

Liability for Global Environmental Harm and the Evolving Relationship between Public and Private Law

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For centuries legal systems around the world have sought to vindicate the principle that those who cause significant, foreseeable harm to others can be held liable for the damage their actions cause. In an important early decision imposing liability for environmental harm, a British court hearing a private nuisance action in 1702 cited the ancient maxim of Roman law *sic utere tuo ut alienum non laedas*, translated as “every man must so use his own as not to damnify another.”² Now widely known as the “*sic utere*” principle, this concept also has been incorporated into public international environmental law. It is recognized in Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration. These declarations acknowledge that nations have the duty “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.”³ Thus, both private parties and sovereign nations have a duty to avoid causing harm to others.

Private litigation seeking to hold polluters liable for harm has faced considerable obstacles. Private plaintiffs occasionally have been able to recover damages when large, single sources of pollution caused visible harm (e.g., early 20th century smelter litigation, large oil spills) or where particular toxic substances (e.g., asbestos) have caused unique “signature” injuries. However, the difficulty of proving individual causation has rendered private law a poor vehicle for preventing the kind of harm now caused by multiple pollutants from multiple sources. While most countries now rely on public law to prevent environmental harm through comprehensive regulatory programs to regulate pollution, these programs usually do not provide compensation to the victims of such harm. When harm is caused by pollution originating in another country, it is even more difficult to hold polluters accountable because public international law has yet to create an effective global regime of liability for transboundary pollution despite commitments in both the Stockholm and Rio declarations to do so.⁴

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² *Tenant v. Goldwin*, 92 Eng. Rep. 222 (1702).

³ Declaration of the United Nations Conference on the Human Environment, Principle 21 (1972).

⁴ See Stockholm Declaration Principle 22 & Rio Declaration Principle 13.

Despite the absence of an agreed-upon global liability regime, remarkable developments are occurring in several countries to make it easier to hold polluters accountable for the harm their emissions cause. Some nations are modifying their laws to make it easier for private plaintiffs to overcome obstacles to recovering for harm caused by pollution. Public law also is being modified to enable governments to recoup damages for environmental harm. In the absence of an effective global liability regime, domestic legal systems are now entertaining more private transnational environmental litigation. These and other developments, which are explored in this paper, are consistent with a phenomenon I have described as the emergence of a kind of “global environmental law” that blurs traditional distinctions between public and private law and between domestic and international law.⁵

Part I of this paper traces the failure of public international law to achieve a global consensus on liability standards for environmental harm. It attributes this failure in part to the fact that public international law focuses on relations between states when most environmental harm is caused by the actions of private actors such as multinational corporations. Part II then discusses the obstacles that have made it difficult for victims of environmental harm to hold polluters liable under domestic law and efforts to overcome these obstacles. Part III then explores the rise of private transnational litigation to recover for environmental harm and efforts to facilitate such litigation by the adoption of reciprocity norms. Part IV then concludes by noting that these developments confirm the rise of global environmental law and the blurring of traditional domestic/international and public/private law distinctions.

I. LIABILITY FOR TRANSBOUNDARY POLLUTION UNDER PUBLIC INTERNATIONAL LAW

The failure of public international law to develop effective standards of liability for transboundary pollution has been covered in considerable detail elsewhere.”⁶ As Professor Noah Sachs notes global liability standards are “the Yeti of international environmental law – pursued for years, sometimes spotted in rough outlines, but remarkably elusive in practice.”⁷ More than a dozen civil liability treaties governing transnational environmental harm have been

⁵ See “El Surgimiento del Derecho Ambiental Global” (The Emergence of Global Environmental Law), in *Desarrollo Sustentable: Gobernanza y Derecho* 11 (V. Duran, S. Montenegro & P. Moraga, eds. 2008); Percival, *The Globalization of Environmental Law*, 26 *Pace Env’tl L. Rev.* 451 (2009); Yang & Percival, *The Emergence of Global Environmental Law*, 36 *Ecol. L. Q.* 615 (2009).

⁶ See Percival, *supra* note 1; Noah Sachs, *Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law*, 55 *U.C.L.A. L. Rev.* 837 (2008).

