and legal systems throughout the world in profound new ways. With the growth of global concern for the environment, nations are transplanting environmental law and policy innovations even from countries with very different legal and cultural traditions. Private actors and nongovernmental organizations are driving the development of new legal and nonlegal strategies to protect the environment. These developments are blurring lines that traditionally separated conceptions of domestic and international law and public and private law. This is leading to the emergence of what I have called “global environmental law.”¹

One of the areas in which the concept of global environmental law can enhance understanding of contemporary legal evolution is the long struggle to develop standards of liability for global environmental harm. The scant progress that has been made in developing tort remedies in international law demonstrates the limitations of relying on public international law that primarily governs relations between states when seeking to regulate private

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1. See Robert V. Percival, *The Globalization of Environmental Law*, 26 PACE ENVTL L. REV. 451 (2009); Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 ECOLOGY L.Q. 615 (2009).

activities that cause environmental harm. For centuries, legal systems around the world have acknowledged the principle that those who cause significant, foreseeable harm to others should be held liable for the damage they cause victims of this harm. The *sic utere* principle of ancient Roman law and the “polluter pays” principle are now enshrined as universal elements of international environmental law, as recognized in the 1972 Stockholm Declaration² and the 1992 Rio Declaration.³ While the nations of the world have pledged to develop liability standards to implement these principles,⁴ effective global liability rules “are the Yeti of international environmental law—pursued for years, sometimes spotted in rough outlines, but remarkably elusive in practice.”⁵ More than a dozen civil liability treaties governing transnational environmental harm have been negotiated but most remain “unadopted orphans in international environmental law.”⁶

This Article begins by reviewing the historical development of liability standards for environmental harm and their haphazard incorporation into public international law. It then discusses the obstacles that have made it difficult for victims of environmental harm to hold polluters liable even under domestic law. The Article then explores efforts to overcome these obstacles and the growth of private transnational litigation to recover for environmental harm. It concludes by arguing that the rise of global environmental law that includes “bottom up” and private initiatives has become an important complement to traditional “top down” efforts to develop international liability norms. As countries strengthen their own domestic liability standards to redress environmental harm, two issues will become

2. United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, Declaration of the United Nations Conference on the Human Environment, prin. 21, U.N. Doc. A/CONF.48/14/Rev. 1 (June 16, 1972), reprinted in 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration], available at http://www.unep.org/Law/PDF/Stockholm_Declaration.pdf.

3. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, Rio Declaration on Environment and Development, prins. 2, 16, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992), reprinted in 33 I.L.M. 874 (1992) [hereinafter Rio Declaration], available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

4. See Stockholm Declaration, *supra* note 2, prin. 22; Rio Declaration, *supra* note 3, prin. 13.

5. Noah Sachs, *Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law*, 55 UCLA L. REV. 837, 839 (2008).

6. *Id.* at 837.

increasingly important: states' receptiveness to entertain lawsuits by foreign plaintiffs and the development of reciprocity standards for the recognition of foreign judgments. Transnational private litigation ultimately will help provide further impetus for the development of global liability norms for environmental harm that will become an important part of the new architecture of global environmental law.

I. ENVIRONMENTAL LIABILITY IN HISTORICAL CONTEXT

For centuries, common law courts have embraced the ancient Roman law principle that no person has a right to cause significant, foreseeable harm to others. Expressed in the ancient Latin maxim *sic utere tuo ut alienum non laedas*, this principle was explained by Lord Holt in 1704 in *Tenant v. Goldwin* as requiring that "every man must so use his own as not to damnify another."⁷ A century and a half later, British courts addressed the question whether a violation of existing regulatory standards was a necessary precondition for tort liability. After briefly holding in *Hole v. Barlow*⁸ that compliance with existing regulatory standards could insulate an activity from tort liability, the British courts in *Bamford v. Turnley*⁹ overruled *Hole* and held that proof of pre-existing violations of regulatory standards was not a precondition for tort liability.

The *sic utere* principle was recognized in an important international arbitration that has become one of the few precedents for international environmental law. In the *Trail Smelter* case,¹⁰ farmers in Washington state, beginning in 1926, sought to hold liable the owners of a smelter across the Canadian border whose pollution had destroyed their crops. Because Washington state courts could not obtain jurisdiction over the Canadian smelter, the farmers asked the U.S. State Department to pursue relief for them pursuant to the Boundary Waters Treaty¹¹ that provided for arbitration of disputes between the U.S. and Canada. After more than a decade of proceedings, an arbitral panel awarded damages to the farmers, based in large part on the U.S. Supreme Court's prior recognition of the *sic utere* principle in domestic transboundary pollution disputes between

7. *Tenant v. Goldwin*, (1704) 92 Eng. Rep. 222, 224 (K.B.).

8. (1858) 140 Eng. Rep. 1113, 1114 (C.P.D.).

9. (1862) 122 Eng. Rep. 27 (K.B.).

10. *Trail Smelter Case* (U.S. v. Can.), 3 R.I.A.A. 1938 (1941).

11. Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit. (for Can.), Jan. 11, 1909, 36 Stat. 2448 [hereinafter *Boundary Waters Treaty*].

states.¹² The arbitral tribunal declared that “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or person therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”¹³

In 1972 representatives from 113 nations gathered in Stockholm for the first global environmental summit—the United Nations Conference on the Human Environment (Stockholm Conference). At the Stockholm Conference they embraced the *sic utere* principle in the first declaration of principles of global environmental law. Principle 21 of the Stockholm Declaration states that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.¹⁴

The Stockholm Declaration also urged the development of principles of liability for global environmental harm. Principle 22 of the Stockholm Declaration asserts that “[s]tates shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.”¹⁵

In the intervening decades, scant progress has been made in implementing this promise. As Lakshman Guruswamy notes, “thus far it does not appear that states are willing to engage in the delicate process of defining the conditions and scope of international responsibility for environmental damage.”¹⁶ The concept of state responsibility for environmental harm has been included in the Third

12. See *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

13. *Trail Smelter Case*, 3 R.I.A.A. at 1965. The requirement of serious harm shown by clear and convincing evidence derived from the U.S. Supreme Court’s decision in *Missouri v. Illinois*, 200 U.S. 496 (1906).

14. Stockholm Declaration, *supra* note 2, prin. 21.

15. *Id.* prin. 22.

16. LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK 327 (1994).

Restatement of Foreign Relations, which describes it as “rooted in customary international law,”¹⁷ but scant progress has been made in implementing it in practice.

In 1992, twenty years after the Stockholm Conference, the 172 governments participating in the Rio “Earth Summit” pledged to work harder to develop global norms of state responsibility for environmental harm. Thus, Principle 13 of the Rio Declaration on Environment and Development declares:

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.¹⁸

Despite efforts by the International Law Commission,¹⁹ little further progress has been made in the subsequent decades on developing principles of state responsibility for environmental harm. Several treaties have provisions that incorporate the *sic utere* principle, but there is no consensus concerning how it should be applied. More than a dozen multilateral agreements have been adopted to address global environmental problems.²⁰ Yet only five of

17. For a description of when state responsibility may be invoked, see Restatement (Third) of Foreign Relations Law §§ 601, 602 (1987).

