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

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Harms Abroad: Environmental Impacts From Global Energy Development

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

» These legal claims come in two flavors:

» direct lawsuits in U.S. courts under international law, host country laws, or U.S. laws, or

» actions to enforce foreign judgments in U.S. courts
What We’re Not Talking About (1)

• Extraterritorial actions that result in environmental harms within the United States

• Result: U.S. environmental laws already provide basis for exercise of jurisdiction
• Extraterritorial actions by U.S. citizens or entities (such as flagged vessels) subject to U.S. laws and regulations

• U.S. law can apply based on nationality

  • But Congress must make clear its intent that the law applies extraterritorially
Direct actions in U.S. courts

• Starting point: foreign plaintiffs can use U.S. judicial fora just like anyone else

• But many hurdles:
  • Complete Diversity
  • Personal jurisdiction over defendants
  • *Forum non conveniens*
  • Removal to federal court
  • Comity
  • Act of State
  • Foreign affairs concerns and Political Question Doctrine
Enforcement of Foreign Judgments

• Essentially, sue abroad, collect at home

• Which law controls the collection action?
  • If federal substantive law applies, then federal common law governs enforcement of foreign judgment
    • *Hilton v. Guyot* (1895)
  • If state law governs, state laws will control enforcement of foreign judgment
    • Uniform Enforcement of Foreign Judgments Act
    • Uniform Foreign Money Judgments Recognition Act
Federal common law, state statutes, and the Uniform Act share several general and specific factors that would lead a U.S. court to refuse enforcement.

General factors –

1. Judgment must result from “full and fair trial abroad before court of competent jurisdiction”
2. Trial conducted under regular proceedings
3. Proper jurisdiction over parties
4. “System of jurisprudence likely to secure impartial administration of justice between citizens of its own country and those of other countries”
Common factors to deny enforcement of foreign judgment

» Specific factors to attack foreign judgment

  » Prejudice in the court or in the system of laws under which it was sitting

  » Fraud in procuring the judgment

  » Any other special reason why comity should not be extended

» Collateral attacks: prior arbitration agreements; racketeering and organized criminal activities
Recent Developments: *Jesner*


- Attempt by victims of terrorism to sue Arab Bank, PLC in Jordan for allegedly financing terrorism

- Question: does the Alien Tort Claims Act of 1789 support actions against foreign corporations?

- Previous decisions had narrowed scope of Alien Tort Claims Act on other grounds
Recent Developments: Jesner

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

- Long-running saga of claims by Ecuadorian indigenous plaintiffs allegedly injured by contamination left by Texaco operations in the Amazonian jungle in the 1950s and 1960s

- Prior milestones:
  - Lawsuit in U.S. court dismissed for *forum non conveniens*
  - Trial in Ecuador resulted in $8.65 billion judgment under Ecuadorian law
Recent Developments: Enforcement of Ecuadorean Judgment Against Chevron

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

» Likely to see more suits against U.S. corporations in U.S. courts for conduct abroad, and to enforce foreign judgments in U.S. courts for environmental damage abroad

» Long-standing principles for enforcement of foreign judgments offer limited protection
  » Outcome of Ecuadorean enforcement action if no underlying fraud?

» Increasing importance of contractual and treaty protections

» Prepare for “appeal” by carefully noting procedural and substantive issues in underlying legal actions tried abroad
The ultimate test case is on the horizon: climate liability litigation

» Already actively in play in U.S. federal and state courts

» Multiple lawsuits in other national court systems, including actions by foreign plaintiffs directly in national courts against resident defendants

» Enforcement of foreign climate liability judgment in U.S. court seems likely, if not probable, in the future

» Efforts to cabin U.S. court jurisdiction over climate liability claims may need to step up to the transnational level
Application to Climate Intervention

- Litigation in remote jurisdictions to halt SRM or large-scale CDR – fate of *forum non conveniens* and comity?

- Passage of domestic laws to authorize litigation challenging climate intervention research, demonstration, or deployment

- State laws in U.S. to restrict, promote, or prohibit climate intervention lawsuit enforcement (albeit unintentionally)

- Remediation, restitution, and mitigation of damages
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