⁷ Sachs, *id.* at 839.

negotiated, but most remain “unadopted orphans in international environmental law.”⁸

The *sic utere* principle was influential in one rare precedent involving liability for transboundary pollution. The *Trail Smelter* case,⁹ which began in 1926, involved a dispute between the U.S. and Canada over pollution from a Canadian smelter that allegedly damaged crops grown by farmers in the U.S. state of Washington south of the Canadian border. The farmers asked the U.S. State Department to pursue relief for them pursuant to the Boundary Waters Treaty 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 states.¹⁰ 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.”¹¹

At the first global environmental summit in 1972 – the United Nations Conference on the Human Environment -- representatives from 113 nations gathered in Stockholm to draft a set of principles of international environmental law. The Stockholm Declaration that they approved unanimously embraced the *sic utere* principle in Principle 21, which provides 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. Declaration of the United Nations Conference on the Human Environment, Principle 21 (1972).¹²

The Stockholm Declaration also promised that the nations of the work would develop more specific principles of liability for global environmental harm. Principle 22 of the Stockholm Declaration states:

⁸ Id.

⁹ 3 (1941) U.N.R.I.A.A. 1938 (1949).

¹⁰ *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

¹¹ 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), another dispute between U.S. states over transboundary pollution.

¹² Declaration of the United Nations Conference on the Human Environment, Principle 21 (1972).

States 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.¹³

Despite several incidents of severe transboundary pollution, including the April 1986 Chernobyl nuclear accident, little progress has been made in developing liability standards under public international law. Nations have been less than enthusiastic about creating liability for themselves when companies subject to their jurisdiction cause transboundary harm. 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.”¹⁴ The Third Restatement of Foreign Relations describes state responsibility for environmental harm as a concept “rooted in customary international law,”¹⁵ but scant progress has been made in implementing it in practice.

In 1992, two decades after the Stockholm Conference, representatives of 172 governments met in Rio de Janeiro for an “Earth Summit” that featured the largest gathering of heads of state in world history. All the government represented pledged a renewed effort to develop global norms of state responsibility for environmental harm. This commitment is embodied in Principle 13 of the Rio Declaration on Environment and Development, which states:

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.¹⁶

Despite the promise of a “more determined” effort to develop global liability standards, little progress has been made since 1992. Since 1978 the International Law Commission (ILC) has been working to develop principles of “International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law.” In 2001 it adopted a preamble and set of 19

¹³ *Id.*, Principle 22 (1972).

¹⁴ Lakshman Guruswamyh, Geoffrey Palmer & Burns Weston, *International Environmental Law and World Order* 327 (1994).

¹⁵ 2 Restatement (Third) of Foreign Relations Law of the U.S. 100 (1987) (see Sections 601 & 602 of the Restatement for a description of when state responsibility may be invoked).

¹⁶ Rio Declaration on Environment and Development, Principle 13 (1992) (emphasis added).

articles on “Prevention of Transboundary Harm from Hazardous Activities”¹⁷ and in 2004 it released for comment eight draft principles on “The Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities.”¹⁸ The ILC’s approach has been to focus liability on the operator of the activity causing the harm rather than on the state it which it originates and to rely on states to develop their own procedures for compensating victims of environmental harm.¹⁹ While this initiative and other efforts²⁰ may point the way for future progress, they fall considerably short of establishing effective global liability standards for environmental harm.

Several treaties have provisions that incorporate the *sic utere* principle, but there is little or no consensus concerning precisely how it should be applied. More than a dozen multilateral agreements have been adopted to address transboundary pollution problems,²¹ but only five of these have entered into force.²² The inadequacy of public international law on liability for transboundary environmental harm is powerfully demonstrated by the fact that no nation asserted any liability claims for the Chernobyl nuclear accident, the worst nuclear accident in history.²³

¹⁷ 2001 International Law Commission Report, paragraph 97

¹⁸ 2004 International Law Commission Report, paragraph 175.

¹⁹ Stephen C. McCaffrey, The Fifty-Sixth Session of the International Law Commission, 35 *Env’tl Pol’y & L.* 109 (2005). Lakshman Guruswamy has argued that the ILC’s work has suffered from failure consistently to distinguish between norms of state responsibility and principles of civil liability for private conduct.

²⁰ See Final Report of the Experts Group on Environmental Law on Legal Principles for Environmental Protection and Sustainable Development, Article 11 in Experts Group on Environmental Law of the World Commission on Environment and Development 80 (1987); UNECE Kyiv Liability Protocol (2003); European Commission, Directive on Environmental Liability (2004).

²¹ Sachs, *supra* note 3, at 854-857.