18. Rio Declaration, *supra* note 3, prin. 13.

19. See Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents, May 21, 2003, U.N. Doc. MP/WAT/2003/1, CP.TEIA/2003/3, available at http://www.unece.org/env/civil-liability/documents/protocol_e.pdf; Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on Environmental Liability With Regard to the Prevention and Remedying of Environmental Damage, 2004 O.J. (L 143) 56, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0035:EN:NOT>; UN International Law Commission, 56th Sess., May 3–4 & July 5–Aug. 6, 2004, *Report of the International Law Commission—Draft Principles on Environmental Liability*, para. 175, U.N. Doc. A/59/10, available at <http://untreaty.un.org/ilc/reports/2004/2004report.htm>.

20. These include: the Paris Convention on Third Party Liability in the Field of Nuclear Energy, the Convention on Liability of Operators of Nuclear Ships, the IAEA Vienna Convention on Civil Liability for Nuclear Damage, the Convention

these have entered into force²¹ and all of these address liability for either oil spills or nuclear accidents. The classic illustration of the inadequacy of existing international law on state responsibility for transboundary environmental harm is the fact that no nation asserted any liability claims for the April 1986 nuclear accident in Chernobyl, the worst such accident in history.²²

II. ENVIRONMENTAL LIABILITY AND “THE CAUSATION CONUNDRUM”

Most developed countries now rely on comprehensive regulatory systems in recognition of the limitations of tort liability as a vehicle for controlling environmental risks. In situations where large, single sources of pollutants, such as smelters, caused visible environmental damage, the common law tort of nuisance could provide some measure of redress to plaintiffs. But in a modern world awash in pollutants from multiple sources, the difficulty of proving causal injury has made common law liability too crude a vehicle to compensate those exposed to environmental hazards. To be sure, when a particular toxic substance, such as asbestos, causes “signature

on Civil Liability for Oil Pollution Damage Resulting From the Exploration for and Exploitation of Seabed Resources, the UNECE Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, the International Maritime Organization Convention on Civil Liability for Oil Pollution Damage, the International Convention on the Establishment of an International Fund for Oil Pollution Damage, Council of Europe Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, the International Maritime Organization Convention on Liability and Compensation in Connection with Carriage of Hazardous and Noxious Substances by Sea, the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movement of Hazardous Wastes, the International Maritime Organization Convention on Civil Liability for Bunker Oil Pollution Damage, and the UNECE Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters. Sachs, *supra* note 5, at 854–57.

21. These are the: Paris Convention on Third Party Liability in the Field of Nuclear Energy, IAEA Vienna Convention on Civil Liability for Nuclear Damage, International Maritime Organization Convention on Civil Liability for Oil Pollution Damage, International Convention on the Establishment of an International Fund for Oil Pollution Damage, IMO International Maritime Organization Convention on Civil Liability for Bunker Oil Pollution Damage. *Id.*

22. See EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 419–423 (2d ed. 2007) (noting that the Chernobyl accident contributed to the adoption of the Convention on Early Notification of a Nuclear Accident, Sept. 26, 1986, 25 I.L.M. 1391 (1986) and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, Sept. 26, 1986, 25 I.L.M. 1377 (1986)).

injuries” uniquely tied to exposure to it, the “causation conundrum” can be overcome. Yet even in the case of asbestos, because exposure to this deadly substance caused fatal diseases with a long latency period, liability was imposed only decades after exposure to the products containing it.²³

Some countries have adopted liability standards for environmental harm that shift or relax the burden of proving causal injury. These efforts recognize the difficulty of satisfying individualized causation standards when large populations are exposed to an environmental hazard. Scientists can estimate how many people are likely to be harmed by such exposures, even if they cannot identify which particular individuals who have a disease have it as a result of the exposure.

In the United States, the “Superfund” legislation holds broad classes of parties associated with the generation and disposal of toxic substances strictly and jointly and severally liable for the costs of remediating releases of them, but it does not provide compensation for the victims of such releases.²⁴ A creative effort to relax causation standards in order to compensate those exposed to radiation from atmospheric nuclear testing by the U.S. government during the 1950s and 1960s was reversed on sovereign immunity grounds.²⁵ Congress responded to this decision by creating a program of administrative compensation to permit certain classes of people who were exposed to radiation from nuclear testing to recover modest amounts.²⁶

While individual smokers repeatedly failed to win lawsuits against manufacturers of tobacco products, the industry’s fortunes turned

23. See David Rosenberg, *The Dusting of America: A Story of Asbestos—Carnage, Cover-up and Litigation*, 99 HARV. L. REV. 1693, 1695 (1986) (reviewing PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985)). Rosenberg notes that the history of the asbestos litigation demonstrates that “the tort system emerged as *the* uniquely effective and indispensable means of exposing and defeating the asbestos conspiracy . . . if left to other devices, the asbestos conspiracy would have been buried along with its victims.” *Id.*

24. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601–75 (2006). The word “compensation” was incorporated in the name of the statute before an amendment deleted an administrative compensation scheme from it.

25. See *Allen v. United States*, 816 F.2d 1417, 1424 (10th Cir. 1987).

26. See Veterans Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) (codified at 38 U.S.C. § 1154); Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990) (codified at 42 U.S.C. § 2210).

when state attorneys general adopted a concerted strategy to hold the companies liable for the increased health costs states incurred due to the use of tobacco products. In 1998, state attorneys general reached a master settlement agreement in which the tobacco companies agreed to pay \$206 billion over twenty-five years to compensate the states for increased health costs caused by tobacco-related diseases. This settlement attracted the attention of foreign governments eager to recover for similar costs incurred due to the export of tobacco products.

Other nations also have made efforts to overcome the causation conundrum in environmental cases. Chinese law purports to shift the burden of proof to polluters to disprove causation in certain circumstances. Once plaintiffs have demonstrated that they have suffered harm associated with exposure to environmental pollutants, China's Civil Code authorizes shifting the burden to defendants to disprove that their discharges of these pollutants caused the harm.²⁷ In April 2009, China's Supreme People's Court awarded damages against a textile mill for harm to a fish farm that occurred in 1994 because the textile mill could not disprove that its discharges were the source of the harm.²⁸

Japan has amended its tort law to make it easier for victims of environmental harm to recover compensation. When residents of the fishing village of Minamata suffered severe mercury poisoning beginning in the mid-1950s, the Chisso Chemical Company contested

27. *See* Some Provisions of the Supreme People's Court on Evidence in Civil Procedures, art. 4 (promulgated by the Judicial Committee of the Sup. People's Ct., Dec. 6, 2001, effective Apr. 1, 2002) LAWINFOCHINA (last visited Mar. 16, 2010) (P.R.C.). Burden-shifting provisions also are contained in article 86 of China's Solid Waste Pollution Control Law and article 87 of its Water Pollution Control Law. *See* Law of the People's Republic of China on the Prevention and Control of Environmental Pollution by Solid Wastes, art. 86 (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2004, effective Apr. 1, 2005) LAWINFOCHINA (last visited Mar. 16, 2010) (P.R.C.); Law of the People's Republic of China on the Prevention and Control of Water Pollution, art. 87 (promulgated by the Standing Comm. People's Cong., Feb. 28, 2008, effective June 1, 2008), LAWINFOCHINA (last visited Mar. 16, 2010) (P.R.C.). These were invoked to shift the burden of proof and hold the Rongping Chemical Plant strictly liable for pollution. *See* Zhang Changjian et al. v. Rongping Chemical Plant (on file with author).