²² Paris Convention on Third Party Liability in the Field of Nuclear Energy, Vienna Convention on Civil Liability for Nuclear Damage, the International Convention on Civil Liability for Oil Pollution Damage, the International Convention on the Establishment of an International Fund for Oil Pollution Damage, International Convention on Civil Liability for Bunker Oil Pollution Damage. *Id.*

²³ See Devereaux F. McClatchey, Chernobyl and Sandoz One Decade Later: The Evolution of State Responsibility For International Disasters, 1986-1996, 25 *GA. J. INT’L & COMP. L.* 659, 662 (1996); Edith Brown Weiss, Stephen McCaffrey, Daniel McGraw & A. Dan Tarlock, *International Environmental Law and Policy* 419-423 (2d ed. 2007). They note 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).

The Trail Smelter²⁴ precedent remains one of the rarest of cases where damages actually were recovered for transboundary environmental harm. With advances in the ability of scientists to trace the long-range fate and transport of pollutants, awareness of the seriousness of the significance of transboundary pollution problems has increased. Scientists estimate that as much as 30 percent of mercury pollution in the western U.S. originates in Asia, primarily from emissions of coal-fired powerplants in China.²⁵ The absence of effective liability standards under public international law leaves private law remedies as the only viable option for the victims of such pollution. Yet, as discussed below, the difficulty of satisfying private law's requirement of individualized proof of causal injury renders private law remedies a poor vehicle for redressing such pollution.

II. EFFORTS TO OVERCOME OBSTACLES TO RECOVERY OF ENVIRONMENTAL DAMAGES UNDER DOMESTIC LAW

The primary obstacle to recovery of damages for environmental harm is the difficulty of satisfying tort law's requirements for individualized proof of causal injury. As noted above, in situations where large, single sources of pollutants, such as smelters, caused visible environmental damage, the common law of private 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 substances, such as asbestos, causes "signature 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.²⁶

²⁴ 3 R.I.A.A. 1938 (1949).

²⁵ Matt Pottinger, Steve Stecklow & John J. Fialka, *Invisible Export – A Hidden Cost of China's Growth: Mercury Migration*, Wall St J., Dec. 20, 2004, at A1. Chinese mercury emissions also have been blamed for half of Korea's mercury pollution. See <http://english.chosun.com/w21data/html/news/200704/200704230024.html>.

²⁶ 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's *Outrageous Misconduct*, 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, providing compensation to victims, and deterring future malfeasance. The book vividly describes the failure of every other institutional safeguard: the asbestos companies, of course, but also the medical and legal professions, the unions, the insurance carriers, and all manner of regulatory and legislative bodies. To be sure, the tort system is far from perfect; but, as Brodeur

Recognizing the limitations of tort liability as a vehicle for controlling environmental risks, most developed countries now rely primarily on comprehensive regulatory standards to protect public health and the environment. In some cases legislative action also has shifted or relaxed the burden of proving causal injury to overcome the difficulty of satisfying individualized causation standards when large populations are exposed to a significant 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.

A. United States

Examples of legislation altering common law liability standards include the “Superfund” legislation in the United States that holds broad classes of parties associated with the generation and disposal of toxic substances strictly, jointly and severally liable for the costs of remediating releases of them. However, proposals to include an administrative compensation scheme for the victims of hazardous substances releases failed to pass Congress by a single vote. Thus, the Superfund legislation does not provide compensation for the victims of such releases.²⁷ However, the Superfund law does impose strict liability for the costs of cleaning up hazardous substance releases and it allows the government to recoup “natural resources damages,” defined to include the cost of restoring or replacing damaged natural resources.²⁸

Plaintiffs exposed to radiation from atmospheric nuclear testing by the U.S. government during the 1950s and 1960s sued the government for compensation. In light of the difficulty of proving that the plaintiff's injuries were caused by the radiation exposure and not other sources, a courageous federal district judge adopted a relaxed standard of causation. However, this decision was reversed on appeal because the appellate court ruled that the government had sovereign immunity from such lawsuits.²⁹ The U.S. 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, as

demonstrates, if left to other devices, the asbestos conspiracy would have been buried along with its victims.”

²⁷ Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675. The word “compensation” was incorporated in the name of the statute before an amendment deleted an administrative compensation scheme from it.

²⁸ 42 U.S.C. §§9607(a)(4)(C) & 9607(f).

²⁹ *Allen v. United States*, 588 F.Supp. 247 (D. Utah), reversed on other grounds 816 F.2d 1417 (10th Cir. 1987).

well as Vietnam War veterans exposed to dioxin from Agent Orange, to recover compensation without resort to the courts.³⁰

Private tort claims against the tobacco industry repeatedly failed in state courts in the face of industry arguments that warning labels mandated by federal law made smokers aware of the health risks from smoking. However, the industry's fortunes were reversed when state attorney generals adopted a concerted strategy to hold the companies liable for the increased health costs states incurred due to the use of tobacco products. Fearful that this litigation would subject them to massive damages, the tobacco industry in 1998 reached a master settlement agreement with state attorneys general. The tobacco companies agreed to pay \$206 billion to the states over 25 years to compensate state governments for the increased health care costs they incurred due to tobacco-related diseases.

If tobacco products caused such injuries in the United States, it is only logical to conclude that exports of such products caused similar harm in other countries. Thus, several foreign governments filed similar suits against the tobacco industry in the U.S. courts, only to be disappointed when the cases were dismissed. Similar difficulties have faced other transnational tort litigation, as discussed below.

The need to prove causal injury is rarely an obstacle to recovering damages for the victims of major oil spills. Companies causing major oil spills are easily identified and U.S. law provides strict liability for parties responsible for such spills. The Exxon Corporation, which was responsible for the Exxon Valdez oil spill in March 1989 in Alaska's Prince William Sound, paid more than \$500 million in damages to compensate the victims of this spill. The company also paid more than \$2 billion to cleanup the spill, \$500 million in civil penalties, and \$500 million in punitive damages.

As a result of the far more massive oil spill in the Gulf of Mexico from April to July 2010, the British corporation BP has agreed to establish a \$20 billion compensation fund to be administered by a private party, Kenneth Feinberg, who administered the fund set up by the U.S. Congress to compensate survivors of the victims of the 9/11 terrorist attacks. The company agreed to establish this fund in response to public pressure and the realization that it would face massive liability if sued in court. The establishment of this fund represents an effort to speed the payment of compensation, which took far longer in the case of the Exxon Valdez, by avoiding contentious tort litigation over damages that undoubtedly will dwarf those paid in any previous environmental catastrophe in the United States.

³⁰ See the Veterans Dioxin and Radiation Exposure Compensation Standards Act (1984) and the Radiation Exposure Compensation Act (1990).

B. China's Tort Law

Other nations also have made efforts to overcome the causation problem in environmental cases. Chinese civil procedure 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.³¹ 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.³²

China has now adopted a new Tort Liability Law that became effective in July 2010.³³ It seeks to make it easier to impose on polluters liability for damage caused by environment pollution.³⁴ Under the law a source of pollution bears the burden of showing the "the non-existence of causation between its act and the harmful consequences."³⁵ The law also has provisions for multiple tortfeasors and for pollution caused by the fault of a third party (in addition to the polluter).³⁶ Chapter III of the law (Articles 26-31) provides for defenses to tort liability including contributory negligence, intentional cause of the pollution by the injured party, force majeure, and third-party cause of the pollution. Within the Tort Liability Law, special provisions are made for damages from nuclear accidents and hazardous substances.³⁷ The possessor or owner of the nuclear facility or hazardous substances is usually liable, although exceptions are provided for intentionality or gross negligence. *Id.* The owner or manager of a hazardous substance bears the burden in showing that it exercised a high

³¹ Civil Procedure Evidence Rule (2002). Burden-shifting provisions also are contained in China's Solid Waste Pollution Control Law (2005), Article 86 and its Water Pollution Control Law (2008), Article 87. These were invoked to shift the burden of proof and hold the Rongping Chemical Plant strictly liable for pollution in *1,721 Villagers v. Rongping Chemical Plant* (2003).

³² *Zhejiang Province Pinghu Normal Special Species Farm v. Jiaxing 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.

³³ Tort Liability Law of People's Republic of China (adopted at the Twelfth Session of the Standing Committee of the Eleventh Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), translated in Squire Sanders Translation for Reference Purpose (last visited Jun. 16, 2010), available at http://www.ssd.com/pdf/chinaupdate/Tort_Liability_Law_of_PRC_Chinese_English.pdf.

³⁴ *Id.* at Article 65.

³⁵ *Id.* at Article 66.

³⁶ *Id.* at Articles 67-68.