28. Zhejiang Province Pinghu Normal Special Species Farm v. Jiaying Buyun Dying and Chemical Factory, Supreme People's Court of the People's Republic of China, Civil Judgment No. 5 [2006] of the Retrial Instance of the Second Division, Apr. 2, 2009 (on file with author).

claims that its waste disposal practices had caused the harm, but it did not cease dumping mercury into Minamata Bay until 1968. After a lengthy legal battle extending over decades, Chisso was held liable in March 1973 for dumping toxic chemicals during the period 1932–68 that caused the “Minamata disease” despite its claim that its discharges had complied with all applicable laws and regulations.²⁹

The Minamata tragedy helped spur the development of new laws in Japan to provide compensation to victims of environmental harm. In 1969, the Law Concerning Special Measures for the Relief of Pollution-Related Health Damage was adopted.³⁰ This law authorized the designation of certain geographical areas as polluted areas, and it mandated that the government provide health benefits to residents certified as having pollution-induced health damage.

In 1969, victims of air pollution filed the Yokkaichi Air Pollution Lawsuit. Three years later, in 1972, the plaintiffs in this case prevailed,³¹ which helped spur enactment of the so-called Absolute Liability Law.³² The following year, the Pollution-Related Health Damage Compensation Law was enacted.³³ This law provides government living assistance to pollution victims in addition to compensation for the medical costs of victims, which is funded by emissions charges on polluters.

Certified pollution victims filed several air pollution lawsuits between 1977 and 1983. After revisions were made to Japan’s Health Compensation Law, in 1989 the Japanese environmental agency canceled the designations of pollution areas and stopped certifying victims. In response to these changes in the law, new lawsuits were

29. *See* Watanabe v. Chisso K. K., 696 HANJI 15 (Kumamoto Dist. Ct., Mar. 20, 1973).

30. Kōgai ni kakaru kenkō higai no kyusai ni kansuru tokubetsu sochi hō [Law Concerning Special Measures for the Relief of Pollution-Related Health Damage], Law No. 90 of 1969 (Japan).

31. *See* Shiono v. Shōwa Yokkaichi Sekiyu, 672 HANJI 30 (Tsu D. Ct., Yokkaichi Branch, July 24, 1972).

32. In June 1972, Japan enacted article 25 to its Air Pollution Control Law and article 19 to its Water Pollution Control Law, which provides for absolute liability whenever any air pollutant or water pollutant injures human life or health. *See* Taiki osen bōshi hō [Air Pollution Control Law], Law No. 97 of 1968, art. 25 (Japan), *translated at* <http://www.asianlii.org/jp/legis/laws/apcl273/>; Suisbitsu odaku bōshi hō [Water Pollution Control Law], Law No. 138 of 1970, art. 19 (Japan), *translated at* <http://www.asianlii.org/jp/legis/laws/wpcl310/>.

33. Kōgai kenkō higai no hoshō tō ni kansuru hōritsu [Pollution-Related Health Damage Compensation Law], Law No. 111 of 1973 (Japan).

filed by pollution victims in 1988 and 1989.

Efforts to compensate pollution victims also occurred at the local level. Twelve local governments, including Tokyo and Osaka, established their own systems to pay medical care expenses and compensate more than 76,000 certified victims. In 1988, victims of air pollution from a steel mill won their Chiba Kawasaki Steel lawsuit.³⁴ Other plaintiffs were victorious in subsequent lawsuits. In March 1991, plaintiffs in the first Osaka Nishiyodogawa lawsuit prevailed, which precipitated a favorable settlement for them in March 1995.³⁵ In July 1995, plaintiffs won the second, third, and fourth Nishiyodogawa lawsuits, holding both the national government and the expressway corporation liable for harm caused by air pollution.³⁶

After prevailing in lawsuits against steel companies, Japanese plaintiffs turned to pollution from automobiles. In August 1998, the Kawasaki Pollution decision recognized health damage caused by automobile pollution and the right of victims of such pollution to recover compensation.³⁷ This served as a precedent for the massive Tokyo Air Pollution lawsuit that extended over the decade from 1996 to 2006.³⁸ Six groups of asthma victims sued the Japanese government, the Tokyo city government, and all seven major Japanese automakers.³⁹ An appellate court ultimately proposed a 1.2 billion yen settlement to provide compensation to 527 pollution victims.⁴⁰ Most of this settlement was to be paid by automobile manufacturers. The settlement agreement was accepted on July 3, 2007.⁴¹

34. See Judgment of Nov. 17, 1988, Chiba [District Court] Hanji, Heisei 1 Nen 8 Gatsu 5 Nichi Go 161 (Japan) (Kawasaki Steel Company Case).

35. See Nakajima v. Japan, 1383 HANJI 22 (Osaka D. Ct., Mar. 29, 1991).

36. See Hamada v. Japan, 1538 HANJI 17 (Osaka D. Ct., July 5, 1995).

37. See Miyata v. Japan, 1658 HANJI 3 (Yokohama D. Ct., Kawasaki Branch, Aug. 5, 1998).

38. See The Tokyo Air Pollution Lawsuit, 1885 HANJI 23 (Tokyo D. Ct., Oct. 29, 2002).

39. These include: Toyota, Isuzu, Mazda, Mitsubishi, Nissan, Nissan Diesel, and Toyota subsidiary Hino Motors.

40. Yang & Percival, *supra* note 1, at 618 n.4 (internal citation omitted); Eri Osaka, *Reevaluating the Role of the Tort Liability System in Japan*, 26 ARIZ. J. INT'L & COMP. L. 393, 420–21 (2009).

41. Osaka, *supra* note 40, at 421.

III. LIABILITY FOR TRANSBOUNDARY ENVIRONMENTAL HARM

Despite the *Georgia v. Tennessee Copper*⁴² and *Trail Smelter*⁴³ precedents, successful tort recoveries for transboundary environmental harm have been exceedingly rare. Yet as scientists improve their ability to trace the long-range fate and transport of pollutants, our awareness of the seriousness of transboundary pollution problems has only increased. We now know that as much as thirty percent of mercury pollution in the western U.S. originates in Asia, primarily from emissions of coal-fired power plants in China.⁴⁴ Yet it remains unlikely that common law liability can be used effectively to redress such transboundary environmental harm.

Concern over global warming and climate change—perhaps the most serious example of transboundary environmental harm—has spurred litigation by state governments and private parties against large sources of greenhouse gas (GHG) emissions. In 2004, eight states and the city of New York filed federal and state common law nuisance actions seeking to require utilities operating the largest U.S. coal-fired power plants to reduce their GHG emissions. In 2005, a federal trial court judge dismissed the litigation as a nonjusticiable “political question.”⁴⁵ In September 2009 (after a lengthy delay caused partly by the court awaiting the U.S. Supreme Court’s *Massachusetts v. EPA*⁴⁶ decision), the Second Circuit reversed the district court’s decision.⁴⁷ The court ruled that the case did not present a nonjusticiable political question, that the plaintiffs had standing to sue, and that the case was not preempted by the federal Clean Air Act.⁴⁸ Defendants in the litigation operate power plants that contribute ten percent of U.S. GHG emissions.

42. 206 U.S. 230 (1907).

43. *Trail Smelter Case* (U.S. v. Can.), 3 R.I.A.A. 1938, 1938 (1941).