³⁷ *Id.* at Articles 70, 72, 74-76.

degree of care when that hazardous substance was possessed unlawfully by a third party.³⁸

C. Japan's Tort Law

Japan also has amended its tort law to make it easier for victims of environmental harm to recover compensation. Japanese tort law was profoundly affected as a result of the Minamata tragedy in the mid-1950s. Residents of a fishing village suffered severe mercury poisoning beginning as a result of mercury discharges from the Chisso Chemical Company. The company initially contested claims that its waste disposal practices had caused the harm and it did continued 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 1932-1968 that caused the "Minamata disease." Japanese courts rejected the company's claim that it could not be held liable because its discharges had complied with all applicable laws and regulations at the time.

The Minamata tragedy helped spur the development of new laws in Japan to provide compensation to victims of environmental harm. In 1969 the Law on Special Measures Concerning Redress for Pollution-Related Health Damage was adopted. 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. In 1972 the plaintiffs prevailed, which helped spur enactment of the Absolute Liability Law. In 1973 the Pollution-Related Health Damage Compensation Law was enacted. This law provides for government living assistance to pollution victims in addition to compensation for medical costs. These compensation programs were funded by emissions charges on polluters.

Between 1977 and 1983 certified pollution victims filed several air pollution lawsuits. Concern that the law was too generous to victims led to amendments of 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 filed by pollution victims in 1988 and 1989.

In addition to national legislation in Japan, 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 to more than 76,000 certified victims. In 1988 victims of air pollution won a lawsuit brought against the Chiba Kawasaki Steel Company. Subsequent

³⁸ *Id.* at Article 75.

lawsuits won compensation for other air pollution victims. After winning a preliminary victory in the first Osaka Nishiyodogawa lawsuit in March 1991, plaintiffs received a favorable settlement in March 1995. In July 1995 plaintiffs won the second, third and fourth Nishiyodogawa lawsuits, holding both the national government and an expressway corporation liable for harm caused by air pollution.

After targeting steel companies, victims of Japanese air pollution eventually turned their attention to pollution from automobiles. In August 1998 Japanese courts recognized the right of victims of such pollution to receive compensation for harm to their health in the Kawasaki Pollution decision. This case served as an important precedent for the lengthy Tokyo Air Pollution lawsuit that extended from 1996 to 2007. Six groups of asthma victims sued the Japanese government, the Tokyo city government, and all seven major Japanese automakers. An appellate court ultimately proposed a 1.2 billion yen settlement to provide compensation to 522 pollution victims. The settlement agreement ultimately was accepted in July 2007, with most of this settlement to be paid by automobile manufacturers. As part of the settlement, the Tokyo metropolitan established a five-year healthcare program for victims of air pollution. The program was funded by contributions from the State (6 billion yen), the automakers (3.3 billion yen), and the Metropolitan Expressway Public Corporation (500 million yen).³⁹

III. TRANSNATIONAL HARM AND TRANSNATIONAL LITIGATION

Given the absence of effective legal remedies under public international law, victims of environmental harm are relying on domestic litigation, including private transnational litigation. Concern over global warming and climate change – perhaps the most serious example of transboundary environmental harm – has spurred litigation in the United States against large sources of greenhouse gas (GHG) emissions. Lawsuits also have been filed in the courts of countries where multinational corporations are based seeking compensation for harm caused by such companies due to their foreign operations.

A. Litigation Over Transnational Harm: Climate Change

In 2004 eight states and the city of New York filed federal and state public 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.”⁴⁰ In September 2009 (after a lengthy delay caused partly by the court awaiting the U.S. Supreme

³⁹ Eri Osaka, *Reevaluating the Role of the Tort Liability System in Japan*, 26 *Ariz. J. Int'l & Comp. L.* 393, 421 (2009);

<http://search.japantimes.co.jp/rss/nn20070701a4.html>

⁴⁰ 406 F.Supp. 2d 265 (S.D.N.Y. 2005).

Court's *Massachusetts v. EPA* decision⁴¹) the Second Circuit reversed the district court's decision. 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. Defendants in the litigation operate powerplants that contribute 10 percent of U.S. greenhouse gas (GHG) emissions. This public law litigation does not seek damages, but rather an injunction requiring gradual reductions in GHG emissions by the defendant utilities.