44. Matt Pottinger, Steve Stecklow & John J. Fialka, *Invisible Export: A Hidden Cost of China’s Growth—Mercury Migration*, WALL ST. J., Dec. 17, 2004, at A1. Chinese mercury emissions also have been blamed for half of Korea’s mercury pollution. See *China Blamed for Half of Korea’s Mercury Pollution*, CHOSUN ILBO (Seoul), Apr. 23, 2007, http://english.chosun.com/site/data/html_dir/2007/04/23/2007042361024.html.

45. *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F.Supp.2d 265 (S.D.N.Y. 2005).

46. 549 U.S. 497 (2007).

47. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009).

48. Pub. L. No. 88-206, 77 Stat. 392 (codified as amended in scattered sections of 42 U.S.C.).

In October 2009, a Fifth Circuit panel followed suit by reversing a district court decision holding that climate change litigation raised a nonjusticiable political question.⁴⁹ The lawsuit, brought by victims of Hurricane Katrina, alleges that oil companies' emissions of GHGs exacerbated the damage caused by the hurricane. On February 26, 2010, the Fifth Circuit vacated the panel decision and agreed to rehear it en banc. The Ninth Circuit also is considering the same issue in a lawsuit brought by residents of a small coastal village in Alaska who are seeking \$400 million to relocate their village to higher ground due to sea level rise.⁵⁰ The residents are seeking the damages from twenty-four oil companies and power plants on the theory that their emissions of GHGs are contributing to global warming that is causing the sea to rise.⁵¹

While these early decisions suggest that trial courts are reluctant to entertain litigation seeking to hold private parties liable for climate change, eventually such a case may come to trial, though it may be difficult for plaintiffs to prevail. The same global "tragedy of the commons" that is making it difficult for the nations of the world to agree on a binding treaty to control GHG emissions also may account for their general failure to agree on global liability standards for environmental harm, as Noah Sachs has ably explained.⁵² As Thomas Merrill has explored, in the context of bilateral transboundary pollution problems, the interests of upwind and upstream source states are quite different from the interests of downwind or downstream victims of pollution. This reduces opportunities for negotiated solutions that benefit both parties.⁵³ Merrill suggests adopting a "reverse golden rule" approach that would hold states

49. *Comer v. Murphy Oil, USA*, 585 F.3d 855 (5th Cir. 2009).

50. Rachel D'Oro, *Kivalina, Alaska: Eroding Village Appeals Lawsuit's Dismissal, Blames Corporations for Climate Change*, HUFFINGTON POST, Jan. 28, 2010, http://www.huffingtonpost.com/2010/01/29/kivalina-appeals-eroding-_n_441420.html.

51. *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009) (The trial court dismissed the case as presenting a nonjusticiable political question.).

52. Sachs, *supra* note 5, at 867–98 (describing the factors preventing agreement on civil liability regimes for transboundary environmental harm as including interest conflicts between developed states and developing states, high transaction costs and low expected payoffs, and the stringent content of proposed liability standards).

53. Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L. J. 931, 935 (1997).

affected by pollution to the same standards of liability to which they hold their own domestic sources.⁵⁴ Yet this concept has not been incorporated in treaties to resolve transboundary conflicts between nations because the countries have little incentive to agree to subject themselves to new liability regimes.

IV. TRANSNATIONAL ENVIRONMENTAL TORT LITIGATION

Despite the failure of public international law to flesh out in any detail state responsibility for transboundary environmental harm, private parties have been aggressively pursuing transnational environmental tort litigation.

In the new era of global environmental law, nongovernmental organizations (NGOs) play a major role in exposing environmentally damaging activities by multinational corporations even in the most remote areas of the world.⁵⁵ Greenpeace International, for example, was among the first global NGOs to expose toxic waste dumping in developing countries.⁵⁶

When the regulatory system fails to prevent incidents of substantial harm, victims may pursue private, transnational litigation. Now that the U.S. Supreme Court has made it very difficult to use the Alien Tort Claims Act to bring environmental lawsuits in the United States,⁵⁷ plaintiffs increasingly are suing multinationals in the country where the harm occurs.

A. Forum Non Conveniens

In the absence of any global enforcement entity, difficult questions are arising concerning the appropriate venues for seeking redress for environmental harm caused by multinational corporations.

54. *Id.* at 998.

55. Yang & Percival, *supra* note 1, at 634.

56. This is well illustrated by the saga of the *Karin B*, a ship that dumped toxic waste from Italy on beach in Nigeria in 1988. After Greenpeace International exposed the waste dumping, the Nigerian government threatened to imprison the Italian ambassador and the waste was quickly retrieved by the dumpers. Steven Greenhouse, *Toxic Waste Boomerang: Ciao Italy!*, N.Y. TIMES, Sept. 3, 1988, <http://www.nytimes.com/1988/09/03/world/toxic-waste-boomerang-ciao-italy.html?pagewanted=1>.

57. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (holding that for a case to be brought under the Alien Tort Statute plaintiffs must establish that the allegedly wrongful act violates the “law of nations,” shorthand for universally applicable principles of law at the time the statute was enacted by the First U.S. Continental Congress).

While U.S. companies initially argued that they should not be subject to suit in the U.S. for harm caused abroad, they are now starting to change their tune as lawsuits against them are progressing in other venues (e.g., a lawsuit against Chevron for environmental harm from oil drilling in the Oriente that is being heard in the Ecuadoran courts). A key issue facing future courts will be standards domestic courts should employ in enforcing liability judgments rendered against multinational corporations by foreign courts.

Victims of environmental harm increasingly are turning to transnational litigation to seek compensation for their injuries. In addition to the usual difficulties of proving causation in toxic tort cases, foreign plaintiffs face other formidable obstacles. American courts often refuse to hear cases brought by plaintiffs injured in foreign countries by invoking the doctrine of *forum non conveniens*, as illustrated by the litigation over the Bhopal tragedy, which was rejected by American courts.⁵⁸ Because American tort law has been perceived to be more generous to plaintiffs than the law in most foreign countries,⁵⁹ the choice of forum can have a substantial impact on the amount of damages recoverable.

In *Dow Chemical Co. v. Alfaro*,⁶⁰ banana workers in Costa Rica claimed that they had been injured by a pesticide (1,2-Dibromo-3-Chloropropane, or DBCP) that EPA had banned within the United States but which continues to be produced in the United States for export abroad.⁶¹ The workers brought a tort action in Texas state court against the U.S. company that manufactured the pesticide. After the trial court dismissed the action, the plaintiffs appealed to the Texas Supreme Court. By a vote of 5-4, the court held that the case must be heard in Texas. In a concurring opinion, Justice Doggett

58. In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 809 F.2d 195 (2d Cir. 1987). See Victoria Arthaud, *Environmental Destruction in the Amazon: Can U.S. Courts Provide a Forum for the Claims of Indigenous Peoples?*, 7 GEO. INT'L ENVTL L. REV. 195 (1994).

59. Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L. J. 321, 352 (1994); Russell J. Weintraub, *The United States As A Magnet Forum and What, If Anything, To Do About It*, in INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 213 (Jack L. Goldsmith ed., 1997).

60. 786 S.W.2d 674 (Tex. 1990).

61. The pesticide DBCP to which the plaintiffs were exposed had been banned in the United States since 1977. For a history behind this ban, see DEVRA DAVIS, *WHEN SMOKE RAN LIKE WATER: TABLES OF ENVIRONMENTAL DECEPTION AND THE BATTLE AGAINST POLLUTION* 195-200 (2002).

argued that “[c]omity is not achieved when the United States allows its multinational corporations to adhere to a double standard when operating abroad and subsequently refuses to hold them accountable for those actions.”⁶² Agreeing with the majority that Texas law did not permit the case to be dismissed on *forum non conveniens* grounds, he concluded that:

The doctrine of *forum non conveniens* is obsolete in a world in which markets are global and in which ecologists have documented the delicate balance of all life on this planet. The parochial perspective embodied in the doctrine of *forum non conveniens* enables corporations to evade legal control merely because they are transnational. This perspective ignores the reality that actions of our corporations affecting those abroad will also affect Texans. Although DBCP is banned from use within the United States, it and other similarly banned chemicals have been consumed by Texans eating foods imported from Costa Rica and elsewhere. In the absence of meaningful tort liability in the United States for their actions, some multinational corporations will continue to operate without adequate regard for the human and environmental costs of their actions. This result cannot be allowed to repeat itself for decades to come.⁶³

In the past, dismissals by U.S. courts on *forum non conveniens* grounds usually spelled the end of efforts to hold a defendant liable. One study concluded that fewer than four percent of cases dismissed by American courts on this ground ever are litigated in foreign courts.⁶⁴ Even when cases dismissed by U.S. courts later were filed in foreign jurisdictions, they rarely were successful in holding defendants accountable for the full measure of the harm they caused.⁶⁵ At the time *Alfaro* was decided by the Supreme Court of

62. *Alfaro*, 786 S.W.2d at 687 (Doggett, J., concurring).

63. *Id.* at 689 (internal citations omitted).

64. David W. Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction”*, 103 LAW Q. REV. 398, 419 (1987). In his concurring opinion in *Alfaro*, Justice Doggett in a footnote cited Professor Robertson’s study, noting that it had found that only one personal injury case out of fifty-five surveyed and only two commercial cases out of thirty surveyed had reached trial overseas. *Alfaro*, 786 S.W.2d at 683 n.5 (Doggett, J., concurring).

65. After the Bhopal litigation was rejected by courts in the United States, the Supreme Court of India approved a settlement in 1989 that barred all actions against Union Carbide, the owner of the plant involved in the Bhopal tragedy, in

Texas, Costa Rican law would have limited the plaintiffs' recoveries to no more than \$1,500 each.⁶⁶ Because the case could be tried in Texas, the eighty-two plaintiffs and their wives ultimately received a settlement worth nearly \$20 million, shortly before the case was scheduled to go to trial in 1992.⁶⁷ One factor leading to the settlement was the plaintiffs' concern that the Texas legislature would adopt legislation reversing the *Alfaro* holding. In February 1993, the Texas legislature passed legislation reinstating the *forum non conveniens* doctrine effective September 1, 1993.⁶⁸

The *Alfaro* case was not the end of tort suits against U.S. chemical companies by foreign banana workers exposed to DBCP. In May 1997, Shell, Dow Chemical Co., and Occidental Chemical Corp. settled a class action filed on behalf of 13,000 banana workers in the Philippines, Honduras, Nicaragua, Ecuador, Guatemala, and Costa Rica who allegedly became sterile or suffered other health problems as a result of exposure to DBCP.⁶⁹ Although the companies maintained that any harm to the workers was caused by misuse of the pesticide, they agreed to create a \$41.5 million fund to compensate the workers.⁷⁰ The first payments from the fund were received by the workers in December 1997.⁷¹ Workers who suffered health problems

return for a payment of \$470 million to compensate the victims. Efforts to overturn the settlement have not been successful. More than 3,000 people were killed and more than 100,000 were injured by the gas leak. *See* Suketu Mehta, *A Cloud Still Hangs Over Bhopal*, N.Y. Times, Dec. 3, 2009, at A43, available at <http://www.nytimes.com/2009/12/03/opinion/03mehta.html>; Rhys Blakely, *Activists Mark Bhopal Anniversary With Renewed Call for Justice*, TIMESONLINE, Dec. 3, 2009, <http://www.timesonline.co.uk/tol/news/world/asia/article6942219>.

66. *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1484, 1618 (1991).

67. Davis, *supra* note 61, at 200. The *Alfaro* decision may have opened the door to similar lawsuits on behalf of foreigners allegedly injured by U.S. corporations. In October 1991, a toxic tort suit was filed against a company in Brownsville, Texas on behalf of a group of more than sixty Mexican children who are deformed or retarded. John M. McClintock, *In Matamoros, Residents' Rage at Polluting U.S.-Owned Companies Is Growing*, BALTIMORE SUN, Jan. 19, 1992, at A8, available at http://articles.baltimoresun.com/1992-01-19/news/1992019023_1_matamoros-birth-defects-mexicans.

68. *See* TEX. CIV. PRAC. & REM. CODE § 71.051 (Vernon 2010); 1993 TEX. SESS. LAW SERV. ch. 4 (S.B. 2) (West 2008).

69. *See* Rick Kennedy, *Fruit of the Poison Tree: In a Dallas Court, Costa Rican Banana Workers Claim a Banana Pesticide Left Them Sterile*, DALLAS OBSERVER, Mar. 10, 2005, <http://www.dallasobserver.com/content/printVersion/285584>.

70. *Id.*

71. *Filipino Workers Receive Compensation from Banana Pesticide Settlement*

received between \$800 and \$5,000, depending on the seriousness of their problems. Workers unable to document health problems but who could show they were exposed to DBCP were to receive \$100 each. While these payments are small by U.S. standards, the average daily wage of a Filipino banana worker was approximately \$4.60 at the time.⁷²

For nearly two decades, residents of the Oriente region of Ecuador have been suing Texaco and its successor corporation Chevron seeking compensation for, and remediation of, severe pollution from oil drilling operations that occurred during the 1970s. Texaco initially persuaded a federal trial court in New York to dismiss the litigation on the ground of *forum non conveniens*. But in *Jota v. Texaco, Inc.*,⁷³ the Second Circuit reversed this dismissal. The court held that the district court should not have used the doctrine of *forum non conveniens* to dismiss the case without at least requiring the company to submit to Ecuador's jurisdiction. In subsequent litigation, the court affirmed the dismissal of the suit only on the condition that Texaco submit to the jurisdiction of the Ecuadoran courts.⁷⁴

B. *Establishing a Violation of "the Law of Nations" Under the Alien Tort Statute*

The Ecuador oil pollution litigation and several other lawsuits have been brought by aliens in federal court against U.S. corporations under the Alien Tort Statute (ATS). The ATS, which was adopted as part of the Judiciary Act of 1789, gives federal courts jurisdiction to hear a civil action by "an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁷⁵ In *Beanal v. Freeport-McMoran, Inc.*,⁷⁶ Tom Beanal, the leader of the Amungme Tribal Council of Lambaga Adat Suki Amungme, sued U.S. mining companies that operated an open pit copper, gold, and silver mine in Indonesia. Bringing his suit in federal district court in Louisiana pursuant to the ATS, Beanal alleged that the companies had caused great harm to him and the members of his tribe by discharging 100,000 tons of tailings per day in several rivers, rendering them

Fund, WALL ST. J., Dec. 12, 1997, at B9C.