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.⁴² The lawsuit, brought by victims of Hurricane Katrina, alleges that oil companies' emissions of GHGs exacerbated the damage caused by the hurricane. On March 1, 2010, the Fifth Circuit vacated the panel decision and agreed to rehear it en banc. However, after eight of the sixteen judges on the en banc court recused themselves, presumably because they owned stock in some of the oil companies who are defendants in the case, only eight judges remained to hear the case -- not enough to enable the court to retain the quorum required for judicial business. The court subsequently dismissed the appeal, while noting the parties' right to petition the Supreme Court of the United States for review.⁴³

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 on higher ground due to sea level rise. The residents are seeking to recover the damages from 24 oil companies and powerplants on the theory that their emissions of GHGs are contributing to global warming that is causing the sea to rise.⁴⁴

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 given the difficulty of proving causal injury from such diffuse harm as that caused by climate change.

B. Transnational Tort Litigation

Victims of environmental harm in foreign countries are suing multinational corporations alleged to have caused such harm in the courts where the

⁴¹ 549 U.S. 497 (2007).

⁴² *Comer v. Murphy Oil, USA*, 585 F.3d 855 (5th Cir. 2009).

⁴³ *Comer v. Murphy Oil, USA*, 2010 U.S. App. LEXIS 11019 (5th Cir. Miss. May 28, 2010).

⁴⁴ *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).

companies are based. While U.S. companies initially argued that they should not be subject to suit in the United States for harm caused abroad, they may soon change their tune as lawsuits against them now are progressing in foreign venues. A key issue for the future will be the standards courts should employ in enforcing liability judgments rendered 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. Courts in the United States often refuse to hear cases brought by foreign plaintiffs by invoking the doctrine of *forum non conveniens*, as illustrated by the litigation over the Bhopal tragedy, which was rejected by American courts.⁴⁵ Because American tort law has been perceived to be more generous to plaintiffs than the law in most foreign countries,⁴⁶ the choice of forum can have a substantial impact on the amount of damages recoverable.

In *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), 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.⁴⁷ 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. After the Texas Supreme Court reversed by a vote of 5-4,⁴⁸ the defendants subsequently agreed to a substantial settlement to avoid a trial.

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 4 percent of cases dismissed by American courts on

⁴⁵ *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1987). See 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).

⁴⁶ 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).

⁴⁷ The pesticide DBCP to which the plaintiffs were exposed had been banned in the United States since 1977. The history behind this ban is told in Devra Davis, *When Smoke Ran Like Water* 195-200 (2002).

⁴⁸ 786 S.W.2d at 681, 687, 689.

this ground ever are litigated in foreign courts.⁴⁹ 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.⁵⁰ At the time *Alfaro* was decided by the Supreme Court of Texas, Costa Rican law would have been limited the plaintiffs' recoveries to no more than \$1,500 each.⁵¹ Because the case could be tried in Texas, the 82 plaintiffs and their wives ultimately received a settlement worth nearly \$20 million, shortly before the case was scheduled to go to trial in 1992.⁵²

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. 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. The first payments from the fund were received by the workers in December 1997.⁵³ Workers who suffered health problems 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 is approximately \$4.60.⁵⁴

⁴⁹ Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 *Law Q. Rev.* 398, 419 (1987).

⁵⁰ 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 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.

⁵¹ *Developments in the Law—International Environmental Law*, 104 *Harv. L. Rev.* 1484, 1618 (1991).

⁵² Devra Davis, *When Smoke Ran Like Water* 200 (2002). 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 60 Mexican children who are deformed or retarded. McClintock, *In Matamoros, Residents' Rage at Polluting U.S.-Owned Companies Is Growing*, *Baltimore Sun*, Jan. 19, 1992, at A8.

⁵³ *Filipino Workers Receive Compensation from Banana Pesticide Settlement Fund*, *Wall St. J.*, Dec. 12, 1997, at B9C.

⁵⁴ *Id.*

For nearly two decades residents of the Lago Agrio 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.*⁵⁵ 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.⁵⁶

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."⁵⁷ In *Beanal v. Freeport-McMoran, Inc.*⁵⁸ 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 unusable for bathing and drinking.

After his claims were dismissed by the trial court,⁵⁹ 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. The court held that the ATS "applies only to shockingly egregious violations of universally recognized principles of international law," citing *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam). The court stated that the Rio Declaration and other sources of international environmental law "only 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." The court also found persuasive "the argument to abstain from interfering in a sovereign's environmental practices

⁵⁵ 157 F.3d 153 (2d Cir. 1998), the Second

⁵⁶ *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002),

⁵⁷ 28 U.S.C. §1350.

⁵⁸ 197 F.3d 161 (5th Cir. 1999),

⁵⁹ *Beanal v. Freeport-McMoran*, 969 F. Supp. 362 (E.D. La. 1997).

. . . especially when the alleged environmental torts and abuses occur within the sovereign's borders and do not affect neighboring countries."⁶⁰

In *Flores v. Southern Peru Copper Corp.*⁶¹ 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 only involved "intranational pollution."

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* decision. In *Sosa* the Court held that the ATS can only be used 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.⁶² While some observers believed that *Sosa* effectively had 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 was coupled with egregious human rights violations.⁶³

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 by 15 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, 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. In February 2003, the Ninth Circuit vacated the panel's decision and agreed to rehear the case en banc.

⁶⁰ 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. 522 (2000).

⁶¹ 414 F.3d 233 (2d Cir. 2003).

⁶² 542 U.S. 692 (2004).

⁶³ 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.")

The case was argued before the en banc court after *Sosa* was decided and the U.S. government supported dismissal of the lawsuits.⁶⁴ However, after the oral argument did not go well for Unocal, a settlement was reached. While the terms of the settlement are confidential, Unocal announced that it "will compensate plaintiffs and provide funds enabling 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."

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 2009 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. But Royal Dutch Shell settled the Saro-wiwa case by agreeing to pay \$15.5 million to his survivors. 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." 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. Reciprocity Norms and Transnational Environmental Litigation

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.⁶⁵ 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.⁶⁶ These and other measures have significantly altered the calculus that now confronts multinational corporations.

⁶⁴ *Doe v. Unocal Corp.*, Nos. 00-56603, 00-56628, 00-57195, 00-57197 (9th Cir.).

⁶⁵ See Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice* (Feb. 19, 2010 draft).

o ⁶⁶ Model Law on International Jurisdiction and Applicable Law in Tort Liability, in 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 (Oxford 2007). See also *See* Walter W. Heiser, *Forum Non*

As noted above, when Texaco won dismissal of the ATS lawsuit filed against it by residents of the Lago Agrio 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 underway 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 Lago Agrio area, Chevron now is facing the prospect of an adverse judgment potentially as large as \$27 billion – the cost estimate by 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 Texaco of responsibility for the harm their activities caused to the individual plaintiffs in the lawsuit. While the litigation over environmental devastation caused by oil production in Ecuador has been underway for nearly two decades, the basic legal question at the heart of the 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 to 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

Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic, 56 U. Kan. L. Rev. 609 (April 2008); Winston Anderson, Forum Non Conveniens Checkmated?--The Emergence of Retaliatory Legislation, 10 *J. Transnat'l L. & Pol'y* 183, 187-213 (2001) (analyzing Dominica's statutes); Henry Saint Dahl, Forum Non Conveniens, Latin America and Blocking Statutes, 35 *U. Miami Inter-Am. L. Rev.* 21, 47-63 (2004) (setting forth statutory provisions from Ecuador, Guatemala, Dominica, Nicaragua, Costa Rica, and the Philippines); Dante Figueroa, Conflicts of Jurisdiction Between the United States and Latin America in the Context of Forum Non Conveniens Dismissals, 37 *U. Miami Inter-Am. L. Rev.* 119, 156-59 (2005) (surveying legislation enacted by several Latin American countries); Zanifa McDowell, Forum Non Conveniens: The Caribbean and Its Response to Xenophobia in American Courts, 49 *Int'l & Comp. L.Q.* 108, 115-28 (2000) (discussing Dominica's statutes); Paul Santoyo, Bananas of Wrath: How Nicaragua May Have Dealt Forum Non Conveniens a Fatal Blow Removing the Doctrine as an Obstacle to Achieving Corporate Accountability, 27 *Hous. J. Int'l L.* 703, 723-36 (2005) (discussing the Nicaraguan statutes)

have urged the company to settle, Chevron spokesperson Don Campbell told the Wall Street Journal that “We’re not going to be bullied into a settlement” because the company has done nothing wrong.⁶⁷

What is particularly ironic about Chevron’s legal posture is that if the company had not fought having the case tried in the 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 video that the company claimed showed the judge was committed to ruling against the oil company. 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. 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 and denied that he had prejudged the case, he was asked to recuse himself by Washington Pezantes, the attorney general of Ecuador. 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. Chevron bases its claim on what it calls the Ecuadoran government’s “exploitation” of the lawsuit. 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. Chevron now claims that it has no choice because “Ecuador’s judicial system is incapable of functioning independently of political influence.” Ecuadoran attorney general Diego Garcia rejected Chevron’s effort to impugn the integrity of the Ecuadoran

⁶⁷ Ben Casselman, Chevron Expects to Fight Ecuador Lawsuit in U.S., Wall St. Journal, July 20, 2009, at B3.