72. *Id.*

73. 157 F.3d 153 (2d Cir. 1998).

74. *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

75. 28 U.S.C. § 1350 (2008).

76. 197 F.3d 161 (5th Cir. 1999).

unusable for bathing and drinking.⁷⁷

After his claims were dismissed by the trial court,⁷⁸ Beanal appealed. The U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal of Beanal's claims. It held that his complaint failed to allege facts that would constitute a violation of the "law of nations," as required by the ATS.⁷⁹ The court held that the ATS "applies only to shockingly egregious violations of universally recognized principles of international law."⁸⁰ The court stated that the Rio Declaration and other sources of international environmental law "merely refer to a general sense of environmental responsibility" and "abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts."⁸¹ The court also found persuasive "the argument to abstain from interfering in a sovereign's environmental practices . . . especially when the alleged environmental torts and abuses occur within the sovereign's borders and do not affect neighboring countries."⁸²

In *Flores v. Southern Peru Copper Corp.*,⁸³ the Second Circuit affirmed the dismissal of another ATS lawsuit brought by residents of Peru against a U.S. company operating a copper smelter in their neighborhood. The court held that the plaintiffs' allegations that uncontrolled emissions from the smelter injured their health and threatened their lives did not rise to the level of a violation of the "law of nations" as required to state a case under the ATS because it involved only "intranational pollution."⁸⁴

By setting such a high bar for establishing a violation of the "law of nations," these decisions foreshadowed the U.S. Supreme Court's *Sosa v. Alvarez-Machain*⁸⁵ decision. In *Sosa*, the Court held that the

77. *Id.* at 163, 166.

78. *Beanal v. Freeport-McMoran*, 969 F. Supp. 362 (E.D. La. 1997).

79. *Beanal*, 197 F.3d at 167.

80. *Id.* (quoting *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983)) (per curiam).

81. *Beanal*, 197 F.3d at 167.

82. *Id.* For a discussion of the history of the Alien Tort Claims Act and efforts to apply it to remedy environmental abuses, see Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545 (2000).

83. 414 F.3d 233 (2d Cir. 2003).

84. *Id.* at 253-59.

85. 542 U.S. 692 (2004).

ATS can be used only to seek redress for actions that violate “specific, universal, and obligatory” norms recognized as part of the “law of nations” at the time the law was enacted.⁸⁶ While some observers believe that *Sosa* effectively gutted the ATS, at least as a vehicle for redressing global environmental harm, others believe that it still provides an important avenue for redress when environmental harm is coupled with egregious human rights violations.⁸⁷

The latter view acquired some force as plaintiffs in two post-*Sosa* cases have recovered substantial settlements when human rights abuses were coupled with environmental claims. In December 2004, plaintiffs who claimed that the Unocal Corporation had colluded with the Burmese military to use forced labor, murder, and rape in connection with construction of an oil pipeline won a favorable settlement in an ATS case. Filed as a class action four years earlier by fifteen Burmese villagers, the lawsuit alleged that the Unocal Corporation should be held liable for forced labor, murder, rape, and torture inflicted on natives of Burma by the country’s military in the course of construction of an oil pipeline. After the district court dismissed the lawsuits,⁸⁸ the plaintiffs appealed to the Ninth Circuit. A panel of the Ninth Circuit held in September 2002 that Unocal could be found liable under the ATS for aiding and abetting the military’s actions if the plaintiffs’ allegations were found to be true at trial.⁸⁹ In February 2003, the Ninth Circuit vacated the panel’s decision and agreed to rehear the case en banc.⁹⁰ The case was argued before the en banc court after *Sosa* was decided, and the U.S. government supported dismissal of the lawsuits.⁹¹ However, after the oral argument did not go well for Unocal, a settlement was reached.⁹² While the terms of the settlement are confidential, Unocal announced that it “will compensate plaintiffs and provide funds enabling

86. *Id.* at 724–25, 732.

87. See GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 175 (2008) (arguing that *Sosa*’s reference to “specific, universal and obligatory” norms is “not to be taken literally” and that “with sufficient qualification and explanation every norm in international law is sufficiently specific to warrant liability”).

88. *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

89. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

90. *Doe I v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003).

91. *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005).

92. *Unocal*, 403 F.3d at 708. See Marc Lifhser, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, Mar. 22, 2005, at C1, available at <http://articles.latimes.com/2005/mar/22/business/fi-unocal22>.

plaintiffs and their representatives to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region.”⁹³

Another ATS suit coupling environmental and human rights claims was settled in June 2009 on the eve of trial. Survivors of Nigerian environmental activist Ken Saro-Wiwa used the ATS to sue Royal Dutch Shell for its alleged complicity in the Nigerian military’s execution of Saro-Wiwa in 1995. In December 2008, Chevron had won another high profile ATS case when a jury in San Francisco ruled in *Bowoto v. Chevron Corp.* that the oil company was not responsible for human rights abuses when the Nigerian military suppressed an environmental protest against its drilling practices.⁹⁴ But Royal Dutch Shell settled the Saro-Wiwa case by agreeing to pay \$15.5 million to his survivors.⁹⁵ The settlement was reached just as the trial was about to commence after thirteen years of litigation. Shell maintained that it had no involvement in the execution of Sara-Wiwa and eight other Ogoni leaders who had been protesting oil pollution in the Niger Delta. It described the settlement as a “humanitarian gesture.”⁹⁶ However, the settlement was widely viewed as an effort to prevent embarrassing revelations at trial concerning the company’s support for the Nigerian military’s repressive tactics.

C. Prudential Standing

A more extreme obstacle to lawsuits in U.S. courts by foreigners to recover for environmental harm is the notion that nonresident aliens do not have prudential standing to sue. On June 20, 2001, the International Labor Rights Fund, which represents eleven villagers from Aceh, Indonesia, sued the Exxon/Mobil Corporation in federal district court in Washington, D.C.⁹⁷ The lawsuit seeks to hold

93. *Contemporary Practice of the United States Relating to International Law—Tentative Settlement of ATCA Human Rights Suits Against Unocal*, 99 AM. J. INT’L L. 479, 498 (2005) (quoting Press Release, Unocal Corp., Settlement Reached in Human Rights Lawsuit, Dec. 13, 2004).

94. See *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008); Verdict and Settlement Summary, *Bowoto v. ChevronTexaco Corp.*, No. C 99-02506 SI, 2008 WL 5483539 (N.D. Cal. filed Dec. 1, 2008).

95. Jad Mouawad, *Shell to Pay \$15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 9, 2009, at B1, available at <http://www.nytimes.com/2009/06/09/business/global/09shell.html>.