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.

Both the plaintiffs in the Lago Argrio litigation and the government of Ecuador returned to federal court in New York in an unsuccessful effort to block Chevron's pursuit of its arbitration claim. They argued that by filing the claim Chevron violated the long-ago promise it had made to the New York court to abide by the rulings of the courts in Ecuador. However, after a hearing on March 11, 2010, Judge Leonard Sand dismissed the plaintiffs' motion for a stay, finding that Chevron had at least one arbitral issue – its claim that two Chevron lawyers were inappropriately indicted criminally in Ecuador – and that this meant the court should not intervene in the arbitration proceeding. On March 30, 2010 Chevron was awarded \$700 million by a separate panel of the Court of Arbitration for oil that Ecuador allegedly failed to pay for during the 1990s in violation of the Bilateral Investment Treaty. The arbitration panel ruled that Ecuador had violated the treaty by failing to provide Chevron with an effective means to recover payment for the oil in the courts of Ecuador. Lawyers for the plaintiffs in the Lago Argrio litigation are appealing the New York district court's refusal to block Chevron's pursuit of the separate arbitral claim in the Hague premised on the Ecuadoran judiciary's handling of the Lago Argrio litigation.

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 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”. Under special procedures prescribed by the law, the defendant must post a \$15 million bond and “has just three days to answer the complaint, the parties have just eight days to present evidence, and the court has eight days to issue a judgment.”

Judge Chaney dismissed DBCP lawsuits brought in Los Angeles Superior Court against the Dole Food Company because of fraud occurring in Nicaragua.⁶⁸ 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

⁶⁸ Steve Stecklow, *Fraud by Trial Lawyers Taints Wave of Pesticide Lawsuits*, Wall St. J., Aug. 19, 2009.

who helped expose the fraud. 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 only applied to cases involving Nicaraguan plaintiffs and that no evidence of fraud has been presented involving DBCP plaintiffs from any other country.

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 residents of Abidjan 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 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. 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. In July 2010, a Dutch court ordered Trafigura to pay a fine of one million Euros for illegally exporting the waste from the Netherlands in violation of Dutch law.

IV. CONCLUSION: EMERGING ENVIRONMENTAL LIABILITY NORMS AND THE DEVELOPMENT OF 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.⁶⁹ 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 have yielded scant progress, as illustrated by the failure of the December 2009 Copenhagen Conference to produce such an agreement. However, progress is being made in the development of environmental liability norms from the "bottom up" through both domestic private litigation for transnational harm and transnational litigation for domestic harm.

⁶⁹ Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 Va. Ent'l L. J. 1, 32 (2007).

NGOs and multinational corporations increasingly are fighting battles over environmental liability in the court of global public opinion. Even losing ATS cases have been 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 Lago Argrio litigation both Chevron and the plaintiffs are aggressively using all means available to influence public opinion.⁷⁰ 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 sub-national units of government. Eight U.S. states and four Canadian provinces have adopted the Uniform Transboundary Pollution Reciprocal Access Act⁷¹ that 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.”⁷²

Both the Lago Argrio 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 to defend themselves *foreign non conveniens*. As developing countries upgrade their judicial systems, the days when such a dismissal was the death knell for claims no matter how meritorious they might be seem to be fading into the past. Environmental liability disputes will remain messy and contentious, but they are 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.

⁷⁰ For Chevron’s perspective see <http://www.chevron.com/ecuador/>. For the perspective of the plaintiffs see www.shellguilty.com and www.truecostofchevron.com.

⁷¹ http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-utpraa.asp (last visited July 26, 2010). See also Noah Hall, Transboundary Pollution: Harmonizing International and Domestic Law, 40 U. Mich. J.L. Reform 681 (2007).

⁷² Michael I. Jeffrey, Transboundary Pollution and Cross Border Remedies, 18 Can-U.S.L. J. 173 177 (1992).