96. *Id.*

97. See *Doe v. ExxonMobil*, No. 01-CV-1357 (D.D.C. July 29, 2002).

ExxonMobil accountable for human rights abuses by Indonesian soldiers guarding the company's oil facilities in Indonesia. It alleges that the company bought military equipment and paid mercenaries who have assisted Indonesian security forces in efforts to crush dissent by torturing and assaulting villagers. Exxon denies responsibility for the behavior of the Indonesian military and says that it condemns the violation of human rights in any form. In 2006, the court refused to dismiss the case despite a State Department claim that it could have a "serious[ly] adverse impact on significant interests of the United States, including interests related directly to the ongoing struggle against international terrorism."⁹⁸ However, in a subsequent companion case assigned to the same judge, the court dismissed similar claims by holding that nonresident aliens have no standing to sue in U.S. courts.⁹⁹ In his decision, Judge Royce Lamberth recognized that there was no question that the Indonesian plaintiffs had made sufficient allegations of harm to establish standing under Article III of the Constitution.¹⁰⁰ Noting that "plaintiffs allege that members of the Indonesian military committed the torts . . . during a period of martial law," Judge Lamberth concluded that he could "see no reason to find that plaintiffs have standing in this unique factual context."¹⁰¹

Similar decisions have kept foreign governments from pursuing lawsuits to hold U.S. tobacco companies liable for the harm caused by their products. While individuals frequently failed to win lawsuits seeking to hold manufacturers of tobacco products liable for the deadly diseases their products caused, in 1998 state attorneys general forced the industry to agree to pay \$206 billion over twenty-five years to compensate the states for increased health costs caused by tobacco-related diseases. While the same products presumably cause the same harm outside of the U.S., to date no foreign plaintiff has been successful in holding a U.S. tobacco company liable.

98. Letter of William H. Taft, IV, Legal Advisor, Dep't of State, to Honorable Louis F. Oberdorfer, submitted in *Doe v. ExxonMobil*, No. 01-CV-1357 (D.D.C. July 29, 2002), at 1 (on file with the Maryland Journal of International Law). See also Peter Waldman & Timothy Maples, *A Global Journal Report: Administration Sets New Hurdles for Human-Rights Cases*, WALL ST. J., Aug. 7, 2002, at B1.

99. *Doe VIII v. Exxon Mobil Corp.*, 658 F. Supp.2d 131 (D.D.C. 2009).

100. *Id.* at 134.

101. *Id.* at 135 (internal citations omitted).

V. THE FOREIGN RESPONSE TO U.S. DISMISSALS

The increasing reluctance of U.S. courts to entertain transnational tort litigation has spawned a backlash in some developing countries where plaintiffs reside. Some countries have adopted statutes designed to preclude *forum non conveniens* dismissals by U.S. courts by providing that their own courts automatically lose jurisdiction to hear a case once suit has been filed in a foreign court with jurisdiction.¹⁰² A model law, drafted by the Latin American Parliament (Parlatino) and widely adopted in Latin American countries allows damages to be calculated under the law of the foreign defendant's country, eliminating the advantage to the defendant of being liable for lesser amounts in the courts of developing countries.¹⁰³ These and other measures have significantly altered the calculus that now confronts multinational corporations.

As noted above, when Texaco won dismissal of the ATS lawsuit filed against it by residents of the Oriente region of Ecuador, it was widely assumed that the company had escaped liability. Yet the case was refiled in the courts of Ecuador where litigation has now been under way for more than a decade. Eight years ago, Chevron acquired Texaco and with it responsibility for defending the lawsuit. After years of trial to assess responsibility for extensive environmental damage in the Oriente, Chevron now is facing the prospect of an adverse judgment potentially as large as \$27 billion—the cost estimate of a court-appointed expert for compensation and remediation of the pollution.

Chevron's defense is that everything it did in Ecuador was legal and that it spent \$40 million on environmental cleanup and was released from further liability by the government of Ecuador in 1992 when Texaco left the country. The plaintiffs claim that this settlement with a too-compliant government does not absolve Chevron of responsibility for the harm its activities caused to the individual plaintiffs in the lawsuit. While the litigation over environmental devastation caused by oil production in Ecuador has been ongoing for nearly two decades, the basic legal question at the heart of the

102. See Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. (forthcoming Sept. 2010).

103. RONALD A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 132–33 (2007).

controversy is remarkably simple: should governments be able to insulate private companies from liability for acts that foreseeably cause significant harm to others?

In July 2009, Chevron officials conceded that the company is likely to lose the lawsuit and have an enormous judgment rendered against it. The company vowed that it will not pay such a judgment and that it will fight in the courts of both Ecuador and the U.S. for decades if necessary. While some shareholders have urged the company to settle, Chevron spokesperson Don Campbell told the Wall Street Journal that “[w]e’re not going to be bullied into a settlement” because the company has done nothing wrong.¹⁰⁴

What is particularly ironic about Chevron’s legal posture is that, if the company had not fought having the case tried in U.S. courts under the ATS, it is highly likely that it would have prevailed on the merits, particularly in the wake of the *Sosa* decision. Chevron’s legal strategy seems to have been driven by the assumption that the risk of a foreign court effectively holding it liable was miniscule. Yet as global environmental law flourishes, countries throughout the world now are upgrading their judicial systems, making such assumptions increasingly questionable.

In September 2009, Judge Juan Nuñez, the Ecuadoran judge presiding over the trial, recused himself from the case after Chevron released a video that the company claimed showed that the judge was committed to ruling against the oil company.¹⁰⁵ In the video, which was posted on Chevron’s website, the judge reportedly refuses to reveal the verdict several times but then responds “yes, sir” to a question Chevron claims was an inquiry as to whether Chevron will lose the lawsuit.¹⁰⁶ There also reportedly is a discussion of how remediation funds Chevron would be ordered to pay will be spent and a suggestion that some could be used to pay off government officials. The video was covertly filmed by an Ecuadoran former contractor for Chevron who the oil company claims was acting entirely independently. While the judge claimed the video had been doctored

104. Ben Casselman, *Chevron Expects to Fight Ecuador Lawsuit in U.S.—As Largest Environmental Judgment on Record Looms, the Oil Company Reassures Shareholders it Won’t Pay*, WALL ST. J., July 20, 2009, at B3.

105. David R. Baker, *Judge Recuses Himself in Suit Against Chevron*, SAN FRAN. CHRON., Sept. 5, 2009, http://articles.sfgate.com/2009-09-05/business/17205188_1_tapes-videos-case.

106. *Id.*

and denied that he had prejudged the case, he was asked to recuse himself by Washington Pezantes, the attorney general of Ecuador.¹⁰⁷ The quick recusal suggests that the Ecuadoran judiciary appreciates the importance of the case and the likely battle that would follow efforts to enforce any judgment against Chevron in the U.S. courts. Judge Nicolás Zambrano will now preside over the case, which is being heard in Lago Agrio, Ecuador.

On September 23, 2009, Chevron announced that it had filed an international arbitration claim against the government of Ecuador in the Permanent Court of Arbitration in the Hague.¹⁰⁸ Chevron bases its claim on what it calls the Ecuadoran government's "exploitation" of the lawsuit.¹⁰⁹ Chevron is asking the tribunal to enforce its 1998 cleanup agreement with Petroecuador and a bilateral U.S.–Ecuador investment treaty. While Chevron's move was widely expected, most observers thought it would not occur until after the litigation against the company was concluded in the Ecuadoran courts.¹¹⁰ Chevron now claims that it has no choice because "Ecuador's judicial system is incapable of functioning independently of political influence."¹¹¹ Ecuadoran attorney general Diego Garcia rejected Chevron's effort to impugn the integrity of the Ecuadoran judiciary and noted that the plaintiffs in the lawsuit before the Ecuadoran court are not parties to the arbitration proceeding Chevron has initiated in the Hague.

As the *Chevron* litigation illustrates, a major issue likely to emerge from this transnational litigation will be the standards for enforcing foreign judgments in the face of charges that due process was not afforded. This already has become an issue in subsequent DBCP litigation in Nicaragua because of changes in procedures for proving claims.

Nicaraguan courts had awarded more than \$2.1 billion in damages to plaintiffs, using Special Law 364 enacted in 2001 to make it easy

107. Mercedes Alvaro, *Judge in Chevron Case Agrees to Step Aside*, WALL ST. J., Sept. 7, 2009, <http://online.wsj.com/article/SB125208172990086901.html>.

108. Press Release, Chevron Corp., Chevron Files International Arbitration Against the Government of Ecuador Over Violations of the United States-Ecuador Bilateral Investment Treaty (Sept. 23, 2009), *available at* <http://www.chevron.com/news/press/release/?id=2009-09-23>.

109. *Id.*

110. *Id.*

111. *Id.*

for plaintiffs to recover in DBCP cases. As described by Los Angeles Superior Court Judge Victoria Chaney, under this law “essentially anyone who obtains two required lab reports stating he is sterile and who claims to have been exposed to DBCP on a banana farm is entitled to damages; causation and liability are conclusively presumed”¹¹² Under special procedures prescribed by the law, the defendant must post a \$15 million bond and “has just 3 days to answer the complaint, the parties have 8 days to present evidence, and the court has 3 days to issue a judgment.”¹¹³

Judge Chaney dismissed DBCP lawsuits brought in Los Angeles Superior Court against the Dole Food Company because of fraud occurring in Nicaragua.¹¹⁴ The judge found the cases to be tainted by pervasive fraud by lawyers and others in Nicaragua who recruited plaintiffs who had never worked on banana plantations, falsified lab reports, and sought to intimidate witnesses who helped expose the fraud.¹¹⁵ In light of Judge Chaney’s conclusions concerning pervasive fraud in Nicaragua, it is unlikely Nicaraguan DBCP judgments will be enforced by U.S. courts. However, Judge Chaney did specifically state that her conclusions applied only to cases involving Nicaraguan plaintiffs and that no evidence of fraud has been presented involving DBCP plaintiffs from any other country.¹¹⁶

In September 2009, the British oil trading firm Trafigura abruptly offered to settle a \$160 million class action brought in London on behalf of 31,000 residents of the Ivory Coast allegedly harmed by the company’s dumping of hundreds of tons of toxic waste in Abidjan in August 2006. The company previously had been forced to clean up the waste at a cost of \$200 million, but thousands of Abidjan residents claimed that exposure to the waste had caused severe health problems and even some deaths. The case against Trafigura had been scheduled to go to trial in Britain on October 6. Trafigura’s defense

112. *Rudolfo Mejia v. Dole Food Company, Inc.*, No. BC340079, at 23 (Cal. Super. Ct. June 17, 2009) (proposed findings of fact and conclusions of law supporting order terminating Mejia and Rivera cases for fraud on the court), available at http://online.wsj.com/public/resources/documents/WSJ-Dole_Chaney_ruling.pdf.

113. *Id.*

114. Steve Stecklow, *Fraud by Trial Lawyers Taints Wave of Pesticide Lawsuits*, WALL ST. J., Aug. 19, 2009, at A1, available at <http://online.wsj.com/article/SB125061508138340501.html>.

115. *Id.*

116. *Mejia*, No. BC340079, at 24.

was to blame the waste dumping on an “independent contractor.” It aggressively threatened to bring libel actions against media outlets who published reports favorable to the claimants. Yet when the Guardian newspaper revealed emails allegedly showing efforts by Trafigura to cover up its involvement in the waste dumping, Trafigura quickly announced that it had reached a nearly \$50 million settlement with attorneys for the plaintiffs.¹¹⁷ While attorneys for the plaintiffs expressed approval of the settlement, Greenpeace argued that the company still should be prosecuted for manslaughter for deaths caused by the waste dumping.¹¹⁸

VI. CONCLUSION: ENVIRONMENTAL LIABILITY AND GLOBAL ENVIRONMENTAL LAW

Three years ago, in an article forecasting the future of environmental law, I predicted that as other nations upgrade their judicial systems, U.S. corporations eventually would prefer to be sued in U.S. courts rather than in foreign jurisdictions.¹¹⁹ The saga of the *Chevron* litigation in Ecuador may confirm the accuracy of this prediction much faster than anyone could have anticipated. This and other transnational environmental litigation is part of the more complex picture that has emerged concerning how global environmental law is developing today. Efforts devoted to the “top down” approach of negotiating comprehensive, multilateral treaties on state responsibility have yielded scant progress. However, progress is being made in the development of environmental liability norms from the “bottom up.”

NGOs and multinational corporations increasingly are fighting battles over environmental liability in the court of global public opinion. Even losing ATS cases have helped shine the glare of international publicity on questionable environmental practices that fall far short of what multinationals would use when operating in the developed world. In the Ecuador litigation, both Chevron and the plaintiffs are aggressively using all means available to influence

117. See David Leigh, *How UK Oil Company Trafigura Tried to Cover Up African Pollution Disaster*, GUARDIAN, Sept. 16, 2009, <http://www.guardian.co.uk/world/2009/sep/16/trafigura-african-pollution-disaster>.

118. See David Leigh, *Greenpeace Continues Trafigura Pursuit Over Toxic Waste*, GUARDIAN, Sept. 20, 2009, <http://www.guardian.co.uk/world/2009/sep/20/greenpeace-trafigura-toxic-waste>.

119. Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENVTL L. J. 1, 32 (2007).

public opinion.¹²⁰ Even apart from any relief mandated by a court, this litigation is likely to influence the development of norms for future corporate behavior in the developing world.

Bilateral approaches to the development of liability standards also are making some progress and much of it is occurring through the actions of subnational units of government. Seven U.S. states and three Canadian provinces have adopted the Uniform Transboundary Pollution Reciprocal Access Act,¹²¹ which seeks to promote “the equalization of rights and remedies of citizens in Canada and the U.S.A. affected by pollution emanating from the other jurisdiction.”¹²²

Both the *Chevron* litigation in Ecuador and the Central American DBCP litigation are likely to spur further interest in the development of procedural norms for access to justice in transnational environmental litigation for both victims of environmental harm and the companies who seek a fair forum in which to defend themselves. As developing countries upgrade their judicial systems, the days when a *foreign non conveniens* dismissal was the death knell for claims, no matter how meritorious they might be seem to be, are fading into the past. Environmental liability disputes will remain messy and contentious, but they will be a necessary avenue for seeking redress when regulatory policy fails to prevent significant harm. They may also serve as a “bottom up” catalyst for the further development of global environmental liability norms.

120. For Chevron’s perspective, see Chevron, Ecuador Lawsuit—Facts About Chevron and Texaco in Ecuador, <http://www.chevron.com/ecuador/> (last visited Apr. 27, 2010). For the plaintiff’s perspective, see TrueCostofChevron.com, Ecuador, <http://www.truecostofchevron.com> (last visited Apr. 27, 2010).

121. Uniform Transboundary Pollution Reciprocal Access Act, §§ 1–10, 9C U.L.A. 392–98 (1982). See also Uniform Law Commissioners, A Few Facts About The . . . Uniform Transboundary Pollution Reciprocal Access Act, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-utpraa.asp (last visited Apr. 27, 2010).

122. Michael I. Jeffrey, *Transboundary Pollution and Cross Border Remedies*, 18 CAN.-U.S. L. J. 173, 177 (1992).